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UNIVERSITY OF UTAH
S.J. QUINNEY COLLEGE OF LAW

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Biographical information for author James H. Backman on page 953, initial footnote, should read as follows:

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THE MISSING THEORY OF VARIABLE SELECTION IN THE ECONOMIC ANALYSIS OF TORT LAW

James M. Anderson*

I. INTRODUCTION

This Article argues that the economic analysis of tort law has yet to satisfactorily answer a critical threshold question: which of the many inputs that leads to an accident should be included in a court's liability analysis? As a result of this missing element, the economic analysis of tort law provides indeterminate prescriptions. This Article proposes an analytical framework to understand the problem and the way in which tort law grapples with the tension between long-run and short-run optima. Finally, the Article concludes that no satisfactory general theory is possible and the optimal combination of liability rules depends on empirical questions about the specific accident contexts.

Consider, for example, Judge Learned Hand's famous opinion in *United States v. Carroll Towing Co.*[1] After a tugboat operator negligently rearranged the lines securing a group of barges on the Hudson River, one of the flour-laden barges detached.[2] It floated up the Hudson River on the south wind and tide, collided with the propeller of another ship, and sprang a slow leak.[3] It eventually capsized and sank.[4] One of the questions Judge Hand faced was whether the owner of a barge had a duty to employ a bargee (watchman) while the barge was moored to prevent the barge from coming loose.[5] Judge Hand famously attempted to formalize his logic into the mathematical formula: $B < PL$.[6] In Hand's formulation, (B), the proper burden of care, was defined by the probability of harm, (P), multiplied by the cost of the loss that would result in (L).[7] If a measure to prevent the harm cost *more* than the cost of the harm multiplied by the probability of the harm, it was not efficient and a defendant should not be considered negligent. If, on the other hand,

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[1] 159 F.2d 169 (2d Cir. 1947).

[2] *Id.* at 170–71.

[3] *Id.* at 171.

[4] *Id.*

[5] *Id.* at 172.

[6] *Id.* at 173.

[7] *Id.*

the accident-reducing measure cost *less* than the probability of harm multiplied by the cost of the harm, it was efficient to undertake the precaution and the defendant should be found negligent for failing to do so. In this way, Judge Hand attempted to provide an economic metric and conceptual rigor to the analysis of the accident prevention methods—the duty of care—required. Hand's explicitly algebraic reasoning has been cited as an important milestone in the economic analysis of tort law.[8]

But why was the issue limited only to the cost of putting a watchman on board the barge at night? Why did the analysis not end with a finding that the tugboat negligently disconnected the barge's stays? Why not also consider the cost of designing barges so that they do not spring leaks after collisions? Why not also consider whether the other vessel could have avoided the collision with the runaway barge? Could not the accident have been prevented in many other ways?

More generally, which accident-reducing inputs should a court take as fixed and which as variable in addressing whether the putative injurer or victim is negligent? Since most accident risk can be reduced (or increased) in a nearly infinite number of ways, this question is central to tort law. Consider, for example, an accident between an automobile and a pedestrian. This can be seen as a function of the skill of the driver and his selection of automobile, tires, and brakes, to name only a few of the potential inputs. The pedestrian inputs include, inter alia, precautionary measures and the frequency of his excursions to the location of the accident. Other variables include the quality and design of the roadway, road surface, and sidewalk. A change in any of these inputs might affect the net costs of accidents. Which should a court consider? Surprisingly, there has been relatively little effort to address the general issue of accident input inclusion in the literature.[9]

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[8] *See, e.g.*, WILLIAM M. LANDES & RICHARD A. POSNER, THE ECONOMIC STRUCTURE OF TORT LAW 85 (1987); John Prather Brown, *Toward an Economic Theory of Liability*, 2 J. LEGAL STUD. 323, 332–35 (1973); Mark F. Grady, *Untaken Precautions*, 18 J. LEGAL STUD. 139, 147 (1989) (describing *Carroll Towing* as "the centerpiece of the conventional economic theory of negligence"). Indeed, in an effort to give law and economics more historical resonance, "[a]ny judge who appeared at all self-conscious about what he was doing was canonized" by practitioners of the new law and economics. SUSAN ROSE-ACKERMAN, RETHINKING THE PROGRESSIVE AGENDA 22 (1992) (describing the use of Learned Hand's portrait as the frontispiece and Hand's economic opinion in *Carroll Towing* as epigram of RICHARD POSNER, TORT LAW: CASES AND ECONOMIC ANALYSIS (1982)). Stephen Gilles recently questioned the assumption that Hand's formulation was an attempt at ensuring efficient resource allocation. Stephen G. Gilles, *On Determining Negligence: Hand Formula Balancing, the Reasonable Person Standard, and the Jury*, 54 VAND. L. REV. 813, 849 (2001).

[9] Giuseppe Dari-Mattiacci squarely addresses the general issue of which variable inputs should be considered in the negligence test, but answers the question only in terms of administrative cost reduction. Giuseppe Dari-Mattiacci, *On the Optimal Scope of Negligence*, 1 REV. L. & ECON. 331, 344–49 (2005); *see infra* notes 13–36 and accompanying text (discussing the literature).

This issue is complicated by the way tort law faces competing and sometimes irreconcilable goals to optimize in the short run and in the long run.[10] A liability test that includes every accident-reducing input might be efficient in the long run but will provide little incentive for subsequent actors to minimize accident costs once negligence has occurred. To examine another famous example, suppose our society includes both railroads that emit sparks and farmers with flammable crops.[11] Further suppose that the long-run efficient solution is for railroads to purchase special no-spark engines. If the railroad fails to use no-spark engines, the farmer can efficiently minimize damages by leaving a gap between the railroad and the flammable crops. Finally, suppose that the railroad has not purchased no-spark engines. If the court considers this first input in the liability test, the farmer will have no incentive to leave a gap or take any efforts to minimize damages since the railroad will be found liable for the damages as a result of its negligence. On the other hand, if the court takes the railroad's failure to purchase no-spark engines as given, and outside the scope of the liability analysis, the farmer will have the proper incentives to take care but the railroad will not.

The central problem this Article addresses is the way courts determine which accident-reducing inputs are taken as given and which are considered potentially negligent choices by the parties in determining liability. The Article proposes a framework for considering this problem: placing the range of accident-reducing inputs along a rough temporal continuum from long before the accident to the moment the loss becomes irreversible. In applying an economic test to determine liability, an analyst (or court) chooses a certain subset of these inputs to examine. So, for example, a long-run test for negligence would consider more inputs as variable, and more actions as potentially negligent. In contrast, a shorter-run test takes more inputs as given and outside the scope of the negligence analysis.

In Part II, this Article explains the application of the idea of differing short- and long-run optima in the economic analysis of tort law and briefly reviews the literature. That section shows that three different areas in the literature of the economic analysis of tort law can be understood as part of the general problem of determining which variables a court includes in a liability test. Part III explains how the conventional economic models of tort law yield indeterminate predictions as to which variables a court should consider and how the variable choice will determine the outcome of the liability test. That section shows that, absent additional empirical information, economic theory cannot tell us, *a priori*, what the best rule is in a particular accident setting. In Part IV, this Article proposes a descriptive analytical framework for understanding the issue and shows how tort law doctrines map onto this framework. Finally, the Article concludes that the

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[10] Alternatively, one can conceptualize this tension in terms of seeking more general versus more partial equilibrium solutions.

[11] A.C. PIGOU, THE ECONOMICS OF WELFARE 134 (4th ed. 1932); *see* René Demogue, *Fault, Risk, and Apportionment of Loss in Responsibility*, 15 ILL. L. REV. 369, 379–82 (1921). Rather than use a tort system, Pigou proposed a tax to force the accident-causing actors to internalize these costs. *See generally* PIGOU, *supra*.

optimal choice of variables will depend on specific empirical questions about short- and long-run accident-affecting technologies and the structure of the relevant markets. This suggests opportunities for further research.

II. THE UNDERLYING CONCEPTUAL UNITY OF THE LITERATURE ON SEQUENTIAL CARE, ACTIVITY LEVEL VERSUS LEVEL OF CARE, AND CAUSATION

The economics of tort law literature has considered the issue of what inputs a court should consider as part of the liability test in three specific areas: sequential care, standard of care versus activity level, and causation.[12] Each of these areas is a specific instance of the general problem of determining which inputs a court should take as given (outside the liability test) and which should be considered variable (included in the liability analysis). Unfortunately, these three areas rarely reference each other or identify the general issue of including and excluding accident inputs.

A. Sequential Care

Commentators have examined the problem of strategic behavior when injurer and victim choose levels of care sequentially.[13] Consider again the example of the spark-emitting railroad next to the farmer with flammable crops. The net social cost of the railroad operation may be substantially higher than the private cost of

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[12] This discussion omits a fourth way this issue is sometimes avoided in the literature. As a matter of pure static law and economics, the issue never arises because no party is ever negligent. If one assumes omniscient courts, the negligence test could incorporate every efficient accident-reducing method. Knowing that it will be found negligent if it fails to undertake the efficient measure, whichever party acts first will always take the efficient actions. Accordingly the first actor will never be found negligent. In order to avoid liability, the second party will do the same. This argument can be extended indefinitely from the longest-run actors to the actions of victims immediately before an accident. On this logic, only efficient accidents will occur. STEVEN SHAVELL, ECONOMIC ANALYSIS OF ACCIDENT LAW 83–84 (1987); Susan Rose-Ackerman, *The Simple Economics of Tort Law: An Organizing Framework*, 2 EUR. J. POL. ECON. 91, 96 (1986).

[13] *See, e.g.*, Lewis A. Kornhauser & Richard L. Revesz, *Sequential Decisions by a Single Tortfeasor*, 20 J. LEGAL STUD. 363 (1991); William M. Landes & Richard A. Posner, *Joint and Multiple Tortfeasors: An Economic Analysis*, 9 J. LEGAL STUD. 517, 543–49 (1980); Steven Shavell, *Torts in Which Victim and Injurer Act Sequentially*, 26 J. LEGAL STUD. 589 (1983) [hereinafter Shavell, *Torts*]; Donald Wittman, *Optimal Pricing of Sequential Inputs: Last Clear Chance, Mitigation of Damages, and Related Doctrines in the Law*, 10 J. LEGAL STUD. 65, 72–74 (1981); *cf.* Mark F. Grady, *Common Law Control of Strategic Behavior: Railroad Sparks and the Farmer*, 17 J. LEGAL STUD. 15, 16 (1988) (arguing that joint care situations open opportunities for one party to place addition burdens on the other party when transactional costs are high enough to preclude a consensual solution); Steven Shavell, *Strict Liability vs. Negligence*, 9 J. LEGAL STUD. 1, 2 (1980) [hereinafter Shavell, *Strict Liability*] (arguing that tortfeasors choose their level of tortious activity only in relation to possible personal benefits).

the railroad because the overall social cost must include the cost of the fires generated by the sparks. As a result of this divergence, the railroad operator's incentives may be distorted by this externality.[14] On the traditional law and economic account, the tort system can induce the railroad and the farmer to take the efficient standards of care to minimize the social cost of fires by the use of either a negligence test with a defense of contributory negligence or strict liability with a defense of contributory negligence. Let us assume the railroad will take the efficient amount of care to avoid being found negligent by utilizing a spark arrestor. Since the farmer will bear the residual costs, the farmer will take whatever other steps are economically efficient to minimize costs.[15]

Now suppose the spark-emitting railroad ignores the efficiency of a spark arrestor and does without one.[16] The farmer, knowing that the railroad will be spewing sparks,[17] might be contributorily negligent if the farmer does not take elaborate, but cost-justified precautions to prevent the sparking railroad from igniting the crops.[18] In this way, the railroad could make the farmer pay for the costs of accident prevention. The conventional law and economic description of this situation is that the farmer should not be found contributorily negligent so as

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[14] PIGOU, *supra* note 11, at 134. In the landmark article *The Problem of Social Cost*, Ronald Coase took Pigou's example of the railroad and the farmer and noted that it was the incompatibility of the activities undertaken by the injurer and the victim that caused the problem of social cost and not merely the activity of the injurer. R.H. Coase, *The Problem of Social Cost*, 3 J. L. & ECON. 1, 28–35 (1960).

[15] Brown, *supra* note 8, at 332–35.

[16] *See* Grady, *supra* note 13, at 16 ("[T]he question is whether each side must take additional precautions once he knows (or has reason to know) that the other party is negligent."); Shavell, *Torts*, *supra* note 13, at 590 ("What will be of special interest about the working of liability rules in the model is twofold—that the party who acts second behaves in response to the party who acts first, and that the party who acts first will take the response of the party who acts second into account."); *see also* Mark F. Grady, *Why Are People Negligent? Technology, Nondurable Precautions, and the Medical Malpractice Explosion*, 82 NW. U. L. REV. 293, 300–01 (1989) [hereinafter Grady, *Why Are People Negligent?*].

[17] This example assumes the farmer knows the railroad will be spewing sparks and plants or stacks her crops accordingly. If the farmer does not know the railroad will be spewing sparks, this example becomes one of simultaneous care rather than sequential care.

[18] *See, e.g.*, LeRoy Fibre Co. v. Chi., Milwaukee & St. Paul Ry., 232 U.S. 340, 352 (1914) (Holmes, J., concurring in part) ("[A]s a general proposition people are entitled to assume that their neighbors will conform to the law . . . and therefore . . . are entitled to assume that their neighbors will not be negligent."). In *LeRoy Fibre* the issue was whether flax that had been stacked eighty-five feet away from the train tracks was negligently close. *Id.* at 349; *see also* LANDES & POSNER, *supra* note 8, at 89 ("The accident no doubt could have been prevented by removing the flax to a greater distance from the tracks, but if this fact made the owner of the flax contributorily negligent, the railroad would have an incentive to spew sparks and cinders with abandon in order to induce the owner to remove the flax to as great a distance as possible, thus minimizing the railroad's own costs of preventing damage to the crops.").

to allow the cost to be shifted,[19] unless the "danger posed by the injurer's activity is very conspicuous,"[20] in which case the victim might be found contributorily negligent for failure to avoid the accident.[21] This solution is problematic because it encourages the railroad conspicuously to emit sparks.

Mark Grady notes that the elaborate literature, abounding with "cases, models, equations and so forth,"[22] essentially ignores "the one question that emerged from [John Prather] Brown's analysis as central: must the one side take additional precautions when it knows the other has failed in its duty?"[23] Grady suggests the common law avoids this problem by applying different rules to different time periods. So, for example, he distinguishes contributory negligence in what he calls the preparation period—that is, assuming that the other party was taking proper care—from contributory negligence in the reaction period, when it is clear to both parties that the first party has been negligent.[24] He argues that courts sometimes control strategic behavior by making the reaction-party rule dependent on whether the other party's negligence was deliberate.[25] Hence, in the case of the spark-emitting steam engine, the farmer's contributory negligence would not bar recovery because the absence of a spark arrestor is presumably deliberately strategic.[26]

For our purposes, this problem of sequential behavior and the resulting strategic behavior can also be understood as a specific case of whether the court wants to induce the long-run optimal solution, by, for example, holding the

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[19] LANDES & POSNER, *supra* note 8, at 90.

[20] *Id.* (noting analogue to the last clear chance doctrine).

[21] Landes and Posner argue that "[t]he temptation of potential injurers deliberately to create palpable dangers in order to induce potential victims to take excessive precautions is held in check by the fact that contributory negligence is not a defense to intentional or reckless conduct." *Id.* Mark Grady suggests that the conventional account is problematic, recognizes that the negligence test includes a built-in time structure, and proposes that courts require victims to take compensatory precautions only in categories of accidents in which there is unlikely to be the opportunity for strategic behavior. Grady, *supra* note 13, at 41. He suggests that the railroad fire situation, often used as paradigmatic in law and economic accounts, was actually uniquely suited to strategic behavior and other accident situations were not. *Id.*

[22] Grady, *supra* note 13, at 16.

[23] *Id.* at 17; *see also* Susan Rose-Ackerman, *Dikes, Dams, and Vicious Hogs: Entitlement and Efficiency in Tort Law*, 18 J. LEGAL STUD. 25, 26 (1989) (noting that in some areas the law gives "stronger entitlement to the careless victim than to the careful one" because law "requires reimbursement for all consequential damages but not for the victim's prevention costs").

[24] Grady, *supra* note 13, at 20–21.

[25] *Id.* at 19–25.

[26] Part IV of this Article can be seen, in part, as an extension of this work. Rather than identify three time periods for accident-reducing inputs, this Article proposes a continuum on which accident-affecting inputs lie. As explained below, *see infra* Part II.B., the Article also recognizes that the essential structure of both the activity-level versus level of care and the limit of proximate cause issues are the same as this sequential care issue.

railroad liable for the spark-emitting engine, or the shorter-run optimal solution that takes the railroad's sparks as a given and requires the farmer to take precautionary measures. Either the court can provide incentives for the short-run optimum (ignoring the negligence of the railroad) or the long-run optimum (and erode incentives for the farmer to take remedial action).

B. Activity Level Versus Level of Care, or, Should the Court Consider How Often the Railroad Should Run?

In a different line of articles, other commentators point out that the solution reached by the negligence test might be inefficient if it were socially optimal to reduce the amount of the activity rather than just affect the way in which the activity is carried out.[27] Generally, under a negligence rule, an injurer has only to exercise due care to avoid the possibility of liability rather than consider the possibility of reducing the amount of activity he undertakes. So if it would be efficient to eliminate railroading or farming, a negligence test would not result in the efficient result, because negligence usually looks to the level of care and not to the level of the activity itself. Steven Shavell, for example, discusses inclusion of activity levels in the standard of due care and points out that under a negligence standard, parties will only take sufficient care in those dimensions of due care that the court examines.[28] More recently, Giuseppe Dari-Mattiacci proposed a theory of determining which factors to include in the negligence test and which to exclude as activity levels based on the administrative costs of courts making these determinations ex post.[29]

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[27] *See, e.g.*, LANDES & POSNER, *supra* note 8, at 102; A. Mitchell Polinsky, *Strict Liability vs. Negligence in a Market Setting*, 70 AM. ECON. REV. 363, 363–64 (1980); Rose-Ackerman, *supra* note 12, at 97 ("If accident probabilities depend, in part, on the number of miles driven or walked, then a negligence standard based only on speed will be inefficient."); Shavell, *Strict Liability*, *supra* note 13, at 2; Alan J. Meese, *The Externality of Victim Care* 9–12 (William & Mary Sch. of Law, Working Paper No. 237992, 2000), *available at* http://ssrn.com/abstract=237992) (follow hyperlink under "Download document from:") ("Theoretically courts could include within their examination of the injurer's care an inquiry into whether it was 'reasonable' to engage in the activity in question."); *see also* Michelle J. White & Donald Wittman, *Optimal Spatial Location Under Pollution: Liability Rules and Zoning*, 10 J. LEGAL STUD. 249, 268 (1981) (discussing different short- and long-run solutions in pollution control).

[28] *See* SHAVELL, *supra* note 12, at 9, 26; Shavell, *Strict Liability*, *supra* note 13, at 8, 22. Shavell notes the information cost difficulties of a court incorporating activity levels into the negligence analysis. Shavell, *Strict Liability*, *supra* note 13, at 23.

[29] *See* Dari-Mattiacci, *supra* note 9, at 338–49. Dari-Mattiacci criticizes the conventional assumption that "level of care" and "activity level" have some independent natural meaning that is exogenous to the model. *Id.* at 334–48. Instead, he provides a theory as to what kinds of precautionary actions should be considered in the negligence analysis based on the administrative and informational costs of a court determining optimal accident reduction efforts *ex post*. *Id.* at 338–49. Dari-Mattiacci is right to criticize the procrustean division of means of accident reduction into level of care versus activity level.

Again, the issue of whether an input is an activity level (and therefore taken as a given in most analyses) or constitutes level of care (and therefore included in the analysis) is a question of what collection of inputs the court will consider variable and which it will take as given. Will the court see a longer-run optimum (including activity levels) or a shorter-run optimum (excluding activity levels)?

Like the problem of sequential care discussed above, this issue also has a temporal component that can lead to strategic behavior. If a railroad knows that the number of trains it runs is never considered in the liability analysis, it will have no incentive to consider the costs of the fires that come from those trains. In this way, it can pass the cost of precautions to the farmer. Conversely, if the farmer knows that the railroad will be found negligent for the number of trains it operated, the farmer has no incentive to take remedial care. Structurally, this problem is identical to that of the strategic behavior considered above. It can also be considered a specific case of the general problem of how the court should decide which inputs to consider fixed and which variable.[30]

C. Causation

In yet a third line of articles, commentators have examined the use of the doctrine of proximate causation in limiting liability.[31] These commentators focus on developing a theory of when and how recovery should be limited by a court, finding that a particular act of negligence was not the proximate cause of an accident. So, for example, Mark Grady examines *Pittsburg Reduction Co. v. Horton*, wherein the defendant company left explosive blasting caps on a

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This Article proposes a more nuanced analytical continuum (short run to long run) in lieu of the simple distinction between standard of care and activity level. See *infra* note 50 for further discussion of Dari-Mattiacci's analysis.

[30] If everyone takes limitation on liability for granted, a first actor may be able to effectively pass the cost of precautionary measures on to subsequent actors. In a state without dram shop liability, for example, the bar owner may not take efficient measures to reduce alcohol-induced accidents. Similarly, a city may not redesign a dangerous intersection if it is immune. In both instances, the first actor (the bar owner or the city) will be able to avoid bearing any of the costs of the accidents and has no incentive to take efficient remedial measures. It seems odd to speak of this lack of action by the bar owner or city as "strategic," but the situation is analytically similar to that of the railroad owner who knows that the number of trains that he runs is not included in the liability analysis. *Cf.* Ariel Porat, *Offsetting Risks* 12–19 (Univ. of Chi. Law & Econ., Olin Working Paper No. 313, 2007), *available at* http://ssrn.com/abstract=946764 (follow hyperlink under "Download the document from:") (arguing that tort damages calculations should be reduced by the amount that negligent action offsets other risks).

[31] *See, e.g.*, Mark F. Grady, *Proximate Cause and the Law of Negligence*, 69 IOWA L. REV. 363 (1984); William M. Landes & Richard A. Posner, *Causation in Tort Law: An Economic Approach*, 12 J. LEGAL STUD. 109 (1983); Steven Shavell, *An Analysis of Causation and the Scope of Liability in the Law of Torts*, 9 J. LEGAL STUD. 463 (1980); *see also* Guido Calabresi, *Concerning Cause and the Law of Torts: An Essay for Harry Kalven, Jr.*, 43 U. CHI. L. REV. 69 (1975).

worksite.[32] The blasting caps were picked up by a boy, taken home, and shown to his mother.[33] The boy then traded them with another boy who was injured.[34] The question was whether the intervening negligence of the mother broke the causal linkage between the negligence of the defendant company and the boy's injury.[35]

Yet again, the question of which inputs the court should take as variable and which it should consider as given and the problem of eroding the incentives for the initially negligent party arise. As Mark Grady explains it:

> The purpose of the direct-consequences doctrine is to cut off the liability of the person responsible for the original cause in circumstances when it is desirable to prevent an erosion of the incentive to take precaution on the part of the person who is responsible for the intervening cause.[36]

All three of these areas in the economic analysis of tort law—sequential actors, activity level versus standard of care, and the reach of causation—are closely related. Each are aspects of the same problem: trying to provide the correct long-run incentives, without eroding shorter-run incentives. Yet the literature on each issue seldom addresses the others or acknowledges the conceptual unity of the problem. The general problem is that we want tort law to induce a social optimum under multiple sets of constraints: both when the existence of the first party's negligence is still a variable and also once it has already occurred and is taken as a given.

III. THE INDETERMINACY OF CONVENTIONAL ECONOMIC ANALYSIS OF TORT LAW

This section explains that the conventional economic analysis of tort law lacks a satisfactory theory of which accident variables a court should consider in its test or combination of tests. As a result, the economic analysis of tort law can be indeterminate in many situations.[37]

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[32] 113 S.W. 647, 647–48 (Ark. 1908); *see* Grady, *supra* note 31, at 417–20.

[33] *Horton*, 113 S.W. at 648.

[34] *Id.*

[35] *Id.*

[36] Grady, *supra* note 31, at 416.

[37] *See* Eric A. Posner, *Economic Analysis of Contract Law After Three Decades: Success or Failure?*, 112 YALE L.J. 829, 834 (2003) (discussing the indeterminacy of economic analysis of contract law); *see also* LOUIS KAPLOW & STEVEN SHAVELL, FAIRNESS VERSUS WELFARE 457–58 (2002) ("Implicit in the notion that this uncertainty (so-called indeterminacy) constitutes a criticism of welfare economics is that easily answered questions—which necessarily ignore relevant, although complicated, features of reality—are somehow better to consider."); Ian Ayres, *Valuing Modern Contract*

In an ideal world, there would be no tension between the short run and the long run because parties would never be negligent and courts would be omniscient. In such a world, courts (or other institutions) would determine optimal solutions, carefully considering the accident cost-reduction probabilities of every possible action by every possible party. An all-inclusive Learned Hand negligence rule, incorporating every possible aspect of behavior, could induce parties to conform to the optimum. Parties would always take this efficient amount of accident precaution. Since no party would ever be negligent, courts would not have to address any second-best solutions.[38]

However, as behavioral legal economists, among others, have noted, we often live in a world of second-, third-, or fourth-best options.[39] Sub-optimal behavior and courts with limited information are the rule not the exception. Human beings are particularly poor at estimating and thinking about the likelihood of improbable events—such as accidents.[40] Because of errors of this sort and the commonness of negligence, the courts do not usually find the unconstrained optimum and seek to hold parties to that standard.[41] Once sub-optimal behavior occurs, the constraints on the social optimization problem change and there is a new most-efficient solution.[42] Yet how does tort law take into account the new solution without undermining the long-run optimum?

Scholarship, 112 YALE L.J. 881, 884 n.17 (2003) (defending the utility of economic analysis of law even if it yields somewhat indeterminate predictions).

[38] SHAVELL, *supra* note 12, at 83–84 (noting that under pure economic theory, no party would be negligent).

[39] *See* Christine Jolls et al., *A Behavioral Approach to Law and Economics*, 50 STAN. L. REV. 1471, 1518 (1998) (discussing the application of bounded rationality to law and economics).

[40] *See* Howard Kunreuther, *The Economics of Protection Against Low Probability Events*, *in* DECISION MAKING: AN INTERDISCIPLINARY INQUIRY 195, 209 (Gerardo R. Ungson & Daniel N. Braunstein eds., 1982). We tend to underestimate the likelihood of a low-probability event until one occurs. At that point, we overestimate the likelihood of a similar event's recurrence. *See* JERRY L. MASHAW & DAVID L. HARFST, THE STRUGGLE FOR AUTO SAFETY 141–46 (1990) (discussing the regulation of school buses in wake of highly publicized school bus accidents); Jolls et al., *supra* note 39, at 1518–21 (discussing application of the availability heuristic to environmental regulation).

[41] As a matter of economic theory, one could specify the optimal actions of all relevant parties conditional on the actions (efficient or otherwise) of all other parties. The problem arises not from economic theory's inability to model inefficiency, but from the tort law system's inability to simultaneously provide incentives to different parties to both prevent inefficient conduct and "remedy" the inefficiency. *Cf.* Aaron S. Edlin & Pinar Karaca-Mandic, *The Accident Externality from Driving*, 114 J. POL. ECON. 931, 932 (2006) (noting efficient driving incentives require that the drivers should be made to bear more than the total cost of the accident).

[42] The inconsistent nature of the tort system at providing deterrence (because it relies on private parties bringing litigation) further complicates the optimization problem. *See* John C.P. Goldberg, *Twentieth-Century Tort Theory*, 91 GEO. L.J. 513, 554 (2003) (noting that as a result of this problem, "economic accounts therefore fail to offer a compelling

Before explaining how the tort system adjusts to this situation, this section more thoroughly discusses short and long run. The conventional way of analyzing accident-cost reduction as exemplified by William Landes and Richard Posner in *The Economic Structure of Tort Law*[43] makes a simple distinction between short run and long run by dividing the activities a party can take to affect accident costs into two categories, the amount of the activity and the level of care engaged in while undertaking this activity.

On the standard view, one can then separate activities where the level of care is the chief determinant of the cost of accidents from activities where the activity level is important.[44] Landes and Posner argue that strict liability is best for activities where the cost of accidents is relatively inelastic with respect to victim precaution and relatively elastic with respect to injurer level of activity (as opposed to standard of care), whereas a negligence regime is best for activities where the cost of accidents is relatively elastic with respect to victim standard of care and relatively inelastic with respect to the level of the activity of the injurer.[45] Blasting, for example, is cited as a good activity for the application of strict liability because victims can do little to take care to reduce accident costs and there are substitutes for the activity.[46] Nevertheless, this view fails to consider the richness of both the injurer's and the victim's possibilities to affect accident costs and the resulting multitude of options for the courts in fashioning liability rules. The conceptual simplicity and ease in modeling afforded by the dichotomy comes at a cost in descriptive subtlety.

Any injurer or victim can take a wide variety of measures to reduce accidents. This variety can be analyzed by using the two conventional categories of accident-

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account of the deep structure of tort law"); Susan Rose-Ackerman & Mark Geistfield, *The Divergence Between the Social and Private Incentives to Sue: A Comment on Shavell, Menell, and Kaplow*, 16 J. LEGAL STUD. 483, 483–84 (1988).

[43] *See* LANDES & POSNER, *supra* note 8, *passim*. Posner's jurisprudence has also been influenced by this model. *See, e.g.*, Ind. Harbor Belt R.R. Co. v. Am. Cyanamid Co., 916 F.2d 1174, 1177 (7th Cir. 1990) (rejecting application of strict liability for transportation of hazardous chemicals); *see also* SHAVELL, *supra* note 12, at 25 ("[F]ailing of the negligence rule . . . under discussion can be regarded as resulting from an implicit assumption that the standard of behavior used to determine negligence is defined only in terms of care.").

[44] *See* SHAVELL, *supra* note 12, at 5 ("Injurers and victims will each have (at least potentially) two kinds of decisions to make: a decision whether, or how much, to engage in a particular *activity*; and a decision over the degree of *care* to exercise when engaging in an activity."); *see also id.* at 26.

[45] *See* LANDES & POSNER, *supra* note 8, at 66–70. For an interesting alternative perspective, see Robert Cooter, *Prices and Sanctions*, 84 COLUM. L. REV. 1523, 1540 (1984). Cooter argues that a negligence regime is best where the courts can calculate the efficient level of care with a high degree of certainty. In contrast, a strict liability regime is appropriate where the courts can best calculate the appropriate damages with a high degree of certainty. *Id.*

[46] LANDES & POSNER, *supra* note 8, at 113; *see also Ind. Harbor Belt R.R.*, 916 F.2d at 1177–78 (discussing the history of strict liability and application to blasting and rejecting application of strict liability to shipping hazardous chemicals).

cost reduction: (1) reducing the amount of the activity; and (2) increasing the level of care taken. An example of these methods of accident reduction can be seen in driver-pedestrian accidents. A driver can reduce accidents by driving less, or by driving more carefully. These two variables correspond with the conventional two categories of accident cost analysis used in the literature. Nevertheless, a driver might also affect accident costs by driving a different route to work or by buying a more or less dangerous (for himself or others) car or by buying new tires or taking a safe driving course.[47] A pedestrian's opportunities to reduce accident costs also transcend the two categories. She could walk less, or walk more carefully, but she could also walk in a different place, wear different shoes, wear reflective clothing, or develop her reflexes so she can better leap out of a car's way. Other actors also affect the cost of accidents. The local government could build wider sidewalks and more traffic lights, or better subsidize mass transit.

It is possible to shoehorn all of these accident cost inputs into the two categories mentioned above, and this certainly makes for ease in modeling. It is easy to reconceptualize driving a different, safer way to work, for example, as a reduction of the activity level if we define the activity as driving by a particular street. However, such redefinition ignores the substantial differences in the way the tort system treats different methods of accident reduction.[48]

Dari-Mattiacci recently formulated this problem: "Until now, economic analyses have disregarded the multidimensional nature of precaution and thus have not studied the optimal composition of the bundle of precautionary measures that, if not taken, amount to negligent behavior."[49] As he observes, "any precautionary measure defined as care . . . can be reinterpreted as a level of activity and vice-versa."[50]

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[47] Many have noted the arbitrariness of the level-of-precaution and level-of-activity categories and their descriptive inadequacy. *See, e.g.*, Dari-Mattiacci, *supra* note 9, at 331–32 ("In fact, motorists can prevent accidents not only by moderating their speed, but also by maintaining well-functioning brakes, correctly using the rear-view mirror, avoiding driving when tired, driving their car less often, and so forth."); *see also* Stephen G. Gilles, *Rule-Based Negligence and the Regulation of Activity Levels*, 21 J. LEGAL STUD. 319, 327–37 (1992).

[48] The conventional activity-level/level-of-care dichotomy also obscures the sequential nature of accident-cost reduction inputs. Suppose, for example, the local government builds a road and sidewalk of a particular size and shape. The driver purchases a particular automobile of a standard type. The pedestrian decides to walk to work instead of taking the bus. All of these accident inputs occur sequentially, and subsequent actors often act with knowledge of the prior actors' decisions. The driver and the pedestrian know the size and shape of the road and sidewalks. Pedestrians know the general qualities of automobiles. This raises the concerns in the sequential actor literature discussed above. *See supra* Part II.A.

[49] Dari-Mattiacci, *supra* note 9, at 332. He helpfully traces the intellectual history of the way in which this question, which was recognized by the early scholars of the law and economics of tort law, became obscured. *Id.* at 334–38.

[50] *Id.* at 336–37 ("For example, riding a bike on a dangerous road may be seen as a lack of care, if emphasis is put on the fact that the cyclist could have ridden on a safer trail.

As a result of this missing theory, the economic analysis of tort law is indeterminate, even when applied to relatively simple hypotheticals. Should a court consider the choice of automobile in determining whether or not a driver was negligent?[51] The conventional economic model of tort law provides no answer to this question.[52] Should the choice of automobile be treated as an activity level (and taken as a given) or a component of the standard of care? The answer to this question may drive the result of the liability test. The dangerous-car driver is more likely to be found liable if a choice of automobile can be considered negligent.

Indeed, the right answer might depend on context- and industry-specific questions: Would failing to incorporate this variable encourage drivers to purchase unsafe automobiles? If so, how many more accidents would result? Would potentially finding drivers negligent for the choice of automobile lead pedestrians to take fewer precautions? Are there other accident-affecting variables that the decision to include or exclude the choice of automobile would affect? These are all questions that could potentially be empirically addressed but are not even usually identified as relevant by the conventional law and economic models.

The indeterminacy also surfaces occasionally in the literature. So, for example, in *Strict Liability: A Comment*, Richard Posner criticizes Calabresi's advocacy of strict liability:

> For example, suppose that people are frequently injured because the blade of their rotary mower strikes a stone and that these accidents could

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However, one could interpret this form of precaution as the frequency of the activity 'riding on dangerous paths,' which is a different activity from 'riding on safe paths.'"); *see also* Peter A. Diamond, *Single Activity Accidents*, 3 J. LEGAL STUD. 107, 110 (1974) (noting the distinction between activity levels and standard of care as "somewhat artificial"). Dari-Mattiacci proposed an economic theory of the scope of negligence—a theory as to which variables a court should consider in the negligence analysis and which should be considered outside the scope of the negligence analysis. Dari-Mattiacci, *supra* note 9, at 336–41. His model is based on minimizing the sum of accident costs and administrative costs. *Id.* at 338. In some respects, his proposal is very similar to Calabresi's proposal to place liability on the cheapest cost avoider. *See id.* at 344–48 ("Thus, the residual bearer should be optimally chosen in order to minimize three different costs: the total accident costs, the information costs of verifying either the injurer's or the victim's behavior, and the compensation costs that arise when the injurer is the residual bearer."); *see also* GUIDO CALABRESI, THE COSTS OF ACCIDENTS: A LEGAL AND ECONOMIC ANALYSIS 309–18 (1970).

[51] Another way of asking this question is to ask whether the choice of car should be considered a proximate cause of an accident. *See supra* Part II.B–C. (explaining the similarity in scope of negligence and causation inquiries).

[52] This critique is similar to that of Eric Posner's recent critique of the law and economics of contract law. *See* Posner, *supra* note 37, at 838 ("[T]he models taken together are probably indeterminate. To generate predictions, one would need a vast amount of information about the characteristics of the parties and the transactions . . . . Yet no one has attempted to collect this information, and it is difficult to imagine how this task could be accomplished.").

> be prevented at least cost by the operator of the mower, who need only remove the stones in his path. Calabresi suggests that the manufacturer of the mower might nonetheless be liable under his approach. The injury is an expectable one and the manufacturer is in a better position than the user to figure out how to minimize the relevant costs.
>
> To impose liability on the manufacturer in this case, however, is inefficient: it eliminates the incentive of the operator to adopt a more economical method of preventing the injury. One could argue, perhaps, that the incentive created by fear of physical injury is already so great that adding or subtracting a pecuniary cost will not affect behavior. But Calabresi does not take this position.[53]

This is an example of the social optimum being defined under two different sets of constraints. Calabresi is concerned with the long-run effects of the liability rule and advocates making the producer strictly liable because in the long run it is likely the producer can most cheaply reduce the cost of accidents. Posner, instead, focuses on the short run and notes the inefficiency of making the liability rule insensitive to the victim's negligence. To know which is more efficient overall, one must know whether the long-run efficiency of holding the manufacturer liable outweighs the shorter-run efficiency of inducing victims to take precautions.

The answer also depends on the availability and cost of substitutes. If there are relatively inexpensive means of making safer lawnmowers, holding manufacturers liable might induce a reduction in accident costs. On the other hand, if there are relatively inexpensive precautionary measures that a potential victim might take, then holding the manufacturer negligent might increase accident costs.[54] It is difficult to draw general conclusions about these issues. The answers depend on many questions that are quite specific to the accident risks being evaluated, such as the availability of substitutes and the price elasticities of various activities. This suggests an empirical research agenda that has largely been ignored.[55]

It is also possible to examine how tort law has grappled with the issue of identifying the appropriate inputs to examine in determining liability. Doing so will suggest an analytic framework to organize the relevant questions. This is not a general, formal theory of which variables a court should include in any given test. Instead, I propose a useful analytic tool, a continuum from long to short run, and show how specific doctrines of tort law map onto this dimension.

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[53] Richard A. Posner, *Strict Liability: A Comment*, 2 J. LEGAL STUD. 205, 213–14 (1973).

[54] Even if we determine that the long-run optimum involves care on the part of the manufacturer, it might still be efficient to place liability on the part of the victims if we think that manufacturers will not comply. If this second-best situation occurs frequently enough, then inducing precautionary care may be efficient.

[55] By focusing on identifying the cheapest-cost avoider, Guido Calabresi identified many of these questions. *See* CALABRESI, *supra* note 50, at 26–31.

IV. THE SHORT-TO-LONG-RUN ANALYTICAL FRAMEWORK AND TORT DOCTRINE

The tort system places different incentives on the different ways of reducing accidents.[56] To understand the interaction between the tort system and the various ways of affecting accident costs, one can organize the different ways along a continuum from the short run to the long run using the moment the loss becomes irreversible as an endpoint for our analysis. The short-run/long-run continuum extends from the situation in which all of the inputs are fixed to the situation in which all of the inputs are alterable.

For example, possible remedial measures that can occur after the accident occurs will be at the short-run end of this continuum.[57] At this point, all or nearly all of the accident-affecting variables are fixed. The level of care at the time of the accident is near the short-run end of this continuum. In the example of the driver, this might be whether or not the driver was paying attention to his driving at the time of the accident. The number of times per minute the driver checked his rear-view mirror is a slightly longer-run means of affecting accident costs. Driving a different way to work or buying new tires or taking a safe driving course are still longer-run ways of affecting accident costs. Buying a different car or driving less are even longer-run ways of affecting accident costs. Giving up driving altogether would be still a longer-run means of affecting accident costs. Perhaps structuring society around public transport would be an even longer-run means of affecting accident costs.

This same continuum applies to pedestrians in much the same way. In the short run, a pedestrian could take more care by looking around more often. This is an example of an input the pedestrian can change given that they are walking in a particular place at a particular time. In the longer run, the pedestrian could walk a different way or at a different time of day. In the even longer run the pedestrian could give up walking altogether, or develop reflexes to leap out of a car's way.

Accident-relevant inputs controlled by other actors can also be organized along this continuum. So, for example, the decision by the municipality to build or not to build a sidewalk will affect the chance of accidents in the long run. The frequency that police are assigned to the intersection would affect accident costs in the medium run. Similarly, the efficacy of a police officer that directed (or misdirected) traffic might affect accident costs in the short run.

The concept of a short run where most inputs are fixed and a long run where most inputs are variable is taken from (elementary) microeconomics.[58] As in the microeconomic context, the concepts are not perfectly correlated with actual time but rather with the actor's ability to vary inputs. This tends to roughly correlate

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[56] Dari-Mattiacci, *supra* note 9, at 331–32; *see also supra* note 49 and accompanying text.

[57] *See* Rose-Ackerman, *supra* note 23, at 38–39 & nn.38–42 (collecting cases on a plaintiff's duty to mitigate harm in various legal contexts).

[58] PAUL A. SAMUELSON & WILLIAM D. NORDHAUS, ECONOMICS 505–06 (13th ed. 1989). One could also speak in terms of seeking general equilibrium solutions or partial equilibrium solutions.

with time—the longer the time horizon of the actor, the more feasible it is to vary inputs because the costs (including information costs) of the change in inputs can be spread over a longer period.[59]

The short-to-long-run continuum is analytically useful because many of the tests and doctrines of tort law, including negligence, contributory negligence, last clear chance, assumption of risk, cheapest-cost-avoider, the victim's duty to mitigate damages, and certain varieties of strict liability, are applied by taking certain cost variables as given and exogenous to the test and others as variable and endogenous. Every application of a liability test therefore occurs with a particular combination of variables that are considered relevant. These combinations of relevant variables can be analyzed and compared by roughly mapping them onto the short-to-long-run continuum. Doing so reveals the ways the common law adjusts to the tension between optimization for the short and long run.

A. The Learned Hand Negligence Test

Tort law unevenly affects different methods of reducing accident costs by performing liability tests at different places on this continuum. The Hand negligence test, for example, is normally performed at a fairly short-run level of analysis. The common understanding of negligence usually includes whether or not the driver was paying attention at the time of the accident, but not generally whether the driver could have inexpensively taken a different and less hazardous route or whether the driver could have bought a safer car. These factors are usually taken as given, exogenous to the Learned Hand cost-benefit analysis.[60]

If the courts perform the Hand test in the short run, there will be no incentive for injurers (or victims) to supply the efficiently increased amount of safety in the medium and long run, except to the extent of their expected liability.[61] For example, drivers generally have no reason to consider accident costs when

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[59] *Cf.* Grady, *Why Are People Negligent?*, *supra* note 16, at 310 ("[T]he cost of remembering to use a durable precaution once can often be amortized over a long service life, whereas the cost of remembering to use a nondurable precaution frequently has an ephemeral payoff.").

[60] The doctrine that a party's negligence must be the proximate cause of an accident has been used to limit analysis to fairly short-run accident causes, but the proximate cause doctrine does not prevent analysis of longer-run causes. *See* Calabresi, *supra* note 31, at 100–08 (emphasizing instrumental use of doctrines of cause); *see also supra* Part II (discussing conceptual unity of causation, scope of negligence, and sequential actor literature). *See generally* Grady, *supra* note 31, at 363.

[61] This is a restatement of the oft-noted inadequacy of negligence to produce efficiency when reduction in the activity level is necessary. Injurers will have some incentive to reduce accidents in the long run under a short-run negligence test to the extent that they expect to be found negligent in the short run. So if there is uncertainty in either the negligence standard or whether the injurer can meet that standard, the injurer will have an incentive to reduce accidents in the long run as well as attempting to meet the shorter-run standard.

choosing to drive to or take the train.[62] There is no reason a court could not, in theory, perform the Learned Hand cost-benefit negligence test in the longer run. The driver, for example, might be held liable because the court found that he could have taken the train instead of driving for less than the expected cost of accidents from driving minus the expected cost of accidents from taking the train.[63]

Alternatively, the pedestrian victim could be held contributorily or comparatively negligent because they could have walked in their own quiet neighborhood instead of in a more distant busy street and the court could determine that the marginal benefit received from walking by the busy road was outweighed by the added risk of accidents. This is a longer-run understanding of negligence than typically used by the courts.[64]

Legal doctrine sometimes reflects a longer-run understanding of negligence. In the *Restatement (Second) of Torts* 1965, section 297 reads: "A negligent act may be one which involves an unreasonable risk of harm . . . although it is done with all possible care." For example, the Restatement mentions:

> [T]here are many mountain roads which may properly be regarded as dangerous no matter how careful . . . the driver may be . . . . [T]here is an inescapable risk in driving down a narrow and ill-kept mountain road . . . particularly if . . . snow, or ice has rendered the road slippery . . . . [M]ere use of such a route . . . may be negligent unless the utility of the route is very great.[65]

The courts do occasionally use a long-run Hand test in product design defect cases.[66] Ironically, the analysis is often called strict liability, though the Hand

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[62] Numerous commentators have made this observation. *See, e.g.*, Edlin & Karaca-Mandic, *supra* note 41, at 932; Jerry Green, *On the Optimal Structure of Liability Laws*, 7 BELL J. ECON. 553, 557, 559 n.8 (1976); Shavell, *Strict Liability*, *supra* note 13, at 4–6; William Vickrey, *Automobile Accidents, Tort Law, Externalities, and Insurance: An Economist's Critique*, 33 LAW & CONTEMP. PROBS. 464, 466 (1968).

[63] *Cf.* Robert Cooter & Ariel Porat, *Does Risk to Oneself Increase the Care Owed to Others? Law and Economics in Conflict*, 29 J. LEGAL STUD. 19, 31 (2000) (noting that conventional application of the Learned Hand test wrongfully ignores the effect an action has on the risk to the injurer).

[64] *Cf.* Ariel Porat, *The Many Faces of Negligence*, 4 THEORETICAL INQUIRIES L. 105 (2003) (noting that different definitions of the Learned Hand test can balance victim's interests, third-party interests, and/or social interests against those of the injurer).

[65] RESTATEMENT (SECOND) OF TORTS § 297 (1965).

[66] *See* Guido Calabresi & Alvin K. Klevorick, *Four Tests for Liability in Torts*, 14 J. LEGAL STUD. 585, 590 (1985). Calabresi and Klevorick differentiate this ex post products liability test from the ordinary ex ante negligence test by pointing out that the test occurs after the accident and does not look so much to the reasonableness of the injurer's behavior ex ante as to whether the injurer's behavior was correct in hindsight. *Id.* While this distinction explains some of the unique character of the test for strict products liability, it does not fully explain the breadth of variables included in the products liability analysis. It would be possible to perform an ex post short-run test, for example. Suppose ex post

marginal cost-benefit analysis is very similar.[67] The courts weigh the costs and benefits of proceeding with a particular design compared to the costs and benefits of other possible designs and decide whether the benefits of the design that the firm used outweighed its costs.[68] Similarly, strict liability in failure to warn cases is predicated on a long-run Learned Hand cost-benefit negligence test. The court asks whether the expected accident costs that could be reduced by a warning would exceed the cost of the warning.[69]

B. Cheapest-Cost-Avoider Test

As an alternative to the negligence test, Calabresi and Hirschoff proposed the cheapest-cost-avoider test to explain the basis of strict liability and as a prescriptive method for economic efficiency.[70] In a cheapest-cost-avoider test, the court decides not whether the injurer should have taken a higher level of care, but whether the injurer was in the better position to reduce accident costs including both the costs of information and the costs of acting upon that information.[71]

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scientific research uncovers the dangerousness of not checking the rear-view mirror every fifteen seconds. This knowledge might impact a short-run negligence test.

[67] *See* Robert Cooter & Ariel Porat, *Total Liability for Excessive Harm*, 36 J. LEGAL STUD. 63, 78 (2007) (suggesting that problems of proof compelled the shift from negligence to strict liability for consumer products).

[68] In *Camacho v. Honda Motor Co.*, the Supreme Court of Colorado overturned a summary dismissal of a suit alleging that Honda could have inexpensively added crash bars to its motorcycles and thereby prevented the leg injuries of Camacho. 741 P.2d 1240, 1241 (Colo. 1987). In discussing the resemblance of the defect test to negligence, the court explained:

> Of course, whether a given product is reasonably safe and, therefore, not unreasonably dangerous, necessarily depends upon many circumstances. Any test, therefore, to determine whether a particular product is or is not actionable must consider several factors. While reference to "reasonable" or "unreasonable" standards introduces certain negligence concepts into an area designed to be free from those concepts, that difficulty is much less troublesome than are the problems inherent in attempting to avoid dealing with the competing interests always involved in allocating the risk of loss in products liability actions.

Id. at 1245–46. Regardless of the jury's focus, or the court's labeling, the kind of test used in product defect cases is a Learned Hand cost-benefit analysis looking at the long-term ways in which a manufacturer could have reduced accident costs. *See* Greenman v. Yuba Power Prods., Inc., 377 P.2d 897, 899 (Cal. 1963) (Traynor, J.) (noting the jury could reasonably have concluded that the manufacturer negligently constructed the subject tool and that this was part of the strict liability test).

[69] *See, e.g.*, Cotton v. Buckeye Gas Prods. Co., 840 F.2d 935, 938 (D.C. Cir. 1988).

[70] *See* Guido Calabresi & Jon T. Hirschoff, *Toward a Test for Strict Liability in Torts*, 81 YALE L.J. 1054 (1972).

[71] *Id.* at 1060.

Unlike the negligence test, a cheapest-cost-avoider test (when used at all) is usually performed at a long-run level of analysis.[72]

Calabresi and Hirschoff introduce another dimension to a liability test. They compare the level of generality of the cheapest-cost-avoider test to that of the negligence test.[73] The level of generality refers to the number of exceptions that are permitted and the degree to which cases are looked at on a case-by-case basis rather then in terms of broad categories.[74] For example, they argue that the decision for strict liability for ultra-hazardous activities is made at a high level of generality and that it is unimportant that in a particular case the plaintiff could have avoided the accident more easily than the defendant.[75]

The level of generality idea used by Calabresi and Hirschoff is conceptually distinct from short and long run analysis. It is possible for courts to perform a short-run cheapest-cost-avoider or negligence test, taking most issues as given, at a high level of generality. For example, a court might rule that all pedestrians are to be held strictly liable for their injuries and the damages they cause from hitting automobiles on the grounds that in general they are the short-run cheapest-cost-avoiders, or on the grounds that in general they are negligent.[76] The pedestrian would not be allowed to prove, in this particular instance, they were not the cheapest-cost-avoider or were not negligent if the test is done at a high level of generality.

Conversely, it would be possible to use a long-run cheapest-cost-avoider test at a low level of generality. Such a test would look on a case-by-case basis to see if a particular party was the long-run cheapest-cost-avoider. A court performing such a test in the railroad example would ask whether the particular railroad being sued or the particular farmer suing would have been the cheapest-cost-avoider in the long run.[77] The court would ask whether it would have been cheaper for this particular railroad to build the tracks through the infertile desert instead of the arable plains or for this particular farmer to cultivate land away from the tracks.[78] Such a specific test at such a long-run basis would likely require the courts to process huge amounts of information.

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[72] *Id.* at 1060–67.

[73] *Id.* at 1067–69.

[74] *Id.*

[75] *Id.*

[76] This is in conflict with most conventional moral notions of fault, but not dissimilar to holding an unintelligent person to the reasonable man standard. Vaughn v. Menlove, (1837) 132 Eng. Rep. 490, 494 (C.P.); *see* Calabresi & Hirschoff, *supra* note 70, at 1070 (discussing a general negligence test that places liability on a category rather than single injurers and victims).

[77] The information costs of such a test are likely to be very high. In general, information costs are related to the level of generality of the test. They are likely to be very low at a high level of generality and much higher when the court has to find specific information about the parties.

[78] *See* Gilles, *supra* note 47, at 319 (using a continuum that resembles Calabresi and Hirschoff's between general rules that the courts use and case-by-case determination)

This information cost suggests an explanation for the general correlation among the level of generality, the type of test, and whether the test looks primarily at the short or long run. Negligence tests in general are used at a low level of generality and in the short run. Courts have to learn an enormous amount about the possible range of precautions the defendant could have taken, in order to decide whether or not the precautions they did take were justified.[79] This requires a great deal of information. Courts economize by taking many things as given, and ignoring long-run precautions, such as activity levels. The test is generally performed on a case-by-case basis, analyzing the specific circumstances of the accident.[80] Because the court determines whether the defendant's action were cost-justified, it makes sense to make the decision on a fairly specific level since it is necessary to use specific information to determine whether the action was negligent.

In comparison, cheapest-cost-avoider tests are generally performed at a longer-run level and a higher level of generality. This test, when performed at a high level of generality, does not require the specific information that the negligence test does because it is comparative and does not hold the defendant's actions to an absolute standard. Thus, it makes sense that information costs are kept low by making the decisions at a high level of generality. Because the test is so general, considering long-run factors is not prohibitively costly.

For example, strict liability for ultra-hazardous activity can be analyzed as a cheapest-cost-avoider test in the long run at a high level of generality.[81] Individuals likely to be injured by planes are largely unfamiliar with them and the pilots are more likely to be in a position to reduce the costs of accidents, in some cases by not flying at all. The decision to make flying an ultra-hazardous activity is made at a very general analytical level. The activity is analyzed in general, and the specifics of the case are unimportant if flying is considered an ultra-hazardous activity. It is unimportant to the decision maker that the victim could have more cheaply avoided the loss if the activity, analyzed as a whole, is one in which the injurers are likely able to reduce costs more cheaply.

As noted above, it is theoretically possible to perform a long-run cheapest-cost-avoider test at a low level of generality. In this context, such a test would look to whether the flier was the long-run cheapest-cost-avoider and could have just as easily walked or taken up something instead of flying or whether the victim was the cheapest-cost-avoider. These questions resemble the questions used in a

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[79] Brown, *supra* note 8, at 333 (stating that, to apply the negligence test, courts must "ferret out complete information about the underlying technology of accident prevention"). Mark Grady suggested that specific untaken precautions proposed as negligence by the plaintiff critically structures the court's inquiries and (presumably) allows the court to economize on information costs. *See* Grady, *supra* note 8, at 141; *see also* Mark F. Grady, *A New Positive Economic Theory of Negligence*, 92 YALE L.J. 799, 799–800 (1983).

[80] Rules like negligence per se can make the test more general. *See* Gilles, *supra* note 47, at 322.

[81] Calabresi & Hirschoff, *supra* note 70, at 1067.

negligence analysis to determine who the cheapest-cost-avoider is and thus may undermine the information cost advantage of the cheapest-cost-avoider test.[82]

It is also possible to perform a cheapest-cost-avoider test in the very short run instead of the long run. For example, suppose we analyzed an automobile accident using a short-run cheapest-cost-avoider test. The result of the test depends on the familiar question of which variables we take as given. If we take the driver's purchase of a particularly dangerous automobile as a given, the cheapest-cost-avoider might be the pedestrian.[83] This example shows how the level of analysis will affect who will be liable. In the longer run the automobile driver might be the cheapest-cost-avoider, and it would therefore be more efficient to impose liability on the driver. In the even longer run, it is possible that the automobile manufacturers might be the cheapest-cost-avoiders because they might have inexpensively prevented the automobile from going out of control in the first place. Thus, just as in the case of the negligence test, the level of analysis—which variables are included in the calculus—can determine the outcome of the cheapest-cost-avoider test.

C. Combining Tests

Courts sometime combine different tests at different levels of analysis. So, for example, in the doctrines of contributory or comparative negligence, assumption of risk, and last clear chance, a court makes an initial determination using either a negligence or cheapest-cost-avoider test in a longer-run setting and then performs another test, looking at shorter-run inputs to possibly alter the assessment of liability.

1. Contributory Negligence

Contributory negligence is a negligence test applied to the plaintiff that serves to bar recovery. As with conventional negligence, it can be applied at any point along the short-to-long-run continuum, though it is more often applied in the shorter term than the original defendant's negligence test. Given that the other injurer was negligent, could the victim have prevented the accident at a cost less than the expected cost of the accident?[84] For example, suppose the defendant is negligently driving without adequate brakes. The plaintiff, a pedestrian, negligently wanders into the edge of a road, a place where non-negligent cars do not drive, and is injured but is barred from recovery because of his own

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[82] An early critic of Calabresi's advocacy of strict liability made this same point. *See* Posner, *supra* note 53, at 215.

[83] This is, of course, similar to the last clear chance doctrine. *See infra* text accompanying note 95.

[84] "A plaintiff is barred from recovery for harm caused by the defendant's reckless disregard for the plaintiff's safety if, knowing of the defendant's reckless misconduct and the danger involved to him therein, the plaintiff recklessly exposes himself thereto." RESTATEMENT OF TORTS § 482(2) (1934).

negligence. This is an example of a court analyzing the plaintiff's negligence given that the defendant was already negligent. The action of the plaintiff would not have increased accident costs independently of the negligence of the defendant.[85]

This definition of contributory negligence can theoretically erode incentives for the injurer to take care,[86] because the injurer might know that the victim will be found contributorily negligent. For example, suppose it is cheaper for workers in a factory to purchase heavy protective clothing than to suffer the expected cost of accidents, *given that the defendant is negligent.* If the defendant's negligence is not taken as given, the cheapest way of avoiding costs is having the defendant buy safety machinery. Perversely, this might cause the injurer to behave as dangerously as possible in the expectation that the plaintiff will fail to take elaborate (but cost-effective) measures and be found contributorily negligent.[87]

A somewhat different form of contributory negligence exists when the plaintiff's negligence increases accident costs independently of the action of the defendant. In this case, the court's contributory negligence test does not take the defendant's negligence as a given, but as independent of the plaintiff's possible negligence. If, in our example of the distracted pedestrian, the pedestrian ran out in the middle of the busy street, the court might find him contributorily negligent into a longer-run test than in the first case. In the first example, the pedestrian's negligence depended on taking the defendant's negligence as a given, exogenous to the negligence calculation. In the second case, the defendant's negligence does not have to be taken as given to determine that the plaintiff's action was negligent. The negligence was independent of the defendant's negligence. This type of contributory negligence test is not necessarily any shorter-run than the defendant's negligence,[88] and does not involve the same risk of strategic behavior, because it is defined independently of the actions of the injurer. As a practical matter, it may be difficult to distinguish these two types of contributory negligence.

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[85] Grady calls this reaction-period negligence. *See* Grady, *supra* note 13, at 20–23.

[86] *See id.* at 15; Wittman, *supra* note 13, at 65–66.

[87] Grady explains that courts reduce this sort of strategic behavior "by making each party's reaction-period obligations depend on the other party's mental state," by, for example, not permitting a defense of contributory negligence when the first negligence was deliberate. Grady, *supra* note 13, at 22–23. But if a technology is somewhat new, the failure to provide it might not be seen to be deliberate. Similarly, some activity-level choices may not be seen to be deliberate in this sense simply because they are taken as given.

[88] The continuum between short and long run is a continuum of including greater or fewer variables as endogenous in the liability test. The exact variables that are successively included as one moves from short to long run are not defined. Thus, it is somewhat difficult to speak of a contributory negligence test as being on a shorter or longer term than the original negligence test. The relevant variables are not the same, so we cannot simply look to see which is more inclusive. Nevertheless one can make rough generalizations about which of the two tests seems to include more variables as relevant.

2. Comparative Negligence

Structurally, comparative negligence is similar to contributory negligence in that it can be applied using any set of inputs as variable although, like contributory negligence, it is often applied on a shorter-run basis than the original negligence test. Additionally, like contributory negligence, comparative negligence can either be defined independently of the injurer's negligence or taking the injurer's negligence as a given. Comparative negligence avoids the discontinuity of contributory negligence—a regime in which one additional quanta of care by the victim is the difference between full recovery and no recovery.[89] However, this fact does not change the analysis or alter the way in which a court has to choose to include or exclude variables in the negligence analysis.[90]

So, for example, if a court, in applying the comparative negligence test, takes the frequent running of a spark-emitting train as a given, the court might find the farmer one hundred percent negligent for stacking his flammable crops near the tracks. On the other hand, if the court considers the frequency of the train running as part of the comparative negligence analysis, it might divide the negligence apportionment and find the railroad partially negligent. Whether the court uses comparative negligence or contributory negligence does not affect the fundamental tension between the long-run optimal outcome and the short-run optimal outcome and how that is reflected in the choice of variables considered by the court.[91]

3. Assumption of the Risk

The assumption of risk doctrine is traditionally viewed as a defense to strict liability or negligence. The defendant claims that the plaintiff assumed the risk of the activity that caused the injury.[92] As Calabresi and Hirschoff observe, the courts can use a fairly specific short-term cheapest-cost-avoider test to determine whether the plaintiff assumed the risk, "a kind of plaintiff's strict liability."[93] This is an

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[89] *See* Cooter, *supra* note 45, at 1532 n.21 ("[U]ncertainty transforms the discontinuity into a nonconvexity."). Cooter suggests that actors' uncertainty about the application of the legal standard will reduce the discontinuity. *See id.*

[90] Historically, some legal economists have disfavored it. *See, e.g.*, LANDES & POSNER, *supra* note 8, at 314–15 (criticizing comparative negligence as a "doctrine[] that impose[s] additional administrative costs on the legal system with no gain in allocative efficiency"); *id.* at 316 (predicting that insurance rates will be slightly higher in comparative negligence states).

[91] *But see* Mark F. Grady, *Efficient Negligence*, 87 GEO. L.J. 397, 416–17 (1998) (suggesting that comparative negligence provides fewer incentives for strategic behavior than contributory negligence).

[92] *See, e.g.*, Murphy v. Steeplechase Amusement Co., 166 N.E. 173, 174 (N.Y. 1929) (Cardozo, J.) (finding that the plaintiff assumed the risk of injury from falling when he boarded an amusement park ride called "The Flopper," which was obviously designed to cause people to lose their footing).

[93] Calabresi & Hirschoff, *supra* note 70, at 1065.

example of the courts performing in the long run either a cheapest-cost-avoider or a negligence test, and then applying a cheapest-cost-avoider test in the short run. This combination of tests allows the courts to define the optimal solution more precisely. Rather than being forced to hold every injurer liable in the broad class that is defined by the conventionally highly general long-run strict liability, the doctrine of assumption of risk allows the court to exclude a certain class of parties from recovery.

It would be possible to apply the assumption of risk doctrine at an either more or less specific level and at an either shorter- or longer-run level. At a more specific level, the test might look to the individual characteristics of the plaintiff to see if she was, for some idiosyncratic reason, not the cheapest-cost-avoider despite her membership in the larger class that, in general, is the cheapest-cost-avoider.[94]

4. Last Clear Chance

The last clear chance doctrine is an additional test that can alter the outcome of a court's judgment. It can render judgment to plaintiffs when they would otherwise be barred from recovery by contributory negligence. It is usually a negligence test applied at a very short-term level. Given the longer-term negligence of both the injurer and the victim, was the injurer negligent?

One court explained the doctrine as follows:

> [T]he last clear chance rule presupposes: (1) That plaintiff has been negligent; (2) that, as a result of his negligence, he is in a position of danger, from which he cannot escape by the exercise of ordinary care; (3) that defendant is aware of plaintiff's dangerous situation under such circumstances that he realizes, or ought to realize, plaintiff's inability to escape therefrom; (4) that defendant then has a clear chance to avoid injuring plaintiff by exercise of ordinary care and fails to do so.[95]

This test, then, takes the given negligent actions of the plaintiff and the defendant as being outside the scope of its short-run negligence analysis. The test only looks to whether the defendant could have avoided injuring the plaintiff by being reasonable, given the prior negligence of the plaintiff. This is the very shortest-run negligence analysis, taking all of the circumstances of the accident as outside the negligence calculus.

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[94] In *Brown v. San Francisco Ball Club, Inc.*, a court ruled that a woman could not recover from the stadium owner for a baseball hitting her while she sat behind an unscreened section of the stadium when there was a screened section available, notwithstanding the fact that she knew little about baseball. 222 P.2d 19, 20–23 (Cal. Dist. Ct. App. 1950). This suggests the assumption of the risk test is performed at a somewhat general level; not every specific idiosyncrasy (in this case, ignorance of baseball) is taken into account when determining if the plaintiff assumed the risk.

[95] Bence v. Teddy's Taxi, 297 P. 128, 130 (Cal. Dist. Ct. App. 1931).

To recapitulate, liability tests that courts use can be placed on two continuums: the specific-to-general continuum and the long-to-short-run continuum. The level of generality is concerned with the size of category on which the liability decision is based and the degree to which the court looks at the idiosyncrasies of the particular actors. The location of a particular test on the short-to-long-run continuum depends on how many inputs the court takes as given and how many it takes as variable when it performs the liability test.

TABLE 1. LIABILITY TESTS

	Short-run		Long-run
Specific	last clear chance assumption of risk*	negligence	design defect
General			Liability for ultra-hazardous activities*

*strict liability test

In practice, courts combine the short- and long-run, general and specific negligence, and cheapest-cost-avoider tests in several ways. These include (1) a longer-run cheapest-cost-avoider or negligence analysis coupled with a shorter-run cheapest-cost-avoider analysis (strict liability with assumption of risk); (2) a short-run negligence analysis coupled with an analysis of the plaintiff's short-run negligence and a second very short-term analysis of the defendant's negligence (conventional negligence with contributory negligence and last clear chance) and; (3) a short-run negligence test with a shorter-run cheapest-cost-avoider test (conventional negligence with assumption of risk).[96] These do not exhaust the possible combinations of tests. Courts could apply negligence or strict liability tests at other points on the short-to-long-run continuum.

[96] One can also apply any particular test with information available at the time the precaution level was chosen, before the accident (ex ante) or during the trial (ex post). *See* Calabresi & Klevorick, *supra* note 66, at 591.

Given this universe of possible tests, how can one analyze when a particular test or combination of tests is efficient and which variables a court should include? Unfortunately, there is no general answer.[97]

All other things being equal, considering longer-run accident-reducing inputs in liability tests will encourage certain categories of efficient accident-reducing behaviors that might otherwise be ignored. So, for example, the driver might consider driving less if the quantity of driving were included in the negligence test. But this must be weighed against the difficulties that courts would have in measuring whether longer-run inputs were efficient. For example, it might be difficult for a court to determine whether it was efficient for the driver to be driving at a particular time or in a particular car. Including longer-run inputs in the test must also be weighed against undermining incentives for care for subsequent actors (both victims and others). Shorter-run tests (like last clear chance or contributory negligence) can be used to encourage subsequent actors to behave efficiently, but these doctrines will necessarily undermine incentives to undertake longer-run accident-reducing measures to the extent they reduce expected liability.

D. Coming to the Nuisance

Another example of a tort law doctrine that can be mapped onto the short-to-long-run continuum is the doctrine of coming to the nuisance. Blackstone pithily summarized it as follows:

> If my neighbour makes a tan-yard, so as to annoy and render less salubrious the air of my house or gardens, the law will furnish me with a remedy; but if he is first in possession of the air, and I fix my habitation near him, the nusance [sic] is of my own seeking, and must continue.[98]

The doctrine is a defense to nuisance liability that can be interposed if the plaintiff moved to the nuisance.[99] For our purposes, it is a doctrine that focuses on longer-run incentives to prevent incompatible land use rather than short-run incentives. Once again there is a tension between the long-run goal of avoiding incompatible land use and the shorter-run goal of minimizing costs once this initial inefficiency occurs.[100]

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[97] *See supra* Part II (discussing indeterminacy).

[98] WILLIAM BLACKSTONE, 2 COMMENTARIES 402–03 (1766).

[99] *See* Donald Wittman, *First Come, First Served: An Economic Analysis of "Coming to the Nuisance,"* 9 J. LEGAL STUD. 557, 558–61 (1980) (providing an economic critique of this doctrine).

[100] For a fascinating discussion of nuisance law, see generally Henry E. Smith, *Exclusion and Property Rules in the Law of Nuisance*, 90 VA. L. REV. 965 (2004).

E. Regulation

Regulation offers another means of affecting accident costs that can also be mapped onto the short-to-long-run continuum.[101] For example, regulations that prohibit the sale of cars without certain safety devices are a means by which long-run accident precautions can be affected. Prohibitions against the use of tractors or bicycles on interstate freeways are regulations that affect shorter-run accident inputs.

A particular advantage of regulation highlighted by this analysis is that regulation need not undermine liability incentives for subsequent actors to take care. Consider the issue of whether the choice of automobile should be included as a possible variable in determining whether a driver is negligent. As discussed above, the disadvantage of including such a variable in liability tests is that it might diminish incentives to take care for subsequent actors. If the government simply bans certain dangerous automobiles, there is no diminution of expected liability by subsequent actors. Similarly, if the government regulates the number of times the spark-emitting railroad engine passes by the farmer, the accident-affecting behavior can be controlled without undermining incentives for subsequent actors—in this case the farmer—to take proper care. This suggests an advantage to a legal regime that combines regulation with tort liability[102] and a sensitivity to background social norms.[103] The advantage in creating efficient incentives comes from the overlapping yet independent sources of suasion.[104]

Of course, regulation also has substantial disadvantages, such as the potential to be too heavy-handed. If the outside regulatory body miscalculates the costs, it might ban certain activities altogether, whereas the tort system might merely

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[101] A discussion of the advantages and disadvantages of regulation versus tort liability is beyond the scope of this Article. *See generally* SHAVELL, *supra* note 12, at 277; Guido Calabresi & A. Douglas Melamed, *Property Rules, Liability Rules, and Inalienability: One View of the Cathedral*, 85 HARV. L. REV. 1089, 1105–15 (1972); Steven Shavell, *Liability for Harm Versus Regulation of Safety*, 13 J. LEGAL STUD. 357, 358–66 (1984); Donald Wittman, *Prior Regulation Versus Post Liability: The Choice Between Input and Output Monitoring*, 6 J. LEGAL STUD. 193, 205–09 (1977).

[102] Another theoretical solution is decoupling liability by making both the injurer and the victim bear the cost of the harm. *See* A. Mitchell Polinsky & Yeon-Koo Che, *Decoupling Liability: Optimal Incentives for Care and Litigation*, 22 RAND J. ECON. 562, 562–64 (1991).

[103] Social norms also serve as a valuable set of alternative constraints that can provide incentives for efficient behavior in the short, medium, and long run, without undermining the incentives created by the tort system. For one particular view of the relationship between tort law and social norms, see ROBERT C. ELLICKSON, ORDER WITHOUT LAW: HOW NEIGHBORS SETTLE DISPUTES (1991). A more comprehensive discussion of the relationship between tort law and social norms is outside the scope of this Article.

[104] In this respect, the doctrine of negligence per se, where an actor is held negligent for violating a regulation, undermines the independence of tort and regulation.

inefficiently assign liability but not outright prohibit the activity.[105] If the activity is actually efficient, then a firm should be able to bear the cost of the tort liability. This suggests that regulation should be restricted to those precautions for which there is a high degree of certainty of efficiency.

V. CONCLUSION

This Article raises an issue that has only been tangentially addressed in the economic literature on tort law: which accident inputs should a court examine when determining liability and which should it take as given? Economic theory yields no a priori answer to this question. Without an answer to this question, the economic analysis of tort law yields indeterminate prescriptions. This Article proposes an analytical framework—a continuum from long-run to short-run accident inputs—to help understand the problem. Many conventional doctrines of tort law map onto this continuum, and it helps make clear the tradeoffs a court faces in choosing the scope of its tests.

If the economic analysis of tort law provides no one-size-fits-all answer to the question of which variables should be included in a liability test, what then should a court or a policymaker do to encourage efficient conduct? Unfortunately, no easy general answer appears possible.

Instead the answer will depend on a number of empirical questions specific to the particular accident context.[106] For example, consider the question of whether a court should evaluate the choice of automobile when determining whether the driver was negligent. What is the price elasticity of the demand for dangerous automobiles? Would added tort liability cause a shift away to safer substitutes? Would liability on the basis of auto selection lead municipalities or pedestrians to take fewer precautions? If so, how many more accidents would result? Are there other accident-affecting variables that the decision to include or exclude the choice of automobile would affect? While by no means trivial to answer, many of these questions do have empirical answers. As the legal academy grows empirically more sophisticated, these kinds of questions should receive increased attention.[107]

These types of questions—questions about the specific economic structure of an accident situation—should sound somewhat familiar. Guido Calabresi raised

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[105] *See* CALABRESI, *supra* note 50, at 113–19.

[106] Gary Schwartz made a similar observation in a slightly different context. *See* Gary T. Schwartz, *Reality in the Economic Analysis of Tort Law: Does Tort Law Really Deter?*, 42 UCLA L. REV. 377, 383 (1994) (noting the difficulty in making generalizations about the efficacy of deterrence for all of tort law). Schwartz instead examines specific accident contexts to evaluate the empirical evidence of deterrence. *Id.* at 390; *see also* Don Dewees & Michael Trebilcock, *The Efficacy of the Tort System and Its Alternatives: A Review of Empirical Evidence*, 30 OSGOODE HALL L.J. 57, 64 (1992) (reviewing "the existing empirical evidence on the efficacy of the tort system and alternatives to it").

[107] *See* Goldberg, *supra* note 42, at 579 (noting the need to learn "more about the deterrent effects of tort law as well as innumerable other facts bearing on the tort system").

many very similar questions over thirty years ago in *The Costs of Accidents*.[108] While he was not considering the specific issue of accident variable inclusion in liability tests, his call for attention to the specific structure of the accident context provides useful guidance for our dilemma as well.[109] He also stressed the need for careful analysis of possible substitutes in determining where liability should be allocated and the need for empirical testing.[110]

Yet his call for careful analysis of specific accident contexts and empirical testing has not received as much attention as it should. Since Calabresi wrote, the economic analysis of tort law has been dominated by general models with comparatively little attention to the specific accident-reduction technologies, or the economic structure (the price elasticities and availability of substitutes) of particular recurring accident situations.[111] However, as I have tried to show, the general answers that the general models offer—e.g., the negligence test will result in the efficient level of precaution with or without a rule of contributory negligence—are indeterminate without a theory of which variables to include in the liability test. The kind of context-specific work, partly analytical and partly empirical, that Calabresi outlined in *The Costs of Accidents* is crucial to

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[108] *See, e.g.*, CALABRESI, *supra* note 50, at 140–41 ("The cost of reducing accident costs by reduction in or modification of a given activity will depend both on its market desirability (how much people want it and how many substitutes it has) and on the relation it bears (in some causal sense) to the accident costs under consideration. For example, although the costs of car-pedestrian accidents could probably be reduced substantially by reductions and modifications of pedestrian activity, such cost reduction might be too expensive if pedestrianism were viewed as a fixed activity, i.e. one without ready substitutes."); *id.* at 155 ("In other words, the search for the cheapest avoider of accident costs is the search for that activity which has most readily available a substitute activity that is substantially safer. It is a search for that degree of alteration or reduction in activities which will bring about primary accident cost reduction most cheaply.").

[109] *See id.* at 141.

[110] *Id.* at 157 ("[W]e will be able to test our choices empirically.").

[111] There are important exceptions. *See, e.g.*, DON DEWEES ET AL., EXPLORING THE DOMAIN OF ACCIDENT LAW: TAKING THE FACTS SERIOUSLY 3 (1996); MICHAEL J. MOORE & W. KIP VISCUSI, COMPENSATION MECHANISMS FOR JOB RISKS 133 (1990); Frank J. Chaloupka et al., *Alcohol-Control Policies and Motor-Vehicle Fatalities*, 22 J. LEGAL STUD. 161, 162 (1993); Elisabeth M. Landes, *Insurance, Liability and Accidents: A Theoretical and Empirical Investigation of the Effect of No-Fault Accidents*, 25 J.L. & ECON. 49, 49 (1982); Michelle Mello & Troyen A. Brennan, *Deterrence of Medical Errors: Theory and Evidence for Malpractice Reform*, 80 TEX. L. REV. 1595, 1597–98 (2002) (analyzing deterrence of medical errors and proposing tort reforms to increase deterrent effect); Frank A. Sloan et al., *Tort Liability Versus Other Approaches for Deterring Careless Driving*, 14 INT'L REV. L. & ECON. 53, 53 (1994) (concluding, inter alia, that dram shop liability reduces fatalities); Aaron Edlin, *Per-Mile Premiums for Auto Insurance* 1–2 (Nat'l Bureau of Econ. Research, Working Paper No. 6934, 1999) (estimating the effects of adopting per-mile automobile insurance premiums); *see also* Rose-Ackerman, *supra* note 23, at 45 (recognizing the importance of empiricism in deciding on an appropriate institutional regime).

determining which variables should be included in liability tests in particular contexts and indeed which liability tests should be used.

The growing empirical literature provides important preliminary information for this enterprise, but much remains to be done.[112] There is little consensus, even on some basic questions.[113] Most of the empirical literature evaluates specific reforms but does not attempt to take a mid-level analytical perspective on the recurring accident situation. And some questions will simply require careful extrapolations since the relevant data do not (yet) exist. For example, no data exist for the effects of including a driver's choice of automobile in the negligence analysis, since no jurisdiction has included this input in a negligence test. Yet data exist on the comparative accident and fatality rates for various trucks and automobiles.[114] From such information, the marginal risk to others of driving a dangerous versus less dangerous car might be calculated. Information on the price elasticities of dangerous cars would also be necessary—extending tort liability to price-inelastic drivers of dangerous cars would not much reduce the use of dangerous cars. The analysis will also require careful attention to the time-horizons of the relevant actors and the sequential nature of many accident inputs.

Was Judge Hand correct in analyzing the variables that he chose in *Carroll Towing*?[115] The district court found the harbormaster and the tugboat jointly liable to the owner of the barge that sank and did not hold the barge owner contributorily negligent for the absence of a bargee.[116] Judge Hand partially reversed, holding

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[112] Benjamin H. Barton, *Tort Reform, Innovation, and Playground Design*, 58 FLA. L. REV. 265, 268–70 (2006) (examining, anecdotally, the effect of products liability on playground design); Alma Cohen & Rajeev Dehejia, *The Effect of Automobile Insurance and Accident Liability Laws on Traffic Fatalities*, 47 J.L. & ECON. 357, 357–58 (2004); J. David Cummins et al., *The Incentive Effects of No-Fault Automobile Insurance*, 44 J.L. & ECON. 427, 428 (2001); Edlin & Karaca-Mandic, *supra* note 41, at 934; Vickrey, *supra* note 62, at 467–68 (estimating elasticity of number of crashes with respect to quantity of driving); W. Kip Viscusi & Michael J. Moore, *Product Liability, Research and Development, and Innovation*, 101 J. POL. ECON. 161, 163 (1993) (attempting to measure the effect of products liability on innovation); *see also* sources cited *supra* note 111.

[113] For example, there is apparently conflicting evidence on the effect of no-fault automobile insurance. *Compare* Landes, *supra* note 111, at 62 (concluding that no-fault increased accidents), *and* Marshall H. Medoff & Joseph P. Magaddino, *An Empirical Analysis of No-Fault Insurance*, 6 EVALUATION REV. 373, 388–89 (1982) (same), *with* Paul Zador & Adrian Lund, *Re-Analyses of the Effects of No-Fault Auto Insurance on Fatal Crashes*, 53 J. RISK & INS. 226, 235 (1986) (concluding that no-fault did not raise accident rates).

[114] *See* Howard Latin & Bobby Kasolas, *Bad Designs, Lethal Profits: The Duty to Protect Other Motorists Against SUV Collision Risks*, 82 B.U. L. REV 1161, 1162–63 (2002); Gary T. Schwartz, *Auto No-Fault and First-Party Insurance: Advantages and Problems*, 73 S. CAL. L. REV. 611, 656–59 (2000); Michelle J. White, *The "Arms Race" on American Roads: The Effect of Sport Utility Vehicles and Pickup Trucks on Traffic Safety*, 47 J.L. & ECON. 333, 334 (2004).

[115] *See* United States v. Carroll Towing Co., 159 F.2d 169, 173 (2d Cir. 1947).

[116] Conners Marine Co. v. Pa. R.R. Co., 66 F. Supp. 396, 398 (S.D.N.Y. 1946).

that the tugboat and the harbormaster were jointly liable for the collision damages suffered when the barge broke free, but not for the subsequent sinking of the barge, which he concluded could have been prevented by the absent bargee.[117]

Remarkably, Hand explained that the barge owner should have *anticipated negligence* on the part of tugs: "Certainly it was not beyond reasonable expectation that, with the inevitable haste and bustle, the work might not be done with adequate care."[118] By finding the barge owner contributorily negligent (in part), Hand undermined longer-run incentives for the harbormaster and tugboat to avoid negligently rearranging barges. If the tugboat owners know that barge owners have a responsibility to make up for their negligence, they have less incentive to take proper care. Indeed, they have some incentive to be as flagrantly reckless as possible, in order to encourage barge owners to take extra care.

At first glance, it seems unlikely that it would be efficient to require every barge to have a bargee aboard during the day in order to mitigate damages should a tugboat negligently disconnect its stays. The rule apparently allows the tugboats to shift a significant portion of the cost of care taking to the barge owners. Why not simply require the tugboat to take "adequate care"?[119]

Perhaps wise Judge Hand knew that tugboats were already taking as much care as possible. Perhaps social norms or regulations were serving as alternative sanctions to keep the standard of care among tugboats efficiently high and that hiring inexpensive bargees to monitor the barges was a more efficient means of reducing accident costs. Absent knowledge of these contextual facts, the economic analysis of tort law provides no answer.

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[117] *Carroll Towing*, 159 F.2d at 173–74.
[118] *Id.* at 174
[119] *See id.*

BRINGING SCALIA'S DECALOGUE DISSENT DOWN FROM THE MOUNTAIN

Kyle Duncan*

I. INTRODUCTION

Like many of Justice Antonin Scalia's opinions, his dissent in the Ten Commandments case, *McCreary County v. ACLU*,[1] emitted its share of thunder and lightning—and clouds, apparently.[2] Some profess to see in the dissent a proposition that is simply not there. That proposition is Scalia's "remarkable"[3] and "shocking,"[4] intention to embed in the Establishment Clause an illiberal and ahistorical preference for monotheistic religions. Scalia's crabbed Establishment Clause, it is claimed, would permit the government to acknowledge only monotheistic religions, and would forbid it from acknowledging polytheistic religions or atheism.[5] Has Scalia, the icon of judicial restraint, become Scalia the monotheistic activist? Reading Scalia's *McCreary County* dissent in this way highlights the perennial dispute between the Justice and his academic critics—whether Scalia's constitutional methodology of original meaning reliably delivers on its promise of restrained, non-political judging.[6] It also facilitates tarring Scalia as a hypocrite and Republican shill.[7] Unfortunately, to read Scalia's dissent as such

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[1] 545 U.S. 844 (2005). The companion case to *McCreary County* was *Van Orden v. Perry*, which concerned a Texas Ten Commandments monument. *See* 545 U.S. 677 (2005).

[2] *See Exodus* 19:16 ("On the morning of the third day there were thunders and lightnings, and a thick cloud upon the mountain, and a very loud trumpet blast, so that all the people who were in the camp trembled.").

[3] *See McCreary County*, 545 U.S. at 879.

[4] *See* Thomas B. Colby, *A Constitutional Hierarchy of Religions? Justice Scalia, the Ten Commandments, and the Future of the Establishment Clause*, 100 NW. U. L. REV. 1097, 1098 (2006).

[5] *Id.* at 1102.

[6] *See, e.g.*, Erwin Chemerinsky, *The Jurisprudence of Justice Scalia: A Critical Appraisal*, 22 U. HAW. L. REV. 385, 389–99 (2000) (criticizing Scalia's originalist methodology for failing to provide the "value-free" judging it promises); George Kannar, *The Constitutional Catechism of Antonin Scalia*, 99 YALE L.J. 1297, 1303–08 (1990) (discussing Scalia's approach to originalism, and his detractors).

[7] *See, e.g.*, Chemerinsky, *supra* note 6, at 391–92 (asserting that the results of Scalia's originalist method "lead[] one to believe that the original meaning of the Constitution and the Republican platform are remarkably similar"); Colby, *supra* note 4, at 1139 (arguing that Scalia's "interpretation of the Establishment Clause [in *McCreary County*] aligns almost perfectly with the political preferences of the Republican Party").

is both to misread it and to obscure what his methodology can add to the Establishment Clause interpretation debate.

Scalia's dissent provides his fullest discussion yet of how he would apply the Establishment Clause to government religious symbolism. However, his interpretative method in *McCreary County* is consistent with his approach in other cases where he has used original meaning and tradition to apply ambiguous constitutional provisions. In those cases, the sweep of tradition as reflected in legislation or other official actions serves as an interpretive grid, an intelligible background against which to measure constitutional limitations on governmental power. This methodology, as Scalia admits, raises numerous difficulties—perhaps the most daunting of which is selecting the appropriate level of generality for defining a relevant tradition. His "original-meaning-plus-tradition" method is thus not mechanical and certainly not foolproof. Scalia's use of this method invites the criticism, among others, that he does not apply the method correctly or consistently.[8]

For purposes of this Article, what is significant is that Scalia's interpretative approach is a hermeneutic of restraint, calibrated to avoid projecting substantive outcomes into the Constitution. Scalia uses tradition to validate traditional practices, where constitutional text or precedent do not impel striking them down. However, his approach leaves open the development of tradition by deference to representative bodies. Thus, reading Scalia's *McCreary County* dissent against the backdrop of his constitutional methodology shows it is unlikely that he is engaging in "monotheistic activism." A better reading is that the government's persistent acknowledgment of a generalized monotheism—especially through symbolic expressions such as our national motto, our Pledge of Allegiance, and (as Scalia argues in *McCreary County*) Ten Commandments displays—provides merely a baseline against which to interpret the Establishment Clause. Moreover, that baseline does not freeze a preference for monotheism into the Establishment Clause itself, but rather defers to representative bodies the development of our traditions to include specific monotheistic religions, non-monotheistic religions, or atheism—or to end the tradition by opting for no government acknowledgment of religion at all.

In Part II, this Article reads Scalia's *McCreary County* dissent within the context of the other Justices' opinions, and in the larger context of Scalia's jurisprudence of tradition. Part II.A sets the dissent against Justice Souter's majority opinion in *McCreary County* and Justice Stevens's dissent in *Van Orden v. Perry*.[9] It argues that—certain rhetorical excesses notwithstanding—Scalia is merely proposing a tradition of monotheistic symbolism as a baseline against which to measure government religious acknowledgments. Part II.B reinforces that reading by assessing Scalia's use of tradition in other contexts. Tradition, for Scalia, emerges as a tool of judicial restraint that reads open-textured constitutional provisions against an intelligible historical background and that tends to validate

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[8] *See infra* Part III.

[9] 545 U.S. 677, 707–35 (2005) (Stevens, J., dissenting).

longstanding practices in the absence of a plainly contrary command of the Constitution or precedent. While tradition may potentially supply an independent reason for striking down a law, that positive function of tradition is limited by the practical exigencies of Scalia's jurisprudence. Moreover, in the area where tradition would most readily justify invalidating laws—the Due Process Clause—Scalia rejects the idea that any divergence from historical practices leads to automatic invalidation. Scalia's traditionalism in the First Amendment context is even more restrained. Historical practices alone (or their absence) would justify invalidating a law only if they *clearly* manifest a common understanding that a specific governmental action was unconstitutional. However, the mere fact that certain practices were engaged in is typically insufficient to infer a constitutional prohibition of other practices. In sum, Scalia has not treated tradition as exhausting the meaning of constitutional guarantees, nor has he frozen constitutional guarantees around the kernel of tradition and thereby stifled any development in the law. He simply defers that development to representative bodies.

Having contextualized Scalia's dissent, Part III specifically addresses the primary criticism of the dissent: that Scalia is projecting an exclusive preference for monotheism into the Establishment Clause. Building on Part II, this Part concludes that Scalia's deployment of tradition is not adapted to projecting his own policy choices—such as an alleged "preference for monotheistic religions"—into the Constitution. Instead, Scalia is using the prevalence of generalized monotheistic language as an intelligible baseline against which to assess the Ten Commandments displays. That baseline certainly makes this case easy for Scalia, but it does not commit him to striking down other acknowledgments simply because they diverge from monotheism. Scalia's treatment of the distinctively Christian elements in the historical record is better explained quite apart from speculation about his own religious or political preferences. More likely, Scalia is articulating the relevant tradition at the proper level of abstraction to assess what he views as simply a monotheistic religious display.

In sum, the Article concludes that Scalia's constitutional methodology generally, and his use of tradition specifically, are not some form of manipulation designed to achieve personal or political aims. Instead, Scalia is using tradition in the same manner as in other areas—to establish an objective baseline for assessing the constitutionality of modern laws.

II. THE DISSENT IN CONTEXT

A. The Conversation Among Scalia, Souter, and Stevens

To understand Scalia's interpretation of the Establishment Clause in *McCreary County*—and whether it is fair to paint him as a monotheistic activist—one should read his dissent as a dissent. Reading it against Justice Souter's *McCreary County* majority opinion and against Justice Stevens's *Van Orden*

dissent reveals a conversation about several overlapping doctrinal issues.[10] These are: (1) the overall function of "neutrality" in the Court's Establishment Clause jurisprudence; (2) the interaction of neutrality with the Court's religious symbolism precedents; (3) the characterization of the Ten Commandments displays at issue in these cases; and (4) the interaction of neutrality with the historical record. This section contrasts Souter's and Stevens's views on these issues with Scalia's, seeking a clearer picture of the claims made by Scalia's dissent. The following section fleshes out that picture by reference to Scalia's general use of tradition in constitutional analysis.

Neutrality is the master principle for both Souter's and Stevens's opinions. Souter writes that the "touchstone" for analyzing whether a law has a "secular legislative purpose" is "the principle that the 'First Amendment mandates governmental neutrality between religion and religion, and between religion and nonreligion.'"[11] Neutrality is the central conceit of the Court's Establishment Clause jurisprudence and also the basic theme of the American history of church-state relationships. Not only has neutrality "provided a good sense of direction" for interpreting the Establishment Clause, but it also "responds to one of the major concerns that prompted adoption of the Religion Clauses"—the prevention of religiously based "civic divisiveness."[12] Governmental neutrality is "an objective of the Establishment Clause" and simultaneously furnishes a "sensible standard for applying" it.[13] Neutrality thus encompasses the Establishment Clause on all sides; it is both the goal toward which it strives and the roadmap for getting there. Stevens also finds neutrality woven into the Establishment Clause's genetic material. Neutrality is the "first and most fundamental" principle for interpreting the "wall of separation between church and state" erected by the Religion Clauses.[14] Not flinching before criticisms that the "wall" metaphor is meaningless, Stevens asserts that the wall's contours are discerned chiefly by the principle that "the Establishment Clause demands religious neutrality—government may not exercise a preference for one religious faith over another."[15] Thus, for both Souter and Stevens, neutrality provides an interpretative key for applying the

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[10] The most relevant portions of those opinions are Part IV of Souter's opinion for the Court in *McCreary County v. ACLU*, 545 U.S. 844, 874–81 (2005), Part I of Scalia's *McCreary County* dissent, *id.* at 885–900 (Scalia, J., dissenting), and Parts I and III of Stevens's *Van Orden* dissent, 545 U.S. at 708–12, 722–35 (Stevens, J., dissenting). Other portions of those opinions will be noted where relevant.

[11] *McCreary County*, 545 U.S. at 860 (quoting Wallace v. Jaffree, 472 U.S. 38, 53 (1985); Epperson v. Arkansas, 393 U.S. 97, 104 (1968); Everson v. Bd. of Educ., 330 U.S. 1, 15–16 (1947)).

[12] *Id.* at 876.

[13] *Id.*

[14] *Van Orden*, 545 U.S. at 709 (Stevens, J., dissenting).

[15] *Id.* For a general criticism of the "wall of separation" metaphor, see DANIEL L. DREISBACH, THOMAS JEFFERSON AND THE WALL OF SEPARATION BETWEEN CHURCH AND STATE (2002).

Establishment Clause. It comes as no surprise, then, that both Justices find that the Ten Commandments displays are clear-cut violations of the Constitution.

Souter and Stevens must then reconcile a rigorous commitment to neutrality with the Court's religious symbolism jurisprudence, principally the two crèche cases (*County of Allegheny v. ACLU*[16] and *Lynch v. Donnelly*[17]) and the legislative prayer case (*Marsh v. Chambers*).[18] The Justices handle this delicate matter by reading the precedents narrowly and by characterizing the Ten Commandments displays as far outside the precedent. For instance, Stevens reads the crèche cases to mean that government may "acknowledg[e] the religious beliefs and practices of the American people" by recognizing religious symbols that have "become an important feature of a familiar landscape or a reminder of an important event in the history of a community."[19] However, Stevens would overrule *Marsh*, finding legislative prayer a violation of neutrality.[20] The symbolism precedents create more discomfort for Souter, leading him to drop the following footnote that Scalia will seize on as demonstrating the capriciousness of the neutrality principle itself:

> At least since *Everson v. Board of Ed. of Ewing*, it has been clear that Establishment Clause doctrine lacks the comfort of categorical absolutes. In special instances we have found good reason to hold governmental action legitimate even where its manifest purpose was presumably religious. No such reasons present themselves here.[21]

Later in his opinion, Souter creates further nuance by disclaiming any intention to hold that "a sacred text can never be integrated constitutionally into a governmental display on the subject of law, or American history," provided the display would not "strike an observer as evidence that that [government] was violating neutrality in religion."[22] However, at bottom, both Souter and Stevens read the Court's religious symbolism precedent through the lens of neutrality. Neither doubts for a moment, as Scalia does in his dissent, that neutrality should apply to government religious symbolism just as readily as it does to other areas of Establishment Clause jurisprudence.

Any difficulty with the religious symbolism precedent is facilitated by the way Souter and Stevens characterize the Ten Commandments displays at issue in *McCreary County* and *Van Orden*. Both Justices see the displays as going beyond

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[16] 492 U.S. 573 (1989).

[17] 465 U.S. 668 (1984).

[18] 463 U.S. 783 (1983).

[19] *Van Orden*, 545 U.S. at 711 (Stevens, J., dissenting).

[20] *Id.* at 723 n.22.

[21] McCreary County v. ACLU, 545 U.S. 844, 859 n.10 (2005) (citing *Marsh*, 463 U.S. 783 (holding legislative prayer did not violate the Constitution)) (other citation omitted).

[22] *Id.* at 874.

the typical government "acknowledgment" of religious history or sentiments.[23] To the contrary, they interpret the displays as an official adoption of the specific precepts of the Ten Commandments by the governments of Texas and McCreary County, Kentucky.[24] For instance, in distinguishing them from "'the inclusion of a crèche or a menorah' in a holiday display," Souter characterizes the purpose of the displays as "subjecting individual lives to religious influence," as "insistently call[ing] for religious action on the part of citizens," and as "urg[ing] citizens to act in prescribed ways as a personal response to divine authority."[25] Stevens is even more explicit. Part II of his *Van Orden* dissent explains why Texas—by placing the monument on capitol grounds in "a large park containing 17 monuments and 21 historical markers"[26]—is explicitly instructing its citizens to adopt the Decalogue's theology and moral precepts.[27] Texas is not only "prescribing a compelled code of conduct from one God, namely a Judeo-Christian God," but also, by choosing either the Catholic or Protestant or Jewish formulation of the text, "tell[ing] the observer that the State supports this side of the doctrinal religious debate."[28] Whether they correctly understand the message sent by the Ten Commandments displays (which, of course, is disputed by other Justices in both cases), their interpretation makes easy work of distinguishing the displays from a Christmas crèche, a Hanukkah menorah, or even a legislative prayer.

Finally, the Justices must address how neutrality engages with the broader American history of church-state relationships, and also with the narrower history of governmental religious acknowledgments. This becomes the key ground for their disagreement with Scalia.[29] For both Souter and Stevens, the lessons history teaches about the scope of the Establishment Clause are sufficiently ambiguous that they must be pitched at a relatively high level of generality.[30] Neutrality

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[23] *McCreary County*, 545 U.S. at 877 n.24; *Van Orden*, 545 U.S. at 712 (Stevens, J., dissenting).

[24] *McCreary County*, 545 U.S. at 869; *Van Orden*, 545 U.S. at 718 (Stevens, J., dissenting).

[25] *McCreary County*, 545 U.S. at 877 n.24 (quoting *id.* at 905 (Scalia, J., dissenting)).

[26] *Van Orden*, 545 U.S. at 702 (Breyer, J., concurring).

[27] *Id.* at 718 (Stevens, J., dissenting).

[28] *Id.* at 718 & nn.15–17. A comparison may clarify the Justices' understanding of the displays. In *Allegheny*, the crèche at issue included the familiar trope of the angel announcing "Glory to God in the Highest!" *See* County of Allegheny v. ACLU, 492 U.S. 579, 580 & n.5 (1989) (describing the crèche and origin of the angel's greeting in the Christian scriptures). Following their interpretation of the Ten Commandments displays, Souter and Stevens would understand in *Allegheny* that the government was itself announcing—through the voice of the angel, so to speak—"Glory to God in the Highest!" To be fair, this seems to approximate the interpretative stance the Court took in *Allegheny*. *See id.* at 598 ("'Glory to God in the Highest!' says the angel in the crèche—Glory to God because of the birth of Jesus. This praise to God in Christian terms is indisputably religious—indeed sectarian—just as it is when said in the Gospel or in a church service.").

[29] *See infra* notes 30–35 and accompanying text.

[30] *See, e.g.*, *McCreary County*, 545 U.S. at 875 (observing that "[t]here is no simple answer" to the meaning of the Establishment Clause and that "issues of interpreting inexact

emerges from a "sense of the past" as a necessary (but not always sufficient) guide to the Establishment Clause, since the Establishment Clause grew out of the desires "of the Framers and the citizens of their time" to avoid the kinds of religious conflicts they knew so well from English and continental history, and from their own colonial experiences.[31] The views of significant Framers, such as James Madison and Thomas Jefferson, provide general guideposts but are themselves ambiguous. Their private opinions cast confusing shadows over their official acts.[32] In Souter's and Stevens's understanding, our history of official religious acknowledgments is somehow both too inconclusive to furnish a reliable background, and too one-sidedly Christian to serve modern purposes.[33] The Justices manage to pick out of this historical miasma the overarching value of official "neutrality" to guide the application of the Establishment Clause to

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Establishment Clause language . . . arise from the tension of competing values"); *id.* ("[T]rade-offs [in interpreting the Clause] are inevitable, and an elegant interpretative rule to draw the line in all the multifarious situations is not to be had."); *Van Orden*, 545 U.S. at 731 (Stevens, J., dissenting) ("As the widely divergent views espoused by the leaders of our founding era plainly reveal, the historical record of the preincorporation Establishment Clause is too indeterminate to serve as an interpretive North Star."); *id.* (stating that, given the inconclusiveness of historical record, the Establishment Clause must be interpreted "not by merely asking what those words meant to observers at the time of the founding, but instead by deriving from the Clause's text and history the broad principles that remain valid today").

[31] *McCreary County*, 545 U.S. at 876 (reasoning from the framing generation's experience with religious divisiveness that "[a] sense of the past thus points to governmental neutrality" as an interpretive guide to the Establishment Clause, but that "given its generality as a principle, an appeal to neutrality alone cannot possibly lay every issue to rest"); *Van Orden*, 545 U.S. at 725–26 (Stevens, J., dissenting) (tracing origins of neutrality from "separationist impulses" gleaned from colonial experiences of religious oppression, such as the fact that "[n]ot insignificant numbers of colonists came to this country with memories of religious persecution by monarchs on the other side of the Atlantic").

[32] *See, e.g.*, *McCreary County*, 545 U.S. at 878 ("The historical record . . . is complicated beyond the dissent's account by the writings and practices of figures no less influential than Thomas Jefferson and James Madison."); *Van Orden*, 545 U.S. at 724 (Stevens, J., dissenting) (arguing that the majority opinion and Scalia's *McCreary County* dissent "disregard the substantial debates that took place regarding the constitutionality of the early proclamations and acts they cite").

