

HARVARD JOURNAL *of* LAW & PUBLIC POLICY

VOLUME 31, NUMBER 1

WINTER 2008

LAW AND MORALITY

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The *Harvard Journal of Law & Public Policy* is published three times annually by the Harvard Society for Law & Public Policy, Inc., Harvard Law School, Cambridge, Massachusetts 02138. ISSN 0193-4872. Nonprofit postage prepaid at Lincoln, Nebraska and at additional mailing offices. POSTMASTER: Send address changes to the Harvard Journal of Law & Public Policy, Harvard Law School, Cambridge, Massachusetts 02138.

Yearly subscription rates: United States, \$45.00; foreign, \$50.00. Special introductory rates are available for students. Subscriptions are renewed automatically unless a request for discontinuance is received.

Back issues in complete sets, volumes, or single issues may be obtained from: William S. Hein & Co., Inc., 1285 Main Street, Buffalo, New York 14209.

The *Journal* welcomes the submission of articles and book reviews. Each manuscript should be typed double-spaced, preferably in Courier 10-point typeface. The *Journal* prefers submissions via ExpressO (<http://www.law.harvard.edu/students/orgs/jlpp/Submissions.htm>). If necessary, authors may also send manuscripts submitted in both hard copy and electronically to jlpp@law.harvard.edu, preferably prepared using Microsoft Word or saved as "rich text format." Views expressed are those of the authors and do not necessarily reflect the views of the Society or of its officers, directors, editors, members, or staff. Unless otherwise indicated, all editors are students at the Harvard Law School.

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PREFACE

From the first day of classes, students at many American law schools encounter an insistence that systematic and rigorous analysis of the law requires “the separation of law and morality.” In such a basic form, however, this separation thesis—generally understood as the defining characteristic of legal positivism—is ambiguous and misleading. Some interaction between law and morality is beyond dispute. No one doubts that widely shared moral beliefs serve as a source in the development of law—legislators and even judges draw upon moral ideas when making and applying the law. Law has also long served as a source in the development of morality. Aristotle highlighted the dependence of morality on law in the closing pages of his *Nicomachean Ethics*, the most comprehensive treatise on the moral virtues in antiquity.

Law and morality are not, however, coextensive. Some aspects of our lives seem appropriate for moral regulation but not for legal control. Philosophers beginning with Plato have noted a distinction between what is legally or conventionally right and what is naturally (or, as many would say today, morally) right. Indeed, legal norms are often subject to criticism from a moral point of view. The precise contours of the relationship between law and morality are complex and deserve serious discussion. The essays and articles presented here address this relationship from a variety of perspectives.

As has been the *Journal's* tradition for more than a quarter-century, we are pleased to publish highlights from this past year's National Federalist Society Student Symposium. The twelve collected essays approach the theme of “Law and Morality” by discussing moral choices and the Eighth Amendment, government promotion of moral issues, the morality of First Amendment jurisprudence, and same-sex marriage in constitutional theory. Judge William Pryor's keynote address confronts directly the role of religion and morality in the practice of judging, arguing that although particular doctrines may not be used in deciding cases, motivational moral and religious influences may help a judge discharge his duty to protect and defend the Constitution.

We thank the Federalist Society for sponsoring this Symposium, Professor Steven Calabresi for helping to organize its proceedings, and the speakers who shared their reflections first with the student attendees and now with our readers.

The *Journal* is particularly pleased to present Professor Robert P. George's lecture on "Natural Law." Legal thinking during much of the last century was dominated by positivism. A recent revival of interest in natural law, led by scholars like Professor George at Princeton and John Finnis at Oxford, has challenged the hegemony of the conventional positivist account. The most prominent argument asserting the so-called separation of law and morals was provided by H.L.A. Hart in his 1957 Holmes Lecture delivered at Harvard Law School. Fifty years later, in his 2007 Dewey Lecture at Harvard Law School, Professor George offered a constructive account of natural law. His lecture explains why the idea of natural law and natural rights is more plausible than Hart and others have supposed, comparing natural law to competing justificatory accounts of positive law and to competing standards for its critical evaluation.

Professor Harry V. Jaffa, an eminent scholar of Lincoln's political thought, contributes an engaging essay arguing that Chief Justice Taney's *Dred Scott* opinion illegitimately applied the sound jurisprudential doctrine of original intent to advance an "incredible misrepresentation" of the Founding ideals. In rejecting the basic proposition that all men are created equal, Taney "invented" a proslavery Founding, thereby "turning the Founders against the Founding." Professor Jaffa subtly contends that the doctrine of original understanding "presupposes a Constitution based upon the laws of nature." Without this legitimacy, the Constitution would lack intrinsic moral authority and a meaningful claim on our fidelity to original meaning. The principles of the Declaration of Independence, although not explicitly incorporated in the Constitution, are therefore "the necessary ground for distinguishing the Constitution's principles from its compromises."

In an exhaustively researched article responding to the writings of two prominent Christian legal scholars, Professor John M. Breen argues that legal measures designed to regulate and discourage abortion fall squarely within the appropriate

boundaries of law. Relying upon a broad Christian tradition, with particular reference to Catholic teaching, Professor Breen suggests that the rule of law is not simply a safeguard of law's own procedural integrity, but is meant to secure justice for those whom it governs. Although immorality and illegality are not coextensive, law and morality must coincide where a fundamental denial of justice is at stake. Despite recognition that the nature of abortion as a social phenomenon is such that it cannot be eliminated through purely legal means, Professor Breen combines empirical assessment and theoretical analysis in demonstrating law's capacity to teach and influence culture through criminal prohibition.

Reflecting upon fifteen years of experience participating in same-sex marriage litigation, Monte Stewart vigorously argues that constitutional norms of equality and liberty do not require the redefinition of marriage from the union of a man and a woman to the union of any two persons. Contrary to a widely held assumption, he contends that judicial choice between competing marriage facts, and not the standard of review, actually determines the outcome in same-sex marriage cases. After a close examination of these competing marriage "facts"—those matters disputed in litigation other than legal principles and procedures—Mr. Stewart concludes that the factual description of marriage advanced by proponents of man-woman marriage is most accurate. Moreover, government imposition of the radically different genderless marriage institution would in fact replace the contemporary man-woman marriage institution, along with the unique and essential social goods it provides.

We are fortunate to open this year's volume with a 30th anniversary retrospective commemorating the inaugural publication of the *Journal* in 1978. Throughout the course of a remarkable career spent serving as a White House aide, United States Senator, and Secretary of Energy, Spencer Abraham has consistently made time to support the legal publication he founded as a law student. We are enormously grateful for his continuing influence, and for the courage he and others displayed in promoting conservative ideas on the Harvard Law School campus and across the country.

An introduction to this issue would not be complete without acknowledging the tireless work of our entire *Journal* staff in preparing the following essays and articles for publication. I am particularly grateful to Christopher Catizone, Christopher Thomas, and Ryan Caughey for their extraordinary efforts throughout the editorial process. Andrew Bernie performed double-duty as a Managing Editor of the *Journal* and as the National Editor overseeing Federalist Society editors from law schools across the country who assisted in preparing the Symposium essays. Brian Callanan deserves much credit for helping to assemble an impressive lineup of contributors. Finally, Deputy Editor-in-Chief Kevin Hinkley has consistently labored far above and well beyond the call of duty to ensure that the *Journal* maintains its high standards of excellence. His unfailing dedication made publication of this issue possible.

Robert R. Porter
Editor-in-Chief

FORWARD

A FOUNDER'S RETROSPECTIVE: THE *JOURNAL* AT 30 YEARS

As the *Harvard Journal of Law & Public Policy* celebrates its 30th anniversary, a brief reflection upon the *Journal's* history and achievements seems appropriate.

The environment at Harvard and most law schools in the mid-1970s was very different than it is today. Not surprisingly, liberal philosophical viewpoints dominated the HLS community at that time. Unlike today, however, there were virtually no sources of alternative argumentation. Few law professors or students were acknowledged moderates and even fewer would admit to conservative inclinations. Consequently, conservative legal thinkers had virtually no receptive legal periodicals in which to publish. At the time, Harvard offered its students the chance to work on a variety of law journals, each advancing one or another form of liberal legal analysis.

Against this backdrop, a small group of conservative Harvard students began meeting during the 1976-77 academic year to try to address the absence of diversity in the Law School's legal publications. The students were dismayed by the lack of balance in the general legal discussion on campus and frustrated that conservative students seeking to gain legal writing experience could only pursue their interests by helping to edit and publish liberal opinions.

Talk led to action and the group ultimately decided to seek Law School funds to launch a journal aimed at presenting conservative and libertarian views on legal and public policy matters. Predictably, others did not share the organizers' zeal. They were told by then-Dean Albert Sachs that Harvard funds would not be made available for the publication of a law journal that openly advocated a particular philosophical viewpoint.

Asked to explain Harvard's support for the Law School's liberal law reviews, the students were informed that those publications were facially neutral and distinguished by subject matter, not philosophy. The fact that very liberal senior editors—

who had long dominated such journals—selected only like-minded younger staffers for leadership positions, and published only ideologically-acceptable articles, was treated as sufficient grounds to separate Harvard from responsibility for the unbroken liberal slant to those periodicals.

In response, a fellow student, Steven Eberhard, and I decided to move ahead without Harvard's financial support and establish an independent publication. By the following school year we had found a benefactor willing to help us publish an initial volume and our group—newly constituted and numbering about ten—met again with the Dean.

The reaction was chilly. We were told that, of course, we could publish our own journal, but that we would not be allowed to use the Harvard name in its title because our content might in some way embarrass the institution. In response, we made a compelling argument that Harvard's failure to challenge the use of its name in conjunction with numerous other independently-funded, quasi-scholarly efforts (as well as pizza parlors, liquor stores, and other such entities), largely undermined their current position. Ultimately, we carried the day.

In the spring of 1978 the first volume of the *Harvard Journal of Law & Public Policy* was published. Our masthead consisted of a handful of HLS students and an advisor who had no connection to the University, because at the time we could not persuade any members of the faculty to openly associate their names with our venture. That first volume contained some 200 pages of mostly public policy content written by individuals largely more famous in political and policy circles than legal ones. Nonetheless, several hundred law libraries bought subscriptions and we were launched.

Financing our first few years' efforts was an ongoing challenge, so I remained in place as Publisher and chief fundraiser for the *Journal* after I graduated in 1979. All editorial decisions, though, remained in student hands and were executed effectively. Slowly our subscriber base grew and various conservative-oriented foundations aided our annual publishing efforts.

Happily, the presidency of Ronald Reagan and the emergence of conservative campus newspapers across the country began to change the environment at Harvard and other law schools. In the early 1980s we found more volunteers for *Journal* editorial posts, more outstanding conservative legal writ-

ing, and a greater receptivity within the faculty and the Law School more broadly. Meanwhile, things were changing at other law school campuses as well. In the spring of 1982, I received a call from Lee Liberman, a law student at the University of Chicago, who informed me that she and several friends at other law schools had launched campus groups aimed at providing opportunities for students to hear conservative and libertarian viewpoints on the law. Lee asked whether the *Journal* would be willing to publish the proceedings of a national symposium that the groups were planning for the upcoming fall. We subsequently published the proceedings of the first student convention of what would become the Federalist Society.

From its formation, the Federalist Society became the *Journal's* closest ally and source of support. Ultimately, a *Journal* subscription became one of the benefits of Federalist Society membership, helping make the *Journal* the second most widely distributed law review in America. As a result, our financing challenges were permanently surmounted and both organizations have thrived. Eugene Meyer and the Federalist Society deserve the utmost thanks for this support.

Today, more than 140 students at Harvard Law School work on the *Journal*, nearly 10 percent of the student body. It is a regularly-cited, authoritative source on the law, and its former editors have played significant roles in the federal and state judiciary, in the Bar, and in the public policy and government arenas. I know that everyone who was involved in the inception of the *Journal* shares the pride I have in what has transpired over the past three decades. The determined group of organizers wanted to make a difference and, viewed from today's perspective, it is clear that they succeeded.

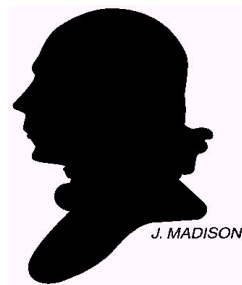
In closing, I wish to express special thanks to some of the individuals whose commitment and dedication were most responsible for the *Journal's* launch. First, to the individuals who participated in our initial organizational meetings and sessions with the Harvard administration, as well as the members of our first masthead. Thanks also to the various individuals and foundations that helped us finance the first *Journal* volumes including, especially, the late John McGoff, whose support helped us publish Volume One. I also wish to thank Clifford Taylor, now Chief Justice of the Michigan Supreme Court, who was our first advisor and played a key part in our early fundraising efforts.

Most importantly, I wish to pay tribute to the late Steven Eberhard who served as Co-Founder and as the Editor-in-Chief of our first two volumes. Steve was an exceptional person. He possessed a keen intellect and an unsurpassed capacity to carry out the most difficult academic and professional challenges. He was a great friend and a great American whose untimely death denied the conservative community and his country the services of an individual who would surely have been one of our great leaders today.

Finally, I wish to express to this year's *Journal* staff my thanks and congratulations for another outstanding effort. Like your predecessors, you have helped strengthen an enterprise which has effectively achieved its twin goals of providing law students the chance to develop editorial and analytical skills in a philosophically hospitable environment and offering conservative legal thinkers an opportunity to contribute to the scholarly debate. It will now fall to those who follow to continue the *Journal's* tradition of academic excellence and philosophical consistency. If the past thirty years are an indication, it seems certain that the best is yet to be.

Spencer Abraham
Co-Founder

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The Twenty-Sixth Annual Student Symposium on Law and Public Policy:

Law and Morality

February 23 and 24, 2007

Northwestern University School of Law

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ON THE FOUNDATIONS AND NATURE OF MORALITY

ROBERT P. BURNS*

INTRODUCTION

Remarks on so vast a topic as the foundations and nature of morality must be focused by the subject with which the Symposium is concerned—namely, the relationship between law and morality. Insofar as half of “law and morality” is “morality,” the Symposium topic necessarily brings the foundations and the nature of morality into play. And insofar as the nature and foundations of morality have been debated against the background of more fundamental philosophical issues, the entire history of ideas is relevant to the Symposium. Present-day lawyers addressing the relationship of law and morality should have some of the humility that knowledge of this intellectual history requires. Discussion of this history should not lead to a relativistically induced silence on these subjects, but can occasion some modesty, care, and certainly, tolerance.

This Essay does not address a discrete contemporary issue or attempt to provide a theory concerning the relationship of law and morality. Instead, it offers some historical observations and important arguments relevant to the contemporary moral debate. Specifically, this Essay includes three sets of observations about morality’s foundations, and three shorter remarks about its nature.

I. THREE HISTORICAL OBSERVATIONS ON THE FOUNDATIONS OF MORALITY

There has been a tectonic shift in the dominant philosophical terms over the course of Western intellectual history. This shift, along with important changes in Western social identity, has

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rendered unavailable to contemporary thinkers many of the premises that have underlain morality for most of Western history.¹ Similarly, the Hebrew-Christian religious tradition—which constantly surrounded, supported, and for many, directly informed moral inquiry—no longer has a hold on important segments of contemporary society.

The contemporary moralist inevitably stands in a historical tradition that defines the types of arguments from which he can draw and the appeals he can make. Awareness of what precedes him should therefore aid the moralist in making the most coherent and convincing case for his understanding of the relationship between law and morality.

A. *The Shift in Philosophical Terms*

The dominant selection² of philosophical terms has changed over the centuries. Philosophers have always sought to determine what the objects of their efforts are, to discover what it is possible and fruitful to know or think. The first of this Essay's six remarks tracks the shift in thought over the centuries about the proper starting point for philosophical and ethical inquiry. This shift has important implications for those attempting to explain morality.

1. *The Metaphysical and Teleological Terminology of the Pre-Moderns*

Until the late modern age, great philosophers generally chose an ontological or metaphysical selection of terms. For example, Plato, Aristotle, St. Augustine, St. Thomas Aquinas, Baruch Spinoza, and G.W. Leibniz all in quite different ways sought to gain knowledge of the nature of things.³ Within the

1. See generally CHARLES TAYLOR, *SOURCES OF THE SELF: THE MAKING OF THE MODERN IDENTITY* (1989).

2. I borrow the term "selection" from American philosopher Richard McKeon. See David J. Depew, *Between Pragmatism and Realism: Richard McKeon's Philosophical Semantics*, in *PLURALISM IN THEORY AND PRACTICE: RICHARD MCKEON AND AMERICAN PHILOSOPHY* 29, 39 (Eugene Garver & Richard Buchanan eds., 2000).

3. See, e.g., PLATO, PHAEDO 97c6–97d1 (David Gallop trans., Clarendon Press 1975) ("[S]o if anyone wanted to find out the reason why each thing comes to be or perishes or exists, this is what he must find out about it: how is it best for that thing to exist, or to act or be acted upon in any way?"); THOMAS AQUINAS, ON TRUTH, Q. 10, art. 5 (1259), reprinted in *AN AQUINAS READER* 239 (Mary Clark ed.,

contexts of their philosophies, these thinkers sought the foundations of morality in the nature of man, his place in the cosmos, and his constitutive relationship with the divine. Acting morally meant realizing man's nature.⁴ It made sense for Augustine to urge, "Become who you are,"⁵ because the nature of any being could be fully understood teleologically. One's true nature was understood as the actualization of a potency that exists in the nature of things.

After the beginning of the Christian era, although the metaphysical understanding continued to reign, it was inevitable that its teleologies would be understood theologically. Man was still defined primarily by reference to the nature of things, but now with specific reference to the nature of the ultimate thing: God. As Dante Alighieri put it, faithful to the Thomistic synthesis that animated his great poem, "The glory of the One who moves all things permeates the universe but glows in one part more and in another less."⁶ Dante defined the parts of the universe by how and to what degree God glowed in them.

2. *Immanuel Kant and the Shift to Epistemology*

The "Copernican revolution" effected by the critical philosophy of Immanuel Kant changed the focus of basic philosophical inquiry from the nature of things to the characteristics of the human mind.⁷ The world as we experience it can be under-

Fordham Univ. Press 1972) ("Human intellectual knowledge is directed, first, to material things according to their form . . .").

4. See, e.g., ALASDAIR MACINTYRE, *AFTER VIRTUE: A STUDY IN MORAL THEORY* 54 (2d ed. 1984) (stating that the Enlightenment-era thinkers' "project of finding a basis for morality had to fail" because they "[a]ll rejected any teleological view of human nature, any view of man as having an essence which defines his true end").

5. St. Augustine is alleged to have said these words to those he baptized. See JEFFREY VANDERWILT, *A CHURCH WITHOUT BORDERS: THE EUCHARIST AND THE CHURCH IN ECUMENICAL PERSPECTIVE* 123 (1998).

6. DANTE ALIGHIERI, *PARADISO*, canto I, lines 1–3 (Allen Mandelbaum trans., Univ. of Cal. Press 1982) (1321).

7. Kant likened his own innovations regarding metaphysics to Copernicus's discovery that the Earth revolved around the Sun and not vice-versa:

Up to now it has been assumed that all our cognition must conform to the objects . . . [L]et us once try whether we do not get farther with the problems of metaphysics by assuming that the objects must conform to our cognition. . . . This would be just like the first thoughts of Copernicus, who, when he did not make good progress in the explanation of the celestial motions if he assumed that the entire celestial host revolves

stood philosophically, Kant argued, only when we understand the ways in which its basic structure is rooted in the conditions of the possibility of all knowledge imposed by our minds. Knowledge begins not with metaphysics or teleology but with epistemology. We do not know the things themselves; we know the world only as finite or “receptive” knowers can see it.⁸ We can *know* only what appears to common sense and empirical science, neither of which gives access to the things themselves. We cannot *know* supersensible objects—objects transcending all sensory experience—including, most importantly, the human soul and God (though we inevitably *think* these concepts for purely practical purposes).⁹

Even within this epistemological selection of philosophical terms, however, Kant resisted the conclusion that moral notions are merely the expression of the contingent characteristics of the human mind, characteristics that empirical science could exhaustively explain.¹⁰ Indeed, he would balk at the theories of some schools of sociobiology.¹¹ Although Kant’s philosophy saw our perception of the world as dependent on the contingent characteristics of our cognitional equipment, he insisted on the importance of moral concepts being rooted in something *fundamental*, something transcending the finite world that we can know through common sense or science. He did so out of necessity. He wanted moral concepts that could bind, that would have the power that Plato tried to identify in his *Phaedo*: the power to create the kind of obligation that would demand

around the observer, tried to see if he might not have greater success if he made the observer revolve and left the stars at rest.

IMMANUEL KANT, *CRITIQUE OF PURE REASON* 110 (Paul Guyer & Allen W. Wood eds. & trans., Cambridge Univ. Press 1998) (1781).

8. We are “receptive” knowers, dependent on sense perception, because we are finite. Unlike God, we do not create the objects of our worldly knowledge.

9. For a summary of Kant’s epistemology, see *AN IMMANUEL KANT READER* 15–20 (Raymond B. Blakney ed. & trans., 1960). Blakney summarizes the first great work of Kant’s critical period, *CRITIQUE OF PURE REASON* (1781).

10. For a summary of Kant’s absolute morality—his “categorical imperative”—see *KANT READER*, *supra* note 9, at 182–86.

11. See, e.g., LAURENCE R. TANCREDI, *HARDWIRED BEHAVIOR: WHAT NEUROSCIENCE REVEALS ABOUT MORALITY* 73–77 (2005) (arguing that modern neuroscience has revealed that decisions in moral contexts traditionally thought to be the result of rational deliberation are in fact determined primarily by physical influences on the brain).

that a soldier stay and defend his position in the face of certain death, just to slow the advance of the enemy, for the benefit of the rest of the army and the city.¹² Kant realized that if moral principles were entirely contingent, they would not bind categorically. For him, it was essential that morality yield *categorical* imperatives, not simply instrumental *hypothetical* imperatives that bind only once one chooses to pursue some more or less arbitrary end.

In ethics, Kant remained a Platonist, though without claiming to know the teleological structure of the universe. When we act ethically in Kant's world, we are still citizens in the "kingdom of ends," which are ultimate and unconditioned by our contingent modes of knowing.¹³ Deeply at odds with his otherwise very modern philosophy, Kant maintained that experiencing moral obligation gives us what we might call "participant observer"¹⁴ understanding of aspects of the intelligible world.¹⁵ Ethics was exceptional, because in it we could overcome, though only practically, the epistemological limitations that denied us a vision of reality in the theoretical or scientific deployment of our reason. Friedrich Nietzsche would later taunt that this disconnect between Kant's more traditional moral philosophy and his otherwise distinctively modern conceptions of knowledge made Kant the "great delayer"¹⁶ of the "onslaught of modernity" that Nietzsche foresaw.¹⁷

12. PLATO, *supra* note 3.

13. See KANT READER, *supra* note 9, at 190–95.

14. I mean "participant observer" consciousness in the sense that one who is normally limited to the role of observer in most of Kant's philosophy can, in ethics, truly "participate" in the "moral reality" in which he is a member. For an example of this meaning of "participate," see R. E. Allen, *Participation and Predication in Plato's Middle Dialogues*, 69 PHIL. REV. 147 (1960). I do not mean to make any reference to "participant observation" theories of research. See, e.g., Morris S. Schwartz & Charlotte Green Schwartz, *Problems in Participant Observation*, 60 AM. J. SOC. 343 (1955).

15. This is one of the reasons he (rather oddly) seeks moral laws that are applicable to all rational creatures, not only to human beings. See KANT READER, *supra* note 9, at 185–86.

16. GEORGE P. GRANT, *ENGLISH-SPEAKING JUSTICE* 79 (House of Anansi Press 1985) (1974).

17. See HANNAH ARENDT, *ON REVOLUTION* 196 (1963).

3. *The Twentieth Century: Language and Action as Basic Terms*

In the twentieth century, after the general decline of Kant's systematic philosophy (aspects of which lived on for a time as Neo-Kantianism),¹⁸ the dominant selection of philosophical terms came to focus on language and action, both thought to be more accessible than either metaphysical knowledge or the structure of the mind. The major thinkers of the age each used these new idioms. John Dewey's form of pragmatism largely rejected conceptions of morality and law rooted in preexisting entities, metaphysical or epistemological. Instead, he thought that moral and legal questions should be determined by an evaluation of consequences. Even his religious thought was decidedly practical and anti-metaphysical.¹⁹ Similarly, Ludwig Wittgenstein's later philosophy identified his "ultimates"—the most fundamental concepts to which one can appeal—as modes of *acting*, perhaps related to even more basic "form[s] of life," themselves simply complex forms of practice.²⁰ And Martin Heidegger tried to show the primacy of the practical, at a level more basic than scientific or theoretical knowledge, in the very constitution of the human world.²¹

Although the evolution from ontological to epistemological to linguistic and practical was not absolute,²² there was clearly a colossal shift in the dominant idiom over the centuries. This shift was not merely a matter of fashion. The largely theoretical

18. The Neo-Kantians struggled in the late nineteenth century "to eliminate the metaphysical elements from Kant's philosophy and to provide a fully post-metaphysical account of human determinacy and human politics." CHRIS THORNHILL, *GERMAN POLITICAL PHILOSOPHY: THE METAPHYSICS OF LAW* 239 (2007). Neo-Kantians include Friedrich Adolf Trendelenburg and Karl David August Röder. *Id.*

19. See JOHN DEWEY, *A COMMON FAITH* 2 (1934) ("I shall develop another conception of the nature of the religious phase of experience, one that separates it from the supernatural and the things that have grown up about it."); see also STEVEN C. ROCKEFELLER, *JOHN DEWEY: RELIGIOUS FAITH AND DEMOCRATIC HUMANISM* (1991).

20. See LUDWIG WITTGENSTEIN, *PHILOSOPHICAL INVESTIGATIONS* § 88e, para. 241 (G.E.M. Anscombe trans., 2d ed. 1997) (1953).

21. See MARK OKRENT, *HEIDEGGER'S PRAGMATISM* 39–44 (1988).

22. Alfred North Whitehead, for example, remained in the metaphysical tradition. So did the Neo-Thomist philosophers, such as Étienne Gilson and Jacques Maritain. See, e.g., ALFRED NORTH WHITEHEAD, *PROCESS AND REALITY* (1929); ÉTIENNE GILSON, *GOD AND PHILOSOPHY* (1941); and JACQUES MARITAIN, *EXISTENCE AND THE EXISTENT* (Lewis Galantiere & Gerald B. Phelan trans., 1948).

debate over the appropriate selection of basic philosophical terms was intertwined with other important intellectual and cultural developments in the modern world, such as meditations on the significance of the practical and theoretical successes of modern science, and the practical attraction of tolerance and pluralism that followed the carnage of the European religious wars. The link between philosophical terminology and broader intellectual developments leads to this Essay's second remark on the foundations of morality.

B. *The Unavailability of Older Foundations*

If philosophical approaches to the foundations of morality have shifted over time, the next question is whether such shifts render the theories of previous ages unavailable. The answer to this question has important consequences for the relationship between law and morality, and certainly for the resources available to defend morality. One who wishes to defend morality based on premises now unavailable—by using, for example, the largely abandoned metaphysical selection of terms—must decide whether to adapt his moral theories to the temper of his age or attempt to recover and make available once again the disfavored premises.

1. *Unavailability Because of Intellectual Developments*

Foundations can become unavailable for two different reasons. First, intellectual developments, such as new theories, can make old theories seem obsolete or inadequate. For example, Kant's critique effectively undermined rationalist theories of self-evident moral principles, on which earlier modern philosophers had built.²³ Similarly, by the twentieth century the selection of philosophical terms had so drastically departed from Aristotle's metaphysical idiom that even an admirer like Alasdair MacIntyre was forced to concede that Aristotle's moral philosophy must be separated from the "metaphysical biology" with which it was originally intertwined.²⁴

23. See ERNST CASSIRER, *THE PHILOSOPHY OF THE ENLIGHTENMENT* 243 (Fritz C.A. Koelln & James P. Pettegrove trans., 1955). Kant's *Critique of Pure Reason*, for example, has been called "the most thorough and devastating of all anti-metaphysical writings." W.H. WALSH, *METAPHYSICS* 38 (Gregg Revivals 1991) (1963).

24. MACINTYRE, *supra* note 4, at 162–63.

Hannah Arendt poignantly described such unavailability in an interchange with fellow émigré Hans Jonas in 1972. She identified the mid-twentieth century's absence of theories that provided secure ontological foundations for morality ("ultimates," in her terms):

[I]f our future should depend on [whether] . . . we will get an ultimate which from above will decide for us (and then the question is, of course, who is going to recognize this ultimate and which will be the rules for recognizing this ultimate—you really have an infinite regress here, but anyhow) I would be utterly pessimistic. If that is the case then we are lost. Because this actually demands that a new god will appear.

. . . [B]ecause this [God] had disappeared [after the Middle Ages] Western humanity was back in the situation in which it had been before it was saved . . . by the good news—since they didn't believe in it any longer. That was the actual situation. . . .

. . .

. . . I am perfectly sure that this whole totalitarian catastrophe would not have happened if people still had believed in God, or in hell rather—that is, if there were still ultimates. There were no ultimates. And you know as well as I do that there were no ultimates which one could with validity appeal to. One couldn't appeal to anybody.²⁵

When Arendt said that "there were no ultimates which one could with validity appeal to," she meant more than simply that totalitarians such as the Nazis were not open to those appeals. She meant that many of those whom the totalitarians persecuted would not have believed *themselves* had they made such appeals. Intellectual developments had rendered "ultimates," or metaphysical foundations, unavailable not only to those who had strayed furthest from traditional morality, but also to typical members of society.

25. HANNAH ARENDT: THE RECOVERY OF THE PUBLIC WORLD 313–14 (Melvyn A. Hill ed., 1979).

2. *Unavailability Because of Social Identity*

There is another way besides intellectual developments that understandings or theories become unavailable. Great philosophies are theoretical expressions of the deep structure, the “form[s] of life,” of an era.²⁶ Knowledge is, in a deep sense, social. Alasdair MacIntyre has argued that a technological society such as ours, whose structure is formed by a purely instrumental rationality, has no place for understandings of morality in any traditional sense.²⁷ Moral foundations are unavailable to us not merely because they fail to comport with the latest philosophical developments, but because they are inconsistent with the deepest structure of our social organization, which is in turn replicated in our individual self-understandings. Our only hope is to await “another . . . St. Benedict”²⁸ who can establish forms of community, discontinuous with the broader society, within which the moral life can flourish.

3. *The Consequences of Unavailability for the Contemporary Moralists*

The potential unavailability of metaphysical foundations raises a question of how one who wishes to give an account of morality in our age should proceed. Must he first accept the end of the metaphysical era, the unavailability of the old foundations, and then start over, providing a new understanding of morals and politics either by refounding morality in the contemporary selection of terms or abandoning foundations altogether? Arendt and other post-metaphysical thinkers thought so.²⁹ Alternatively, is metaphysics, regardless of its current availability, indispensable to morality? Is morality, even understood strictly as a matter of reason and not faith, unavoidably intertwined with metaphysical perspectives and dependent upon metaphysical foundations? Rather than give up on the discarded language of metaphysics, must the would-be moralist struggle to recover it?

26. WITTGENSTEIN, *supra* note 20, § 88e, para. 241.

27. MACINTYRE, *supra* note 4, at 51–61.

28. *Id.* at 263.

29. See HANNAH ARENDT, *THE ORIGINS OF TOTALITARIANISM* 298–99 (1973).

C. *The Source of Moral Obligation: Reason or Revelation*

The third set of questions about the foundations of morality concerns the relationship between reason and revelation. This relationship is, I suspect, important to many lawyers and scholars interested in the topic of law and morality.

Until very recently, Western understandings of morality developed in a religious context that philosopher Alan Donagan called the “Hebrew-Christian” tradition.³⁰ The practical sources for moral thinking in this tradition were key texts of the Hebrew and Christian Scriptures, and moral obligation ultimately derived from God’s commands. Important segments of society, however, are no longer immersed in the Hebrew-Christian tradition and do not view Scripture as an authoritative source for their moral lives and decisions. Much as the metaphysical foundations of morality have become unavailable over time, the theological framework, within which traditional conceptions of morality developed, is rejected by many.³¹

Historically, there has been a spectrum of positions concerning the relationship of reason and revelation on moral matters. One central question is whether moral obligation stems from God’s revealed commands or from a source available to natural reason, some form of natural law. This question has been intertwined with issues of God’s omnipotence, and answers to it cover the gamut. Some thinkers, generally known as “voluntarists,” argued that God’s will expressed in His commands is as far as we can or need go. They feared that placing morality in the realm of natural reason might limit God’s power and authority.³² Many Protestant thinkers were suspicious of the Catholic invocation of natural law, considering it an attempt to avoid the commands of the Gospel.³³ Occupying the doctrinal middle ground were other Christian moralists (“intellectual-

30. ALAN DONAGAN, *THE THEORY OF MORALITY* 27 (1977).

31. Indeed, questioning that framework provides grist for many widely read contemporary writers. See, e.g., CHRISTOPHER HITCHENS, *GOD IS NOT GREAT: HOW RELIGION POISONS EVERYTHING* (2007); RICHARD DAWKINS, *THE GOD DELUSION* (2006); DANIEL C. DENNETT, *BREAKING THE SPELL: RELIGION AS A NATURAL PHENOMENON* (2006); SAM HARRIS, *THE END OF FAITH: RELIGION, TERROR, AND THE FUTURE OF REASON* (2004).

32. See 1 ERNST TROELTSCH, *THE SOCIAL TEACHING OF THE CHRISTIAN CHURCHES* 328–30 (Olive Wyon trans., 1931).

33. *Id.*

ists")—St. Thomas Aquinas not least among them—who went to great lengths to show that at least *some* of the commands in the Bible could be derived directly from the light of reason, as they thought St. Paul had suggested in his letter to the Romans.³⁴ In polar opposition to the theological voluntarists, some eighteenth-century thinkers argued that *any* ultimate appeal to scriptural commands violated the first principle of enlightenment, as expressed by the maxim "Dare to know!" in Kant's famous essay.³⁵ To these thinkers, the enlightenment of man by liberation from his self-imposed tutelage,³⁶ and his achievement of autonomy, required him to seek the foundations of moral obligation in his own reason.³⁷ Reason was the ultimate touchstone, even regarding which parts of the scriptures to accept and which to reject.

Any exploration of morality must include a search for the source of moral obligation. Those with a commitment to revealed religion will feel the pressure of the question particularly acutely.

II. THREE IMPORTANT ATTRIBUTES OF PHILOSOPHICAL PERSPECTIVES

This Essay now turns from the foundations of morality to its nature, identifying some attributes of moral systems relevant to the relationship between law and morality. Every conception of morality is determined substantially by the resolution of three issues. First, the relationship between moral theory and ordinary moral practice. Second, the form, either rule-based or nar-

34. *Romans* 2:14–15 (New King James) ("[F]or when Gentiles, who do not have the law, by nature do the things in the law, these, although not having the law, are a law to themselves, who show the work of the law written in their hearts . . ."). St. Thomas Aquinas cites these verses while setting forth his natural law theory. See THOMAS AQUINAS, *Summa Theologica* I–II, Q. 91, art. 2, *sed contra*, in *THE TREATISE ON LAW* (R.J. Henle ed. & trans., 1993).

35. IMMANUEL KANT, *What Is Enlightenment?*, in *FOUNDATIONS OF THE METAPHYSICS OF MORALS AND WHAT IS ENLIGHTENMENT?*, at 85 (Lewis White Beck trans., Liberal Arts Press 1959) (1785) ("*Sapere aude!* [*Dare to know!*] 'Have courage to use your own reason!'—that is the motto of enlightenment."). The slogan was also adopted in 1736 by the Society of the Friends of Truth, an "important circle in the German Enlightenment." *Id.* at 85 n.1.

36. *Id.* at 85 ("Enlightenment is man's release from his self-incurred tutelage.").

37. *Id.* ("Self-incurred is this tutelage when its cause lies not in lack of reason but in lack of resolution and courage to use it without direction from another.").

rative-based, that a moral system's propositions take. Third, the range of application of moral norms—the spheres of human action in which a system of morality defines what is right.

A. *Morality—Theory, Practice, or Both?*

The first of these attributes is the relationship between morality and the actual practices of a given society. Any conception of the nature of morality will be determined in large part by the closeness of or the distance between theory and practice. Some thinkers understand morality as virtually identical to the practices (and the considered judgments supporting the practices) of a given society. These thinkers tend to be conservative and suspicious of the spirit of abstraction in moral and political matters. Think, for example, of the morality in F.H. Bradley's essay *My Station and Its Duties*,³⁸ in Michael Oakeshott's critical essay *Rationalism in Politics*,³⁹ and G.F. Hegel's rationalized Burkean criticism of the "empty" Kantian morality of high principle.⁴⁰ These thinkers argue that actual moral practices are normative for a number of reasons: they have passed the test of actuality, they are demonstrably capable of being integrated into a way of life with other practices to form an organic whole, they express the concrete wisdom of a society, they are deeply embedded in the very identity of the citizenry, and they are less likely to occasion social catastrophe.⁴¹ This mode of thought does not place actual practice beyond criticism, but criticism tends to be internal, incremental, and based on concrete norms

38. In this essay, Bradley argues for a social conception of the self and of morality. See generally F.H. BRADLEY, *My Station and Its Duties*, in *ETHICAL STUDIES* (2d. ed. 1927) (1876).

39. In this essay, Oakeshott vigorously denounces the involvement in politics of "the Rationalist"—he for whom the ultimate merit of all political and social institutions is to be measured by his abstract intellectual standards rather than by tradition or any benchmark outside his own mind. See generally MICHAEL OAKESHOTT, *Rationalism in Politics*, in *RATIONALISM IN POLITICS AND OTHER ESSAYS* (1962).

40. HEGEL'S PHILOSOPHY OF RIGHT 89–90 (T.M. Knox trans., Clarendon Press 1952) (1821).

41. Edmund Burke, for example, famously predicted that the preference of the French revolutionaries for abstract theory over societal practices and traditions would end in the tragedy of dictatorship. See EDMUND BURKE, *REFLECTIONS ON THE REVOLUTION IN FRANCE* 54–55 (Frank M. Turner ed., Yale Univ. Press 2003) (1790).

already embedded in some other aspect of the society: arguments in this vein are “rhetorical.”

Others argue that morality comprises not our practices, but the principles by which we may criticize those practices.⁴² These thinkers, who separate morality from the actual practices of societies, must search for an Archimedean point of view from which to criticize the often or even always flawed practices of society. We need a place to stand when attempting to step outside of and criticize our own culture. Thus, Jeremy Bentham, who began his career with a critique of Blackstone,⁴³ invokes a universal principle of utility that can serve to criticize the “nonsense upon stilts” encrusted in all the practices of the common law and common morality.⁴⁴ Kant, the early John Rawls, and Jürgen Habermas likewise demanded a perspective transcending actual practices. Alan Donagan invokes the example of the simple man and martyr Franz Jägerstätter who, during the Third Reich, was able to find a place to stand in the principles of morality to resist the practices embraced by almost all those around him.⁴⁵

*B. The Form of Fundamental Moral Principles:
Rules or Narratives?*

A second definitive attribute of any conception of morality is the form its fundamental principle takes. Moral principles have often been expressed as rules. The Golden Rule, for example, and the injunction to love one’s neighbor as one’s self, are rules.⁴⁶ So are Kantian formulations of the categorical impera-

42. See, e.g., DONAGAN, *supra* note 30, at 1–2.

43. See generally JEREMY BENTHAM, A FRAGMENT ON GOVERNMENT (J.H. Burns & H.L.A. Hart eds., Cambridge Univ. Press 1988) (1776).

44. Bentham first set forth his principle of utility in JEREMY BENTHAM, AN INTRODUCTION TO THE PRINCIPLES OF MORALS AND LEGISLATION 11–12 (J.H. Burns & H.L.A. Hart eds., Methuen & Co. 1982) (1789). The famous phrase “nonsense upon stilts” comes from his essay *Anarchical Fallacies*, in BENTHAMIANA: OR, SELECT EXTRACTS FROM THE WORKS OF JEREMY BENTHAM 67 (John Hill Burton ed., Gaunt, Inc. 1998) (1824).

45. See DONAGAN, *supra* note 30, at 15–17. For a more detailed telling of the story of Jägerstätter, see GORDON C. ZAHN, IN SOLITARY WITNESS: THE LIFE AND DEATH OF FRANZ JÄGERSTÄTTER (1986).

46. In its Christian forms: “And just as you want men to do to you, you also do to them likewise,” *Luke* 6:31 (New King James), or “Therefore, whatever you want men to do to you, do also to them, for this is the Law and the Prophets,” *Matthew*

tive: "Act so that the maxim of your action may be willed as a universal rule!" and "Act so that you treat the humanity in your person or in another always as an end and not solely as a means!"⁴⁷ There are deep questions about the relationships between moral rules and actual moral norms that inform concrete decisions.

Not all thinkers understand the ultimate touchstone of morality to be rules. Some have suggested that what is most basic is not rules, but narratives.⁴⁸ Those can be, for example, the narratives of the Exodus, the Gospel, or the American Founding. The promulgation of rules may be part of those stories, but the stories themselves provide moral sources that go well beyond the rules. Among contemporary legal thinkers, Milner S. Ball seems to fall within this perspective.⁴⁹

C. *The Moral Realm—or is it Realms?*

Finally, and crucially for this Symposium, the nature of morality is also defined by how widely truly moral norms apply. We live our lives within a number of overlapping social spheres: we are members of a family, have friends, belong to a neighborhood and an occupation or a profession, may be members of a church, function as consumers and sellers, and act in various ways as citizens, as legal subjects, and as participants in a global economy. Do distinctively moral norms apply to our actions across all of these spheres, or only to those that take place in local, face-to-face communities? Do moral norms apply to the political and economic spheres, or are the norms internal to those spheres of action quite distinct from the norms we call moral?

Some conceive of morality narrowly, as a system of rules, excuses, and justifications applicable only to face-to-face relations. Others conceive of morality broadly, arguing that it ap-

7:12 (New King James). This rule was first set forth in the Hebrew Scriptures as part of the Ten Commandments. See *Leviticus* 19:18. It was later re-emphasized in the New Testament as particularly important. See *Matthew* 22:34–40.

47. These are paraphrases of some of the categorical imperatives that Kant describes in *The Foundations of the Metaphysics of Morals*. KANT, *supra* note 35, at 39, 47.

48. See e.g., MILNER S. BALL, *THE PROMISE OF AMERICAN LAW: A THEOLOGICAL, HUMANISTIC VIEW OF LEGAL PROCESS* 16–28 (1981).

49. *Id.*

plies to all the spheres of human action, and usually arguing that it applies analogously across the different spheres.

That brings us to what are perhaps the central questions posed in this Symposium: Do moral norms operate in the sphere of the law? Does morality determine legal rules and practices? If so, how? How should legal rules and practices take account of and treat moral norms if the legal sphere is a realm apart from the others?

CONCLUSION

One discussing the relationship between law and morality does so within his own historical age, with its own philosophical terms and its own religious commitments (or lack thereof). Man cannot jump over his own shadow. Only some foundations are available to him in his time, but some may be necessary to the type of morality he proposes, regardless of whether the age in which he lives cares to hear them or not. Similarly, any conception of morality he seeks to advance or attack must resolve a small number of basic issues that are unavoidable.

Both parts of this Essay aimed to equip the student of morality more fully for these two challenges. It is my hope that, having read this short and rough "traveler's guide" to morality, the reader will begin his trip through this Symposium with a better understanding of the terrain of this old subject.

*The Twenty-Sixth Annual
National Federalist Society Student Symposium:
Law and Morality*

I.

**MORAL CHOICES AND THE EIGHTH
AMENDMENT**

ESSAYISTS

RONALD J. ALLEN
LAURENCE CLAUS
MICHAEL S. MOORE

MORAL CHOICES, MORAL TRUTH, AND THE EIGHTH AMENDMENT

RONALD J. ALLEN*

What passes for normative scholarship in the law schools is often little more than making public the topography of the author's mind. I suppose this practice does have a certain appeal akin to the great national fascination with reality shows these days,¹ but it is unclear what other interests it serves than the obvious ones of getting tenure and being invited to conferences. Thus, my own scholarly efforts are directed toward propositions with truth value, and I try to leave the moralizing to others.

To be sure, there can be scholarship about normative questions that is motivated by pursuit of truth, such as many of the fine efforts of Michael Moore in laying out the landscape of normative discourse.² Those works, however, are not normative (whatever motivates them) in the sense pertinent today, and thus they are outside my consideration.

Normative scholarship involving the defense or critique of normative positions *could* serve purposes other than moralizing or autobiography, including facilitating inquiry into the underlying factual issues. For example, the great national debate on wel-

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1. See, e.g., *The NewsHour with Jim Lehrer: Reality TV* (PBS television broadcast, July 5, 2005), available at http://www.pbs.org/newshour/bb/media/july-dec00/reality_7-5.html (a panel discussion about the format's appeal); Randall L. Rose & Stacy L. Wood, *Paradox and the Consumption of Authenticity Through Reality Television*, 32 J. CONSUMER RES. 285 (2005) (a psychological examination of the format's popularity); see also Gary Levin, 'Simple economics': More reality TV; Networks plan a slate of shows, USA TODAY, May 8, 2007, at 1D, available at http://www.usatoday.com/life/television/news/2007-05-07-reality-TV_N.htm (noting the growing popularity of reality TV, and that "56 network reality series will air this season, up from 51 last year, and pilot orders are up 50%").

2. See, e.g., Michael S. Moore, *Moral Reality Revisited*, 90 MICH. L. REV. 2424 (1992); Michael S. Moore, *The Plain Truth About Legal Truth*, 26 HARV. J.L. & PUB. POL'Y 23 (2003).

fare might have focused attention on how the short-term desire to ameliorate woeful living conditions might have devastating long-term effects,³ or how the desire to legitimate and express retributive feelings through the death penalty assumes accuracy and consistency in decision-making that, if not present, might have quite radical unintended effects.⁴ And to be fair, debates in the legal literature may filter into the public's conscience in such a way as to have a positive educational effect, but I doubt it. The moral cast to much of our normative arguments is completely epiphenomenal. It does not matter to others what we think of welfare programs or the death penalty; what matters is their consequences. Or so, I suspect, the world at large, quite intelligently, believes. To the extent it serves useful purposes, one could entirely strip out all the moralizing references and just leave whatever underlying factual or analytical inquiry there is.

We certainly do not educate ourselves or advance knowledge with these normative debates. If we did, it would be commonplace for people to confess error in their views and revise them accordingly, but how often have you seen that occur? Or its blood cousin, a public recognition that analysis and investigation has forced the truth of a proposition upon a person that is repugnant to that individual? Virtually never.

The stability of personal preferences is especially true with respect to the particular subset of normative discourse pertinent to this Symposium—moral propositions. Indeed, what is prevalent is the opposite of reconsideration: a proposition, theory, or moral position is advanced and meets opposition,

3. See, e.g., Edmund S. Phelps, *Raising the Employment and Pay of the Working Poor: Low-Wage Employment Subsidies Versus the Welfare State*, 84 AM. ECON. REV. 54, 54–56 (1994) (arguing that “[t]he welfare system harms disadvantaged workers through its impacts on the availability of jobs, on the overall reward from work, and on the morale of disadvantaged communities”); Robert Rector & Patrick F. Fagan, *How Welfare Harms Kids*, (Heritage Found., Backgrounder No. 1084, 1996), available at <http://www.heritage.org/Research/Welfare/BG1084.cfm> (arguing that welfare, by ignoring values and undermining the norms of work, self-control, and marital stability, has harmed those it intended to help).

4. See Death Penalty Info. Ctr., *Innocence and the Death Penalty*, <http://www.deathpenaltyinfo.org/article.php?did=412> (last visited Jan. 2, 2008) (collecting statistics and noting that “[s]ince 1973, 124 people in 25 states have been released from death row with evidence of their innocence”); see also Press Release, Death Penalty Info. Ctr., *Death Row Exonerations Reach Record Numbers Across the Country: Questions of Innocence Fuel National Debate as Inmates are Cleared in Ohio, Missouri, and Pennsylvania* (July 28, 2003), available at <http://www.deathpenaltyinfo.org/111-exonerations.pdf>.

which in turn prompts its enthusiasts to modify its justifications rather than modify its contours, as, say, a scientist facing an anomaly might do.⁵ Around my own law school, for example, it is commonplace to encounter yet another defense of the unitary executive, or originalism, or a particular view of separation of powers, often prefaced, in my view highly ironically, with statements to the effect that, “previous defenses of this view have not fared considerably well, so here is another one.” What occurs to me is that perhaps the failures of the prior defenses might be explanatory of the truth or utility of the idea, but this notion seems not to be making much headway.

Rather than pursue knowledge, the objective of normative work in general, and moral reasoning in particular, seems much more directed at defending one’s prior, subjective views. The game is to never give in no matter the evidence arrayed against you—come up with the clever response, create sophisticated arguments deflecting the latest criticism.

Scholarship of this sort is tedious, providing sufficient reason in and of itself, in my subjective opinion, to ban it from constitutional discourse. When the focus shifts from moral proselytizing generally to the Supreme Court doing it specifically, an additional problem arises. Normative views are largely, and probably exclusively, subjective creations of the minds of individuals, which is precisely why normative views are so immune to change.⁶ I have no doubt that they form for reasons, including reasons that refer to facts in the world, but those reasons are just as surely the culmination of a person’s experiences. This sort of thing is not going to lend itself to efficient rational discourse. If moral negotiation is to occur, it will need to be done in a sustained fashion over time, in a complex and chaotic environment—in a legislature, for example, or in citizen

5. Cf. *Political bias affects brain activity, study finds*, MSNBC.com, Jan. 24, 2006, <http://www.msnbc.msn.com/id/11009379> (discussing a study in which brain scanners revealed that political party loyalists “get quite a rush from ignoring information that’s contrary to their point of view”).

6. See Robert A. Hinde, *Law and the Sources of Morality*, 359 PHIL. TRANSACTIONS ROYAL SOC’Y 1685, 1686–91 (2004), available at <http://www.journals.royalsoc.ac.uk/content/xna817aucdf3u7q0/fulltext.pdf> (discussing the formation of normative views as a result of one’s childhood experiences); *Political bias affects brain activity*, *supra* note 5 (discussing the durability of political views as a result of their inherently emotional nature).

movements. Courts issuing edicts are about the last place one would predict that moralizing would be useful or effective.⁷

These points will seem to some as hopelessly naive philosophically and to others as virtually beside the point. The concern of philosophical naivety comes from the implicit suggestion that subjectivity can be eliminated, and maybe it cannot. But one can have more or less of it. When I am doing arithmetic sums, perhaps there is an element of subjectivity—after all, it is me choosing to do the sums—but I can choose to follow the rules or not. So, too, judges, or anyone else. The concern of irrelevance is that, like it or not, moral propositions exist (regardless of their truth value), many individuals see them as pertinent to deciding cases, and plainly in some cases requiring decision sources of law run out and invoking a moral proposition or two might be a handy way out of a difficult problem. I agree with all of this, but again one can have more or less of it.

And so, inescapably, the question becomes the role of judges generally, and Supreme Court Justices particularly. Here the evidence is pretty plain: judges are no better than the rest of us at moral reasoning. Indeed, the most disastrous decisions of the Supreme Court are highly associated with their most willful decisions—that is, decisions in which extra-legal determinations played a significant role in decision.⁸ This should come as a surprise to no one for precisely the reason identified above: the judicial process is not conducive to effective moral discourse. The legislative and political processes more generally are, which seems to be a good reason to leave such matters largely to them.

But, what does “largely” mean? Haven’t I already recognized that moral questions may be ineradicable in judicial decisions even if we prefer that less rather than more attention be paid to

7. The argument to the contrary—that judges are *better* able to reach wise moral judgments—ignores what judges have actually done in this country and confuses the rationalization of chaotic thought processes reflected in judicial opinions with the reality of those processes reflected in public political debate. More enlightening comparisons would be between the internal thought processes of judges and political debate on the one hand, and judicial opinions and legislation on the other.

8. A majority of the Supreme Court apparently thought that it was going to defuse secessionist forces in *Dred Scott v. Sandford*, 60 U.S. 393 (1856), that it was going to resolve difficult political and moral questions about life and privacy in *Roe v. Wade*, 410 U.S. 113 (1973), that it was going to peacefully bring about an integrated society in decisions such as *Swann v. Charlotte-Mecklenburg Board of Education*, 402 U.S. 1 (1971), that it was going to strike a clarion call for individual rights in *Lochner v. New York*, 198 U.S. 45 (1905), and so on.

them? If so, aren't I just avoiding the question? Don't I need a general theory about whether I think moral propositions should be on the front or the back burner? Here is the one point in this Symposium at which perhaps I can provide the reader something useful to think about. The only general theory pertinent to the kinds of questions we are addressing is that, as Holmes said, no general theory is worth a damn.⁹ None of the endless efforts to provide general theories of judging and of legislating and of the meaning of law¹⁰ is worth a damn.

One can explain why such efforts are worthless in a single word: complexity. The objects of theorizing are complex human institutions of thousands if not millions of relevant variables that can interact in virtually an infinite number of ways. A "general theory" would have to articulate the sets of necessary and sufficient conditions for outcomes in light of all the combinations and permutations of these variables, and of course many of the variables are not dichotomous, adding yet another layer of complexity. These issues are discussed at length in my writings on evidence,¹¹ and I will not take them up here except to give one example to make the point concrete. Computational complexity is why computers still struggle to beat the best human chess players. Even though there are only a limited number of pieces and a limited number of moves, the combinations of moves quickly spirals out of control so that cognitive devices besides computation can still affect outcomes. These cognitive devices are not reducible to rules, not yet at any rate. If they were, they could be programmed and the game between computers and humans would be over.¹²

9. Letter from Oliver Wendell Holmes, Jr. to Sir Frederick Pollock (Nov. 22, 1920), in 2 HOLMES-POLLOCK LETTERS: THE CORRESPONDENCE OF MR. JUSTICE HOLMES AND SIR FREDERICK POLLOCK 1874-1932, at 58, 59 (Mark DeWolfe Howe ed., Fred B. Rothman & Co. 1994) (1941).

10. See, e.g., RONALD M. DWORKIN, *TAKING RIGHTS SERIOUSLY* (1979); H.L.A. HART, *THE CONCEPT OF LAW* (1961); Antonin Scalia, *Common-Law Courts in a Civil-Law System: The Role of United States Federal Courts in Interpreting the Constitution and Laws*, in *A MATTER OF INTERPRETATION: FEDERAL COURTS AND THE LAW: AN ESSAY* (Amy Gutmann ed., 1997).

11. See, e.g., Ronald J. Allen, *Factual Ambiguity and a Theory of Evidence*, 88 NW. U. L. REV. 604 (1994); Ronald J. Allen, *Rationality, algorithms, and juridical proof: a preliminary inquiry*, 1 INT'L J. OF EVIDENCE & PROOF (SPECIAL ISSUE) 254 (1997).

12. See George Johnson, *Conventional Wisdom Says Machines Cannot Think*, N.Y. TIMES, May 9, 1997, <http://www.nytimes.com/library/cyber/week/050997chess.html>; William Saletan, *Chess Bump: The Triumphant Teamwork of Humans and Computers*, SLATE, May 11, 2007, <http://www.slate.com/id/2166000>.

The game of legislating and judging is infinitely more complex than chess. One obvious solution is to let legislatures be the source of ongoing moral debate and to direct the courts to decide which of the parties' cases is more plausible. To be sure, plausibility may have its referents from time to time in extra-legal sources, but so long as the judicial stance is largely choosing between the parties' presentations, its conclusions are always revisable—thus the genius of the common law.

What I am describing seems to be the best description of our actual institutions, which have produced the most astonishing civilization the world has ever seen. So, if you are into creating astonishing civilizations, you might want to pay attention to such matters.

How does this all map onto the assertion by the majority of the Court in *Roper v. Simmons*¹³ that the Justices had to make their own personal moral judgments about the propriety of aspects of capital punishment?¹⁴ There is no obvious need to rely on the personal views of the Justices and there are very good reasons not to. There may be sources of law that had not "run out of power" in the context of the Eighth Amendment, but assume to the contrary and thus that something like "evolving standards of decency"¹⁵ is an appropriate gap filler. Still, "evolving standards" can be widely-held conventions rather than the subjective moral beliefs of the individual Justices,¹⁶ even if determining what "widespread" means involves a subjective component. Obviously, such a determination might be influenced by a Justice's moral views, but the significance of the subjective beliefs can be reduced. And the decision does not have to be in terms of hard descriptions of those evolving no-

13. 543 U.S. 551 (2005).

14. *Id.* at 564.

15. *Id.* at 561 (citing *Trop v. Dulles*, 356 U.S. 86, 100–01 (1958)).

16. Compare *id.* at 573 (finding it wrong to allow capital punishment for juveniles with maturity and culpability equivalent to adults because it would open the door to the possibility "that the brutality or cold-blooded nature of any particular crime would overpower mitigating arguments based on youth as a matter of course, even where the juvenile offender's objective immaturity, vulnerability, and lack of true depravity should require a sentence less severe than death"), with *id.* at 608 (Scalia, J., dissenting) ("I do not believe that the meaning of our Eighth Amendment, any more than the meaning of other provisions of our Constitution, should be determined by the subjective views of five Members of this Court . . .").

tions,¹⁷ but instead in terms of what may be inferred from the presentations of the parties—which, in short, is the more plausible case.

Approaching decision-making in this manner has many consequences, although whether they are advantages will depend upon your own interests.¹⁸ Most consequences such as those having to do with democratic processes and the like are matters that have been discussed at length in the literature, and need no extended treatment here. Such decision-making has the further advantage, less discussed, of leaving decision open to whatever arguments might be advanced in the future rather than constraining that future by guesses concerning the moral temperaments of the Justices.

Of course, in light of personal interests, some might think this an unappealing prescription, largely because they reject the truth of one of the propositions upon which I am operating; namely, that moral views are radically subjective reflections of experience and do not correspond to mind-independent entities in the necessary sense—in short, that moral propositions do not possess truth value in that sense. If one thought that moral propositions do possess truth value, the problem of governing might appear to be eased considerably, for obviously one should join in the grand pursuit of truth, justice, and the American way. There are two difficulties. First, that moral propositions possess truth value in the right way is obviously false. Second, even if it were true, there is an insurmountable epistemological gap of knowing when one has arrived at the truth. One way to understand the history of the twentieth century, in fact, is as one large example of how deadly these difficulties are. A few words on both and then I will close.

I cannot do more than give a flavor of why moral propositions do not have truth value in the right sense. The best defense of the opposite view is put forth by Michael Moore in his article *Moral Reality Revisited*.¹⁹ The Reader's Digest version of his ar-

17. *Id.* at 565 (noting that in the fifteen years preceding its decision, five states had abandoned the death penalty for juveniles, thereby indicating a trend in the national consensus).

18. See, e.g., Stephen A. Saltzburg, *The Unnecessarily Expanding Role of the American Trial Judge*, 64 VA. L. REV. 1 (1978) (discussing some of the merits and demerits of a judicial decision-making process that relies solely on the parties to present the relevant information).

19. 90 MICH. L. REV. 2424 (1992).

gument is that he asks you to compare two propositions: (1) it is true that it is wrong for two boys to douse a cat with gasoline and light it on fire for their own amusement; and (2) it is true that protons exist. Professor Moore engages in an extended argument to show that the truth of the moral proposition is the best explanation of the evidence of your reaction to the burning cat, just as the truth of the proposition that protons exist is the best explanation of centuries of scientific progress in the physical sciences.²⁰ Professor Moore is an avowed empiricist, but there are two striking empirical problems with this claim. First, there is no convincing demonstration that the obvious alternative hypothesis about moral propositions—that they are conventions that reflect background and experience²¹—is not an equally good or better explanation. By contrast, many theories of matter have been advanced as substitutes for the standard atomic model, and they have been disverified one by one over the centuries.

This leads to the second empirical problem. Faced with competing theories, a true empiricist would construct a test to differentiate them, and nowhere in the hundreds of pages written in defense of the truth of moral propositions that I have read is such a program ever advanced. The defenses are all rhetoric. This is all the more striking because such tests could easily be constructed. If it is the moral truth that it is wrong to inflict unnecessary suffering on animals that causes a sense that the boys' actions were wrong, then this should be universal, and people everywhere should have the same reaction, just like protons behave identically everywhere scientific experiments are done. We can test this by polling a random selection of humans from across the planet. Were we to do so, I predict the results would not confirm the hypothesis.²² In large portions of the planet, the inhabitants would be supremely indifferent to boys burning cats.²³

20. *Id.* at 2511–13.

21. See, e.g., Bryan R. Wilson, *Morality in the evolution of the modern societal system*, 36 BRIT. J. SOC. 315, 318 (1985) (explaining that although “moral demands were represented as ‘human nature’” by earlier societies, they were later understood to be the products of attempts to normalize societally developed conventions).

22. See, e.g., Richard Willing, *Courts asked to consider culture*, USA TODAY, May 25, 2004, at A03 (discussing practices of animal sacrifice that are common and legal in some countries but considered animal cruelty in the United States).

23. Cf. Valentine Low, *World Cup tussle over whether to eat doggies*, THE EVENING STANDARD, Dec. 12, 2001, at C21.

Another test: the proposition that causing unnecessary suffering of animals is bad must generalize, just like the properties of protons are general. Protons don't change whether locked in an atom of water or copper. Now, quickly think of all the cases of unnecessary suffering inflicted on animals that are perfectly acceptable to large swaths of humanity: bullfighting, cockfighting, dogfighting, peoplefighting, hunting and fishing in all their manifestations, rodeos, zoos, medical experiments on animals.²⁴ What happened to the truth of the moral proposition? Press the matter further. Consider all the suffering that goes on in our nation's slaughterhouses,²⁵ yet none of us needs to eat meat; we would probably be better off without it. None of us needs leather shoes or belts or coats. Aren't we killing all these animals, and breeding them under horrendous conditions, for our enjoyment? Again, where is the moral proposition? Perhaps it is asleep somewhere, bored, like me, by all this moralizing that people are doing.

As I say, I very much doubt that I will convince anyone committed to the truth of moral propositions merely by asking them to be serious about their commitments to empiricism. They will respond that they are quite serious about both, and will advance arguments that all the cases I have identified of unnecessary cruelty to animals are just cases of people acting wrongly. All those billions of people are just wrong, wrong, wrong! Fine, and now the epistemological problem: How do we know that? How do we know whose intuitions to tap into to determine the contours of this quite elusive set of true moral propositions?

Now, look at the history of the twentieth century through the lens of individuals who were confident they were in possession of truth. What was the result? Mass slaughter of over a hundred million people in wars fought over truth, and massive and deliber-

24. See, e.g., Alan Cowell, *Hooked Fish Feel Pain, British Scientists Say, Roiling the Waters*, N.Y. TIMES, May 6, 2003, at A14 (noting research indicating that fish "feel pain when hooked" and discussing the rebuttal from the "pro-fishing lobby"); Doug Simpson, *Cockfighting's Last Stand*, WASH. POST, Apr. 15, 2007, at A12 (discussing the move in Louisiana to ban cockfighting despite the sport's ability to draw a crowd of hundreds, "not unlike the typical high school football crowd"); Doug Simpson, *Illegal Dogfighting Increasing in U.S.*, WASH. POST, Jan. 25, 2004, at A05 (noting the growing popularity of dogfighting even though it is banned in all 50 states and classified as a felony in 47 states).

25. See, e.g., Tim Golden, *Cuisine Raises Debate on Cruelty and Culture*, N.Y. TIMES, Aug. 26, 1996, at A1.

ately induced starvation to the same end.²⁶ And this is not the only century in which battles over truth devastated humanity. The religious wars in Europe are another example.²⁷ And so on.

What is the lesson to be learned from this? It seems that, unless you are in favor of mass killings, we need to cabin and confine those who make claims to access to moral truth. We need to keep such people from the levers of power, and especially from the institutions of organized force. We need to create ways to permit moral negotiation to proceed that can generate largely acceptable outcomes in substantial part because those outcomes are always revisable in ways responsive to the interests of the citizenry, and so on—all those platitudes of liberal democratic theory, in short. And we should insist that all governmental actors, judges included, behave with a little epistemological modesty—no, actually, they should behave with a lot of epistemological modesty. Judges in particular should so behave precisely because of their insulation from the political process. In my humble, subjective opinion, a judge who, like the Justices in *Roper*, asserts that it is really up to the judges in light of their own subjective beliefs to decide important questions, and the rest of us be damned, commit impeachable offenses no different from a President who subverts the constitutional order. To be sure, there may be only a difference of degree between the arrogance of Justice Kennedy and those who concurred with him in *Roper*, and the judge who agonizingly sees no way out of the box of decision but to invoke a moral proposition, but it is precisely the difference between arrogance and agony that you and I, the citizens of the country, should patrol in the judiciary.