[33] *See, e.g.*, *McCreary County*, 545 U.S. at 879–80 (claiming that the historical record supports the "fair inference . . . that there was no common understanding about the limits of the establishment prohibition," but also that "history shows that the religion of concern to the Framers was not that of the monotheistic faiths generally, but Christianity in particular"); *Van Orden*, 545 U.S. at 724, 726 (Stevens, J., dissenting) (claiming that it is "misleading" to present certain Framers' religious statements "as a unified historical narrative," but also that "many of the Framers understood the word 'religion' in the Establishment Clause to encompass only the various sects of Christianity").

problems such as the Ten Commandments displays.[34] Neutrality therefore emerges as both the principal original animating feature of the Establishment Clause, as well as the principle that the Court's case law has managed to tease out of a clause that was once significantly animated by a desire to prostrate every religion except Protestant Christianity.[35] This appears to be the historical metaphysics that informs Souter's and Stevens's opinions.

Scalia's dissent can be fairly analyzed only against these views. That is because Scalia is primarily concerned with contesting their understanding (which is now the Court's understanding) of how neutrality functions in the Court's Establishment Clause jurisprudence. Whereas Souter and Stevens distill neutrality as the organizing principle of the Establishment Clause, Scalia views it as one among other complimentary and sometimes competing principles. Whereas Souter and Stevens assess American historical practices through the lens of a univocal command of neutrality, Scalia discerns the contours of the Establishment Clause primarily through the lens of longstanding American practices of public religious acknowledgment. Whereas Souter and Stevens view the Establishment Clause as itself embodying an evolving, judicially applied tradition of neutrality, Scalia sees the Establishment Clause as a distinct limitation on government action whose contours emerge from both founding-era understandings and subsequent traditions reflected in laws and official practices. Between these approaches lies a gulf that cannot be explained merely by divergent interpretations of historical materials. Here instead are deep disagreements about how the Establishment Clause—and hence the courts—function in shaping the resolution of church-state issues. Admittedly, Scalia's dissent does represent a fundamentally different approach to interpreting the Establishment Clause. Nevertheless, to label that difference as simply Scalia's desire to write a preference for monotheism into the Establishment Clause is to caricature his dissent. Such a characterization also misses the real conversation that is taking place among the Justices.

What is Scalia's view on the place of neutrality within the Court's jurisprudence? Scalia regards as sheer *ipse dixit* the Court's enshrinement of neutrality as the Establishment Clause's master key—a key that falsifies both the Court's own jurisprudence and the larger history of American church-state

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[34] *See, e.g.*, *McCreary County*, 545 U.S. at 876 (finding support for the neutrality principle in the fact that "[t]he Framers and the citizens of their time intended not only to protect the integrity of individual conscience in religious matters, but [also] to guard against the civic divisiveness that follows when the Government weighs in on one side of religious debate" (citation omitted)); *id.* at 878 (finding support for the neutrality principle in deletion of the word "national" during the drafting of the Establishment Clause); *Van Orden*, 545 U.S. at 733–34 (Stevens, J., dissenting) (finding the neutrality principle "firmly rooted in our Nation's history and our Constitution's text," and explaining that "we are not bound by the Framers' expectations [but] . . . by the legal principles they enshrined in our Constitution").

[35] *See McCreary County*, 545 U.S. at 874 ("The importance of neutrality as an interpretative guide is no less true now than it was when the Court broached the principle in *Everson* . . . ." (citing Everson v. Bd. of Educ., 330 U.S. 1 (1947))).

relationships.[36] Scalia traces this defect to the cavalier approach to history taken in *Everson v. Board of Education*,[37] which inaugurated modern Establishment Clause jurisprudence.[38] *Everson*'s historiography, of course, has been criticized since virtually the day it appeared in the United States Reports.[39] Scalia's point is that the *McCreary County* Court has finally taken *Everson* at its word and enshrined as legal rule *Everson*'s absolutist rhetoric about the Establishment Clause's meaning. If the Establishment Clause means neutrality, and neutrality means not preferring religion to "nonreligion," then the state cannot use religious symbolism. In Scalia's view, this analysis is simplistic and wrong.[40]

The Court's own precedent should cast doubt on such an approach, and that is where Scalia focuses sharp attacks. He argues that the overall tenor of the Court's case law is incompatible with a one-size-fits-all principle of government "neutrality," understood as a rigorous evenhandedness between "religion and nonreligion."[41] Scalia points to the Court's approval of legislative accommodations for religious practices, tax exemptions for church property, and released-time programs for religious education.[42] Central to his attack is *Marsh*,[43] which upheld

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[36] *See, e.g., id.* at 889 (Scalia, J., dissenting) (arguing that the Court's broad invocations of neutrality are supported only by "the Court's own say-so, citing as support only the unsubstantiated say-so of earlier Courts going back no farther than the mid-20th century").

[37] 330 U.S. 1 (1947).

[38] *McCreary County*, 545 U.S. at 890 n.2 (observing that the "fountainhead of this jurisprudence, *Everson*" based its broad neutrality formulation "on a review of historical evidence that focused on the debate leading up to the passage of the Virginia Bill for Religious Liberty" (citing *Everson*, 330 U.S. at 11–13)). In that footnote, Scalia cites Edward S. Corwin's criticism that, in its *Everson* historiography, "it appeared the Court had been 'sold . . . a bill of goods.'" *Id.* (quoting Edward S. Corwin, *The Supreme Court as National School Board*, 14 LAW & CONTEMP. PROBS. 3, 16 (1949)).

[39] For instance, one of *Everson*'s most notable early critics, the theologian and political theorist John Courtney Murray, wrote in 1949 that "the absolutism of the *Everson* and *McCollum* doctrine of separation of church and state is unsupported, and unsupportable, by valid evidence and reasoning—historical, political, or legal—or on any sound theory of values, religious or social." John Courtney Murray, *Law or Prepossessions?*, 14 LAW & CONTEMP. PROBS. 23, 40 (1949); *see also* GERARD V. BRADLEY, CHURCH-STATE RELATIONSHIPS IN AMERICA 1–13, 86–88, 91–92, 114–15 (1987); ROBERT L. CORD, SEPARATION OF CHURCH AND STATE 8 (1982); DREISBACH, *supra* note 15, at 100–04; Corwin, *supra* note 38, at 16; Michael W. McConnell, *Establishment and Disestablishment at the Founding, Part I: Establishment of Religion*, 44 WM. & MARY L. REV. 2105, 2107–09 (2003). *But cf.* THOMAS J. CURRY, THE FIRST FREEDOMS: CHURCH AND STATE IN AMERICA TO THE PASSAGE OF THE FIRST AMENDMENT 207–08 (1986).

[40] *See McCreary County*, 545 U.S. at 893 (Scalia, J., dissenting).

[41] *Id.* at 889 (citation and internal quotation marks omitted).

[42] *See id.* at 891 (citing Corp. of Presiding Bishop of Church of Jesus Christ of Latter-day Saints v. Amos, 483 U.S. 327, 338 (1987); Walz v. Tax Comm'n, 397 U.S. 664, 673 (1970); Zorach v. Clauson, 343 U.S. 306, 308 (1952)).

[43] Marsh v. Chambers, 463 U.S. 783 (1983).

Nebraska's practice of opening its legislative sessions with prayers as "a tolerable acknowledgment of beliefs widely held among people of this country."[44] Scalia holds up *Marsh* as exhibit A for the proposition that the Court has never really embraced the full implications of what it said about neutrality in *Everson*, particularly when it comes to symbolic government acknowledgments of widely shared religious sentiments.[45] In other words, incautious dicta in *Everson* cannot be elevated to the cardinal principle of the Establishment Clause without entirely falsifying the Court's approach to legislative prayer in *Marsh* and to religious symbolism in *Lynch* and *Allegheny*. Nor can *Marsh* be confined to its facts and quarantined from the rest of the Court's case law. Interestingly, given the importance of tradition to his jurisprudence, Scalia explicitly rejects "antiquity of the practice at issue" as a reason for upholding legislative prayer.[46] He explains the Court's unwillingness to cleave to neutrality as a form of institutional timidity, or as evidence that neutrality is not as deeply rooted in the Constitution as the Court now claims.[47]

However, Scalia does not stop there. He turns from the generalized neutrality as between religion and nonreligion, to the narrower neutrality as between one religion and another.[48] Here Scalia is at his most controversial level, but it is also here that the core of his rationale emerges. As the controlling ratio of his opinion, this helps contextualize the foray through the history of religious acknowledgments that begins his dissent. It also clarifies Scalia's disagreements with Souter's and Stevens's historical methodology. Therefore it is worth paying close attention to what Scalia says here—and what he does not say.

The nub of Scalia's dissent is that even the narrower form of neutrality between different religions must apply "in a more limited sense" to governmental "acknowledgment of the Creator."[49] A rigorous evenhandedness between one religion and another religion is indeed required—Scalia claims without explaining why—when the government gives financial assistance to religion or passes laws that affect religious practice.[50] Nevertheless, the same iron law cannot apply to government acknowledgments of religion for the simple reason that it would stamp

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[44] *McCreary County*, 545 U.S. at 892, 894 (Scalia, J., dissenting) (citing *Marsh*, 463 U.S. at 792).

[45] *See id.* at 892 ("Indeed, we have even approved (post-*Lemon*) government-led prayer to God.").

[46] *Id.* (reasoning that "antiquity of the practice at issue . . . is hardly a good reason for letting an unconstitutional practice continue" (citation omitted)).

[47] *See id.* ("What, then, could be the genuine 'good reason' for occasionally ignoring the neutrality principle? I suggest it is the instinct for self-preservation . . . .").

[48] *See id.* at 893 (observing that the Court's opinion additionally "suggests that the posting of the Ten Commandments violates the principle that the government cannot favor one religion over another").

[49] *Id.*

[50] *Id.* (citing Zelman v. Simmons-Harris, 536 U.S. 639, 652 (2002); Church of Lukumi Babalu Aye, Inc. v. Hialeah, 508 U.S. 520, 532–33 (1993)); *see infra* notes 188–190 and accompanying text.

them out altogether.[51] He sets forth this reasoning in the most controversial passage from the dissent:

> If religion in the public forum had to be entirely nondenominational, there could be no religion in the public forum at all. One cannot say the word "God" or "the Almighty," one cannot offer public supplication or thanksgiving, without contradicting the beliefs of some people that there are many gods, or that God or the gods pay no attention to human affairs. With respect to public acknowledgment of religious belief, it is entirely clear from our Nation's historical practices that the Establishment Clause permits this disregard of polytheists and believers in unconcerned deities, just as it permits the disregard of devout atheists.[52]

Scalia's jibe about "disregarding" polytheists, deists, and atheists[53] should not obscure his point, which he summarizes more placidly in the next paragraph: "Historical practices thus demonstrate that there is a distance between the acknowledgment of a single Creator and the establishment of a religion."[54]

Scalia rounds out this argument by explaining why government "acknowledgment of a single Creator" through a Ten Commandments display fits squarely within *Marsh*'s approval of "'a tolerable acknowledgment of beliefs widely held among the people of this country.'"[55] In supporting that position, Scalia asserts that the vast majority of religious believers in the United States—i.e., the 97.7% of whom are Christians, Jews, or Muslims—believe in "a single Creator" and recognize the Ten Commandments as a religious text reflective of that belief.[56]

Scalia's rhetorical flourishes aside, his main point here is narrow. He does not reject neutrality altogether but instead denies that it should rigorously apply to government religious acknowledgments. He discards neutrality in this area, not only in light of the Court's own precedents, but more fundamentally in light of a persistent tradition of public religious acknowledgment by American government. This requires Scalia to do two things that underscore the differences between his approach and that of Souter and Stevens. He must characterize the symbolic import of Ten Commandments displays at issue and then situate those displays within a tradition of historical practices that will help him assess whether the Establishment Clause permits them.

Scalia understands the messages of the Ten Commandments display in a way fundamentally different from Souter and Stevens. Whereas they see the displays as government-backed commands,[57] Scalia characterizes them as "a public

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[51] *McCreary County*, 545 U.S. at 893 (Scalia, J., dissenting).
[52] *Id.*
[53] *See infra* notes 240–243 and accompanying text.
[54] *McCreary County*, 545 U.S. at 894 (Scalia, J., dissenting).
[55] *Id.* (quoting Marsh v. Chambers, 463 U.S. 783, 792 (1983)).
[56] *Id.*
[57] *See supra* notes 23–28 and accompanying text.

acknowledgment of religious belief,"[58] "the acknowledgment of a single Creator,"[59] "public [or governmental] acknowledgment of God,"[60] "government invocation of monotheism,"[61] and "governmental affirmation of society's belief in God."[62] He analogizes the displays to public religious expressions such as the oath-taking formula "so help me God,"[63] the court-opening formula "God save . . . this honorable Court,"[64] our pledge-taking formula "a Nation under God,"[65] and our national motto, "In God We Trust."[66] Finally, he links the displays with public religious proclamations such as legislative prayers, officially designated "day[s] of thanksgiving and prayer,"[67] and explicit religious language in presidential addresses.[68] While Scalia agrees that the displays discriminate against non-monotheistic religions and atheism, he argues that this is a harm no different in kind and no greater in degree than other public expressions inflict when they "publicly honor[] God" (and refrain from honoring any particular god or gods, or affirming that there is no god).[69]

Scalia thus treats the Ten Commandments display as an integrated symbol. This sharply contrasts with Souter and Stevens, who view the Ten Commandments as ten government-backed prescriptions[70] (as if it were a sign outside a government building advising people to "Keep Off The Grass! Don't Feed the Pigeons!"). Scalia explicitly rejects that interpretation, retorting that "[t]he observer would no more think himself 'called upon to act' in conformance with the Commandments than he would think himself called upon to think and act like William Bradford because of the courthouse posting of the Mayflower Compact."[71] When called on to explain the symbolic meaning of the display, Scalia keeps to a high level of generality, suggesting that the displays "testif[y] to the popular understanding that the Ten Commandments are a foundation of the rule of law, and a symbol of the role that religion played, and continues to play, in our system of government."[72]

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[58] *McCreary County*, 545 U.S. at 893 (Scalia, J., dissenting).
[59] *Id.* at 894.
[60] *Id.* at 896.
[61] *Id.* at 897.
[62] *Id.* at 889.
[63] *Id.* at 886, 888.
[64] *Id.*
[65] *Id.* at 889.
[66] *Id.* at 888–89, 895 (emphasis omitted).
[67] *Id.* at 886.
[68] *Id.* at 886–88, 895.
[69] *Id.* at 893–94.
[70] *See* Van Orden v. Perry, 545 U.S. 677, 718 (2005) (Stevens, J., dissenting); *McCreary County*, 545 U.S. at 869.
[71] *McCreary County*, 545 U.S. at 905 n.10 (Scalia, J., dissenting).
[72] *Id.* at 907. Elsewhere, Scalia argues that the displays represent "[t]he acknowledgment of the contribution that religion in general, and the Ten Commandments in particular, have made to our Nation's legal and governmental heritage." *Id.* at 905. He also refers approvingly to the *Van Orden* plurality's interpretation that the display has

Scalia's reading of the Ten Commandments display as a unified symbol—and not as a government command to follow the individual commandments or to adopt their theological premises—enables him to place the displays within the holdings of *Marsh* and *Lynch*, and within the Court's general zone of tolerance for acknowledgments of broad-based religious sentiments.

We now have the framework for assessing the most controversial part of Scalia's argument: his use of history to interpret the Establishment Clause. Generally speaking, Scalia cannot intend his historical catalogue simply to demonstrate that similar religious invocations have a venerable pedigree and continue to season the nation's public rhetoric. After all, Scalia explicitly rejects "antiquity" as a reason for upholding unconstitutional practices.[73] While the Court has recognized widespread public religious sentiment and has even afforded it some constitutional significance,[74] Scalia's dissent transcends that approach to history. In *McCreary*, Scalia begins to construct a constitutional methodology for assessing American historical religious phenomena in the context of the Establishment Clause. Three passages from his dissent illustrate that method. First, following his historical catalogue, Scalia asks incredulously how the Court "can . . . *possibly* assert" that the Establishment Clause demands government neutrality towards religion as a general rule:

> Who says so? Surely not the words of the Constitution. Surely not the history and traditions that reflect our society's constant understanding of those words. Surely not even the current sense of our society, recently reflected in an Act of Congress adopted *unanimously* by the Senate and with only five nays in the House of Representatives . . . criticizing a Court of Appeals opinion that had held "under God" in the Pledge of Allegiance unconstitutional.[75]

Second, in a passage already noted, Scalia summarizes his approach to assessing government religious acknowledgments under the Establishment Clause: "Historical practices thus demonstrate that there is a distance between the acknowledgment of a single Creator and the establishment of a religion. The former is, as *Marsh v. Chambers* put it, 'a tolerable acknowledgment of beliefs widely held among the people of this country.'"[76]

"'undeniable historical meaning' as a symbol of the religious foundations of law." *Id.* at 905 n.10 (citing *Van Orden*, 545 U.S. at 690).

[73] *McCreary County*, 545 U.S. at 892.

[74] *See, e.g.*, Zorach v. Clauson, 343 U.S. 306, 313–14 (1952) (explaining that when legislatures act to accommodate religious belief or practice, they "follow[] the best of our traditions").

[75] *McCreary County*, 545 U.S. at 889 (Scalia, J., dissenting).

[76] *Id.* at 894 (quoting Marsh v. Chambers, 463 U.S. 783, 792 (1983) (Brennan, J., dissenting)).

Third, in response to Stevens's criticism of his use of history, Scalia clarifies his method with the following:

> But I have not relied upon (as [Justice Stevens] and the Court in this case do) mere "proclamations and statements" of the Founders. I have relied primarily upon official acts and official proclamations of the United States or of the component branches of its Government . . . . The only mere "proclamations and statements" of the Founders I have relied upon were statements of Founders who occupied federal office, and spoke in at least a quasi-official capacity . . . .
>
> It is no answer for Justice Stevens to say that the understanding that these official and quasi-official actions reflect was not "enshrined in the Constitution's text." The Establishment Clause, upon which Justice Stevens would rely, *was* enshrined in the Constitution's text, and these official actions show *what it meant*.[77]

From these passages emerges Scalia's methodology for using history to interpret and apply the Establishment Clause. Principally, Scalia relies on the overall sweep of certain historical practices as an interpretive grid against which to measure a textually inconclusive constitutional provision. He also attempts to pitch the relevant historical practices at a level of generality that can shed light on the particular issue involved. While one should place this method in the context of Scalia's jurisprudence,[78] some limited conclusions can be drawn about it from *McCreary County* itself.

First, because Scalia self-consciously confines his interpretive palette to official uses of religious language, Scalia is clearly not mounting an "original intent" argument. Instead, he takes official language itself as probative of a relevant historical practice against which to measure the Ten Commandments displays. Of course, relying on the language in which official pronouncements are formulated still requires some interpretation of text and context, but since we do not have here a strict "original intent" approach, Scalia would not need to delve into the theological intent or expectations of its authors (or ratifiers). To the contrary, Scalia is interested in the shared political significance of religious language rather than "which God" the authors had in mind (Deist? Christian? Judeo-Christian? All of them?) or "which religions" the ratifiers saw benefited by such pronouncements (Christianity? Protestant Christianity? "Judeo-Christianity"?). Interpreting the Establishment Clause thus is consistent with Scalia's general approach to constitutional interpretation, which is less a strict "original intent" than an "original meaning" approach informed by relevant traditional practices.[79]

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[77] *Id.* at 895–96 (quoting *Van Orden*, 545 U.S. at 724 (Stevens, J., dissenting)).

[78] *See infra* Part II.B.

[79] *See, e.g.*, ANTONIN SCALIA, A MATTER OF INTERPRETATION: FEDERAL COURTS AND THE LAW 38 (1997) (rejecting "original intent" methodology, but explaining that he

Second, Scalia is not using historical materials to liquidate a "meaning" from the Establishment Clause. Souter and Stevens are doing just that, which explains why they find an impracticable level of ambiguity in the historical record and settle on "neutrality" as the generalized but indeterminate "meaning" of the Establishment Clause.[80] If one requires that historical materials furnish people's expectations about how open-textured constitutional language applies to a specific situation—i.e., a "what would James Madison do?" approach—this will lead one inevitably to conclude that the historical record is intolerably ambiguous. That may well be a compelling criticism of "original intent" methodology, but the important point is that Scalia explicitly denies he follows that approach.[81] Instead, he claims to be measuring ambiguous constitutional language against a set of historical practices that are—if appropriately defined and characterized—supposed to clarify the application of that language to the modern practice at issue.[82] Thus, it is an error to see Scalia's historical catalogue in the first part of his dissent as an (inevitably incomplete) thesis called "The Framers' Attitudes Toward Government Use of Religious Language," or as purporting to unravel all the ambiguities of that subject.[83] Scalia is using the historical materials for an altogether narrower and more modest purpose.

Third, Scalia's method leads him to characterize the historical materials in a particular way if they are to have any usefulness. As already discussed, Scalia understands the Ten Commandments displays as unified symbols whose message is pitched at a fairly high level of generality. In context, they are better understood as saying "Monotheistic religion has had an important impact on our public heritage of law and morality," rather than "You should become a Christian (or a

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consults Framers' writings "not because they were Framers and therefore their intent is authoritative and must be the law; but rather because their writings, like those of other intelligent and informed people of the time, display how the text of the Constitution was originally understood"); *see also* Kannar, *supra* note 6, at 1306–07 (explaining that Scalia draws a sharp distinction between his original meaning approach and an original intent approach, and concluding that Scalia's method is "a profoundly positivist and textualist vision, inclined not only to minimize the role in constitutional interpretation of policy or the general contemplation of contemporary morals, but at times the Framers' actual intent, even when that intent is knowable"); David M. Zlotnick, *Justice Scalia and His Critics: An Exploration of Scalia's Fidelity to His Constitutional Methodology*, 48 EMORY L.J. 1377, 1393 (1999) (explaining that "[w]hile Scalia's motives are similar to those of the proponents of 'original intent,' Scalia's focus on the Framers' end product rather than their pre- or post-drafting debates has significant implications for how he implements his originalism," and that "[u]nlike many versions of originalism, Scalia's approach does not use the statements and writings of individual drafters as authoritative sources for the meaning of the text"). On Scalia's supplementation of original meaning with tradition, see *infra* Part II.B.

[80] *See supra* note 30 and accompanying text.

[81] *See supra* note 79.

[82] *See infra* Part II.B.

[83] *See* McCreary County v. ACLU, 545 U.S. at 844, 885–89 (2005) (Scalia, J., dissenting).

Jew) and follow these rules."[84] Scalia may be wrong about that matter of interpretation, but the point is that Scalia must tease from the historical materials the relevant tradition against which to measure displays, understood as such. How he uses history for that purpose is analogous to how he treats the Court's symbolism precedents—i.e., finding that the displays' religious acknowledgment "is surely no more of a step toward establishment of religion than was the practice of legislative prayer we approved in *Marsh v. Chambers*, and it seems to be on par with the inclusion of a crèche or a menorah in a 'Holiday' display that incorporates other secular symbols."[85] Scalia is using historical materials in a similar way. He wants an analogue to the disputed government practice in order to have some intelligible standard against which to judge it.

The next Part discusses in more depth how Scalia's understanding of tradition informs this inquiry, but for now it is enough to point out that his method naturally leads him to be selective about the historical materials. Scalia understands the Ten Commandments displays as a symbolic affirmation, or acknowledgment, of the historical interrelationship among law, morality, and religion. The displays' religious content, in Scalia's view, is better described as a generalized monotheism rather than a specific adoption of the moral commands themselves or of any of the theological traditions that have embraced them. Scalia's characterization of the displays leads him to search the historical record for analogous governmental affirmations (and, as seen in the next section, for any traditions rejecting such affirmations). It will be no surprise to any student of American political and religious history that Scalia easily finds a rich vein of relevant materials in presidential inaugural addresses, in thanksgiving proclamations, and in a variety of national symbols. Such materials are particularly helpful to Scalia's argument because, not only do they demonstrate a persistent tradition of government religious language, but they also lack any consistent counter-tradition in which laws or other official practices have explicitly rejected using such language on constitutional grounds. The exceptional nature of Jefferson's refusal (at least at the federal level; Jefferson was willing to deploy religious language at the state level) simply proves the point.[86]

Nevertheless, does Scalia ignore or minimize the explicitly Christian content of the historical materials in order to make his case for monotheism look better than it does? This is a central feature in the case against Scalia—charging that he manufactures a historical record to avoid concluding that our traditions of religious symbolism are not broadly "monotheistic" but narrowly Christian. Properly evaluating these claims requires a more complete development of the role tradition plays in Scalia's jurisprudence,[87] but a basic point can be noted here. Given

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[84] *See supra* notes 57–69 and accompanying text.

[85] *McCreary County*, 545 U.S. at 905 (Scalia, J., dissenting) (citations omitted).

[86] *See, e.g.*, DREISBACH, *supra* note 15, at 27, 59, 63–64 (attributing Jefferson's aversion to designating days of thanksgiving and fasting, in part, to his understanding of the First Amendment constraints peculiar to the federal government, and noting that, while governor of Virginia in 1779, Jefferson proclaimed days of thanksgiving and prayer).

[87] *See infra* Part II.B.

Scalia's historical method, it is not clear why a tradition of Christian religious acknowledgment is relevant to his inquiry. After all, Scalia has identified the symbolic import of the Ten Commandments displays, rightly or wrongly, with a generalized monotheism and not with a particular theological tradition, whether Jewish or Christian or Protestant Christian. If, hypothetically, there were a tradition of Christian religious acknowledgments alongside, or intertwined with, a tradition of generalized monotheistic acknowledgment, it is not clear why that would hurt Scalia's case. If all Scalia is doing is measuring a "monotheistic" religious display against our traditions of religious acknowledgments, he should be able to claim plausibly that the display fits within at least one, or part of one, of our traditions.

But is that all Scalia is doing? In a later passage, Scalia responds to Stevens's criticism that some Founders thought the Establishment Clause protected only Christianity:

> I am at a loss to see how this helps [Justice Stevens's] case, except by providing a cloud of obfuscating smoke. (Since most thought the Clause permitted government invocation of monotheism, and some others thought it permitted government invocation of Christianity, [Stevens] proposes that it be construed not to permit any government invocation of religion at all.)[88]

Scalia might have stopped here, content to show that Stevens's narrower reading of tradition, even if correct, would not necessarily invalidate a Ten Commandments display. Nevertheless, Scalia goes on to remark that, "[a]t any rate, those narrower views of the Establishment Clause were *as clearly rejected* as the more expansive ones."[89] In support of that claim, Scalia remarks that the vast majority of the materials he relied on "have invoked God, but not Jesus Christ."[90]

What should one make of these comments by Scalia? Up to that point in his dissent, he seems content to have identified a tradition of generalized monotheism in our historical practices—one more than sufficient, in his view, to validate the Ten Commandments displays. Then, in response to Stevens's criticism that he has resisted following tradition where it actually leads (that is, to a tradition of "exclusively Christian" government acknowledgements), Scalia says that any tradition of "Christian acknowledgments" has been "clearly rejected." Does Scalia mean that, if government today wanted symbolically to acknowledge Christianity, then Scalia would strike down that practice simply based on his view of the content of our traditions? Or is Scalia saying something far more modest about the role of our traditions in interpreting the Establishment Clause? Answering these questions requires a look at the broader approach Scalia takes to using tradition in constitutional interpretation.

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[88] *McCreary County*, 545 U.S. at 897 (Scalia, J., dissenting).
[89] *Id.* (emphasis added).
[90] *Id.*

B. The Role of Tradition in Scalia's Constitutional Jurisprudence

Traditions reflected in longstanding and persisting government practice generally tell Scalia what a constitutional provision was not originally designed to do. The function of a constitutional limitation, in Scalia's view, is to place a supermajority restraint on what ensuing "transient majorities" can accomplish by ordinary political processes.[91] In that scheme, tradition provides a relatively objective historical standard by which a court can flesh out the boundaries of a constitutional limitation on government power. Tradition for Scalia thus acts as an adjunct to original meaning. The history of particular governmental practices provides an amplified commentary on a common original understanding of constitutional guarantees. This section of the Article explicates this understanding of tradition in Scalia's jurisprudence. It does not comprehensively assess Scalia's traditionalism;[92] nor does it join the extensive academic commentary on traditionalism as a form of constitutional interpretation.[93] Instead, it takes the measure of Scalia's use of tradition in order to gauge, in the final section, the precise question about tradition posed by his *McCreary County* dissent: is Scalia using tradition to embed in the Establishment Clause an exclusive preference for monotheism in government religious acknowledgments?[94]

Scalia's use of tradition must be understood in connection with his view of the function of constitutional limitations on governmental power. Such limitations are generally not intended to embed in the Constitution a guarantee that laws will reflect current societal (or, *a fortiori*, judicial) preferences. For Scalia, ordinary political processes ensure that laws reflect current values. However, constitutional guarantees, including those securing individual rights, serve the opposite function of "prevent[ing] the law from reflecting certain *changes* in original values that the society adopting the Constitution thinks fundamentally undesirable."[95] That

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[91] A.C. Pritchard & Todd Zywicki, *Finding the Constitution: An Economic Analysis of Tradition's Role in Constitutional Interpretation*, 77 N.C. L. REV. 409, 418–29 (1999).

[92] *See, e.g.*, J. Richard Broughton, *The Jurisprudence of Tradition and Justice Scalia's Unwritten Constitution*, 103 W. VA. L. REV. 19, 38–67 (2000) (discussing Justice Scalia's jurisprudence of tradition by contrasting original meaning—which Justice Scalia supports—with search for intent, which he considers futile); Pritchard & Zywicki, *supra* note 91, at 418–29 (presenting "Justice Scalia's Majoritarian Theory of Tradition" as squaring tradition with democracy).

[93] *See generally* J.M. Balkin, *Tradition, Betrayal, and the Politics of Deconstruction*, 11 CARDOZO L. REV. 1613 (1990); Rebecca L. Brown, *Tradition and Insight*, 103 YALE L.J. 177 (1993); Anthony T. Kronman, *Precedent and Tradition*, 99 YALE L.J. 1029 (1990); David Luban, *Legal Traditionalism*, 43 STAN. L. REV. 1035 (1991); Michael W. McConnell, *The Right to Die and the Jurisprudence of Tradition*, 1997 UTAH L. REV. 665; Michael J. Perry, *The Authority of Text, Tradition, and Reason: A Theory of Constitutional "Interpretation,"* 58 S. CAL. L. REV. 551 (1985); David A. Strauss, *Tradition, Precedent, and Justice Scalia*, 12 CARDOZO L. REV. 1699 (1991).

[94] *See infra* Part III.

[95] Antonin Scalia, *Originalism: The Lesser Evil*, 57 U. CIN. L. REV. 849, 862 (1989). In that passage, Scalia does recognize the possibility of amending the Constitution to

understanding informs Scalia's most expansive discussion, in *Rutan v. Republican Party of Illinois*, of the relationship between the Bill of Rights and "tradition":

> The provisions of the Bill of Rights were designed to restrain transient majorities from impairing long-recognized personal liberties. They did not create by implication novel individual rights overturning accepted political norms. Thus, when a practice not expressly prohibited by the text of the Bill of Rights bears the endorsement of a long tradition of open, widespread, and unchallenged use that dates back to the beginning of the Republic, we have no proper basis for striking it down. Such a venerable and accepted tradition is not to be laid on the examining table and scrutinized for its conformity to some abstract principle of First Amendment adjudication devised by this Court. To the contrary, such traditions are themselves the stuff out of which the Court's principles are to be formed. They are, in these uncertain areas, the very points of reference by which the legitimacy or illegitimacy of *other* practices are to be figured out. When it appears that the latest "rule," or "three-part test," or "balancing test" devised by the Court has placed us on a collision course with such a landmark practice, it is the former that must be recalculated by us, and not the latter that must be abandoned by our citizens.[96]

This passage sheds considerable light on Scalia's use of tradition. First, tradition helps Scalia interpret constitutional guarantees when the text is not determinative. As Scalia explains in his dissent in *McIntyre v. Ohio Elections Commission*, "[w]here the meaning of a constitutional text (such as the 'freedom of speech') is unclear, the widespread and long-accepted practices of the American people are the best indication of what fundamental beliefs it was intended to enshrine."[97] Second, tradition subsequent to adoption of a constitutional provision does not create a "meaning" independent of the constitutional limitation itself. Instead, tradition has merely a "validating" or "clarifying"[98] function with regard

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"update" its guarantees, but asserts that constitutional limitations also serve to "require the society to devote to the subject the long and hard consideration required for a constitutional amendment before those particular values can be cast aside." *Id.*

[96] 497 U.S. 62, 95–96 (1990) (Scalia, J., dissenting) (footnote omitted); *see also* SCALIA, *supra* note 79, at 40 (explaining that the "whole purpose [of a constitution] is to prevent change—to embed certain rights in such a manner that future generations cannot readily take them away").

[97] 514 U.S. 334, 378 (1995) (Scalia, J., dissenting); *see also* Planned Parenthood of Se. Pa. v. Casey, 505 U.S. 833, 1000 (1992) (Scalia, J., concurring and dissenting) (complaining that the Court "ignore[s] a long and clear tradition clarifying an ambiguous text," as it did with respect to the Establishment Clause in *Lee v. Weisman*, 505 U.S. 577 (1972)).

[98] *See Casey*, 505 U.S. at 980 n.1, 1000 (Scalia, J., concurring and dissenting).

to the text, and thus "cannot alter the core meaning of a constitutional guarantee."[99] Third, as the concrete expression of "tradition," Scalia has in mind longstanding practices recognized chiefly in state or federal laws, and also in court decisions or in analogous official practices.[100] As Professors Pritchard and Zywicki explain in their assessment of Scalia's traditionalism, "[l]egislative tradition is paramount in Scalia's hierarchy of sources of tradition."[101] Scalia views such products of representative political processes as concretely reflecting the people's ongoing resolution of "'the basic policy decisions governing society.'"[102] A longstanding and consistent pattern of such resolutions thus gives Scalia an objective benchmark against which to discern a common understanding of the limits imposed by the Constitution on political processes. In a sense, Scalia's hermeneutic of tradition projects the original understanding of a constitutional provision across time, amplifying it by reading consistent and widely accepted governmental practices as a sort of running commentary on citizens' understanding of the Constitution.[103]

The key aspect of Scalia's *Rutan* discussion is that it highlights the largely negative and restraining character tradition plays in constitutional interpretation.[104] With some additional nuances discussed below, tradition's core function is to map out areas in which constitutional limitations were not designed to restrain the policy preferences of majorities. This idea is implicit in the relationship between tradition and constitutional guarantees. To one side are the "long-recognized personal liberties" that a supermajority removes from a future majority's reach by protecting them in constitutional guarantees.[105] To the other side are the "accepted political norms" that are excluded from the Constitution's purview and left to

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[99] *McIntyre*, 514 U.S. at 378 (Scalia, J., dissenting).

[100] *See, e.g.*, Pritchard & Zywicki, *supra* note 91, at 420 ("'[T]radition' for Scalia is more accurately characterized simply as 'history': a collection of facts regarding past patterns of legislative regulation, rather than an ongoing source of wisdom and contextual understanding.").

[101] *Id.* at 421; *see also id.* at 424 ("Legislative tradition is seen as the *best* evidence of political consensus.").

[102] *Id.* at 419 (quoting Mistretta v. United States, 488 U.S. 361, 415 (1989) (Scalia, J., dissenting)).

[103] For instance, Scalia observes that, in the face of a thin or ambiguous record of original understanding, a "most weighty" indication of constitutional meaning appears in:

> the widespread and longstanding traditions of our people. Principles of liberty fundamental enough to have been embodied within constitutional guarantees are not readily erased from the Nation's consciousness. A governmental practice that has become general throughout the United States, and particularly one that has the validation of long, accepted usage, bears a strong presumption of constitutionality.

McIntyre, 514 U.S. at 375 (Scalia, J., dissenting).

[104] *See* Rutan v. Republican Party of Ill., 497 U.S. 62, 95–96 (1990) (Scalia, J., dissenting).

[105] *Id.* at 95.

ordinary political processes.[106] For Scalia, tradition helps discern those "accepted political norms" that lie outside constitutional limitations and thus outside the judiciary's reach.[107] For example, in *McIntyre*, Scalia used a "universal and long-established American legislative practice" of election disclosure requirements to discern the kind of practices the First Amendment did not reach and thus left to ordinary legislation.[108] In *Michael H. v. Gerald D.*, Scalia relied on a longstanding legislative tradition—one curtailing an adulterous biological father's ability to establish parental rights in opposition to the husband and wife—to find that the Due Process Clause did not overturn California's traditional policy.[109] Tradition thus places an outer limit on the constitutional limitations themselves and, by necessary implication, on the judiciary's power to strike down laws on the basis of those limitations.

Tradition and judicial restraint are closely linked for Scalia. His explanation of how tradition functions in constitutional interpretation presupposes that broad constitutional theories cannot override a persistent line of policy resolutions by representative bodies. This comes through plainly in *Rutan*, where Scalia explains that "traditions are themselves the stuff out of which the Court's principles are to be formed," and that, therefore, any constitutional "test" devised by the Court must be "recalculated" if it will disrupt a "landmark practice."[110] His dissent in *United States v. Virginia* similarly reaffirms that "whatever abstract tests we may choose to devise, they cannot supersede—and indeed ought to be crafted *so as to reflect*—those constant and unbroken national traditions that embody the people's understanding of ambiguous constitutional texts."[111] The other side of this coin is Scalia's readiness to defer to the resolutions reached by the political process. For instance, again in *Rutan*, Scalia's deference to a tradition of governmental political patronage goes hand-in-hand with his deference to "the choice between the desirable mix of merit and patronage principles in widely varying federal, state, and local political contexts."[112] Additionally, in *Cruzan v. Director, Missouri Department of Health*, Scalia affirms that "reasonable and humane limits . . . [on] requiring an individual to preserve his own life" are ensured, not by the judicially derived substance of the Due Process Clause, but rather by the political safeguards inherent in the Equal Protection Clause, "which requires the democratic majority to accept for themselves and their loved ones what they impose on you and me."[113]

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[106] *Id.* at 95–96.

[107] *Id.* at 85–95.

[108] *McIntyre*, 514 U.S. at 375–77 (Scalia, J., dissenting).

[109] 491 U.S. 110, 121–30 (1989).

[110] 497 U.S. at 96 (Scalia, J., dissenting). Scalia further explains in that opinion that "[t]he order of precedence is that a constitutional theory must be wrong if its application contradicts a clear constitutional tradition; not that a clear constitutional tradition must be wrong if it does not conform to the current constitutional theory." *Id.* at 97 n.2.

[111] 518 U.S. 515, 568 (1996) (Scalia, J., dissenting).

[112] 497 U.S. at 94 (Scalia, J., dissenting).

[113] 497 U.S. 261, 300 (1989) (Scalia, J., concurring). Elsewhere in *Cruzan*, Scalia explains that "even when it *is* demonstrated by clear and convincing evidence that a patient

Professors Pritchard and Zywicki highlight this restraining role of tradition, observing that "tradition aids [Scalia's] constitutional theory by restraining judges from substituting their own policy preferences for those of democratically elected legislatures."[114] Indeed, "[w]hen neither text nor tradition recognizes a claimed right, Scalia defers to the decisions reached by legislative majorities."[115]

Scalia's use of tradition seems calibrated to uphold long-recognized practices (and their modern analogues), at least where constitutional text does not unambiguously invalidate them. Tradition would establish an objective baseline of constitutionality against which to measure future practices. Reinforcing this view is Scalia's understanding of the Court's institutional role. In his *Virginia* dissent, for instance, he asserts that "the function of this Court is to *preserve* our society's values . . . not to *revise* them; to prevent backsliding from the degree of restriction the Constitution imposed on democratic government, not to prescribe, on our own authority, progressively higher degrees."[116] This view does not exclude the possibility that tradition could positively inform the substance of a constitutional guarantee, thus empowering judges to invalidate counter-traditional practices. Tradition might justify striking down laws, and would not always simply justify refraining from striking them down. This possibility most clearly appears in Scalia's *McIntyre* dissent, where he discusses an "easy" case for the originalist.[117] Strictly speaking, Scalia's discussion concerns practices contemporaneous with the framing to discern original meaning, but his reasoning applies with equal force to tradition proper (that is, to a *post*-adoption tradition of government practices).

In *McIntyre*, Scalia identifies the "easy" originalist case for upholding a practice as one where "government conduct that is claimed to violate the Bill of Rights or the Fourteenth Amendment is shown, upon investigation, to have been engaged in without objection at the very time the Bill of Rights or the Fourteenth Amendment was adopted."[118] For Scalia, this explains why laws against obscenity and libel are untouched by the First Amendment—"they existed and were universally approved in 1791."[119] At the opposite extreme lies the case "where the government conduct at issue was *not* engaged in at the time of adoption, and there is ample evidence that the *reason* it was not engaged in is that it was thought to violate the right embodied in the constitutional guarantee."[120] Scalia would thus invalidate modern use of "[r]acks and thumbscrews," since, although well-known at the founding, they "were not in use because they were regarded as cruel

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no longer wishes certain measures to be taken to preserve his or her life, it is up to the citizens of Missouri to decide, through their elected representatives, whether that wish will be honored." *Id.* at 293.

[114] Pritchard & Zywicki, *supra* note 91, at 420 (citing Scalia, *supra* note 95, at 863).

[115] *Id.* at 421.

[116] 518 U.S. at 568 (Scalia, J., dissenting).

[117] McIntyre v. Ohio Elections Comm'n, 514 U.S. 334, 379–81, 385 (1995) (Scalia, J., dissenting).

[118] *Id.* at 372.

[119] *Id.*

[120] *Id.*

punishments."[121] The difficult originalist case, Scalia explains, lies between these extremes: where founding-era evidence discloses neither a shared constitutional approval nor disapproval of a particular practice.[122] Such a case demands, over and above historical analysis, a delicate judgment "as to whether the government action under challenge is consonant with the concept of the protected freedom . . . that existed when the constitutional protection was accorded."[123]

In these difficult cases, post-adoption tradition can help clarify original meaning.[124] For Scalia, using post-adoption tradition to interpret an indeterminate text is no different from using contemporaneous practice to determine original meaning. After all, as already noted, Scalia treats tradition as simply an adjunct to original meaning.[125] Theoretically this means tradition can project meaning into the Constitution and justify striking down a counter-traditional law. Admittedly, in *McIntyre*, a post-adoption tradition leads Scalia not to invalidate the law under the First Amendment.[126] Nevertheless, his reasoning is premised on the idea that he would have invalidated that same law, if he had located a tradition showing the First Amendment *protected* the kind of expression at issue.[127]

Thus, Scalia's traditionalism could result in either upholding or invalidating a law under the Constitution. Said another way, tradition potentially has both a negative function (simply saying what a constitutional limitation was not designed to do) and a positive function (saying affirmatively what kind of protection the provision was supposed to afford). While the negative function is congenial to Scalia's overall philosophy of judicial restraint, the positive function is theoretically compatible with his use of tradition. Indeed, as discussed below, in some cases Scalia explicitly foresees the possibility of striking down laws on the basis of tradition. However, this is theory and not practice. A closer look at the practical implications of Scalia's traditionalism reveals that the negative role of tradition is far more prominent a feature of his jurisprudence.

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[121] *Id.*

[122] *Id.* at 375 (identifying "[t]he most difficult case for determining the meaning of the Constitution" as one where "[n]o accepted existence of governmental restrictions of the sort at issue here demonstrates their constitutionality, but neither can their nonexistence clearly be attributed to constitutional objections").

[123] *Id.*; *see also* SCALIA, *supra* note 79, at 45 (explaining that in difficult cases, where original meaning is either ambiguous or must be applied to "new and unforeseen phenomena," "the Court must follow the trajectory of the [constitutional guarantee at issue], so to speak, to determine what it requires—and assuredly that enterprise is not entirely cut-and-dried but requires the exercise of judgment").

[124] *McIntyre*, 514 U.S. at 375 (Scalia, J., dissenting); *see also supra* note 98 and accompanying text.

[125] *See supra* notes 96–103 and accompanying text.

[126] *See McIntyre*, 514 U.S. at 375–76 (Scalia, J., dissenting). The tradition Scalia identifies in *McIntyre* as providing a reason for upholding Ohio's election disclosure requirement was one approving such requirements, dating only from the late-nineteenth century but since adopted virtually unanimously by the states. *Id.*

[127] *Id.* at 379.

The positive aspect of Scalia's traditionalism seems very difficult to activate, particularly when relying on the fact that particular practices were not historically engaged in. The absence of a particular governmental practice, either in the founding era or extending beyond it, is simply not enough. Instead, the "nonexistence" of a practice must "clearly be attributed to constitutional objections" in order to flower into an affirmative constitutional prohibition.[128] As Scalia explains in *McIntyre* with regard to more modern restrictions on anonymous electioneering, "[q]uite obviously, not every restriction upon expression that did not exist in 1791 or in 1868 is *ipso facto* unconstitutional."[129] Scalia thus raises a high barrier against the Court inferring, from government non-engagement in a practice, a common understanding of a constitutional prohibition on that practice. In *McIntyre*, Scalia might have been willing to infer such a prohibition from the prevalence of anonymous pamphleting in founding-era politics,[130] but his identification of a widespread post-adoption tradition of election disclosure requirements resolved the ambiguity of original meaning the other way. The implicit obstacles in Scalia's method against using tradition to invest positive meaning in the Constitution lead Professors Pritchard and Zywicki to remark that "Scalia's argument is a one-way ratchet: A practice of regulation proves the constitutional power to regulate, but an absence of regulation is ambiguous because it provides no evidence as to whether the government has the (previously unexercised) *power* to regulate."[131]

That is somewhat overstated because Scalia recognizes that the nonexistence of a practice (whether at the founding or, by extension, in post-adoption tradition) could imply a common understanding of a constitutional limitation on government power.[132] Nevertheless, the point is practically sound and is illuminated by examining Scalia's use of tradition in interpreting the Due Process Clause. In that area, the constitutional text invests tradition with a plainly normative power—for Scalia, traditional practices are, by definition, "due" process.[133] But even here, Scalia rejects using tradition to freeze constitutional provisions around the kernel of tradition. Instead, tradition only provides a constitutional baseline against which practices diverging from tradition can be measured.

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[128] *Id.* at 375.

[129] *Id.* at 373.

[130] *See id.* at 375. More precisely, Scalia would have required "further evidence of common practice in 1868, since I doubt that the Fourteenth Amendment time-warped the post-Civil War States back to the Revolution." *Id.*

[131] Pritchard & Zywicki, *supra* note 91, at 424–25; *see also* Broughton, *supra* note 92, at 58 ("Justice Scalia's use of tradition as the 'primary determinant of what the Constitution means' tends to produce two practical results: it tends to favor republican (though Scalia most often refers to them as 'democratic') outcomes adopted in the political branches, and it tends to circumscribe judicial review." (citation omitted)).

[132] *See McIntyre*, 514 U.S. at 378 (Scalia, J., dissenting) ("[P]ost-adoption tradition cannot alter the core meaning of a constitutional guarantee.").

[133] Schad v. Arizona, 501 U.S. 624, 650 (1991) (Scalia, J., dissenting).

Scalia's opinions suggest that tradition plays a consistent interpretative role across the entire Bill of Rights.[134] However, tradition's impact will vary, implicitly, since tradition supplements textual meaning and the definiteness of different constitutional texts obviously varies. The Due Process Clause is where tradition would have greatest impact on determining original meaning, since for Scalia, "[i]t is precisely the historical practices that *define* what is 'due.'"[135] In Scalia's jurisprudence, this holds for both procedural and substantive due process.[136] Because Scalia equates "due process" with the "law of the land" contemporaneous with adoption of the Due Process Clause, the guarantees of the Due Process Clause are anchored to settled historical practices.[137] For instance, personal service on a defendant physically present in the forum is, by definition, process "due" under the Due Process Clause because such process is part of settled historical usage against which any modern development must be measured.[138] Or, again, a state's refusal to afford an adulterous biological father the right to obtain parental rights in opposition to the husband and wife cannot, by definition, violate substantive due process, given "a societal tradition of enacting laws *denying* the [biological father's] interest."[139]

Tradition in Scalia's due process jurisprudence is not simply an adjunct to original meaning—it is the substance of original meaning itself. Consequently, tradition would here seem best positioned to give Scalia a reason to strike down a counter-traditional law. Furthermore, if one wanted to catch Scalia shaping a constitutional guarantee around tradition—freezing the Constitution in the past, so to speak, and leaving no room for development—it would logically be here, where tradition and original meaning coalesce. But that is not what one finds. As Scalia's due process opinions tell us explicitly, traditional practices merely serve as an objective benchmark against which to measure the constitutionality of modern practices. Therefore, traditional practices would obviously validate similar modern practices (particularly if the traditional practices had persistent post-adoption

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[134] *See, e.g.*, case cited *supra* note 96 and accompanying text.

[135] *Schad*, 501 U.S. at 650 (Scalia, J., dissenting).

[136] *See, e.g.*, Burnham v. Superior Court of Cal., 495 U.S. 604, 619 (1990) (Scalia, J., plurality) ("The short of the matter is that jurisdiction based on physical presence alone constitutes due process because it is one of the continuing traditions of our legal system that define the due process standard of 'traditional notions of fair play and substantial justice.'"); Michael H. v. Gerald D., 491 U.S. 110, 122 (1989) (Scalia, J., plurality) ("In an attempt to limit and guide interpretation of the [Due Process] Clause, we have insisted not merely that the interest denominated as a 'liberty' be 'fundamental' (a concept that, in isolation, is hard to objectify), but also that it be an interest traditionally protected by our society.").

[137] *See, e.g.*, Pac. Mut. Life Ins. Co. v. Haslip, 499 U.S. 1, 28–31 (1991) (Scalia, J., concurring) (explaining the original meaning of "due process").

[138] *See Burnham*, 495 U.S. at 610–16, 619 (holding that "jurisdiction based on physical presence alone constitutes due process because it is one of the continuing traditions of our legal system that define the due process standard of 'traditional notions of fair play and substantial justice'").

[139] *Michael H.*, 491 U.S. at 122 n.2.

usage), but they would not automatically invalidate every departure from tradition. They would simply provide an objective standard for comparison. Indeed, as will be seen, Scalia even allows that a settled modern consensus might justify the invalidation of traditional practices.

In his *Pacific Mutual Life Insurance Co. v. Haslip* concurrence, Scalia lays out his view of "the proper role of history in a due process analysis":

> If the government chooses to *follow* a historically approved procedure, it necessarily *provides* due process, but if it chooses to *depart* from historical practice, it does not necessarily *deny* due process. The remaining business, of course, was to develop a test for determining *when* a departure from historical practice denies due process.[140]

Scalia draws this framework from the Court's 1884 decision in *Hurtado v. California*.[141] In two opinions, Scalia has quoted the following language from *Hurtado* approvingly:[142]

> [A] process of law, which is not otherwise forbidden, must be taken to be due process of law, if it can show the sanction of settled usage both in England and in this country; *but it by no means follows, that nothing else can be due process of law*. . . . [T]o hold that such a characteristic [i.e., that a particular process has been "immemorially the actual law of the land"] is essential to due process of law, would be to deny every quality of the law but its age, and to render it incapable of progress or improvement. It would be to stamp upon our jurisprudence the unchangeableness attributed to the laws of the Medes and the Persians.[143]

In *Haslip*, Scalia criticizes the Court for departing from this historically grounded due process standard and substituting a malleable "fundamental fairness" standard that has become progressively decoupled from historical practices.[144] He emphasizes that his own approach is not the Court's, but instead the one, stemming from *Hurtado* and reaffirmed by Justice Cardozo in *Snyder v. Massachusetts*,[145] that "no procedure firmly rooted in the practices of our people can be so

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[140] 499 U.S. at 31–32 (Scalia, J., concurring).

[141] 110 U.S. 516, 527–29 (1884).

[142] *See Haslip*, 499 U.S. at 31 (Scalia, J., concurring); *Burnham*, 495 U.S. at 619 (Scalia, J., plurality).

[143] *Hurtado*, 110 U.S. at 528–29 (emphasis added). In *Haslip*, following the quoted language, Scalia explained that "*Hurtado*, then, clarified the proper role of history in a due process analysis." 499 U.S. at 31 (Scalia, J., concurring).

[144] *Haslip*, 499 U.S. at 31–36 (Scalia, J., concurring).

[145] 291 U.S. 97 (1934).

'fundamentally unfair' as to deny due process of law."[146] Scalia qualifies even that last statement by explaining that "firmly rooted practices" can nonetheless be invalidated by other constitutional provisions that, unlike the Due Process Clause, "might be thought to have some counter-historical content."[147] Finally, Scalia ends his concurrence with the striking concession that an evolving consensus of legislative or judicial practice could "purge[] a historically approved practice from our national life," thereby "permit[ting] this Court to announce [under the Due Process Clause] that it is no longer in accord with the law of the land."[148]

Thus, even in the area where tradition most decisively impacts original meaning—due process—tradition for Scalia does not freeze the content of the constitutional guarantee. As Judge Michael McConnell observes with respect to Scalia's traditionalism, "[a] jurisprudence grounded in text and tradition is not hostile to social change, but it assigns the responsibility to determine the pace and direction of change to representative bodies."[149] To be sure, tradition furnishes an important benchmark against which to assess the constitutionality of modern practices (in this case, whether they provide "due process of law"). Modern practices identical, or closely analogous, to settled historical practices will be upheld, but, importantly, modern practices that diverge from settled historical usage will not be automatically invalidated on that basis alone. The language from *Hurtado* that Scalia is fond of quoting harshly dismisses such an approach as "stamp[ing] upon our jurisprudence the unchangeableness attributed to the laws of the Medes and the Persians."[150] Historical practices instead provide the raw materials for evaluating the divergent practices—a practice which Scalia admits is fraught with difficult judgments, but which plainly does not amount to automatic invalidation. In fact, Scalia is even willing to posit some evolutionary content to the Due Process Clause, should a definitive national consensus develop rejecting settled historical practice.[151]

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[146] *Haslip*, 499 U.S. at 38 (Scalia, J., concurring) (citing *Snyder*, 291 U.S. at 105). For a good discussion of the evolution of the historical due process standard, see McConnell, *supra* note 93, at 694–95.

[147] *Haslip*, 499 U.S. at 38 (Scalia, J., concurring). Scalia offers the Equal Protection Clause as an example of a provision that "might be thought to have some counter-historical content." *Id.*

[148] *Id.* at 39. Scalia did not need to take such a step in *Haslip*, since the practice at issue there—common-law assessments of punitive damages—was "far from a fossil, or even an endangered species. They are (regrettably to many) vigorously alive." *Id.*

[149] McConnell, *supra* note 93, at 686 (citing Burnham v. Superior Court of Cal., 495 U.S. 604, 627 (1990)).

[150] *Haslip*, 499 U.S. at 31 (Scalia, J., concurring) (quoting Hurtado v. California, 110 U.S. 516, 529 (1884)).

[151] *Cf.* McConnell, *supra* note 93, at 671 (observing, with reference to the similar due process approach in *Washington v. Glucksberg*, that the Court "implied that even a traditional norm could come to violate substantive due process if it is subsequently abandoned or rejected by a new stable consensus" (citing Washington v. Glucksberg, 521 U.S. 702, 714–18 (1997))).

Furthermore, there is every reason to think that this is Scalia's approach in the area of substantive due process. In *Michael H.*, for instance, although Scalia rejects recognition of the biological father's counter-traditional claim under the substantive component of due process, he explicitly says he would defer to a counter-traditional legislative policy.[152] "It is," as Scalia says, "a question of legislative policy and not constitutional law whether California will allow the presumed parenthood of a couple desiring to retain a child conceived within and born into their marriage to be rebutted."[153] In *Cruzan*, despite finding determinative for due process purposes the longstanding tradition of anti-suicide laws, Scalia would defer to ordinary political process for resolving increasingly complex end-of-life issues.[154] Implicitly affirming that there exist "reasonable and humane limits that ought not to be exceeded in requiring an individual to preserve his own life," Scalia entrusts the setting of such limits to democratic majorities constrained "to accept for themselves and their loved ones what they impose on you and me."[155] Finally, in *Lawrence v. Texas*, Scalia's dissent would have rejected finding a right to homosexual sodomy rooted in substantive due process, but at the same time would have raised no constitutional opposition to counter-traditional legislation through ordinary political processes.[156] Since "[s]ocial perceptions of sexual and other morality change over time, and [since] every group has the right to persuade its fellow citizens that its view of such matters is the best," Scalia explains that he "would no more *require* a State to criminalize homosexual acts—or, for that matter, display *any* moral disapprobation of them—than [he] would *forbid* it to do so."[157]

As with procedural due process, then, so with substantive. Tradition acts as a constitutional benchmark for evaluating modern practices, but does not commit the judiciary to striking down laws simply because they diverge from historical practices. Judge McConnell explains that the effect of this historical use of tradition in the substantive due process area

> is to allow the democratic, decentralized institutions of the country to continue to ponder the issue, and to adapt to changing mores and national experience. The Court's [substantive due process] approach thus leaves

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[152] *See* Michael H. v. Gerald D., 491 U.S. 110, 129–30 (1989).

[153] *Id.*

[154] Cruzan v. Director, Mo. Dep't of Health, 497 U.S. 261, 293 (Scalia, J., concurring).

[155] *Id.* at 300; *see also id.* at 292–93 (explaining that "the States have begun to grapple" with "the difficult, indeed agonizing, questions that are presented by the constantly increasing power of science to keep the human body alive for longer than any reasonable person would want to inhabit it," and professing concern that the Court is "poised to confuse that enterprise" by "requiring [the legislative debate] to be conducted against a background of federal constitutional imperatives that are unknown because they are being newly crafted from Term to Term").

[156] *See* 539 U.S. 558, 603–04 (2003) (Scalia, J., dissenting).

[157] *Id.* at 603.

> social change and experimentation to the political branches, and reserves to the courts the task of enforcing traditional and enduring principles of justice.[158]

Scalia's approach thus casts the Due Process Clause—as the prime exemplar of tradition at work in constitutional interpretation—in a primarily negative role. "'Its function,'" as Scalia explains in *Haslip*, "'is negative, not affirmative, and it carries no mandate for particular measures of reform.'"[159]

It should be noted that tradition will have a less dramatic impact on other constitutional guarantees than on the Due Process Clause. For Scalia, historical practices themselves are the yardstick for due process.[160] The text of the Due Process Clause itself points to tradition and, logically, there can be for Scalia no original meaning of "due process" separable from historically settled usage. By contrast, other constitutional guarantees are not simply empty vessels for tradition. For example, Scalia sees the Equal Protection Clause as having "counter-historical" content—that is, as designed to invalidate certain historical practices that might otherwise claim the status of tradition.[161] Other constitutional guarantees likewise have their own normative content that would trump incompatible subsequent practices.[162] This is how Scalia views the First Amendment. As already seen, Scalia developed his theory of tradition largely in *Rutan* and *McIntyre*, both cases dealing with the impact of the Free Speech Clause on governmental practices restricting expression. In those opinions, Scalia cast "freedom of speech" as an

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[158] McConnell, *supra* note 93, at 672. Judge McConnell is there addressing the Court's substantive due process approach in *Washington v. Glucksberg*, 521 U.S. 702, 716–36 (1997), but he closely associates that approach with Scalia's own historical method, *see, e.g.*, McConnell, *supra* note 93, at 671 n.47 (observing that "one of the most important aspects of the *Glucksberg* decision" is the majority's acceptance of Scalia's methodology in *Michael H.* (citing *Michael H.*, 491 U.S. at 121–24)).

[159] Pac. Mut. Life Ins. Co. v. Haslip, 499 U.S. 1, 39 (1991) (Scalia, J., concurring) (quoting Ownbey v. Morgan, 256 U.S. 94, 112 (1921)).

[160] Scalia uses historical practices to measure due process without exhausting the content of the Due Process Clause by limiting "due process" to those historical practices only. *See supra* note 138 and accompanying text.

[161] *See Haslip*, 499 U.S. at 38 (Scalia, J., concurring) ("The Equal Protection Clause and other provisions of the Constitution, unlike the Due Process Clause, are not an explicit invocation of the 'law of the land,' and might be thought to have some counter-historical content."). Of course, Scalia's insistence that the Equal Protection Clause has an unambiguous textual meaning that clearly invalidates both affirmative action and racial segregation is a controversial point. *See, e.g.*, City of Richmond v. J.A. Croson Co., 488 U.S. 469, 520–28 (1989) (Scalia, J., dissenting). That controversy is not over Scalia's traditionalism per se, but over how he applies his traditionalism in the Equal Protection Clause context and is therefore beyond the scope of this Article.

[162] *See, e.g.*, *Haslip*, 499 U.S. at 38 (Scalia, J., concurring) (explaining further that "the principle I apply today does not reject our cases holding that procedures demanded by the Bill of Rights—which extends against the States only *through* the Due Process Clause—must be provided despite historical practices to the contrary").

ambiguous concept whose original meaning needs clarification from either contemporaneous practices or post-adoption tradition, but, unlike "due process," "freedom of speech" is not reducible to historical practices. For example, in *McIntyre*, Scalia explained that a "postadoption tradition" of anti-flag-desecration laws "cannot alter the core meaning" of the Free Speech Clause—i.e., that "the government may not prohibit the expression of an idea simply because society finds the idea itself offensive or disagreeable."[163]

With a guarantee like the Free Speech Clause, then, tradition will emphatically play a "clarifying" or "validating" role.[164] Whether we are dealing with contemporaneous or post-adoption practices, tradition glosses original meaning. Contrast this with the Due Process Clause, where contemporaneous understandings of "historical practices" or "the law of the land" determine the content of due process (with, presumably, a post-adoption continuation of such practices confirming that original content). With due process, traditional practices straightforwardly project meaning into the Constitution, providing a stand-alone reason for invalidating a counter-traditional law.[165] By contrast, with freedom of speech, traditional practices shed light on original meaning, but do not determine it.[166] There is, by definition, a core of original meaning that tradition could not contradict. This is not to say that traditional practices could not, under the Free Speech Clause, provide an independent reason for invalidating a law. Scalia never denies that, and the possibility is implicit in *McIntyre*. But, in practice, Scalia would be less likely to use tradition in this way under the Free Speech Clause than he would under the Due Process Clause.[167] Scalia's *McIntyre* dissent in particular reveals the implicit obstacles to using tradition as its own justification for invalidating a law.[168] There, tradition appears better adapted to mapping out areas committed to resolution by ordinary political processes than to projecting judicially enforceable content into the Constitution. This aspect of Scalia's traditionalism will be crucial when considering his use of tradition to interpret another textually ambiguous clause in the First Amendment—the Establishment Clause. It will also answer whether Scalia's critics have fairly censured him for projecting an exclusive preference for monotheism into the Establishment Clause.

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[163] McIntyre v. Ohio Elections Comm'n, 514 U.S. 334, 377–78 (1995) (Scalia, J., dissenting) (quoting Texas v. Johnson, 491 U.S. 397, 414 (1989)).

[164] *See* Planned Parenthood of Se. Pa. v. Casey, 505 U.S. 833, 898, 1000 (1992) (Scalia, J., concurring and dissenting); *see also supra* note 98 and accompanying text.

[165] Schad v. Arizona, 501 U.S. 624, 650 (1991) (Scalia, J., dissenting).

[166] *McIntyre*, 514 U.S. at 378 (Scalia, J., dissenting).

[167] Moreover, as noted, even in the due process area, divergence from historical practices does not result in automatic invalidation. *See supra* notes 140–159 and accompanying text.

[168] *See McIntyre*, 514 U.S. at 371–78; *see also supra* notes 147–148 and accompanying text.

III. THE DISSENT AND THE CRITICS: IS SCALIA A MONOTHEISTIC ACTIVIST?

Having placed Scalia's dissent in its larger jurisprudential context, we can now ask whether his critics hit home. Criticisms of his dissent come from Souter's and Stevens's direct replies to Scalia in *McCreary County*[169] and *Van Orden*,[170] and also from legal scholars.[171] To judge from the critics' tone, something more is at stake than the resolution of a doctrinal issue. Souter's majority opinion in *McCreary County* deems Scalia's dissent "a surprise," delivering the "remarkable view" that "government should be free to approve the core beliefs of a favored religion over the tenets of others, a view that should certainly trouble anyone who prizes religious liberty."[172] Souter invokes the "St. Bartholomew's Day massacre and the treatment of heretics in early Massachusetts" as specters of religious violence counseling modern respect for the principle of neutrality.[173] Stevens's *Van Orden* dissent accuses Scalia of "marginalizing the belief systems of more than 7 million Americans by deeming them unworthy of the special protections he offers monotheists under the Establishment Clause."[174] Among academic commentators, the most prominent rejoinders to Scalia thus far up the ante. Professor Jack Balkin characterizes Scalia's Establishment Clause as only "requir[ing] neutrality among *monotheistic religions that believe in a personal God who cares about and who intervenes in the affairs of humankind*, and in particular, among Christianity (and its various sects), Judaism, and Islam."[175] Professor Thomas Colby believes that Scalia's dissent may portend "a wholesale rethinking of the constitutional relationship between church and state,"[176] and that it launches "an all-out assault on the venerable principle of neutrality, the constitutional foundation upon which both liberals and conservatives alike had stood steadfast for generations."[177] Colby goes further, warning that Scalia's approach would "represent the single greatest sea change in the history of the Establishment Clause,"[178] and even that it "would represent a complete rethinking of the very nature of our country—of the role that religion plays in government, and of the rights of religious minorities."[179] Are these criticisms overstated? Are they wrong? This Part addresses those questions. As will be explained, such criticisms boil down to the notion that Scalia would violently overturn the bedrock principle of neutrality in Establishment Clause

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[169] McCreary County v. ACLU, 545 U.S. 844, at 850–81 (2005).

[170] Van Orden v. Perry, 545 U.S. 677, 707–36 (2005) (Stevens, J., dissenting).

[171] *See, e.g.*, *infra* notes 175–179 and accompanying text.

[172] *McCreary County*, 545 U.S. at 879–80.

[173] *Id.* at 881.

[174] *Van Orden*, 545 U.S. at 719 n.18 (Stevens, J., dissenting).

[175] *See* Posting of Jack Balkin to Balkinization Blog, Justice Scalia Puts His Cards on the Table, http://balkin.blogspot.com/2005/06/justice-scalia-puts-his-cards-on-table.html (June 27, 2005, 12:53 EST).

[176] Colby, *supra* note 4, at 1098.

[177] *Id.* at 1105.

[178] *Id.* at 1113.

[179] *Id.* at 1121.

jurisprudence, and replace it with a principle that exclusively favors monotheistic religions. The particular instrument Scalia would use to inaugurate this revolution is tradition. Having explored Scalia's use of tradition in the previous section, this Part can now ask whether that is in fact what Scalia is attempting to do.

There are two interlocking parts to the overall criticism of Scalia's dissent. First is his "rejection" of a broad neutrality principle and his substitution (at least in the area of government religious acknowledgments) of a preference for monotheistic religions. The second part is more important, but a word needs to be said about the first. It is simply overstated to say that Establishment Clause jurisprudence has always operated under a consistent, overarching principle of neutrality, and that Scalia "would cast that decades-old cardinal understanding aside in one fell swoop."[180] It is more accurate to say that the Court has consistently paid lip-service to various formulations of neutrality, but has had to constantly adjust, refine, or even jettison the principle in certain areas of its Establishment Clause jurisprudence.[181] The inherent difficulties in the concept of neutrality have led Professor Frank Ravitch, a noted Religion Clause scholar, to conclude that "neutrality, whether formal or substantive, does not exist."[182] Nowhere is the gulf between neutrality and actual practice more palpable than with

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[180] *Id.* at 1113.

[181] On neutrality and its variations in Religion Clause jurisprudence, see Daniel O. Conkle, *The Path of American Religious Liberty: From the Original Theology to Formal Neutrality and an Uncertain Future*, 75 IND. L.J. 1, 8–24 (2000) (describing development of the neutrality doctrine); Carl H. Esbeck, *A Constitutional Case for Government Cooperation with Faith-Based Social Service Providers*, 46 EMORY L.J. 1, 20–39 (1997) (same); Patrick M. Garry, *Religious Freedom Deserves More than Neutrality: The Constitutional Argument for Nonpreferential Favoritism of Religion*, 57 FLA. L. REV. 1, 3–15 (2005) (same); Douglas Laycock, *The Underlying Unity of Separation and Neutrality*, 46 EMORY L.J. 43, 46–73 (1997) (describing the "no-aid" and "nondiscrimination" versions of neutrality, but arguing that the essential goal of both separation and neutrality is the "goal of minimizing government influence on religious choices"); Ira C. Lupu & Robert Tuttle, *The Distinctive Place of Religious Entities in Our Constitutional Order*, 47 VILL. L. REV. 37, 65–72 (2002) (describing development of the neutrality doctrine); Ira C. Lupu, *The Lingering Death of Separationism*, 62 GEO. WASH. L. REV. 230, 237–46 (1994) (describing abandonment of strict separationism for "some version of religious neutrality, or equal religious liberty").

[182] Frank S. Ravitch, *A Funny Thing Happened on the Way to Neutrality: Broad Principles, Formalism, and the Establishment Clause*, 38 GA. L. REV. 489, 492 (2004). Professor Ravitch reasons that "[c]laims of neutrality cannot be proven" because "[t]here is no independent neutral truth or baseline to which they can be tethered." *Id.* at 493. Therefore, "any baseline to which we attach neutrality is not neutral; claims of neutrality built on these baselines are by their nature not neutral." *Id.* Ravitch echoes Professor Steven Smith's provocative thesis that "the quest for neutrality . . . is an attempt to grasp at an illusion." STEVEN D. SMITH, FOREORDAINED FAILURE: THE QUEST FOR A CONSTITUTIONAL PRINCIPLE OF RELIGIOUS FREEDOM 96 (2005); *see also* STEVEN D. SMITH, GETTING OVER EQUALITY: A CRITICAL DIAGNOSIS OF RELIGIOUS FREEDOM IN AMERICA 103–15 (2001) (critiquing the neutrality principle).

government religious symbolism.[183] Professor Ira Lupu correctly observes that "government-sponsored religious messages can never achieve the status of neutrality among religions,"[184] presumably meaning that all religious symbols are unconstitutional and rigorous adherence to neutrality would make religious symbolism cases easy. However, the "endorsement" test the Court has settled on for these cases is, far from being a neutrality-based standard, one that is inherently non-neutral in that it focuses on the perceptions of exclusion felt by religious "outsiders."[185] As Judge McConnell observes, "there is no 'neutral' position, outside the culture, from which to make this assessment."[186] The sheer existence of the endorsement test in religious symbolism cases—one that appears to be

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[183] On the relationship of the Court's approach to government religious symbolism and the neutrality principle, see generally Robin Charlow, *The Elusive Meaning of Religious Equality*, 83 WASH. U. L.Q. 1529, 1561 & n.130 (2005) (suggesting that the Court simply avoids applying the neutrality principle in religious symbolism cases); Steven G. Gey, *"Under God," the Pledge of Allegiance, and Other Constitutional Trivia*, 81 N.C. L. REV. 1865, 1880–84 (2003) (arguing that the inclusion of the phrase "under God" in the Pledge is not trivial and therefore unconstitutional); Kenneth Karst, *Justice O'Connor and the Substance of Equal Citizenship*, 55 SUP. CT. REV. 357, 376–402 (2003) (equating Justice O'Connor's concern with exclusion felt from government religious symbols with a concern for racial equality); Douglas Laycock, *Theology Scholarships, the Pledge of Allegiance, and Religious Liberty: Avoiding the Extremes but Missing the Liberty*, 118 HARV. L. REV. 155, 177 (2004) ("[T]he right to religious liberty is a right to government neutrality. That is why litigants can object to government-sponsored religious symbols even though plaintiffs in such cases are not 'unduly burdened.'"); Arnold H. Loewy, *Rethinking Government Neutrality Towards Religion Under the Establishment Clause: The Untapped Potential of Justice O'Connor's Insight*, 64 N.C. L. REV. 1049, 1049–51 (1986) (arguing that government neutrality toward religion can be achieved through application of Justice O'Connor's "advance or inhibit" test); Ira C. Lupu, *Government Messages and Government Money:* Santa Fe, Mitchell v. Helms, *and the Arc of the Establishment Clause*, 42 WM. & MARY L. REV. 771, 816 (2001) ("[G]overnment-sponsored religious messages can never achieve the status of neutrality among religions."); Toni M. Massaro, *Religious Freedom and "Accommodationist Neutrality": A Non-Neutral Critique*, 84 OR. L. REV. 935, 949–63 (2005) (discussing incompatibility between neutrality and government use of religious symbols); Michael W. McConnell, *Religious Freedom at a Crossroads*, 59 U. CHI. L. REV. 115, 147–57, 148 (1992) (criticizing the "endorsement test" used for religious symbolism cases and remarking that "[w]hether a particular governmental action appears to endorse or disapprove religion depends on the presuppositions of the observer, and there is no 'neutral' position, outside the culture, from which to make this assessment"); Gabriel A. Moens, *The Menace of Neutrality in Religion*, 2004 BYU L. REV. 535, 574 (arguing that the neutrality principle should be rejected because it "fails to achieve true nutrality and often trivializes religion's role in public life"); Richard C. Schragger, *The Role of the Local in the Doctrine and Discourse of Religious Liberty*, 117 HARV. L. REV. 1810, 1844–48 (2004) (advocating a decentralized approach to the Religion clauses).

[184] Lupu, *supra* note 183, at 816.

[185] *See, e.g.*, County of Allegheny v. ACLU, 492 U.S. 573, 598–602 (1989); Lynch v. Donnelly, 465 U.S. 668, 688 (1984) (O'Connor, J., concurring).

[186] McConnell, *supra* note 183, at 148.

bleeding into other areas[187]—is itself a refutation of the claim that the Establishment Clause lives under an all-encompassing regime of neutrality. Of course, these dissonances were present at the inception of the Court's modern jurisprudence. In *Everson*, the Court invoked a sweeping formulation of neutrality,[188] but then immediately pared it back to resolve a parochial school funding issue without falling into complete contradiction.[189] The *Everson* majority's refusal to extend absolute neutrality to its logical separationist end-point provoked the dissent to accuse it of subverting neutrality altogether.[190] This was the thrust of Justice Jackson's famous quip that the Court, like Lord Byron's Julia, "whispering 'I will ne'er consent,'—consented."[191]

It is, in short, untenable to claim that "[b]efore Justice Scalia's opinion, virtually everyone was operating within the neutrality paradigm,"[192] without dropping a telling footnote that describes the deep academic and judicial disagreements about the utility of neutrality—in other words, to what extent neutrality is "inadequate, manipulable, incapable of deciding hard cases, or even incoherent."[193] This explains why the Court itself has had to soften neutrality with

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[187] *See, e.g.*, McCreary County v. ACLU, 545 U.S. 844, 860 (2005) (reasoning that "[b]y showing a purpose to favor religion, the government 'sends the . . . message to . . . nonadherents that they are outsiders, not full members of the political community, and an accompanying message to adherents that they are insiders, favored members'" (quoting Santa Fe Indep. Sch. Dist. v. Doe, 530 U.S. 290, 309–10 (2000) (internal quotation marks omitted))).

[188] *See* Everson v. Bd. of Educ., 330 U.S. 1, 15–16 (1947) (reasoning that the Establishment Clause means, inter alia, that "[n]either [state nor federal government] can pass laws which aid one religion, aid all religions, or prefer one religion over another," and that "[n]o tax in any amount, large or small, can be levied to support any religious activities or institutions").

[189] *See id.* at 17 ("[W]e cannot say that the First Amendment prohibits New Jersey from spending tax-raised funds to pay the bus fares of parochial school pupils as a part of a general program under which it pays the fares of pupils attending public and other schools."). As Professor Keith Werhan observes, "*Everson*'s easy statement of the neutrality principle disguised its enduring difficulty, for the principle has proven far easier to state than to apply in contested cases. *Everson* itself serves as an example." Keith Werhan, *Navigating the New Neutrality: School Vouchers, the Pledge, and the Limits of a Purposive Establishment Clause*, 41 BRANDEIS L.J. 603, 604 (2003).

[190] *See* 330 U.S. at 58–59 (Rutledge, J., dissenting) (arguing that the policy excluding children in religious schools from participation in transportation reimbursements "entails hardship . . . [b]ut it does not make the state *unneutral* to withhold what the Constitution forbids it to give. On the contrary it is only by observing the prohibition rigidly that the state can maintain its *neutrality* and avoid partisanship in the dissensions inevitable when sect opposes sect over demands for public moneys to further religious education, teaching or training in any form or degree, directly or indirectly." (emphases added)).

[191] *Id.* at 19 (Jackson, J., dissenting).

[192] Colby, *supra* note 4, at 1113.

[193] *Id.* at 1113 & n.54 (noting "that the neutrality paradigm is, of course, no panacea" and that "neutrality means different things to different people, and there has been a great

formulations such as "benevolent neutrality,"[194] which critics quickly labeled a counterfeit of genuine neutrality. This also explains why prominent Religion Clause scholars, such as Professors Douglas Laycock and Frank Ravitch, have felt impelled to construct refinements such as "substantive neutrality" or "facilitation" tests.[195] Perhaps most tellingly, this is why the opposing sides in the most prominent anti-establishment case in a decade—the school voucher case, *Zelman v. Swimmon-Harris*—were worlds apart on the outcome, while both claiming the mantle of neutrality.[196] No one will likely say it better than Professor Laycock: "Those who think neutrality is meaningless have a point. We can agree on the principle of neutrality without having agreed on anything at all."[197]

What Scalia is proposing to do with neutrality is entirely predictable. There is nothing revolutionary about it. Scalia is simply unwilling to allow abstract jurisprudential guideposts to override long-established public practices, especially where constitutional text or precedent does not clearly invalidate them. As he explained in *Rutan*, "a long tradition of open, widespread, and unchallenged use that dates back to the beginning of the Republic . . . is not to be laid on the

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deal of discussion among academics and judges about the extent to which it is inadequate, manipulable, incapable of deciding hard cases, or even incoherent").

[194] *See, e.g.*, Walz v. Tax Comm'n, 397 U.S. 664, 669 (1970) (observing that "[t]he course of constitutional neutrality in this area cannot be an absolutely straight line" and that "[s]hort of those expressly proscribed governmental acts there is room for play in the joints productive of a benevolent neutrality which will permit religious exercise to exist without sponsorship and without interference"); *id.* at 711 (Douglas, J., dissenting) ("The [property tax] exemptions provided here insofar as welfare projects are concerned may have the ring of neutrality. But subsidies either through direct grant or tax exemption for sectarian causes, whether carried on by church *qua* church or by church *qua* welfare agency, must be treated differently, lest we in time allow the church *qua* church to be on the public payroll, which, I fear, is imminent.").

[195] *See* Douglas Laycock, *Formal, Substantive, and Disaggregated Neutrality Toward Religion*, 39 DEPAUL L. REV. 993, 1001 (1990) (proposing as "substantive neutrality" the principle that "the religion clauses require government to minimize the extent to which it either encourages or discourages religious belief or disbelief, practice or nonpractice, observance or nonobservance"). *See generally* Ravitch, *supra* note 182, at 504–06, 544–49 (critiquing Laycock's formulation of neutrality as valuable but non-neutral and proposing a related "facilitation test").

[196] *Compare* 536 U.S. 639, 653 (2002) (approving the Ohio voucher program because it is "neutral in all respects toward religion"), *with id.* at 688, 696–98 (Souter, J., dissenting) (arguing that the majority has "ignor[ed] the meaning of neutrality and private choice themselves" in order to validate the voucher scheme, and describing his understanding of neutrality). *See also* Ravitch, *supra* note 182, at 506–07, 513–23 (describing the difficulty with applying neutrality in *Zelman*). Tellingly, Justice Souter begins his dissent in *Zelman* by quoting the absolutist "no tax" language in *Everson*, claiming that "[t]he Court has never in so many words repudiated this statement," and concluding that "[i]t is only by ignoring *Everson* that the majority can claim to rest on traditional law in its invocation of neutral aid provisions and private choice to sanction the Ohio law." *Zelman*, 536 U.S. at 686–88 (Souter, J., dissenting).

[197] Laycock, *supra* note 195, at 994.

examining table and scrutinized for its conformity to some abstract principle of First Amendment adjudication devised by this Court."[198] To the contrary, the order of priority is the reverse: public practices reflecting a persistent, widespread common understanding of constitutional guarantees are themselves the raw material for the Court's principles of adjudication—the "very points of reference by which the legitimacy or illegitimacy of *other* practices are to be figured out."[199] Judge McConnell captures this distinction when he explains that the "moral philosophic approach" to constitutional interpretation of a jurist like Souter "is deductive and theoretical, deriving specific prescriptions from more general theoretical propositions," whereas the "traditionalist approach" of a jurist like Scalia "is inductive and experiential . . . , reason[ing] up from concrete cases and circumstances."[200] Thus, Scalia's core disagreement with his critics is not primarily over the relative importance of neutrality as an Establishment Clause principle, but really over the function of any such overarching principle in constitutional methodology. Scalia reads such abstract principles against the available background of relevant tradition, and not (as Souter and Stevens do) the other way around.

This different interpretative methodology explains another aspect of Scalia's dissent that has drawn sharp criticism. In his dissent, Scalia admits that some form of neutrality is "indeed a valid principle where public aid or assistance to religion is concerned, or where the free exercise of religion is at issue."[201] Critics have asked why Scalia accepts neutrality as valid in these areas, but would discard it in the area of governmental religious symbolism. Indeed, why not jettison neutrality across the board, ask the critics, and allow government to channel funds selectively to favored monotheistic religions?[202] This criticism confuses Scalia's approach with Souter's and Stevens's, which read neutrality as an overarching theoretical command of the Establishment Clause. Scalia, by contrast, shapes the principles of Establishment Clause adjudication around the intelligible contours of long-accepted public practices. Scalia does not elaborate in *McCreary County* why this approach might lead to accepting neutrality in one area and not in another, but it is not difficult to imagine why. As to public funding of religion, our nation's common understanding of the evils of religious establishments was shaped significantly by eighteenth-century controversies over compelled funding of

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[198] Rutan v. Republican Party of Ill., 497 U.S. 62, 95–96 (1990) (Scalia, J., dissenting); *see also* United States v. Virginia, 518 U.S. 515, 568 (1996) (Scalia, J., dissenting) ("[W]hatever abstract tests we may choose to devise, they cannot supersede—and indeed ought to be crafted *so as to reflect*—those constant and unbroken national traditions that embody the people's understanding of ambiguous constitutional texts.").

[199] *Rutan*, 497 U.S. at 96 (Scalia, J., dissenting); *see supra* note 96 and accompanying text.

[200] McConnell, *supra* note 93, at 672.

[201] McCreary County v. ACLU, 545 U.S. 844, 893 (2005) (Scalia, J., dissenting) (citing *Zelman*, 536 U.S. at 652; *Church of Lukumi Babalu Aye, Inc. v. Hialeah*, 508 U.S. 520, 532–33 (1993); *id.* at 557–58 (Scalia, J., concurring)).

[202] *See, e.g.*, Colby, *supra* note 4, at 1112.

churches and nineteenth-century controversies over funding of religious schools.[203] Whether we have drawn the correct constitutional lessons from these controversies is open to serious question, but it is evident why the historical record might lead a traditionalist like Scalia to infer some principle of evenhandedness for religious funding issues. The same can be said, even more forcefully, for free exercise principles and neutrality. The historical record shows that the Free Exercise Clause was understood, at the very least, to ban laws that were explicitly non-neutral with regard to religious belief and practice.[204] The only controversy in that area is whether free exercise also impacts laws that simply have a disparate impact on religion.[205] One can choose to explain Scalia's differing approach to these discrete areas as mere hypocrisy. A fairer explanation—fairer because it takes into account Scalia's overall methodology—is that Scalia draws a different lesson from our public traditions of religious acknowledgement. Because the neutrality principle falsifies those traditions, it cannot override them.

The core of the case against Scalia concerns how he would allegedly use traditions of religious acknowledgment. Scalia, it is said, would not merely deploy those traditions negatively but positively.[206] He would embed in the Establishment Clause a preference for religious acknowledgments of a certain theological stripe, thereby excluding recognition of other forms of religion. According to the critics, Scalia would derive the theological content of this tradition from Framers' expectations about what "religion" they meant to enshrine in the Establishment

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[203] *See, e.g.*, Laycock, *supra* note 181, at 48–50 (observing that "[f]inancing of churches was the central church-state issue of the 1780s, and was the immediate background to the adoption of the Establishment Clause in 1791," and that "[t]he other great controversy that gave prominence to the no-funding principle was the nineteenth century dispute over common schools").

[204] *See, e.g.*, Kurt T. Lash, *The Second Adoption of the Free Exercise Clause: Religious Exemptions Under the Fourteenth Amendment*, 88 NW. U. L. REV. 1106, 1108, 1114 (1994) (explaining that the original Free Exercise Clause "[a]t most . . . prevented the federal government from passing laws targeting religion *qua* religion" and that "even if the [Clause] could be read as an expression of individual rights, it would prohibit only those laws that directly targeted religion"); Michael W. McConnell, *The Origins and Historical Understanding of Free Exercise of Religion*, 103 HARV. L. REV. 1409, 1418 (1990) (explaining that one view of the Free Exercise Clause, at its core, forbids laws that directly target religious conduct for unfavorable treatment).

[205] *Compare* Michael W. McConnell, *Free Exercise Revisionism and the* Smith *Decision*, 57 U. CHI. L. REV. 1109, 1137–41 (1990) ("[W] hen . . . regulations [and laws] . . . *do* have a substantial impact on the press or on religion, they raise a serious claim for exemption."), *with* Philip A. Hamburger, *A Constitutional Right of Religious Exemption: An Historical Perspective*, 60 GEO. WASH. L. REV. 915, 917–47 (1992) ("Americans did not, however, authorize or acknowledge a general constitutional right of religious exemption from civil laws.").

[206] *See supra* notes 104–09, 128–33 and accompanying text (distinguishing negative and positive uses of tradition in Scalia's jurisprudence).

Clause.[207] For instance, on Souter's reading, "[Scalia's] dissent says that the deity the Framers had in mind was the God of monotheism."[208] Stevens agrees, but adds that Scalia has misconstrued the historical record. The material Scalia reads as giving "specially preferred constitutional status to all monotheistic religions" would "just as strongly support[] a preference for Christianity."[209] Stevens claims that "many of the Framers understood the word 'religion' in the Establishment Clause to encompass only the various sects of Christianity."[210] Professor Colby advances this case even more forcefully: Scalia's Establishment Clause would "permit[] the government . . . , in the context of governmental religious expression, to favor Judeo-Christian monotheism over all other religions (but not vice versa)."[211] Scalia's mishandling of tradition would mean, he claims, that "biblical monotheism is now, has always been, and will always be, the favored religion of the United States Constitution."[212]

These criticisms were not snatched from thin air. There are a few passages in Scalia's dissent that, if read out of context and divorced from Scalia's interpretative methodology and overall jurisprudence, might support the critics' reading.[213] But properly assessing the tail requires taking account of the dog. Scalia's general approach to using tradition in constitutional interpretation, as described above, is incompatible with the view that, in *McCreary*, he would use tradition to embed a particular and exclusive theological content in the Establishment Clause. Scalia's traditionalism is far better adapted to negative uses—ruling that constitutional guarantees do not extend to certain practices—than to the positive use of providing independent reasons for finding practices unconstitutional. Tradition is for Scalia a backstop, not a plan for action. Indeed, the typical criticisms of Scalia's traditionalism lament that he defers too much to majorities and refuses to deploy tradition as an evolving standard for ongoing judicial enforcement.[214] There is, in short, a critical difference in Scalia's

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[207] *See, e.g.*, McCreary County v. ACLU, 545 U.S. 844, 877 (2005); Van Orden v. Perry, 545 U.S. 677, 728–29 (2005) (Stevens, J., dissenting).

[208] *McCreary County*, 545 U.S. at 879.

[209] *Van Orden*, 545 U.S. at 729 (Stevens, J., dissenting).

[210] *Id.* at 726.

[211] Colby, *supra* note 4, at 1098.

[212] *Id.*

[213] *See infra* notes 58–69 and accompanying text.

[214] *See, e.g.*, Balkin, *supra* note 93, at 1620 (claiming that through his use of tradition in *Michael H.*, "Justice Scalia tried to write 1950's white middle class theories of the family into the Constitution—thus establishing the hegemony of Ozzie and Harriet, if you will"); Brown, *supra* note 93, at 202 (characterizing Scalia's use of tradition as "a thinly-veiled effort to cut off all possibility of progressive interpretation of the past"); Strauss, *supra* note 93, at 1708 (observing that "Justice Scalia's traditionalism . . . is highly majoritarian" and consequently, "[u]nless the Constitution is clear, a majority can make any practice constitutional just by sustaining it for a time"); Zlotnick, *supra* note 79, at 1394 ("[L]ike his semantic textualism, Scalia's 'historical practices' approach more often results in no protection for a modern practice, either because that practice was condemned under the religious or moral precepts of that earlier time, or because the modern situation

methodology between saying, "tradition means the government may elect to do, or not do, this," and saying, "tradition alone means the government may never do this." The critics of Scalia's Ten Commandments dissent have cast him as a jurist looking to tradition for the power to strike down laws, but the role sits uncomfortably on his shoulders.[215]

Due process is where tradition is best situated to provide Scalia a stand-alone reason for finding a current practice unconstitutional.[216] Settled historical usages define what process is "due," and thus a modern practice, opposed to historical practices, cries out for invalidation. Even here, Scalia would not use tradition automatically to invalidate every practice that diverges from the traditional baseline. Recall Scalia's own formulation of his due process analysis: "If the government chooses to *follow* a historically approved procedure, it necessarily *provides* due process, but if it chooses to *depart* from historical practice, it does not necessarily *deny* due process."[217]

What if this paradigm were applied to Scalia's use of tradition to interpret the Establishment Clause? This would require an assumption contrary to the fact that the Establishment Clause interacts with traditional practices exactly as the Due Process Clause does—in other words, that historically settled usage alone *defines* the content of the Establishment Clause. But, for purposes of argument, transposing Scalia's due process traditionalism would result in this analysis of a religious symbolism case under the Establishment Clause: "If the government chooses to *follow* a historically approved [practice of religious acknowledgment], it necessarily [acts in conformity with the Establishment Clause], but if it chooses to *depart* from historical practice, it does not necessarily [violate the Establishment Clause.]"[218]

So, even supposing that the Establishment Clause is the empty vessel for tradition that the Due Process Clause is, Scalia would still refrain from using tradition to capture and freeze the meaning of the Establishment Clause. "Historically approved practices"—in this case a particular tradition of government religious acknowledgments—would provide a backdrop for the reach of the Establishment Clause, but the character of historical acknowledgments would not capture the Establishment Clause in its entirety. Any divergence from our traditions of religious acknowledgement would not mean automatic invalidation. Nor would Scalia's use of tradition necessarily prohibit today's majorities from

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was unknown to the Framers." (footnotes omitted)); *id.* at 1397 ("Scalia's threshold for departing from originalism is so high that, while theoretically possible, its conditions rarely, if ever, will occur."); *cf.* McConnell, *supra* note 93, at 672 (describing a traditionalism like Scalia's as "allow[ing] the democratic, decentralized institutions of the country to continue to ponder the issue, and to adapt to changing mores and national experience," and as "leav[ing] social change and experimentation to the political branches").

[215] *See supra* notes 175-79 and accompanying text.

[216] *See supra* notes 132–133 and accompanying text.

[217] Pac. Mut. Life Ins. Co. v. Haslip, 499 U.S. 1, 31–32 (1991) (Scalia, J., concurring).

[218] *Id.*

altering our practices of government religious acknowledgment. As Judge McConnell explained, such a traditionalism would, to the contrary, "allow the democratic, decentralized institutions of the country to continue to ponder the issue, and to adapt to changing mores and national experience," and would "leave[] social change and experimentation to the political branches."[219]

It is true that, on this view, historical practices alone could theoretically justify striking down a contrary modern practice or religious acknowledgments. If historical practices set a baseline, it follows that some modern practices might fall below it. But how likely is it that Scalia's traditionalism will result in striking down a modern practice? After all, even in due process, Scalia adopts the view that, simply because a current practice lacks "the sanction of settled usage[,] . . . it by no means follows that nothing else can be due process of law."[220] Thus, while departing from historical practices could deny due process, "by no means" does every departure *automatically* deny it.[221] The likelihood that tradition alone will invalidate a law becomes clearer when we consider Scalia's use of tradition outside the context of due process.

Scalia treats the Establishment Clause like the Free Speech Clause, as a constitutional provision that, while not reducible to historical practices, nonetheless benefits from historical clarification.[222] The upshot is that First Amendment traditions are even less likely than due process traditions to justify, on their own strength, striking down laws. Religious and speech traditions are better adapted to negative and restraining uses, merely clarifying the limits of constitutional guarantees.[223] This becomes evident, as already seen, in Scalia's *McIntyre* dissent.[224] There, to justify invalidating modern election disclosure requirements based on tradition alone, Scalia would have required far more than the mere absence of similar laws during the founding era, and even more than the founding-era prevalence of ostensibly contrary practices (such as anonymous

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[219] McConnell, *supra* note 93, at 672.

[220] *Haslip*, 499 U.S. at 31 (Scalia, J., concurring) (quoting Hurtado v. California, 110 U.S. 516, 528 (1884)).

[221] *Id.* at 31–32.

[222] *See, e.g.*, Lee v. Weisman, 505 U.S. 577, 632–33 (1991) (Scalia, J., dissenting) (stating that history illuminates how the Framers thought the Establishment Clause should apply to contemporaneous practices and that a practice existing at that time should be viewed with importance in interpreting the Establishment Clause (citing Marsh v. Chambers, 463 U.S. 783, 790 (1983); Walz v. Tax Comm'n, 397 U.S. 664, 681 (1970) (Brennan, J., concurring))).

[223] *See, e.g.*, Zlotnick, *supra* note 79, at 1394 (observing that while "Scalia's originalism sometimes defends a historic practice now under attack," his approach "more often results in no protection for a modern practice"). Of course, by "no protection for a modern practice," Professor Zlotnick could have just as easily said "a limitation on a constitutional guarantee that shows the Constitution neither forbids nor denies the modern practice." Whatever the verbal formulation, the bottom line is that Scalia's traditionalism is better adapted to saying what practices the Constitution defers to representative bodies, than to saying what practices the Constitution categorically forbids (or requires).

[224] *See supra* notes 98–99 and accompanying text.

electioneering).[225] Instead, Scalia would have demanded that the "nonexistence [of election disclosure laws] clearly be attributed to constitutional objections."[226] This erects a high barrier against using tradition alone to invalidate laws under the Free Speech Clause. The historical absence of a governmental practice—or the existence of different practices—does not imply, in and of itself, that the Constitution was understood to forbid the practice.[227] Rather, Scalia would require evidence clearly showing a practice was not engaged in because of a common understanding that it was unconstitutional.[228] Not engaging in the practice—or, again, engaging in different practices—because of political calculus, personal preferences, or because the kinds of lawmaking at issue had not occurred to anyone at the time,[229] would not merit the inference of a constitutional understanding about the practice. This leads Professors Pritchard and Zywicki to deem Scalia's traditionalism a "one-way ratchet"—that is, a method that tends to use tradition negatively (to say what practices ambiguous constitutional guarantees do not restrain) and not positively (to say what practices ambiguous constitutional guarantees forbid).[230]

Can one understand Scalia's use of tradition in *McCreary County* as an application of these general principles? There is a strong case for answering yes. First, notice how Scalia frames the basic legal issue when he concludes that "[h]istorical practices . . . demonstrate that there is a distance between the acknowledgment of a single Creator and the establishment of a religion."[231] This narrow formulation suggests a correspondingly narrow (and negative) use of

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[225] *See, e.g.*, McIntyre v. Ohio Elections Comm'n, 514 U.S. 334, 374 (1995) (Scalia, J., dissenting) (arguing that Justice Thomas's concurrence "recounts other pre- and post-Revolution examples of defense of anonymity in the name of 'freedom of the press,' but not a single one involves the context of restrictions imposed in connection with a free, democratic election, which is all that is at issue here"); *id.* (characterizing "the sum total of the historical evidence marshaled by the concurrence for the principle of *constitutional entitlement* to anonymous electioneering" as "partisan claims in the debate on ratification (which was *almost* like an election) that a viewpoint-based restriction on anonymity by newspaper editors violates freedom of speech").

[226] *Id.* at 375.

[227] *Id.* at 374.

[228] *See id.* at 375 (noting that the nonexistence of a tradition of government prohibition of anonymous electioneering could not be "clearly attributed to constitutional objections").

[229] *See id.* at 374 (observing that "[t]he issue of a governmental prohibition upon anonymous electioneering in particular . . . simply never arose," given that "[t]he idea of close government regulation of the electoral process is a more modern phenomenon, arriving in this country in the late 1800's").

[230] *See* Pritchard & Zywicki, *supra* note 91, at 424–25.

[231] McCreary County v. ACLU, 545 U.S. 844, 894 (2005) (Scalia, J., dissenting). Later, Scalia restates this point as "[i]nvocation of God despite [non-monotheistic Americans'] beliefs is permitted not because nonmonotheistic religions cease to be recognized by the religion clauses of the First Amendment, but because governmental invocation of God is not an establishment." *Id.* at 899–900.

tradition. Saying that "the acknowledgment of a single Creator"[232] or "governmental invocation of God"[233] is "not an establishment"[234] (or "distant" from an establishment) confines Scalia's conclusion to the case at hand. It suggests he is deploying "historical practices" merely as a baseline for comparison with the Ten Commandments displays, and not as a vehicle to define the Establishment Clause exhaustively. Scalia constructs a public record of monotheistic religious acknowledgments as a reference point for evaluating monotheistic displays.[235] Nevertheless, saying that these displays fall within our settled public practices of religious acknowledgments is a far cry from saying that those settled public practices exhaustively define and prospectively delimit all that the Establishment Clause would ever allow. To do so, as Scalia has remarked in the due process context, would "stamp upon our jurisprudence the unchangeableness attributed to the laws of the Medes and the Persians."[236]

Second, Scalia's treatment of neutrality sheds light on what he is doing with tradition. In the Religion Clauses as elsewhere, Scalia subordinates constitutional theory to settled usages that reflect a common understanding of constitutional guarantees.[237] Scalia thus refuses to deploy "neutrality" to strike down governmental religious symbolism that falls within tradition. This is why Scalia reasons that neutrality between religions must "necessarily appl[y] in a more limited sense to public acknowledgment of the Creator."[238] Scalia has identified a settled public practice of acknowledging God, and he does not accept that a "neutrality" principle latent in the Establishment Clause must now scour that practice from public life.[239] Scalia recognizes that even the blandest invocation of "God" or "the Almighty" necessarily violates neutrality with respect to atheists or polytheists, but this supports rather than undermines his resolve not to use neutrality in a blunt fashion.[240] Importantly, he speaks of "monotheists" versus "atheists and polytheists" simply because he has already characterized the Ten Commandments display as plainly monotheistic.[241] It is only in that sense that

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[232] *Id.* at 894.

[233] *Id.* at 900.

[234] *Id.*

[235] *See id.* at 894 ("Publicly honoring the Ten Commandments is thus indistinguishable, insofar as discriminating against other religions is concerned, from publicly honoring God.").

[236] Pac. Mut. Life Ins. Co. v. Haslip, 499 U.S. 1, 31 (1991) (Scalia, J., concurring) (quoting Hurtado v. California, 110 U.S. 516, 528 (1884)); *see supra* notes 140–148 and accompanying text.

[237] *See supra* notes 73–77 and accompanying text. As Scalia remarks in his *Lee v. Weisman* dissent, "[o]ur Religion Clause jurisprudence has become bedeviled (so to speak) by reliance on formulaic abstractions that are not derived from, but positively conflict with, our long-accepted constitutional traditions." 505 U.S. 577, 644 (1991) (Scalia, J., dissenting).

[238] *McCreary County*, 545 U.S. at 893 (Scalia, J., dissenting).

[239] *Id.*

[240] *Id.*

[241] *See supra* notes 52–56 and accompanying text.