26. See, e.g., STANLEY G. PAYNE, A HISTORY OF FASCISM, 1914–1945, at 355 (1995); Robert Mallet, *The Fascist Challenge Dissected*, 44 HIST. J. 859 (2001).

27. For a comprehensive look at the causes and effects of Europe's religion-based conflicts, see RICHARD S. DUNN, THE AGE OF RELIGIOUS WARS, 1559–1715 (Norton History of Modern Europe) (W.W. Norton & Co. 1979) (1970).

METHODOLOGY, PROPORTIONALITY, EQUALITY: WHICH MORAL QUESTION DOES THE EIGHTH AMENDMENT POSE?

LAURENCE CLAUS*

The words of the Eighth Amendment have a history much longer than the life of the Amendment itself. When the First Congress chose to include those words in the United States Constitution's Bill of Rights, the assembled legislators were appropriating an artifact of their English heritage. At that moment, the language was celebrating its centenary, having first been drafted and adopted by the English Parliament in the Bill of Rights of 1689.¹

Parliament enacted the 1689 Bill of Rights to articulate limitations on what future monarchs could do. A century later, Congress included the Eighth Amendment's historic language among limitations on what the new American nation's government could do. Many of the Revolutionary American states had already employed the words to limit their own governments, starting with Virginia in 1776.² Those states had, in the wake of independence, created bills of rights that recited the historic prohibition of excessive bail, excessive fines, and cruel and unusual punishments.³ But the deliberations on whether to include that prohibition, both in the national Bill of Rights and in those of the states, were rather perfunctory. This suggests that in adopting the language, the American Founders were reflexively claiming part of their English heritage, part of what they had fought for, part of what they alleged had been denied them by a monarch and an unrepresentative Parliament in the pre-Revolutionary period. That conclusion invites an inference that

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1. For an elaborated account of evidence and arguments presented in this Essay, see Laurence Claus, *The Antidiscrimination Eighth Amendment*, 28 HARV. J.L. & PUB. POL'Y 119 (2004).

2. See *id.* at 124, 127.

3. See *id.* at 133.

the American Founders meant the Amendment's language to fulfill the function that it had historically fulfilled for the English.⁴

The strategy of adopting *seriatim* lists to allege political wrongdoing and to assert political entitlements is embedded in the English political tradition, going back to Magna Carta.⁵ The very use of the phrase "bills of rights" in popular parlance to describe the new documents that the Revolutionary American states adopted was an allusion to the English Bill of Rights. Likewise, the American Declaration of Independence imitated the *seriatim* listing of wrongs that opened the English Declaration of Rights, as the English Bill of Rights had been called prior to its passage through Parliament in 1689.

The English Declaration recited wrongs committed by government under the just-ousted King James II. Among those wrongs, complained the authors of the English Declaration, were "excessive Bail," "excessive Fines," and "illegal and cruel punishments."⁶ Corresponding to the recited wrongs, the declarants listed rights that future monarchs would have to respect. Among these was the assertion "[t]hat excessive Bail ought not to be required, nor excessive Fines imposed; nor cruel and unusual Punishments inflicted."⁷

Thomas Jefferson seized on the English Declaration's format when drafting the Declaration of Independence. His list of wrongs substituted George for James, reminding the English that they, too, had rebelled against an oppressive monarch who had not accorded them the historic rights of Englishmen. This strategy for alleging wrongs and for asserting entitlements continued as the newly-independent states adopted "bills of rights." It was manifested again in the First Congress's choice to mirror the English format and to propose such a list of entitlements for inclusion in the national Constitution.

The Eighth Amendment's history invites inquiry as to what its language of excessive bail, excessive fines, and cruel and unusual punishments meant to the English. That language had

4. *See id.* at 124–35.

5. *See* English Declaration of Rights, 1 W. & M., sess. 2, c. 2 (1689) (Eng.) (precursor to U.S. CONST. amend. VIII); Petition of Right, chs. 6, 10 (1628) (Eng.) (precursor to U.S. CONST. amend. III); Magna Carta, c. 39 (1215) (Eng.) (precursor to the U.S. Constitution's Due Process Clause).

6. English Declaration of Rights, *supra* note 5.

7. *Id.*

been conceived in reaction to ways in which courts in the 1680s, especially during the reign of James II, had treated the King's political and religious enemies. The words were meant to establish an objective inquiry. They did not purport to authorize a clash of subjective impressions. *Excessiveness* was prohibited only in respect of bail and fines, not in respect of punishments generally, because excessiveness in bail and fines could be measured objectively. Bail and fines were excessive if they were *more than the accused could pay*. Bail and fines were excessive if they were deployed to impose indefinite imprisonment, a strategy that James II's judges had adopted to silence his political and religious detractors.⁸ In the cases of politically disfavored individuals, the King's courts had often set unreachably high bail and imposed unpayable fines for comparatively minor offenses which, under the Habeas Corpus Act of 1679, warranted bail before conviction, and for which the legally proper punishments were fines.⁹ By setting bail and imposing fines at levels higher than defendants could pay, the King's judges were able to circumvent the protections of the Habeas Corpus Act and to lock up the King's opponents indefinitely. Parliament's 1689 prohibition of excessive bail and fines was designed to prevent such practices in the future.¹⁰

Cruel unusualness in other punishments was likewise an ostensibly objective criterion for identifying judicial sentencing behavior that deserved to be prohibited. Cruel unusualness was constituted by departure from the common law in the direction of greater severity without the kinds of morally sufficient reasons that would indicate an evolved understanding of the common law. The punishments targeted by the prohibition of "cruel and unusual punishments" were punishments beyond what the common law provided for offenses of conviction, imposed on the legally and morally irrelevant ground that the offender was a political or religious adversary of the King. In the year that it enacted the English Bill of Rights, Parliament also responded to particular instances of the punishments that it meant to prohibit, and provided redress to the affected individuals. The concept with which Parliament worked was effectively one of invidiously discriminatory treatment. The com-

8. See LOIS G. SCHWOERER, *THE DECLARATION OF RIGHTS, 1689*, at 87, 90–92 (1981).

9. See *id.*

10. See *id.* at 90–91.

mon law provided ranges of acceptable punishments for defined offenses, and Parliament could see that particular persons had been targeted for punishments that improperly discriminated by being harsher than the common law allowed for what those persons had allegedly done. That discrimination in the direction of greater severity was what made punishments cruel and unusual.¹¹

Now we have these words in a constitution that we must apply in the twenty-first century. Article III of the Constitution extends the judicial Power of the United States to “all Cases, in Law and Equity, arising under this Constitution,”¹² and a constitutional provision concerning punishments seems an obvious one for courts to expound and to apply. Yet the prohibition of “cruel and unusual punishments” invites a moral inquiry. Now that we are realists about the nature of law, the Eighth Amendment seems to invite judges to supplant legislators’ moral reasoning and intuitions with their own. But accepting that reality still leaves a critical question unanswered: what is the nature of the moral inquiry for which the Eighth Amendment calls? The word “cruel,” when applied to punishment, is linguistically susceptible of three quite distinct connotations, and each of these invites a distinct moral inquiry.

Candidate number 1: proportionality of amount. Is this punishment immorally too much? Is it excessive?

Candidate number 2: viciousness of method. Is this punishment immoral in its method? Is it a *kind* of punishment that is morally unacceptable? This conception of the prohibition is Justice Scalia’s candidate.

Candidate number 3: invidious discrimination in application. Is this punishment immorally more than is imposed on others for comparable conduct, and in that sense, cruel and unusual?

Candidate number 3 best fits the constitutional language’s pre-adoption history and satisfies both elements of the Eighth Amendment’s proscription. The Eighth Amendment proscribes

11. See Claus, *supra* note 1, at 136–44; see also John F. Stinneford, *The Original Meaning of ‘Unusual’: The Eighth Amendment as a Bar to Cruel Innovation*, 102 Nw. U. L. REV. (forthcoming 2008) (presenting a detailed historical case for understanding “unusual” to mean “contrary to long usage”).

12. U.S. CONST. art. III, § 2, cl. 1.

only punishments that are both cruel and *unusual*. An antidiscrimination conception most closely translates the historic text into a modern context.¹³

The Supreme Court's current Eighth Amendment jurisprudence embraces all three conceptions of cruelty in punishment. The Court's decisions combine to say: "We'll have 'em all! If a punishment suffers from any of these features—if we think it's immorally too much,¹⁴ if we think the method is immorally vicious,¹⁵ or if we think that it's being applied in an immorally discriminatory fashion¹⁶—we'll say that it's 'cruel and unusual.'" The Eighth Amendment has become a prime exemplar of the approach to constitutional interpretation that Henry Paul Monaghan critiqued in his famous essay, *Our Perfect Constitution*.¹⁷ Focus in recent cases has been on a proportionality inquiry. Is a punishment immorally too much? Is the punishment excessive in the view of the Court? Judicial desire to engage in that inquiry is understandable enough. A Court confined to policing a "no discrimination" inquiry could condemn distinctions in punishment, both new and old, on the ground that those distinctions had been drawn for morally insufficient reasons. But if the Court could not also condemn excessiveness per se, then it could not reach claims that those imposing punishments had failed to draw new, moral distinctions.

The linguistic difficulty with holding the phrase "cruel and unusual" to invite a pure proportionality inquiry is that although disproportionality might indeed be called cruel, it is not intrinsically unusual. The same goes for vicious methods. Unless an amount or method of punishment is new or newly revived, there may be no linguistically plausible basis for calling that amount or method *unusual* within the jurisdiction in which the punishment is imposed. An antidiscrimination conception of "cruel and unusual punishment" more assuredly fits both elements of the constitutional conjunction. If one has identified an invidiously discriminatory application of a punishment, then, *ipso facto*, that is unusual. If the morally unjustified

13. See Lawrence Lessig, *Fidelity in Translation*, 71 TEX. L. REV. 1165 *passim* (1993).

14. See, e.g., *Roper v. Simmons*, 543 U.S. 551, 564, 573–75 (2005); *Solem v. Helm*, 463 U.S. 277, 289 (1983).

15. See, e.g., *In re Kemmler*, 136 U.S. 436, 446–47 (1890).

16. See, e.g., *Furman v. Georgia*, 408 U.S. 238, 256 (1972).

17. 56 N.Y.U. L. REV. 353 (1981).

discrimination is in the direction of greater severity, then it may plausibly be called cruel too.

To pursue a pure proportionality inquiry under the Eighth Amendment—to seek to say that a punishment violates the Amendment’s prohibition of cruelty whenever the Supreme Court thinks that the punishment is excessive—the Court has felt the need to find a way to allege an accompanying unusualness. The way identified has been inter-jurisdictional comparison. Contrast that with the original connotation of the language, which concerned *intra*-jurisdictional comparison. The language was written to combat punishments that were novel when compared with what like offenders received *within* the jurisdiction, not when compared with what offenders were receiving in other jurisdictions. Note also that the Court, while invoking inter-jurisdictional comparison in the context of pure proportionality analysis, has not treated inter-jurisdictional comparison as *indispensable* to such proportionality analysis under the Eighth Amendment. Justice Stevens’ majority opinion in *Atkins v. Virginia* emphasized that if the Court thought a punishment excessive, the Court would strike the punishment down even if an inter-jurisdictional survey did not reveal the punishment to be, on the Court’s own terms, unusual.¹⁸

Justice Scalia’s advocacy of a “vicious methods” understanding of cruel unusualness,¹⁹ on the other hand, draws support from nineteenth-century American case law. The language in its English origins did not concern vicious methods at all; the notorious punishments that Parliament called cruel and unusual were targeted, novel combinations of wholly accepted methods.²⁰ As William Blackstone made clear to lawyers in the American Founding era, the English Bill of Rights did not condemn *methods* of punishment²¹—not even the grotesque practice of drawing and quartering traitors.²² The interpretive tra-

18. See *Atkins v. Virginia*, 536 U.S. 304, 312–13 (2002).

19. See, e.g., *Ewing v. California*, 538 U.S. 11, 31–32 (2003); *Atkins*, 536 U.S. at 339–40 (Scalia, J., dissenting); *Harmelin v. Michigan*, 501 U.S. 957, 961–94 (1991) (Scalia, J., concurring in the judgment).

20. See Claus, *supra* note 1, at 136–44.

21. See 4 WILLIAM BLACKSTONE, COMMENTARIES *370–73 (1769).

22. Some of the participants in Bonnie Prince Charlie’s eighteenth-century uprising were later drawn and quartered. See Anthony F. Granucci, “Nor Cruel and Unusual Punishments Inflicted:” *The Original Meaning*, 57 CAL. L. REV. 839, 856 (1969). Formal elimination of these official methods of punishment in Britain had

jectory of nineteenth-century American courts toward condemning vicious methods as “cruel and unusual” seems to have been guided by two developments. First, nineteenth-century American legislatures used, in a range of statutes regulating punishment, the phrase “cruel and unusual” divorced from its historic linkage to excessiveness in bail and fines.²³ Second, the era was one of strengthening societal consensus against methods of punishment that inflicted acute physical suffering. Influenced by cases in which they had interpreted the phrase “cruel and unusual punishments” without having to account for its relation to prohibitions of excessiveness in bail and fines, courts naturally rode the zeitgeist of penological reform and held the phrase to condemn vicious methods of punishment.²⁴ Such methods had mostly fallen into disuse and were contemporaneously being repealed from the statute books if they had not been already,²⁵ so could plausibly be called unusual.²⁶ Leading nineteenth-century cases that accorded the phrase a “vicious methods” connotation did so in the course of explaining why the prohibition had not been violated—that is, in the course of dismissing what were essentially

to await the nineteenth century. *See* 54 Geo. 3, c. 146 (1814) (Eng.) (repealing drawing for traitors and providing that quartering could occur only after hanging or beheading had caused death); 33 & 34 Vict., c. 23, § 31 (1870) (Eng.) (repealing quartering and beheading for traitors).

23. In some states the phrase became the test for unlawful treatment of slaves. *See, e.g.,* *Turnipseed v. The State*, 6 Ala. 664, 665 (1844); *Scott v. Mississippi*, 31 Miss. 473 (1856); *Dowling v. Mississippi*, 13 Miss. (5 S. & M.) 664, 687 (1846). Under federal law, officers of American ships were prohibited from inflicting “any cruel or unusual punishment” with malice upon crew members. *See, e.g.,* *United States v. Winn*, 28 F. Cas. 733, 733 (Story, Circuit Justice, C.C.D. Mass. 1838) (No. 16,740); *Charge to Grand Jury*, 30 F. Cas. 981, 981 (Curtis, Circuit Justice, C.C.D.R.I. 1853) (No. 18,249); *United States v. Collins*, 25 F. Cas. 545, 545 (Curtis, Circuit Justice, C.C.D.R.I. 1854) (No. 14,836).

24. *See* Claus, *supra* note 1, at 152–57.

25. *See, e.g., Ex parte Wilson*, 114 U.S. 417, 427 (1885).

26. *See* THOMAS M. COOLEY, A TREATISE ON THE CONSTITUTIONAL LIMITATIONS WHICH REST UPON THE LEGISLATIVE POWER OF THE STATES OF THE AMERICAN UNION 329–30 (1868) (“But those degrading punishments which in any State had become obsolete before its existing constitution was adopted, we think may well be held to be forbidden by it as cruel and unusual. We may well doubt the right to establish the whipping-post and the pillory in States where they were never recognized as instruments of punishment, or in States whose constitutions, revised since public opinion had banished them, had forbidden cruel and unusual punishments.”).

discrimination or disproportionality claims.²⁷ The prohibition of “cruel and unusual punishments” that restricts state governments through the Fourteenth Amendment might for this reason be held to prohibit both invidious discrimination *and* vicious methods. But proportionality analysis did not achieve prominence as a way to apply the Eighth Amendment’s words until the end of the nineteenth century.²⁸

The resort to inter-jurisdictional comparison in recent Eighth Amendment cases has contributed to a widespread lament, heard even in the chambers of Congress, about the Court’s reliance on foreign law.²⁹ That lament has been somewhat mistargeted. If the right translation into a modern context of the phrase “cruel and unusual punishments” were actually “punishments disproportionate and more than what other jurisdictions are imposing for like behavior,” then those seeking to answer the question whether a punishment is relevantly “unusual” might be constitutionally *compelled* to inquire into the content of foreign law.

27. See *Barker v. People*, 20 Johns. 457, 459 (N.Y. Sup. Ct. 1823) (upholding disenfranchisement as not relevantly unusual, treating unusualness as pertaining to method of punishment). (Compare plaintiff’s argument on appeal in the Court for the Correction of Errors. *Barker v. People*, 3 Cow. 686, 694 (N.Y. 1824). The appellate court, however, disposed of the issue on the ground that the Eighth Amendment did not apply to state action. *Id.* at 702. New York’s Constitution did not proscribe cruel and unusual punishments until 1846, although the proscription had been included in the state’s 1787 statutory bill of rights.) See also *Commonwealth v. Wyatt*, 27 Va. (6 Rand.) 694, 700–01 (1828) (upholding a broad discretion to impose whipping as not relevantly unusual because unusualness pertained to method of punishment); *State v. Manuel*, 20 N.C. (4 Dev. & Bat.) 20, 35–37 (N.C. 1838) (upholding a racially discriminatory requirement to work off unpaid fines, treating unusualness as pertaining to method of punishment); *United States v. Collins*, 25 F. Cas. 545, 545 (Curtis, Circuit Justice, C.C.D.R.I. 1854) (No. 14,836) (upholding flogging on the basis that unusualness pertained to method of punishment); *Commonwealth v. Hitchings*, 71 Mass. (5 Gray) 482, 486 (1855) (upholding a large fine and mandatory imprisonment for a first offense of selling liquor on the basis that unusualness pertained to method of punishment).

28. See *O’Neil v. Vermont*, 144 U.S. 323, 339–40 (1892) (Field, J., dissenting). The Supreme Court endorsed and applied proportionality analysis in *Weems v. United States*, 217 U.S. 349, 371, 380–82 (1910).

29. See Constitution Restoration Act of 2005, S. 520, 109th Cong. § 201 (2005). (“In interpreting and applying the Constitution of the United States, a court of the United States may not rely upon any constitution, law, administrative rule, Executive order, directive, policy, judicial decision, or any other action of any foreign state or international organization or agency, other than English constitutional and common law up to the time of the adoption of the Constitution of the United States.”) (introduced in the U.S. House of Representatives on Mar. 3, 2005, as H.R. 1070).

Under a pre-realist view of the common law as a higher body of shared principle that courts in multiple jurisdictions were striving to apply, the concepts of intra-jurisdictional and inter-jurisdictional novelty would not have been so readily distinguishable as they are today. Under the vision of law that prevailed at the American Founding, there was a sense in which, for purposes of the common law, the common law world was one big jurisdiction. As Justices Oliver Wendell Holmes and Felix Frankfurter each memorably discussed, that vision of law was reflected in the old treatises, which cited case law from England and from other common law jurisdictions interchangeably.³⁰ But now the distinction between intra-jurisdictional novelty and inter-jurisdictional novelty is sharp, and for a reason that suggests intra-jurisdictional novelty is the most faithful translation of the Eighth Amendment's historic inquiry into a modern context. The historic prohibition of cruel and unusual punishments never invited a general inquiry into how governments around the globe were treating people. It did not even involve comparison to the penal regimes of continental Europe. It was about what the common law required in places where the common law applied.

The most substantial basis for complaint about use of foreign law in the recent Eighth Amendment cases is not the mere fact of use, but rather the character of the judicial inquiries that led to that use.³¹ The strong reason to complain about the Court's recent Eighth Amendment decisions is that the Justices ask the wrong question. They ask: "What's excessive?" If the Justices were only asking the questions that the Constitution most plausibly invites, namely, "What's immorally discriminatory?" and perhaps, "What's immorally vicious?", then the Court's discovery of some value in considering the laws and practices of other jurisdictions when answering those questions could readily be defended.

Inter-jurisdictional comparison is uniquely controversial when undertaken in a quest for multi-jurisdictional *consensus*, as if mere existence of punishment policies elsewhere deserves

30. See *Guaranty Trust Co. v. York*, 326 U.S. 99, 101–02 (1945) (Frankfurter, J., opinion of the Court); *Black & White Taxicab & Transfer Co. v. Brown & Yellow Taxicab & Transfer Co.*, 276 U.S. 518, 533 (1928) (Holmes, J., dissenting).

31. Cf. Frank H. Easterbrook, *Foreign Sources and the American Constitution*, 30 HARV. J.L. & PUB. POL'Y 223, 228–29 (2006).

to influence decisions about punishment policies in the United States.³² The Court has slid smoothly into treating what other jurisdictions do as intrinsically relevant to what the Constitution requires because it has been using inter-jurisdictional comparison to answer the question whether punishments are unconstitutionally *unusual*. The Court has needed to do that only because it has wished to condemn punishments simply for being immorally too much, and has had no ground for calling those punishments unusual other than inter-jurisdictional comparison.

If the Court were to confine its attention under the Eighth Amendment to invidiously discriminatory punishments, and perhaps to new or newly revived vicious methods, then the Court would not need inter-jurisdictional comparison to establish the *unusualness* of those punishments. Judges engaged in any inquiry into cruelty, whether cruelty be conceived as invidious discrimination, viciousness, or disproportionality, may nonetheless choose to engage in inter-jurisdictional comparison when deciding what is *cruel*—that is, in deciding which distinctions in punishment are immoral, or which methods are too vicious, or which amounts are too much. But considering foreign law and practice in the course of deciding what is *cruel* need not fixate on a search for foreign *consensus* at all. Considering foreign law and practice in the course of deciding what is cruel might simply seek to identify reasons and to notice experience that would assist American courts in deciding which punishments deserve to be called cruel.

When Article III of the Constitution vests the judicial Power of the United States in “one supreme Court” and extends the judicial Power to “all Cases . . . arising under this Constitution,” Article III invests the Court with discretion to consider whatever reasons and evidence the Court finds relevant to deciding constitutional questions. Congress can no more prohibit the Court from relying on reasons and evidence found abroad than on reasons and evidence found in any other source, including the Court’s own precedents, the opinions of other

32. Cf. Youngjae Lee, *International Consensus as Persuasive Authority in the Eighth Amendment*, 156 U. PA. L. REV. 63 (2007); Eric A. Posner & Cass R. Sunstein, *On Learning from Others*, 59 STAN. L. REV. 1309 (2007); Eric A. Posner & Cass R. Sunstein, *The Law of Other States*, 59 STAN. L. REV. 131 (2006); Nicholas Quinn Rosenkranz, *Condorcet and the Constitution: A Response to The Law of Other States*, 59 STAN. L. REV. 1281 (2007); Ernest A. Young, *Foreign Law and the Denominator Problem*, 119 Harv. L. Rev. 148 (2005).

American courts, and, indeed, the writings of scholars in journals like this one. Nor are there sound prudential reasons for disregarding reasoning and evidence based merely on the geographic location of their source.

The Eighth Amendment indisputably invites a moral inquiry. The Court has, however, treated the Amendment's words as describing a conceptual chameleon and inviting multiple, distinct moral inquiries. That conclusion, absent historical evidence to support it, resembles holding that the Second Amendment protects both gun possession and upper limbs. Such an exploitation of linguistic happenstance seems a dubious way to apply any law, let alone a constitution.

MORALITY IN EIGHTH AMENDMENT JURISPRUDENCE

MICHAEL S. MOORE*

INTRODUCTION

Morality in Eighth Amendment jurisprudence is but one aspect of a more general topic: the use of moral reasoning by judges in American constitutional interpretation. Seeing the role of moral reasoning through the prism of the Eighth Amendment may help shed light on the more general topic because of three facts: a clear historical record about the Amendment, its frequent invocation in theoretical debates about morality and jurisprudence, and the way it has forced the Supreme Court to address morality directly in its opinions.

We know a great deal about the history of the Eighth Amendment. We know precisely what kind of debate surrounded the provisions that ultimately led to the adoption of the Cruel and Unusual Punishment Clause.¹ We also have a fairly specific understanding of what penalties were thought to be acceptable under the Clause at the time of its adoption. A sufficient historical record is thus available to interpret the Clause for those who choose to do so because they adhere to a narrow intentionalist theory of constitutional interpretation (as did the Justice Department under Ed Meese²). We know, for

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1. For an extensive description of the history and original understanding of the Cruel and Unusual Punishment Clause, see Anthony F. Granucci, *"Nor Cruel and Unusual Punishments Inflicted": The Original Meaning*, 57 CAL. L. REV. 839 (1969).

2. See Edwin Meese III, *The Attorney General's View of the Supreme Court: Toward a Jurisprudence of Original Intention*, 45 PUB. ADMIN. REV. 701, 701-02 (1985).

example, that the application of the death penalty to juveniles—the issue considered in *Roper v. Simmons*³—was considered acceptable so long as the defendants were at least seven years old.⁴ If original intent and history are important to a judge, a thorough record is available for use.

In part because of the extensive historical record, the Eighth Amendment has opened the door to extensive debate over so-called “interpretive intent,” drawing in such theorists as Paul Brest,⁵ Ronald Dworkin,⁶ Raoul Berger,⁷ and H. Jefferson Powell.⁸ These scholars often refer to the Cruel and Unusual Punishment Clause because the debates at the time of adoption allow competing sides to make arguments about whether the Framers intended the clauses of the Constitution to be interpreted by their own intentions. As a result, Eighth Amendment jurisprudence is comparatively well theorized.

Finally, throughout Supreme Court opinions interpreting the Clause—from *Weems v. United States*,⁹ to Justice Stewart’s opinion in *Gregg v. Georgia*,¹⁰ to Justice Kennedy’s opinion in *Roper*¹¹—one finds Justices who are self-conscious about their use of moral reasoning in their jurisprudence. The Court’s Eighth Amendment opinions, like those under the Due Process Clause of the Fourteenth Amendment, are miniature essays in judicial philosophy, so Eighth Amendment interpretation is already theorized as a moral enterprise by the judges who have interpreted it. The Eighth Amendment is therefore a good illustration of the general topic of morality in constitutional interpretation.

3. 543 U.S. 551 (2005).

4. *Id.* at 587 (Stevens, J., concurring) (“If the meaning of that Amendment had been frozen when it was originally drafted, it would impose no impediment to the execution of 7-year-old children today.”); *Stanford v. Kentucky*, 492 U.S. 361, 368 (1989) (describing the common law at the time the Amendment was adopted).

5. See Paul Brest, *The Misconceived Quest for the Original Understanding*, 60 B.U. L. REV. 204, 212, 232 (1980).

6. See RONALD DWORKIN, *TAKING RIGHTS SERIOUSLY* 131–49 (1977).

7. See generally Raoul Berger, “Original Intention” in *Historical Perspective*, 54 GEO. WASH. L. REV. 296 (1986).

8. See generally H. Jefferson Powell, *The Modern Misunderstanding of Original Intent*, 54 U. CHI. L. REV. 1513 (1987); H. Jefferson Powell, *The Original Understanding of Original Intent*, 98 HARV. L. REV. 885 (1985).

9. 217 U.S. 349 (1910).

10. 428 U.S. 153 (1976).

11. 543 U.S. 551 (2005).

A longer article might have discussed what elements *besides* moral reasoning go into constitutional interpretation. For example, some jurists turn to the history surrounding adoption of the Constitution, mining it for either the intentions of the Framers or the beliefs of their original audience. Others turn to Supreme Court precedent, to the semantics of the constitutional text, or to its pragmatics in the context of its utterance. Some judges find a place for default rules, which Judge Frank Easterbrook calls, in a different context, “tiebreakers.”¹² These are just a few of the many things a complete theory of interpretation might include.¹³

For this Essay, I focus only on the role of moral reasoning in constitutional interpretation, analyzing this important factor through the lens of the Cruel and Unusual Punishment Clause of the Eighth Amendment. In particular, the Essay pursues three aspects of this topic: first, whether constitutional interpretation is, can, or should be value-free; second, what the sources of values might be for judges when they look to values in their constitutional interpretation; third, whether judges doing such interpretation should ever rely on their own valuations.

I. CAN CONSTITUTIONAL INTERPRETATION BE FREE OF MORAL REASONING?

On the first topic—whether constitutional interpretation is, can, or should be value-free—it is important at the outset to reject the kind of skepticism about the use of morality by judges urged at this Symposium by Professor Allen.¹⁴ We could not have a constitutional scheme like the one we have were judges to accept such skepticism about their use of moral reasoning. Values must be real, and judges must use them in their reasoning, if we are to make sense of the constitutional scheme that we have.

Support for this view can be seen by looking at those who do not hold it. Judge Robert Bork is perhaps the best-known ex-

12. See *In re Erickson*, 815 F.2d 1090, 1095 (7th Cir. 1987).

13. At the 1995 Conference on Law and Linguistics held at Northwestern University, I compiled a list of ten factors one might include in a theory of constitutional interpretation. See Symposium, *Law and Linguistics Conference*, 73 WASH. U. L.Q. 785, 884–91 (1995).

14. See Ronald J. Allen, *Moral Choices, Moral Truth, and the Eighth Amendment*, 31 HARV. J.L. & PUB. POL’Y 25 (2008).

ample of a jurist who both denied objectivity to value judgments and denied that judging necessarily involves moral reasoning. At the Seventh Annual National Federalist Society Symposium, held in 1988 at the University of Virginia, I sat on a panel with the late Paul Bator, Ron Rotunda, and Justice Scalia at a kind of Irish “wake” for Judge Bork’s lost nomination for a position on the Supreme Court. I was celebrating, not regretting, that loss, for my take on Bork’s theory was that it aspired to be value-free.¹⁵ Bork appeared to think that value-free adjudication was desirable for three reasons: (1) imposition of the values of unelected judges would overturn fundamental democratic choices; (2) moral values did not exist, so all value judgments are mere impositions of subjective will and preference; (3) judges would be unable to grasp with any accuracy the nature of moral rights even if such rights did exist, and therefore such judges would simply be imposing their own views.¹⁶ Bork was thus an avowed skeptic of the use of morality in constitutional interpretation.¹⁷

Judge Bork’s theory of interpretation was a narrow intentionalism that was in vogue at the time. Under this view, clauses of the Constitution are to be seen as aimed at barring specific types of legislation, and only those laws the Framers intended to be forbidden as unconstitutional were to be held unconstitutional. Statutes that were never intended by the Framers to be banned could not later be found unconstitutional because of judicial moralizing. Judge Bork’s treatment of the Equal Protection Clause¹⁸ is an illustrative example. Senator Arlen Specter, in his well-known cross-examination toward the end of the confirmation hearings, asked Judge Bork how he could justify a ban on gender discrimination under the Equal Protection Clause based on his stated theory of interpretation.¹⁹ The honest answer should have been simple: you cannot.

15. See Michael S. Moore, *Judge Bork, A Contradiction in Terms Angling for Confirmation, He Pretends to Be Mainstream*, L.A. TIMES, Sept. 18, 1987, § 2, at 5.

16. See *id.* On Bork’s own articulation of his theory, see Robert H. Bork, *Neutral Principles and Some First Amendment Problems*, 47 IND. L.J. 1 (1971).

17. Before his confirmation hearings, this was most clearly expressed in Bork, *supra* note 16; see also Moore, *supra* note 15.

18. U.S. CONST. amend. XIV, § 1.

19. See *Nomination of Robert H. Bork to be Associate Justice of the Supreme Court of the United States: Hearings Before the S. Comm. on the Judiciary*, 100th Cong., 1st Sess. 434–38 (1987) (questioning by Sen. Arlen Specter).

It seems relatively clear from the history of the Fourteenth Amendment that it was intended to validate the Civil Rights Act of Congress of 1866,²⁰ which in turn aimed at invalidating the Black Codes of the Reconstructionist South.²¹ Given that history, under Judge Bork's theory of interpretation, the Framers of the Fourteenth Amendment only intended to protect against those discriminations based on race that were like the discriminations of the Black Codes. As a result, sex discrimination would not be included within the scope of Equal Protection. This race-only view, of course, would emasculate what many believe equal protection is and should be. Such a view would emasculate the Equal Protection Clause, which says in its plain text that everyone has the right to "equal protection of the laws."²² Neither the text nor morality limits equality to *racial* equality.

The natural tendency of a moral skeptic like Judge Bork is virtually to eliminate judicial review from our constitutional scheme. If morality is a kind of sham—personal preferences masquerading as objective truths—then one should want to restrict its use by judges as much as possible. In the constitutional context, this means restricting judicial review to cases where plain facts, such as the historical fact of what was intended by the Framers, can supplant the independent moral reasoning of judges.

For reasons more of democratic deference than those stemming from moral skepticism, Justice Scalia's jurisprudence also tends to disavow the legitimacy of judicial review.²³ Justice Scalia, like Judge Bork, only reluctantly accepts the propriety of judicial review, and then only because of deference to history and tradition. Yet the Madisonian compromise²⁴ struck the correct balance between majority rule and minority rights, and if judicial review is the right mechanism with which to enforce that compromise, it is difficult to maintain that judges should not have recourse to moral reasoning. Such reasoning is essen-

20. Civil Rights Act of 1866, ch. 31, 14 Stat. 27 (1866) (codified as amended at 42 U.S.C. §§ 1981–1982 (1987)).

21. See generally THEODORE BRANTNER WILSON, *THE BLACK CODES OF THE SOUTH* (1965).

22. U.S. CONST. amend XIV, § 1.

23. See Antonin Scalia, *Originalism: The Lesser Evil*, 57 U. CIN. L. REV. 849 (1989).

24. See generally Michael G. Collins, *Article III Cases, State Court Duties, and the Madisonian Compromise*, 1995 WIS. L. REV. 39 (1995).

tial to policing the balance that is at the heart of our constitutional scheme.²⁵

A glance at Eighth Amendment jurisprudence reveals that judges continually engage in moral reasoning. They do this because they must. Under Eighth Amendment proportionality review, for example, courts repeatedly face questions like the one in *Roper*: Does anybody deserve to die when that person lacks the mental maturity that marks moral agency?²⁶ This is surely a moral question. The proportionality questions posed in *Atkins v. Virginia*²⁷ with regard to mental retardation, and in *Coker v. Georgia*²⁸ with regard to the imposition of the death penalty for the crime of rape, are the same. If judges are prohibited from engaging in moral reasoning, they will have no way of answering these difficult questions rooted in morality.

Questions of moral desert are unavoidable in proportionality review. If judges are to make reasoned proportionality judgments, they need a coherent theory of punishment. Defining *excessive* punishment can be done only if a judge is able to determine punishment that is of proper severity—in other words, punishment that is *not* excessive. Any plausible theory of the proper amounts of punishment will have moral desert as at least a limiting condition. A retributivist believes moral desert to be a sufficient condition too, but desert is surely at least a limiting condition of punishment in any just punishment scheme.²⁹ Judgments of excessiveness thus require judgments of what quantity of culpable wrongdoing deserves what quantity of punishment, and there is nothing more moral than that question.

Another set of Eighth Amendment cases deals with *kinds* (rather than amounts) of permissible punishments. One might think, for example, that a torturer may deserve to be tortured (on the old *lex talionis* view of desert, for example), and yet that such kind of deserved punishment nonetheless is excessive because it is violative of basic human rights against certain kinds of pun-

25. I discuss the advantage for justifying review, if one is not a skeptic about morality, in Michael S. Moore, *Justifying the Natural Law Theory of Constitutional Interpretation*, 69 *FORDHAM L. REV.* 2087 (2001), and in Michael S. Moore, *Moral Reality Revisited*, 90 *MICH. L. REV.* 2424, 2469–80 (1992).

26. See 543 U.S. 551 (2005).

27. 536 U.S. 304 (2002).

28. 433 U.S. 584 (1977).

29. I argued at length for this proposition in MICHAEL MOORE, *PLACING BLAME: A GENERAL THEORY OF THE CRIMINAL LAW* (1997).

ishment. What those kinds of punishment are that are excessive by their very nature is itself a moral judgment, requiring nothing less than a full theory of the substance of human rights. This Eighth Amendment issue again illustrates how impossible it is to have value-free constitutional adjudication.

II. POSSIBLE SOURCES OF VALUES FOR MORALLY-LADEN CONSTITUTIONAL INTERPRETATION

My second inquiry is what source of values should be used by judges making moral judgments in the constitutional context. We need first to separate the forest from the trees. Here, the forest is the most basic distinction between so-called “critical morality” and “moral sociology.” Judges can rely on their own moral judgments—what some observers call critical morality, and what I prefer to call committed, first-person judgments about morality.³⁰ In contrast, judges may also practice what I call moral sociology—this is a third-person judgment about what some other group of persons believes is morally right. Justice Stewart’s opinion in *Gregg* and Justice Kennedy’s opinion in *Roper* clearly distinguish these two sources of moral values, and in fact use both first-person and third-person judgments quite explicitly.³¹ They have tried to make Eighth Amendment jurisprudence a mixture of both kinds of moral reasoning.

Let me now turn from the overview of the forest to examine the trees in more detail. Those of us who are today called moral realists distinguish two kinds of first-person moral judgments.³² The first is characterized by an attitude that says, “It is right because I judge it so.” Such an attitude is illustrated by the baseball umpire who says, “They ain’t nothing ‘til I call ‘em.” The second type of first-person moral judgment is characterized by an attitude that says, “I judge it is right because it is right.” This would be the baseball umpire who says, “I call ‘em as I see ‘em.”

In order for the second kind of judgment to be possible, it has to be antecedently true or false that the Eighth Amendment prohibits, for example, the application of the death penalty to

30. Michael S. Moore, *Four Reflections on Law and Morality*, 48 WM. & MARY L. REV. 1523, 1541 (2007).

31. See *Roper*, 543 U.S. at 560–75; *Gregg v. Georgia*, 428 U.S. 153, 168–87 (1976).

32. See generally MICHAEL MOORE, OBJECTIVITY IN ETHICS AND LAW (2004).

juvenile defendants. In making this kind of judgment, the job of the judge is to try to determine whether this proposition is true or false. Of course, if I am the judge, I have to use my first-person judgment, just as I have to use my first-person judgment about anything I decide. *I* have to judge whether the sun is going to come up tomorrow. That is my judgment. I cannot get out of using my judgment. But the *truth* of what I am judging is nonetheless something independent of me; in this case, the fact of the sun rising. The same is true of first-person moral judgments: of course I have to rely on my judgment, but that practical reality does not make all moral facts subjective. There is a fact of the matter as to whether there is a right under the Eighth Amendment to be free of cruel and unusual punishment, and whether this right specifically precludes the imposition of the death penalty on juveniles. That is the first-person judgment of the second sort that is rightly demanded of our judges in constitutional cases.

The other type of first-person moral judgment—the view that something is right merely because a judge deems it so—is far less legitimate because licensing this sort of judgment would be to give judges the power to make decisions on no better grounds than their own preferences. As a matter of *power*, of course, this is true of Supreme Court Justices: the Court has the final word, so the Constitution is in some sense exactly what the Supreme Court says it is. As a matter of *obligation*, however, this would lead to the radical view that the only job of a Justice is to *decide*, rather than to decide one way or another. Such a view would imply that the Supreme Court could not be wrong because its view would be the only criterion of correctness.

If one is a skeptic about morality, then this last possibility is all that first-person judgments can ever look like. If one does not think that there is a mind-independent moral reality to which true moral propositions correspond, then all judges' first-person judgments will be assertions of subjective preferences and nothing else. A famous moral skeptic on the bench was Justice Oliver Wendell Holmes. My own unsympathetic take on Justice Holmes is that his view of his own first-person judgments was precisely that of the moral skeptic: "Oh, there is no answer to moral questions, but isn't it great to be on the Court. Someone's values have to go in; thank God they're

mine.”³³ It is difficult to justify such unrestrained imposition of one person’s values on others who may not share them. On the other hand, if one is a moral realist—as Madison, Hamilton, and Locke were³⁴—it follows that when judges are enjoined to make moral judgments, they judge something that is not of their own creation. Whether a particular punishment is cruel or unusual is true or false independent of what such judges think about the matter. Although judges have limited normative powers to make something legally right by their decisions, their obligation is to use such normative powers in accordance with what is objectively right prior to their decision. This approach is available only to moral realists, not to moral skeptics like Holmes.

I turn now to the third-person moral judgments relied on by some judges in their interpretation of the Constitution. There is a rich variety of approaches, due largely to the highly charged rhetoric used by the Supreme Court in its occasional flight from responsibility. One example is Chief Justice Earl Warren’s “evolving standards of decency that mark the progress of a maturing society.”³⁵ Before that were Justice Felix Frankfurter’s “canons of decency and fairness which express the notions of justice of the English-speaking peoples.”³⁶ Justice Benjamin Cardozo identified “principle[s] of justice so rooted in the traditions and conscience of our people as to be ranked as fundamental.”³⁷ A more recent example is Justice Scalia’s attention to “the most specific level at which a relevant tradition . . . can be identified.”³⁸ This diversity in approaches reveals an unseemly variety of elements invoked in the name of popular morality.

The following taxonomic scheme is a useful tool with which to order this tangle of judicial rhetoric. Categorize the moral beliefs of others on which the Court relies by (1) the time at which the beliefs are held, (2) the makeup of the population that has to hold the moral beliefs in question, and (3) the de-

33. See generally Oliver Wendell Holmes, *Natural Law*, 32 HARV. L. REV. 40 (1918).

34. See Michael S. Moore, *Do We Have an Unwritten Constitution?*, 63 S. CAL. L. REV. 107, 136–37 (1989).

35. *Trop v. Dulles*, 356 U.S. 86, 101 (1958).

36. *Rochin v. California*, 342 U.S. 165, 169 (1952).

37. *Palko v. Connecticut*, 302 U.S. 319, 325 (1937) (quoting *Snyder v. Massachusetts*, 291 U.S. 97, 105 (1934)).

38. *Michael H. v. Gerald D.*, 491 U.S. 110, 127–28 n.6 (1989).

gree of reconstruction that the Justice is willing to engage in as he or she decides what the majority believes.

With respect to the time dimension, one could ask: (a) either what the original audience of the text believed or what the authors of the relevant text believed. Both of these can be called originalist moral beliefs. For example, what did Americans believe about the death penalty in 1791 when the Bill of Rights was ratified? One could also ask some variant of Justice Scalia's question: (b) what are the longest-held beliefs on the matter at issue, framed in the narrowest language? The answer to this question need not take us all the way back to the beliefs of the Framers or of their original audience, although it could. Third, one could ask: (c) what do people right now think? When Earl Warren spoke of the evolving standards of decency, he seemed to have in mind some contemporary consensus. Justices Brennan and Marshall relied in part on some such consensus in their concurring opinions in *Furman* in 1972, suggesting that America had matured to the point that its citizens were morally opposed to the death penalty.³⁹ (In this they were surprised, as the states and Congress passed much death penalty legislation.⁴⁰) Finally, one might ask: (d) what will people think on these matters in the future? One interpretation of Alexander Bickel was that the Court should predict what popular consensus will be in the future.⁴¹ (This is a problematic inquiry for judges because the very decisions made by the Supreme Court will play a role in shaping any future consensus.)

If the first taxonomic principle is the time dimension, the second might be called the "who-holds-the-belief" dimension. The possibilities on this dimension include: (a) everyone in the world. Here one would attempt to find cultural universals. Or, one might count the beliefs of: (b) only English-speaking peoples, on the assumption that the culture of the United States is exclusively Anglo-American. (This is an assumption of Justice Frankfurter's that his contemporary, Justice Hugo Black, immediately questioned.⁴²) One could also count: (c) only the be-

39. *Furman v. Georgia*, 408 U.S. 238, 277–79, 295–300 (1972) (Brennan, J., concurring); *id.* at 329, 360–63 (Marshall, J., concurring).

40. See *Gregg v. Georgia*, 428 U.S. 153, 179–81 (1976).

41. See ALEXANDER M. BICKEL, *THE SUPREME COURT AND THE IDEA OF PROGRESS* 99 (1978).

42. *Rochin v. California*, 342 U.S. 165, 175–76 (1952) (Black, J., concurring).

liefs of citizens of the United States. Alternatively, one could restrict the analysis further and look to: (d) only some subset of the United States population. Judge Frank, for example, once asserted that judges should inquire about the beliefs of our “ethical leaders” in resolving questions of law and morality.⁴³ This was in contrast to Frank’s fellow judge, Learned Hand, who had urged that in such cases judicial decisions should reflect consensus moral opinions.⁴⁴ Judge Frank would instead determine who the ethical leaders were and ask what they, rather than the general public, thought about particular questions, such as whether performing euthanasia evinced bad moral character.⁴⁵

The third organizing principle involves the degree of reconstruction of popular belief a judge is willing to perform. One possibility is: (a) take totally unreconstructed popular beliefs at face value by reflecting such beliefs just as their holders state them. For example, a judge determining what most people think about abortion would accept whatever they say in a Gallup Poll as what they think. Or a judge could: (b) take a more activist role and reconstruct popular belief according to ideally informed preferences. When Thurgood Marshall found in the capital punishment cases that most people actually favored capital punishment, he nonetheless clung to his faith that most people *would* find the death penalty unacceptable if they were fully educated about it.⁴⁶ This could be called the “hypothetical belief view.” (I find this view highly suspect: did Justice Marshall’s judgment of what most people *would* think differ even slightly from what Thurgood Marshall himself actually *did* think? Of course not.) Equally manipulable is a third possibility: (c) identify the fundamental moral commitments that underlie various popular preferences. Thus, Ronald Dworkin urges judges to synthesize a “community morality” so as to distill the deep principles that best cohere and explain the mass of particular moral judgments made by that community.⁴⁷ Not surprisingly, the principles Dworkin distills differ not a whit from what Dworkin himself happens to think on every con-

43. *Repouille v. United States*, 165 F.2d 152, 154 (2d Cir. 1947) (Frank, J., dissenting).

44. *Id.* at 153.

45. *Id.* at 154 (Frank, J., dissenting).

46. See *Gregg v. Georgia*, 428 U.S. 153, 232 (1976) (Marshall, J., dissenting).

47. DWORKIN, *supra* note 6, at 126–30.

ceivable issue.⁴⁸ This could be deemed the “reconstructed morality approach.”

Although one could explore particular problems with each of these variations of conventional morality, such particular problems are moot in that all forms of conventional moral judgment should be rejected. Instead, judges should use their own first-person, committed judgments about the moral issues that arise in constitutional adjudication.

III. THE DESIRABILITY OF COMMITTED, FIRST-PERSON MORAL JUDGMENTS BY JUDGES INTERPRETING THE CONSTITUTION

There are four reasons why judges should make their own moral judgments in the first person in Eighth Amendment and other cases. The first is a limited argument, albeit a popular one: even if a judge decides to defer to consensus opinion, he or she must at least make a first-person value judgment that such deference is appropriate.⁴⁹ Judges typically defer to popular consensus because they value democracy and fear the unequal treatment that results from judicial capriciousness. Of course, judges who defer in this way are making moral judgments about democracy and equality in order *not* to make other moral judgments on the merits. Judges cannot avoid morality completely inasmuch as they must make that much of a moral judgment.⁵⁰

At a Federalist Society National Symposium nearly twenty years ago, I discussed a second reason.⁵¹ It is what John Harrison, then a law student in attendance, now calls the “Mark II originalism” argument.⁵² The argument is originalist in that the meaning of the text of the Constitution is in part a function of the beliefs of the Framers of 1791 and 1868. Such Framers had three sorts of beliefs of particular relevance here: ontological,

48. I explore why supposed deference to reconstructed moral convention turns out to be such a sham in Moore, *Four Reflections on Law and Morality*, *supra* note 30, at 1541–49.

49. I call this a “regress” form of arguing for the infusion of morality into law. *See id.* at 1528–29.

50. *Id.*

51. *See* Michael S. Moore, *The Written Constitution and Interpretivism*, 12 HARV. J.L. & PUB. POL’Y 3 (1989), expanded in Moore, *Do We Have an Unwritten Constitution?*, *supra* note 34.

52. John Harrison, *Forms of Originalism and the Study of History*, 26 HARV. J.L. & PUB. POL’Y 83, 92–93 (2003).

epistemological, and semantic. The first was an ontological belief in natural rights. Madison, Hamilton, and the Abolitionists of 1868 all believed in the moral metaphysics of John Locke.⁵³ That metaphysics holds that all persons have certain natural rights, rights that exist independently of any laws or beliefs validating their existence.⁵⁴

Such Framers also shared Locke's epistemological beliefs. Locke wrote that one can know the truths of morality as easily, and demonstrate them with as much certainty, as one can know and demonstrate the truths of mathematics.⁵⁵ If one shares such Lockean metaphysical and epistemological beliefs, then one might well think that the clauses in the Bill of Rights and in the Civil War Amendments name, but do not create, rights that courts should enforce. Whether this conclusion follows depends upon a third belief.

The final belief is a semantic thesis in the sense that it is a thesis about the meaning of words used in the Constitution, including the words used in its rights-conferring clauses. When speakers of a natural language like English speak, what they mean by their words is a function of the semantic intentions with which they speak. Broadly, there are two kinds of such semantic intentions, what I once called "sparse" versus "rich" intentions.⁵⁶ Most current philosophers would call these "referential" versus "attributive" intentions, respectively.⁵⁷

For example, if I send someone out to get some *gold*, my intention typically is referential: with the word "gold," I am referring to a substance whose nature guides its meaning. In that situation, one should not fix my meaning by reference to examples of particular yellow stuff, even if I am the one who is the source of such examples; nor should one fix my meaning by a list of properties that some definition of "gold" would employ,

53. Regarding Madison and Hamilton's beliefs, see MORTON WHITE, *PHILOSOPHY, THE FEDERALIST, AND THE CONSTITUTION* (1987).

54. See, e.g., 5 FREDERICK COPLESTON, *Hobbes to Hume*, in *A HISTORY OF PHILOSOPHY* 128–29 (1959).

55. JOHN LOCKE, *AN ESSAY CONCERNING HUMAN UNDERSTANDING* 295 (Kenneth P. Winkler ed., 1996) (1689).

56. Michael S. Moore, *A Natural Law Theory of Interpretation*, 58 S. CAL. L. REV. 277, 340 (1985); see also Moore, *Justifying the Natural Law Theory of Constitutional Interpretation*, *supra* note 25, at 2093–96.

57. See, e.g., Keith S. Donnellan, *Reference and Definite Descriptions*, 75 PHIL. REV. 281 (1966).

even if I am the one who gave such a definition. Nor should one look to some consensus about what is or is not gold; I do not want any fool's gold, no matter how popular it may be to call it "gold." I want the real stuff. One should figure out what gold is using his or her judgment and then get me some.⁵⁸

Similarly, when a statute allows organs to be transferred only on the *death* of a person, do not decide when someone is dead by the conventional beliefs then prevailing about when someone is dead. Do not even recite legal definitions attributing properties to events that are to be called "deaths." Rather, find out, by the best science available, when someone is really dead. It might turn out that although her heart and lungs have ceased spontaneous functioning, she has lost consciousness, and she popularly might be regarded as "dead," she is not really dead but is actually revivable (because, for example, she has been immersed in sufficiently cold water). Do not start cutting out organs of people who would be considered dead by conventional standards but are actually still alive. The organ-donation statute's direction to a judge is to figure out what death is.⁵⁹

Or consider best interest litigation in custody disputes. A statute may direct judges to award custody such that the *best interest* of the child is maximized. Again, judges are not asked by such statutes to determine what most people think is in the best interest of the child. In a once celebrated Iowa case, a judge had to determine whether a child should live with his father, a hippie living on a houseboat in Sausalito, California, or with his more conventional, conservative, maternal grandparents living in rural Iowa.⁶⁰ The Iowa social conventions no doubt differed somewhat from the social conventions prevailing in California, but that social fact is irrelevant; judges should ignore both sets of conventions. Judges, whether in California or Iowa, are directed by law to decide what is really in the best interest of that child, not what their communities might think about it.

58. This is the example used in 2 HILARY PUTNAM, *The Meaning of 'Meaning,'* in MIND, LANGUAGE AND REALITY: PHILOSOPHICAL PAPERS 215, 227–28 (1975).

59. I explore this example at length in Moore, *A Natural Law Theory of Interpretation*, *supra* note 56, at 293–300, 322–28.

60. See *Painter v. Bannister*, 140 N.W.2d 152 (Iowa 1966).

The same obligation to ignore convention (whether contemporary or original) and make a moral judgment applies with respect to constitutional clauses, such as the Eighth Amendment prohibition of cruel and unusual punishment. Proper application of this standard depends preliminarily upon the answer to the historical question: what were the semantic intentions of the Framers? Asking the question in this way confirms John Harrison's classification of this as a kind of originalist argument.⁶¹ It differs from more typical originalist arguments in that it relies on the spare semantic intentions of the Framers as the basis for *not* relying on their exemplars or concepts of the clauses they wrote.

Over time I have become less rigid in my view of the dominance of spare over rich semantic intentions. Sometimes people do speak with rich ("attributive") rather than spare ("referential") intentions. For example, suppose somebody says to you, "Go meet the man in the Brooks Brothers suit." Usually, people saying such things would have referential, or spare, semantic intentions: they intend to refer to a particular person whom you are to meet, irrespective of whether he is really wearing a Brooks Brothers suit. Thus, the property used to pick out that person, "wearing a Brooks Brothers suit," does not fix the reference. The nature of the thing referred to does. However, if *my* wife were to say to me, "Go see the man in the Brooks Brothers suit," it is likely that she speaks with an attributive, or rich, semantic intention. Her thought is, "I do not care who you see, just go see what a well-dressed man looks like; that is, look at someone who is actually wearing a Brooks Brothers suit." For me to follow that direction, I need to find anyone who has that property.⁶²

People therefore can, and on different occasions do, speak with different kinds of semantic intentions. The semantic thesis I attribute to Madison and Hamilton is that their semantic intentions were spare, or referential. This is the thesis that natural rights exist, and the Framers were referring to them by the rights-conferring clauses they wrote.⁶³ This is what Mark II originalism amounts to: we have a constitutional scheme based

61. See *supra* note 52 and accompanying text.

62. The example is from LEO KATZ, *BAD ACTS AND GUILTY MINDS: CONUNDRUMS OF THE CRIMINAL LAW* 85 (1987).

63. See *supra* notes 53–54 and accompanying text.

on the belief that people have real human rights that are outside of politics; we have created an institution, judicial review, that protects those rights; and judges, in exercising the great power of judicial review, will have to find the meaning of the rights-conferring clauses in the nature of the rights referred to, and not in anything else, be it social convention or the preferred constitutional interpretation of the Framers.⁶⁴ Such an originalism commits judges to engaging in some first-person, committed moral reasoning about the nature of the rights protected by the Constitution.

If such a scheme is to be successful, it matters a lot who the judges are that engage in the task of articulating the nature of our natural rights. Hamilton and Madison dealt with this in the *Federalist Papers*.⁶⁵ Given the power we are giving judges, of course we only want persons of virtue who have strong powers of moral discernment.⁶⁶ Not everyone should be entrusted with such responsibility. This second argument in favor of judges making their own moral judgments in constitutional interpretation is thus a bit hostage to which individuals we put on the bench.

The third argument in favor of first-person moral reasoning by judges is what I shall call the “backdoor” argument. Suppose the Supreme Court is right that, generally speaking, there are only two possibilities as to the source of values. The possibilities are either first-person judgments of the judges themselves or third-person sociological judgments about what other people believe. If you eliminate the sociological determinations (which is the strategy of the backdoor argument), that leaves first-person judgments as necessary (assuming that morality-free constitutional interpretation is simply not possible). The strategy of the backdoor argument to eliminate reliance on sociology is based on two decisive objections against judges’ relying on other people’s moral beliefs.

One is the late John Hart Ely’s objection, which he eloquently voiced some thirty years ago.⁶⁷ Between a court and a legislature,

64. See *supra* notes 53–55 and accompanying text.

65. See THE FEDERALIST NO. 78, at 471–72 (Alexander Hamilton) (Clinton Rossiter ed., 1961) (1787).

66. See *id.*

67. See JOHN HART ELY, DEMOCRACY AND DISTRUST: A THEORY OF JUDICIAL REVIEW (1980).

how could anyone think that courts better reflect community conventions than institutions composed of freely elected representatives?⁶⁸ If the purpose of judicial review were truly to protect some conventional consensus about the rights we have, why would anyone think that appointed judges are better at reflecting that consensus than the institution we set up to be representative, the legislature? Ely was a moral skeptic, so this argument led him to believe that there should be no substantive judicial review. For those who are not skeptics, the argument should lead them to believe that judges should apply their own independent moral judgments in exercising judicial review.

The second objection to the application of conventional moral views by the judiciary is based in part on the fear of the tyranny of the majority that led to the Madisonian compromise.⁶⁹ Despite a democratic scheme of governance, we enshrined the rights of a minority as beyond the reach of ordinary politics. Suppose, however, that the rights of the minority are interpreted by what the majority believes them to be. What is the worth of a right good against the majority when that same majority interprets that right? Would the Nazis have marched in Skokie if the First Amendment had been governed by the majority's interpretation of free speech? It is highly unlikely.

The rights enshrined in the Madisonian compromise are supposed to be good against the majority. It does not make sense to give a majoritarian interpretation of minority rights against the majority.⁷⁰ Thus, at some point, a judge has to say what rights people really have, not what rights a contemporary majority or any other consensus believes that they have. To do this, a judge must engage in first-person, committed moral judgment.

The fourth and final argument in favor of allowing judges to resort to their own moral beliefs in interpreting the Constitution is that judges do better in their constitutional adjudication if they make committed, first-person, emotion-laden judgments, rather than being guided by the dry recitation of moral shibboleths accepted by others.⁷¹ When individuals make their own decisions, they must seek their own commitments, rely on their own most cherished beliefs, and engage their emotions.

68. *See id.* at 102.

69. *See id.* at 80–81.

70. *See id.*

71. *See Moore, A Natural Law Theory of Interpretation, supra* note 56, at 392–93.

When people have to stand behind their decisions and take responsibility for them, they take the task much more seriously than they would if they were simply deferring to the supposed authority of other people's moral beliefs. Judges should thus do what Justice Kennedy did in *Roper*, and what Justice Stewart did before him in *Gregg*; they should decide what *they* think constitutes cruel and unusual punishment.⁷² The committed question is not: what do other people think about this? The better question for a judge is: what do I think?

The need for judges to consider what they think right is illustrated in the immigration cases of a generation or more ago.⁷³ Because Judge Learned Hand was a moral skeptic, he regularly deferred to popular judgment instead of relying on his own first-person moral judgments.⁷⁴ For example, when a statute required a finding of good moral character for citizenship, Judge Hand deferred to what he took to be a consensus on that issue, despite some sympathetic fact patterns.⁷⁵ One case Judge Hand heard involved an Italian immigrant who had killed his fourth child (out of five children) because he could not put the rest through school.⁷⁶ The father regrettably euthanized his hopelessly retarded fourth child in order to help his other children.⁷⁷ Did that act evince a lack of good moral character requiring that his petition for citizenship be denied? Judge Hand dryly recited the conventional moral shibboleth that one should not kill people, particularly one's own children, and left it at that.⁷⁸ But the moral issue is actually much more interesting than any general moral conventions can capture. Judge Hand would have done a better job if he were seriously in session with himself in trying to determine whether the father really had good moral character.⁷⁹ Then Judge Hand's emotions would have been engaged, and then his judgment would have had to penetrate the easy generalities and grapple with the

72. See *supra* text accompanying notes 10–11.

73. LEARNED HAND, THE ART AND CRAFT OF JUDGING 45–64 (Hershel Shanks ed., 1968). I am grateful to the late Gerald Gunther for drawing my attention to these cases.

74. *Id.* at 17, 24–25.

75. See, e.g., *Repouille v. United States*, 165 F.2d 152, 152–53 (2d Cir. 1947).

76. *Id.*

77. *Id.*

78. *Id.*

79. See generally Edmond N. Cahn, *Authority and Responsibility*, 51 COLUM. L. REV. 838 (1951).

compelling particularities of the case. Judge Hand's own moral judgment might well have been considerably more nuanced and responsive to the facts of the case had he thrown off his deference to the moral views of others.

These last four arguments urge judges to resort to their own first-person, committed moral judgments as they interpret the Constitution. To put this conclusion pithily: surely first, foremost, and always, the job of a judge is to *judge*.⁸⁰

80. A truism relied upon by Herbert Hart for a very different point. See H.L.A. Hart, *The Ascription of Responsibility and Rights*, 49 PROC. ARISTOTELIAN SOC'Y 171, 182 (1949).

*The Twenty-Sixth Annual
National Federalist Society Student Symposium:
Law and Morality*

II.

**GOVERNMENT PROMOTION OF
MORAL ISSUES**

ESSAYISTS

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GOVERNMENT PROMOTION OF MORAL ISSUES: GAMBLING, SMOKING, AND ADVERTISING

LINO A. GRAGLIA*

What makes gambling, smoking, and advertising and the encouragement of those activities “moral” issues? The use of the word “moral” should prompt the question: From what is “moral” being distinguished? This Essay tries to avoid use of the word because it usually conceals more than it clarifies as a basis for policy judgments. The usual distinction is between a principle-based morality, as advocated by Immanuel Kant, and utilitarianism, a morality based on consequences. The issue, therefore, would seem to be whether government should or may regulate conduct on any other than purely utilitarian grounds.

Utilitarianism maintains that the rightness or wrongness of conduct depends on its consequences. To a secularist claiming no aid from the supernatural, the above assertion seems self-evident. How is it possible to judge an action except by its consequences? Kantian tradition answers by judging an action’s inherent justice or rightness, which should somehow be determined apart from and regardless of consequences. “Do justice,” the Kantian view advises, “though the heavens fall”¹—that is, do what is inherently right, even though it brings about an unimaginable disaster. Surely that has to be wrong: If doing justice will bring about an unimaginable disaster, we must rethink our idea of justice. The fanaticism underlying the Taliban’s destruction of the Buddhist statues may illustrate the alternative of a morality apparently not based on consequences.²

Taking as a given on utilitarian grounds that human liberty is a good thing, the answer to the question whether govern-

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1. *R v. Wilkes*, (1770) 93 Eng. Rep. 327, 347 (K.B.) (translation of “*fiat justitia, ruat cælum*”).

2. See CNN.com, Afghanistan’s Taliban Orders Destruction of Statues, <http://edition.cnn.com/2001/WORLD/asiapcf/central/02/26/taliban.statues/> (last visited Jan. 2, 2008).

ment should prohibit certain conduct, and thereby restrict liberty, on any grounds other than its consequences is not a difficult one. Government should prohibit conduct only to produce beneficial consequences sufficient to overcome the resulting loss of liberty. This answer presents a problem because consequences yielding a net benefit for some people may not yield the same result for others, at least not immediately; utilitarianism, it is said, is not sufficiently respectful of the individual.³ To some extent, however, that problem is a necessary and inevitable consequence of any system of law; "immediately beneficial for every individual" does not provide a workable test for determining what constitutes permissible government action. Almost every change in the law makes some people better and other people worse off.

Taking as another given on utilitarian grounds that the welfare of each individual is equally important, utilitarianism may result in the highest degree of welfare achievable for everyone in a world of limited resources. The difficulty is not that the consequences of an action may vary for different people, but in determining the consequences. Consequences vary significantly depending upon how far into the future one looks.⁴ As a result, individuals must make decisions according to generally useful rules without attempting to determine the actual consequences of their actions. In addition, it is necessary to accept the reality that decision-making according to rules necessarily produces some suboptimal results.

The source of the disagreement between Kantian moralists and utilitarians is that the Kantians try to make certain rules absolute and seek an unattainable degree of certainty. Some libertarians, such as John Stuart Mill, make the same mistake when they try to answer all problems of legal coercion with "one very simple principle,"⁵ namely, that government should limit individual freedom only to prevent harm to others and never to protect the individual from himself.⁶ The meaning of this principle turns on the highly debatable question of what

3. Jeremy Waldron, *Rights*, in *A COMPANION TO CONTEMPORARY POLITICAL PHILOSOPHY* 575, 581 (Robert E. Goodin & Philip Pettit eds., 1993).

4. See, e.g., R. I. Sikora, *Unforeseeable Consequences*, 29 *ANALYSIS* 89, 89 (1969).

5. JOHN STUART MILL, *ON LIBERTY* (1859), reprinted in *THREE ESSAYS* 14-15 (Oxford Univ. Press 1975).

6. *Id.* at 92-93.

constitutes harm to others. Mill's principle does not necessarily produce what most people would consider desirable results. The perhaps less brilliant but eminently sensible jurist, James Fitzjames Stephen, correctly answered Mill by noting that "the state of our knowledge is [not] such as to enable us to enunciate any 'very simple principle as entitled to govern absolutely the dealings of society with the individual in the way of compulsion and control.'"⁷ Specifically, society does not know enough to settle all questions of legal coercion with a single, simple rule. In fact, there probably can never be such a rule because the occasions of legal coercion are too varied and complex to formulate one.

Whether prostitution or the use of certain drugs should be legalized, for example, should depend not on any *a priori* principle, but on society's best judgment of the consequences of legalization. The same is true as to the legal regulation of gambling and smoking; the answer cannot be found in a single principle that courts can enforce as a supposed principle of constitutional law.

Indeed, on issues of public policy, constitutional law is often a means of avoiding consideration of a problem on its merits and defending an indefensible position. For example, I once debated Arthur Fleming, then Chairman of the Civil Rights Commission, on the merits of busing to increase public school racial integration. If busing does not improve educational achievement, he was asked, why should we continue to do it? "Because," he replied, "it is necessary . . . to enforce and to implement the Constitution of the United States."⁸ Justice Robert Jackson famously answered the assertion in a different context by noting that the Constitution is not a "suicide pact."⁹

The Constitution does require some unfortunate, anti-democratic consequences, such as making Governors Arnold Schwarzenegger of California and Jennifer Granholm of Michi-

7. JAMES FITZJAMES STEPHEN, *LIBERTY, EQUALITY, FRATERNITY* 85 (R. J. White ed., Univ. of Chicago Press 1991) (1873).

8. Lino Graglia, Debate at Dunbar High School in Washington, D.C. (1976), <http://realaudio.cc.utexas.edu:8080/asxgen/law/depts/media/Reels/Graglia1976.wmv> (last visited Jan. 2, 2008).

9. *Terminiello v. Chicago*, 337 U.S. 1, 37 (1948) (Jackson, J., dissenting).

gan ineligible to be President,¹⁰ creating the privilege against self-incrimination,¹¹ and giving Wyoming two Senate seats¹² and Supreme Court Justices lifetime tenure.¹³ It does not, however, make the vote of a majority of Supreme Court Justices a superior alternative to the vote of elected legislators on all issues of public policy.

For example, Dr. Michael Newdow mistakenly believes that his policy preference of banning all government recognition of religion must prevail, regardless of opposition by the vast majority of the American people. This is not, he asserts, simply because it is his policy preference, but because it is a command of the Constitution¹⁴—which, as it happens, it clearly is not. More seriously, because one can expect better of a leading legal theorist, Professor Michael Moore argues that all sex discrimination by government is subject to “strict scrutiny” and thus strongly presumed unconstitutional because the word “equal” appears in the Fourteenth Amendment.¹⁵ He considers it irrelevant that the Fourteenth Amendment was not meant to have anything to do with sex discrimination.¹⁶ The desire of some legal academics to have their policy preferences prevail leads them to resort to constitutional arguments with no basis in the Constitution.

A result of constitutional law is that serious questions occupy the attention of some of our best minds that could not arise anywhere else because they would correctly be seen as silly. Only in America do legal scholars argue that although the government can ban cigarettes altogether, it cannot take the lesser step of banning only cigarette advertising, because that

10. U.S. CONST. art. II, § 1, cl. 5 (“No Person except a natural born Citizen . . . shall be eligible to the Office of President . . .”).

11. U.S. CONST. amend. V (“No person . . . shall be compelled in any criminal case to be a witness against himself . . .”).

12. U.S. CONST. art. I, § 3, cl. 1 (“The Senate of the United States shall be composed of two Senators from each State . . .”).

13. U.S. CONST. art. III, § 1 (stating that federal judges “shall hold their Offices during good Behaviour”).

14. See CNN.com, *Litigant Explains Why He Brought Pledge Suit*, <http://archives.cnn.com/2002/LAW/06/26/Newdow.cnn/index.html> (last visited Jan. 2, 2008).

15. See Michael S. Moore, *Morality in Eighth Amendment Jurisprudence*, 31 HARV. J.L. & PUB. POL’Y 47, 51 (2008).

16. It took the Nineteenth Amendment to give women even the right to vote. U.S. CONST. amend. XIX.

would violate the First Amendment.¹⁷ Such an assertion illustrates George Orwell's famous statement that "[t]here are some ideas so wrong that only a very intelligent person could believe in them."¹⁸ It would not occur to an ordinary American that the First Amendment restricts the power of government to prohibit advertising of a harmful product any more than the First Amendment restricts the power of government to prohibit perjury. The Framers intended the First Amendment to prevent the national government from adopting the crime of seditious libel.¹⁹ Whatever more, if anything, it was meant to do, it was not meant to prevent the government from prohibiting advertising of a noxious product.

To answer the question posed, government can, but probably should not, ban smoking. Currently, government is moving toward an effective ban by limiting the places where it is permissible to smoke and by imposing near-prohibitive cigarette taxes in many places.²⁰ The government also can, and probably should, ban cigarette advertising. No inconsistency exists in permitting people to sell a harmful product, but prohibiting them from encouraging its use through advertising.

Similarly, with respect to gambling, the question arises whether the government should prohibit it, permit it, permit but discourage it, or permit and encourage it. Again, the application of a general principle creates inappropriate limitations because the conduct, gambling, has many different forms and these different forms may require different treatment. Whether or not one favors prohibiting some forms of gambling, few people, not even libertarians, would argue that government should encourage it. Encouraging gambling, however, is what most states are actually doing in connection with state-operated lotteries. Although lotteries were once banned in

17. See *Lorillard Tobacco Co. v. Reilly*, 533 U.S. 525 (2001).

18. OXFORD DICTIONARY OF HUMOROUS QUOTATIONS 158 (2d ed. 2001).

19. See generally LEONARD W. LEVY, *LEGACY OF SUPPRESSION: FREEDOM OF SPEECH AND PRESS IN EARLY AMERICAN HISTORY* (Harper & Row 1963) (1960); but see Leonard Levy, *The Legacy Reexamined*, 37 STAN. L. REV. 767 (1985); David M. Rabban, *An Ahistorical Historian: Leonard Levy on Freedom of Expression in Early American History*, 37 STAN. L. REV. 795 (1985).

20. See, e.g., Assemb. B. 846, 2002-2003 Sess. (Cal. 2003) (enacted) (banning smoking within 20 feet of public buildings in California); Editorial, *Put Down the Cigarette, and Dial*, N.Y. TIMES, May 11, 2005, at A18 (noting that the price of a pack of cigarettes in New York City is now about \$7).

every state but Nevada—recognized as a sort of national red light district—in recent years they have been legalized in a large majority of the States.²¹ Despite being generally recognized as an evil, lotteries were legalized to avoid the often greater evils of illegal lotteries, other gambling, and, worst of all, money diverted to lotteries run by other states.²² In addition, supporters asserted that state lotteries would raise money to finance public education,²³ and surely nothing can be more important in this country than every person receiving more education regardless of desire or ability.

Today, one cannot travel around Texas, for example, without seeing billboards and other advertising describing the riches to be won through the purchase of lottery tickets. “Purchase,” however, is never the word used. It is called “playing the lottery.”²⁴ States merely invite people to participate actively in a fun game. Some people play tennis and golf, and others, an almost entirely different group, play the lottery. Encouraging people, likely mostly the poor,²⁵ to buy lottery tickets cannot be good social policy.

But, libertarians will tell you, lottery players are, after all, adults, and it is their money. If they would rather spend it on an impossible dream than on food, clothing, housing, or recreation, their choice should be respected. There, indeed, should be a strong presumption in favor of government leaving people alone; any restriction on human freedom by law requires justification. Although that is a good principle, it should not preclude thought as to particular cases. Sufficient justification sometimes does exist for government prohibition of certain conduct. When it appears obvious to most people that other members of society are engaging in an activity that hurts indi-

21. See DAVID NIBERT, HITTING THE LOTTERY JACKPOT: STATE GOVERNMENT AND THE TAXING OF DREAMS 60–61 (2000) (listing thirty-seven states and the District of Columbia as having state-run lotteries with a total revenue in excess of \$34 billion by 1996).

22. RICHARD MCGOWAN, STATE LOTTERIES AND LEGALIZED GAMBLING: PAINLESS REVENUE OR PAINFUL MIRAGE 16 (1994).

23. *Id.* at 17.

24. ALAN J. KARCHER, LOTTERIES 75–76 (1989).

25. See MARY O. BORG ET AL., THE ECONOMIC CONSEQUENCES OF STATE LOTTERIES 19, 29 (1991) (showing that while total purchases of lottery tickets increase with income, total purchases decrease as a percentage of gross income as a purchaser becomes more affluent).

viduals, their children, and society, it must be permissible and appropriate for the society to prohibit that activity. Although it is true that argument has led to such things as coercion of a minority to give them the ultimate good of saving their souls, it merely illustrates the necessity of making distinctions. It is not true that, as the ACLU claims, if *Hustler* is banned, *Hamlet* will soon be next.²⁶

Banning lotteries does not present a more difficult question than banning false advertising; in both cases the government interferes with free choice to protect people from products it considers harmful or ineffective, even though others might consider them beneficial. Government can and probably should ban lotteries, and there should be no question at all as to its power to ban, and the desirability of its banning, advertising that encourages smoking and participation in lotteries.

26. See American Civil Liberties Union, Freedom of Expression, <http://www.aclu.org/freespeech/gen/21179pub20051031.html> (last visited Jan. 2, 2008).

WHAT IS THE GOVERNMENT'S ROLE IN PROMOTING MORALS? . . . SERIOUSLY?

G. MARCUS COLE*

In thinking about the government's proper role in promoting morals, it is helpful first to understand the nature of the disagreement. Part I of this Essay examines what is commonly meant by—as the great Lon Fuller described it—the “morality of law.”¹ Following Professor Fuller's framework, this Essay distinguishes between two very different moralities of law: the “morality of duty” and the “morality of aspiration.”² The morality of duty consists of the basic proscriptions—against murder or theft, for example—required by any governmental authority.³ The morality of aspiration, however, is a different matter altogether. It comprises the rules associated with promoting virtue.⁴ Part I concludes by recasting government's role in promoting virtue, in light of Professor Fuller's insight, as an attempt to promote a specific type of morality: the morality of aspiration.

Part II explores the wisdom of giving the government the role of regulating the morality of aspiration by asking why there is an apparent inclination to legislate virtue. The Essay concludes that this inclination owes more to history than to nature and can be traced to the merger of the state and the church in Tudor England. “Aspirational morality” was once the exclusive province of the church, outside the jurisdiction of the state. King Henry VIII, however, saw this separation of church and

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1. LON L. FULLER, *THE MORALITY OF LAW* (Yale Univ. Press 1969) (1964).

2. *Id.* at 5. This distinction must itself be distinguished from the dichotomy offered by Professor Randy Barnett when he referred to Aquinas's distinction between “public” and “private” morality. See Randy E. Barnett, Remarks at the 2007 National Federalist Society Student Symposium (Feb. 23, 2007) (transcript on file with Author).

3. See FULLER, *supra* note 1, at 5–6.

4. See *id.* at 5.

state as onerous because the Church repeatedly exercised its freedom from his control by condemning his adultery as "immoral."⁵ To correct this state of affairs and facilitate his own "affairs," King Henry commandeered the responsibilities of the Church and made morality the responsibility of the State.

Finally, Part III suggests that it is a mistake to look to government for moral guidance, even in the rare case when a society can agree upon moral principles. There is no reason to assume that democratic governments are virtuous in theory, and there is good reason to believe that they fail to reflect popular concepts of virtue in practice.

I. LON FULLER'S DICHOTOMY: THE MORALITY OF ASPIRATION VERSUS THE MORALITY OF DUTY

Those who characterize law as a moral enterprise are undoubtedly correct. It is important, however, to determine at which level it is appropriate for morality to drive the law. Professor Lon Fuller distinguished between two different types of morality with which the law deals: the "morality of aspiration" and the "morality of duty."⁶

The morality of aspiration is that conception of moral principles to which humans *ought* to aspire.⁷ It is "the good life" of virtue, to which Professor Barnett has referred.⁸ It is the "higher" standard of morality, to which both churches and individuals hope to conform, and which people hope to impart to their children.

The "morality of duty" is, on the other hand, that lower standard of morality and behavior by which a much greater part of society agrees it ought to be judged, measured, and even constrained.⁹ These are the rules that all must be expected to obey: those certain, basic rules that must restrain those who have no desire to conform to the values shared by the rest of society.¹⁰ The morality of duty is, in the nomenclature of Oliver

5. See *infra* Part II.

6. FULLER, *supra* note 1, at 5.

7. See *id.* at 5–6.

8. Barnett, *supra* note 2.

9. See FULLER, *supra* note 1, at 5–6.

10. See *id.* at 5–6.

Wendell Holmes, Jr., the morality for the "bad man."¹¹ All are constrained by a basic duty to respect the person and property of others.

More concretely, laws regarding murder or theft can be thought to impose the morality of duty. Laws requiring church attendance or graduate level education are representative of laws imposing the morality of aspiration. All agree that government ought to curb murderous or larcenous behavior. Professor Fuller's morality of duty is not frequently at issue; disagreements usually center on the morality of aspiration. The real question is not whether the government has a role in prescribing morals, but which *type* of morality the government should prescribe.

Professor Fuller's dichotomy focuses the debate on the wisdom of the government's imposition, through law, of the morality of aspiration. Should the government outlaw or even speak against gambling, smoking, and drinking (especially when it also profits immensely from these activities)? Should the government promote the consumption of milk, but prohibit the consumption of marijuana? Before responding to these questions, it may be helpful to ask a more basic question. Why is there an apparent inclination to legislate virtue?

II. THE INCLINATION TO LEGISLATE VIRTUE

With the question reframed this way—"Should the government legislate virtue?"—it is helpful to ask where this inclination originates. In other words, why is it assumed that a proper role of government is to make people better?

The answer is not found in our nature. The idea that government is a proper source of moral guidance is, in fact, a relatively young idea in human history. It has not always been part of American culture or law. Chancellor James Kent, author of Kent's *Commentaries*, and one of the most influential American legal minds of all time, had a personal story that illustrates how foreign this impulse is to American law. According to Kent's grandson:

[He was] waited upon by a temperance committee and urged to give his authority and sanction to the principles

11. Oliver Wendell Holmes, Jr., *The Path of the Law*, 10 HARV. L. REV. 457, 459 (1897).

and aims of a mass meeting by adding his name to the list of those who had pledged themselves not to use intoxicating liquor, being unduly pressed after his first polite negative, he made the following reply, declining the request: "Gentlemen, I refuse to sign any pledge. I never have been drunk, and, by the blessing of God, I never will get drunk, but I have a constitutional privilege to get drunk, and that privilege I will not sign away."¹²

Kent never had the inclination to grant legislative authority over his sobriety. Indeed, he saw certain acts of *immorality* as a constitutional right. He recognized something akin to Professor Fuller's distinction. Nevertheless, virtue—the morality of aspiration—is assumed today to be the proper province of the state. Why?

Throughout most of the history of Western Civilization, questions of morality were administered by institutions wholly separate from, and in competition with, the institutions that administered law.¹³ Separation of church and state predates Dr. Michael Newdow; it was *de rigueur* for most of Western history.¹⁴ Church and state were, quite literally, separate and co-equal sovereigns.

Before the Reformation, the question whether homosexuals could marry would never have been put to the king; marriage was completely within the jurisdiction of the Church.¹⁵ Simi-

12. WILLIAM KENT, MEMOIRS AND LETTERS OF JAMES KENT, LL.D. 165 (1898).

13. Although St. Augustine is credited with developing the idea of separation of church and state in *City of God*, developments in Europe during the Middle Ages entrenched this separation, as popes fought for independent appointment without the interference of kings, and the kings fought against papal supremacy over secular matters. See STEPHEN M. FELDMAN, PLEASE DON'T WISH ME A MERRY CHRISTMAS: A CRITICAL HISTORY OF THE SEPARATION OF CHURCH AND STATE (1999); see also UTA-RENAME BLUMENTHAL, THE INVESTITURE CONTROVERSY: CHURCH AND MONARCHY FROM THE NINTH TO THE TWELFTH CENTURY (1988) (detailing Pope Gregory's successful attempt to wrest control of papal appointment from civil rule); H.E.J. COWDREY, POPE GREGORY VII, 1073–85 (1998) (detailing same); GERD TELLENBACH, THE CHURCH IN WESTERN EUROPE FROM THE TENTH TO THE EARLY TWELFTH CENTURY (1993) (detailing same). The development of Gallicanism on the Continent also reinforced the idea of separation of church and state. See THOMAS P. NEILL & RAYMOND H. SCHMANDT, HISTORY OF THE CATHOLIC CHURCH 431–35 (1957). The First of the Four Gallican Articles pronounced by French clergy in 1682 held that the pope had supreme spiritual power but no secular power. *Id.*

14. See Michael Newdow, Remarks at the 2007 National Federalist Society Student Symposium (Feb. 23, 2007) (transcript on file with Author).

15. See ARTHUR R. HOGUE, ORIGINS OF THE COMMON LAW 72 (1966).

larly, the idea that enfeoffment of property might be a question for a bishop would have been quite laughable; lands of the realm were the province of the king. Questions involving the morality of aspiration were the province of the Church and the ecclesiastical courts.¹⁶ Questions of property—the morality of duty—were the province of the king and the king's courts of law.¹⁷

When did questions of the “higher” morality become the province of the king? In Anglo-American legal history, it happened when the state took over the role of the church by taking over the Church. Specifically, a particular King of England found the constraints of the Church too constraining. Our practice of looking to the state to define morality began when King Henry VIII—acting as the State—decided to imprison and execute a queen so that he could marry a woman more “worthy” of the throne.¹⁸ To effectuate his intentions, the King had to overcome a significant obstacle posed by the condemnation of the Church. Because his—the State's—authority did not extend to marital issues, which were the province of the Church, he simply assumed by force the Church's responsibilities and powers.

In other words, the State became the keeper of morality to enable the King's adultery. The State's first act in its new role as the regulator of morality was to facilitate its own immorality. Ever since, the state has occupied and further assumed the traditional functions of the church: approving marriages,

16. See *id.* at 72–73. A prerogative writ issued by Edward I in 1286, *Circumspecte Agatis*, recognized and reaffirmed the King's understanding of the distinction between purely spiritual matters (*quae mere sunt spiritualia*) and civil matters. *Id.*

17. See *id.* at 71.

18. The new queen turned out later to be not so worthy, and so had to be executed so that yet another queen could take her place. This brief, “tongue-in-cheek” interpretation of the reign of Henry VIII and the English Reformation dramatically oversimplifies the merger of ecclesiastical and civil law. Church historians often refer to the merger of spiritual and civil affairs under the absolute state as “Gallicanism.” See THOMAS P. NEILL & RAYMOND H. SCHMANDT, *supra* note 13, 431–35. The term Gallicanism refers to the most complete expression of the movement of nation-states away from shared power with the pope, as it took shape in seventeenth-century France under Louis XIV. *Id.* at 433. The term, however, is misleading. The movement away from ecclesiastical law and authority, and toward the absolute state, began much earlier than the Gallic events, and was expressed most dramatically, if not completely, in the schism between the Church of England and the Roman Catholic Church under Henry VIII. See GOLDWIN SMITH, A CONSTITUTIONAL AND LEGAL HISTORY OF ENGLAND 264–66 (1955).

making proclamations about moral behavior, and educating children.¹⁹

Understanding this traditional distinction between the role of the church and that of the state suggests a final point: if those who seek virtue look to government to promote it in others, they are likely to be disappointed.

III. GOVERNMENT'S UNSUITABILITY TO PROMOTE MORALITY

Why cannot government provide moral guidance? What exactly is government? Is it something better than the individual? Is it "practiced" by those higher or more virtuous? Does it respond to popular, obviously flawed concepts of virtue? Even if it does, are its operatives sufficiently skilled to regulate such a delicate area of human affairs?

Public choice theory has provided many reasons, in addition to those provided by the Founders, to mistrust pure democracy. Majoritarian processes are now known to be limited and corruptible by "logrolling," Condorcet cycling, and Arrow's Theorem, resulting in special interest legislation that does not even represent the views of the majority.²⁰ Why would legislation of aspirational morality be immune from these legislative infirmities?

Furthermore, even if legislation actually reflected the will of the majority, why should one expect fifty-one percent of the electorate to be particularly "moral?" The simple and familiar examples of the duly elected Chancellor of Germany in the 1930s and 1940s, Jim Crow legislation throughout the South during much of the twentieth century, and the eugenics projects of the so-called "Progressive" movement of the early twentieth century should disabuse one of the notion that majorities are always "moral majorities."

But even if the majority were always a "moral majority," one should still be reluctant to turn over the reins of moral aspirations to it. Why? The experience of the European churches is

19. Edward I recognized an even longer list of "traditional" functions of the Church, many of which arguably would be regarded today as purely civil matters. See HOGUE, *supra* note 15, at 72-73.

20. For a thorough treatment of the limitations on and corruptibility of democratic institutions and decision making, see JAMES M. BUCHANAN & GORDON TULLOCK, *THE CALCULUS OF CONSENT* 171-88, 265-95 (1962). See generally Kenneth J. Arrow, *A Difficulty in the Concept of Social Welfare*, 58 J. POL. ECON. 328 (1950) (explaining Arrow's Theorem).

instructive. A recent cover story of the European edition of *Newsweek* magazine described the current condition of churches and cathedrals across Europe.²¹ Church attendance is dropping so “precipitously” that many churches are being labeled “redundant.”²² Because these church buildings are protected by law, they cannot be razed, and in many countries must be maintained. To generate the revenue necessary to maintain them, these spaces are now rented for commercial purposes. A church in Cheltenham, England, for example, is currently used as an Italian restaurant.²³ A nightclub in Amsterdam is in the sanctuary of a cathedral.²⁴ A twelfth-century church in Prague is used for exotic dancing and techno music parties.²⁵

To a Christian, this is sad and even outrageous. These sacred places are abused through disuse and commercial expedience. Taking care not to conflate religion with metaphysics, the comparison is striking. Government-supported churches in Europe sit empty while self-sufficient churches in America overflow every Sunday. Why, then, would one want to adopt a European, socialized model of virtue? Americans do not let civil servants build stealth bombers, provide health care, or distribute food. Americans resist allowing civil servants to provide the most important services. Why should civil servants be entrusted with shaping character?

When society turns its aspirational morality over to the state, the state makes a mess of it. The handiest example is public education. A guided tour of Chicago's public schools would persuade even the most ardent opponent of school vouchers that public education, at least in some settings, simply does not work. It might have been better to keep prayer in schools while getting government out of them.

CONCLUSION

For Christians, morality, virtue, and salvation require freedom. My father, Gilbert Cole, often said that he “had never

21. William Underhill, *Remodeling the Churches*, *NEWSWEEK* (ATLANTIC EDITION), Feb. 12, 2007, at 50.

22. *Id.*

23. *Id.*

24. *Id.*

25. *Id.*

seen a problem that couldn't be solved with a little physical violence." Although he was not referring to government, his expression accurately applies to the law. Law, and government enforcement of it, is coercive, and legitimately so. The gun on the sheriff's hip implies that challenges to law and legal authority will be met with physical force, and if need be, violence.

Although we can compel compliance with the law through physical violence, we cannot compel salvation, virtue, or genuine morality through such means. As a Christian, I believe that we cannot, through government's monopoly on the legitimized use of physical violence, compel the ultimate choice between good and evil, between salvation and damnation. This is the very choice for which our Creator gave us free will. To be Christian ultimately means to believe in freedom: freedom of conscience as well as of action, freedom to choose or reject sin or salvation, so long as our actions do not injure others or deprive them of their equal freedom.

This is not to say that government does not do certain things well. It does. Those things, however, are all along the lines of what Professor Fuller describes as the "morality of duty." It is great at collecting things: taxes and information to name just two. It is relatively good at things like defense and policing criminal harms. Asking government to compete with freedom when it comes to aspirations and virtue, however, is asking it to aspire to heights beyond the reach of its arsenal.

So, if one really cares about morality, why would one let government anywhere near it?

HOW TO REVERSE GOVERNMENT IMPOSITION OF IMMORALITY: A STRATEGY FOR ERODING *ROE V. WADE*

STEVEN G. CALABRESI*

The topic of this Symposium is the relationship between law and morality. The essays in this volume adeptly explore the theory of this relationship, track its historical path, and address pressing legal and moral issues of our time. The very basics of law and morality, at least, should be relatively clear. All law worthy of obedience is rooted in morality. A regime whose law is not based in morality, like the regimes of Nazi Germany or Soviet Russia, is not one where the positive law deserves to be obeyed. To our good fortune and to the credit of our forebears, the laws of the United States, for the most part, are rooted in moral presuppositions. Indeed, very few would claim that the American legal regime is fundamentally immoral and ought to be overthrown, and I would not make such a claim myself.

There is, however, one important respect in which our law is deeply immoral: its recognition of *a constitutional right* of women to have abortions. In the United States, we have not merely decriminalized or legalized abortion. We have made the legality of abortion a matter of individual constitutional right. In so doing, the American legal system has put its highest moral imprimatur on a loathsome procedure that ought to be at least discouraged by the law if not forbidden altogether. *Roe v. Wade*¹ was thus in my opinion not merely wrongly decided. It was also profoundly immoral.

This Essay lays out a plan for righting that wrong. It describes how pro-life groups can erode the precedential value of *Roe*, paving the way for its overruling, and legally discourage abortion once again. In the process, this Essay makes two suggestions which should be useful to those who wish to reverse

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1. 410 U.S. 113 (1973).

other legal trends they find unfortunate—for example, the extensive constitutional protection our legal system gives to pornography² or our unusual use of the death penalty as a form of punishment.³

First, those working against *Roe* must understand that public opinion matters. Just as there are limits on the government's ability to legislate morality (as the experiment of Prohibition taught us) without at least some degree of public support, so too is it the case that the Supreme Court will not overrule incorrect or immoral decisions when the public clearly opposes its doing so. For better or worse, each part of the struggle against abortion—the legislative *and* the constitutional—requires building up public support.

Second, Americans who oppose abortion must candidly discuss strategy. We must learn to litigate shrewdly and to shape public opinion. On both scores, we would be well-advised to adopt some of the legal tactics employed in past moral constitutional campaigns—for example, the campaigns against capital punishment and racial segregation. To prevail, supporters of the pro-life cause must adapt old means used in these prior campaigns to the new end of cutting back on *Roe*.

This Essay proceeds in two Parts. Part I discusses how the pro-life position can prevail in the Supreme Court—how *Roe* can be overruled. Part II suggests several ways to turn the tide of public opinion against abortion, not only insofar as necessary to achieve victory in the Supreme Court, but also so that abortion can once again be legally discouraged, with laws against at least some forms of abortion that are routinely enforced.

I. WINNING IN COURT

Pro-life Americans must work to erode the precedents of *Roe v. Wade* and *Planned Parenthood of Southeastern Pennsylvania v. Casey*⁴ with the same sense of determination and strategic genius that the NAACP Legal Defense Fund used in eroding the prece-

2. See Phyllis Schlafly, *The Morality of First Amendment Jurisprudence*, 31 HARV. J.L. & PUB. POL'Y 95 (2008).

3. See Ronald J. Allen, *Moral Choices, Moral Truth, and the Eighth Amendment*, 31 HARV. J.L. & PUB. POL'Y 25 (2008).

4. 505 U.S. 833 (1992).

dent of *Plessy v. Ferguson*.⁵ It is worth noting in this regard that the NAACP's campaign against *Plessy* was a protracted one, beginning in the 1930s, achieving a major victory twenty years later in *Brown v. Board of Education*,⁶ and only realizing complete success with the 1967 decision *Loving v. Virginia*,⁷ more than thirty years after the campaign against Jim Crow had begun. This final victory in *Loving*—which declared anti-miscegenation laws to be unconstitutional—came only after Congress had weighed in on the pro-civil rights side with the Civil Rights Act of 1964⁸ and the Voting Rights Act of 1965.⁹ I do not think Americans necessarily need to wait twenty or thirty years to overrule *Roe*. Indeed, we may well be closer to being able to attain that objective than we realize, even if we are much further away from having a political climate in which even the most extreme forms of abortion can again be made illegal.

I am cautiously hopeful about where the pro-life cause currently stands in the Supreme Court. I believe there are probably four Justices—Roberts, Scalia, Thomas, and Alito—who would like to vote to eviscerate *Roe* right now, although I do not think Justices Roberts and Alito are prepared to do that suddenly in one case. The crucial fifth vote in abortion cases belongs to Justice Kennedy. I will begin by stating my own personal impression of what Justice Kennedy is likely to do in future cases.

I believe that Justice Kennedy is in fact personally pro-life as a policy matter, as he privately suggested to some at the time he was nominated to the Supreme Court.¹⁰ I am not aware of any indication that he has changed his mind on abortion or has “grown” on the issue during the twenty years he has been on the Court. Indeed, Justice Kennedy dissented in the first par-

5. 163 U.S. 537 (1896).

6. 347 U.S. 483 (1954).

7. 388 U.S. 1 (1967).

8. 42 U.S.C. § 2000 *et seq.* (2000).

9. 42 U.S.C. § 1973 (2000).

10. Editorial, *Religion and the Court*, WALL. ST. J., Oct. 11, 2005, at A16 (“Conservative Senator Jesse Helms had doubts, however, so Judge Kennedy met him in a private room at the White House that November. According to columnist Cal Thomas, Mr. Helms said to Judge Kennedy, ‘I think you know where I stand on abortion.’ Judge Kennedy smiled and answered, ‘Indeed I do and I admire it. I am a practicing Catholic.’” (internal quotation marks omitted)).

tial-birth abortion decision, *Stenberg v. Carhart*,¹¹ with a passionate and obviously heartfelt opinion, and he was rumored to have been furious with Justices Souter and O'Connor for relying in *Carhart* on the plurality opinion the three of them wrote in *Casey*.¹² Justice Souter seems to have confirmed this by suggesting that he may have lost Justice Kennedy's vote in *Bush v. Gore* in part because Justice Kennedy was still angry with him over their split in *Carhart*.

I would be surprised if Justice Kennedy were ever again on the same side of an abortion case as Justice Souter, and since Justice O'Connor has retired from the Court, the three-Justice *Casey* plurality opinion now rests on the ash heap of history. Thus, the only "burdens" on abortion that the Court is likely to strike down as "undue"¹³ are those that strike Justice Kennedy as undue. The very term "undue burden" is an O'Connor-invented test without roots in the case law; the only way to understand which burdens are undue, therefore, is to understand what Justice Kennedy thinks.

I believe Justice Kennedy starts from the premise that abortion ought to be legally discouraged, but I suspect he is deeply worried about the political backlash that the Court might trigger by precipitously overruling *Roe*. The *Casey* opinion upholding *Roe* was issued in June of 1992, only months before President George H.W. Bush lost his bid for reelection. It is therefore not beyond the realm of possibility that Justice Kennedy might have feared that overruling *Roe* at that time could have cost President Bush his reelection by driving away suburban Republicans. He could even have been worried that in the event Governor Bill Clinton were elected President, the overruling of *Roe* would itself be overruled soon thereafter when Justice Byron White was likely to retire.

In fact, if the Court had overruled *Roe* in 1992, Justice White's replacement, Ruth Bader Ginsburg, almost certainly would have voted to spring it back to life the very next year. Moreover, the Democratic Congress and President elected in 1992 would very probably have passed a federal statute codifying abortion rights. This would have been a huge setback for the

11. 530 U.S. 914 (2000).

12. See, e.g., JEFFREY TOOBIN, *THE NINE: INSIDE THE SECRET WORLD OF THE SUPREME COURT* 135–36 (2007).

13. 505 U.S. 833, 874 (1992).

pro-life cause. If my supposition is correct, Justice Kennedy's reasons for not overruling *Roe* in *Casey* could well have been largely prudential.

I suspect that Justice Kennedy may understand the *Casey* plurality opinion to mean that most regulations of abortion commanding fifty percent support in national public opinion polls are constitutional. In the capital punishment area, Justice Kennedy has not hesitated to give constitutional weight to modern public opinion opposing the execution of the mentally infirm¹⁴ or of juveniles,¹⁵ and he might give similar weight to public opinion with respect to regulations of abortion. It is worth noting in this regard that the plurality opinion in *Casey* upheld the imposition of waiting periods and parental consent for abortions for minors, both of which were supported by majorities in national public opinion polls.¹⁶ *Casey* did strike down the Pennsylvania spousal notification requirement,¹⁷ which commanded more than fifty percent support in national public opinion polls. But it is possible that Justice Kennedy agreed to this largely as a sop to Justices O'Connor and Souter, allowing the three of them to collaborate together on the *Casey* plurality opinion. Regardless of his reason for acting the way he did at that time, I personally do not expect Justice Kennedy ever again to overturn a regulation of abortion with majority support in national opinion polls.

The key to eroding *Roe v. Wade*, then, is to pass a number of state or federal laws that restrict abortion rights in ways approved of by at least fifty percent of the public in national public opinion polls. Those cases can then be litigated up to the Supreme Court, and we can begin to build up a body of pro-life case law, like *Gonzales v. Carhart*.¹⁸ Once we have won enough such cases, the Court will be in a position to overrule *Roe*. I think there may well be a substantial period of time where *Roe* is not technically "overruled" but during which it will be rendered meaningless. This is what happened to *Lochner v. New York*,¹⁹ which became a dead letter in 1937,²⁰ but which was not

14. See *Atkins v. Virginia*, 536 U.S. 304 (2002).

15. See *Roper v. Simmons*, 543 U.S. 551 (2005).

16. *Id.* at 885–87, 899–901.

17. *Id.* at 887–99.

18. 127 S. Ct. 1610 (2007).

19. 198 U.S. 45 (1905).

formally overturned until the Court's decision in *Ferguson v. Skrupa*²¹ in 1963. Despite any temporary delay in its formal overruling, however, the days of *Roe* would be numbered.

I am not an expert on national public opinion polling on abortion, so I will defer to others to develop the precise content of the kind of abortion restrictions that might pass muster with Justice Kennedy. Offhand, I would recommend passing laws like the following: a ban on abortion for sex selection, a law preventing boyfriends or parents from intimidating young women into choosing to have an abortion, a ban on any form of abortion that might cause pain to the fetus (such as by sucking out his or her brain, or hacking his or her body into pieces), and a nationally-applicable mandatory waiting period before abortions can be performed. The pro-life movement should borrow a page here from the opponents of capital punishment, who challenge every mode of execution, from hanging to lethal injection, as imposing cruel and unusual punishment. Opponents of abortion should raise the same kinds of challenges, one by one, to each abortion procedure. This will force the public to focus on exactly what abortion entails, and that will put us on the national majority side of the issue. The end goal should be to have all abortion procedures banned nationally.

My strategy for eroding *Roe* thus advocates gradualism rather than immediate and outright challenges. If the recent South Dakota law banning abortion, for example, had survived its brush with the voters,²² Justice Kennedy might have struck it down because national public opinion polls reveal a majority opposed to "overruling" *Roe*. I thus think that the pro-life cause is best advanced by slowly tightening the regulatory noose around abortion, and would suffer a setback were *Roe* challenged head on.

20. See *West Coast Hotel Co. v. Parrish*, 300 U.S. 379 (1937).

21. 372 U.S. 726 (1963).

22. In 2006, the South Dakota Legislature passed, and the Governor signed, the "Women's Health and Human Life Protection Act," making abortion illegal on the grounds that "life begins at the time of conception, a conclusion confirmed by scientific advances since the 1973 decision of *Roe v. Wade*." S. HB 1215, 2006 Leg., 81st Sess. (S.D. 2006) (enacted). The measure failed to win the support of a majority of state voters when it was put to referendum on November 7, 2006. S.D. CODIFIED LAWS § 12-17-7 (2006).

II. SHAPING PUBLIC OPINION

In order to overrule *Roe*, therefore, we must arrive at a situation where a majority of the public supports overruling *Roe*. We will need such a majority not only to get Justice Kennedy's vote, but also to confirm new originalist Justices, to pass new laws restricting abortion, and to make sure that prosecutors enforce those new laws. Here, I think opponents of abortion need a massive public education campaign that informs citizens about the facts of fetal development and that puts the moral authority of government on the side of discouraging resort to abortion.

We do not have too far to go. Former President Bill and Senator Hillary Rodham Clinton, for example, still claim they want abortion to be safe, legal, *and rare*.²³ The Clintons need to be called on their rhetoric. If they truly mean it when they say that they want abortion to be rare, they should have no objection to starting a massive, federally-funded educational campaign to discourage abortion and encourage adoption. This campaign could and should be modeled on the federal government's highly successful campaign over the last forty years to end smoking. The first step toward outlawing abortion is to persuade the American people that it is morally wrong, and the first step toward accomplishing that is a massive, federally-funded anti-abortion advertising campaign.

Some of the folks who now say they hate abortion will jump off the boat at this point, because they do not in fact really mean it when they say they want abortion to be rare. But it is vitally important that these people be unmasked and revealed as supporters of the morality of abortion and not just of its legality. Much of the public does not think abortion is moral, and I think many Americans will support efforts to advertise that fact.

Another aspect of the campaign against abortion should be for all pro-life groups constantly and publicly to compare abortion providers, like Planned Parenthood, to big tobacco companies. The comparison is fair; both are entities that exist to make money by encouraging vice. Similarly, pro-life state attorneys general should consider bringing at least some of the

23. President William J. Clinton, Remarks Accepting the Presidential Nomination at the Democratic National Convention in Chicago (Aug. 26, 1996), <http://www.presidency.ucsb.edu/ws/index.php?pid=53253> (emphasis added).

same kinds of lawsuits against abortion providers that anti-smoking advocates have brought against big tobacco companies. They should seek substantial judgments from abortion providers, with the money from these judgments going to pro-life and pro-adoption advertising funds.

I predict that by following this course we would, eventually, change public opinion to the point where even Justice Kennedy will be prepared to overrule *Roe* if he is still on the Supreme Court. But more importantly, such a public campaign to advertise the immorality of abortion will create a climate in which pro-life Supreme Court nominees, laws, and decisions to prosecute abortionists will flourish. Since our goal is not merely to erode *Roe* but actually to protect unborn life, we need to bring Congress and public opinion over to our side of this issue. Overruling *Roe* without creating a climate in which at least some abortionists can be and are in fact prosecuted would be a meaningless victory.

The overruling of *Roe* is *the* biggest issue implicating law and morality that we face today. The question of what tactics are necessary to make abortion illegal deserves more thought and discussion. One thing is certain, however: we cannot achieve the overruling of *Roe* and the protection of the unborn without first changing social attitudes on abortion. You cannot reverse the government's imposition of immorality unless you first build up public support for doing so.

*The Twenty-Sixth Annual
National Federalist Society Student Symposium:
Law and Morality*

III.

**THE MORALITY OF FIRST AMENDMENT
JURISPRUDENCE**

ESSAYISTS

PHYLLIS SCHLAFLY
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THE MORALITY OF FIRST AMENDMENT JURISPRUDENCE

PHYLLIS SCHLAFLY*

Many people argue that government cannot, or should not, try to dictate morality.¹ But the judiciary, particularly the United States Supreme Court, has dictated *immorality* through First Amendment jurisprudence. What has achieved greater First Amendment free speech rights than political campaign speech, the Pledge of Allegiance, the Ten Commandments, and the Boy Scout Oath combined? The answer is pornography. Since a series of Warren Court decisions in the 1960s, perhaps no single side of any issue has won in the Supreme Court as often as pornography.

In the early twentieth century, the American people, without resort to government or litigation, maintained a society of decency. Pornography did not appear in neighborhood movie theaters or in popular music. Americans did not need or want government action because Hollywood regulated itself. The Hollywood Production Code, known as the Hays Code, reviewed movie scripts and banned sex, nudity, and profanity.² Their efforts contributed to the success of the business; more people went to the movies in the 1940s than go today.³

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1. See, e.g., G. Marcus Cole, *What is the Government's Role in Promoting Morals . . . Seriously?*, 31 HARV. J.L. & PUB. POL'Y 77 (2008).

2. FRANK MILLER, *CENSORED HOLLYWOOD: SEX, SIN & VIOLENCE ON SCREEN* 51, 89 (1994).

3. See Karen L. Gulick, *Creative Control, Attribution, and the Need for Disclosure: A Study of Incentives in the Motion Picture Industry*, 27 CONN. L. REV. 53, 76 n.82 (1994) ("At the peak of moviegoing in the 1940s, one-half of the U.S. population went to the movies at least once a week, with attendance regularly topping four billion annually. . . . For the past two decades, theater admissions have maintained a constant rate of roughly one billion annually.").

In a 1957 case, *Roth v. United States*,⁴ the Supreme Court declared that “obscenity is not within the area of constitutionally protected speech or press.”⁵ Calling *Roth* “the first time the question has been squarely presented to this Court,” the majority stated that “expressions found in numerous opinions indicate that this Court has always assumed that obscenity is not protected by the freedoms of speech and press.”⁶ The cases cited in support of this declaration dated back as far as 1877.⁷ Another way of reaching the *Roth* Court’s conclusion would be to hold that obscene performances do not qualify as “speech” and obscene publications do not qualify as “press” as those terms are used in the First Amendment.⁸

The supporters of pornography sought to overturn this decision. Charles Rembar, an advocate of constitutional protections for pornography, described their legal strategy in a book entitled *The End of Obscenity*, and constructed a clever legal argument to persuade *Roth* author Justice William Brennan to change his position on the issue.⁹ Rembar took Justice Brennan’s *Roth* definition of “obscenity as utterly without redeeming social importance”¹⁰ and persuaded him to make “utterly” a constitutional requirement.¹¹ The new legal test became that pornography *cannot* be banned “unless it is found to be *utterly* without redeeming social value.”¹²

Justice Brennan adopted this new legal test in the Court’s next obscenity case, *Memoirs v. Massachusetts*,¹³ also known as the *Fanny Hill* case.¹⁴ “Social value” became a key phrase used in winning the Supreme Court’s approval of pornography.¹⁵ Justice Brennan was joined in his opinion supporting pornography by

4. 354 U.S. 476 (1957).

5. *Id.* at 485.

6. *Id.* at 481.

7. *Id.* (citing *Ex parte Jackson*, 96 U.S. 727 (1877)).

8. U.S. CONST. amend. I.

9. CHARLES REMBAR, *THE END OF OBSCENITY* 118–26 (1968).

10. *Roth v. United States*, 354 U.S. 476, 484 (1957).

11. See REMBAR, *supra* note 9, at 439, 480.

12. *Memoirs v. Massachusetts*, 383 U.S. 413, 419 (1966) (plurality opinion) (emphasis added).

13. *Id.*

14. See REMBAR, *supra* note 9, at 490.

15. *Id.* at 480.

Chief Justice Earl Warren and by Justice Abe Fortas,¹⁶ whom President Lyndon Johnson had just appointed to the Supreme Court. Justice Fortas had connections inside Lyndon Johnson's White House,¹⁷ served as an attorney for pornographers,¹⁸ and signed an amicus brief on behalf of pornographers in *Roth*.¹⁹

After *Memoirs*, pornographers dramatically increased their production of movies and invested a significant amount of time and money to bring dozens of cases to the Supreme Court. By the fall term in October 1966, the Supreme Court was flooded with appeals from lower court convictions. This showed the great financial resources of the pornography industry, its determination to change a longstanding culture, and its optimism that it could accomplish this with the assistance of the Warren Court, including the activist liberal Justices Warren, Fortas, Brennan, Black, and Douglas.

In the short space of thirteen months, May 1967 to June 1968, the Warren Court handed down a series of twenty-six decisions that changed dramatically the law of obscenity.²⁰ These decisions elevated pornography and other assaults on decency to the level of a First Amendment right. The Supreme Court reversed dozens of judges, juries, and appellate courts in sixteen states, made laws against obscenity unenforceable, and lowered drastically the standards of decency in communities throughout America.

This avalanche of pro-pornography decisions started on May 8, 1967, with *Redrup v. New York*.²¹ The case involved the sale of books published by William Hamling, a wealthy publisher of lewd magazines, who financed the defendant's case.²² The most shocking aspect of this case is that Hamling had been Justice

16. *Memoirs*, 383 U.S. at 414.

17. See EDWARD DE GRAZIA, *GIRLS LEAN BACK EVERYWHERE: THE LAW OF OBSCENITY AND THE ASSAULT ON GENIUS* 529 (1992) ("Fortas listed himself in *Who's Who in the South and Southwest* as 'Presidential advisor,' giving his address as 'Care of the White House, 1600 Pennsylvania Avenue, Washington, D.C.'").

18. See *id.* at 527 (Fortas's firm "had represented the publishers of *Playboy* and *Rogue* magazines").

19. *Id.* at 528.

20. See *infra* note 25. This tally also includes *Redrup v. New York*, 386 U.S. 767 (1967) (per curiam).

21. 386 U.S. 767 (1967) (per curiam).

22. DE GRAZIA, *supra* note 17, at 513.

Fortas's client before he joined the Court.²³ Despite this connection, Justice Fortas did not recuse himself, but instead voted to reverse Robert Redrup's conviction for selling pornographic books published by Hamling.²⁴

Following the *Redrup* decision, from June 1967 to June 1968, the Supreme Court handed down nineteen more pro-pornography decisions that simply cited *Redrup* as the reason for reversing lower court decisions.²⁵ The majority of these decisions consisted of only one or two sentences, a pattern Justice John Harlan referred to as the "*Redrup* treatment."²⁶ For example, in *Mazes v. Ohio*,²⁷ the Court reversed the judgments of the Ohio Supreme Court, the Ohio Court of Appeals, the trial judge, and the jury, in a single sentence: "The petition for a writ of certiorari is granted and the judgment of the Supreme Court of Ohio is reversed. *Redrup v. New York*, 386 U.S. 767."²⁸ This single sentence constitutes the entire majority opinion. In most of these decisions, the Court granted *certiorari* and reversed the

23. *Id.* at 527–28.

24. See *Redrup*, 386 U.S. at 768, 771.

25. (1) *Keney v. New York*, 388 U.S. 440 (1967) (per curiam); (2) *Friedman v. New York*, 388 U.S. 441 (1967) (per curiam); (3) *Ratner v. California*, 388 U.S. 442 (1967) (per curiam); (4) *Cobert v. New York*, 388 U.S. 443 (1967) (per curiam); (5) *Sheperd v. New York*, 388 U.S. 444 (1967) (per curiam); (6) *Avansino v. New York*, 388 U.S. 446 (1967) (per curiam); (7) *Aday v. United States*, 388 U.S. 447 (1967) (per curiam); (8) *A Quantity of Copies of Books v. Kansas*, 388 U.S. 452 (1967) (per curiam); (9) *Schackman v. California*, 388 U.S. 454 (1967) (per curiam); (10) *Books, Inc. v. United States*, 388 U.S. 449 (1967) (per curiam); (11) *Mazes v. Ohio*, 388 U.S. 453 (1967) (per curiam); (12) *Potomac News Co. v. United States*, 389 U.S. 47 (1967) (per curiam); (13) *Conner v. City of Hammond*, 389 U.S. 48 (1967) (per curiam); (14) *Cent. Magazine Sales, Ltd. v. United States*, 389 U.S. 50 (1967) (per curiam); (15) *Chance v. California*, 389 U.S. 89 (1967) (per curiam); (16) *I. M. Amusement Corp. v. Ohio*, 389 U.S. 573 (1968) (per curiam); (17) *Robert-Arthur Mgmt. Corp. v. Tennessee ex rel. Canale*, 389 U.S. 578 (1968) (per curiam); (18) *Felton v. City of Pensacola*, 390 U.S. 340 (1968) (per curiam); (19) *Henry v. Louisiana*, 392 U.S. 655 (1968) (per curiam). Six other pornography cases decided during this period relied on other, or no, reasoning. (1) *Corinth Publ'ns, Inc. v. Wesberry*, 388 U.S. 448 (1967) (per curiam) (citing no cases); (2) *Rosenbloom v. Virginia*, 388 U.S. 450 (1967) (per curiam); (3) *Teitel Film Corp. v. Cusack*, 390 U.S. 139 (1968) (per curiam); (4) *Rabeck v. New York*, 391 U.S. 462 (1968) (per curiam); (5) *Lee Art Theatre, Inc. v. Virginia*, 392 U.S. 636 (1968) (per curiam); (6) *Interstate Circuit, Inc. v. City of Dallas*, 390 U.S. 676 (1968).

26. *Bloss v. Dykema*, 398 U.S. 278, 278 (1970) (Harlan, J., dissenting).

27. 388 U.S. 453 (1967).

28. *Id.*

lower courts at the same time, thus not even allowing the government to present its views in oral argument.²⁹

This procedure enabled the Court to conceal from the public the substance of the cases that it was approving. In fact, it requires a search of the lower court decisions to identify the nature of the gross obscenities the Court protected with the First Amendment.³⁰ The public was kept in the dark, but the Justices knew exactly what they were doing. The Court held “movie day[s]” where the Justices and their clerks would watch the films at issue in pornography cases.³¹

All but one of the twenty-eight pro-pornography decisions the Warren Court handed down during this period were issued *per curiam*, that is, anonymously.³² This practice of anonymity suggests that the Justices could not defend the obscenity that they used the First Amendment to protect.

Hollywood understood the message of the Court, and the Motion Picture Association stopped enforcing its own Production Code. The results of the Academy Awards reflected this

29. See, e.g., *Chance v. California*, 389 U.S. 89 (1967) (per curiam).

30. See, e.g., *State v. Mazes*, 209 N.E.2d 496, 498 (Ohio App. 1965).

31. BOB WOODWARD & SCOTT ARMSTRONG, *THE BRETHERN: INSIDE THE SUPREME COURT* 198 (1979).

32. (1) *Redmond v. United States*, 384 U.S. 264 (1966) (per curiam); (2) *Redrup v. New York*, 386 U.S. 767 (1967) (per curiam); (3) *Keney v. New York*, 388 U.S. 440 (1967) (per curiam); (4) *Friedman v. New York*, 388 U.S. 441 (1967) (per curiam); (5) *Ratner v. California*, 388 U.S. 442 (1967) (per curiam); (6) *Cobert v. New York*, 388 U.S. 443 (1967) (per curiam); (7) *Sheperd v. New York*, 388 U.S. 444 (1967) (per curiam); (8) *Avansino v. New York*, 388 U.S. 446 (1967) (per curiam); (9) *Aday v. United States*, 388 U.S. 447 (1967) (per curiam); (10) *Corinth Publ'ns, Inc. v. Wesberry*, 388 U.S. 448 (1967) (per curiam); (11) *Rosenbloom v. Virginia*, 388 U.S. 450 (1967) (per curiam); (12) *A Quantity of Copies of Books v. Kansas*, 388 U.S. 452 (1967) (per curiam); (13) *Schackman v. California*, 388 U.S. 454 (1967) (per curiam); (14) *Books, Inc. v. United States*, 388 U.S. 449 (1967) (per curiam); (15) *Mazes v. Ohio*, 388 U.S. 453 (1967) (per curiam); (16) *Potomac News Co. v. United States*, 389 U.S. 47 (1967) (per curiam); (17) *Conner v. City of Hammond*, 389 U.S. 48 (1967) (per curiam); (18) *Cent. Magazine Sales, Ltd. v. United States*, 389 U.S. 50 (1967) (per curiam); (19) *Chance v. California*, 389 U.S. 89 (1967) (per curiam); (20) *I. M. Amusement Corp. v. Ohio*, 389 U.S. 573 (1968) (per curiam); (21) *Robert-Arthur Management Corp. v. Tennessee ex rel. Canale*, 389 U.S. 578 (1968) (per curiam); (22) *Teitel Film Corp. v. Cusack*, 390 U.S. 139 (1968) (per curiam); (23) *Felton v. City of Pensacola*, 390 U.S. 340 (1968) (per curiam); (24) *Rabeck v. New York*, 391 U.S. 462 (1968) (per curiam); (25) *Lee Art Theatre, Inc. v. Virginia*, 392 U.S. 636 (1968) (per curiam); (26) *Henry v. Louisiana*, 392 U.S. 655 (1968) (per curiam); (27) *Von Cleef v. New Jersey*, 395 U.S. 814 (1969) (per curiam). Only one of the Warren Court's pro-pornography decisions was signed. *Interstate Circuit, Inc. v. Dallas*, 390 U.S. 676 (1968) (opinion by Marshall, J.).

abrupt change. In 1965, the Best Picture was *The Sound of Music*; in 1969, the Best Picture was *Midnight Cowboy*, an X-rated film about a homeless male hustler.³³ This new freedom brought obscene language, near-total nudity, graphic sex scenes, and sadistic violence to neighborhood movie theaters.

When Chief Justice Warren announced his resignation in 1968, President Johnson nominated his good friend Justice Fortas to be Chief Justice.³⁴ In a dramatic confirmation battle led by Republican Senator Robert P. Griffin, the Senate refused to confirm Justice Fortas as Chief Justice, primarily because of his votes in obscenity cases and his conflict of interest involving pornographers.³⁵ Senators were shocked when they viewed the pictures and videos of the obscenity that the Warren Court had wrapped in the First Amendment. As Democratic Senator Frank Lauschke said, "If the nominee were my brother, I would not vote for him."³⁶ Justice Fortas was not confirmed as Chief Justice; he later resigned from the Court in disgrace, and his own law firm, Arnold, Fortas and Porter, would not take him back out of fear that he would tarnish the firm's image.³⁷

Justice Fortas did not write many significant Supreme Court opinions, and he did not author any of the pornography decisions. He did, however, participate in every obscenity case while serving on the Supreme Court, and in every case he voted in favor of the challenged materials.³⁸ Justice Fortas was generally recognized as extremely forceful and persuasive, as well as very intelligent—that is how he achieved great success as a private lawyer—and it stands to reason that he could have had a similar effect on his fellow Justices in their private deliberations.³⁹

This record vindicates the words of Judge Robert Bork that "the suffocating vulgarity of popular culture is in large measure the work of the [Supreme] Court" because "it defeated attempts . . . to . . . minimize vulgarity."⁴⁰ Chief Justice Warren

33. See PETER C. MOWREY, AWARD WINNING FILMS: A VIEWER'S REFERENCE TO 2700 ACCLAIMED MOTION PICTURES 250–51, 357 (1994).

34. See DE GRAZIA, *supra* note 17, at 538.

35. See *id.* at 530, 545–46. The President eventually withdrew his nomination of Justice Fortas in the face of a Senate opposition. See *id.* at 546.

36. *Id.* at 539.

37. *Id.* at 549.

38. See *supra* note 25.

39. See DE GRAZIA, *supra* note 17, at 528.

40. ROBERT H. BORK, COERCING VIRTUE: THE WORLDWIDE RULE OF JUDGES 64 (2003).

and Justices Fortas, Brennan, Black, and Douglas no longer sit on the Supreme Court, but in Shakespeare's words, "The evil that men do lives after them."⁴¹

The Supreme Court continues to treat pornography as a privileged industry. After Warren Burger replaced Earl Warren as Chief Justice, a new majority tried to minimize the damage of the Warren Court's decisions and to restore the *Roth* test, particularly in *Miller v. California*.⁴² It was nearly impossible, however, to turn back the tide of pornography; the damage was already done and continues to this day. Courts have not extended constitutional protection to individuals who say a prayer before a football game⁴³ or post the Ten Commandments in a courthouse.⁴⁴ The federal courts routinely censor political and religious speech,⁴⁵ but protect pornographers. Explicit sex can travel onto family computers where children may access it, and the Supreme Court prevents democratically elected officials from acting to restrict access to such material.

In the last five years, the Supreme Court has extended First Amendment protection to computer-generated child pornography and Internet pornography in general, thereby blocking efforts to clean up the culture. In *Ashcroft v. Free Speech Coalition*,⁴⁶ the Supreme Court struck down two provisions of the Child Pornography Prevention Act, which would have banned computer-generated child pornography.⁴⁷ In *Ashcroft v. ACLU*,⁴⁸ the Supreme Court enjoined enforcement of the Child Online Protection Act, which would have required pornographers to take reasonable steps to restrict minors' access to pornography on the Internet.⁴⁹ This law did not censor a single word or picture.⁵⁰ It merely required the purveyors of sex-for-profit materials to screen their websites from minors, which they could do

41. WILLIAM SHAKESPEARE, *JULIUS CAESAR* 114 (Mary Ellen Snodgrass trans., Wiley Publ'g, Inc. 2006) (1623).

42. 413 U.S. 15 (1973).

43. See *Santa Fe Indep. Sch. Dist. v. Doe*, 530 U.S. 290 (2000).

44. See *McCreary County v. ACLU of Ky.*, 545 U.S. 844 (2005).

45. See, e.g., *McConnell v. FEC*, 540 U.S. 93 (2003); *Lee v. Weisman*, 505 U.S. 577 (1992).

46. 535 U.S. 234 (2002).

47. *Id.*

48. 542 U.S. 656 (2004).

49. *Id.* at 659, 662, 673.

50. See *id.* at 682 (Breyer, J., dissenting).

by credit card or other verification requirements.⁵¹ The Court instead shifted the burden to families to screen out graphic Internet sex, rather than imposing the cost on the companies profiting from the pornography, as the invalidated law required.⁵² The reasoning makes as much sense as telling a family to pull down its window shades if it does not want to see people exposing themselves in the street.

The lower federal courts have followed the Supreme Court's direction, often with illogical results. After the State of Washington imposed a fine for the sale or rental to minors of video or computer games that demonstrate how to kill police officers, a federal court struck down the statute because violent video games "are as much entitled to the protection of free speech as the best of literature."⁵³ In other words, a video game showing how to kill police officers deserves the same constitutional protection as the works of William Shakespeare and Herman Melville.

In June 2007, the Court of Appeals for the Second Circuit struck down the Federal Communications Commission's discipline of television networks for broadcasting profanity at entertainment awards ceremonies.⁵⁴ The court implied that it is unconstitutional to ban similar profanity in the future.⁵⁵

Today, pornography exists even in public school classrooms. Assignments for middle school children include books of fiction that contain explicit sex, immoral behavior, and profanity. Parents cannot make progress with their objections, even when many supporting parents attend a school board meeting to assert their rights. The courts are expanding a power for public schools to teach anything to schoolchildren because, as the Ninth Circuit initially wrote in *Fields v. Palmdale School District*,⁵⁶ parents' rights over the care and upbringing of their children do "not extend beyond the threshold of the school door."⁵⁷

51. *See id.*

52. *See id.* at 667–69.

53. *Video Software Dealers Ass'n v. Maleng*, 325 F. Supp. 2d 1180, 1184 (W.D. Wash. 2004) (quoting *Interactive Digital Software Ass'n v. St. Louis County*, 329 F.3d 954, 958 (8th Cir. 2003)).

54. *Fox Television Stations v. FCC*, 489 F.3d 444, 467 (2d Cir. 2007).

55. *See id.*

56. 427 F.3d 1197 (9th Cir. 2005).

57. *Id.* at 1207. This ruling stirred up so much criticism that the United States House of Representatives passed a resolution denouncing the decision. H.R. Res. 547, 109th Congress (2005). Subsequently, the Ninth Circuit amended its opinion

The pornographic sea continues to rise. The courts are not interpreting the First Amendment; they are rewriting it to guarantee the profits of pornographers. The Supreme Court's view of the First Amendment now protects X-rated movies and other forms of obscenity, which represents a serious problem for standards of decency in America's communities and for the proper education of America's children.

to delete the offensive "threshold" sentence, but did not change its previous ruling. *Fields v. Palmdale Sch. Dist.* 447 F.3d 1187, 1190 (9th Cir. 2006).

WHY PHYLLIS SCHLAFLY IS RIGHT (BUT WRONG) ABOUT PORNOGRAPHY

ANDREW KOPPELMAN*

Phyllis Schlafly is wrong about the regulation of pornography, but her views need to be taken more seriously than they typically are in the overwhelmingly liberal academy. She represents an important tradition in thinking about gender issues, and she has advanced her views vigorously and articulately.

Schlafly's preeminent concern is to preserve a pattern of gender-specific roles and relations that, she thinks, have helped protect women and children from desertion and abuse. She wants to suppress pornography because it helps to reinforce a vernacular masculine culture that is indifferent or even hostile to the needs of women and children. Schlafly's worries about this culture are legitimate. But the suppression of pornography, I will conclude, is the wrong solution to the problem.

I. SCHLAFLY ON PORNOGRAPHY

Schlafly has argued that

[p]ornography can be best defined as the degradation of woman. It exploits women individually and as a group in the most offensive, degrading, and cruel way. In the modern jargon, pornography is the most "sexist" activity of all.

The women's liberationists prove their hypocrisy by their nonattitude toward pornography. They profess outrage at the role-concept fostered by school textbooks that include pictures of women in the home as wives and mothers, but they raise no protest about the role-concept fostered by obscene

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pictures of women as playthings for male lust and sadism in obscene and "bondage" books, magazines, and movies.¹

Schlafly wants to suppress pornography precisely because of the way in which it socializes men. "Pornography cannot be victimless because its very essence demands that a victim be subordinate. One cannot be an abuser unless there is an abused. Pornography portrays the past abuse, and pornography is a tool to facilitate future abuse."² The testimonies of women abused either in the making of pornography or by men who have consumed pornography—testimonies that Schlafly collected in an edited volume—"prove that pornography is addictive, and that those who become addicted crave more bizarre and more perverted pornography, and become more callous toward their victims."³ The basic problem is the effect of pornography on the way that men think. "Pornography changes the perceptions and attitudes of men toward women, individually and collectively," she writes, "and desensitizes men so that what was once repulsive and unthinkable eventually becomes not only acceptable but desirable. What was once mere fantasy becomes reality. Thus conditioned and stimulated by pornography, the user seeks a victim."⁴ Pornography, she argues, should be regarded as a "public nuisance."⁵

The claims just quoted are wildly overstated. Schlafly suggests that pornography provokes sexual violence. The correlation between pornography and sexual violence, however, is strong only among a very small subset of already pathological men, comprising less than one percent of the male population.⁶ In the aggregate, it appears that the availability of pornography

1. PHYLLIS SCHLAFLY, *THE POWER OF THE POSITIVE WOMAN* 158 (1977). This criticism is no longer accurate, but Schlafly was writing before the feminist critique of pornography was made prominent. See, e.g., ANDREA DWORKIN, *PORNOGRAPHY: MEN POSSESSING WOMEN* (1989); TAKE BACK THE NIGHT: *WOMEN ON PORNOGRAPHY* (Laura Lederer ed., 1981); CATHARINE A. MACKINNON, *FEMINISM UNMODIFIED: DISCOURSES ON LIFE AND LAW* (1987).

2. Phyllis Schlafly, *Introduction* to *PORNOGRAPHY'S VICTIMS* 9, 15 (Phyllis Schlafly ed., 1987).

3. *Id.* at 16.

4. *Id.*

5. SCHLAFLY, *supra* note 1, at 156; Schlafly, *supra* note 2, at 9.

6. Andrew Koppelman, *Does Obscenity Cause Moral Harm?*, 105 COLUM. L. REV. 1635, 1663–72 (2005).

actually *reduces* the frequency of sexual assault.⁷ It is true that women have often been abused during the production of pornography, but abuses of this kind are ubiquitous in illegal markets, and they appear to have become relatively rare in the porn industry now that producers are permitted to operate openly in some parts of the country.⁸ There is anecdotal evidence that some consumers of pornography become so transfixed by it as to lose all interest in relationships with actual people.⁹ There is no good data, however, on the proportion of consumers for whom this is true, and no principled distinction can be made between this and other socially isolating behavior (such as too many hours spent watching television); “addiction,” therefore, is not a helpful metaphor for the problem.¹⁰

Despite these caveats about Schlafly’s arguments, the deeper concern she identifies is worth investigating. Violence is hardly the only way in which men victimize women. A lot of American men behave very badly, and that behavior has something to do with the way in which they are socialized and the culture in which they are raised. The real and important concern raised by Schlafly is not about the effects of pornography, but about its meaning.

Schlafly has a frightening and pessimistic story to tell about the relations between the sexes. Her story lies at the confluence of two major strands of thought about the social meaning of gender, which together form the basis of a critique of both sex equality and pornography. The story Schlafly tells is a caricature, but caricatures have some virtues. Schlafly’s story makes salient important features of reality that we might not have seen quite as clearly without her help.

7. Todd Kendall, *Pornography, Rape, and the Internet* (Mar. 2007) (unpublished paper delivered at Stanford Law School), *available at* <http://people.clemson.edu/~tkendal/internetcrime.pdf>.