Scalia then claims that "the Establishment Clause permits this disregard of polytheists and believers in unconcerned deities, just as it permits the disregard of devout atheists."[242] However, Scalia speaks only in terms of what the Establishment Clause permits, and not in terms of what it commands. His rhetoric is equally compatible with the conclusion that, in a case concerning different religious symbolism, the Establishment Clause would also "permit" the "disregard" of devout monotheists in favor of polytheists or atheists. It does not follow from Scalia's statements that he is projecting an exclusively monotheistic tradition into the Establishment Clause. Taking Scalia's tart rhetoric out of context makes for effective sound-bites, but it does not do justice to what Scalia is saying.[243]

Third, Scalia's characterization of the Ten Commandments displays as simply "acknowledg[ing] a single Creator"[244] clarifies his focus on monotheism. Monotheism turns out to be crucial to Scalia's dissent, but not for the reasons his critics believe. Of course, Scalia's understanding of the display as a "monotheistic acknowledgment" usefully allows him to place it within *Marsh*'s "tolerable acknowledgment of beliefs widely held among the people of this country."[245] However, that characterization also has implications for tradition. For if the question is whether a monotheistic acknowledgement violates our traditions, then

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[242] *McCreary County*, 545 U.S. at 893 (Scalia, J., dissenting).

[243] It does even less justice to Scalia's point to change the quotation from "the Establishment Clause permits *this* disregard of polytheists, [etc.]," *id.* at 893 (emphasis added), to "the Establishment Clause permits *th[e]* disregard of polytheists," Colby, *supra* note 4, at 1109 (emphases added) (alteration in original). The two statements have strikingly different implications. The actual quotation suggests that the Establishment Clause permits a limited form of "disregard" for non-monotheistic sensibilities, while recognizing an entire panoply of constitutional "regard" for non-monotheists in other contexts. The altered quote suggests that Scalia thinks the Establishment Clause permits majorities to ride roughshod over non-monotheists' rights in any context. Because Scalia's "choice of words here (and throughout his dissent) is important," Colby, *supra* note 4, at 1109, it bears noting that, later in his dissent, Scalia explicitly *rejects* the notion that "non-monotheistic religions cease to be religions recognized by the religion clauses of the First Amendment," *McCreary County*, 545 U.S. at 899–900 (Scalia, J., dissenting).

[244] *McCreary County*, 545 U.S. at 894 (Scalia, J., dissenting).

[245] *Id.* at 892, 894 (quoting Marsh v. Chambers, 463 U.S. 783, 792 (1983)). Incidentally, Scalia's statements that "[t]he three most popular religions in the United States, Christianity, Judaism, and Islam—which combined account for 97.7% of all believers—are monotheistic" and also "believe that the Ten Commandments were given by God to Moses, and are divine prescriptions for a virtuous life," *id.* at 894, are made with direct reference to the quoted statement in *Marsh*. In other words, Scalia uses statistics to locate the displays within *Marsh*'s "tolerable acknowledgement of beliefs widely held among the people of this country." *Id.* at 892, 894. Scalia is simply not making an argument, as critics claim, that grounds the displays' constitutionality on some vague standard of "inclusiveness," and it consequently falls flat to level the accusation that "[i]n claiming inclusiveness, Justice Scalia is simply glossing over [atheists or Buddhists or Wiccans], as if they do not exist at all," Colby, *supra* note 4, at 1118.

it makes sense to compare apples to apples and ask whether we have in fact historically engaged in analogously monotheistic public utterances. To answer yes, based on evidence such as presidential inaugural addresses and public mottoes, is not the same thing as saying: "A theology of monotheism is written into the Establishment Clause." It is also different from saying, "Religious acknowledgments that deviate from a generalized monotheism automatically violate the Establishment Clause." Admittedly, Scalia never spells any of this out, but he does drop a footnote giving a specific example of how a Ten Commandments display would violate the Establishment Clause.[246] Scalia explains that the Establishment Clause "would prohibit . . . governmental endorsement of a particular version of the Decalogue as authoritative."[247] It is telling that, when pressed to identify an actual constitutional violation, Scalia does not alter the theological content of the religious display (saying, for instance, "If the government displayed the Sermon on the Mount or a passage from the Qur'an, *that* would violate the Clause"), but instead changes the use the government makes of the display. The Establishment Clause is violated, not by one theological content over another, but by a governmental deployment of text that ventures into the core of historical religious establishments: official promulgation of doctrine.[248]

Fourth, and most importantly, Scalia's approach to tradition explains how he treats the historical record of public religious acknowledgments. Tradition for Scalia, it must be recalled, is an adjunct to original meaning. Scalia, of course, rejects using original intent in both constitutional and statutory interpretation. He refuses to plumb the private motives or expectations of Framers, and instead seeks the public, commonly held understanding of constitutional guarantees contemporaneous with their drafting, promulgation, and ratification.[249] Historical practices, whether contemporaneous or post-adoption, aid Scalia only insofar as they clarify that original, public understanding of the constitutional guarantee. Consequently, when using tradition to interpret the Constitution, Scalia tries to reconstruct a record of public practices from which to infer a common understanding about the reach of constitutional guarantees. The important axiom is that Scalia is not using tradition to discern the Framers' original intent behind the Establishment Clause, whether that intent is characterized as what "religion" the Framers "had in mind" when drafting the Religion Clauses, what forms of Christianity the Framers adhered to or hoped to benefit through the Religion Clauses, or what Framers privately thought about government use of religious language.

Scalia's critics have failed to make this critical distinction between original meaning and original intent. For instance, Souter and Stevens criticize Scalia for a

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[246] *See McCreary County*, 545 U.S. at 894 n.4 (Scalia, J., dissenting).

[247] *Id.*

[248] *See, e.g.*, McConnell, *supra* note 39, at 2131–36 (describing as a central element of the founding-era understanding of an establishment of religion the government's "control over doctrine and liturgy").

[249] *See supra* notes 96–103 and accompanying text.

treatment of the historical record selectively privileging monotheistic utterances and ignoring the Framers' tacit preferences for either Christianity or Deism.[250] Professor Colby likewise accuses Scalia of making a "hash" of history by "selectively drawing upon the historical record to give the appearance of a historical consensus that did not exist"—specifically, by ignoring certain Framers' reservations about government religious language and glossing over explicitly Christian content in some founding-era practices.[251] These criticisms simply fail to address what Scalia, according to his own methodology, is doing with the historical record. Because Scalia is not using tradition to discover original intent, it is irrelevant whether Framers like Madison or Jefferson had private or idiosyncratic reservations about using public religious language. From the viewpoint of original meaning, the important point is that critics can point to precious little public disagreement about the common official deployment of religious utterances.[252]

It is one thing to claim there was "a dispute and outcry among the framing generation" about government religious language, but it is another thing to support that claim with public evidence.[253] The kind of "dispute and outcry" that would

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[250] *See, e.g.*, *McCreary County*, 545 U.S. at 876–81; Van Orden v. Perry, 545 U.S. 677, 724–29 (2005) (Stevens, J., dissenting).

[251] Colby, *supra* note 4, at 1127 & n.120.

[252] *Id.* at 1128. For instance, it is telling that in the 1822 letter of Madison to Edward Livingston—often cited to show a divergence of founding-era opinion on the constitutionality of executive thanksgiving proclamations—Madison admits that "[w]hilst I was honored with the Executive Trust I found it necessary on more than one occasion to follow the example of predecessors" in making such proclamations. *Id.* at 1128 & n.123 (citing Letter from James Madison to Edward Livingston (July 10, 1822), *reprinted in* 5 THE FOUNDERS' CONSTITUTION 105, 105 (Philip B. Kurland & Ralph Lerner eds., 1987)). Madison adds, in his own defense, that he "was always careful to make the Proclamations absolutely indiscriminate, and merely recommendatory." *Id.* In other words, the very evidence showing Madison's private opinion about his actions as President demonstrates, given Madison's inconsistent public actions, a very different common understanding about the limits of the Establishment Clause. Why, in short, would Madison have found it "necessary on more than one occasion" to issue such proclamations, unless the common understanding was that the Establishment Clause did not bar them (indeed, so much so, that Madison felt political pressure to issue them)? The only public dissent from this view that Scalia's critics point to is evidence such as Jefferson's decision not to issue thanksgiving proclamations, and the vote of one representative against a congressional resolution urging Washington to issue a thanksgiving proclamation. *See, e.g.*, *id.* at 1128 nn.125 & 126. This is flimsy material upon which to base a claim that the original public understanding substantially diverged about whether the Establishment Clause permitted executive thanksgiving proclamations. It rather confirms the opposite: the widely held understanding was that the proclamations presented no constitutional question.

[253] *See, e.g.*, *id.* at 1127–28 & nn.123–25, 1134 n.146 (citing JAMES MADISON, DETACHED MEMORANDA 558 (Elizabeth Fleet ed., 1946); Letter from Thomas Jefferson to Rev. S. Miller (Jan. 23, 1808), *reprinted in* 5 THE FOUNDERS' CONSTITUTION, *supra* note 252, at 98, 98–99; Letter from James Madison, *supra* note 252, at 105). Justice Souter relies on similar materials in his *McCreary County* majority opinion to support the

count in Scalia's traditionalism is one that impacted the pattern of public religious language, or, better yet, one that coalesced into a tangible counter-tradition of laws and practices. Private reservations or official inaction derived from personal interpretation or political scruples scarcely reflect a commonly held public understanding of constitutional meaning. To the contrary, virtually every indication of founding-era practices points to a common understanding that public religious acknowledgments did not present a question of constitutional magnitude.[254] Moreover, there appears to be no evidence whatsoever reflecting a public understanding going the other way—i.e., that government religious utterances were avoided because they were commonly thought to violate the Establishment Clause.[255] Historian and Religion Clause scholar Thomas Curry notes there was substantial agreement in the founding generation—even between Baptists and Congregationalists, who disagreed violently about tax-supported churches—regarding the propriety of "Sabbath laws, appointment of chaplains, and designation of days of prayer."[256] Curry remarks that, in 1789, such religious acknowledgments "caused no conflict at either the state or federal level."[257] As for

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conclusion that "there was no common understanding about the limits of the establishment prohibition." 545 U.S. at 879. In the letter to Reverend Miller cited above, Jefferson himself makes the point quite nicely about the difference between private and public actions. *See* Letter from Thomas Jefferson, *supra*, at 99. At the end of the letter, Jefferson "express[es] . . . satisfaction that you have been so good as to give me an opportunity of explaining myself in a *private letter*, in which I could give my reasons more in detail than might have been done in a *public answer*." *Id.* (emphasis added).

[254] *See, e.g.*, Lupu, *supra* note 183, at 775–79; *see also* CURRY, *supra* note 39, at 218 (describing the first Congress's "many involvements with religion" and remarking that "[c]ustoms like days of prayer and thanksgiving appeared not so much matters of religion as part of the common coin of civilized living"); *id.* at 218–19 ("Even Baptists and Congregationalists, so sharply at odds with each other on tax support for churches, shared many common attitudes about such non-disputed Church-State matters as Sabbath laws, appointment of chaplains, and designation of days of prayer. Eventually, these would become subjects of controversy. In 1798, however, they caused no conflict at all at either the state or federal level."); JOHN WITTE, RELIGION AND THE AMERICAN CONSTITUTIONAL EXPERIMENT: ESSENTIAL RIGHTS AND LIBERTIES 76 (2000) (observing that "it is rather clear that the First Session of Congress had little compunction about confirming and continuing the Continental Congress's tradition of supporting chaplains, prayers, Thanksgiving Day proclamations, and religious education, . . . [as well as its] practice of including religion clauses in its treaties, condoning the American edition of the Bible, funding chaplains in the military, and celebrating religious services officiated by religious chaplains," and suggesting that "[t]he ease with which Congress passed such laws does give some guidance on what forms of religious support the First Congress might have condoned").

[255] *Cf.* McIntyre v. Ohio Elections Comm'n, 514 U.S. 334, 375 (1995) (Scalia, J., dissenting) (requiring that the "nonexistence [of election disclosure laws] clearly be attributed to constitutional objections" in order to infer a constitutional prohibition); *see also supra* note 108 and accompanying text.

[256] CURRY, *supra* note 39, at 218–19.

[257] *Id.* at 219.

Madison and Jefferson, each held idiosyncratic opinions about church-state relationships that were out-of-step with commonly held views.[258] Evidence of what they thought privately about religious invocations actually supports the existence of a common understanding that contradicted their views. Moreover, when drafting and debating the Religion Clauses, Madison willingly suspended his private views of church-state relationships in favor of more politically expedient measures that would command broader support.[259] As Professor Gerard Bradley explains, "[t]he

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[258] *See, e.g.*, *id.* at 205 (observing that, while Madison would have supported more far-reaching alterations in church-state relationships, "[r]epeatedly, in his correspondence, as well as in his speeches, [Madison] asserted that he sought achievable amendments that would eschew controversy and gain ratification"); DREISBACH, *supra* note 15, at 27 ("Critics had castigated Jefferson for departing from the practice of his presidential predecessors and virtually all state chief executives, who routinely designated days for prayer, fasting, and thanksgiving."); 2 JAMES HITCHCOCK, THE SUPREME COURT AND RELIGION IN AMERICAN LIFE: FROM "HIGHER LAW" TO "SECTARIAN SCRUPLES" 22–30 (2004) (generally describing Madison's and Jefferson's views on church-state relations, and arguing that Madison's "separationist position, like Jefferson's, was not shared widely enough to make it politically safe to adhere to in all its fullness"); *id.* (observing that "Jefferson's and Madison's separationism was a relatively new development, emerging from the Enlightenment of the eighteenth century," and that "Jefferson's and Madison's positions did not command a consensus in their own day"); WITTE, *supra* note 254, at 48, 68–70, 74, 77 (explaining that Madison unsuccessfully pressed the minority position that protection of religious liberties should be guaranteed in the Constitution against the states themselves). Professor Gerard Bradley discusses a particularly instructive letter from Madison to Jefferson on October 17, 1788, in which Madison explained to Jefferson that, to be effective, rights secured in the Bill of Rights must hew closely to the public's general sentiments. *See* BRADLEY, *supra* note 39, at 72. Madison wrote that he was opposed to "absolute restrictions" being placed in the Bill of Rights "in cases that are doubtful, or where emergencies may overrule them," since such restrictions, "however strongly marked on paper will never be regarded when opposed to the decided sense of the public, and after repeated violations in extraordinary cases they will lose even their ordinary efficacy." Letter from James Madison to Thomas Jefferson (Oct. 17, 1788), *reprinted in* 5 THE WRITINGS OF JAMES MADISON 271, 274 (Gaillard Hunt ed., 1904). Since, as Professor Bradley explains, "Madison divorced a federal bill of rights from his own latitudinal views" of church-state relationships, such a letter confirms the view that Madison did not even attempt to lodge his own views in the Religion Clauses. BRADLEY, *supra* note 39, at 72 (citation omitted); *see* Letter from James Madison, *supra*.

[259] *See, e.g.*, BRADLEY, *supra* note 39, at 72 (characterizing Madison's church-state opinions as "quite alien to the sense of the community," and explaining that, consequently, "Madison divorced a federal bill of rights from his own latitudinal views"); CURRY, *supra* note 39, at 205 (stating Madison "sought achievable amendments that would eschew controversy and gain ratification of three-fourths of the states"). Professor Bradley goes on to explain that "the distance between the First Amendment and Madison's personal philosophy is not hard to locate. His was a highly specific political enterprise with no room for unorthodox views—his own or anyone else's." BRADLEY, *supra* note 39, at 88.

truth is that Madison's personal philosophy, whatever it may have been, has nothing to do with the meaning of the Establishment Clause."[260]

Much the same can be said for the notions that certain Framers had Christianity "in mind" when they approved the Religion Clauses, or that, because many Framers held deistic ideas, they could not have meant to privilege the Judeo-Christian monotheism reflected in a Ten Commandments display.[261] These two arguments are often made against government religious acknowledgments, but they are, of course, incompatible with each other. A coterie of deist Framers would not have imposed through the Constitution an exclusivist Christianity that would have been politically and theologically unpalatable to any respectable deist.[262] In any event, Scalia's interpretative approach would see these claims as irrelevant. As already noted, Scalia is not using tradition to plumb the personal theological convictions of Madison, Jefferson, Washington, Story,[263] or anyone else, whether

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[260] BRADLEY, *supra* note 39, at 87; *see also id.* at 86 (arguing that "[t]he historical fallacy with the most severe consequences is the implication that to the extent Madison 'authored' or 'sponsored' the Establishment Clause, it represents what Madison personally believed was the proper alignment of church and state").

[261] *See supra* notes 207–212 and accompanying text; *see also* Colby, *supra* note 4, at 1126–29.

[262] On the multifaceted deism of prominent Framers, see generally DAVID L. HOLMES, THE FAITHS OF THE FOUNDING FATHERS 49–108 (2006); Avery Cardinal Dulles, *The Deist Minimum*, 149 FIRST THINGS 25, 26–27 (2005). While one should speak of a spectrum of deist beliefs, and while not every deist in the founding era was hostile to orthodox Christianity, deism in any form differed fundamentally from the tenets of traditional Christianity. As David Holmes explains, even so-called "Christian" deists "replaced the Judeo-Christian explanation of existence with a religion far more oriented to reason and nature than to the Hebrew Bible, Christian Testament, and Christian creeds." HOLMES, *supra*, at 44. *See generally id.* at 39–48.

[263] A passage from Justice Story's *Commentaries on the Constitution of the United States* is typically held up to show that the common understanding of the founding era extended constitutional protections only to Christian sects. *See, e.g.*, Van Orden v. Perry, 545 U.S. 677, 727 (2005) (Stevens, J., dissenting). Story did indeed write that the "real object" of the Establishment Clause was "not to countenance, much less to advance Mahometanism, or Judaism, or infidelity, by prostrating Christianity; but to exclude all rivalry among Christian sects." JOSEPH STORY, COMMENTARIES ON THE CONSTITUTION OF THE UNITED STATES § 991, at 700 (Ronald D. Rotunda & John E. Nowak eds., 1987). However, he wrote that sentence to reject what he considered the false claim that the First Amendment was "[a]n attempt to level all religions, and to make it a matter of state policy to hold all in utter indifference." *Id.* § 988, at 700. He also admitted that, while Christians would naturally want the government "to foster, and encourage [Christianity]," the "real difficulty lies in ascertaining the limits, to which government may rightfully go in fostering and encouraging religion." *Id.* §§ 986–87, at 699. Furthermore, Story recognized that "the duty of supporting religion, and especially the Christian religion, is very different from the right to force the consciences of other men, or to punish them for worshipping God in the manner, which, they believe, their accountability to him requires." *Id.* § 990, at 700–01. For the inviolability of the conscience, and for the proposition that "[t]he rights of conscience are, indeed, beyond the just reach of any human power," Story cited none other

deist or Christian.[264] Rather, Scalia takes the language of public religious utterances as itself relevant to how people commonly understood the Establishment Clause.[265] He is constructing a public record, not a Founders' biography. The conclusion he draws from the general range of such utterances is unremarkable: that the common understanding must have been, at the very least, that generalized monotheistic language (such as "God" or "Providence" or "Almighty Being") did not present a constitutional problem when deployed officially by the federal government.[266] Again, Scalia uses that conclusion merely as a baseline for determining the constitutionality of a Ten Commandments display. It is, of course, evident that Scalia's construal of the display is strikingly different from Souter's and Stevens's.[267] But the point is not whether Scalia is correct about that, but rather about his use of tradition to reach that conclusion. His method here is perfectly consistent with his negative use of tradition in other areas, deploying historical practices to demarcate the current practices the Establishment Clause does not reach.

A special word needs to be said about the claim that Scalia glosses over the Christian character of certain founding-era practices (such as Christian language in certain presidential addresses or Christian worship services conducted by

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than Madison and Locke. *Id.* § 990, at 701. Story's chain of reasoning led him to conclude that, in the Religion Clauses, "it was deemed advisable to exclude from the national government all power to act upon the subject" and that "[t]he only security was in extirpating the power [to create a religious establishment]." *Id.* § 992, at 702. Story's conclusion to this part of his *Commentaries* deserves quotation in full:

> Thus, the whole power over the subject of religion is left exclusively to the state governments, to be acted upon according to their own sense of justice, and the state constitutions; and the Catholic and the Protestant, the Calvinist and the Arminian, the Jew and the Infidel, may sit down at the common table of the national councils, without any inquisition into their faith, or mode of worship.

Id. § 992, at 702–03. While this Article is not the place for a complete exposition of Justice Story's understanding of the Religion Clauses, simply reading his comments in context reveals his thought to be far from the "Christian nation" stereotype with which he is often labeled. *See also id.* § 213, at 161 (explaining that the Establishment Clause "seems to prohibit any laws, which shall recognize, found, confirm, or patronize any particular religion, or form of religion, whether permanent or temporary, whether already existing, or to arise in the future").

[264] *See, e.g.*, SCALIA, *supra* note 79, at 38 (explaining that Scalia consults Framers' writings "not because they were Framers and therefore their intent is authoritative and must be the law; but rather because their writings, like those of other intelligent and informed people of the time, display how the text of the Constitution was originally understood"); *see also supra* note 79 and accompanying text.

[265] *See* McCreary County v. ACLU, 545 U.S. 844, 897 (2005) (Scalia, J., dissenting).

[266] *See, e.g.*, CURRY, *supra* note 39, at 218 (remarking that "[c]ustoms like days of prayer and thanksgiving appeared not so much matters of religion as part of the common coin of civilized living").

[267] *See supra* notes 23–28 and accompanying text.

congressional chaplains). The notion is that Scalia conveniently ignores where the real originalist evidence would lead—to an exclusive constitutional preference not for "monotheism" but for Christianity.[268] This again shows a failure to understand Scalia's method. Such criticisms would have much greater force if Scalia understood himself to be constructing the definitive theological history of founding-era religious invocations. However, Scalia does not understand himself as a historian, but as a judge tasked with interpreting the reach of constitutional language.[269] Thus, his treatment of the historical material goes only so far as to answer the question before the Court. Having located a sizeable deposit of religious language of a "generally monotheistic" character, Scalia's interpretative method does not require him to scavenge the rest of the historical record for evidence of more particularized theologies. What Scalia documents is more than enough to allow him to dispose of the case. If it is true that Scalia has overlooked or minimized certain instances of Christian utterances, he would likely be the first to admit that, as a non-historian, he may have oversimplified the monotheistic character of our traditions.[270] Nevertheless, that would not change the fact that, for Scalia, our traditions are nonetheless capacious enough to validate the generalized acknowledgment of "a single Creator" he detects in the Ten Commandments display.[271]

In assessing Scalia's treatment of the distinctively "Christian" historical elements, one must also take into account the level of generality at which Scalia pitches tradition. Much has been written about this aspect of Scalia's traditionalism, but suffice it here to say that the interpretative use Scalia makes of historical practices leads him to define them at a level of abstraction as close as possible to the law or practice at issue.[272] The most controversial and well-known example of this is Scalia's definition of the relevant tradition in *Michael H.* California law presumptively barred a biological father's parental visitation rights, where his child was born into another existing marriage.[273] To measure this law

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[268] *See, e.g.*, *Van Orden*, 545 U.S. at 729 (Stevens, J., dissenting); Colby, *supra* note 4, at 1135–37.

[269] *See, e.g.*, Scalia, *supra* note 95, at 857 (admitting that the originalist judge's task is one "sometimes better suited to the historian than the lawyer").

[270] *See, e.g.*, *id.* at 856 (recognizing that "it is often exceedingly difficult to plumb the original understanding of an ancient text," since "[p]roperly done, the task requires the consideration of an enormous mass of material . . . an evaluation of the reliability of that material . . . [a]nd further still, it requires immersing oneself in the political and intellectual atmosphere of the time").

[271] McCreary County v. ACLU, 545 U.S. 844, 894 (2005) (Scalia, J., dissenting).

[272] The paradigm instance of this appears in the infamous "footnote 6" of Scalia's opinion in *Michael H. See* Michael H. v. Gerald D., 491 U.S. 110, 127 n.6 (1989); *see also* Balkin, *supra* note 93, at 1615–17 (criticizing Scalia's specificity in defining relevant tradition in *Michael H.*); McConnell, *supra* note 93, at 671 & n.47 (describing *Glucksberg*'s adoption of Scalia's substantive due process methodology from *Michael H.* (citing Washington v. Glucksberg, 521 U.S. 702, 721–22 (1997))).

[273] 491 U.S. at 115.

against due process, Scalia sought a tradition in positive law either recognizing or curtailing a biological father's parental rights in that specific situation.[274] He rejected Justice Brennan's alternate method of asking, at a much higher level of generality, whether our traditions recognize "parenthood."[275] For Scalia, the proper level of generality was one that allowed him to compare California's specific policy choice with the most closely analogous policy choices made throughout our history.[276] Commenting on this kind of historical methodology, Judge McConnell explains that "[a]iry generalities like 'the right to be left alone,' or to make choices 'central to personal dignity and autonomy, . . . are too imprecise to support legal analysis" and hence to "determine whether any such traditions exist, or if they exist, what might be included within them."[277]

Scalia's concern for exactness in calibrating the generality of tradition clarifies how he treats the historical record in *McCreary County*. Having defined the Ten Commandments display as akin to "acknowledging a single Creator," Scalia then constructs a public record of religious acknowledgments calculated to give him a precise standard for comparison.[278] In other words, Scalia wants to compare apples to apples—governmental policy choices that correspond as precisely as the historical record allows to the policy choice made in erecting a Ten Commandments display. Scalia, then, would presumably pass over instances of more theologically specific religious language—such as explicitly Christian references—than the usual references to "the Supreme Being" or "Divine Providence." This explains Scalia's almost casual rejoinder to Stevens that "[s]ince most thought the Clause permitted government invocation of monotheism, and some others thought it permitted government invocation of Christianity, [Justice Stevens] proposes that it be construed not to permit any government invocation at all."[279] Indeed, this *a fortiori* argument is Scalia's basic response to the charge of minimizing the Christian character of the historical materials: if there were, so to speak, intertwining traditions of both Christian and monotheistic acknowledgments, then how could an acknowledgment like the Ten Commandments displays—which falls within the broader of those traditions—possibly violate the Establishment Clause?

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[274] *See id.* at 123.

[275] *See id.* at 130.

[276] *Compare id.* at 127 & n.6 (Scalia, J., plurality) ("We refer to the most specific level at which a relevant tradition protecting, or denying protection to, the asserted right can be identified."), *with id.* at 137 (Brennan, J., dissenting) (focusing on the definition of "parenthood").

[277] McConnell, *supra* note 93, at 671. Judge McConnell argues that the Court's "[a]cceptance" of Scalia's method of specificity in substantive due process "is one of the most important aspects of the *Glucksberg* decision." *Id.* at 671 n.47; *see Glucksberg*, 521 U.S. at 721 (insisting that the Court's historical inquiry be based on "a 'careful description' of the asserted fundamental liberty interest" (citations omitted)).

[278] McCreary County v. ACLU, 545 U.S. 844, 894 (2005) (Scalia, J., dissenting).

[279] *Id.* at 897.

Having situated Scalia's dissent within his traditionalism, we can now assess those "difficult" passages where Scalia has been understood as saying that the Establishment Clause permits nothing other than acknowledgments of generalized monotheism. On this view, specific acknowledgments of Christianity, Judaism, or Islam—and, by extension, any non-monotheistic religion—would violate the Establishment Clause, precisely because of their theological content.[280] Scalia's critics have seized on these passages and read his entire dissent in light of them.[281] Concentrated in fewer than three pages, these passages respond to Stevens's claim that a truly principled originalism would recognize the inconvenient truth that

> many of the Founders who are often cited as authoritative expositors of the Constitution's original meaning understood the Establishment Clause to stand for a *narrower* proposition than the plurality, for whatever reason, is willing to accept. Namely, many of the Framers understood the word "religion" in the Establishment Clause to encompass only the various sects of Christianity.[282]

Stevens later reiterates this point in direct reply to Scalia's dissent, asserting that "[t]he original understanding of the type of 'religion' that qualified for constitutional protection under the Establishment Clause likely did not include those followers of Judaism and Islam who are among the preferred 'monotheistic' religions Justice Scalia has embraced in his *McCreary County* opinion."[283] Stevens flatly claims that evidence for the Establishment Clause's original meaning "just as strongly supports a preference for Christianity as it does a preference for monotheism."[284] Finally, Stevens derides the founding generation *in toto* as "men who championed our 'Christian nation' [and] men who had no cause to view anti-Semitism or contempt for atheists as problems worthy of civic concern."[285] Since Stevens does not cite a single source for these sweeping claims, they are perhaps better understood as rhetoric, buttressing the argument that Scalia has culled from the historical materials only what is most palatable to (some) modern sensibilities.

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[280] *See supra* notes 11–15 and accompanying text (discussing the use of neutrality in Justices Souter's and Stevens's opinions).

[281] *See, e.g.*, Colby, *supra* note 4, *passim*; Balkin, *supra* note 93, *passim*.

[282] Van Orden v. Perry, 545 U.S. 677, 726 (2005) (Stevens, J., dissenting).

[283] *Id.*

[284] *Id.* at 728.

[285] *Id.* Again, one wonders how these universalist claims are consistent with the widely accepted historical view that many prominent founders held, to some degree, deistic views of Christianity. Those founders, including Jefferson, Madison, Franklin, Adams, Monroe, and perhaps even Washington, would have been perplexed by the very notion of a "Christian nation," not to mention horrified by the accusation that they had somehow tried to embed that idea, by invisible ink as it were, in the Constitution's Religion Clauses. *See* HOLMES, *supra* note 262, at 40–49.

In any event, the controversial passages in Scalia's dissent are a direct[286] response to Stevens's philippic, and should be read as such.

The most problematic of Scalia's responses is his claim that "those narrower views of the Establishment Clause were as clearly rejected as the more expansive ones."[287] The key term here is "rejected." Does Scalia mean that the common understanding of the Establishment Clause "rejected" the notion that government could acknowledge any but the generalized monotheism uttered by prominent founders? Scalia's comments immediately following might support that reading, since he emphasizes the fact that every example of Framers' religious language "invoked God, but not Jesus Christ."[288] Scalia then cites George Washington's letter to the Hebrew Congregation of Newport, Rhode Island, in which Washington clearly contemplates that our "'liberty of conscience and immunities of citizenship'" extend to non-Christians.[289] That evidence appears to stand for the uncontroversial proposition that the protections offered by the Religion Clauses were not limited to Christians.[290] So, what is Scalia getting at in his response to Stevens, and, specifically, what does he mean that our common understanding "rejected" both the "narrower" and "more expansive" views of the Establishment Clause that Stevens articulates? Again, two things help clarify Scalia's sometimes unwieldly rhetoric: the particular context of his comments, and his overall approach to using tradition in constitutional interpretation.

First, context indicates that Scalia is saying only that our traditions have "rejected" Stevens's "broader" and "narrower" views of the Establishment Clause. The "broader" view, held for instance by Thomas Jefferson, was that the Establishment Clause categorically forbids government religious language.[291] In response, Scalia argues that Jefferson's idiosyncratic view was "plainly rejected"

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[286] *See, e.g.*, McCreary County v. UCLA, 545 U.S. 844, 897 (2005) (Scalia, J., dissenting) (responding directly to Stevens's claim that "some in the founding generation thought that the Religion Clauses of the First Amendment should have a *narrower* meaning, protecting only the Christian religion or perhaps only Protestantism").

[287] *Id.*

[288] *Id.*

[289] *Id.* (quoting Letter from George Washington to the Hebrew Congregation of Newport, R.I. (Aug. 18, 1790), *reprinted in* 6 THE PAPERS OF GEORGE WASHINGTON: PRESIDENTIAL SERIES 284, 285 (Dorothy Twohig et al. eds., 1996)).

[290] *Cf.* STORY, *supra* note 263, § 992, at 702–03 (affirming that, under the Religion Clauses, "the Catholic and the Protestant, the Calvinist and the Arminian, the Jew and the Infidel, may sit down at the common table of the national councils, without any inquisition into their faith, or mode of worship").

[291] *See* Van Orden v. Perry, 545 U.S. 677, 724 (2005) (Stevens, J., dissenting) ("Notably absent from [the plurality's] historical snapshot is the fact that Thomas Jefferson refused to issue the Thanksgiving proclamations that Washington had so readily embraced based on the argument that to do so would violate the Establishment Clause." (citations omitted)).

in common public understanding of the time.[292] By the same token, the "narrower" view described by Stevens is that "the word 'religion' in the Establishment Clause . . . encompass[ed] only the various sects of Christianity," and that, consequently, the original Establishment Clause offered "protection" only to Christians and not to "followers of Judaism and Islam."[293] Scalia responds directly to that claim by arguing that "*those* narrower views . . . were as clearly rejected as the more expansive ones."[294] Thus, Scalia is saying that tradition has "clearly rejected" the narrower view that the Establishment Clause protects only Christian sects.[295] This makes sense of the examples Scalia includes to support that statement. Washington's letter to the Newport Hebrew Congregation confirms that Washington understood the Religion Clauses as offering protection to non-Christians.[296] Additionally, the examples of public religious language demonstrate that common understanding permitted recognition of religious belief more broadly than Christianity proper. Notice what Scalia does not say. He does not say that, simply because our tradition rejected the "narrower" view of the Establishment Clause, the Clause therefore mandates a particular theology of government religious pronouncements. Careful attention to context shows that Scalia is responding to the stark polarities in Stevens's opinion and is not positing a specific theological content for the Establishment Clause itself.

Nevertheless, it is true that Scalia's statements are not as transparent as they ought to be. Only by considering his broader traditionalism does Scalia's meaning become clear. How does Scalia's general approach to tradition help interpret these passages? The answer is fairly straightforward. If Scalia is doing what the critics claim—embedding a preference for generic monotheism in the Establishment Clause—then he is going beyond using tradition negatively and is proposing to use it positively. In other words, Scalia would allegedly use a record of historical practices (monotheistic acknowledgements) and the non-existence or rarity of other practices (explicitly Christian acknowledgments) to infer a constitutional prohibition on religious acknowledgments that diverge from the historical norm. However, we have already seen what high barriers Scalia's own jurisprudence raises against this positive use of tradition in the First Amendment context.[297] As explained in *McIntyre*, what Scalia would need to demonstrate is not merely the non-existence of Christian acknowledgments, but instead, that the non-existence or

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[292] *McCreary County*, 545 U.S. at 896 (Scalia, J., dissenting) ("There were doubtless some who thought [the Clause] should have a broader meaning, but those views were plainly rejected.").

[293] *Van Orden*, 545 U.S. at 726, 728 (Stevens, J., dissenting).

[294] *McCreary County*, 545 U.S. at 897 (Scalia, J., dissenting) (emphasis added). The antecedent of "those" is the statement, earlier in the paragraph, that "some in the founding generation thought that the Religion Clauses . . . should have a *narrower* meaning, protecting only the Christian religion or perhaps only Protestantism." *Id.*

[295] *See id.*

[296] *Id.* at 898 (citing Letter from George Washington, *supra* note 289, at 285).

[297] *See supra* notes 128–131 and accompanying text.

rarity of Christian acknowledgments clearly implies a common understanding that such acknowledgments were constitutionally forbidden.[298]

Scalia does not even attempt to make such a case in his *McCreary County* dissent. By comparison to the careful sifting of historical evidence in *McIntyre*, Scalia's treatment of the historical record in *McCreary County* is almost cursory.[299] Why? Because *McCreary County* is an easy case for Scalia.[300] His parsing of the historical record easily reveals a tradition of religious acknowledgments wide enough to contain the Ten Commandments display. Scalia's handling of the distinctively Christian elements in that record seems more like a counter-argument than an independent historical inquiry. That is, Scalia's remarks about the relative absence of Christian language (compared to the more prevalent monotheistic language)[301] seem calculated merely to dismiss Stevens's arguments about originalism. Scalia is not constructing a record dense enough to prove that Christian language would necessarily violate the Establishment Clause. Nor would Scalia's methodology be satisfied merely by pointing to the historical prevalence of generically monotheistic language. One would still need to draw the negative inference from such evidence that Christian language was commonly understood to be constitutionally outlawed. Just as Scalia recognized in the Free Speech context that "[q]uite obviously, not every restriction upon expression that did not exist in 1791 or in 1868 is *ipso facto* unconstitutional,"[302] it is equally true that not every form of government religious expression that was not commonplace in 1791 or 1868 is *ipso facto* unconstitutional. Scalia's conclusions about Christian language are, in a word, tentative, because Scalia is merely rebutting the claim that an original understanding of the Establishment Clause necessarily privileges Christianity (or Protestant Christianity) and prostrates all other religions. That, too, for Scalia is a claim easily dismissed. The limited effort he gives to dealing with the Christian evidence is enough for that purpose. But Scalia makes scarcely a start on the harder task of inferring a tradition constitutionally forbidding Christian acknowledgments, and that is a good reason for concluding that Scalia's dissent does nothing of the kind.[303]

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[298] *See supra* notes 128–131 and accompanying text; *see also* McIntyre v. Ohio Elections Comm'n, 514 U.S. 334, 375 (1995) (Scalia, J., dissenting).

[299] *See McCreary County*, 545 U.S. at 886–89 (Scalia, J., dissenting).

[300] *See supra* notes 117–118 and accompanying text.

[301] *See supra* notes 268–271 and accompanying text.

[302] *McIntyre*, 514 U.S. at 373 (Scalia, J., dissenting).

[303] Much the same can be said for Scalia's comments about tradition in his *Lee v. Weisman* dissent. *See* 505 U.S. 577, 641 (1991) (Scalia, J., dissenting). There Scalia "concedes" that "our constitutional tradition, from the Declaration of Independence and the first inaugural address of Washington . . . down to the present day, has, with a few aberrations . . . ruled out of order government-sponsored endorsement of religion . . . where the endorsement is sectarian, in the sense of specifying details upon which men and women who believe in a benevolent, omnipotent Creator and Ruler of the world are known to differ (for example, the divinity of Christ)." *Id.* These comments sound, more than anything in *McCreary County*, like a statement about the positive content of religious

It should be said that the critics' case against Scalia goes further than this. Not only is he supposed to be using tradition to embed monotheism in the Establishment Clause, but he is also supposed to be limiting any further development of the Establishment Clause (what this Article has referred to as "freezing" the Establishment Clause around monotheism). If it is unlikely Scalia is doing the first, it is straining credibility to the breaking point to believe he is doing the second. Even in the due process area, Scalia does not do this with tradition. As explained in *Haslip*, Scalia would not regard every divergence from historical practices as an automatic violation of due process.[304] Rather, he would simply use those historical practices as a touchstone for measuring the constitutionality of divergent modern practices.[305] Thus, even if Scalia in *McCreary County* is at his most aggressive in deploying tradition, even then he would not be poised to do what the critics claim.[306] At most, Scalia would be saying that religious acknowledgments that diverge from historical standards (for instance, a Christian symbol, or Islamic language, or a Buddhist text) would not be the easy Establishment Clause cases that a generic monotheism presents. What "test" Scalia might devise to assess these harder cases he does not say, and it is beyond the scope of this Article to devise one.[307] Nevertheless, the point is that even a more stringent analysis would not equal automatic invalidation. More fundamentally, a different analysis would not be the fruit of some blind, ahistorical, or politically motivated preference for "generic monotheism."[308] Instead, it would stem from the same methodological exigencies that inform all of Scalia's traditionalism. This does not make Scalia a religious bigot. It makes him a principled jurist.

In sum, a careful reading of Scalia's dissent, in light of his overall traditionalism, indicates that Scalia uses tradition in *McCreary County* just as he typically does elsewhere: negatively. Traditional practices serve as an objective baseline for measuring the constitutionality of modern practices, and not as a

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tradition. The problem is that, in *Lee*, Scalia appears to be granting these premises merely for the sake of argument, much as, earlier in the same paragraph, he had "acknowledge[d] for the sake of argument" the claims of "some scholars" that by 1790 the term "establishment" had acquired a broader meaning. *Id.* Regardless, *Lee* was just as easy a case for Scalia as *McCreary County*, and he comes nowhere close in either opinion to marshalling the historical evidence to support a positive inference from tradition that any religious acknowledgment, other than generalized monotheism, is unconstitutional. It thus makes little sense to read either opinion as flying in the face of a historical methodology that Scalia has worked out carefully elsewhere.

[304] *See* Pac. Mut. Life Ins. Co. v. Haslip, 499 U.S. 1, 38 (1991) (Scalia, J., concurring); *see also supra* notes 134–159 and accompanying text.

[305] *See id.*; *see also supra* notes 95–103 and accompanying text.

[306] *See, e.g.*, Colby, *supra* note 4, at 1098.

[307] *Cf. Haslip*, 499 U.S. at 33–34 (Scalia, J., concurring) (discussing the Court's difficulties in formulating and applying a "fundamental fairness" standard to assess departures from historical practices under the Due Process Clause).

[308] *See, e.g.*, Colby, *supra* note 4, at 1139 (speculating that Scalia's "preference" for a generic monotheism arises out of a political desire to support the Bush administration's "war on terror").

pretext to project substantive outcomes into the Constitution. Scalia is no more using tradition to embed monotheism in the Establishment Clause than he was using tradition in *Michael H.* to embed the "nuclear family" in the Due Process Clause,[309] and no more than he was using tradition in *Rutan* to embed the patronage system in the Free Speech Clause.[310] Scalia uses tradition in these cases not to confine the law's development behind a wall of traditionalism, but instead to restrain the judiciary from embedding its own evolutionary charter in the Constitution. Scalia's traditionalism defers that development to representative government. If tradition confines anyone in this process, it is Scalia himself. To paraphrase Jaroslav Pelikan, Scalia's tradition is the living constitutionalism of the dead, not the dead constitutionalism of the living.[311]

IV. CONCLUSION

Scalia's dissent in *McCreary County* may well turn out to be important and controversial, but not for the reasons that legal scholars have so far identified. A close reading of the dissent—in light of Scalia's overall approach to using tradition in constitutional interpretation—shows that Scalia is not using tradition to propose an Establishment Clause hardwired by the founders for monotheistic religions. Tradition does not typically serve that kind of positive function in Scalia's jurisprudence, and it does not do so in *McCreary County*. Instead, tradition serves as a tool of judicial restraint, precisely to avoid imprinting the judiciary's own views indelibly onto constitutional guarantees. Moreover, traditional practices for Scalia merely provide a historical baseline for understanding constitutional provisions—they do not freeze the Constitution in place around those traditions.

Far from stifling the ongoing development of our traditions of religious symbolism, Scalia's traditionalism simply defers from courts to representative bodies the mechanism for developing tradition. Seen that way, his approach to religious symbolism in *McCreary County* meshes with his approach to free exercise accommodations in his equally controversial opinion in *Employment Division, Department of Human Resources v. Smith*, the Oregon peyote case.[312] Scalia's *McCreary County* dissent thus fills out his general approach to the Religion Clauses. He searches for relatively clear judicial rules, while seeking to withdraw courts from the business of assessing different forms of religious expression or of weighing the relative merits of religious and secular interests. In *McCreary County*, tradition is the tool Scalia uses for those purposes.

The debate in *McCreary County* among Scalia, Souter, and Stevens fundamentally concerns the proper use of history to interpret the Establishment

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[309] *See supra* note 139 and accompanying text. *But see supra* note 214.

[310] *See supra* note 112 and accompanying text.

[311] *See* Jaroslav Pelikan, THE VINDICATION OF TRADITION 65 (1984) ("Tradition is the living faith of the dead; traditionalism is the dead faith of the living.").

[312] *See* 494 U.S. 872, 874–90 (1990); *see also* sources cited *supra* note 205 and accompanying text.

Clause. At bottom, Scalia's traditionalism may represent his attempt to inject a measure of historical restraint into the Establishment Clause's interpretation. Ever since beginning its Establishment Clause project in 1947, the Court has not only been plagued with bad historical research but, more fundamentally, it has been deeply confused over precisely what questions history was supposed to answer about the Establishment Clause. Scalia's traditionalism in *McCreary County* proposes a historical orientation to the Establishment Clause strikingly different from the usual one. The Establishment Clause would not serve, as it does for Souter and Stevens, as an invitation for the Court to superintend the ongoing development of our traditions of church and state according to the Justices' best lights. Rather, in Scalia's view, the Establishment Clause places an intelligible historical backdrop, grounded in actual practices, against which to assess the modern development of church-state relationships. Regardless of whether Scalia's assessment of our traditions is compelling in this particular case, the view he seems to take of the relationship between history and the Establishment Clause could reorient and clarify the way history is used to interpret the Establishment Clause. Therefore, quite apart from its problematic interpretation by legal scholars, Scalia's Ten Commandments dissent is worth understanding on its own merits. However, doing that requires clearing away misinterpretations of Scalia's approach. This Article has attempted both tasks, simultaneously.

It will not suffice to read the entirety of Scalia's dissent through the prism of a few passages that are both ambiguous and contentious. However, read in light of his traditionalism, it becomes evident that Scalia proposes an essentially restrained approach to using history to interpret the Establishment Clause. Not only does this approach have the merit of inviting judges to formulate clearer standards for establishment issues, but it also acts to confine the discretion of judges according to the intelligible pattern of our historical practices. Those would be no small benefits in an area of jurisprudence as plagued with confusion and incoherence from its modern rebirth as the Establishment Clause.

ABOVE THE LAW: UNLAWFUL EXECUTIVE AUTHORIZATIONS REGARDING DETAINEE TREATMENT, SECRET RENDITIONS, DOMESTIC SPYING, AND CLAIMS TO UNCHECKED EXECUTIVE POWER

Jordan J. Paust*

I. INTRODUCTION

Whether they constitute "torture" or "violence to life and person," it is quite clear that the tactics portrayed in photos from Abu Ghraib Prison, namely the stripping naked and hooding of persons for interrogation purposes and the use of dogs for interrogation and terroristic purposes, are patently illegal interrogation tactics. Such treatment violates the explicit rights of detainees of any status covered by various treaty-based and customary international legal prohibitions of cruel, inhuman, degrading, and humiliating treatment, physical coercion, threats of violence, measures of intimidation, and terrorism during any armed conflict and regardless of purpose or feigned excuses on the basis of reciprocity, reprisals, or alleged necessity.[1]

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[1] *See* Jordan J. Paust, *Executive Plans and Authorizations to Violate International Law Concerning Treatment and Interrogation of Detainees*, 43 COLUM. J. TRANSNAT'L L. 811, 814–22, 835, 838–41, 843–46 (2005); *see also* U.N. Comm. Against Torture [CAT], *Consideration of Reports Submitted by States Parties Under Article 19 of the Convention: Conclusions and Recommendations of the Committee Against Torture, United States of America*, ¶ 14, U.N. Doc. CAT/C/USA/CO/2 (July 25, 2006), *available at* http://www.unhchr.ch/tbs/doc.nsf/898586b1dc7b4043c1256a450044f331/e2d4f5b2dccc0a4cc12571ee00290ce0/$FILE/G0643225.pdf [hereinafter U.N. CAT Report] ("The [United States] should recognize and ensure that the Convention applies at all times, whether in peace, war or armed conflict, in any territory under its jurisdiction . . . ."); *id.* ¶ 15 ("[P]rovisions of the Convention . . . apply to, and are fully enjoyed, by all persons under the effective control of its authorities, of whichever type, wherever located in the world."); *id.* ¶ 19 (stating there exists an "absolute prohibition of torture . . . without any possible derogation"); *id.* ¶ 24 ("The [United States] should rescind any interrogation technique, including methods involving sexual humiliation, 'waterboarding,' 'short shackling' and using dogs to induce fear, that constitutes torture or cruel, inhuman or degrading treatment or punishment, in all places of detention under its de facto effective control, in order to comply with . . . the Convention."); U.N. Econ. & Soc. Council [ECOSOC], Comm. on Human Rights, *Situation of Detainees at Guantánamo Bay*, ¶¶ 9–10, 12–14, 21–22, 24–25, 37, 51–52, 87, U.N. Doc. E/CN.4/2006/120 (Feb. 15, 2006) (*prepared by* Leila Zerrougui et al.), *available at* http://news.bbc.co.uk/1/shared/bsp/hi/pdfs/16_02_06_un_guantanamo.pdf [hereinafter U.N. Experts' Report]; Eur. Parl. Ass., *Report from the Comm. on Legal Affairs & Human Rights: Lawfulness of Detentions by the United States in*

Did President Bush, various members of his administration, and others within the executive branch authorize or abet these and other violations of international law? Have these and other violations been ruled out by the administration, especially after passage of the 2005 Detainee Treatment Act pressed by Senator McCain? The Bush administration has claimed a radical and seemingly unending commander-in-chief power to violate any inhibiting international law or congressional legislation during an alleged "war" on "terrorism," a war that currently has lasted longer than World War II and that Congress has not declared or formally authorized. Does this alleged unrestrained executive power form a basis for claims that the President and other U.S. officials and government personnel are acting "within the law" when the administration authorizes and condones the use of methods of interrogation and treatment of detained persons patently contrary to international law and domestic legislation, the secret detention and secret rendition to other countries of numerous human beings contrary to international law, the domestic surveillance of our phone calls and email contrary to domestic legislation, and the leaking of classified information contrary to domestic legislation? If so, what constitutionally based restraints are there on the President's commander-in-chief power? Is the President bound by the laws of war? Can Congress rightly limit warfare in terms of its objects, operations, modes, and persons affected?

Guantánamo Bay, Doc. No. 10497, § I, ¶¶ 7(i)–(vi), 8(i)–(iii), (vii) (2005), *available at* http://assembly.coe.int/Main.asp?link=/Documents/WorkingDocs/Doc05/EDOC10497.htm [hereinafter P.A. Doc. 10497]; Jose E. Alvarez, *Torturing the Law*, 37 CASE W. RES. J. INT'L L. 175, 176–77 (2006); M. Cherif Bassiouni, *The Institutionalization of Torture Under the Bush Administration*, 37 CASE W. RES. J. INT'L L. 389, 399 (2006); Jennifer Moore, *Practicing What We Preach: Humane Treatment for Detainees in the War on Terror*, 34 DENV. J. INT'L L. & POL'Y 33, 55–56 (2006); Mary Ellen O'Connell, *Affirming the Ban on Harsh Interrogation*, 66 OHIO ST. L.J. 1231, 1244–45 (2005); Mark Brzezinski, *Torture Reports Tarnish US Image*, BOSTON GLOBE, Nov. 22, 2005, at A11; Douglas Jehl, *Report Warned C.I.A. on Tactics in Interrogation*, N.Y. TIMES, Nov. 9, 2005, at A1; Josh White, *Military Lawyers Say Tactics Broke Rules*, WASH. POST, Mar. 16, 2006, at A13 ("[T]op lawyers for the Army, Navy and Marine Corps have told Congress that a number of aggressive techniques used by military interrogators . . . were not consistent with the guidelines in the Army field manual on interrogations . . . . 'The [Field Manual] provides that the Geneva Convention provisions . . . be strictly adhered to in the quest to identify legitimate threats and gain needed intelligence . . . . Among those provisions are the prohibition on physical or moral coercion and the prohibition on subjecting individuals to humiliating or degrading treatment.'"); *infra* note 7 and text accompanying notes 5, 7 (describing the use of dogs, etc.).

II. UNLAWFUL EXECUTIVE AUTHORIZATIONS REGARDING DETAINEE TREATMENT AND RENDITION CONTINUE

A. Actors, Authorizations, Abetments, and the Administration's Public Paper Trails

On December 1, 2005, during a speech at the Council on Foreign Relations, Attorney General Alberto Gonzales, who as White House Counsel had previously abetted denials of detainee rights and protections under the laws of war,[2] stated that what happened at Abu Ghraib was "shocking," "horrific," and not allowed.[3] Despite Attorney General Gonzales's denial of authorizations to use certain tactics depicted in the Abu Ghraib photos, by the time of his speech it was well known that Secretary of State Donald Rumsfeld had expressly authorized the stripping of persons naked, use of dogs, and hooding as interrogation tactics, among other unlawful tactics. Furthermore, in an action memo dated December 2, 2002,[4] and a memo dated April 16, 2003,[5] the Secretary added that if additional interrogation

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[2] *See, e.g.*, Paust, *supra* note 1, at 824–26, 830, 834 n.89, 848 n.138; *infra* note 9 and text accompanying notes 18, 28–37; *see also* Diane Marie Amann, *Abu Ghraib*, 153 U. PA. L. REV. 2085, 2086 (2005) (describing "self-conscious creation of the Executive" and "deliberate executive construction" of a process of interrogation as more generally violative of the law); *id.* at 2094 (noting Gonzales's advice to Bush that "'Geneva's strict limitations'" should not be observed); *infra* note 77. As attorney general, it is evident that Gonzales is less than interested in investigating and prosecuting all persons within or who had previously served in the executive branch who are reasonably accused of authorizing or directly perpetrating war crimes, abetting war crimes, being derelict in duty with respect to war crimes, or directly participating in a common plan to deny protections under the laws of war. *See also infra* text accompanying notes 52–58. Nonetheless, as attorney general it is his duty to do so, and in a normal criminal justice system all apparent criminal activity would be investigated. Concerning such forms of criminal liability, nonimmunity (civil and criminal), and two sets of federal legislation that allow prosecution of civilian or military persons for war crimes in federal district courts, see Paust, *supra* note 1, at 824 n.47, 836 n.94, 852–55. Under the circumstances, the need for an independent special prosecutor has rarely been so apparent.

[3] *See* Alberto R. Gonzales, U.S. Att'y Gen., Dep't of Justice, Remarks at the Council on Foreign Relations Meeting (Dec. 1, 2005) (transcript and audio stream available on the Council on Foreign Relations website, http://www.cfr.org/publication/9344/).

[4] Paust, *supra* note 1, at 840–41.

[5] *Id.* at 843–44 & nn.120 & 122; s*ee also* O'Connell, *supra* note 1, at 1245. *See generally* Jane Mayer, *The Memo: How an Internal Effort to Ban the Abuse and Torture of Detainees Was Thwarted*, NEW YORKER, Feb. 27, 2006, at 32 (addressing Memorandum from Alberto J. Mora, Gen. Counsel of the Navy, to Vice Admiral Albert Church, Inspector Gen., Dep't of the Navy, Statement for the Record: Office of General Counsel Involvement in Interrogation Issues (July 7, 2004), *available at* http://msl1.mit.edu/furdlog//docs/newyorker_articles/2006-02-27_newyorker_the_memo.pdf [hereinafter Mora Memo], memos

techniques for a particular detainee were required he might approve them upon written request.[6] There is no public evidence that the 2003 illegal authorization was withdrawn before adoption of a necessarily inconsistent Department of Defense ("DOD") directive in September 2006 and there is no evidence the patently illegal tactics have been completely ruled out by the Bush administration.

In an August 2005 interview, Brigadier General Janis Karpinski confirmed that Major General Geoffrey Miller was sent to Iraq in 2003 to assure that Secretary Rumsfeld's authorized interrogation tactics were used in Iraq. As Karpinski stated, "he said that he was going to use a template from Guantanamo Bay to 'Gitmo-ize' the operations out at Abu Ghraib" and that a Rumsfeld memo was posted on a pole within Abu Ghraib:

> It was a memorandum signed by Secretary of Defense Rumsfeld, authorizing a short list, maybe 6 or 8 techniques: use of dogs; stress positions; loud music; deprivation of food; keeping the lights on, those kinds of things. And then a handwritten message over to the side that appeared to be the same handwriting as the signature, and that signature was Secretary Rumsfeld's. And it said, 'Make sure this happens' with two exclamation points.[7]

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from Rumsfeld, the role of others in approving and abetting unlawful interrogation tactics, abuse at Guantanamo, and the failure to foster checks and balances and the flow of the best available information within executive decisional processes that might provide ultimate decision makers with sound information required for rational, policy-serving choice).

[6] Paust, *supra* note 1, at 843–44.

[7] Interview by Marjorie Cohn, Professor, Thomas Jefferson Sch. of Law, with Janis Karpinski, Army Reserve Brigadier Gen. (Aug. 3, 2005), *available at* http://www.truthout.org/docs_2005/082405Z.shtml; *see* O'Connell, *supra* note 1, at 1245 (regarding the role of Lt. Gen. Sanchez); Paust, *supra* note 1, at 843 (regarding testimony of DOD officials in 2004 that dogs, "fear up harsh," and humiliating treatment, among other tactics, were approved for use in Iraq); *id.* at 847–48 & nn.135 & 138 (regarding well-publicized authorizations by Lt. Gen. Sanchez and others for the use of "fear up harsh," military working dogs to exploit fear, yelling "to create fear," and similar tactics in Iraq); Bryan Bender, *Prison Rules "Not Humane": Iraq Interrogation Guidelines Possibly Illegal, Officials Concede*, BOSTON GLOBE, May 14, 2004, at A1 (stating tactics of stripping naked, hooding, and the use of dogs were approved); Esther Schrader & Greg Miller, *U.S. Officials Defend Interrogation Tactics*, L.A. TIMES, May 13, 2004, at A11 (asserting that "[t]op U.S. defense officials," including Gen. Richard B. Myers, Chairman of the Joint Chiefs of Staff, testified that dogs, "fear up harsh," and humiliating treatment were authorized for use in Iraq); *Rumsfeld Exposed*, AUSTL., Nov. 28, 2006, at 12 (reiterating these points in an interview in Spain). During a court-martial of Sgt. Michael J. Smith, Colonel Thomas M. Pappas (who controlled military intelligence at Abu Ghraib) testified that Gen. Geoffrey D. Miller had authorized the use of dogs to exploit "Arab fear of dogs." *See* Eric Schmitt, *Judge Orders a Top Officer to Attend Abuse Trial*, N.Y. TIMES, Apr. 19, 2006, at A16; Josh White, *Memo Shows Officer's Shift on Use of Dogs*, WASH. POST, Apr. 15, 2006, at A11. *But see* Neil A. Lewis, *Court in Iraq Prisoner Abuse Case Hears*

In another interview, Brigadier General Karpinski expanded on the mission of Major General Miller to "Gitmoize" the operation:

> [A]nd military intelligence, they were all listening and pay[ing] attention and taking notes . . . . "It's going to change . . . we're going to change the nature of interrogation at Abu Ghraib." . . . Every day, there's more people arriving out at Abu Ghraib to be interrogators, and they either had experience in Afghanistan or down at Guantanamo Bay. Many of them were personally selected by Gen. Miller and sent to Iraq . . . . Many of them were contractors.[8]

In November 2005, David Addington, who was Vice President Cheney's top lawyer and is now his chief of staff, openly advised the Bush administration to continue its illegal policy of noncompliance with the minimal and absolute requirements concerning treatment of detainees in common article 3 of the Geneva Conventions, a policy that Addington helped orchestrate in several ways.[9] Colonel

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Testimony of General, N.Y. TIMES, May 25, 2006, at A19 (stating that, during a court-martial of dog handler Sgt. Santos A. Cardona, Gen. Geoffrey D. Miller testified that he did not recommend to Lt. Gen. Sanchez that dogs be used for intimidation during interrogation, but for "custody and control" of detainees instead).

[8] *Frontline: The Torture Question*, Interview with Janis Karpinski (PBS television broadcast Aug. 5, 2005), *available at* http://www.pbs.org/wgbh/pages/frontline/torture/interviews/karpinski.html; *see also* Paust, *supra* note 1, at 847; *see also* Evan Thomas & Michael Hirsh, *The Debate over Torture*, NEWSWEEK, Nov. 21, 2005, at 28 ("Rumsfeld sent . . . Lt. Gen. Geoffrey Miller . . . to 'Gitmoize' the interrogation techniques in Iraq."); Josh White, *General Asserts Right on Self-Incrimination in Iraq Abuse Cases*, WASH. POST, Jan. 12, 2006, at A1.

[9] *See, e.g.*, Tim Golden & Eric Schmitt, *Detainee Policy Sharply Divides Bush Officials*, N.Y. TIMES, Nov. 2, 2005, at A1 (adding: "Another official said Mr. Addington and others also argued that Mr. Bush had specifically rejected the Article 3 standard in 2002 . . . when he ordered that military detainees 'be treated humanely and [merely], to the extent appropriate and consistent with military necessity, in a manner consistent with the principles of Geneva.'"); David Ignatius, *Cheney's Cheney*, WASH. POST, Jan. 5, 2006, at A19; *see* Thomas & Hirsh, *supra* note 8, at 35 (stating that Addington "has strongly attacked a draft directive from DOD [Deputy Secretary of Defense Gordon] England that would require detainees to be treated in accordance with language drawn from Article Three of the Geneva Conventions"); *infra* notes 11–12. Concerning the role played by Addington, see also Paust, *supra* note 1, at 816–18, 834 n.89; Daniel Klaidman et al., *Palace Revolt*, NEWSWEEK, Feb. 6, 2006, at 34, 34; and Jane Mayer, *The Hidden Power*, NEW YORKER, July 3, 2006, at 44, 44 ("[Addington] played a central role in shaping the Administration's legal strategy . . . . that the President, as Commander-in-Chief, has the authority to disregard virtually all previously known legal boundaries . . . . Under this framework, statutes prohibiting torture, secret detention, and warrantless surveillance have been set aside."). Addington either drafted or provided advice for the Bybee torture memo

Larry Wilkerson, former chief of staff to former Secretary of State Colin Powell, explained that:

> [T]he Secretary of Defense, under the cover of the vice president's office, began to create an environment—and this started from the very beginning when David Addington . . . was a staunch advocate of allowing the president . . . to deviate from the Geneva Conventions . . . . [T]hey began to authorize procedures within the armed forces that led to . . . what we've seen . . . . [S]ome of the ways that they detailed were not in accordance with the spirit of the Geneva Conventions and the laws of war.[10]

Addington's unlawful policy received continued support from Under-Secretary of Defense Stephen A. Cambone and DOD General Counsel William J. Haynes.[11]

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and another memo that claimed the right to violate "legal prohibitions against the inhumane treatment of foreign prisoners held by the C.I.A." Mayer, *supra*. Addington reportedly berated Matthew Waxman, see *infra* note 11, for seeking compliance with humane treatment requirements under the Geneva Conventions "rather than the President's way." Mayer, *supra*, at 54; *see* Mayer, *supra* note 5, at 41; Chitra Ragavan, *Cheney's Guy*, U.S. NEWS & WORLD REP., May 29, 2006, at 32 (stating that Addington helped draft the 2002 Gonzales memo abetting denials of Geneva law protections to detainees; helped draft the infamous Bybee torture memo with John Yoo; participated in the Bush decision to engage in domestic surveillance in violation of the Foreign Intelligence Surveillance Act ("FISA") and claimed that the commander-in-chief power allows the President to violate domestic law, *see also infra* note 133; and was in active opposition to the McCain amendment that reiterated the legal ban on cruel, inhuman, and degrading treatment).

[10] *Morning Edition: Ex-Powell Staffer Discusses Cheney's Role in Iraq War*, Interview with Larry Wilkerson, former Chief of Staff for former Sec'y of State Colin Powell (NPR broadcast Nov. 3, 2005), *available at* http://www.npr.org/templates/story/story.php?storyID=4987598; *see* Mayer, *supra* note 5, at 33 ("[T]hose achievements were largely undermined by a small group of lawyers closely aligned with Vice-President Cheney."); *see also* James Gordon Meek, *Torture's No Good, Army Cadets Told*, N.Y. DAILY NEWS, Nov. 13, 2005, at 24 (reporting Wilkerson's remarks regarding the administration's so-called prohibition of torture: "[t]hat is not what I saw in the paperwork coming out of the vice president's office and the office of the secretary of defense"); *Powell Aide: Torture 'Guidance' from VP*, CNN.COM, Nov. 20, 2005, http://www.cnn.com/2005/US/11/20/torture (stating Wilkerson has no doubt that Cheney provided the philosophical guidance and flexibility for the torture of detainees); *supra* note 9.

[11] *See, e.g.*, Golden & Schmitt, *supra* note 9. Regarding Cambone, see Paust, *supra* note 1, at 846, 847 n.135; Mayer, *supra* note 5, at 40 ("Just a few months ago, Mora attended a meeting in Rumsfeld's private conference room at the Pentagon, called by Gordon England, the Deputy Defense Secretary, to discuss a proposed new directive defining the military's detention policy. The civilian Secretaries of the Army, the Air Force, and the Navy were present, along with the highest-ranking officers of each service, and some half-dozen military lawyers. Matthew Waxman, the deputy assistant secretary of defense for detainee affairs, had proposed making it official Pentagon policy to treat

Moreover, President Bush expressly authorized the denial of absolute rights and protections contained in the Geneva Conventions and therefore authorized violations of the Geneva Conventions in a February 7, 2002, memorandum that apparently has not been withdrawn.[12]

In October 2005, the United States Senate voted ninety to nine to approve an amendment to a defense appropriations bill offered by Senator John McCain (the "McCain amendment") that merely reaffirmed the absolute ban on use of torture and cruel, inhuman, and degrading treatment of any detainee in U.S. custody or control, but Vice President Cheney openly opposed any congressional reiteration of the prohibition.[13] The evident message from Vice President Cheney and several

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detainees in accordance with Common Article Three of the Geneva conventions . . . . England asked for a consensus on whether the Pentagon should support Waxman's proposal . . . . One by one, the military officers argued for returning the U.S. to what they called the high ground. But two people opposed it. One was Stephen Cambone, the under-secretary of defense for intelligence; the other was Haynes . . . . Their opposition was enough to scuttle the proposal . . . . Since then, efforts to clarify U.S. detention policy have languished."); and *infra* notes 71, 73. Regarding Haynes, see Paust, *supra* note 1, at 834–35 n.89, 840–41, 847 n.133; Mayer, *supra* note 5, at 40 (quoted above); Mayer, *supra* note 9, at 50 (noting that Addington reportedly "exerted influence" over Haynes and "'runs the whole operation'" at the Pentagon's Office of the General Counsel); and Ragavan, *supra* note 9, at 32.

[12] *See, e.g.*, Paust, *supra* note 1, at 827–28, 854–55 (including related claims of government lawyers in 2005); *see also id.* at 842–43 (discussing 2004 views of Bush, Rumsfeld, and DOD officials); Mayer, *supra* note 5, at 32 (stating that "in April, 2004, Mora warned his superiors at the Pentagon about the consequences of President Bush's decision, in February 2002, to circumvent the Geneva conventions . . . [and] described as 'unlawful,' 'dangerous,' and 'erroneous' novel legal theories" underlying the decision to violate humanitarian law); Editorial, *Rewriting the Geneva Conventions*, N.Y. TIMES, Aug. 14, 2006, at A20 (stating that Bush's plan to violate the Geneva Conventions continues); *supra* note 9 (regarding interpretations in 2005 and earlier by "Addington and others" of the Bush authorization to deny Geneva protections and Addington's role with respect to the 2002 Gonzales memo, which abetted denials of Geneva law protections). Mora affirmed that the Bush administration's "authorizations rested on three beliefs: that no law prohibited the application of cruelty; that no law should be adopted that would do so; and that our government could choose to apply the cruelty—or not—as a matter of policy depending on the dictates of perceived military necessity." Alberto J. Mora, *An Affront to American Values*, WASH. POST, May 27, 2006, at A25; *see also infra* notes 35–36.

[13] *See, e.g.*, Charlie Savage, *McCain Fights Exception to Torture Ban*, BOSTON GLOBE, Oct. 26, 2005, at A2; Eric Schmitt, *New Army Rules May Snarl Talks with McCain on Detainee Issue*, N.Y. TIMES, Dec. 14, 2005, at A1; *Vice President for Torture*, WASH. POST, Oct. 26, 2005, at A18; *see also* Walter Pincus, *McCain Will Not Bend on Detainee Treatment; He Pushes White House to Ban Torture*, WASH. POST, Dec. 5, 2005, at A18; *infra* note 14. On December 14, 2005, the House voted 308 to 122 to endorse the McCain amendment. Eric Schmitt, *House Defies Bush and Backs McCain on Detainee Torture*, N.Y. TIMES, Dec. 15, 2005, at A14. A year earlier, the full Congress had declared that "the Constitution, laws, and treaties of the United States . . . prohibit the torture or cruel,

of his associates in the administration has been that such forms of illegal treatment should continue under the Cheney-Bush-Addington-Gonzales plan and President Bush's earlier illegal authorizations and orders that still have not been withdrawn.[14] In fact, CIA Director Porter Goss admitted that Agency techniques of interrogation would be restricted under the McCain amendment.[15] Moreover, some

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inhuman, or degrading treatment of foreign prisoners held in custody by the United States." National Defense Authorization Act for Fiscal Year 2005, Pub. L. No. 108-375, § 1091(a)(6), 118 Stat. 1811 (codified at 10 U.S.C. § 801 note (2006)); *see also* 22 U.S.C. § 262d(a) (2006) (defining gross violations of human rights as including "torture or cruel, inhumane, or degrading treatment"); *id.* § 2304(d)(1) (same); Paust, *supra* note 1, at 823 n.43. In the final legislation, the McCain amendment was restricted. *See infra* text accompanying note 86.

Before the House voted to approve the McCain amendment, former CIA Director Stansfield Turner and thirty-two other retired CIA and other professional intelligence and interrogation experts wrote a letter on December 9, 2005, to Senator McCain expressing their "strong support" for the amendment "reinforcing the ban on cruel, inhuman and degrading treatment by all US personnel around the world." Letter from Stansfield Turner et al. to Sen. John McCain (Dec. 9, 2005), *available at* http://www.humanrightsfirst.info/pdf/051209-etn-cia-mcain.pdf. The letter also declared that "use of torture and other cruelty against those in US custody undermines" U.S. efforts to combat terrorist violence and that "[s]uch tactics fail to produce reliable information, risk corrupting the institutions that employ them, and forfeit the ideals that attract others to our nation's cause." *Id.*

[14] Concerning the unlawful plan, authorizations, and orders, see Paust, *supra* note 1, at 827–29, 836, 848 n.138, 854; *see also* JOHN YOO, WAR BY OTHER MEANS ix (2006) (explaining that denial of Geneva protections and coercive interrogation "policies were part of a common, unifying approach to the war on terrorism"); *id.* at 35, 39–40, 43, 171–72, 177, 187, 190–91, 200, 231; Thomas & Hirsh, *supra* note 8, at 26 ("Cheney, with CIA Director Porter Goss in tow, has been lobbying against McCain . . . . Cheney remains adamantly opposed to any check on executive power."); *supra* notes 9–13; and *infra* note 15 and text accompanying notes 18–22, 28–37, 72–73.

[15] *See, e.g.*, *Goss Says CIA "Does Not Do Torture," but Reiterates Need for Interrogation Flexibility*, FRONTRUNNER, Nov. 21, 2005; *see also* YOO, *supra* note 14, at 171 (stating that under the Bush policy, "methods . . . short of the torture ban . . . could be used"); *id.* at 178 (stating that pursuant to the Bush policy, "[m]ethods that . . . do not cause severe pain or suffering are permitted"); *id.* at 187 (stating that "using 'excruciating pain'" related to "coercive interrogation" was not prohibited by the President); *id.* at 190–91 (noting that "coercive interrogation" was used); *id.* at 200 ("If the text of the McCain Amendment were to be enforced as is, we could not coercively interrogate."); Toni Locy & John Diamond, *Memo Lists Acceptable "Aggressive" Interrogation Methods*, USA TODAY, June 27, 2004, at 5A (stating that a secret DOJ August 2002 memo exists that is more detailed than the 2002 Bybee torture memo; it "spelled out specific interrogation methods that the CIA" can use, including "waterboarding"); Mayer, *supra* note 9 (discussing a memo that allows inhumane treatment of persons held by the CIA); Eric Schmitt & Carolyn Marshall, *In Secret Unit's "Black Room," A Grim Portrait of U.S. Abuse*, N.Y. TIMES, Mar. 19, 2006, at A1 (stating that secret sites in Camp Nama near Baghdad and elsewhere in Iraq were used for harsh interrogation by the CIA, military, and others, and tactics

CIA personnel have reported that approved Agency techniques include "striking detainees in an effort to cause pain and fear," "the 'cold cell'. . . [where d]etainees are held naked in a cell cooled to 50 degrees and periodically doused with cold water," and "'waterboarding' . . . [which produces] a terrifying fear of

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included the use of the cold cell); R. Jeffrey Smith, *Fired Officer Believed CIA Lied to Congress*, WASH. POST, May 14, 2006, at A1 (stating that there is a "secret Justice Department opinion in 2004 authorizing the agency's creation of 'ghost detainees'—prisoners removed from Iraq for secret interrogations" in violation of Geneva law—and that CIA officer and former director of intelligence programs at the National Security Agency, Mary O. McCarthy, has discussed CIA policies that authorized treatment she "considered cruel, inhumane or degrading"). For a discussion on the Bush administration's approval of the secret rendition of persons from Afghanistan, Iraq, and elsewhere to other countries in violation of the 1949 Geneva Conventions, the Convention Against Torture and Other Cruel, Inhuman or Degrading Treatment, customary prohibitions of forced disappearance, and other customary and treaty-based international law, see U.N. Experts' Report, *supra* note 1, ¶¶ 26–27, 37, 55, 89 ("The practice of rendition of persons to countries where there is a substantial risk of torture . . . amounts to a violation of the principle of non-refoulement and is contrary to article 3 of the Convention against Torture and Article 7 of the [International Covenant on Civil and Political Rights]"); Eur. Parl. Ass., *supra* note 1, § I, ¶ 7(vi) (stating the United States "has engaged in the unlawful practice of secret detention"); *id.* ¶ 7(vii) (finding the United States "has, by practicing 'rendition' (removal of persons to other countries, without judicial supervision, for purposes such as interrogation or detention), allowed detainees to be subjected to torture and cruel, inhuman or degrading treatment, in violation of the prohibition of *non-refoulement*"); *id.* ¶ 8(vii), (ix); Alvarez, *supra* note 1, at 199, 210–11, 213; Bassiouni, *supra* note 1, at 411–13; Paust, *supra* note 1, at 836–37 & n.96, 850–51 & nn.147–51; Jordan J. Paust, *Post 9/11 Overreaction and Fallacies Regarding War and Defense, Guantanamo, the Status of Persons, Treatment, Judicial Review of Detention, and Due Process in Military Commissions*, 79 NOTRE DAME L. REV. 1335, 1352–56 (2004) [hereinafter Paust, *Post 9/11*]; Leila Nadya Sadat, *Ghost Prisoners and Black Sites: Extraordinary Rendition Under International Law*, 57 CASE W. RES. J. INT'L L. 309, 312 (2006); Christine Spolar, *Ex-spy: CIA, Italians Worked on Abduction; Arrest Warrant Targets 4 Accused Americans*, CHI. TRIB., July 9, 2006, at C10; Craig Whitlock, *Germans Charge 13 CIA Operatives*, WASH. POST, Jan. 31, 2007, at A1; Diane Marie Amann, *The Committee Against Torture Urges an End to Guantanamo Detention*, ASIL INSIGHTS, June 8, 2006, http://www.asil.org/insights/2006/06/insights060608.html; and *infra* notes 19, 44, 88.

drowning,"[16] each of which is manifestly illegal under the laws of war and human rights law and can result in criminal and civil sanctions for war crimes.[17]

With respect to CIA interrogation tactics, it has been reported that Alberto Gonzales "convened his colleagues in his . . . office in the White House," including "top Justice Department and Defense Department lawyers" in July 2002, just before the creation of the infamous Bybee torture memo, to approve illegal interrogation tactics such as "waterboarding."[18] It was also reported that "current and former CIA officers . . . [stated that] there is a presidential finding, signed in 2002, by President Bush, Condoleezza Rice, and then-Attorney General John Ashcroft approving the techniques, including water boarding."[19] It was also

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[16] Editorial, *Director for Torture*, WASH. POST, Nov. 23, 2005, at A18; *see* Paust, *supra* note 1, at 836 n.96, 848 n.138; Douglas Jehl & David Johnston, *C.I.A. Expands Its Inquiry into Interrogation Tactics*, N.Y. TIMES, Aug. 28, 2004, at A10 ("[There were] some extreme tactics used at those secret [CIA] centers, including 'waterboarding.'"); Jonathan S. Landay, *Cheney: Water Torture Is OK, Confirms Method Used on al-Qaeda*, NEWS & OBSERVER (Raleigh, N.C.), Oct. 26, 2006, at A4; Press Release, The White House, Interview of the Vice President, WDA at Radio Day at the White House (Oct. 24, 2006); *supra* note 15.

[17] *See, e.g.*, *In re* Estate of Ferdinand E. Marcos Human Rights Lit., 910 F. Supp. 1460, 1463 (D. Haw. 1995) (noting that "forms of torture" include "[t]he 'water cure,' where a cloth was placed over the detainee's mouth and nose, and water poured over it producing a drowning sensation," and that "[f]orcing a detainee while wet and naked to sit before an air conditioner often while sitting on a block of ice," was among other interrogation tactics); *see* Paust, *supra* note 1, at 836 n.96, 846 (describing the use of "cold air to chill" as another interrogation tactic); *see also infra* notes 180–81.

[18] *See* Thomas & Hirsh, *supra* note 8, at 28; *see also* W. Bradley Wendel, *Legal Ethics and the Separation of Law and Morals*, 91 CORNELL L. REV. 67, 75–76 & n.18 (2005); Editorial, *Impunity*, WASH. POST, Apr. 26, 2005, at A14 (stating that the Gonzales meeting approved simulated drowning); Eric Lichtblau, *Gonzales Says Humane-Policy Order Doesn't Bind C.I.A.*, N.Y. TIMES, Jan. 19, 2005, at A17 (stating that Gonzales still claimed in 2005 that CIA and nonmilitary personnel are outside the reach of any remaining limitations on treatment contained in the Bush February 7, 2002, directive and that a congressional ban on cruel and inhumane treatment does not apply to "'aliens overseas'"). Concerning the evident role of Vice President Cheney, see also Paust, *supra* note 1, at 837–38 & n.97; Landay, *supra* note 16; Mayer, *supra* note 9, at 44–54 (regarding Addington's involvement in the creation of the CIA interrogation memo and effective control of the White House counsel's office, one administration lawyer claimed that although Gonzales would call the meetings, Gonzales was weak and "'an empty suit'"); and *supra* note 10. Concerning other relevant conduct by Gonzales, see *supra* note 2 and *infra* note 28. Concerning the infamous Bybee torture memo, see Paust, *supra* note 1, at 834–35.

[19] Brian Ross, *History of an Interrogation Technique: Water Boarding*, ABC NEWS, Nov. 29, 2005, http://abcnews.go.com/WNT/Investigation/story?id=1356870; *see also* Paust, *supra* note 1, at 836–37 & n.96 (describing a secret authorization for the CIA to use the water boarding technique); *id.* at 848 n.138; Wendel, *supra* note 18, at 84 & n.60 (revealing that a secret presidential directive exists for CIA transfer of detainees for such forms of interrogation); Landay, *supra* note 16; *supra* note 15.

reported that President Bush authorized the CIA to secretly detain and interrogate persons in a September 17, 2001, directive known as a memorandum of notification and that harsh tactics were devised in late 2001 and early 2002.[20] Subsequently, the CIA disclosed the existence of a directive signed by President Bush granting the CIA power to set up secret detention facilities in foreign territory and outlining interrogation tactics that were authorized. The CIA also revealed a document that contains a DOJ legal analysis specifying interrogation methods that the CIA was authorized to use against top al-Qaeda members.[21] There is no indication that the presidential finding or directive has been withdrawn. In fact, during a speech in early September 2006, President Bush admitted that a CIA program has been implemented "to move . . . [high-value] individuals to . . . where they can be held in secret" and interrogated using "tough" forms of treatment and he stated that the CIA program will continue.[22]

Portions of a previously secret December 2002 CIA memo were also disclosed during prosecution of a CIA civilian contractor in August 2006. The

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[20] *See* David Johnson & Douglas Jehl, *At a Secret Interrogation, Dispute Flared over Tactics*, N.Y. TIMES, Sept. 10, 2006, at 1.

[21] *See, e.g.*, Dan Eggen, *CIA Acknowledges 2 Interrogation Memos*, WASH. POST, Nov. 14, 2006, at A29; David Johnston, *CIA Tells of Bush Directive on Handling of Detainees*, N.Y. TIMES, Nov. 15, 2006, at A14.

As noted in the subsequent Nuremberg proceedings, Hitler's directives:

> had the force and effect of law. . . . [but t]o recognize as a defence to [international crimes] that a defendant acted pursuant to the order of his government or of a superior . . . . would be to recognize an absurdity. . . . International Common Law must . . . take precedence over National Law or directives issued by any governmental authority. A directive to violate International Criminal Common Law is therefore void and can afford no protection to one who violates such law in reliance on such a directive.

United States v. Von Leeb (The High Command Case) (1948), *in* 11 TRIALS OF WAR CRIMINALS BEFORE THE NUREMBERG MILITARY TRIBUNALS UNDER CONTROL COUNCIL LAW NO. 10, at 50708 (1952) [hereinafter TRIALS].

[22] Pres. George W. Bush, Remarks from the East Room of the White House (Sept. 6, 2006) (transcript available at http://www.npr.org/templates/story/story.php?storyId=5777480); *see* Julian E. Barnes, *CIA Can Still Get Tough on Detainees*, L.A. TIMES, Sept. 8, 2006, at A1; John Donnelly & Rick Klein, *Bush Admits to CIA Jails; Top Suspects Are Relocated*, BOSTON GLOBE, Sept. 7, 2006, at A1; Ken Herman, *Bush Confirms Secret Prisons, Denies Torture*, ATLANTA J.-CONST., Sept. 7, 2006, at 1A (adding that the CIA secret detention program "had held about 100 detainees"); Anthony Mitchell, *U.S. Seeks Terror Suspects in Secret African Prisons*, VA.-PILOT, Apr. 4, 2007, at A4; Dana Priest, *CIA Holds Terror Suspects in Secret Prisons*, WASH. POST, Nov. 2, 2005, at A1; Mark Silva et al., *Bush Confirms Use of CIA Secret Prisons*, CHI. TRIB., Sept. 7, 2006, at A1; *see also* Paust, *supra* note 1, at 836–37 & n.96; Eggen, *supra* note 21; Johnston, *supra* note 21; *infra* text accompanying note 26.

CIA memo notes that the Bush administration allowed three exceptions to prohibited restraints during interrogation of detainees by CIA personnel, although Geneva Convention and human rights prohibitions, for example, of torture and cruel, inhuman, degrading, or humiliating treatment are patently peremptory. The December 2002 memo prohibits:

> any significant physiological aspects (*e.g.*, direct physical contacts, unusual mental duress, unusual physical restraints or deliberate environmental deprivations)—beyond those reasonably required [1] to ensure the safety and security of our officers and [2] to prevent the escape of the detainee—[3] without prior and specific headquarters guidance.[23]

When asked why President Bush would prefer that Geneva law strictures not apply, John Yoo, who had been a deputy assistant attorney general in the Bush administration and primary author of the infamous Yoo-Delahunty 2002 memo, responded:

> Think about what you want to do when you have captured people from the Taliban and Al Qaeda. You want to interrogate them . . . . [T]he most reliable source of information comes from the people in Al Qaeda you captured . . . . [I]t seems to me that if something is necessary for self-defense, it's permissible to deviate from the principles of Geneva [including the prohibition of torture].[24]

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[23] Priti Patel, *A Wider Torture Loophole?*, L.A. TIMES, Aug. 18, 2006, at B11 (the numbers in brackets have been added to more easily identify the three exceptions set forth in the CIA memo, the third being prior specific approval by CIA headquarters of apparently any interrogation tactic or form of treatment).

[24] *Frontline: The Torture Question*, Interview with John Yoo (PBS television broadcast July 19, 2005), *available at* http://www.pbs.org/wgbh/pages/frontline/torture/interviews/yoo.html; *see* Anne-Marie O'Connor, *In Wartime, This Lawyer Has Got Bush's Back*, L.A. TIMES, Dec. 12, 2005, at E1 (reporting that Yoo was opposed to the McCain amendment and quoting him as stating, "[t]he real effect of the McCain amendment would be to shut down coercive interrogation"); Memorandum from John C. Yoo & Robert J. Delahunty to William J. Haynes II, Gen. Counsel, Dep't of Defense, Application of Treaties and Laws to al-Qaeda and Taliban Detainees 28 (Jan. 9, 2002) (opining in error that "the President has a variety of constitutional powers with respect to treaties, including powers to . . . contravene them" and that "power[s] over treaty matters . . . are within the President's plenary authority"), *available at* http://www.msnbc.msn.com/id/5025040/site/newsweek [hereinafter Yoo & Delahunty Memo]; *infra* note 27; *see also* Nat Hentoff, *Don't Ask, Don't Tell*, THE VILLAGE VOICE (New York City, N.Y.), Feb. 7, 2006, at 28 (reporting John Yoo's outrageous if no longer surprising remarks during a debate: Professor Doug Cassel: "If the President deems that he's got to torture somebody, including by crushing the testicles of the person's child, there is no law that can stop him?" John Yoo: "No treaty." Doug Cassel: "Also, no law by Congress—that is what you wrote in the August

Of course, it is widely known that alleged necessity does not permit violations of relevant Geneva law (such as common article 3), the customary laws of war reflected therein, and nonderogable treaty-based, customary, and peremptory human rights.[25] John Yoo also admitted that "some of the worst possible

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2002 memo . . . ." John Yoo: "I think it depends on why the President thinks he needs to do that."); *infra* note 139. Yoo also stated during the debate in Chicago, "I don't think a treaty can constrain the President as commander in chief." Hentoff, *supra*. *But see* John Yoo, *Terrorists Are Not POWs*, USA TODAY, Nov. 2, 2005, at 12A ("Physical and mental abuse is clearly illegal . . . . The Geneva Conventions—which already prohibit the torture or cruel, inhumane or degrading treatment of prisoners—clearly apply in Iraq."). John Yoo also indicated that among the members of the 2003 DOD Working Group that approved use of various illegal interrogation tactics were JAGS and "general counsels." *Frontline*, *supra*; *see also* YOO, *supra* note 14, at 195 ("[The Office of Legal Counsel] advised the group composed of both military officers and Defense Department civilians."). Nonetheless, several JAG officers did not approve. *See, e.g.*, Paust, *supra* note 1, at 843 & n.119; *see also* Mayer, *supra* note 5, at 32 (stating that Alberto Mora had been a member of the DOD Working Group, but openly disapproved); Mora Memo, *supra* note 5, at 15–19 & n.12. Mora had not seen the final version of the Report and, thus, was one of those who allegedly did not sign it (some reportedly in protest). *See* Paust, *supra* note 1, at 841 n.114.

[25] *See, e.g.*, G.A. Res. 60/148, pmbl., U.N. Doc. A/RES/60/148 (Feb. 21, 2006) ("[F]reedom from torture and other cruel, inhuman or degrading treatment or punishment is a non-derogable right that must be protected under all circumstances, including in times of international or internal armed conflict or disturbance . . . [and] absolute prohibition of torture . . . is affirmed in relevant international instruments."); *id.* ¶ 1 ("Condemns all forms of torture and other cruel, inhuman or degrading treatment or punishment, including through intimidation, which are and shall remain prohibited at any time and in any place whatsoever and can thus never be justified . . . ."); *id.* ¶ 3 ("Condemns any action or attempt by States or public officials to legalize, authorize or acquiesce in . . . [such treatment] under any circumstances, including on grounds of national security or through judicial decisions[.]"); U.N. Experts' Report, *supra* note 1, at 21, ¶¶ 42–43; Bassiouni, *supra* note 1, at 392–93, 395, 406; Richard Goldstone, *Combating Terrorism: Zero Tolerance for Torture*, 37 CASE W. RES. J. INT'L L. 343, 343 (2006); Paust, *supra* note 1, at 815–16, 820–21; *supra* note 1; *see also* United States v. List (The Hostage Case), 11 TRIALS, *supra* note 21, at 1256 (1950) ("[M]ilitary necessity or expediency do not justify a violation of positive rules."); U.S. DEP'T OF THE ARMY, FIELD MANUAL NO. 27-10: THE LAWS OF LAND WARFARE 4, ¶ 3(a) (1956) [hereinafter FM 27-10]; *infra* notes 42, 44, 50. John Yoo still does not understand that "necessity" is not a defense under binding treaty law of the United States of several varieties. *See* YOO, *supra* note 14, at 172 (urging the President to "do what is reasonably necessary"); *id.* at 175 (allowing torture for "good reasons"); *id.* at 200 (allowing torture for "necessity or self-defense"). In response to such claims, Professor Michael Reisman cautioned that such a "practice sits precariously on a slippery—and nasty—slope: torture, by its nature, once sanctioned and however contingent and restrictive . . . metastasizes quickly, infecting the whole process of interrogation." W. Michael Reisman, *Holding the Center of the Law of Armed Conflict*, 100 AM. J. INT'L L.

interrogation methods we've heard of in the press have been reserved for the leaders of al-Qaeda that we've captured"[26] and, with remarkable candor and abandonment, "I've defended the administration's legal approach to the treatment of al-Qaida [sic] suspects and detainees," including the use of torture.[27] More recently, he provided an honest, remorseless, and revealing set of admissions concerning inner-circle decisions to violate Geneva law. As he recounts, detention, denial of Geneva protections, and coercive interrogation "policies were part of a common, unifying approach to the war on terrorism."[28] Instead of "following the Geneva Conventions," the inner circle decided whether such "would yield any benefits or act as a hindrance."[29] John Yoo further stated that the inner circle knew that following Geneva law would "interfere with our ability to . . . interrogate"[30] since "Geneva bars 'any form of coercion,'"[31] "[t]his became a central issue,"[32] and following "'Geneva's strict limitations on . . . questioning'" "made no sense."[33] The inner circle calculated that "treating the detainees as unlawful combatants would increase flexibility in detention and interrogation."[34] The question became merely "what interrogation methods fell short of the torture ban

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852, 855–56 (2006). Moreover, use of cruel and inhuman tactics with impunity encourages contempt for the rule of law.

[26] *Morning Edition: Agreement Reached on McCain Torture Amendment* (NPR radio broadcast Dec. 15, 2005); *see also* YOO, *supra* note 14, at 190–91; Silva, *supra* note 22 (Bush admits that "tough" tactics were used against high-value detainees held in secret detention by the CIA).

[27] John Yoo, *President's Power in Times of War*, TRIB.-REV. (Greensburg, Pa.), Dec. 25, 2005. Concerning the role that Yoo played, see also Paust, *supra* note 1, at 830–33, 834 n.89, 842–43, 856 & n.172, 858, 861–62 & n.198; Klaidman et al., *supra* note 9, at 38 (explaining the infamous 2002 Bybee torture memo was "drafted by Yoo" and a "Yoo memo in March 2003 was even more expansive, authorizing military interrogators . . . to ignore many criminal statutes"); Mayer, *supra* note 5, at 32 (stating that, on February 6, 2003, Alberto Mora asked John Yoo, "'Are you saying the President has the authority to order torture?' 'Yes,' Yoo replied."); Ragavan, *supra* note 9, at 32 (noting Yoo was a drafter, along with Addington and Bybee, of the Bybee torture memo); Mora Memo, *supra* note 5, at 19. *But see* YOO, *supra* note 14, at 196 (stating that Yoo thinks he "would not have said . . . torture" as such to Mora).

[28] YOO, *supra* note 14, at ix; *see also id.* at 30 (noting that, in December 2001 and for months thereafter, Gonzales chaired the meetings "to develop [such] policy"). Concerning the chairing of meetings by Gonzales, see also Paust, *supra* note 1, at 834 n.89, 848 n.138; and *supra* text accompanying note 18.

[29] YOO, *supra* note 14, at 35.

[30] *Id.* at 39.

[31] *Id.*

[32] *Id.*

[33] *Id.* at 39–40.

[34] *Id.* at 43.

and could be used"[35] as "coercive interrogation,"[36] which includes cruel, inhuman, and degrading treatment.[37] In view of the fact that a "common, unifying approach" was devised to use coercive interrogation tactics and President Bush admitted that such tactics and secret detention have been used in other countries, it is obvious that coercive interrogation tactics could migrate also to Iraq and Afghanistan as part of a common plan. It is also clear that several memos and letters (including the Yoo-Delahunty, Gonzales, Ashcroft, Bybee, and Goldsmith memos and letter); presidential and other authorizations, directives and findings; and the 2003 DOD Working Group Report substantially facilitated the effectuation of the common, unifying plan to use coercive interrogation and that use of coercive interrogation tactics were either known or substantially foreseeable consequences.

B. The "We Do Not 'Torture'" Ploy and Refusals to Prosecute

From October through early December 2005, President Bush, Vice President Cheney, CIA Director Goss, Attorney General Gonzales, Secretary of State Rice, and others within the administration were canting an earlier refrain, "we do not torture,"[38] as if that is all that is proscribed under common article 3 and other

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[35] *Id.* at 171; *see also id.* at ix ("[By focusing] on what constituted 'torture' under the law . . . our agents [supposedly, but erroneously] would know exactly what was prohibited, and what was not."); *id.* at 172 ("[The Office of Legal Counsel] addressed this question: what is the meaning of 'torture?'"). This is an example of manifestly and seriously unprofessional advice, leaving unstated, for example, the ban of cruel, inhuman, and degrading treatment under several treaties of the United States and customary international law.

[36] *See id.* at 172 (allowing "harsh interrogation short of torture"); *id.* at 177 (noting that "Congress banned torture, but not interrogation techniques short of it" and "coercive interrogation" is permitted); *id.* at 178 ("Methods that . . . do not cause severe pain or suffering are permitted."); *id.* at 187 (stating "American law prohibits torture but not coercive interrogation," such as "using 'excruciating pain'"); *id.* at 190–92 (noting that coercive interrogation was used and "should not be ruled out").

[37] *Id.* at 200. Such tactics were authorized for use in Iraq. *See* Paust, *supra* note 1, at 843, 847 & n.135.

[38] *See, e.g.*, Seth F. Kreimer, *"Torture Lite," "Full Bodied" Torture, and the Insulation of Legal Conscience*, 1 J. NAT'L SECURITY L. & POL'Y 187, 197–98 (2005); Brian Knowlton, *U.S. Holds Firm as Rice Faces CIA Storm*, INT'L HERALD TRIB., Dec. 5, 2005, at 1; *supra* notes 14–15, 18. *But see* Interview by BBC with Tom Ridge, former Sec'y of Homeland Sec. (Jan. 14, 2005) ("*By and large, as a matter of policy* . . . we do not condone the use of torture to extract information . . . ." (emphasis added)), *quoted in* Kim Lane Scheppele, *Hypothetical Torture in the "War on Terrorism,"* 1 J. NAT'L SECURITY L. & POL'Y 285, 285 n.1 (2005). President Bush used this tactic earlier. *See* Paust, *supra* note 1, at 837 n.96; *see also* Moore, *supra* note 1, at 47, 49–50 (noting that the Bush administration narrowed its definition of "torture" in order to claim interrogation tactics were not "torture").

provisions of the 1949 Geneva Conventions;[39] article 7 of the International Covenant on Civil and Political Rights;[40] articles I and XXV of the American

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[39] *See, e.g.*, Geneva Convention Relative to the Protection of Civilian Persons in Time of War art. 3, Aug. 12, 1949, 6 U.S.T. 3516, 75 U.N.T.S. 287 [hereinafter Civilian Geneva Convention]; *see also id.* arts. 5, 27, 31–33, 49 (prohibiting the transfer of non-prisoners-of-war from occupied territory "regardless of . . . motive," but allowing "evacuation of a given area" to occur within the territory "if security of the population or imperative military reasons so demand," unless evacuation within the territory is otherwise impossible); Paust, *supra* note 1, at 816–20, 850–51; Sadat, *supra* note 15, at 325–31 (noting that transfers from occupied territory violate article 49 of the Geneva Convention). Among the absolute rights and duties reflected in article 3 of the Civilian Geneva Convention are the right to be "treated humanely," freedom from "violence to life and person," freedom from "cruel treatment and torture," and freedom from "outrages upon personal dignity, in particular humiliating and degrading treatment." Civilian Geneva Convention, *supra*, art. 3. Article 3 of the Civilian Geneva Convention now reflects minimum and absolute rights and duties under customary laws of war that are directly applicable in any armed conflict whether portions of the Conventions as such are self-executing. *See, e.g.*, Paust, *supra* note 1, at 813 n.8, 814 n.10, 816–18 & nn.17 & 19; *see also* Hamdan v. Rumsfeld, 126 S. Ct. 2749, 2794 n.57 (2006) (noting that the rights guaranteed by the "Geneva Conventions were written 'first and foremost to protect individuals'" (quoting 4 Int'l Comm. of Red Cross, Commentary: Geneva Convention Relative to the Protection of Civilian Persons in Time of War 21 (1958))). Moreover, the relevant articles in the treaty contain mandatory, self-executing language. *See, e.g.*, Paust, *supra* note 1, at 814 n.10. The rights and duties reflected in article 3 of the Civilian Geneva Convention apply "in all circumstances" to any person who is not taking an active part in hostilities, thus including any person detained and regardless of the person's status (such as a civilian, prisoner of war, unprivileged belligerent, terrorist, or state or nonstate actor). *See, e.g.*, *id.* at 816–18.

Because article 3 applies with respect to any detainee during an armed conflict, there is no gap in the reach of some forms of protection even if the detainee is not a prisoner of war. *Id.* at 817–18 & n.20; *see Hamdan*, 126 S. Ct. at 2796 n.63. Nationals of a "neutral State" who are not prisoners of war have additional rights and protections under Part II of the Civilian Geneva Convention. *See* Civilian Geneva Convention, *supra*, pt. II. A narrow exception for such persons concerning additional protections under Part III of the treaty (containing, for example, articles 27, 31–33, and 49) applies only when they are "in the territory of" the detaining state. Paust, *supra* note 1, at 819 & n.28, 851 n.149. Thus, when the United States detains non-prisoners-of-war outside the United States, they have additional rights and protections under Part III of the Civilian Geneva Convention. *See* Civilian Geneva Convention, *supra*, pt. III.

[40] International Covenant on Civil and Political Rights art. 7, *opened for signature* Dec. 19, 1966, S. Exec. Doc. E, 95-2 (1978), 999 U.N.T.S. 171 (entered into force Mar. 23, 1976) [hereinafter ICCPR] ("No one shall be subjected to torture or to cruel, inhuman or degrading treatment . . . ."); *see* Paust, *supra* note 1, at 820–23. Article 50 of the ICCPR assures that orders, authorizations, conspiracies, complicitous conduct (including memos that abet violations) and other acts within the United States in violation of the provisions of the treaty are proscribed "without any limitations or exceptions." *See* ICCPR, *supra*, art. 50 ("The provisions of the present Covenant shall extend to all parts of federal States without any limitations or exceptions."). Concerning the unavoidable and direct domestic effects of

article 50's mandate even in the face of a declaration of partial non-self-execution with respect to other articles, see JORDAN J. PAUST, INTERNATIONAL LAW AS LAW OF THE UNITED STATES 361–78 (2d ed. 2003) [hereinafter PAUST, INTERNATIONAL LAW]. With respect to any relevant, potentially non-self-executing article, the President has a constitutional duty to faithfully execute the laws, including treaties of the United States, and is unavoidably bound by U.S. treaties. *See id.* at 109, 147 n.77, 169–73; Paust, *supra* note 1, at 814 n.10.

Contrary to the Bush administration's view, the ICCPR also applies wherever a person is subject to the jurisdiction or effective control of a party to the treaty. *See, e.g.*, ICCPR, *supra*, art. 2(1); Legal Consequences of the Construction of a Wall in the Occupied Palestinian Territory, Advisory Opinion, 2004 I.C.J. [108?], 108–11 (July 9) (the ICCPR "is applicable in respect of acts done by a State in the exercise of its jurisdiction outside its own territory"), *reprinted in* 43 I.L.M. 1009, 1039–40 (2004); Alejandre v. Cuba, Case 11.589, Inter-Am. C.H.R., Report No. 86/99, OEA/Ser.L./V/II.106, doc. 3 rev. ¶ 24 n.14 (1999); Coard v. United States, Case 10.951, Inter-Am. C.H.R., Report No. 109/99, OEA/Ser.L./V/II.106, doc. 3 rev. ¶ 37 n.6 (1993); U.N. Experts' Report, *supra* note 1, at 8–9, ¶ 11; U.N. Office of the High Comm'r for Human Rights, Human Rights Comm., *Concluding Observations of the Human Rights Committee: Croatia*, ¶ 9, U.N. Doc. CCPR/C/79/Add.15 (Dec. 12, 1992); U.N. Office of the High Comm'r for Human Rights, Human Rights Comm., *General Comment No. 24: Issues relating to reservations made upon ratification or accession to the Covenant or the Optional Protocols thereto, or in relation to declarations under article 41 of the Covenant*, ¶¶ 4, 12, U.N. Doc. CCPR/C/21/Rev.1/Add.6 (Apr. 11, 1994) [hereinafter *General Comment No. 24*] (stating that rights "should be ensured to all those under a State party's jurisdiction"); U.N. Office of the High Comm'r for Human Rights, Human Rights Comm., *General Comment No. 31: Nature of the General Legal Obligation Imposed on States Parties to the Covenant*, ¶ 10, U.N. Doc. CCPR/C/21/Rev.1/Add.13 (May 26, 2004) ("[The ICCPR applies] to all persons subject to their jurisdiction. This means . . . anyone within the power or effective control of that State Party, even if not situated within the territory of the State . . . . [It applies] to all individuals . . . who may find themselves in the territory or subject to the jurisdiction of a State Party . . . . [It] also applies to those within the power or effective control of the forces of a State Party acting outside its territory, regardless of the circumstances in which such power or effective control was obtained."); *id.* ¶ 11 ("[T]he Covenant applies also in the situation of armed conflict to which the rules of international humanitarian law are applicable."); Paust, *supra* note 1, at 822 n.40. More specifically, there is no territorial limitation set forth with respect to the absolute rights and duties contained in article 7 of the ICCPR. The authoritative decisions and patterns of *opinio juris* noted above are part of subsequent practice and expectation relevant to proper interpretation of the treaty. *See* Vienna Convention on the Law of Treaties art. 31(3)(b), May 23, 1969, S. Exec. Doc. L, 92-1 (1971), 1155 U.N.T.S. 331 [hereinafter Vienna Convention]. Treaties must also be interpreted in light of their object and purpose, *see, e.g.*, *id.* art. 31(1), which in this instance is to assure universal respect for and observance of the human rights set forth in the treaty, *see* ICCPR, *supra*, pmbl. (recognizing "equal and inalienable rights of all" and that "everyone . . . may enjoy" human rights, as well as "[c]onsidering the obligation of States under the Charter of the United Nations to promote universal respect for, and observance of, human rights"). The preamble to a treaty must also be used for interpretive purposes, *see, e.g.*, Vienna Convention, *supra*, art. 31(2), which in this instance reflects the

Declaration of the Rights and Duties of Man;[41] articles 55(c) and 56 of the United Nations Charter;[42] articles 2, 4, and 16 of the Convention Against Torture and

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object and purpose of the ICCPR to achieve universal respect for and observance of the human rights set forth in the treaty. More generally, in view of the general and preemptive duty of States under the United Nations Charter to achieve universal respect for and observance of human rights, human rights treaties are presumptively universal in reach. *See, e.g.*, U.N. Charter arts. 55(c), 56, 103; Vienna Convention, *supra*, art. 31(3)(c), (stating that "any relevant rules of international law" (such as the preemptive human rights duties under the U.N. Charter) are to be taken into account when interpreting a treaty (such as the ICCPR)); ICCPR, *supra*, pmbl.; *infra* note 42. Further, the Supreme Court recognized that treaties are to be interpreted in a broad manner to protect express and implied rights. *See, e.g.*, Paust, *supra* note 1, at 832 n.76.

Concerning the invalidity of an attempted reservation to ICCPR article 7's reach to all forms of torture and cruel, inhuman, and degrading treatment, see U.N. Office of the High Comm'r for Human Rights, Human Rights Comm., *Concluding Observations of the Human Rights Committee: United States of America*, ¶ 279, U.N. Doc. CCPR/C/79/Add.50 (Oct. 3, 1995); Paust, *supra* note 1, at 821 n.40, 823 n.42; *infra* note 60. Article 7 is also expressly among the nonderogable articles in the treaty. ICCPR, *supra*, art. 4(2). Moreover, the rights and duties reflected in article 7 are part of customary and *jus cogens* international law of a nonderogable and universal reach regardless of attempted treaty reservations or understandings. *See, e.g.*, U.N. Experts' Report, *supra* note 1, ¶¶ 8, 21, 42–43; Paust, *supra* note 1, at 821–23. Acceptance of an attempted reservation to a treaty that conflicts with *jus cogens* rights or duties is not possible because such acceptance would render that portion of the treaty void. *See, e.g.*, Vienna Convention, *supra* arts. 53, 64. More generally, the United States has not "declared a 'state of emergency' within the meaning of Article 4" and has not attempted a formal "derogation from its commitments under the Covenant." SECOND AND THIRD PERIODIC REPORT OF THE UNITED STATES OF AMERICA TO THE UN COMMITTEE ON HUMAN RIGHTS CONCERNING THE INTERNATIONAL COVENANT ON CIVIL AND POLITICAL RIGHTS 31–32, paras. 89, 91 (2005) (copy on file with author).

[41] Organization of American States [OAS], American Declaration on the Rights and Duties of Man art. I, Apr. 30, 1948 ("Every human being has the right to life, liberty and the security of his person."), *reprinted in* OEA/Ser.L.V/II.71 doc. 6 rev. 1 (1987); *id.* art. XXV ("Every individual who has been deprived of his liberty . . . has the right to humane treatment . . . ."). As a party to the Charter of the Organization of American States, the United States is bound by the American Declaration, which is a legally authoritative indicium of human rights protected through article 3(k) of the Organization of American States Charter. O.A.S. Charter arts. 3(k), 44, 111, Apr. 30, 1948, 2 U.S.T. 2394, 33 I.L.M. 989 (1994); *see, e.g.*, Interpretation of the American Declaration of the Rights and Duties of Man within the Framework of Article 64 of the American Convention on Human Rights, Advisory Opinion OC-10/89, Inter-Am. Ct. H.R. (ser. A) No. 10, ¶ 45, 47 (July 14, 1989); Roach, Case 9647, Inter-Am. C.H.R., Report No. 147, ¶ 48, OEA/Ser.L/V/II.71, doc. 9 rev. 1 ¶ 15 (1987); The "Baby Boy" Opinion, Case 2141, Inter-Am. C.H.R., Report No. 25, ¶ 16, OEA/Ser.L/V/II.54, doc. 9 rev. 1, ¶ 16 (1981) ("As a consequence of Article 3, 16, 51e, 112 and 150 of [the Charter], the provisions of other instruments and resolutions of the OAS on human rights, acquired binding force. Those instruments and resolutions of the OAS on human rights were approved with the vote of the U.S. Government [including the American Declaration of the Rights and Duties of Man]."); Inter-Am. C.H.R., *Report on the*

Situation of the Inhabitants of Human Rights in Ecuador, ch. VIII, O.A.S. Doc. OEA/Ser.L/V/II.96, doc. 10 rev. 1 (Apr. 24, 1997) ("The American Declaration . . . continues to serve as a source of international obligation for all member states."). The American Declaration also affirms several human rights, now protected through the OAS Charter, including the right to "resort to the courts to ensure respect for . . . [one's] legal rights." American Declaration on the Rights and Duties of Man art. XVIII; *see also* RICHARD B. LILLICH & HURST HANNUM, INTERNATIONAL HUMAN RIGHTS: PROBLEMS OF LAW, POLICY, AND PRACTICE 802–04 (3d ed. 1995); MYRES S. MCDOUGAL ET AL., HUMAN RIGHTS AND WORLD PUBLIC ORDER 198, 316 (1980); DAVID WEISSBRODT ET AL., INTERNATIONAL HUMAN RIGHTS: LAW, POLICY, AND PROCESS 598–600 (3d ed. 1996).

Within the Americas, the United States is also bound to take no action that is inconsistent with the object and purpose of the American Convention on Human Rights, Nov. 22, 1969, O.A.S.T.S. No. 36, 1144 U.N.T.S. 123, which would necessarily include orders, authorizations, complicity, and more direct acts in violation of the human rights protected in the Convention. This obligation arises because the United States has signed the treaty as it awaits ratification. *See, e.g.*, Vienna Convention, *supra* note 40, art. 18, S. Exec. Doc. L, 92-1. Article 5 of the American Convention requires:

> (1) Every person has the right to have his physical, mental, and moral integrity respected.
>
> (2) No one shall be subjected to torture or to cruel, inhuman, or degrading punishment or treatment. All persons deprived of their liberty shall be treated with respect for the inherent dignity of the human person . . . .

American Convention on Human Rights, *supra*, art. 5. Moreover, the United States is bound by article 15(1) of the Inter-American Convention Against Terrorism to respond to terrorism "with full respect for the rule of law, human rights, and fundamental freedoms." Inter-American Convention Against Terrorism, O.A.S. G.A. Res. 1840, art. 15(1), O.A.S. Doc. XXXII-0/02 (June 3, 2002); *see also* David P. Stewart, Commentary, *Human Rights, Terrorism, and Efforts to Combat Terrorism*, *in* HUMAN RIGHTS & CONFLICT 267–70 (Julie A. Mertus & Jeffrey W. Helsing eds., 2006) ("A government cannot justify . . . torturing its captives, on the grounds of combating terrorism . . . . terrorists themselves have human rights and it is not justifiable to commit human rights violations in pursuit of counterterrorism.").

[42] U.N. Charter arts. 55(c), 56. The universally applicable duty of states under articles 55(c) and 56 is to take joint and separate action to achieve "universal respect for, and observance of, human rights" and, thus, not to authorize their violation or to violate them in any location, in any social context (including actual war), and with respect to any person. *See id.*; *see also* G.A. Res. 59/195, pmbl., U.N. Doc. A/LES/59/195 (Mar. 22, 2005) ("[A]ll States have an obligation to promote and protect all human rights . . . , [r]eaffirming that all measures to counter terrorism must be in strict conformity with international law, including international human rights . . . ."); Protection of Human Rights and Fundamental Freedoms While Countering Terrorism, G.A. Res. 59/191, pmbl., U.N. Doc. A/RES/59/191 (Mar. 10, 2005) ("States are under the obligation to protect all human rights and fundamental freedoms of all persons . . . in the context of the fight against terrorism."); *id.* para. 1 ("States must ensure that any measure taken to combat terrorism complies with their obligations under international law, in particular international human rights . . . and

Other Cruel, Inhuman or Degrading Treatment or Punishment ("CAT");[43] and the customary, nonderogable, peremptory, and universally applicable laws of war and human rights reflected therein.[44]

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humanitarian law."); Declaration on Principles of International Law Concerning Friendly Relations and Co-Operation Among States in Accordance with the Charter of the United Nations, G.A. Res. 2625, pmbl., U.N. GAOR, 25th Sess., Supp. No. 28, at 121, U.N. Doc. A/8028 (Oct. 24, 1970) ("Every State has the duty to promote through joint and separate action universal respect for and observance of human rights and fundamental freedoms in accordance with the Charter."); S.C. Res. 1566, pmbl., U.N. Doc. S/RES/1566 (Oct. 8, 2004) (quoted *infra* note 50); Paust, *supra* note 1, at 822 n.41. One uses evidences of the content of customary human rights to identify those rights "guaranteed to all by the Charter." *See* Filartiga v. Pena-Irala, 630 F.2d 876, 882 (2d Cir. 1980) ("[T]he guaranties include, at a bare minimum, the right to be free from torture. This prohibition has become part of customary international law as evidenced and defined by the Universal Declaration of Human Rights . . . . Charter precepts embodied in this Universal Declaration 'constitute basic principles of international law.'" (quoting G.A. Res. 2625 (XXV), at 124, U.N. Doc. A/8082 (Oct. 24, 1970))). In addition to the prohibition of torture, article 5 of the Universal Declaration prohibits "cruel, inhuman or degrading treatment or punishment." Universal Declaration of Human Rights, G.A. Res. 217A (III), art. 5, U.N. GAOR, U.N. Doc. A/810 (Dec. 10, 1948). The more general right to human dignity is mirrored in article 1. *Id.* art. 1. Concerning the status of the Universal Declaration and its use as an authoritative interpretive aid, see MCDOUGAL ET AL., *supra* note 41, at 274, 302, 325–27. *See also* G.A. Res. 59/191, *supra* pmbl. ("Stressing that everyone is entitled to all the rights and freedoms recognized in the Universal Declaration . . . ."); Paust, *supra* note 1, at 822 n.40 (noting that the U.S. Executive has recognized that rights and duties reflected in article 5, among others, are customary international law). The same absolute prohibitions are found in the Resolution on Torture and Other Cruel, Inhuman or Degrading Treatment or Punishment, G.A. Res. 59/182, U.N. Doc. A/RES/59/182 (Mar. 8, 2005), *quoted in* Paust, *supra* note 1, at 821 n.35, and the 1975 Declaration on the Protection of All Persons from Being Subjected to Torture and Other Cruel, Inhuman or Degrading Treatment or Punishment, G.A. Res. 3452, pmbl., U.N. GAOR, 30th Sess., Supp. No. 34, U.N. Doc. A/1034 (Dec. 9, 1975). Article 2 of the 1975 Declaration affirms that each form of prohibited conduct violates human rights under the U.N. Charter. *Id.* art. 2. The 1975 Declaration was also used in *Filartiga* to identify U.N. Charter-based and customary human rights prohibitions. *See* 630 F.2d at 882–83; *see also* Kadic v. Karadzic, 70 F.3d 232, 240 (2d Cir. 1995), *cert. denied*, 518 U.S. 1005 (1996); *In re* Estate of Ferdinand E. Marcos Human Rights Litig., 978 F.2d 493, 499 n.14 (9th Cir. 1992), *cert. denied*, 508 U.S. 972 (1993).

The 1988 Body of Principles for the Protection of All Persons Under Any Form of Detention or Imprisonment also affirms that "[a]ll persons under any form of detention . . . shall be treated in a humane manner and with respect for the inherent dignity of the human person." G.A. Res. 43/173, princ. 1, U.N. GAOR, 43d Sess., Supp. No. 49, U.N. Doc. A/43/49 (Dec. 9, 1988); *see also* Kane v. Winn, 319 F. Supp. 2d 162, 197–99 (D. Mass. 2004) (using the Body of Principles as evidence of customary law).

[43] United Nations Convention Against Torture and Other Cruel, Inhuman or Degrading Treatment of Punishment, Dec. 10, 1984, 1465 U.N.T.S. 85 [hereinafter U.N. Convention Against Torture]; *see also id.* pmbl. ("Having regard to article 5 of the Universal Declaration of Human Rights and article 7 of the International Covenant . . . ,

When interpreting article 7 of the International Covenant, the Human Rights Committee created by the Covenant recognized important related responsibilities of states: "Complaints about ill-treatment must be investigated . . . . Those found guilty must be held responsible, and the alleged victims must themselves have effective remedies at their disposal, including the right to obtain compensation."[45]

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both of which provide that no one may be subjected to torture or to cruel, inhuman or degrading treatment" and "[d]esiring to make more effective the struggle against torture and other cruel, inhuman or degrading treatment . . . throughout the world . . . ."); U.N. CAT Report, *supra* note 1, ¶ 17 ("The State party should ensure that no one is detained in any secret detention facility under its de facto effective control. Detaining persons in such conditions constitutes, per se, a violation of the Convention."); *id.* ¶ 18 ("The State party should adopt all necessary measures to prohibit and prevent enforced disappearance in any territory under its jurisdiction, and prosecute and punish perpetrators, as this practice constitutes, per se, a violation of the Convention."); *id.* ¶ 22 ("[D]etaining persons indefinitely without charge, constitutes per se a violation of the Convention . . . ."); *id.* ¶ 24 (quoted *supra* note 1); *id.* ¶ 25 ("The State party should promptly, thoroughly and impartially investigate all allegations of acts of torture or cruel, inhuman or degrading treatment or punishment by law-enforcement personnel and bring perpetrators to justice, in order to fulfill its obligations under article 12 of the Convention."); *id.* ¶ 26 ("The State party should . . . eradicate all forms of torture and ill-treatment of detainees by its military or civilian personnel, in any territory under its jurisdiction . . . ."); U.N. Experts' Report, *supra* note 1, at 21, ¶ 42 (stating that CAT also encompasses the prohibition of cruel, inhuman or degrading treatment); *id.* ¶ 44 ("[CAT], also encompasses the principle of non-refoulement (art. 3) . . . [and] the prohibition of incommunicado detention . . . ."); *id.* at 24–25, ¶¶ 51, 37, 87 (covering "degrading treatment" and "inhuman treatment"); *id.* ¶ 89 (quoted *supra* note 15); Paust, *supra* note 1, at 823 n.43; *infra* note 88. CAT obligations apply in times of war and relative peace. *See, e.g.*, U.N. Convention Against Torture, *supra*, art. 2 ("No exceptional circumstances whatsoever, whether a state of war or a threat of war, internal political instability, or any other public emergency, may be invoked as a justification . . . ."); U.N. CAT Report, *supra* note 1, ¶ 14.

[44] *See, e.g.*, U.N. Experts' Report, *supra* note 1, at 8, ¶¶ 8, 21, 42–43; O'Connell, *supra* note 1, at 1233, 1235, 1241, 1243–48; Paust, *supra* note 1, at 816–23, 826; *see also* Resolution of the American Society of International Law § 3, Mar. 30, 2006, *available at* http://www.asil.org/events/am06/resolutions.html ("Torture and cruel, inhuman, or degrading treatment of any person . . . are prohibited by international law from which no derogation is permitted.").

[45] Human Rights Commission, *Report of the Human Rights Commission*, 37 U.N. GAOR Supp. (No. 7) at 1, ¶ 1, U.N. Doc. E/CN.4/Sub.2/Add.1/963 (1982). The same types of obligation were reiterated by the U.N. Committee Against Torture in connection with the CAT. *See, e.g.*, U.N. CAT Report, *supra* note 1, at 4, ¶ 18 (requiring that states "prosecute and punish perpetrators" of "enforced disappearance"); *id.* at 5, ¶ 19 (requiring states to "ensure that perpetrators of acts of torture are prosecuted and punished"; "ensure that . . . no doctrine under domestic law impedes the full criminal responsibility of perpetrators"; and "promptly, thoroughly, and impartially investigate any responsibility of senior military and civilian officials authorizing, acquiescing or consenting, in any way, to acts of torture committed by their subordinates"); *id.* at 7, ¶ 25 (requiring states to "promptly, thoroughly

In a later admonition, the committee reminded parties to the treaty that "it is not sufficient" merely to make violations "a crime."[46] States should:

> report the provisions of their criminal law which penalize torture and cruel, inhuman and degrading treatment or punishment, specifying the penalties applicable to such acts, whether committed by public officials or other persons acting on behalf of the State, or by private persons . . . [and t]hose who violate article 7, whether by encouraging, ordering, tolerating or perpetrating prohibited acts, must be held responsible . . . .[47]

States have a duty to afford protection against such acts "whether inflicted by people acting in their official capacity, outside their official capacity or in a private capacity"; "[a]mnesties are generally incompatible with" such duties and "[s]tates may not deprive individuals of the right to an effective remedy . . . ."[48]

More recently, the United Nations Security Council reaffirmed "its condemnation in the strongest terms of all acts of violence or abuses committed against civilians in situations of armed conflict . . . in particular . . . torture and

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and impartially investigate all allegations of torture or cruel, inhuman or degrading treatment or punishment . . . and bring perpetrators to justice"); *id.* at 7, ¶ 26 (requiring states to "promptly and thoroughly investigate such acts, [and] prosecute all those responsible"); *id.* at 7, ¶ 27 ("The Committee is concerned that the Detainee Treatment Act of 2005 aims to withdraw the jurisdiction of the State party's federal courts with respect to habeas corpus petitions, or other claims by or on behalf of Guantanamo Bay detainees, except under limited circumstances. The Committee is also concerned that detainees in Afghanistan and Iraq, under the control of the Department of Defense, have their status determined and reviewed by an administrative process of that department . . . . The State party should ensure that independent, prompt and thorough procedures to review the circumstances of detention and the status of detainees are available to all detainees, as required by article 13 of the Convention."); *id.* at 7, ¶ 28 ("The State party should ensure, in accordance with the Convention, that mechanisms to obtain full redress, compensation and rehabilitation are accessible to all victims of acts of torture or abuse, including sexual violence, perpetrated by its officials."); *id.* at 8, ¶ 32 (requiring states to "ensure that all allegations of violence in detention centres are investigated promptly and independently, perpetrators are prosecuted and appropriately sentenced and victims can seek redress, including appropriate compensation").

[46] Human Rights Committee, *Compilation of General Comments and General Recommendations Adopted by Human Rights Treaty Bodies, General Comment No. 20*, 6 ¶ 1, 30 ¶ 8, U.N. Doc. HRI/GEN/1 (Sept. 4, 1992) [hereinafter *General Comment No. 20*].

[47] *Id.* ¶13 2. The same obligations were reflected in a recent U.N. General Assembly resolution. *See* G.A. Res. 60/148, *supra* note 25, ¶ 4 ("[A]ll allegations . . . must be promptly and impartially examined . . . [and] those who encourage, order, tolerate or perpetrate acts of torture must be held responsible and severely punished . . . ."); *id.* ¶ 5 ("[A]ll acts of torture must be made offences under domestic criminal law . . . [and] perpetrators . . . must be prosecuted and punished . . . .").

[48] *General Comment No. 20*, *supra* note 46, ¶¶ 2, 15.

other prohibited treatment."[49] The Security Council also demanded that all parties to an armed conflict "comply strictly with the obligations applicable to them under international law, in particular those contained in the Hague Conventions of 1899 and 1907 and in the Geneva Conventions of 1949"[50] and emphasized "the responsibility of States to comply with their relevant obligations to end impunity and to prosecute those responsible for war crimes, genocide, crimes against humanity and serious violations of international humanitarian law."[51]

Despite such requirements, for more than five years the Bush administration has furthered a general policy of impunity by refusing to prosecute any person of any nationality under the War Crimes Act or alternative legislation,[52] the torture statute,[53] genocide legislation,[54] and legislation permitting prosecution of certain civilians employed by or accompanying U.S. military forces abroad.[55]

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[49] S.C. Res. 1674, ¶ 5, U.N. Doc. S/RES/1674 (Apr. 28, 2006).

[50] *Id.* ¶ 6; *see also* S.C. Res. 1566, pmbl., U.N. Doc. S/RES/1566 (Oct. 8, 2004) (requiring states to "ensure that any measures taken to combat terrorism comply with all their obligations under international law . . . , in particular international human rights, refugee, and humanitarian law"). Decisions of the Security Council are binding on the United States and other members of the United Nations under articles 25 and 48 of the U.N. Charter. As treaty-based obligations, they bind the President. *See infra* note 97.

[51] S.C. Res. 167, ¶ 8, U.N. Doc. S/RES/1674 (Apr. 28, 2006). Concerning the customary international legal responsibility *aut dedere aut judicare* to either initiate prosecution of or to extradite all persons reasonably accused of such crimes and other violations of customary international criminal law, see JORDAN J. PAUST ET AL., INTERNATIONAL CRIMINAL LAW 10, 12, 131–44, 155, 169 (3d ed. 2007). Article 7 of CAT mirrors this customary legal duty. *See* CAT, *supra* note 43, art. 7(1). The same duty is reflected in the Geneva Conventions. *See, e.g.*, Civilian Geneva Convention, *supra* note 39, art. 146.

[52] *See* War Crimes Act, 18 U.S.C. § 2441 (2006). Alternative legislation allowing prosecution of any war crime in federal district courts is based on 10 U.S.C. § 818 used in conjunction with 18 U.S.C. § 3231. *See* Paust, *supra* note 1, at 824 n.47; *see also* Bassiouni, *supra* note 1, at 407, 412.

[53] 18 U.S.C. §§ 2340–2340A.

[54] *Id.* §§ 1091–1093.

[55] The Military Extraterritorial Jurisdiction Act, *id.* § 3261; *see* Bassiouni, *supra* note 1, at 415–16; Heather Carney, Note, *Prosecuting the Lawless: Human Rights Abuses and Private Military Firms*, 74 GEO. WASH. L. REV. 317, 328 (2006) ("The Coalition Provisional Authority in Iraq declared that 'disciplining contractor personnel is the contractor's responsibility.' This lack of accountability is disturbing . . . ." (quoting Attorney Scott Horton, Barry Yeoman, *Dirty Warriors*, Mother Jones, May/June 2003, at 35)); Robin M. Donnelly, Note, *Civilian Control of the Military: Accountability for Military Contractors Supporting the U.S. Armed Forces Overseas*, 4 GEO. J.L. & PUB. POL'Y 237, 250–54 (2006); David Johnston, *U.S. Inquiry Falters on Civilians Accused of Abusing Detainees*, N.Y. TIMES, Dec. 19, 2006, at A1; *see also* Julian E. Barnes, *CIA Contractor Guilty in Beating of Detainee*, L.A. TIMES, Aug. 18, 2006, at A18 (adding that the Afghan detainee later died in custody and that human rights organizations have been critical of the lack of other indictments of CIA personnel or "contractors"); *cf.* Patel, *supra*

Furthermore, during the last five years no known criminal investigation was commenced against U.S. military personnel or persons of any other status for authorizing or participating in the manifestly illegal transfer of non-prisoner-of-war detainees from occupied territory in violation of the Geneva Conventions,[56] illegal rendition in violation of the CAT and other international law,[57] or the crime against humanity known as forced disappearance of individuals that President Bush admitted has been and will continue to be used under a CIA program of secret detention and what President Bush cryptically refers to as "tough" interrogation.[58]

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note 23 (stating that a CIA contractor was charged with abusing a detainee in U.S. custody); Andrea Weigl, *Passaro Convicted of Assaulting Afghan*, NEWS & OBSERVER (Raleigh, N.C.), Aug. 18, 2006, at A1 (discussing the conviction of a CIA civilian contractor, David Passaro, for assault resulting in bodily injury of a detainee on a U.S. military base in Afghanistan under the Patriot Act, which was found to be applicable to the conduct of U.S. nationals on U.S. facilities abroad). By definition, civilian contractors are not members of the armed forces and are not combatants entitled to combatant immunity for lawful acts of warfare or prisoner of war status upon capture.

[56] Concerning the illegal Bush policy and practice of transferring persons from occupied territories and the application of relevant Geneva law, see Alvarez, *supra* note 1, at 199–208; Paust, *supra* note 1, at 850–51 & nn.147–51; Sadat, *supra* note 15, at 325–31.

[57] *See, e.g.*, *supra* notes 15, 43, 45; *infra* note 88.

[58] *See, e.g.*, *supra* notes 19–22. The Bush administration's policy has been to detain numerous individuals in Afghanistan and Iraq, at Guantanamo Bay, Cuba, and in many other places without disclosing the whereabouts or names of all persons detained, or whether secret detention was under the control of the CIA or (until September 7, 2006) military personnel. Such forms of secret detention are violations of the customary prohibition of forced disappearance. *See, e.g.*, Declaration on the Protection of All Persons from Enforced Disappearance, G.A. Res. 47/133, U.N. GAOR, 47th Sess., U.N. Doc. A/RES/47/133 (Dec. 18, 1992), *reprinted in* 32 I.L.M. 903 (1993); Rome Statute of the International Criminal Court art. 7(2)(i), U.N. Doc. A/CONF.183/9 (July 1, 2002), *available at* http://www.un.org/law/icc/statute/english/rome_statute(e).pdf (stating forced disappearance is a crime against humanity); Inter-American Convention on Forced Disappearance of Persons art. II, June 9, 1994, *reprinted in* 31 I.L.M. 1529 (1994); P.A. Doc. 10497, *supra* note 1, § I, ¶¶ 7(vi), 8(vii)–(viii); *In re* Marcos Human Rights Litig., 25 F.3d 1467, 1475 (9th Cir. 1994); Tachiona v. Mugabe, 234 F. Supp. 2d 401, 416, 426 (S.D.N.Y. 2002); Xuncax v. Gramajo, 886 F. Supp. 162, 184–85 (D. Mass. 1995); Forti v. Suarez-Mason, 694 F. Supp. 707, 710–12 (N.D. Cal. 1988); *see also* 22 U.S.C. § 2151n(a); *id.* § 2304(d) ("[C]ausing the disappearance of persons" is among the "flagrant" and "gross violations of internationally recognized human rights"); S. REP. NO. 102-249, at 9 (1991), *quoted in Xuncax*, 886 F. Supp. at 172; U.N. CAT Report, *supra* note 1, ¶¶ 17–18; RESTATEMENT (THIRD) OF THE FOREIGN RELATIONS LAW OF THE UNITED STATES § 702(c) & cmt. n, at 1 (1987); JEAN-MARIE HENCKAERTS & LOUISE DOSWALD-BECK, CUSTOMARY INTERNATIONAL HUMANITARIAN LAW: RULES 340–43, 421, 439 (ICRC ed. 2005); U.S. DEP'T OF ARMY, OPERATIONAL LAW HANDBOOK 39–40 (2003) ("[C]ausing the disappearance of individuals is a violation of customary international law."); Alvarez, *supra* note 1, at 199, 210–11, 213; Bassiouni, *supra* note 1, at 411–13; Maureen R. Berman &

During a European trip in early December 2005, Secretary Rice shifted the administration's previous stance when she was pressured to admit that more than torture is proscribed. She announced in guarded language that, "as a matter of U.S. policy, [U.S.] obligations under the CAT, which prohibits cruel, inhumane and

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Roger C. Clark, *State Terrorism: Disappearances*, 13 RUTGERS L.J. 531, 531 (1982); Paust, *Post 9/11*, *supra* note 15, at 1352–56; Sadat, *supra* note 15, at 322–23; *supra* notes 15, 43, 45. In the context of wars in Afghanistan and Iraq, the policy also creates violations of the Geneva Conventions that can be prosecuted as war crimes. *See* Civilian Geneva Convention, *supra* note 39, arts. 5, 25, 71, 106–07, 143; [International Committee of the Red Cross, IV COMMENTARY, GENEVA CONVENTION RELATIVE TO THE PROTECTION OF CIVILIAN PERSONS IN TIME OF WAR OF AUGUST 12, 1949, at 56–58 (J. Pictet ed., 1958) [hereinafter IV COMMENTARY]; Paust, *supra* note 1, at 836–37 n.96; Paust, *Post 9/11*, *supra* note 15, at 1355 n.84; *see also* United States v. Altstoetter (The Justice Case), *in* 3 TRIALS, *supra* note 21, at 1058 (1951) ("Night and Fog [prisoners] . . . were kept secretly and not permitted to communicate in any manner with their friends and relatives. This is inhumane treatment . . . . [T]he victim was held incommunicado and the rest of the population only knew that a relative or citizen had disappeared in the night and fog; hence, the name of the decree. If relatives or friends inquired, they were given no information. If diplomats or lawyers inquired concerning the fate of . . . [a victim], they were told that the state of the record did not admit of any further inquiry or information."). The U.S. Supreme Court also condemned the totalitarian practice of using "unrestrained power to seize persons . . . [and] hold them in secret custody, and wring from them confessions by physical and mental torture." Ashcraft v. Tennessee, 322 U.S. 143, 155 (1944).

In addition to other customary and treaty-based international law concerning illegal rendition and forced disappearance of persons, European countries have relevant regional obligations. Article 8(2) of the European Convention for the Prevention of Torture and Inhuman or Degrading Treatment or Punishment, Mar. 1, 1992, Europ. T.S. No. 126 (1987), requires signatories to provide the European Committee for the Prevention of Torture and Inhuman or Degrading Treatment or Punishment full information on all places where persons deprived of their liberty are held. The European Court of Human Rights has held that a state violates article 2 of the European Convention for the Protection of Human Rights and Fundamental Freedoms, Nov. 4, 1950, 213 U.N.T.S. 221, if the authorities fail to take reasonable measures to prevent the disappearance of a person with respect to whom there is a particular risk of disappearance. *See* Gongadze v. Ukraine, App. No. 34056/02, ¶¶ 175–80 (2005), *available at* http://cmiskp.echr.coe.int/tkp197/view.asp?item=1&portal=hbkm&action=html&highlight=gongadze%20%7C%2039056/02&sessionid=10198806&skin=hudoc-en; Mahmut Kaya v. Turkey, App. No. 22729/93, 28 Eur. H.R. Rep. 1, 25–28 (1998) (Commission report). Further, articles 2 and 13 are violated when authorities fail to investigate disappearances. *See* Cyprus v. Turkey, App. No. 25781/94, 35 Eur. Ct. H.R., 30, 821–24, 851–53 (2002); Kurt v. Turkey, App. No. 24276/94, 27 Eur. H.R. Rep. 373, 410–17 (1998) (adding that article 5 requires the authorities to take effective measures to safeguard against a risk of disappearance and to conduct prompt and effective investigations).

degrading treatment . . . extend to U.S. personnel wherever they are."[59] However, U.S. obligations to prohibit cruel, inhuman, and degrading treatment are not limited to those under the CAT; U.S. obligations under that treaty and others are not merely U.S. policy but are also law; and "U.S. obligations under the CAT" are more extensive than the administration admits, especially in view of the fact that an attempted U.S. reservation that sought to avoid the treaty's unyielding prohibition of all forms of cruel, inhuman, and degrading treatment and to cover merely those that are prohibited under domestic U.S. law by the Fifth, Eighth, and Fourteenth Amendments to the U.S. Constitution is necessarily incompatible with the object and purpose of the treaty and, as such, is void *ab initio* as a matter of law.[60]

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[59] Guy Dinmore & Demetri Sevastopulo, *Rice Shifts Stance on Interrogation to Shake Off Claims of Torture Abroad*, FIN. TIMES (London), Dec. 8, 2005, at 1; David Holley & Paul Richter, *Rice Fails to Clarify U.S. View on Torture*, L.A. TIMES, Dec. 8, 2005, at A1.

[60] *See, e.g.*, Vienna Convention, *supra* note 40, art. 19(c), 1155 U.N.T.S. at 338; U.N. Experts' Report, *supra* note 1, at 22 (regarding the U.S. "obligation to fully respect the prohibition of torture and ill-treatment" and attempted U.S. reservations to the CAT and the ICCPR, the Experts "recall the concerns of the relevant treaty bodies, which deplored the failure of the United States to include a crime of torture consistent with the Convention definition in its domestic legislation and the broadness of the reservations made by the United States"); *id.* at 45 n.48 (quoting U.N. Office of the High Comm'r for Human Rights, CAT, *Conclusions and Recommendations of the Committee Against Torture: United States of America*, ¶¶ 179–80, U.N. Doc. A/55/44 (May 15, 2000) ("The Committee expresses its concern about: (a) The failure of the State Party to enact a federal crime of torture in terms consistent with article 1 of the Convention; (b) The reservation lodged to article 16, in violation of the Convention, the effect of which is to limit the application of the Convention . . . ."); U.N. Office of the High Comm'r for Human Rights, Human Rights Comm., *Concluding Observations of the Human Rights Committee: United States of America*, ¶¶ 266–304, U.N. Doc. CCPR/C/79/Add.50, A/50/40 (Oct. 3, 1995) ("[¶] 279. The Committee regrets the extent of the State party's reservations, declarations and understandings to the Covenant. It believes that, taken together, they intended to ensure that the United States has accepted only what is already the law of the United States. The Committee is also particularly concerned at reservations to article 6, paragraph 5, and article 7 of the Covenant, which it believes to be incompatible with the object and purpose of the Covenant.")); Paust, *supra* note 1, at 823 n.43; *see also*, Office of the United Nations High Commissioner for Human Rights, Declarations and Reservations, http://www.ohchr.org/english/law/cat-reserve.htm (last visited Jan. 23, 2007) (listing objections to the U.S. CAT reservations from Finland, the Netherlands, and Sweden). An additional U.S. "understanding" that the treaty does not preclude all forms of cruel, inhuman, and degrading treatment is simply erroneous and, therefore, of no legal effect. *See* Paust, *supra* note 1, at 823 n.43; *see also* O'Connell, *supra* note 1, at 1250–51 (recognizing that to the extent the United States Constitution prohibition varies from the CAT, it "cannot alter . . . legal obligations under the CAT"). Moreover, as customary international law, peremptory norms, and *jus cogens*, the prohibitions against torture apply universally and without any limitations attempted in treaty reservations and understandings. *See, e.g.*, Paust, *supra* note 1, at 821–22 nn.40–41; *supra* note 40. In *Prosecutor v. Furundzija*, it was recognized that

In early September 2006, President Bush refuted the policy announced by Secretary Rice when he stated that various "tough" CIA interrogation tactics during secret detention had occurred and would continue[61] and the public had been on notice for several years concerning what the "tough" tactics entailed.[62] A week later, Secretary Rice dispelled any notion that the administration's policy was to comply with absolute bans under international law of any form of cruel, inhuman, or degrading treatment. In a letter to the Senate's Armed Services Committee,

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the prohibition of torture

> has evolved into a peremptory norm or *jus cogens*, that is, a norm that enjoys a higher rank in the international hierarchy than treaty law and even 'ordinary' customary rules. The most conspicuous consequence of this higher rank is that the principle at issue cannot be derogated from by States . . . . [It is] an absolute value from which nobody must deviate. The fact that torture is prohibited by a peremptory norm of international law has other effects at the inter-state and individual levels. At the inter-state level, it serves to internationally de-legitimise [sic] any legislative, administrative or judicial act authorizing torture. It would be senseless to argue, on the one hand, that on account of the *jus cogens* value of the prohibition against torture, treaties or customary rules providing for torture would be null and void *ab initio*, and then be unmindful of a State say, taking national measures authorizing [sic] or condoning torture or absolving its perpetrators through an amnesty law. If such a situation were to arise, the national measures, violating the general principles and any relevant treaty provision, would produce the legal effects discussed above and in addition would not be accorded international legal recognition.

Case No. IT-95-17/1-T, Judgment, ¶¶ 153–55 (Dec. 10, 1998).

The putative reservation had attempted to limit the treaty's reach to types of treatment, not the place of treatment. Given the universal reach of the treaty proscriptions, if the putative reservation had attempted to require application merely within U.S. territory, there would have been an additional reason why it would be incompatible with the object and purpose of the treaty and void *ab initio* as a matter of law. *See, e.g.*, Paust, *supra* note 1, at 823 n.43; *see also supra* note 43; *infra* note 88. In any event, the U.S. Constitution applies abroad to restrain executive authority. *See, e.g.*, Jordan J. Paust, *Antiterrorism Military Commissions: Courting Illegality*, 23 MICH. J. INT'L L. 1, 18–20 (2001) [hereinafter Paust, *Courting Illegality*]. As Justice Black affirmed in *Reid v. Covert*, our government is one of delegated powers, one that is entirely a creature of the Constitution, and one that has no power or authority to act here or abroad inconsistently with the Constitution. *See Reid*, 354 U.S. 1, 5–6, 12, 35 n.62 (1957); *see also* Paust, *Courting Illegality*, *supra*, at 19–20 nn.43 & 47. Concerning a related Supreme Court recognition of limitations on the authority of any member of the executive branch, see *infra* note 214.

[61] *See, e.g.*, *supra* note 22. President Bush might also be relying on the void putative U.S. reservation to the CAT, as if U.S. obligations under the CAT are limited and, mistakenly, that only the CAT applies. Even then, various "tough" tactics noted above would violate amendments to the Constitution. *See also infra* note 180.

[62] *See, e.g.*, *supra* notes 12, 15–19, 26, 35–37 and accompanying text.

Secretary Rice offered her "department's view" that "there is not . . . any inconsistency with respect to the substantive behavior that is prohibited" by the same phrase in common article 3 of the Geneva Conventions "and the behavior that is prohibited . . . as that phrase is defined in the U.S. reservation to the Convention Against Torture" and U.S. compliance with prohibitions reflected in the reservation to the CAT will "fully satisfy the obligations of the United States with respect to the standards" in common article 3 of the Geneva Conventions.[63] However, the legal propriety of this viewpoint is in serious error. First, not all forms of cruel, inhuman, and degrading treatment that are proscribed in the CAT and in the Geneva Conventions would be covered by the reach of what are merely U.S. domestic prohibitions under three constitutional amendments.[64] Second, no reservation has been attempted to common article 3 or any other article of the Geneva Conventions like that attempted with respect to the CAT. It would be outrageous to suggest that a putative reservation to one multilateral treaty can override the reach and meaning of another multilateral treaty that has never had a similar reservation. This is especially the case with respect to a putative reservation to the CAT that has been denounced by the Convention's Committee Against Torture and is void *ab initio* as a matter of law and of no legal effect.

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[63] Letter from Condoleezza Rice, Sec'y of State, to John Warner, Senate Armed Servs. Comm. Chairman (released Sept. 14, 2006), *available at* http://www.uniontribune.net/news/nation/terror/20060914-1513-powell-riceletters.html.

[64] Not only is the content different, *see also supra* note 60; *cf. infra* note 180, but the U.S. Constitution does not reach all private actors even under a domestic notion of "color of law," whereas treaties and the laws of war can be violated by private actors. *See, e.g.*, War Crimes Act, 18 U.S.C. § 2441(a) (2000) (stating that an offense may be committed by "whoever, whether inside or outside the United States"); *In re* Holocaust Victim Assets Litig., 225 F.3d 191, 195–97 (2d Cir. 2000); Kadic v. Karadzic, 70 F.3d 232, 239, 242–43 (2d Cir. 1995) (demonstrating private actor violations of common article 3 of the Geneva Conventions and laws of war), *cert. denied*, 518 U.S. 1005 (1996); *In re* Agent Orange Prod. Liab. Litig., 373 F. Supp. 2d 7, 58–59 (E.D.N.Y. 2005); Estate of Rodriquez v. Drummond Co., Inc., 256 F. Supp. 2d 1250, 1260–62 (N.D. Ala. 2003) (applying common article 3 of the Geneva Conventions); Presbyterian Church of Sudan v. Talisman Energy, Inc., 244 F. Supp. 2d 289, 310–11 (S.D.N.Y. 2003) (discussing private actor violations of common article 3 and laws of war); Doe v. Islamic Salvation Front, 993 F. Supp. 3, 7–8 (D.D.C. 1998) (including common article 3); 11 Op. Att'y Gen. 297, 299–300 (1865) (stating that laws of war can be violated by citizens and every citizen is bound); 1 Op. Att'y Gen. 68, 69 (1797) (providing an example of a private individual violation of the law of nations); 1 Op. Att'y Gen. 57, 58 (1795); FM 27-10, *supra* note 25, at 178, ¶ 498; Jordan J. Paust, *After My Lai: The Case for War Crime Jurisdiction over Civilians in Federal District Courts*, 50 TEX. L. REV. 6, 12–15 (1971); Jordan J. Paust, *The Reality of Private Rights, Duties, and Participation in the International Legal Process*, 25 MICH. J. INT'L L. 1229, 1230–40, 1242 (2004).

Secretary Rice also claimed that:

> [I]t is appropriate for a state to look to its own legal framework, precedents, concepts and norms in interpreting these terms and carrying out its international obligations. Such practice in the application of a treaty is an accepted reference point in international law . . . . [and] the prohibitions found in the Detainee Treatment Act of 2005 [which limit coverage in a manner like the putative U.S. reservation to the CAT] fully satisfy the obligations of the United States with respect to the standards . . . of Common Article 3.[65]

This claim is also in fundamental error for the reasons noted above. Moreover, domestic law of a single party to a multilateral treaty cannot provide complete, authoritative content or be determinative regarding the meaning of the treaty.[66] As Justice Scalia recognized with respect to the proper interpretation of treaties:

> The question before us in a treaty case is what the two or more sovereigns agreed to, rather than what a single one of them, or the legislature of a single one of them, thought it agreed to. And to answer the question accurately, . . . whatever extratextual materials are consulted must be materials that reflect the mutual agreement (for example, the negotiating history) rather than a unilateral understanding. Thus, we have declined to give effect . . . even to an explicit condition of ratification adopted by the full Senate, when the President failed to include that in his ratification.[67]

Our courts have recognized more generally that "[t]he subject of treaties . . . is to be determined by the law of nations"[68] and "[w]henever doubts and questions arise relative to the validity, operation or construction of treaties, or of any articles in them, those doubts and questions must be settled according to the maxims and principles of the laws of nations."[69] James Wilson remarked during formation of

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[65] Letter from Condoleezza Rice, *supra* note 63. *But see supra* note 60.

[66] There is also a major difference between good-faith use of domestic legal standards as minimum rights or duties protected under a treaty or to further effectuate a treaty, and attempting to use them as maximum obligations and limitations. The latter is unacceptable. *See also supra* note 60. With respect to customary international law, see also *Ross v. Rittenhouse*, 2 U.S. (2 Dall.) 160, 162 (Pa. 1792) ("[M]unicipal law of the country . . . may . . . facilitate or improve the execution of . . . [the law of nations], by any means they shall think best, provided the great universal law remains unaltered."). Further, it is well known with respect to the reach of international criminal law that domestic law is no excuse. *See, e.g.*, *infra* note 90.

[67] United States v. Stuart, 489 U.S. 353, 372–74 (1989) (Scalia, J., concurring).

[68] Ware v. Hylton, 3 U.S. (3 Dall.) 199, 261 (1796).

[69] Henfield's Case, 11 F. Cas. 1099, 1101 (C.C.D. Pa. 1793) (No. 6360).

the Constitution that "[t]o pretend to define the law of nations which depended on the authority of all the Civilized Nations of the World, would have a look of arrogance."[70]

C. Mangling Military Manuals

In May 2006, media reports indicated that a nearly-final draft of a new Army Field Manual on interrogation was created that contained major changes from previous manuals and would perpetuate unlawful treatment during interrogation of alleged terrorists and unprivileged belligerents. The new draft was created under the supervision of Stephen Cambone,[71] who opposed use of legally required minimum protections for all detainees under customary international law reflected in common article 3 of the Geneva Conventions.[72] The media also reported that DOD "civilian leaders" had argued "that the Geneva Convention does not apply to terrorists or irregular fighters" and the new draft manual should create two separate sets of interrogation tactics—one for prisoners of war and the other for non-prisoners-of-war, and the latter set "would allow tougher techniques."[73] Despite the DOD civilian leader assertion, it is widely known that there are no gaps in the reach of at least some forms of Geneva law protection during any armed conflict to detainees of any status and that the absolute rights, duties, and responsibilities reflected in common article 3 are among the legal provisions that

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[70] 2 THE RECORDS OF THE FEDERAL CONVENTION OF 1787, at 65 (M. Farrand ed. 1937).

[71] *See, e.g.*, Eric Schmitt, *Clash Foreseen Between C.I.A. and Pentagon*, N.Y. TIMES, May 10, 2006, at A1 ("[The] Pentagon proposal [is] to have one set of interrogation techniques for enemy prisoners of war and another . . . for the suspected terrorists imprisoned at Guantanamo . . . .").

[72] *See, e.g.*, *supra* note 11. Cambone's opposition to the legal requirements clearly mirrors Addington's. *See supra* note 9.

[73] Julian E. Barnes, *Army Rules Put on Hold*, L.A. TIMES, May 11, 2006, at A1; *see also* Julian E. Barnes, *Army Manual to Skip Geneva Detainee Rule*, L.A. TIMES, June 5, 2006, at A1 (reporting that Addington and Cambone oppose the use of common article 3 standards regarding interrogation of non-POWs, and that the draft manual would omit the ban on humiliating and degrading treatment required under international law for all detainees). This would constitute a major change from standards in previous manuals. *See, e.g.*, David E. Graham, *Treatment and Interrogation of Detained Persons*, *in* INTERNATIONAL LAW CHALLENGES: HOMELAND SECURITY AND COMBATING TERRORISM 215 (U.S. Naval War Coll., International Law Studies vol. 81, Thomas McK. Sparks & Glenn M. Sulmasy eds., 2006); White, *supra* note 1, at A13 (addressing the uniform minimum standards required by Geneva law that are contained in the previous manual); *see also* Paust, *supra* note 1, at 840 n.111 (addressing prohibitions in prior manuals). Later reports indicated that congressional and military pressure might lead to the preclusion of two different sets of standards for detainee interrogation. *See, e.g.*, Eric Schmitt, *Pentagon Rethinking Manual with Interrogation Methods*, N.Y. TIMES, June 14, 2006, at A21.

apply to detainees of any status.[74] Moreover, as noted above, human rights law and other customary and treaty-based international laws that are part of the constitutionally based laws of the United States also prohibit the use of torture or cruel, inhuman, or degrading treatment against any human being in any context for any purpose.

Finally, after the Supreme Court's rejection in *Hamdan v. Rumsfeld* of the Bush administration's claim that common article 3 does not apply to detainees captured during armed conflicts in Afghanistan and Iraq being held at Guantanamo,[75] Deputy Defense Secretary Gordon England issued a memo requiring compliance with common article 3 by U.S. military personnel as of July 7, 2006.[76] Behind the scenes, many military lawyers informed civilian officials that if this had not occurred there would have been a firestorm of protests and resignations by JAG officers. However, other members of the administration still oppose application of common article 3 in any other context and President Bush has stated that the CIA program of coercive interrogation will continue.[77]

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[74] *See, e.g.*, *supra* notes 1, 39.

[75] *See* 126 S. Ct. 2749, 2795–96 (2006) ("[T]here is at least one provision of the Geneva Conventions that applies here . . . . Common Article 3, then, is applicable here."); *id.* at 2797 (stating that the phrase "'regularly constituted court'" in common article 3 "must be understood to incorporate at least the barest of those trial procedures that have been recognized by customary international law"); *id.* at 2799, 2802 (Breyer, J., concurring in part) ("[T]he requirement of the Geneva Conventions [is] a requirement that controls here . . . . The Court is correct to concentrate on one provision of the law of war that is applicable to our Nation's armed conflict with al Qaeda in Afghanistan . . . . That provision is Common Article 3 . . . . The provision is part of a treaty the United States has ratified and thus accepted as binding law . . . . By Act of Congress, moreover, violations of Common Article 3 are considered 'war crimes,' punishable as federal offenses."). Common article 3 applies as a minimum set of customary rights and prohibitions concerning any detainee during the wars in Afghanistan and Iraq. *See supra* note 39. The Court should have adopted this recognition instead of applying common article 3 to the fight with al-Qaeda as such (and, thus, also outside and unconnected with the armed conflicts in Afghanistan and Iraq). *See infra* note 150.

[76] *See, e.g.*, Stephen J. Hedges, *U.S. Relents on Gitmo Detainees; Geneva Conventions Will Apply to Inmates*, CHI. TRIB., July 12, 2006, at 1; Scott Shane, *Terror and Presidential Power: Bush Takes a Step Back*, N.Y. TIMES, July 12, 2006, at A20. Thus, armed with a Supreme Court ruling that common article 3 applies in the fight against al-Qaeda, England and military lawyers finally prevailed over Addington, Cambone, and Haynes with respect to compliance with the laws of war by military personnel and others subject to DOD control. *See also supra* note 11.

[77] *See, e.g.*, Rosa Brooks, *Orwell Had Nothing on This White House*, L.A. TIMES, July 14, 2006, at B13 (discussing how Justice Department Representative, Steven Bradbury, testified before the Senate Armed Services Committee on July 11, 2006, in serious error, that "[u]nder the law of war . . . the president is always right"); R. Jeffrey Smith & Jonathan Weisman, *Policy Rewrite Reveals Rift in Administration; Top Officials Split on Treatment of Detainees*, WASH. POST, July 14, 2006, at A4 (stating that "the Justice Department and

Deputy Defense Secretary England and professional military lawyers prevailed again on September 5, 2006, when England issued a Department of Defense Directive setting forth a new DOD policy applicable "during all armed conflicts, however such conflicts are characterized, and in all other military operations."[78] The new DOD directive, applicable to military personnel and others subject to DOD control, requires:

- All detainees shall be treated humanely and in accordance with U.S. law, the law of war, and applicable U.S. policy.[79]

- All persons subject to this Directive shall observe the requirements of the law of war, and shall apply, without regard to a detainee's legal status, at a minimum the standards articulated in Common Article 3 of the Geneva Conventions of 1949 . . . , as construed and applied by U.S. law, . . . in the treatment of all detainees . . . . Note that certain categories of detainees, such as enemy prisoners of war, enjoy protections under the law of war in addition to the minimum standards prescribed in Common Article 3 . . . .[80]

- Detainees and their property shall be accounted for and records maintained according to applicable law . . . .[81]

At the same time, a new *Army Field Manual on Human Intelligence Collector Operations*[82] was presented to the public. The manual states:

> [T]he handling and treatment of sources must be accomplished in accordance with applicable law and policy. Applicable law and policy include U.S. law; the law of war; relevant international law; relevant directives . . . . The principles and techniques of HUMINT [human intelligence] collection are to be used within the constraints established

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the Pentagon have offered starkly different accounts of the administration's" stance after the *Hamdan* ruling); Andrew Zajac, *Gonzales Takes Issue with Justices' Detainees Ruling*, CHI. TRIB., July 14, 2006, at C28 (stating that Gonzales "took issue . . . that al Qaeda combatants were covered by . . . Common Article 3"); *see also supra* note 22 and accompanying text (noting President Bush stated that the CIA program will continue).

[78] U.S. Dep't of Defense, Directive No. 2310.01E, ¶ 2.2 (Sept. 5, 2006), *available at* http://www.defenselink.mil/pubs/pdfs/Detainee_Prgm_Dir_2310_9-5-06.pdf.

[79] *Id.* ¶ 4.1.

[80] *Id.* ¶ 4.2.

[81] *Id.* ¶ 4.4. "Applicable law," of course, requires that there be no disappearance of detainees. *See supra* notes 15, 43, 45.

[82] U.S. DEP'T OF THE ARMY, FIELD MANUAL NO. 2-22.3: HUMAN INTELLIGENCE COLLECTOR OPERATIONS (2006), *available at* http://www.fas.org/irp/doddir/army/FM2-22.3.pdf [hereinafter FM 2-22.3].

> by U.S. law including the following: . . . [listing, among others, three of the 1949 Geneva Conventions and adding with respect to each: "(including Common Article 3)"] . . . Detainee Treatment Act of 2005 . . . .[83]

The manual also lists several interrogation tactics that are not to be employed, including some previously authorized in administration memos and other documents,[84] such as the stripping of persons naked and hooding for interrogation, the use of dogs for interrogation, use of extreme cold or heat, and waterboarding.[85]

III. THE 2005 DETAINEE TREATMENT ACT AND OTHER BINDING LAWS OF THE UNITED STATES

When the McCain amendment was finally placed in legislation, it was noticeably restricted. The general ban on cruel, inhuman, or degrading treatment or punishment in the amendment was limited in the 2005 Detainee Treatment Act (which is part of a Defense Appropriations Act) to treatment or punishment "prohibited by the Fifth, Eighth, and Fourteenth Amendments to the Constitution of the United States, as defined in the United States Reservations, Declarations and Understandings to the United Nations Convention Against Torture and Other Forms of Cruel, Inhuman or Degrading Treatment or Punishment done at New York, December 10, 1984."[86] Moreover, it did not expressly include "torture" and was limited to persons "in the custody or under the physical control of the United States Government,"[87] which presumably includes persons under physical control of U.S. government personnel or others acting on behalf of the U.S. government but does not mirror the more extensive requirements of the CAT,[88] much less

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[83] *Id.* at vii (alterations added).

[84] Concerning previous authorizations, see *supra* notes 1, 4–5, 7, 15–19, 22, 26–27, 35–37.

[85] *See, e.g.*, Stephen J. Hedges, *U.S. Revises Rules for Detainees; Treatment Will Follow Geneva Conventions*, CHI. TRIB., Sept. 7, 2006, at C13; Josh White, *New Army Manual Recalls Abuse*, WASH. POST, Sept. 9, 2006, at A8. The manual retained sixteen tactics previously set forth in a 1992 manual and added three: good-cop/bad-cop, interrogator portraying self as someone from another country, and "separation" unless the detainee is a prisoner of war. FM 2-22.3, *supra* note 82, at 71.

[86] Detainee Treatment Act of 2005, § 1003(d), Pub. L. No. 109–48, 119 Stat. 2680 (codified at 42 U.S.C. § 2000dd (2006), 10 U.S.C. § 801, 28 U.S.C. § 2241).

[87] *Id.* § 1003(a) ("In general—No individual in the custody or under the control of the United States Government, regardless of nationality or physical location, shall be subject to cruel, inhuman, or degrading treatment or punishment.").

[88] *See* U.N. Convention Against Torture, *supra* note 43, pmbl. (recognizing "the obligation of States under the [U.N.] Charter, in particular, Article 55, to promote *universal* respect for, and *observance* of, human rights"; "[h]aving regard to Article 5 of the Universal Declaration of Human Rights and Article 7 of the [ICCPR], both of which

provide that no one may be subjected to torture or to cruel, inhuman or degrading treatment or punishment"; and "[d]esiring to make more effective the struggle against torture and other cruel, inhuman or degrading treatment . . . *throughout the world*" (emphasis added)); *id.* art. 1 (stating that torture under the treaty is proscribed whenever it is "inflicted by or at the instigation of or with the consent or acquiescence of a public official or other person acting in an official capacity," for example, whether victims are actually in U.S. custody or control); *id.* art. 2(1) (discussing how state duty exists without limitations to "prevent acts of torture in any territory under its jurisdiction" and, thus, whether victims are in U.S. territory and whether victims within the territory who are subject to U.S. jurisdiction are in U.S. custody or control); *id.* art. 4(1) (covering "an act by any person which constitutes complicity or participation in torture" and, therefore, applies whether or not victims are within territory subject to U.S. jurisdiction or are in U.S. custody or control); *id.* art. 5(1)(a) (applying whenever "the offences are committed in any territory under its jurisdiction or on board a ship or aircraft registered in that state"); *id.* art. 5(2) (stating a duty to exercise criminal jurisdiction when any "alleged offender is present in any territory under its jurisdiction" and, thus, regardless of the nationality of the perpetrator or place of the crime); *id.* art. 16 (discussing a duty to "prevent [torture] in any territory under its jurisdiction"); U.N. CAT Report, *supra* note 1, ¶ 14 (requiring states to prevent torture "in any territory under its jurisdiction"); *id.* ¶ 15 (including "'territory under [the State party's] jurisdiction' (arts. 2, 5, 13, 16). . . . [as] all areas under the de facto effective control of the State party, by whichever military or civil authorities such control is exercised," and stating that "the provisions of the Convention expressed as applicable to 'territory under the State party's jurisdiction' apply to, and are fully enjoyed by, all persons under the effective control of its authorities, of whichever type, wherever located in the world" (first alteration in original)); *id.* ¶ 17 (applying to "any secret detention facility under its de facto effective control"); *id.* ¶ 18 (requiring a party state to "prohibit and prevent enforced disappearance in any territory under its jurisdiction, and prosecute and punish perpetrators, as this practice constitutes, per se, a violation of the Convention"); *id.* ¶ 20 (noting that, contrary to the Bush administration's claim that article 3 of the Convention does not extend to persons detained outside the United States, the United States "should apply the *non-refoulement* guarantee to all detainees in its custody, cease rendition of suspects, in particular by its intelligence agencies, to States where they face a real risk of torture, in order to comply with its obligations under article 3 of the Convention" and the United States "should always ensure that suspects have the possibility to challenge decisions of *refoulement*"); *id.* ¶ 24 (applying "in all places of detention under its de facto effective control"); *id.* ¶ 26 (applying "in any territory under its jurisdiction").

With respect to the prohibition of transfer or extradition of any person to another country where there is a real risk that the person will be subject to torture, cruel, inhuman or degrading treatment, or violations of human rights more generally, see U.N. Experts' Report, *supra* note 1, ¶ 55 ("[T]he United States practice of 'extraordinary rendition' constitutes a violation of article 3 of the Convention against Torture and article 7 of ICCPR."); P.A. Doc. 10497, *supra* note 1, § I, ¶ 7(vii) ("*[T]he United States has, by practicing 'rendition' (removal of persons to other countries, without judicial supervision, for purposes such as interrogation or detention), allowed detainees to be subjected to torture and to cruel, inhuman or degrading treatment, in violation of the prohibition on non-refoulement.*"). *See also* Bader v. Sweden, 2005-II Eur. Ct. H.R. #, ¶ 29 ("[A]n alien must not be sent to a country where there are reasonable grounds for believing that he or

those in other relevant treaties and universally applicable customary international law. Thus, not all cruel, inhuman, or degrading treatment is covered by the 2005 legislation and the legislation does not mirror the legal rights and prohibitions contained in several treaties of the United States and customary laws of war and human rights law or the more extensive obligations of the United States that exist under the CAT despite certain putative U.S. reservations and understandings with respect to the CAT.[89]

Nevertheless, Congress expressed no intent to override either treaty-based or customary international legal rights and duties when it enacted the 2005 Defense Appropriations Act. And because there is a well-recognized requirement that there must be a clear and unequivocal expression of congressional intent to override as part of a five-step process concerning conflicts between treaties and federal statutes, relevant treaty-based rights and duties remain among the operative laws of the United States.[90] Moreover, even if Congress had expressed such an intent clearly and unequivocally, the traditional "rights under" a treaty exception to the last-in-time rule recognized in Supreme Court decisions[91] would assure the

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she would be in danger of suffering capital or corporal punishment or of being subjected to torture or other inhuman or degrading treatment or punishment."); Chahal v. United Kingdom, 1996-V Eur. Ct. H.R. 1831, 1832; The Soering Case, 161 Eur. Ct. H.R. (ser. A) at 34–36, 44 (1989); *supra* notes 15, 58.

[89] *See supra* note 60.

[90] *See, e.g.*, Weinberger v. Rossi, 456 U.S. 25, 35 (1982) ("[C]ongressional expression [to override is] necessary."); Cook v. United States, 288 U.S. 102, 120 (1933) (stating the purpose to override or modify must be "clearly expressed"); Cheung Sum Shee v. Nagle, 268 U.S. 336, 345–46 (1925) ("[The] act must be construed with the view to preserve treaty rights unless clearly annulled, and we cannot conclude . . . a congressional intent absolutely to exclude."); United States v. Lee Yen Tai, 185 U.S. 213, 221 (1902) (stating the "purpose . . . must appear clearly and distinctly from the words used" by Congress); PAUST, INTERNATIONAL LAW, *supra* note 40, at 99, 107, 120, 124–25 nn.2–3; *see also* Spector v. Norwegian Cruise Line Ltd., 545 U.S. 119, 142–44 (2005) (Ginsburg, J., concurring). In any event, the rights and duties remain at the international level, because inconsistent domestic law is not an excuse. *See, e.g.*, Vienna Convention, *supra* note 40, art. 27, 1155 U.N.T.S. at 1-18232 (stating that a party to a treaty "may not invoke the provisions of its internal law as justification for its failure to perform a treaty"); 9 Op. Att'y Gen. 356, 357 (1859); Int'l Law Comm'n, Principles of the Nuremberg Charter and Judgment, princ. II ("[I]nternal law . . . does not relieve the person . . . from responsibility."), *adopted by* G.A. Res. 177 (II)(a), at 11–14, ¶ 99, 5 U.N. GAOR, 2nd Sess., Supp. No. 12, U.N. Doc. A/1316 (July 1950); PAUST, INTERNATIONAL LAW, *supra* note 40, at 125–27 n.4, 305–08 n.547, 422, 435–38, 445; O'Connell, *supra* note 1, at 1235 n.13. Moreover, the 2006 Security Council resolution noted above, *see supra* notes 49–51, is subsequent in time to the 2005 Appropriations Act, *see* source cited *supra* note 86, and, as part of U.S. treaty law, would prevail in case of an unavoidable clash. *See generally* PAUST, INTERNATIONAL LAW, *supra* note 40, at 460, 480–81 n.62.

[91] *See, e.g.*, PAUST, INTERNATIONAL LAW, *supra* note 40, at 104–05, 137–39 nn.40–49 (citing Supreme Court cases).

primacy of treaty-based rights to freedom from all forms of cruel, inhuman, and degrading treatment over subsequent legislation. More specifically, with respect to rights and duties under the customary and treaty-based laws of war, precedent requires that they prevail as well.[92]

In any event, other federal statutes that the Executive must faithfully execute, expressly or by incorporating relevant international law by reference, allow criminal and civil sanctions for various forms of torture and cruel, inhuman, degrading, and humiliating treatment.[93] Additionally, with respect to executive implementation of human rights, Executive Order 13107 requires that it:

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[92] *See, e.g.*, 11 Op. Att'y Gen. 297, 299–300 (1865) ("Congress may define those laws, but cannot abrogate them . . . . [T]he laws of war . . . are of binding force upon the departments and citizens of the Government . . . . [War] must . . . be carried on according to the known laws and usages of war . . . . Congress cannot abrogate them or authorize their infraction. The Constitution does not permit this Government to prosecute a war [in violation of the laws of war]."); PAUST, INTERNATIONAL LAW, *supra* note 40, at 106–07, 141–42 nn.53–57 (concerning recognitions of Justices Chase, Field, and Sutherland that the laws of war must prevail over inconsistent congressional legislation); *see also* United States *ex rel.* Schlueter v. Watkins, 67 F. Supp. 556, 564 (S.D.N.Y. 1946) (quoting Albert Gallatin in 1798: "[b]y virtue of [the war] power, . . . Congress could . . . [act], provided it be according to the laws of nations and to treaties"); 9 Op. Att'y Gen. 356, 362–63 (1850) (stating that the law of nations "must be paramount to local law in every question where local laws are in conflict [and] what [the President] will do must of course depend upon the law of our own country, as controlled and modified by the law of nations"); PAUST, INTERNATIONAL LAW, *supra* note 40, at 7–9, 67–70, 169–73, 175, 488–89, 493–94 (documenting that the Executive is bound by international law, especially the laws of war); Jordan J. Paust, *International Law Before the Supreme Court: A Mixed Record of Recognition*, 45 SANTA CLARA L. REV. 829, 839–40 n.53 (2005) [hereinafter Paust, *Before the Supreme Court*] (documenting the unanimous views of the Founders, uniform case law, and judicial recognitions that assure all within the executive branch are bound by the laws of war); *infra* notes 97, 114–15. In view of the singular importance of compliance with the laws of war during an armed conflict (as opposed, for example, to a trade agreement), such a recognized primacy of the laws of war is also logical and policy-serving. Since rights and duties under the customary laws of war prevail, all persons within the executive branch are bound to comply with the laws of war as opposed to subsequent legislation that is even unavoidably inconsistent and based in a clear and unequivocal expression of congressional intent to override. By not violating the laws of war, the executive duty to faithfully execute the laws is fulfilled, but one set of laws has primacy over another.

[93] For example, see 10 U.S.C. § 818 (2006) (incorporating all war crimes by reference as offenses against the laws of the United States), as supplemented to provide federal district court jurisdiction by 18 U.S.C. § 3231. *See* Paust, *supra* note 1, at 824 n.47; *see also* 10 U.S.C. §§ 881, 892–893, 920, 925, 928, 934 (regarding courts-martial jurisdiction over offenses such as assault, dereliction of duty, cruelty and maltreatment, rape, sodomy, indecent acts with another, etc.); War Crimes Act, 18 U.S.C. § 2441 (regarding prosecution of certain war crimes committed by any person, civilian or military); Antiterrorism Act, *id.* §§ 2331–2333 (regarding criminal and civil sanctions for certain acts against U.S. national victims); *id.* §§ 2340–2340A (regarding torture); Military Extraterritorial Jurisdiction Act,

> shall be the policy and practice of the government of the United States . . . fully to implement its obligations under the international human rights treaties to which it is a Party and that all executive departments and agencies . . . shall perform . . . [their] functions so as to respect and implement those obligations fully.[94]

IV. CONSTITUTIONALLY UNACCEPTABLE CLAIMS TO UNCHECKED EXECUTIVE POWER

A. Legal Constraints on the Commander-in-Chief Power

Upon signing the 2005 Defense Appropriations Act, President Bush stated that:

> [t]he executive branch shall construe Title X in Division A, relating to detainees, in a manner consistent with the constitutional authority of the President to supervise the unitary executive branch and as Commander in Chief and consistent with the constitutional limitations on the judicial power, which will assist in . . . protecting the American people from further terrorist attacks.[95]

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id. § 3261 (regarding certain civilians employed by or accompanying U.S. military forces abroad); Alien Tort Claims Act (or Alien Tort Statute), 28 U.S.C. § 1350 (regarding a tort for violation of customary international law or a treaty of the United States); Torture Victim Protection Act, Pub. L. No. 102–256, 106 Stat. 73 (1992) (codified at 28 U.S.C. § 1350) (regarding civil sanctions against certain persons for torture or extrajudicial killing); Paust, *supra* note 1, at 852–55.

It is also of interest that the President's pardon power is expressly limited to the pardoning of "Offenses against the United States" as such, U.S. CONST. art. II, § 2, cl. 1, as opposed to all offenses against the laws of the United States. Thus, it does not appear to reach violations of the customary law of nations or multilateral treaties as such (which are offenses against the international community) or offenses under the laws of the United States that incorporate international law by reference. *See, e.g.*, Jordan J. Paust, *Contragate and the Invalidity of Pardons for Violations of International Law*, 10 HOUS. J. INT'L L. 51, 51 (1987). Moreover, an attempt to provide immunity for international crimes in new legislation would have no binding legal effect outside the United States. *See, e.g.*, PAUST ET AL., *supra* note 51, at 28, 130, 135–36; *see also* Principles of the Nuremberg Charter and Judgment, *supra* note 90, princ. II.

[94] Exec. Order No. 13107, 63 Fed. Reg. 68,991 (Dec. 10, 1998).

[95] President's Statement on Signing H.R. 2863 (Dec. 30, 2005), *available at* http://www.whitehouse.gov/news/releases/2005/12/20051230-8.html.

Whatever implications lurk in the language of such a statement, President Bush has no delegated or inherent authority to suspend, change, or ignore the reach of duties set forth in the 2005 legislation.[96]

First, the President is expressly and unavoidably bound by the Constitution to faithfully execute the laws, including the 2005 Act and relevant international law, especially the laws of war.[97] Second, Supreme Court opinions have recognized since 1800 that Congress has constitutionally based power to place limits on certain commander-in-chief powers during actual war.[98] More generally, the Court

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[96] *See also* Press Release, Senator John W. Warner and Senator John McCain Statement on Presidential Signing Detainee Provisions (Jan. 4, 2006), http://mccain.senate.gov/index.cfm?fuseaction'NewsCenter.ViewPressRelease&Content_id'1634 [hereinafter Press Release, Sens. Warner & McCain Statement] ("Congress declined when asked by administration officials to include a presidential waiver of the restrictions included in our legislation."). The President has no general legislative power, *see infra* note 121, and has not been delegated any legislative powers in the 2005 Act. Thus, as Senators Warner and McCain have indicated, there is no delegation of power to suspend, waive, or change restrictions contained in the legislation by executive fiat, interpretation, or elsewise. *See* Press Release, Sens. Warner & McCain Statement, *supra*. With respect to signing statements more generally, clearly the President is not a legislator and presidential signing statements are not law and do not amend or suspend the reach of law.

[97] *See, e.g.*, U.S. CONST. art. II, § 3; PAUST, INTERNATIONAL LAW, *supra* note 40, at 109, 147 n.77, 169–73, 179, 487–90, 492–95 (addressing numerous relevant cases); Paust, *supra* note 1, at 856–61 (documenting the consistent and unyielding judicial recognition that, in particular, the laws of war are binding on the executive branch and limit the lawful exercise of the commander in chief powers); *see also* Hamdi v. Rumsfeld, 542 U.S. 507, 520–21 (2004) (regarding Hamdi's objection that Congress did not authorize indefinite detention and stating that "indefinite detention for the purpose of interrogation is not authorized"; "Congress' grant of authority . . . [was] to detain for the duration of the relevant conflict, and our understanding [of the Authorization for Use of Military Force's "grant of authority for the use of 'necessary and appropriate force'"] is based on longstanding law-of-war principles"; and "[i]t is a clearly established principle of the law of war that detention may last no longer than active hostilities"); Rosa Brooks, *Protecting Rights in the Age of Terrorism: Challenges and Opportunities*, 36 GEO. J. INT'L L. 669, 679 (2005); David M. Golove, *The Commander in Chief and the Laws of War*, 99 AM. SOC'Y INT'L L. PROC. 198, 198–201 (2005) [hereinafter Golove, *Commander in Chief*]; David Golove, *Military Tribunals, International Law, and the Constitution: A Franckian-Madisonian Approach*, 35 N.Y.U. J. INT'L L. & POL. 363, 364, 374–78 (2003) [hereinafter Golove, *Military Tribunals*]; Harold Hongju Koh, *A World Without Torture*, 43 COLUM. J. TRANSNAT'L L. 641, 648–49 (2005); Jules Lobel, *International Law Constraints*, *in* THE U.S. CONSTITUTION AND THE POWER TO GO TO WAR 107, 109 (Gary M. Stern & Morton H. Halperin eds., 1994); *supra* note 92. Further, it was well known that the people are bound by international law. *See, e.g.*, PAUST, INTERNATIONAL LAW, *supra* note 40, at 7–8, 169, 171–72, 180 n.2, 181 nn.7 & 14. Thus, they could not delegate to the federal executive a supposed power to violate such law that they did not possess.

[98] *See, e.g.*, Hamdan v. Rumsfeld, 126 S. Ct. 2749, 2774 n.23 (2006) ("Whether or not the President has independent power, absent congressional authorization, to convene

military commissions, he may not disregard limitations that Congress has, in proper exercise of its own war powers, placed on his powers . . . . The Government does not argue otherwise."); *id.* at 2799 (Kennedy, J., concurring in part) ("It is a case where Congress, in the proper exercise of its powers as an independent branch of government, and as part of a long tradition of legislative involvement in matters of military justice, has considered the subject of military tribunals and set limits on the President's authority."); *id.* at 2808 (concluding that the presidential military commission "exceeds the bounds Congress has placed on the President's authority"); Youngstown Sheet & Tube Co. v. Sawyer, 343 U.S. 579, 643 (1952) (Jackson, J., concurring) ("He has no monopoly of 'war powers,' whatever they are . . . . [Congress] is also empowered to make rules for the 'Government and Regulation of land and naval forces,' by which it may to some unknown extent impinge upon even command functions."); *Ex parte* Quirin, 317 U.S. 1, 25 (1942) ("[D]etention and trial . . . ordered by the President in the declared exercise of his powers as Commander in Chief of the Army in time of war . . . are not to be set aside by the courts without the clear conviction that they are in conflict with[, for example,] laws of Congress constitutionally enacted."); Herrera v. United States, 222 U.S. 558, 573 (1912) ("It was there decided that the military commander at New Orleans 'had power to do all that the laws of war permitted, except so far as he was restrained by . . . the effect of congressional action.'" (quoting Planters' Bank v. Union Bank, 83 U.S. (16 Wall.) 483, 495 (1873))); *Ex parte* Milligan, 71 U.S. (4 Wall) 2, 119, 121 (1866) (stating that during war, "[t]he President . . . is controlled by law, and has his appropriate sphere of duty, which is to execute . . . [and] not to make the laws"; the *Milligan* Court added: "[b]y the protection of the law human rights are secured; withdraw that protection, and they are at the mercy of wicked rulers"); *id.* at 139 (Chase, C.J., dissenting) ("Congress . . . has . . . the power to provide by law for carrying on war. This power necessarily extends to all legislation essential to the prosecution of war with vigor and success, except such as interferes with the command of the forces and the conduct of campaigns."); McCulloch v. Maryland, 17 U.S. (4 Wheat.) 316, 407 (1819) (finding that Congress has the power to "conduct a war"); Gelston v. Hoyt, 16 U.S. (3 Wheat.) 246, 330–38 (1818) (noting that a statute controls presidential instructions regarding the seizure of vessels); The Thomas Gibbons, 12 U.S. (8 Cranch) 421, 427–28 (1814) (finding the President's right to seize vessels is limited); Brown v. United States, 12 U.S. (8 Cranch) 110, 152–153 (1814); Little v. Barreme (The Flying Fish), 6 U.S. (2 Cranch) 170, 177–78 (1804) (Marshall, C.J.) (ruling that, despite presidential power as commander-in-chief to seize vessels during war, a congressional act "limits that authority" and Congress "prescribed . . . the manner in which [law] shall be carried into execution"); Talbot v. Seeman, 5 U.S. (1 Cranch) 1, 28 (1801) (Marshall, C.J.) ("The whole powers of war being, by the constitution of the United States, vested in congress, the acts of that body can alone be resorted to as our guides."); Bas v. Tingy, 4 U.S. (4 Dall.) 37, 40–45 (1800); Hamdan v. Rumsfeld, 344 F. Supp. 2d 152, 158–59 (D.D.C. 2004); Dellums v. Bush, 752 F. Supp. 1141, 1144 n.5 (D.D.C. 1990); 9 Op. Att'y Gen. 517, 518–19 (1860) (stating Congress can limit the use of land and naval forces that are otherwise "under his orders as their commander in chief"); PAUST, INTERNATIONAL LAW, *supra* note 40, at 461–62, 474 n.54, 477 n.58; Paust, *supra* note 1, at 842 n.114; *see also* U.S. CONST. art. I, § 8, cl. 1 ("Congress shall have Power To . . . provide for the Common Defence . . . ."); *id.* § 8, cl. 11 (giving Congress the power to "make Rules concerning Captures on Land and Water"); *id.* § 8, cls. 14–16, 18; *Hamdi*, 542 U.S. at 509–10 (stating "Congress authorized the detention of combatants in the narrow circumstances alleged here" regarding the detention of "a man

whom the Government alleges took up arms with the Taliban during" the war in Afghanistan); *id.* at 536 ("Whatever power the . . . Constitution envisions for the Executive in its exchanges with other nations or with enemy organizations in times of conflict, it most assuredly envisions a role for all three branches when individual liberties are at stake."); *id.* at 521 (quoted *supra* note 97); *id.* at 541 (Souter, J., dissenting in part and concurring in judgment) (noting that a statute controls detention of a citizen during war); *id.* at 574 (Scalia, J., dissenting) (same); Rumsfeld v. Padilla, 542 U.S. 426, 465 (2004) (Stevens, J., dissenting) (stressing the importance of "the constraints imposed on the Executive by the rule of law"); United States v. Verdugo-Urquidez, 494 U.S. 259, 261 (1990) (emphasizing that "restrictions on" executive use of "armed force" can be imposed by "treaty, or legislation"); Madsen v. Kinsella, 343 U.S. 341, 348 (1952) ("In the absence of attempts by Congress to limit the President's power . . . as Commander in Chief . . . he may, in time of war . . . establish and prescribe the jurisdiction and procedure of military commissions."); Ludecke v. Watkins, 335 U.S. 160, 168 (1948) (stating that war "may be terminated by treaty or legislation"); *id.* at 169 n.13 ("[T]here are statutes which have provisions fixing the date of the expiration of the war powers they confer upon the Executive."); Santiago v. Nogueras, 214 U.S. 260, 266 (1909) (stating Congress can impose limits on the military government during occupation); The Prize Cases, 67 U.S. (2 Black) 635, 668 (1862) (addressed *infra* note 133); Fleming v. Page, 50 U.S. (9 How.) 603, 615 (1850) ("His duty and his power [as commander in chief] are purely military."); United States v. Smith, 27 F. Cas. 1192, 1230 (C.C.D.N.Y. 1806) (No. 16,342) (Paterson, J., on circuit) ("The president of the United States cannot control the [Neutrality Act], nor dispense with its execution, and still less can he authorize a person to do what the law forbids. If he could, it would render the execution of the laws dependent on his will and pleasure; which is a doctrine that has not been set up, and will not meet with any supporters in our government. In this particular, the law is paramount . . . . [It would not] be pretended that the president could rightfully grant a dispensation and license [to avoid the statute]."); Padilla v. Hanft, 389 F. Supp. 2d 678, 690–91 (D.S.C. 2005) ("As Justice Jackson stated, 'Congress, not the Executive, should control utilization of the war power as an instrument of domestic policy' . . . [and to allow the President to detain a U.S. citizen pursuant to an alleged "inherent authority" and commander in chief power contrary to congressional legislation] would not only offend the rule of law and violate this country's constitutional tradition, but it would also be a betrayal of this Nation's commitment to the separation of powers that safeguards our democratic values and individual liberties."), *rev'd on other grounds*, 423 F.3d 386 (4th Cir. 2005); Swaim v. United States, 28 Ct. Cl. 173, 221 (1893), *aff'd*, 165 U.S. 553 (1897); *War Powers Resolution: Hearings Before the Senate Committee on Foreign Relations*, 95th Cong., 1st Sess. 109 (1977) (statement of Abraham D. Sofaer, Professor of Law, Columbia Univ. Sch. of Law) ("[N]one of our early Presidents claimed that their constitutionally granted powers were beyond the legislature's authority to control."); FEDERALIST NO. 51, at 290 (James Madison) (Clinton Rossiter ed., 1961) ("In republican government the legislative authority, necessarily predominates."); LOUIS HENKIN, FOREIGN AFFAIRS AND THE U.S. CONSTITUTION 103–04 (2d ed. 1996) ("[T]he President's powers as Commander in Chief are subject to ultimate Congressional authority . . . ."); *id.* at 233, 235 (stating that international law is binding on the Executive); THE JOHN E. NOWAK & RONALD D. ROTUNDA, CONSTITUTIONAL LAW 252 (6th ed. 2000) ("Constitutional language suggests that the president and Congress share the war power, the dominant authority being vested in the legislature . . . . Congress determines the rules of warfare . . ."); NORMAN REDLICH ET

also recognized that the President's foreign relations power can "be regulated by treaty or by act of Congress . . . and [if regulated thusly, must] be executed by the executive" in accordance with the treaty or legislative limitations.[99]

Although there are many relevant judicial opinions concerning the reach of congressional authority, those expressed in two early Supreme Court decisions are especially enlightening. In the celebrated case of *Bas v. Tingy*,[100] Justice Washington affirmed the Court's general recognition that Congress can authorize a war "confined in its . . . extent" and "limited as to places, persons, and things" and in such instances "those who are authorised to commit hostilities, act under special authority, and can go no farther."[101] As Justice Chase explained, "Congress is empowered to declare a general war, or congress may wage a limited war; limited in place, in objects and in time," adding that "[i]f a general war is declared, its extent and operations are only restricted and regulated by the *jus belli* [or law of war], forming a part of the law of nations; but if a partial war is waged, its extent and operation depend upon" the grant of authority in congressional laws.[102] Justice Paterson agreed that congressional legislation created "a qualified state of hostility . . . or a war, as to certain objects, and to a certain extent" and "[a]s far as congress tolerated and authorized the war . . . , so far may we proceed in hostile operations," that war may be conducted "in the manner prescribed."[103] To reiterate, the Justices recognized that Congress can limit warfare in terms of its extent, objects, operations, persons and things affected, places, and time.

AL., UNDERSTANDING CONSTITUTIONAL LAW 257 (3d ed. 2005) ("The Constitution, in requiring the President faithfully to execute the laws, does not except laws governing use of the armed forces abroad. The Supreme Court expressed this view in an early pronouncement on presidential power." (citing *Little*, 6 U.S. (2 Cranch) at 177–78)); LAURENCE TRIBE, AMERICAN CONSTITUTIONAL LAW 209 (2d ed. 1988) ("[C]ommander in chief is conceived as commanded by law."); Golove, *Commander in Chief*, *supra* note 97, at 199–201; Golove, *Military Tribunals*, *supra* note 97, at 381–94; Koh, *supra* note 97, at 648–50. Furthermore, in this instance the 2005 legislation banning certain types of treatment merely implements part of treaty-based and customary international law that is already binding on the President.

[99] Fong Yue Ting v. United States, 149 U.S. 698, 713 (1893); *see also Youngstown*, 343 U.S. at 635 n.2 (Jackson, J., concurring) (noting that dicta in *Curtiss-Wright* concerning presidential foreign affairs power does not suggest that the President "might act contrary to an act of Congress" (citing United States v. Curtiss-Wright Exp. Corp., 299 U.S. 304, 321–22 (1936))); *Curtiss-Wright*, 299 U.S. at 318 (recognizing that despite broad presidential foreign affairs powers to speak, listen, negotiate, and so forth, executive "operations" in a foreign "territory must be governed by treaties . . . and the principles of international law"); PAUST, INTERNATIONAL LAW, *supra* note 40, at 477 n.58.

[100] 4 U.S. (4 Dall.) 37 (1800).

[101] *Id.* at 40 (Washington, J.).

[102] *Id.* at 43 (Chase, J.).

[103] *Id.* at 45 (Paterson, J.). Justice Paterson added that "this modified warfare is authorized by the constitutional authority of our country," which is Congress. *Id.*

Points of agreement between the majority opinion of Chief Justice Marshall and the dissenting opinion of Justice Story in *Brown v. United States*[104] are also particularly informing concerning the reach of congressional power and are emblematic of the duty of the President to faithfully execute domestic legislation and the laws of war. In *Brown*, Chief Justice Marshall recognized that an 1812 Act containing a declaration of war had the "effect of placing" the United States and Great Britain "in a state of hostility, of producing a state of war, of giving [to the United States] those rights which war confers,"[105] which under the laws of war in that era included the right to confiscate enemy property. Marshall added that the Act also "authorizes the president . . . to use the whole land and naval force . . . to carry the war into effect,"[106] but despite broad language in the Act it did not thereby authorize the confiscation of enemy property as an incident of war since the choice whether to confiscate is a question of "policy . . . for the consideration of the legislature" and Congress had not authorized such a war measure expressly or by implication.[107]

Justice Story agreed that "the sovereignty of the nation as to the right of making war, and declaring its limits and effects" rests with Congress.[108] He added: "[t]he [congressional] power to declare war . . . *includes all the powers incident to war*, and necessary to carry it into effect"[109] and that the congressional power "'to provide and maintain a navy'" includes "the power to *regulate* and *govern* the navy."[110]

His main point in dissent was that although Congress has the power to set limits on the "objects and mode of warfare," it had not done so in the 1812 Act:

> There is no act of the legislature defining the powers, objects or mode of warfare: by what rule, then, must he be governed? I think the only rational answer is by the law of nations as applied to a state of war. Whatever act is legitimate, whatever act is approved by the law, or hostilities among civilized nations, such he may, in his discretion, adopt and exercise; for with him the sovereignty of the nation rests as to the execution of the laws. If any of such acts are disapproved by the legislature, it is in their power to narrow and limit the extent to which the rights of war shall be exercised; but until such limit is assigned, the executive must have all the right of modern warfare vested in him, to be exercised in his sound discretion.[111]

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[104] 12 U.S. (8 Cranch) 110 (1814).
[105] *Id.* at 125–26.
[106] *Id.* at 127.
[107] *Id.* at 128.
[108] *Id.* at 145 (Story, J., dissenting).
[109] *Id.* at 150 (emphasis added).
[110] *Id.* at 151 (emphasis added).
[111] *Id.* at 149.

Justice Story assumed that broad language in the Act "authorizing the president to employ the public forces to carry it into effect" was a sufficient conferral of the power to confiscate "property, wherever, by the law of nations, it may be lawfully seized," "there being no limitation in the act"[112] and no violation of the law of nations. For Justice Story, "[i]f the legislature does not limit the nature of the war, all the regulations and rights of general war attach."[113] "He has a discretion vested in him, as to the manner and extent; but he cannot lawfully transcend the rules of warfare . . . . He cannot lawfully exercise powers or authorize proceedings which the civilized world repudiates and disclaims."[114] "[C]ertainly the rights of the 'commander in chief,'" Story affirmed, "must be restrained to such acts as are allowed by the laws."[115]

In view of the broad reach of congressional power evident in several judicial decisions, as well as relevant patterns of legislation agreed to by Congress and the President[116] and the express constitutional power of Congress to "make all Laws

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[112] *Id.* at 145.

[113] *Id.* at 154.

[114] *Id.* at 153. Chief Justice Marshall clearly agreed that the President is bound by international law. *See* PAUST, INTERNATIONAL LAW, *supra* note 40, at 170, 180 n.2, 181 nn.8 & 11. No other Justice disagreed. *See, e.g.*, *id.* at 169–71; *see also id.* at 7–9, 38–39 nn.32–45, 44–47 nn.54–56.

[115] *Brown*, 12 U.S. (8 Cranch) at 153.

[116] *See, e.g.*, War Declared Between Germany and the United States, Pub. L. No. 331-77, 55 Stat. 796 (1941) ("[T]he President is hereby authorized and *directed to employ the entire naval and military forces* . . . ." (emphasis added)); War Declared Between Japan and the United States, Pub. L. No. 328-77, 55 Stat. 795 (1941) ("[T]he President is hereby authorized and *directed to employ the entire naval and military forces* . . . ." (emphasis added)); Act of May 13, 1846, ch. XVI, 9 Stat. 9, 9–10 (stating in section 1 that the President "is hereby, authorized . . . to call for and accept the services of any number of volunteers, not exceeding fifty thousand, who may offer their services, either as cavalry, artillery, infantry, or riflemen, to serve twelve months"; stating in section 3 that "the said volunteers shall furnish their own clothes, and if cavalry, their own horses and horse equipments"; stating in section 5 that "the said volunteers . . . shall be accepted by the President in companies, battalions, squadrons, and regiments, whose officers shall be appointed in the manner prescribed by law in the several States and Territories"; and stating in section 6 that "the President shall, if necessary, apportion the staff, field, and general officers among the respective States and Territories from which the volunteers" come); S.J. Res. 24, 55th Cong., 30 Stat. 738 (1898) ("[T]he President . . . hereby is, *directed* and empowered *to use the entire land and naval forces* of the United States . . . ." (emphasis added)). Legislation during the limited war with France from 1798 to 1800 limited the conduct of war, including types of vessels that could be seized. *See* Act of Feb. 27, 1800, ch. X, 2 Stat. 7 (adding sections 9 through 12 to Act of Feb. 9, 1799, 1 Stat. 613, *addressed in* Little v. Barreme (The Flying Fish), 6 U.S. (2 Cranch) 170, 171–78 (1804); Act of Mar. 2, 1799, ch. XXIV, 1 Stat. 709, *addressed in* Bas v. Tingy, 4 U.S. (4 Dall.) 37, 37–46 (1800).

Some of the early congressional appropriations allocated monies in significant detail. *See, e.g.*, Act of June 15, 1864, ch. CXXIV, 13 Stat. 126; Act of Aug. 14, 1848, ch.

which shall be necessary and proper for carrying into Execution" its powers "and all other Powers vested by this Constitution in the Government of the United States, or in any Department or Officer thereof,"[117] there is a compelling basis for the presumptive validity of acts of Congress that set limits concerning the extent of war, its objects, its operations, its mode, persons and things to be affected, places, general effects, and time.

Third, numerous cases throughout our history clearly affirm that the judiciary has constitutionally based power to interpret international law and to review various decisions and actions taken by the Executive during war, including the status and treatment of detainees.[118] More particularly, there is consistent and unyielding judicial recognition that the laws of war are binding on all persons within the executive branch, including the President;[119] and, more generally, it has

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CLXXIII, § 2, 9 Stat. 304, 306 (directing that the President can "increase the number of privates, of not more than five regiments, to such number as he may think discreet, not exceeding one hundred privates to each of the companies of said five regiments"); Act of Mar. 2, 1847, ch. XXXV, 9 Stat. 149.

[117] U.S. CONST. art. I, § 8, cl. 18. Whatever lurks behind the Bush administration's unilateralist claim of power "to supervise the unitary executive branch," *see supra* text accompanying note 97,—a phrase unknown to the Constitution—it is clear that clause 18 provides Congress an express authority to pass laws for carrying into execution the powers of any executive "Department or Officer." U.S. CONST. art. I, § 8, cl. 18.

[118] *See, e.g.*, Hamdi v. Rumsfeld, 542 U.S. 507, 535–36 (2004) (stating that courts can "exercise their own time-honored and constitutionally mandated roles of reviewing and resolving claims" (citing Sterling v. Constantin, 287 U.S. 378, 401 (1932) ("What are the allowable limits of military discretion, and whether or not they have been overstepped in a particular case, are judicial questions."))). The court in *Hamdi* also stated that an executive claim to unreviewable power or to power subject only to "a heavily circumscribed role for the courts" cannot comport with the proper separation of powers since it "serves only to *condense* power into a single branch of government." *Id.* at 536. The Court in *Hamdi* added that "a state of war is not a blank check for the President." *Id.*; *see also* Gerald L. Neuman & Charles F. Hobson, *John Marshall and the Enemy Alien*, 9 GREEN BAG 39, 43 (2005); Paust, *supra* note 1, at 856 n.169; Jordan J. Paust, *Judicial Power to Determine the Status and Rights of Persons Detained Without Trial*, 44 HARV. INT'L L.J. 503, 514, 517–24 (2003) [hereinafter Paust, *Judicial Power*].

Even after losing *Hamdi*, in another case the "government . . . argued that the district court [for the District of Columbia] had no authority to issue injunctive relief [for a U.S. citizen detained by U.S. military in Iraq who was to be transferred to Iraqi authorities] because doing so would 'inject [the court] into an exclusive Executive function' and . . . [would raise] 'non-justiciable political questions.'" Omar v. Harvey, 479 F.3d 1, 4 (D.C. Cir. 2007) (quoting Respondents' Opposition to Petitioners' Ex Parte Motion for a TRO at 22, 25, Omar v. Harvey, 416 F. Supp. 2d 19 (D.D.C. 2006) (No. Civ. A. 05-2374 RMU)). The Circuit Court panel disagreed: "The Supreme Court's recent decision in *Hamdi* makes abundantly clear that Omar's challenge to his detention is justiciable" and that his "challenge to his transfer is equally justiciable, ... [even though] a decision on the merits might well have *implications* for military and foreign policy." *Id.* at 10.

[119] *See, e.g.*, *supra* notes 92, 97–98 and text accompanying notes 102, 112–15.

been recognized that executive views cannot be determinative of the content of law.[120] If the President disagrees and claims that the commander-in-chief power

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[120] *See, e.g.*, *Hamdi*, 542 U.S. at 535–36 (see quote *supra* note 118); United States v. Nixon, 418 U.S. 683, 703 (1974) ("'[It] is emphatically the province and duty of the judicial department to say what the law is.'" (quoting Marbury v. Madison, 5 U.S. (1 Cranch) 137, 177 (1803))); *id.* at 704 ("Any other conclusion would be contrary to the basic concept of separation of powers and the checks and balances that flow from the scheme of tripartite government."). With respect to ultimate judicial determination of the content of customary and treaty-based international law (contrary to executive views) and its application to executive decisions and military conduct abroad during war, see *The Paquete Habana*, 175 U.S. 677, 683, 691, 700, 708, 711 (1900); PAUST, INTERNATIONAL LAW, *supra* note 40, at 105, 174–75, 184 n.24, 188 n.67, 295–96, 387 n.47, 489–90, 493–95; Paust, *supra* note 1, at 858–59 (discussing *The Paquete Habana*); Paust, *Judicial Power*, *supra* note 118, at 505–25 (addressing numerous cases affirming ultimate judicial authority to interpret and apply treaties and customary international law with respect to decisions and conduct of the Executive during war); Jordan J. Paust, Paquete *and the President: Rediscovering the Brief for the United States*, 34 VA. J. INT'L L. 981, 981–90 (1994) (addressing the Supreme Court ruling that an executive interpretation of customary laws of war was incorrect and executive conduct abroad during war was a violation of the laws of war); *see also* Sanchez-Llamas v. Oregon, 126 S. Ct. 2669, 2684 (2006) ("[D]etermining the[] meaning [of treaties] as a matter of federal law 'is emphatically the province and duty of the judicial department'" (quoting *Marbury*, 5 U.S. (1 Cranch) at 177)); Clark v. Allen, 331 U.S. 503, 513 (1947); Perkins v. Elg, 307 U.S. 325, 333 (1939); Factor v. Laubenheimer, 290 U.S. 276, 295 (1933) (noting an executive interpretation of a treaty is "not conclusive upon courts"); Nielsen v. Johnson, 279 U.S. 47, 52 (1929) (noting the judiciary has ultimate authority to interpret treaties); Jordan v. Tashiro, 278 U.S. 123, 128–29 (1928) (noting the judiciary may interpret treaties broadly); Asakura v. City of Seattle, 265 U.S. 332, 341 (1924) (noting the judiciary is bound to interpret and apply treaties); Jones v. Meehan, 175 U.S. 1, 32 (1899) (noting "[t]he construction of treaties is the peculiar province of the judiciary" and rights under treaties cannot "be divested by any subsequent action of . . . Congress, or of the Executive"); Reichart v. Felps, 73 U.S. (6 Wall.) 160, 165 (1867) (same); Ware v. Hylton, 3 U.S. (3 Dall.) 199, 239–40, 249, 251, 253–54, 283 (1796) (exercising its interpretive power and giving examples of interpreted language in a treaty); THE FEDERALIST NO. 78, at 435 (Alexander Hamilton) (Clinton Rossiter ed., 1961) ("[I]nterpretation of the laws is the proper and peculiar province of the courts."). *But see* Julian G. Ku, Ali v. Rumsfeld*: Challenging the President's Authority to Interpret Customary International Law*, 37 CASE W. RES. J. INT'L L. 371, 371 (2006) (ignoring numerous directly relevant cases and baldly asserting in significant error that presidential "control over the interpretation of [customary international law (CIL)] . . . is . . . reflected in . . . judicial precedent"); *id.* at 376 n.29 (asserting in outrageous error that "no court has preempted state law using CIL"); *id.* at 376 (asserting in outrageous error that "incorporation of CIL as federal law is unsupported by any judicial precedent prior to the 1980s"); *id.* at 378, 380 (discussing *The Paquete Habana* and asserting in outrageous error that the President can "reject CIL rules" and "make his interpretations binding on federal and state courts") (But see, regarding each error, numerous federal and state cases addressed in PAUST, INTERNATIONAL LAW, *supra* note 40, at 7–11, 38–59, 116, 165–67 nn.134–35, 180–87 nn.2–42, 489–90, 493–95, 499–502 nn.23–31, 507–10 nn.82–103);

allows him to violate the 2005 Act and underlying laws of war and human rights law, he will be conducting war on the Constitution.[121]

Julian G. Ku, *Gubernatorial Foreign Policy*, 115 YALE L.J. 2380, 2404 n.103 (2006) (asserting in error and without citation that "Congress and the President hold the power to recognize rules of customary international law as binding on the U.S. government"); John C. Yoo, *Rejoinder: Interpretation and the False Sirens of Delegation*, 90 CAL. L. REV. 1305, 1309 (2002) (preferring a radical change and theorizing that the "treaty power as a whole . . . ought to be regarded as an exclusively executive power"); Yoo & Delahunty Memo, *supra* note 24, at 28.

[121] *See* PAUST, INTERNATIONAL LAW *supra* note 40, at 109, 147 n.77, 169–73, 179, 487–90, 492–95, 497–510. Although some misconstrue an "over-simplified," non-determinative formula once proffered by Justice Jackson, the Justice was emphatic that the President is bound by law. *See, e.g.*, *id.* at 191–92 n.81, 487, 489–90 (citing Youngstown Sheet & Tube Co. v. Sawyer, 343 U.S. 579, 646, 649 (1952) (Jackson, J., concurring) (stating that unreviewable "powers *ex necessitate*" were omitted by the Framers, who assured "control of executive powers by law," and that "it is not a military prerogative, without support of law, to seize persons or property because they are important or even essential for the military")); *id.* at 497 nn.1–3, 502 n.31; *supra* note 98 (quoting *Youngstown*, 343 U.S. at 643 (Jackson, J., concurring)); *see also* Hamdi v. Rumsfeld, 542 U.S. 507, 536 (2004) ("We have long since made clear that a state of war is not a blank check for the President . . . ." (citing *Youngstown*, 343 U.S. at 587)); *id.* at 552 (Souter, J., concurring in part and dissenting in part) ("[I]t is instructive to recall Justice Jackson's observation that the President is not Commander in Chief of the country, only of the military."); Rumsfeld v. Padilla, 542 U.S. 426, 465 (2004) (Stevens, J., dissenting); Duncan v. Kahanamoku, 327 U.S. 304, 335 (1946) (Murphy, J., concurring) (quoting *Ex parte* Milligan, 71 U.S. (4 Wall.) 2, 120–21 (1866) (stating the claim of executive power to suspend the Constitution during war is "pernicious" and "the theory of necessity on which it is based is false")); *Ex parte* Merryman, 17 F. Cas. 144, 149–50 (C.C.D. Md. 1861) ("Nor can any argument be drawn from . . . necessity . . . [or] self-defense in times of tumult and danger. The government of the United States is one of delegated and limited powers; it derives its existence and authority altogether from the constitution . . . ."). The *Merryman* Court added that the Constitution provides "security against imprisonment by executive authority." 17 F. Cas. at 149–50. *Youngstown* also affirmed that the President's duty "to see that the laws are faithfully executed refutes the idea that he is to be a lawmaker." 343 U.S. at 587. It follows that the President's constitutional duty of faithful execution also refutes the idea that the President can simply suspend or change the reach of rights and duties based in legislation and it refutes the idea that his views of the content of the law are determinative. *See also* United States v. Smith, 27 F. Cas. 1192, 1230 (C.C.D.N.Y. 1806) (No. 16,342) (quoted *supra* note 98); Neil Kinkopf, *Statutes and Presidential Power: The Case of Domestic Surveillance*, JURIST, Mar. 13, 2006, http://jurist.law.pitt.edu/forumy/2006/03/statutes-and-presidential-power-case.php (stating deference to executive interpretations of statutes conferring powers on the President would be improper); *supra* note 120 (showing executive views cannot determine the content of law). As Richard Nixon learned, presidential authorizations to violate law are, in the words of the House Judiciary Committee, "subversive of constitutional government." HOUSE COMM. ON THE JUDICIARY, IMPEACHMENT OF RICHARD M. NIXON, PRESIDENT OF THE UNITED STATES, H.R. Doc. No. 93-1305, at 4 (1974).