8. See NADINE STROSSEN, *DEFENDING PORNOGRAPHY* 179–198 (1995).

9. See M. Douglas Reed, *Pornography Addiction and Compulsive Sexual Behavior*, in *MEDIA, CHILDREN, AND THE FAMILY: SOCIAL SCIENTIFIC, PSYCHODYNAMIC, AND CLINICAL PERSPECTIVES* 249, 251 (Dolf Zillmann et al. eds., 1994) (noting “clinical diagnostic criteria” identifying use of pornography as an addiction, including the reduction of “important . . . social activities” and the desire to be alone).

10. See Martin P. Levine & Richard R. Troiden, *The Myth of Sexual Compulsivity*, 25 J. SEX RES. 347, 360–61 (1988).

II. THE FOUNDATIONS OF SCHLAFLY'S ANTIFEMINISM

A. Rousseau

The roots of Schlafly's antifeminist philosophy lie, surprisingly, in the thought of Jean-Jacques Rousseau.¹¹ Rousseau is generally remembered as the patron saint of the French Revolution, but he is also the most sophisticated source of modern secular conservative thought about gender. Rousseau began, like other Enlightenment thinkers, by endorsing sex equality.¹² On reflection, however, he changed his mind. He became the wellspring of modern antifeminist thought.¹³

Rousseau thought that most human desires provide no basis for enduring social ties.¹⁴ Even sexual appetite can be satisfied by a momentary coming together and then parting.¹⁵ The only desire that does provide a solid basis for social relationships is *amour-propre*, which can be translated loosely as pride or vanity. Unlike the bodily appetites that the savage felt, *amour-*

11. Schlafly herself is surprised by this suggestion. At the conference at which this paper was first delivered, she emphatically distanced herself from Rousseau, whose behavior toward his mistress and children, she said, made him "a jerk of the first magnitude." Her judgment is sound: he dispatched all five of his children to the Foundling Hospital as soon as they were born, and never saw them again. Rousseau describes his conduct in language dripping with self-justification and self-pity in JEAN-JACQUES ROUSSEAU, *THE CONFESSIONS* 322, 332-34 (J.M. Cohen trans., Penguin Books 1953) (1781). He reports that he "had the greatest difficulty in the world in persuading [his mistress] to accept this sole means of saving her honour." *Id.* at 322. Rousseau's philosophical argument depends heavily on the assumption of male selfishness and callousness. He was in a position to know what he was talking about.

I leave it to the reader to judge whether all the elements of Rousseau's case against sex equality are reproduced in Schlafly's arguments, described below. These arguments have been repeated many times over the years, and Schlafly may not have known who first formulated them. The maculate provenance of Rousseau's arguments is not, of course, evidence that they are unsound. Quite the contrary: those who casually dismiss Schlafly are likely to be less cavalier with Rousseau. Rousseau was a horrible father but a great philosopher, and his ideas about gender have enduring importance.

12. SUSAN MOLLER OKIN, *WOMEN IN WESTERN POLITICAL THOUGHT* 104 (1979).

13. On the debt of other modern antifeminist writers, such as Allan Bloom and George Gilder, to Rousseau, see Andrew Koppelman, *Sex Equality and/or the Family: From Bloom vs. Okin to Rousseau vs. Hegel*, 4 YALE J.L. & HUM. 399, 413 n.62 (1992).

14. See JEAN-JACQUES ROUSSEAU, *Discourse on the Origin and Foundations of Inequality Among Men*, in *THE FIRST AND SECOND DISCOURSES* 77, 174-75 (Roger D. Masters ed., Roger D. & Judith R. Masters trans., St. Martin's 1964).

15. *Id.* at 219.

propre is "a relative sentiment, artificial and born in society, which inclines each individual to have a greater esteem for himself than for anyone else" and "inspires in men all the harm they do to one another."¹⁶ This sentiment is quite distinct from the natural self-love of the savage, who does not compare himself with anyone and who is indifferent to the opinions of others. The natural man was dependent upon things, not upon men.¹⁷ As society developed, people became aware that others were looking at them: "Each one began to look at the others and to want to be looked at himself, and public esteem had a value."¹⁸ This was the origin of all conflict.

As soon as men had begun to appreciate one another, and the idea of consideration was formed in their minds, each one claimed a right to it, and it was no longer possible to be disrespectful toward anyone with impunity. From this came the first duties of civility, even among savages; and from this any voluntary wrong became an outrage, because along with the harm that resulted from the injury, the offended man saw in it contempt for his person which was often more unbearable than the harm itself. Thus, everyone punishing the contempt shown him by another in a manner proportionate to the importance he accorded himself, vengeance became terrible, and men bloodthirsty and cruel.¹⁹

According to Rousseau, the problem that any society must address, then, is how to make it possible for men maddened by *amour-propre*, each of whom is seeking to be "the sole master of the universe,"²⁰ to live together peacefully. An important part of the solution, Rousseau believed, lay in the family. It is "by means of the small fatherland which is the family that the heart attaches itself to the large one," and it is "the good son, the good husband, and the good father who make the good citizen."²¹

The only social tie in which *amour-propre* can find harmless and enduring satisfaction is the tie between man and woman. Women can use their charms and wiles to pander to men's *amour-propre* and, by thus manipulating them, satisfy their own

16. *Id.* at 222.

17. JEAN-JACQUES ROUSSEAU, *EMILE OR ON EDUCATION* 85 (Allan Bloom trans., Basic Books 1979).

18. ROUSSEAU, *supra* note 14, at 149.

19. *Id.* at 149–50.

20. *Id.* at 195.

21. ROUSSEAU, *supra* note 17, at 363.

amour-propre as well.²² Women bear the burden of creating and maintaining this arrangement because they need the family more than men do.

Woman and man are made for each other, but their mutual dependence is not equal. Men depend on women because of their desires; women depend on men because of both their desires and their needs. We [men] would survive more easily without them than they would without us.²³

Women bear children, and would raise them with difficulty without the help of the father. Material necessity thus impels a woman to induce a man to love his children, for their sake as well as for her own.²⁴ Rousseau suggested powerful reasons why she can only do this by submitting to her husband's absolute authority. First, the husband must feel confident that the children are indeed his.²⁵ Second, because a man's natural sexual desires can be satisfied by any woman at all, his desire for any particular woman is sporadic and weak.²⁶ It is therefore necessary for a woman to inflame her man's desire by catering to his vanity, as Joel Schwartz explains:

The male desires not his partner, but his partner's esteem (and his own self-esteem) as the stronger. He desires to be desired more than he truly desires. Because of its psychological basis, the sexual relationship must appear to the male to be a political relationship; one in which his physical strength gives him title to rule the female. Because his desire is weaker, the male must seem to be the stronger. Female modesty, the resistance to male sexual advances which is then overcome, gives the male the desired appearance of strength.²⁷

A wife therefore must pretend to be weaker than she is; she must cloister herself in her house; she must be seductive toward her husband and chaste toward all other men.²⁸ By allowing her husband the illusion of rule over her, she achieves real rule over him. "Woman, who is weak and who sees nothing

22. *Id.* at 358.

23. *Id.* at 364.

24. *See id.* at 361, 364.

25. *Id.* at 361.

26. JOEL SCHWARTZ, *THE SEXUAL POLITICS OF JEAN-JACQUES ROUSSEAU* 17 (1984).

27. *Id.* at 35.

28. ROUSSEAU, *supra* note 17, at 361.

outside the house, estimates and judges the forces she can put to work to make up for her weakness, and those forces are men's passions."²⁹ Because he thinks he is the boss, and she knows she is the boss, the *amour-propre* of both is satisfied.

Rousseau thought the alternative of dropping the pretense and frankly asserting their equality would be disastrous for women, because they would then lose their seductive appearance of weakness, while the burden of childrearing would continue to impair their ability to provide for themselves. "The more women want to resemble [men], the less women will govern them, and then men will truly be the masters."³⁰

B. Domesticity

The second notable source of Schlafly's thought is the nineteenth century ideal of "separate spheres" for the sexes. Throughout much of the nineteenth century, that ideal improved the social status of middle class white women considerably. (It exacerbated, however, the stigmatization of working-class white women and of most women who were not white because these women could not conform to the domestic ideal.) The ideology of the two spheres recognized the female vulnerability that Rousseau emphasized, and acknowledged that the degree of a woman's vulnerability is highly contingent on the culture in which she lives.

In the eighteenth century, nothing about women or their social role was particularly admired, and their husbands' authority over them in all things was taken for granted.³¹ By 1850, as Glenna Matthews observes, "all of this had changed. The home was so much at the center of the culture that historians speak of a 'cult' of domesticity in the early to mid-nineteenth century. Women in their homes were the locus of moral authority in society."³² Greater material prosperity and a widespread concern for how to socialize the citizens of the new American republic created the possibility of and inclination for a sentimental valorizing of both domestic life and the one who presided over

29. *Id.* at 387; see also *id.* at 371–72; ROUSSEAU, *supra* note 14, at 134–35.

30. ROUSSEAU, *supra* note 17, at 363.

31. GLENNA MATTHEWS, "JUST A HOUSEWIFE": THE RISE AND FALL OF DOMESTICITY IN AMERICA 5–6 (1987).

32. *Id.* at 6.

it.³³ Middle class white women continued to be confined to the home, but their role there came to be understood to be, and to make them, uniquely valuable. Domesticity, Carl Degler writes, "was an alternative to patriarchy, both in intention and in fact. By asserting a companionate role for women, it implicitly denied patriarchy."³⁴ The ideology of separate spheres and its resulting elevation of women and their roles eventually became a basis for women's claims to political influence, as reformers began to attack aspects of male culture, such as slavery, prostitution, and the consumption of alcohol, in the name of their own superior virtue.³⁵

Some of the activities of the domesticity-based women's movement were largely altruistic. Northern white women had nothing substantial to gain from the abolition of slavery, for example.³⁶ But some of what women reformers sought was pursued out of pure self-defense. Most pertinent was the crusade against alcohol, and specifically against the saloon.

In the late 1800s, the saloon was a distinctive kind of institution with little in common with the modern bar. Saloons were usually owned by local brewers, and openly encouraged heavy drinking. They were often connected with prostitution: an 1876 survey in Philadelphia found that nearly half of the drinking establishments in the city had formal or informal connections with "houses of ill fame."³⁷ They encouraged the practice of "treating," in which a patron bought a round of drinks for a large group of patrons in order to show to his friends that he could "keep his end up."³⁸ This practice created a valued sense of camaraderie among the men, but it had destructive consequences for their dependents. "Treating" was particularly common on paydays.³⁹ The saloons frequently provided free drinks

33. *Id.* at 6–12, 26–27.

34. CARL N. DEGLER, *AT ODDS: WOMEN AND THE FAMILY IN AMERICA FROM THE REVOLUTION TO THE PRESENT* 28 (1980); *see also* NANCY F. COTT, *THE BONDS OF WOMANHOOD: "WOMAN'S SPHERE" IN NEW ENGLAND, 1780–1835*, at 197–206 (1977).

35. *See* MATTHEWS, *supra* note 31, at 66–91; DEGLER, *supra* note 34, at 279–327. On the limitations and ultimate decline of the domesticity ideal, *see* ANDREW KOPPELMAN, *ANTIDISCRIMINATION LAW AND SOCIAL EQUALITY* 123–27 (1996).

36. *See* DEGLER, *supra* note 34, at 303–05.

37. MARK EDWARD LENDER & JAMES KIRBY MARTIN, *DRINKING IN AMERICA: A HISTORY* 104 (rev. ed. 1987). Thanks to Nancy Koppelman for directing my attention to this volume.

38. *Id.*

39. *Id.*

to new patrons, and also to boys, an investment that would pay off when these children became habitual drinkers.⁴⁰ In short, as historians Mark Edward Lender and James Kirby Martin observe, saloons were a major threat to families.

They introduced children to drunkenness and vice and drove husbands to alcoholism; they also caused squandering of wages, wife beating, and child abuse; and, with the patron's inhibitions lowered through drink, the saloon led many men into the arms of prostitutes (and, not incidentally, contributed to the alarming spread of syphilis). If any of these disasters occurred, a displaced homemaker had no social welfare system to cushion the blow.⁴¹

Prohibition destroyed saloons. In some places, they were replaced by speakeasies, which held distinctive dangers of their own. But the speakeasy was far less common than the saloon and its ability to recruit children was hamstrung by its inability to operate openly. Prohibition is commonly regarded as a failure, but it did reduce drinking in the United States by somewhere between one-third and one-half.⁴² After the repeal of Prohibition, the saloon never returned in its previous form. Alcohol producers consciously avoided the excesses that had ruined their public image in the past, and this caution persists. Today they spend millions to promote "responsible drinking."⁴³

In short, the women's campaign against alcohol was, in many ways, a real victory. The saloon promoted a toxic masculine culture, and the temperance campaign brought that particular culture largely to an end.⁴⁴ Note, however, the qualified nature of this statement; the real target of the campaign was not alcohol as such, but the culture that had grown up around it.

Alcohol, of course, is merely a chemical, and its effects vary wildly in different cultures.⁴⁵ Consumption of alcohol was not

40. *Id.* at 104–06.

41. *Id.* at 104.

42. *Id.* at 136–47; NORMAN H. CLARK, *DELIVER US FROM EVIL: AN INTERPRETATION OF AMERICAN PROHIBITION* 146–47 (1976).

43. LENDER & MARTIN, *supra* note 37, at 173–75.

44. Elements of it do persist to the present day. Thanks to Carolyn Graglia for emphasizing this.

45. For example, alcohol use leads to aggression and sexual arousal in some cultures but not in others. *See generally* CRAIG MCANDREW & ROBERT B. EDGERTON, *DRUNKEN COMPORTMENT: A SOCIAL EXPLANATION* (1969). Ethan Nadelmann observes:

generally regarded as a social problem in the United States in the early nineteenth century, when Americans consumed more than seven gallons of absolute alcohol per capita each year. Drinking was increasingly regarded as a severe problem in the late nineteenth and early twentieth centuries, when annual absolute alcohol consumption was approximately two gallons per capita.⁴⁶ This lower rate of consumption was considered problematic because social norms had changed. At the time of the Founding, most drinking took place in the context of family and community activities, or in small doses throughout hard workdays on the farm. Drunkenness was heavily stigmatized and was liable to severe criminal punishment.⁴⁷ The saloon culture and all that it entailed introduced new and legitimate concerns about the effects of heavy drinking, and these were the targets of the successful temperance campaign mounted by female reformers. Alcohol itself was never the problem.

C. Schlafly's Synthesis

Schlafly's views, lucidly laid out in her 1977 book, *The Power of the Positive Woman*, draw on both Rousseau's concern about the female predicament and the nineteenth-century concern about male cultural formations hostile to women's needs.

She begins by positing innate differences between the sexes. Perhaps the most salient of these differences is "woman's innate maternal instinct."⁴⁸ Men, on the other hand, cannot be induced to display the same degree of care for children.⁴⁹ In order to protect women's maternal role, Schlafly thinks, it is necessary to maintain social mores that reinforce appropriate gender roles.

[W]hile certain types of drugs are more difficult to use in moderation than others, the principal determinants of destructive drug use patterns involve not the pharmacology of the drug but the set and setting in which the drug is consumed. That is why alcohol consumption among conquered aboriginal groups and cocaine consumption among some inner-city populations have more in common with one another than either does with patterns of alcohol or cocaine consumption among less vulnerable sectors of the population.

Ethan A. Nadelmann, *Thinking Seriously About Alternatives to Drug Prohibition*, 121 DAEDALUS 85, 102 (1992).

46. See LENDER & MARTIN, *supra* note 37, at 177.

47. *Id.* at 9–21.

48. SCHLAFLY, *supra* note 1, at 17, 51–52.

49. *Id.* at 42–43, 223.

Our Judeo-Christian civilization has developed laws and customs that, since women must bear the physical consequences of the sex act, require men to assume other consequences. These laws and customs decree that a man must carry his share by physical protection and financial support of his children and of the woman who bears his children, and also by a code of behavior that benefits and protects both the woman and the children.⁵⁰

But women's situation also requires them to manipulate men into marriage. Sexuality is a powerful tool in this enterprise:

The sexual drive of men is much stronger than that of women. That is how the human race was designed in order that it might perpetuate itself. The other side of the coin is that it is easier for women to control their sexual appetites. A Positive Woman cannot defeat a man in a wrestling or boxing match, but she can motivate him, inspire him, encourage him, teach him, restrain him, reward him, and have power over him that he can never achieve over her with all his muscle.⁵¹

Schlafly is as attentive to *amour-propre* as Rousseau. The most important foundation of a happy marriage "is that a wife must appreciate and admire her husband."⁵² This is because, "[w]hereas a woman's chief emotional need is active (i.e., to love), a man's primary emotional need is passive (i.e., to be appreciated and admired)."⁵³ A woman should have "enough self-confidence that she [can] afford to accord to her man a preeminence in their personal relationship."⁵⁴ The law can help here by reinforcing men's sense of their authority:

If marriage is to be a successful institution, it must likewise have an ultimate decision maker, and that is the husband. Seen in this light, the laws that give the husband the right to establish the domicile of the marriage and to give his surname to his children are good laws designed to keep the family together. They are not anachronisms from a bygone era from which wives should be liberated in the name of

50. *Id.* at 33.

51. *Id.* at 17.

52. *Id.* at 54.

53. *Id.*

54. *Id.* at 55.

equality. If a woman does not want to live in her husband's home, she is not entitled to the legal rights of a wife.⁵⁵

Sexual liberation is a cheat for women. "It robs the woman of her virtue, her youth, her beauty, and her love—for nothing, just nothing."⁵⁶ And the ideology of gender equality deprives women of powerful cultural tools, ultimately leading men to desert their wives,⁵⁷ usually for younger women.⁵⁸ "The woman who goes into marriage thinking she can make it a mathematically equal fifty-fifty partnership in every decision and activity will come out on the short end every time."⁵⁹ For women, Schlafly thinks, sex equality is a recipe for loneliness and poverty. Home for the "liberated" woman is "a cold, lonely apartment whose silence is broken only by the occasional visits of men who size her up as one with a liberated view of sex, societal restraints, and the institution of marriage, and therefore an easy mark for sexual favors for which they will neither have to pay nor assume responsibility."⁶⁰

III. THE LIMITS OF SCHLAFLY'S CRITIQUE

Schlafly's vision will strike many as a strange collection of crude sexist stereotypes, but it resonated with many women, and fueled the mobilization against the Equal Rights Amendment (ERA), which she fought successfully to keep out of the Constitution. She won the battle but lost the war: the ERA was defeated, but its rule against sex discrimination was incorporated into constitutional law anyway, by judicial interpretation of the Fourteenth Amendment.⁶¹

55. *Id.* at 50. The deference to male authority that Schlafly contemplates sometimes reaches astonishing lengths, as when she condemns the law reforms that seek to erase the distinction between spousal rape and stranger rape by proscribing the same punishment for both acts. See Phyllis Schlafly, *Twenty Years in Prison for Having Sex with His Wife*, EAGLE FORUM (Feb. 6, 2006), available at <http://www.eagleforum.org/column/2006/feb06/06-02-08.html>.

56. SCHLAFLY, *supra* note 1, at 16.

57. *Id.* at 53, 59, 95.

58. *Id.* at 27, 76, 80.

59. *Id.* at 57.

60. *Id.* at 63.

61. See *United States v. Virginia*, 518 U.S. 515 (1996); *Miss. Univ. for Women v. Hogan*, 458 U.S. 718 (1982); *Craig v. Boren*, 429 U.S. 190 (1976); *Frontiero v. Richardson*, 411 U.S. 677 (1973).

In retrospect, the fight over the ERA did not make much difference. The feminists won, but it turned out that they were fighting the wrong war. Despite their judicial victory, women's economic disadvantages persist, partly because of their disproportionate responsibility for childrearing and partly because the structure of workplaces disadvantages those who have such responsibilities. Most high-paying jobs are designed with the expectation that the worker has someone at home taking care of the children. Sex-based classification was never the heart of the problem.⁶²

What has really worked to diminish male authority has been the increasing importance of women's wages in the economies of households, which makes women less economically vulnerable than they once were.⁶³ Women's increasing independence often produced, not abdication, but a renegotiation of the male role, with more consensual decision-making and greater involvement by fathers in the lives of their children. The structure that Schlafly was so eager to preserve turns out to have blocked access to real benefits for men, women, and children alike. The bonds that hold contemporary families together are very different from those contemplated by the Rousseauian vision, and show the limits of that vision.⁶⁴

But Rousseau and Schlafly are not anachronisms. The modern two-income family exhibits a very different structure than the structure of dependency that Schlafly contemplated. Yet divorce continues to hurt women financially, much more than men. Rational women should continue to worry about that financial risk; doubtless many of them do. Women have benefited in huge numbers from the movement for sex equality. Yet that movement has also disrupted Rousseauian strategies, and

62. See ROUSSEAU, *supra* note 17, at 115–45; Andrew Koppelman, *Feminism and Libertarianism: A Response to Richard Epstein*, 1999 U. CHI. LEGAL F. 115 (1999).

63. Barbara Ehrenreich points out that the appeal of Schlafly's vision was "class specific: directed to the woman who is a member of the middle or upper-middle class and whose membership depends on a contractual relationship with a man of that class." BARBARA EHRENREICH, *THE HEARTS OF MEN: AMERICAN DREAMS AND THE FLIGHT FROM COMMITMENT* 161 (1983). Working-class families usually did not have the luxury of managing on a single paycheck.

64. The historical malleability of the role of father in the United States is documented in detail in ROBERT L. GRISWOLD, *FATHERHOOD IN AMERICA: A HISTORY* (1993). Griswold finds enormous variation in the ways fathers understood and lived out their roles, revealing a complexity far beyond that contemplated in the Rousseauian formula.

there have been losers.⁶⁵ Schlafly's activism and writing is centrally animated by an admirable and humane concern for those women. She has given them a voice.⁶⁶

Contemporary feminists are vividly aware of these concerns. They typically respond by calling for legal intervention to improve women's status.⁶⁷ But the persistence of these critiques reveals the precarious status of too many women in today's nominally egalitarian world. It is too soon to forget the older formulas for protecting women. Those formulas have obvious limitations: they bear little relation to the actual dynamics of an increasing number of families, and sometimes they are counter-productive. The stay-at-home lesbian mother is vulnerable in exactly the ways that Schlafly worries about, and insistence on traditional gender patterns is worse than no help to her. Many women, however, still depend on Rousseauian strategies.

Schlafly's views of gender relations are troubling, and one reason they arouse so much hostility is because they are so pessimistic. In Rousseauian terms, they do not flatter our *amour-propre*. In this she invites comparison with other pessimistic political theorists, such as Augustine and Hobbes. Augustine was eventually supplanted by the sunnier Christianity of Aquinas: even in this fallen world, the state can do more than contain men's sinful tendencies; it can deliver real goods. Hobbes, too, was displaced by the sunnier contractarianisms of Locke and Rawls, who pointed out that we could contract for more than the avoidance of violent death. Schlafly is vulnerable in the same way. Perhaps we can hope for more from gender relations than a stable pattern of (unilateral or mutual) domina-

65. The Rousseau model is, of course, an ideal type, reflected to different degrees in different families.

66. Schlafly's principal failing is that of treating the part as if it were the whole: neglecting the needs of all the people who do not follow the script that she does. *The Power of the Positive Woman* is particularly egregious in its treatment of gay people, who function as a kind of bogeyman in the argument. Thus, she denounces laws that would ban the firing of gay schoolteachers: "Surely the right of parents to control the education of their children is a right of a higher order than any alleged right of, say, the two college-educated lesbian members of the Sym-bionese Liberation Army [a 1970s terrorist cell!] to teach our young people." SCHLAFLY, *supra* note 1, at 90.

67. See, e.g., R.W. CONNELL, *GENDER AND POWER* (1987); EHRENREICH, *supra* note 63; MARTHA ALBERTSON FINEMAN, *THE AUTONOMY MYTH: A THEORY OF DEPENDENCY* (2004); MACKINNON, *supra* note 1; SUSAN MOLLER OKIN, *JUSTICE, GENDER AND THE FAMILY* 176-83 (1989); DEBORAH L. RHODE, *JUSTICE AND GENDER* (1989).

tion and deception.⁶⁸ But the pessimism of Augustine and Hobbes has never been conclusively refuted. In contemporary Iraq, for example, many are doubtless nostalgic for the old Leviathan, who was at least competent to keep the peace.

A world in which women never need to pursue Rousseauian strategies, and in which their own safety does not impel them to intervene in the cultural formations that develop among men, would be a better world. But Schlafly is correct that this is not our world. We need to work to build that world.

In the realm of sexuality, there can be no doubt that one of the things that makes so many men act like louts is a male culture of camaraderie in which women are of interest primarily as trophies with which to impress other men. And the cold, performance-driven vision of sexuality that pervades so much pornography is a part of that. Schlafly's concern, essentially, is that pornography functions as a modern day saloon: as an institution that socializes men into a world that is destructively indifferent or even hostile to the well-being of their wives and children.

There is, however, an important dissimilarity between the saloon and pornography. The saloon was a well-organized set of customs attached to a specific set of destructive behaviors: drunkenness, sex with prostitutes, and the depleting of family assets. The only behavior that specifically attaches to pornography is solitary masturbation. Masturbation does not spread disease, nor does it get women pregnant. Of course, Schlafly is correct that consumption of pornography can be connected with the internalization of attitudes that are damaging to women. But the connection is more contingent and tenuous than she asserts. Pornography is less like the institution of the saloon and more like the chemical alcohol, the social meaning and effect of which is extremely variable.

IV. PORNOGRAPHY AND MORAL HARM

The real issue for Schlafly is the message that pornography imparts to its readers. Does pornography treat women as "playthings for male lust and sadism," desensitizing men so that they are more willing to abuse women?

68. This argument is developed further in Koppelman, *supra* note 13.

Here the reflections of the late Wayne Booth are particularly enlightening. In his book, *The Company We Keep: An Ethics of Fiction*, Booth developed a sophisticated account of the moral effects of literature. As we read, "a large part of our thought-stream is *taken over*, for at least the duration of the telling, by the story we are taking in."⁶⁹ The reader is invited to view the world in the same way that the narrative does. Literature is good for us when it teaches us to view the world, and particularly human interaction, subtly and sensitively. Booth argues that the "facts" that we take in when we read a narrative are of two kinds. One is "nonce beliefs," which the reader embraces "only for the duration"⁷⁰ of the story: "Once upon a time there was a farmer who had the good fortune to possess a goose that laid a golden egg every day. . . ." But any story will also depend for its effect on "fixed norms," which are "beliefs on which the narrative depends for its effect but which also are by implication applicable in the 'real' world."⁷¹ When Aesop concludes the goose story with the proposition that "overweening greed loses all," the reader is meant to internalize that message and continue to believe it long after the story ends.⁷² The point applies to all fiction, whether or not it has overt moral lessons like those found in Aesop's fables.

Morally bad literature promulgates morally repugnant fixed norms. Just as good literature invites us to perceive the world subtly and empathetically, it is possible—indeed, it is common—for novels or films or television shows to portray the world crudely and insensitively, and to spin out self-aggrandizing fantasies that invite self-centeredness and cruelty. This is a huge problem in our culture. Pornography is merely the tip of this very large iceberg.⁷³

V. WILL CENSORSHIP MAKE MATTERS BETTER?

It is unlikely that censorship of pornography will make matters better. The First Amendment protects even the most evil

69. WAYNE C. BOOTH, *THE COMPANY WE KEEP: AN ETHICS OF FICTION* 141 (1988).

70. *Id.* at 142.

71. *Id.* at 142–43.

72. *Id.* at 143.

73. The objectification that takes place is not all characterized by cruelty, however. Much of it reflects mere self-centeredness, which is often morally innocuous. See Koppelman, *supra* note 6, at 1647–51.

ideas. The government cannot stop Nazis from publishing Hitler's *Mein Kampf*, for example, no matter how repugnant the overwhelming majority of Americans find its viewpoint. Defenders of obscenity law and the restrictions that it places on pornography try to get around this difficulty by regarding sexual arousal as entirely unrelated to ideas and so insidious that it short-circuits the normal process of rational assessment of texts. Their argument does not work. Sexuality is not wholly disconnected from the mind.⁷⁴

The legal standard for determining obscenity also focuses rather determinedly on irrelevancies. The present test for determining whether a publication is obscene, laid down in 1973 in *Miller v. California*,⁷⁵ is

(a) whether the average person, applying contemporary community standards, would find that the work, taken as a whole, appeals to the prurient interest, (b) whether the work depicts or describes, in a patently offensive way, sexual conduct specifically defined by the applicable state law, and (c) whether the work, taken as a whole, lacks serious literary, artistic, political, or scientific value.⁷⁶

The concern about corrupt fixed norms is not identical to, and only fortuitously overlaps with, concern about the dissemination of any particular image or subject matter. The *Miller* test addresses the problem of this vagueness by declaring that any obscenity statute must specifically define the conduct that may not be depicted; it offers as examples "[p]atently offensive representations or descriptions of ultimate sexual acts, normal or perverted, actual or simulated," and "[p]atently offensive representation or descriptions of masturbation, excretory functions, and lewd exhibition of the genitals."⁷⁷ Justice William J. Brennan, Jr. reportedly relied on what his clerks called the "limp dick" standard, according to which a work was obscene if and only if it showed an erect penis.⁷⁸

74. See Andrew Koppelman, *Free Speech and Pornography: A Response to James Weinstein*, 31 N.Y.U. REV. L. & SOC. CHANGE 899 (2007); Andrew Koppelman, *Is Pornography "Speech"?*, 14 LEGAL THEORY (forthcoming 2008).

75. 413 U.S. 15 (1973).

76. *Id.* at 24.

77. *Id.* at 25.

78. See BOB WOODWARD & SCOTT ARMSTRONG, *THE BRETHREN: INSIDE THE SUPREME COURT* 229 (1981).

If one wanted a litmus test for morally bad pornography, however, it would be this: the fixed norms that it promotes treat people as mere objects of sexual interest, whose feelings and desires do not matter. Identifying this idea as a fixed norm in any particular text is a tricky business.⁷⁹ The content of any photo or film has no necessary relation to the fixed norms it propounds. The most worrisome type of pornography from this perspective is that which portrays violent sex in an arousing way. It is this type that has been shown in laboratory experiments to make viewers more willing to aggress against women and more tolerant of rape. If one were to be concerned, however, merely about *portrayals* of sexual violence, then one would be required, absurdly, to ban feminist films such as *Boys Don't Cry*.⁸⁰

Moreover, even if a text does promote bad fixed norms, nothing about its effects on its readers necessarily follows from this fact. The meaning of sexual fantasies in particular is complex. One of Sigmund Freud's key insights is that the overt and latent content of fantasies (sexual or otherwise) are likely to be very different from each other. Sexual fantasies operate at a quasi-infantile level of consciousness, where the superego cannot operate and where moral judgment is misplaced. Of course it is not only men who consume pornography. Nancy Friday's studies of women's sexual fantasies found that rape scenarios are exceedingly common. (Friday thinks that the rape fantasy served to absolve the women of guilt, since the sex that occurred was not their fault.)⁸¹ The disproportionate importance of latent content in pornographic texts and their effects on readers complicates the effort to discern the fixed norms in those texts.

The tendency to generalize from single instances of truly bad pornography to some large undifferentiated mass of "pornography," Laura Kipnis observes, relies on the unexamined as-

79. Linda Williams's survey of various types of sadomasochistic pornography finds that in all the films she surveyed, "violence invariably arises out of an agreement between dominator and dominated." LINDA WILLIAMS, *HARD CORE: POWER, PLEASURE, AND THE "FRENZY OF THE VISIBLE"* 212 (rev. ed. 1999).

80. This 1999 film depicted the rape and murder of a transgender teenager. *BOYS DON'T CRY* (Hart-Sharp Entertainment 1999).

81. NANCY FRIDAY, *WOMEN ON TOP* 16–17 (1991); MICHAEL J. BADER, *AROUSAL: THE SECRET LOGIC OF SEXUAL FANTASIES* 51–55 (2002). The benefits of pornography for many readers are examined at length in STROSSEN, *supra* note 8, at 141–78 (1995), although Strossen overstates her case by refusing to acknowledge any countervailing harms.

sumption that low cultural forms are devoid of complexity, and that their consumers are stupid and easily brainwashed. The dangerous fantasy at work here is a “projection of upper-class fears about lower-class men: brutish, animal-like, sexually voracious.”⁸² A film is more complex than a drug, and its effects are more complex than a drug’s effects. Different narratives have different meanings to different people. The state does not know enough about the consumers of pornography to intelligently censor what they get to think about, nor does it have any basis to feel confident that the readers deserve to be treated as if they were children in this way.

We have come to some old free-speech themes: state incompetence and the consumer’s right to be free from thought control. The power to regulate pornography has been persistently abused, not only to suppress great works of literature, but also to suppress frank discussions of sexual ethics and to deprive women of information about birth control.⁸³ The old Comstock laws would have banned as pornographic material the sex articles in *Cosmopolitan*, which is essentially a Rousseauian trade publication for women, full of advice on how to use sex to get your boyfriend to marry you. These are, of course, the very women whom Schlafly wants to help, and who are using precisely the strategies she describes.

Schlafly offers no safeguards against these potential abuses of pornography regulation. She proposes a remarkably cramped vision of free speech: she would like to “restore full rights to local juries to make the final determination as to what is obscene.”⁸⁴ Even Robert Bork, whose denunciation of “the suffocating vulgarity of popular culture” she quotes with approval,⁸⁵ does not go so far. At the hearings on his ill-fated nomination to the Supreme Court, Bork said that “[a] community’s definition or characterization of a particular magazine or book or movie as ‘pornographic’ cannot be taken as final,” because then a state

82. LAURA KIPNIS, *BOUND AND GAGGED: PORNOGRAPHY AND THE POLITICS OF FANTASY IN AMERICA* 175–77 (1999).

83. See HELEN LEFKOWITZ HOROWITZ, *REREADING SEX: BATTLES OVER SEXUAL KNOWLEDGE AND SUPPRESSION IN NINETEENTH CENTURY AMERICA* (2003).

84. SCHLAFLY, *supra* note 1, at 157.

85. PHYLLIS SCHLAFLY, *THE SUPREMACISTS: THE TYRANNY OF JUDGES AND HOW TO STOP IT* 57 (2004).

could censor any speech it likes by calling it pornographic.⁸⁶ Schlafly does not address this concern, and her view of the appropriate scope of free speech protection is accordingly unclear.

If censorship of pornography is a bad idea, moral criticism of pornography is an urgent necessity. And here I would like to end with a lament about the state of discourse on this subject. It is no coincidence that this Essay is appearing in a law journal. Most of the serious discussions about the moral import of pornography take place in the context of proposals to criminalize it. Criminalizing pornography is a mistake. But discussion of pornography's moral import is urgently needed.

And not only the moral import of pornography. Other narratives ubiquitous in our culture need examination even more urgently. One story that dominates American popular culture, from R-rated movies to Disney cartoons, is a struggle between good guys and bad guys, in which the problem is solved in the end by the death of the bad guy.⁸⁷ The reader is invited into a world in which violence is the answer to all our problems, and the only question is whether the evil ones will in fact be wiped out. It is a tale that bears a striking resemblance to the worldview of the September 11th terrorists. Under some circumstances, such narratives are accurate, preeminently during World War II, which still dominates the American imagination. (Even then, a more ambivalent view of our ally Stalin would have served us better.) But this narrative is a dangerous paradigm with which to approach the world, which is usually much more complicated. At Abu Ghraib, for example, this narrative seems to have made it harder for the jailers to notice that the overwhelming majority of their prisoners were innocent people who were merely picked up on the basis of suspicions that proved groundless.⁸⁸

86. NORMAN VIEIRA & LEONARD GROSS, SUPREME COURT APPOINTMENTS: JUDGE BORK AND THE POLITICIZATION OF SENATE CONFIRMATIONS 102 (1998).

87. Hayao Miyazaki, the animator whose work has sometimes been criticized as too sophisticated for American children, understands the problem well. "The concept of portraying evil and then destroying it—I know this is considered mainstream, but I think it's rotten," he said, explaining why his films have no clear-cut villains. "This idea that whenever something evil happens someone particular can be blamed and punished for it, in life and in politics, it's hopeless." A. O. Scott, *Where the Wild Things Are: The Miyazaki Menagerie*, N.Y. TIMES, June 12, 2005, § 2, at 15.

88. See Andrew Koppelman, *Reading Lolita at Guantanamo*, 53 DISSENT 64 (Spring 2006). More recently, the television series *24*, which routinely shows the country saved by the fictitious hero's willingness to torture suspects, has been directly

The same narrative appears to have played a large role in the occupation of Iraq, the biggest foreign policy disaster since Vietnam. President Bush and his advisers desperately wanted to prevail, fearing above all that Americans would die unnecessarily if they did not properly prepare for the war. Yet somehow none of them could get their minds around the idea that their difficulties might not be conclusively solved by the defeat of Saddam Hussein. Chalk another one up to the corrupting effects of bad literature.

linked to copycat abuses by American troops in Iraq. The Dean of West Point and a group of top military interrogators have met with the show's creators to implore them to change the show's treatment of torture. This evidently was to no avail; the series is making too much money as it is. Jane Mayer, *Whatever It Takes*, THE NEW YORKER, Feb. 19, 2007, at 66.

THE FEDERALIST APPROACH TO THE FIRST AMENDMENT

JOHN O. MCGINNIS*

In this Essay, I propose that the First Amendment should be applied much more stringently against the federal government than it is against the States. Under this view, the federal government should be subject to severe restrictions under the First Amendment. For instance, it should be prevented from regulating speech on moral grounds. By contrast, states should have substantially more room for regulation to prevent what they regard as moral harms. They should be required to respect only the core of the First Amendment that protects political speech.

One could make legal arguments for this position by attacking the incorporation doctrine,¹ or, if one is taken with the current fad of referring to foreign law,² by expanding what European Union law calls the “margin of appreciation.”³ Proponents of the latter concept suggest that subsidiary governments should enjoy greater autonomy in making regulatory decisions.⁴

Instead, however, I want to offer an analysis less focused on text or precedent and more focused on the issue of law and morality. I begin with two simple premises: one about morality’s content and another about its epistemology. First, good societies are concerned with protecting both liberty and condi-

* Professor of Law, Northwestern University. This is a lightly edited version of a speech I gave at the Twenty-Sixth Annual Federalist Society National Student Symposium. Some of the ideas in this Essay are drawn from Nelson Lund & John O. McGinnis, *Lawrence v. Texas and Judicial Hubris*, 102 MICH. L. REV. 1555 (2004).

1. See Edwin Meese III, *The Attorney General’s View of the Supreme Court: Toward a Jurisprudence of Original Intention*, 45 PUB. ADMIN. REV. 701, 704 (1985).

2. See John O. McGinnis, *Foreign to Our Constitution*, 100 NW. U. L. REV. 303 (2006) (critiquing the turn to foreign law in constitutional interpretation).

3. See Harold Hongju Koh, *On American Exceptionalism*, 55 STAN. L. REV. 1479, 1483 (2003) (“[The] judicial doctrine of ‘margin of appreciation,’ familiar in European Union law, permits sufficient national variance as to promote tolerance of some measure of this kind of rights distinctiveness.”).

4. See *id.*

tions for human flourishing.⁵ In a just society, people should have freedom to act, but legal norms should also help sustain the conditions for the flourishing of family life, friendship, and other social goods. In short, we would like to prevent freedom from turning into what older political philosophers called “license,” with the potential to damage other social goods.⁶

The second, epistemological premise is that the line between liberty and license is very hard to draw.⁷ The reason for this is that the consequences of freedoms and restrictions in the social realm are difficult to assess. For instance, what are the effects of pornography? Does it encourage violence against women, or, more subtly but as importantly, does it lead to a coarsening of sensibilities that erodes family life, as Phyllis Schlafly has suggested?⁸ Or, to the contrary, does it serve as a substitute for violence and perhaps an outlet for satisfying fantasies the pursuit of which in other ways would tend to dissolve families?⁹ Or, as Professor Koppelman has asked, can a government police pornography without counterproductively sweeping in material that may help preserve families?¹⁰

In the case of pornography, I am intuitively skeptical of regulation for reasons not unlike Professor Koppelman’s.¹¹ Even a law professor, however, must admit to himself occasionally that he is fallible in his social and moral intuitions.¹² Because of such all-too-human fallibility, a very desirable feature of constitutional design is a structure that helps us calculate the consequences of our social policies by providing us with more evidence than just our intuitions.

The need for such a mechanism of moral and social discovery seems to be the decisive argument for a federalist approach to the First Amendment. If states have the responsibility for

5. See Nelson Lund, *Federalism and Civil Liberties*, 45 U. KAN. L. REV. 1045, 1060–61 (1997).

6. See *id.*

7. For a superb discussion of the difficulties involved in the tradeoff between liberty and license, see *id.* at 1060–64.

8. See Phyllis Schlafly, *The Morality of First Amendment Jurisprudence*, 31 HARV. J.L. & PUB. POL’Y 95 (2008).

9. For a variant of this view, see Andrew Koppelman, *Why Phyllis Schlafly is Right (But Wrong) About Pornography*, 31 HARV. J.L. & PUB. POL’Y 105 (2008).

10. See *id.*

11. Compare Koppelman, *supra* note 9, with Schlafly, *supra* note 8.

12. See Lund & McGinnis, *supra* note *, at 1598.

setting social policy, representative legislatures can make hard decisions about the proper line to draw between liberty and license. Moreover, these legislatures, unlike federal judges, are subject to accountability through regular elections. So long as constitutional law protects free movement and the free flow of core political speech among the States, individuals are free to exit if the balance between liberty and license becomes radically off kilter.¹³

Most importantly for the topic of law and morality, federalism creates feedback on a range of possible balances as states experiment with different social policies. Thus, unlike a system in which the Supreme Court enforces some national rule of its own devise, we would be able to make comparisons and learn about consequences by reviewing the actions of many relatively similar jurisdictions. If one state puts restrictions on pornography and another does not, we will be able to compare their results.¹⁴

In my view, the possibilities of civic learning from federalism are greater today than they were in the age of the Framers, or even twenty years ago, because “we are at the dawn of the greatest age of empiricism the world has ever known.”¹⁵ The reason is that the increasing power of computers improves dramatically our ability to evaluate the consequences of laws. Greater computer capacity enables us to collect and record facts in systematic form, and to make more precise measurements of the effects of a legal regime. Over seventy years ago, Justice Louis Brandeis argued that federalism creates laboratories of democracy.¹⁶ Today, technological innovation can bring this vision to pass. This more scientific approach to social policy can be effective, however, only if the States can experiment so that their different laws can be evaluated. Researchers can then run scores of regressions on their laptops in a few hours and readily assess the results.

Just as the technological acceleration of our age makes analysis of the consequences of different legal regimes more sophisti-

13. On the importance of exit rights, see John O. McGinnis & Ilya Somin, *Federalism vs. States' Rights: A Defense of Judicial Review in a Federal System*, 99 NW. U. L. REV. 89, 107–10 (2004).

14. See Jim Chen, *Diversity in a Different Dimension: Evolutionary Theory and Affirmative Action's Destiny*, 59 OHIO ST. L.J. 811, 912 (1998).

15. John O. McGinnis, *Age of the Empirical*, 137 POL'Y REV. 47, 48 (2006).

16. *New State Ice Co. v. Liebmann*, 285 U.S. 262, 311 (1932) (Brandeis, J., dissenting).

cated, it also makes the need for the flexible responses permitted by federalism more important. Pornography provides an excellent example. Within 15 to 25 years, technological change will permit intense, interactive pornography in virtual reality. This change in degree, if not in kind, of the nature of pornography may lead to a different tradeoff between its dangers and benefits.

Supreme Court case law is not an effective method for determining what social norms we should apply to this disruptive technology, or any of the other moral issues that technological acceleration will raise in the years ahead. The problem with relying on case law is that its principles are fabricated by a few insulated individuals who can hardly be expected to take the future into account.¹⁷ Moreover, the necessarily formal lawyer's logic that comes from cases frequently makes it hard to be sensitive to changes in context and consequence. In contrast, a federalist structure for the First Amendment will permit states to react creatively to technological change. We can then analyze the costs and benefits of divergent responses.

To be sure, even in this federalist conception of the First Amendment, federal courts have a role to play. First, it is important that states be required to respect core political speech so that their citizens can be aware of the debate over their social policies. In twenty-first century America, however, threats to that right are relatively rare.

Making sure that states do not export their law to other states is a harder goal for federal courts. For instance, if federal courts permit one state to punish an out-of-state publisher because its citizens viewed the publisher's magazine, the risk of prosecution would effectively make it impossible for the publisher to print the material in his home state where it is legal. The courts, however, can craft doctrines that will give states the autonomy to regulate and punish their own citizens for consuming pornography, without penalizing citizens of other states.

It is worth noting that a federalist program has implications beyond matters of the First Amendment. A federalist approach to other moral issues, such as same-sex marriage, might also be effective. Such an approach would reject a Supreme Court decision that interprets the Fourteenth Amendment to permit

17. See John O. McGinnis, *Justice without Justices*, 16 CONST. COMMENT. 541 (1999) (describing the parochialism of Supreme Court Justices).

same-sex marriage, but it would also oppose a federal marriage amendment prohibiting states from recognizing same-sex marriage. “Laws affecting marriage vary among the states and have varied over time.”¹⁸ This is an example of an area where competitive federalism is effectively conducting experiments that may mature into a lasting consensus.¹⁹

There are two other strong arguments for adopting the federalist solution to the role of morality in the First Amendment. First, the federalist approach tends to defuse tension among people with different moral views. Instead of having a national rule that alienates those with minority views, jurisdictions generate different rules and those who feel strongly that they want to live under a particular set of rules can move to the appropriate location.

Second, the federalist approach lessens partisanship by creating a structure that facilitates the study of the consequences of moral principles. It is easy for people, particularly partisans, to adhere to their own principles and dismiss those of others, because individuals with opposing principles are often unable to overcome their differences by persuasive means. This sense of incommensurability that comes from focusing on abstract principles is an important cause of partisan conflict. It leads to angry divisions where each side questions the good faith and even the sanity of the other side.

A focus on consequences, however, can sometimes change people’s minds. By permitting the creation of different legal regimes, federalism creates evidence about their effects. Unlike our personal intuitions, evidence from these differences is something we have in common—a potential source of consensus.

Using federalism as a discovery machine²⁰ accords with the best of the Western tradition that emphasizes skepticism and humility. Over 300 years ago, Oliver Cromwell urged his colleagues in Parliament to remember that even in matters of religion, they may be mistaken.²¹ Fifty years ago, Judge Learned

18. Lund & McGinnis, *supra*, note *, at 1613.

19. *Id.*

20. On the concept of discovery machines in constitutional law, see John O. McGinnis, *Reviving Tocqueville’s America: The Rehnquist Court’s Jurisprudence of Social Discovery*, 90 CAL. L. REV. 485 (2002).

21. Letter from Oliver Cromwell to the General Assembly of the Kirk of Scotland; or, in case of their not sitting, To the Commissioners of the Kirk of Scotland (Aug. 30 1650), in 2 THE WRITINGS AND SPEECHES OF OLIVER CROMWELL 303 (Wilbur Cortez Abbott ed., 1939).

Hand noted that “[t]he spirit of liberty is the spirit which is not too sure that it is right.”²² A federalist approach to the First Amendment is a concrete manifestation of that spirit which is particularly appropriate in an age of accelerating technology and the many new moral issues it will raise.

22. LEARNED HAND, *The Spirit of Liberty*, in *THE SPIRIT OF LIBERTY: PAPERS AND ADDRESSES OF LEARNED HAND* 189, 190 (3d ed. 1960).

*The Twenty-Sixth Annual
National Federalist Society Student Symposium:
Law and Morality*

IV.

**MARRIAGE, PUBLIC POLICY, AND THE
CONSTITUTION**

ESSAYIST

LOUIS MICHAEL SEIDMAN

GAY SEX AND MARRIAGE, THE RECIPROCAL DISADVANTAGE PROBLEM, AND THE CRISIS IN LIBERAL CONSTITUTIONAL THEORY

LOUIS MICHAEL SEIDMAN*

There is nothing unusual about constitutional controversy, but some disagreements, typified by the argument over constitutional protection for gay sex and marriage, go beyond ordinary differences of opinion. Some opponents of constitutional protection for gay rights think that their adversaries are not just wrong, but have exceeded the bounds of respectable constitutional argument. They want to turn the defense of gay constitutional rights into a position that dare not speak its name.

Consider, for example, Justice Scalia. For him, the Supreme Court's defense of gay rights "employs a constitutional theory heretofore unknown"¹ and depends on "a novel and extravagant constitutional doctrine."² The Court's treatment of the gay community as a politically unpopular group worthy of constitutional protection is "nothing short of preposterous"³ and "insulting."⁴ A Court opinion striking down discrimination against gay men and lesbians "has no foundation in American constitutional law, and barely pretends to."⁵ Justice Scalia is not exactly known for understatement, but even for him, these are strong words. What, precisely, is he so upset about?

This brief Essay does not take a strong stand on whether the constitutional case for gay rights has been made. Instead, it at-

* Carmack Waterhouse Professor of Constitutional Law, Georgetown University Law Center. This Essay is drawn from a debate held at the 2007 National Federalist Society Student Symposium at Northwestern University School of Law. I have preserved the informal character of my original remarks. I am grateful to Lama Abu-Odeh and Chai Feldblum for commenting on a previous version of this Essay. I also had outstanding research assistance from James Branda and Richard Harris.

1. *Romer v. Evans*, 517 U.S. 620, 651 (1996) (Scalia, J., dissenting).

2. *Id.* at 652.

3. *Id.*

4. *Id.*

5. *Id.* at 653.

tempts to explain why Justice Scalia and his allies are wrong to think that the case for gay rights is outside the range of reasonable constitutional argument, and to speculate about why they nonetheless hold this view.

I.

Justice Scalia's core objection to constitutional protection for gay rights is that providing such protection requires the Court to "tak[e] sides in the culture war, departing from its role of assuring, as a neutral observer, that the democratic rules of engagement are observed."⁶ Any honest argument favoring constitutional protection for gay sex and marriage must begin with a concession: Justice Scalia is right when he insists that affording gay relationships constitutional protection takes one side on a currently contestable moral question.

This concession does not amount to much, however, because of what one might call the principle of reciprocal constitutional disadvantage. It is true, as Justice Scalia insists, that constitutional protection for gay sex and marriage implicates one set of moral views. The problem is that failing to provide constitutional protection for gay sex and marriage implicates a reciprocal set of moral views. The principle of reciprocal constitutional disadvantage means that the morality charge is a wash. The inability to separate constitutional law from nonconstitutional moral principles does indeed create a kind of crisis for standard forms of liberal constitutionalism, but it does not disadvantage proponents of constitutional protection for gay marriage. Courts are simply stuck taking a stand in the culture war whichever way they rule. Justice Scalia, therefore, will have to look beyond the supposed requirement of moral neutrality to justify his opposition.

This assertion is itself contested, but it follows more or less inevitably from the logic of the Equal Protection Clause.⁷ The

6. *Lawrence v. Texas*, 539 U.S. 558, 602 (2003) (Scalia, J., dissenting).

7. U.S. CONST. amend. XIV, § 1. Although Justice O'Connor relied upon the Equal Protection Clause in her concurring opinion in *Lawrence*, the opinion for the Court relied upon the liberty guaranteed by the Due Process Clause. Compare *Lawrence*, 539 U.S. at 564, with *id.* at 579 (O'Connor, J., concurring in the judgment). For ease of explication, this Essay's analysis focuses on equality. With some additional analysis, the same points could be made with reference to liberty.

reasons why are familiar,⁸ so I will simply sketch them here. Equal treatment is not the same as identical treatment. Equality means treating people similarly to the extent that they are the same, but differently to the extent that they are different. People, however, are similar and different across an infinite range of dimensions. Thus, making the equality norm operational requires a decision regarding which differences and similarities are relevant.

Relevance can be understood as either a moral or an instrumental virtue, although, for reasons outlined below, the instrumental version turns out to collapse into the moral version. The overtly moral version of relevance directs our attention to the attributes that matter according to a particular moral theory. For example, one might say that sex between individuals of different races cannot be outlawed because race is a morally irrelevant characteristic, at least when it comes to the flourishing derived from sexual intimacy.⁹ Sex between humans and nonhumans can be outlawed, for equal protection purposes, because species lines are relevant to sexual intimacy in a way that race is not.¹⁰ Are gender lines relevant? Perhaps there is a right answer to this question, but the answer depends upon one's conception of human flourishing—assuming that human flourishing is the appropriate moral standard for right action, which is itself contested.

It follows that if one adopts the moral version of relevance, arguments for or against a constitutional right to gay marriage suffer from reciprocal constitutional disadvantage. A ruling that gay marriage is either like or unlike interracial marriage requires a moral judgment. This result is hardly surprising, given that we have begun with a moral conception of relevance. It may come as more of a surprise that it is not possible to avoid reciprocal constitutional disadvantage by treating relevance as an instrumental virtue.

8. For one of the earliest and best explanations of the ideas set out below, see Peter Westen, *The Empty Idea of Equality*, 95 HARV. L. REV. 537 (1982).

9. See *Loving v. Virginia*, 388 U.S. 1 (1967) (holding that prohibitions on interracial marriage violate the Fourteenth Amendment).

10. See, e.g., Stephen Macedo, *Reply to Critics*, 84 GEO. L.J. 329, 334 (1995) (defending gay marriage, but arguing that "sexual relations with animals are a deeply degrading form of sexual desperation").

On the instrumental theory, people are treated equally when the differentiating trait is instrumentally useful in advancing an end that the government legitimately can pursue. There are two problems with this version of relevance. First, it is not clear that this version corresponds to ordinary intuitions about equality. For example, the standard of instrumental relevance might be satisfied by a government program that inflicted very large losses on a small group of people in order to achieve trivial benefits for a majority.

The second, perhaps more serious, problem is that most of the work done by the instrumental formulation is accomplished by the requirement of a legitimate governmental end. Without this qualification, no differentiation could ever be instrumentally irrelevant, because any classification advances some end. For example, discrimination against gay men and lesbians is instrumentally rational if the aim is making the lives of gay men and lesbians as unhappy as possible.¹¹

How should the realm of legitimate governmental ends be limited? On one approach, the limitation is supplied by the Constitution, which provides the exclusive specification of the ends that the government may pursue.¹² The trouble with this

11. The Court has insisted that mere dislike of a group is not a sufficient justification for discrimination against it. *See, e.g., Lawrence*, 539 U.S. at 571; *Romer v. Evans*, 517 U.S. 620, 634–35 (1996); *U.S. Dep’t of Agric. v. Moreno*, 413 U.S. 528, 534–35 (1973). But in most cases, differential treatment is premised on disapproval of the behavior that a group engages in, rather than simple dislike of the group itself. The Court has made clear that moral disapproval of behavior is, at least in some circumstances, sufficient grounds for differential treatment. *See, e.g., Gonzales v. Carhart*, 127 S. Ct. 1610, 1633–34 (2007) (“Congress could . . . conclude that the type of abortion proscribed by the Act requires specific regulation because it implicates additional ethical and moral concerns that justify a special prohibition.”). Thus, the statement in the text might be revised by saying that discrimination against people who engage in gay sex is instrumentally rational if, for moral reasons, one wants to discourage gay sex.

12. The Court has taken this approach in the context of equality in educational funding:

It is not the province of this Court to create substantive constitutional rights in the name of guaranteeing equal protection of the laws. Thus, the key to discovering whether education is “fundamental” is not to be found in comparisons of the relative societal significance of education as opposed to subsistence or housing. Nor is it to be found by weighing whether education is as important as the right to travel. Rather, the answer lies in assessing whether there is a right to education explicitly or implicitly guaranteed by the Constitution.

San Antonio Indep. Sch. Dist. v. Rodriguez, 411 U.S. 1, 33–34 (1972).

approach is that it makes the Equal Protection Clause surplusage. If the Clause does no more than outlaw ends that are already outlawed, then it accomplishes nothing. The only way to give the Clause content, at least in its instrumental form, is to specify ends that the rest of the constitutional text does not prohibit, but that are nonetheless illegitimate bases for government differentiation. The only way to do that is to deploy some extra-constitutional moral theory.

Liberal constitutionalists typically make use of two escape hatches to avoid these disquieting conclusions. Some people, including Justice Scalia, argue that when constitutional judgments implicate contestable moral questions, the matter should be remitted to ordinary political processes.¹³ This assertion is made so frequently and with such assurance that it is often given credence that it does not deserve. A preference for the political process itself reflects a contestable moral judgment. It does not automatically follow from the fact of moral disagreement that the matter should be decided collectively and publicly. Widespread disagreement exists about the nature of God and about sensible child-rearing techniques. Few people think that these matters should therefore be settled through political processes. Instead, disagreement on the answers to these questions means that individuals should decide on appropriate answers for themselves.

Moreover, it is important to emphasize that a decision either for or against *every* equal protection claim rests on a moral judgment. The first escape hatch, therefore, would mean that equal protection questions should always be resolved by ordinary political processes. A strong reading of Section 5 of the Fourteenth Amendment and its drafting history might support the view that the Amendment was intended to grant power to Congress, rather than to the courts.¹⁴ Even on this reading,

13. See *Lawrence*, 539 U.S. at 603 (Scalia, J., dissenting) ("Social perceptions of sexual and other morality change over time, and every group has the right to persuade its fellow citizens that its view of such matters is the best."); *Romer*, 517 U.S. at 652 (Scalia, J., dissenting) ("I think it no business of the courts (as opposed to the political branches) to take sides in this culture war."); *Cruzan v. Dir. Mo. Dep't of Health*, 497 U.S. 261, 293 (1990) (Scalia, J., concurring) ("[I]t is up to the citizens of Missouri to decide" when treatment for terminally ill should be terminated.).

14. Section 5 provides that "Congress shall have power to enforce, by appropriate legislation, the provisions of this article." U.S. CONST. amend. XIV, § 5. As originally drafted, the Amendment consisted solely of a similar version of this congressional power-granting provision. See WILLIAM E. NELSON, *THE FOURTEENTH AMENDMENT: FROM POLITICAL PRINCIPLE TO JUDICIAL DOCTRINE* 49 (1988).

however, courts would have to decide moral questions about equality in order to determine whether Congress had acted within its granted powers. Moreover, this is not the standard reading of the Amendment, and it is certainly not the reading adopted by Justice Scalia and his allies.¹⁵ On the standard reading, the Amendment defines judicially enforceable limits on political decision making. If one adopts the standard reading, the relegation of all moral questions to political decision making effectively ignores the Fourteenth Amendment's command, a position that itself would have to rest on some extra-constitutional moral judgment.

The second escape hatch conflates the command of the Equal Protection Clause with the particular moral conceptions of equality held by the Framers of the Constitution. Justice Scalia has also identified himself with this view,¹⁶ but the position is similarly untenable. The problems with this position are, once again, quite familiar. First, the Equal Protection Clause is written on a high level of generality. The Framers chose to constitutionalize equality, not a particular list of practices that they thought were inconsistent with equality.¹⁷ Second, the context in which the Framers worked suggests that this was a conscious choice. As the most astute student of the legislative history of the Fourteenth Amendment has written, one of the available explanations for the vagueness of the Fourteenth Amendment is that its draftsmen

were accustomed to thinking and speaking in the amorphous, moralistic, rhetorical categories of liberty and equality that

It was only toward the end of the drafting process that language was added that might be interpreted as providing for judicial enforcement, apparently out of a concern that future Congresses might repeal statutory protections. *See id.* at 55.

15. *See, e.g.,* United States v. Morrison, 529 U.S. 598 (2000) (holding that Congress's Section 5 powers do not permit it to create substantive Fourteenth Amendment rights not recognized by the judiciary).

16. *See* M.L.B. v. S.L.J., 519 U.S. 102, 138 (1996) (Thomas, J., joined by Scalia, J., dissenting) (condemning the majority for embracing "an equalizing notion of the Equal Protection Clause that would . . . have startled the Fourteenth Amendment's Framers"); *cf.* Michael H. v. Gerald D., 491 U.S. 110, 122 (1989) (opinion by Scalia, J.) ("The Judiciary . . . comes nearest to illegitimacy when it deals with judge-made constitutional law having little or no cognizable roots in the language or even the design of the Constitution." (quotation marks omitted) (quoting Moore v. East Cleveland, 431 U.S. 494, 544 (1977) (White, J., dissenting))).

17. This point has been made most forcefully by Ronald Dworkin. *See, e.g.,* RONALD DWORKIN, TAKING RIGHTS SERIOUSLY 133 (1977).

had brought them to power in 1860, [and] cared less about [the Amendment's] precise substantive content than about its well-rounded phraseology. Their concern was that the Constitution contain a declaration about protecting fundamental rights in a language inspiring respect for them, but they had never worked out precisely what the fundamental rights were and accordingly could not provide an exact list of them.¹⁸

Apart from the Amendment's language and its Framers' intent, the constitutionalization of the Framers' particular conception of equality would have results that virtually no one today would accept. If we were to adopt this course, gay marriage would be the least of our problems. Although a few scholars deny it,¹⁹ the overwhelming weight of scholarly opinion is that the Framers did not intend to outlaw segregated public schools.²⁰ More to the point, statutes prohibiting interracial marriage were common in postbellum America, and there is no indication that the Framers intended the Equal Protection Clause to jeopardize these laws.²¹

Even if the principle of reciprocal constitutional disadvantage is somehow wrong or exaggerated on the level of analytics, it is surely right on the level of sociology. It is just a fact, by now exceptionally well-documented, that changes in constitutional meaning track changes in conventional moral judgment. The Supreme Court held that segregated schools violated the equality norm in 1954 at least in part because roughly half of the country opposed the separate-but-equal regime, which was not true in 1896 when the Court upheld a system of segregated transportation.²² Between 1886, when the Court upheld a

18. NELSON, *supra* note 14, at 52.

19. See Michael W. McConnell, *Originalism and the Desegregation Decisions*, 81 VA. L. REV. 947 (1995).

20. See, e.g., RAOUL BERGER, *GOVERNMENT BY JUDICIARY: THE TRANSFORMATION OF THE FOURTEENTH AMENDMENT* 102–03 (1977); MICHAEL J. KLARMAN, *FROM JIM CROW TO CIVIL RIGHTS: THE SUPREME COURT AND THE STRUGGLE FOR RACIAL EQUALITY* 26, 146 (2004).

21. See BERGER, *supra* note 20, at 241.

22. At the time *Plessy v. Ferguson*, 163 U.S. 537 (1896), was decided, southern whites strongly supported segregation and northern whites were accepting or indifferent. See KLARMAN, *supra* note 20, at 22–23. By 1954, public opinion had shifted dramatically. Indeed, Justice Jackson “treated such changes as constitutional justification for eliminating segregation.” *Id.* at 309. On the day it was decided, slightly more than half the country supported *Brown v. Board of Education*, 347 U.S. 483 (1954). KLARMAN, *supra* note 20, at 310.

state sodomy statute, and 2003, when it struck down a similar statute, public opinion concerning the rights of gay men and lesbians changed dramatically.²³ Demographic data suggest that additional change is on the way,²⁴ and, if history is any guide, this shift in popular moral judgments will produce further change in legal doctrine.

II.

It does not follow from the principle of reciprocal constitutional disadvantage that gay marriage should be constitutionally protected. The principle merely takes one argument against constitutional protection off the table. It remains open to the opponents of gay marriage to argue that the distinction between gay and straight sexual intimacy is morally relevant. What does follow, therefore, is that someone who wants to make a constitutional argument for gay marriage had better attend to the moral argument.

For this reason, the rest of this Essay is devoted to a sketch of a moral defense of gay marriage. Before embarking on this project, however, there are two qualifications. First, I do not intend to provide all the detail, analysis, and refutation of contrary positions that a full-scale argument would require. I provide the skeleton of an argument that would support a more comprehensive defense, but not the defense itself.²⁵ My only con-

23. Between *Bowers v. Hardwick*, 478 U.S. 186 (1986), and *Lawrence v. Texas*, 539 U.S. 558 (2003), public opinion went from opposing legalization of homosexual relations by a fifty-five percent to thirty-three percent margin to favoring legalization by a sixty percent to thirty-five percent margin. Michael J. Klarman, *Brown and Lawrence (and Goodridge)*, 104 MICH. L. REV. 431, 443 (2005).

24. In a Gallup poll conducted in May 2007, respondents between eighteen and thirty-four years of age indicated that they thought homosexuality was an acceptable alternative lifestyle by a margin of seventy-five to twenty-three percent. Respondents over the age of fifty-five disagreed with the same proposition by a margin of fifty-one to forty-five percent. Lydia Saad, *Tolerance for Gay Rights at High-Water Mark* (May 29, 2007), available at <http://www.galluppoll.com/content/?ci=27694>; see also AM. ENTER. INST., *ATTITUDES ABOUT HOMOSEXUALITY AND GAY MARRIAGE 3* (2006) (citing National Opinion Research Center polling data from 2002 finding that forty-eight percent of those between the ages of eighteen and twenty-nine and sixty-eight percent of those sixty and older believed that homosexual sexual relations were always wrong).

25. There is a large literature providing a moral defense of gay relationships. For some of the best work, see WILLIAM N. ESKRIDGE, JR., *THE CASE FOR SAME-SEX MARRIAGE: FROM SEXUAL LIBERTY TO CIVILIZED COMMITMENT* (1996); ANDREW SULLIVAN, *VIRTUALLY NORMAL: AN ARGUMENT ABOUT HOMOSEXUALITY* (1995); Carlos A. Ball, *Moral Foundations for a Discourse on Same-Sex Marriage: Looking Beyond Political Liberalism*, 85 GEO. L.J. 1871 (1997); Chai R. Feldblum, *Gay Is Good:*

tention here is that there is the possibility of a respectable moral argument for gay marriage,²⁶ and that this possibility, when taken in conjunction with the principle of reciprocal constitutional disadvantage, means that gay rights advocates should not be ashamed to make a constitutional argument.

Second, even if the moral argument were comprehensively fleshed out, it would not somehow compel the rejection of opposing views. Properly understood, moral argument does not work that way. Although it can provide reasons why a particular conclusion is plausible, it cannot force people to conclusions that they want to resist. This fact poses problems for the ambitions of liberal constitutionalism, but not for defenders of gay marriage. After all, moral argument can no more compel gay marriage defenders than gay marriage opponents. Reciprocal constitutional disadvantage means that neither moral nor constitutional argument will settle the gay marriage dispute by the force of brute logic, but it also means that constitutional rhetoric is available to both sides to influence the resolution.

What, then, is the moral case for gay marriage? The case begins with a tragic fact about the structure of our society. Our culture provides a limited number of social scripts that people are expected to follow to live a good life.²⁷ These scripts work for some people, and, for these people, they may be a good thing. Perhaps ordinary people are simply incapable of facing the virtually infinite range of choices theoretically available for how to live, and perhaps, if faced with a virtually infinite range of choices, people would make bad ones. Indeed, it is hard to imagine even in principle how people could start from scratch, choosing from an endless menu of cultures, social structures, and modes of living.

Unfortunately, however, the standard, off-the-shelf social scripts do not work for everyone. Personal lives are complicated, multifaceted, and endlessly varied. It is hardly surpris-

The Moral Case for Marriage Equality and More, 17 YALE J.L. & FEMINISM 139 (2005); Andrew Koppelman, *Is Marriage Inherently Heterosexual?*, 42 AM. J. JURIS. 51 (1997).

26. Because my contention is limited in this way, I do not consider here criticisms of gay marriage from within the gay community. See *infra* note 40.

27. This criticism is a familiar feature of feminist jurisprudence. See, e.g., Wendy W. Williams, *Notes From A First Generation*, 1989 U. CHI. LEGAL F. 99, 107–08 (noting that “men and women come in many shapes, sizes, sexualities, aspirations, experiences, and life patterns”); cf. Feldblum, *supra* note 25, at 179 (asking why the state should “support *just* marriage partners—and not other intimate partnerships that equally support the development of the self”).

ing that the models that work for many people do not work for all people. When the standard models do not work, this failure produces needless misery. Either people try, generally unsuccessfully, to comply with social norms that do not fit their needs, or they are denied goods that would otherwise help them lead happy and productive lives. The costs of these failed attempts and deprivations can be measured in the currency of loneliness, anger, disappointment, sadness, and even suicide. The unavailability of alternative social scripts therefore prevents the pursuit of happiness in the most literal sense. This frustration of happiness, in turn, establishes a *prima facie* case for making available a variety of alternative scripts.

Of course, not just any alternative script is acceptable. For the reasons outlined above, placing outer limits on the possibility of truly eccentric choices may be justified. Moreover, there are modes of life that are selfish, harmful, or indifferent to social obligation.²⁸ It is a mistake, however, to confuse the case for alternative scripts with the case for self-indulgence. There is no *a priori* reason to believe that a given alternative script leads to less social commitment than a standard script. On the contrary, it is the very availability of life-fulfilling alternatives that tends to create social cohesion by giving as many people as possible a stake in social structures.²⁹

If the gay lifestyle followed a social script that was self-indulgent, harmful, or alienating, then there might be a case for discouraging or even prohibiting it. A defense of gay intimacy, therefore, requires a second strand to address the charge that gay sex is somehow inherently and inevitably destructive. For people who believe that any sexual intimacy not tied to reproduction (or to sex of the "reproductive type," as some social conservatives phrase it)³⁰ is *per se* illegitimate, this second

28. Cf. Ball, *supra* note 25, at 1921 (explaining the perfectionist liberal view that "[a]lthough freedom is an intrinsic good . . . not all choices that are made through the exercise of that freedom are good").

29. Cf. MICHAEL J. SANDEL, DEMOCRACY'S DISCONTENT: AMERICA IN SEARCH OF A PUBLIC PHILOSOPHY 105–07 (1996) (expressing doubt that gay rights can be grounded on liberal autonomy rights because "it is by no means clear that social cooperation can be secured on the strength of autonomy rights alone" and arguing instead for defense of gay relationships as a substantive good).

30. See Robert P. George & Gerard V. Bradley, *Marriage and the Liberal Imagination*, 84 GEO. L.J. 301, 307 (1995) (referring to marriage as "a one-flesh communion of persons . . . consummated and actualized in the reproductive-type acts of spouses").

strand will necessarily be unconvincing.³¹ But few people today hold this belief. In a world where use of birth control is widespread, even among Catholics and conservative Protestants, the contention that sexual intimacy must be tied to the possibility of pregnancy is no longer plausible. Moreover, even most opponents of birth control have no difficulty with sexual intimacy between married men and women even though, perhaps because of age or physical impairment, there is no prospect that their sex will produce children. It seems entirely arbitrary to characterize this as sex of the reproductive type, while insisting that sex between people of the same gender is not of the reproductive type.³² *A priori* taxonomy is not the same thing as argument.

Once one sees that sex that is not tied to reproduction is not evil, the ground is clear for an argument that gay sex is a good because it is a type of nonprocreative sex, and nonprocreative sex is, *prima facie*, a good. It is a *prima facie* good because it is pleasurable, and, holding everything else constant, pleasure is a good.³³ At this point, Justice Scalia deserves another concession. In his *Lawrence* dissent he offers a parade of horrors and lists state laws forbidding adult incest, fornication, and masturbation, which, he argues, are called into question by the decision in *Lawrence*.³⁴ To the extent that these forms of sex are pleasurable, they are indeed *prima facie* moral goods.

Of course, these judgments are only *prima facie*. If the pleasure is achieved at the expense of countervailing harm, then the *prima facie* case unravels. But opponents of pleasurable sex must make the case that it causes harm. At least with respect to gay sex, they have not made this case.

When considering intercourse between two or more people, as opposed to masturbation, the argument for sex as a good is even stronger.³⁵ Even when it is anonymous and impersonal, the good of sex is heightened by its capacity to provide pleasure by giving pleasure to another. Nor is it just any kind of

31. See, e.g., John M. Finnis, *Law, Morality and "Sexual Orientation,"* 69 NOTRE DAME L. REV. 1049, 1064–68 (1994); George & Bradley, *supra* note 30.

32. For a detailed argument along these lines, see Ball, *supra* note 25, at 1909–19 and Koppelman, *supra* note 25, at 57–70.

33. See Sara Ruddick, *On Sexual Morality*, in MORAL PROBLEMS: A COLLECTION OF PHILOSOPHICAL ESSAYS 26 (James Rachels ed., 2d ed. 1975).

34. See *Lawrence v. Texas*, 539 U.S. 558, 590 (2003) (Scalia, J., dissenting).

35. The argument that follows is somewhat similar to that found in Thomas Nagel, *Sexual Perversion*, 66 J. PHIL. 5, 10–13 (1969); see also Ruddick, *supra* note 33, at 30.

pleasure. It is pleasure that derives from a linking of mind and body that is crucial to mental health.³⁶ Sex is similar to physical exercise in that it provides a heightened awareness that one's body belongs to oneself. In the case of sex, though, that awareness is coupled with the reflexive knowledge that someone else is getting pleasure from one's body even as one is getting pleasure from the other's body and that both are getting pleasure from the knowledge that the other is getting pleasure.

It is therefore appropriate that the Court in *Lawrence* granted constitutional protection even to entirely anonymous and casual sexual intimacy. Moreover, the case for gay marriage is actually on stronger footing than the case for the type of sex that *Lawrence* protects. When sex takes place in a continuing and intimate relationship, the good of sex is heightened still further because it involves emotional intimacy, trust, and connection in both the literal and metaphysical sense. It would be surprising indeed if the Court provided constitutional protection for a one night stand without providing similar protection for deep and continuing relationships.³⁷

None of this means that all sex is good or that sex is only a good. There is obviously a dark side to sex. It can also be about power, submission, and even hatred. Sex can be addictive and dangerous. It can and does destroy people's lives.

But if sex is at least potentially a good, then gay sex is especially a good because it provides a model for what sex might be like if it were disconnected from pervasive gender hierarchies.³⁸ It

36. See Ruddick, *supra* note 33, at 29–30.

37. Oddly, Justice Scalia recognized this idea in his *Lawrence* dissent:

If moral disapprobation of homosexual conduct is “no legitimate state interest” for purposes of proscribing that conduct, and if, as the Court coos (casting aside all pretense of neutrality), “[w]hen sexuality finds overt expression in intimate conduct with another person, the conduct can be but one element in a personal bond that is more enduring”; what justification could there possibly be for denying the benefits of marriage to homosexual couples exercising “[t]he liberty protected by the Constitution”? Surely not the encouragement of procreation, since the sterile and the elderly are allowed to marry. This case “does not involve” the issue of homosexual marriage only if one entertains the belief that principle and logic have nothing to do with the decisions of this Court.

Lawrence, 539 U.S. at 604–05 (Scalia, J., dissenting) (citations omitted).

38. See Robin West, *Universalism, Liberal Theory, and the Problem of Gay Marriage*, 25 FLA. ST. U. L. REV. 705, 727 (1998) (“[S]ame-sex marriage, unlike traditional marriage, has never been predicated on the presumed desirability of subordinating the female sex. . . . The difference is important because it carries the promised

is important to qualify this assertion in a number of ways. First, I am not making the ridiculous charge that all or even many instances of heterosexual intercourse are rape. Nor am I arguing that all homosexual interactions are disconnected from exploitation, dominance, submission, and power. Gay relationships, like straight relationships, can be pathological. Even when there are not differences in gender, there may be differences in power.

Although heterosexual sex is not always rape, it is always complicated by a pervasive gender hierarchy. This fact makes the sex act and the events leading up to the sex act more freighted, complicated, and difficult than they would be without the hierarchy. Conversely, some homosexual sex is exploitative, but the exploitation does not map directly and obviously onto pervasive social hierarchies. When sex is freed from these hierarchies, it can be less conflicted and more fun. Thus, straight people have something to learn from gay men and lesbians about the potential for sex if straight relationships could be freed from the curse of subjugation.

Of course, some find this possibility more terrifying than comforting. The stereotype of gay promiscuity fuels the fear that legitimizing gay relationships will jeopardize the sexual status quo in a fashion that will have unintended consequences, especially for the welfare of children.³⁹ These fears are greatly overstated. Perhaps there is a legitimate reason grounded in the fact of sexual hierarchy for fearing more male, heterosexual, promiscuity. In a world where men also have most of the wealth and power, the ability and willingness of heterosexual men to have more partners might create problems for women.

While this worry is understandable, it remains mysterious why it translates into fear of gay promiscuity which, by definition, does not involve gender hierarchy. Perhaps the point is that straight men will envy their gay brothers and copy their promiscuity without bothering to dismantle gender hierarchies first. This is a possibility, but it seems implausible that the decline in heterosexual monogamy (if indeed there has been a de-

potential to transform the very institution of marriage itself into a truly liberal and even egalitarian institution.”).

39. See, e.g., Maggie Gallagher, *What Is Marriage for? The Public Purposes of Marriage Law*, 62 LA. L. REV. 773, 788–91 (2002); Amy L. Wax, *The Conservative's Dilemma: Traditional Institutions, Social Change, and Same-Sex Marriage*, 42 SAN DIEGO L. REV. 1059, 1064–71 (2005).

cline) is caused by gay sex. In fact, the movement favoring gay marriage reflects something like the opposite phenomenon. Rather than straights mimicking gay lifestyles, some gay men and lesbians insist on the kind of stability and commitment that straight individuals like to think characterize their relationships. Indeed, it is for just this reason that some members of the gay community oppose gay marriage.⁴⁰

For similar reasons, fears about the impact of gay marriage on children are hard to understand. Research indicates that the children of gay couples do at least as well as the children of straight couples.⁴¹ Oddly, opponents of gay marriage point to the pathologies in *straight* relationships as an argument against gay marriage. Children of single and divorced heterosexual parents seem to fare worse as a class than children in stable, two-parent households.⁴² Some opponents of gay marriage have used this data to speculate that children of gay parents might also do worse.⁴³ But the children of gay marriages and civil unions are not raised by a single caregiver and have not experienced the trauma of divorce. If one is serious about regulating parent-child relationships that are dysfunctional for children, gay relationships seem like an odd place to start. Why not regulate straight divorce and single parenting, the practices that research shows cause problems? In a world where even parents who have been convicted of serial child abuse have a

40. See, e.g., MICHAEL WARNER, *THE TROUBLE WITH NORMAL: SEX, POLITICS, AND THE ETHICS OF QUEER LIFE* 81–147 (1999); Paula Ettelbrick, *Since When Is Marriage a Path to Liberation?*, in *SEXUAL ORIENTATION AND THE LAW* 721 (William B. Rubenstein ed., 2d ed. 1997); Nancy D. Polikoff, *We Will Get What We Ask For: Why Legalizing Gay and Lesbian Marriage Will Not "Dismantle the Legal Structure of Gender in Every Marriage,"* 79 VA. L. REV. 1535, 1546–50 (1993). Because my only contention is that there is a respectable case for gay marriage, it is not necessary to evaluate these arguments here. Chai Feldblum, however, is on the right track when she argues that "unless advocates of marriage for same-sex couples affirmatively *distance* themselves from the normative judgment that being married constitutes a better status than being unmarried, the simple act of seeking the right to enter the married status can well be understood as *acquiescing* in the normative judgment that marriage is better than other relationships." Feldblum, *supra* note 25, at 154.

41. For a summary of the literature as of 1992, see Charlotte J. Patterson, *Children of Lesbian and Gay Parents*, 63 CHILD DEV. 1025, 1029–34 (1992). A more recent study strongly supports the same conclusion. See Jennifer L. Wainright et al., *Psychosocial Adjustment, School Outcomes, and Romantic Relationships of Adolescents with Same-Sex Parents*, 75 CHILD DEV. 1886 (2004).

42. For a summary of the literature, see JUNE CARBONE, *FROM PARTNERS TO PARENTS: THE SECOND REVOLUTION IN FAMILY LAW* 111–29 (2000).

43. See Wax, *supra* note 39, at 1087.

right to get married and to have children, it is hard to take seriously an argument that deep concern for the welfare of children precludes a gentle and loving gay couple from raising children in a two-parent home.

Moreover, it is worth remembering that children of gay couples would not necessarily find straight parents if gay and lesbian parents were unavailable. Many of them would grow up in orphanages or foster homes. In what sense are these children put in a worse position by the availability of gay relationships?

III.

It follows that there is a respectable moral case to be made for gay sex and marriage. This is hardly a case that would win over Pat Robertson, John Finnis, or Pope Benedict XVI. We live in a world of ineradicable—or at least very persistent—moral disagreement. But given the principle of reciprocal constitutional disadvantage, the demonstration that there is a respectable moral argument for gay sex and marriage also serves to show that there is a respectable constitutional argument for its protection.

Why, then, do people like Justice Scalia persist in asserting that the argument is not just wrong, but fundamentally illegitimate? No doubt, some people who take this position are motivated by animus towards gay men and lesbians. Justice Scalia says that he does not hate gay Americans,⁴⁴ and I am prepared to take him at his word, even though this is a courtesy he sometimes fails to extend to others.⁴⁵ Assuming that animus toward gay men and lesbians does not explain his reaction, what does? Although I cannot prove it, the best alternative explanation for this blindness to the principle of reciprocal constitutional disadvantage stems from very deep insecurities about the intellectual foundations of liberal constitutionalism. After all, if it is true that constitutional questions are inextricably tied to moral questions, and if it is also true that moral questions cannot be resolved by reasoned argument, then it

44. See *Romer v. Evans*, 517 U.S. 620, 644 (1996) (Scalia, J., dissenting) (“Of course it is our moral heritage that one should not hate any human being or class of human beings.”).

45. See *Lawrence v. Texas*, 539 U.S. 558, 604 (2003) (Scalia, J., dissenting) (“[T]he Court says that the present case ‘does not involve whether the government must give formal recognition to any relationship that homosexual persons seek to enter.’ . . . Do not believe it.”).

follows that constitutional questions cannot be so resolved either. But then it would be true that our polity is not founded on principles that all of our citizens are bound to respect and that the ambitions of liberal constitutionalism would have failed.

A concession of this sort would be a very big deal, especially for someone whose every official act depends on the principles of liberal constitutional theory for its legitimacy.⁴⁶ It is no surprise, then, that Justice Scalia is worried, or that these worries would cause him to lash out at people who, he perceives, are attacking the very foundations of the Republic, not to mention his self-conception of how he performs his job. This is not the place to attempt the large task of putting these worries to rest, if indeed it is possible to do so.⁴⁷ For now, it is enough to insist that they provide no excuse for projecting neurotic anxieties about constitutional legitimacy on innocent gay and lesbian citizens who want nothing more than to get on with their private lives.

46. One does not have to look very hard to see how this personal anxiety gets translated into constitutional doctrine. Consider, for example, the following remarkable passage:

As long as this Court thought (and the people thought) that we Justices were doing essentially lawyers' work up here—reading text and discerning our society's traditional understanding of that text—the public pretty much left us alone. . . . But if in reality our process of constitutional adjudication consists primarily of making *value judgments* . . . then a free and intelligent people's attitude towards us can be expected to be (*ought to be*) quite different. The people know that their value judgments are quite as good as those taught in any law school—maybe better. If, indeed, the "liberties" protected by the Constitution are, as the Court says, undefined and unbounded, then the people *should* demonstrate, to protest that we do not implement *their* values instead of *ours*. Not only that, but confirmation hearings for new Justices *should* deteriorate into question-and-answer sessions in which Senators go through a list of their constituents' most favored and most disfavored alleged constitutional rights, and seek the nominee's commitment to support or oppose them. Value judgments, after all, should be voted on, not dictated; and if our Constitution has somehow accidentally committed them to the Supreme Court, at least we can have a sort of plebiscite each time a new nominee to that body is put forward.

Planned Parenthood of Se. Pa. v. Casey, 505 U.S. 833, 1000–01 (1992) (Scalia, J., dissenting).

47. For an attempt to put these worries to rest, see LOUIS MICHAEL SEIDMAN, OUR UNSETTLED CONSTITUTION: A NEW DEFENSE OF CONSTITUTIONALISM AND JUDICIAL REVIEW (2001).

*The Twenty-Sixth Annual
National Federalist Society Student Symposium:
Law and Morality*

KEYNOTE ADDRESS

MORAL DUTY AND THE RULE OF LAW

WILLIAM H. PRYOR JR.

MORAL DUTY AND THE RULE OF LAW

WILLIAM H. PRYOR JR.*

In his immortal play *A Man for All Seasons*, Robert Bolt provides a fictional account of an argument between Sir Thomas More, who served as the Chancellor of England and would later become the patron saint of lawyers and judges, and his son-in-law, William Roper.¹ Their argument is about the demands of fidelity to both law and morality. In the course of that argument, More pleads, “The law, Roper, the law. I know what’s legal not what’s right. And I’ll stick to what’s legal.”²

Roper then makes two provocative charges against More. First, Roper asserts to More, “Then you set man’s law above God’s!”³ More responds in the negative:

No, far below; but let me draw your attention to a fact—I’m *not* God. The currents and eddies of right and wrong, which you find such plain sailing, I can’t navigate. I’m no voyager. But in the thickets of the law, oh, there I’m a forester. I doubt if there’s a man alive who could follow me there, thank God . . .⁴

Later Roper charges, “So now you’d give the Devil benefit of law!”⁵ To that charge, More responds in the affirmative and asks a question of Roper: “Yes. What would you do? Cut a

* Circuit Judge, United States Court of Appeals for the Eleventh Circuit. The text of this address, delivered at the Twenty-Sixth Annual National Federalist Society Student Symposium, is drawn in large part from two previous addresses: William H. Pryor Jr., *Christian Duty and the Rule of Law*, 34 CUMB. L. REV. 1 (2003) [hereinafter Pryor, *Christian Duty*]; William H. Pryor Jr., *The Religious Faith and Judicial Duty of an American Catholic Judge*, 24 YALE L. & POL’Y REV. 347 (2006). The text also borrows, in small part, from a third address: William H. Pryor Jr., *The Murder of Father James Coyle, the Prosecution of Edwin Stephenson, and the True Calling of Lawyers*, 20 NOTRE DAME J.L. ETHICS & PUB. POL’Y 401 (2006).

1. ROBERT BOLT, *A MAN FOR ALL SEASONS* (Vintage Int’l 1990) (1960).

2. *Id.* at 65.

3. *Id.*

4. *Id.* at 65–66.

5. *Id.* at 66.

great road through the law to get after the Devil?"⁶ Roper then falls into the trap when he answers, "I'd cut down every law in England to do that!"⁷

More then offers the most memorable lines of the entire play:

Oh? And when the last law was down, and the Devil turned round on you—where would you hide, Roper, the laws all being flat? This country's planted thick with laws from coast to coast—man's laws, not God's—and if you cut them down—and you're just the man to do it—d'you really think you could stand upright in the winds that would blow then? Yes, I'd give the Devil benefit of law, for my own safety's sake.⁸

Robert Bolt's portrait of Saint Thomas More offers lawyers and judges the right role model. I have been asked to contribute to this Symposium on Law and Morality by reflecting on my personal experiences of being embroiled in controversies about the potential conflict of moral and legal duties, both as a former state attorney general and a nominee for a federal judgeship. The stakes of those controversies, thankfully, were not nearly as high as those that led to the execution of Saint Thomas More, but they were high drama in the contemporary arena of American law and politics. In each instance, the law offered me the right path to follow.

My first experience came in June 2003, two months after the President nominated me to serve as a United States Circuit Judge. That nomination was controversial for several reasons, among them my public statement as a politician that *Roe v. Wade*⁹ was "the worst abomination of constitutional law in our history,"¹⁰ my defense as attorney general of an Alabama law that made sodomy a crime,¹¹ and even my decision as a parent to plan a family vacation at Disney World so as not to coincide with the Gay Day fes-

6. *Id.*

7. *Id.*

8. *Id.* (stage directions omitted).

9. 410 U.S. 113 (1973).

10. William F. Buckley Jr., *On the Right*, NAT'L REV., July 14, 2003, at 54, 55 (quotation marks omitted); see also Byron York, *The Nominee Who Won't Back Down*, NAT'L REV. ONLINE, June 12, 2003, <http://www.nationalreview.com/york/york061203.asp>.

11. See Brief of the State of Alabama et al. as Amici Curiae in Support of Respondent, *Lawrence v. Texas*, 539 U.S. 558 (2003) (No. 02-102).

tivities at the park.¹² During my confirmation hearing,¹³ a few members of the Senate Judiciary Committee raised questions about my “deeply held” beliefs¹⁴ and whether I was “asserting an agenda of [my] own, a religious belief of [my] own, inconsistent with [the] separation of church and state.”¹⁵ When the Committee Chairman, Senator Orrin Hatch, responded to these statements by asking about my Catholic faith¹⁶ and then asserting that “in every case” he could see, I had “followed the law regardless of [my] . . . religious beliefs,”¹⁷ two other Senators objected to Chairman Hatch’s reference to my religion.¹⁸

Later that summer, an interest group sponsored political advertisements that described opponents of my confirmation to the federal bench as engaged in discrimination against me based on my Catholic faith.¹⁹ The advertisement portrayed a sign that read, “Catholics need not apply,” hanging on a door to a federal courthouse.²⁰ That advertisement created a furor in the Senate and a lively debate in national newspapers and magazines.²¹

12. Buckley, *supra* note 10, at 55; Kathryn Jean Lopez, *The Disney Smear*, NAT’L REV. ONLINE, June 17, 2003, <http://www.nationalreview.com/lopez/lopez061703.asp>.

13. *Confirmation Hearing on the Nominations of William H. Pryor, Jr. To Be Circuit Judge for the Eleventh Circuit and Diane M. Stuart To Be Director, Violence Against Women Office, Department of Justice Before the S. Comm. on the Judiciary*, 108th Cong. (2003).

14. *Id.* at 11–12 (statement of Sen. Charles Schumer, Member, S. Comm. on the Judiciary); *id.* at 92 (statement of Sen. Edward Kennedy, Member, S. Comm. on the Judiciary).

15. *Id.* at 90 (statement of Sen. Richard Durbin, Member, S. Comm. on the Judiciary); *see also id.* at 76 (statement of Sen. Dianne Feinstein, Member, S. Comm. on the Judiciary).

16. *Id.* at 104–05 (statement of Sen. Orrin Hatch, Chairman, S. Comm. on the Judiciary).

17. *Id.* at 106 (statement of Sen. Orrin Hatch, Chairman, S. Comm. on the Judiciary).

18. *Id.* at 107–08 (statements of Sen. Patrick Leahy and Sen. Arlen Specter, Members, S. Comm. on the Judiciary).

19. Charles Hurt, *Pryor’s religion triggers debate: Democrats target Catholic’s beliefs*, WASH. TIMES, July 24, 2003, at A1.

20. *Id.*

21. *See, e.g.*, Richard John Neuhaus, *The Public Square*, FIRST THINGS, Oct. 2003, at 78, 91–92; Charles Krauthammer, Editorial, *A Judge Prejudged*, WASH. POST, Aug. 29, 2003, at A23; John Mallon, Op-Ed., *Bias and judicial nominees: Catholic is as Catholic does*, WASH. TIMES, Aug. 12, 2003, at A15; Robert Novak, Editorial, *Unmasking religious code words*, CHI. SUN-TIMES, Aug. 11, 2003, at 37; Ami Eden, *Confirmation Debate Morphs into Bitter Religious Battle*, FORWARD.COM, Aug. 8, 2003, <http://www.forward.com/articles/confirmation-debate-morphs-into-bitter-religious-b/>; Terry Eastland, *Catholic Baiting*, DAILY STANDARD, Aug. 6, 2003, <http://www.theweeklystandard.com/Content/Public/Articles/000/000/002/957edgkx.asp>; Jonah Goldberg, *Dems Want to Bench Judges of Faith*, TOWNHALL.COM, Aug. 6, 2003, http://www.townhall.com/columnists/JonahGoldberg/2003/08/06/dems_

My second experience came at the end of that same summer when Roy Moore, who was then the Chief Justice of Alabama, refused to obey an injunction of a federal district court that required the removal of a monument of the Ten Commandments from the rotunda of the Alabama Judicial Building.²² As attorney general, I publicly disagreed with Chief Justice Moore and assisted the associate justices of the Supreme Court of Alabama in ensuring compliance with the injunction.²³ After the Alabama Judicial Inquiry Commission then filed charges of misconduct against Chief Justice Moore, I personally prosecuted the charges in the Alabama Court of the Judiciary, which unanimously granted my request to remove Chief Justice Moore from his judicial office.²⁴

Throughout these experiences, my perspective on the potential conflict of legal and moral duties has been that I should follow the example of Saint Thomas More. My Catholic faith is the foundation of my worldview, and my judicial duty is governed, from beginning to end, by the law. Faith properly informs the religious lawyer or judge, and morality is not in tension with fidelity to the law.

I will first address my perspective about the controversy that affected my judicial nomination: the role of religion in judging. Religious faith properly informs me, as a judge, in my fidelity to my judicial duty in at least four ways: in my understanding of my oath of office, in my moral duty to obey lawful authority, in my responsibility to work diligently, and in my responsibility to work honestly. Each of these ways is motivational; that is, each concerns the judge's duty to perform his work well. None involves using religious doctrine to decide a case in conflict with the law.

The most fundamental way that faith properly matters to me as a judge is in my understanding of my judicial oath of office. In Article VI of the Constitution, the Framers required that

want_to_bench_judges_of_faith; Hugh Hewitt, *The Catholic Test*, DAILY STANDARD, Aug. 5, 2003, <http://www.weeklystandard.com/Content/Public/Articles/000/000/002/956qpnnx.asp>; Editorial, *Playing the Religion Card*, N.Y. TIMES, Aug. 4, 2003, at A12; Michael Novak, "Deeply Held" Feelings, NAT'L REV. ONLINE, Aug. 4, 2003, <http://www.nationalreview.com/novak/novak080403.asp>.

22. See *Glassroth v. Moore*, 229 F. Supp. 2d 1290 (M.D. Ala. 2002), *aff'd*, 335 F.3d 1282 (11th Cir. 2003); *Moore v. Judicial Inquiry Comm'n*, 891 So. 2d 848 (Ala. 2004).

23. See Pryor, *Christian Duty*, *supra* note *.

24. *Moore*, 891 So. 2d at 862.

every officer of our government “be bound by Oath or Affirmation, to support th[e] Constitution.”²⁵ In the next part of that clause, they provided that “no religious Test shall ever be required as a Qualification to any Office or public Trust under the United States.”²⁶ The Framers thought that the particular religious beliefs of the judge should not matter, but that it was crucial for the judge to have his conscience—as informed by those beliefs—bound by the Constitution.

Many of the states had different rules. Delaware, for example, in article 22 of its Constitution of 1776, required officers to “profess faith in God the Father, and in Jesus Christ His only Son, and in the Holy Ghost, one God, blessed for evermore,” and to “acknowledge the holy scriptures of the Old and New Testament to be given by divine inspiration.”²⁷ Vermont, in chapter 2, section 9, of its Constitution of 1777, required legislators to declare, “I do believe in one God, the Creator and Governor of the universe, the rewarder of the good and punisher of the wicked. And I do acknowledge the scriptures of the old and new testament to be given by divine inspiration, and own and profess the protestant religion.”²⁸ I am especially grateful that last line of the Vermont Constitution did not become part of the Federal Constitution.

During the ratification process, some Americans objected to the ban on religious tests, as many Protestants feared the election or appointment of Catholics to federal office. James Iredell, a delegate to the North Carolina convention, provided my favorite rejoinder to these objections when he rose to defend the ban on religious tests on July 30, 1787. His words were especially memorable for Catholics. Iredell said,

I met by accident with a pamphlet this morning, in which the author states as a very serious danger, that the Pope of Rome might be elected President. I confess this never struck me before, and if the author had read all the qualifications of a President, perhaps his fears might have been quieted. No man but a native, and who has resided fourteen years in America, can be chosen President. I know not all the qualifi-

25. U.S. CONST. art. VI, cl. 3.

26. *Id.*

27. DEL. CONST. of 1776, art. 22, *reprinted in* 4 THE FOUNDERS’ CONSTITUTION 633, 634 (Philip B. Kurland & Ralph Lerner eds., 1987).

28. VT. CONST. of 1777, ch. 2, § 9, *reprinted in* 4 THE FOUNDERS’ CONSTITUTION, *supra* note 27, at 634.

cations for a Pope, but I believe he must be taken from the college of Cardinals, and probably there are many previous steps necessary before he arrives at this dignity. A native of America must have very singular good fortune, who after residing fourteen years in his own country, should go to Europe, enter into Romish orders, obtain the promotion of Cardinal, afterwards that of Pope, and at length be so much in the confidence of his own country, as to be elected President. It would be still more extraordinary if he should give up his Popedom for our Presidency. Sir, it is impossible to treat such idle fears with any degree of gravity.²⁹

"The Framers' general understanding was that proscribing religious tests did not necessarily remove the religious significance of the general oath."³⁰ James Madison, the Father of the Constitution, explained in a letter to Edmond Pendleton dated October 28, 1787, that an oath should make a religious test unnecessary. Madison wrote,

Is not a religious test as far as it is necessary, or would operate, involved in the oath itself? If the person swearing believes in the supreme Being who is invoked, and in the penal consequences of offending him, either in this or a future world or both, he will be under the same restraint from perjury as if he had previously subscribed a test requiring this belief. If the person in question be an unbeliever in these points and would notwithstanding take the oath, a previous test could have no effect. He would subscribe it as he would take the oath, without any principle that could be affected by either.³¹

Madison's argument, expressed by others as well, was that a religious believer would take an oath seriously without need of a religious test and that a religious test could be declared by an unprincipled atheist without fear of punishment after death. Either way, a religious test was unnecessary.

When I placed my left hand on the Holy Bible and swore to "perform all the duties incumbent upon me as United States

29. THE DEBATE ON THE CONSTITUTION: FEDERALIST AND ANTIFEDERALIST SPEECHES, ARTICLES, AND LETTERS DURING THE STRUGGLE OVER RATIFICATION, PART TWO 906 (Bernard Bailyn ed., 1993).

30. Matthew Spalding, *Oaths Clause*, in THE HERITAGE GUIDE TO THE CONSTITUTION 295 (Edwin Meese III et al. eds., 2005).

31. Letter from James Madison to Edmund Pendleton (Oct. 28, 1787), in 4 THE FOUNDERS' CONSTITUTION, *supra* note 27, at 639.

Circuit Judge under the Constitution and laws of the United States” and swore “that I [would] well and faithfully discharge the duties of the office on which I [was] about to enter[,] [s]o help me God,”³² my conscience was and remains affected by my religious beliefs. Were it not so, what would be the point of placing my hand on the Bible or ending the oath with the declaration, “So help me God”? Taking a false oath is a violation of the Second Commandment not to take the name of the Lord in vain.³³ As the *Catechism of the Catholic Church* explains, “[t]aking an oath or swearing is to take God as witness to what one affirms. It is to invoke the divine truthfulness as a pledge of one’s own truthfulness. An oath engages the Lord’s name.”³⁴ My entire understanding of my judicial duty flows from taking my oath seriously; James Madison and the other Framers of the Constitution expected nothing less.

My religious faith also informs my perspective on my judicial duty to obey lawful authority; I have a moral obligation to obey our government and its laws. Before I became a judge, this perspective informed my decision, as the attorney general of Alabama, to obey the federal injunction that required the removal of a monument of the Ten Commandments in the Alabama State Judicial Building.³⁵ My moral duty to obey the law pertains to my judicial duty now just as it pertained to my executive duty then.

My faith informs my judicial duty in a third way, by inculcating me with a belief in the moral duty to work. I believe that

32. The words of the oath for judicial officers are taken from two statutes: 5 U.S.C. § 3331 (2000) and 28 U.S.C. § 453 (2000). The oath reads as follows:

I, [name], do solemnly swear that I will administer justice without respect to persons, and do equal right to the poor and to the rich, and that I will faithfully and impartially discharge and perform all the duties incumbent upon me as [office] under the Constitution and laws of the United States; and that I will support and defend the Constitution of the United States against all enemies, foreign and domestic; that I will bear true faith and allegiance to the same; that I take this obligation freely, without any mental reservation or purpose of evasion; and that I will well and faithfully discharge the duties of the office on which I am about to enter. So help me God.

The Oath for Judicial Officers (on file with Author).

33. CATECHISM OF THE CATHOLIC CHURCH ¶ 2150 (1994); see also *Exodus* 20:7.

34. CATECHISM OF THE CATHOLIC CHURCH, *supra* note 33, ¶ 2150.

35. Pryor, *Christian Duty*, *supra* note *. See generally *Moore v. Judicial Inquiry Comm’n*, 891 So. 2d 848 (Ala. 2004).

work is, in a real sense, a form of prayer.³⁶ This religious belief motivates my commitment to my oath to “well and faithfully discharge the duties of the office”³⁷ of a circuit judge.

The final way my faith informs my performance as a judge is by teaching me to be honest. The moral duty of honesty requires both truthfulness in communication and reasoning and respect for the property of others. This duty is reflected in the commandments against bearing false witness and stealing, respectively.³⁸ Regarding the former, the *Catechism* has the following strong words about the necessity for truth in a judicial system:

When it is made publicly, a statement contrary to the truth takes on a particular gravity. In court it becomes false witness. When it is under oath, it is perjury. Acts such as these contribute to condemnation of the innocent, exoneration of the guilty or the increased punishment of the accused. They gravely compromise the exercise of justice and the fairness of judicial decisions.³⁹

Although my religion properly informs and motivates me to be faithful to my oath of office, to be faithful to my moral duties to obey the government and its laws, and to work both diligently and honestly, there is a limit to the relevance of religion in the performance of my judicial duty. That limit is defined by the very nature of my judicial authority. Properly understood, the exercise of my authority as a federal judge is governed by the law alone, and that understanding is where the real controversy exists in the contemporary debate about judicial authority.

As a judge, I am not given the authority to use a personal moral perspective to update or alter the text of our Constitution and laws. The business of using moral judgment to change the law is reserved to the political branches, which is why the officers of those branches are regularly elected by the people. A judge’s task is limited to serving, in Chief Justice Roberts’s words, as an “um-

36. See CATECHISM OF THE CATHOLIC CHURCH, *supra* note 33, ¶ 2427.

37. The Oath for Judicial Officers, *supra* note 32.

38. *Exodus* 20:15–16.

39. CATECHISM OF THE CATHOLIC CHURCH, *supra* note 33, ¶ 2476 (footnotes omitted).

pire,”⁴⁰ so that controversies between citizens and officers of their government may be resolved based on the law. For that limited task, a federal judge is granted a privilege designed to secure his independence: life tenure with no reduction in salary.⁴¹

An officer of a political branch is free to propose changes in the law that conform to his perspective of morality, as informed by his religion. For centuries, members of Congress have supported a variety of new morality-based laws concerning whether to abolish slavery, withdraw troops from foreign wars, abolish child labor, guarantee civil rights, provide assistance to the poor and sick, protect marriage, and prohibit the sale of intoxicating liquors. The changing of laws enacted by political authorities is not a judge’s task; the duty of a judge is the application of those laws in controversies within the jurisdiction of the courts.

I do not mean to suggest that the task of judging is either mechanical or easy. The meaning and application of the law is sometimes difficult to discern, which is why judges in good faith sometimes disagree. The duty to administer justice requires the exercise of judgment, but not the employment of religious doctrine as a source of authority to supplant or evade the law when judging becomes difficult or a decision’s outcome may be undesirable. A judge who is motivated by moral duties to fulfill his oath and obey the law must strive to be as objective as possible using traditional methods of construction, reliance on precedent, and legal reasoning.

This limited understanding of the judicial role has served our nation well for more than two centuries. It has allowed the judiciary, as a separate branch, to perform, when necessary, its vital role of demanding compliance with the Constitution. In short, the rule of law that flows from the separation of powers has preserved our freedom.

With that understanding of my moral and legal duties in mind, I will relate my experience as the attorney general of Alabama to illustrate how my understanding of these duties guided me. In the days following the removal of his monument

40. *Confirmation Hearing on the Nomination of John G. Roberts, Jr. To Be Chief Justice of the United States Before the S. Comm. on the Judiciary*, 109th Cong. 55 (2005) (statement of John G. Roberts, Jr.).

41. See U.S. CONST. art. III, § 1.

of the Ten Commandments, Chief Justice Moore and his most prominent supporters advanced three arguments against those of us who complied with the federal injunction. They argued, first, that we had a moral duty to acknowledge God that required us to disobey the injunction.⁴² Second, as they surrounded the State Judicial Building with the hope of preventing the removal of the monument, Chief Justice Moore's supporters compared their struggle with that of the civil rights movement led by Dr. Martin Luther King, Jr.⁴³ In turn, they compared those of us who complied with the federal injunction to the defenders of racial segregation. Finally, Chief Justice Moore argued that we had a duty to disobey the injunction, just as we would have had a duty to disobey an injunction that allowed slavery.⁴⁴

42. See Sallie Owen & Karen Tolkinen, *The Monument is Moved Away*, MOBILE REG. (Ala.), Aug. 28, 2003, at 1A (quoting Chief Justice Roy Moore as saying, "I am profoundly disappointed with our governor, our attorney general and the associate justices of the Alabama Supreme Court who have allowed the basis of our justice system to be undermined by a federal judge who says that we cannot acknowledge God"). One of Chief Justice Moore's leading supporters even compared the Senior Associate Justice of the Supreme Court of Alabama, Gorman Houston, Jr., to Judas, the betrayer of Jesus. See Todd Kleffman, *Moore Won't Move Display*, MONTGOMERY ADVERTISER (Ala.), Aug. 15, 2003, at 1A ("The Rev. Rick Scarborough likened Houston to Judas. 'I wonder if Houston kissed him on the way out the door,' Scarborough said."); see also Alvin Benn & Jannell McGrew, *Lack of Support Stuns Visitors*, MONTGOMERY ADVERTISER (Ala.), Aug. 23, 2003, at 1A. Both Justice Houston's son, a Methodist minister, and Justice Houston's pastor objected to religious criticisms mounted against Justice Houston, who serves as a Sunday school teacher and keeps a prayer kneeler in his office. See Sallie Owen & Kristen Campbell, *Supreme Court Justice Sought Son's Counsel*, MOBILE REG. (Ala.), Aug. 22, 2003, at 4A.

43. Stan Bailey, *Capitol Rally: Thousands Show Support for Commandments Monument*, BIRMINGHAM NEWS (Ala.), Aug. 17, 2003, at 15A ("[The Rev. Rick] Scarborough; the Rev. Jerry Falwell of Lynchburg, Va; former U.N. diplomat Alan Keyes and other speakers compared the battle for public display of the Ten Commandments to the civil rights movement that began here nearly five decades ago. They compared Moore's role to that of the Rev. Martin Luther King Jr."). On this issue, Chief Justice Moore was equivocal. Compare Stan Bailey, *Justices Overrule Moore; Monument Ordered Out*, BIRMINGHAM NEWS (Ala.), Aug. 22, 2003, at 1A (quoting Chief Justice Moore as saying that the example of Dr. Martin Luther King "is proof enough that great men do follow the rule of law and not the rule of man"), with Roy S. Moore, Op-Ed., *In God I Trust*, WALL ST. J., Aug. 25, 2003, at A10 ("My decision to disregard the unlawful order of the federal judge was not civil disobedience, but the lawful response of the highest judicial officer of the state to his oath of office.").

44. See Richard Land, *FIRST PERSON: Commandments Controversy: Two Issues, Not One*, BAPTIST PRESS, Aug. 25, 2003, <http://www.bpnews.net/bpnews.asp?ID=16553> (quoting Moore as saying, "I hear others talk of a rule of

I disagreed with Chief Justice Moore.⁴⁵ I argued that I had a moral duty, as a Christian, to obey the federal injunction. There was no moral justification for civil disobedience. My oath to uphold the U.S. Constitution required me, as attorney general of Alabama, to obey the injunction without regard to whether I agreed with the basis for that injunction. My moral duty was not in conflict or even in tension with my legal duty. Instead, my Christian duty provided the foundation for my public duty.

During the controversy, I explained that the Christian duty to obey the government and its laws is clearly expressed in the New Testament. In Saint Matthew's Gospel, Jesus gave a provocative lesson about the moral duty to obey the government: "Then give to Caesar what is Caesar's, but give to God what is God's."⁴⁶ In his Epistle to the Romans, the Apostle Paul taught, "Let every person be subordinate to the higher authorities, for there is no authority except from God, and those that exist have been established by God."⁴⁷ And in his first Epistle, Peter wrote, "Be subject to every human institution for the Lord's sake, whether it be to the king as supreme or to governors as sent by him for the punishment of evildoers and the approval of those who do good."⁴⁸

During the several years that I served as attorney general, I defended the constitutionality of depicting the Ten Commandments in a courthouse.⁴⁹ I assisted Governor Bob Riley in creating a display of several foundations of our law, including the Ten Commandments, in the old Supreme Court library of the State Capitol.⁵⁰ I also publicly agreed with the opinion written by the late Chief Justice Rehnquist that the Ten Commandments "have made a substantial contribution to our secular legal codes."⁵¹

law. If the rule of law means to do everything a judge tells you to do, we would still have slavery in this country.").

45. See Pryor, *Christian Duty*, *supra* note *, at 3.

46. *Matthew* 22:21 (New American Bible).

47. *Romans* 13:1 (New American Bible).

48. 1 *Peter* 2:13–14 (New American Bible).

49. See *State ex rel. James v. ACLU of Ala.*, 711 So. 2d 952 (Ala. 1998); Brief for the State of Alabama et al. as Amici Curiae, in Support of Petition for a Writ of Certiorari, *City of Elkhart v. Books*, 532 U.S. 1058 (2001) (No. 00-1407); Bill Pryor, Op-Ed., *Religious Display Proper*, USA TODAY, Apr. 11, 1997, at 14A.

50. See Stan Bailey, *Commandments Plaque Put on Display by Riley*, BIRMINGHAM NEWS (Ala.), Sept. 10, 2003, at 1A.

51. *City of Elkhart*, 532 U.S. at 1061 (Rehnquist, C.J., dissenting from denial of certiorari); Pryor, *Christian Duty*, *supra* note *, at 6; see also *Stone v. Graham*, 449 U.S. 39,

Nevertheless, in the controversy about Chief Justice Moore, I was both morally and legally obliged to obey the injunction of the federal court. My legal duty to ensure removal of the monument of the Ten Commandments from the courthouse did not require me or any other official to violate a moral duty. Christ did not command anyone to maintain a monument of the Ten Commandments in the rotunda of a courthouse. The legality of a monument in the rotunda of Caesar's courthouse is a question for Caesar.

What about the second accusation? Did compliance with the injunction violate the civil rights of Christians? Were the protesters outside the State Judicial Building engaged in rightful civil disobedience? Was Chief Justice Moore the new Dr. King, and I the modern day Bull Connor? The writings of Dr. King suggest the contrary. The authoritative text on this issue is the letter written by Dr. King from the Birmingham City Jail on Easter weekend 1963.⁵² The letter was addressed to liberal white clergy of Birmingham who opposed segregation but did not support Dr. King's nonviolent protests against racial discrimination. The white religious leaders argued that, as a Christian, Dr. King had a duty to obey the government.⁵³

Dr. King responded that he was not obliged to obey an immoral or unjust law. He argued, based on the writings of Saint Augustine and Saint Thomas Aquinas, that "[a]n unjust law is a human law that is not rooted in eternal law and natural law."⁵⁴ Dr. King contended that "segregation statutes are unjust because

45 (1980) (per curiam) (Rehnquist, J., dissenting) ("It is equally undeniable . . . that the Ten Commandments have had a significant impact on the development of secular legal codes of the Western World."); *Freethought Soc'y of Greater Phila. v. Chester County*, 334 F.3d 247 (3d Cir. 2003) (upholding display of Ten Commandments in a county courthouse); *King v. Richmond County*, 331 F.3d 1271 (11th Cir. 2003) (upholding depiction of Ten Commandments in official seal of county court); *Anderson v. Salt Lake City Corp.*, 475 F.2d 29 (10th Cir. 1973) (upholding display of Ten Commandments monument at entrance of city-county courthouse); *State v. Freedom from Religion Found., Inc.*, 898 P.2d 1013 (Colo. 1995) (en banc) (upholding Ten Commandments monument on grounds of State Capitol).

52. MARTIN LUTHER KING, JR., *Letter from Birmingham Jail*, in *WHY WE CAN'T WAIT* 77 (1963).

53. For an excellent recounting of the history of this letter and the controversy, see TAYLOR BRANCH, *PARTING THE WATERS: AMERICA IN THE KING YEARS 1954-63*, at 737-45 (1988).

54. KING, *supra* note 52, at 85.

segregation distorts the soul and damages the personality.”⁵⁵ He explained, “A law is unjust if it is inflicted on a minority that, as a result of being denied the right to vote, had no part in enacting or devising the law.”⁵⁶ He concluded that a law is unjust when it is used “to deny citizens the First-Amendment privilege of peaceful assembly and protest.”⁵⁷ Dr. King’s case was that segregation treated black persons as though they were less than citizens and gave them no political recourse with which to remedy their injury.

Dr. King then explained the difference between unjust defiance and just civil disobedience. He wrote,

In no sense do I advocate evading or defying the law, as would the rabid segregationist. That would lead to anarchy. One who breaks an unjust law must do so openly, lovingly, and with a willingness to accept the penalty. I submit that an individual who breaks a law that conscience tells him is unjust, and who willingly accepts the penalty of imprisonment in order to arouse the conscience of the community over its injustice, is in reality expressing the highest respect for law.⁵⁸

Dr. King’s letter belies any comparison of the civil rights protests of 1963 in Birmingham and the 2003 protests of Chief Justice Moore and his supporters in Montgomery. The injunction to remove the monument did not distort the Christian soul or personality because Christianity is not dependent upon the presence of a monument in a government building. The injunction did not represent a government denial of political recourse for Christians; Christians still enjoy the constitutional rights to vote, hold office, speak, exercise their faith, and assemble. Indeed, the election of Chief Justice Moore and the peaceful protests for two weeks outside the State Judicial Building, complete with extensive freedom of the press, illustrated the vitality of the civil rights of Christians.

The most fundamental distinction between Dr. King’s example and Chief Justice Moore’s example is the difference between defiance of the law and civil disobedience. Dr. King expected the law he called unjust to be enforced against him, but Chief Justice

55. *Id.*

56. *Id.* at 85–86.

57. *Id.* at 86.

58. *Id.*

Moore and his supporters said that they expected our state officials not to enforce the injunction. Dr. King was a private citizen who, in his words, “lovingly” accepted the punishment of an unjust law, but Chief Justice Moore was a public official who refused to obey the law and sought to evade any punishment or responsibility for his actions. A private citizen may, in extreme circumstances, engage in civil disobedience and accept the punishment of an unjust law, but a public official has no such option. A public official is sworn to uphold the law.

Perhaps the greatest irony was the reaction of Chief Justice Moore’s supporters following the removal of the monument from the rotunda. When we complied with the injunction, the supporters of Chief Justice Moore called on me to resign.⁵⁹ As a public official, if I am ever *unable* to fulfill my oath and obey the law, then I should resign.

The duty of a public official brings me to my response to Chief Justice Moore’s final contention: that we were obliged to disobey the injunction in the same way that we would be obliged to disobey an order allowing slavery. After the associate justices unanimously ordered the building manager to comply with the injunction, Chief Justice Moore said, “If the rule of law means to do everything a judge tells you to do, we would still have slavery in this country.”⁶⁰ This assertion is contrary to the American history of the abolition of slavery, especially the example set by the Great Emancipator, Abraham Lincoln.

An infamous decision of the Supreme Court, of course, promoted slavery. In 1857, the Supreme Court ruled in *Dred Scott v. Sandford*⁶¹ that the Missouri Compromise, which prohibited slavery in Western territories, was unconstitutional and that blacks were not citizens. Abraham Lincoln argued that *Dred Scott* was wrongly decided and must be opposed.

But Lincoln’s perspective about the proper response to *Dred Scott* is instructive. In October 1858, Lincoln explained, in one of his famous debates with Stephen Douglas,

59. See Bob Jones, *Pryor Commitment*, WORLD MAG., Sept. 13, 2003, at 14; Bill Rankin, *Commandments Stand Costs Pryor*, ATLANTA J. & CONST., Aug. 31, 2003, at A1.

60. Land, *supra* note 44.

61. 60 U.S. (19 How.) 393 (1857).

We oppose the Dred Scott decision in a certain way We do not propose that when Dred Scott has been decided to be a slave by the court, we, as a mob, will decide him to be free. We do not propose that, when any other one, or one thousand, shall be decided by that court to be slaves, we will in any violent way disturb the rights of property thus settled; but we nevertheless do oppose that decision as a political rule which shall be binding on the voter, to vote for nobody who thinks it wrong, which shall be binding on the members of Congress or the President to favor no measure that does not actually concur with the principles of that decision. . . . We propose so resisting it as to have it reversed if we can, and a new judicial rule established upon this subject.⁶²

Lincoln explained that there were two ways of opposing a decision of a court allowing slavery. One method of opposition was illegitimate and to be avoided. The other method of opposition was legitimate and necessary.

The illegitimate opposition was defiance of a final order of a court. Lincoln recognized that Article III of the Constitution created a federal judiciary to resolve disputes, particularly those involving the interpretation of the Constitution. In Lincoln's view, upon the resolution of their dispute, the parties to the lawsuit were obliged to follow the orders of the court, and nonparties were obliged to respect the resolution of that dispute. Public officials sworn to uphold the constitutional framework for resolving disputes were obliged to enforce the final orders of the judicial process as between the parties, without regard to the public officials' opinion of the correctness of the ruling.

The legitimate method of opposition, according to Lincoln, was political. Voters should support candidates who would work to end slavery. Elected representatives should enact laws to end slavery. And the judiciary should, in proper cases, reverse its erroneous decisions that promoted slavery.

Lincoln also supported another more provocative method of opposition. Lincoln refused to allow the *Dred Scott* decision to bind his administration. For example, Lincoln required his administration to issue a passport to a black student and a patent

62. Abraham Lincoln, Speech at the Sixth Debate with Stephen A. Douglas, at Quincy, Illinois (Oct. 13, 1858), in 3 THE COLLECTED WORKS OF ABRAHAM LINCOLN 245, 255 (Roy P. Basler ed., 1953).

to a black inventor.⁶³ Lincoln supported government policies that challenged the continued application of *Dred Scott* because he considered those policies constitutional notwithstanding the erroneous precedent established in *Dred Scott*. As Lincoln explained in his inaugural address,

[T]he candid citizen must confess that if the policy of the government, upon vital questions, affecting the whole people, is to be irrevocably fixed by decisions of the Supreme Court, the instant they are made, in ordinary litigation between parties, in personal actions, the people will have ceased, to be their own rulers, having, to that extent, practically resigned their government, into the hands of that eminent tribunal.⁶⁴

When the judiciary interprets the Constitution erroneously, the American people can exercise many of the lawful tools of political opposition that President Lincoln employed. The American people can campaign for different policies. The American people can elect candidates who will enact their favored policies. Elected officials can appoint judges faithful to the rule of law. The American people can bring new cases before the courts and urge the overruling of erroneous precedents. If necessary, the American people can even amend the Constitution. Defiance of the law, however, is not a remedy under the Constitution.

Contrary to Chief Justice Moore's arguments, slavery did not end through the defiance of an injunction by a public official. Slavery was abolished, following our bloody civil war, with the adoption of the Thirteenth Amendment to the Constitution. The rebellion of the southern states set the wrong example of defiance.

Many might say, and I would agree, that it is easy to see why Chief Justice Moore was wrong to take the law into his own hands. Because our liberty depends on the rule of law, we are all bound to obey even when we disagree with the decisions of our courts. As

63. See *Passports for Colored Citizens*, in 5 THE WORKS OF CHARLES SUMNER 497–98 (1872); *Denial of Patents to Colored Inventors*, in 6 THE WORKS OF CHARLES SUMNER 144 (1872).

64. Abraham Lincoln, First Inaugural Address (Mar. 4, 1861), in 4 THE COLLECTED WORKS OF ABRAHAM LINCOLN 262, 268 (Roy P. Basler ed., 1953).

Saint Thomas More said, “The law, Roper, the law. I know what’s legal not what’s right. And I’ll stick to what’s legal.”⁶⁵

But the controversy surrounding Chief Justice Moore raises another question: What about those who applaud or publish glowing editorials when other judges place their own different notions of morality above the law? That wrong can be done from either the right, as in the case of Chief Justice Moore, or the left. The law is not a mirror that will always reflect our individual notions of right and wrong. For courts, questions about morality, including issues like the death penalty, marriage, and family, are to be resolved based on the law, not based on what a majority of lawyers or judges thinks the law should be. Legislators and voters may change the law and be informed by morality in that endeavor, but none of us has the authority to defy or subvert the law in the name of morality.

Faced with a conflict of law and morality, we should follow the example of Saint Thomas More, who resigned as Lord Chancellor after King Henry VIII left his wife, Catherine, for relations with Anne Boleyn, and the clergy surrendered the property of the Church in England to the King. When the English Parliament passed the Act of Succession, which made Anne Boleyn’s issue first in succession to the Crown, Saint Thomas More said he would swear to the succession for it was the law of the land, but he refused to declare the supremacy of the King over the Church. Saint Thomas More recognized clearly his duty to render to God what belongs to Him, while rendering to Caesar what belongs to him.⁶⁶ In his devotion to duty, Saint Thomas More paid the ultimate price. As More succinctly explained a moment before his execution, he “died the King’s good servant and God’s first.”⁶⁷

Saint Thomas More lovingly accepted the punishment of an unjust law, just as Dr. King did centuries later in America. Both Saint Thomas More and Dr. King rejected the path of defiance, evasion, and subversion of the law. They recognized that such

65. BOLT, *supra* note 1, at 65.

66. See *Matthew* 22:18–22.

67. JOHN FARROW, *THE STORY OF THOMAS MORE* 241 (1954); see also Matthew Mehan, *Getting to Know Thomas More*, NAT’L REV. ONLINE, Aug. 25, 2005, <http://www.nationalreview.com/comment/mehan200508250824.asp>.

a path would lead, in Dr. King's words, to "anarchy," when moral duty instead requires "the highest respect for the law."⁶⁸

Those who would, like William Roper or Chief Justice Moore, cut down the law to get after the Devil risk falling into his trap. When the Devil turns around, where will they hide, the laws all being flat? For me, I will strive to follow Saint Thomas More's example and give even the Devil the benefit of law for my own safety's sake.

68. KING, *supra* note 52, at 86.

NATURAL LAW

ROBERT P. GEORGE*

Oliver Wendell Holmes, the legal philosopher and judge whom Richard Posner has, with admiration, dubbed “the American Nietzsche,”¹ established in the minds of many people a certain image of what natural law theories are theories of, and a certain set of reasons for supposing that such theories are misguided and even ridiculous. While I have my own reasons for admiring some of Holmes’s work—despite, rather than because of, the Nietzscheanism that endears him to Judge Posner—I think that everything Holmes thought and taught about natural law is wrong. I have elsewhere set forth a detailed critique of Holmes’s thought,² which I will not repeat here. Rather, this Article offers a constructive account of what natural law theories are in fact theories of, explains why the idea of natural law and natural rights is far more plausible than people influenced by Holmes have supposed, and shows how natural law theories are similar to and different from leading compet-

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1. Richard A. Posner, *Introduction* to *THE ESSENTIAL HOLMES: SELECTIONS FROM THE LETTERS, SPEECHES, JUDICIAL OPINIONS, AND OTHER WRITINGS OF OLIVER WENDELL HOLMES, JR.*, at xxviii (Richard A. Posner ed., 1992) (citing his comparison of the two in *RICHARD A. POSNER, THE PROBLEMS OF JURISPRUDENCE* 239–42 (1990)).

2. See Robert P. George, *Holmes on Natural Law*, in *NATURE IN AMERICAN PHILOSOPHY* 127 (Jean De Groot ed., 2004).

ing accounts of practical reasoning and of moral judgments that provide the justificatory basis of positive law as well as standards for its critical evaluation.

Theories of natural law are reflective critical accounts of the constitutive aspects of the well-being and fulfillment of human persons and the communities they form. The propositions that pick out fundamental aspects of human flourishing are directive (that is, prescriptive) in our thinking about what to do and refrain from doing (our practical reason)—they are, or provide, more than merely instrumental reasons for action and self-restraint. When these foundational principles of practical reflection are taken together (that is, integrally), they entail norms that may exclude certain options and require other options in situations of morally significant choosing. Natural law theories, then, propose to identify principles of right action—moral principles—specifying the first and most general principle of morality, namely, that one should choose and act in ways that are compatible with a will towards integral human fulfillment.³ Among these principles is a respect for rights people possess simply by virtue of their humanity—rights which, as a matter of justice, others are bound to respect and governments are bound not only to respect but, to the extent possible, also to protect.

Theorists of natural law understand human fulfillment—the human good—as variegated. There are many irreducible dimensions of human well-being. This is not to deny that human nature is determinate. It is to affirm that our nature, though determinate, is complex. We are animals, but rational. Our integral good includes our bodily well-being, but also our intellectual, moral, and spiritual well-being. We are individuals, but friendship and sociability are constitutive aspects of our flourishing. We form bonds with others not only for instrumental purposes, but because of our grasp of the inherent fulfillments available in joining together in a wide variety of formal and informal types of association and community. In ways that are highly relevant to moral reflection and judgment, man truly is a social animal.

3. On the first principle of morality and its specifications, see JOHN FINNIS, JOSEPH M. BOYLE, JR. & GERMAIN GRISEZ, *NUCLEAR DETERRENCE, MORALITY AND REALISM* 281–87 (1987).

By reflecting on the basic goods of human nature, especially those most immediately pertaining to social and political life, natural law theorists propose to arrive at a sound understanding of principles of justice, including those principles we call human rights. In light of what I have already said about how natural law theorists understand human nature and the human good, it should be no surprise that natural law theorists typically reject both strict individualism and collectivism.

Individualism overlooks the intrinsic value of human sociability and tends to view human beings atomistically. It reduces all forms of human association to the instrumental value they possess. To criticize this reductionism is not to deny that some forms of association are indeed purely instrumentally valuable or that virtually all forms of human association have instrumental value in addition to whatever intrinsic value they may have, but instead to remember that sociability is an intrinsic aspect of human well-being and fulfillment.

Similarly, collectivism compromises the dignity of human beings by tending to instrumentalize and subordinate their well-being to the interests of larger social units. It reduces the individual to the status of a cog in the wheel whose flourishing is merely a means rather than an end to which other things—such as government, systems of public and private law, and other institutions created by members of human communities for the sake of their common good—however noble and important (or, to use Aristotle's description, "great and god-like"⁴), are ultimately merely means.

Individualists and collectivists both have theories of justice and human rights, but they are highly unsatisfactory. They are rooted in grave misunderstandings of human nature and the human good. Neither can do justice to the concept of a human *person*—that is, a rational animal who is a locus of intrinsic value (and, as such, an end-in-himself who may never legitimately be treated as a mere means to others' ends), but whose well-being *intrinsically* includes relationships with others and membership in formal and informal communities in which he or she has, as a matter of justice, both rights and responsibilities.

4. ARISTOTLE, NICOMACHEAN ETHICS 1094b10.

I am sometimes asked whether natural law theorists suppose that rights are “hard-wired into our nature.” Unfortunately, this metaphor is more likely to mislead than to illuminate. There are human rights if there are principles of practical reason directing us to act or abstain from acting in certain ways out of respect for the well-being and the dignity of persons whose legitimate interests may be affected by what we do. I certainly believe that there are such principles. They cannot be overridden by considerations of utility. (So a complete defense of any account of natural law and natural rights must include a telling critique of utilitarian and other consequentialist or aggregative accounts of moral reasoning.)⁵ At a very general level, they direct us, in Kant’s phrase, to treat human beings always as ends and never as means only. When we begin to specify this general norm, we identify important negative duties, such as the duty to refrain from enslaving people.

Although we *need* not put the matter in terms of “rights,” it is perfectly reasonable, and I believe helpful, to speak of a *right* against being enslaved, and to speak of slavery as a violation of human *rights*. It is a moral right that people have—one that every community is morally obliged to protect by law—not by virtue of being members of a certain race, sex, class, or ethnic group, but simply by virtue of our humanity.⁶ In that sense, it is a *human* right. But there are, in addition to negative duties and their corresponding rights, certain positive duties. We can articulate these too in the language of rights, though here it is especially important that we be clear about by whom and how a given right is to be honored. Some say, for example, that education or health care is a human right. It is not unreasonable to speak this way, but much more needs to be said if it is

5. For such a critique by an eminent contemporary theorist of natural law, see JOHN FINNIS, *FUNDAMENTALS OF ETHICS* 80–108 (1983).