One of the causes of our Revolution involved a British governor's "defiance of the obligation of treaties."[122] Additional causes involved the King's prosecution of hostilities "without regard to faith or reputation"[123] and use of Indians who acted outside the "known rule of warfare."[124] It is inconceivable that the Founders and Framers would have countenanced a commander-in-chief who claimed a right to violate treaties or, more particularly, the laws of war. Unanimous documented views of the era affirm that they did not.[125] Additionally, the Founders decried the King's efforts "to render the military independent of, and superior to the civil power."[126] Although the President would later be given power as commander-in-

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[122] *See* Declaration of the Causes and Necessity of Taking Up Arms, July 6, 1775, *reprinted in* RICHARD L. PERRY, SOURCES OF OUR LIBERTIES 295, 298 (rev. ed. 1972).

[123] *Id.*

[124] THE DECLARATION OF INDEPENDENCE para. 30 (U.S. 1776).

[125] *See, e.g.*, PAUST, INTERNATIONAL LAW *supra* note 40, at 7–9, 67–69, 169–71, 180–83 nn.1–22; *supra* note 97; *see also id.* at 195–202, 208–09 (concerning early commitment to human rights); Jordan J. Paust, *My Lai and Vietnam: Norms, Myths and Leader Responsibility*, 57 MIL. L. REV. 99, 112–13 (1972) (concerning other early adherence to laws of war and more general laws of nations).

[126] THE DECLARATION OF INDEPENDENCE para. 14 (U.S. 1776); Delaware Declaration of Rights § 20 (1776), *reprinted in* Perry, *supra* note 121, at 339 ("[I]n all cases and at all times the military ought to be under strict subordination to and governed by the civil power."); MASS. CONST. OF 1780, A Declaration of the Rights of the Inhabitants of the Commonwealth of Massachusetts, art. XVII, *reprinted in* Perry, *supra* note 121, at 376 ("[T]he military power shall always be held in an exact subordination to the civil authority, and be governed by it."); MD. CONST. OF 1776, A Declaration of Rights § XXVII, *reprinted in* Perry, *supra* note 121, at 348 ("[I]n all cases, and at all times, the military ought to be under strict subordination to and control of the civil power."); N.C. CONST. OF 1776, A Declaration of Rights § XVII, *reprinted in* Perry, *supra* note 121, at 356 ("[T]he military should be kept under strict subordination to, and governed by, the civil power."); N.H. CONST. OF 1784, art. I § VIII, *reprinted in* Perry, *supra* note 121, at 383 ("[A]ll the magistrates and officers of government are . . . at all times accountable to [the people]."); *id.* § XXVI, *reprinted in* Perry, *supra* note 121, at 385 ("In all cases, and at all times, the military ought to be under strict subordination to, and governed by the civil power."). Additionally, at the Constitutional Convention, Charles Pinckney of South Carolina warned that giving the President unfettered power over war "would render the Executive a Monarchy of the worst kind." 1 THE RECORDS OF THE FEDERAL CONVENTION OF 1787, supra note 69, at 64–65; PA. CONST. of 1776, A Declaration of the Rights of the Inhabitants of the Commonwealth, or State, of Pennsylvania § IV, *reprinted in* Perry, *supra* note 121, at 329 ("[A]ll officers of government, whether legislative or executive, are . . . at all times accountable to [the people]."); *id.* § XIII, *reprinted in* Perry, *supra* note 121, at 330 ("[T]he military should be kept under strict subordination to, and governed by, the civil power."); *see also* VA. CONST. OF 1776, Bill of Rights § 2, *reprinted in* Perry, *supra* note 121, at 311 ("[M]agistrates are . . . at all times amendable to [the people]."); *id.* § 13, *reprinted in* Perry, *supra* note 121, at 312 ("[I]n all cases the military should be under strict subordination to, and governed by, the civil power."); VT. CONST. OF 1777, A Declaration of the Rights of the Inhabitants of the State of Vermont § V, *reprinted in* Perry, *supra* note

chief of the military partly to assure civil control of the military, it is inconceivable that the Founders would have countenanced a commander-in-chief of the military or "first general" who was himself superior to "civil power" and not "governed by it."[127]

121, at 365 ("[A]ll officers of government, whether legislative or executive, are . . . at all times accountable to [the people]."); *id.* § XV, *reprinted in* Perry, *supra* note 121, at 366 ("[T]he military should be kept under strict subordination to, and governed by, the civil power.").

[127] *See supra* note 126 (demonstrating that the quoted language "civil power" and "governed by it" appears in various early state declarations of right and constitutions). Alexander Hamilton declared that the President's commander-in-chief power "in substance [is] much inferior to . . . [the British King's power and] would amount to nothing more than the supreme command and direction of the military and naval forces, as first general and admiral." THE FEDERALIST NO. 69, at 385–86 (Alexander Hamilton) (Clinton Rossiter ed., 1961). In addition, Hamilton stated that the British King's power "extends to the . . . *regulating* of fleets and armies—all of which, by the Constitution . . . , would appertain to the legislature." *Id.* No Founder is known to have claimed that a "first general" should not ultimately be controlled and "governed by" the "civil power." *Cf.* THE FEDERALIST NO. 72, at 404 (Alexander Hamilton) (Clinton Rossiter ed., 1961) (noting "the direction[s] of the operations of war" as such "[are] matters of a like nature . . . [that] seem[] to be most properly understood by the administration of government."). Moreover, the Declaration of Independence decried "usurpations" by the King of England, such as "abolishing the free System of English Laws in a neighbouring Province," "abolishing our most valuable Laws," "suspending our own Legislatures," and other acts "which may define a Tyrant." THE DECLARATION OF INDEPENDENCE paras. 22, 23, 24 (U.S. 1776). Thus, it would have been inconceivable that the Founders would have tolerated a commander-in-chief who violated our laws and claimed a power to ignore them. *See also* 1 Op. Att'y Gen. 492, 493 (1821) ("[I]n a government purely of laws, no officer should be permitted to stretch his authority and carry the influence of his office beyond the circle which the positive law of the land has drawn around him. This . . . is republican orthodoxy . . . ."); Declaration of the Causes and Necessity of Taking Up Arms, *supra* note 122, at 299 (decrying "the tyranny of irritated ministers"). Most assuredly this was "common sense." *See* THOMAS PAINE, COMMON SENSE (Phila., Newbury-Port 1776) ("[I]n America THE LAW IS KING. For as in absolute governments the King is law, so in free countries the law ought to be King; and there ought to be no other."), *reprinted in* THE ESSENTIAL THOMAS PAINE 49 (Sidney Hook ed., 1969).

Madison had expressed a related distrust of executive power regarding more general decisions concerning war, peace, and their limitation:

> It is in war . . . that laurels are to be gathered, and it is the executive brow they are to encircle. The strongest passions, and most dangerous weaknesses of the human breast; ambition, avarice, vanity, the honorable or venial love of fame, are all in conspiracy against the desire and duty of peace.

JAMES MADISON, *"Helvidius" Number 4*, *in* THE WRITINGS OF JAMES MADISON 171, 174 (Gallard Hunt ed., Knickerbocker Press 1906). In a letter to Jefferson, Madison also noted: "The constitution supposed, what the History of all Gov[ernmen]ts demonstrates, that the

B. The Commander-Above-the-Law Theory

These recognitions would be unremarkable if members of the Bush administration had not claimed that the President, as commander-in-chief, can violate international and domestic laws. The commander-above-the-law theory was set forth in various DOJ and DOD memoranda and reports from 2001 to 2003 that the administration has not denounced. A primary proponent of the theory was John Yoo[128] and several others in the administration endorsed the theory or proffered a related claim of necessity to violate international law.[129] For example, a 2003 DOD Working Group Report on Detainee Interrogations adopted John Yoo's commander-above-the-law theory[130] and the Yoo theory was set forth in the infamous 2002 Bybee torture memo.[131] A related claim that "courts may not second-guess" the President also has been reflected in administration briefs.[132]

Ex[ecutive] is the branch of power most interested in war, & most prone to it. It has accordingly with studied care, vested the question of war in the Legisl[ature]." Letter from James Madison to Thomas Jefferson (Apr. 2, 1798), *available at* http://press-pubs.uchicago.edu/founders/documents/a1_8_11s8.html.

[128] *See, e.g.*, YOO, *supra* note 14, at 35 (stating that, instead of faithful execution of Geneva law, the inner circle did a cost-benefit analysis of compliance and decided not to comply); *id.* at 192 ("[C]oercive interrogation . . . should not be ruled out."); *id.* at 202 ("The executive branch should continue . . . deciding when to use coercive interrogation."); *supra* notes 24, 38; *infra* note 139.

[129] *See, e.g.*, Paust, *supra* note 1, at 824 (Gonzales); *id.* at 828 (Bush); *id.* at 831 (Delahunty and others); *id.* at 835 n.90 (Bybee); *id.* at 836–38 nn.96–97; *id.* at 842 n.114 (Mary Walker and others); Brooks, *supra* note 77 (quoting Bradbury's testimony before the Senate Armed Services Committee); Mayer, *supra* note 9, at 44 (discussing Addington's involvement in drafting Bybee's torture memo); Ragavan, *supra* note 9, at 32 (discussing Addington's involvement in drafting the Gonzales memo); *see also* Alvarez, *supra* note 1, at 197–98; Amann, *supra* note 2, at 2100 n.58 (addressing the claim of Gonzales in 2005 that the President "'could theoretically decide that a U.S. law—such as the prohibition against torture—is unconstitutional'" (quoting Dan Eggen & Charles Babington, *Torture by U.S. Personnel Illegal, Gonzales Tells Senate*, WASH. POST, Jan. 19, 2006, at A4)); Lichtblau, *supra* note 18; Press Briefing of Alberto Gonzales, U.S. Att'y Gen. (June 22, 2004), *available at* http://www.whitehouse.gov/news/releases/2004/06/20040622-14.html (the President "has not exercised his Commander-in-Chief override, he has not determined that torture is, in fact, necessary"); *infra* note 139.

[130] *See, e.g.*, Paust, *supra* note 1, at 842 n.114; Mora Memo, *supra* note 5, at 17–18.

[131] *See, e.g.*, Paust, *supra* note 1, at 835 & n.89; Koh, *supra* note 97, at 648–50; *supra* note 37. The Bybee memo was later withdrawn, but the commander-above-the-law theory was not denounced.

[132] *See, e.g.*, Amann, *supra* note 2, at 2100; Norman C. Bay, *Executive Power and the War on Terror*, 83 DENV. L. REV. 335, 362, 364, 367–68 (2005); Erwin Chemerinsky, *Enemy Combatants and Separation of Powers*, 1 J. NAT'L SECURITY L. & POL'Y 73, 87 (2005); Paust, *Judicial Power*, *supra* note 118, at 504 & n.4. The Supreme Court rejected

More recently, a DOJ memorandum on domestic spying claimed a commander-in-chief power to ignore congressional legislation,[133] a claim that was subsequently

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this claim in *Hamdi*. *See* Hamdi v. Rumsfeld, 542 U.S. 507, 535–36 (2004) (quoted *supra* note 118).

[133] *See* Memorandum from the Dep't of Justice on Legal Authorities Supporting the Activities of the National Security Agency Described by the President 3, 35 (Jan. 19, 2006), *available at* http://www.usdoj.gov/opa.whitepaperonnsalegalauthorities.pdf (arguing that an implied executive power termed an "inherent constitutional authority as Commander in Chief and sole organ for the Nation in foreign affairs to conduct warrantless surveillance" exists and is somehow an exclusive power both here and abroad, and that in the event of a clash with the Foreign Intelligence Surveillance Act, "FISA would be unconstitutional"); *see also* Eric Lichtblau & James Risen, *Legal Rationale by Justice Dept. on Spying Effort*, N.Y. TIMES, Jan. 19, 2006, at A1; Eric Lichtblau, *Nominee Says N.S.A. Stayed Within Law on Wiretaps*, N.Y. TIMES, May 19, 2006, at A20 (former head of the National Security Agency, General Michael Hayden, testified before the Senate Intelligence Committee: "I talked to the N.S.A. lawyers . . . they were very comfortable with the Article II arguments and the president's inherent authorities . . . . Our discussion anchored itself on Article II"); Mayer, *supra* note 9, at 44 (stating that Addington and Cheney told N.S.A. lawyers "that the President, as Commander-in-Chief, had the authority to override" FISA); Ragavan, *supra* note 9 (noting that Addington used the commander-in-chief-above-the-law claim in support of President Bush's decision to engage in domestic surveillance in violation of FISA); Charlie Savage, *Bush Challenges Hundreds of Laws: President Cites Powers of His Office*, BOSTON GLOBE, Apr. 30, 2006, at A1 (noting that in signing statements, President Bush has "claimed the authority to disobey more than 750 laws enacted since he took office," including laws regulating domestic spying, the McCain amendment, requirements to report to Congress concerning use of the Patriot Act, laws forbidding use of U.S. troops in combat in Colombia, laws requiring retraining of prison guards on requirements of the Geneva Conventions, and a law creating an inspector general for Iraq); *infra* note 142. *But see* ABA TASK FORCE ON DOMESTIC SURVEILLANCE IN THE FIGHT AGAINST TERRORISM, RESOLUTION 302 AND REPORT 27 (2006), *available at* http://www.abanet.org/op/greco/memos/aba_house302-0206.pdf (Resolution 302 was adopted by the ABA House of Delegates on February 13, 2006); PAUST, INTERNATIONAL LAW *supra* note 40, at 509 n.97; David A. Cole, Remarks, *NSA Wiretapping Controversy*, 37 CASE W. RES. J. INT'L L. 509, 513–14, 529 (2006); Joyce Appleby & Gary Hart, *Wake Up, America, to a Constitutional Crisis: 'Congress Has Been Supine in the Face of the President's Grab for Unconstitutional Power,'* CHI. SUN-TIMES, Apr. 2, 2006, at B2; *Lawyers Group Opposes Warrantless Spying*, L.A. TIMES, Feb. 14, 2006, at A13; Jordan J. Paust, Op-Ed., *Not Authorized by Law: Domestic Spying and Congressional Consent*, JURIST, Dec. 23, 2005, http://jurist.law.pitt.edu/forumy/2005/12/not-authorized-by-law-domestic-spying.php (noting also that Congress set limits on domestic surveillance in the FISA and did not expressly or impliedly authorize their obviation with respect to surveillance either within or outside the United States in any subsequent legislation, including the 2001 Authorization for Use of Military Force ("AUMF")—addressed *infra* Part IV); *see also* Statement on Signing S.1566, Foreign Intelligence Surveillance Act of 1978, into Law, 2 Pub. Papers 1853, 1853 (Oct. 25, 1978), *available at* http://www.cnss.org/Carter.pdf ("[The law] requires . . . a prior judicial warrant for *all* electronic surveillance for foreign intelligence or counterintelligence purposes in the United

denounced by a federal district court.[134] Revelations of domestic electronic spying

States in which communications of U.S. persons might be intercepted. It clarifies the Executive's authority . . . .").

Similar claims were made in a letter to four congresspersons on December 22, 2005, by Assistant Attorney General Moschella. *See* Letter from William Moschella, Assistant Att'y Gen., to Senators Pat Roberts and Peter Hoekstra, Chairmen, Senate Select Comm. on Intelligence, and John D. Rockefeller, IV, Vice Chairman, and Jane Harman, Ranking Member (Dec. 22, 2005), *available at* http://cryptome.org/doj-nsa-spy.htm. Senator Roberts has openly accepted the commander-above-the-law theory. *See Meet the Press* (NBC television broadcast Feb. 12, 2006) (remarks of Sen. Pat Roberts) (stating that, in regard to FISA limits, "the president has the constitutional authority . . . . [that] rises above any law passed by the Congress"). With respect to the commander-in-chief power, Assistant Attorney General Moschella seriously misread the *Prize Cases* by ignoring the fact that immediately before the language he quoted, the Supreme Court expressly referred to two early federal statutes that "authorized . . . [and] bound" the President to use armed force, demonstrating another instance of congressional power to regulate portions of the commander-in-chief power during actual war. *See* The Prize Cases, 67 U.S. (2 Black) 635, 668 (1862) ("*[B]y the Acts of Congress* of February 28th, 1795, and 3d March, 1807, he is *authorized* to . . . use the military and naval forces of the United States in case of invasion by foreign nations . . . . [Thus, i]f a war be made by invasion of a foreign nation, the President is not only *authorized* but *bound* to resist force by force." (emphasis added)); *see also id.* at 691 (Nelson, J., dissenting) (regarding the Acts of 1792 and 1795 and the presidential power to call the militia). The Court also expressly affirmed that the President "has no power to initiate or declare a war," *id.* at 668, "is bound to take care that the laws be faithfully executed," *id.* at 691, and that "[t]he right of . . . capture has its origin in the '*jus belli*,' and is governed and adjudged under the law of nations," *id.* at 666. Justice Thomas engaged in the same misread of *The Prize Cases* in Hamdan v. Rumsfeld, 126 S. Ct. 2749, 2823, 2826 (2006) (Thomas, J., dissenting) (alleging in error that the *Prize* opinion "observed" that the President has "broad constitutional authority to protect the Nation's security in the manner he deems fit" and "recogniz[ed] that war may be initiated by 'invasion . . . ,' and . . . the President's response, usually precedes congressional action").

It does not follow merely because intelligence-gathering is an accepted and important war measure that (1) Congress cannot set limits on its use during war (*e.g.*, under the FISA), or (2) Congress impliedly authorizes such a measure when it authorizes the use of force, much less a very selective use of appropriate force. *See also* Paust, *supra* (stating no congressional authorization exists in the AUMF to override the requirements of the FISA and such would not be "appropriate"); *supra* note 98 and text accompanying notes 121–22, 124–27; *cf. Hamdi*, 542 U.S. at 518 (stating that the 2001 congressional authorization of certain necessary and appropriate force impliedly authorized the detention of a limited category of individuals from the war in Afghanistan as a "fundamental and accepted . . . incident to war" regarding the "'force' Congress has authorized").

[134] *See* ACLU v. NSA, 438 F. Supp. 2d 754, 775–80 (E.D. Mich. 2006) (ruling that the President's domestic spying program "has undisputedly been implemented without regard to FISA and of course the more stringent standards of Title III, and obviously in violation of the Fourth Amendment" and has violated the First Amendment rights of plaintiffs); *id.* at 778 (stating that the President's domestic spying program "undisputedly,

have been followed by revelations of warrantless mail inspections in violation of federal legislation with a claimed right to do so in a 2006 presidential signing statement attached to a postal statute.[135] It was also reported that Vice President Cheney and others in the White House, and perhaps President Bush, had authorized the leaking of two types of highly classified national security information for political purposes despite federal laws prohibiting such conduct.[136]

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has violated the provisions of FISA for a five-year period . . . [and violated] the Separation of Powers ordained by the very Constitution of which this President is a creature"); *id.* at 779 (ruling that the President's domestic spying program is not authorized by the 2001 Authorization for Use of Military Force, especially since the FISA and Title III "have made abundantly clear that prior warrants must be obtained from the FISA court for such surveillance, with limited exceptions," and the FISA's "highly specific . . . requirements" would prevail over the more general AUMF even if it impliedly applied to antiterrorist intelligence surveillance); *id.* at 780 (stating the President's domestic spying program is not permissible because of a claim that the President, as Commander-in-Chief, "has been granted the inherent power to violate not only the laws of the Congress but the First and Fourth Amendments of the Constitution").

[135] *See, e.g.*, Mimi Hall & David Jackson, *Bush Administration Defends Warrantless Mail Inspection*, USA TODAY, Jan. 5, 2007, at 4A (addressing a Dec. 20, 2006, signing statement that is not even limited to contexts of war or terrorism).

[136] *See, e.g.*, David Johnston & David E. Sanger, *Cheney's Aide Says President Approved Leak*, N.Y. TIMES, Apr. 7, 2006, at A1; Richard B. Schmitt & Peter Wallsten, *Libby Said Bush OKd Leaks*, L.A. TIMES, Apr. 7, 2006, at A1 (stating leaks of classified information from the National Intelligence Estimate of 2003, which "was [only] officially declassified almost two weeks later," occurred with approval from Cheney and Addington, who stated that Bush authorized the leaking of classified information); Richard B. Schmitt, *Libby Says 'Superiors' Authorized Leaks*, L.A. TIMES, Feb. 10, 2006, at A1; Andrew Zajac, *Libby Said He Had OK to Leak Secrets*, CHI. TRIB., Feb. 10, 2006, at C1; *see also* Mayer, *supra* note 5, at 32–41 ("Documents embarrassing to Addington's opponents were leaked to the press."). Members of the Bush Administration also intentionally leaked highly classified information concerning the identity of high-level covert CIA employee Valerie Plame Wilson for political purposes with clearly foreseeable harm of great significance to CIA operatives, the Agency, and our national security. *See, e.g.*, Bob Deans, *Plame: Leak Felt Like "Hit in the Gut": On Capital Hill, Former CIA Operative Says Covert Identity Exposed, U.S. Intelligence Efforts Undercut for Political Purposes*, ATLANTA J.-CONST., Mar. 17, 2007, at 1A; Trevor Royle, *The Fall Guy*, SUNDAY HERALD, Mar. 11, 2007, at 42; Raymond Whitaker & Andrew Buncombe, *How an Article in the "IOS" Led to the Conviction of Lewis "Scooter" Libby*, INDEP. (London), Mar. 11, 2007, at 50; Zajac, *supra*. This is just one set of detrimental consequences that has followed from an arrogant commander-above-the-law policy that has shifted the war to one against our own institutions. Leaks of such a nature are far different from leaks by lower-level officials to disclose governmental illegality of highest-level officials. The latter sort of leaks can also involve a claimed defense of "justification," especially when disclosures of illegality to those highest-level officials that authorized the illegality would be futile. Concerning the justification defense, see Irina Dmitrieva, Note, *Stealing Information: Application of a*

Even if the Vice President had a power like the President to declassify certain documents, the mere existence of such a power would not be a defense to unlawful leaks that occurred while the documents and information remained classified.[137]

John Yoo's commander-above-the-law preference for the primacy of so-called "self-defense" interrogation tactics over nonderogable international law and his radical and nihilistic theory that the President can lawfully violate the laws of war[138] has its domestic counterpart—a fundamentally anti-democratic and unconstitutional preference for a congressionally unchecked and judicially unreviewable executive commander-in-chief power to override any inhibiting domestic law.[139] Some of John Yoo's DOJ memos addressing presidential power

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Criminal Anti-Theft Statute to Leaks of Confidential Government Information, 55 FLA. L. REV. 1043, 1072 n.170 (2003).

[137] *See* United States v. Nixon, 418 U.S. 683, 695–96 (1974) (stating that "[s]o long as this regulation is extant it has the force of law" and "[s]o long as [an executive] regulation remains in force the Executive branch is bound by it, and indeed . . . [the three branches are] bound to respect and to enforce it" despite the power in the President to amend or terminate it); 10 Op. Att'y Gen. 11, 17 (1861); WILLIAM WINTHROP, MILITARY LAW AND PRECEDENTS 32 (2d ed. 1920).

[138] *See, e.g.*, *supra* notes 24, 27, 120, 130–31.

[139] *See, e.g.*, David Golove, *United States: The Bush Administration's "War on Terrorism" in the Supreme Court*, 3 INT'L J. CONST. L. 128, 145 (2005); Paust, *supra* note 1, at 834 n.89 (quoting John Yoo in an interview regarding "'the Commander-in-Chief function'" as compared to congressional power: "'[Congress] can't prevent the President from ordering torture.'" (alteration in original)); Hentoff, *supra* note 24 (quoting John Yoo's response regarding laws created by Congress); O'Connor, *supra* note 24; Peter Slevin, *Scholar Stands by Post-9/11 Writings on Torture, Domestic Eavesdropping*, WASH. POST, Dec. 26, 2005, at A3; Andrew Sullivan, *Nixon's Revenge: The Return of the Wiretappers*, SUNDAY TIMES (London), Jan. 1, 2006, at 4; Cass R. Sunstein, *The 9/11 Constitution*, NEW REPUBLIC, Jan. 16, 2006, at 21, 24–25; John C. Yoo, *A Crucial Look at Torture Law*, L.A. TIMES, July 6, 2004, at B11 ("[A]s commander in chief, [the President] may have to take measures . . . that might run counter to Congress' wishes."); Memorandum Opinion from John C. Yoo, Deputy Assistant Att'y Gen., Office of Legal Counsel, for the Deputy Counsel to the President (Sept. 25, 2001), *available at* http://www.usdoj.gov/olc/warpowers925.htm ("Neither statute [addressed] . . . can place any limits on the President's determinations as to . . . the method, timing, and nature of the response. These decisions . . . are for the President alone to make . . . . In the exercise of his plenary power to use military force, the President's decisions are for him alone and are unreviewable."); *see also* YOO, *supra* note 14, at 120–21 (stating "emergencies . . . cannot be addressed by existing laws" and "presidents [should not be] . . . duty-bound to obey any and all acts of Congress, even those involving the commander-in-chief power"); *id.* at 200–02 (stating that even after the prohibition of coercive interrogation in the 2005 Detainee Treatment Act, "[t]he executive branch should continue . . . deciding when to use coercive interrogation"). *But see supra* Part IV.A. Yoo's co-author of the 2002 Yoo & Delahunty Memo, *see supra* note 24, continues to claim that the President has a commander-in-chief authority "to authorize torture," even "in violation of statutory law and the CAT." *See* Robert J. Delahunty, *The CINC Authority and the Laws of War*, 99 AM. SOC'Y INT'L L.

reflect a jurisprudence of a right-winged flock that is not "conservative" or originalist, but ahistorical, autocratic, and ideologic at base. It is also clearly not strict constructionist.[140] The blueprint for its adherents reflects a willingness to ignore the Founders' and Framers' most relevant majority and uniform views (if any are addressed), the text and structure of the Constitution, and overwhelming judicial opinions for more than 200 years, and pretends that if a few professors with an extremist agenda disagree legal limits somehow disappear and the content of law can be recast merely through anti-contextualist ideologic debate.[141] The

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PROC. 190, 192 (2005). The autocratic Yoo and Delahunty commander-above-the-law theory seems to have a few academic supporters. *See, e.g.*, Julian G. Ku, *Is There an Exclusive Commander-in-Chief Power?*, 115 Yale L.J. Pocket Part 84, 84 (2006), *available at* http://www.thepocketpart.org/images/pdfs/37.pdf (opining that the President has "an exclusive Commander-in-Chief power that authorizes him to refuse to execute laws and treaties that impermissibly encroach upon his inherent constitutional power," with merely imperfect attention to two cases and missing judicial recognition of the significant reach of congressional power documented herein); *see also* Curtis A. Bradley & Jack L. Goldsmith, *Congressional Authorization and the War on Terrorism*, 118 HARV. L. REV. 2047, 2100–02, 2089, 2097 (2005).

[140] *See generally* Golove, *supra* note 139. *See* Neal Kumar Katyal, Comment, Hamdan v. Rumsfeld*: The Legal Academy Goes to Practice*, 120 HARV. L. REV. 65, 100 (2006) (stating the theory that "statutes could be set aside" is a "reactionary ideology . . . that has pervaded . . . [the Bush administration's] activity in the past five years"); *id.* at 105 (stating that military commissions are "a reactionary constitutional ideology"); Paust, *supra* note 1, at 856–59, 862 n.198; Wendel, *supra* note 18, at 68 n.2, 70 & n.7, 112–14, 120, 128; Mayer, *supra* note 9, at 44 (quoting attorney Scott Horton, historian Arthur Schlesinger, Jr., conservative attorney Bruce Fein, Professor Richard A. Epstein, and others); *supra* notes 24, 98; *see also* Cornelia Pillard, *Unitariness and Myopia: The Executive Branch, Legal Process, and Torture*, 81 IND. L.J. 1297, 1297–98 (2005) ("[The] failure [of "the rule of law"] was predictable in an administration whose legal decision making bespeaks prerogatives of power more than limitations of law. Hand-picked political appointees collaborated secretly on the Torture Memo, driving directly to a desired bottom line . . . . [T]he torture debacle was born in part of ideologically driven myopia."); Louis Fisher, *President's Game? History Refutes Claims of Unlimited Presidential Power over Foreign Affairs*, LEGAL TIMES (Wash., D.C.), Dec. 4, 2006, *available at* http://www.law.com/jsp/dc/PubArticleDC.jsp?id=1164636899541 (stating that Yoo and others misuse dictum in *Curtiss-Wright* and ignore historic trends).

[141] *See also* Delahunty, *supra* note 139, at 192; Ku, *supra* note 120, at 376–80; Paust, *Before the Supreme Court*, *supra* note 92, at 851–52 & n.118; Michael D. Ramsey, *Toward a Rule of Law in Foreign Affairs*, 106 COLUM. L. REV. 1450, 1451, 1453, 1458–61, 1466, 1470–72 (2006) (reviewing JOHN YOO, THE POWERS OF WAR AND PEACE: THE CONSTITUTION AND FOREIGN AFFAIRS AFTER 9/11 (2005)) (criticizing Yoo's theories regarding war and treaty powers as ahistorical, anti-textual, and shockingly ignoring of actual views of the majority of Founders and Framers and actual trends in judicial decision); Yoo & Delahunty Memo, *supra* note 24, at 35 & n.108. In practice, the approach failed to provide the executive branch with sound, realistic, and professional legal advice. *See also* Alvarez, *supra* note 1, at 186, 191 (describing the torture memo as "shoddy and

administration has not abandoned the domestic counterpart to John Yoo's theory[142] despite its lack of any clear support in the text and structure of our Constitution, views of the Founders and Framers, relevant patterns of legislation, and predominant recognitions and trends in judicial opinions.[143]

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incomplete . . . reckless," and "a perversion of . . . law"); *id.* at 215–18, 222–23; Richard B. Bilder & Detlev F. Vagts, Editorial Comment, *Speaking Law to Power: Lawyers and Torture*, 98 AM. J. INT'L L. 689, 693–95 (2004); Koh, *supra* note 97, at 647–50, 652–54; Wayne McCormack, *Emergency Powers and Terrorism*, 185 MIL. L. REV. 69, 134 (2005) (stating the Bybee Memo "seems irresponsible lawyering at best"); Pillard, *supra* note 140, at 1297–98; Wendel, *supra* note 18, at 68–70 & nn.2 & 7, 112–14, 126–27; Aaron R. Jackson, Comment, *The White House Counsel Torture Memo: The Final Product of a Flawed System*, 42 CAL. W. L. REV. 149, 153–56 (2005); Kathleen Clark & Julie Mertus, *Torturing the Law: The Justice Department's Legal Contortions on Interrogation*, WASH. POST, June 20, 2004, at B3; Geoffrey R. Stone, *Taking Liberties*, WASH. POST, Nov. 5, 2006, at T6 (book review) (describing Yoo's conclusion that the President is exclusively in charge in wartime as "extreme, reckless and dangerous"); Geoffrey S. Corn, *Pentagon Process Subverted? The Lost Battle of Alberto Mora*, JURIST, Feb. 22, 2006, http://jurist.law.pitt.edu/forumy/2006/02/pentagon-process-subverted-lost-battle.php; Lawyers' Statement on Bush Administration's Torture Memos from Richard L. Abel et al. to President George W. Bush et al. (2004), *available at* http://www.afj.org/spotlight/0804statement.pdf (criticizing the claims to engage in torture); *supra* notes 5, 35.

Westlaw-phobia is an apparent affliction shared by other professors who offer sometime sophistic speculation about important aspects of the reach of law or who, having discovered alleged controversy or uncertainty among themselves, assume that the content of law is no longer extant and discoverable. Lack of attention to actual and directly relevant holdings and expectations of the judiciary set forth in judicial opinions can render even eloquent prattle sterile. The affliction would be of little consequence if left lifeless in law reviews, but it can be dangerous if it migrates to memoranda and briefs under the pretense of providing our government with a statement of "law." Are those in the executive branch bound by the laws of war? Is the commander-in-chief power completely free from legislative limits? Does the judiciary have authority to review the legality of executive decisions and conduct during war? Directly relevant and stable holdings and patterns of juristic expectation regarding each question are discoverable in numerous cases and should not be ignored.

[142] *See also* Mayer, *supra* note 9, at 44 (quoting especially the claims of Addington and Cheney); Wendel, *supra* note 18, at 84; Byron York, *Listening to the Enemy—The Legal Ground on Which the President Stands*, NAT'L REV., Feb. 27, 2006, at 22, 22; Eric Lichtblau, *Panel Rebuffed on Documents on U.S. Spying*, N.Y. TIMES, Feb. 2, 2006, at A1; *Spy Crimes*, NEW REPUBLIC, Jan. 16, 2006, 7, 7; *supra* notes 22, 129, 133–34 (discussing the Bush statement that he will not abandon secret detentions and "tough" interrogation tactics in apparent violation of section 1003(a) of the 2005 Detainee Treatment Act).

[143] Bay, *supra* note 132, at 362, 367, 386; *supra* notes 92, 97–120, 142.

V. MISINTERPRETATIONS OF THE 2001 AUTHORIZATION FOR USE OF MILITARY FORCE

A few argue that the 2001 congressional Authorization for Use of Military Force ("AUMF")[144] after 9/11 provided an authorization for executive use of any lawful war measure here or abroad during a so-called "war" on "terrorism." However, such a claim is in error. The AUMF is not a declaration of "war," but merely a very limited authorization to use necessary and "appropriate" "force" against certain persons, nations, or organizations that were either directly involved in or aided the 9/11 attacks, or that had "harbored" such organizations or persons before or during the 9/11 attacks.[145] Congressional use of the past tense regarding nations, organizations, or persons that "aided" or "harbored" those who planned, authorized, or committed the 9/11 attacks means that the intentional aiding or harboring must have occurred before or during the 9/11 attacks and with reference to such attacks. The AUMF does not authorize use of force against those persons or organizations who were or are merely general supporters of those responsible for the 9/11 attacks; who were or are merely "affiliated," "associated," or have "links" with al-Qaeda; or who pose any threat of future terrorist attacks.[146]

It most certainly did not authorize a "war" against al-Qaeda (a non-state actor), as opposed to force,[147] or a "war" against a mere tactic of "terrorism."

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[144] Authorization for Use of Military Force, Pub. L. No. 107-40, 115 Stat. 224 (2001) (codified at 50 U.S.C. § 1541 (2006)) [hereinafter AUMF].

[145] *Id.* pmbl. ("To authorize [action] . . . against those responsible for the recent attacks . . . ."); *id.* § 2(a) (applying to "those . . . [that] planned, authorized, committed, or aided the terrorist attacks that occurred on September 11, 2001, or harbored such . . . ."); *see* Paust, *Before the Supreme Court*, *supra* note 92, at 838 n.51; Tung Yin, *Ending the War on Terrorism One Terrorist at a Time: A Noncriminal Detention Model for Holding and Releasing Guantanamo Bay Detainees*, 29 HARV. J.L. & PUB. POL'Y 149, 189–90 (2005) ("Whatever other targets may be encompassed when the President refers to the global war on terrorism, the entities that Congress has designated to be the subject of military force are limited to those that either played a role in planning or carrying out the 9-11 attacks or sheltered those responsible."); *id.* at 192 ("The class of persons [addressed] under President Bush's executive order [regarding military commissions is] significantly broader than the class of persons fitting within the terms of Congress's Military Force Authorization."); *see also* YOO, *supra* note 14, at 115, 124.

[146] *See, e.g.*, Paust, *Before the Supreme Court*, *supra* note 92, at 838 n.51; Yin, *supra* note 145, at 189–90.

[147] The fact that the United States uses military "force" in a foreign state in legitimate self-defense against a non-state actor engaged in a process of armed attacks against the United States, its military, and/or its nationals here or abroad does not create a "war," "armed conflict," armed "hostilities," or "combat" if the non-state actor is not a belligerent or insurgent and U.S. military forces do not engage in hostilities with the armed forces of the state in whose territory the self-defense measure takes place. *See, e.g.*, Jordan J. Paust, *Use of Armed Force Against Terrorists in Afghanistan, Iraq, and Beyond*, 35 CORNELL INT'L L.J. 533, 535 n.3 (2002) [hereinafter Paust, *Use of Force*]; Paust, *Post 9/11*, *supra*

Congress actually refused to authorize use of force against "acts of terrorism" as such[148] and the Supreme Court recognized earlier that only Congress has the constitutional power to determine whether a war exists.[149] Moreover, the United

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note 15, at 1341 & n.23 (noting remarks of former U.S. Department of State Legal Adviser Abraham D. Sofaer); *see also* Louis Henkin, *War and Terrorism: Law or Metaphor*, 45 SANTA CLARA L. REV. 817, 821 (2005); *cf.* YORAM DINSTEIN, WAR, AGGRESSION AND SELF-DEFENCE 245 (4th ed. 2005) (arguing that such actions create an "armed conflict" with the state, but not a "war"). The fact that Section 2(b)(1) of the AUMF, Pub. L. No. 107-40, 115 Stat. 224 (2001) (codified at 50 U.S.C. § 1541 (2006)), stated that the AUMF was specific statutory authorization within the meaning of Section 8(a)(1) of the War Powers Resolution, 50 U.S.C. §§ 1541–1548, does not mean that Congress contemplated that use of any sort of force in the future would create a state of war. It was contemplated that the U.S. military would be engaged in conflict with al-Qaeda in Afghanistan where the Taliban was engaged in a war with the Northern Alliance. Additionally, the AUMF authorized the use of force against certain nations, which at the time might have been thought to have included the state of Afghanistan—a nation controlled by the Taliban. *See* AUMF, Pub. L. No. 107-40, § 2(a), 115 Stat. 224 (2001) (codified at 50 U.S.C. § 1541 (2006)); *see also infra* note 153. Under the circumstances, it was contemplated that U.S. armed forces would be introduced "into situations where imminent involvement in hostilities" between the Taliban and the Northern Alliance, or against the Taliban, clearly could occur within the meaning of the War Powers Resolution and the international laws of war. Additionally, Congress is presumed to understand that under international law (and apparently under U.S. domestic law) the United States cannot be at "war" with a "person" or "organization" or any entity lacking even insurgent status. *See also infra* note 150.

[148] *See, e.g.*, David Abramowitz, *The President, the Congress, and Use of Force: Legal and Political Considerations in Authorizing Use of Force Against International Terrorism*, 43 HARV. INT'L L.J. 71, 72–74 & n.5 (2002) (stating that the AUMF is not a declaration of war); Bradley & Goldsmith, *supra* note 139, at 2079 & nn.133–35.

[149] *See, e.g.*, The Prize Cases, 67 U.S. (2 Black) 635, 668 (1863) (stating the President "has no power to initiate or declare a war"); *id.* at 693 (Nelson, J., dissenting) ("Congress alone can determine whether war exists or should be declared . . . ."); *id.* at 698 ("[T]his power belongs exclusively to the Congress of the United States . . . ."); *see* United States v. Smith, 27 F. Cas. 1192, 1230 (C.C.D.N.Y. 1806) (No. 16,342) (Paterson, J., on circuit) ("[P]ower of making war . . . is exclusively vested in congress . . . ."); Nat'l Savings & Trust Co. v. Brownell, 222 F.2d 395, 397 (D.C. Cir. 1955) ("[A] state of war, constitutionally speaking . . . is a matter of congressional declaration . . . ."); ALEXANDER HAMILTON, *Pacificus No. 1* (June 29, 1793), *in* 15 THE PAPERS OF ALEXANDER HAMILTON 33, 42 (Harold Syrett ed., 1969) ("[T]he Legislature can alone declare war, can alone actually transfer the nation from a state of Peace to a state of War."); FRANCIS D. WORMUTH & EDWIN B. FIRMAGE, TO CHAIN THE DOG OF WAR 24, 28, 30–31 (Univ. of Ill. Press 1989) (1986) (quoting James Madison, who said that "'power to declare war . . . is *fully* and *exclusively* vested in the legislature . . . [and] the executive has no right, in any case, to decide the question, whether there is or is not cause for declaring war'"); *id.* at 66, 76 (quoting Thomas Jefferson, who said that "'Congress alone is constitutionally invested with the power of changing our conditions from peace to war'"); *id.* at 84, 179 n.4 (quoting James Wilson, who discussed how the war power is "vested" in Congress); Letter from James Monroe to former President James Madison (1824), *in* THE RECORD OF AMERICAN

States cannot be at "war" with al-Qaeda since it is not a state, nation, belligerent, or insurgent.[150]

DIPLOMACY 185 (Ruhl J. Bartlett ed., 1947) ("The Executive has no right to compromit the nation in any question of war."); *see also* PAUST, INTERNATIONAL LAW, *supra* note 40, at 470 n.25; *cf. The Prize Cases*, 67 U.S. (2 Black) at 667 (regarding merely that "a civil war['s] . . . actual existence is a fact . . . which the Court is bound to notice and to know"). *But see id.* at 670 (stating that the "Court must be governed by the decisions" of the President, whether a civil war as such with "belligerents" exists).

[150] *See, e.g.*, Jordan J. Paust, *War and Enemy Status After 9/11: Attacks on the Laws of War*, 28 YALE J. INT'L L. 325, 326–28 (2003) [hereinafter Paust, *Enemy Status*]. *But cf.* Hamdan v. Rumsfeld, 126 S. Ct. 2749, 2778 n.31 (2006) ("[W]e do not question the Government's position that the war commenced with the events of September 11, 2001."); *supra* note 75. Most text writers agree that we cannot be at "war," or in "armed conflict" or "combat" with al-Qaeda as such, or a mere tactic of "terrorism." *See, e.g.*, Bruce Ackerman, *This Is Not a War*, 113 YALE L.J. 1871, 1872–73 (2004); Silvia Borelli, *Casting Light on the Legal Black Hole: International Law and Detentions Abroad in the "War on Terror,"* 87 INT'L REV. RED CROSS 39, 45 (2005); David Cole, *Enemy Aliens*, 54 STAN. L. REV. 953, 958 (2002); Christopher Greenwood, *War, Terrorism, and International Law*, 56 CURRENT LEGAL PROBS. 505, 529 (2003); Joan Fitzpatrick, *Jurisdiction of Military Commissions and the Ambiguous War on Terrorism*, 96 AM. J. INT'L L. 345, 348–49 (2002); McCormack, *supra* note 141, at 70 & n.6; Moore, *supra* note 1, at 36; Mary Ellen O'Connell, *The Legal Case Against the Global War on Terror*, 36 CASE W. RES. J. INT'L L. 349, 349–57 (2004); Leila Nadya Sadat, *Terrorism and the Rule of Law*, 3 WASH. U. GLOBAL STUD. L. REV. 135, 140 (2004); Marco Sassòli, *Use and Abuse of the Laws of War in the "War on Terrorism,"* 22 LAW & INEQUALITY 195, 197–98 (2004); Warren Richey, *Tribunals on Trial*, CHRISTIAN SCI. MONITOR, Dec. 14, 2001, at 1 (quoting Professor Leila Sadat, who stated that "[t]he actions of September 11 aren't war crimes, they are civilian crimes, they are crimes against humanity"); Detlev F. Vagts, *"War" in the American Legal System*, 12 ILSA J. INT'L & COMP. L. 541, 543–45 (2006); Kenneth Roth, *The Law of War in the War on Terror: Washington's Abuse of "Enemy Combatants,"* FOREIGN AFF., Jan./Feb. 2004, at 2, 2; *see also DOJ Oversight: Preserving Our Freedoms While Defending Against Terrorism: Hearing on Review of Military Terrorism Tribunals Before Congress*, 107th Cong. (2001) (statement of Scott Silliman, Executive Director, Center of Law, Ethics, and National Security, Duke University School of Law), *available at* http://judiciary.senate.gov/testimony.cfm?id=126&wit_id=70 (contending that the United States is not at war with al-Qaeda and the 9/11 attacks could not be violations of the laws of war); U.N. Experts' Report, *supra* note 1, at 36, ¶ 83 ("The war on terror, as such, does not constitute an armed conflict for the purposes of the applicability of international humanitarian law."); Mark A. Drumbl, *Guantánamo, Rasul, and the Twilight of Law*, 53 DRAKE L. REV. 897, 908 (2005) (stating the Bush policy has the unwanted consequence of "absurdly glorifying terrorism as armed conflict and terrorists as 'warriors'"); Jenny S. Martinez, *Inherent Executive Power: A Comparative Perspective*, 115 YALE L.J. 2480, 2500 (2006) (stating that "'[t]errorist violence, serious as it is,'" is not a "'war or other public emergency threatening the life of the nation'" (quoting A (FC) & Others (FC) v. Sec'y of State for the Home Dep't [2004] UKHL 56, 96 (U.K.) (Lord Hoffman))); *CNN Late Edition with Wolf Blitzer*, Interview with Zbigniew Brzezinski, former Nat'l Sec. Adviser (CNN television broadcast May 14, 2006) ("I don't buy the proposition we are at

It follows that the AUMF provides no support for what rhetorically is claimed to be a "war on terrorism"[151] and if the AUMF authorized any "war" measures it did so only with respect to the war in Afghanistan against the Taliban (as the government of the nation of Afghanistan) "for the duration" of "active hostilities" during that war[152] if the Taliban had actually "harbored" al-Qaeda prior to or during the 9/11 attacks.[153] Moreover, it is clear that Congress only authorized the use of "appropriate" force, and the word "appropriate" contains a statutory limitation that necessarily limits executive discretion and requires executive

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war . . . . [T]his is really a distortion of reality. We have a serious security problem with terrorism . . . . But to create an atmosphere of fear, almost of paranoia, claiming that we're a nation at war, opens the door to a lot of legal shenanigans . . . . [Without compliance with FISA, we] slide into a pattern of illegality . . . ."); *cf.* Bay, *supra* note 132, at 337 n.6 (citing sources standing both for and against the proposition that the "war on terror" is not a "true war"); Yin, *supra* note 145, at 189–90 ("[I]t is important to distinguish the rhetoric of the 'war on terrorism' from the congressional authorization . . . [and t]he current war on terrorism."). *But see* YOO, *supra* note 14, at 12–13 (recognizing that we cannot be at war with terrorism, but claiming that we are "in an international armed conflict with al Qaeda"); Jane Gilliland Dalton, *What Is War? Terrorism as War After 9/11*, 12 ILSA J. INT'L & COMP. L. 523, 533 (2006); John C. Yoo & James C. Ho, *The Status of Terrorists*, 44 VA. J. INT'L L. 207, 209–15 (2003).

[151] There are several reasons why the rhetoric of "war on terror" is not preferable. One is that it can mask and sanitize choices based on underlying nationalistic, racist, or religious-based aggression and violence against other human beings, not that all responses to acts of human beings who use the tactic of terrorism are based on any such circumstance. During what is claimed to be a "war on terror," it may be that certain members of the general public choose not to know what forms of violence are actually practiced against a dehumanized "them" as long as it is done "over there." In this sense, some of the Abu Ghraib photos might have been disturbing, not so much because of the cruel, inhuman, and degrading treatment portrayed, but because it was "brought home." *Cf.* Scheppele, *supra* note 38, at 292 n.17 (addressing results of a USA Today/CNN/Gallup poll in 2005).

[152] *See* Hamdi v. Rumsfeld, 542 U.S. 507, 520–21 (2004). The "active hostilities" in Afghanistan have lasted longer than World War II.

[153] There is no convincing proof that the Taliban knew of the pending 9/11 attacks or helped to plan, authorize, commit, or aid the 9/11 attacks. Thus, by its terms, the AUMF would not authorize use of force against the Taliban unless they had "harbored" al-Qaeda before or during the 9/11 attacks, which in the context of its use in the AUMF seems to mean "harbored" with knowledge of the pending 9/11 attacks as such. *See* AUMF, Pub. L. No. 107-40, § 2(a), 115 Stat. 224 (2001) (codified at 50 U.S.C. § 1541 note (2006)); *supra* note 145; *see also* Paust, *Use of Force*, *supra* note 147, at 542–43, 554–55. The same points pertain with respect to Saddam Hussein's regime in Iraq, except that there is no known factual basis to even suggest that Iraq had "harbored" al-Qaeda before the 9/11 attacks and with reference to such attacks. There were other reasons for use of force in Iraq. *See, e.g.*, Paust, *Use of Force*, *supra* note 147, at 549–50, 555–56. Nonetheless, rightly or wrongly, we have been at war in Afghanistan and Iraq, and both armed conflicts have been international armed conflicts to which all of the customary laws of war and relevant treaties apply. *See also* Paust, *supra* note 1, at 813–14, 816; *supra* note 39.

compliance with relevant constitutional, customary, and treaty-based international and other federal laws. This is especially true since (1) the Executive has a constitutional duty to faithfully execute the laws and, thus, all are on notice that it would be clearly inappropriate to violate them,[154] and (2) Supreme Court opinions have long recognized that relevant international law is a necessary background for interpretation of federal statutes[155] and, in this instance, for interpretation of the

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[154] *See supra* notes 97–99, 101–03, 108–12, 114–16 and accompanying text. Legislative history documents the recognition that only "appropriate" force was authorized and that, therefore, force must comply with "international laws." *See, e.g.*, 147 CONG. REC. H5673 (daily ed. Sept. 14, 2001) (statement of Rep. Clayton); *see also Hamdi*, 542 U.S. at 520–21; Bradley & Goldsmith, *supra* note 139, at 2078 (stating the AUMF authorization to use necessary and appropriate force specifies "both the resources that the President can use and the methods that he can employ"). *But see* Bradley & Goldsmith, *supra* note 139, at 2066 (claiming, inconsistently and illogically, that the AUMF somehow authorized the President to "fully" prosecute a "war"); *id.* at 2081 (regarding their inconsistent statement and unproven assumption that legislative debates "suggest that Congress did not view the 'necessary and appropriate' phrase as a limitation on presidential action"—with footnoted quotations referring merely to a "wide" or "broad delegation of authority" and to an express recognition that the word "'appropriate'" encompasses international legal requirements); *id.* at 2089, 2097 (preferring that the "AUMF should not be read as prohibiting the President from violating the laws of war"—a power he clearly does not possess, *see supra* notes 97, 111, 114–15 and accompanying text).

Even if the limiting word "appropriate" had not been used, it is certain that there was no clear and unequivocal expression of congressional intent to override international law, which is a requirement based in Supreme Court decisions and part of the five-step process regarding potential conflicts between statutes and international law. *See* cases cited *supra* note 90 and accompanying text. Precedent also exists affirming that Congress has no authority to authorize a violation of the laws of war. *See supra* note 92. In view of the above, it would be quite illogical to claim that a congressional requirement to use "appropriate" force should not be read as prohibiting the President from violating relevant international law, especially given the President's constitutionally based duty to faithfully execute the laws and an unswerving judicial recognition of executive duties to comply with the laws of war. *See also supra* notes 92, 97, 114–26.

[155] *See, e.g.*, Spector v. Norwegian Cruise Line Ltd., 545 U.S. 119, 142 (2005) (Ginsburg, J., concurring); Trans World Airlines, Inc. v. Franklin Mint Corp., 466 U.S. 243, 252 (1984); Weinberger v. Rossi, 456 U.S. 25, 32 (1982); United States v. Flores, 289 U.S. 137, 159 (1933); Cook v. United States, 288 U.S. 102, 120 (1933); United States v. Payne, 264 U.S. 446, 448 (1924); MacLeod v. United States, 229 U.S. 416, 434 (1913); Whitney v. Robertson, 124 U.S. 190, 194 (1888); The Pizarro, 15 U.S. (2 Wheat.) 227, 245–46 (1817); Murray v. The Charming Betsy, 6 U.S. (2 Cranch) 64, 117–18 (1804); Talbot v. Seeman, 5 U.S. (1 Cranch) 1, 43 (1801); 1 Op. Att'y Gen. 26, 27 (1792); PAUST, INTERNATIONAL LAW, *supra* note 40, at 12–13, 43 n.53, 47 n.57, 59 n.73, 70, 99, 101, 120, 124 n.2, 134 n.18, 137 n.41, 143–44 n.73; *see also Hamdi*, 542 U.S. at 521 ("[O]ur understanding [of the AUMF] is based on longstanding law-of-war principles."); *id.* at 551 (Souter, J., dissenting in part and concurring in judgment) (using the law of war and stating "there is reason to question whether the United States is acting in accordance with the laws

statutory limitations incorporated through use of the word "appropriate." More particularly, given that there is unswerving judicial recognition that all members of the executive branch are bound by the laws of war,[156] it is presumed that Congress required executive conduct to comply with the laws of war, it being most inappropriate under the Constitution and in view of consistent judicial decisions and recognitions not to do so. The compelling nature of this presumption is enhanced by federal criminal statutes for prosecution of war crimes as offenses against the laws of the United States that apply, without limitation, to "[w]hoever" [157] might commit such crimes.[158]

VI. THE MALIGNANT MILITARY COMMISSIONS ACT OF 2006

Just before Congress passed the Military Commissions Act of 2006 ("MCA"),[159] Senator McCain was widely quoted as stating "[t]here is no doubt that the integrity and letter and spirit of the Geneva Conventions have been preserved."[160] On the Senate floor he also assured:

> The President and his subordinates are . . . bound to comply with Geneva. That is clear to me and to all who have negotiated this legislation in good faith . . . . [T]his bill makes clear that the United States will fulfill all of its obligations under those Conventions. We expect the CIA to conduct interrogations in a manner that is fully consistent . . . with all of our obligations under Common Article 3 . . . [and Congress is not] amending, modifying or redefining the Geneva Conventions.[161]

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of war . . . I conclude accordingly that the Government has failed to support the position that the [AUMF] authorizes the described detention."). This well-recognized interpretive criterion would apply whether or not Congress uses the word "appropriate."

[156] *See supra* note 97 and text accompanying notes 112–14, 119.

[157] *See* 10 U.S.C. § 818 (incorporating all of the laws of war by reference); War Crimes Act, 18 U.S.C. § 2441 (incorporating many of the laws of war by reference for prosecution of "[w]hoever" might be reasonably accused); *supra* note 93.

[158] *See* Hamdan v. Rumsfeld, 126 S. Ct. 2749 (2006) (finding there was no intent to limit requirements concerning the structure and procedures in military commissions contained in 10 U.S.C. §§ 821, 823, 836); *supra* notes 133–34 and accompanying text (discussing the fact that there was no congressional intent to limit the requirements of the FISA concerning domestic spying).

[159] Military Commissions Act of 2006, Pub. L. No. 109-366, 120 Stat. 2600 (codified in scattered sections of 10 U.S.C., 28 U.S.C. § 2241, and 42 U.S.C.)

[160] *See, e.g.*, R. Jeffrey Smith & Charles Babington, *White House, Senators Near Pact on Interrogation Rules*, WASH. POST, Sept. 22, 2006, at A1 (quoting Sen. John McCain).

[161] 152 CONG. REC. S10414 (daily ed. Sept. 28, 2006) (statement of Sen. McCain). Upon signing the Act, President Bush stated that it "complies with both the spirit and the letter of our international obligations." *President Signs 'Military Commissions Act of 2006,'* U.S. FED. NEWS, Oct. 17, 2006.

The statements were not fully accurate, but they reaffirm that when passing the legislation there was no clear and unequivocal expression of a congressional intent to override the Geneva Conventions as treaty law of the United States. For this reason, the Geneva Conventions necessarily have primacy as law of the United States in case of a potential clash.[162]

This significant recognition is also evident in language of the legislation. For example, section 6 is entitled "Implementation of Treaty Obligations," thereby evincing an intent of Congress to comply with U.S. treaty obligations. Section 6(a)(1) adds various acts enumerated in subsections (b) and (c) to 18 U.S.C. § 2441 and states that the added acts "constitute violations of common Article 3 of the Geneva Conventions prohibited by United States law" that are implemented in the new legislation, not that they constitute an exclusive set of violations of common article 3 or that Congress intends to obviate the reach of other proscriptions. Section 6(a)(2) states that the provisions of § 2441, "as amended by" section 6 of the new legislation, "fully satisfy the obligation under Article 129 of the Third Geneva Convention . . . to provide effective penal sanctions for grave breaches which are encompassed in common Article 3." The legislative statement is incorrect, but it demonstrates the clear intent of Congress to "fully satisfy" U.S. treaty obligations reflected in article 129 and to not inhibit or obviate them in any way. Section 6(a)(3)(A) recognizes a presidential authority to interpret the Geneva Conventions—an authority the President already has in connection with the duty to faithfully execute the laws and, thus, to make an initial choice concerning the interpretation and application of a treaty, a choice and application that numerous cases affirm are subject to judicial review.[163] Section 6(a)(3)(A) also states that the President has authority "to promulgate higher standards and administrative regulations for violations of treaty obligations which are not grave breaches," not

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[162] *See, e.g.*, *supra* note 90. One does not apply the last-in-time rule unless there is a clear and unequivocal expression of congressional intent to override a prior treaty. *See id.* Even if the last-in-time rule were applicable, the traditional "rights under" treaties exception to the last-in-time rule documented in Supreme Court decisions, *see* cases cited *supra* note 91, and the law of war exception recognized by Supreme Court Justices and Attorneys General, *see* sources cited *supra* note 92, would assure the primacy of "rights under" the Geneva Conventions and primacy of the Geneva Conventions more generally as laws of war.

[163] *See, e.g.*, PAUST, INTERNATIONAL LAW, *supra* note 40, at 105, 174–75, 184 n.24, 188 n.67, 295 n.503, 387 n.47; Paust, *Judicial Power*, *supra* note 118, at 514–25. Section 6(a)(3)(c) adds that a relevant executive order "shall be authoritative (except as to grave breaches of common article 3) as a matter of United States law, in the same manner as other administrative regulations," Military Commissions Act of 2006, Pub. L. No. 109-366, § 6(a)(3)(C), 120 Stat. 2600, 2632 (codified at 18 U.S.C. § 2241 note). However, such an authoritative provisional characterization by the Executive concerning the meaning of common article 3 of treaty law of the United States must still be subject to ultimate review by the judiciary in view of the constitutionally based judicial power and authority at stake.

lower standards or violations of the Conventions. Section 6(c) addresses an "Additional Prohibition of Cruel, Inhuman, or Degrading Treatment or Punishment," not an exclusive prohibition of such forms of treatment or one that is intended to override other inconsistent federal statutes or the many treaties of the United States that set forth related rights and prohibitions. Finally, each recognition in section 6 is overlaid by subsection (a)(3)(D), which assures that "[n]othing" in section 6 "shall be construed to affect the constitutional functions and responsibilities of . . . the judicial branch." Necessarily then, the judicial functions and responsibilities that are not to be affected include the constitutionally based and time-honored authority and responsibility of the judiciary to identify, clarify, and apply treaties of the United States as law of the United States and to assure the primacy of international law when there is not a clear and unequivocal expression of congressional intent to override international law.[164]

Nevertheless, there are provisions in the legislation that are inconsistent with rights and duties contained in common article 3. Common article 3 requires that all detainees "shall in all circumstances be treated humanely,"[165] not merely whenever domestic U.S. constitutional amendments or federal criminal laws against "torture" happen to coincide with some of the common article 3 standards. Common article 3 also prohibits "torture," "mutilation," "cruel treatment," "outrages upon personal dignity," "humiliating" treatment, and "degrading" treatment "at any time and in any place whatsoever."[166] A core of generally shared meaning and definitional factors operates in various judicial fora for imposition of criminal and civil responsibility with respect to each term or phrase despite the possibility of a lack of generally agreed meaning at the extreme outer edges of theoretically possible meanings[167]—a circumstance well-known to lawyers and judges who interpret words such as "cruel," "due process," "free speech," "good faith," and the like in constitutions, statutes, private contracts, and other instruments.

Addressing article 4 of the Statute of the International Criminal Tribunal for Rwanda,[168] which incorporates all violations of common article 3 and lists several of its proscriptions (including torture, mutilation, outrages upon personal dignity, humiliating treatment, degrading treatment, rape, and any form of indecent

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[164] *See, e.g.*, Paust, *Judicial Power*, *supra* note 118, at 514–25; *infra* note 202.

[165] Civilian Geneva Convention, *supra* note 39, art. 3(I), 6 U.S.T. at 3518, 75 U.N.T.S. at 289–90.

[166] *Id.*

[167] *See generally* Vienna Convention, *supra* note 40, art. 31(1), 1155 U.N.T.S. at 340 (requiring treaties to be interpreted in good faith in accordance with ordinary meaning and given the treaty's purpose); JORDAN J. PAUST ET AL., INTERNATIONAL LAW AND LITIGATION IN THE U.S. 69–70, 255, 365, 390, 413, 417, 419 (2d ed. 2005).

[168] Statute of the International Tribunal for Rwanda, S.C. Res. 955, art. 4, U.N. Doc. S/RES/955 (Nov. 8, 1994).

assault[169]), the Trial Chamber in *The Prosecutor v. Musema* (2000)[170] ruled that the list "is taken from Common Article 3 of the Geneva Conventions and of Additional Protocol II" and "comprises *serious* violations of the fundamental humanitarian guarantees which . . . are recognised as customary international law."[171] Thus, all of the proscriptions listed in common article 3 are among "serious" violations of the laws of war.

More particularly, the Trial Chamber ruled that *humiliating* and *degrading* treatment includes "[s]ubjecting victims to treatment designed to subvert their self-regard,"[172] adding: "motives required for torture would not be required."[173] "Indecent assault," the tribunal affirmed, involved "the infliction of pain or injury by an act which was of a sexual nature and inflicted by means of coercion, force, threat or intimidation and was non-consensual."[174] Other international courts and tribunals have provided guidance concerning the meaning and definitional factors with respect to cruel, inhuman, and degrading treatment[175] and so have several U.S. courts.[176] For example, while addressing five British interrogation tactics used in the 1970s (wall-standing, hooding, subjection to noise, deprivation of sleep, and deprivation of food and drink), the European Court of Human Rights affirmed that *inhuman* treatment occurred with respect to a combination of some of the tactics that "caused, if not bodily injury, at least intense physical and mental suffering."[177] The five "techniques were also *degrading*, since they were such as to arouse in their victims feelings of fear, anguish and inferiority capable of humiliating and debasing them and possibly breaking their physical or moral resistance."[178] In 1999, other European decisions expressly reaffirmed the recognition that treatment is degrading if it is "such as to arouse in its victims

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[169] *Id.*

[170] Prosecutor v. Musema, Case No. ICTR-96-13-A, Judgement [sic] and Sentence (Jan. 27, 2000).

[171] *Id.* ¶ 287 (emphasis added). In a related manner, the United States Congress has determined that "cruel, inhuman, or degrading treatment or punishment, prolonged detention without charges and trial, [and] causing the disappearance of persons by the abduction and clandestine detention of those persons" are among "flagrant" and "gross violations of internationally recognized human rights." 22 U.S.C. § 2304(d) (2006).

[172] *Musema*, Case No. ICTR-96-13-A, ¶ 285.

[173] *Id.*

[174] *Id.*; *see also* 22 U.S.C. § 2152 note (stating "rape and other forms of sexual violence" constitute torture); Zubeda v. Ashcroft, 333 F.3d 463, 472 (3d Cir. 2003) (stating that rape and sexual assault "can constitute torture"); Al-Saher v. INS, 268 F.3d 1143, 1147 (9th Cir. 2001) (stating that torture in Iraq included "rape, breaking of limbs, denial of food and water, and threats to rape or otherwise harm relatives").

[175] *See* Paust, *supra* note 1, at 845–46.

[176] *Id.* at 821 n.40.

[177] Ireland v. United Kingdom, 25 Eur. Ct. H.R. (ser. A) at 66 (1978) (emphasis added).

[178] *Id.* (emphasis added).

feelings of fear, anguish and inferiority capable of humiliating and debasing them."[179]

A U.S. court also recognized that "*cruel, inhuman*, or *degrading* treatment includes acts which inflict mental or physical suffering, anguish, humiliation, fear and debasement" and that being "forced to observe the suffering of friends and neighbors . . . [is] another form of inhumane and degrading treatment."[180] The

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[179] T & V v. United Kingdom, App. No. 24888/94, 30 Eur. H.R. Rep. 121, 175 (2000); Selmouni v. France, 1999-V Eur. Ct. H.R. 149, 182 (1999).

[180] Mehinovic v. Vuckovic, 198 F. Supp. 2d 1322, 1348–49 (N.D. Ga. 2002) (emphasis added). More generally, the Supreme Court has recognized the impermissibility of "coercive cruelty." Weems v. United States, 217 U.S. 349, 373 (1910). U.S. cases have also provided informing recognition of what types of conduct can amount to cruel treatment under the Eighth Amendment. *See, e.g.*, Hudson v. McMillian, 503 U.S. 1, 14, 17 (1992) (Blackmun, J., concurring) (recognizing "shocking [prisoners] with electric currents, asphyxiating them short of death, intentionally exposing them to undue heat or cold" and infliction of "psychological pain" as cruel and unusual punishment); Wilson v. Seiter, 501 U.S. 294, 305 (1991) (recognizing a combination of deprivation of food and warmth, "for example a low cell temperature at night combined with a failure to issue blankets," as cruel and unusual punishment); Estelle v. Gamble, 429 U.S. 97, 104 (1976) ("[D]eliberate indifference to serious medical needs of prisoners constitutes the 'unnecessary and wanton infliction of pain[]' . . . ." (quoting Gregg v. Georgia, 428 U.S. 153, 173 (1976))); Brooks v. Florida, 389 U.S. 413, 414–15 (1967) (per curiam) (finding the deprivation of adequate food and detention while naked in a small cell was in context "a shocking display of barbarism"); Beecher v. Alabama, 389 U.S. 35, 36, 38 (1967) (per curiam) (finding "gross coercion" existed when an officer pressed a gun to an escaped convict's face and stated, "'If you don't tell the truth I am going to kill you,'" and thereafter another officer fired a rifle nearby); United States v. Rojas-Tapia, 446 F.3d 1, 4–5 (1st Cir. 2006) (finding "physically coercive punishment, such as an unreasonable deprivation of food or sleep" obviates the voluntariness of a confession); Wright v. McMann, 387 F.2d 519, 526 (2d Cir. 1967) (finding that solitary confinement conditions in a "'strip cell,'" where the prisoner was nude and exposed to bitter cold, "serve to destroy completely the spirit and undermine the sanity of the prisoner" and violate the Eighth Amendment); Scarver v. Litscher, 371 F. Supp. 2d 986, 993, 1000–02 (W.D. Wis. 2005) (finding that stripping a prisoner naked and placing him in a cold cell without a mattress, blankets, etc. and subjecting him to high temperatures in the summer and long periods of confinement would be sufficiently serious to constitute an Eighth Amendment violation); Littlewind v. Rayl, 839 F. Supp. 1369, 1372 (D.N.D. 1993) (holding, as a matter or law, that the Eight Amendment was violated where prisoner was restrained naked for seven hours, denied clothing for six days, denied a blanket for two days, restrained seven days in leg irons and handcuffs, and tied to a bed for eight hours), *remanded by* Littlewind v. Rayl, 33 F.3d 985, 986 (8th Cir. 1994); Ferola v. Moran, 622 F. Supp. 814, 822–23 (D.R.I. 1985) (finding it cruel and unusual to restrain a prisoner so as to deny him access to a bathroom for fourteen hours); Hancock v. Avery, 301 F. Supp. 786, 791–92 (M.D. Tenn. 1969) (stating that forcing persons to strip nude and sleep on cement floors with no means to maintain personal cleanliness is cruel and unusual punishment in violation of the Eighth Amendment); Al Ghashiyah v. McCaughtry, 602

Committee Against Torture affirmed that seven interrogation tactics are either torture or cruel, inhuman, or degrading treatment criminally proscribed by the Convention: (1) restraining in very painful conditions, (2) hooding under special conditions, (3) sounding loud music for prolonged periods, (4) sleep deprivation for prolonged periods, (5) threats, including death threats, (6) violent shaking, and (7) using cold air to chill.[181]

Language in the 2006 legislation fails to reflect the international legal standards recognized by international and U.S. courts and tribunals. First, several definitions are limited to others that are found in prior U.S. legislation,[182] even though the Committee Against Torture noted that prior U.S. legislation is inadequate.[183] Second, in contrast to some of the standards noted above, some of the definitions in the 2006 legislation are too limiting and, thus, do not adequately warn U.S. interrogators regarding what the actual legal standards are under customary international and treaty law of the United States. Third, the legislation abets this problem by attempting to require that "[n]o foreign or international source of law shall supply a basis for a rule of decision in the courts . . . in interpreting the prohibitions enumerated."[184] However, the attempt to exclude time-honored judicial use of "international sources of law" to interpret a statute or treaty of the United States violates the separation of powers, since it is the

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N.W.2d 307, 316 (Wis. Ct. App. 1999) (finding strip searches employed for the purpose of intimidating a person or humiliating or harassing violate the Eighth Amendment).

[181] U.N. Office of the High Comm'r for Human Rights, CAT, *Concluding Observations of the Committee Against Torture: Israel*, ¶¶ 256–57, U.N. Doc. A/52/44 (Sept. 5, 1997). With respect to the use of cold air to chill, a U.S. case decided that among acts of "torture" is that of "[f]orcing a detainee while wet and naked to sit before an air conditioner." *In re* Estate of Marcos, 910 F. Supp. 1460, 1463 (D. Haw. 1995); *see also* U.N. Experts' Report, *supra* note 1, at 25, ¶ 51 ("[S]tripping [persons] naked . . . can in individual cases cause extreme psychological pressure and can amount to degrading treatment, or even torture. The same holds true for the use of dogs, especially if it is clear that an individual phobia exists. Exposure to extreme temperatures, if prolonged, can conceivably cause severe suffering."); *id.* ¶ 52 ("[U]se of dogs, exposure to extreme temperatures, sleep deprivation for several consecutive days and prolonged isolation were perceived as causing severe suffering."). CAT has also recognized that "incommunicado detention" is a form of cruel, inhuman, and degrading treatment and that, if prolonged, it can even rise to the level of torture. *See* U.N. Office of the High Comm'r for Human Rights, *Fact Sheet No. 4: Methods of Combating Torture*, at 32 (1st rev. 2002), *available at* http://www.unhchr.ch/html/menu6/2/fs4rev1.pdf; *see also* Aschraft v. Tennessee, 322 U.S. 143, 153–54 (1944) (finding incommunicado detention is coercion violative of the Fifth Amendment).

[182] *See, e.g.*, Military Commissions Act of 2006, Pub. L. No. 109-366, § 6(b)(1), 120 Stat. 2600, 2633–35 (codified at 18 U.S.C. § 2441(d)(1)(B)). The Act adds section 6(b)(1), which references other statutes in subsections (A) through (C) and (E), to 18 U.S.C. § 2441.

[183] *See supra* note 60.

[184] Military Commissions Act § 6(a)(2), 120 Stat. at 2632 (codified at 18 U.S.C. § 2441 note).

judiciary that has the ultimate, traditional, and essential authority to interpret law in cases before the courts and to use international law to interpret a federal statute[185] as well as treaty law of the United States.[186]

Examples of incomplete coverage of international proscriptions are found in limiting words in the legislation used to define "cruel or inhuman" treatment such as "intended to inflict," "severe," and "serious."[187] Moreover, "cruel" treatment is more egregious than "inhuman" treatment and it is improper to lump their definitions together. Instead of prohibiting "mutilation" outright, the legislation seeks to limit mutilation to that which is "permanently disabling."[188] The legislation also limits coverage of "serious physical pain or suffering" by excluding "cuts, abrasions, or bruises" not amounting to "a burn or physical disfigurement"[189] and excluding serious pain or suffering not involving "significant loss or impairment of the function of a bodily member, organ, or mental faculty," or "extreme" physical pain, or "a substantial risk of death."[190] Thus, the legislation does not cover all forms of serious injury to body or health, mutilation, cruel treatment, and inhuman treatment.

There is no attention to Geneva prohibitions of "humiliating" treatment and there is only one portion that addresses "degrading" treatment[191]—and it does so in a manner that fails to provide adequate legal guidance to U.S. interrogators, because it attempts to limit additional coverage of "cruel, inhuman, or degrading treatment" to merely the "cruel, unusual, and inhumane" treatment prohibited by three domestic U.S. constitutional amendments.[192] On their face, the terms "cruel, unusual, and inhumane" do not reflect "degrading" treatment. Moreover, as noted, the Committee Against Torture rejected such an attempt to limit the reach of the CAT in a putative U.S. reservation.[193] Additionally, there has never been such an attempted reservation to the Geneva Conventions and, if there had been, such a putative reservation would also have been void *ab initio* as a matter of law. Constitutional amendments simply do not cover all cruel, inhuman, degrading, and humiliating treatment proscribed under the laws of war and human rights law.[194]

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[185] *See, e.g.*, *supra* notes 118, 120, 155 (addressing judicial authority to interpret statutes, treaties, and customary international law).

[186] *See, e.g.*, PAUST, INTERNATIONAL LAW, *supra* note 40, at 12, 61 n.103, 73, 388 n.64, 437 n.69 (describing application of international law to interpret treaties, and citing relevant cases); *see also* Vienna Convention, *supra* note 40, art. 31(3)(c), 1155 U.N.T.S. at 340 (stating treaties are to be interpreted in light of other relevant international law).

[187] *See* Military Commissions Act § 6(b)(1), 120 Stat. at 2633–35 (codified at 18 U.S.C. § 2441).

[188] *Id.* (codified at 18 U.S.C. § 2441(d)(1)(E)).

[189] *Id.* (codified at 18 U.S.C. § 2441(d)(2)(D)(iii)).

[190] *Id.* (codified at 18 U.S.C. § 2441(d)(2)(D)(i)–(ii), (iv)).

[191] *See id.* § 6(c) (codified at 42 U.S.C. § 2000dd-0).

[192] *Id.*

[193] *See supra* note 60 and accompanying text.

[194] *See also supra* note 60.

Moreover, constitutional amendments do not reach all private perpetrators, whereas U.S. cases have rightly recognized that the laws of war and human rights law can reach private perpetrators.[195]

Among the most egregious portions of the legislation are attempts to deny any person (i.e., any U.S. citizen or alien), here or abroad, in time of peace or war, now and in the future, the right to invoke his or her rights under the Geneva Conventions

> in any habeas or other civil action or proceeding to which the United States, or a current or former officer, employee, member of the Armed Forces, or other agent of the United States is a party as a source of rights in any court of the United States or its States or territories.[196]

Furthermore, these provisions attempt to deny any so-called "unlawful enemy combatant"[197] the right to "invoke the Geneva Conventions as a source of rights"

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[195] *See supra* note 64.

[196] Military Commissions Act § 5(a), 120 Stat. at 2631–32 (codified at 28 U.S.C. § 2241 note). The attempt in section 5(a) to deny habeas corpus to any person with respect to their treaty-based Geneva rights and claims is an attempted suspension of habeas corpus unlimited as to time, place, nationality, necessity, and the circumstances of rebellion or invasion; it is patently beyond the lawful authority of Congress and unconstitutional. *See infra* note 208. Moreover, the attempt was to preclude the right to "invoke the Geneva Conventions," not customary international law. *See* Military Commissions Act § 5(a), 120 Stat. at 2631–32. Since the rights reflected in the Geneva Conventions are now customary international law, *see, e.g.*, Paust, *supra* note 1, at 813 & n.8, one can still invoke such rights as customary international law. There is no ambiguity in that regard and, if there had been, the Supreme Court has long recognized that a federal statute "can never be construed to violate . . . rights [under the customary law of nations] . . . further than is warranted by the law of nations." Murray v. The Charming Betsy, 6 U.S. (2 Cranch) 64, 117–18 (1804).

[197] The Act defines "unlawful enemy combatant" to include within one such category "a person who has engaged in hostilities or who has purposefully and materially supported hostilities against the United States or its co-belligerents who is not a lawful enemy combatant." Military Commissions Act § 3(a)(1), 120 Stat. at 2601 (codified at 10 U.S.C. § 948a(1)(A)(i)). The Act defines three types of "lawful enemy combatant" in a way that only partly mirrors article 4(A)(1)–(3) of the Geneva Convention Relative to the Treatment of Prisoners of War, Aug. 12, 1949, 20 U.S.T. 3316, 75 U.N.T.S. 135 [hereinafter POW Geneva Convention], and does not expressly include certain persons under article 4(A)(1) and (3) and three other types of persons who are entitled to prisoner of war status under article 4(A)(4)–(6). *Compare* Military Commissions Act § 3(a)(1), 120 Stat. at 2601 (codified at 10 U.S.C. § 948a(2)), *with* POW Geneva Convention, *supra*, art. 4(A)(1)–(6). Thus, some persons who are prisoners of war and lawful combatants under Geneva law might be "unlawful enemy combatants" under the Act unless the Act is construed in a manner consistent with U.S. treaty law, which is required by Supreme Court decisions. *See supra* notes 118, 120, 155. Moreover, the Act may attempt to deny combatant and prisoner-of-war rights under Geneva law to "a person who is part of the Taliban . . . ." *See* Military

at his or her trial by military commission.[198] These provisions necessarily violate the Geneva Conventions, which contemplate the invocation and enforcement of individual rights in domestic courts and tribunals.[199] The provisions also attempt to

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Commissions Act § 3(a)(1), 120 Stat. at 2601 (codified at 10 U.S.C. § 948a(1)(a)(i)). But such a broad denial would violate Geneva law, especially for members of the regular armed forces of the Taliban who are protected under article 4(A)(1) and (3) of the POW Geneva Convention. Thus, this portion of the legislation should also be construed to be consistent with U.S. treaty law, especially since there was no intent to violate the Geneva Conventions. *See supra* text accompanying notes 160–62. Concerning combatant and prisoner of war status under Geneva law, see Paust, *Enemy Status*, *supra* note 150, at 328–34. Under the MCA, anyone else of any nationality, including a civilian or prisoner of war of any sort, might be classified by the Executive as an unlawful enemy combatant. *See* Military Commissions Act 3(a)(1), 120 Stat. at 2601 (codified at 10 U.S.C. § 948a (1)(A)(i)).

It must be recalled, however, that outside the context of actual wars in Afghanistan and Iraq mere members of al-Qaeda cannot be engaged in "hostilities" or "combat" against the United States. *See supra* notes 147–50. They are not "combatants" and, having no combatant immunity, they can be prosecuted for criminal acts of violence. *See* Paust, *Enemy Status*, *supra* note 150, at 327–28, 332. However, they can be prosecuted for war crimes only with respect to acts occurring during an actual war to which the laws of war apply, like the wars in Afghanistan and Iraq.

[198] *See* Military Commissions Act § 3(a)(1), 120 Stat. at 2602 (codified at 10 U.S.C. § 948b(g)). Here, the attempt was merely to deny a right to "invoke the Geneva Conventions" and not customary international law. *See id.* Since rights reflected in the Geneva Conventions are also customary international law, such rights can be invoked as customary international legal rights. *See supra* note 196.

[199] *See, e.g.*, Civilian Geneva Convention, *supra* note 39, arts. 3(1)(d), 29 (regarding state and individual liability); *id.* at 43 (stating propriety of detention must be reconsidered "by an appropriate court or administrative board"); *id.* at 78 (regarding "right of appeal" of detention); *id.* at 148 (regarding "liability" and nonimmunity); POW Geneva Convention, *supra* note 197, arts. 3(1)(d), 84, 99, 102, 105–06; IV COMMENTARY, *supra* note 58, at 209–11, 260–61, 368–69, 595–96, 602–03 ("liable to pay compensation"); 1 COMMENTARY, GENEVA CONVENTION FOR THE AMELIORATION OF THE CONDITION OF THE WOUNDED AND SICK IN ARMED FORCES IN THE FIELD 84 (Jean S. Pictet ed., 1952) ("'It should be possible . . . for the rules of the Convention to be evoked before an appropriate national court by the protected person who has suffered a violation.'"); Paust, *supra* note 1, at 852 n.154 (citing relevant cases and addressing nonimmunity); Paust, *Judicial Power*, *supra* note 118, at 514–16 & nn.43–45; *see also* Hamdan v. Rumsfeld, 126 S. Ct. 2749, 2794 n.57 (2006) (quoted *supra* note 39).

Although the provisions are violative of the Geneva Conventions, there was no clear and unequivocal expression of a congressional intent to override the Conventions. *See supra* notes 160–64 and accompanying text. Thus, the last-in-time rule does not apply and Geneva law must have primacy. *See supra* note 90. Even if the last-in-time rule could apply, the "rights under" treaties and law of war exceptions to the last-in-time rule would assure the primacy of Geneva law. *See supra* notes 91–92.

Article 23(h) of the Annex to the 1907 Hague Convention No. IV, Respecting the Laws and Customs of War on Land, sets forth another relevant law of war prohibition: "it is

deny the Supreme Court's ruling in *Hamdan* that common article 3 of the Geneva Conventions is directly relevant treaty law that must be followed.[200]

Congress has no power to obviate original jurisdiction of the Supreme Court.[201] Thus, the attempt to deny treaty-based rights "in any court" is facially unconstitutional. Moreover, Congress has no power to violate the separation of powers by such a blatant denial of a constitutionally mandated, traditional, and essential judicial power to implement treaty law of the United States that, as the Constitution expressly requires, "shall extend to all cases . . . arising under . . . treaties."[202]

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especially forbidden . . . [t]o declare abolished, suspended, or inadmissible in a court of law the rights . . . of the nationals of the hostile party." Hague Convention No. IV, Annex, art. 23(h), Oct. 18, 1907, 36 Stat. 2277, T.S. No. 539; *see also* Rome Statute of the International Criminal Court art. 8(2)(a)(vi), *adopted by* the U.N. Diplomatic Conference, July 17, 1998, U.N. Doc. A/64F.15319, *reprinted in* JORDAN J. PAUST ET AL., INTERNATIONAL CRIMINAL LAW DOCUMENTS SUPPLEMENT 268, 272–73 (2007) (stating that "[w]ilfully depriving a prisoner of war or other protected person of the rights of fair and regular trial" is a "grave breach" of the Geneva Conventions); *id.* art. 8(2)(b)(xiv) (stating that "[d]eclaring abolished, suspended or inadmissible in a court of law the rights . . . of the nationals of the hostile party" is a serious war crime). Denial of the use of rights under the Geneva Conventions in a court of law would violate the law of war and constitute a war crime. Every violation of the law of war is a war crime. *See, e.g.*, FM 27-10, *supra* note 25, at 178, ¶ 499; Paust, *supra* note 1, at 812 n.2. In view of such war crime responsibility, there is an additional reason to recognize the primacy of Geneva law—one that is in the interest of congresspersons and judges alike.

[200] *See supra* note 75; *see also supra* note 39.

[201] *See, e.g.*, U.S. CONST. art. III, § 1 ("The judicial Power of the United States, shall be vested in one supreme Court . . . ."); *id.* § 2 ("In all cases affecting Ambassadors, other public Ministers and Consuls . . . the supreme Court shall have original Jurisdiction . . . ."); *see also* Durousseau v. United States, 10 U.S. (6 Cranch) 307, 314 (1810) (Marshall, C.J.) (stating the "appellate powers of this court" are not created by statute but are "given by the constitution"), *quoted in Hamdan*, 126 S. Ct. at 2764.

[202] U.S. CONST. art. III, § 2; *see* PAUST ET AL., *supra* note 167, at 123–29; PAUST, INTERNATIONAL LAW, *supra* note 40, at 67–70, 105, 189, 295, 387 n.47; Paust, *Judicial Power*, *supra* note 118, at 518–24. As Chief Justice Marshall recognized concerning the textual commitment to the judiciary of authority to decide cases arising under treaties, "[t]he reason for inserting that clause was, that all persons who have real claims under a treaty should have their causes decided" by the judiciary and that "[w]henever a right grows out of, or is protected by, a treaty . . . it is to be protected" by the judiciary. Owings v. Norwood's Lessee, 9 U.S. (5 Cranch) 344, 348–49 (1809). The next year, he also confirmed a fundamental expectation of the Framers concerning an essential reach of judicial power when he affirmed that our judicial tribunals "are established . . . to decide on human rights." Fletcher v. Peck, 10 U.S. (6 Cranch) 87, 133 (1810). Concerning the rich history of Founder, Framer, and judicial attention to human rights and their use in thousands of federal and state cases, see PAUST, INTERNATIONAL LAW, *supra* note 40, at 193–223.

The violation of the separation of powers in this instance is especially evident where federal courts have continuing jurisdiction in all cases arising under treaties and Congress attempts to substantially inhibit judicial independence by controlling the results in certain cases. Congress is attempting precisely that by prescribing rules for decision in a particular way or, in this instance, rights and rules of law contained in the Geneva Conventions that cannot be used for decision.[203] This congressional effort to deny use of particular law and to control judicial decision of cases in a particular way is all the more blatant where Congress has attempted to deny judicial use of common article 3 as a rule for decision in detainee cases after the Supreme Court clearly decided that common article 3 is a primary rule for decision.[204] Additionally, Congress has no power to deny to the States of the United States their shared constitutionally based duty and authority to implement treaty law of the United States as supreme law of the land.[205]

The attempt in another section of the Act to deny any habeas corpus relief at any time and under any circumstances to any alien in U.S. custody here or abroad[206] who has been properly determined to be an "enemy combatant" (either

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[203] *See, e.g.*, United States v. Klein, 80 U.S. (13 Wall.) 128, 145–47 (1871) (stating that a violation of the separation of powers exists where Congress withholds appellate jurisdiction "as a means to an end," "to deny . . . the effect which this court had adjudged" acts "to have" and when the Court had "decided . . . to consider them and give them effect," "to prescribe a rule for the decision of a cause in a particular way . . . [or to] prescribe rules of decision . . . in cases pending before" the judiciary); JOHN E. NOWAK & RONALD D. ROTUNDA, CONSTITUTIONAL LAW 36–39 (6th ed., Westgroup 2000) (1978); BERNARD SCHWARTZ, CONSTITUTIONAL LAW 20 (2d ed., MacMillan Publ'g Co., Inc. 1979) (1972); *see also* Plaut v. Spendthrift Farm, Inc., 514 U.S. 211, 218–28 (1995); Walker v. U.S. Dep't of Hous. & Urban Dev., 912 F.2d 819, 829 (5th Cir. 1990) ("Congress cannot prescribe a rule of decision in a case pending before the courts so as to decide a matter as Congress would like to see." (citing United States v. Sioux Nation of Indians, 448 U.S. 371, 404 (1980))); Hyundi Merch. Marine Co. Ltd. v. United States, 888 F. Supp. 543, 548 (S.D.N.Y. 1995) ("[A] violation of the separation of powers doctrine occurs when Congress enacts legislation that prescribes a rule of decision to the judicial branch in cases pending before it . . . ." (citing *Sioux Nation of Indians*, 448 U.S. at 404; Brown v. Hutton Group, 795 F. Supp. 1307, 1313 (S.D.N.Y. 1992))). The Act attempts to deny habeas relief and various other actions in "all cases, without exception, pending on or after the date of" enactment. Military Commissions Act, §7(b), 120 Stat. at, 2635.

[204] *See supra* notes 75, 203.

[205] *See, e.g.*, U.S. CONST. art. VI, cl. 2 (stating "all Treaties" are "supreme Law of the Land; and the Judges in every State shall be bound thereby," whereas congressional legislation merely has that effect if it is "made in Pursuance" of the Constitution and not if it is made inconsistently with the Constitution to deny traditional judicial independence, authority, and responsibility regarding "all" treaties of the United States); *id.* amend. X; PAUST ET AL., *supra* note 167, at 506–08.

[206] Concerning application of the Fifth and Sixth Amendments of the U.S. Constitution abroad as textual and structural restraints on executive authority, see Paust, *Courting Illegality*, *supra* note 60, at 18–20; Elizabeth Sepper, Note, *The Ties that Bind: How the*

"lawful" or "unlawful") or who "is awaiting such determination"[207] is decidedly contrary to constitutional textual strictures and is therefore beyond the lawful power of Congress.[208] The draconian attempt to also deny such alien persons here

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Constitution Limits the CIA's Actions in the War on Terror, 81 N.Y.U. L. REV. 1805, 1833–39 (2006). Additionally, resident aliens within the United States have rights under the Fifth and Sixth Amendments whether or not they have the same rights abroad. *See* Wong Wing v. U.S., 163 U.S. 228, 238 (1896).

[207] *See* Military Commissions Act § 7(a), 120 Stat. at 2636 (codified at 28 U.S.C. § 2241(e)). The word "awaiting" might mean that denial of habeas could last for years if the provision was not otherwise unconstitutional, *see infra* note 208, and trumped by treaty law, *see supra* notes 162, 202.

[208] The Constitution expressly mandates that "[t]he privilege of the Writ of Habeas Corpus shall not be suspended, unless when in Case of Rebellion or Invasion the public Safety may require it." U.S. CONST. art. I, § 9, cl. 2; *see also* PERRY, *supra* note 122, at 195 (addressing the proposal by Charles Pinckney that suspension shall not occur "except upon the *most urgent and pressing* occasions" (emphasis added)). The phrase—"except upon the most urgent and pressing occasions"—was relevant to the restrictive meaning of the word "require" that was finally adopted by the Framers even though the "occasions" were expressly limited to two (i.e., rebellion and invasion). In this instance, there had been no rebellion or invasion at the time of the MCA's enactment in 2006, and suspension of habeas corpus had not been required for five years after 9/11 and for two years after the decision of the Supreme Court in *Rasul*. Rasul v. Bush, 542 U.S. 466 (2004). Moreover, the attempted suspension is without limits concerning time, place, necessity, or invasion. Thus, the attempt in section 7(a) of the MCA to suspend the writ is contrary to constitutional textual strictures and structural limitations on governmental power and is, therefore, *ultra vires*. The attempt in section 5(a) to suspend habeas for any person (citizen or alien), here or abroad, in time of peace or war, regardless of any alleged necessity due to invasion, and at all times in the future with respect to claims under the Geneva Conventions, *see supra* note 196 and accompanying text, suffers from the same constitutional impropriety.

In *Hamdan v. Rumsfeld*, the district court correctly found that "[t]he MCA is not a constitutionally valid suspension of the writ of habeas corpus" since neither "rebellion nor invasion" existed as required by the Constitution. 464 F. Supp. 2d 9, 12 (D.D.C. 2006). It noted that Congress had previously suspended habeas only four times and that each suspension was "accompanied by clear statements expressing congressional intent to suspend the writ and limiting suspension to periods during which the predicate conditions (rebellion or invasion) existed." *Id.* at 14. However, the district court thought that "Congress's removal of jurisdiction from the federal courts was not a suspension of habeas corpus," but a "removal" without limits, and merely a "jurisdiction-stripping" denial of Hamdan's "statutory access to the writ." *Id.* at 19. This appears to be plain sophistry and ignores the fact that Congress simply has no constitutional authority to suspend or indefinitely remove habeas corpus in this instance. More particularly, the Framers did not allow Congress to terminate habeas and a claim that "termination," which can be operative only until the next Congress (or the present Congress) changes the legislation, is not "suspension" is patently silly. Similarly it is nonsensical to claim that legislation does not suspend habeas when it suspends (or terminates) the jurisdiction of federal courts to hear habeas claims. *See also* Hamdi v. Rumsfeld, 542 U.S. 507, 525 (2004) ("[The parties a]ll agree that, absent suspension, the writ of habeas corpus remains available . . . . At all other

or abroad, at any time, and under any circumstances, "any other action against the United States or its agents relating to any aspect of the detention, transfer, treatment, trial, or conditions of confinement"[209] is a flagrant "denial of justice" under customary international law[210] and an outrageous denial of peremptory rights of access to courts, rights to a remedy, and/or equality of treatment under numerous multilateral and bilateral treaties of the United States and customary international law.[211] Such a sweeping denial of treaty-based requirements is also a

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times, it has remained a critical check on the Executive . . . .").

In *Boumediene v. Bush*, the circuit panel decision focused on rights as opposed to the fact that our government is one of limited powers and that some governmental acts are *ultra vires*, and decided that aliens abroad did not have rights to complain about the constitutionality of the MCA's suspension of habeas corpus. 476 F.3d 981, 990–94 (D.C. Cir. 2007). The dissenting judge stated that the focus on rights was inapt, "the Suspension Clause is a limitation on the powers of Congress . . . [and] limits the removal of habeas"; it "offends the constitutional constraint on suspension . . . [and] is therefore void and does not deprive this court or the district courts of jurisdiction." *Id.* at 995 (Rogers, J., dissenting). With respect to suspension, the dissent stated that the constitutional "proscription applies equally to removing the writ itself and to removing all jurisdiction to issue the writ. *Id.* at 1000 (citing United States v. Klein, 80 U.S. (13 Wall.) 128, 146 (1871)).

It is of historic interest that despite an authorization in an 1863 Act of Congress to suspend habeas corpus "in any case throughout the United States, or any part thereof," Act of Mar. 3, 1863, ch. 81, 12 Stat. 755, the Supreme Court refused to recognize suspension in the state of Indiana, which was outside the area of the Civil War rebellion, *see ex parte* Milligan, 71 U.S. (4 Wall) 2, 126 (1866).

[209] Military Commissions Act § 7(a), 120 Stat. at 2636 (codified at 28 U.S.C. § 2241(e)(2)). The word "action" indicates an intent to cover a civil action, not a criminal prosecution. The only limit is found in the phrase "[e]xcept as provided in paragraphs (2) and (3) of section 1005(e) of the Detainee Treatment Act of 2005 (10 U.S.C. 801 note)." *Id.* Section 8(b) of the MCA revises the reach of 42 U.S.C. § 2000dd-1 with respect to a defense in civil actions and criminal prosecutions where, under section 2000dd-1, the "officer, employee, member of the Armed Forces, or other agent of the United States Government who is a United States person . . . did not know that the practices were unlawful and a person of ordinary sense and understanding would not know the practices were unlawful"; however, it does not "provide immunity from prosecution for any criminal offense by the proper authorities." 42 U.S.C. § 2000dd-1. The "would not know" appears to be related to the international legal "should not have known" test, which rests on a negligence standard. *See, e.g.*, PAUST ET AL., *supra* note 51, at 51–78, 100–14.

[210] *See, e.g.*, PAUST, INTERNATIONAL LAW, *supra* note 40, at 199, 259–61 nn.250–75, 287 n.481, 290 n.483; RESTATEMENT, *supra* note 58, § 711 & cmts. a–c, h.

[211] *See, e.g.*, United Nations Convention Against Torture and Other Cruel, Inhuman or Degrading Treatment or Punishment, *supra* note 43, pmbl., arts. 13–15; ICCPR, *supra* note 40, pmbl., art. 2(1); *id.* art. 2(3) (affirming nonimmunity as well by assuring the right to "an effective remedy, notwithstanding that the violation has been committed by persons acting in an official capacity"); *id.* arts. 9(4), 14(1), (5), 26; Civilian Geneva Convention, *supra* note 39, arts. 29, 148; American Declaration of the Rights and Duties of Man, *supra* note 41, arts. II, XVIII, XXV–VI (operative through the Organization of American States

violation of the separation of powers, since it attempts to control judicial decision and to deny the judiciary its time-honored and essential role of applying fundamental and peremptory rights and requirements contained in treaty law of the United States.[212] More generally, it is an attempt to deny the rule of law.

VII. CONCLUSION

There are short- and long-term consequences of illegality. For example, war crimes policies and authorizations are not merely a threat to constitutional government and our democracy. They threaten law and order more generally, violate our common dignity, degrade our military,[213] place our soldiers and CIA personnel in harm's way, thwart our mission, and deflate our authority and influence abroad. They can embolden an enemy, serve as a terrorist recruitment tool, lengthen social violence, and fulfill other terrorist ambitions.

The claim that the President has authority to violate international laws of war, human rights law, and domestic legislation is patently unconstitutional and unacceptable. Its nihilistic essence is remarkably close to the unlimited psychotic justifications of many terrorists and is far removed from the essential characteristics of modern human civilization. At least one sharply contrasting and

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Charter, arts. 3(k), 44, 111); Universal Declaration of Human Rights, *supra* note 42, pmbl., arts. 1–2, 7–8, 10–11; Hague Convention No. IV, *supra* note 199, Annex, art. 23(h); U.N. CAT Report, *supra* note 1, ¶¶ 27–28, 32; *General Comment No. 20*, *supra* note 46, ¶ 15; *General Comment No. 24*, *supra* note 40, ¶¶ 8, 11–12; PAUST ET AL., *supra* note 167, at 340–42 (quoting Dubai Petroleum Co. v. Kazi, 12 S.W.3d 71, 82 (Tex. 2000)); PAUST, INTERNATIONAL LAW, *supra* note 40, at 224–29; Paust, *Courting Illegality*, *supra* note 60, at 10–15, 17 n.38 (noting the requirements of access to courts and equality of treatment contained in bilateral friendship, commerce, and navigation treaties with numerous states that would necessarily be violated if the treaties did not have primacy); Paust, *supra* note 1, at 852 n.154 (addressing nonimmunity for violations of the ICCPR, the CAT, and war crimes as well); Paust, *Judicial Power*, *supra* note 118, at 507–10, 514; *supra* notes 199, 210; *see also* United States v. Altstoetter (The Justice Case), *in* 3 TRIALS, *supra* note 58, Indictment ¶ 16, at 22 (stating "discriminatory measures against Jews, Poles, 'gypsies,' and other designated 'asocials' resulted in . . . deprivations of rights to file private suits and rights of appeal" and were war crimes). Even if the last-in-time rule could apply (it cannot because there is no clear and unequivocal expression of congressional intent to override *any* of these treaties, *see supra* note 90), the "rights under" treaties exception would apply to guarantee the primacy of such rights, *see supra* note 91.

[212] *See supra* notes 202–03.

[213] Degradation can include moral and psychologic degradation and detrimental impacts upon military morale, retention, and recruitment. *See* Corn, *supra* note 141. Ultimately, a strong and effective military that serves the national interest in a constitutional democracy is one that operates within the law. The same point pertains more generally with respect to the presidency.

venerable aspect of the meaning of America is worth conserving—the constitutionally based precept that no one is above the law.[214]

[214] An especially apt affirmation appears in *United States v. Lee*:

> No man in this country is so high that he is above the law. No officer of the law may set that law at defiance with impunity. All the officers of the government, from the highest to the lowest, are creatures of the law, and are bound to obey it. It is the only supreme power in our system of government, and every man who by accepting office participates in its functions is only the more strongly bound to submit to that supremacy, and to observe the limitations which it imposes upon the exercise of the authority which it gives.

106 U.S. 196, 220 (1882); *see also* Hamdan v. Rumsfeld, 126 S. Ct. 2749, 2798 (2006) ("[T]he Executive is bound to comply with the Rule of Law.").

TOWARD A FEMINIST THEORY OF THE RURAL

Lisa R. Pruitt*

Feminists have often criticized law's ignorance of women's day-to-day, lived experiences, even as they have sought to reveal the variety among those experiences. This article builds on both critiques to argue for greater attentiveness to a neglected aspect of women's situation: place. Specifically, Professor Pruitt asserts that the hardships and vulnerability that mark the lives of rural women and constrain their moral agency are overlooked or discounted by a contemporary cultural presumption of urbanism.

This Article considers judicial responses to the realities of rural women's lives in relation to three legal issues: intimate abuse, termination of parental rights, and abortion. In each of these contexts, Pruitt scrutinizes judicial treatment of spatial isolation, lack of anonymity, a depressed socioeconomic landscape, and other features of rural America. She contrasts responses to the plight of rural women in these legal contexts, where courts often show little empathy or understanding, with judicial responses to the vulnerability and hardships associated with sustaining rural livelihoods in non-gendered contexts.

Drawing on rural sociology and economics, as well as from judicial opinions, Pruitt argues that the combination of features that constitute rural America seriously disadvantages rural women. She further maintains that this disadvantage is aggravated when society's prevailing urban perspective obscures legal recognition of the rural. Unlike Catharine MacKinnon's landmark work under a similar title, Toward a Feminist Theory of the State, Pruitt does not purport to articulate grand theory. Nevertheless, by showing how features of rural life are often overlooked or misunderstood by legal actors, and by explaining the legal relevance of these features to critical junctures at which women encounter the law, Pruitt begins the process of articulating a feminist theory of the rural.

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Feminist scholars have long lamented law's inattentiveness to and misunderstanding of the day-to-day realities of women's lives.[1] Anti-essentialists have argued that feminism must look beyond gender as the sole or primary site of subordination to other factors that shape women's lives.[2] This Article draws on both arguments, calling attention to rural women as a distinct population, differentiated by place.[3] In it, I argue that the social, political, and economic realities that form the backdrop of rural women's lives are largely ignored in many legal contexts. In the rare cases that acknowledge the rural context, its role in defining women's choices is often downplayed or dismissed in relation to the legal issue at hand.

This Article discusses the relevance of place to rural women's situation in three different contexts: intimate abuse, termination of parental rights, and abortion. With respect to each of these, I assess whether and how the relevant legal doctrines sufficiently accommodate information about the lived realities of rural women. I reveal, for example, that legal analyses of intimate abuse and termination of parental rights often ignore or discount the added vulnerability and hardship that rural women may experience by virtue of their rural setting. In the abortion context, my analysis illustrates how courts have consistently denied or dismissed the significance of obstacles that effectively prevent many rural women from exercising this constitutional right.

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[1] *See generally* JUDITH A. BAER, OUR LIVES BEFORE THE LAW 40–67 (1999) (advocating "situation jurisprudence," which focuses on women's situation and what has been done to women, and criticizing "character jurisprudence," which emphasizes "essential gender distinction[s]"); CATHARINE A. MACKINNON, WOMEN'S LIVES, MEN'S LAWS 6, 34 (2005) (arguing that we "should analyze the legal issues in terms of the real issues, and strive to move law so that the real issues *are* the legal issues").

[2] See, e.g., Berta Esperanza Hernández-Truyol, Out of the Shadows: Traversing the Imaginary of Sameness, Difference, and Relationalism—A Human Rights Proposal, 17 WIS. WOMEN'S L.J. 111, 126–30 (2002); Danielle Elyce Hirsch, Recognizing Race in Women's Programming: A Critique of a Women's Law Society, 19 BERKELEY WOMEN'S L.J. 106, 110–14 (2004); see also generally MARTHA CHAMALLAS, INTRODUCTION TO FEMINIST LEGAL THEORY, ch 5, The Diversity Stage (2d ed. 2003) (describing the emergence and breadth of anti-essentialist thought in feminist legal theory). Somewhat ironically, my own analysis tends to essentialize "the rural," albeit tentatively and self-consciously.

[3] I use "place" in this Article primarily in a literal sense, while also beginning to explore how the identities of women in rural areas are socially constructed in relation to their rural situation. *See infra* note 9. I also lay the groundwork here for further theorizing about the socio-spatial dimensions of rural women's lives. I thus rely implicitly on the work of critical geographers who call attention to the role of space and place in understanding how societies operate and change. *See, e.g.*, DOREEN MASSEY, SPACE, PLACE AND GENDER (1994); LINDA MCDOWELL, GENDER, IDENTITY & PLACE: UNDERSTANDING FEMINIST GEOGRAPHIES (1999); EDWARD W. SOJA, POSTMODERN GEOGRAPHIES: THE REASSERTION OF SPACE IN CRITICAL SOCIAL THEORY (1989).

Part I details the rural milieu, to the extent that it can be generalized across regions. While the term "rural" has many definitions and connotations[4] this Article uses it primarily to signify sparsely populated places.[5] But rural places have more in common than low population density, and I also use the term to refer to the conglomeration of characteristics generally associated with rural areas. Rural people labor under various structural disadvantages that stem generally from poor economic and educational opportunities, but also arise from specific deficits in transportation, child care, and housing, among others. While a great deal of the information presented relates to the socioeconomic disadvantage that marks rural lives, my argument is not based solely on class.[6] It is also about other features of rural America: close-knit community where residents tend to be familiar with one another; more tradition-bound and conservative thinking that emphasizes women's care-giving roles; spatial isolation created by low population density; and attachment to place.

Part II provides a theoretical framework for conceptualizing rural women's difference as disadvantage and for arguing that place merits attention in our analysis of gender issues. Drawing on the work of Catharine MacKinnon, I assert that we must attend to the details of women's lives—that we should "strive to move law so that the real issues *are* the legal issues."[7] Based on the work of Judith Baer, I argue that we must focus on women's situation rather than on their character.[8] In this regard, my analysis reveals the aggravated disadvantage and

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[4] *See* Lisa R. Pruitt, *Rural Rhetoric*, 39 CONN. L. REV. 159, 168 (2006).

[5] The distances typical of rural areas go hand-in-hand with the fact that "all rural areas share one common characteristic: relatively low population densities." Greg Duncan et al., *Lessons Learned: Welfare Reform and Food Assistance in Rural America*, *in* RURAL DIMENSIONS OF WELFARE REFORM: WELFARE, FOOD ASSISTANCE AND POVERTY IN RURAL AMERICA 455, 456 (Bruce A. Weber et al. eds., 2002).

[6] *See generally* Ann R. Tickamyer, *Public Policy and Private Lives: Social and Spatial Dimensions of Women's Poverty and Welfare Policy in the United States*, 84 KY. L.J. 721 (1995–96) (discussing the feminization of poverty). *See also* Diana Pearce, *The Feminization of Poverty: Women, Work and Welfare*, 11 URB. & SOC. CHANGE REV. 28, 29 (1978) (citing Dean D. Knudsen, *The Declining Status of Women: Popular Myths and the Failure of Functionalist Thought*, 48 SOC. FORCES 183, 188 (1969)) (noting that the higher the percentage of workers who are female in a given occupation, the lower the occupation's average income).

[7] MACKINNON, *supra* note 1, at 6.

[8] Baer essentially renames dominance theory, associated with radical feminists, as situation theory. She explains that "the implication that dominance is a universal feature of women's lives is contentious, the assertion that women's situation has been a subject one is incontrovertible." BAER, *supra* note 1, at 41 (emphasis omitted). She thus refers to theories that emphasize dominance as theories of women's situation. *See id.* "Situation theory (jurisprudence) holds that what makes law male is the fact that men use it to subordinate women." *Id.* "If we fail to discuss what has been done to women," Baer asserts, "we leave out a huge part of reality. We limit the insights we can reach about people who do these things and about a society that lets them do it and teaches them how." *Id.* at 62.

multi-faceted vulnerability that rural women experience by virtue of place, including the differing socio-spatial dynamic created by sparsity of population and geographic isolation.[9]

Building on anti-essentialist scholarship, I maintain that geography matters, just as race, sexual orientation, and other factors do. Rurality is highly relevant to many legal analyses, even though law has rarely recognized it in relation to and in combination with gender. Being a rural woman may also represent a significant component of identity. Just as being a woman of color is a greater element of identity than being white,[10] experiencing a rural upbringing or being a long-time rural resident can be a critical aspect of how a woman sees herself, even while the urban equivalent may not be.[11]

Part III discusses three different contexts in which courts have adjudicated conflicts arising in rural places and in which characteristics of the rural setting were arguably legally relevant: intimate abuse, termination of parental rights, and abortion. In discussing each of these, I illustrate law's ignorance of–or indifference to–rural realities. I also contrast law's typically insensitive responses to these gender-specific issues with more empathic judicial handling of non-gendered legal issues that similarly implicate the spatial isolation and lack of anonymity that are characteristic of rural areas.

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[9] *See infra* notes 21–22, 50–53, 56-63, 334 and accompanying text (discussing the social and economic significance of these phenomena). *See also* Gerald W. Creed & Barbara Ching, *Recognizing Rusticity: Identity and the Power of Place*, *Introduction* to KNOWING YOUR PLACE: RURAL IDENTITY AND CULTURAL HIERARCHY 6 (Barbara Ching & Gerald W. Creed eds., 1997) (lamenting the "lack of a conceptual vocabulary for articulating the blend of psychic, cultural, and 'real' geography" for analyzing the rural/urban distinction and place-based identity). Professors Ching and Creed argue for a "theoretical middle ground in which 'place' can be metaphoric yet still refer to a particular physical environment and its associated socio-cultural qualities." *Id.* at 7. They claim that "place identities are clearly linked to a particular kind of place, but even identities built upon the land are social constructions." *Id.* at 12.

[10] *See* Angela P. Harris, *Race and Essentialism in Feminist Legal Theory*, 42 STAN. L. REV. 581, 604 (1990) (sharing an anecdote of a West Coast feminist critics meeting at which all women were asked to pick two or three words to describe themselves: "[n]one of the white women mentioned their race, [while] all of the women of color did").

[11] Creed & Ching, *supra* note 9, at 4 (arguing that marked and marginalized rural folk experience the distinction more intimately and their "rural" status is a more significant element of identity for them: "the urban-identified can confidently assume the cultural value of their situation while the rural-identified must struggle to gain recognition"). In each pairing, black/white and rural/urban, the former is the outsider, the minority, while the latter represents the default or the norm. It is thus the former about which society must be educated and sensitized. As a related matter, Creed and Ching have argued that "the rural/urban distinction underlies many of the power relations," and that "the city remains the locus of political, economic and cultural power." *Id.* at 2, 17.

By the claim "toward a feminist theory of the rural," I do not purport to articulate "epic theory"[12] as MacKinnon did in her germinal text under a similar title.[13] Rather, my aim is to explain and document how rural women have been disadvantaged by law's ignorance of or callousness about the practical realities that shape their lives. In positing how law's urban presumption and bias have undermined rural women, I reconceptualize the significance of rurality to women's lives, particularly as those lives encounter the law.

I. RURAL WOMEN, RURAL REALITIES

Rural scholars caution that diversity among the nation's rural places makes it difficult to generalize across the rural populace.[14] Yet studies of women in areas ranging from Appalachian Kentucky to rural Michigan reveal similarities. Rural women's lives are shaped by conservative views, including those regarding the proper roles of women.[15] Their situation is characterized by low educational attainment[16] and frequent underemployment.[17]

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[12] CATHARINE A. MACKINNON, TOWARD A FEMINIST THEORY OF THE STATE, at x–xi (1989) (citing Sheldon Wolin, *Political Theory as a Vocation*, 63 AM. POL. SCI. REV. 1079–80 (1967)).

[13] *See id.*

[14] *See, e.g.*, Cynthia B. Struthers & Janet L. Bokemeier, *Myths and Realities of Raising Children and Creating Family Life in a Rural County*, 21 J. FAM. ISSUES 17, 41 (2000). Courts have sometimes been reluctant to so generalize across states and regions, but at other times they have done so. One sees both practices, for example, in abortion decisions assessing regulations that arguably create undue burdens on women's right to abortion. *See infra* Section III.C.3(a) (discussing *Utah Women's Clinic, Inc. v. Leavitt* and *Karlin v. Foust*, in which each court dismissed differences between the geography of Pennsylvania and that of Utah and Wisconsin, respectively, and *A Woman's Choice-East Side Women's Clinic v. Newman*, in which the majority rejected evidence of the consequences of abortion regulations in Mississippi as insufficient to prove that similar regulations in Indiana would lead to consequences there similar to those in Mississippi).

[15] PUB. OPINION STRATEGIES & GREENBERG QUINLAN ROSNER RESEARCH, W.K. KELLOGG FOUND., ELECTION 2002: RURAL VOTER AND RURAL ISSUES 37 (2002), *available at* http://www.wkkf.org/ (follow "Knowledgebase" hyperlink and select "Publications and Resources" from the drop-down menu; then follow "Food Systems and Rural Development" hyperlink; then follow "E" hyperlink under "Browse By Title"; then follow "Election 2002: Rural Voters and Rural Issues" hyperlink) [hereinafter PUB. OPINION STRATEGIES]. "Rural women are actually stronger GOP partisans than their male counterparts, are more supportive of conservative religious groups, [and] are more conservative than non-rural men on self-reported ideology . . . ." *Id.*

[16] Forty-two percent of rural women have attained only a high school education or less, compared with twenty-four percent of urban women; twenty-six percent completed some college, as opposed to thirty percent of urban women; and thirty-two percent graduated from college or went beyond, compared with forty-five percent of metro women. *Id.* at 24.

A. Political and Social Trends

Some social and cultural differences between rural and urban areas dissipated or disappeared with the decline of the family farm and the corresponding decrease in rural population.[18] Family size and birth rates are now similar in rural and urban areas,[19] and advances in transportation and communication have reduced rural isolation.[20] Despite some blurring between rural and urban values and practices in recent decades, rural individuals still tend to hold more traditional beliefs than those who live in cities.[21] Sociologists attribute this, at least in part, to the types of relationships rural people form as a result of decreased population size and density: the closer interaction among people within a rural community leads to "greater levels of consensus on important values and morals."[22]

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[17] J. Brian Brown & Daniel T. Lichter, *Poverty, Welfare, and the Livelihood Strategies of Nonmetropolitan Single Mothers*, 69 RURAL SOC. 282, 295 (2004).

[18] Don E. Albrecht & Carol Mulford Albrecht, *Metro/Nonmetro Residence, Nonmarital Conception, and Conception Outcomes*, 69 RURAL SOC. 430, 433 (2004).

[19] *Id.* at 435.

[20] *Id.* at 433.

[21] *Id.* at 449–50. *See also* Anastasia R. Snyder & Diane K. McLaughlin, *Female-Headed Families and Poverty in Rural America*, 69 RURAL SOC. 127, 146 (2004) (comparing family structures across rural, suburban and central city areas in 1980, 1990, and 2000, and finding that family structures in rural and suburban areas remain more traditional compared to those in central city areas).

[22] *Id.* at 435. *See also* Fern K. Willits et al., *Persistence of Rural/Urban Differences in* RURAL SOCIETY IN THE U.S.: ISSUES FOR THE 1980S 70, 72–74 (Don A. Dillman and Daryl J. Hobbs, eds. 1982) (observing that rural residents are "more traditional in their moral orientation . . . more ideologically religious and conservative in their practices, and more satisfied with their lifestyle" compared to their urban counterparts).

The conservative politics of so-called non-metro[23] residents are evident in rural voting tendencies. Until the latter part of the twentieth century, rural voters aligned themselves with Democratic candidates who "tapped into the economic concerns of rural districts."[24] Rural voters overwhelmingly supported Republican candidates in 2002, marking the fifth consecutive election in which they did so.[25] Further, President Bush carried the vast majority of rural districts in each of the

[23] The word "non-metro" indicates "rural" when the study cited uses the Office of Management and Budget ("OMB") designations of metro and non-metro, which are defined slightly differently than the U.S. Census Bureau's "rural." HOUSING ASSISTANCE COUNCIL, TAKING STOCK: RURAL PEOPLE, POVERTY, AND HOUSING AT THE TURN OF THE 21ST CENTURY 11 (2002), *available at* http://ruralhome.org/pubs/hsganalysis/ts2000/index.htm [hereinafter HAC, TAKING STOCK]. The U.S. Census Bureau uses the term "rural" to mean "all territory, population, and housing units located outside of UAs [urbanized areas] and UCs [urban clusters]." U.S. Census Bureau, Census 2000 Urban and Rural Classification, http://www.census.gov/geo/www/ua/ua_2k.html (last visited Mar. 6, 2007). It defines "urban" as "including all territory, population, and housing units located within an urbanized area (UA) or urban cluster (UC)." *Id.* This definition delineated the boundaries of "urbanized areas" and "urban clusters" to encompass densely settled territory, which consists of: "core census block groups or blocks that have a population density of at least 1,000 people per square mile and surrounding census blocks that have an overall density of at least 500 people per square mile." *Id.*

The OMB uses the terms "metropolitan" and "micropolitan" to refer to essentially the same dichotomy. Micropolitan areas are outside metropolitan areas and have no cities of 50,000 people or more. OFFICE OF MGMT. & BUDGET, EXECUTIVE OFFICE OF THE PRESIDENT, OMB BULL. NO. 07-01, UPDATE OF STATISTICAL AREA DEFINITIONS AND GUIDANCE ON THEIR USES app. at 2 (2006), *available at* http://www.whitehouse.gov/omb/bulletins/fy2007/b07-01.pdf. Metropolitan areas, on the other hand, are those with at least 50,000 residents or with an urbanized area of 50,000 people or more. *Id.* Metro areas thus include suburbs and other areas near them that are socially and economically integrated. *See id.*; *see also* Standards for Defining Metropolitan and Micropolitan Statistical Areas, 65 Fed. Reg. 82,228, 82,238 (Dec. 27, 2000). Some scholars have pointed out that the definition of non-metro areas is a narrow one that excludes twenty-nine million people who live in small towns with fewer than 2500 residents or in open territory, but who are classified as metro because they are within a metro county. *See* Leslie A. Whitener et al., *As the Dust Settles: Welfare Reform and Rural America*, *Introduction* to RURAL DIMENSIONS OF WELFARE REFORM, *supra* note 5, at 1, 19 n.4. This Article nevertheless treats the terms as essentially synonymous because both refer to sparsely populated areas that are removed from urban centers. *See also* Pruitt, *supra* note 4, at 9–11 (analyzing complexities of rural classification).

[24] Gregory L. Giroux, *Recalibrating the Rural Voter's Place*, CONG. Q. WEEKLY, June 27, 2005, at 1722.

[25] News Release, W.K. Kellogg Found., Cultural Issues in Rural America Gave Republicans a Wide Margin of Success in Recent Election: Gender Gap Narrower Among Rural Voters, Rural Voter Study Shows (Dec. 12, 2002), *available at* http://www.wkkf.org/ (enter "Cultural Issues" in the search box and click "Search"; then follow "W.K. Kellogg Foundation: Press Release: Cultural Issues" hyperlink).

last two presidential races.[26] This shift is attributed to conservative views espoused by Republicans on topics of importance to rural voters: gun control, abortion, and religion.[27] When rural communities do elect Democrats to Congress, their voting records are more conservative than those of urban Democrats.[28]

As for rural women, they tend to marry younger and at a greater rate than urban women.[29] They also have a tendency toward more traditional views about themselves, believing that their primary role is to bear, raise, and protect children.[30] Non-metro women's views about abortion are generally more conservative, too, with rural women significantly more likely to support pro-life rather than pro-choice candidates. [31] A study of nonmarital conceptions among

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[26] Special Report, *Who Represents the Different Demographics*, CONG. Q. WEEKLY, June 27, 2005, at 1725, 1725. In 2000, Bush beat Gore in forty-seven of the sixty-one rural districts, and in 2004 he beat Kerry in fifty-one districts. *Id.* at 1732–36. Gore carried seventy of the ninety urban districts in 2000; in 2004, Kerry won in sixty-five. *Id.*

[27] Giroux, *supra* note 24, at 1722. One scholar has argued that "[t]he far right understands rural peoples' alienation and exploits it, transforming their bitter desperation into political action that suits the right's own broader agenda." OSHA GRAY DAVIDSON, BROKEN HEARTLAND 118 (1990).

Abortion has been a very controversial issue in rural communities. For example, the South Dakota legislature in February 2006 passed a law making it a felony for doctors to perform abortions unless necessary to save the life of the mother. Evelyn Nieves, *S.D. Abortion Bill Takes Aim at 'Roe': Senate Ban Does Not Except Rape, Incest*, WASH. POST, Feb. 23, 2006, at A1. The law was designed to challenge *Roe v. Wade*, 410 U.S. 113 (1973), and does not make an exception for victims of rape or incest. Nieves, *supra*. However, voters rejected the law in a referendum in the November 2006 election. Monica Davey, *The 2006 Elections: Ballot Measures; South Dakotans Reject Sweeping Abortion Ban*, N.Y. TIMES, Nov. 8, 2006, at P8; *see also* FAYE D. GINSBURG, CONTESTED LIVES: THE ABORTION DEBATE IN AN AMERICAN COMMUNITY 15–16 (1989) (examining the social impact of the abortion debate in Fargo, North Dakota, and arguing that the debate there mirrors that occurring across the nation).

[28] Giroux, *supra* note 24, at 1724 ("In most cases, rural-district Democrats have voting records in line with their conservative-leaning constituencies but at odds with their party's more liberal leaders. As of Memorial Day, four of the five House Democrats [with] the lowest 'party unity' scores so far this year—meaning that they often voted with the Republicans and against most fellow Democrats on mainly party-line votes—came from rural districts . . . .").

[29] Struthers & Bokemeier, *supra* note 14, at 34; Anastasia R. Snyder, Susan L. Brown, & Erin P. Condo, *Residential Differences in Family Formation: The Significance of Cohabitation,* 69 RURAL SOC. 235 (2004).

[30] JUDITH IVY FIENE, THE SOCIAL REALITY OF A GROUP OF RURAL, LOW-STATUS, APPALACHIAN WOMEN 41 (1993); *see also* Struthers & Bokemeier, *supra* note 14, at 37.

[31] PUB. OPINION STRATEGIES, *supra* note 15, at 2 (finding that rural voters prefer a right-to-life candidate over a pro-choice candidate by an eight-point margin). In addition, rural women surveyed in New York and Kentucky voiced extreme anti-abortion sentiments. *See* FIENE, *supra* note 30, at 44–45 (indicating Kentucky women's rejection of abortion even when the pregnancy results from rape); JANET M. FITCHEN, POVERTY IN

rural and urban women found that those in rural areas were more likely to carry a fetus to term and to marry before the baby's birth.[32]

B. Limited Economic Opportunities

More than fifty-five million people—roughly twenty percent of Americans—live in non-metro areas.[33] Of the 15.1% of these living in poverty,[34] women, children, and people of color represent a disproportionate share.[35] Families headed by females are now almost proportionately represented in rural areas,[36] and 35.2% of those living in such families were impoverished in 2003, a rate 7% higher than that for their urban counterparts.[37]

Myriad other reasons also account for the prevalence of low socioeconomic status among women in rural America. These include limited economic

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RURAL AMERICA: A CASE STUDY 127 (1981) (indicating strong opposition to abortion among the New York women who were interviewed).

[32] Albrecht & Albrecht, *supra* note 18, at 444, 447.

[33] HAC, TAKING STOCK, *supra* note 23, at 9.

[34] Leif Jensen, *At the Razor's Edge: Building Hope for America's Rural Poor*, RURAL REALITIES (2006), *available at* http://www.ruralsociology.org/pubs/ RuralRealities/Rural Realities1-1.pdf (noting also a 2005 metro poverty rate of 12.5%). Poverty rates have been rising for the past few years. In 2000, 14.6% of the non-metro population were poor, while the poverty rate nationwide was 12.4% and the rate in metro areas was 11.8%. HAC, TAKING STOCK, *supra* note 23, at 9; *see also* RURAL POVERTY RESEARCH CTR., PLACE MATTERS: ADDRESSING RURAL POVERTY 3 (2004), *available at* http://www.rprconline.org/ synthesis.pdf. Eighty-four percent of U.S. counties with poverty rates above the national average are non-metro. HAC, TAKING STOCK, *supra* note 23, at 20.

[35] HAC, TAKING STOCK, *supra* note 23, at 2, Figure 3, 20–22. While minorities living in rural areas are far more likely to be poor than their urban counterparts, most of the rural poor (66.3%) are white. *Id.* at 2, Figure 3. The poverty rate among rural African Americans is 22%. *Id.* at 18.

[36] Daniel T. Lichter & Leif Jensen, *Rural America in Transition: Poverty and Welfare at the Turn of the Twenty-First Century in* RURAL DIMENSIONS OF WELFARE REFORM *supra* note 5, at 83 (providing statistics according to race).

[37] USDA Econ. Res. Service, *Rural Income, Poverty, and Welfare: Rural Poverty,* 4–5 *available at* http://www.ers.usda.gov/Briefing/IncomePovertyWelfare/ruralpoverty/. The urban rate was 28.9%. *Id.* In 1995, 50.8% of rural, female-headed families with children lived in poverty compared to 40.1% of their urban counterparts. Linda K. Cummins, *Homelessness Among Rural Women, in* THE HIDDEN AMERICA: SOCIAL PROBLEMS IN RURAL AMERICA FOR THE TWENTY-FIRST CENTURY 57, 63 (Robert M. Moore III ed., 2001) (citing the Housing and Assistance Council).

A study of the risks of poverty for female-headed families shows they are significantly higher for those living in non-metro areas than for others. Synder & McLaughlin, *supra* note 21, at 143–45 (finding rural, female-headed families with children most likely to be poor and twice as likely to be living in poverty as their suburban counterparts).

opportunities and deficits in human capital that plague rural communities.[38] While the 2000 census reported a median household income in metro areas of $44,755, the median income in non-metro areas was only $33,687.[39] On average, then, non-metro workers earn twenty-eight percent less than their metro counterparts.[40] This earnings differential is no doubt related to the fact that only fifteen percent of non-metro residents have at least a bachelor's degree, compared to twenty-five percent of all U.S. residents.[41]

Despite the more traditional nature of rural culture, metro and non-metro women are employed at equal rates.[42] Yet, women in rural areas earn only about half of what men are paid for similar jobs, an earnings ratio that is similar to that between urban women and men.[43] Women residing in rural areas are thus at a significant disadvantage relative not only to all metro workers, but also relative to the men in their own communities.

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[38] HAC, TAKING STOCK, *supra* note 23, at 21.

[39] *Id.* at 20. Some have debated whether the impact of this differential is blunted by a lower cost of living in rural areas. *Compare* Mark Nord, *Does it Cost Less to Live in Rural Areas? Evidence from New Data on Food Security and Hunger*," 65 RURAL SOC. 104 (2000) (noting that while housing costs tend to be lower in rural areas, the cost of other necessities tend to be higher) *with* DEAN JOLLIFFE, THE COST OF LIVING AND THE GEOGRAPHIC DISTRIBUTION OF POVERTY, USDA ECONOMIC RESEARCH REPORT NUMBER 26 15 (2006), *available at* http://www.ers.usda.gov/publications/err26/err26.pdf (suggesting that poverty measures be adjusted to account for cost-of-living differences between metro and non-metro areas, which would cause metro poverty levels to be greater than non-metro levels between 1991 and 2002).

[40] *Id.* at 19; *see also* David A. Cotter et al., *Gender Inequality in Nonmetropolitan and Metropolitan Areas*, 61 RURAL SOC. 272, 282 (1996) (noting nonmetropolitan earnings are well below metropolitan earnings); Struthers & Bokemeier, *supra* note 14, at 42 (noting that poverty results not only from "not wanting to work" but also from an "inability to find employment that allows parents to support their families").

[41] HAC, TAKING STOCK, *supra* note 23, at 16.

[42] Cotter et al., *supra* note 40, at 280–82. *See also* William M. Smith, Jr. & Raymond T. Coward, *The Family in Rural Society: Images of the Future* in THE FAMILY IN RURAL SOCIETY 221, 224 (Raymond T. Coward & William M. Smith Jr., eds 1981) (noting the increasing presence of rural women in the paid workforce, largely due to economic necessity, and some consequences of the phenomenon for rural families).

[43] Cummins, *supra* note 37, at 86 (citing Angeline Bushy, *Rural Women: Lifestyle and Health Status*, 28 RURAL NURSING 187, 189 (1993)). Nevertheless, male-to-female earnings ratios are similar in rural and urban areas. Cotter et al., *supra* note 40, at 280–82.

Rural people are more likely than urban people to work in manufacturing,[44] and rural women are more likely than rural men—seventy-three percent compared to thirty-nine percent—to do so.[45] In addition, consumer service jobs now comprise one-third of non-metro employment.[46] Both categories of jobs have drawbacks. Manufacturing jobs are subject to market whims and overseas relocation, thus providing little security.[47] While the flexibility of service jobs can accommodate a mother's schedule, it may also mean fewer hours, lower earnings, and poor benefits.[48] In sum, rural women tend to be employed in "low-wage, unstable, secondary-sector," gender-segregated jobs.[49]

Rural women frequently rely on elaborate, carefully balanced social networks for support and assistance to supplement their incomes.[50] Rather than turning to social service agencies, women often look to each other for help with child care, transportation, and even occasionally paying bills.[51] In return, they offer the same services to others within their networks, either as payment for assistance given or as a down payment, of sorts, for a future favor.[52] By utilizing a combination of

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[44] In 2000, manufacturing accounted for eighteen percent of all jobs in non-metro areas but fourteen percent nationwide. HAC, TAKING STOCK, *supra* note 23, at 18. Thirteen percent of non-metro women worked in manufacturing, compared to ten percent of metro women. Robert M. Gibbs, *Rural Labor Markets in an Era of Welfare Reform*, *in* RURAL DIMENSIONS OF WELFARE REFORM, *supra* note 5, at 51, 59.

Changed rural employment opportunities have affected both male and female workers in recent decades. Historically, rural economies were not diversified and were grounded in so-called extractive industries, including farming, mining, logging, and fishing. *Id.* at 56; *see also* Cummins, *supra* note 37, at 59. More recently manufacturing and service jobs have become staples of rural economies. *See* Gibbs, *supra*, at 58. *See also* MORRISTOWN: IN THE AIR AND SUN (Anne Lewis documentary 2007) (depicting the changing employment base and economic fortunes of Morristown, Tennessee, a population center of 25,000 in the midst of three rural counties in northeast Tennessee).

Deborah Weissman has written of the consequences of economic restructuring, including factory closings prompted by globalization, for women. Deborah M. Weissman, *The Personal is Political – and Economic*: *Rethinking Domestic Violence,* 2007 BYU L. Rev. (forthcoming Mar. 2007) at Part III.

[45] Gibbs, *supra* note 44, at 59.

[46] HAC, TAKING STOCK, *supra* note 23, at 19. This number has risen seven percentage points since 1990. *Id.*

[47] *Id.* at 18.

[48] Gibbs, *supra* note 44, at 59.

[49] Barbara Wells, *Women's Voices: Explaining Poverty and Plenty in a Rural Community*, 67 RURAL SOC. 234, 236 (2002).

[50] *See* FIENE, *supra* note 30, at 64–66; MARGARET K. NELSON, THE SOCIAL ECONOMY OF SINGLE MOTHERHOOD 63–92 (2005) (examining the systems of social support and reciprocity relied upon by single mothers in rural Vermont).

[51] NELSON, *supra* note 50, at 75.

[52] FIENE, *supra* note 30, at 65; NELSON, *supra* note 50, at 81. Women tend to request only as much as they are willing to give, knowing they may otherwise be expelled from the network. *Id.* at 77. One woman described the relationship as: "like the checking account—

these networks and informal work, rural women are sometimes able to avoid welfare and maintain their independence. Nevertheless, some scholars have observed that such networks are increasingly fragile and temporary. As single parenthood increases, family-based and social support networks diminish in significance, and many rural women seem to be losing a previously valuable resource.[53]

C. Significant Structural Disadvantages

While the broad economic picture of rural America is disheartening, the situation of women there is even more so.[54] Transportation, child care, and housing are among the structural obstacles that weigh heavily on the rural female population, who have even fewer resources than rural men to devote to them.[55]

1. Transportation

The long distances that typically separate rural residents from jobs, services, and other people make reliable transportation a necessity.[56] It is thus not surprising that, compared to those in urban areas, rural Americans spend a higher percentage of their income on transportation.[57] Nevertheless, rural counties have a higher rate

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first you put the money in and then you make the withdrawal and there's no problem. It's when you do it the other way around [that] there's red ink." *Id.* at 67.

[53] Janet M. Fitchen, *Rural Poverty in the Northeast: The Case of Upstate New York*, *in* RURAL POVERTY IN AMERICA 177, 195 (Cynthia M. Duncan ed., 1992). *See also* Lisa R. Pruitt, *Missing the Mark: Welfare Reform and Rural Poverty,* 10 J. GENDER, RACE & JUST. 440, 474–76 (2007) [hereinafter Pruitt, *Missing the Mark*] (arguing that such networks and the informal economy are insufficient to provide an adequate financial safety net for rural families).

[54] *See generally* Pruitt, *Missing the Mark, supra* note 53, at 445–51 (documenting with detailed statistics the problem of rural poverty, including so-called persistent poverty and poverty among female-headed households).

[55] Because of their lower earnings, rural women likely face greater pressure related to housing and other problems than do rural men. Wendy Boka, *Domestic Violence in Farming Communities: Overcoming the Unique Problems Posed by the Rural Setting*, 9 DRAKE J. AGRIC. L. 389, 399 (2004). The extremely high poverty rates among female-headed families in rural areas and the shortage of housing there leave rural women very vulnerable to homelessness. *Id. See also* HAC, TAKING STOCK, *supra* note 23, at 21 (listing housing problems, low wages, and a shortage of adequate child care as some of the factors that contribute to the severity of non-metro women's poverty).

[56] Katherine Porter, *Going Broke the Hard Way: The Economics of Rural Failure*, 2005 WIS. L. REV. 969, 1001; *see also* Signe-Mary McKernan et al., *Impact of Welfare Policy on the Employment of Single Mothers Living in Rural and Urban Areas*, *in* RURAL DIMENSIONS OF WELFARE REFORM, *supra* note 5, at 257, 262.

[57] Porter, *supra* note 56, at 1008 (citing BUREAU OF LABOR STATISTICS, U.S. DEP'T OF LABOR, 2001 CONSUMER EXPENDITURE SURVEY tbl.51 (2003)). In 2001, rural households

of car-lessness than urban counties.[58] While rural residents are more reliant upon public transportation than their urban counterparts, they have fewer public transport options.[59] With less than a tenth of all federal funding for public transportation going to rural areas,[60] only about sixty percent of rural counties are able to offer it.[61] Of those using rural public transportation, sixty-two percent are women.[62] Yet transportation challenges put these and other rural residents at a disadvantage for getting access to employment, health care, child care, and other services.[63]

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spent twenty-five percent of their income on transportation, whereas urban households spent only nineteen percent. *Id.* The average transportation expenditure for a rural household exceeded that of its urban counterpart by almost $1000. *Id.* (citing BUREAU OF LABOR STATISTICS, U.S. DEP'T OF LABOR, REP. NO. 966, CONSUMER EXPENDITURES IN 2001, at 13 tbl.7 (2003)).

[58] U.S. DEP'T OF AGRIC., AGRIC. INFO. BULL. 795, RURAL TRANSPORTATION AT A GLANCE 3 (2005), *available at* http://www.ers.usda.gov/publications/AIB795/AIB795_lowres.pdf [hereinafter RURAL TRANSPORTATION AT A GLANCE]. A high rate of car-lessness is at least twice the average rate of car-lessness. *Id.* According to the U.S. Department of Agriculture, more than 1.6 million rural households have no car. *Id.* Nevertheless, in 2000, rural households had access to a car at a slightly higher rate (92.7%) than urban ones (88.9%). *Id.* For a look at how access to cars has changed women's lives, see Carol Sanger, *Girls and the Getaway: Cars, Culture, and the Predicament of Gendered Space,* 144 U. PA. L. REV. 705, 711-28 (1995). She writes of rural women that they "could now visit friends, receive visitors (including federal farm agent-educators), take their children to the doctor, shop in town instead of from catalogues, attend meetings, and generally 'relieve the monotony of the household routine.'" *Id.* at 714.

[59] *See* Susan Murty, *Regionalization and Rural Service Delivery, in* THE HIDDEN AMERICA, *supra* note 37, at 199, 207; Porter, *supra* note 56, at 1026. *But see* RURAL TRANSPORTATION AT A GLANCE, *supra* note 58, at 1 (stating that recent increases in federal funding and greater state and local control have led to improvements in rural roads and public transportation).

[60] RURAL TRANSPORTATION AT A GLANCE, *supra* note 58, at 3. In this report, the U.S. Department of Agriculture relies on the Office of Management and Budget definition of rural. *Id.* at 6; *see supra* note 23. Nevertheless, rural public transportation services grew in the 1990s. RURAL TRANSPORTATION AT A GLANCE, *supra* note 58, at 3. "[N]onmetro providers offer[ed] 62 percent more passenger trips, 93 percent more miles traveled, and 60 percent more vehicles (vans and buses) . . . ." *Id.*

[61] RURAL TRANSPORTATION AT A GLANCE, *supra* note 58, at 3. Twenty-eight percent of these counties offer only limited services, meaning fewer than twenty-five trips per car-less household per year. *Id.*

[62] *Id.* at 4. Thirty-one percent of users were elderly, and twenty-three percent were disabled. *Id.* Rural residents, particularly those in high poverty areas, are more reliant on public transportation than their urban counterparts. *Id.* at 3.

[63] Services are often located in the county seat or some other distant regional location. *See* Murty, *supra* note 59, at 204–05.

2. Child Care

The nature of rural job markets and the omnipresent issue of distance mean that rural residents have fewer child care options than urban ones.[64] Because there are fewer child care centers per capita in rural areas,[65] only twenty-five percent of rural children under age five are cared for in such centers, compared to thirty-five percent nationwide.[66] For poor rural families, the federally funded Head Start program may be the only tenable center-based child care option,[67] but it may not offer all-day programs that would permit women to work full-time.[68]

Seventy-five percent of rural children in child care are in private residences other than the child's home.[69] Known as "kith and kin" arrangements,[70] these offer

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[64] A lack of child care resources creates an added obstacle for mothers who are trying to find work or leave abusive relationships. Boka, *supra* note 55, at 397. *See also* Debra A. Henderson et al., *The Impact of Welfare Reform on the Parenting Role of Women in Rural Communities,* 11 J. OF CHILDREN & POVERTY 131, 134, 139 (2005) (observing the child care challenges faced by rural residents attempting to move from welfare to work).

[65] LAURA J. COLKER & SARAH DEWEES, MACRO INT'L INC., CHILD CARE FOR WELFARE PARTICIPANTS IN RURAL AREAS 2 (2000). Also, rural child care providers "tend to be less educated and trained than their metropolitan counterparts," resulting in lower quality care. *Id.* (citing RURAL POLICY RESEARCH INST., RURAL AMERICA AND WELFARE REFORM: AN OVERVIEW ASSESSMENT (1999), *available at* http://www.rupri.org/publications/archive/old/welfare/p99-3/p99-3.pdf).

[66] *Id.* (citing JEFFREY CAPIZZANO ET AL., THE URBAN INST., CHILD CARE ARRANGEMENTS FOR CHILDREN UNDER FIVE: VARIATION ACROSS STATES (2000), *available at* http://www.urban.org/UploadedPDF/anf_b7.pdf; Betty A. Beach, *Perspectives on Rural Child Care*, ERIC DIGS., Aug. 5, 1997, http://www.ericdigests.org/1997-3/rural.html).

[67] *Id.* at 3. Head Start, created under the U.S. Department of Health and Human Services, is a child development program serving children up to the age of five. United States Department of Health & Human Services, Administration for Children & Families, Office of Head Start, About Head Start, http://www.acf.hhs.gov/programs/hsb/about/index.htm (last visited Mar. 6, 2007). Head Start programs "have the overall goal of increasing the school readiness of young children in low-income families." *Id.* To participate, families must meet low-income eligibility. *Id.*

[68] COLKER & DEWEES, *supra* note 65, at 3.

[69] *Id.* at 3–4 (citing Alice M. Atkinson, *Rural and Urban Families' Use of Child Care*, 43 FAM. REL. 16, 17 (1994); Beach, *supra* note 66). Nationally, fifteen percent of preschool children are cared for in the homes of licensed child care providers. *Id.* at 3 (citing LYNNE M. CASPER, U.S. CENSUS BUREAU, CURRENT POPULATION REP. NO. P70-62, "WHO'S MINDING OUR PRESCHOOLERS?" (1997)).

[70] "Kith" are friends and neighbors and "kin" are relatives. *Id.* at 4. One study found that rural residents are twice as likely as urban dwellers to use kith and kin arrangements. *Id.* (citing Atkinson, *supra* note 69, at 20). Low-income families are fifty percent more likely to use them than their wealthier counterparts. *Id.* (citing ANN COLLINS & BARBARA CARLSON, NAT'L CTR. FOR CHILDREN IN POVERTY, CHILD CARE BY KITH AND KIN:

the advantages of flexibility[71] and low cost, and may feature informal payment schemes.[72] However, the quality of care is inconsistent, and it may prove unreliable.[73]

Finding adequate, quality child care is thus a great challenge for rural parents who work outside the home. This burden surely falls more heavily on rural women because they are even more likely than their urban counterparts to be responsible for child care, given the traditional views common in rural communities. As a consequence, rural women often work part-time or engage in informal employment activities so they can care for their young children.[74]

3. Housing

While the past several decades have seen many improvements in rural housing,[75] almost thirty percent of non-metro residents still face housing problems,[76] the most common being affordability.[77] About 5.5 million rural households pay in excess of thirty percent of their monthly income for housing.[78] Worse yet, housing costs consume more than half of the incomes of another 2.4 million.[79] Housing quality presents another challenge in non-metro areas, where

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SUPPORTING FAMILY, FRIENDS, AND NEIGHBORS CARING FOR CHILDREN 3 (1998); Atkinson, *supra* note 69, at 18; Beach, *supra* note 66).

[71] This flexibility includes options for drop-in child care and extended hours. *Id.* at 3.

[72] These arrangements may include bartering or trading services, but most are on a fee-paying basis. *Id.* at 4.

[73] *Id.* at 3–4. Local regulations governing licensure in rural areas are typically not as stringent as metropolitan ones. *Id.* at 3 (citing Beach, *supra* note 66).

[74] *See* Struthers & Bokemeier, *supra* note 14, at 25 (stating that rural women believe parenting is "their most important job" and that household work is often based on "a gendered division of labor"); Tickamyer, *supra* note 6, at 738 ("Women with young children are more likely to engage in productive (economic) activities close to their reproductive (childrearing and household) responsibilities."). *But see* Katherine MacTavish & Sonya Salamon, *What Do Rural Families Look Like Today?*, *in* CHALLENGES FOR RURAL AMERICA IN THE TWENTY-FIRST CENTURY 73, 77 (David L. Brown & Louis E. Swanson eds., 2003) (pointing out that many older rural children "may find themselves in latchkey situations" due to parental employment outside the community).

[75] HAC, TAKING STOCK, *supra* note 23, at 24.

[76] *Id.* at 31. "Over 6.2 million nonmetro households have at least one major problem . . . . [About] 662,000 rural households have two or more housing problems." *Id.* "Problems" include affordability, substandard quality, and crowding. *Id.*

[77] *Id.* Recent research indicates that more rural households are experiencing housing difficulties since the implementation of welfare reform in 1996. *Id.* at 20. Rural welfare recipients have greater difficulty paying rent, and they are more often evicted than urban welfare recipients. *Id.* (citations omitted).

[78] *Id.* at 28.

[79] *Id.*

1.6 million units are moderately or severely substandard.[80] For example, while rural homes comprise only one-fifth of the nation's total housing units, they account for over thirty percent of houses with inadequate plumbing.[81]

Sixty-eight percent of the nation's households are owner-occupied, representing an all-time high.[82] While non-metro residents enjoy an even higher rate of home ownership, at seventy-six percent,[83] this does not necessarily indicate greater wealth, wellbeing, or stability.[84] The higher rate of rural home ownership is due in part to manufactured homes, which are twice as common in non-metro areas as they are nationwide.[85] But manufactured homes are less beneficial to consumers than conventional single-family homes because the former tend to depreciate in value[86] and are financed with higher-rate, personal property loans.[87] Rural housing assets also tend to be less liquid because rural home owners are often tied to their specific location as a consequence of greater attachment to nearby family, the community, or their land.[88] Finally, recent shifts in emphasis by federal housing programs have reduced the amount of assistance available to rural households.[89]

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[80] *Id.* at 30. This represents 6.9% of non-metro units. Additionally, people of color in non-metro areas are almost three times more likely to live in substandard housing than their white counterparts. *Id.*

[81] *Id.*

[82] *Id.* at 24–25.

[83] *Id.* at 25.

[84] The national median value of a home is $120,000, while that of a non-metro home is $80,000. *Id.* at 32.

[85] *Id.* at 24. Although non-metro areas have less than a quarter of the nation's housing units, these areas have over half the manufactured homes. *Id.* While the quality of manufactured homes has improved in recent years, more than a third of non-metro mobile home residents live in units at least twenty years old. *Id.* at 26. Manufactured housing is the fastest-growing segment of rural housing stock, accounting for thirty-eight percent of homes built between 1996 and 2001. Ezra Rosser, *Rural Housing and Code Enforcement: Navigating Between Values and Housing Types*, 13 GEO. J. ON POVERTY L. & POL'Y 33, 47 (2006) (citing a 2001 American Housing Survey).

[86] HAC, TAKING STOCK, *supra* note 23, at 32. "[M]anufactured homes depreciate at a rate of 1.5% annually compared to an annual appreciation rate of 4.5% for conventionally constructed single-family homes." *Id.* Further, "manufactured homes in rural areas appreciate less than those in more urbanized areas." *Id.* This is particularly troubling considering that a "home is the most valuable asset most Americans will ever own." *Id.* "The median purchase price of a new manufactured home in nonmetro areas is approximately $41,000, compared to $130,000 for a new single-family home." *Id.* at 26.

[87] *Id.* This type of loan is less beneficial for the consumer than conventional housing loans because of higher interest rates and shorter terms. *Id.* at 26, 32. About one-tenth of non-metro owners with a mortgage pay an interest rate of ten percent or more. *Id.* at 32. This is nearly double the proportion of metro owners who pay such high rates. *Id.*

[88] Rosser, *supra* note 85, at 43. Farmers often make their living from the land on which their homes are located, and non-farmers "are limited by the fact that these small towns cannot support a commercial rental market except on a very small scale." *Id.* Data show that "[r]ural residents are less likely to move than their metro counterparts." HAC,

D. Summary

Most rural areas are economically depressed and offer few opportunities for enhancement of human capital. Rural dwellers face particular structural obstacles, often related to the physical distances that separate them from services. While gender-specific data are not available regarding each of these barriers, it is reasonable to surmise that because rural women earn substantially less than rural men, they are less likely to own a vehicle or to be in a stable housing situation. Rural women are, in fact, one of the poorest populations in the United States.

The social and political portrait of rural America also lends insights into expectations of the women who live there. Rural residents tend to hold more conservative political views, and their expectations of women's roles are usually more traditional and more rigid. These factors, like economic and structural ones, severely limit women's opportunities, as well as their day-to-day choices.

II. A ROLE FOR PLACE IN FEMINIST THEORY

At least two strands of feminist thought accommodate or facilitate theorizing about rural women and what distinguishes their situation from those of other women. Radical feminism's focus on power disparities is useful for conceptualizing how rural women's differences—not only from men, but also from urban women—operate to their disadvantage. Anti-essentialism scholarship acknowledges the complexity of each woman's identity and circumstances.[90] It can and should also attend to the role of place in women's lives.[91]

TAKING STOCK, *supra* note 23, at 16. In 2000, fifty-nine percent of rural residents over the age of five lived in the same houses where they had lived in 1995. *Id.* "Non-metro residents who moved between 1995 and 2000 were more likely than metro movers to relocate to different counties, but less likely to move to different states." *Id.*

[89] HAC, TAKING STOCK, *supra* note 23, at 34. Federal assistance is crucial for many households, as indicated by a U.S. Department of Agriculture Economic Research Service study that found ninety percent of rural borrowers would probably not have been able to afford their homes without federal assistance. *Id.* at 33. The shifts have been "to indirect subsidies such as loan guarantees and tax incentives." *Id.* at 34. However, only "3% of guaranteed loans, as opposed to 44% of the program's direct loans, served very low-income households" in fiscal year 2000. *Id.*

[90] *See, e.g.*, Harris, *supra* note 10, at 588 (arguing that "women's experience" cannot be "described independent of other facets of experience like race, class and sexual orientation"); *see also* sources cited at *supra* note 2.

[91] *See generally* Tickamyer, *supra* note 6 (arguing for greater attention to spatial issues in research and theorizing about women and poverty).

Radical feminist Catharine MacKinnon's work centers on the experiences of women and the operation of power in society.[92] She asserts that "[w]omen have systematically been subjected to physical insecurity; targeted for sexual denigration and violation; depersonalized and denigrated; deprived of respect, credibility and resources; and silenced—and denied public presence, voice and representation of their interests."[93] For rural women, these deprivations and denials, as well as the vulnerability and hardship they beget, are often aggravated by their geographical circumstances.[94] Their low socioeconomic status magnifies their physical insecurity and denies them credibility and resources. So do the practical challenges they face in accessing child care, educational opportunity, good jobs, and government assistance. Rural women's physical distance from those who can assist or rescue them exacerbates their vulnerability to physical violence by intimates and others.[95] Further, in their more traditional communities, rural women are more definitively relegated to the private sphere of hearth and home. Their only "public" presence, typically, is in low-wage, dead-end employment.

In a similar vein, radical feminist Judith Baer advocates what she calls situation jurisprudence, arguing that feminist legal theory must "develop analyses that will separate situations from the people experiencing them."[96] She asserts that failure "to discuss what has been done to women . . . leave[s] out a huge part of reality."[97] Baer distinguishes between situation jurisprudence and what she calls character jurisprudence, which focuses on the nature or character of women.[98]

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[92] *See, e.g.*, Catharine A. MacKinnon, *Points Against Postmodernism*, 75 CHI.-KENT L. REV. 687 *passim* (2000) (discussing women, power, and sexuality as it relates to the feminist movement).

[93] MACKINNON, *supra* note 12, at 160.

[94] Of course, many others have criticized Professors Catharine MacKinnon and Robin West for focusing solely on the role of gender in these social hierarchies while overlooking other markers of identity. *See, e.g.*, Patricia A. Cain, *Feminist Jurisprudence: Grounding the Theories*, 4 BERKELEY WOMEN'S L.J. 191, 201–04 (1988–90) (arguing that MacKinnon and West excluded the lesbian experience from their theorizing); Harris, *supra* note 10, at 585 (arguing that MacKinnon and West inadequately accounted for race, placing white women at the center of their work).

[95] *See generally* Boka, *supra* note 55 (discussing domestic abuse in a rural setting).

[96] BAER, *supra* note 1, at 68.

[97] *Id.* at 62.

[98] *See id.* at 40–67. Baer writes:

> Critiques of situation jurisprudence fall into the same trap as character jurisprudence: they let men and institutions off the hook while focusing women's attention on themselves. Whereas character jurisprudence threatens to trap women in gender-role expectations, critical reaction to situation jurisprudence threatens to frustrate gender-role change. Character theory has produced an ethic of burden and obligation; situation theory has been read as an insult to women.

Situation jurisprudence, she asserts, disputes liberalism's presumption of autonomy, which our sexist society in fact denies women.[99]

In support of her argument against this presumption of autonomy and her focus on women's situation, Baer calls attention not only to women's vulnerability, but also to the responsibility and duty they bear, particularly in relation to care-giving.[100] She acknowledges that MacKinnon "captures the objectification, the danger, and the vulnerability" of being a woman, but Baer argues that MacKinnon overlooks or discounts "the work, the demands, [and] the domestic burdens heaped" on women.[101] Regarding women's duty, Baer writes: "It's not only the lying down that oppresses, but the jumping up: the expectation that one is available to meet others' needs is a crucial component of women's situation."[102] This, too, is part of gendered power.

Baer discusses another way in which legal actors (scholars of character jurisprudence, in particular) use the theme of responsibility against women: the "popular idea" that people are responsible for their own trouble.[103] She notes the specific examples of blaming victims of domestic violence and poverty for bringing those problems on themselves.[104] Baer refutes the accuracy of these claims, suggesting that holding victims responsible for their problems is a "useful conservative tool."[105] She notes that it is easier to oppose policies that might reduce poverty and abuse if individuals are held responsible.[106] Taking a battered woman as an example, Baer writes that "the abuse belongs to her, not to the abuser or the society in which the abuse occurs."[107] She complains that the "term 'battered woman' itself incorporates this premise; society defines the problem in terms of victims, not in terms of violent husbands and lovers."[108]

Id. at 62.

[99] *Id.* at 55. Baer notes a rights conceptualization as problematic because "they isolate individuals in theory when they are not independent of one another in reality." *Id.* (quoting Wendy Brown, *Reproductive Freedom and the Right to Privacy: A Paradox for Feminists*, *in* FAMILIES, POLITICS, AND PUBLIC POLICY 322, 331 (Irene Diamond ed., 1983)).

[100] *See id.* at 55–59.

[101] *Id.* at 57.

[102] *Id.* at 58.

[103] *Id.* at 63.

[104] *See id.*

[105] *Id.* at 65.

[106] *See id.*

[107] *Id.* at 66.

[108] *Id.* Baer asserts that the battered woman's situation "may not be her fault in the sense of causation, but it is her fault in the sense of being her misfortune." *Id.* The phenomenon Baer describes is illustrated in the judicial opinion of *Swails v. State*, discussed *infra* Part III.A, where the court uses the passive voice in writing that "Connie Landers was beaten by her boyfriend, Kevin Swails." Swails v. State, 986 S.W.2d 41, 42 (Tex. App. 1999).

Baer's attention to women's situation in all of its complexity can obviously serve the interests of rural women, who are literally situated in physical isolation from each other, as well as from services, educational and economic opportunity, and more. Both aspects of "responsibility" that Baer discusses are also highly relevant to rural women. While women tend to bear greater responsibility than their male partners for the care of children and other dependents,[109] rural women appear even more burdened than their urban counterparts, due in large part to the more rigid and traditional gender-role expectations of their communities. The poor educational and employment opportunities available to rural women, coupled with the dearth of quality child care, further constrain those who seek employment outside the home in lieu of—or in addition to—fulfilling these traditional roles.[110]

As for the phenomenon of viewing women as responsible for their own woes, that is evident, too, in law's responses to rural women. Law often fails to appreciate the influence of structural barriers that constrain rural women's choices, instead blaming them for their unfortunate circumstances and consequences. I discuss this phenomenon below in relation to judicial adjudication of parental rights and intimate abuse questions.[111] Judicial assumptions of individual responsibility—for both the consequences of having sex and of living in an inconvenient place—also loom large in the abortion context.[112]

Next, my analysis draws on anti-essentialist scholarship to argue for inclusion of the critical context that place—and the rural milieu in particular—can represent in both theorizing women's subordination and responding to it. Anti-essentialists have long maintained that gender is not the sole basis of women's disempowerment.[113] As scholars have drawn attention to the intersection of gender and race, or gender and sexual orientation (among others), I assert the need for

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[109] *See* JOAN WILLIAMS, UNBENDING GENDER: WHY FAMILY AND WORK CONFLICT AND WHAT TO DO ABOUT IT 33 (2000) (discussing the increased conflict in households where men are expected to do significant amounts of domestic work, as well as the phenomenon of women quitting their jobs to avoid this conflict, thus allowing their husbands to be "ideal workers"); *see also* Tickamyer, *supra* note 6, at 725 (referring to agreement among feminists that women's disproportionate responsibility for reproductive labor and care-giving contributes to high poverty among women); W. Jean Yeung et al., *Children's Time with Fathers in Intact Families*, 63 J. MARRIAGE & FAM. 136, 148 (2001) (looking at the amount of time fathers spend with their children and finding, based on data collected in 1997, that "the relative time fathers in intact families were directly engaged with children was 67% that of mothers' on weekdays and 87% that of mothers' on weekends").

[110] *See supra* Part I.B (discussing the employment patterns of rural women).

[111] *See infra* Part III.A–B.

[112] *See infra* Part III.C.

[113] *See, e.g.*, Harris, *supra* note 10, at 587 ("[P]eople are not oppressed only or primarily on the basis of gender, but on the basis of race, class, sexual orientation, and other categories in inextricable webs.").

attention to the intersection of gender and place.[114] A rural setting is legally relevant to more issues, particularly women-specific issues, than the law currently acknowledges.

In her landmark 1990 article on anti-essentialism, Angela Harris explains that gender essentialism is dangerous because "experiences of women perceived as 'different' are ignored or treated as variations on the (white) norm."[115] In the rare cases when law has seen and engaged rural women, recognizing them in relation to place, it has viewed these women simply as variations on an urban norm. Frequently law has not seen or identified rural women as such; rather, it has looked right past their rural circumstances. This phenomenon is reflected in remarks by rural scholars who have observed, "[w]e are an urban society now, one that is pretty sure we know what 'urban' is, but not at all sure we know what 'rural' is."[116]

Just as Sylvia Law defined "heterosexism" as the "pervasive cultural presumption and prescription of heterosexual relationships,"[117] we must query whether law functions under a pervasive cultural presumption of urbanism. But place—like race, sexual orientation, and class—is inextricably linked to the experiences of rural women as they encounter law. To illustrate, I introduce some of the stories of rural women, as reflected in judicial narratives. In doing so, I attend to this crucial aspect of their context and bring them into the broader conversation about women and law.[118]

III. RURAL WOMEN IN THE PRESENCE OF LAW

This Part discusses judicial (in)attention to the realities of rural women in the contexts of intimate abuse, termination of parental rights, and abortion. The first two contexts are somewhat similar in that the relevant legal doctrines accommodate a multi-factor, contextual analysis that ultimately assesses the appropriateness of a woman's actions. That is, adjudication of intimate abuse cases usually involves passing judgment on whether a woman was justified in defending herself or whether she acted under duress in responding to intimate abuse. Decisions to terminate parental rights are also multi-faceted, involving a comprehensive assessment of a parent's behavior.

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[114] A rich literature in critical geography and other disciplines attends to the relevance of place, as well as space, in women's lives. *See, e.g.*, Tickamyer, *supra* note 6, at 734–41 (citing sources) and sources cited *supra* note 3.

[115] at 615.

[116] ELIZABETH BEESON & MARTY STRANGE, WHY RURAL MATTERS: THE NEED FOR EVERY STATE TO TAKE ACTION ON RURAL EDUCATION 2 (2000), *available at* http://eric.ed.gov/ERICDocs/data/ericodcs2/content_storage_01/0000000b/80/23/11/c6.pdf.

[117] Sylvia A. Law, *Homosexuality and the Social Meaning of Gender*, 1988 WIS. L. REV. 187, 195.

[118] *See* Harris, *supra* note 10, at 585 (writing that she introduces the voices of black women to "destabilize and subvert the unity of MacKinnon's and West's 'woman'").

The relevant legal inquiry regarding abortion is somewhat narrower: What constitutes an undue burden on a woman's right to terminate her pregnancy? While applying this test theoretically involves a fact-intensive analysis of the consequences of the regulation in question, courts have been very miserly about deeming regulations undue burdens, even in the face of highly compelling factual records. In several cases, the U. S. Supreme Court and other federal courts have disregarded the structural realities of rural women's lives that, in combination with abortion regulations, prevent those women from exercising their right to an abortion.[119]

A. Intimate Abuse

> *[B]ring sanity to bear on the notion that a woman victimized by a physically abusive man must go to an outdoor toilet for refuge and cannot seek that refuge in her [car] where the doors lock and the victim has mobility to further escape if necessary.*[120]

Intimate abuse is part of the factual background in many legal contexts, including those that adjudicate the assault, battery, or death of a battered woman or her abusive partner. Whether a woman's behavior was appropriate or reasonable may become an issue, for example, if she harms or kills her assailant. A woman's perception of the threat to her, along with her firmness in the face of that threat, may become an issue if she acquiesces to become her abuser's partner in crime.

Lenore Walker, who coined the term "battered women's syndrome," brought to light the complexity of an abused woman's psychological condition.[121] Like Walker, many have criticized law's unease with or incapacity to accommodate the battered woman scenario.[122] Some calling for reform propose the substitution of a

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[119] *See infra* Part III.C.

[120] State v. Hage, 595 N.W.2d 200, 204 (Minn. 1999) (statement of Cynthia Hage, a victim of intimate abuse charged with driving while under the influence of alcohol).

[121] *See, e.g.*, LENORE E. WALKER, TERRIFYING LOVE: WHY BATTERED WOMEN KILL AND HOW SOCIETY RESPONDS 23–40 (1989) (arguing that the behavior of battered women who kill needs to be understood as normal, not crazy); LENORE E. WALKER, THE BATTERED WOMAN SYNDROME 14–22 (1984); *see also* ANGELA BROWNE, WHEN BATTERED WOMEN KILL 127–30 (1987) (identifying some predictive factors for when women kill their abusers).

[122] *See, e.g.*, CYNTHIA K. GILLESPIE, JUSTIFIABLE HOMICIDE: BATTERED WOMEN, SELF DEFENSE, AND THE LAW 182–93 (1989) (discussing ways in which the law of self-defense discriminates against women); ELIZABETH M. SCHNEIDER, BATTERED WOMEN AND FEMINIST LAWWMAKING 185–86 (2000) (discussing the criminal justice system's profound inadequacies in responding to domestic violence); Donna Coker, *Crime Control and Feminist Law Reform in Domestic Violence Law: A Critical Review*, 4 BUFF. CRIM. L. REV. 801, 803 (2001); Laura E. Reece, *Women's Defense to Criminal Homicide and the Right to Effective Assistance of Counsel: The Need for Relocation of Difference*, 1 UCLA

reasonable woman[123] or a reasonable battered woman[124] standard. Others call for a move away from the imminence standard, endorsing instead a jury determination of when deadly force is necessary.[125]

This section considers how a woman living in a rural area, or merely present in one, may experience aggravated vulnerability based on spatial isolation from others, in particular from sources of aid. This section looks in detail at several cases in which a woman in a rural area claimed she responded under duress to intimate abuse. The decisions reflect a lack of understanding of the quandary that victims of such crimes, particularly when physical distance from those who could render assistance serves to heighten their dilemma.[126]

WOMEN'S L.J. 53, 55 (1991) (asserting that criminal law is male-centered and discriminates against women); Stephen J. Schulhofer, *The Gender Question in Criminal Law*, 7 SOC. PHIL. & POL'Y 105, 127 (1990) (discussing self-defense standards as applied to battered women); Walter W. Steele, Jr. & Christine W. Sigman, *Reexamining the Doctrine of Self Defense to Accommodate Battered Women*, 18 AM. J. CRIM. L. 169, 175–76 (1991).

[123] *See, e.g.*, Phyllis L. Crocker, *The Meaning of Equality for Battered Women Who Kill Men in Self-Defense*, 8 HARV. WOMEN'S L.J. 121, 152 (1985).

[124] *See, e.g.*, Kit Kinports, *Defending Battered Women's Self-Defense Claims*, 67 OR. L. REV. 393, 416 (1988).

[125] *See, e.g.*, Richard A. Rosen, *On Self-Defense, Imminence, and Women Who Kill Their Batterers*, 71 N.C. L. REV. 371, 376–77 (1993).

[126] *See* Weissman, *supra* note 44, at Part III.B.3 (arguing that "[d]ecreased opportunities for neighbors and coworkers to provide social support, reduced police presence, and diminished social services have been linked to community crime generally, and especially to family dysfunction, including an increased risk of intimate partner violence."). This is not to suggest that if people are present, as they typically are in urban areas, they will necessarily assist a person in distress. The well-known incident of the attack on Kitty Genovese serves as evidence that people will not always assist. However, if people are not present, no opportunity to proffer aid exists.

A rural setting is sometimes relevant to the outcome of a domestic violence case for reasons other than enhanced vulnerability. Specifically, low population density sometimes fosters lack of anonymity among those in a rural community, and that familiarity may be legally relevant. *See generally* Boka, *supra* note 55, at 400. A 2004 decision of the Connecticut Superior Court is a good example of a court understanding the lack of anonymity that marks rural communities and applying the law in light of that reality. *See* Florence v. Town of Plainfield, 849 A.2d 7 (Conn. Super. Ct. 2004). The court held that the estate of a woman murdered by her ex-boyfriend could sue in negligence the small municipality in which she lived for failing to protect her. *Id.* at 15. The decedent had repeatedly sought protection from police, who failed for several weeks to execute an arrest warrant against the former boyfriend. *Id.* at 11. Indeed, the trial court found it "hard to imagine what more a desperate woman could have done to reach out for police protection . . . [and] to construct a situation of such delay and failure of the police to appreciate the gravity of the situation and act accordingly." *Id.* at 15. The court suggested that because the parties lived in a small town, the police department would be expected to have working knowledge of such ongoing situations, making its failure to act even more inexcusable. *Id.* at 10. The court wrote that the police department in this rural area knew, or should have

In *Swails v. State*, the Texas Court of Appeals upheld a trial court's refusal to instruct the jury regarding the defense of duress to murder.[127] The refused instruction came in the face of the female defendant's argument that she had been terrorized by her boyfriend, who initiated the murder plan. The majority opinion in the case recited these facts:

> One evening in 1994, Connie Landers was beaten by her boyfriend, Kevin Swails, because she had no money to give him. Later, the couple went driving. During the drive, Kevin told Connie they were going to rob and kill an old man because Kevin wanted his money and guns. After this conversation, the couple drove to Waldo Blanke's house and parked their car in front of his door. While Connie sat in the car, Kevin knocked on the door. Blanke answered, and Connie heard Kevin telling Blanke "we're going to play a game old man" and then saw Kevin shock Blanke with a 2000 volt stun gun and begin pushing and hitting him repeatedly. Connie, still in the car, heard Blanke saying "oh God, Kevin, oh God."
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> At first, when Kevin yelled at her to come inside, Connie did nothing. But then Kevin yelled that he would kill her if she did not come inside. Connie walked inside and, when Kevin told her to get something

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known, of the defendant and "his antisocial and criminal propensities by reputation if not by personal contact." *Id.* Somewhat offensive was the court's effort to distinguish the case at hand from other domestic violence situations, the significance of which it dismissed. The court wrote:

> [T]his was not simply one of those, regrettably routine, calls for domestic violence assistance. Situations are presented to police departments daily where two ordinarily law-abiding citizens may be involved in an intrafamilial disturbance marked by threats or scuffling brought on by momentary anger or intoxication. There are many levels of complaints which require judgment and discretion on the part of the police officers engaged in the stressful daily pursuit of their duties. This was not an ordinary domestic violence case.

Id. at 14.

The South Carolina Supreme Court reached a contrary conclusion in a somewhat similar case. In *Arthurs v. Aiken County*, the court held the sheriff's department not liable for failure to protect Deborah Munn from her husband, who threatened her and her family three times on the day he killed her. 551 S.E.2d 579, 585 (S.C. 2001). Munn declined sheriff deputies' suggestions that she go to a safe house. *Id.* at 583. The court noted that because the husband was not present at the scene when the deputies responded, he was not subject to immediate arrest. *Id.* at 584. The court concluded that the officers neither owed nor breached a duty to Munn. *Id.* at 585. *See also* G. Kristian Miccio, *Exiled from the Province of Care: Domestic Violence, Duty, and Conceptions of State Responsibility,* 37 RUTGERS L.J. 111 (2005) (arguing for greater state accountability in domestic violence cases).

[127] 986 S.W.2d 41, 47 (Tex. App. 1999).

> with which to strangle Blanke, she gave him a radio she found on a nearby table. As Connie watched, Kevin hit Blanke in the head with the radio, pushed him onto the couch, and fell with him onto the floor. Connie then saw Kevin put the radio cord around Blanke's neck and pull on one end of the cord. Connie held the other end with her knee.[128]

Kevin and Connie then took Blanke's guns, jewelry, and money to their car.[129] They married several days later.[130]

Connie asserted the defense of duress in response to the State's capital murder charges.[131] She argued that Kevin presented a threat of death or serious bodily injury to her and that he had previously threatened, stalked, and physically assaulted her.[132] Expert testimony supported her argument that a person of reasonable firmness might not have been able to resist Kevin's efforts to force her participation in the crimes.[133] The trial court nevertheless rejected Connie's request for jury instructions regarding duress, and the jury found her guilty of capital murder.[134]

The Texas Court of Appeals upheld the trial court's decision not to instruct the jury regarding duress because the defense "was not raised by the evidence."[135] The court explained that a "defendant is 'compelled' to engage in proscribed conduct 'only if the force or threat of force would render a person of reasonable firmness incapable of resisting the pressure.'"[136] Further, "the threatened death or serious bodily injury is 'imminent' only if it will occur in the present, not in the future."[137] Finally, the court explained, for duress to apply, the defendant must not have "intentionally, knowingly, or recklessly placed [her]self in a situation in which it was probable that [s]he would be subjected to compulsion."[138]

The court did not see Kevin's threats to kill Connie as evidence that she was "*compelled* to enter the house by a threat of *imminent* death or serious bodily injury."[139] It noted that, to the contrary, Connie knew of Kevin's intent to rob and kill Blanke, and she knew that he entered the house with "only a stun gun,"[140] an apparent reference to the fact he was not a serious threat to her. The court observed that Connie "sat alone in the car—outside the reach of Kevin," for "some period of

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[128] *Id.* at 42.
[129] *Id.*
[130] *Id.*
[131] *Id.* at 43.
[132] *Id.*
[133] *Id.*
[134] *Id.*
[135] *Id.* at 45.
[136] *Id.* (quoting TEX. PENAL CODE ANN. § 8.05(c) (Vernon 1994)).
[137] *Id.* (citation omitted).
[138] *Id.* at 45–46 (quoting TEX. PENAL CODE ANN. § 8.05(d) (Vernon 1994)).
[139] *Id.* at 46.
[140] *Id.*

time," suggesting that she should have taken "this opportunity to leave the scene."[141] Because she instead entered the house, the court found that if "Kevin's threat is construed to mean he would hunt Swails down and kill her if she did not go inside Blanke's house, it was a threat of future, not imminent, harm."[142]

Dissenting Judge Alma L. López pointed out the relevance of the rural setting to the determination of whether sufficient evidence supported Connie's argument of duress. After reciting the history between Connie and Kevin, Judge López noted that "Kevin yelled, screamed and terrorized Connie and told her he would kill her, too" as they drove away from the murder scene.[143] She noted that Connie had "visibly observed Kevin killing the victim" and that he had threatened to kill her, too, if she did not assist him.[144] Judge López thus concluded it was "logical that Connie felt threatened and compelled to help Kevin or risk losing her life."[145] He had, after all, killed Blanke while armed "with only a stun gun."[146] She took issue with the majority's implication that Connie was "necessarily free to leave the scene during the murder," arguing that no evidence supported this assumption.[147] In doing so, Judge López revealed some facts that the majority had omitted:

> The scene of the murder is located in rural Bandera County. Although the photographic exhibits suggest other lake homes in close proximity to the Blanke home, there is no testimony that any of these homes were occupied at the time of the offense so as to serve as an immediate source of aid or sanctuary.[148]

Noting that the car they had driven was parked "next to the front door, just a few steps from where Kevin was yelling his threats of violence to Connie," Judge López also commented on the lack of evidence as to who controlled the car keys.[149] She concluded: "Would a person of reasonable firmness, who had suffered three beatings that very day from him, have considered Kevin's threats and commands to present only future danger to her under these circumstances? I think not."[150]

Judge López thus picked up on the enhanced vulnerability that women may experience when threatened in rural areas. Because they are physically removed from others who might rescue them or render assistance, these women are at even greater risk than those who are otherwise similarly situated. The majority's

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[141] *Id.*
[142] *Id.*
[143] *Id.* at 48 (López, J., dissenting).
[144] *Id.*
[145] *Id.*
[146] *Id.*
[147] *Id.*
[148] *Id.*
[149] *Id.*
[150] *Id.*

assumption that Connie was not under duress as a result of Kevin's threats depended, in part, on its perception of her ability to escape to a place where he could not reach her. Yet Judge López disputeed the majority's inference that because Kevin carried "only a stun gun," he did not present an imminent threat to Connie so long as she was not within arm's reach. While the majority appears to assume that Connie could outrun Kevin and make her way to a safe place with even a twenty-yard head start, Judge López was doubtful that Connie could have escaped Kevin. Indeed, she was skeptical of the existence of a safe place in the vicinity. Emphasizing the rural nature of the locale, Judge López would have permitted the jury to determine whether Kevin was, in fact, an imminent threat to Connie.[151]

While scholars have argued for a legal standard other than imminence in cases of intimate abuse, Professor Holly Maguigan's research indicates that the real problem in cases where battered women kill is not existing law.[152] The legal standard of imminence is less the problem, she concludes, than judicial interpretation of the law in ways that keep questions of imminence from reaching juries.[153] The Texas courts' handling of *Swails* supports Maguigan's argument.

In contrast to *Swails,* the jury in *State v. Hage*[154] had an opportunity to consider the appropriateness of a woman's actions in response to a battering incident. The jury there found the woman was not under duress when she used her car as refuge from her abusive boyfriend.[155] On appeal in 1999, the Minnesota Supreme Court showed no more empathy than the jury had for the woman's plight. It thus upheld her conviction for being in physical control of a motor vehicle while under the influence of alcohol.[156]

On the day in question, Cynthia Hage's boyfriend became violent with her.[157] He had physically abused her in the past, and on this occasion he slammed her hand into a table with force sufficient to draw blood.[158] She left their trailer home and took refuge in her car.[159] A law enforcement officer responded to a report from Cynthia's boyfriend that she was drunk and sitting in her car.[160] The officer, who had responded to a domestic disturbance call involving that couple in the past

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[151] *Id.* at 48–49.

[152] *See* Holly Maguigan, *Battered Women and Self-Defense: Myths and Misconceptions in Current Reform Proposals*, 140 U. PA. L. REV. 379, 385, 457–58 (1991) (arguing that the real problem in cases where battered women kill is not existing law, but judges interpreting the law in such a way that self-defense instructions rarely get to the jury).

[153] *Id.* at 458–59.

[154] 595 N.W.2d 200 (Minn. 1999).

[155] *Id.* at 204.

[156] *Id.* at 202.

[157] *Id.*

[158] *Id.*

[159] *Id.*

[160] *Id.* at 203.

month, found Cynthia sitting in the driver's seat.[161] The car was not running, but the keys were in the ignition.[162] In dispute was whether Cynthia had driven the car from their home to the county road where the officer found her, or whether the car had been parked there all day and Cynthia had fled to it there as sanctuary.[163] Both field sobriety and breathalyzer tests confirmed Cynthia's intoxication, and she was charged with driving under the influence of alcohol.[164]

The court denied Cynthia's request for an instruction on "self defense/retreat" and instead instructed the jury on the defense of necessity.[165] Specifically, it instructed the jury that Cynthia bore the burden of proof to show that her actions were necessary because of an emergency situation "where the peril is instant, overwhelming and leaves no alternative but the conduct in question."[166] After the jury found Cynthia guilty, she moved for a judgment of acquittal on the basis that the jury had "failed to adequately consider her emergency circumstances."[167] She argued specifically "that the court bring sanity to bear on the notion that a woman victimized by a physically abusive man must go to an outdoor toilet for refuge and cannot seek that refuge in her [car] where the doors lock and the victim has mobility to further escape if necessary."[168] The trial court denied her motion. It noted that "other options were available to Hage besides seeking refuge" in the driver's seat of her car,[169] but it did not specify what these options were. The issue on appeal was whether the jury had been properly instructed; the Minnesota Supreme Court found no error.[170]

It is difficult to squabble with a jury determination on an instruction such as the one given in *Hage*. Of course, the argument can be made that, as a matter of policy, the burden of proof that Cynthia was not facing an emergency should lie with the state. The real lesson from cases like *Hage*, though, may be one for defense lawyers. If Cynthia's plea on her motion for judgment notwithstanding the verdict had been made instead to the jury in closing argument, perhaps it would have led to a different outcome. The jury might have empathized if focused more on the predicament Cynthia faced that day: remain in the trailer with an abusive man, hide in an outhouse, or sit in a car with locking doors. Outcomes like that in

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[161] *Id.*

[162] *Id.*

[163] *Id.* at 202. Because of record flooding in the area at the time, the property on which Cynthia, her boyfriend, and some of their neighbors lived was isolated from the surrounding area by flood waters for thirty-one days. *Id.* Although a gravel driveway led from County Road 93 to their home, some evidence indicated that it was not passable on the day in question. *Id.*

[164] *Id.* at 203.

[165] *Id.*

[166] *Id.* at 203–04.

[167] *Id.* at 204.

[168] *Id.*

[169] *Id.*

[170] *Id.*

Hage suggest that defense lawyers should present these situations to juries in all relevant detail, playing the "rural card," if you will.

Insensitivity to the peril of the female defendant in opinions such as *Swails* and *Hage* is ironic in light of judicial recognition elsewhere of the added vulnerability—even helplessness—associated with rural places.[171] Judicial narratives in cases adjudicating other crimes often suggest the greater susceptibility of rural residents to crime, a vulnerability stemming from their physical distance from those who could thwart a criminal act or render assistance in its wake.[172] In a 1979 decision, for example, the Alaska Supreme Court upheld the maximum sentence for an escapee who fled to a remote fishing camp where he committed several thefts and broke into some smokehouses.[173] The court based its decision on the vulnerability of rural residents, even though the defendant injured no one there.[174] By way of explanation, the court wrote that the residents

> don't have the assurance that people in the more developed areas and communities might have that they can secure some protection by picking up the phone and calling a police officer from a nearby police station who can quickly get over to that area in a car. People are simply much more on their own and simply don't have that kind of security . . . .[175]

Thus, the court concluded, the escapee's actions "must be considered as a very serious offense against the public."[176]

As a related matter, judicial narratives often note that the defendant took his victim to a rural area, suggesting the defendant could thereby evade detection.[177]

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[171] Courts sometimes expressly recognize that rural residents' isolation exposes them to other perils, too. In a 1987 Mississippi case the court repeatedly noted the vulnerability of an elderly, rural woman whose phone service was wrongfully disconnected. S. Cent. Bell v. Epps, 509 So. 2d 886, 892–93 (Miss. 1987). The court suggested that the phone company's injury to her was aggravated because she was such a vulnerable customer, and their wrongdoing left her unserved, without the lifeline she needed. *Id.* at 893–94.

[172] *See, e.g.*, Furman v. Georgia, 409 U.S. 238, 253 (1972) (stating that the defendant "entered the rural home of a 65-year-old widow . . . while she slept and raped her"); Stein v. New York, 346 U.S. 156, 160 (1953) (describing robbery and murder that occurred on "lonely country roads"); State v. Olson, 806 P.2d 963, 964 (Idaho 1991) (alleging that the shooting occurred on "a rural mountain road in Latah County"); McElmurry v. State, 2002 OK CR 40, ¶¶ 3–4, 60 P.3d 4, 13–14 (claiming that the defendant approached the victim's rural house through the woods in order not to be seen).

[173] One v. State, 592 P.2d 1193, 1195–96 (Alaska 1979)

[174] *Id.*

[175] *Id.* at 1195.

[176] *Id.*

[177] *See, e.g.*, Lingar v. Bowersox, 176 F.3d 453, 455 (8th Cir. 1999) (stating that the defendant drove the young male victim to a rural area and ordered him to disrobe and masturbate before shooting him); Fitzgerald v. Greene, 150 F.3d 357, 360–61 (4th Cir. 1998) (stating that the defendant took a thirteen-year-old girl to a rural area where he raped

Indeed, the vulnerable position in which some victims are put when taken to rural areas sometimes leads to conviction for a more serious offense. In a 2002 Texas case, the defendants kidnapped, sexually assaulted, and then released the victim in a rural area.[178] The defendants argued on appeal that they should not have been convicted of aggravated kidnapping, but rather of a lesser offense, because they had released the victim in a "safe place."[179] The appellate court agreed with the trial judge that the victim had not been released in a safe place, noting testimony that the place was "'in the country,'" where there were "'mainly fields and that sort of thing'" with a few trailer houses and a bait shop.[180]

Similarly, the U.S. Supreme Court found sufficient the jury instructions in a 1977 case in which the defendants kidnapped and robbed their victim before abandoning him without his trousers, boots, coat, or glasses, "on an unlighted, rural road."[181] In poor visibility from blowing snow and a temperature near zero, the victim was struck and killed by a speeding pickup truck twenty minutes later.[182] The defendants argued that they could "not have anticipated the fatal accident."[183] The judge "advised the jury that 'a person acts recklessly with respect to a result or to a circumstance . . . when he is aware of and consciously disregards a substantial and unjustifiable risk that such result will occur or that such

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her); Anderson v. Hopkins, 113 F.3d 825, 827 (8th Cir. 1997) (noting how the victim was tricked into going to a rural place where he was then killed); Ponder v. State, 713 S.W.2d 178, 180 (Tex. 1986) (describing how the defendant kidnapped a female law enforcement officer and drove her into a rural area where he repeatedly sexually assaulted her under a bridge, leaving her handcuffed there); Pilkinton v. State, Nos. 05-04-00686-CR, 05-04-00702-CR, 2005 WL 852005, at *1 (Tex. App. Apr. 14, 2005) (describing how the defendant "drove the back roads" while beating his girlfriend for ten hours); State v. Fosnow, 2001 WI App 2, ¶ 2, 240 Wis. 2d 699, 702, 624 N.W.2d 883, 885 (stating that the defendant kidnapped a woman and took her to a "home in rural Crawford County" where he sexually assaulted her).

[178] Wray v. State, Nos. 03-01-00626-CR, 03-01-00627-CR, 03-01-00628-CR, 2002 WL 31525288, at *2 (Tex. App. Nov. 15, 2002).

[179] *Id.* (citing TEX. PENAL CODE ANN. § 20.04(d) (West Supp. 2002)).

[180] *Id.* at *3. The court continued:

> CP had been sexually assaulted by two strangers, and the examining nurse later found thirty-six areas of acute physical trauma to her body. CP was clothed but barefoot, was still under the influence of alcohol, and did not know where she was. She was afraid that her assailants, who she believed were armed, would return. It was before dawn, and CP was unable to rouse the residents of the trailer houses in the area. Eventually, a passing car stopped and its occupants summoned help.

Id.

[181] Henderson v. Kibbe, 431 U.S. 145, 147 (1977).

[182] *Id.*

[183] *Id.* at 148.

circumstance exists.'"[184] The perilous situation in which the defendants left the victim—including the rural location—thus supported the finding of "a substantial and unjustifiable risk" of death.

While most cases in which the vulnerability stemming from spatial isolation has influenced a legal outcome do not involve gender issues, a few do. For example, the Indiana Court of Appeals in 2004 upheld an administrative law judge's ruling that an employer had sexually harassed two women who worked in his home, which served as the office for his elevator installation business.[185] The court determined that the employer, sole proprietor of the business, harassed two secretaries who worked for him for consecutive periods.[186] Among the allegations were that he appeared before them semi-clad (no shirt) and finished dressing in their presence; showed pictures of himself and his prior girlfriend skinny dipping; said his bathtub was large enough for two; called them into his bedroom to see something on television; and told them that he should put golden arches, standing for "2,000 served" over his bed.[187] The court quoted the administrative law judge's findings of fact (endorsed by the Indiana Civil Rights Commission), with respect to each woman, that the woman and her employer "worked in a house, with nobody else present, subject to visitors rarely and only by appointment and that the house was located in a rural, sparsely populated area."[188] In upholding the administrative findings, the court cited Seventh Circuit precedent for the proposition that the "presence or absence of other persons, and other aspects of context" are relevant to the determination of harassment.[189] The opinion emphasized the rural location of the employer's home-based business, noting it three additional times.[190] The court thus clearly saw the rural setting—because it connoted the absence of the other persons—as critical context in assessing sexual harassment.

Similarly, some intimate abuse cases have also acknowledged the aggravated vulnerability associated with presence in rural areas. The Nebraska Court of Appeals in 2001, for example, cited a woman's situation in a rural area as justification for shooting her husband.[191] The court held that the sentencing judge had abused his discretion by imposing an excessive sentence on the woman.[192] He explained that she was "in a rural area with an intoxicated and angry person with a

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[184] *Id.* at 149 (emphasis omitted).

[185] Zeller Elevator Co. v. Slygh, 796 N.E.2d 1198, 1215–16 (Ind. Ct. App. 2003).

[186] *Id.* at 1201–05.

[187] *Id.* at 1202–05.

[188] *Id.* at 1203–05.

[189] *Id.* at 1213 (quoting Baskerville v. Culligan Int'l Co., 50 F.3d 428, 431 (7th Cir. 1995)).

[190] *See id.* at 1213 ("rural location"); *id.* at 1215 ("rural, isolated area"); *id.* at 1216 ("rural, isolated office").

[191] State v. Oldenburg, 628 N.W.2d 278, 289 (Neb. Ct. App. 2001).

[192] *Id.* at 288.

history of physical abuse who had only moments earlier abused her."[193] Another case cited an abusive husband's frequent threat while beating his wife, that "no one would hear a gunshot coming from their rural residence,"[194] to justify a $340,000 damages award for intentional infliction of emotional distress.[195] These decisions, as well as those in other criminal contexts that recognize the enhanced vulnerability attendant to distance from sources of assistance, are good models for appropriate legal responses to the intimate abuse of rural women.

B. Termination of Parental Rights

> *The reservation is in a very rural area and commuting to Las Vegas is fifty plus miles. And, we had at that time no suitable day care at the reservation. He was an infant. We had Head Start, but there was no way for her to leave him.*[196]

The same structural barriers that contribute so significantly to rural poverty—poor educational and job opportunities, and lack of child care and transportation, among others[197]—frequently shape the situations that put rural mothers at risk for termination of their parental rights. Procedures and substantive law regarding termination of parental rights vary somewhat from state to state, but they usually involve a fact-intensive inquiry that scrutinizes a given parent's behavior. Courts frequently discuss not only the parent's history of interaction with the child(ren), but also employment records, education level, and other factors, such as tolerance

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[193] *Id.* at 289. The court continued:

> These facts are not disputed. Kurt's claim that he was "incensed" at having a gun pointed at him in his own home is a ridiculous excuse for charging at Charlene while she held a gun. It can only mean that he intended to take that gun away from her. No reasonable person in Charlene's position, given the history of spousal abuse, would expect that Kurt would stop at merely taking the gun from her. Kurt's rights in his own home can be no greater than Charlene's right to be free from physical abuse in her own bedroom.

Id. The concurring judge offered an even more emphatic opinion reversing the trial judge. *See id.* at 291–92 (Hannon, J., concurring in part and dissenting in part).

[194] Moyer v. Moyer, No. 03-03-00751-CV, 2005 WL 2043823, at *1 (Tex. App. Aug. 26, 2005).

[195] *Id.* at *44–45.

[196] Recodo v. State (*In re* Bow), 930 P.2d 1128, 1138 (Nev. 1997) (quoting a social worker testifying about obstacles to employment facing a mother whose parental rights were at stake), *overruled by In re* N.J., 8 P.3d 126 (Nev. 2000).

[197] Pruitt, *supra* note 53, at Part II (detailing the structural barriers to rural women's economic self-sufficiency); *see also* Smith & Coward, *supra* note 42at 225 (discussing the impact of geographical isolation and "space relationships" on rural families).

of domestic violence.[198] While some courts show considerable empathy for the particular challenges a rural parent faces, others appear oblivious to the realities confronting her.

In some cases, the very decision to live in a rural area is held against a mother. In such cases, the rural locale of the mother's home appears to be the proverbial last straw, as other factors already weigh against her. For example, in a 2001 Iowa decision the appellate court opined that a mother had "not demonstrated that she can act in the best interests of her children."[199] The court cited as evidence of this her rural home in a trailer park, "isolated from services, shopping, or neighborhood resources."[200] It noted both the mother's lack of transportation and the lack of services within walking distance,[201] having already recited the mother's history of abusive relationships, as well as her job and housing insecurity while her case was pending.[202]

A 2002 Delaware decision looked unfavorably on a mother's decision to live with her own mother, the child's grandmother, "in rural New Castle County along Route 13 away from regular lines of public transportation," which made her "dependent upon others to get to work."[203] While the court articulated other factors

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[198] In many jurisdictions, domestic violence is included on a list of factors to be considered in making the determination regarding parental rights. Exposure to domestic violence may support a state's case for termination of parental rights. *See, e.g.*, State v. Eventyr (*In re* Eventyr J.), 902 P.2d 1066, 1072–73 (N.M. 1995) (supporting the decision to terminate parental rights with a statement that the mother "had exposed the children to domestic violence" and "admitted that, after a dispute with her boyfriend, she once brandished her shotgun in the presence of the children because she was afraid the boyfriend might return"). For a broad and interdisciplinary discussion of termination of parental rights, see JOSEPH GOLDSTEIN ET AL., THE BEST INTERESTS OF THE CHILD: THE LEAST DETRIMENTAL ALTERNATIVE (1996). The Adoption and Safe Families Act of 1997, Pub. Law No. 105-89, 111 Stat. 2115 (codified in various sections of 42 U.S.C. (1998)) effectively encouraged states to more readily terminate the parental rights to children in foster care. Libby S. Adler, *The Meanings of Permanence: A Critical Analysis of the Adoption and Safe Families Act of 1997,* 38 HARV. J. ON LEGIS. 1, 3–6 (2001) (describing and critiquing the Act).

[199] *In re* A.H., No. 01-0195, 2001 WL 1659290, at *6–7 (Iowa Ct. App. Dec. 28, 2001).

[200] *Id.* at *7.

[201] *Id.*

[202] *Id.* at *6–7.

[203] Div. of Family Servs. v. L.X., 801 A.2d 12, 21 (Del. Fam. Ct. 2002). The court also wrote:

> Residing in Grandmother's home may provide Mother with temporary shelter, but at what expense. Living there subjects Mother to complete dependence upon maternal Grandmother for food, transportation and the ability to be employed in addition to shelter. Grandmother's residence lacks sufficient number of bedrooms, Mother having indicated that if K were returned to her there, Mother

in support of its decision to terminate the mother's parental rights,[204] it also noted that the mother had rejected the option of relocating to a shelter where she could "receive services and live with her daughter."[205]

While these courts recognize the transportation challenges and attendant isolation from services that rural parents face, they appear to ignore these parents' dearth of housing options other than those in the rural locale. By judging women harshly for living in rural areas and suggesting that they move to more populous ones, these decisions go beyond the remedial actions dictated in other contexts. For example, in the workers' compensation and disability settings courts have held that rural residents need not relocate to a larger job market in order to secure replacement employment.[206] Injured and disabled workers are allowed to receive benefits while continuing to live in rural areas where limited labor markets leave them without appropriate employment options.[207]

By suggesting that a woman should move to the city in order to retain her parental rights, judges imply that places are fungible. In so doing, they overlook another rural reality: residents' greater attachment to place.[208] As discussed in Part

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> would sleep in the living room; it provides no access to public transportation which Mother requires in light of Mother's inability to drive and the expressed reluctance by maternal Grandmother to assist Mother in Mother gaining driving experience through the use of Grandmother's automobile; and ultimately residing there would place K back in an environment with an established history of interpersonal conflict as well as physical and emotional abuse.

Id. at 25.

[204] *See id.*

[205] *Id.* at 21.

[206] *See, e.g.*, Weld County Sch. Dist. v. Bymer, 955 P.2d 550, 556–57 (Colo. 1998) (en banc); cases cited *infra* notes 322–328.

[207] *See infra* notes 322–328 and accompanying text (discussing decisions that do not penalize rural residents for the limited job market and do not require the residents to move in order to secure replacement employment).

[208] *See* HAC, TAKING STOCK, *supra* note 23, at 16 ("[R]ural residents are less likely to move than their metro counterparts . . . ."); Karen Anijar, *Reframing Rural Education—Through Slippage and Memory*, *in* THE HIDDEN AMERICA, *supra* note 37, at 234, 236 (indicating that most of the population for a study of students in the rural South were born in their area of residence); Robert M. Gibbs, *College Completion and Return Migration Among Rural Youth*, *in* RURAL EDUCATION AND TRAINING IN THE NEW ECONOMY: THE MYTH OF THE RURAL SKILLS GAP 61, 73 (Robert M. Gibbs et al. eds., 1998) (reporting that although "20% of all colleges are located in rural areas, 53% of rural students attend rural colleges," indicating an attachment to place, or at least that which is familiar); Smith & Coward, *The Family in Rural Society*, *supra* note 42, at 225 (noting that rural attitudes about the relationship between people and the land may differ from those in urban areas); Rosser, *supra* note 85, at 42–44. This attachment to place may be linked to rural residents' historical attachment to their land. *See* Pruitt, *supra* note 4, at 191 nn.156–57 (citing Paul S. Taylor, *Public Policy and the Shaping of Rural Society*, 20 S.D. L. REV. 475, 497 (1975)

I, many rural women are reliant on the networks they have accrued in their home communities, and abandoning these would represent a significant loss.[209] By telling these women to move to the city, courts reveal an urban bias.

Other judges are more attuned to the realities of rural living and exhibit an understanding of its consequences. A dissenting judge in a 1997 Nevada case, *In re Bow,*[210] showed particular sensitivity to the burdens associated with spatial isolation from educational options and foster homes, as well as the limited job opportunities available to rural parents.[211] The Native American mother whose rights were at stake, Adrina Recodo, was living with her grandparents in rural southern Nevada when she gave birth to her son Michael.[212] When Michael was fourteen months old, Recodo voluntarily placed him in foster care because she was unable to care for him.[213] She and the tribe's social worker made a six-month plan whereby Recodo would complete her GED, look for employment in Las Vegas on weekdays, and care for Michael on weekends.[214]

During this time Recodo struggled to get into Las Vegas every day.[215] She drove her grandfather's car until she was unable to afford gas, and then she stayed with friends or studied and slept in her car.[216] According to the case report, Recodo's financial circumstances were so dire at this point "that often she would not eat for days just so she could afford to drive to Las Vegas to attend school and to try to find a job."[217] Eventually, Recodo no longer had access to a car, but she rode her bike or tried to get rides with friends into Las Vegas.[218] Conflicting evidence was presented regarding the frequency of Recodo's visits to her son, but a trial judge determined that she saw him only three times during one fifteen-month period.[219] She held two jobs during part of that period but lost both because of insubordination.[220]

A judge terminated Recodo's parental rights to Michael following a hearing in

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(discussing links between rural lives and land ownership in the context of arguing for a public policy that preserves family farms)).

[209] *See supra* Part I.B.

[210] Recodo v. State (*In re* Bow), 930 P.2d 1128 (Nev. 1997) (upholding termination of mother's parental rights), *overruled on other grounds by In re* N.J., 8 P.3d 126 (Nev. 2000).

[211] *See id.* at 1135–38 (Springer, J., dissenting).

[212] *See id.* at 1129. Recodo had four other children at the time of the hearing. *Id.* Three lived with her former husband, who had beaten her during their marriage. *Id.* Another daughter lived with Recodo at her grandmother's house. *Id.*

[213] *Id.* In his dissenting opinion, Justice Springer disputed the voluntary nature of the placement. *Id.* at 1137 (Springer, J., dissenting).

[214] *Id.* at 1130 (majority opinion).

[215] *Id.*

[216] *Id.*

[217] *Id.*

[218] *Id.*

[219] *Id.* at 1131.

[220] *Id.*

May 1995, and the Nevada Supreme Court upheld the decision.[221] Justice Springer disagreed, offering this alternative summation of facts in his dissent:

> Adrina Recodo was the victim of an abusive domestic relationship, and she sought the help of a social worker on the Paiutes Reservation, stating that she was having problems taking care of her son after she got out of the relationship. She told her case worker that she had no income, no place to live and no transportation. In need of money, food and a place to live, the State's response was to send Ms. Recodo to a psychologist. The State also decided to take her son away from her and to place him in foster care. Ms. Recodo was destitute; and on many occasions she was faced with the choice of eating or spending the money on transportation that would take her to school or to try and find a job.[222]

Justice Springer said Ms. Recodo had "*tried*" to better her situation so that she could keep her son, and he criticized the State for its position that they held no responsibility for helping her.[223] Justice Springer quoted the appellant's social worker, who recognized that transportation and child care were major problems in light of Recodo's rural home: "The reservation is in a very rural area and commuting to Las Vegas is fifty plus miles. And, we had at that time no suitable day care at the reservation. He was an infant. We had Head Start, but there was no way for her to leave him."[224] Justice Springer concluded by characterizing the obstacles put in the way of Ms. Recodo by the state as "almost insurmountable."[225] He thus not only offered a much more empathic vignette than the majority, Justice Springer also expressly discussed the particular burden that spatial isolation cast upon this rural mother.

Like Justice Springer's dissent in *Bow*, other judges have been more sensitive to the particular structural barriers that rural parents face. One court lauded rural parents specifically for making bi-monthly visits to their children "despite the hardships attendant to living in a rural area without private transportation."[226] Another court reversed the termination of parental rights of a woman who left her daughter with a relative and did not reclaim her for several weeks.[227] That court excused the mother's actions because she had taken refuge from her abusive

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[221] *Id.* at 1134 (finding that sufficient evidence existed to support the decision and concluding that Ms. Recodo had not been denied her due process rights).

[222] *Id.* at 1137 (Springer, J., dissenting).

[223] *Id.* at 1137–38. Justice Springer expressed disapproval of the trial judge's statement that "'the [Welfare] Division cannot be expected to get Recodo a job, a home, and to provide financial stability.'" *Id.* at 1137 (alteration in original).

[224] *Id.* at 1138.

[225] *Id.*

[226] *In re* PAB, 570 A.2d 522, 523 (Pa. Super. Ct. 1990).

[227] Robinette v. Keene, 347 S.E.2d 156, 157 (Va. Ct. App. 1986).

husband (who had recently sexually abused their other daughter) in a rural locale where she had no transportation or telephone.[228]

Although none of these decisions turned solely on the rural setting, each court acknowledged it. Some understood its relevance in light of the structural challenges it presented for the rural parents and handled it as a mitigating factor. Others, however, did not, failing to grasp the significance not only of the aggravated disadvantage of spatial isolation from jobs and services, but also of long-time rural residents' attachment to place.

C. Abortion

> *While traveling seventy miles on secondary roads may be inconsequential to my brethren in the majority who live in the urban sprawl of Baltimore, as the district court below and I conclude, such is not to be so casually addressed and treated with cavil when considering the plight and effect on a woman residing in rural Beaufort County, South Carolina.*[229]

Abortion is perhaps the only legal context in which the particular realities of rural women have been an explicit focus—if only barely and briefly—in making law. Several decisions have closely examined details of the obstacles that informed consent and waiting period requirements represent for rural women seeking abortions.[230] While such consideration has not led to success in securing a less restricted abortion right, it has put rural women on feminists' proverbial radar as a distinct population of women who share some significant challenges.[231] The

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[228] *Id.* at 157–58, 160.

[229] Greenville Women's Clinic v. Bryant, 222 F.3d 157, 202 (4th Cir. 2000) (Hamilton, J., dissenting).

[230] *See, e.g.*, Planned Parenthood of Se. Pa. v. Casey, 505 U.S. 833, 937 (1992); Utah Women's Clinic v. Leavitt, 844 F. Supp. 1482, 1491 n.11 (D. Utah 1994).

[231] *See, e.g.*, Caitlin E. Borgmann, *Winter Count: Taking Stock of Abortion Rights After* Casey *and* Carhart, 31 FORDHAM URB. L.J. 675, 716 (2004) (arguing that individual restrictions on abortion "pile up," especially for poor and rural women); Gillian E. Metzger, *Unburdening the Undue Burden Standard: Orienting* Casey *in Constitutional Jurisprudence*, 94 COLUM. L. REV. 2025, 2038 (1994) (noting that regulations constitutional in Pennsylvania might not be in more rural or poorer states); Valerie Pacer, *Salvaging the Undue Burden Standard—Is It a Lost Cause? The Undue Burden Standard and Fundamental Rights Analysis*, 73 WASH. U. L.Q. 295, 310 (1995) (arguing that the undue burden standard has a disparate impact on women who are poor, young, battered, and/or rural).

Interestingly, many states that impose the greatest restrictions on abortion are states with significant rural populations. *See* GUTTMACHER INST., STATE POLICIES IN BRIEF: AN OVERVIEW OF ABORTION LAWS 3 (2007), *available at* http://www.guttmacher.org/statecenter/spibs/spib_OAL.pdf. Twenty-eight states require women to undergo pre-abortion counseling, *id.* at 1, and twenty-one mandate a twenty-four-hour waiting period,

following sections scrutinize judicial responses to hardships that, collectively, are unique to rural women who are seeking abortion services.[232] In the abortion

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id. at 3. Of the thirteen most rural states in the country, six impose these restrictions. *See id.* In addition, seven states have partial-birth abortion bans that apply throughout pregnancy and eight have bans that lack an exception for the health of the mother. GUTTMACHER INST., *supra*, at 2; *see* Gonzales v. Carhart, 127 S. Ct. 1610, 1638-39 (2007) (upholding the constitutionality of the Partial-Birth Abortion Ban Act of 2003, 18 U.S.C. § 1531 (2006), against a facial challenge despite lack of a health exception, and distinguishing *Stenberg v. Carhart*, 530 U.S. 914 (2000), which struck down Nebraska's ban as unconstitutional because it did not contain a health exception). About half of the states with partial birth abortion bans fall within the "most rural" category. *See* GUTTMACHER INST., *supra*, at 2.