6. By the phrase “our humanity,” I refer more precisely to the nature of humans as rational beings. The nature of human beings is a rational nature. So in virtue of our human nature, we human beings possess a profound and inherent dignity. The same would be true, however, of beings other than humans whose nature is a rational nature, if indeed there are such beings. In the case of humans, even individuals who have not yet acquired the immediately exercisable capacities for conceptual thought and other rational acts, and even those who have temporarily or permanently lost them, and, indeed, even those who do not possess them, never possessed them, and (short of a miracle) never will possess them, possess a rational nature.

to be a meaningful statement. Who is supposed to provide education or health care to whom? Why should those persons or institutions be the providers? What place should the provision of education or health care occupy on the list of social and political priorities? Is it better for education and health care to be provided by governments under socialized systems or by private providers in markets? These questions go beyond the application of moral principles. They require technical (for example, economic) and prudential judgments, including judgments of the sort that can vary depending on contingent circumstances people face in a given society at a given point in time. There is rarely a single, uniquely correct answer. The answer to each question, moreover, can lead to further questions, and the problems can be extremely complex, far more complex than, for example, the issue of slavery, in which once a right has been identified its universality and the basic terms of its application are fairly clear. Everybody has a moral right not to be enslaved, and everybody an obligation as a matter of strict justice to refrain from enslaving others; governments have a moral obligation to respect and protect the right and, correspondingly, to enforce the obligation.⁷

The discussion thus far provides an idea of how we ought to go about identifying human rights. The argument must be made with regard to each putative right, however, and in many cases complexities arise. For example, one basic human right that almost all natural law theorists would recognize is the right of an innocent person not to be directly killed or maimed (including by torture). This is a right that is violated when someone makes the death or injury of another person the

7. Having said this, I do not want to suggest a sharper difference than can be justified between positive and negative rights. Even in the case of negative rights, it is sometimes relevant to ask how a right should be honored and who, if anyone, has particular responsibility for protecting it. Moreover, it can be the case that there is not a uniquely correct answer to questions about what place the protection of the right should occupy on the list of social priorities. Consider, for example, the right not to be subjected to assault or battery. Although it is obvious that individuals have an obligation to respect this right, and equally obvious that governments have an obligation to protect persons within their jurisdiction from those who would violate it, different communities reasonably differ not only as to the means or mix of means that are used to protect persons from assault and battery, but also as to the level of resources they allocate to protect people against violations of the right. I am grateful to Allen Buchanan for this point.

precise object of his action. It is the right that grounds the norm against targeting non-combatants, even in justified wars, and against abortion, euthanasia, the killing of hostages, and the torturing of prisoners, even for the sake of preventing disasters. When we examine these norms individually, however, complexities emerge. In the case of abortion, some argue that human beings in the embryonic or fetal stages of development do not yet qualify as persons and so do not possess human rights. Similarly, in the case of euthanasia, some argue that permanently comatose or severely retarded or demented people do not (or no longer) qualify as rights-bearers. I think that these claims are mistaken,⁸ but for present purposes I will say only that people who do not share with me the conviction that human beings in early stages of development and in severely debilitated conditions are rights-bearers may nevertheless agree that *whoever* qualifies as a person is protected by the norm against direct killing of the innocent.

This natural law understanding of human rights is connected with a particular account of human dignity. Under this account, the natural human capacities for reason and freedom are fundamental to the dignity of human beings—the dignity that is protected by human rights. The basic goods of human nature are the goods of a rational creature—a creature who, unless impaired or prevented from doing so, naturally develops and exercises capacities for deliberation, judgment, and choice. These capacities are God-like (albeit, of course, in a limited way). In fact, from the theological vantage point they constitute a certain sharing—limited, to be sure, but real—in divine power. This is what is meant, I believe, by the otherwise extraordinarily puzzling Biblical teaching that man is made in the very image and likeness of God.⁹

Whether or not one recognizes Biblical authority or believes in a personal God, however, human beings possess a power traditionally ascribed to divinity—namely, the quite literally

8. For a more detailed explanation of the reasons for holding that the moral status of a human being does not depend on his age, size, stage of development, or condition of dependency, see ROBERT P. GEORGE & CHRISTOPHER TOLLEFSEN, *EMBRYO: A DEFENSE OF HUMAN LIFE* (forthcoming 2008).

9. See *Genesis* 1:26 (New International Version) (“Then God said, ‘Let us make man in our image, in our likeness . . .’”).

awe-inspiring power to be an uncaused causing. This is the power to envisage a possible state of affairs, to grasp the value of bringing it into being, and then to act by choice (not merely by impulse or instinct) to bring it into being. That state of affairs may be anything from the development of an intellectual skill or the attainment of an item of knowledge, to the creation or critical appreciation of a work of art, to the establishment of marital communion. Its moral or cultural significance may be great or—as is far more common—quite minor. What matters is that it is a product of human reason and freedom. It is the fruit of deliberation, judgment, and choice. We may, if we like, consider as a further matter whether beings capable of such powers could exist apart from a divine source and ground of their being. I do not, however, think it makes sense to say that beings whose nature is to develop and exercise such powers are lacking in dignity and rights and may therefore be treated as mere objects, instruments, or property. On this point, I share common ground with my atheist colleague and friend Jeffrey Stout, who argues on something closely akin to this basis that unbelievers, too, can affirm human dignity and fundamental human rights.¹⁰

Now, what about the authority for this view of human nature, the human good, human dignity, and human rights? Natural law theorists are interested in the intelligible *reasons* people have for their choices and actions. We are particularly interested in reasons that can be identified without appeal to any authority apart from the authority of reason itself. This is not to deny that it is often reasonable to recognize and submit to religious or secular (for example, legal) authority in deciding what to do and not do. Indeed, natural law theorists such as Yves Simon have made important contributions to understanding why and how people can sometimes be morally bound to submit to, and be guided in their actions by, authority of vari-

10. Professor Stout made this point most clearly at a conference at Princeton University in 2003. See Jeffrey Stout, Comment on Secularism, Law and Public Policy at the James Madison Program in American Ideals and Institutions Conference on Faith and the Challenges of Secularism (Oct. 11, 2003), *available at* <http://web.princeton.edu/sites/jmadison/calendar/video/Faith%20&%20Challenges.html>; see also Jeffrey Stout, *Truth, Natural Law, and Ethical Theory*, in *NATURAL LAW THEORY: CONTEMPORARY ESSAYS* 71 (Robert P. George ed., 1992).

ous types.¹¹ Even here, however, the special concern of natural law theorists is with the *reasons* people have for recognizing and honoring claims to authority. We do not simply appeal to authority to justify authority.

One might then ask whether human beings are in fact rational. Can we discern any intelligible reasons for human choices and actions? Everyone recognizes that some ends or purposes pursued through human action are intelligible at least insofar as they provide means to other ends. For example, people work to earn money, and their doing so is perfectly rational. Money is a valuable means to a great many important ends. No one doubts its instrumental value. Even skeptics do not deny that there are instrumental goods. The question, rather, is whether some ends or purposes are intelligible as providing *more than merely instrumental* reasons for acting. Are there intrinsic, as well as instrumental, goods? Skeptics deny that there are intelligible ends or purposes that make possible rationally *motivated* action. Natural law theorists, by contrast, hold that friendship, knowledge, virtue, aesthetic appreciation, and certain other ends or purposes are intrinsically valuable.¹² They are intelligibly “choice worthy,” not simply as means to other ends, but as ends-in-themselves. They cannot be reduced to—nor can their intelligible appeal be accounted for exclusively in terms of—emotion, feeling, desire, or other subrational motivating factors. These basic human goods are constitutive aspects of the well-being and fulfillment of human persons and the communities they form, and they thereby provide the foundations of moral judgments, including our judgments pertaining to justice and human rights.

Of course, there are many today who embrace philosophical or ideological doctrines that deny the human capacities I maintain are at the core of human dignity. They adopt a purely instrumental and essentially non-cognitivist view of practical reason—for example, Hume’s view that reason is nothing more than “the slave of the passions”¹³—and argue that the human

11. YVES R. SIMON, *A GENERAL THEORY OF AUTHORITY* (1962).

12. See, e.g., JOHN FINNIS, *NATURAL LAW AND NATURAL RIGHTS* 59–127 (2d prt. 1982).

13. DAVID HUME, *A TREATISE OF HUMAN NATURE*, bk. II, pt. III, § III, at 415 (Clarendon Press 1888) (1739).

experience of deliberation, judgment, and choice is illusory. The ends people pursue, they insist, are ultimately given by nonrational motivating factors, such as feeling, emotion, or desire. "[T]he thoughts are to the desires," Hobbes has taught them to suppose, "as scouts and spies, to range abroad and find the way to the things desired."¹⁴ Truly rationally motivated action is impossible for creatures like us. There are no more-than-merely-instrumental reasons for action—no basic human goods.

If proponents of this non-cognitivist and subjectivist view of human action are right, then the entire business of ethics is a charade and human dignity is a myth. But I do not think they are right. Indeed, they cannot give any account of the norms of rationality to which they must appeal in attempting to make a case against reason and freedom that is consistent with the denial that people are capable of more-than-merely-instrumental rationality and true freedom of choice. Germain Grisez and Joseph Boyle, together with the late Olaf Tollefsen, make a powerful argument along these lines against skepticism and the denial of free will in a book entitled *Free Choice: A Self-Referential Argument*.¹⁵ They, and I, do not deny that emotion figures in human action; it does, and on many occasions it (or other subrational factors) does the main work of motivation. We hold that people can have, and often do have, basic reasons for their actions—reasons provided by ends they understand as humanly fulfilling *and desire precisely as such*. These ends, too, figure in motivation.¹⁶

14. THOMAS HOBBS, *LEVIATHAN*, pt. 1, ch. viii, at 41 (Edwin Curley ed., Hackett Publ'g Co. 1994) (1651).

15. JOSEPH M. BOYLE, JR., GERMAIN GRISEZ & OLAF TOLLEFSEN, *FREE CHOICE: A SELF-REFERENTIAL ARGUMENT* (1976).

16. See, e.g., Christine M. Korsgaard, *The Normativity of Instrumental Reason*, in *ETHICS AND PRACTICAL REASON* 215 (Garrett Cullity & Berys Gaut eds., 1997). Although she identifies herself with the Kantian (rather than the Aristotelian) tradition in ethics, the distinguished Harvard moral philosopher Christine Korsgaard makes a similar point when she argues that there can be no true practical rationality—not even an instrumentalist one composed of hypothetical imperatives—unless there are "some rational principles determining which ends are worthy of preference or pursuit," *id.* at 230, some "normative principles directing us to the adoption of certain ends," *id.* at 220, and "*something* which gives normative status to our ends," *id.* at 250, by providing (what she describes as) "unconditional reasons for having certain ends, and, it seems, unconditional principles from which those reasons are derived," *id.* at 252.

Now, if I am correct in affirming that human reason can identify human rights as genuine grounds of obligation to others, rights which people possess as a matter of natural law (what have been termed "natural rights"), how can we explain or understand widespread failures to recognize and respect human rights and other moral principles? As human beings, we are rational animals, but we are imperfectly rational. We are prone to making intellectual and moral mistakes and capable of behaving grossly unreasonably, especially when deflected by powerful emotions that run contrary to the demands of reasonableness. Even when following our consciences, as we are morally bound to do, we can go wrong. A conscientious judgment may nevertheless be erroneous. Some of the greatest thinkers who ever lived failed to recognize the human right to religious liberty. Their failure, I believe, was rooted in a set of intellectual errors about what such a right presupposes and entails. The people who made these errors were neither fools nor knaves. The errors were not obvious, and it was only with a great deal of reflection and debate that the matter was clarified.

Of course, sometimes people fail to recognize and respect human rights because they have self-interested motives for doing so. In most cases of exploitation, for example, the fundamental failing is moral, not intellectual. In some cases, though, intellectual and moral failures are closely connected. Selfishness, prejudice, partisanship, vanity, avarice, lust, ill-will, and other moral delinquencies can, in ways that are sometimes quite subtle, impede sound ethical judgments, including judgments pertaining to human rights. Whole cultures or subcultures can be infected with moral failings that blind large numbers of people to truths about justice and human rights, and ideologies hostile to these truths will almost always be both causes and effects of these failings. Consider, for example, the case of slavery in the antebellum American South. The ideology of white supremacy was both a cause of many people's blindness to the wickedness of slavery, and an effect of the exploitation and degradation of its victims.

Let us now turn in a more focused way to the question of God and religious faith in natural law theory. Most, but not all, natural law theorists are theists. They believe that the moral order, like every other order in human experience, is what it is because God creates and sustains it as such. In accounting for

the intelligibility of the created order, they infer the existence of a free and creative intelligence—a personal God. Indeed, they typically argue that God’s creative free choice ultimately provides the only satisfactory account of the existence of the intelligibilities humans grasp in every domain of inquiry.

Natural law theorists do not deny that God can reveal moral truths, and most believe that God has chosen to reveal many such truths. Natural law theorists, however, also affirm that many moral truths, including some that are revealed, can also be grasped by ethical reflection apart from revelation. They assert, with St. Paul, that there is a law “written [on the] hearts” even of the Gentiles who did not know the law of Moses¹⁷—a law the knowledge of which is sufficient for moral accountability. So the basic norms against murder and theft, for example, though revealed in the Decalogue, are accessible and knowable even apart from God’s special revelation.¹⁸ The natural law can be known by us, and we can conform our conduct to its terms, by virtue of our natural human capacities for deliberation, judgment, and choice.

The absence of a divine source of the natural law would be a puzzling thing, just as the absence of a divine source of any and every other intelligible order in human experience would be a puzzling thing. An atheist’s puzzlement might well cause him to reconsider the idea that there is no divine source of the order we perceive and understand in the universe. Such a reconsideration figures in the accounts given by some eminent modern thinkers of their conversions from one or another form of secularism to religious faith; examples among Anglophone philosophers include Elizabeth Anscombe, Michael Dummett, John Finnis, Alasdair MacIntyre, Peter Geach, and Nicholas Rescher. It is far less likely to cause someone to conclude that our perception is illusory or that our understanding is a sham, though that is certainly logically possible. Of course, puzzlement may not necessarily lead to religious faith, even for those who accept our perception of reason and freedom as epistemically warranted. Consider, for example, Michael Moore, a distinguished contemporary natural law theorist for whom it is

17. *Romans* 2:15 (New International Version).

18. See ST. THOMAS AQUINAS, *SUMMA THEOLOGICA* I–II, Q. 91, art. 2, Q. 100, art. 1.

"obvious . . . that nothing exists answering to a personal conception of God and that the human needs to create such a fictional creature are the only explanation why so many people have come out the other way on the question."¹⁹

The question then arises: can natural law—assuming that there truly are principles of natural law—provide the basis for a regime of human rights law without consensus on the existence and nature of God and the role of God in human affairs? In my view, anybody who acknowledges the human capacities for reason and freedom has good grounds for affirming human dignity and basic human rights. These grounds remain in place whether or not one adverts to the question whether there is a divine source of the moral order whose tenets we discern in inquiry regarding natural law and natural rights. I happen to think that the answer to this question is yes, and that we should be open to the possibility that God has revealed himself in ways that reinforce and supplement what can be known by unaided reason. But we do not need agreement on the answer, so long as we agree about the truths that give rise to the question—namely, that human beings, possessing the God-like (literally *awesome*) powers of reason and freedom, are bearers of a profound dignity that is protected by certain basic rights.

If there is a set of moral norms, therefore, including norms of justice and human rights, that can be known by rational inquiry, understanding, and judgment even apart from any special revelation, these norms of natural law can provide the basis for an international regime of human rights. Of course, we should not expect consensus. There are moral skeptics who deny that there are moral truths. There are religious fideists of various faiths who hold that moral truths cannot be known apart from God's special revelation. And, even among those who believe in natural law, there will be differences of opinion about its content and implications for certain issues, including important ones. Thus, it is our permanent condition to discuss and debate these issues, both as a matter of abstract philosophy and as a matter of practical politics. I have elsewhere criticized certain inferences for political morality drawn by the late John

19. Michael S. Moore, *Good Without God*, in *NATURAL LAW, LIBERALISM, AND MORALITY* 249, 259 (Robert P. George ed., 1996).

Rawls from what he labeled “the fact of reasonable pluralism,” but I do not deny that it is a fact; rather, I affirm it as such.²⁰ There are burdens of judgment; ethical questions can be difficult. In circumstances of political liberty, reasonable people of goodwill can be expected to develop divergent views, even about some profoundly important moral matters and even extending to questions of who is to count as a member of the human community and, as such, someone to whom obligations of justice are due.

It is sometimes regarded as an embarrassment to natural law thinking that some great ancient and medieval figures in the natural law tradition failed to recognize—indeed, have even denied—human rights that are affirmed by contemporary natural law theorists and others, and even regarded as fundamental. Consider, for example, the basic human right to religious liberty, or what the Constitution of the United States refers to as the right to the free exercise of religion.²¹ This right was not widely acknowledged in the past and was even denied by some prominent natural law theorists. They wrongly believed that a wide conception of liberty in matters of faith presupposes religious relativism or indifferentism, entails that religious vows are immoral or nonbinding, or the comprehensive subservience of ecclesial communities to the state.²² It is interesting that when the Catholic Church put itself on record firmly in support of the right to religious freedom robustly conceived in the document *Dignitatis Humanae* of the Second Vatican Council, it presented both a natural law argument and an argument from specifically theological sources. The natural law argument for religious liberty is founded on the obligation of each person to pursue the truth about religious matters and to live in conformity with his conscientious judgments.²³ This

20. See ROBERT P. GEORGE, *THE CLASH OF ORTHODOXIES: LAW, RELIGION, AND MORALITY IN CRISIS* 52–53 (2001); see also Robert P. George & Christopher Wolfe, *Natural Law and Public Reason*, in *NATURAL LAW AND PUBLIC REASON* 51, 52–53 (Robert P. George & Christopher Wolfe eds., 2000).

21. U.S. CONST. amend. I.

22. For a brief but sound analysis and some useful citations, see JOHN FINNIS, *MORAL ABSOLUTES: TRADITION, REVISION, AND TRUTH* 26 & n.50 (1991).

23. SECOND VATICAN COUNCIL, *DECLARATION ON RELIGIOUS LIBERTY: DIGNITAS HUMANA* § 2–3 (1965), reprinted in *VATICAN COUNCIL II, THE CONCILIAR AND POST CONCILIAR DOCUMENTS* 800–01 (Austin Flannery, O.P., ed., rev. ed. 1988).

obligation is, in turn, rooted in the proposition that religion—considered as conscientious truth-seeking regarding the ultimate sources of meaning and value—is a crucial dimension of human well-being and fulfillment. It is among the basic human goods that provide rational motivation for our choosing. The right to religious liberty follows from the dignity of man as a conscientious truth-seeker.

Of course, people who reject the natural law understanding of human dignity and human rights will differ from natural law theorists on questions of what constitutes progress and decline. From a certain theological point of view, the type of religious freedom defended by contemporary natural law theorists will be regarded as licensing heresy and religious irresponsibility. Natural law ideas will be seen as a rhetorically toned down form of liberal secularism. By contrast, from a certain liberal secularist point of view, natural law ideas about abortion, sexuality, and other hot-button moral issues will be regarded as intolerant and oppressive—a philosophically gussied up form of religious fundamentalism. In the end, natural law ideas, like theocratic ideas or secularist liberal ones, must stand or fall on their merits. Anyone who wonders whether they are sound or unsound must consider carefully and dispassionately the arguments offered in their support and the counterarguments advanced by their critics.

Let me now turn to the ways in which natural law theories are both like and unlike utilitarian (and other consequentialist) approaches to morality, on the one hand, and Kantian (or deontological) approaches on the other. Like utilitarian approaches, and unlike Kantian ones, natural law theories are fundamentally concerned with human well-being and fulfillment and, indeed, take basic human goods as the starting points of ethical reflection. Unlike utilitarian approaches, however, natural law theories understand the basic forms of human good (as they figure in options for morally significant choosing) as incommensurable in ways that render senseless the utilitarian strategy of choosing the option that overall and in the long run promises to conduce to the net best proportion of benefit to harm (in whatever way “benefit” and “harm” may be understood and defined). Natural law theorists share the Kantian rejection of aggregative accounts of morality that regard the achievement of sufficiently good consequences or the avoidance of suffi-

ciently bad ones as justifying choices that would be excluded by application of moral principles in ordinary circumstances. Unlike Kantians, however, natural law theorists do not believe that moral norms can be identified and justified apart from a consideration of the integral directiveness of the principles of practical reason directing human choice and action towards what is humanly fulfilling and away from what is contrary to human well-being. Natural law theorists do not believe in purely deontological moral norms. Practical reasoning is reasoning about *both* the “right” and the “good,” and the two are connected. The content of the human good shapes the moral norms applied in judgments about right (and wrong) choices and actions. Moral norms themselves are entailments of the primary practical principles that direct us to basic aspects of human well-being or fulfillment. These primary practical principles’ integral directiveness is articulated in the master principle of morality and its specifications in morality’s norms.

Such a view presupposes the possibility of free choice—that is, choosing that is the pure product neither of external forces nor internal but subrational motivating factors, such as sheer desire. Accordingly, a complete theory of natural law will include an account of principles of practical reason, including moral norms as providing rational guidance for free choices, and a defense of free choice as a genuine possibility. This entails the rejection of strict rationalism, according to which all phenomena are viewed as caused. It understands human beings—some human beings, at least sometimes—as partially uncaused causings of those realities that they bring into existence *for reasons but by choices that are free because underdetermined by reasons and passions alike*. On the natural law account of human action, freedom and reason are mutually entailed. If people were not really free to choose among options—free in the sense that nothing but the choosing itself settles what option gets chosen—truly rationally motivated action would not be possible. If rationally motivated action were not possible, the experience we have of freely choosing would be illusory.

Philosophers in the natural law tradition, going all the way back to Aristotle, have emphasized the fact (or, in any event, what we believe to be the fact) that by our choices and actions we not only alter states of affairs in the world external to us, but also at the same time determine and constitute ourselves—

for better or worse—as persons with a certain character.²⁴ Recognition of this self-shaping or “intransitive” quality of morally significant choosing leads to a focus on *virtues* as habits born of upright choosing that orient and dispose us to further upright choosing, especially in the face of temptations to behave immorally. People sometimes ask: is natural law about rules or virtues? The answer is that it is about *both*. A complete theory of natural law identifies norms for distinguishing right from wrong as well as habits or traits of character whose cultivation disposes people to choose in conformity with the norms and, thus, compatibly with what we might call—borrowing a phrase from Kant—a good will, a will towards integral human fulfillment.

Human beings live not as isolated individuals, but in families, kinship groups, clans, and various forms of political association. And, as previously discussed, natural law theorists hold that among the irreducible aspects of human flourishing are various forms of harmony or unity with others; so we propose accounts of the *common good* of communities, including political communities. The political common good is understood not as some additional human good alongside the others, but rather as the securing of conditions in which people can flourish by cooperating with each other as fellow citizens. There is a common good because (1) the basic human goods are aspects of the flourishing of each and every member of the human family; (2) many of these goods can be enjoyed, or enjoyed more fully, by common action to secure them; and (3) common action itself can be intrinsically fulfilling inasmuch as humans are indeed “political animals” whose integral good includes intrinsically social dimensions.

The common good of any human society demands that governments be established and maintained to make and enforce laws. Law and government are necessary not merely because human beings sometimes treat one another unjustly and even behave in a predatory manner towards each other, but more fundamentally because human activity often must be coordinated by authoritative stipulations and other exercises of authority to secure common goals. Consider the simple case of regulating highway traffic. Even in a society of perfect saints,

24. See, e.g., NICOMACHEAN ETHICS, *supra* note 4, at 1113b5–13.

law and government would be necessary to establish and maintain a system of traffic regulation for the sake of the common good of motorists, cyclists, pedestrians, and everyone who benefits from the safe and efficient transportation of goods and persons on the highways. Because often it is the case that there is no uniquely reasonable or desirable scheme of regulation, only different possible schemes with different benefits and costs, governmental authority must be employed to choose by stipulating one from among the possible schemes. Authority in such a case is necessary because unanimity is impossible. Authority serves the common good by making a stipulation and enforcing its terms. Assuming that there is no corruption or other injustice involved in the choice of a certain scheme of traffic regulation or the enforcement of its terms, we can regard this as a focal case of legal authority under a natural law account of the matter. Of course, the complete account would begin by identifying the human goods that schemes of traffic regulation are meant to advance and protect, including but not limited to the protection of human life and health and the evils they seek to allay. The account would observe that in the absence of a legally stipulated and enforced scheme of regulation these goods would be in constant jeopardy as motorists, even motorists of goodwill who were doing their best to exercise caution, crashed into each other or created traffic gridlock of the sort that could easily be avoided by the prudent stipulation of coordinated schemes of driving norms. It would then defend the legitimacy of governmental authority to make the required stipulations, not by referring to the unique desirability of the scheme it happens to choose, but rather by appealing to the need for *a* scheme to be given the standing of law.

Law making and law enforcement are central functions and responsibilities of legitimate political authority. The justifying point of law is to serve the common good by protecting the goods of persons and the communities of which they are members. Where the laws are just and effective, political authorities fulfill their obligations to the communities they exist to serve. To the extent that the laws are unjust or ineffective, they fail in their mission to serve the common good. As Aquinas said, the

very point of the law is the common good.²⁵ In that sense, law is as he defined it: “an ordinance of reason for the common good, made by him who has care of the community.”²⁶ Inasmuch as the moral point of law is to serve the integral good of human beings—people as they are—laws against many of the sorts of common wrongdoing are necessary and proper in human societies. Aquinas’s definition of law also requires that there be some individual, group, or institution exercising authority in political communities and fulfilling this authority’s moral function by translating certain principles of natural law into positive law and reinforcing these principles with legal sanctions—that is, the threat of punishment for law-breaking. In this sense, justified authorities derive the law they make (positive law) from the natural law or, equivalently, translate natural law principles of justice and political morality into the rules of positive law.

Following Aquinas, who was himself picking up a lead from Aristotle, natural law theorists hold that all just positive law, from schemes of traffic regulation to complex sets of rules governing, say, bankruptcy, is “derived” from natural law; still, there are two different types of derivation corresponding to different types of law.²⁷ In certain cases, the legislator, for the sake of justice and the common good, simply and directly forbids or requires what morality itself forbids or requires. For example, the legislator in making murder a criminal offense puts the force and sanctions of positive law behind a principle by which people are bound as a matter of natural law even in the absence of positive law on the subject—namely, the principle forbidding the direct or otherwise unjust killing of one’s fellow human beings. Aquinas noted that, in acting in this way, the legislator derives the positive law from the natural law in a manner akin to the deduction of conclusions from premises in mathematics or the natural sciences.

For other types of positive law, however, such a “deductive” approach is not possible. Here again the case of traffic regulation is illustrative. In choosing a scheme from among a possible range of reasonable schemes, each with its own costs and bene-

25. AQUINAS, *supra* note 18, at Q. 96, art. 1.

26. *Id.* at Q. 90, art. 4.

27. *See id.* at Q. 95, art. 2.

fits, the legislator moves not by a process akin to deduction, but rather by an activity of the practical intellect that Aquinas called "*determinatio*."²⁸ Although, unfortunately, no single word in English captures all that the Latin term denotes and connotes, the concept is not difficult to understand. Aquinas explained it by analogy to the activity of a craftsman commissioned to build a house—what we would probably call an architect. There is, of course, no uniquely correct way to design a house. Many different designs are reasonable. Certain design features will be determined by the needs of the person or family that will occupy the dwelling, others are simply matters of style and taste, and others still are optional compromises between expense and risk. So, in most cases, the architect will exercise a significant measure of creative freedom within a wide set of boundaries. Consider the question of ceiling height. While some possibilities are excluded by practical considerations—for example, ceilings of only four feet in height would make living in the house impossible for most people and ceilings of forty feet in height would ordinarily be impractically expensive—no principle of architecture fixes ceiling heights at seven feet four inches, nine feet, anything in between, or anything a bit higher or lower. In executing his commission, the architect will endeavor to choose a height for the ceilings that harmonizes with other features of his design, including features (such as door heights) that are themselves the fruit of *determinations*.

Like the architect, the lawmaker will in many domains exercise a considerable measure of creative freedom in working from a grasp of basic practical principles. He will direct actions towards the advancement and protection of basic human goods and away from their privations. Through his exercise of creative freedom, he will craft concrete schemes of regulation aimed at coordinating conduct for the sake of the all-around well-being of the community—that is, the common good. Among the considerations a good legislator will always bear in mind is the fairness of the distribution of burdens and benefits attending any scheme of regulation. Because, on the natural law account, all persons have a profound, inherent, and equal

28. *Id.*

dignity, the interests—that is, the well-being—of each and every person must be taken into account and no one's interests may be unfairly or otherwise unreasonably favored or disfavored. The common good is not the utilitarian's "greatest net good" or "greatest good of the greatest number";²⁹ rather, it is the shared good of all, including the good of living in a community where the dignity and rights of all—including the right to have one's equal basic dignity respected—are honored in the exercise of public authority.

Although the natural law sets the derivation of positive laws from the natural law as the task of the legislator (and it is only through his efforts that the natural law can become effective for the common good), it is important to note that the body of law created by the legislator is not itself the natural law. Whereas the natural law is in no sense a human creation, the positive law is indeed created (posited, put in place)—not simply implemented—by humans. This point is telling about the metaphysical status of the positive law. Following Aristotle, we might say that the positive law belongs to the order of "making" rather than to the order of "doing." It is thus fitting that the positive law is subject to technical application and is analyzed by a sort of technical reasoning. Hence, law schools do not (or do not only) teach their students moral philosophy, but focus the attention of students on distinctive techniques of legal analysis, such as how to identify and understand legal sources and how to work with statutes, precedents, and the (often necessarily) artificial definitions that characterize any complex system of law. At the same time we must be careful to distinguish a different metaphysical order that attaches to the moral purpose of the law. It is in the order of "doing" (the order of free choice, practical reasoning, and morality) that we identify the need to create law for the sake of the common good. The legislator creates a cultural object—that is, the law—which is deliberately and reasonably subject to technical analysis, for a purpose that is moral and not merely technical.³⁰

29. On the incoherence of these Benthamite notions, see FINNIS, *supra* note 12, at 112–18.

30. See John Finnis, *Natural Law and Legal Reasoning*, in NATURAL LAW THEORY: CONTEMPORARY ESSAYS, *supra* note 10, at 134, 138–43.

That the law is a cultural object created for a moral purpose engenders much confusion about the role of moral philosophy in legal reasoning. For instance, a much debated question in American constitutional interpretation is the scope and limits of the power of judges to invalidate legislation under certain allegedly vague or abstract constitutional provisions. Some constitutional theorists, such as Professor Ronald Dworkin, defend an expansive role for the judge by arguing that the conscientious judge must bring judgments of moral and political philosophy to bear in deciding hard cases.³¹ Others, such as Judge Robert Bork and Justice Antonin Scalia, fear such a role for the judge and hold that a sound constitution—at any rate, the Constitution of the United States—does not give the judge any such role.³² They maintain that moral philosophy has little or no place in judging, at least within the American legal system. Where should natural law theorists stand on this complex issue?

Natural law theory treats the role of judge as itself fundamentally a matter for *determinatio* and not for direct translation from the natural law. Accordingly, it does not presuppose that the judge enjoys (or should enjoy) as a matter of natural law a plenary authority to substitute his own understanding of the requirements of the natural law for that of the lawmaker in deciding cases at law. On the contrary, the Rule of Law (ordinarily understood as a necessary but insufficient condition for a just system of government) morally requires—that is, obligates as a matter of natural law—the judge to respect the limits of his own authority as it has been allocated to him by way of an authoritative *determinatio*. This entails a hypothetical solution to the puzzle that confronts us: if the law of the judge's system constrains his law-creating power in the way that Justice Scalia believes American fundamental law does, then he is obliged—legally and, presumptively, morally—to respect these constraints, even where his own understanding of natural justice deviates from that of the legislators (or constitution makers and ratifiers) whose laws he must interpret and apply. Hence, the question of what degree of law-creating power a judge enjoys

31. See RONALD DWORKIN, *LAW'S EMPIRE* (1986).

32. See, e.g., ROBERT H. BORK, *THE TEMPTING OF AMERICA: THE POLITICAL SEDUCTION OF THE LAW* 251–59 (1990).

is itself a matter of the positive law of the Constitution and is not determinable by natural law alone.

I will conclude by briefly treating an issue, which I believe is actually a non-issue, that has exercised some influential modern critics of natural law theory, such as Hans Kelsen.³³ They have seized upon the slogan, found in St. Augustine and echoed by Aquinas, that “a law that is not just, seems to be no law at all.”³⁴ These critics claim the proposition expressed in this slogan, which they regard as being at the heart of natural law thinking, is utterly implausible because it either sanctifies injustice (by entailing that any law possessing validity by reference to the criteria of a positive system of law is morally good and therefore creates an obligation to obey), or because it contradicts plain fact (by suggesting that what everyone takes to be laws—that is, rules possessing validity by reference to the criteria of a positive system of law—are in fact not laws if they are unjust).

This line of criticism is misguided. Natural law theorists through the ages have taken note of the distinction between the systemic validity of a proposition of law, the property of belonging to a legal system, and the law’s moral validity and bindingness as a matter of conscience. These theorists have had no difficulty accepting the central thesis of what we today call legal positivism—that is, that the existence and content of the positive law depends on social facts and not on its moral merits. Indeed, it is hard to see how one would otherwise make sense of the locution “a law that is not just.”

Note, however, that accepting this thesis is independent of denying other modal connections between morality and the law. In particular, it is unlikely that we would be able to understand significant aspects of the law if we were unable to grasp moral reasons. This is so because the reasons people have for establishing and maintaining legal systems are often moral reasons that issue from normative practical deliberation aimed at the common good. Far from threatening the thesis of positivity, such explanatory connections are necessary to provide any

33. See, e.g., Hans Kelsen, *The Natural-Law Doctrine Before The Tribunal of Science*, in *WHAT IS JUSTICE? JUSTICE, LAW, AND POLITICS IN THE MIRROR OF SCIENCE: COLLECTED ESSAYS* 144 (1957).

34. AQUINAS, *supra* note 18, at Q. 96, art. 4 (quoting ST. AUGUSTINE, *DE LIB. ARB. [ON FREE WILL]* bk. i, 5).

fine-grained descriptive account of the law.³⁵ How else would one locate the focal cases of the law or appreciate the standards by which laws are judged to be defective as laws (as we surely do, for example, in the case of laws that show unjustified partiality to certain groups)? A particularly fundamental connection in this vein is the way in which the normativity of practical reasoning and its directiveness towards human well-being and fulfillment explains the normativity and the action-guiding character of law's authority. Thus, while natural law theory preserves a descriptive characterization of the law, it does not commit the fallacy of explaining prescriptive features by reference to nothing but descriptive features.

Natural law theorists join with many self-described legal positivists, such as H.L.A. Hart and his great student (and my teacher) Joseph Raz, in deploying the concept of "law" in a way sufficiently flexible to take into account the differences between the demands of (i) intrasystemic legal analysis or argumentation (for example, in the context of professional legal advocacy or judging); (ii) what, following Hart, we might call "descriptive" social theory (for example, "sociology of law"); and (iii) fully critical (that is, "normative," "moral," conscience-informing) discourse. Aquinas, for example, made central to his reflections the question whether, and, if so, how and to what extent, unjust laws bind in conscience those subject to them.³⁶ It is clear enough that Aquinas believed that human positive law creates a moral duty of obedience even where the conduct it commands (or prohibits) would, in the absence of the law—that is, morally, as a matter of natural law—be optional. This critical-moral belief in the power of positive law to create (or, where moral obligation already exists, reinforce) moral obligation naturally suggests the question whether this power, and the duties that are imposed by its exercise on those subject to it, is absolute or defeasible. If defeasible, under what conditions is it defeated?

To answer this question it is necessary to press the critical-moral analysis. What is the source of the power in the first place? Plainly, it is the capacity of law to serve the cause of justice and the common good by, for example, coordinating be-

35. See FINNIS, *supra* note 12, at 12–18.

36. See AQUINAS, *supra* note 18, at Q. 96, art 4.

havior to make possible the fuller and fairer realization of human goods by the community as a whole. But, *from the critical-moral viewpoint*, laws that due to their injustice damage rather than serve the common good, lack the central justifying quality of law. Their law-creating power (and the duties they purport to impose) is thus weakened or defeated. Unjust laws are, Aquinas says, “not so much laws as acts of violence.”³⁷ As violations of justice and the common good, unjust laws lack the moral force of law; they bind in conscience, if at all, only to the extent that one is under an obligation not to bring about bad side effects that would, in the particular circumstance, likely result from one’s defiance of the law—for example, causing “scandal or disturbance”³⁸ by undermining respect for law in a basically just legal system or unfairly shifting the burdens of a certain unjust law onto the shoulders of innocent fellow citizens.³⁹ That is to say, unjust laws bind in conscience, if at all, not *per se*, but only *per accidens*. They are laws, not “*simpliciter*,” or, as we might say, “straightforwardly” or in the “focal” or “paradigmatic” sense, but only in a derivative or secondary sense (*secundum quid*, or, in a certain respect but not in all respects).

Nothing in Aquinas’s legal theory or in the thought of modern natural law theorists, such as myself, suggests that the injustice of a law renders it something other than a law (or “legally binding”) for purposes of intrasystemic juristic analysis and argumentation. It is true that Aquinas counseled judges, where possible, to interpret and apply laws in such a way as to avoid unjust results where the law makers did not foresee circumstances in which a strict application of the rule they laid down would result in injustice and where, had they foreseen such circumstances, they would have crafted the rule differently.⁴⁰ But, even there, he does not appeal to the proposition that the injus-

37. *Id.*

38. *Id.* Note, however, that, according to Aquinas, one may never obey a law requiring one to do something unjust or otherwise morally wrong. And sometimes *disobedience* is required to avoid causing (or contributing to) “scandal or disturbance.” See *id.* at Q. 96, art. 5; see also *id.* at Q. 104, art. 6. On issues relevant to the translation of Aquinas’s phrase “*scandalum vel turbatio*,” see JOHN FINNIS, *AQUINAS: MORAL, POLITICAL AND LEGAL THEORY* 223 n.23, 273 n.112, 274 n.d (1998).

39. See *AQUINAS*, *supra* note 18, at Q. 96, art. 4.

40. *Id.* at Q. 96, art. 6.

tice likely to result from an application of the rule strictly according to its terms nullifies those terms from the legal point of view.

Nor does Aquinas say or imply anything that would suggest treating Augustine's comment that "a law that is not just, seems to be no law at all" as relevant to social-theoretical (or historical) investigations of what is (or was) treated as law and legally binding in the legal system of any given culture (however admirable or otherwise from the critical-moral viewpoint). Professor Hart was careful never to promote the sort of caricature of natural law one finds in the writings of Kelsen and Holmes. He had a real, if qualified, respect for the tradition of natural law theorizing and was, in fact, the person who commissioned for Oxford's Clarendon Law Series the book by John Finnis, *Natural Law and Natural Rights*, that revived interest in natural law among analytic legal philosophers in our time. Still, Hart was among those who misunderstood Aquinas and his stream of the natural law tradition on precisely this point. He seemed to think there was something antithetical to the principles of natural law theory in the "descriptive sociology" of law he proposed in his masterwork *The Concept of Law*.⁴¹ This is the reverse of the truth.

Natural law theorists need not suppose that Hart erred by treating as laws (and legal systems) various social norms (and social norm-generating institutions) that fulfill the criteria or conditions for legality or legal validity of Hart's concept of law, despite the fact that his social-theoretical enterprise (reasonably!) prescind to a considerable extent (indeed, it seeks to prescind as far as possible) from critical-moral evaluations of laws

41. Even before the appearance of *The Concept of Law*, Hart had sternly repudiated natural law theory, arguing that "in all its protean guises" natural law theory relies on the implausible descriptive sociological claim "that human beings are equally devoted to and united in their conception of aims (the pursuit of knowledge, justice to their fellow men) other than that of survival." H.L.A. Hart, *Positivism and the Separation of Law and Morals*, 71 HARV. L. REV. 593, 623 (1958). Of course, Hart was correct that such a claim is utterly implausible. The trouble is that no natural law theorist (or anyone else, so far as I am aware) has ever asserted any such thing. As John Finnis has remarked in criticizing Hart's attribution of the claim to natural law theorists, "[c]ertainly the classical theorists of natural law all took for granted, and often enough bluntly asserted, that human beings are not all equally devoted to the pursuit of knowledge or justice, and are far from united in their conception of what constitutes worthwhile knowledge or a demand of justice." FINNIS, *supra* note 12, at 29.

and legal systems. The criticism Hart's work invites from a natural law perspective has nothing to do with his willingness to treat unjust laws as laws; rather, it has to do with his unwillingness to follow through on the logic of his own method and his insight into the necessity of adopting or reproducing what he calls the *internal* point of view—a viewpoint from which (*pace* Hobbes, Bentham, and Austin) law is understood not as causing human behavior, but as providing people with certain types of reasons for action, what Hart described in his *Essays on Bentham* as “content-independent peremptory reason[s].”⁴² Finnis and others have argued that a rigorous application of Hart's method will extricate legal philosophy from Benthamism altogether by identifying the focal or paradigmatic case of law as *just* law—law that serves the common good—and the focal or paradigmatic case of the internal (or what Raz calls the “legal”) point of view as the viewpoint of someone who understands law and legal systems as valuable to establish and maintain, and legal rules as ordinarily binding in conscience, insofar as they are just and, *qua* just, fulfill what natural law theorists contend is the justifying moral-critical point of law and legal systems—namely, to serve the common good.⁴³

42. H.L.A. HART, *ESSAYS ON BENTHAM: STUDIES IN JURISPRUDENCE AND POLITICAL THEORY* 256 (1982).

43. See FINNIS, *supra* note 12, at 12–18. On Hart's misinterpretation of Aquinas on these matters, see *id.* at 354–62.

DRED SCOTT REVISITED

HARRY V. JAFFA*

I.

It has been many years since I first wrote that the American Revolution was, at once, an event in time and an idea out of time.¹ Lincoln meant no less when he wrote that Jefferson enshrined in the Declaration of Independence “an abstract truth, applicable to all men and all times.”² It was a commonplace among the Founders (and Lincoln) that the American experiment in self-government was not for Americans alone, but for all mankind.³ This was not merely an expression of national pride. It was a sober judgment. It was almost as impossible then, as it is now, to imagine circumstances more favorable to the success of this experiment than those that existed at the Founding. It was, and is, hard to imagine this experiment succeeding elsewhere if it failed here. The Civil War clearly was a test, as Lincoln said at Gettysburg, of whether any nation “conceived in Liberty, and dedicated to the proposition that all men are created equal” could long endure.⁴ The test came when

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1. See HARRY V. JAFFA, *EQUALITY AND LIBERTY* 120 (1965).

2. Letter from Abraham Lincoln to Henry L. Pierce and Others (Apr. 6, 1859), in *3 THE COLLECTED WORKS OF ABRAHAM LINCOLN* 374, 376 (Roy P. Basler ed., 1953).

3. See, e.g., *THE FEDERALIST* NO. 1, at 27 (Alexander Hamilton) (Clinton Rossiter ed., 1999) (“It has been frequently remarked that it seems to have been reserved to the people of this country, by their conduct and example, to decide the important question, whether societies of men are really capable or not of establishing good government from reflection and choice, or whether they are forever destined to depend for their political constitutions on accident and force.”).

4. Abraham Lincoln, Gettysburg Address (Nov. 19, 1863), in *THIS FIERY TRIAL: THE SPEECHES AND WRITINGS OF ABRAHAM LINCOLN* 183, 184 (William E. Gienapp ed., 2002).

eleven states “seceded” following the election of Abraham Lincoln in 1860. The Republican platform in that year contained a pledge to end any further extension of slavery into the new territories from which new states might be formed.⁵ The seceding states found it intolerable that all new states would be free states, so that eventually three-fourths of the states might be able to abolish slavery by constitutional amendment, without the consent of the slave states. As Lincoln put it in his first inaugural, “One section of our country believes slavery is *right*, and ought to be extended, while the other believes it is *wrong*, and ought not to be extended. This is the only substantial dispute.”⁶

Lincoln believed that the Constitution established a regime within which such disputes might be resolved peacefully. The states, in ratifying the Constitution, bound themselves to accept the results of elections held according to the rules of the Constitution. To set aside the results of an election because of dissatisfaction with those results, as the secessionists proposed, would make a mockery of the very idea of government by elections. It would leave tyranny or anarchy as the only alternatives. Lincoln set out this argument—ballots or bullets—with mathematical simplicity and clarity. He conceded, however, that if any constitutional rights or privileges had been denied to the discontented states in the elections, or if there was any future threat by the Republicans to such rights or privileges, the states’ withdrawal from the Union might be justified.⁷ Lincoln took the greatest pains to deny that any such rights or privileges had been denied or threatened. He could not, however, deny their differences concerning slavery. Nor did he deny that a difference on this subject could turn friends into enemies and make a common citizenship impossible.⁸

In all his speeches, from Peoria in 1854,⁹ to Cooper Union in 1860,¹⁰ and finally to Gettysburg in 1863,¹¹ Lincoln insisted that

5. Republican Convention 1860: Platform of 1860, in *A POLITICAL TEXT-BOOK FOR 1860*, at 26, 26–27 (Horace Greeley & John F. Cleveland eds., 1860).

6. Abraham Lincoln, First Inaugural Address (Mar. 4, 1861), in *THIS FIERY TRIAL: THE SPEECHES AND WRITINGS OF ABRAHAM LINCOLN*, *supra* note 4, at 88, 94.

7. *Id.* at 93.

8. *Id.* at 93–97.

9. Abraham Lincoln, The Legitimate Object of Government (July 1, 1854?), in *THIS FIERY TRIAL: THE SPEECHES AND WRITINGS OF ABRAHAM LINCOLN*, *supra* note 4, at 27–28.

the central idea of the Founding, from which all its minor thoughts radiated, was the proposition that all men are created equal. The slavery that existed in the Founding generation was an inherited evil that could not be eradicated instantly, but it was, in accordance with the principles of the Declaration, to be "put in course of ultimate extinction."¹² All the legal rights of white men depended finally upon the recognition of a common human nature. The Declaration itself was addressed to a "candid world,"¹³ which included all races and nations. There could be no such thing as equal rights of slavery and freedom. Property in human beings could not be compared indifferently to property in non-human chattels. To make chattels of other human beings was a violation of the laws of nature, and this nation was founded upon "the Laws of Nature and of Nature's God."¹⁴

To justify their claim to the same rights in the territories as in the free states, leading Southerners transformed the assertion of equality of the rights of individual human beings into a claim of equality of rights of the states. They contended that the federal government could not discriminate between the property of settlers from free states and settlers from slave states, since the territories were the joint property of all the states. This argument was elaborated by John C. Calhoun.¹⁵ To make it, he had to deny any authority to the Declaration's proposition of equality. This "hypothetical truism," he said, was "the most false and dangerous of all political errors."¹⁶ For the Slave South, Calhoun became a prophet of unrivalled authority. His argument suffered, however, because it was based upon a can-

10. Abraham Lincoln, Speech at the Cooper Union (Feb. 27, 1860), in *THIS FIERY TRIAL: THE SPEECHES AND WRITINGS OF ABRAHAM LINCOLN*, *supra* note 4, at 71, 78–80.

11. Abraham Lincoln, *supra* note 4, at 183.

12. Abraham Lincoln, Speech at Chicago, Illinois (July 10, 1858), in *ABRAHAM LINCOLN: SPEECHES AND WRITINGS 1832–1858*, at 445, 446 (Don E. Fehrenbacher ed., 1989).

13. THE DECLARATION OF INDEPENDENCE para. 2 (U.S. 1776).

14. *Id.* at para. 1.

15. See, e.g., John C. Calhoun, Senate Speech on the Oregon Bill (June 27, 1848), in *UNION AND LIBERTY: THE POLITICAL PHILOSOPHY OF JOHN C. CALHOUN* 563, 565–70 (Ross M. Lence ed., 1992).

16. *Id.* at 565.

did rejection of the Founders, who were still revered in the antebellum South. Jefferson he regarded as a fanatic.¹⁷

To turn the Founders against the Founding, to expunge the authority of the idea of the equality of the rights of individual human persons, was the task to which Chief Justice Roger Taney set himself in *Dred Scott* 150 years ago. To accomplish this task, Taney did not merely have to ignore the generally accepted historical view of the Founding, accepted even by Calhoun; he actually had to reverse the facts in the case. Here is how he did it:

It is difficult at this day to realize the state of public opinion in relation to that unfortunate race, which prevailed in the civilized and enlightened portions of the world at the time of the Declaration of Independence, and when the Constitution of the United States was framed and adopted. . . .

They had for more than a century before been regarded as beings of an inferior order, and altogether unfit to associate with the white race, either in social or political relations; and so far inferior, that they had no rights which the white man was bound to respect; and that the negro might justly and lawfully be reduced to slavery for his benefit. . . . This opinion was at that time fixed and universal in the civilized portion of the white race.¹⁸

Taney was a firm advocate of what is known now as a jurisprudence of original intent. According to this view, the words of the Constitution are always to be interpreted as they were understood by those who framed and ratified them. No change in how those words might come to be understood at any later period authorizes a departure from that original meaning. Only an amendment to the Constitution by the authority that made the Constitution can authorize an emendation in that original understanding.¹⁹ Taney's approach in *Dred Scott*, however, was counterfeit originalism. He placed this perfectly sound juris-

17. See *id.* at 569–70 (“[The belief in equality] had strong hold on the mind of Mr. Jefferson, the author of [the Declaration of Independence], which caused him to take an utterly false view of the subordinate relation of the black to the white race in the South; and to hold, in consequence, that the former, though utterly unqualified to possess liberty, were as fully entitled to both liberty and equality as the latter; and that to deprive them of it was unjust and immoral.”).

18. *Dred Scott v. Sandford*, 60 U.S. 393, 407 (1857).

19. See *id.* at 409–11. Taney might also be said to be a disciple of Aristotle's maxim that the intention of the legislator is the law.

prudential doctrine in the service of an incredible misrepresentation of the Founding ideals shared by those who framed and adopted the Declaration of Independence and the Constitution.

It is true that blacks at the time of the Founding were regarded in some generalized sense as inferior. This remained true throughout the nineteenth century and beyond. But such alleged inequality of blacks and whites was not necessarily regarded as greater than that ordinarily seen among whites. Jefferson, for example, once observed that although Sir Isaac Newton may have been the most intelligent man in the world, this gave him no dominion over Jefferson's person or his property.²⁰ The inequality *within* species must be distinguished from the inequality *of* species. There is no inequality within the human species such as that between man and beast, or between man and God. Unequal abilities among human persons, regardless of color, nationality, or gender, do not determine what the rights or privileges of said persons ought to be.²¹

When Taney says that blacks during the Founding era were regarded as inferior, he is not exaggerating. But when he says that they were regarded as having "no rights which the white man was bound to respect"—as if they were animals of a different species—he is simply wrong. Historian Don Fehrenbacher has pointed out that a free black man in late eighteenth century America had, in some respects, more legal rights than a

20. Letter from Thomas Jefferson to Henri Gregoire (Feb. 25, 1809), in 11 THE WORKS OF THOMAS JEFFERSON 99, 100 (Paul Leicester Ford ed., 1905).

21. Lincoln expressed this Aristotelian idea, which makes a lie of natural slavery, with exquisite logic:

If A can prove, however conclusively, that he may, of right, enslave B, why may not B snatch the same argument and prove equally, that he may enslave A?

You say A is white and B is black. It is *color*, then; the lighter, having the right to enslave the darker? Take care. By this rule you are to be slave to the first man you meet, with a fairer skin than your own.

You do not mean *color* exactly? You mean the whites are *intellectually* the superiors of the blacks, and therefore have the right to enslave them? Take care again. By this rule, you are to be slave to the first man you meet, with an intellect superior to your own.

But, say you, it is a question of *interest*; and, if you make it your *interest*, you have the right to enslave another. Very well. And if he can make it his interest, he has the right to enslave you.

Abraham Lincoln, Fragment on Slavery (1854), in ABRAHAM LINCOLN, SPEECHES AND WRITINGS 1832–1858, *supra* note 12, at 303.

married white woman.²² Free blacks could marry, inherit and bequeath property, buy and sell, sue and be sued.²³ Nor is it true that they could “justly and lawfully be reduced to slavery.”²⁴ In fact, there was never a time or place at which a free black in America could be lawfully reduced to slavery. A free black man, like a free white man, could be deprived of his liberty only when he had been duly convicted of a crime.²⁵

Taney invented a proslavery Founding and a proslavery jurisprudence of original intent. After quoting in full the passage in the Declaration beginning, “We hold these truths to be self-evident,” he comments:

The general words above quoted would seem to embrace the whole human family, and if they were used in a similar instrument at this day would be so understood. But it is too clear for dispute, that the enslaved African race were not intended to be included, and formed no part of the people who framed and adopted this declaration; for if the language, as understood in that day, would embrace them, the conduct of the distinguished men who framed the Declaration of Independence would have been utterly and flagrantly inconsistent with the principles they asserted; and instead of the sympathy of mankind, to which they so confidently appealed, they would have deserved and received universal rebuke and reprobation.²⁶

Taney’s assertion that the words of the Declaration “seem to embrace the whole human family” is remarkable, and it becomes even more remarkable when joined with the further assertion that these same words would be so understood “to-day,” that is, in 1857. Taney assumes without question that he knows that the so-called African race belongs to the “human family.” But he implies that those who wrote the Declaration in 1776, and those who subsequently framed and adopted the Constitution, did not know this. We know the meaning of their words, but they did not! Taney does not explain, or apparently think there is any need to explain, why we should be governed

22. DON E. FEHRENBACHER, *THE DRED SCOTT CASE: ITS SIGNIFICANCE IN AMERICAN LAW AND POLITICS* 349 (1978).

23. *Id.*

24. *Dred Scott*, 60 U.S. at 407.

25. FEHRENBACHER, *supra* note 22, at 348–49.

26. *Dred Scott*, 60 U.S. at 410.

by the Founders' allegedly defective understanding, rather than by our own superior understanding. Yet, the doctrine of original understanding presupposes a Constitution based upon the laws of nature and of nature's God—human nature as it really is. Without this legitimacy, the Constitution would have no intrinsic moral authority or claim on our fidelity to original meaning.²⁷

Taney implies that if the Framers had understood the meaning of their own words, they would have abolished slavery. But he does not explain why, if we today (in 1857) know that the words of the Declaration "embrace the whole human family," do we not act to end slavery? Why should we who know better not make that better understanding the basis for interpreting the Constitution? Why does Taney pile Pelion on Ossa to prove that because the Founders did not abolish slavery (something they had no power to do!), they did not think blacks belonged to the human family? Taney's contention was that public opinion in 1857 was more favorable to the recognition of a black man's humanity than it was at the Founding. But this is clearly the reverse of the truth. It is the reverse, not only of what dissenting Justice Curtis and Abraham Lincoln thought, but also of what virtually everyone—including the most vocal partisans of the Slave South—thought.

27. Some qualifications concerning the jurisprudence of original intent are here in order. As a general doctrine governing the relationship of judges to law, originalism must meet the objection that it applies only to a morally defensible legal system. Could a judge in Nazi Germany conscientiously apply Nazi law—for example, the Nuremberg laws—governing Jews? He could if he were a Nazi with a Nazi conscience (if that is not an oxymoron). If he were instead a decent human being, he would do his best to frustrate the law, and to make it as unburdensome to the Jews as possible. He might go along with it to some extent, on the assumption that his replacement would be a true Nazi. But, as a non-Nazi he could not commit himself to a jurisprudence of Nazi intent. To paraphrase Aristotle, a good man is a good citizen (or a good judge) only in a good regime. He is a bad citizen in a bad regime. Only a bad man can be a good citizen in a bad regime. Justice Thurgood Marshall believed the regime of the Founding was bad because he believed it was based upon slavery and racism, not unlike the regime of Adolf Hitler. Clearly, the Founders thought the regime they were founding—based upon the principles of the Declaration of Independence—was a good one. They regarded slavery as an exception to the principles of the Declaration, not as consistent with those principles. A Nazi judge would have regarded the Nuremberg laws as perfectly consistent with the Nazi principles of Adolf Hitler. A Jefferson (or a Lincoln) could not regard the presence of slavery in the Constitution of 1787 as consistent with the principles of the Declaration or the Constitution.

Taney wrote that the opinion that blacks did not belong to the human family was “fixed and universal” in the civilized world in 1776 and 1787.²⁸ In fact, the “fixed and universal” opinion was almost the exact opposite. Consider, for example, the following passage from Alexander Stephens’s “Cornerstone” Speech of March 22, 1861. Stephens was Vice President of the Confederate States of America, which had become a completely organized and functioning government at least two weeks before Abraham Lincoln was sworn in as President of the United States. Stephens explained:

The prevailing ideas entertained by [Jefferson] and most of the leading statesmen at the time of the formation of the old Constitution were, that the enslavement of the African was in violation of the laws of nature; that it was wrong in *principle*, socially, morally, and politically. It was an evil they knew not well how to deal with, but the general opinion of the men of that day was that, somehow or other, in the order of Providence, the institution would be evanescent and pass away. This idea, though not incorporated in the Constitution, was the prevailing idea at the time.²⁹

Stephens recognized in the Founding principles the exact opposite of the assertion Taney called “fixed and universal.” He recognized, too, that the principles of the Declaration of Independence, although not explicitly incorporated in the Constitution, are the necessary ground for distinguishing the Constitution’s principles from its compromises, something hotly denied and disputed today no less than before the Civil War. While acknowledging the racial egalitarianism of the Founding, Stephens goes on to say that it has now been superseded:

Our new government is founded upon exactly the opposite idea [to that of the equality of the races]; its foundations are laid, its corner-stone rests upon the great truth that the negro is not equal to the white man. That slavery—subordination to the superior race—is his natural and moral condition.

28. *Dred Scott*, 60 U.S. at 407.

29. Alexander H. Stephens, African Slavery: The Corner-stone of the Southern Confederacy (Mar. 22, 1861), in 27 PULPIT AND ROSTRUM 65, 69 (1862). The date of this speech was at almost an exact midpoint between Lincoln’s inauguration on March 4 and the firing on Fort Sumter on April 13, at a time before there was any certainty of a coming civil war. Hence there was no clear reason for Stephens at that time to have doubted the permanence of the Confederate government.

This, our new government, is the first in the history of the world based upon this great physical, philosophical, and moral truth.³⁰

Stephens goes on to compare the reluctance to accept this "truth" to the tardy acceptance of all new scientific discoveries, such as those of Galileo and Harvey.³¹ He is confident that this scientific discovery, like others that have preceded it, will eventually triumph, and with it will come the vindication of "our new government." It is sufficient for present purposes to repeat once again that Stephens's account of the opinion of the civilized world on the subject of race in the latter part of the eighteenth century is the exact opposite of Taney's. Yet, Taney does not subscribe to the "scientific" racism of Stephens. The afore-said "science," along with a host of other variants on the theory of evolution, was sweeping over the western world in the later nineteenth century, virtually obliterating consciousness of the natural rights doctrine of the Declaration of Independence. Darwin's *Origin of Species* was published in 1859, but the seminal ideas therein had been germinating since Rousseau's 1754 *Discourse on the Origin of Inequality*.

There is yet another witness against Taney, one more unlikely and potent than even Alexander Stephens. The following is a speech to a jury in 1819 by a young lawyer in Frederick, Maryland. His client was Jacob Gruber, a Methodist minister who had delivered an abolitionist sermon to an audience of some 2,600, including some 400 blacks, many of whom were slaves. Gruber was indicted for inciting the slaves to rebellion. The young lawyer delivered this remarkable (and successful) speech to the jury:

Any man has a right to publish his opinions on that subject [slavery] whenever he pleases It is a subject of national concern, and may at all times be freely discussed. Mr. Gruber did quote the language of our great act of national independence, and insisted on the principles contained in that venerated instrument. He did rebuke those masters, who, in the exercise of power, are deaf to the calls of humanity; and he warned them of the evils they might bring upon themselves. He did speak with abhorrence of those reptiles, who live by trading in human flesh, and enrich themselves

30. *Id.* at 70.

31. *Id.* at 71.

by tearing the husband from the wife—the infant from the bosom of the mother: and this I am instructed was the head and front of his offending. Shall I content myself with saying he had a right to say this? That there is no law to punish him? So far is he from being the object of punishment in any form of proceeding, that we are prepared to maintain the same principles, and to use, if necessary, the same language here in the temple of justice, and in the presence of those who are the ministers of the law. A hard necessity, indeed, compels us to endure the evil of slavery for a time. It was imposed upon us by another nation, while we were yet in a state of colonial vassalage. It cannot be easily, or suddenly removed. Yet while it continues it is a blot on our national character, and every real lover of freedom confidently hopes that it will be effectually, though it must be gradually, wiped away; and earnestly looks for the means, by which this necessary object may be best attained. And until it shall be accomplished: until the time shall come when we can point without a blush, to the language held in the Declaration of Independence, every friend of humanity will seek to lighten the galling chain of slavery, and better, to the utmost of his power, the wretched condition of the slave.³²

A modern scholar, nay, Lincoln himself, could not have composed a better epitome of Lincoln's speeches and writings on slavery. It is all there: the recognition of the slaves' humanity, the recognition of "colonial vassalage" as the cause of the presence of slavery at the Founding, the reliance on the authentic antislavery meaning of the Declaration of Independence, and the avowal that the honor and future of the United States depended upon the "ultimate extinction" of slavery.³³ The young lawyer who in 1819 authored this speech was, of course, Roger B. Taney. He was, therefore, the greatest among all witnesses against the Chief Justice who espoused the opposite point of view in 1857. There is no question that the public opinion from which the Declaration was fashioned was favorable to the rights of black human beings, and that in 1857, the Constitution ought to have been interpreted in that light. Yet, against this condemnation of the Taney of 1857, we must nonetheless

32. CLEMENT EATON, *THE FREEDOM-OF-THOUGHT STRUGGLE IN THE OLD SOUTH* 132 (Harper & Row 1964) (1940).

33. Abraham Lincoln, "House Divided" Speech at Springfield, Illinois (June 16, 1858), in *ABRAHAM LINCOLN, SPEECHES AND WRITINGS 1832-1858*, *supra* note 12, at 426, 428.

recognize the faint echo of 1819, which reveals that Taney's mind (unlike Alexander Stephens's) had not been completely submerged in the rising tide of a false "scientific" racism.

II.

There is no more erroneous opinion about *Dred Scott* today than that it represented an attempt by the Supreme Court to usurp power belonging to the elected branches of government. A prominent critic of the Taney Court has written:

The Court in *Dred Scott* decided that all of the agitation and debate in Congress over the Missouri Compromise in 1820, over the Wilmot Proviso a generation later, and over the Kansas-Nebraska Act in 1854 had amounted to absolutely nothing. It was, in the words of Macbeth, "A tale told by an idiot, full of sound and fury, signifying nothing." According to the Court, the decision had never been one that Congress was entitled to make; it was one that the Court alone, in construing the Constitution, was empowered to make.³⁴

This analysis skips from the Wilmot Proviso of 1846–47 to the Kansas-Nebraska Act of 1854, omitting any mention of the territorial laws passed as part of the great Compromise of 1850. The laws adopted in 1850 for the Territories of Utah and New Mexico, from which five states were eventually formed, provided that the people of those territories could apply for admission to the Union with constitutions that permitted or prohibited slavery, as the people might at that time decide.³⁵ This was, as far as it went, "popular sovereignty" for the territories. Senator Stephen A. Douglas adopted these laws as the authority for his version of popular sovereignty that he incorporated into the Kansas-Nebraska Act of 1854.³⁶ But there was a difference, which Douglas (but not Lincoln) conveniently overlooked: according to the territorial laws of 1850, the deci-

34. William H. Rehnquist, *The Notion of a Living Constitution*, 54 TEX. L. REV. 693, 701–702 (1976), reprinted in 29 HARV. J.L. & PUB. POL'Y 401, 410 (2006) (footnote omitted).

35. Act of Sept. 9, 1850, ch. 51, § 1, 9 Stat. 453, 453 (establishing a territorial government for Utah); Act of Sept. 9, 1850, ch. 49, § 2, 9 Stat. 446, 446–47 (establishing a territorial government for New Mexico).