[232] Prior to *Casey*, 503 U.S. 833, a few abortion decisions explicitly considered the situation of rural women. In *Planned Parenthood League v. Belotti*, the First Circuit Court of Appeals in 1981 struck down a Massachusetts law that imposed a twenty-four-hour waiting period. 641 F.2d 1006, 1023 (1st Cir. 1981). The court wrote that the burdens in terms of time, money, travel, and work schedules would be "substantial," especially for the "poor, the rural, and those with pressing obligations." *Id.* at 1015.

The federal district court in *Hodgson v. Minnesota* grappled with the realities of rural women's lives—both in terms of spatial isolation from services and lack of anonymity. *See* 648 F. Supp. 756, 770, 779 (D. Minn. 1986), *rev'd*, 853 F.2d 1452 (8th Cir. 1988), *aff'd*, 497 U.S. 417 (1990). The district court wrote:

> In view of the logistical obstacles facing Minnesota women who live in counties without a regular provider of abortion services, the court believes a 48 hour waiting period is excessively long. Travel to an abortion provider, particularly in winter from a rural area in Minnesota, can be a very burdensome undertaking. A requirement that a minor either bear this burden twice or spend up to three additional days in a city distant from her home cannot be justified by the State's interests in encouraging parental consultation, because a shorter waiting period would effectuate that interest as completely.

Id. at 779. The Eighth Circuit's reversal of the decision did not mention rural women. *See* 853 F.2d at 1457 (mentioning only briefly the concerns that the lower court had for rural women). Only Justice Marshall, dissenting from the Supreme Court's affirmation of the Court of Appeals, again briefly acknowledged rural women. 497 U.S. at 476 (Marshall, J., dissenting). He noted that because judges in some counties refuse to hear bypass procedures, women must travel to judges who will. *Id.* He wrote that the burden of doing so, which often requires "an overnight stay in a distant city[,] is particularly heavy for poor women from rural areas." *Id.*

In the 1977 decision in *Poelker v. Doe*, the U.S. Supreme Court held that a city hospital's refusal to perform abortions for indigent women, even though it provided full prenatal care to those carrying babies to term, was not an equal protection violation. 432 U.S. 519, 521 (1977). Justice Brennan, writing for three dissenters, called the unavailability of abortion in public hospitals an "insuperable obstacle" and noted that the decision would be "felt most strongly in rural areas, where the public hospital will in all likelihood be closed to elective abortions" and where demand for a separate abortion clinic will be insufficient. *Id.* at 524 (Brennan, J., dissenting).

context as in several others, the law has turned a blind eye to the very real plight of the rural populace, especially those with the fewest resources.

1. Casey *and the Undue Burden Test*

In its 1992 decision *Planned Parenthood of Southeastern Pennsylvania v. Casey*, the U.S. Supreme Court reaffirmed the basic holding of *Roe v. Wade*[233]: every woman has a fundamental right to obtain an abortion prior to fetal viability.[234] But the *Casey* Court also made new law in setting forth the undue burden test for determining the constitutionality of laws that restrict abortion.[235] The Court applied the test to several restrictions in a Pennsylvania law: a spousal notification requirement, a parental notification requirement, and a mandatory informed consent provision that included a twenty-four-hour waiting period.[236] The Court explained that "[a] finding of an undue burden is a shorthand for the conclusion that a state regulation has the purpose or effect of placing a *substantial obstacle* in the path of a woman seeking an abortion of a nonviable fetus."[237] Unfortunately, the joint opinion in *Casey* did not provide much instruction about how lower courts should determine whether a regulation's purpose is to impose an undue burden.[238]

At first blush, the undue burden inquiry appears to be a fact-intensive one. Indeed, the *Casey* Court's analysis of the so-called spousal notification provision[239]

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[233] 410 U.S. 113 (1973).

[234] *Casey*, 505 U.S. at 834.

[235] *See* Ruth Burdick, *The* Casey *Undue Burden Standard: Problems Predicted and Encountered, and the Split over the* Salerno *Test*, 23 HASTINGS CONST. L.Q. 825, 825 (1996) (indicating *Casey* struck down *Roe*'s trimester framework and replaced it with the "undue burden" standard); Sandra Lynne Tholen & Lisa Baird, *Con Law Is as Con Law Does: A Survey of* Planned Parenthood v. Casey *in the State and Federal Courts*, 28 LOY. L.A. L. REV. 971, 980 (1995); Linda Wharton et al., *Preserving the Core of* Roe: *Reflections on* Planned Parenthood v. Casey, 18 YALE J. OF L. & FEMINISM 317, 319–332 (2006) (discussing how *Casey* altered *Roe* and arguing for a robust interpretation of what remains of *Roe*).

[236] *Casey*, 505 U.S. at 879.

[237] *Id.* at 877 (emphasis added).

[238] Okpalobi v. Foster, 190 F.3d 337, 354 (5th Cir. 1999).

[239] The spousal notification provision required a woman to produce a signed statement certifying that she had notified her husband of her intent to have an abortion. *Casey*, 505 U.S. at 887–98. The spousal notification provision contained some narrow exceptions, including for situations where the woman certified that her spouse was not the father of her child, that she could not find her spouse, that the pregnancy was the result of a sexual assault by her spouse that she reported, or that she had reason to believe that notifying her spouse would cause him, or another, to inflict bodily injury upon her. *Id.* at 908–09. A physician who performed an abortion without obtaining the required statement would have her license revoked and be liable to the woman's husband for damages. *Id.*

which it ultimately declared an undue burden, was fact driven.[240] The plurality devoted twelve pages to discussing this provision, examining both the trial court's extensive findings of fact[241] and an American Medical Association summary of research about domestic violence.[242] The Court acknowledged that between two and four million women are victims of severe domestic violence each year, with the worst abuse sometimes associated with pregnancy.[243] The Court determined that the spousal notification provision was "likely to prevent a significant number of women from obtaining an abortion."[244] Because many instances of domestic violence (i.e., unreported marital sexual assault, psychological abuse, spousal infliction of harm upon a woman's family members) did not fall within the relatively narrow exceptions to the spousal notification requirement, it would not simply make abortions more difficult to procure, but would actually deter some women entirely, thus imposing an undue burden.[245] Although the Court found that the provision imposed no burden on the vast majority of women seeking an abortion, it analyzed whether the provision was an undue burden only in relation to the admittedly very small population of women it would affect: those who were unwilling to share their decision with their spouse for fear of retaliatory violence.[246]

Aside from the spousal notification provision, the *Casey* Court offered little close factual examination of obstacles created by other aspects of the Pennsylvania law. It upheld the law's parental notification provision for minors by stating simply, "[w]e have been over this ground before."[247] The Court reaffirmed prior decisions holding that a law requiring a minor seeking an abortion to get parental consent is constitutional, so long as it includes an adequate judicial bypass procedure.[248]

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[240] *Id.* at 887–99.

[241] *See id.* at 888–91. The district court found that "[t]he vast majority of women consult their husbands prior to deciding to terminate their pregnancy," but it also determined that "[a] wife may not elect to notify her husband of her intention to have an abortion for a variety of reasons." *Id.* at 888. The spousal notification requirement would "force women to reveal their most intimate decision-making on pain of criminal sanctions," but "the confidentiality of these revelations could not be guaranteed, since the woman's records are not immune from subpoena." *Id.* at 889.

[242] *See id.* at 891.

[243] *Id.* at 889.

[244] *Id.* at 893.

[245] *Id.* at 893–94.

[246] *Id.* at 894–95. Even though the spousal notification requirement would affect less than one percent of women seeking an abortion, the *Casey* Court decided that "the proper focus of constitutional inquiry is the group for whom the law is a restriction, not the group for whom it is irrelevant." *Id.* at 894.

[247] *Id.* at 899.

[248] *Id.*

The *Casey* Court's handling of the waiting period requirement is more complicated because of conflicts between the district court's factual findings and those the Third Circuit chose to examine. The district court found that "for those women who have the fewest financial resources, those who must travel long distances, and those who have difficulty explaining their whereabouts to husbands, employers, or others, the 24-hour waiting period will be 'particularly burdensome.'"[249] It then concluded that the waiting period would require every woman to make two trips to an abortion provider and that forty-two percent of women would have to travel more than an hour just to get to the nearest clinic.[250]

The Third Circuit retreated, finding that the "waiting period *may* require . . . two visits to a clinic."[251] That court went on to conclude that "the wait does not prevent any women from having an abortion."[252] Rather than adhering to the factual findings below, then, the appellate court seemed to alter them slightly to support a different result.

Although the Supreme Court purported to analyze the district court's findings of fact, referring to some of them as "troubling in some respects,"[253] it played a semantic game with the district court's conclusions. The Supreme Court said the trial judge had not concluded "that the increased costs and potential delays amount to substantial obstacles,"[254] the term the Court used to define "undue burden."[255] The plurality continued:

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[249] *Id.* at 886 (quoting Planned Parenthood of Se. Pa. v. Casey, 744 F. Supp. 1323, 1352 (E.D. Pa. 1990)).

[250] *See Casey*, 744 F. Supp. at 1352. The district court noted that in 1988, fifty-eight percent of women getting abortions in the state had resided in just five of Pennsylvania's counties, meaning women living in any of the "other 62 counties must travel for at least one hour, and sometimes longer than three hours, to obtain an abortion from the *nearest* provider." *Id.*

[251] Planned Parenthood of Se. Pa. v. Casey, 947 F.2d 682, 706 (3d Cir. 1991) (emphasis added). "[T]his means that the overall cost of an abortion to her may increase by a significant percentage." *Id.* Planned Parenthood's petition for certiorari discussed this problem, noting that the Third Circuit had "substituted for the record actually developed here a factual finding implicitly adopted in a different case involving completely distinct issues." Brief of Petitioner-Appellant at 50, *Casey*, 505 U.S. 833 (Nos. 91-744, 91-902), 1992 WL 551419. Planned Parenthood argued that if undisputed factual findings could be "discarded so cavalierly, the 'undue burden' test was truly meaningless." *Id.* The Supreme Court, however, never touched on the substituted factual record and seems to have accepted the Third Circuit's version of it.

[252] *Casey*, 947 F.2d at 707. The Third Circuit also wrote that "possible overinclusiveness of the provision does not render it irrational, especially given the serious and irreversible consequences of a hasty and ill-considered abortion decision." *Id.*

[253] *Casey*, 505 U.S. at 886.

[254] *Id.*

[255] *See id.* at 877. *See* Wharton, *supra* note 235, at 336 (quoting Laurence Tribe, who characterized this semantic maneuver as "hypertechnical").

> We also disagree with the District Court's conclusion that the "particularly burdensome" effects of the waiting period on some women require its invalidation. A particular burden is not of necessity a substantial obstacle. Whether a burden falls on a particular group is a distinct inquiry from whether it is a substantial obstacle even as to the women in that group. And the District Court did not conclude that the waiting period is such an obstacle even for the women who are most burdened by it. Hence, on the record before us, and in the context of this facial challenge, we are not convinced that the 24-hour waiting period constitutes an undue burden.[256]

From the beginning, then, the Supreme Court applied the "undue burden" standard inconsistently.

2. Waiting Periods and Rural Women Under Casey

Because the main focus of this Article is to reconsider the burden that abortion restrictions place on rural women, I return here to the district court's detailed findings of fact regarding the waiting period. In addition to determining that the waiting period would force all women seeking abortions in Pennsylvania to make at least two visits to an abortion provider, the court found that the "waiting period" would cause "delays far in excess of 24 hours" because most clinics and physicians do not perform abortions every day.[257] Because the mandatory wait would require women to double their travel time or stay overnight near an abortion facility, the court noted that many would not only incur added expenses for transportation, lodging, child care, and food, but would also "lose additional wages or other compensation" if forced to miss work twice.[258] Further, the court noted, delays associated with the waiting period would push some patients into the second trimester, thus substantially increasing the cost and risks of the procedure.[259]

The court concluded: "Finally, *women living in rural areas* and those women that have difficulty explaining their whereabouts, such as school age women, battered women, and working women without sick leave, will also experience significant burdens in attempting to effectuate their abortion decision, if a mandatory 24-hour waiting period were in place."[260] Although the district court did not utilize the undue burden standard, its findings indicate that the waiting period

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[256] *Casey,* 505 U.S. at 886–87.

[257] Planned Parenthood of Se. Pa. v. Casey, 744 F. Supp. 1323, 1351 (3d Cir. 1991). The district court concluded that the delays were likely to vary from forty-eight hours to two weeks. *Id.*

[258] *Id.* at 1352.

[259] *Id.*

[260] *Id.* at 1379 (emphasis added).

imposes significant burdens on some women. It enumerated rural women as one such group.

Two organizations that filed amicus briefs with the Supreme Court on behalf of Planned Parenthood also closely examined the effects of the twenty-four-hour waiting period and expressed concern for rural women. The American Psychological Association's brief highlighted the district court's findings regarding travel distances.[261] The brief observed that "[i]n many geographic areas of the country, women live long distances, even hundreds of miles, from the nearest abortion provider."[262] It also cited research showing that the greater a woman's distance from a provider, the less likely she is to procure an abortion.[263]

The National Association for the Advancement of Colored People's ("NAACP") amicus brief focused in part on the waiting period's impact on low-income urban women, and called special attention to the "acute" problem for rural women.[264] The NAACP cited data and examples from rural states, including the fact that at the time not a single physician residing in North Dakota performed abortions, and only one South Dakota physician did so.[265] The sole abortion clinic in northern Minnesota served twenty-four counties.[266] The brief highlighted the

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[261] Brief for Amicus Curiae American Psychological Ass'n in Support of Petitioners at 29, *Casey*, 505 U.S. 833 (Nos. 91-744, 91-902), 1992 WL 12006399. These included the fact that one clinic was the primary abortion provider for eighteen counties and that, among another clinic's patients, 909 traveled at least 100 miles to reach the clinic. *Id.* at 29 n.65.

[262] *Id.* at 28.

[263] *Id.* at 28–29 (citing Stanley K. Henshaw & Jennifer Van Vort, *Abortion Services in the United States, 1987 and 1988*, 22 FAM. PLAN. PERSP. 102, 105 (1990); James D. Shelton et al., *Abortion Utilization: Does Travel Distance Matter?*, 8 FAM. PLAN. PERSP. 260, 260 (1976)). In non-metro areas, ninety-three percent of counties have no provider, and eighty-three percent of (non-metro) women live in those counties. Henshaw & Van Vort, *supra*, at 106.

[264] Brief of Amici Curiae of the NAACP Legal Def. & Educ. Fund, Inc. et al. in Support of Planned Parenthood of Se. Pennsylvania at 1–3, 21, *Casey*, 505 U.S. 833 (Nos. 91-744, 91-902), 1992 WL 12006401. It noted that "women with family incomes under $11,000 are nearly four times more likely to have an abortion than women with family incomes over $25,000." *Id.* at 17 (citing GUTTMACHER INST., GOLD, ABORTION AND WOMEN'S HEALTH: A TURNING POINT FOR AMERICA? 5, 16 (1990)). "At least one study indicates that for women below the poverty level, six out of ten births are unintended, i.e., unwanted or mistimed, compared to three out of ten births to women above 200% of the poverty level." *Id.* at 18 (citing Stephen E. Radecki, *A Racial and Ethnic Comparison of Family Formation and Contraceptive Practices Among Low-Income Women*, 106 PUB. HEALTH REP. 494, 500 (1991)). The brief attributed the higher rate of unintended pregnancies among poor women to the greater incidence of contraceptive failure and their preference for fewer children. *Id.* at 17.

[265] *Id.* at 21–22.

[266] *Id.* at 22. The brief noted the particular plight of Native American women, who often live in rural areas:

fact that eighty-two percent of all U.S. counties—home to one-third of all reproductive-age women—had no abortion provider as of 1985 and that even more non-metro counties—ninety percent—presently had no provider.[267] The NAACP thus argued that the mandatory waiting period would effectively prohibit abortion for poor women because of the increased cost of obtaining an abortion[268] and the "barriers of distance and mobility."[269]

In their arguments to the Supreme Court, both Planned Parenthood and amici curiae highlighted the plight of rural women as a group or class, with further emphasis on the aggravated burden for poor rural women. Yet the Justices in the *Casey* plurality were unmoved by evidence of these burdens. The Court concluded that while the increased cost and inconvenience to women might make it difficult for them to get abortions, it would not actually deter them. Indeed, in spite of the district court's and plaintiffs' attention to rural women, the word "rural" appears only once in 168 pages of *Casey* opinions. Justice Blackmun used the word in his separate opinion where he quoted the district court's finding that the waiting period "would pose especially significant burdens on women living in rural areas and those women that have difficulty explaining their whereabouts."[270]

When a majority of Justices in *Casey* concluded that the threat of domestic violence from the spousal notification provision would deter women, but that the waiting period would merely inconvenience them, they set up a dichotomy

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> In particular, poor Native American women face some of the largest obstacles, since the Indian Health Services, which may be the only familiar provider of health care and the only health service available for hundreds of miles, is prohibited from performing abortions even if women can find the monetary resources to pay for the procedure themselves.

Id.

[267] *Id.* at 20–21. The brief cited, as an example, the Women's Health Services clinic in Pittsburgh, which serves thirty-four counties in Pennsylvania, portions of Ohio, West Virginia, Maryland, and New York. *Id.* That agency's Executive Director stated that women often travel three or four hours to reach the clinic, sometimes much longer if they travel by bus. *Id.*

[268] *Id.* at 22–23.

[269] *Id.* at 20. "Overcrowded conditions at public facilities delay and frequently foreclose timely treatment. At Health and Hospitals medical clinics in New York City, for example, patients must wait six to twenty-two weeks to get a first clinic appointment; women must wait four to fifteen weeks for an appointment with a gynecologist." *Id.* at 20 n.13.

[270] Planned Parenthood of Se. Pa. v. Casey, 505 U.S. 833, 937 (1992) (Blackmun, J., concurring in part and dissenting in part) (citing Planned Parenthood of Se. Pa. v. Casey, 744 F. Supp. 1323, 1378–79 (E.D. Pa. 1990)). However, the plurality did quote the district court as having found "that for those women who have the fewest financial resources, those who must travel long distances, and those who have difficulty explaining their whereabouts to husbands, employers, or others, the 24-hour waiting period will be 'particularly burdensome.'" *Id.* at 886 (quoting *Casey*, 744 F. Supp. at 1352).

between violence (or the threat of it) on one hand, and economic disaster (or the threat of it) on the other.[271] The Court essentially assumed that women will forego abortion to avoid the former but not the latter. This assumption is unfounded. While I do not dismiss or downplay the significance and severity of physical abuse, it bears noting that many victims of intimate abuse remain with their abusers for financial reasons.[272] For example, women sometimes opt not to leave because without the male breadwinner they do not have the financial resources to support themselves and their children. They endure violence in order to avoid poverty. Ironically, the plurality in *Casey* recognized this phenomenon in analyzing the spousal notification provision, and it cited empirical research in support of it.[273] The plurality nevertheless held that the waiting period does not constitute an undue burden—not even for rural women or others with severe financial constraints.

But survival is about more than avoiding a beating. If a woman will endure violence in order to be able to feed herself and her family, the chances are good that she will also forego an abortion in order to achieve the same end. Thus, the

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[271] *See infra* notes 303–04 and accompanying text for a discussion of the Seventh Circuit Court of Appeals contrasting violence against those who seek abortions with inconvenience to them. *See also infra* note 366–69 and accompanying text (discussing the constitutionality of the Freedom of Access to Clinic Entrance Act of 1994, 18 U.S.C. § 248 (2006), in which there is also sensitivity to violence in relation to abortion); *cf.* Alan Brownstein, *How Rights Are Infringed: The Role of Undue Burden Analysis in Constitutional Doctrine,* 45 HAST. L. J. 867 (1994) (articulating a dichotomy between abortion regulations that facilitate reflective decision making and those that simply hinder exercise of the right).

[272] There is support for the proposition that women engage in a cost-benefit analysis before deciding to leave an abusive partner. Financial concerns, particularly when children are involved, make the final decision to leave more difficult. *See* Kristina Coop Gordon et al., *Predicting the Intentions of Women in Domestic Violence Shelters to Return to Partners: Does Forgiveness Play a Role*, 18 J. FAM. PSYCHOL. 331, 331 (2004) (suggesting that lack of personal income and low potential for securing employment are factors that weigh in favor of staying in the relationship); Helen M. Hendy et al., *Decision to Leave Scale: Perceived Reasons to Stay in or Leave Violent Relationships*, 27 PSYCHOL. WOMEN Q. 162, 163 (2003) (stating that women are "more reluctant to leave violent relationships when they have investments of time, marriage, money, children, or emotional attachment").

Deborah Weissman has also recently argued for a paradigm shift in how we view domestic violence. *See* Weissman, *supra* note 44, at Part II. She proposes that we consider domestic violence in relation to economic instability. *Id.* Similar to my assertion, Weissman argues, for example, that it is not sensible to "speak of patriarchy separate from the material conditions of everyday life." *Id.* at Part I. She asserts that patriarchy is "mediated by and a function of economic forces." *Id.* at Part I.

[273] *See* 505 U.S. at 891–92 (citing B.E. Aguirre, *Why Do They Return? Abused Wives in Shelters*, 30 J. NAT'L ASS'N SOC. WORKERS 350, 352 (1985) (arguing abused women may return to their abusers because they have no other source of income); Tracey Herbert et al., *Coping with an Abusive Relationship: I. How and Why Do Women Stay?*, 53 J. MARRIAGE & FAM. 311 (1991)).

Casey Court was only half right about self-preservation in relation to abortion. It was correct about women's likely response to the spousal notification provision, but it ignored the connection between the perils of physical violence on the one hand and economic disaster on the other. If, as even the *Casey* plurality recognized, women will endure physical violence to prevent financial ruin, they will forego abortion for the same purpose. The Court appeared oblivious to the fact that waiting periods risk that very tragedy for some women, as I illustrate in the following section.

*3. Post-*Casey *Decisions*

The *Casey* Court indirectly stated that it was deciding only the case before it, leaving the door open for other challenges to the provisions it upheld.[274] Subsequent courts have nevertheless been reluctant to deviate from *Casey*'s holdings. As Gillian Metzger observes, "regulations that are not burdensome in Pennsylvania may well be burdensome in other states where there are fewer abortion providers or a more rural and poorer population."[275] By and large, however, courts have been unwilling to examine in detail the particular burdens on the women in a state whose abortion regulations are challenged.[276] Yet states continue to enact regulations that prevent at least some women—including those living a significant distance from an abortion provider—from exercising their right to an abortion. These regulations not only impose waiting period and informed consent requirements, some also involve parental consent for minors.

(a) Mandatory Waiting Periods, Informed Consent Laws, and Spatial Isolation

Utah Women's Clinic, Inc. v. Leavitt[277] is an excellent example of the tendency of post-*Casey* courts to assess constitutionality based more on an abortion regulation's text than on the factual record.[278] The plaintiffs in *Leavitt*

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[274] *See id.* at 887.

[275] Metzger, *supra* note 231, at 2038.

[276] *Id.* at 2037–38.

[277] 844 F. Supp. 1482 (D. Utah 1994) (upholding a twenty-four-hour waiting period as constitutional), *rev'd in part on other grounds*, 75 F.3d 564 (10th Cir. 1995).

[278] *See* Karlin v. Foust, 188 F.3d 446 (7th Cir. 1999). The *Karlin* plaintiffs similarly presented evidence of "factual and demographic differences between Pennsylvania and Wisconsin" focusing on "the geographic distribution and scarcity of abortion providers in relation to the female population of Wisconsin." *Id.* at 486. The court was not convinced, however, concluding that "the demographic differences between the two states were not significant enough to suggest that Wisconsin women are quantitatively more burdened" by the Wisconsin law than Pennsylvania women had been by the mandatory wait in *Casey*. *Id.* The court also went into a detailed discussion of the plaintiffs' argument, based on a study of a Mississippi abortion regulation that had arguably caused a sharp decline in the number

argued that because Utah is larger than Pennsylvania and has only one metropolitan area, a twenty-four-hour waiting period would be more burdensome in that state than an equivalent regulation in Pennsylvania.[279] Nevertheless, because the Utah regulation was less restrictive than the provision upheld in *Casey*, the federal district court concluded that it must be constitutional.[280] Finding no significant differences either between the text of the Utah and Pennsylvania laws or in how they would affect women in their respective states,[281] the court went as far as to call the plaintiffs' argument a "red herring."[282]

The *Leavitt* judge reasoned that all women seeking abortions must travel to a clinic for the procedure, but that because the "travel burden is not a factor of state law[,] . . . . getting to a clinic has absolutely nothing to do with the constitutional inquiry here."[283] The court offered this hypothetical to illustrate its logic:

> A woman in Alaska, for example, could be required to travel 800 miles to get to an abortion clinic merely because she lives in one place and the nearest abortion clinic is on the other side of the state. But that certainly doesn't constitute anything even approaching an undue burden. *Roe v. Wade* may have established a constitutional right to an abortion, but it did not require that a state provide abortion clinics in close proximity to every woman's home.
>
> On the other hand, a waiting period which may require two visits to a clinic imposes an additional burden. For some women, this burden will require that they double their travel time by making a second trip to the clinic. For other women, in a worst-case scenario where the distance is such that it is impracticable to make a return visit, the burden will require an overnight stay at a location near the clinic. [284]

Thus, the district court in Utah concluded that the regulation's greatest burden on any woman—no matter where she lived in proximity to an abortion provider—was

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of abortions in that state. *Id.* at 486–87. The plaintiffs argued that Wisconsin and Mississippi were analogous, but the Seventh Circuit, like the district court, found the Mississippi study methodologically flawed. *Id.* at 487–88. The Seventh Circuit said the study had not controlled "for the persuasive effect of the law." *Id.* at 487. That is, the Court of Appeals speculated that the number of abortions in Mississippi might have declined not because the waiting period made getting an abortion more difficult, but because the materials presented as part of the informed consent law convinced women not to get abortions. *Id.* at 487–88.

[279] 844 F. Supp. at 1490–91.

[280] *Id.*

[281] *Id.* at 1491.

[282] *Id.* at 1491 n.11.

[283] *Id.*

[284] *Id.*

an overnight stay near that provider.[285] It dismissed the possibility that some women would have to make two trips and therefore never considered that multiple trips might each be several days long. Because the *Casey* Court had not viewed an overnight stay as an undue burden, the judge in *Leavitt* reasoned that the Utah provision also did not constitute one.[286]

Other judges in the post-*Casey* era have shown greater empathy for the plight of rural women seeking abortion in the face of mandatory waiting periods.[287] However, these judges are either federal district judges who were subsequently overruled or dissenters from the decisions of courts of appeals. They have nevertheless called attention to the circumstances of rural women despite colleagues who, like the district judge in *Leavitt*, disregarded details of the obstacles facing rural women, or who saw the obstacles as being "merely" financial.[288]

Although the Mississippi Supreme Court in 1998 upheld state regulations that imposed a mandatory twenty-four-hour waiting period,[289] Justice Sullivan's dissent in *Pro-Choice Mississippi v. Fordice* highlighted the "undue burden on low-income women living in rural areas."[290] Disputing the chancellor's characterization of this burden as "mere inconvenience," Justice Sullivan argued that the plaintiffs successfully demonstrated that the restrictions would preclude "a substantial number of women from obtaining abortions altogether, and create[] an undue burden due to travel and lodging expenses, child care costs, loss of wages and other compensation, and health risks."[291] Noting that only two Mississippi counties had abortion providers, Justice Sullivan argued that the law was unconstitutional even if it created an undue burden only for low-income women and those living in rural areas.[292] He also pointed to plaintiffs' evidence that the number of Mississippi women obtaining abortions had decreased by thirteen percent since the law went into effect, suggesting that the waiting period was actually preventing at least a tenth of the state's women from terminating their pregnancies.[293]

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[285] *See id.*

[286] *Id.*

[287] *See infra* notes 290–293, 295–99, 306–08 and accompanying text.

[288] *See, e.g.*, *Leavitt*, 844 F. Supp. at 1491 n.11.

[289] Pro-Choice Miss. v. Fordice, 95-CA-00960-SCT (¶ 74) (Miss. 1998) (not using the word "rural" in the majority opinion).

[290] *Id.* ¶ 80 (Sullivan, J., dissenting).

[291] *Id.*

[292] *Id.* (citing Planned Parenthood of Se. Pa. v. Casey, 505 U.S. 883, 887–98 (1992) (holding that the spousal consent law was unconstitutional based on the small number of women with abusive husbands, for whom it would create an undue burden)).

[293] *Id.* ¶ 81. This study was later discredited in *Karlin v. Foust*, 188 F.3d 446, 486–88 (7th Cir. 1999), but supplemented prior to *A Woman's Choice-East Side Women's Clinic v. Newman*, 305 F.3d 684, 689–90 (7th Cir. 2002). The study also indicated that the number of second-trimester abortions in Mississippi had risen by eighteen percent since the law went into effect. *Fordice*, 95-CA-00960-SCT (¶ 81).

The Seventh Circuit in *A Woman's Choice-East Side Women's Clinic v. Newman* similarly upheld an Indiana informed consent law requiring that a woman be given information in the presence of her doctor eighteen hours before obtaining an abortion.[294] This 2002 case was decided on probably the best-developed factual record in the post-*Casey* era. Yet the evidence presented swayed only Judge Diane Wood, in dissent, to agree with the federal district court that the law constituted an undue burden.[295]

The Indiana district court, relying in part on an updated version of the Mississippi study cited in *Fordice*, struck down the Indiana law as unconstitutional.[296] It found that the supplemented study adequately demonstrated that the Mississippi law caused a ten- to thirteen-percent decrease in abortions among that state's residents, as well as a significant increase in more expensive, more dangerous second-trimester abortions.[297] Based on these findings and on those of a similar study conducted in Utah, the court concluded that the waiting period would also cause the number of abortions performed in Indiana to decrease by ten to thirteen percent.[298] The court further determined that this decline was due, not to the persuasive nature of the materials, but rather to obstacles imposed by the waiting period.[299]

Two of three members of the Seventh Circuit panel viewed the factual evidence differently. Judges Easterbrook and Coffey refused to accept the district court's assessment of the study because the plaintiffs failed to demonstrate that Indiana and Mississippi were similar, and that the consequences of the Mississippi law were likely to be manifest in Indiana.[300] They believed the ten-percent decline in abortions, rather than representing a practical consequence of the two-visit

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[294] 305 F.3d at 685–86, 691–93. The decision also debated the burden represented by a so-called "presence" requirement. The Indiana statute required information to be given to the women seeking the abortion in the "presence" of the physician or physician's assistant. *Id.* at 685. Information about abortions could therefore not be given in a pamphlet, by telephone, or through a web site. *Id.* The "presence" requirement thereby required the pregnant woman to make two trips to the clinic—one for the information and the other to receive the abortion. *Id.* The court held that the presence requirement did not create an undue burden on a woman's right to abortion. *Id.* at 693.

[295] *See id.* at 704–17 (Wood, J., dissenting).

[296] A Woman's Choice-E. Side Women's Clinic v. Newman, 132 F. Supp. 2d 1150, 1173–75 (S.D. Ind. 2001). The plaintiffs in *Karlin* relied on an earlier version of the same study, but the court in that case questioned its validity. *See* 188 F.3d at 487–88. It was supplemented before the trial in *A Woman's Choice*, correcting several aspects that had been criticized.

[297] *A Woman's Choice*, 132 F. Supp. 2d at 1173. The court also found that the Mississippi law caused a significant increase in the number of that state's residents who traveled out of state to obtain abortions and a significant decrease in the number of other states' residents who came to Mississippi for abortions. *Id.*

[298] *Id.*

[299] *Id.* at 1176.

[300] *A Woman's Choice*, 305 F.3d at 692.

requirement, was simply a consequence of the persuasive effect of the information.[301] Writing for the majority, Judge Easterbrook asserted that Indiana's law should be "evaluated in light of experience *in Indiana*."[302] Echoing *Casey*'s elevation of concerns about violence against women over other concerns about their well-being, he suggested that a two-trip requirement would constitute an undue burden only if it deterred women by increasing the possibility of violence against them.[303] Judge Easterbrook referred specifically to the "threat or actuality of violence at the hands of those tipped off by a preliminary visit" and said if evidence of such violence came to light in Indiana, it would require reconsideration of informed consent laws across the nation.[304]

Judge Coffey, also in the majority, openly flouted the hardships and concerns of the ten to thirteen percent of women who might be unable to obtain an abortion. He concluded that legislation posing no substantial obstacle for eighty-seven to ninety percent of a state's women, and which "may have the incidental effect of reducing the demand for abortions by merely 10 to 13%, is reasonable, sensible, and lawful."[305] Judge Coffey apparently disregarded the fact that those women deterred from getting an abortion by the mandatory waiting period (as many as thirteen percent) were, in fact, unduly burdened by it. Rather than seriously evaluating the evidence that substantiated the argument that waiting periods create undue burdens for some women, both Easterbrook and Coffey determined that because the waiting period would probably not increase violence against women, it was constitutional.

Once again, it was the dissenting judge who attended to the concerns of rural women as a class. Judge Wood wrote that Indiana, "like all states," has "significant rural areas and significant numbers of people living far from a reproductive health services facility."[306] She cited statistics indicating that Indiana, with eleven abortion providers, had one "for almost every 3,300 square miles."[307] These clinics, which are not "distributed with perfect geographical regularity," are most likely concentrated in cities, Judge Wood observed, meaning that women in rural Indiana lived "substantial distances from the nearest facility."[308]

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[301] *Id.* at 690.

[302] *Id.* at 692–93. This insistence on not comparing states or analogizing between them is ironic in light of other courts' tendency in the context of abortion regulations to eschew state-specific, fact-intensive inquiries. *See supra* notes 277–86 and accompanying text.

[303] *Id.*

[304] *Id.*

[305] *Id.* at 704 (Coffey, J., concurring).

[306] *Id.* at 711 (Wood, J., dissenting).

[307] *Id.*

[308] *Id.* Judge Wood continued:

> At most, the details the majority demands might suggest that more Indiana women can withstand the burdens of the Indiana statute than their counterparts

The majority contingent in each of these opinions, like the federal district judge in *Leavitt*, overlooked or denied the lived realities of many rural women. They also ignored a critical aspect of *Casey*'s undue burden analysis of the spousal notification requirement: the relevant group of women with respect to whom the requirement was to be assessed. Informed consent and waiting period provisions do, in fact, have a greater impact on—and are in fact a greater deterrent to abortion for—rural women. They are an even more onerous burden on, and deterrent to, those among that group with low incomes.

The geography of Utah may be referenced to illustrate this point. Consider first a working-class woman in Salt Lake City who enjoys little work schedule flexibility. She would likely have difficulty securing time off both to go through the informed consent meeting and to have the abortion. Depending on her schedule, she could arrange the two different appointments on different days of the same week or on consecutive weeks. If she were without a vehicle but lived in the Salt Lake City metro area, she would have some public transportation options to facilitate her journeys. Making two trips would likely be inconvenient, even burdensome to her. Multiple journeys might, for example, significantly increase the cost of the abortion if a lack of work flexibility or the existence of other duties forced her to schedule her second appointment during her second trimester. Still, the burden of the waiting period on her is unlikely to be as great as that on a woman living in rural southern Utah, as far as 300 miles from Salt Lake City.

Imagine a woman living in Boulder, Utah, for example, in the shadow of Grand Staircase-Escalante National Monument and fifteen miles from Utah Highway 12. She would be 327 miles (seven hours) from Las Vegas,[309] 367 miles (seven hours and fifty-five minutes) from Flagstaff, Arizona,[310] 381 miles (seven hours and fifty-eight minutes) from Aspen, Colorado,[311] and 261 miles (five hours

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> in Mississippi could. But the question is not, for example, whether Indiana women as a group live closer to abortion clinics. It is whether an Indiana woman living 60 miles away from a clinic in Indiana who cannot afford (either financially, socially, or psychologically) to make two visits, will respond the same way a Mississippi woman living 60 miles away from a clinic in Mississippi with similar constraints did. To repeat, *Casey* made it clear that the set of women we must consider are those who are burdened by the law, and it found 1% enough to justify striking down the spousal notification rule. Maybe 10% of the women in Mississippi have that problem and "only" 3% of women in Indiana do. No matter. The district court was quite reasonable to find that women in Indiana are like all other people and that their responses will be the same as those of women elsewhere.

Id. at 711–12.

[309] *See* Yahoo! Local Maps, http://maps.yahoo.com (enter "Boulder, UT" and "Las Vegas, NV" and click "Go") (last visited Mar. 6, 2007).

[310] *See id.* (enter "Boulder, UT" and "Flagstaff, AZ" and click "Go").

[311] *See id.* (enter "Boulder, UT" and "Aspen, CO" and click "Go").

and twenty-nine minutes) from Salt Lake City,[312] the locations of the four nearest abortion providers. These one-way travel times assume the woman has access to private transportation. If she does not and must rely on public transportation, her situation is even more dire. Boulder, Utah, has no public transportation services. The nearest Greyhound bus stop is 143 miles (three hours and forty minutes) away in Parowan, Utah.[313] Only two buses a day serve the Parowan-Salt Lake City route, and the journey each way is four hours.[314] A woman without a car, living in Boulder would thus have to borrow a car or hitch-hike to Parowan, and then make a four-hour bus journey to Salt Lake City, the site of the nearest abortion clinic.

A working-class woman with little work schedule flexibility, but this time in rural Utah, will face considerable practical and financial obstacles to terminating her pregnancy. If, as *Leavitt* assumes, she is able to secure consecutive days off from work, her burden may nevertheless be greater than an overnight hotel stay. If she must travel several hours to reach the bus station and several more by bus to reach the abortion provider (and again to return home) the woman may need three or more consecutive days off work—and several nights' hotel stay—to accomplish the termination. If, contrary to the *Leavitt* court's assumption, she is unable to take several consecutive days off work, the obstacles are much greater. A woman in such a situation will not only have to make two return journeys to Salt Lake City by whatever means are available, each of those journeys may require several days. Contrary to *Leavitt*'s conclusion, then, the worst-case scenario may not be merely an overnight stay. It may be several days' stay. It may, in fact, require two journeys, each lasting multiple days, with attendant impacts on the woman's employment, family, and financial circumstances.[315]

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[312] *See id.* (enter "Boulder, UT" and "Salt Lake City, UT" and click "Go").

[313] *See id.* (enter "Boulder, UT" and "Parowan, UT" and click "Go"). *See generally* Eli Sanders, *As Greyhound Cuts Back, The Middle of Nowhere Means Going Nowhere*, N.Y. TIMES, Sept. 6, 2004, at A10 (discussing the impact on rural America of Greyhound's dramatic cuts in service). Interestingly, a dissenting judge in another abortion case spefically asserted the legal relevance of the lack of public transportation. *See infra* note 340 and accompanying text.

[314] Greyhound offers two buses a day from Parowan, Utah, to Salt Lake City, one leaving at 2:50 a.m. and another leaving at 11:05 a.m. Each trip lasts four hours. Buses from Salt Lake City to Parowan leave twice a day, at 8:30 a.m. and 6:00 p.m. *See* Greyhound, Ticket Center, http://www.greyhound.com/scripts/en/TicketCenter/Step1.asp (last visited Mar. 6, 2007).

[315] A medical consequence of abortion further aggravates the barriers for rural women. Women who are sedated for abortions are not allowed to drive for twenty-four hours following the procedure, even though women whose abortions are performed under local anesthesia may do so. American Association of Nurse Anesthetists, AnesthesiaPatientSafety.com, Preparing for Anesthesia?, http://www.anesthesiapatient safety.com/patients/about/having.asp (last visited Apr. 16, 2007). This means that some women must find someone to accompany them in order to provide a ride home following the abortion procedure. Needless to say, this limits the options of rural women even more than those of urban residents. While the latter may be able to take a taxi home or rely on a

An even more dramatic example could be generated from the geography of Alaska, with its dearth of abortion services, which the *Leavitt* court used to illustrate its point that there is no constitutional right to convenience in procuring an abortion.[316] But *Casey* made accessibility relevant by adopting the undue burden standard, and at some point—even the *Leavitt* court might concede if it acknowledged detailed facts—waiting periods constitute an undue burden for the most isolated, most disadvantaged women.

My aim here is not to identify the most extreme example of hardship created by waiting periods. Rather, it is to demonstrate that courts have not seriously considered the practical obstacles confronting rural women. As Judge Wood wrote in *A Woman's Choice*, the undue burden question "is whether an Indiana woman living 60 miles away from a clinic in Indiana who cannot afford (either financially, socially, or psychologically) to make two visits" will be deterred from exercising her fundamental right.[317] The undue burden inquiry is not only about the woman who is worst-situated for getting an abortion; it is about all those who will be deterred by the obstacle that the waiting period presents.

Certainly, some women in rural areas will be better situated to secure abortions than others, even in states with mandatory waiting periods. Women with job flexibility and security, and access to a car, child care, and—of course—money, will more easily overcome the obstacles. But the *Casey* Court said that, for the purposes of analyzing any regulation, "[t]he proper focus of constitutional inquiry is the group for whom the law is a restriction, not the group for whom the law is irrelevant."[318] Further, the *Casey* Court found sufficient the mere one percent of all women who would be deterred by the Pennsylvania spousal notification requirement.[319] Even taking *Casey*'s parsimonious approach to the undue burden test as the starting point, courts applying the standard have been both

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friend to provide transport for the relatively short journey, a rural woman must either rely on a lengthy public transport journey or find a friend with sufficient flexibility to make the long journey with her.

A 1997 survey found that fifty-eight percent of first-trimester abortion providers used only local anesthetic. E. Steve Lichtenberg et al., *First Trimester Surgical Abortion Practices: A Survey of National Abortion Federation Members*, 64 CONTRACEPTION 345, 347 (2001). Thirty-two percent used intravenous sedation and local anesthetic, and the remaining ten percent used either general anesthesia or nitrous. *Id.* at 347; *see also* Planned Parenthood of the Rocky Mountains, Abortion Services, http://www.plannedparenthood.org/rocky-mountains/abortion-services-surgical.htm (last visited Mar. 6, 2007) (discussing surgical abortion services).

[316] *See* Utah Women's Clinic v. Leavitt, 844 F. Supp. 1482, 1491 n.11 (D. Utah 1994).

[317] A Woman's Choice-E. Side Women's Clinic v. Newman, 305 F.3d 684, 711 (7th Cir. 2002). Specifically, at this point in the opinion, Wood was arguing that a Mississippi study had shown that the state's informed consent law had deterred Mississippi women from pursuing abortion. *See id.* at 712–15.

[318] Planned Parenthood of Se. Pa. v. Casey, 505 U.S. 833, 894 (1992).

[319] *See id.*

unrealistic and insensitive about the impediments that regulations create for rural women seeking abortion.

While *Leavitt* may be correct that *Roe v. Wade* did not guarantee the right to convenience in procuring an abortion, waiting periods create so much "inconvenience" for some women that they impede access to that right for those women. That is, waiting periods effectively preclude exercise of that right. This is surely the case for many rural women who live literally hours from the nearest abortion provider. Their hardship is exacerbated by the specific circumstances that mark many of their lives: inadequate transportation, limited or nonexistent child care, lack of job flexibility and security, and overall economic vulnerability.[320] The existence of each of these circumstances aggravates the burden that the mandatory waiting period imposes on a given rural woman.

In contrast to these abortion decisions, precedents in other areas of the law acknowledge not only the reality, but also the legal relevance of the hardships created by spatial isolation from centers of commerce and the services located there.[321] For example, in disability, workers compensation, and insurance coverage settings, courts recognize that those who live in rural areas are at a disadvantage in seeking replacement employment, in receiving appropriate rehabilitation, and in obtaining medical care.[322] These judicial decisions appropriately accommodate the

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[320] *See* discussion *supra* Part I.B–C.

[321] In a rare civil procedure case addressing the practical effect of rural locale, a federal district court held that, because they "live in rural areas and lack resources and access to transportation," migrant workers seeking to opt into a class action need not have their consents authenticated because it "could well present a heavy burden, if not an insuperable obstacle to their participation." Roebuck v. Hudson Valley Farms, Inc., 239 F. Supp. 2d 234, 240 (N.D.N.Y. 2002); *see also* State v. Morgan, 907 P.2d 116, 118 (Idaho Ct. App. 1995) (finding the trial court had made an adequate inquiry into the defendant's absence from trial when it waited half an hour, called his home, and then proceeded in his absence, but noting that such an effort might be insufficient if "the defendant resides in a rural area many miles from the courthouse"); Rancourt v. State Dep't of Licensing, Div. of Fin. Responsibility, 666 P.2d 955, 956 (Wash. Ct. App. 1983) (assuming defendant's receipt of notice to appear in court was delayed because of the nature of rural mail delivery and giving him a second opportunity to appear when he received a notice to appear only thirteen days after the mailing).

[322] *See, e.g.*, Brodsky v. City of Phoenix Police Dep't Ret. Sys. Bd., 900 P.2d 1228, 1232 (Ariz. Ct. App. 1995) (holding that a police officer with a knee injury was still capable of a "reasonable range of duties" in an urban police department and thus not eligible for disability, although the court recognized that a similarly disabled officer in a rural setting with a smaller force might not be able to perform a reasonable range of duties for his department).

In a 2001 decision, the Court of Appeals for the District of Columbia held that a former custodian with the transit authority who sued under the Americans with Disabilities Act ("ADA") was not "substantially limited" in his ability to work because his back injury did not prevent him from finding alternate employment. Duncan v. Wash. Metro. Area Transit Auth., 240 F.3d 1110, 1115–17 (D.C. Cir. 2001). Concurring, Judge Randolph

fact that many rural residents must travel significant distances for access to such services and opportunities.

A trilogy of Colorado workers' compensation cases is illustrative.[323] The Colorado Supreme Court held in these consolidated cases that rural workers who could not secure replacement employment because of their limited rural labor markets could nevertheless receive benefits.[324] Each of the cases involved a rural-dwelling worker with relatively few skills,[325] and each had reached maximum medical improvement. The crux of the inquiry, the court said, was whether employment is "reasonably available to the claimant given his or her circumstances."[326] The court did not blame these rural workers for the fact that the rural economy provided them no job opportunities; it therefore determined they

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complained of the "geographic disparity" that would result from this rule. *Id.* at 1118 (Randolph, J., concurring). He observed that if identical individuals with identical impairments worked for the same company, the one working in a rural area would "wind up being classified as disabled under the ADA more readily" than one in a "major metropolitan area where more jobs are available." *Id.*

[323] *See* Weld County Sch. Dist. v. Bymer, 955 P.2d 550 (Colo. 1998) (en banc) (consolidated).

[324] *Id.* at 556–57.

[325] Two of these were laborers with limited English skills who had completed the fourth grade in Mexico and the third was a custodian whose injury prevented her from driving long distances. *Id.* at 552–53. In the first two cases, the court of appeals had affirmed the administrative law judge's consideration of "the claimant's commutable labor market" in deciding "permanent total disability." *Id.* at 559. In the third case, the court of appeals reversed, declaring "'disability is a function of impairment, not geography or job availability.'" *Id.* at 553 (quoting Spady Bros. v. Indus. Claim Appeals Office, 942 P.2d 1340, 1342 (Colo. Ct. App. 1997)). In all three cases, both administrative law judges and administrative appellate bodies had declared the workers to be permanently and totally disabled, *see id.* at 552–53; only the court of appeals had reached inconsistent results.

[326] *Id.* at 557. In *Parsons v. Employment Security Commission*, a woman who had worked as a grocery clerk quit her job and moved with her husband, who had been laid off, to property they owned in a rural community with only one grocery store. 379 P.2d 57, 58–59 (N.M. 1963). The woman was unable to secure work at the grocery store, or at either of the two stores within commutable distance. *Id.* at 58. She did not want to work as a waitress or secretary and was therefore unable to secure employment. *Id.* The Commission found that her voluntary unemployment made her ineligible for benefits, but the New Mexico Supreme Court reversed, finding that she had made reasonable efforts to secure employment. *Id.* at 61; *see also* Wood Mosaic Co. v. Brown, 199 S.W.2d 433, 434 (Ky. Ct. App. 1947) (finding a sixty-four-year-old laborer who had worked as a carpenter, blacksmith, and coal miner to be permanently disabled when he injured his arm and noting that in the rural area where he lived, alternative "vocational opportunities" were restricted to very few fields).

were entitled to benefits.[327] The court did not suggest that the resident move or commute long distances to secure replacement employment.[328]

Other courts have been similarly empathic regarding the practical consequences of rural residents' spatial isolation, holding that an insurer must pay the transportation costs associated with obtaining necessary treatment.[329] As one court expressed, "for citizens living miles from our cities the inability to obtain compensation for transportation expenses may result in life sustaining medical treatment being unavailable."[330] In another matter, the Colorado Supreme Court held that an insurer should reimburse a claimant's wife for providing home health care services, which had been prescribed by his physician, when home health care services were unavailable in his rural community.[331] In a similar vein, the Alabama Supreme Court ruled that an insurer must pay for a physician-prescribed hot tub in the claimant's home when the rural locale in which he lived made travel to a health club unfeasible.[332]

Cases such as these demonstrate judicial empathy for the hardships—including financial costs—associated with spatial isolation, a hallmark of rural life. They also recognize that such hardships aggravate the economic vulnerability that is a constant for many rural residents. Such decisions stand in stark contrast to the lack of understanding judges have shown about these hardships and vulnerabilities in relation to abortion access and other issues that particularly impact rural women.

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[327] *See Weld County*, 955 P.2d at 558.

[328] *See id.* at 560–61 (Kourlis, J., dissenting). While the court never explicitly mentioned the claimants' spatial isolation, it recognized the rural job market realities in its decision to uphold their status as permanently and totally disabled. Indeed, the court wrote that considering a claimant's access to employment "is both reasonable and consistent with the Act's purpose of assisting injured workers who are unable to secure employment." *Id.* at 557. Dissenting Justice Kourlis explicitly mentioned the rural nature of the claimants' locales, stating that they "may have to move to find work, just as someone who is laid off may need to move." *Id.* at 560–61 (Kourlis, J., dissenting). He argued vigorously that "access to employment within the labor market where a claimant resides is not an appropriate factor to consider in awarding permanent total disability benefits." *Id.* at 558.

[329] *See, e.g.*, Allstate Ins. Co. v. Smith, 902 P.2d 1386, 1387 (Colo. 1995).

[330] *Id.* at 1388.

[331] Suetrack USA v. Indus. Claim Appeals Office, 902 P.2d 854, 855–56 (Colo. Ct. App. 1995).

[332] Cont'l Cas. Ins. Co. v. McDonald, 567 So. 2d 1208, 1220 (Ala. 1990). The insurer in that case was found liable for intentional infliction of emotional distress for unreasonably delaying payments to the claimant's health care providers, causing some of them to deny him services and pain medication. *Id.* at 1210. With respect to the hot tub, the insurer had challenged the doctor's recommendation, repeatedly asking him to justify it. *Id.* at 1214–15. The insurer then took the position that "the unavailability of a health spa was due to McDonald's own decision to live in a rural area and that [the insurer] would not want to pay for an expensive hot tub and then have to install another one if McDonald moved." *Id.* at 1215. The appellate court upheld the intentional infliction of emotional distress judgment. *Id.* at 1221–22.

(b) Judicial Bypass Procedures and Lack of Anonymity

Rural women have also been acknowledged in abortion litigation challenging judicial bypass procedures for minors. At issue in the Sixth Circuit Court of Appeals' 1999 decision in *Memphis Planned Parenthood v. Sundquist*[333] were both the spatial isolation associated with rural places and the lack of anonymity people experience there.[334] *Sundquist* examined a Tennessee law that permitted minors to seek judicial bypass of the parental consent requirement, but imposed several restrictions on the process.[335] For example, the minor was required to file her petition in either the county in which she resided or in which the abortion was sought, and to swear that she had consulted with a physician about the abortion before seeking the bypass.[336] The majority upheld the law as constitutional.[337]

Judge Keith, in dissent, discussed at length the particular hurdles faced by rural minors seeking to use the procedure.[338] He focused on both transportation and confidentiality problems.[339] With regard to the former, he noted the lack of trains and the fact that even "buses do not reach the rural areas."[340] With respect to the latter, Judge Keith observed that a "minor's actions can easily be detected by relatives and friends" in rural areas.[341] He included in his dissent numerous detailed anecdotes from the testimony of officials at Memphis's and Knoxville's abortion providers.[342] The Director of Counseling at the Knoxville Center for Reproductive Health testified about problems arising from the law's venue restriction:

> The areas surrounding Knoxville where many of our patients come from *are very rural. It is next to impossible to go to any public place completely undetected.* One minor patient told us she couldn't pursue a

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[333] 1999 FED App. 0162P (6th Cir.), 175 F.3d 456.

[334] Sparsity of population tends to produce a "high density of acquaintanceship" in rural areas. Robert M Moore III, *Introduction* to THE HIDDEN AMERICA, *supra* note 37, at 16 (citing Flora and Flora 1993).

[335] *Id.* at 2–3, 175 F.3d at 459.

[336] *Id.* at 4, 175 F.3d at 459–60.

[337] *Id.* at 8–16, 175 F.3d at 462–66.

[338] *See id.* at 30–40, 51–57, 66–67, 175 F.3d at 473–78, 484–87, 492–93 (Keith, J., dissenting).

[339] *See id.*

[340] *Id.* at 36, 175 F.3d at 476 (quoting the declaration of Connie Simpson, Director of Counseling at the Knoxville Center for Reproductive Health).

[341] *Id.* at 32, 175 F.3d at 474. "Minors who do not have cars, which are most of our clients, must arrange transportation with a friend or a trusted relative. Often rides do not show up and they have to reschedule." *Id.* at 36, 175 F.3d at 476 (quoting the declaration of Connie Simpson, Director of Counseling at the Knoxville Center for Reproductive Health).

[342] *See id.* at 31–36, 175 F.3d at 473–76.

> waiver from the local court because her aunt worked there. Another tried to pursue a waive [sic] in her home county, only to discover the judge assigned to her case was her former Sunday school teacher. She was so afraid of appearing in front of someone who knew her and her parents that she left and did not pursue the waiver.[343]

While lack of anonymity prevented minors from applying for judicial bypass in their home counties, the director also expounded on the difficulties created by the alternative: traveling to the county where the abortion provider is located to apply for judicial bypass there.[344] Noting that some patients must travel as far as six hours to reach Knoxville for an abortion, the director testified that most minors can only get there once—for the medical procedure.[345]

The Director of the Memphis Center for Reproductive Health similarly touched on the confidentiality and transportation issues that plague minors living in rural areas. She shared the anecdote of a patient who was reluctant to get a money order made payable to the abortion clinic.[346] The woman had feared that the tellers at her local bank, who knew her, might disclose her activities to others.[347] The director attested to the particular difficulties minors have in going undetected because the lack of public transportation in rural Tennessee leaves them relying on friends or extended family for transportation, while also factoring in as much as four hours of travel time each way.[348]

Judge Keith responded to this evidence with a compelling and compassionate summation of the situations faced by many young women seeking abortions. He gave special attention to the additional challenges facing those who live in rural areas:

> Sitting in its "ivory tower," the majority ignores the realities of the situation and claims that making phone calls over a forty-eight hour period cannot be characterized as a substantial burden, thereby mocking the plight of these young girls for whom making a single telephone call, particularly during the court's business hours, may mean walking a long distance in a rural area to make a toll call from a public telephone, all without arousing suspicion or having her conversation overheard and her confidentiality destroyed.
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> . . . Furthermore, in the case of small rural towns where this type of bypass may most likely be sought, the minors may feel that their confidentiality and anonymity are also at stake if they have to contact a

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[343] *Id.* at 52, 175 F.3d at 485.
[344] *Id.* at 52–53, 175 F.3d at 485.
[345] *Id.*
[346] *See id.* at 55, 175 F.3d at 486.
[347] *Id.*
[348] *Id.* at 55–56, 175 F.3d at 486–87.

> law office where a relative or acquaintance may be employed as support staff.[349]

Judge Keith thus took seriously the hardships the Tennessee law created—because of spatial isolation and lack of anonymity—for young rural women in particular.

Judicial responses to lack of anonymity in other contexts have been similarly realistic and empathic. As is the case with spatial isolation, courts outside the abortion context have held the lack of anonymity for rural residents is legally relevant.[350] Opinions in both civil and criminal decisions note that rural residents are aware of community events and each others' lives.[351] For example, one court assumed that an informant was more credible because the basis of his knowledge sprang "from rural soil rather than from the faceless anymity [sic] of an urban swarm."[352] The court characterized reputation in a rural place as "better substantiated."[353] The lack of anonymity associated with rural communities arises most often in relation to whether a defendant can get a fair trial in a rural venue.[354]

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[349] *Id.* at 40, 175 F.3d at 478.

[350] *See supra* note 126.

[351] *See, e.g.*, Roberts v. Dutton, 368 F.2d 465, 470 (5th Cir. 1966) (taking judicial notice that in a rural county "information concerning witnesses and events is more generally known than in large cities"), *cited in* Foxworth v. State, 267 So. 2d 647, 651 (Fla. 1972); State v. Havlena, No. A-98-069, 1998 WL 939628, at *3 (Neb. Ct. App. Dec. 8, 1998) (noting that the circumstances of a convict ordered to pay restitution is not a "deep secret" in a rural community).

[352] Stanley v. State, 313 A.2d 847, 855 n.7 (Md. Ct. Spec. App. 1974) (citing United States v. Harris, 403 U.S. 573 (1971)).

[353] *Id.*; *see also* State v. Missamore, 761 P.2d 1231, 1232 (Idaho Ct. App. 1988) (recounting the fact that a police officer stopped the defendant driver based on the officer's personal knowledge that the defendant had no driver's license).

[354] *See, e.g.*, Knapp v. Leonardo, 46 F.3d 170, 181 (2d Cir. 1995) (Oakes, J., dissenting) (arguing for grant of habeas petition because eighty-three percent of 1417 members of the jury pool were disqualified for cause from an emotionally super-charged trial in rural New York); State v. Hunter, 740 P.2d 559, 565 (Kan. 1987) (suggesting jury selection should be more closely scrutinized in rural areas where it is "inevitable that members of jury panel will be acquainted with trial participants or victims"); State v. Brown, 610 P.2d 655, 660–61 (Kan. Ct. App. 1980) (stating the exercise of peremptory challenges in chambers is acceptable in rural areas because jurors are often known to parties and counsel).

Mere acquaintance by jurors with a party or attorney is often insufficient to justify a change in venue or to constitute error. *See, e.g.*, Payton v. State, 2001-KA-01658-SCT (¶ 130) (Miss. 2003) (noting it was "not unusual for potential jurors to know parties and witnesses in trials" in rural areas, but where jurors assure courts they can be impartial, there is no error to permit them to serve on a jury); Jernigan v. State, 475 S.W.2d 184, 186 (Tenn. Crim. App. 1971) (stating "[m]any cases are tried in rural areas wherein all of the jurors know all of the lawyers, litigants and witnesses" and this is not necessarily grounds for a mistrial); State v. Brooks, 563 P.2d 799, 801 (Utah 1977) (finding it "almost impossible, in some of our rural counties, to choose a jury who did not know witnesses and

A North Carolina decision held the defendant could not have gotten a fair trial in a "small, rural and closely-knit county where the entire county was, in effect, a neighborhood."[355]

The issue of bias stemming from familiarity in rural communities arises in civil cases, too. Judges sometimes refer to "word-of-mouth publicity,"[356] or even "gossip"[357] that may impede seating an unbiased jury in a rural venue.[358] The North Dakota Supreme Court in 1994 characterized most of the state's counties as places where "most jurors know something about every person in the county, their families, or their businesses."[359]

In light of judicial recognition of the lack of anonymity that characterizes rural areas, judicial failure to take seriously this reality as it relates to abortion

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did not know the parties or something about the parties," and holding that knowledge alone was insufficient to disqualify a person from jury service).

[355] State v. Jerrett, 307 S.E.2d 339, 348 (N.C. 1983); *see also* State v. Vereen, 324 S.E.2d 250, 257–58 (N.C. 1985) (distinguishing the case at bar from *Jerrett*). In *Jerrett*, the court overturned the conviction and granted a new trial to a defendant who had been tried in a county with fewer than 10,000 inhabitants. 307 S.E.2d at 348–49. The victim in that case was "a well-known and respected dairy farmer," and a third of potential jurors had "acknowledged familiarity" with him or some member of his family. *Id.* at 348. *But cf.* State v. McKisson, No. COA02-955, 2003 WL 21649214, at *6 (N.C. Ct. App. July 15, 2003) (upholding denial of change of venue where jurors did not personally know the victims or their families, in spite of the defendant's arguments that the crime had "rocked" the rural county and pretrial publicity had "infected" the jury pool).

[356] *See, e.g.*, State v. White, 316 S.E.2d 42, 44 (N.C. 1984).

[357] *See, e.g.*, People v. Nesler, 941 P.2d 87, 109 n.1 (Cal. 1997) (Baxter, J., dissenting) (stating that a "hometown trial [in a rural community] entailed the strong chance that jurors would hear gossip about the case and about defendant," and referring to the "likelihood of local gossip, rumor, and discussion of the case within this close-knit community"); State v. Breding, 526 N.W.2d 465, 468–69 (N.D. 1995) (refusing change of venue and noting that to accept the defendant's argument—that "rumor, gossip, and speculation 'small community living generates as a matter of course' should have been sufficient alone to support his motion"—would require a change of venue in every serious criminal prosecution in a rural county).

[358] *See, e.g.*, Wolfe v. Brigano, 2000 FED App. 0394P at 8 n.1 (6th Cir.), 232 F.3d 499, 504 n.1 (Wellford, J., concurring) (quoting the trial judge's acknowledgment that "'we're in a small community and you hear matters, and . . . you read things'" (alteration in original)); Roberts v. C.W. Adams & Son Co., 110 S.W. 314, 316 (Ky. 1908) (describing a rural neighborhood "where everybody knows in a general way everybody's business").

[359] State v. Brooks, 520 N.W.2d 796, 802 (N.D. 1994) (Meschke, J., concurring) (justifying North Dakota Rule of Evidence 606(b), which does not permit affidavits, evidence, or testimony by a juror about the jury's discussion, even when a juror discloses to the others some personal knowledge about a party); *see also* Farmers Union Grain Terminal Ass'n v. Nelson, 223 N.W.2d 494, 499–500 (N.D. 1974) (noting the difficulty in finding a family in a rural community who had not done business with the defendant-owned or -operated facility, but that this would not indicate a direct relationship that should disqualify the person from jury service).

regulations is especially striking and unfortunate. In an early essay on *Roe v. Wade*, Catharine MacKinnon argued that most women do not control the conditions under which they have sex.[360] She asserted that women may be reluctant to use birth control because of its social meaning—specifically signaling a woman's sexual availability.[361] A related argument applies to rural women, who may be less likely to use contraceptives because of their lack of anonymity in seeking such services in their communities.[362] This is surely also true regarding abortion, particularly given the more conservative attitudes rural residents tend to hold regarding it.[363] The prevalence of such attitudes is all the more reason rural women may be deterred from abortion by judicial bypass processes that so casually risk their anonymity, and it is all the more reason such processes should respond to this rural reality.

4. Summary

Given that abortion is the sole legal context in which courts have been confronted with realities of rural women as a class, it is an understatement to say that the response has been disappointing. *Casey* and its progeny have consistently discounted or denied the impact that spatial isolation and lack of anonymity have on rural women who seek to exercise their constitutional right to procure an abortion. Suggesting that physical distance, lack of transportation, economic vulnerability, and lack of anonymity are insufficient to deter women from pursuing an abortion—that these are not substantial obstacles—is callous and insulting. This is particularly so when those deciding sit, as Judge Hamilton put it in his dissent in *Greenville Women's Clinic v. Bryan*, amidst an urban sprawl, with myriad services and with public transportation to facilitate their access and use.[364]

These decisions are especially disappointing in light of the law's recognition elsewhere of the hardships associated with these aspects of rural living. They are also somewhat puzzling because federal judges in another abortion context have called attention to the plight of rural women. In contrast to the lack of empathy the same courts have shown to rural women in relation to application of the undue

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[360] *See generally* CATHARINE A. MACKINNON, *Privacy v. Equality: Beyond* Roe v. Wade, *in* FEMINISM UNMODIFIED: DISCOURSES ON LIFE AND LAW (1987), *discussed in* CHAMALLAS, *supra* note 2, at 48.

[361] *Id.* at 93–102.

[362] Professor Fiene's study of rural Appalachian women found a common ideology that "[a] good mother welcomes all of her pregnancies and does not attempt to terminate any of them . . . . A good mother does not consider abortion a reproductive option even when her pregnancy is the result of rape." FIENE, *supra* note 30, at 44–45.

[363] *See supra* notes 31–32 and accompanying text.

[364] *See* Greenville Women's Clinic v. Bryan, 222 F.3d 157, 202 (4th Cir. 2000) (Hamilton, J., dissenting); *see also supra* notes 253–256 and accompanying text (discussing *Casey*'s core holding regarding mandatory waiting periods); *supra* Part III.C.2 (discussing the burden that a waiting period imposes on rural women).

burden test, courts upholding the constitutionality of the Freedom of Access to Clinic Entrance Act ("FACE")[365] have relied on the needs of rural women to justify their decisions.

For example, in 2000 the Third Circuit, in *United States v. Gregg*, upheld FACE, concluding that the misconduct it proscribes exacerbates the "shortage of abortion-related services [that] exists in this country."[366] The court noted that eighty-three percent of all U.S. counties have no abortion provider, and that the shortage is particularly acute in rural areas because reproductive health clinics tend to be "located primarily in metropolitan areas."[367] Ironically, this is the same court of appeals that, in *Casey*, dismissed a statistic demonstrating that eighty-two percent of Pennsylvania counties have no provider. "In a rural community," the Third Circuit wrote in *Gregg*, "only one provider usually exists in a large geographical area, thus making it a preferred target for anti-abortionists because elimination of that provider eliminates abortion services for all women in that area."[368]

While *Gregg* and other FACE decisions have acknowledged rural realities associated with physical distance in the context of concluding that an interstate market for abortion services exists, courts applying the undue burden test have stubbornly downplayed this fact and the gravity of the obstacles it creates for rural women. *Gregg* observed that the closure of an abortion clinic would "*eliminate*[] abortion services for all women" in a rural area that had a single abortion provider.[369] *Casey* and its progeny, by contrast, have assumed that rural women will be able to get abortions regardless of the distance they must travel to an abortion provider, even if they must stay overnight or make the trip twice. Current "undue burden" precedents—in sharp contrast to *Gregg*'s "elimination" language—conclude that rural women will simply experience inconvenience in exercising this fundamental right.

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[365] Freedom of Access to Clinic Entrance Act of 1994, 18 U.S.C. § 248 (2006).

[366] 226 F.3d 253, 263 (3d Cir. 2000) (citing S. REP. NO. 103-117, at 17); *see also* United States v. Bird, 124 F.3d 667, 679 (5th Cir. 1997) (upholding the constitutionality of FACE, relying on Congress's commerce clause power; among the supporting facts was that the only abortion provider in South Dakota commutes from Minnesota); United States v. White, 893 F. Supp. 1423, 1426 (C.D. Cal. 1995) (finding that violent attacks on abortion facilities "sharply curtail access to health care for many women, particularly women living in rural areas" (citation omitted)). Indeed, *Terry v. Reno* discusses how abortion violence in some rural areas forced medical clinics to "stop providing not only abortions, but other reproductive services as well, including pre- and postnatal care." 101 F.3d 1412, 1416 (D.C. Cir. 1996).

[367] *Gregg*, 226 F.3d at 264.

[368] *Id.* (citing H.R. REP. NO. 103-306, at 8, *reprinted in* 1994 U.S.C.C.A.N. 699, 705).

[369] *Id.* (emphasis added).

IV. CONCLUSION

> *No law addresses the deepest, simplest, quietest, and most widespread atrocities of women's everyday lives. The law that purports to address them . . . does not reflect their realities or . . . is not enforced. It seems either the law does not exist, does not apply, is applied to women's detriment, or is not applied at all. The deepest rules of women's lives are written beneath or between the lines, and on other pages.*[370]

Angela Harris argued almost two decades ago that, "to energize legal theory, we need to subvert it with narratives and stories, accounts of the particular, the different, the hitherto silenced."[371] I have sought to do precisely that here: to surface the stories of rural women, one group who have been overlooked, misunderstood, and thus silenced. Rural women have been silenced not only because of the lack of power that stems from socioeconomic disadvantage, but also because of their physical distance from public places, from centers of power, from services, and from opportunities of all sorts.[372] The deepest atrocities of their everyday lives have often gone unseen, without legal redress, due in part to that geographic isolation, but also because of our society's pervasive urban presumption.

The vulnerability and hardship with which rural women live have been discounted as the state has taken away their children and faulted them for their acts of self-preservation. The fundamental right to abortion has been denied to many of them as restrictions on that right have been upheld as inconsequential, even as evidence has shown how heavily the restrictions weigh upon them. To the extent the law has recognized the difficulty inherent in their situations, it has often blamed the women for their circumstances.

Judges in many of the cases discussed in this Article may not understand that rural women generally have less economic, social, cultural, and political power than both urban residents and rural men. They may not understand that spatial isolation and lack of anonymity limit these women. If judges are not from rural areas or have no first-hand information about them, they may have no ability to empathize with rural people—and rural women in particular.[373] The lack of knowledge or ability to empathize suggests that judges may be making decisions based on unfounded assumptions about how rural people live.[374] If, on the other

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[370] MACKINNON, *supra* note 1, at 34.

[371] Harris, *supra* note 10, at 615.

[372] *See* Tickamyer, *supra* note 6, at 740–41.

[373] Professor Lynne Henderson has written of the significance of empathy in judging. *See generally* Lynne N. Henderson, *Legality and Empathy*, 85 MICH. L. REV. 1574 (1987).

[374] This statement is drawn from similar language by Justice Thurgood Marshall: "[I]t is disgraceful for an interpretation of the Constitution to be premised upon unfounded

hand, legal decision makers are familiar with and do understand rural realities, they are wrong to assume that these women are free, equal, and responsible when they fail to hold a job or contact their children, do not simply walk away from an abusive relationship, or cannot get an abortion in the face of very real obstacles.[375]

Rural women do not play on the same field as urban women any more than women of color play on the same field as white women. We no longer presume laws serving the interests of women in the United States will always serve the interests of women in other countries. We understand that laws do not operate in a social or cultural vacuum. Just as we have become sensitive to place and culture on an international level,[376] we must recognize its variance domestically. We must become sensitive to rurality, which we can only begin to do by acknowledging its very existence, by first seeing it.

While I have described rural women here as a group with many common concerns, I am acutely aware of differences among rural communities,[377] as well as

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assumptions about how people live." United States v. Kras, 409 U.S. 434, 460 (1973) (Marshall, J., dissenting), *quoted in* Henderson, *supra* note 373, at 1574.

[375] This statement is analogous to one by Catharine MacKinnon, who wrote: "The assumption is that women can be unequal to men economically, socially, culturally, politically, and in religion, but the moment they have sexual interactions, they are free and equal." CATHARINE A. MACKINNON, ARE WOMEN HUMAN? AND OTHER INTERNATIONAL DIALOGUES 8 (2006).

[376] *See, e.g.*, Leti Volpp, *Feminism Versus Multiculturalism*, 101 COLUM. L. REV. 1181 (2001) (arguing that feminism should not be pitted against multiculturalism); Madhavi Sunder, *Piercing the Veil*, 112 YALE L.J. 1399 (2003) (arguing that women in Islamic cultures are fighting to construct their identities within those religious and cultural communities). Such accommodation of place and culture is also reflected in the doctrine of margin of appreciation as applied by the European Court of Human Rights. The doctrine seeks to balance the sovereignty of contracting parties with their obligations under the European Convention on Human Rights. It recognizes the "diversity of political, economic, cultural and social situations" in the various societies. *See* THE EUROPEAN SYSTEM FOR THE PROTECTION OF HUMAN RIGHTS 83 (Ronald St. J. Macdonald et al. eds., 1993).

Interestingly, Cynthia Bowman has recognized the significance of the rural/urban axis in the context of intimate violence in sub-Saharan Africa. She has observed, for example, that different legal responses may be appropriate in rural settings, where customary law still holds greater sway, than in urban ones. *See, e.g*, Cynthia Bowman, *Domestic Violence: Does the African Context Demand a Different Approach?* 26 INT'L J. L. & PSYCH. 473, 486–87, 491 (2003) (concluding that "a diversity of remedies and approaches is necessary to address the problem of domestic violence in the diverse communities that exist in America as well").

[377] A common expression among rural scholars is, "When you've seen one rural area, you've seen one rural area." *See* RURAL POVERTY RESEARCH CTR., *supra* note 34, at 3; *see also* Charles W. Fluharty, *Refrain or Reality: A United States Rural Policy*, 23 J. LEGAL MED. 57, 58 (2002) (noting that diversity among rural areas creates a public policy challenge); J. Dennis Murray & Peter A. Keller, *Psychology and Rural America: Current Status and Future Directions*, 46 AM. PSYCHOL. 220, 222 (1991) (noting diversity in cultures, occupations, wealth, lifestyles, and physical geography across rural America).

among rural women. I acknowledge that my analysis has tended to essentialize the rural; indeed, it has also essentialized certain characteristics associated with rural places. But "[e]ven a jurisprudence based on multiple consciousness must categorize," for without categorization, each individual is isolated, thus impeding social change.[378] I have therefore named the category "rural women," even while agreeing with Angela Harris that such categories should be "explicitly tentative, relational, and unstable."[379]

Like any other aspect of one's situation or any marker of identity, living in a rural area or "being a rural woman" does not exist in isolation. Barbara Ching and Gerald Creed, in arguing for scholarly attention to the rural-urban dichotomy, observed that social theorists

> generally fail to acknowledge that a rural woman's experience of gender inequality may be quite different from that of an urban woman, or that racial oppression in the city can take a different form from that in the countryside . . . . [C]ontemporary discussions of the fragmentation and recombination of identities locate this process almost exclusively in the city.[380]

Thus, law's failure to see the role of place and to take seriously the ways in which rural places differ from the presumed urban norm has seriously restricted our understanding not only of place, but also of other aspects of identity.[381] Law's assumption of an urban setting fails not only to recognize rurality, but also to see how rurality "inflects other dimensions such as race, class, gender, and ethnicity."[382] This must change if the law is to do justice in the lives of rural women.

Other opportunities for investigating the intersection between gender and place thus present themselves. This Article has focused largely on two aspects of rurality: spatial isolation and lack of anonymity. More work remains to be done not only regarding other characteristics associated with rural places, but also regarding social constructions of rural identity.[383] In addition, considering women's productive and reproductive roles in an explicitly rural context, while also assessing the links between these roles and rural culture, can help us further appreciate their complexity.[384]

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[378] Harris, *supra* note 10, at 586.

[379] *Id.*

[380] Creed & Ching, *supra* note 9, at 3.

[381] *See id.* at 27.

[382] *Id.* at 22.

[383] *Id.* at 3 (noting the lack of interest in the rural-urban dichotomy among those studying identity politics).

[384] *See* Tickamyer, *supra* note 6, at 723 (calling for inquiry into the "complexities of the relationship between women's productive and reproductive roles and activities, the

While I have begun in this Article the task of theorizing the rural, practical lessons may also be taken from my analysis and critique.[385] First, it does not pay to be subtle about rural realities. Lawyers litigating cases such as those discussed must be willing to describe rural settings in detail and to explain how the rural context alters power dynamics and limits actors' options, whatever the legal right or issue at stake. Judges and other legal decision makers must be taught how rurality creates disadvantage and constrains autonomy.

Second, use of this word "rural" may disserve rural women. I have characterized as "rural" many of the situations and settings discussed, just as the litigants, attorneys, or judges did. However, rural women as litigants might be wiser to use terms such as "spatial isolation" or "lack of anonymity" to focus on the precise rural characteristic that describes the critical aspect of context. Doing so should help moderate the rhetorical potency of the term "rural," which so often carries positive, even idyllic associations.[386] Those associations and the notion that rural hardships are ameliorated by the scenic and serene aspects of rural living may otherwise obscure the challenges the rural resident is facing.[387]

As Judith Baer has observed, "[f]acts do not interpret themselves."[388] Judges and juries apply law to facts and, in so doing, give legal consequence (or the lack of it) to those facts. Those who care about the well-being of women—all women—

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ways these link to other societal and community roles and responsibilities, and notably, the intersection between gender and spatial dimensions of poverty and welfare").

[385] *See* BAER, *supra* note 1, at 80. "While we claim to derive theory from experience, the human mind cannot make sense of experience without some sort of theory, however rudimentary . . . [I]t is misleading to say that theory comes from practice; they reinforce each other." *Id.*

[386] *See* Pruitt, *supra* note 4, at 161–68.

[387] Rural sociologists have observed the "largely nostalgic and romantic image of rural living," along with the myth of "country living and family life as simple, pure, and wholesome; slower paced; free from pressures and tensions; and surrounded by pastoral beauty and serenity." Raymond T. Coward & William M. Smith, Jr., *Families in Rural Society*, *in* RURAL SOCIETY IN THE U.S., *supra* note 22, at 77. Rural communities are commonly envisioned as "safer, friendlier, better places to raise children, as having a simpler lifestyle, cleaner environment, and as being closer to outdoor recreation." Andrew J. Sofranko, *Transitions in Rural Areas of the Midwest and Nation*, *in* RURAL COMMUNITY ECONOMIC DEVELOPMENT 21, 34 (Norman Walzer ed., 1991); *see also* W.K. KELLOGG FOUND., THE MESSAGE FROM RURAL AMERICA 2004 VS. 2002, at 1 (2004), *available at* http://www.wkkf.org/Pubs/FoodRur/Media_Coverage_of_Rural_America_00253_04093.pdf (finding seventy-seven percent of the terms the media used to describe rural America in 2004 had a positive tone, including praise for residents' behavior such as "good values" and "strong work ethic," and aesthetic judgments such as "picturesque" and "pastoral," while only twenty-three percent were negative); W.K. KELLOGG FOUND., PERCEPTIONS OF RURAL AMERICA 6–8 (2004), *available at* http://www.wkkf.org/pubs/FoodRur/Pub2973.pdf (discussing the "overwhelmingly positive view of the people, the values, and the culture of rural America").

[388] BAER, *supra* note 1, at 80.

must find new ways to help legal decision makers understand the relevance of the sometimes harsh reality in which rural women live and make decisions. Catharine MacKinnon has written that it is an "aspiration indigenous to women across place and across time" to be "no less than men . . . not to lead a derivative life, but to do everything and be anybody at all."[389] Rural women share that aspiration, and feminist theory can inform practice to help them realize it.

[389] Catharine A. MacKinnon, *Whose Culture? A Case Note on* Martinez v. Santa Clara Pueblo, *in* FEMINISM UNMODIFIED, *supra* note 360, at 63, 67–68.

Comment

BAPCPA'S NEW SECTION 109(H) CREDIT COUNSELING REQUIREMENT: IS IT HAVING THE EFFECT CONGRESS INTENDED?

Michael Newman*

[BAPCPA] contains several provisions that seek to improve consumers' financial literacy in an attempt to decrease the total number of future bankruptcy filings.[1]

I. INTRODUCTION

The Bankruptcy Abuse Prevention and Consumer Protection Act ("BAPCPA")[2] was enacted overwhelmingly by both houses of Congress[3] and signed by the President on June 30, 2005.[4] The majority of BAPCPA's provisions took effect on October 17, 2005,[5] although a handful of its provisions took effect immediately.[6] BAPCPA's reputation as being much tougher on debtors than prior versions of the Bankruptcy Code[7] preceded it.[8]

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[1] 151 CONG. REC. E685, E704 (2005) (statement of Rep. Moore).

[2] Bankruptcy Abuse Prevention and Consumer Protection Act of 2005, Pub. L. No. 109-8, 119 Stat. 23 (codified as amended at 11 U.S.C. §§ 101 to 1532 (2006)) [hereinafter BAPCPA].

[3] BAPCPA was passed with a vote of 302 to 126 in the House and 74 to 25 in the Senate. WILLIAM D. WARREN & DANIEL J. BUSSEL, BANKRUPTCY 515 (7th ed. 2006).

[4] *See* 151 CONG. REC. H5482, H5598 (2005).

[5] *See* 11 U.S.C. § 101 note.

[6] Some BAPCPA provisions took effect immediately upon enactment. For example, several amendments to the homestead exemptions were effective immediately. *See id.* § 522(o)–(q).

[7] BAPCPA was enacted at the behest of creditors to make access to bankruptcy relief more difficult. *See supra* note 1 and accompanying text (quoting Representative Moore of Kansas, whose statement before Congress on April 14, 2005, suggested that BAPCPA's credit counseling provision is aimed at ultimately decreasing bankruptcy filings).

[8] Bankruptcy courts across the country experienced an unprecedented rise in consumer bankruptcy filings. *See, e.g.*, Clifford J. White III, *USTP's Top Priority: Making Bankruptcy Reform Work*, AM. BANKR. INST. J., June 2006, at 16, 16 (noting the

A. BAPCPA's New Credit Counseling Requirement

Among the various new provisions added by BAPCPA is 11 U.S.C. § 109(h),[9] which imposes a "credit counseling" requirement[10] on all individuals[11] seeking protection under title 11.[12] Section 109(h) requires debtors to obtain credit counseling from an approved, non-profit credit counseling agency[13] within 180 days prior to filing a bankruptcy petition.[14]

The credit counseling requirement is a product of Congress's increased awareness of the growing perception that bankruptcy was too easy to access and had become a first resort in some cases, instead of the last resort that it should be.[15] Congress's intent in enacting the new credit counseling provisions of BAPCPA was thus to encourage individual consumer debtors to consider bankruptcy a

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"unprecedented number of bankruptcy filings in the four weeks leading up to Oct. 17, 2005").

[9] All future statutory references are to BAPCPA, 11 U.S.C. §§ 101 to 1532 (2006), effective October 17, 2005, unless otherwise specifically noted. Any reference to the Bankruptcy Code as it existed prior to the 2005 amendments are referred to as 11 U.S.C. §§ 101 to 1330 (2000) or "Pre-BAPCPA §§ 101 to 1330."

[10] 11 U.S.C. § 109(h)(1) ("*[A]n individual may not be a debtor under this title* unless such individual has, during the 180-day period preceding the date of filing of the petition by such individual, received . . . an individual or group briefing . . . that outlined the opportunities for available credit counseling and assisted such individual in performing a related budget analysis." (emphasis added)).

[11] Debtors have argued, creatively, that by imposing the credit- counseling requirement only on individuals, it violates the equal protection clause. The courts have rejected this argument. *See, e.g.*, *In re* Hedquist, 342 B.R. 295, 299–300 (B.A.P. 8th Cir. 2006) (holding that § 109(h) does not violate the equal protection clause); *In re* Watson, 332 B.R. 740, 746–47 (Bankr. E.D. Va. 2005) (finding the requirement that only individuals must obtain credit counseling, not business associations, does not violate the Constitution's equal protection clause).

[12] "Title 11" refers to the Bankruptcy Code, which is found in title 11 of the United States Code.

[13] 11 U.S.C. § 111 describes which entities may be a "nonprofit budget and credit counseling agency," and procedures for their approval.

[14] *Id.* § 109(h)(1).

[15] *In re* Tomco, 339 B.R. 145, 151–52 (Bankr. W.D. Pa. 2006) (citing H.R. REP. NO. 109-31, pt. 1, at 4 (2005), *reprinted in* 2005 U.S.C.C.A.N. 88, 90 ("[T]here is a growing perception that bankruptcy relief may be too readily available and is sometimes used as a first resort, rather than a last resort.")).

"remedy of last resort," by forcing debtors to learn about the consequences of filing bankruptcy and the available non-bankruptcy alternatives.[16]

Generally speaking, the consequences of a debtor's failure to comply with the eligibility provisions of section 109 (entitled "Who may be a debtor") are far more severe than the consequences of failure to comply with the "routine" filing requirements of section 521 (entitled "Debtor's duties").[17] Specifically, by placing the credit counseling requirement in section 109, which requires compliance pre-petition in order to be eligible to be a debtor in title 11, Congress placed a much less forgiving duty on debtors than if Congress had made the requirement one of the section 521 "duties," which may be performed post-petition.[18] Furthermore, the "safe harbor" provision of BAPCPA's section 109(h)(3) is limited and creates an exception for non-compliant bankruptcy petitioners to obtain credit counseling post-petition only where he or she can prove "exigent circumstances" that the court believes merit a waiver.[19] Otherwise, if a petitioner fails to comply with section

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[16] *See* H.R. REP. NO. 109-31, pt. 1, at 2 (2005), *reprinted in* 2005 U.S.C.C.A.N. 88, 89 ("[The bill] requires debtors to receive credit counseling before they can be eligible for bankruptcy relief so that they will make an informed choice about bankruptcy, its alternatives, and consequences.").

It is interesting to note that although credit card companies were among the strongest advocates for the credit-counseling requirements, historically they have been largely uncooperative in the credit counseling process. *See* 151 CONG. REC. S2306, S2313 (daily ed. Mar. 9, 2005) (statement of Director Jean Ann Fox et al., Consumer Federation of America) ("[T]he credit card companies that created credit counseling have taken steps in recent years that undermine it as a viable alternative to bankruptcy for some consumers. . . . Unfortunately, credit card companies in recent years have become increasingly unwilling to reduce interest rates for consumers in credit counseling, which has led to more bankruptcy filings.").

[17] *See* 11 U.S.C. §§ 109, 521. Section 521, the "Debtor's duties" section, spells out the documents a debtor must file and the actions a debtor must take. *In re* Thompson, 344 B.R. 899, 903 (Bankr. S.D. Ind. 2006).

[18] *See* 11 U.S.C. § 521.

[19] Section 109(h)(3)(A) states:

> Subject to subparagraph (B), the requirements of paragraph (1) shall not apply with respect to a debtor who submits to the court a certification that—(i) describes exigent circumstances that merit a waiver of the requirements of paragraph (1); (ii) states that the debtor requested credit counseling services from an approved nonprofit budget and credit counseling agency, but was unable to obtain the services referred to in paragraph (1) during the 5-day period beginning on the date on which the debtor made that request; and (iii) is satisfactory to the court.

Id. § 109(h)(3)(A).

109(h), he or she is simply not eligible for bankruptcy relief under any chapter of the Bankruptcy Code.

B. BAPCPA's New Automatic Stay Limitations

Another key feature of BAPCPA are the alterations made to the automatic stay provisions of section 362, which severely limit the availability of the automatic stay to debtors. The automatic stay has traditionally been considered one of the most important and powerful debtor protections under the Code.[20] Section 362's stay of creditors' and others' actions against the debtor traditionally were imposed immediately and automatically[21] upon the filing of a bankruptcy petition.[22]

BAPCPA added sections 362(c)(3) and (4)[23] in order to further Congress's objective of preventing debtor abuses of the bankruptcy process. Specifically, Congress wished to deter serial filings[24] by debtors.[25] The effect of BAPCPA's

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[20] *See In re* Russo, 94 B.R. 127, 129 (Bankr. N.D. Ill. 1988) (noting that the automatic stay gives debtors "one of the most powerful weapons known to the law"). The term "Code," as used herein, refers to the Bankruptcy Code, which is found at title 11 of the United States Code.

[21] Section 362 provides eight types of actions that are immediately stayed upon the filing of the bankruptcy petition. *See* 11 U.S.C. § 362(a); *see also Russo*, 94 B.R. at 129.

[22] The Code defines the term "petition" as meaning a "petition filed under . . . [title 11], commencing a case under [title 11]." 11 U.S.C. § 101(42).

[23] Section 362(c)(3) and (4) states:

> (3) [I]f a single or joint case is filed by . . . an individual . . . and if a single or joint case of the debtor was pending within the preceding 1-year period but was dismissed . . . —(A) the stay under subsection (a) with respect to any action taken with respect to a debt or property securing such debt or with respect to any lease shall terminate with respect to the debtor on the 30th day after the filing of the later case; . . . (4)(A)(i) if a single or joint case is filed by . . . an individual under this title, and if 2 or more . . . cases of the debtor were pending within the previous year but were dismissed, . . . the stay . . . shall not go into effect upon the filing of the later case . . . .

Id. § 362(c)(3)–(4).

[24] The phrase "serial filing" refers to a situation where debtors file a petition and later voluntarily dismiss the case, solely to invoke the protections of the automatic stay in the face of collection actions by creditors with a security interest in real property. *See, e.g.*, *In re* Seaman, 340 B.R. 698, 708 (Bankr. E.D.N.Y. 2006); *see also* 11 U.S.C. § 109(g)(2) (excluding a debtor from eligibility under any chapter of title 11, for a period of 180 days, if the debtor "obtained the voluntary dismissal of [another] case following the filing of a request for relief from the automatic stay").

sections 362(c)(3) and (4) is to severely limit the availability of the automatic stay to debtors with one or more prior dismissed cases during the preceding year.[26]

C. The Credit Counseling Dilemma

As well-intentioned as its enacting legislators may have been, in practice BAPCPA's provisions appear to bring more confusion than aid to an already-criticized bankruptcy system.[27] Since BAPCPA took effect in October 2005, the courts have struggled to interpret its provisions. Indeed the only matter judges seem to agree upon is that Congress largely failed to provide clarity either in the BAPCPA provisions themselves or in the legislative history behind BAPCPA.[28] Courts have struggled to interpret even the most fundamental of provisions of the Code.[29]

The BAPCPA pre-filing credit counseling requirements appear clear and simple in their effect: generally, under section 109(h), a petitioner[30] who fails to obtain counseling before filing for bankruptcy is ineligible to be a debtor.[31]

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[25] *See* H.R. REP. NO. 109-31, pt. 1, at 2 (2005), *reprinted in* 2005 U.S.C.C.A.N. 88, 89 ("With respect to the interests of creditors, the proposed reforms respond to many of the factors contributing to the increase in consumer bankruptcy filings, such as . . . the proliferation of serial filings . . . .").

[26] *See* 11 U.S.C. § 362(c)(3)–(4).

[27] *See, e.g.*, Edith H. Jones & Todd J. Zywicki, *It's Time for Means-Testing*, 1999 BYU L. REV. 177, 177 (noting that bankruptcies rapidly increased despite no significant growth in consumer financial distress during the same period).

[28] *See, e.g.*, *In re* Donald 343 B.R. 524, 529 (Bankr. E.D.N.C. 2006) ("Unfortunately, the BAPCPA amendments . . . are confusing, overlapping, and sometimes self-contradictory. They introduce new and undefined terms that resemble, but are different from, established terms that are well understood. Furthermore, the new provisions address some situations that are unlikely to arise. Deciphering this puzzle is like trying to solve a Rubik's Cube that arrived with a manufacturer's defect.").

[29] For example, the courts have struggled to apply BAPCPA's provisions governing the calculation of a debtor's required monthly payment under a chapter 13 repayment plan. *See, e.g.*, *In re* Jass, 340 B.R. 411, 415–19 (Bankr. D. Utah 2006); *In re* Hardacre, 338 B.R. 718, 724–28 (Bankr. N.D. Tex. 2006).

[30] For purposes of this Comment, the term "petitioner" refers to an individual who has filed a bankruptcy petition, whether or not that individual has satisfied the Code's section 109 eligibility requirements for being a "debtor." *See* 11 U.S.C. § 109.

[31] Again, BAPCPA provides for a limited extension for debtors who certify that they face "exigent circumstances" and that they requested but were unable to obtain counseling from an approved agency within five days after requesting it. *See supra* note 19 and accompanying text. At least one court held that a debtor need only contact a single credit-counseling agency before filing a certification under section 109(h)(3). *See In re* Hubbard, 333 B.R. 377, 387 (Bankr. S.D. Tex. 2005).

However, much less clear and simple is how to dispose of a bankruptcy petition where the individual who filed the petition failed to satisfy the credit counseling requirements of section 109(h).[32] The majority of courts addressing the issue have found that the court must "dismiss" the "case."[33] A minority of the courts that have tackled the matter have held that the court must "strike" the individual's bankruptcy petition, because no "case" exists to be dismissed, unless and until the individual has become a "debtor" by complying with the credit counseling requirements of section 109(h).[34]

At first glance, the distinction between dismissing and striking may seem insignificant. Indeed, prior to BAPCPA, it was a meaningless distinction.[35] However, under BAPCPA, whether a "case" existed during the preceding year and whether it was dismissed has become crucial to debtors, as it directly impacts whether and for how long a debtor will receive the protection of section 362's automatic stay. Under section 362(c)(3)(A), the automatic stay automatically terminates after thirty days where the debtor had one prior pending case during the preceding year that was dismissed.[36] Under section 362(c)(4)(A), the automatic

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[32] It is interesting to note that courts are also split on whether a debtor must obtain credit counseling at least one calendar day prior to the petition date or whether the debtor may obtain the counseling on the day of filing. *Compare, e.g.*, *In re* Mills, 341 B.R. 106, 109 (Bankr. D.D.C. 2006) (interpreting the language of section 109(h) as requiring that "[a] person must obtain credit counseling . . . on a date prior to the petition date to be eligible for relief under title 11"), *with In re* Warren, 339 B.R. 475, 480 (Bankr. E.D. Ark. 2006) (holding that a debtor can satisfy the credit-counseling requirement of section 109(h) by completing the credit counseling on the day of filing).

[33] *See In re* Tomco, 339 B.R. 145, 157 (Bankr. W.D. Pa. 2006) ("[M]ost courts have chosen to simply dismiss a case filed by an ineligible debtor."); *see also In re* DiPinto, 336 B.R. 693, 699–700 (Bankr. E.D. Pa. 2006); *In re* Rodriguez, 336 B.R. 462, 477 (Bankr. D. Idaho 2005); *In re* Sosa, 336 B.R. 113, 115 (Bankr. W.D. Tex. 2005); *In re* Watson, 332 B.R. 740, 747 (Bankr. E.D. Va. 2005).

[34] *See Tomco*, 339 B.R. at 157 ("[A] minority of other courts have instead implemented the practice of 'striking' the petitions . . . in an effort to avoid the 'one strike' consequences elucidated above."); *see also In re* Rios, 336 B.R. 177, 179–80 (Bankr. S.D.N.Y. 2005); *Hubbard*, 333 B.R. at 387.

[35] *See In re* Thompson, 344 B.R. 899, 904 (Bankr. S.D. Ind. 2006) (observing that before BAPCPA, "it made little difference whether a case of an [sic] debtor ineligible for relief under other sections of § 109 was dismissed or stricken because the termination of the case did not affect a debtor's ability to trigger the full advantages of the automatic stay in a subsequently filed case"); *see also In re* Salazar, 339 B.R. 622, 633 (Bankr. S.D. Tex. 2006) (concluding that whether a case was dismissed or a petition stricken was a "difference without a distinction").

[36] 11 U.S.C. § 362(c)(3)(A) (2006) ("[T]he stay under subsection (a) with respect to any action taken with respect to a debt or property securing such debt or with respect to any lease shall terminate with respect to the debtor on the 30th day after the filing of the later

stay never goes into effect where the debtor had two or more prior pending cases during the preceding year that were dismissed.[37] Under sections 362(c)(3)(B) and 362(c)(4)(B), a debtor can move to extend or impose, respectively, the automatic stay,[38] but only upon meeting the statutory burden of proof.[39]

Although Congress intended the eligibility and automatic stay amendments of BAPCPA to deter abusive behavior by debtors,[40] the section 109(h) eligibility amendment in conjunction with the new automatic stay limitations of sections 362(c)(3) and (4) actually punish *good-faith* debtors.[41] As several courts have noted, the typical consumer debtor is unfamiliar with the Bankruptcy Code and "is *caught by surprise* by the nuances of the credit counseling briefing provisions of the 2005 Act and finds that bankruptcy relief may be beyond his or her reach."[42] One court recently highlighted that it is common among debtors who filed without

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case."). The courts have also struggled to decipher the effects of the thirty-day stay termination of section 362(c)(3). The majority of courts have held that the stay terminates only as to "property of the debtor." *See, e.g.*, *In re* Harris, 342 B.R. 274, 280 (Bankr. N.D. Ohio 2006); *In re* Bell, No. 06-11115 EEB, 2006 WL 1132907, at *2 (Bankr. D. Colo. Apr. 27, 2006); *In re* Jones, 339 B.R. 360, 363–65 (Bankr. E.D.N.C. 2006); *In re* Johnson, 335 B.R. 805, 807 (Bankr. W.D. Tenn. 2006). However, in *In re Jumpp*, the court held that Congress must have intended the stay to terminate both as to property of the estate and property of the debtor. 344 B.R. 21, 26–27 (Bankr. D. Mass. 2006).

[37] Section 362(c)(4)(A) states:

> [I]f a single or joint case is filed by or against a debtor who is an individual under this title, and if 2 or more single or joint cases of the debtor were pending within the previous year but were dismissed, other than a case refilled under section 707(b), the stay under subsection (a) shall not go into effect upon the filing of the later case.

11 U.S.C. § 362(c)(4)(A).

[38] Actually, BAPCPA provides that any "party in interest," which includes debtors, may move to impose or extend the automatic stay against creditor(s). *Id.* § 362(c)(3)(B), (4)(B).

[39] *See id.* § 362(c)(3)–(4). However, if a presumption of not filing in good faith arises under section 362(c)(3)(C) or 362(c)(4)(D), a debtor must then rebut such presumption by "clear and convincing evidence to the contrary," to establish that the most recent filing was filed "in good faith as to the creditors to be stayed" pursuant to sections 362(c)(3)(B) and 362(c)(4)(B). *See also, e.g.*, *In re* Galanis, 334 B.R. 685, 691 (Bankr. D. Utah 2005) (interpreting these provisions of the Code and noting that typically a preponderance of the evidence standard is imposed).

[40] *See supra* notes 15, 25 and accompanying text.

[41] The above-described dilemma is referred to herein simply as "the credit-counseling dilemma" or "the dilemma."

[42] *In re* Tomco, 339 B.R. 145, 152 (Bankr. W.D. Pa. 2006) (emphasis added).

having met the credit counseling requirement to have done so on the eve of foreclosure of their residence.[43] Individual debtors facing eviction or foreclosure typically do not immediately meet with lawyers; rather, in the weeks or months leading up to bankruptcy, the typical consumer debtor is seeking relief through other avenues, such as trying to work something out with mortgage lenders or landlords or looking for better-paying work.[44] In other words, the average individual debtor facing foreclosure of a residence does not have the time or funds to seek counsel while devoting time and resources to become current with creditors and pay family living expenses such as housing, utilities, groceries, and clothing.[45]

Pro se debtors are another class of debtors who commonly file without obtaining credit counseling.[46] Indeed, at least one court found that:

> the vast majority of debtors who are ineligible under § 109(h) are pro se debtors who are neither serial filers nor aware that they must seek or attempt to seek credit counseling before they file. Typically, they file before obtaining credit counseling because negotiations with a secured lender have broken down and foreclosure is inevitable.[47]

That court argued that, under BAPCPA, a debtor who is ineligible under section 109(h), "whose ineligibility was caused by the failure to perform the ministerial act of obtaining credit counseling" should be afforded different, more sympathetic treatment than "a debtor ineligible under § 109(g), who, by definition, is a repeat filer."[48] Thus, it appears Congress may have inadvertently enacted law that, in application, poses a serious threat to good-faith debtors through the credit counseling dilemma.

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[43] *See In re* Thompson, 344 B.R. 899, 903 (Bankr. S.D. Ind. 2006).

[44] *Tomco*, 339 B.R. at 152 (citing *Frustrated Judges Vent in Opinions*, BCD NEWS & COMMENT (LRP Publ'ns), Feb. 14, 2006, at 4); *see also In re* Dixon, 338 B.R. 383, 390 (B.A.P. 1st Cir. 2006) (affirming bankruptcy court's holding that because the Missouri foreclosure statute required twenty days notice of the sale, waiting to file a bankruptcy petition on the day before the sale was not exigent circumstances); *In re* Hubbard, 333 B.R. 333 B.R. 377, 383 (Bankr. S.D. Tex. 2005) (involving debtors in five cases filed without credit-counseling certificates; all debtors filed motions for post-petition credit counseling, alleging that they were at risk of either home foreclosure or vehicle repossession).

[45] *Tomco*, 339 B.R. at 152.

[46] *See, e.g.*, *Thompson*, 344 B.R. at 907 n.14.