36. See Abraham Lincoln, Speech on the Kansas-Nebraska Act at Peoria, Illinois (Oct. 16, 1854), in ABRAHAM LINCOLN: SPEECHES AND WRITINGS 1832–1838, *supra* note 12, at 307, 344.

sion for or against slavery was to be made by the people of the territories at the time they framed their state constitutions.³⁷ Nothing, however, was said in 1850 of the legal status of slavery *during* the territorial period, before the people of the territories framed their state constitutions.³⁸ The facts on the ground during this interim period would determine what the people of the territories would decide when they framed their constitutions, but on the all-important question of the status of slavery during the territorial period, Congress could not and did not make up its mind. Congress was divided into so many different factions that none commanded a majority. Its solution was to provide in the territorial laws that any dispute over slavery arising during the territorial period could be appealed directly from the supreme court of the territory to the Supreme Court of the United States.³⁹ Hence, jurisdiction on the question of the status of slavery in a territory during the territorial period was given to the Court by Congress. It was not seized by the Court from Congress.

Dred Scott was not a judicial power grab but rather part of a Slave Power conspiracy involving two Presidents, a Chief Justice, and a United States Senator (with many unnamed co-conspirators). An indispensable guide to understanding the politics surrounding *Dred Scott* is Lincoln's "House Divided" speech, which set in motion his 1858 campaign for the Senate seat held by Stephen A. Douglas. The speech places *Dred Scott* in the context of a national conspiracy. But the speech must also be seen from the perspective of the struggle within the Republican Party between Illinois Republicans and the East Coast Republicans who wanted Illinois Republicans to support Douglas for reelection. The House Divided speech was delivered to a state convention that had assembled for the express purpose of declaring that Abraham Lincoln was the first, last, and only candidate of the Republican Party of Illinois.⁴⁰ Until the firing on Fort Sumter, Lincoln regarded Douglas (rather than the fol-

37. § 1, 9 Stat. at 453; § 2, 9 Stat. at 447. In his Peoria Speech, Lincoln definitively refutes the idea that the territorial laws of 1850 supplied a precedent for the concept of popular sovereignty embodied in the Kansas-Nebraska Act. Lincoln, *supra* note 36, at 344–46.

38. See generally § 1, 9 Stat. 453; § 2, 9 Stat. 446.

39. See § 1, 9 Stat. at 455–56; § 2, 9 Stat. at 450.

40. See Lincoln, *supra* note 33, at 426.

lowers of John C. Calhoun) as the greatest threat to the nation. This was because Douglas offered, in popular sovereignty, a temptingly easy way out of the sectional crisis. Douglas's claim was that if the people of each territory were allowed to determine the status of slavery in that territory, then the slavery question could be confined within territorial boundaries and need not roil Congress or the nation. What made Douglas all the more attractive was his leadership of the Congressional Republicans in the recent struggle over the Lecompton Constitution—the draft state constitution proposed by proslavery forces in Kansas. According to Lincoln, however, Douglas's easy way out would delay but not end the crisis over slavery. Furthermore, such appeasement of slavery would only make the crisis, when it came, more difficult. For Lincoln, only a principled rejection of slavery could end the crisis.

In the House Divided speech, Lincoln accused Douglas, along with Taney and two Presidents of the United States, of participating in a conspiracy to spread slavery, not only to all the new territories, but to the free states as well:

“A house divided against itself cannot stand.”

I believe this government cannot endure, permanently half *slave* and half *free*.

I do not expect the Union to be *dissolved*—I do not expect the house to *fall*—but I *do* expect it will cease to be divided.

It will become *all* one thing, or *all* the other.

Either the *opponents* of slavery, will arrest the further spread of it, and place it where the public mind shall rest in the belief that it is in course of ultimate extinction; or its *advocates* will push it forward, till it shall become lawful in *all* the States, *old* as well as *new*—*North* as well as *South*.⁴¹

No more fateful words have ever been spoken here, or perhaps anywhere, or at any time in human history. Lincoln's account of events, from the Kansas-Nebraska Act of 1854 to *Dred Scott* in 1857 and beyond, cannot be stated more concisely, more profoundly, or more brilliantly than Lincoln himself did in the House Divided speech. It cannot be doubted that there existed a common understanding and common goal among the four

41. *Id.*

"workmen—Stephen, Franklin, Roger, and James," as Lincoln described them.⁴² "Roger" was certainly not acting alone. *Dred Scott* was not primarily in the interest of judicial power. It was in the interest of the Slave Power.

The results of the Presidential Election of 1856 signaled the looming threat to the Slave Power and were surely on Taney's mind when he began writing the opinion in *Dred Scott*. Democrat James Buchanan had been elected with 174 electoral votes to Republican John C. Fremont's 114; Millard Fillmore received only 8 electoral votes but garnered 873,053 popular votes to Buchanan's 1,836,072 and Fremont's 1,342,345.⁴³ Fillmore's American Party was largely the residue of the old Whig party. Thus, the further alienation of old Whigs (like Lincoln), together with Know Nothings and Free Soil Democrats, would soon engulf the presidential electoral process. That would mean the end of slavery's expansion and, eventually, of slavery itself.

How to preserve slavery within the Union and prevent the impending Republican victory were the problems facing Taney when he sat down to write the opinion of the Court in *Dred Scott*. To this end he devoted all his energy and considerable talent.

This was not a task in which he was acting alone. Pierce and Buchanan were the preeminent "Doughface" Presidents (Northern men with Southern principles).⁴⁴ Pierce in his final State of the Union Address⁴⁵ and Buchanan in his Inaugural Address,⁴⁶ endorsed, in advance, the forthcoming *Dred Scott* decision. The two Presidents joined in calling on all good Americans to accept *Dred Scott* as a final settlement of all outstanding constitutional questions in regard to slavery. Both of these Presidents knew that *Dred Scott* would "settle" these questions in a way most satisfactory to the Slave Power. Stephen A. Douglas also

42. *Id.* at 431. Lincoln was referring of course to Stephen A. Douglas, Franklin Pierce, Roger Taney, and James Buchanan.

43. CONGRESSIONAL QUARTERLY, 1 GUIDE TO U.S. ELECTIONS 682, 767 (5th ed. 2005).

44. Northern Democrats were said to have faces of dough that Southerners could shape as they wanted.

45. Franklin Pierce, Fourth Annual Address (Dec. 2, 1856), in 1 THE STATE OF THE UNION MESSAGES OF THE PRESIDENTS 1790–1966, at 918, 922 (Fred L. Israel, ed., 1966).

46. James Buchanan, Inaugural Address (Mar. 4, 1857), in INAUGURAL ADDRESSES OF THE PRESIDENTS OF THE UNITED STATES FROM GEORGE WASHINGTON 1789 TO HARRY S. TRUMAN 1949, at 103, 104 (1952).

endorsed *Dred Scott* in advance,⁴⁷ although it is doubtful that he knew how the decision would undercut “popular sovereignty.”

At the time of Buchanan’s inauguration on March 4, 1857, the forces of slavery had tenuous control of the presidency, the Senate, and the Supreme Court. This gave slavery a moment of political power not likely to occur again in the foreseeable future. The election of a Republican President would mean no more proslavery appointments to the Court. It would mean a veto of any legislation likely to add a slave territory or a slave state to the Union. The Court in *Dred Scott* attempted to provide a permanent constitutional status for slavery within the Union. But should that status be denied to it by the forthcoming elections, *Dred Scott* also would provide a constitutional justification for secession. Secession could be made to appear not as an attack on the Union, but as a defense of the Constitution as interpreted by the Supreme Court.

Exactly how, then, did Taney in *Dred Scott* propose to resolve the existing constitutional impasse? First, he declared that the right to property in slaves was “expressly affirmed” in the Constitution.⁴⁸ This was another example of a straightforward lie—like the one about the subhuman status of the Negro at the time of the Founding—which he knew to be false, but which he also knew would be believed by those who had an interest in believing it. Taney then observed that if the right of property in slaves was an expressly affirmed constitutional right, any law or state constitution that denies it is itself unconstitutional.⁴⁹ Hence, the Missouri Compromise’s exclusion of slavery from the Louisiana Territory, or any law limiting a slaveowner’s access to any United States territory, was unconstitutional.⁵⁰ Although Taney’s opinion directly addresses only slavery in the territories, its logic applied to the states as well, by virtue of the Supremacy Clause.⁵¹ The “tenons and mortises” of the four workmen, when fitted together, made a struc-

47. See ROBERT W. JOHANNSEN, STEPHEN A. DOUGLAS 546 (1973).

48. *Dred Scott*, 60 U.S. at 451.

49. *Id.* at 451–52.

50. *Id.* at 452.

51. U.S. CONST. art. VI, § 2 (“This Constitution, and the Laws of the United States which shall be made in Pursuance thereof, . . . shall be the supreme Law of the Land . . . any Thing in the Constitution or Laws of any State to the Contrary notwithstanding.”).

ture of legal reasoning in which slavery would be lawful not only in every territory, but in every state, old as well as new, North as well as South.⁵²

Lincoln foresaw this threat. When I was writing *Crisis of the House Divided*, some fifty years ago, the most influential historians refused to take seriously Lincoln's assertion of an imminent threat of slavery becoming lawful in the free states.⁵³ They saw Lincoln's argument as a scare tactic in the service of his personal ambitions.⁵⁴ They believed that the great historical trends were against slavery.⁵⁵ They supposed that with or without Lincoln, and without a civil war, slavery was destined for the dust bin of history.⁵⁶ But in the second of their seven joint debates, at Freeport, Lincoln read at length from a speech in which Douglas denounced the Washington *Union*—the mouthpiece of the Buchanan administration. Here are Douglas's words, as quoted by Lincoln:

When I saw that article in the *Union* of the 17th of November, followed by the glorification of the Lecompton Constitution on the 18th of November, and this clause in the [Lecompton] Constitution asserting the doctrine that a State has no right to prohibit slavery within its limits, I saw that there was a *fatal blow* being struck at the sovereignty of the States of this Union.⁵⁷

Here is direct confirmation, from Douglas himself, of Lincoln's charge in the House Divided Speech that slavery could become lawful in all the states, as well as in all the territories. Lincoln's quoting of Douglas on the threat of slavery becoming lawful in the states, no less than in the territories, was a lightning bolt, an illumination of the entire political landscape.

The third of the questions (or "interrogatories") put by Lincoln to Douglas at Freeport was as follows:

52. Lincoln, *supra* note 33, at 431–32.

53. See HARRY V. JAFFA, *CRISIS OF THE HOUSE DIVIDED* 19–27 (1959) (identifying historians making these arguments).

54. *Id.* at 23, 27.

55. See *id.* at 22.

56. See *id.*

57. Abraham Lincoln, Second Debate, Freeport, Illinois: Lincoln's Rejoinder (Aug. 27, 1858), in ABRAHAM LINCOLN, *SPEECHES AND WRITINGS 1832–1858*, *supra* note 12, at 573, 579.

If the Supreme Court of the United States shall decide that States can not exclude slavery from their limits, are you in favor of acquiescing in, adopting and following such decision as a rule of political action?⁵⁸

Here is Douglas's reply:

I am amazed that Lincoln should ask such a question. ("A school boy knows better.") Yes, a school boy does know better. Mr. Lincoln's object is to cast an imputation upon the Supreme Court. He knows that there never was but one man in America, claiming any degree of intelligence or decency, who ever for a moment pretended such a thing. It is true that the *Washington Union*, in an article published on the 17th of last December, did put forth that doctrine, and I denounced the article on the floor of the Senate, in a speech which Mr. Lincoln now pretends was against the President. . . . He casts an imputation upon the Supreme Court of the United States by supposing that they would violate the Constitution of the United States. I tell him that such a thing is not possible. (Cheers). It would be an act of moral treason ⁵⁹

Douglas is simply blustering; he never answers the question. The *Washington Union* was Buchanan's mouthpiece, and the article in question was a sighting shot in the war that was beginning between Douglas and the Buchanan Administration on the proslavery Lecompton Constitution. In that war, Douglas led the Republicans to victory over the leadership of his own party. This gave Douglas at least a temporary standing in the Free Soil movement. Lincoln, however, would destroy that standing by pointing to the inconsistency between Douglas's support of *Dred Scott* and his attempt to annul the consequences of *Dred Scott* by popular sovereignty. The imputation of moral treason that Douglas says Lincoln cast upon the Supreme Court was not speculative. The moral treason had already been committed. To call property in slaves an *expressly affirmed* constitutional right would make it the supreme law of the land, overriding any state constitution or law to the contrary.

58. Abraham Lincoln, Second Debate, Freeport, Illinois: Lincoln's Speech (Aug. 27, 1858), in ABRAHAM LINCOLN: SPEECHES AND WRITINGS 1832-1858, *supra* note 12, at 537, 542.

59. Stephen A. Douglas, Second Debate, Freeport, Illinois: Douglas' Reply (Aug. 27, 1858), in ABRAHAM LINCOLN: SPEECHES AND WRITINGS 1832-1858, *supra* note 12, at 549, 553-54.

The second question put to Douglas by Lincoln at Freeport has been wrongly celebrated in the popular lore about the debates, for its significance is not equal to that of the third question. The “Freeport question” and the reply to it are nonetheless worth examining in their original forms:

Can the people of a United States Territory, in any lawful way, against the wish of any citizen of the United States, exclude slavery from its limits prior to the formation of a State Constitution?⁶⁰

Douglas replied:

I answer emphatically, as Mr. Lincoln has heard me answer a hundred times from every stump in Illinois, that in my opinion the people of a Territory can, by lawful means, exclude slavery from their limits prior to the formation of a State Constitution. . . . It matters not what way the Supreme Court may hereafter decide as to the abstract question whether slavery may or may not go into a territory under the constitution, the people have the lawful means to introduce it or exclude it as they please, for the reason that slavery cannot exist a day or an hour anywhere, unless it is supported by local police regulations. . . . Those police regulations can only be established by the local legislature, and if the people are opposed to slavery they will elect representatives to that body who will by unfriendly legislation effectually prevent the introduction of it into their midst. If, on the contrary, they are for it, their legislation will favor its extension. Hence, no matter what the decision of the Supreme Court may be on that abstract question, still the right of the people to make a slave territory or a free territory is perfect and complete under the Nebraska bill.⁶¹

Douglas, as one of the four “workmen,” had committed himself in advance to accepting the decision of the Supreme Court in *Dred Scott* as the solution to all outstanding questions on slavery. Yet he now tries to escape the Court’s conclusion that there is no power under the Constitution to prevent a slaveowner from lawfully carrying his slave property into a territory. Douglas was quite wrong in asserting that slavery cannot exist without local police regulations. As Lincoln explained, slavery had often been protected by the informal collaboration

60. Lincoln, *supra* note 58, at 541–42.

61. Douglas, *supra* note 59, at 551–52.

of slave owners.⁶² Readers of *Huckleberry Finn* will recall the slave patrol on the Mississippi that forced Jim to hide under the raft.⁶³ Such patrols were commonplace in the antebellum South, as was the *posse comitatus*, a system of police enforcement that did not require legislation.⁶⁴

Douglas's distinction between an "abstract" constitutional right and an effectual one was utterly fallacious, and Lincoln took pains to see that it did not gain acceptance. He did so by comparing the right to hold slave property in a territory, as set forth in *Dred Scott*, to the constitutional right to reclaim runaway slaves. The Fugitive Slave Clause provides that,

No Person held to Service or Labour in one State, under the Laws thereof, escaping into another, shall, in Consequence of any Law or Regulation therein, be discharged from such Service or Labour, but shall be delivered up on Claim of the Party to whom such Service or Labour may be due.⁶⁵

The Constitution does not say how or by whom a runaway slave is to be pursued, captured, or incarcerated, or how the owner's claim is to be adjudicated. The words "shall be delivered up," however, leave no room for doubt that appropriate legislation, whether by the states or by Congress, must be forthcoming to implement this constitutional right. Lincoln supported the Fugitive Slave Act of 1850, much as he hated to see runaway slaves hunted down and forcibly returned to their unrequited labor. He did so because the commanding word "shall" in the Constitution bound whoever took an oath to support the Constitution to support such legislation as well.⁶⁶ The obligation to do so could not be evaded by calling the right in question "abstract."

62. Abraham Lincoln, Third Debate, Jonesboro, Illinois: Lincoln's Reply (Sept. 15, 1858), in ABRAHAM LINCOLN, SPEECHES AND WRITINGS 1832-1858, *supra* note 12, at 602, 618.

63. MARK TWAIN, ADVENTURES OF HUCKLEBERRY FINN 155-57 (Susan K. Harris ed., Houghton Mifflin Co. 2000) (1884).

64. See Lincoln, *supra* note 62, at 618; see also Fugitive Slave Act of 1850, ch. 60, § 5, 9 Stat. 462, 462-63 (authorizing enlistment of *posse comitatus* and commanding "all good citizens" to aid enforcement of fugitive slave law).

65. U.S. CONST. art. IV, § 2, cl. 3.

66. Abraham Lincoln, Seventh Debate, Alton, Illinois: Lincoln's Reply (Oct. 15, 1858), in ABRAHAM LINCOLN, SPEECHES AND WRITINGS 1832-1858, *supra* note 12, at 790, 813 ("Why then do I yield support to a fugitive slave law? Because I do not understand that the Constitution, which guarantees that right, can be supported without it.").

In the course of the debates, Lincoln pointed out the abolitionists' claim of a right to deny enforcement of the Fugitive Slave Law of 1850. He then pointed to Douglas's analogous claim of a right to deny enforcement of a slaveholder's right to be secure in his slave property when emigrating to a territory. Lincoln would show that, just as the Fugitive Slave Clause could not be evaded, neither could Douglas use his doctrine of popular sovereignty to evade the "abstract" constitutional right of slave ownership, if *Dred Scott* were correct.⁶⁷ Lincoln concluded the last of the joint debates, at Alton, as follows:

I defy any man to make an argument that will justify unfriendly legislation to deprive a slaveholder of his right to hold his slave in a Territory, that will not equally, in all its length, breadth and thickness furnish an argument for nullifying the fugitive slave law. Why there is not such an Abolitionist in the nation as Douglas, after all.⁶⁸

This ironic comparison of Douglas's Freeport Doctrine to abolitionism, pursued relentlessly by Lincoln, effectively destroyed Douglas as a national leader. Its culminating effect came at the Democratic Convention in Charleston in April of 1860. A majority of the delegates wanted Douglas as the Democratic candidate for President, but they could not attain the two-thirds majority that the party's rules required. The seven states of the Deep South would not support Douglas unless he supported federal enforcement of slaveholders' rights in any United States territory. They took their stand upon these concluding words in Taney's opinion in *Dred Scott*:

Now, as we have already said . . . the right of property in a slave is distinctly and expressly affirmed in the Constitution. . . . And no word can be found in the Constitution which gives Congress a greater power over slave property . . . than property of any other description. The only power conferred is the power *coupled with the duty* of guarding and protecting the owner in his rights.⁶⁹

The italicized words may be the most portentous in American history. No one who accepted them could have been elected dog catcher in any free state. Yet they convinced the Deep

67. *Id.* at 813–14.

68. *Id.* at 814.

69. *Dred Scott*, 60 U.S. at 451–52 (emphasis added).

South that it was an absolute constitutional necessity that Congress provide federal police protection for slave property in any territory that did not itself provide that protection. The South believed that a denial of this alleged constitutional right was a breach of the compact from which the Union under the Constitution derived its being. It became the foundation of their soon to be claimed right of secession.

These words—the words of Roger Taney—denied the nomination of a united Democratic party to Douglas and, in effect, assured the Election of 1860 to Lincoln and the Republicans.

MODESTY AND MORALISM: JUSTICE, PRUDENCE, AND ABORTION—A REPLY TO SKEEL & STUNTZ

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INTRODUCTION

In a recent article, Professors David Skeel and William Stuntz argue in favor of what they describe as a “modest” conception of law from an explicitly Christian and biblical point of view.¹ Briefly put, Skeel and Stuntz assert that the enormous expansion that law has undergone in the last one hundred years—particularly in the area of criminal law—has seriously undermined the rule of law by vesting public officials with an inordinate amount of discretion. They further contend that this expansion has been exacerbated by the practice of “legal moralism,” whereby lawmakers enact laws as a means of expressing certain values, rather than for the purpose of governing society. Moreover, because these largely symbolic laws are not regularly enforced, they are incapable of teaching people the cultural values that they supposedly embody. Instead, the occasional enforcement of such laws through the exercise of official discretion nurtures a pernicious cynicism in the public by teaching people that law is less a matter of commitment to certainty, predictability, and equality, and more a function of individual circumstance and governmental fiat. Because biblical principles strongly support rule-of-law values, Skeel and Stuntz argue that a genuinely Christian conception of law would repudiate the practice of moralism and pursue a more modest course. They conclude that a genuine commitment to legal modesty dictates that law not be used to restrict a number of activities that many Christians currently hope to limit through legal means, including, somewhat surprisingly, the practice of abortion.

Skeel and Stuntz’s article is surely a welcome addition to the burgeoning field of “Christian legal theory.”² By addressing various topics from “specifically and self-consciously Christian

1. David A. Skeel, Jr. & William J. Stuntz, *Christianity and the (Modest) Rule of Law*, 8 U. PA. J. CONST. L. 809–13 (2006).

2. The renewed interest in the relationship between Christianity and the law that has taken place over the past fifteen years can be seen in the creation of new journals, such as the *Journal of Catholic Social Thought*, and the reorganization of *The Catholic Lawyer* as *The Journal of Catholic Legal Studies*, as well as the publication of several books on the subject, including *RECOVERING SELF-EVIDENT TRUTHS: CATHOLIC PERSPECTIVES ON AMERICAN LAW* (Michael A. Scaperlanda & Teresa Stanton Collett eds., 2007) and *THE TEACHINGS OF MODERN CHRISTIANITY ON LAW, POLITICS, AND HUMAN NATURE* (John Witte, Jr. & Frank S. Alexander eds., 2006) (2 vols.).

perspectives,"³ this mode of discourse seeks to contribute to the "multifarious conversation"⁴ taking place in the academy regarding both specific legal issues and the nature of law in general. Skeel and Stuntz's contribution is especially welcome because they have both been critical of the way that Christian legal literature has proceeded. For example, in his well-known review of Robert Cochran, Michael McConnell, and Angela Carmella's book, *Christian Perspectives on Legal Thought*, Stuntz criticizes the essays in that volume, and Christian legal scholarship in general, for an absence of what he terms "critical bite."⁵ That is, notwithstanding the radical nature of Christianity, Stuntz finds the examples of Christian legal theory in the book "moderate and familiar," even "comfortable."⁶ Indeed, according to Stuntz, these essays could suggest to others that Christian legal scholars "think about our legal system pretty much the way other legal theorists do."⁷ Likewise, Skeel has written about the lightness of Christian legal scholarship that is made evident, he says, by the near total absence of "reflection in the scholarly legal literature on the relationship between Christian-

3. Patrick McKinley Brennan, Book Review, 16 J.L. & RELIGION 667, 668 (2001) (reviewing CHRISTIAN PERSPECTIVES ON LEGAL THOUGHT (Michael W. McConnell, Robert F. Cochran, Jr. & Angela C. Carmella eds., 2001)).

4. CHRISTIAN PERSPECTIVES ON LEGAL THOUGHT, xviii (Michael W. McConnell, Robert F. Cochran, Jr. & Angela C. Carmella eds., 2001).

5. William J. Stuntz, *Christian Legal Theory*, 116 HARV. L. REV. 1707, 1709 (2003) (reviewing CHRISTIAN PERSPECTIVES ON LEGAL THOUGHT (Michael W. McConnell, Robert F. Cochran, Jr. & Angela C. Carmella eds., 2001)).

6. *Id.*

7. *Id.*; see also Mark Tushnet, *Distinctively Christian Perspectives on Legal Thought?*, 101 MICH. L. REV. 1858 (2003). What Tushnet found largely missing in the book were essays with "perspectives that derived in some strongly presented way from the authors' understanding of Jesus's distinctive position in religious thought." *Id.* at 1868 n.29. Implicit in Tushnet's review is the claim that Christian legal scholarship is destined to inhabit, at best, the margins of legal academic discourse. He makes this claim by way of a dilemma. On the one hand, Christian legal theory could remain relatively indistinct, presenting ideas that are already widely available in the academy, but without the unnecessary religious baggage that many find objectionable. For Tushnet, the essays in the McConnell, Cochran and Carmella book contain precisely this sort of legal analysis; their attenuated connection to the Christian message renders them indistinct and unremarkable. On the other hand, if Christian legal theory were to speak in a genuinely and decisively Christian voice, then it would be sectarian. By drawing upon the premises that are unique to the Christian story of God's revelation in Jesus Christ, Christian legal theorists would be unable to address legal problems in a way that would be accessible and acceptable in a society defined by religious pluralism. *Id.* at 1868.

ity and the secular law.”⁸ Although Skeel provides a useful definition for what should qualify as genuine Christian legal scholarship,⁹ he concludes that, at present, work of this sort can only be found in “scattered outposts” across the landscape of American law.¹⁰

By voicing these criticisms, Skeel and Stuntz invite an examination of their own work to see whether they succeed in avoiding the shortcomings they perceive in the work of others. If “critical bite” means proposing something truly radical and outside the mainstream of American legal thought, then plainly, their article has little “bite” to offer. It is, after all, difficult to imagine anything more conventional or more deeply rooted in the mainstream of American legal discourse than an argument on behalf of rule-of-law values. Still, what the article lacks in “bite” it surely makes up for in “bark.” Indeed, Skeel and Stuntz’s provocative argument concerning the practice of legal moralism, and their specific identification of pro-life legal efforts with this practice, call for a thorough response.

This Article offers an analysis of the idea of “legal modesty” that informs Skeel and Stuntz’s article.¹¹ Because they write from an Evangelical perspective, Skeel and Stuntz’s engagement with Christian sources is largely confined to citing passages from sacred scripture.¹² Although the Christian Church “has always venerated the divine Scriptures” and “urges all the Christian faithful . . . to learn by frequent reading” of the Bible,¹³ scriptural exegesis is not the sum total of Christian wisdom accumulated through the centuries. Therefore while their

8. David A. Skeel, Jr., *The Unbearable Lightness of Christian Legal Scholarship* 6 (U. Pa. Law Sch. Pub. Law & Legal Theory Working Group, Paper No. 06-37, 2007), available at <http://papers.ssrn.com/abstract=929850>.

9. Skeel posits that genuine Christian legal scholarship must satisfy two criteria. “First, it must provide either a normative theory derived from Christian scripture or tradition[,] or a descriptive theory that explains some aspect of the influence of Christianity on law, or of law on Christianity. . . . Second, it must seriously engage the best secular scholarship treating the same issues.” *Id.* at 31.

10. *Id.* at 33–34.

11. See *infra* Parts I–III.

12. See Skeel & Stuntz, *supra* note 1, at 812–18 (repeatedly citing the Hebrew and Christian scriptures).

13. SECOND VATICAN ECUMENICAL COUNCIL, DOGMATIC CONSTITUTION ON DIVINE REVELATION, *Dei Verbum* ¶¶ 21, 25 (Nov. 18 1965), reprinted in THE DOCUMENTS OF VATICAN II, at 111 (Walter M. Abbott, S.J., ed., Joseph Gallagher trans., 1966), available at http://www.vatican.va/archive/hist_councils/ii_vatican_council/documents/vat-ii_const_19651118_dei-verbum_en.html.

thesis has much to recommend it, their work would have greatly benefited from a fuller engagement with the Christian intellectual tradition, especially as that tradition is reflected in Catholic social teaching and, in particular, the social magisterium of the late John Paul II.¹⁴

Nowhere is the absence of the Christian intellectual tradition more acutely felt than in Skeel and Stuntz's treatment of abortion. Indeed, the Church's social teaching serves as a potent reminder that the point of the rule of law is not simply to guard law's own integrity, but to secure justice for those whom it governs. Justice, properly understood, is the measure of both law's modesty and law's ambition.¹⁵ Moreover, the wider tradition that Skeel and Stuntz ignore offers a sustained reflection on the nature of justice in general and its specific meaning in the context of abortion.

The Christian intellectual tradition also offers an account of the virtue of prudence.¹⁶ Although Skeel and Stuntz's conclusion that law should refrain from regulating abortion seems to be prudential in character, they fail to explain how their judgment fits within the demands of prudence. Above all, prudence requires diligent work to obtain a correct understanding of the facts in a given situation. Inexplicably, however, Skeel and Stuntz rely on a single source, Gerald Rosenberg's *The Hollow Hope*,¹⁷ for their understanding of both the frequency of abortion and the practical effects that legal restrictions on the procedure had before the Supreme Court's decision in *Roe v. Wade*.¹⁸ In doing so, they ignore the substantial literature on the subject that challenges Rosenberg's rather thin empirical claims.¹⁹ In this respect, Skeel and Stuntz's article gives new meaning to the problem of "lightness" in Christian legal theory that Skeel elsewhere diagnoses.²⁰

To their credit, Skeel and Stuntz correctly perceive that the values, institutions, and attitudes that make up a given culture

14. See *infra* Part II.D–E.

15. See *infra* Part II.B.

16. See *infra* Part II.F.

17. See Skeel & Stuntz, *supra* note 1, at 829, 833 (citing GERALD N. ROSENBERG, *THE HOLLOW HOPE: CAN COURTS BRING ABOUT SOCIAL CHANGE?* (1991)).

18. 410 U.S. 113 (1973).

19. See *infra* Part IV.B.

20. See Skeel, *supra* note 8, at 6.

are vastly more important in guiding the lives of individuals than the law could ever hope to be. Indeed, although Skeel and Stuntz do not express the point in precisely the same way, they agree with John Paul II and the Catholic social tradition as a whole in discerning that “culture” enjoys a kind of priority over “law” in the conduct of human affairs.²¹ When combined with their skeptical view of law’s ability to teach and their dubious empirical claims regarding the effectiveness of abortion restrictions, however, this view leads Skeel and Stuntz to conclude that opponents of abortion should eschew legal restrictions on the practice in favor of a cultural witness to the value of life.

In this respect, Skeel and Stuntz share a certain affinity with a number of Catholic commentators who have advocated a similar “culture first” approach.²² These commentators argue that the law should not be used in a coercive fashion, forcing women to carry their pregnancies to term. Instead, law should address the difficult social circumstances that impel many women to choose abortion.²³ These commentators argue that the law can both persuade individuals to choose life and help bring about a change in the culture regarding unwanted pregnancies by rendering material assistance and standing in solidarity with the most vulnerable members of society.

The available data, however, simply does not support the idea that greater social assistance will curb the incidence of abortion to any significant degree, nor that it will help pave the way for a cultural outlook that is more respectful of nascent human life.²⁴ The high incidence of abortion in many European countries with far more generous social service networks than the United States confirms this fact. Instead, programs that provide financial assistance to pregnant women should be supported for their own sake, as a matter of justice, and not simply as a means of changing the cultural landscape.

In addition, the Article argues that Skeel and Stuntz grossly undervalue law’s capacity to teach and influence culture through criminal prohibition.²⁵ Much of this teaching takes place beyond the specific instances in which particular laws are

21. See *infra* Part IV.A.

22. See *infra* Parts V.A–B.

23. See *infra* Part V.C.

24. See *id.*

25. See *infra* Part VII.

enforced. For example, although illegal abortions took place in large numbers prior to *Roe*, social science evidence indicates that the incidence of the procedure underwent a dramatic increase following its legalization.²⁶

The nature of abortion as a social phenomenon is surely such that it cannot be solved through purely legal means. Accordingly, the Article concludes with an historical example of how law and culture can work in tandem to address social problems. Specifically, this Article discusses the remarkable reduction in drunk driving fatalities that followed both the enactment and enforcement of stricter laws and the wide dissemination of cultural messages designed to discourage the practice.²⁷ A wider engagement with the Christian tradition would have shown Skeel and Stuntz that efforts designed to regulate and discourage abortion through legal means fall squarely within the proper boundaries of law, correctly understood. Indeed, such laws could form one component of a larger cultural strategy designed to address the difficult situation faced by women with unwanted pregnancies, and the threat that widely available abortion services pose to the lives of unborn children.²⁸

I. THE SKEEL-STUNTZ THESIS: MODESTY IN LAW AND THE VICE OF LEGAL "MORALISM"

The central claim that Skeel and Stuntz advance in their article is that law, properly understood, should be modest, both in the scope of its application and in the goals that it seeks to realize in social life.²⁹ They argue that this modest approach to law is consistent with what they describe as "the Christian conception of law."³⁰ Modesty, they say, is needed in order to preserve rule-of-law values that are threatened by the excessive role that discretion plays in our legal system. Thus, to uphold these values, law must "pursue a more modest agenda" by avoiding the error of moralism.³¹

26. See *infra* Part IV.B.

27. See *infra* Part V.D.

28. See *infra* Part V.E.

29. Skeel & Stuntz, *supra* note 1, at 809–12.

30. *Id.* at 812.

31. *Id.*

Part of law's virtue can indeed be found in the rule-of-law values that Skeel and Stuntz dutifully rehearse.³² As they note, the rule-of-law requires that state action must primarily be "the consequence of a legal rule, not a discretionary choice";³³ legal rules "must have a reasonable measure of specificity,"³⁴ such that individuals can distinguish between "behavior that is subject to legal penalty and behavior that isn't";³⁵ legal rules "must be defined in advance of the penalized conduct";³⁶ the law "must treat violators at least roughly the same" regardless of class or social status;³⁷ and "the law must not punish intent divorced from conduct."³⁸

Skeel and Stuntz claim that these rule-of-law values "follow naturally from Christian premises."³⁹ For example, they argue that the idea of human equality, from which the principle of equal treatment under the law is derived, finds its source in the biblical revelation that men and women are created in the image of God.⁴⁰ The Bible also makes clear that men and women are fallen creatures "prone to selfishness and exploitation."⁴¹ Thus, from a Christian perspective, law is necessary to prevent the chaos that follows when individuals pursue their own self interest without restraint. At the same time, law must treat individuals made in God's image as worthy of dignity and respect. From this, Skeel and Stuntz conclude that the Bible leads "to the same rule-of-law principles that our legal system purports to honor," such as the reasonable specificity of laws and their general applicability regardless of social class.⁴²

Skeel and Stuntz then contrast these rule-of-law principles with the actual content of divine law set forth in sacred scripture. As they note, divine law is often stated in extremely gen-

32. A classic statement of rule-of-law values can be found in LON L. FULLER, *THE MORALITY OF LAW* 33–41 (rev. ed. 1969).

33. Skeel & Stuntz, *supra* note 1, at 809.

34. *Id.* at 815.

35. *Id.* at 809.

36. *Id.*

37. *Id.* at 810.

38. *Id.*

39. *Id.* at 812.

40. *Id.* at 813–14.

41. *Id.* at 814.

42. *Id.* at 815.

eral terms.⁴³ It also often defines wrongdoing in terms of a person's interior thoughts alone, divorced from any conduct.⁴⁴ Therefore, according to Skeel and Stuntz, "God's law, as Jesus teaches and applies it, violates every single principle that flies under the banner of the 'rule of law.'"⁴⁵ To incorporate God's law into the positive law of the state would invest public officials with "absolute discretion to choose who should be sent to prison and who should go free."⁴⁶ Although God's law should provide guidance to men and women in how they live their lives, it cannot "serve as a code for judges and juries."⁴⁷

The problem with contemporary American law, according to Skeel and Stuntz, is that it aspires to be comprehensive in scope.⁴⁸ In its ambition, the positive law often mimics the moral law found in religious texts, including the Christian Bible. Skeel and Stuntz state that the source of this ambition is political insofar as legislators have an incentive to create countless criminal prohibitions to satisfy the desires of some constituents.⁴⁹ Moreover, legislators have no incentive to curtail this appetite for lawmaking because they "know that the laws they pass will rarely be enforced."⁵⁰ Even if an enacted law sits unused, however, the legislator will still benefit from the symbolic act of "taking a stand against one or another type of crime."⁵¹ Thus, lawmakers "can please constituents who wish to condemn the relevant conduct, without paying either the fiscal or political price of *stopping* that conduct."⁵²

By enacting statutes that they do not expect anyone to enforce, lawmakers fall prey to the vice that Skeel and Stuntz call "moralism." This misuse of the law occurs when laws are enacted, not in order to punish conduct or resolve disputes, but to

43. *Id.* at 816.

44. *Id.*

45. *Id.* at 817.

46. *Id.*

47. *Id.* at 819.

48. *Id.* at 811.

49. *See id.* at 825.

50. *Id.* at 824.

51. *Id.*

52. *Id.* at 825. Skeel and Stuntz contend that this "legal excess is actually self-reinforcing," *id.* at 820, such that the proliferation of new criminal statutes becomes "natural," *id.* at 824.

teach and inspire the public by expressing certain values.⁵³ Laws of this sort are best seen as a “means of sending messages to voters, not sending offenders to prison.”⁵⁴ Even worse, Skeel and Stuntz contend that legislators—and members of Congress in particular—feel free to enact what are in essence extensive moral codes.⁵⁵ As examples of this misuse of law, Skeel and Stuntz refer to such disparate statutes as the Mann Act, enforcement of Prohibition under the 18th Amendment, and the Sarbanes-Oxley Act, as well as statutes designed to regulate abortion.⁵⁶

These measures are problematic for the rule of law because what a legislator may think of as a set of “purely symbolic laws,”⁵⁷ a prosecutor may regard as a generous source of possible charges that may be brought against a defendant.⁵⁸ Because these laws are often “defined in the vaguest possible terms,”⁵⁹ Skeel and Stuntz conclude that these measures undermine the rule of law by giving prosecutors wide discretion to “define the bounds of criminal liability.”⁶⁰ The predictability of law evaporates when its practical existence is a matter of governmental fiat.

Skeel and Stuntz see no way out of this predicament other than to retreat from the practice of adding an endless stream of new statutes to the existing laws. If our society is to avoid the situation in which “the rule of law is honored in theory but widely ignored in practice. . . . it must be a more modest law that rules.”⁶¹ Furthermore, Skeel and Stuntz suggest that the kind of modesty necessary to preserve rule-of-law values would preclude the use of law to regulate abortion.

53. *Id.* at 811. Elsewhere, Stuntz has written that moralism “begins with the claim that law’s highest goal is to identify classes of behavior that are not just socially wasteful or inefficient but *evil*, and then to stamp them out.” Stuntz, *supra* note 5, at 1733.

54. Skeel & Stuntz, *supra* note 1, at 825.

55. *See id.* at 811.

56. *Id.* at 825–26, 829.

57. *Id.* at 828.

58. Here Skeel and Stuntz distinguish the conduct of state and local prosecutors from that of federal prosecutors. With high crime rates and limited budgets, the former abjure the more esoteric crimes and “focus instead on core violent crimes, major thefts, and drug deals.” *Id.* at 821. Federal prosecutors, by contrast, are “free to go after the cases they think matter most or the cases most likely to yield headlines.” *Id.*

59. *Id.* at 822.

60. *Id.* at 828.

61. *Id.* at 811–13.

II. THE PRINCIPLES OF LEGAL MODESTY AND LEGAL AMBITION

Skeel and Stuntz are correct to argue that law is often an inapt means of addressing many types of social ills. They are right to fear that the seemingly endless multiplication of criminal statutes (the enforcement of which no prosecutor's office could competently oversee) leads to the immodest creation of laws that will not be enforced.⁶² They are wrong, however, to claim that the legal regulation of abortion would violate the boundaries of law's modesty, properly understood.

A. *Skeel and Stuntz's Notion of Legal Modesty: An Idea in Search of a Principle*

Although Skeel and Stuntz are emphatic about the need for legal modesty, their article is striking in its failure to offer an account of the principle that informs this allegedly essential virtue of legal order. That is to say, they do not define legal modesty. They fail to distinguish, in a principled fashion, appropriate from inappropriate exercises of state power.

62. I do not share the same concern that Skeel and Stuntz express over the growing use of merely procedural crimes, such as lying to federal investigators and the like. Prosecutors often bring charges involving these relatively minor, technical violations of the law when they are unable to prove or lack confidence in their ability to prove the primary criminal activity under investigation. As examples of the wrongful prosecution of crimes that are almost never pursued, they cite the conviction of Martha Stewart for lying to federal investigators and the investigation of President Bill Clinton for perjury and obstruction of justice. Skeel & Stuntz, *supra* note 1, at 810–11, 821–22, 827. The use of these lesser, procedural crimes is not especially troubling so long as the punishment available for such conduct is proportionately less than the primary offenses under investigation.

On the larger issue of prosecutorial discretion, they do not offer an alternative system in which such discretion would be largely absent, nor could they. Discretion is unavoidable in the operation of any system that depends upon the exercise of human judgment. Furthermore, a large reduction in the number of criminal law statutes is simply not desirable given that our large, complex society boasts, among other things, a diverse and multi-faceted economy in need of regulation and policing. Moreover, such a massive overhaul of our criminal law would not be politically feasible given the inertia that established laws enjoy because of the reluctance of politicians to repeal them. Even if such a change could be brought about, and American criminal law returned to a common law system of a few well-known crimes, this change would not eliminate official discretion. The meaning of the law would still be informed by the discretion of the prosecutors and other law enforcement officials responsible for enforcing it.

Despite their reticence in this regard, Skeel and Stuntz's article does suggest several plausible, though ultimately unconvincing, accounts of legal modesty. For example, Skeel and Stuntz could be understood to say modesty dictates that the law not proscribe conduct that people will continue to perform regardless of its legal status. One could glean this notion of legal modesty from Skeel and Stuntz's references to the continued consumption of alcohol under Prohibition and the practice of abortion prior to *Roe v. Wade*.⁶³ Such an account of legal modesty, however, would prove too much. If it were taken seriously, such a principle would require the elimination not only of the kinds of excessive regulation that Skeel and Stuntz find so troubling, but also virtually every legal prohibition that exists, including even the most basic laws such as those against murder and theft. The fact that people regularly, and in some cases routinely, violate such laws is not an argument for their abolition. The truth is that no law ever enjoys perfect compliance, and indeed, laws are enacted precisely with the expectation that they will be violated.

In addition, Skeel and Stuntz could be understood to say that legal modesty means that the law should refrain from attempting to regulate those areas of life where legal involvement will only inspire creative evasion by those subject to its regulation.⁶⁴ Clearly, those who have greater material resources at their disposal will, as a general matter, enjoy a greater chance of evading detection or conviction. Still, where a person is sufficiently motivated, he will find a way to avoid the law and pursue his desired goals, regardless of means. This will always be the case, whether the conduct in question is smuggling narcotics or complying with the tax code. Accordingly, such a notion of legal modesty likewise proves too much.

The last and most obvious reading that one could give to Skeel and Stuntz's idea of legal modesty is that law should not be employed where those responsible for its enforcement will wield excessive discretion. Plainly, Skeel and Stuntz extol the virtues of

63. See *id.* at 829.

64. See *id.* at 836 (observing that "[r]egulated actors exercise their creativity by looking for ways to *evade* legal norms—like taxpayers filling out their tax forms every April 15, trying all the while to hold on to every penny they can"); see also Anthony D'Amato, *Can Legislatures Constrain Judicial Interpretation of Statutes?* 75 VA. L. REV. 561, 575–87 (1989) (discussing the phenomenon of creative interpretation with respect to the provisions of the tax code).

limited discretion and bemoan the fact that “[d]iscretion mostly rules in America’s justice system” such that “[t]he rule of law [has] become[] a veneer” for governmental fiat.⁶⁵ The principle of legal modesty, however, cannot require the wholesale elimination of discretion because, as Skeel and Stuntz rightly concede, discretion is an unavoidable part of every legal system.⁶⁶

B. *Justice Under Law: The Soul of Legal Modesty and Ambition*

What emerges from Skeel and Stuntz’s article is not a principle of legal modesty, but a strong dislike for prosecutorial discretion and didactic legislation. Skeel and Stuntz seem to posit that the purpose of a legal system is to protect itself. It must preserve its own integrity by ensuring that rule-of-law values are respected. Although the rule of law is important and significant in maintaining a well-ordered society, it is not the purpose for which any particular statute or legal system as a whole exists. Instead, the purpose of law, and the principle that animates both legal modesty and legal ambition, is justice.⁶⁷ It is entirely possible for a statute to satisfy all of the requirements of the rule of law and be profoundly unjust.⁶⁸ Indeed, the formal qualities of a given law might be exemplary, yet fail to compensate for its substantive deficiencies. For example, a law that prohibited all acts of religious worship might satisfy the

65. Skeel & Stuntz, *supra* note 1, at 811.

66. See *id.* at 809 (stating that “[o]bviously, discretion exists, and it matters, but the key policy judgments . . . should be made by those who *define* legal rules, not by those who *enforce* such rules”); *id.* at 815 (admitting that “no legal system can define permissible and impermissible behavior in intricate detail, [but] the line between the two should be reasonably clear” and insisting that without “a reasonable measure of specificity,” one leaves the world of law and “[is] right back in the world of unbounded discretion”).

67. This point enjoys wide support among legal theorists who greatly differ from one another on a host of other questions concerning law. See, e.g., JOHN RAWLS, A THEORY OF JUSTICE 3 (1971) (“Justice is the first virtue of social institutions, as truth is of systems of thought.”); JOHN FINNIS, NATURAL LAW AND NATURAL RIGHTS 260 (1980) (“The authority of law depends . . . on its justice or at least its ability to secure justice.”).

68. This was, of course, the principal issue lurking in the background of the famous Hart-Fuller debate concerning the definition of law. Compare H.L.A. Hart, *Positivism and the Separation of Law and Morals*, 71 HARV. L. REV. 593 (1958) with Lon L. Fuller, *Positivism and Fidelity to Law—A Reply to Professor Hart*, 71 HARV. L. REV. 630 (1958). This issue remains the eight-hundred pound gorilla sitting in the living room of legal positivism.

formal requirements of specificity, clarity, and consistency of application. At the same time, by denying people the fundamental right of religious liberty, such a law could never serve the ends of justice.⁶⁹

Despite their criticism of the vice of “moralism,” Skeel and Stuntz give some indication that they understand the importance of justice. They insist that the “chief object” of law is not to teach but to rule, and law rules best “when its ambitions are modest . . . [i]dentifying the most destructive wrongs . . . for fair, accurate adjudication.”⁷⁰ They conclude that “law must draw lines not between right and wrong, but between the most destructive and verifiable wrongs, and everything else.”⁷¹

By describing anti-abortion laws as examples of “legal moralism” that should not be enacted, Skeel and Stuntz seem to suggest that they do not believe that justice—the chief object of law—is at stake in the case of efforts to restrict abortion. To their credit, Skeel and Stuntz do not argue that the law would enhance freedom and serve the ends of justice by recognizing the choice of a woman to terminate her pregnancy as a legal right. At the same time, on the basis of their article,⁷² one is left to conclude that Skeel and Stuntz do not believe that the deliberate killing of children *in utero* is one of “the most destructive wrongs” or “one of the most destructive and verifiable wrongs” to which the law must respond.⁷³ Instead, one is left to conclude that, in their view, it would be an exercise of grandi-

69. Cf. *McDaniel v. Paty*, 435 U.S. 618, 626 (1978) (“The Free Exercise Clause categorically prohibits government from regulating, prohibiting, or rewarding religious beliefs as such.”). For a thoughtful discussion regarding the importance of religious freedom and why it must be protected in law, see John H. Garvey, *Free Exercise and the Values of Religious Liberty*, 18 CONN. L. REV. 779 (1986). For a discussion of the history behind the special place afforded religious belief in our constitutional order, see Michael W. McConnell, *The Origins and Historical Understanding of Free Exercise of Religion*, 103 HARV. L. REV. 1409 (1990).

70. Skeel & Stuntz, *supra* note 1, at 830–31.

71. *Id.* at 839.

72. As part of a conference that featured a panel on the Skeel-Stuntz thesis hosted by the Lumen Christi Institute and the Law Professors’ Christian Fellowship, David Skeel made clear his own opposition to abortion and his support for pro-life legal efforts. Although this position is in no way discernable from Skeel and Stuntz’s article, it is nevertheless welcome news.

73. Skeel & Stuntz, *supra* note 1, at 839.

ose ambition for the law to attempt to ban a procedure that medical science tells us results in the death of a human being.⁷⁴

But this is not the case. With respect to justice, however, it is an exceedingly modest goal for law to seek to prevent the willful extermination of an innocent human being. Although it is true that “immorality and illegality cannot and must not be co-extensive,”⁷⁵ it is also true that law and morality must be coex-

74. See, e.g., KEITH L. MOORE, *BEFORE WE ARE BORN: BASIC EMBRYOLOGY AND BIRTH DEFECTS* 23 (2d ed. 1983) (“Development begins at fertilization when a sperm fuses with an ovum to form a zygote The zygote is the first cell of a new human being.” (emphasis omitted)). For a remarkably succinct essay that conveys precisely the scientific understanding of the human embryo as a human being, see William J. Saunders, Jr., *Embryology: Inconvenient Facts*, *FIRST THINGS*, Dec. 2004, at 13. Obviously much more could be said on this subject. Regrettably, many supporters of the abortion license have argued that the entity in the womb is not a human being. See, e.g., *Thornburgh v. American College of Obstetricians & Gynecologists*, 476 U.S. 747, 779 (1986) (Stevens, J., concurring) (declaring that “there is a fundamental and well-recognized difference between a fetus and a human being”), *overruled on other grounds by* *Planned Parenthood v. Casey*, 505 U.S. 833 (1992). Others have properly chastised these advocates for seemingly having forgotten the basic lessons they were taught in their high school biology classes. See Michael Stokes Paulsen, *The Worst Constitutional Decision of All Time*, 78 *NOTRE DAME L. REV.* 995, 1017 (2003) (“To claim that the pre-born human embryo is not human life is, from a scientific and medical standpoint, simply absurd. No serious physician or biologist would hold such a view. To so claim is either an act of ignorance or one of willful intellectual dishonesty.”). A more intellectually defensible position is to concede, as an empirical matter, that the human embryo is a “human being” but to argue, as a moral and legal matter, that it is not yet a “person.” See, e.g., John A. Robertson, *In the Beginning: The Legal Status of Early Embryos*, 76 *VA. L. REV.* 437, 444 n.24 (1990) (“The abortion debate has often been confused by loose use of terms such as person, human life, human being, etc. Clearly the fertilized egg, embryo, and fetus are human and are living. The question is whether they merit the moral protection accorded to clearly defined persons.”).

75. Skel & Stuntz, *supra* note 1, at 838; see also Stuntz, *supra* note 5, at 1735 (arguing that legal moralism can be legitimate only if immorality and illegality are coextensive, “[y]et they cannot possibly be coextensive”). This proposition enjoys wide support among those who have reflected on the relationship between law and morality. See, e.g., Larry Alexander & Frederick Schauer, *Law’s Limited Domain Confronts Morality’s Universal Empire*, 48 *WM. & MARY L. REV.* 1579 (2007) (arguing that law is a “limited domain” in that the legal reasons that justify legal actions constitute only a subset of the possible moral justifications); Gregory A. Kalscheur, *John Paul II, John Courtney Murray, and the Relationship Between Civil Law and Moral Law: A Constructive Proposal for Contemporary American Pluralism*, 1 *J. CATH. SOC. THOUGHT* 231 (2004). Nevertheless, to say that law and morality are not coextensive is quite different from the extreme positivist position that law and morality are entirely separable. See JOHN AUSTIN, *THE PROVINCE OF JURISPRUDENCE DETERMINED* 136–41 (Wilfrid E. Rumble ed., 1995).

tensive where the fundamental denial of justice is at stake.⁷⁶ It is indeed modest to seek to avoid having the state serve as the vehicle and protector of gross injustice.⁷⁷ It only now seems to be an immodest proposition to set upon this course because of the breadth and tenacity of the Court's decision in *Roe v. Wade* and the culture it has engendered over the past thirty years.

C. *The Road Not Taken: Mainline Protestant Support for Abortion Rights*

Skeel and Stuntz's decision to avoid a serious discussion of the substantive aspects of justice in the context of abortion may reveal their desire to resolve the difficult question of legal regulation on merely formal grounds. Because legal modesty involves justice in both its substantive and procedural dimensions, however, their solution is too neat by half. Indeed, a correct understanding of legal modesty plainly requires a more thorough examination of justice in the context of abortion.

Writing from a self-consciously Christian and Evangelical perspective, Skeel and Stuntz could hardly be unaware of the many claims that self-professed Christians make regarding abortion and the substantive ends of justice. Indeed, if Skeel and Stuntz had wanted to go beyond their Christian defense of the relatively uncontroversial rule-of-law values that they set forth and take up these substantive claims, they could have made use of any number of sources. Many of the mainline Protestant churches have been enthusiastic supporters of the abortion license since the beginning of the abortion reform movement in the late 1960s and early 1970s.⁷⁸ In their policy

76. As discussed in greater detail below, the Catholic social tradition, and in particular the magisterium of the late Pope John Paul II, are especially instructive on this point. See, e.g., Pope John Paul II, Encyclical Letter, *Evangelium Vitae* ¶ 71 (Mar. 25, 1995) [hereinafter *Evangelium Vitae*] (discussing the "need to recover the basic elements of a vision of the relationship between civil law and moral law"), available at http://www.vatican.va/edocs/ENG0141/_index.htm.

77. *Id.* ("While public authority can sometimes choose not to put a stop to something which—were it prohibited—would cause even more serious harm, it can never presume to legitimize as a right of individuals . . . an offence against other persons caused by the disregard of so fundamental a right as the right to life.").

78. See, e.g., Sidney E. Zion, *State Council of Churches to Seek Abortion Law Liberalization*, N.Y. TIMES, Dec. 13, 1966, at 52. Some Protestant ministers went beyond mere advocacy of permissive abortion laws. In 1967, a group of twenty-one New York Protestant and Jewish clergy announced the formation

of the Clergy Consultation Service in an advertisement in the *New York Times*. The group declared that they would provide abortion counseling and referral information to interested women. As its members generated a network of resources for women seeking abortions prior to legalization, the group expanded to other cities. Following the enactment of New York's liberal abortion law in 1970, they directed thousands of women from outside the state to abortion providers operating in New York. See NANETTE J. DAVIS, FROM CRIME TO CHOICE: THE TRANSFORMATION OF ABORTION IN AMERICA 129–155 (1985); DAVID J. GARROW, LIBERTY AND SEXUALITY: THE RIGHT TO PRIVACY AND THE MAKING OF ROE V. WADE 333–34 (1994); ANDREW H. MERTON, ENEMIES OF CHOICE: THE RIGHT-TO-LIFE MOVEMENT AND ITS THREAT TO ABORTION 51, 56–57 (1981).

For a useful, though incomplete and now somewhat dated, collection of statements by various Christian denominations regarding abortion, see J. GORDON MELTON, THE CHURCHES SPEAK ON ABORTION: OFFICIAL STATEMENTS FROM RELIGIOUS BODIES AND ECUMENICAL ORGANIZATIONS (1989). For an excellent bibliography reflecting many sources on the subject, see GEORGE F. JOHNSTON, ABORTION FROM THE RELIGIOUS AND MORAL PERSPECTIVE: AN ANNOTATED BIBLIOGRAPHY (2003).

That the mainline Christian denominations overwhelmingly gave their support to the abortion rights movement in the early days of abortion reform is really quite remarkable. For example, beginning in 1970, the national governing body of the Presbyterian Church (U.S.A.), the General Assembly, declared that “the artificial or induced termination of a pregnancy is a matter of careful ethical decision of the patient . . . and therefore should not be restricted by law.” Presbyterian 101—Abortion Issues, <http://www.pcusa.org/101/101-abortion.htm> [hereinafter *Presbyterian 101—Abortion Issues*] (last visited Jan. 2, 2008) (quoting various meetings of the General Assembly on the issue of abortion).

The United Church of Christ's (“UCC”) Board for Homeland Ministries voted in 1970 to support a “woman's right to choose the legal option of abortion.” In 1971, the General Synod of the UCC, the national deliberative body for the denomination, overwhelmingly approved a proposal entitled “Freedom of Choice Concerning Abortion.” In adopting this “proposal for action,” the General Synod announced its support for a woman's right to choose abortion in the early months of pregnancy and called upon local congregations to work for the repeal of abortion laws. See UNITED CHURCH OF CHRIST, MINUTES OF THE 8TH GENERAL SYNOD 131–133 (1971).

The United Methodist Church (“UMC”) was among the first of the Christian churches to lend its support to the view that abortion should be permitted as a moral and legal matter. In 1968 the UMC's General Conference adopted a “Statement on Responsible Parenthood” in which it declared its support for legislation “allowing termination of pregnancy” where “the physical or mental health of the mother is seriously threatened, or where substantial medical evidence indicates that a child will be born grossly deformed in mind or body, or where pregnancy has resulted from rape or incest.” United Methodist Church, STATEMENT OF RESPONSIBLE PARENTHOOD (1968), reprinted in MELTON, *supra*, at 162. The UMC adopted a more liberal statement in 1976, which declared that “the path of mature Christian judgment may indicate the advisability of abortion” and encouraged UMC member churches and society as a whole to “[s]afeguard the legal option of abortion under standards of sound medical practice, and make abortions available to women without regard to economic status.” United Methodist Church, *Statement on Responsible Parent-*

statements concerning abortion, these churches often refer to the biblical injunction to preserve the “sanctity of life,” sometimes even describing abortion as “tragic.”⁷⁹ In each case, however, these concerns give way to the imperative of personal autonomy and the dictates of individual conscience.

For example, the Presbyterian Church, U.S.A. believes that “[t]he considered decision of a woman to terminate a pregnancy can be morally acceptable,”⁸⁰ so the right to obtain an abortion “should not be restricted by law.”⁸¹ Likewise, the Episcopal Church insists that the law “must take special care to see that the individual conscience is respected,” making clear its “unequivocal opposition” to any law that would “abridge[] the right of a woman to reach an informed decision about the ter-

hood (1976), reprinted in MELTON, *supra*, at 163–64. The UMC was also instrumental in the founding of what is now known as the Religious Coalition for Reproductive Choice. See Religious Coalition for Reproductive Choice—A Proud History as a Voice of Conscience, <http://www.rcrc.org/about/history.cfm> (last visited Jan. 2, 2008).

For its part, the Episcopal Church first endorsed the liberalization of laws restricting abortion at its 62nd General Convention held in 1967. There the Episcopal Church announced its support for laws permitting the “termination of pregnancy” for reasons of rape, incest, fetal deformity, or physical health of the mother. Episcopal Church, RESOLUTION ON ABORTION (1967), reprinted in MELTON, *supra*, at 48. Like the UMC, the Episcopal Church subsequently adopted an even more permissive stance. Indeed, at its 65th General Convention held in 1976, the Episcopal Church voted to reaffirm the 1967 resolution on abortion. The Episcopal Church went further, however, “express[ing] its unequivocal opposition to any legislation on the part of national or state governments which would abridge or deny the right of individuals to reach informed decisions in this matter and to act upon them.” Episcopal Church, *Resolution to Reaffirm the 1967 General Convention Statement on Abortion*, in JOURNAL OF THE GENERAL CONVENTION OF THE EPISCOPAL CHURCH, MINNEAPOLIS, 1976, at C-3 (1977), available at http://www.episcopalarchives.org/cgi-bin/acts/acts_resolution-complete.pl?resolution=1976-D095.

79. Episcopal Church, *Resolution to Reaffirm the General Convention Statement on Childbirth and Abortion*, in JOURNAL OF THE GENERAL CONVENTION OF THE EPISCOPAL CHURCH, INDIANAPOLIS, 1994, at 323–25 (1995) [hereinafter *Episcopal Church Statement 1994*] (stating that all abortion has a “tragic dimension” and that “[a]ll human life is sacred from its inception until death”), available at http://www.episcopalarchives.org/cgi-bin/acts/acts_resolution-complete.pl?resolution=1994-A054. This is the most recent general statement adopted by the Episcopal Church with respect to abortion. Cf. THE BOOK OF DISCIPLINE OF THE UNITED METHODIST CHURCH 102 (2004) (stating that “belief in the sanctity of unborn human life makes us reluctant to approve abortion”), available at <http://archives.umc.org/interior.asp?mid=1732>.

80. *Presbyterian 101—Abortion Issues*, *supra* note 78 (discussing the 204th General Assembly in 1992).

81. *Id.* (discussing the 182nd General Assembly in 1970).

mination of pregnancy or that would limit the access of a woman to safe means of acting on her decision.”⁸² Although it is uncertain whether the Episcopal Church applies this same criterion in the formulation of its other policy positions, the Church says that its opposition to laws restricting abortion stems in part from the fact that legal prohibitions “will not address the root of the problem.”⁸³ The Evangelical Lutheran Church in America (“ELCA”) opposes not only laws “that would outlaw abortion in all circumstances,” but also “laws that [would] deny access to safe and affordable services” for what it terms “morally justifiable abortions.”⁸⁴ According to the ELCA, this category is considerably broader than those few especially troubling cases in which the pregnancy threatens the life of the mother or where it is the result of rape or incest.⁸⁵ Indeed, according to the ELCA, “abortion prior to viability should not be prohibited by law or by lack of public funding of abortions by low income women.”⁸⁶ Similarly, the United

82. *Episcopal Church Statement 1994*, *supra* note 79.

83. *Id.*

84. The Evangelical Lutheran Church in America (“ELCA”) adopted a lengthy statement on abortion in 1991. See EVANGELICAL LUTHERAN CHURCH IN AMERICA, ELCA SOCIAL STATEMENT ON ABORTION 9–10 (1991), available at <http://www.elca.org/socialstatements/abortion/> (last visited Jan. 2, 2008).

85. The ELCA statement provides that “[a]bortion ought to be an option only of last resort.” *Id.* at 4. Because “[t]he strong Christian presumption is to preserve and protect life,” *id.* at 3–4, the ELCA “in most circumstances, encourages women with unintended pregnancies to continue the pregnancy,” *id.* at 6. At the same time, the ELCA “recognizes that there can be sound reasons for ending a pregnancy through induced abortion,” among which it includes “a clear threat to the physical life of the woman,” pregnancy resulting from rape, incest and other forms of nonconsensual sex, and “circumstances of extreme fetal abnormality, which will result in severe suffering and very early death of an infant.” *Id.* at 6–7.

86. *Id.* at 10. In its entirety, the ELCA statement with respect to legal regulation of the procedure provides the following:

The position of this church is that, in cases where the life of the mother is threatened, where pregnancy results from rape or incest, or where the embryo or fetus has lethal abnormalities incompatible with life, abortion prior to viability should not be prohibited by law or by lack of public funding of abortions for low income women. On the other hand, this church supports legislation that prohibits abortions that are performed after the fetus is determined to be viable, except when the mother's life is threatened or when lethal abnormalities indicate the prospective newborn will die very soon.

Beyond these situations, this church neither supports nor opposes laws prohibiting abortion.

Id.

Methodist Church ("UMC") "support[s] the legal option of abortion under proper medical procedures."⁸⁷

D. Justice, Abortion, and the Christian Tradition

Given the modest role for law concerning abortion envisioned by these various Christian denominations, it is unclear why Skeel and Stuntz chose not to engage these sources. It may have been that they were unimpressed by the fatuous moral and legal reasoning reflected in such statements. Or it may have been that Skeel and Stuntz were underwhelmed by the tenuous relationship between the conclusions asserted in these documents and the biblical foundation they believe is necessary for authoritative Christian teaching. One would like to think, however, that Skeel and Stuntz sensed in these various policy statements a dramatic innovation in Christian moral teaching, and that their decision not to engage these texts reveals a desire for something more than the current deliberations of modern-day American ecclesiastics.

In fact, each of the statements described above represents a decisive break with the Christian past, and an undeniable loss of continuity with the apostolic tradition. That is, in sharp contrast with "the morals of the Greco-Roman world" in which Christianity first took root, "[t]he tradition of the Church has always held that human life must be protected and cherished from the beginning, just as at the various stages of its development."⁸⁸ The prohibition against the intentional destruction of life in the womb is a topic that is addressed in some of the earliest Christian texts. Indeed, although the Hebrew and Christian scriptures do not specifically mention the term "abor-

87. THE BOOK OF DISCIPLINE OF THE UNITED METHODIST CHURCH 102 (2004), available at <http://archives.umc.org/interior.asp?mid=1732>. Oddly enough, the UMC apparently envisioned that civil laws must provide some level of religious instruction before they can be enacted. Absent such a requirement it is difficult to make sense of the UMC's statement that legal restrictions on abortion are inappropriate because "[g]overnmental laws and regulations do not provide all the guidance required by the informed Christian conscience." *Id.*

88. Sacred Congregation for the Doctrine of the Faith, Declaration on Procured Abortion, *Quaestio de abortu* ¶ 6 (Nov. 18, 1974) [hereinafter *Quaestio de abortu*], reprinted in VATICAN COUNCIL II: MORE POSTCONCILIAR DOCUMENTS 441 (Austin Flannery, O.P., ed., 1982) [hereinafter POSTCONCILIAR DOCUMENTS], available at http://www.vatican.va/roman_curia/congregations/cfaith/documents/rc_con_cfaith_doc_19741118_declaration-abotion_en.html.

tion,"⁸⁹ some scholars plausibly contend that several oblique references condemning the practice can be found in the New Testament.⁹⁰ Even if this interpretation is incorrect, it is clear

89. Supporters of abortion rights are fond of noting this omission. From this fact they wish to infer that the Church's opposition to abortion is a mere human construct, and that the decision to obtain an abortion can be consistent with a life devoted to Christ. See, e.g., Anne Eggebroten, *The Bible and Choice*, in ABORTION: MY CHOICE, GOD'S GRACE 209, 210 (Anne Eggebroten ed., 1994); see also Paul D. Simmons, *Personhood, the Bible and Abortion*, in THE ETHICS OF ABORTION: PRO-LIFE VS. PRO-CHOICE 207, 222–23 (Robert M. Baird & Stuart E. Rosenbaum eds., 3d ed. 2001) (concluding that "the claim that the Bible teaches that the fetus is a person from the moment of conception is problematic at best"); GARY WILLS, HEART AND MIND: AMERICAN CHRISTIANITIES 526 (2007) ("Abortion is not treated in the Ten Commandments—or anywhere in the Jewish Scripture. It is not treated in the Sermon on the Mount—or anywhere in the New Testament. It is not treated in the early creeds. It is not treated in the early ecumenical councils.").