[47] *Id.*

[48] *Id.*

D. Purpose of This Comment

This Comment first analyzes the recent split in case decisions involving the credit counseling dilemma. It explores the analysis conducted by courts on both sides of the dispute and explains the holdings, reasoning, and policy considerations of the courts. Second, this Comment analyzes the recent decision of *In re Thompson*[49] and explores whether the *Thompson* court was correct in its novel holding and reasoning in light of the case law interpreting BAPCPA and also pre-BAPCPA case law interpreting other section 109 eligibility provisions. Finally, this Comment proposes some practical considerations that debtors' counsel should take into account to ensure their clients' interests are protected, even when faced with the credit counseling dilemma.

II. AN OVERVIEW OF THE CASE LAW INTERPRETING SECTION 109(H)

A theme running through the following cases is that Congress failed to provide any clear guidance as to how courts should dispose of a bankruptcy petition when the debtor is ineligible under section 109(h). Courts on both sides of the dispute note that Congress failed to provide clear guidance either in the code provisions themselves[50] or in the legislative history.[51] Furthermore, when Congress passed BAPCPA, the established case precedent, at least with respect to the pre-BAPCPA provision most analogous to section 109(h), was largely split.[52]

There is a split among the various bankruptcy courts and the one Bankruptcy Appellate Panel ("BAP")[53] that has addressed the credit counseling dilemma largely because the Code is ambiguous and the legislative history offers no guidance as to whether a petition filed by a debtor who is ineligible under section 109(h) operates to commence a case or whether no case is commenced and the

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[49] 344 B.R. 899.

[50] *See, e.g.*, *In re* Seaman, 340 B.R. 698, 701 (Bankr. E.D.N.Y. 2006) (noting that BAPCPA's section 109(h) is silent as to how the courts must dispose of a case of an individual debtor who is ineligible due to failure to satisfy the credit counseling requirements).

[51] *See, e.g.*, *In re* Carey, 341 B.R. 798, 804 (Bankr. M.D. Fla. 2006) ("The BAPCPA legislative history is silent as to Congress' intent for failure to meet the credit counseling requirement.").

[52] *See In re* Brown, 342 B.R. 248, 251–52 nn.8 & 10 (Bankr. D. Md. 2006) (collecting cases).

[53] Each Federal Circuit Court of Appeals is to establish a BAP, which is a panel "composed of bankruptcy judges from the districts in a circuit who are appointed by a judicial council" of the circuit. 28 U.S.C. § 158(b)(1) (2006). Under 28 U.S.C. § 158, BAPs hear appeals directly from the bankruptcy courts, instead of the federal district courts. *Id.* § 158(a)–(b)(1).

petition should be stricken. The various arguments set forth by the "strike" and "dismiss" courts[54] in favor of their respective positions are discussed below.

A. The Strike Courts

A minority of courts addressing the issue have held that courts must strike the petition of a debtor ineligible under section 109(h). The majority of the strike courts have held that no "case" was commenced under section 301. Those courts then conclude that, although they have jurisdiction pursuant to 28 U.S.C. §§ 1334(a)[55] and 157(a)[56] to determine, inter alia, whether the debtor is eligible under section 109(h) and whether a case was commenced pursuant to section 301,[57] once the court determines no case was commenced under title 11, the court has no subject matter jurisdiction and must strike (or dismiss) the petition.[58] These courts find support in a strict reading of sections 301 and 302, in combination with section 109(h). Sections 301[59] and 302[60] each provide that a case commences "by the filing with the bankruptcy court" a petition by an entity or by individuals that "may be a debtor." Section 109(h) provides that an individual may be a debtor only if such individual obtains credit counseling pursuant to section 109(h)(1)[61] or an

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[54] This Comment generally refers to those courts ruling in favor of striking the petition collectively as the "strike courts." Likewise, those courts ruling in favor of dismissing the case will generally be referred to collectively as the "dismiss courts."

[55] 28 U.S.C. § 1334(a) ("Except as provided in subsection (b) of this section, the district courts shall have original and exclusive jurisdiction of all cases under title 11.").

[56] *Id.* § 157(a) ("Each district court may provide that any or all cases under title 11 and any or all proceedings arising under title 11 or arising in or related to a case under title 11 shall be referred to the bankruptcy judges for the district.").

[57] *See, e.g.*, *In re* Rios, 336 B.R. 177, 178 (Bankr. S.D.N.Y. 2005) ("The Court has jurisdiction over this contested matter under 28 U.S.C. §§ 1334(a) and 157(a) and the standing order of reference to bankruptcy judges . . . . This is a core proceeding under 28 U.S.C. § 157(b).").

[58] *See, e.g.*, *In re* Salazar, 339 B.R. 622, 632–33 (Bankr. S.D. Tex. 2006) (striking debtors' petitions and holding that an ineligible debtor's petition does not give rise to a bankruptcy case or entitle the debtor, even temporarily until an eligibility determination is made, to the protections of automatic stay); *Rios*, 336 B.R. at 180 (holding that striking the petition is proper rather than dismissing case).

[59] 11 U.S.C. § 301 (2006) (governing petitions filed by a single entity, for example, an individual).

[60] *Id.* § 302 (governing petitions filed jointly by individuals, for example, a husband and a wife filing jointly).

[61] Section 109(h)(1) provides:

> [A]n individual may not be a debtor under this title unless such individual has, during the 180-day period preceding the date of filing of the petition by such

extension of time to comply pursuant to section 109(h)(3).[62] Therefore, the courts hold, that where a petitioner has failed to comply with section 109(h), he or she "may not" be a debtor and therefore any petition filed by the ineligible debtor does not commence a case under sections 301 or 302.[63]

For example, in *In re Rios*,[64] the Bankruptcy Court for the Southern District of New York considered whether a petition filed by an individual who had neither obtained credit counseling nor sought an extension pursuant to section 109(h)(3), operated, pursuant to sections 109(h) and 301,[65] to commence a case.[66] The court held that where the debtor could not be a debtor for failure to comply with section 109(h) (i.e., was "ineligible" to be a debtor), no "case" was commenced.[67] The court then held that the "petition would be stricken, as opposed to dismissed."[68] The court argued that if it were to dismiss the debtors' cases for failure to seek credit counseling, the result would be one which "Congress intended to *avoid*; that is future limitation of debtor protection under [the automatic stay provisions of BAPCPA]."[69] Instead, the court explained, "[I]t is the Court's belief that Congress did not intend for debtors to enjoy the protections, or suffer the consequences,[[70]] provided in the Bankruptcy Code unless or until they received the credit

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> individual, received . . . an individual or group briefing (including a briefing conducted by telephone or on the Internet) that outlined the opportunities for available credit counseling and assisted such individual in performing a related budget analysis.

Id. § 109(h)(1).

[62] *Id.* § 109(h)(3) (providing that a temporary exemption allowing additional time to comply is available to an individual who certifies to the court that: (1) exigent circumstances merit a waiver of the requirements set forth in sections 109(h)(1); and (2) debtor sought but was unable to procure counseling services during the five days prior to the bankruptcy filing). Additionally, such certification must meet the court's satisfaction. *Id.*

[63] *See, e.g.*, cases cited *infra* notes 64–76 and accompanying text.

[64] 336 B.R. 177 (Bankr. S.D.N.Y. 2005).

[65] 11 U.S.C. § 301.

[66] *Rios*, 336 B.R. at 179–80.

[67] *Id.* at 179 (citing *In re* Hubbard, 333 B.R. 377, 388 (Bankr. S.D. Tex. 2005) (holding that "putative debtors" who failed to comply with section 109(h) were not eligible to be debtors, despite having obtained counseling post petition, and—citing 11 U.S.C. § 301, which provides that a voluntary case is only commenced by the filing of a petition by a party who may be a debtor—held that the resulting petitions were to be stricken)).

[68] *Id.*

[69] *Id.* at 180 (emphasis added).

[70] As the *Tomco* court explained, the "consequences" referred to by the *Rios* court are namely that section 362(c)(3) through (4) limit the debtor's automatic stay protections in future filings. *See In re* Tomco, 339 B.R. 145, 157–58 (Bankr. W.D. Pa. 2006).

counseling required by 11 U.S.C. § 109(h)."[71] The court then reasoned that "Congress could have made failure to seek credit counseling cause for dismissal under revised 11 U.S.C. § 707, but did not."[72]

The court also inferred that where no case commences, because the filed petition is void ab initio, the automatic stay does not go into effect.[73] The court then continued, warning debtors and creditors alike that a "party in interest, including a debtor, *can only be certain* that a case has not been commenced [thus not invoking the automatic stay] because of a failure to comply with § 109(h) *after a court has ruled*[74] that the filing is *void ab initio*."[75] Another court, in *In re Salazar*, held in much more definitive terms that where the debtor is ineligible under section 109(h), no case is commenced and the ineligible debtor's petition

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[71] *Rios*, 336 B.R. at 180.

[72] *Id.* Although this argument is not addressed further in this Comment, it is important to note that the court in *Tomco* disputed this conclusion, arguing that Congress's enumeration of causes for dismissal in section 707 (as well as in sections 1112, 1208, and 1307,) are not exhaustive and that failure to meet an eligibility requirement of section 109 constitutes "cause" for dismissal. *See* 339 B.R. at 158.

[73] *See Rios*, 336 B.R. at 180 n.2. ("[T]he Court considers that under the BAPCPA version of § 362, the stay is considerably 'less automatic.'").

[74] The court may have provided this warning in an attempt to establish an informal protection for debtors, since under the court's holding the automatic stay does not take effect on the filing of the petition by an ineligible debtor, thus leaving the debtor vulnerable to creditor action until the debtor can file a new petition. However, if creditors recognizing that the debtor may not have complied with section 109(h) are frightened into inaction until obtaining an order from the court, the protection afforded debtors is effectually the same. *See, e.g.*, *In re* Salazar, 339 B.R. 622, 627 (Bankr. S.D. Tex. 2006) ("It is true that an ineligible debtor is temporarily protected by a delay when a creditor chooses to wait for an eligibility determination before taking action that would otherwise violate a valid stay."). Although these courts recognize that uncertainty exists during the gap between filing and the court's eligibility determination and that creditors who act during that gap may later face repercussions for violating the stay, they hold that this is what the law requires. *See, e.g.*, *id.* at 627.

One of the primary points of criticism that the dismiss courts have expressed with respect to the decisions of the strike courts is precisely the confusion of both debtors and creditors that stems from this gap of uncertainty. *See, e.g.*, *In re* Thompson, 344 B.R. 899, 902 (Bankr. S.D. Ind. 2006).

[75] *Rios*, 336 B.R. at 180 n.2 (first and second emphasis added). The court also explained that procedure requires "creditors to seek a court determination as to whether a case was properly commenced prior to taking any action in reliance on debtors' eligibility pursuant to § 109." *Id.*

does not give rise to bankruptcy case or entitle the debtor, even temporarily until eligibility determination is made, to protections of automatic stay.[76]

B. The Dismiss Courts

As noted previously, the majority of courts addressing the matter of debtor ineligibility under BAPCPA's section 109(h) have held that a court must dismiss the case.[77] The courts reason that although section 109(h) is silent as to the appropriate resolution for cases in which the debtor is ineligible under section 109(h), the courts (1) should be persuaded by pre-BAPCPA case law construing analogous Code provisions;[78] (2) must hold under such existing case law that section 109 eligibility is not jurisdictional—i.e., a case filed by an ineligible debtor is not a mere "nullity" or void ab initio;[79] and (3) this approach is validated by Congress's enactment of sections 362(c)(3) and (4).[80] Furthermore, the courts

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[76] 339 B.R. 622, 626–28 (Bankr. S.D. Tex. 2006). The *Salazar* decision was certified for direct appeal to the Fifth Circuit Court of Appeals under BAPCPA's new provisions for direct certification. *See* 28 U.S.C. § 158(d)(2) (2006); Salazar v. Heitkamp, 153 F. App'x 281, 282 (5th Cir. 2006). An appeal was filed on April 12, 2006.

More recently, two other bankruptcy courts agreed with the above analysis. *See In re* Racette, 343 B.R. 200, 201–03 (Bankr. E.D. Wis. 2006) (holding that it could strike debtors' case for having failed to obtain credit counseling, even though the debtors made a representation on the face of their prior petition that they had received credit counseling, and not treat it as a prior case for the purpose of deciding what type of stay arose in the debtors' second chapter 13 case); *In re* Carey, 341 B.R. 798, 804 (Bankr. M.D. Fla. 2006) (holding that the appropriate consequence of debtor's ineligibility for an exemption from the credit-counseling requirement under section 109(h)(3) was entry of an order striking the petition; similarly reasoning that no case was commenced under section 301(a), and that because "[n]o case resulted from the filing of their petition pursuant to § 301(a)," there was no case to dismiss and the debtor's petition was to be stricken).

[77] *See supra* notes 33–34 and accompanying text.

[78] *See In re* Seaman, 340 B.R. 698, 701 (Bankr. E.D.N.Y. 2006); *In re* Ross, 338 B.R. 134, 136 (Bankr. N.D. Ga. 2006) (noting that the BAPCPA amendments do not provide different consequences for ineligibility under section 109(h) than under any other section 109 provision and holding, that, therefore, section 109(h) ineligibility should be treated like any other kind of section 109 ineligibility).

[79] *See, e.g.*, *Seaman*, 340 B.R. at 707; *In re* Tomco, 339 B.R. 145, 159–60 (Bankr. W.D. Pa. 2006); *Ross*, 338 B.R. at 137–38 (explaining that although the courts were previously split on section 109(g) eligibility, the courts had formulated various methods of dealing with serial filing abuses—e.g., dismissing with prejudice, stay annulment, and in rem stay relief orders—indicating that section 109(g) was not jurisdictional such that the ineligible debtor's filing was void ab initio).

[80] *See, e.g.*, *In re* Mills, 341 B.R. 106, 109–10 (Bankr. D.D.C. 2006) (citing *In re* Hawkins, 340 B.R. 642, 644 (Bankr. D.D.C. 2006) (refusing to hold that a case

explain, by holding that a case indeed commences, the section 362 automatic stay takes effect (at least until the court rules that the debtor is ineligible), and the courts can thereby avoid the substantial uncertainty for debtors and creditors.[81] In other words, as one court explained, during the time period between when the petition is filed and when the court enters judgment regarding the debtor's eligibility, both creditors and debtors remain uncertain as to whether the stay is in effect and may be fearful of taking any action.[82]

One of the first dismiss courts to address the matter was *In re Ross*.[83] In *Ross*, the Bankruptcy Court for the Northern District of Georgia held that:

> [E]ligibility under § 109 in general and under § 109(h) in particular is *not jurisdictional* and that, therefore, the filing of a petition by a debtor ineligible to do so nevertheless *commences a bankruptcy case* that is neither a "nullity" nor void *ab initio*. Consequently, upon timely determination that an individual ineligible to be a debtor under § 109(h) has filed a petition, the proper remedy is dismissal of the case.[84]

The *Ross* court further analyzed pre-BAPCPA case law interpreting the analogous provisions of section 109(g) and concluded that "because there is a threshold issue to be decided, the issue of whether the debtor 'may be a debtor' in the subsequent

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commenced by an ineligible debtor is void ab initio because section 362(b)(21)(A), which provides "that the automatic stay does not arise with respect to an act to enforce a lien against or a security interest in real property 'if the debtor is ineligible under [§] 109(g) to be a debtor in a case under this title,'" would be rendered superfluous)); *Ross*, 338 B.R. at 138–39 (finding that there would be no reason for section 362(b)(21)(A) if the case were void ab initio, as there would have been no automatic stay in the first place).

[81] *See, e.g.*, *Seaman*, 340 B.R. at 707–09; *Tomco*, 339 B.R. at 159 ("Prudential reasons support the Court's conclusion that a case commenced by an ineligible debtor is not *void ab initio*. One such reason is the automatic stay, and the ability of parties in interest to rely on it." (citing *In re* Rios, 336 B.R. 177, 180 n.2 (Bankr. S.D.N.Y. 2005))); *Ross*, 338 B.R. at 140 ("Treating an ineligible debtor's case as filed and dismissing it avoids serious problems that treating a petition as void *ab initio* or as failing to establish jurisdiction creates.").

[82] *In re* Thompson, 344 B.R. 899, 903 (Bankr. S.D. Ind. 2006) (explaining that "[f]oreclosing creditors may be uncertain whether they are stayed from proceeding with the sale or may be unprepared for the repercussions if the sale proceeds" and that "[i]neligible debtors may believe they are entitled to the automatic stay, minimally in the interim between the filing of the petition and the determination of eligibility, so as to prevent the sale").

[83] *See* 338 B.R. at 140–41.

[84] *Id.* at 136 (first and second emphasis added).

case,"[85] and that "[section] 109(g) is not jurisdictional and [] a petition filed by an individual who by its terms is ineligible nevertheless commences a case that is not void *ab initio*."[86] In *In re Tomco*, the Bankruptcy Court for the Western District of Pennsylvania discussed and agreed with the *Ross* decision.[87] The *Tomco* court stated the following:

> This court is unable to accept the notion that Section 109(h) ineligibility impacts a determination of whether a case was "commenced" and whether the Court's subject matter jurisdiction has been invoked. This Court holds that the operative event which triggers the commencement of a bankruptcy case, and this Court's jurisdiction, is the filing of a petition. This conclusion is consistent with the fact that neither Sections 109 nor 301 of the Bankruptcy Code, nor any other provisions in the Bankruptcy Code, make mention of jurisdiction. Jurisdiction is "granted" to bankruptcy courts through title 28, not title 11, of the United States Code. This Court's conclusion is also consistent with the decisions reached in other courts which hold that Section 109 of the Bankruptcy Code is not jurisdictional.[88]

The courts ruling in favor of dismissing the case bolster their position by arguing that Congress's enactment of section 362(b)(21)(A), which provides that the automatic stay will not protect a debtor who is ineligible under section 109(g) as to real property foreclosure proceedings, clearly shows that Congress must have contemplated that the automatic stay would otherwise be in effect, even though the debtor is ineligible to be a debtor under title 11 pursuant to section 109(g). The *Ross* court phrased the argument as follows:

> BAPCPA's amendments to § 362 confirm that Congress did not view § 109(g) as being a jurisdictional provision. New § 362(b)(21)(A)

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[85] *Id.* at 138 (quoting *In re* Flores, 291 B.R. 44, 52 (Bankr. S.D.N.Y. 2003)); *see also Hawkins*, 340 B.R. at 646–47 (holding that a case improperly commenced by an individual who is ineligible under section 109 creates a case for the limited purpose of determining whether the court had subject matter jurisdiction over the case).

[86] *Ross*, 338 B.R. at 138 (citing Montgomery v. Ryan (*In re* Montgomery), 37 F.3d 413, 415 n.5 (8th Cir. 1994); Promenade Nat'l Bank v. Phillips (*In re* Phillips), 844 F.2d 230, 235 n.2 (5th Cir. 1988); *Flores*, 291 B.R. at 60) ("The Court concludes, in accordance with the reasoning in *Flores* and consistently with the two appellate courts that have considered the issue, that § 109(g) is not jurisdictional and that a petition filed by an individual who by its terms is ineligible nevertheless commences a case that is not void *ab initio*." (footnote omitted)).

[87] *In re* Tomco, 339 B.R. 145, 159 (Bankr. W.D. Pa. 2006).

[88] *Id.* (citing *Ross*, 338 B.R. at 138–41 & nn. 6–11 (collecting cases)).

> provides an exception to the automatic stay of § 362(a) with regard to foreclosure of real property if the debtor is ineligible under § 109(g). If such a filing were void *ab initio* and did not result in an automatic stay under existing law, such an amendment would not have been necessary. Congress is presumed to know the state of existing law when it enacts new legislation. The enactment of additional exceptions to the automatic stay thus evidences the understanding of Congress that a filing in violation of § 109(g) commences a case and results in an automatic stay.[89]

The dismiss courts further argue that practical considerations support their position. Under the holdings of various strike courts, since no case is commenced, no automatic stay goes into effect.[90] In *In re Seaman*, the Bankruptcy Court for the Eastern District of New York addressed the uncertainty created by striking a petition as void ab initio, and held that by holding a case does indeed commence, the court "avoids uncertainty with respect to the petitioner's status and the existence of the automatic stay."[91]

Furthermore, the *Seaman* court set forth two additional policy arguments in favor of dismissing the case.[92] First, striking the case would create administrative uncertainties and burdens—e.g., whether filing fees should be returned and whether chapter 7 trustees may be compensated for work on a case that proved to be a nullity.[93] Second, the *Seaman* court argued, the legislative history behind the credit counseling requirement of BAPCPA suggests a desire to address the problem of serial filings made to invoke the protections of the automatic stay: "[S]triking petitions could result in abuse of the automatic stay, shielding the bad-faith petitioner from creditor action from the time of filing to the time the petition is stricken, with no bar to that petitioner repeating the process over and over again."[94]

C. In re Thompson

Perhaps the most creative, and certainly the most debtor-friendly, approach is the one recently announced by Judge Anthony J. Metz III of the Bankruptcy Court for the Southern District of Indiana in *In re Thompson*.[95] Judge Metz held that no

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[89] 338 B.R. at 138–39 (citing Cannon v. Univ. of Chi., 441 U.S. 677, 699 (1979)).
[90] *See supra* notes 64–68 and accompanying text.
[91] 340 B.R. 698, 707 (Bankr. E.D.N.Y. 2006) (citing *Flores*, 291 B.R. at 54–55).
[92] *See id.* at 707–08.
[93] *Id.* at 707.
[94] *Id.* at 708.
[95] 344 B.R. 899 (Bankr. S.D. Ind. 2006).

"case" commenced and that striking the petition was the proper approach, but the automatic stay still took effect upon the filing of a petition under the language of section 362(a).[96] In effect, the debtor not only sidesteps the consequences of the BAPCPA automatic stay limitations under section 362(c) by not having a prior dismissed case, but also benefits from an automatic stay during the gap after filing and until the court has the opportunity to rule on the debtor's eligibility. Under *Thompson*, a debtor can rest assured there is a short time period during which creditors are stayed, to prepare—including getting credit counseling—to immediately file a new petition upon her petition ultimately being struck by the court.

In *Thompson*, the debtors, Mr. and Mrs. Thompson, filed a chapter 13 bankruptcy petition "on the eve of the sheriff's sale of their residence."[97] The court found that the debtors had not complied with section 109(h) and were therefore not eligible to be debtors under BAPCPA.[98] The court considered whether "dismissal of the case rather than striking of the petition" was proper.[99]

Judge Metz held that "when it has been determined that a debtor who files a bankruptcy petition is ineligible under § 109(h) to commence a case under title 11, it would seem that . . . the petition should be stricken."[100] The court reasoned that a fair reading of sections 301 and 302 leads to the conclusion that a title 11 case only commences upon the filing of a petition by an *eligible* debtor:

> [M]y reading of §§ 301 and 302 leads me to conclude that the "filing of a petition" is not synonymous with "the commencement of a case." The phrase "an entity that may be a debtor under such chapter" or "an individual that may be a debtor under such chapter" qualifies "petition" and that only those petitions filed by those eligible to be debtors "under such chapter" can "commence" a "case." If the debtor filing the petition is not eligible to be a debtor under any chapter of the code, then a petition filed by such debtor is not the type of petition that is sufficient to trigger the "commencement" of the "case" under §§ 301, 302.[101]

The court then defended this conclusion against arguments previously posited by dismiss courts, that to "strike" a case is not contemplated by the Code.[102] Judge Metz argued that although the Code itself does not contemplate striking a case (as

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[96] *Id.* at 905–07.
[97] *Id.* at 901.
[98] *Id.*
[99] *Id.*
[100] *Id.* at 905–06.
[101] *Id.* at 905.
[102] *Id.*

the United States Trustee had argued), the court did not need to strike a case because there is no case; rather, it would strike a petition.[103] In further support of his holding that striking a petition is proper, the judge noted that "[s]triking a petition is not foreign to the [bankruptcy] rules, for Rule 9011 of the Federal Rules of Bankruptcy Procedure provides for the 'striking' of a petition if it is not signed."[104] Furthermore, the court explained that it had previously:

> interpreted other rules which has led to the "striking" of a complaint rather than the dismissal of a case. Fed. R. Bankr. P. 7003 provides that "[a] civil action is commenced by filing a complaint with the court." When this Court determines that an attorney not admitted to practice before the courts of this District has filed a complaint to "commence" a civil action, this Court strikes the complaint because the attorney is ineligible to "commence" a case in this District.[105]

The court addressed pre-BAPCPA case law interpreting section 109(g), noting that "[b]efore BAPCPA, only §§ 109(a) and (g) imposed an eligibility requirement for those seeking to be a debtor under *any* chapter of the bankruptcy code."[106] The court thus concluded that "[p]re-BAPCPA [case] law . . . decided under § 109(g), *may be instructive* as to how to treat a petition filed by an ineligible debtor [under § 109(h)]."[107] However, the court then distinguished its holding from pre-BAPCPA cases, explaining that "the legal consequences to a putative debtor who fails to comply with § 109(h) take on added significance because BAPCPA added §§ 362(c)(3) and (4)[[108]] which afford a debtor only limited or no protection under the automatic stay."[109]

Indeed, at least one other court appears to have been influenced by the added significance of BAPCPA's addition of sections 362(c)(3) and (4). The Bankruptcy Court for the Southern District of Florida, addressing whether a pro se filer who had neither obtained credit counseling nor demonstrated exigent circumstances qualified as a "debtor," held that because the petitioning individual was not eligible to be a debtor, the court would not consider this to be a dismissed case, for purposes of sections 362(c)(3) and (4).[110] However, the Bankruptcy Court for the

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[103] *Id.* (emphasis added).

[104] *Id.* (citing FED. R. BANKR. P. 9011).

[105] *Id.* (citing FED. R. BANKR. P. 7003).

[106] *Id.* at 903.

[107] *Id.* (emphasis added).

[108] *See supra* note 23 and accompanying test (discussing new provisions under BAPCPA § 362(c)(3) through (4), which impose limitations on the automatic stay of a debtor who has one or more prior dismissed bankruptcy case(s)).

[109] *Thompson*, 344 B.R. at 903.

[110] *In re* Valdez, 335 B.R. 801, 803 (Bankr. S.D. Fla. 2005).

Southern District of New York held in *In re Flores*, with respect to the eligibility provision of section 109(g), that a case indeed commences and the court must dismiss it.[111]

The more original and creative[112] portion of the court's holding in *Thompson* is its finding that the automatic stay takes effect upon the filing of a petition even though filed by an ineligible debtor and even though no case had commenced.[113] Judge Metz noted that those courts that held no case was commenced by the filing of an ineligible debtor, also found that the case was "void *ab initio*" and, therefore, the court had no subject matter jurisdiction over the matter.[114] It thus followed that no automatic stay could have been invoked.[115] However, Judge Metz held that "§§ 301, 302, and 303 allow for petitions to be filed by ineligible debtors, they just don't allow *cases to be commenced* by petitions filed by ineligible debtors."[116] In other words, the court explained:

> [I]t is possible for the stay to be imposed without a case having been commenced. The creative author behind this theory succinctly summarized it as follows:
>
> ["]Section 362 says that 'a petition filed under section 301, 302 and 303' operates as a stay. But 301, 302 and 303 do not actually say that a petition may only be filed by an eligible debtor; rather, what they [say] is that 'a case is commenced' by the filing of a petition by an eligible debtor. Thus, the filing of a petition by an ineligible debtor can trigger the automatic stay under 362 (which refers to the filing of a petition, not

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[111] *In re* Flores, 291 B.R. 44, 55 (Bankr. S.D.N.Y. 2003). It should be noted that different judges decided the two cases. *Flores* was decided by Judge Adlai S. Hardin, Jr., and *Rios* was decided by Judge Cecilia G. Morris. Furthermore, Judge Morris noted in footnote 2 of her opinion:

> In rendering this opinion, the Court is not unmindful of the decision in *In re Flores* . . . . The interpretation of § 109(h) in this opinion has far reaching implications for both debtors and creditors. The Court agrees with the procedure in *Flores* that required creditors to seek a court determination as to whether a case was properly commenced prior to taking any action in reliance on debtors' eligibility pursuant to § 109.

In re Rios, 336 B.R. 177, 180 n.2 (Bankr. S.D.N.Y. 2005).

[112] *Thompson*, 344 B.R. at 906 (describing American Bankruptcy Institute "blog" author David L. Rosendorf as the "creative author behind this theory").

[113] *Id.*

[114] *Id.* at 904–06.

[115] *See, e.g.*, *In re* Salazar, 339 B.R. 622, 624 (Bankr. S.D. Tex. 2006).

[116] *Thompson*, 344 B.R. at 906.

> the commencement of a case), but that petition will not commence a 'case' unless the petitioner is eligible. So, the stay would be in effect temporarily pending determination of eligibility, but if the debtor is determined not to be eligible, then the petition would be dismissed (or stricken, if you prefer), and would not be regarded as a 'previous case' for purposes of 362(c)(3) or (4).["][117]

To defend its unique holding, the court argued that various practical difficulties arise under the decisions of those strike courts that hold that no stay is invoked.[118] Judge Metz explained that substantial uncertainty would arise if a court held that no stay ever actually arose if indeed the petitioner is deemed to have been ineligible as a debtor under title 11.[119] The court points out that often those debtors filing without first obtaining credit counseling are doing so on the eve of foreclosure of their residence.[120] Thus, substantial uncertainty may result if an interpretation such as that announced in the *Salazar* holding were to control.

Furthermore, Judge Metz cited section 362(b)(21)[121] as supporting his conclusion that the stay goes into effect pending determination of eligibility.[122] The court noted:

> Congress could have provided for a similar exception from the stay for § 109(h) cases but chose not to do so. The resulting implication is that, like § 109(g), petitions filed by ineligible § 109(h) debtors *do* trigger the automatic stay but, unlike § 109(g), there is no statutory carve out that allows secured creditors to proceed against real property.[123]

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[117] *Id.* (quoting Posting of David L. Rosendorf to ABI's BAPCPA Blog, You Say Strike It, I Say Dismiss It—What Happens when an Ineligible Debtor Files, http://bapcpa.blogspot.com/2006_04_01_archive.html (Apr. 18, 2006, 17:03 EST)).

[118] *See, e.g.*, *Salazar*, 339 B.R. at 633.

[119] *Thompson*, 344 B.R. at 903 (stating that "[i]neligible debtors may believe they are entitled to the automatic stay, minimally in the interim between the filing of the petition and the determination of eligibility, so as to prevent the sale," while "[f]oreclosing creditors may be uncertain whether they are stayed from proceeding with the stay or may be unprepared for the repercussions if the sale proceeds").

[120] *Id.* at 907.

[121] 11 U.S.C. § 362(b)(21) (2006). As noted previously, this provision was added by BAPCPA and limits the protections afforded by the automatic stay, such that the debtor benefits from only a thirty-day "temporary stay" where the debtor has had either one prior dismissed case, and the debtor receives no automatic stay protection where he or she has had two or more dismissed cases. *Id.*

[122] *Thompson*, 344 B.R. at 907.

[123] *Id.*

The *Thompson* argument is different in that it argues that section 362(b)(21) contemplates only that the stay is in effect upon the filing of a petition.[124]

In summary, the court held that "petitions filed by ineligible § 109(h) debtors are *not* void ab initio, but in fact trigger the imposition of the automatic stay and the stay remains in place until it is later modified or the proceeding is closed."[125] However, the court held, a case does not commence "until [the court determines] that the debtor filing the petition is eligible for bankruptcy relief under § 109(h)."[126] Where, however, the court determines the debtor is ineligible under section 109(h), the court agrees with the strike courts that the petition is to be stricken, as there was never a case to dismiss.[127] Furthermore, if there was no case to dismiss, "then there could not have been a 'pending case' . . . *at least for purposes of §§ 362(c)(3) and (4).*"[128] Thus, if an ineligible debtor were to subsequently file another petition within a year and satisfy the section 109(h) criteria, the prior petition filed would "not count as a 'case pending and dismissed' for §§ 362(c)(3) and (4) purposes."[129]

III. ANALYZING *IN RE* THOMPSON

At first glance, the *Thompson* decision appears very sound, as it seems to (1) comport with the plain reading of section 301 (that a case only commences upon the filing of a petition by an *eligible* debtor, and therefore only a petition exists, which could then be stricken so as to avoid the effects of sections 362(c)(3) and (4)); and (2) concur with Congress's intent as reflected in its enactment of section

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[124] *See id.* The *Tomco* court, among others, cited this same BAPCPA provision (section 362(b)(21)), in support of its holding that a case does commence, reasoning that without the commencement of a case, no stay would arise and the addition of this provision would be senseless. *See In re* Tomco, 339 B.R. 145, 160 (Bankr. W.D. Pa. 2006). The *Tomco* court's use of section 362(b)(21) in support of its argument is in response to those decisions that hold no case commenced and, as a result, no stay went into effect. *See, e.g.*, *In re* Salazar, 339 B.R. 622, 630–33 (Bankr. S.D. Tex. 2006). The argument is the same in both instances: both courts cite the code provision for the proposition that Congress contemplated an automatic stay being in effect, at least temporarily, even where the petitioner is ineligible. *Compare Thompson*, 344 B.R. at 907 (arguing that section 362(b)(21) contemplates only that the stay is in effect upon the filing of a petition), *with Tomco*, 339 B.R. at 160 (reasoning that section 362(b)(21) necessarily contemplates that a case was commenced, in order for there to be a stay in effect).

[125] *Thompson*, 344 B.R. at 907.

[126] *Id.*

[127] *Id.* at 907–08.

[128] *Id.* at 908.

[129] *Id.*

362(b)(21), which operates on the presumption that an automatic stay is in effect even where the petitioner is ineligible to be a debtor, pursuant to section 109(g). Furthermore, as the court noted in its decision: "this outcome . . . strikes a satisfactory balance between a creditor's need for certainty in proceeding once a petition is filed and an eligible debtor's ability to refile a subsequent petition without losing the benefits of the automatic stay due to his prior failure to comply with the credit counseling requirement."[130]

A. Did the Thompson *Court Find the Solution to the Credit Counseling Dilemma?*

Although the *Thompson* decision appeals to reason on several levels, it appears to conflict with a fair reading of the Code and with pre-BAPCPA case precedent. The remainder of this Comment focuses on the following two contentions:[131] (1) a fair reading of section 362(a), which language was not altered by BAPCPA, appears to require the commencement of a case before the section 362 automatic stay can take effect; and (2) pre-BAPCPA case law interpreting section 109, though split on the pre-BAPCPA code provision most analogous to section 109(h), seems to weigh more heavily on the side of a case commencing and being dismissed upon the court finding the debtor ineligible.

1. A Fair Reading of the Code Appears to Require a Case Before the Automatic Stay Can Take Effect

Section 362(a), which provides that "a petition filed *under section 301, 302, or 303* of this title . . . operates as a stay, applicable to all entities"[132] appears to require nothing more than a petition, which is what the *Thompson* court held.[133] Furthermore, section 301,[134] which determines when a voluntary case commences, adds the additional requirement that a filer be "an entity that *may be a debtor* under such chapter."[135] Despite the logical conclusion from reading these provisions together that only the commencement of a case requires that the debtor be eligible, section 101(42) of the Code defines the term "petition" as a "petition filed under

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[130] *Id.*

[131] This Comment does not dispute the holding in *Thompson*, or any other decision; rather, these two contentions merely provide a good framework for analysis of the strike-dismiss dispute and serve as the basis for a handful of proposals on these two areas of contention.

[132] 11 U.S.C. § 362(a) (2006) (emphasis added).

[133] *See Thompson*, 344 B.R. at 906.

[134] *See supra* notes 64–65 and accompanying text.

[135] 11 U.S.C. § 301(a) (emphasis added).

section 301, 302, or 303[136] of this title, as the case may be, *commencing a case* under this title."[137] Thus, section 101 appears to define a petition as both being filed under "section 301, 302, 303, or 304" (as does the reference to filing a petition in the section 362 automatic stay provision) and "commencing a case under this title."[138] Thus, the act of filing of a petition, which is clearly the act that operates as a stay under section 362, also, per its definition in section 101(42), includes the commencement of a case.

2. Pre-BAPCPA Case Law Appears to Require Courts to Hold that a Case Commences with the Filing of a Petition by an Ineligible Debtor and Must Be Dismissed upon Finding that Debtor Is Ineligible

Regardless of whether the Code's automatic stay provision requires that a case have been previously commenced, pre-BAPCPA case law interpreting section 109, indicates that a case does indeed commence upon the filing of a petition by an ineligible debtor.[139] The case then continues to exist until the court rules that the debtor is indeed ineligible, at which point the case is dismissed. Furthermore, under pre-BAPCPA case law, the automatic stay takes effect until the time that the court dismisses the case.[140] Prior to BAPCPA, the courts addressed the matter in the context of various other section 109 eligibility provisions, including sections 109(a),[141] 109(e),[142] and 109(g).[143]

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[136] Although section 304 no longer exists due to changes under BAPCPA, section 101(42) still references it. *See id.* § 101(42).

[137] *Id.* (emphasis added).

[138] *Id.* §§ 101(42), 362(a).

[139] *See, e.g.*, cases cited *infra* notes 144–55 and accompanying text.

[140] *See, e.g.*, cases cited *infra* notes 144–55 and accompanying text.

[141] *See* 11 U.S.C. § 109(a) ("[O]nly a person that resides or has a domicile, a place of business, or property in the United States, or a municipality, *may be a debtor under this title*." (emphasis added)).

[142] *See id.* § 109(e) (regarding determining eligibility "under chapter 13 of this title").

[143] Section 109(g) states:

> [N]o individual or family farmer *may be a debtor under this title* who has been a debtor in a case pending under this title at any time in the preceding 180 days if (1) the case was dismissed by the court for willful failure of the debtor to abide by orders of the court . . . or (2) the debtor requested and obtained the voluntary dismissal of the case following the filing of a request for relief from the automatic stay.

Id. § 109(g) (emphasis added).

Sections 109(e) and 109(g) have been interpreted by various courts. With respect to section 109(e), the majority of courts agree "that the automatic stay arose upon the filing of a petition under chapter 13 by a debtor that was later determined to be ineligible pursuant to Section 109(e), as the question of eligibility was not always determinable at the time of filing and required further evidence and court action."[144] Furthermore, in a decision later affirmed by the Fourth Circuit, a federal district court overturned a bankruptcy court's decision, holding that the automatic stay, arose upon the filing of the debtors' chapter 13 petitions regardless of whether the debtors were eligible for chapter 13 relief under section 109(e) and terminated on entry of the court's order to dismiss the case for ineligibility.[145]

However, the provision that appears most analogous to section 109(h) is section 109(g) because it similarly targets debtor abuses of the bankruptcy process and makes a debtor ineligible for relief under all chapters of title 11.[146] Although section 109(a) also makes a debtor ineligible under all chapters,[147] its policy is unrelated to debtor abuses. Section 109(g), like section 109(h), targets abusive behavior of debtors; section 109(g) precludes a debtor found to have committed one of the acts enumerated in sections 109(g)(1) or (2) from filing another bankruptcy petition for 180 days.[148] However, also like section 109(h), Congress remained silent as to whether a case commences and/or as to the status of the automatic stay when a section 109(g) ineligible debtor files a petition within the 180-day bar. As a result, the courts were split with respect to section 109(g)[149] just as they are split with respect to section 109(h).[150]

Unlike the section 109(h) question, two federal circuit courts have addressed section 109(g).[151] In *In re Montgomery*, the Eighth Circuit was called upon to

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[144] *In re* Brown, 342 B.R. 248, 251–52 (Bankr. D. Md. 2006).

[145] Shaw v. Ehrlich, 294 B.R. 260, 267, 271 (Bankr. W.D. Va. 2003), *aff'd*, *In re* Wiencko, 99 F. App'x 466 (4th Cir. 2004).

[146] Like section 109(e), most of the remaining subsections of section 109 address eligibility only as to specific chapters of the bankruptcy code. For example, sections 109(b) and (d) address who may be a debtor "under chapter 7 of this title," 11 U.S.C. § 109(b), (d); section 109(c) governs who may be a debtor "under chapter 9 of this title," *id.* § 109(c); and section 109(f) addresses eligibility "under chapter 12 of this title," *id.* § 109(f).

[147] *Id.* § 109(a).

[148] *Id.* § 109(g).

[149] *Brown*, 342 B.R. at 251–52 ("Some courts determined that a filing by an ineligible debtor did not commence a case as described in Section 301 and therefore the petition was stricken. Other courts disagreed and found that a case was commenced and subsequently was terminated by dismissal." (internal citations and quotation marks omitted)).

[150] *See supra* Part I.C.

[151] *See* Montgomery v. Ryan (*In re* Montgomery), 37 F.3d 413, 415 n.5 (8th Cir. 1994); Promenade Nat'l Bank v. Phillips (*In re* Phillips), 844 F.2d 230, 235 n.2 (5th Cir. 1988).

review the dismissal of a debtor's case for "willful failure to abide by orders of the court" pursuant to section 109(g)(1).[152] Though the majority of the court's decision was dedicated to analysis of whether the debtor had "willfully" disobeyed a court order, it ultimately affirmed the bankruptcy court's dismissal of the debtor's case for his violating the eligibility provision of section 109(g)(1).[153] More importantly, in *In re Phillips*, the Fifth Circuit Court of Appeals found that the eligibility provision of section 109(g), as an eligibility provision, does not affect a court's subject matter jurisdiction,[154] meaning that a case filed by an ineligible debtor would not be void ab initio.[155]

As noted above, the *Thompson* court distinguished pre-BAPCPA precedent based on the opinion that prior to BAPCPA the strike versus dismiss distinction was irrelevant, but is now very important.[156] Furthermore, another court, the Bankruptcy Court for the Southern District of New York, reached an opposite conclusion under section 109(h) and BAPCPA[157] than it had under section 109(g) and pre-BAPCPA Code.[158] The *Rios* court, apparently persuaded to do so by the "far reaching implications for both debtors and creditors" under BAPCPA, held that striking the petition was proper.[159] The far-reaching implications are presumably the automatic stay limitations imposed on a debtor with a prior dismissed case or cases under section 362.[160]

Although the *Thompson* and *Rios* courts distinguish the section 109(h) consideration on the fact that BAPCPA added automatic stay limitations for prior dismissed cases through section 362(c)(3) and (4), there is an argument that

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[152] 37 F.3d at 414–15.

[153] *Id.* at 415–16.

[154] 844 F.2d at 263 n.2.

[155] *See, e.g.*, *In re* Seaman, 340 B.R. 698, 707 (Bankr. E.D.N.Y. 2006). The circuit court decisions may be called into question because in *Montgomery* it is not clear that the parties actually disputed whether a case had commenced, which could be dismissed, 37 F.3d at 414–16, and because the *Phillips* court actually dismissed the appeal on other grounds, though it opined that the case would not be void ab initio, 844 F.2d at 235 n.2 (dismissing appeal for lack of appellate jurisdiction, but opining that the eligibility provision of section 109(g) does not raise an issue of subject matter jurisdiction).

[156] *See In re* Thompson, 344 B.R. 899, 904 (Bankr. S.D. Ind. 2006).

[157] *See In re* Rios, 336 B.R. 177, 180 n.2 (Bankr. S.D.N.Y. 2005).

[158] *See In re* Flores, 291 B.R. 44, 46 (Bankr. S.D.N.Y. 2003). Dismiss courts have cited *In re Flores* in their decisions, even though the *Flores* court already issued its *Rios* decision in December 2005, interpreting section 109(h) in favor of striking. *See, e.g.*, *In re* Ross, 338 B.R. 134, 138 (Bankr. N.D. Ga. 2006) ("'A bankruptcy filing within 180 days of a prior dismissal under Section 109(g) cannot be a nullity or void *ab initio*, because there is a threshold issue to be decided, the issue of whether the debtor 'may be a debtor' in the subsequent case.'" (quoting *Flores*, 291 B.R. at 52)).

[159] *Rios*, 336 B.R. at 180 n.2.

[160] *See* 11 U.S.C. § 362(c)(3), (4) (2006).

Congress is presumed to be familiar with the state of the law when it enacts new legislation. Furthermore, as one court noted, Congress did not provide different consequences for ineligibility under the different provisions of section 109.[161] Therefore, the case law interpreting other provisions of section 109 might also be viewed as persuasive for all provisions of section 109.[162] Finally, although various dismiss courts have argued that since section 109 does not affect the court's subject matter jurisdiction, the filed case cannot therefore be void ab initio, section 109 generally pertains only to a debtor's eligibility, not to the bankruptcy court's subject matter jurisdiction,[163] which is derived from 28 U.S.C. §§ 1334 and 157.[164]

Thus, although the dismiss courts have not directly rebutted the strike courts' reading of the plain language of section 301,[165] which provides that a case is

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[161] *See Ross*, 338 B.R. at 135–36 (noting that the BAPCPA amendments do not provide different consequences for ineligibility under section 109(h) than under any other section 109 provision, and holding that section 109(h) ineligibility should be treated like any other kind of section 109 ineligibility).

[162] *See, e.g., id.* at 138 (citing Hamilton Creek Metro. Dist. v. Bondholders Colo. Bondshares (*In re* Hamilton Creek Metro. Dist.), 143 F.3d 1381, 1385 n.2 (10th Cir. 1998)) ("[T]he Tenth Circuit has noted that eligibility of an entity to be a debtor under § 109(c) in a chapter 9 case does not raise a jurisdictional question."); *see also id.* (citing Marlar v. Williams (*In re* Marlar), 432 F.3d 813 (8th Cir. 2005); McCloy v. Silverthorne (*In re* McCloy), 296 F.3d 370 (5th Cir. 2002)) ("Courts considering eligibility . . . in analogous contexts have also concluded that eligibility is not a jurisdictional matter. The Fifth and Eighth circuits have held that the filing of an involuntary petition against a farmer, prohibited by 11 U.S.C. § 303, nevertheless commences a case.").

[163] *In re* Phillips, 844 F.2d 230, 235 & 236 n.2 (5th Cir. 1988); *see* 2 COLLIER ON BANKRUPTCY ¶ 109.08, at 109–54 (Alan A. Resnick & Henry J. Sommer eds., 15th ed. rev. 2005); Ned W. Waxman, *Judicial Follies: Ignoring the Plain Meaning of Bankruptcy Code § 109(g)(2)*, 48 ARIZ. L. REV. 149, 150–51 (2006); *see also Flores*, 291 B.R. at 52–53. *Contra In re* Prud'Homme, 161 B.R. 747, 751 (Bankr. E.D.N.Y. 1993); *In re* Keziah, 46 B.R. 551, 554 (Bankr. W.D.N.C. 1985).

[164] 28 U.S.C. §§ 1334, 157 (2000); Rudd v. Laughlin, 866 F.2d 1040, 1041 (8th Cir. 1989); *Flores*, 291 B.R. at 46.

[165] Among the decisions by the dismiss courts, the only argument made in direct opposition to the strike courts' reading of section 301 was posited by the Bankruptcy Court for the Western District of Pennsylvania in *In re Tomco*. *See* 339 B.R. 145, 152 (Bankr. W.D. Pa. 2006). Specifically, the *Tomco* court found that the word "may," as used in section 301, "has an expansive connotation." *Id.* at 159. "In ordinary common parlance, the word 'may' as used in the § 301 of the Bankruptcy Code means 'might' or is meant to express a 'possibility.'" *Id.* (citing *In re* Copper, 314 B.R. 628, 637 (B.A.P. 6th Cir. 2004); RANDOM HOUSE UNABRIDGED DICTIONARY 1189 (2d ed. 1993)). The *Tomco* court then asserted that "[t]he debtor in *Rios* as in any bankruptcy case, had the *possibility* of being a debtor under the Bankruptcy Code, but he had to obtain the credit counseling to be certain." 339 B.R. at 159 (emphasis added). However, this argument does not appear to hold up under close scrutiny since, while the court cites *In re Copper* for the proposition

commenced only on filing of a petition by an eligible debtor, pre-BAPCPA precedent holds that a case nevertheless commences upon the filing of a petition by even a debtor ineligible under section 109.[166] Though the pre-BAPCPA case precedent regarding section 109(g) is split, two circuit courts have affirmed the dismissal of the case in situations where the debtors were ineligible under section 109(g).[167] Furthermore, with respect to other provisions of section 109, the courts largely agree that a case commences, because section 301 of title 11 does not appear generally to invoke the courts' jurisdiction, such that a debtor's ineligibility under section 109 renders the debtor's case void ab initio for failure to invoke the courts' jurisdiction.[168]

IV. PROPOSALS FOR IMMEDIATE, PRACTICAL APPLICATION

The courts agree that their hands are tied and they have no discretion but to prevent ineligible debtors under section 109(h) from receiving any relief under the Code from the point at which the court rules the debtor to be ineligible.[169] Specifically, under a fair reading of the Code and under established precedent, it appears the courts may have no discretion but to dismiss the case of an ineligible debtor. As a result, such debtors will be penalized in future filings occurring within one year with either termination of their automatic stay after thirty days under section 362(c)(3), or with no stay at all pursuant to section 362(c)(4). This is troubling considering that the class of debtors most often impacted by the credit

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that the word "may," as used in section 301 means "might," *In re Copper* actually addresses a very different provision of the Code, section 706(a). *See* 314 B.R. at 634 (interpreting pre-BAPCPA 11 U.S.C. § 706(a) (2000)). Section 706(a) addresses the circumstances under which "a debtor *may* convert a case under [chapter 7] to a case under chapter 11, 12, or 13," 11 U.S.C. § 706(a) (emphasis added), while section 109(h) addresses "who may be a debtor," *id.* § 109(h) (2006). The term "may" appears to be used in different contexts in each of these two different code provisions. As many courts addressing the matter have assumed, section 109(h)'s use of the word "may" instead likely invokes an expression of having the necessary qualifications to be a debtor. *See, e.g.*, *In re* Thompson, 344 B.R. 899, 902 (Bankr. S.D. Ind. 2006).

[166] *See supra* notes 144–45, 151–64 and accompanying text.

[167] *See supra* notes 151–54 and accompanying text.

[168] *See supra* notes 144–45, 151–55, 161–64and accompanying text.

[169] *See In re* Hedquist, 342 B.R. 295, 300 (B.A.P. 8th Cir. 2006) (affirming the dismissal of a case for failure to obtain credit counseling and explaining that section 109(h) can produce harsh results, but that the bankruptcy courts have no discretion but to dismiss cases in which a debtor fails to comply with the provisions of section 109(h)); *In re* Carey, 341 B.R. 798, 803 (Bankr. M.D. Fla. 2006) (holding that the pre-petition credit-counseling requirement is explicit and requires debtors to obtain pre-petition credit counseling or file a motion to excuse, and stating that the code allows no room for a court to exercise discretion).

counseling dilemma are honest, but unfortunate, debtors who have either filed pro se or were forced to file on the eve of foreclosure.

These debtors should be able to seek relief as they are likely filing their petitions in good faith, and Congress did not intent to penalize or deter such debtors. This contradiction—honest debtors, on the one hand, and, on the other hand, code provisions requiring dismissal of the case and penalizing honest debtors for those prior dismissals—is unsettling. Until the confusion is cleared up, counsel for debtors affected by the credit counseling dilemma should take proper precautions.

Assume that a debtor has no choice but to file immediately due to failed attempts to negotiate with a mortgage lender, but because he or she was unaware of the pre-petition credit counseling requirement could not obtain the required counseling prior to filing, in violation of section 109(h).[170] If the debtor lives in a district where the court will hold that a case was commenced and an automatic stay invoked until a ruling can be made on the debtor's eligibility, the debtor will nevertheless benefit from an automatic stay until the case is dismissed for ineligibility under section 109(h). Upon the case being dismissed, the debtor can likely file a new petition immediately.[171] Because section 362(c)(3) is invoked and the debtor will only receive a thirty-day temporary stay, debtor's counsel should immediately move to extend the thirty-day temporary stay under section 362(c)(3)(B). The courts have held that to receive an extension under section 362(c)(3)(B), debtors must file and serve a motion to extend the stay so as to allow the court to rule within thirty days after the case filing.[172] Furthermore, in districts where the local rules require, for example twenty days notice of such a motion, a

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[170] Several courts, including the Eighth Circuit BAP, have addressed the issue and held that filing on the eve of foreclosure does not constitute "exigent circumstances" for purposes of obtaining an extension of time to comply post-petition. *See In re* Dixon, 338 B.R. 383, 386–87 (B.A.P. 8th Cir. 2006). *But see Thompson*, 344 B.R. at 907 n.14 ("Contrary to some courts, this court views an impending foreclosure of a residence as an 'exigent circumstance' meriting a deferral, despite the debtor's advance knowledge of the foreclosure and the debtor's 'eleventh hour' filing.").

[171] Of course, the debtor would first need to obtain the requisite credit counseling and satisfy all other pre-filing requirements.

[172] *See In re* Harris, 342 B.R. 274, 277 (Bankr. N.D. Ohio 2006); *In re* Berry, 340 B.R. 636, 637 (Bankr. M.D. Ala. 2006); *In re* Moon, 339 B.R. 668, 670 (Bankr. N.D. Ohio 2006) ("[T]he Court may extend the automatic stay only after notice and a hearing completed before the expiration of the thirty day period after the filing of the later case."); *In re* Wright, 339 B.R. 474, 475 (Bankr. E.D. Ark. 2006); *In re* Ziolkowski, 338 B.R. 543, 545–46 (Bankr. D. Conn. 2006) ("Debtors were the movants and it was their ultimate burden to insure that the Motion was timely scheduled.").

debtor will need to file and give notice of the motion immediately so as to allow the court to rule on the matter within the thirty-day window.[173]

Under the existing case law, a good-faith debtor should be eligible to extend the thirty-day stay,[174] if they are able to show that the new petition was filed in good faith. Nevertheless, debtors' counsel should be prepared to make the requisite showing that the petition was filed in good faith,[175] based on the applicable standard of proof.[176]

Assume the same debtor is forced to file hastily in a district where the court holds a petition filed by a debtor who is ineligible under section 109(h) is void ab initio. Although the stricken petition will not invoke the automatic stay limitations of section 362(c) against the debtor, the debtor may be in jeopardy, as these courts largely hold that no automatic stay is invoked at filing, not even for the brief time period until the court can rule on the debtor's eligibility.[177] However, the debtor may still be informally protected from creditor action, as creditors may not take

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[173] *See, e.g.*, *In re* Wilson, 336 B.R. 338, 347 (Bankr. E.D. Tenn. 2005); *In re* Taylor, 334 B.R. 660, 661 (Bankr. D. Minn. 2005).

[174] Various courts have addressed the Code's requirements to extend the temporary stay of section 362(c)(3), holding that there are four minimum requirements: (1) a motion was filed; (2) there was notice and a hearing; (3) the hearing was completed before the expiration of the thirty-day stay; and (4) the debtor proved that the filing of the new case was "in good faith as to the creditors to be stayed." *See In re* Castaneda, 342 B.R. 90, 93–94 (Bankr. S.D. Cal. 2006); *In re* Collins, 335 B.R. 646, 650 (Bankr. S.D. Tex. 2005); *In re* Montoya, 333 B.R. 449, 453 (Bankr. D. Utah 2005); *In re* Charles, 332 B.R. 538, 541 (Bankr. S.D. Tex. 2005).

[175] *See, e.g.*, *In re* Galanis, 334 B.R. 685, 692 n.16 (Bankr. D. Utah 2005) (citing *In re* Gier, 986 F.2d 1326, 1328–29 (10th Cir. 1993)) (holding that, in determining good faith under section 362(c)(3)(B), it would use a "totality of the circumstances" approach, and adopting the following factors, which it derived from the *Gier* decision: (1) the timing of the petition; (2) how the debtor's debts arose; (3) debtor's motive in filing the petition; (4) how the debtor's actions affected creditors; (5) why debtor's prior case was dismissed; (6) the likelihood of the debtor having steady income throughout the bankruptcy plan, and being able to fund a plan; and (7) whether the Trustee or creditors have objected to the debtor's motion).

[176] *See, e.g.*, *Galanis*, 334 B.R. at 691 (holding that where the section 362(c)(3)(C) "not in good faith" presumption arises, the party moving to extend the stay is subject to a "clear and convincing evidence" standard; however, where no presumption arises, the moving party is instead subject only to a "preponderance of the evidence" standard under section 362(c)(3)(B)).

[177] *See, e.g.*, *In re* Salazar, 339 B.R. 622, 626–28 (Bankr. S.D. Tex. 2006).

action for fear of violating the stay in the event it is ultimately held to have been in effect by the court.[178]

Finally, even if a debtor files a petition with one prior case dismissed during the prior year for failure to satisfy the eligibility requirements of section 109(h), the debtor may not have such a dilemma under section 362(c)(3) as one might assume. Under the decisions of most courts that have addressed the issue, even where the thirty-day temporary stay terminates pursuant to section 362(c)(3)(A),[179] a debtor may not be susceptible to much creditor action. Nearly all courts that have addressed the issue, held that only the property of the debtor loses protection of the automatic stay.[180] Under section 541 of the Code, the majority of the debtor's property becomes property of the estate upon the "commencement of a case under section 301, 302 or 303 of [title 11]." [181] Thus, creditors cannot get to the majority of the property, as it is technically "property of the estate" and not "property of the debtor." That said, at least one court recently took the opposite view, holding that despite the plain language of section 362(c)(3)(A), Congress must have intended the stay to terminate as to the property of the estate as well as property of the debtor.[182]

V. CONCLUSION

In a perfect world, Congress would immediately revise BAPCPA to clarify these points of dispute. BAPCPA contains ambiguities that have and will create difficulties for the courts, honest debtors, and creditors. The discussion set forth herein demonstrates one set of difficulties arising out of the ambiguities of BAPCPA. The courts have struggled, in the face of penalizing good-faith debtors with the BAPCPA automatic stay limitations of sections 362(c)(3) and (4), to interpret the consequences of a debtor's failure to comply with the BAPCPA credit

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[178] *See, e.g.*, *In re* Rios, 336 B.R. 177, 180 n.2 (Bankr. S.D.N.Y. 2005) ("The Court therefore cautions all debtors and creditors to carefully read all applicable provisions of the Bankruptcy Code to determine if the stay is in effect.").

[179] See *supra* note 23 for a quotation of the code language.

[180] *See, e.g.*, *In re* Harris, 342 B.R. 274, 280 (Bankr. N.D. Ohio 2006) ("Although such an interpretation may not provide much of a benefit to creditors . . . it is an appropriate one given the manner in which Congress chose to draft § 362(c)(3)."); *In re* Bell, No. 06-11115 EEB, 2006 WL 1132907, at *2 (Bankr. D. Colo. Apr. 27, 2006); *In re* Jones, 339 B.R. 360, 363–65 (Bankr. E.D.N.C. 2006) (holding that under both "plain meaning" and policy arguments, the stay remains in effect as to property of the estate); *In re* Johnson, 335 B.R. 805, 805 (Bankr. W.D. Tenn. 2006) ("When read in conjunction with subsection (1), . . . the plain language of § 362(c)(3)(A) dictates that the 30-day time limit only applies to 'debts' or 'property of the debtor' and not to 'property of the estate.'").

[181] 11 U.S.C. § 541(a) (2006).

[182] *In re* Jumpp, 334 B.R. 21, 23 (Bankr. D. Mass. 2006).

counseling requirement of section 109(h). The automatic stay limitations, which were enacted to deter abusive filings by debtors, in practice have proved to harm good-faith debtors.

In the meantime, courts and counsel should take into consideration the practical considerations set forth above. Specifically, if the debtor's district has already ruled on the disposition of a petition filed in violation of section 109(g), act accordingly: if in a dismiss district, counsel should prepare to immediately file a new petition and a motion to extend the automatic stay under section 362(c)(3)(B); if in a strike district, counsel must hope that no creditor dares take action and prepare to file a new petition immediately upon the petition being stricken. Furthermore, counsel should consider whether the debtor's bankruptcy court has ruled on the effects of stay termination of section 362(c)(3)(A). Even if the debtor is unsuccessful in extending the thirty-day stay, the consequences of the thirty-day stay termination, under case precedent, may not be as severe as it initially sounds.

Comment

A TRAP FOR THE RATIONAL: SIMULTANEOUS REMOVAL AND APPOINTMENT OF A GENERAL PARTNER UNDER THE REVISED UNIFORM LIMITED PARTNERSHIP ACT

Mitchell A. Stephens*

I. INTRODUCTION

Although limited partnerships may have become less important with the advent of the limited liability company, they still play a significant role in the United States. "[T]he International Association of Commercial Administrators (IACA) indicate that the limited partnership remains a significant entity of choice. IACA's members report more than 63,000 new limited partnerships filings in 2000, more than 55,000 in 2001, and more than 63,000 in 2002."[1] These numbers are in addition to the "hundreds of thousands of existing limited partnerships."[2] Additionally, four uniform laws address the legal treatment of limited partnerships.

Notwithstanding the abundance of limited partnerships and the uniform laws, there are significant questions that remain unanswered. One such question stems from an ambiguity in the partnership dissolution provisions of the Revised Uniform Limited Partnership Act ("RULPA"). Specifically, the RULPA dictates that a partnership is dissolved if a general partner is removed and there is not "at least one other general partner."[3] Although the language is facially clear, the Act is ambiguous as to whether a partnership is dissolved when, simultaneous with the removal of the old general partner, a new general partner is appointed. In other words, does a general partner appointed at the same time the old general partner is removed count as a "one other general partner"? The courts are split on the answer.

This Comment examines the reasoning behind the court decisions that have allowed simultaneous replacement and those that have not. To provide context, this Comment reviews the history of limited partnerships and the requirements for the removal and appointment of a general partner.

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[1] Daniel S. Kleinberger, *A User's Guide to the New Uniform Limited Partnership Act*, 37 SUFFOLK U. L. REV. 583, 588 (2004).

[2] *Id.*

[3] REVISED UNIF. LTD. P'SHIP ACT (1976) § 801(4) (amended 1985), 6A U.L.A. 462 (2003).

II. THE LAW OF LIMITED PARTNERSHIPS

A. The Creation of Limited Partnerships and the Uniform Limited Partnership Act of 1916

Common law traditionally prohibited limited partnerships based on the notion that individuals who shared in the profits of a non-incorporated entity were also required to unconditionally share in the losses of that same entity.[4] This common law doctrine changed rapidly when in 1822 the New York Legislature introduced a new entity to the United States—the "limited partnership."[5] This new entity spread quickly, and by the early 1900s every state in the union had passed similar legislation.[6] "[The] general purpose and intent of [such] legislat[ion was] to encourage trade by authorizing and permitting a capitalist to put his money into a partnership with general partners possessed of skill and business character only, without becoming a general partner, or hazarding anything in the business except the capital originally subscribed."[7]

Despite the legislatures' purpose and intent, courts remained hesitant to permit limited liability for limited partners and required exact compliance with strictly construed rules.[8] "Gradually, the limited partnership became known as a liability trap for the unwary investor . . . ."[9]

The Uniform Limited Partnership Act was, in part, a reaction to the courts' strict interpretation of the states' individual limited partnership acts.[10] "Since remedial legislation was needed in most jurisdictions, the matter was considered by the Commissioners on Uniform State Laws, and a proposed uniform act was drafted and submitted to the states in 1916."[11] The result was a law that provided greater protection for limited partners and was almost uniformly adopted.[12]

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[4] *See* Wendell M. Basye, *A Survey of the Limited-Partnership Form of Business Organization*, 42 OR. L. REV. 35, 35 (1962) (citing Grace v. Smith, (1774) 96 Eng. Rep. 587, 588 (Ct. Com. Pl.) ("Every man who has a share of the profits of a trade ought also to bear his share of the loss.")); *see also* FRANCIS M. BURDICK, THE LAW OF PARTNERSHIPS INCLUDING LIMITED PARTNERSHIPS 384 (2d ed. 1906).

[5] 1822 N.Y. Laws 259.

[6] Janet L. Eifert, Note, *Removal of General Partners: A Method of Intrapartnership Dispute Resolution for Limited Partnerships*, 39 VAND. L. REV. 1407, 1410 (1986); *see also* BURDICK, *supra* note 4, at 384–85.

[7] Clapp v. Lacey, 35 Conn. 463, 463 (1868); *accord* BURDICK, *supra* note 4, at 387 ("The principle object which legislators had in view . . . was the encouragement of trade.").

[8] *See* BURDICK, *supra* note 4, at 390 ("[C]ourts have shown a disposition to give a harsh and technical construction to limited partnership statutes, on the ground that they are in derogation of the common law." (citations omitted)); Basye, *supra* note 4, at 37; Eifert, *supra* note 6, at 1410–11.

[9] Eifert, *supra* note 6, at 1411.

[10] *See* Basye, *supra* note 4, at 37.

[11] *Id.*

[12] *See* UNIF. LTD. P'SHIP ACT, Table of Jurisdictions Wherein Act Has Been Adopted, 6 U.L.A. 49 (Supp. 1973).

However, the drafters of the new uniform law had to balance the competing interests of limited partners with those of third-party creditors.[13] In so doing, the drafters directly tied liability to control. Under the Act of 1916, the "[g]eneral partners manage[d] the limited partnership and [could] incur unlimited personal liability for the partnership's debts. Limited partners [could] not incur personal liability beyond the amount of their partnership contributions, but they [were] prohibited from taking an active role in the management of the partnership."[14] If limited partners did take an active role in the management of the company, they were subject to the same liability as a general partner.[15]

The uniform law also required each limited partnership to have at least one general partner at all times.[16] The policy behind this requirement was two-fold. First, it ensured there would always be a general partner who could be held personally liable to third-party creditors.[17] Second, it ensured there would always be a general partner who could manage the affairs of the limited partnership.[18]

B. The 1976 and 1985 Revisions: The Revised Uniform Limited Partnership Act

"In 1976, the National Conference of Commissioners on Uniform State Laws adopted the first revision of the Uniform Limited Partnership Act . . . ."[19] This new act superseded the Uniform Act of 1916.[20] In 1985 the National Conference approved a third Act. However, the Conference later determined that instead of superseding the 1976 Act, the 1985 alterations would simply be incorporated as amendments to the Revised Uniform Limited Partnership Act of 1976.[21]

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[13] Eifert, *supra* note 6, at 1413.

[14] *Id.*

[15] UNIF. LTD. P'SHIP ACT § 7, 6 U.L.A. 582 (1969) ("A limited partner shall not become liable as a general partner unless . . . he takes part in the control of the business."); *see, e.g.*, Millard v. Newmark & Co., 266 N.Y.S.2d 254, 259 (N.Y. App. Div. 1966) (citing a New York partnership law that states a limited partner is not liable unless "he takes part in the control of the business" (citations omitted)).

[16] UNIF. LTD. P'SHIP ACT § 20, 6 U.L.A. 604 (1969) (providing for dissolution upon the "retirement, death, or insanity of a general partner" unless there are remaining general partners). This requirement continues today. *See* REVISED UNIF. LTD. P'SHIP ACT (1976) § 801 (amended 1985), 6A U.L.A. 462 (2003) (providing for dissolution upon the event of withdrawal of a general partner "unless at the time there is at least one other general partner"); UNIF. LTD. P'SHIP ACT (2001) § 801, 6A U.L.A. 84 (2003) (providing for dissolution after dissociation of the only general partner unless a new general partner is admitted).

[17] *See* Eifert, *supra* note 6, at 1413.

[18] *Id.*

[19] REVISED UNIF. LTD. P'SHIP ACT (1976), Prefatory Note (amended 1985), 6A U.L.A. 127–29 (2003).

[20] *Id.* Historical Notes, 6A U.L.A. 126.

[21] *Id.*

As with the Uniform Law of 1916, the 1975 Act along with the amendments of 1985 were readily adopted by the states. Indeed, the RULPA was adopted by forty-nine of the states, as well as the District of Columbia and the Virgin Islands.[22]

The intent of both the 1975 Act and the 1985 Revisions was to "modernize the prior [1916] uniform law while retaining the special character of limited partnerships as compared with corporations."[23] Therefore, the basic format of limited partnerships was left intact. General partners were still subject to personal liability for the debts of the partnership,[24] and limited partners were not liable for the obligations of a limited partnership, unless the limited partner participated in the control of the business.[25] Further, like the Act of 1916, a limited partnership was still required to have a general partner at all times.[26]

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[22] Louisiana is the only state that did not adopt the RULPA. *See id.* Table of Jurisdictions Wherein Act Has Been Adopted, 6A U.L.A. 125–26. Because of the nearly uniform adoption of the RULPA, the Uniform Act of 1916 has little relevance to current limited partnerships; many states actually repealed their prior adoption of the 1916 Act. *Id.*

[23] *Id.* Prefatory Note, 6A U.L.A. 127.

[24] *See id.* § 403, 6A U.L.A. 365 ("[A] general partner of a limited partnership has the liabilities of a partner in a partnership . . . ."). In fact, section 403 of the RULPA was actually derived from section 9(1) of the 1916 Act. *Id.* § 403 cmt.

[25] *Id.* § 303, 6A U.L.A. 324 ("[A] limited partner is not liable for the obligations of a limited partnership unless . . . in addition to the exercise of his [or her] rights and powers as a limited partner, he [or she] participates in the control of the business." (alterations in original)).

One important clarification that the RULPA did provide concerned the scope of liability for a limited partner who participated in the control of the limited partnership. Before the RULPA was promulgated, the courts were uncertain as to whether a limited partner was liable for all of the limited partnership's obligations, or only those that were the direct result of the limited partners' participation in the control of the limited partnership. In other words, there was a question as to whether the creditors had to believe the limited partner acted under the authority of a general partner. *See* J. WILLIAM CALLISON & MAUREEN A. SULLIVAN, PARTNERSHIP LAW AND PRACTICE § 23:18 (2006).

The RULPA answered this question by providing that a limited partner who participates in the control of the business "is liable only to persons who transact business . . . reasonably believing, based upon the limited partner's conduct, that the limited partner is a general partner." REVISED UNIF. LTD. P'SHIP ACT (1976) § 303 (amended 1985), 6A U.L.A. 324 (2003).

In addition to answering questions about the scope of liability, section 303 of the RULPA also addressed what actions constituted "participat[ion] in the control of the business." *Id.* This section did so by providing a non-exhaustive list of actions in which a limited partner could engage without participating in the control of the business. *Id.* § 303(b).

[26] *Id.* § 801(4), 6A U.L.A. 462 (providing for dissolution upon "an event of withdrawal of a general partner unless at the time there is at least one other general partner," or a new general partner is appointed within ninety days).

Presumably, this requirement was left intact for the same policy reasons motivating its initial enactment—to provide protection for creditors and to ensure proper management

C. The Uniform Limited Partnership Act of 2001

In August of 2001, the National Conference of Commissioners on Uniform State Laws approved a new version of the Revised Limited Partnership Act ("New Limited Partnership Act" or "NULPA"). "The new Limited Partnership Act is a 'stand alone' act, 'de-linked' from both the original general partnership act . . . and the Revised Uniform Partnership Act . . . ."[27] In other words, the NULPA is intended to provide "the entire operative organizational law for limited partnerships in a single act,"[28] instead of turning to partnership law to fill in the blanks as the prior uniform acts had.[29]

Despite this "de-linking," NULPA "does retain much of the feel of RULPA. Many of the changes simply seek to update RULPA to reflect amendments already made by various states, [new] case law, and the adoption of LLC statutes since RULPA's last revision."[30]

The familiar aspects of limited partnerships are, for the most part, still present. General partners are still held personally liable for the obligations of the limited partnership.[31] Limited partners still do not face personal liability for the partnership's obligations,[32] and finally, there still must be a general partner at all times.[33]

However, there are two important differences between the NULPA and the RULPA. First, "[a] limited partner is not personally liable, . . . even if the limited partner participates in the management and control of the limited partnership."[34] The drafters of the NULPA found that "[i]n a world with LLPs, LLCs and, most importantly, LLLPs, the control rule has become an anachronism."[35] Accordingly, the control rule was deleted altogether. Second, the NULPA has yet to garner

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of the limited partnership. *See supra* text accompanying note 17 (explaining the policy behind general partner requirement).

[27] UNIF. LTD. P'SHIP ACT (2001), Prefatory Note, 6A U.L.A. 2–8 (2003). This is a new course for limited partnerships, as they previously shared some common base with regular partnerships. *See* REVISED UNIF. LTD. P'SHIP ACT (1976) § 1105 (amended 1985), 6A U.L.A. 547 (2003).

[28] Thomas E. Geu & Barry B. Nekritz, *Expectations for the Twenty-First Century: An Overview of the New Limited Partnership Act*, PROB. & PROP., January/February 2002, at 47, 47.

[29] *See* REVISED UNIF. LTD. P'SHIP ACT (1976) § 1105 (amended 1985), 6A U.L.A. 547 (2003); UNIF. LTD. P'SHIP ACT (2001), Prefatory Note, 6A U.L.A. 2–8 (2003).

[30] Geu & Nekritz, *supra* note 28, at 48.

[31] UNIF. LTD. P'SHIP ACT (2001) § 404, 6A U.L.A. 57 (2003).

[32] *Id.* § 303, 6A U.L.A. 46.

[33] *Id.* § 801(3), 6A U.L.A. 84 (providing for dissolution after the dissociation of a sole general partner unless a new general partner is admitted).

[34] *Id.* § 303, 6A U.L.A. 46.

[35] *Id.* § 303 cmt., 6A U.L.A. 46–47.

uniform support; currently only seven states have adopted the NULPA.[36] As such, most limited partnerships are still governed by the RULPA. For this reason, this Comment accepts the RULPA as the governing law for limited partnerships.[37]

III. REMOVING AND APPOINTING GENERAL PARTNERS

Because limited partners cannot control the affairs of the partnership without risking personal liability, the general partner wields enormous power and is vital to the partnership's success. Under the RULPA the general partner has the same "rights and powers . . . of a partner in a partnership without limited partners."[38] Thus, "[a] general partner may bind a partnership for actions taken within the ordinary course of business."[39]

With such broad control granted to the general partner, it is not difficult to imagine or find a situation in which a limited partner's interests are neglected.[40] Fortunately, the limited partners may have a strong weapon in checking mismanagement by the general partner—the ability to remove the general partner.[41] Unfortunately, such removal can be more difficult than it sounds.

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[36] Those states are Florida, Hawaii, Illinois, Iowa, Minnesota, and North Dakota. *See* Florida Revised Uniform Limited Partnership Act of 2005, FLA. STAT. §§ 620.1101 to .2205 (2006); Uniform Limited Partnership Act (Revised), HAW. REV. STAT. §§ 425E-101 to -1205 (2006); Uniform Limited Partnership Act, IDAHO CODE ANN. §§ 53-2-101 to -1205 (Supp. 2006); Uniform Limited Partnership Act, 805 ILL. COMP. STAT. §§ 215/0.01 to /1402 (Supp. 2006); Uniform Limited Partnership Act, IOWA CODE §§ 488.101 to .1207 (2007); Uniform Limited Partnership Act of 2001, MINN. STAT. §§ 321.0101 to .1208 (2006); Uniform Limited Partnership Act (2001), N.D. CENT. CODE §§ 45-10.2-01 to -117 (Supp. 2005).

[37] The section of the RULPA that creates the ambiguity with regard to simultaneous appointment/removal is largely the same under both the 2001 and 1985 acts. The ambiguity in both acts rests with the bright-line test as to whether there was a "remaining general partner" at the time of removal. *Compare* UNIF. LTD. P'SHIP ACT (2001) § 801(3)(B), 6A U.L.A. 84 (2003) (requiring dissolution after removal "if the limited partnership does not have a remaining general partner" unless certain conditions are met), *with* REVISED UNIF. LTD. P'SHIP ACT (1976) § 801(4) (amended 1985), 6A U.L.A. 462 (2003) (requiring dissolution after removal "unless at the time there is at least one other general partner" or other conditions are met).

[38] REVISED UNIF. LTD. P'SHIP ACT (1976) § 403(a) (amended 1985), 6A U.L.A. 365 (2003).

[39] 59A AM. JUR. 2D *Partnership* § 848 (2006).

[40] *See, e.g.*, Obert v. Envtl. Research & Dev. Corp., 752 P.2d 924, 925 (Wash. Ct. App. 1988) (removing general partner for "breaches of fiduciary duties"), *rev'd on other grounds*, 771 P.2d 340, 349–51 (Wash. 1989) (en banc).

[41] See Eifert, *supra* note 6, for a discussion of the removal of a general partner as a method of intrapartnership dispute resolution.

A. Removal Under the RULPA

It is difficult to remove a general partner under the RULPA. To begin with, "the RULPA does not explicitly grant limited partners the right to remove general partners."[42] However, the RULPA does allow partners to create the power to remove general partners when drafting the terms of the limited partnership agreement.[43] Section 402 of the RULPA provides that "a person ceases to be a general partner of a limited partnership . . . [if] the general partner is removed as a general partner in accordance with the partnership agreement."[44]

However, this section is of little comfort to a limited partner if the partnership agreement does not contain a removal provision. "[Assuming] a limited partnership agreement does not contain a general partner removal provision and there is no mechanism for amending its terms . . . involuntary removal and replacement of the general partner . . . would probably not be possible . . . ."[45] The only way to remove a general partner under these circumstances would be to have all parties to the partnership agreement—including the general partner—unanimously agree to amend the terms of the agreement to allow for removal.[46]

Therefore, before entering into a limited partnership, a limited partner would be wise to consider the terms (if any) specifying the procedure for the removal of the general partner. If no such terms are provided, a limited partner should consider introducing such terms or finding another investment.

B. Removal Under the Partnership Agreement

Assuming the parties created the authority to remove a general partner in the partnership agreement, a court will likely uphold the removal of a general partner without imposing any requirements beyond those set forth in the partnership agreement.[47] For this reason, when specifying the procedure for removal, the following issues, among others, should be addressed:

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[42] *Id.* at 1431. Janet Eifert argues that the RULPA should include a statutory right to remove a general partner because this contractual option is simply not enough protection for a limited partner with little bargaining power as to the terms of partnership agreement. *Id.* at 1462. Although her approach was not entirely adopted, the NULPA of 2001 does provide limited statutory and judicial means for the removal of a general partner. *See* UNIF. LTD. P'SHIP ACT (2001) § 601, 6A U.L.A. 71–72 (2003) (providing for statutory removal with unanimous consent of all other partners under certain circumstances and for judicial removal based on the general partner's actions).

[43] *See* REVISED UNIF. LTD. P'SHIP ACT (1976) § 402(3) (amended 1985), 6A U.L.A. 358–59 (2003).

[44] *Id.*

[45] Kenneth Hooker, *The Power of Limited Partners to Remove and Replace the General Partner of a Limited Partnership*, 19 TEX. TECH. L. REV. 1, 2 (1988).

[46] *Id.* at 2–3.

[47] *See, e.g.*, Consortium Mgmt. Co. v. Mut. Am. Corp., 271 S.E.2d 488, 490 (Ga. 1980) (upholding removal of a general partner in compliance with the partnership

> [T]he percentage of limited partners needed to call a partnership meeting and the notification requirements, [should] be addressed. The partnership agreement also [should] specify the percentage of limited partners' votes required to effect removal, quorum requirements, availability of proxies and the method of valuation of the removed general partner's interest.[48]

Likewise, the partnership agreement should expressly permit any remaining general partner to carry on the partnership operations.[49]

If the partnership agreement does not provide for the removal of a general partner but allows for the limited partners to amend the terms of the agreement itself, the limited partners may still be able to remove a general partner. The limited partners could use the amendment power to write-in a provision allowing for the removal of a general partner.[50]

In short, the terms of the partnership agreement dictate the ability to remove a general partner. If there is no provision in the partnership agreement, the limited partners must amend the partnership agreement to include such a provision in order to remove a general partner.[51]

C. Appointing General Partners

The appointment of additional or substitute general partners is similar to the removal of general partners. "[A]dditional general partners may be admitted as provided in writing in the partnership agreement or, if the partnership agreement

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agreement); Waite v. Sylvester, 560 A.2d 619, 621–22 (N.H. 1989) (same); *see also* CALLISON & SULLIVAN, *supra* note 25, § 20:7.

[48] Eifert, *supra* note 6, at 1421.

[49] See *infra* notes 70–71 and accompanying text for a discussion of why such a provision is necessary to prevent the dissolution of a limited partnership.

[50] *See, e.g.*, Aztec Petroleum Corp. v. MHM Co., 703 S.W.2d 290, 293 (Tex. App. 1985) ("[N]either the partnership act nor the limited partnership act prohibit[s] removal and substitution of a general partner in a limited partnership, even though the partnership agreement initially does not directly allow such action, if the partnership agreement provides a method for amendment and an amendment permitting substitution and removal of a general partner is adopted."). By contrast, if the agreement does not provide for amendment by the limited partners, all parties to the contract—including the ousted general partner—would have to agree to the amendment. *See* Hooker, *supra* note 45, at 2–3.

[51] However, the general partner may withdraw, even if the partnership agreement contains no reference to withdrawal or even prohibits the general partner from withdrawing. *See* REVISED UNIF. LTD. P'SHIP ACT (1976) § 602 (amended 1985), 6A U.L.A. 425–26 (2003) ("A general partner may withdraw from a limited partnership at any time . . . , but if the withdrawal violates the partnership agreement, the limited partnership may recover from the withdrawing general partner damages for breach of the partnership agreement . . . .").

does not provide in writing for the admission of additional general partners, with the written consent of all partners."[52]

In other words, the only difference between the removal provision and the appointment provision of the RULPA is that there is a statutory default for the appointment of general partners, but none for their removal.[53]

Nevertheless, the statutory default requires the unanimous consent of *all* the partners. As such, a minority partner, even the recently ousted general partner, can prevent the appointment of a general partner by withholding consent. Therefore, absent express terms in the partnership agreement, the appointment of a general partner will also "probably not be possible."[54]

In short, the partnership agreement will most likely determine whether the removal or appointment of a general partner is even an option for the limited partners.[55] Furthermore, it is important to note that any provision in the partnership agreement governing the appointment of a general partner only governs so long as the appointment is made *before* any act of withdrawal by the general partner.[56] Otherwise, the appointment of a substitute general partner is likely subject to the requirements of section 801, as is discussed in the next section.

IV. AVOIDING DISSOLUTION AFTER THE REMOVAL OF A GENERAL PARTNER

As previously noted, under all of the Uniform Limited Partnership Acts the limited partnership must have a general partner.[57] The same policy reasons motivating implementation of the "general partner provision" in the 1916 Uniform Act remain essential to continuation of the general partner requirement. First, creditors of the partnership need some assurance of personal liability. Second, the limited partnership needs a general partner to control its affairs.[58] Failure to comply with this strict general partner requirement can cause dissolution of the limited partnership.[59] As such, limited partners need to act with caution if they seek to remove a general partner and want avoid dissolution of the partnership.

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[52] *Id.* § 401, 6A U.L.A. 356.

[53] *See id.* §§ 401–02, 6A U.L.A. 356, 358–59.

[54] Hooker, *supra* note 45, at 2 (discussing removal).

[55] *See* CALLISON & SULLIVAN, *supra* note 25, § 20:7 ("[U]nless the partnership agreement is carefully drafted, it can be difficult under RULPA to permit the limited partners to continue the partnership business without obtaining the removed general partner's consent . . . .").

[56] This position assumes there is no other general partner and the partnership agreement does not provide for the continuance of the agreement.

[57] *See supra* note 16 and accompanying text (discussing the requirement of a general partner). *But see infra* notes 98–100 and accompanying text (noting that dissolution after the withdrawal of a general partner can be waived under NULPA).

[58] *See supra* note 17 and accompanying text (discussing the policy behind the requirement of a general partner).

[59] *See* REVISED UNIF. LTD. P'SHIP ACT (1976) § 801 (amended 1985), 6A U.L.A. 462 (2003).

A. General Causes of Dissolution

There are generally five ways to dissolve a limited partnership under the RULPA.[60] The first three involve the consent of the all partners. Thus, the partnership may be dissolved (1) "at the time specified in the certificate of limited partnership,"[61] (2) "upon the happening of events specified . . . in the partnership agreement,"[62] or (3) upon the "written consent of all partners."[63] The fourth cause of dissolution involves the withdrawal[64] of a general partner.[65] The fifth means of dissolution is through a judicial decree based upon a finding that "it is not reasonably practicable to carry on the business in conformity with the partnership agreement."[66]

Limited partners seeking to remove a general partner need to be aware of the fourth cause of dissolution—"an event of withdrawal of a general partner."[67]

B. Dissolution After an Event of Withdrawal: Removal of a General Partner

Under section 801 of the RULPA there are two separate ways the removal of a general partner can cause the dissolution of the partnership.

First, if there is not at least one other remaining general partner after the removal of a general partner, the partnership is dissolved unless "all partners agree in writing to continue the business of the limited partnership and to the appointment of one or more additional general partners" within ninety days of the removal.[68] After removal, the consent of all of the partners may be difficult to obtain, considering the limited partners just ousted the general partner against his will. As such, it is important for limited partners seeking to remove a general partner to make sure there is always "at least one other general partner."[69]

Second, even if there is a remaining general partner, the partnership dissolves unless at the time of removal "the written provisions of the partnership agreement

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[60] *Id.*

[61] *Id.* § 801(1).

[62] *Id.* § 801(2).

[63] *Id.* § 801(3).

[64] Section 402 defines the events of withdrawal of a general partner. Among other ways, there has been a withdrawal of a general partner if "the general partner is removed as a general partner in accordance with the partnership agreement." *Id.* § 402(3), 6A U.L.A. 359. In other words, the removal of a general partner is one form of withdrawal.

[65] *Id.* § 801(4), 6A U.L.A. 462.

[66] *Id.* §§ 801(5), 802, 6A U.L.A. 462, 469.

[67] *Id.* § 801(4), 6A U.L.A. 462.

[68] *Id.*

[69] *See, e.g.*, Obert v. Envtl. Research & Dev. Corp., 752 P.2d 924, 926–27 (Wash. Ct. App. 1988) (noting the removed general partner refused to consent to continue the partnership and argued the partnership was accordingly dissolved), *rev'd on other grounds*, 771 P.2d 340, 349–51 (Wash. 1989) (en banc).

permit the business of the limited partnership to be carried on by the remaining general partner,"[70] or "within 90 days . . . all partners agree in writing to continue the [partnership]."[71] As noted, the consent of the recently ousted general partner may be difficult to obtain. As such, limited partners would be wise to ensure that the terms of the partnership allow for continuation in the event of removal.

C. Ability to Contractually Limit Causes of Dissolution

The provisions of the RULPA that dictate the dissolution of a limited partnership after the removal of a sole general partner cannot be altered by the terms of the partnership agreement.[72] In other words, when section 801 dictates that a limited partnership is dissolved "upon an event of withdrawal," the partnership dissolves regardless of whether the partnership agreement states otherwise.[73] This rule is widely accepted, and "even in the case of a general partnership [that existed at common law and is not merely a creature of statute] . . . the partners cannot contract to negate the statutory events of dissolution."[74] Therefore, regardless of whether a partnership agreement allows for the continuation of the limited partnership without a general partner, such a partnership would still be dissolved in accordance with the RULPA.

V. THE RESULT OF SIMULTANEOUS REMOVAL AND APPOINTMENT OF A GENERAL PARTNER

Despite the seemingly clear dissolution provisions, the RULPA does not provide a definitive answer as to the effect of the simultaneous removal of an old general partner and appointment of new general partner.

Section 801 of the RULPA dictates the dissolution of a limited partnership after the removal of a general partner unless "at the time there is at least one other general partner" or all partners agree to continue the partnership.[75] What is missing is a critical determination as to whether section 801 applies when the removal of the old general partner and the attempted appointment of the new general partner occurred *at the same time*. In other words, does simultaneous removal and

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[70] *Id.* at 927.

[71] *Id.*

[72] *See id.* at 926–27; *see also In re* Hagerstown Fiber Ltd. P'ship, No. 98 B 41988(SMB), 1998 WL 538607, at *5 (Bankr. S.D.N.Y. 1998).

[73] *Hagerstown*, 1998 WL 538607, at *5.

[74] *Id.*; *see also* Finkelstein v. Sec. Props., Inc., 888 P.2d 161, 166 & n.6 (Wash. Ct. App. 1995); ALAN R. BROMBERG & LARRY E. RIBSTEIN, BROMBERG AND RIBSTEIN ON PARTNERSHIP § 7.01(c), at 7:14 (1998) ("[T]he occurrence of a statutory cause of dissolution . . . *necessarily* causes dissolution of the partnership entity . . . .").

[75] REVISED UNIF. LTD. P'SHIP ACT (1976) § 801 (amended 1985), 6A U.L.A. 462 (2003).

appointment of a general partner mean "at the time [of removal] there [was or was not] at least one other general partner"?[76] This question divides the courts.[77]

A. The View that Simultaneous Appointment and Removal Requires Dissolution Under Section 801

The best argument that the simultaneous removal of an old general partner and the appointment of a new general partner causes dissolution under section 801, is the plain language of section 801. Section 801 triggers dissolution after "an event of withdrawal of a general partner unless *at the time there is at least one other general partner* . . . [and the partnership is] carried on by the *remaining* general partner."[78] There are two arguments that the simultaneous appointment and removal of a general partner does not satisfy the terms of section 801.[79]

The first argument is that there is never "one *other* general partner." In order "[t]o invoke the exception [in section 801], there must be at least *one other* general partner at the time of the event of withdrawal."[80] Simultaneous removal and appointment never presents this situation. Instead, the new general partner is appointed at exactly the same time the old general partner is removed.[81] There is no overlap, and therefore at no time is there ever any *other* general partner. Instead, there is always only *one* general partner and none other.

The second argument concerns interpretation of the term "remaining" contained in section 801. Section 801 requires the "partnership be carried on by the *remaining* general partner."[82] The term "remaining" implies a preexisting state that is simply not present in the case of simultaneous removal and appointment.[83] In the case of simultaneous appointment and removal, the appointment of a new general

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[76] *Id.*

[77] *Compare In re* Sovereign Group, 88 B.R. 325, 331 (Bankr. D. Colo. 1988) ("Since [the general partner] will be replaced by a substitute general partner at the very moment of confirmation of the plan, [the general partner]'s contention that the . . . partnership is dissolved and should be wound up pursuant to this section is without merit because at no time will the partnership be without a general partner at its helm."), *with Hagerstown*, 1998 WL 538607, at *7 (finding simultaneous appointment and removal caused dissolution because a partnership with only one general partner never has "one other general partner" and because a newly appointed general partner "has to be a general partner at the time of the event of withdrawal").

[78] REVISED UNIF. LTD. P'SHIP ACT (1976) § 801 (amended 1985), 6A U.L.A. 462 (2003) (emphasis added).

[79] *See Hagerstown*, 1998 WL 538607, at *7.

[80] *Id.* (emphasis added).

[81] *See* WEBSTER'S NEW INTERNATIONAL DICTIONARY 2342 (2d ed. 1934) (defining "simultaneous" as "[t]aking place or operating at the same time; as, *simultaneous* events").

[82] REVISED UNIF. LTD. P'SHIP ACT (1976) § 801 (amended 1985), 6A U.L.A. 462 (2003) (emphasis added).

[83] To "remain" is "to continue in the same state" or "to be left after the removal . . . of all else." RANDOM HOUSE UNABRIDGED DICTIONARY 1629 (Stuart Berg Flexner & Leonore Crary Hauck eds., 2d ed. 1993).

partner does not occur before the removal of the old general partner—instead the two occur simultaneously. As such, the simultaneously appointed general partner is not a "remaining" partner and does not meet the exception set forth in section 801.[84]

Both of these arguments have merit and are difficult to rebut. Indeed, the courts that have allowed simultaneous appointment and removal have largely sidestepped these textual arguments.[85]

B. The View that Simultaneous Appointment and Removal Does Not Require Dissolution Under Section 801

The best argument that simultaneous removal and appointment does not requires dissolution, stems from the policy underpinnings of section 801. One court explained that policy as follows:

> The purpose of this statute is to permit the continuation of the partnership as an entity under certain conditions so long as proper steps are taken in the proper order. The prescribed procedure is meant to ensure that there is a continuity of general partners. Once continuity is assured . . . the [purpose of the] statute is satisfied.[86]

When examining only the policy behind section 801, the answer to the question of simultaneous removal and appointment seems clear. Indeed, the fact that the partnership was never left without a general partner seems dispositive.[87] Finding otherwise would cause the unintentional dissolution of a partnership without serving any policy.

The case of *Obert v. Environmental Research and Development Corp.* demonstrates such a situation.[88] In *Obert*, the partnership agreement allowed for the removal or appointment of a general partner after a majority vote.[89] In accordance with these provisions, "74.4 percent of the limited partners voted by proxy to remove [the general partner] and elect a successor general partner."[90] Unfortunately the limited partners did not jump through the right hurdles. Instead of holding two votes (the first to elect a new general partner and then a subsequent

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[84] *See Hagerstown*, 1998 WL 538607, at *7.

[85] *See, e.g.*, *In re* Sovereign Group, 88 B.R. 325, 331 (Bankr. D. Colo. 1988) (finding simultaneous removal and appointment did not require dissolution, without addressing the textual arguments).

[86] Fid. Trust Co. v. BVD Assocs., 492 A.2d 180, 185–86 (Conn. 1985).

[87] In fact, it has been dispositive for some courts. *See, e.g.*, *Sovereign Group*, 88 B.R. at 331 (finding simultaneous removal and appointment did not require dissolution, "because at no time will the partnership be without a general partner at its helm").

[88] *See* 752 P.2d 924, 925 (Wash. Ct. App. 1988), *rev'd on other grounds*, 771 P.2d 340 (Wash. 1989) (en banc).

[89] *Id.* at 926.

[90] *Id.* at 925.

to remove the old general partner), the limited partners consolidated the matter.[91] According to the court, this mistake was fatal and the partnership was dissolved.[92]

The irrationality of such a rule can be demonstrated by looking at the terms of a theoretical partnership agreement. Assuming a partnership agreement allows for both the removal and appointment of a general partner with the vote of fifty-one percent or more of the limited partners and also allows for the continuation of the partnership after removal, there are two options for replacing the general partner.

First, the limited partners could appoint a new general partner with at least a fifty-one percent vote and then subsequently remove the old general partner with that same percentage. Under these circumstances, section 801 does not require dissolution as there was clearly one *other* general partner at the time of removal. Thus, the partnership will continue as it had before.[93]

Second, the limited partners could simultaneously vote to remove the old general partner and appoint a new general partner. Assuming such action implicates section 801 because there was never one *other* general partner, the limited partners would now need at least fifty-one percent to remove and one hundred percent to appoint and continue the partnership.

Other than the forty-nine percent increase in votes needed to appoint a new general partner and continue the partnership, there is no material change between the two situations. Neither partnership was ever left without a general partner. Thus, requiring dissolution after simultaneous removal and appointment serves no purpose other than to create a trap for limited partners who fail to jump through the right procedural hoops.[94]

Therefore, the strongest argument against the *Obert* ruling, and others like it, is that they create arbitrary distinctions that are out of touch with the policy underlying section 801. Regardless of whether the removal and appointment is

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[91] *See id.*

[92] *Id.* at 927. This decision was later reversed on separate grounds by *Obert*, 771 P.2d 340. Additionally, the original decision has been criticized by scholars, mainly on the grounds that the court failed to provide an analysis of why simultaneous removal and appointment required dissolution under section 801. *See, e.g.*, Kleinberger, *supra* note 1, at 618 n.163. Nonetheless, the facts of the case suffice to make the point.

[93] This is so because there is one other general partner and the partnership agreement allows for the business of the limited partnership to be carried on by the remaining general partner. *See* REVISED UNIF. LTD. P'SHIP ACT (1976) § 801 (amended 1985), 6A U.L.A. 462 (2003).

[94] One example of such "hoop-jumping" is the insertion of language that makes manifest the removal will not take effect until immediately *after* the appointment of the new general partner. For an example of such language, see M. LUBAROFF & P. ALTMAN, DELAWARE LIMITED PARTNERSHIPS § 8.1, at 8–6 (1977) (recommending that the removal should not be made effective until immediately *after* the successor general partner is admitted).

The actual length of the overlap between the two partners seems immaterial. Theoretically, the old general partner could be removed less than a nanosecond after the new general partner was appointed and section 801 would not apply. *See* Kleinberger, *supra* note 1, at 618 ("Timing thus becomes crucial; a nanosecond can matter . . . .").

simultaneous or if there is a one-second overlap, the partnership has never gone without a general partner. Accordingly, the two situations should be treated similarly.

VI. THE UNIFORM LIMITED PARTNERSHIP ACT OF 2001—A STEP IN THE RIGHT DIRECTION

The NULPA takes a step in the right direction with regard to the issue of simultaneous removal and appointment. As with the RULPA, there is still some question as to whether simultaneous removal and appointment causes the dissolution of a partnership. This is because the NULPA again uses the phrase "remaining general partner."[95] However, for most cases the ambiguity is resolved by a change in the uniform law.

First, the NULPA differs from the RULPA in that it does not require unanimous consent of all the partners in order to avoid dissolution.[96] Instead, the NULPA allows the limited partners to avoid dissolution by a "majority [vote] of the . . . limited partners at the time the consent is to be effective."[97] Thus, not only is the sheer number of votes different, but also the ousted general partner's vote does not count—eliminating the possibility of a hold-out. The difference between the two Acts is clear when applied to the facts of *Obert*. Under the NULPA, there would have been no cause for dissolution as a majority (seventy-four percent) of the limited partners approved of the appointment of the new general partner and, at least implicitly, consented to the continuation of the partnership.

Second, and of perhaps greater importance, is that under the NULPA the partnership agreement can actually control whether the limited partnership is dissolved after the withdrawal of a general partner.[98] "A continuity provision could therefore apply regardless of whether a sole general partner is removed before, after, or during the appointment of a substitute general partner."[99] Thus, it is only

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[95] UNIF. LTD. P'SHIP ACT (2001) § 801(3), 6A U.L.A. 84 (2003).

[96] *Compare* REVISED UNIF. LTD. P'SHIP ACT (1976) § 801(4) (amended 1985), 6A U.L.A. 462 (2003) ("[T]he limited partnership is not dissolved and is not required to be wound up by reason of any event of withdrawal if, within 90 days after the withdrawal, all partners agree in writing to continue the business of the limited partnership and to the appointment of one or more additional general partners if necessary or desired."), *with* UNIF. LTD. P'SHIP ACT (2001) § 801(3)(B), 6A U.L.A. 84 (2003) (requiring dissolution "unless before the end of the [ninety-day] period . . . consent to continue the activities of the limited partnership and admit at least one general partner is given by limited partners owning a majority of the rights to receive distributions as limited partners at the time the consent is to be effective").

[97] UNIF. LTD. P'SHIP ACT (2001) § 801(3)(B)(i), 6A U.L.A. 84 (2003).

[98] *See* UNIF. LTD. P'SHIP ACT (2001) § 110(b), 6A U.L.A. 23 (2003) (providing a list of provisions that may not be altered by the agreement that fails to list section 801).

[99] Kleinberger, *supra* note 1, at 618.

when the partnership agreement is silent that the majority vote requirement in section 801 applies.[100]

VII. RECOMMENDATIONS

Despite the clarifications the NULPA provides, there are still two reasons for concern. First, the NULPA has only been adopted by seven states.[101] Second, the NULPA still does not answer the question of whether in the absence of a continuity provision, simultaneous removal and appointment triggers section 801.

Accordingly, it is imperative that legislatures and courts take proper steps to remedy the ambiguity. First the states that have not adopted the NULPA should consider doing so. The NULPA's treatment of simultaneous removal and appointment is but one of the many modernizations and improvements on the RULPA.[102] Second, the states that continue to rely on the RULPA either need to answer the question of whether simultaneous removal and appointment triggers section 801, or they should render the issue moot by legislating that the partnership agreement governs the appointment of general partners *regardless* of whether section 801 applies. Third, limited partners and their attorneys need to be aware of the potential trap inherent in simultaneous removal and appointment and find ways to avoid it.[103]

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[100] *Id.*

[101] *See supra* note 36 and accompanying text (discussing the limited adoption of the NULPA and indicating which states have adopted it).

[102] For a more complete list of changes made by the NULPA, as well as a recommendation that the states adopt the NULPA, see Kleinberger, *supra* note 1 at 600–07 (providing a comparison table that shows some of the major differences between the NULPA and the RULPA). *See also* Geu & Nekritz, *supra* note 28, at 47–51; Carol Goforth, *Time for Another New Business Statute: The Case for the Uniform Limited Partnership Act*, 2004 ARK. L. NOTES 55, 57–63 (arguing that Arkansas should adopt the Act).

[103] The easiest way to avoid this trap would be to appoint a new general partner and subsequently remove the old general partner, or to specifically provide that the removal of the old general partner is not effective until the new general partner has been appointed in the partnership agreement.