In his encyclical letter, *Evangelium Vitae*, Pope John Paul II acknowledges that "[t]he texts of *Sacred Scripture* never address the question of deliberate abortion and so do not directly and specifically condemn it." He argues that these texts, nevertheless, "show such great respect for the human being in the mother's womb that they require as a logical consequence that God's commandment 'You shall not kill' be extended to the unborn child as well." *Evangelium Vitae*, *supra* note 76, ¶ 61; see also *id.* ¶ 44 ("Although there are no direct and explicit calls to protect human life at its very beginning, specifically life not yet born, and life nearing its end, this can easily be explained by the fact that the mere possibility of harming, attacking, or actually denying life in these circumstances is completely foreign to the religious and cultural way of thinking of the People of God."); GERMAIN GRISEZ, ABORTION: THE MYTHS, THE REALITIES AND THE ARGUMENTS 127 (1970) (arguing that, given that the people of Israel "considered life the paradigm of value, [and] . . . regarded it as a gift of God entirely subject to his dominion" it is likely that "the silence in the Old Testament about induced abortion rather indicates that legislation against abortion was unnecessary than that abortion was tacitly approved").

90. Specifically, Judge John Noonan argues that the term "*pharmakeia*," which appears in the list of moral prescriptions in St. Paul's *Letter to the Galatians*, refers to the use of abortifacient medicines. Likewise, Noonan argues that the *Apocalypse*, attributed to St. John, condemns the *pharmakai* or those who practice the use of such medicines. John T. Noonan, Jr., *An Almost Absolute Value in History*, in THE MORALITY OF ABORTION: LEGAL AND HISTORICAL PERSPECTIVES 1, 8–9 (John T. Noonan, Jr., ed., 1970) (citing *Galatians* 5:19–21 and *Revelation* 9:21, 21:8, 22:15). According to Noonan, the term "*pharmakeia*" is "best translated as 'medicine' in the sense in which a North American Indian medicine man makes medicine." *Id.* at 8 (citation omitted). Unfortunately, says Noonan, the term is regularly mistranslated as "sorcery," "witchcraft," or "fortune-telling." *Id.* at 8 n.17.

In his history of the Church's treatment of abortion, John Connery agrees with Noonan that *pharmakeia* is often mistranslated as "sorcery," and that the term instead referred to the practice of giving poisonous drugs, including abortifacient drugs. He argues, however, that although a condemnation of *pharmakeia* "might have included an abortion caused by drugs, [it] would not

that the *Didache*, a first century manuscript that gives its readers basic instruction concerning both the Church's liturgical practices and beliefs and her moral teaching, specifically condemns the practice: "do not murder a child by abortion or kill a newborn infant."⁹¹ This same teaching can be found in the works of the early Church Fathers in both the East and the West, and in the disciplinary and penitential canons of a number of early Church councils.⁹² Although the Church's stance on abortion underwent further exposition and refinement in the centuries that followed,⁹³ the Church has consistently taught

affect one caused by some other means" such that "[i]f Paul wanted to condemn abortion as such, this was a very confusing and ineffective way of doing it." JOHN CONNERY, S.J., ABORTION: THE DEVELOPMENT OF THE ROMAN CATHOLIC PERSPECTIVE 34–35 (1977). What Connery fails to note, however, is that Paul's letter was not written for a general audience, but for the local Christian community in Galatia. In this context, the meaning of Paul's condemnation of *pharmakeia* as a condemnation of abortion may well have been unmistakably clear.

91. *The Teaching of the Twelve Apostles, Commonly Called the Didache*, in 1 EARLY CHRISTIAN FATHERS 171, 172 (Cyril C. Richardson ed. & trans., 1953).

92. See Noonan, *supra* note 90, at 7–18, and CONNERY, *supra* note 90, at 33–64, for a more detailed exposition of the subject. Even some who disagree with the Church's position concerning abortion acknowledge the accuracy of this history. See, e.g., DANIEL CALLAHAN, ABORTION: LAW, CHOICE AND MORALITY 410–411 (1970). Others, however, contend that the evidence of early Christian opposition to abortion is thin, and that what does exist is not founded on scripture or the values of the Gospel, but is instead a misogynistic invention intended to control the sexual lives of women—a man-made rule buoyed by a hierarchical power structure that is unrepentantly patriarchal. See, e.g., BEVERLY WILDUNG HARRISON, OUR RIGHT TO CHOOSE: TOWARD A NEW ETHIC OF ABORTION 119–44 (1983). Harrison offers a thoroughgoing revisionist account of early Christian opposition to abortion along these lines. Although her efforts to marginalize the many early Christian sources that speak against abortion may succeed on a rhetorical level (if not as a matter of historical and theological analysis), what she is unable to do is point to any Christian sources, prior to the twentieth century, that support the permissibility, let alone the virtue, of abortion. This failure is due precisely to the fact that abortion—the intentional destruction of a developing human being—is incompatible with the Christian message.

93. See generally CONNERY, *supra* note 90; GRISEZ, *supra* note 89, at 150–55, 165–84; Noonan, *supra* note 90. As Connery and Noonan both make clear, over the centuries the Church has grappled with different theories concerning when the entity developing in the womb is infused with a rational human soul. These theories have sometimes framed the question in terms of the moment of "ensoulment," or whether or not the embryo or fetus is "formed," or whether it undergoes immediate or delayed "animation" or "hominization." Some who do not favor the Church's current teaching on the subject claim that Christianity historically embraced a kind of pluralism with respect to the humanity of the fetus and thus to the morality of its destruction. See, e.g.,

over the course of nearly two thousand years that abortion is “gravely contrary to the moral law.”⁹⁴

E. The Treatment of Abortion in Catholic Social Thought

Plainly, although Skeel and Stuntz claim to base their understanding of legal modesty on Christian premises, their article could have benefited from a fuller engagement with the Christian tradition regarding abortion. Instead, their article offers no hint of recognition—let alone appreciation—of what this tradition says about the practice of abortion and the proper legal response to it.

Although a number of different churches and ecclesial communities have faithfully preserved this teaching,⁹⁵ nowhere has

HARRISON, *supra* note 92; DANIEL A. DOMBROWSKI & ROBERT DELTETE, A BRIEF, LIBERAL, CATHOLIC DEFENSE OF ABORTION (2000). At best, these efforts constitute an exercise in poor historical scholarship, projecting onto the past the kind of equivocal treatment of abortion they wish to legitimize in the Church today. See GRISEZ, *supra* note 89, at 145–49 (providing an historically correct reading of St. Augustine consistent with the Church’s historic understanding of abortion); *id.* at 282–83 (critiquing an article by Joseph Donceel, S.J., providing a liberal reading of St. Thomas Aquinas, upon which Dombrowski and Deltete rely); see also Anne Barbeau Gardiner, *For Catholic Dissenters, Abortion is Like Mowing Grass*, NEW OXFORD REV., Oct. 2004, at 40 (reviewing Dombrowski and Deltete’s book and criticizing the authors’ misuse of Augustine and Aquinas). Moreover, as Connery nicely summarizes: “In the Christian tradition the distinction between the formed and unformed fetus (animated and unanimated) played no more than a secondary role” in that it was “mainly used for purposes of legal classification and the grading of penances relative to the reconciliation of sinners.” CONNERY, *supra* note 90, at 305. Although the Church has expressly rejected the notion that ensoulment takes place at birth, see CONNERY, *supra* note 90, at 308, the Church has not definitively taught when ensoulment actually occurs. In some ways, the resolution of this philosophical and theological question is irrelevant to the Church’s moral evaluation of abortion because science confirms that, at the time of fertilization, “a life is begun which is neither that of the father nor of the mother; it is rather the life of a new human being with his own growth.” *Quaestio de abortu*, *supra* note 88, ¶ 12. At the same time, the magisterium seems to have moved closer to the position of immediate ensoulment. See *Evangelium Vitae*, *supra* note 76, ¶ 60 (noting that “the results . . . of scientific research on the human embryo provide ‘a valuable indication for discerning by use of reason a personal presence at the moment of the first appearance of human life’” (quoting Congregation for the Doctrine of the Faith, *Instruction on Respect for Human Life in its Origin and on the Dignity of Procreation*, *Donum Vitae* § 1 (1987))), available at http://www.vatican.va/roman_curia/congregations/cfaith/documents/rc_con_cfaith_doc_19870222_respect-for-human-life_en.html.

94. CATECHISM OF THE CATHOLIC CHURCH ¶ 2271 (rev. ed. 1999) (“Since the first century the Church has affirmed the moral evil of every procured abortion. This teaching has not changed and remains unchangeable.”).

the Christian response to abortion been more thoroughly sustained in its integrity and carried forward to meet the challenges of the current age than in the body of papal, conciliar, and other magisterial texts known as Catholic social thought.⁹⁶

95. The discussion above concerning the policy positions of several mainline Protestant denominations may have given the misimpression that all the churches in the Reform tradition were united in their support for abortion rights. Thankfully, however, this is not the case. In fact, a number of mainline and Evangelical churches have courageously presented the Church's teaching with integrity, and many Protestant theologians have given eloquent witness to the cause of life in sermons, presentations, and academic papers. See, e.g., MATTHEW EVERHARD, *ABORTION: THE EVANGELICAL PERSPECTIVE* (2007); THE LUTHERAN CHURCH-MISSOURI SYNOD, *ABORTION IN PERSPECTIVE* (1984), reprinted in MELTON, *supra* note 78, at 60; Paul Ramsey, *Abortion: A Review Article*, 37 THE THOMIST 174 (1973); Paul Ramsey, *Reference Points in Deciding About Abortion*, in THE MORALITY OF ABORTION: LEGAL AND HISTORICAL PERSPECTIVES 60, 69 (John T. Noonan, Jr., ed., 1970).

96. "Catholic social thought" or the "Catholic social tradition" undoubtedly includes more than the official documents issued by popes, bishops and episcopal conferences. Plainly, given the sacred office of bishops within the hierarchical communion that is the Church, see SECOND VATICAN ECUMENICAL COUNCIL, DOGMATIC CONSTITUTION ON THE CHURCH, *Lumen Gentium* ¶¶ 18–29 (Nov. 21, 1964), reprinted in THE DOCUMENTS OF VATICAN II, *supra* note 13, available at http://www.vatican.va/archive/hist_councils/ii_vatican_council/documents/vat-ii_const_19641121_lumen-gentium_en.html (describing the bishops as successors of the apostles who, through episcopal consecration, are given the authority and the charism to teach, govern, and sanctify the faithful in their charge), the official texts enjoy a kind of primacy and authority that non-magisterial texts cannot enjoy. At the same time, these documents serve as a locus for both the wider and the more particular conversations that take place within the Church as to the meaning of the faith and how it should be lived in specific situations. See Pope Paul VI, Apostolic Letter, *Octogesima Adveniens* ¶ 4 (May 14, 1971) [hereinafter *Octogesima Adveniens*], reprinted in CATHOLIC SOCIAL THOUGHT: THE DOCUMENTARY HERITAGE 265 (David J. O'Brien & Thomas A. Shannon, eds., 1992) [hereinafter CATHOLIC SOCIAL THOUGHT], available at http://www.vatican.va/holy_father/paul_vi/apost_letters/documents/hf_p-vi_apl_19710514_octogesima-adveniens_en.html. ("In the face of such widely varying situations it is difficult for [the Pope] to utter a unified message and to put forward a solution which has universal validity," therefore "[i]t is up to the Christian communities to analyze with objectivity the situation which is proper to their own country, to shed on it the light of the Gospel's unalterable words and to draw principles of reflection, norms of judgment and directives for action from the social teaching of the Church."). Thus, the Catholic social tradition also includes the many responses generated by Catholic laity interpreting the official texts and suggesting how they might be applied within particular contexts. See Kenneth R. Himes, O.F.M., *Introduction*, to MODERN CATHOLIC SOCIAL TEACHING: COMMENTARIES AND INTERPRETATIONS 1, 3–4 (distinguishing Catholic social "teaching" from Catholic social "thought"); Richard R. Gaillardetz, *The Ecclesiological Foundations of Modern Catholic Social Teaching*, in MODERN CATHOLIC, *supra*, at 72, 86–90 (Kenneth R.

The encyclical letters, exhortations, decrees, and other documents that make up the Catholic social tradition address a variety of social problems, many of which are peculiar to the modern age, such as the rights of workers and the effects of industrialization and urbanization on individuals and families;⁹⁷ the rights and duties that accompany the private ownership of property and the errors of communism;⁹⁸ the harmful effects created by post-war colonialism and the difficulties faced by the developing world;⁹⁹ the evils of racism and ethnic discrimination and the urgent need for social solidarity;¹⁰⁰ the need for peace among nations, especially in the shadow of the threat of nuclear annihilation;¹⁰¹ the duty of the secular state to respect the exercise of religious freedom and to refrain from mandating practices contrary to religious faith;¹⁰² and the nature of the

Himes, O.F.M., ed., 2005) [hereinafter MODERN CATHOLIC] (offering one view of the different levels of authority among magisterial texts).

97. Pope Leo XIII, Encyclical Letter, *Rerum Novarum* (May 15, 1891), reprinted in CATHOLIC SOCIAL THOUGHT, *supra* note 96, at 14, available at http://www.vatican.va/holy_father/leo_xiii/encyclicals/documents/hf_1-xiii_enc_15051891_rerum-novarum_en.html; Pope John Paul II, Encyclical Letter, *Laborem Exercens* (Sept. 14, 1981), reprinted in CATHOLIC SOCIAL THOUGHT, *supra* note 96, at 352, available at http://www.vatican.va/edocs/ENG0217/_INDEX.HTM.

98. *Octogesima Adveniens*, *supra* note 96, ¶ 3; Pope Pius XI, Encyclical Letter, *Quadragesimo Anno* (May 15, 1931), reprinted in CATHOLIC SOCIAL THOUGHT, *supra* note 96, at 42, available at http://www.vatican.va/holy_fathers/pius_xi/encyclicals/documents/hf_p-xi_enc_19310515_quadragesimo-anno_en.html;

99. Pope Paul VI, Encyclical Letter, *Populorum Progressio* (Mar. 26, 1967), reprinted in CATHOLIC SOCIAL THOUGHT, *supra* note 96, at 240, available at http://www.vatican.va/holy_father/paul_vi/encyclicals/documents/hf_p-vi_enc_26031967_populorum_en.html.

100. Pope Pius XI, Encyclical Letter, *Mit Brennender Sorge* (Mar. 10, 1937), available at http://www.vatican.va/holy_father/pius_xi/encyclicals/documents/hf_p-xi_enc_14031937_mit-brennender-sorge_en.html; Pope John Paul II, Encyclical Letter, *Sollicitudo Rei Socialis* (Dec. 30, 1987), reprinted in CATHOLIC SOCIAL THOUGHT, *supra* note 96, at 395, available at http://www.vatican.va/edocs/ENG0223/_INDEX.HTM; NATIONAL CONFERENCE OF CATHOLIC BISHOPS, BROTHERS AND SISTERS TO US (1979), available at <http://www.usccb.org/saac/bishopspastoral.shtml>.

101. Pope John XXII, Encyclical Letter, *Pacem in Terris* (Apr. 11, 1963), reprinted in CATHOLIC SOCIAL THOUGHT, *supra* note 96, at 131 available at http://www.vatican.va/holy_father/john_xxiii/encyclicals/documents/hf_j-xxiii_enc_11041963_pacem_en.html; National Conference of Catholic Bishops, *The Challenge of Peace: God's Promise and Our Response* (1983), reprinted in CATHOLIC SOCIAL THOUGHT, *supra* note 96, at 492, available at <http://usccb.org/sdwp/international/TheChallengeofPeace.pdf>.

102. SECOND VATICAN ECUMENICAL COUNCIL, DECLARATION ON RELIGIOUS FREEDOM, *Dignitatis Humanae* (Dec. 7, 1965), reprinted in THE DOCUMENTS OF VATICAN II,

family as an institution and its vulnerability in a culture which often celebrates a kind of sexual licentiousness as the pinnacle of freedom.¹⁰³ The dignity of the human person, including his or her right to life, is at the heart of this tradition in a way that transcends the particular social problems under review. Although the human person may enjoy “other goods, and some are more precious,” the right to life is “fundamental—the condition of all the others.”¹⁰⁴

The primary texts at the heart of the Catholic social tradition offer a unique mixture of scriptural exegesis, theological reflection, and philosophical reasoning. Although each of these components is important, it is this last quality, the capacity of the tradition to speak in terms of human reason and not simply in terms of revealed religion, that gives it the potential to appeal to those outside the Christian community. Thus, with respect to questions of law and public policy, the Catholic social tradition not only conveys the Christian way of thinking about the morality of abortion, it also addresses the question of how this teaching may receive proper juridical expression in a pluralistic society. Put another way, one need not be a believing Christian to subscribe to the premises and conclusions that the tradition offers for consideration.

Perhaps the finest articulation of the Christian teaching on abortion within this tradition¹⁰⁵ is the magisterium of Pope

supra note 13, at 675, ¶ 1, available at http://www.vatican.va/archive/hist_councils/ii_vatican_council/documents/vat-ii_exh_19811122_familiaris-consortio_en.html.

103. Pope John Paul II, Apostolic Exhortation, *Familiaris Consortio* (Nov. 22, 1981), available at http://www.vatican.va/holy_father/john_paul_ii/apost_exhortations/documents/hf_jp-ii_exh_19811122_familiaris-consortio_en.html; Pope John Paul II, Letter to Families, *Gratissimam Sane* (Feb. 22, 1994), available at http://www.vatican.va/holy_father/john_paul_ii/letters/documents/hf_jp-ii_let_02021994_families_en.html. The topic of the family, as well as virtually every other topic mentioned above, is discussed at some length in the Second Vatican Council's wide-ranging Pastoral Constitution on the Church in the Modern World. SECOND VATICAN ECUMENICAL COUNCIL, PASTORAL CONSTITUTION ON THE CHURCH IN THE MODERN WORLD, *Gaudium et Spes* (Dec. 7, 1965) [hereinafter *Gaudium et Spes*], reprinted in THE DOCUMENTS OF VATICAN II, *supra* note 13, at 199, available at http://www.vatican.va/archive/hist_councils/ii_vatican_council/documents/vat-ii_const_19651207_gaudium-et-spes_en.html.

104. *Quaestio de abortu*, *supra* note 88, ¶ 11.

105. The modern papacy has addressed the problem of abortion on a number of occasions. In his encyclical letter *Casti Connubii*, Pope Pius XI described the practice of “the taking of the life of the offspring hidden in the mother’s womb” as “a very grave crime.” Pope Pius XI, Encyclical Letter, *Casti Connubii* § II, ¶ 63 (Dec. 31, 1930), reprinted in SEVEN GREAT ENCYCLICALS 94 (James P. Sweeney,

S.J., trans., 2d ed. 1963), available at http://www.vatican.va/holy_father/pius_xi/encyclicals/documents/hf_p-xi_enc_31121930_casti_connubii_en.html. Writing in an era in which abortion was still prohibited by law in most countries, Pius warned the faithful of the demands that abortion “be . . . in no way penalized” and indeed “that the public authorities provide aid for these death-dealing operations.” *Id.* In rejecting these calls for reform, Pius noted that one may well sympathize with a woman who faces a difficult and unwanted pregnancy, but, he asked rhetorically, “what could ever be a sufficient reason for excusing in any way the direct murder of the innocent? This is precisely what we are dealing with here.” *Id.* § II, ¶ 64. Indeed, because the life of both the woman and her unborn child are “equally sacred, . . . no one has the power, not even the public authority, to destroy it.” *Id.*

Pius XII, who succeeded Pius XI in 1939, addressed the topic of abortion on several occasions, most notably in an address he gave to Italian midwives in 1951. There he noted that the unborn child is not partially human, nor is it a being in the process of attaining human status. Instead, “[t]he child is ‘man,’ even if he be not yet born, in the same degree and by the same title as his mother.” Pope Pius XII, *Address to Midwives on the Nature of Their Profession* § 2 (Oct. 29, 1951), reprinted in THE MAJOR ADDRESSES OF POPE PIUS XII 163 (Vincent A. Yzermans ed., 1961). Moreover, just as the quality of being a human being is not a status that the child attains by achieving some level of development, so the right to life is not something conferred upon it by others. As Pius XII makes clear, “Every human being, even the infant in the mother’s womb, has the right to life *immediately* from God and not from the parent or any human society or authority.” *Id.* Consequently, there is “no man, no human authority, no science, no medical, eugenic, social, economic or moral ‘indication,’ that can show or give a valid judicial title for direct deliberate disposal of an innocent human life—which is to say, a disposition that aims at its destruction either as an end in itself or as the means of attaining another end that is perhaps in no way at all illicit in itself.” *Id.*

Likewise, Pius XII’s successor, Pope John XXIII, insisted in his encyclical *Mater et Magistra* that “all must regard the life of man as sacred, since, from its inception, it requires the action of God the Creator.” Pope John XXIII, Encyclical Letter, *Mater et Magistra* ¶ 194 (1961), reprinted in CATHOLIC SOCIAL THOUGHT, *supra* note 96, at 84, available at http://www.vatican.va/holy_father/john_xxiii/encyclicals/documents/hf_j-xxiii_enc_15051961_mater_en.html. Individuals who fail to respect the sacredness of human life not only “dishonor themselves and the human race, but they also weaken the inner fiber of the commonwealth.” *Id.*

Moreover, the Second Vatican Council, which John XXIII convoked, addressed the topic of abortion briefly, but in words that leave no doubt as to the Church’s judgment on the matter. In the Council’s Pastoral Constitution on the Church in the Modern World, *Gaudium et Spes*, the Council fathers cautioned that “from the moment of its conception [human] life must be guarded with the greatest care, while abortion and infanticide are unspeakable crimes.” *Gaudium et Spes*, *supra* note 103, ¶ 51. Elsewhere, the Council condemns “whatever is opposed to life itself.” *Id.* ¶ 27. Here it lists abortion together with murder, genocide, euthanasia, and suicide as “infamies indeed” that “poison human society.” *Id.*

John’s successor, Pope Paul VI, confirmed the teaching of the Council in his momentous encyclical, *Humanae Vitae*, in which he reaffirmed the Church’s judgment regarding the illicit nature of artificial contraception. In the letter, Paul also firmly stated that “the direct interruption of the genera-

John Paul II and, in particular, his encyclical, *Evangelium Vitae*.¹⁰⁶ The publication of this book-length document marked the first time that a pope had devoted an entire encyclical letter to the moral analysis of actions involving the intentional destruc-

tive process already begun, and above all, direct abortion, even for therapeutic reasons, are to be absolutely excluded as lawful means of controlling the birth of children." Pope Paul VI, Encyclical Letter, *Humanae Vitae* ¶ 14 (July 25, 1968), reprinted in POSTCONCILIAR DOCUMENTS, *supra* note 88 at 397, 404, available at http://www.vatican.va/holy_father/paul_vi/encyclicals/documents/hf_p-vi_enc_25071968_humanae-vitae_en.html.

In 1971, the Synod of Bishops, a periodic meeting of bishops drawn from around the world for the purpose of strengthening the Church's communion and advising the Holy See on the issues of the day, produced the document *Convenientes ex Universo*, in which they addressed the topic of justice in the world. The document is frequently cited and justifiably celebrated for the bishops' conclusion that "[a]ction on behalf of justice and participation in the transformation of the world fully appear to us as a constitutive dimension of the preaching of the Gospel, or, in other words, of the Church's mission for the redemption of the human race and its liberation from every oppressive situation." SYNOD OF BISHOPS, JUSTICE IN THE WORLD, reprinted in CATHOLIC SOCIAL THOUGHT, *supra* note 96, at 288, 289. The synodal document is also significant for identifying "[t]he fight against legalized abortion" as a "significant form[] of defending the right to life." *Id.* at 292.

The two most significant Church statements regarding abortion in recent years are *Quastio de Abortu*, *supra* note 88, and *Evangelium Vitae*, *supra* note 76, both of which are discussed in the text above.

In addition to these Roman sources, the American bishops, through their body, the United States Conference of Catholic Bishops (and its predecessor organizations: the National Catholic Welfare Conference, the United States Catholic Conference, and the National Conference of Catholic Bishops), have generated an impressive number of documents articulating the Church's teaching on the subject and setting forth their own proposed strategies for changing both the law and the culture in the United States. See, e.g., National Conference of Catholic Bishops, *Pastoral Message* (1973), available at <http://usccb.org/prolife/issues/abortion/roevwade/Feb1973PastoralMessage.pdf>; National Conference of Catholic Bishops, *Pastoral Plan for Pro-Life Activities* (1975), available at <http://usccb.org/prolife/issues/abortion/roevwade/1975PastoralPlan.pdf>; National Conference of Catholic Bishops, *Resolution on Abortion*, 19 ORIGINS 395 (1989), available at <http://www.usccb.org/prolife/tdocs/resabort89.shtml>; National Conference of Catholic Bishops, *Faithful for Life: A Moral Reflection* (1995), available at <http://www.usccb.org/prolife/tdocs/FaithfulForLife.pdf>; National Conference of Catholic Bishops, *Living the Gospel of Life: A Challenge to American Catholics*, 28 ORIGINS 429 (1998), available at <http://www.usccb.org/prolife/gospel.shtml>; United States Conference of Catholic Bishops, *Pastoral Plan for Pro-Life Activities: A Campaign in Support of Life* (2001), available at <http://www.usccb.org/prolife/pastoralplan.shtml#intro>. Various state episcopal conferences and individual bishops have also written on the subject on numerous occasions. See, e.g., Catholic Bishops of New Jersey, *In God's Image: A Statement on the Sanctity of Human Life*, 14 ORIGINS 151 (1984); Catholic Bishops of Pennsylvania, *The Church, Public Policy and Abortion*, 20 ORIGINS 14 (1990).

106. *Evangelium Vitae*, *supra* note 76.

tion of human life. More than this, however, *Evangelium Vitae* is especially significant both for its eloquent defense of human dignity in the context of capital punishment, euthanasia, and abortion, and for its searing diagnosis of the social milieu in which these practices have become commonplace.

In contrast to Skeel and Stuntz's reluctance to discuss the matter forthrightly, in *Evangelium Vitae*, John Paul II is refreshingly direct in his analysis of abortion as a moral act and cultural phenomenon. He reminds us that abortion always involves "the deliberate and direct killing . . . of a human being in the initial phase of his or her existence."¹⁰⁷ Thus, society must resist the temptation to engage in obfuscation and denial. Instead, we must "have the courage to look the truth in the eye and to call things by their proper name."¹⁰⁸ The hard truth that abortion calls us to "recognize [is] that we are dealing with murder" because "[t]he one eliminated is a human being at the very beginning of life."¹⁰⁹ John Paul recognizes that a woman's decision to abort may not be made "for purely selfish reasons or out of convenience," but may be made in order to protect other "important values such as her own health or a decent standard of living for the other members of the family."¹¹⁰ Although these values might, under different circumstances, justify other kinds of moral acts, they "can never justify the deliberate killing of an innocent human being."¹¹¹

It should be clear from this discussion that by identifying abortion as a crime—indeed, as murder—the Church believes that more is at stake than simply the Christian injunction to "love one another."¹¹² Although the Christian tradition has always held that abortion is antithetical to the Christian norm of love,¹¹³ it has also held that abortion is incompatible with the

107. *Id.* ¶ 58.

108. *Id.* (emphasis omitted).

109. *Id.*

110. *Id.* (emphasis omitted).

111. *Id.*

112. *John* 13:34–35; see also *Matthew* 5:43–46; *Mark* 12:28–34; *Luke* 6:27–35.

113. See Noonan, *supra* note 90, at 18 (concluding that by 450 A.D., "[a]ll the [Christian] writers agreed that abortion was a violation of the love owed to one's neighbor"); *id.* at 59 (noting that Christians knew "the commandment to love" as exemplified in Christ could demand "sacrifice carried to the point of death" in extreme situations, and in "less extreme cases," such as an unwanted pregnancy, "preference for one's own interests to the life of another seemed to express cruelty or selfishness irreconcilable with the demands of

demands of justice. That is, the decision to abort rather than to carry the child to term represents a failure to render to the unborn child that which is his or her due—to recognize his or her right to life.¹¹⁴ The law cannot compel an act of love, “the free gift of self”¹¹⁵ whereby the human person chooses to bring about the genuine good of another.¹¹⁶ Justice, by contrast, is something that the coercive power of the state can help to realize, albeit in an imperfect fashion.

love”); CALLAHAN, *supra* note 92, at 410 (“The historical source of the Catholic teaching on abortion was the conviction of the early Christian community that abortion is incompatible with and forbidden by the fundamental Christian norm of love, a norm which forbade the taking of life.”).

Writing from a feminist perspective, by contrast, Professor Harrison does not bother engaging in the conceit of trying to explain the right to abortion in terms of Christian love. As Harrison candidly admits, “there is nothing to be gained by pretending that a feminist theological viewpoint is consistent with what other theologians too often call ‘the Christian tradition.’” HARRISON, *supra* note 92, at 117. Thus, notwithstanding a rhetorical nod to Christian *agape*, *id.* at 115, she replaces the norm of love with a new ethic of freedom “understood as the power of creativity [that] achieves its consummate expression in deepened community.” *Id.* at 100. Of course, this creative freedom includes the power to say “no” to community with the developing child in the violent act of abortion. Indeed, according to Harrison, “[f]rom a feminist theological point of view, prohibition of legal abortion involves the effort to deny freedom or centered moral agency, and hence full humanity, to over half the population.” *Id.* at 116. Harrison assures us that, in a society that fully realized the feminist ethic, “power would be experienced as *reciprocity in relation*” such that “our individual power to act would be nourished and enhanced by mutual regard and cocreativity.” *Id.* at 99. She does not, however, explain how the aborted child would experience the power imposed on it, resulting in its own death, as “reciprocity in relation.” Instead, like most other supporters of the abortion right, she denies the humanity of the entity developing in the womb. *Id.* at 214 (claiming that it is “genuinely absurd” to refer to “a conceptus or an early differentiated fetus [as] ‘a human being,’ or even ‘a person’”). By eliminating the developing child from moral consideration, she also eliminates the need to explain how a woman’s unilateral, creative power to exterminate is in fact the manifestation of a benign reciprocity.

114. Cf. JOSEF PIEPER, *THE FOUR CARDINAL VIRTUES* 43–44 (1966) (discussing the classic definition of justice as “the notion that each man is to be given what is his due”). This well-known formulation of justice enjoys an ancient lineage, appearing in a number of classic sources in the Western canon. See, e.g., 3 ST. THOMAS AQUINAS, *SUMMA THEOLOGICA*, II–II, Q. 58, art. 1 (Fathers of the English Dominican Province trans., 1948); HOMER, *THE ODYSSEY* 188 (bk. xiv, ln. 83–84) (Albert Cook trans., 1974) (“For the blessed gods are not fond of cruel deeds; / No, they reward justice and the righteous needs of men.”).

115. Pope John Paul II, Encyclical Letter, *Centesimus Annus* ¶ 41 (1991) [hereinafter *Centesimus Annus*], reprinted in *CATHOLIC SOCIAL THOUGHT*, *supra* note 96, at 439, 470, available at http://www.vatican.va/edocs/ENG0214/_INDEX.HTM.

116. See ST. THOMAS AQUINAS, *supra* note 114, at II–II, Q. 23, art. 1.

Clearly this understanding of abortion and justice has implications for the content of law. The legal treatment of the subject must reflect the fact that the practice of abortion realizes a fundamental injustice: the intentional destruction of an innocent human being. As John Paul makes clear, law "can never presume to legitimize as a right of individuals . . . an offence against other persons caused by the disregard of so fundamental a right as the right to life."¹¹⁷ Put another way, "[n]o circumstance, no purpose, no law whatsoever can ever make licit an act which is intrinsically illicit."¹¹⁸ Thus, precisely because laws that purport to authorize or support abortion are "radically opposed not only to the good of the individual but also the common good," they "are completely lacking in authentic juridical validity."¹¹⁹ Accordingly, John Paul encourages political leaders to take steps that "will lead to the reestablishment of a just order in the defence and the promotion of the value of life."¹²⁰

It should be clear that the desire to legally prohibit abortion is reflected in the Church's teaching does not, as Skeel and Stuntz suggest, spring from "a tendency to confuse God's law with man's"¹²¹ or "to make the statute books mirror the law of God."¹²² As a fundamental matter, pro-life legal efforts are not an attempt to use law as a "tool[] for healing a spiritually dis-

117. *Evangelium Vitae*, *supra* note 76, ¶ 71.

118. *Id.* ¶ 62.

119. *Id.* ¶ 72.

120. *Id.* ¶ 90.

121. Skeel & Stuntz, *supra* note 1, at 832. Although pro-choice partisans frequently try to portray the pro-life position as an attempt by religious zealots to impose a set of narrow sectarian views on an unwilling public, the truth is that "were government to choose to outlaw abortion, it would not have to rely on a religious argument about the requirements of human well-being." MICHAEL J. PERRY, *RELIGION IN POLITICS: CONSTITUTIONAL AND MORAL PERSPECTIVES* 70 (1997); *see also* PHILIP E. DEVINE, *THE ETHICS OF HOMICIDE* 206 (University of Notre Dame Press 1990) (1978) (noting that the chief arguments against abortion "do not appeal to the sovereignty of God over human life, notions about the soul, or even quasi-religious notions such as the sanctity of life"). *Cf.* JOHN T. NOONAN, JR., *A PRIVATE CHOICE: ABORTION IN AMERICA IN THE SEVENTIES* 57 (1979) (noting that if there is "no secular criterion by which human life c[an] be determined to exist . . . then *any* position on the beginning of human life [is] 'religious'").

122. Skeel & Stuntz, *supra* note 1, at 835; *see also* Stuntz, *supra* note 5, at 1734 (noting that some believe that opposition to abortion "smacks of theocracy").

eased society.”¹²³ As the late Joseph Bernardin neatly summarized in testifying before Congress, “[t]he obligation to safeguard unborn human life arises not from religious or sectarian doctrine, but from universal moral imperatives concerning human dignity, the right to life, and the responsibility of government to protect basic human rights.”¹²⁴ Surely Skeel and Stuntz are right to say that it is “abundantly clear that law cannot save souls,” and that “salvation must come through other means.”¹²⁵ It is also abundantly clear, however, that the goal of legal restrictions on abortion is not salvation in the afterlife but justice in the here and now. These efforts represent a desire to achieve justice from a purely secular point of view—not biblical justice, but the kind of justice that should be found at the heart of a liberal democracy in a pluralistic society.¹²⁶

123. Skeel & Stuntz, *supra* note 1, at 837. From a religious perspective, of course, that the law might help to bring about a kind of spiritual healing would be an added benefit. For a lawmaker to foresee and desire such an ancillary effect would not thereby render the enacted legislation unconstitutional. See *McGowan v. Maryland*, 366 U.S. 420, 442 (1961) (concluding that “the ‘Establishment’ Clause does not ban federal or state regulation of conduct whose reason or effect merely happens to coincide or harmonize with the tenets of some or all religions”); *Lemon v. Kurtzman*, 403 U.S. 602, 612 (1971) (insisting that a statute “must have a secular legislative purpose” and that the “principal or primary effect” of the legislation must neither advance nor inhibit religion); see also KENT GREENAWALT, *RELIGIOUS CONVICTIONS AND POLITICAL CHOICE* 250 (1988).

124. Proposed Constitutional Amendments on Abortion, 1976: Hearings Before the Subcomm. on Civil and Constitutional Rights of the H. Comm. on the Judiciary, 94th Cong. 306 (1976) (testimony of Archbishop Joseph L. Bernardin).

125. Skeel & Stuntz, *supra* note 1, at 831.

126. There exists, in contemporary circles that lean left, a near paranoia that the strict secularism that has been a defining trait of our national politics for the past several generations is about to be overrun by a kind of theocracy. See Ross Douthat, *Theocracy, Theocracy, Theocracy*, *FIRST THINGS*, Aug./Sept. 2006, at 23 (reviewing KEVIN PHILLIPS, *AMERICAN THEOCRACY: THE PERIL AND POLITICS OF RADICAL RELIGION, OIL, AND BORROWED MONEY IN THE 21ST CENTURY* (2006); JAMES RUDIN, *THE BAPTIZING OF AMERICA: THE RELIGIOUS RIGHT’S PLANS FOR THE REST OF US* (2006); MICHELLE GOLDBERG, *KINGDOM COMING: THE RISE OF CHRISTIAN NATIONALISM* (2006); and RANDALL BALMER, *THY KINGDOM COME: HOW THE RELIGIOUS RIGHT DISTORTS THE FAITH AND THREATENS AMERICA: AN EVANGELICAL’S LAMENT* (2006)). From this perspective, efforts to curb abortion rights feature prominently in the threat of theocratic and antidemocratic rule. See, e.g., Maureen Dowd, *The Red Zone*, *N.Y. TIMES*, Nov. 4, 2004, at A25 (arguing that President Bush won re-election “by dividing the country along fault lines of fear, intolerance, ignorance and religious rule” and that he “ran a jihad” that drew “a devoted flock of evangelicals . . . to the polls by opposing abortion, suffocating stem cell research and supporting a constitutional amendment against gay marriage”). The questions

F. *The Need for Prudence in the Formulation of Law*

Justice, of course, is not the only principle that should inform the creation of law. Prudence, the “mother” of all the cardinal virtues,¹²⁷ also has an essential role to play in the formation of legal rules. Indeed, prudence enjoys a kind of preeminence in that it makes possible the attainment of justice and the exercise of true fortitude and temperance. Thus, it is no exaggeration to say that “[a]ll virtue is necessarily prudent.”¹²⁸

Prudence is essentially a cognitive faculty that aids the exercise of practical judgment. It enables a person “to obtain knowledge of the future from knowledge of the present or past” and to determine how to act in the future.¹²⁹ The prudent person forsakes rashness and indecision and “above all [possesses] the ability to be still in order to attain objective perception of reality.”¹³⁰ Accordingly, prudence involves “the capacity to estimate, with a sure instinct for the future, whether a particular action will lead to the realization of the goal.”¹³¹ As such, the exercise of prudence is vital to ensuring that law does not exceed the bounds of its competence.

Although Skeel and Stuntz do not mention prudence by name, in many ways it is the dominant theme of their article. If, as they suggest, the legal prohibition of some conduct were to in fact increase its frequency, then obviously the use of law in that case would be imprudent,¹³² because it would not help to advance the social goal for which the law was established.¹³³

that ask whether and to what extent religious views may enter into liberal political discourse and become the basis for legal action have been the subject of serious reflection by a number of commentators. See, e.g., GREENAWALT, *supra* note 123; ROBERT AUDI, RELIGIOUS COMMITMENT AND SECULAR REASON (2000); MICHAEL J. PERRY, UNDER GOD: RELIGIOUS FAITH AND LIBERAL DEMOCRACY (2003). Although the Establishment Clause of the Constitution surely imposes limits on the kinds of laws that the state may enact, a convincing case has yet to be made that principled opposition to abortion is intrinsically religious, or that legal measures restricting abortion would constitute a kind of theocratic rule.

127. PIEPER, *supra* note 114, at 3–4.

128. *Id.* at 5 (noting that “there is no sort of justice and fortitude which runs counter to the virtue of prudence,” and that “the unjust man has been imprudent before and is imprudent at the moment he is unjust”).

129. ST. THOMAS AQUINAS, *supra* note 114, at II–II, Q. 47, art. 1.

130. PIEPER, *supra* note 114, at 13.

131. *Id.* at 17–18.

132. See John Gardner, *Prohibiting Immoralities*, 28 CARDOZO L. REV. 2613, 2613 (2007) (arguing that the immorality of a thing or act is not sufficient to justify its legal prohibition, but that “the prohibition must be effective, or at

There are, however, many reasons to doubt the prudential judgment that Skeel and Stuntz employ in their discussion of abortion and the law. They suggest that the legal prohibition of abortion can no more stop its practice than the legal regime of Prohibition succeeded in producing “an alcohol free culture” or “contemporary law enforcement crusades have produced a culture that is drug-free.”¹³⁴ Although their empirical claim concerning alcohol and drugs is undoubtedly true, within this claim Skeel and Stuntz implicitly suggest an impossible standard for gauging the success of a law. As noted above,¹³⁵ the failure of a criminal law to achieve perfect deterrence with respect to the conduct in question does not justify its repeal. If that were the case, then murder, rape, and burglary—the uncontroversial “common law” crimes to which Stuntz elsewhere refers¹³⁶—would likewise be subject to repeal. Murders still take place with alarming frequency, yet few would suggest that the laws against homicide should be done away with.¹³⁷ Although absolute deterrence of a defined criminal act may be the ideal, it is hardly the expectation.¹³⁸ Instead, the vital ques-

least not counterproductive; thanks to the prohibition there must be fewer, or at least no more, [occurrences] than there would otherwise be”).

133. To be clear, Skeel and Stuntz do not make the bizarre contention that the legal prohibition of some act leads to an increase in the incidence of the conduct subject to regulation. They do not, for example, contend that Prohibition led to an increase in alcohol consumption, or that statutes outlawing crack cocaine led to an increase in the drug’s popularity. Likewise, they do not suggest that statutes outlawing abortion led to an increase in the number of women seeking to terminate their pregnancies. Instead, they argue that a law contains the seeds of its own demise when it leads to adverse publicity and subsequent public dissatisfaction following its enforcement. Thus, they point to the discriminatory enforcement of Prohibition against working class consumers of alcohol and the death of erstwhile pregnant women from illegal abortions. See Skeel & Stuntz, *supra* note 1, at 829, 832–33; see also William J. Stuntz, *Self-Defeating Crimes*, 86 VA. L. REV. 1871, 1874–80, 1886–91 (2000).

134. Skeel & Stuntz, *supra* note 1, at 829.

135. See *supra* Part II.A.

136. See Stuntz, *supra* note 133, at 1897.

137. See Clarke D. Forsythe, *The Effective Enforcement of Abortion Law Before Roe v. Wade*, in *THE SILENT SUBJECT: REFLECTIONS ON THE UNBORN IN AMERICAN CULTURE* 179, 195 (Brad Stetson ed., 1996) (“There are tens of thousands of vehicular homicides, rapes, robberies, and burglaries each year. It is never suggested that any of these crimes should be legalized because the law is broken or because so many crimes go unpunished.”).

138. Indeed, that the deterrent effect of the criminal law is imperfect merely highlights the fact that the criminal prohibition of conduct that is harmful to others can serve other important societal interests such as retribution and

tions to ask in this context are whether the incidence of the conduct in question would be even higher in the absence of criminal prohibition, and whether the potentially lower incidence of such conduct would justify the investment in resources necessary to achieve it.

In the case of abortion, the issue might be framed as follows: Skeel and Stuntz assume that one million abortions per year occurred prior to legalization.¹³⁹ According to the Guttmacher Institute, the research arm of Planned Parenthood, nearly 1.3 million abortions now take place each year.¹⁴⁰ If we assume, for the sake of argument, that making abortion illegal today would cause the number of abortions to return to pre-*Roe* levels,¹⁴¹ then the question becomes: would preventing the intentional destruction of over a quarter-of-a-million unborn children every year be worth the cost involved in investigating and prosecuting those who illegally provide abortion services?¹⁴² As

restitution. See, e.g., Gerard V. Bradley, *Retribution: The Central Aim of Punishment*, 27 HARV. J.L. & PUB. POL'Y 19, 19–20 (2003).

139. The authors say that “[c]ommon estimates of the number of illegal abortions during the 1960s . . . range from 500,000 to 1.5 million.” Skeel & Stuntz, *supra* note 1, at 829 n.84 (citing GERALD R. ROSENBERG, *THE HOLLOW HOPE: CAN COURTS BRING ABOUT SOCIAL CHANGE?* 355 (1991)). Rosenberg himself concludes that “the 1 million figure is probably not a grossly unreasonable estimate.” ROSENBERG, *supra* at 355. Likewise, Stuntz has elsewhere asserted that “[b]y most estimates, there were about a million abortions per year during the 1960s.” Stuntz, *supra* note 133, at 1886. Here again, his sole authority for this figure is Rosenberg. *Id.* at 1886 n.37.

140. For 2003, the most recent year for which data is available, the Guttmacher Institute estimates that 1.287 million abortions took place. LAWRENCE B. FINER & STANLEY K. HENSHAW, *ESTIMATES OF U.S. ABORTION INCIDENCE, 2001–2003* at 5 tbl.1 (2006), available at http://www.guttmacher.org/pubs/2006/08/03/ab_incidence.pdf.

141. As set forth in greater detail below, there are a number of sound reasons to believe that criminalization of the procedure today would not result in an immediate return to pre-*Roe* levels of abortion. At the same time, it is also surely the case that criminal restrictions on abortion today would have an enormous impact on the frequency with which the procedure is sought and obtained. See *infra* Parts IV.B, V.E.

142. For the reasons stated below, any legal regime outlawing abortion should focus on abortion providers and not on the women who obtain abortions. Such an approach to enforcement would be consistent with the practice prior to *Roe*. See, e.g., Paul Benjamin Linton, *Enforcement of State Abortion Statutes After Roe: A State-by-State Analysis*, 67 U. DET. L. REV. 157, 163 n.31 (1990) (“Although more than one-third of the states . . . have enacted statutes prohibiting a woman from aborting herself or consenting to an abortion performed on her by another, no prosecutions have been reported under any of these statutes. . . . No American court has upheld the conviction of a woman for

self-abortion or consenting to an abortion performed on her by another.”); Forsythe, *supra* note 137, at 184 (“Although some state laws in the nineteenth century allowed the prosecution of aborting women, there is apparently no reported appellate decision in American history upholding the conviction of a woman for self-induced abortion or for submitting to an abortion.”) (citing Linton, *supra* note 142, at 163 n.31). Indeed, even supporters of the abortion license agree that women were not subject to prosecution during the era of criminalization. See Leslie J. Reagan, “About to Meet Her Maker”: Women, Doctors, Dying Declarations, and the State’s Investigation of Abortion, *Chicago 1867-1940*, 77 J. AMER. HIST. 1240, 1243–44 (1991) (conceding that “women were not arrested, prosecuted, or incarcerated for having abortions,” but insisting that “the state nonetheless punished working-class women for having illegal abortions through official investigations and public exposure of their abortions”).

I do not wish to sidestep the difficult question of what, if any, punishment should be imposed on the woman who obtains an abortion. Clearly the woman who terminates her pregnancy is responsible in a proximate fashion for causing the death of her child. Acknowledging this fact, however, does not preclude the state from recognizing that many women seek abortions for reasons that are understandable, even as they remain terribly wrong. The inability to financially support the child, the financial impact the child would have on other family members, the feeling of rejection and sense of isolation and abandonment experienced by women whose husbands or boyfriends threaten to leave, the fear that bearing a child will interfere with the parents’ education or career plans, and the concern that the child will not enjoy the kind of life that he or she should be given are all understandable reasons, even if they do not justify the intentional destruction of a developing human being. Thus, in the legal regulation of abortion, the state could take these factors into account in formulating a legal response to such women. That is, the state could, in part, respond to such women with compassion, as persons who suffer from the ordinary human weakness of trying to find an expedient answer to a difficult situation, often under extraordinary pressure. Cf. M. Cathleen Kaveny, *The Limits of Ordinary Virtue: The Limits of the Criminal Law in Implementing Evangelium Vitae*, in CHOOSING LIFE: A DIALOGUE ON EVANGELIUM VITAE 146 (Kevin Wm. Wildes, S.J., & Alan C. Mitchell eds., 1997) [hereinafter CHOOSING LIFE] (arguing that it should be possible for the law “to consider some such persons to be inculpably ‘ignorant’ of the true wrong caused by abortion in a manner that would render criminal sanctions inappropriate” and to honor “the honest, although mistaken, moral beliefs of others”).

Although their circumstances differ in significant ways, perhaps here the state could draw upon its experience in responding to people addicted to drugs. In that context, the best legal response has often proven not to be long prison sentences for users of contraband, but rehabilitation, counseling, and social assistance. See, e.g., DOUGLAS LIPTON, THE EFFECTIVENESS OF TREATMENT FOR DRUG ABUSERS UNDER CRIMINAL JUSTICE SUPERVISION (1995). In other words, in fashioning a legal response to abortion, what is needed is for society to stand in solidarity with such women, much as Pope John Paul II recommended. See, e.g., *Evangelium Vitae*, *supra* note 76, ¶¶ 87, 90 (asserting that “appropriate and effective programmes of support for new life must be implemented, with special closeness to mothers” and that “the underlying causes of attacks on life have to be eliminated, especially by ensuring proper support for families and motherhood”). Moreover, just as, in the context of drugs, law enforcement resources are best directed at those who produce and

set forth in greater detail below,¹⁴³ although abortions did occur in large numbers prior to legalization, the best scholarly research suggests that the figure of one million abortions per year, upon which Skeel and Stuntz rely, is greatly exaggerated. What if, as some argue, the true annual incidence of abortion prior to legalization was only 500,000 or 100,000? Similarly, what if the criminal prohibition of abortion today would reduce the number of abortions per year from 1.3 million to 500,000 or 100,000? Skeel and Stuntz do not ask these sorts of questions, not only because they uncritically accept the numbers proffered by supporters of abortion, but also because they ignore the central question of justice that the practice of abortion presents. Such studied ignorance is inimical to the real virtue of prudence.¹⁴⁴

Moreover, prudence does not simply demand that one see the concrete effects that both the recognition of abortion as a right and the absence of legal regulation of the procedure will have on the conduct of individuals. It also demands that one see the effect that such an approach will have on law as a whole. Here again, Skeel and Stuntz could have greatly benefited from the work of John Paul II. The late Pope was especially keen in foreseeing the consequences for law in the absence of legal protection for the unborn.

According to John Paul, when the state authorizes the deliberate killing of a certain class of human beings, it undermines the fundamental principle of equality upon which the state is founded. As John Paul makes clear, "[t]his equality is the basis of all authentic social relationships which, to be truly such, can only be founded on truth and justice, recognizing and protecting every man and woman as a person and not as an object to be used."¹⁴⁵ By renouncing the truth of the human person, the legal right to abortion—the legal right to dismember and kill a

distribute narcotics and other banned substances, so in the case of abortion law enforcement should focus on the individuals who are not subject to the pressures of the situation but who freely choose to perform acts that kill nascent human life.

143. See *infra* Part IV.B.

144. As Josef Pieper notes, prudence is the virtue that "informs" the other virtues, including justice. PIEPER, *supra* note 114, at 7. To inform judgments regarding the pursuit of justice, however, one must first take cognizance of justice. In the context of abortion, that is precisely what Skeel and Stuntz fail to do.

145. *Evangelium Vitae*, *supra* note 76, ¶ 57.

developing human being—eviscerates the heart of law, for “[i]f there is no transcendent truth, in obedience to which man achieves his full identity, then there is no sure principle for guaranteeing just relations between people.”¹⁴⁶ In the absence of such truth, the “democratic ideal” of protecting individuals through law “is betrayed in its very foundations” and is replaced by “the tragic caricature of legality.”¹⁴⁷ Despite “[t]he appearance of the strictest respect for legality [being] maintained,”¹⁴⁸ law ceases to be the rational ordering of human affairs designed to protect the dignity of all. In its place, “the force of power takes over, and each person tends to make full use of the means at his disposal in order to impose his own interests or his own opinion, with no regard for the rights of others.”¹⁴⁹

Given that Skeel and Stuntz hope to preserve law’s integrity through modesty, the irony of John Paul II’s diagnosis could not be greater. Legal modesty, as Skeel and Stuntz describe it, turns out to have a decidedly immodest effect. By suggesting that law should not seek to challenge the practice of abortion, they do not steer a course toward a more modest future for law. Instead, by allowing abortion to go unchecked, they abandon the principle that “every innocent human being is absolutely equal to all others”¹⁵⁰ and so chart a course toward law’s intellectual collapse.¹⁵¹ Clearly, the real virtue of prudence would recommend that another path be taken.

III. SKEEL & STUNTZ’S RECIPE FOR SUCCESS: DEFEAT AS THE KEY TO VICTORY

In the midst of their criticism of “legal moralism,” Skeel and Stuntz introduce us to the surprising, novel claim that “[l]egal victory produces cultural and political defeat.”¹⁵² By this they mean that when lawmakers use criminal codes to accomplish

146. *Centesimus Annus*, *supra* note 115, ¶ 44.

147. *Evangelium Vitae*, *supra* note 76, ¶ 20 (emphasis omitted).

148. *Id.*

149. *Centesimus Annus*, *supra* note 115, ¶ 44.

150. *Evangelium Vitae*, *supra* note 76, ¶ 57.

151. For a fuller discussion of this intellectual collapse, see John M. Breen & Michael A. Scaperlanda, *Never Get Out’a the Boat: Stenberg v. Carhart and the Future of American Law*, 39 CONN. L. REV. 297 (2006).

152. Skeel & Stuntz, *supra* note 1, at 833.

cultural goals, “the effort usually backfires,”¹⁵³ generating public sympathy for the offenders’ cause. Stuntz has developed this point elsewhere, claiming that Prohibition actually “undercut the norm it sought to enforce.”¹⁵⁴ According to Stuntz, the swift repeal of Prohibition, which had been a widely popular political stance only a few years earlier, was the result of selective enforcement of the law against the poorer and ethnic classes.¹⁵⁵

Although the selective enforcement of Prohibition was undoubtedly a source of frustration for many, there is reason to doubt that this factor was decisive in prompting the relatively quick end of Prohibition and the swift return to the legal consumption of alcohol. That is, the overthrow of Prohibition was not merely a case of “differential enforcement breeding contempt for the law,” as Stuntz contends.¹⁵⁶ Instead, during Prohibition, society also witnessed the rise and worsening of many social problems that state-enforced temperance was designed to curtail. With the flourishing of violent criminal organizations, the increased corruption of law enforcement, and the suffering of women and families, support for Prohibition waned even among those who had been its most ardent supporters.¹⁵⁷

Skeel and Stuntz’s more contemporary example—the substantially harsher federal criminal sentences for offenses involving crack cocaine rather than powder cocaine¹⁵⁸—also fails to prove their point. As they note, crack cocaine is often sold “in poor inner-city neighborhoods,” whereas powder cocaine is often sold “more discretely, usually in wealthier communi-

153. *Id.* at 829.

154. Stuntz, *supra* note 133, at 1874–75.

155. *See id.* at 1874–78.

156. *Id.* at 1878–79.

157. *See* DAVID E. KYVIG, REPEALING NATIONAL PROHIBITION 116–36 (1979). Although Stuntz cites Kyvig’s work, he does not engage the substance of the text to which he refers. *See* Stuntz, *supra* note 133, at 1874 n.8. That is, although Kyvig makes some passing mention of the effect that Prohibition had on the consumption of alcohol by those in the working classes, *see* Kyvig, *supra* at 24–25, he does not argue that selective enforcement was a significant factor in undermining the social norm embodied in Prohibition. Instead, Kyvig contends that the central arguments employed in the effort to repeal Prohibition involved a federalist interest in “home rule” and against the power of the national government, as well as concerns over the dramatic increase in violent crime, widespread official corruption, political hypocrisy, harm to American business, and general disrespect for the law generated during Prohibition. *See id.* at 36–136.

158. Skeel & Stuntz, *supra* note 1, at 823.

ties.”¹⁵⁹ As a consequence of urban racial demographics, Skeel and Stuntz argue, “many young black men are treated very differently and much more harshly than young white men who commit similar crimes.”¹⁶⁰ Although this sort of disparate treatment calls into question the reasonableness of Congress’s judgment with respect to this matter, it has not undermined support for the norm prohibiting the use of cocaine. The public has not called for the repeal of statutes criminalizing the sale and purchase of crack. Instead, the most common responses have been calls for a more even-handed administration of punishment.¹⁶¹ Thus, the “legal victory” of harsh sentences for crack cocaine has not paved the way for “cultural and political defeat,”¹⁶² if “defeat” means the wholesale rejection of the underlying social norm.

With respect to abortion, Skeel and Stuntz argue that the shift in social norms that led to the end of abortion’s legal prohibition was less the result of selective enforcement and more the result of the publicity given to “the gruesome deaths that women risked when they sought illegal, black-market abortions.”¹⁶³ That is, as Stuntz has elsewhere written, “the legal regime [of abortion prohibition] generated sympathetic cases *for the losing side*, cases that seemed to highlight the downside of the existing law.”¹⁶⁴ Because opponents of legal abortion have, in turn, focused on the “deaths of almost-born infants in partial birth abortions,”¹⁶⁵ Skeel and Stuntz suggest the law in its current form¹⁶⁶ may hurt the pro-choice cause. For this reason, Stuntz posits that “[p]erhaps *Roe v. Wade* is the pro-life move-

159. *Id.*

160. *Id.*

161. See, e.g., Mary Beth Lipp, *A New Perspective on the “War on Drugs”: Comparing the Consequences of Sentencing Policies in the United States and England*, 37 LOY. L.A. L. REV. 979, 991–1000 (2004) (reviewing the history and criticism of the disparate mandatory sentences for offenses involving powder cocaine and crack); Andrew N. Sacher, Note, *Inequities of the Drug War: Legislative Discrimination on the Cocaine Battlefield*, 19 CARDOZO L. REV. 1149, 1193–94 (1997) (arguing against the current 100-to-1 crack cocaine penalty ratio and in favor of a 3-to-1 penalty ratio, justified by the fact that crack is three times as addictive as cocaine).

162. Skeel & Stuntz, *supra* note 1, at 833.

163. *Id.* at 832; see also Stuntz, *supra* note 133, at 1887–89 (discussing stories published in popular periodicals in the early 1960s).

164. Stuntz, *supra* note 133, at 1888.

165. Skeel & Stuntz, *supra* note 1, at 832.

166. It should be noted that Skeel and Stuntz’s paper was published prior to the Supreme Court’s decision in *Gonzales v. Carhart*, 127 S. Ct. 1610 (2007).

ment's friend, not its enemy."¹⁶⁷ Indeed, Skeel and Stuntz argue that "[w]hen the relevant legal territory is morally contested, the law's weaponry tends to wound those who wield it."¹⁶⁸ Thus, they contend that cultural warriors should refrain from wielding the arsenal of law and should instead confine their efforts to persuading pregnant women to carry their children to term.¹⁶⁹

An alternate reading of history suggests that the law helps those who hold the legal high ground. It helps those whose position is now reflected in the law to consolidate the culture—to convince the public that their preferred policy position was and is indispensable to the maintenance of a free and orderly society. Moreover, although it is undoubtedly correct that *Roe* helped to galvanize opposition to abortion,¹⁷⁰ it is absurd to suggest that *Roe* has been a benefit to the pro-life movement.¹⁷¹

Instead, *Roe* was so utterly devastating, such an overwhelming defeat for those who favor legal protection for the unborn, that it has confounded pro-life activists since its inception. This difficulty is not a result of either the intellectual rigor of the opinion or its firm basis in the text, structure, or history of the Constitution, as *Roe* plainly lacks these qualities.¹⁷² Rather, it is

167. Stuntz, *supra* note 5, at 1739.

168. Skeel & Stuntz, *supra* note 1, at 833. Others have joined Skeel and Stuntz in making this point and in drawing a superficial comparison to the experience under Prohibition. See WILLS, *supra* note 89, at 535 ("Prohibition demonstrated the difficulty of imposing a moral regime on people who do not agree with the moral principle involved. Prohibition did not stop alcohol consumption, it just drove it underground where it bred corruption, defiance, and death.").

169. See *id.* at 838–39. Of course, such efforts at persuasion may offend the zeal of some supporters of abortions rights who have quite immodestly attempted to restrict these efforts, notwithstanding the First Amendment. See *infra* notes 366–74 and accompanying text.

170. This is a point opponents of the right-to-life movement have long recognized. See KRISTIN LUKER, ABORTION AND THE POLITICS OF MOTHERHOOD 126–57 (1985); see also STEPHEN M. KRASON, ABORTION: POLITICS, MORALITY AND THE CONSTITUTION 71 (1984); Ruth Bader Ginsburg, *Some Thoughts on Autonomy and Equality in Relation to Roe v. Wade*, 63 N.C. L. REV. 375, 381 (1985) (stating that the "sweep and detail" of *Roe* "stimulated the mobilization of a right-to-life movement and an attendant reaction in Congress and state legislatures").

171. This would be equivalent to arguing that the Holocaust benefited opponents of anti-Semitism because it ultimately led to the creation of the State of Israel.

172. The literature criticizing the Court's decision in *Roe* is vast, and it includes work both by scholars who support and who oppose abortion as a moral and political matter. For a small sample of this scholarship, see John T.

attributable to the nearly absolute nature of the right created by *Roe* and its status as a constitutional decision. As such, absent a change by the Court, *Roe* cannot be challenged apart from the arduous process of constitutional amendment. Thus, *Roe* has so thoroughly occupied the field that pro-life forces, though galvanized, have been left scratching their heads, looking for a weak spot in the armor of “choice.” Meanwhile, the number of unborn children killed under the authority of *Roe* is now approaching 50 million.¹⁷³ Given this staggering death toll, it is exceedingly difficult to make sense of the claim that *Roe* might be “the pro-life movement’s friend.”¹⁷⁴

IV. LAW, CULTURAL CHANGE, AND ABORTION

Skeel and Stuntz’s thesis that law should be modest in its ambitions is in part inspired by a healthy skepticism regarding the law’s ability to bring about genuine social change. Although Skeel and Stuntz acknowledge that law has a “role to play in reinforcing healthy moral values,”¹⁷⁵ they do not believe that law can “teach people how to live.”¹⁷⁶ Simply put, “[w]hen the relevant legal territory is morally contested,”¹⁷⁷ the state should not adopt “symbolic . . . affirmations of norms that the

Noonan, Jr., Commentary, *The Root and Branch of Roe v. Wade*, 63 NEB. L. REV. 668 (1984); John Hart Ely, *The Wages of Crying Wolf: A Comment on Roe v. Wade*, 82 YALE L.J. 920 (1973); Richard A. Epstein, *Substantive Due Process by Any Other Name: The Abortion Cases*, 1973 SUP. CT. REV. 159 (1973).

173. GUTTMACHER INST., IN BRIEF: FACTS ON INDUCED ABORTION IN THE UNITED STATES (2006), available at http://www.guttmacher.org/pubs/fb_induced_abortion.pdf (“From 1973 through 2002, more than 42 million legal abortions occurred.”). If the trend of roughly 1.3 million abortions a year has continued through the past five years, then the number of unborn children killed under the legal regime created by *Roe* now exceeds 48 million.

174. See Stuntz, *supra* note 5, at 1739. Although the pro-life political activism and organization spurred on by *Roe* have been of enormous value in the fight against abortion, these features of the movement likely would have taken place even absent *Roe*. That is, if the issue of abortion had remained with the States, it is entirely possible that pro-life organizations across the country would have risen to meet the challenge of efforts to liberalize abortion laws, much as they did in Michigan in 1972. See JOHN T. MCGREEVY, CATHOLICISM AND AMERICAN FREEDOM: A HISTORY 276–77 (2003) (discussing the defeat of the Michigan abortion reform referendum).

175. See Skeel & Stuntz, *supra* note 1, at 828.

176. *Id.* at 829.

177. *Id.* at 833.

citizenry is unwilling to live by.”¹⁷⁸ If such measures are adopted, they may well serve to undermine the rule of law through discriminatory enforcement, but they will not alter people’s conduct to any significant degree. Thus, where cultural practices are at odds with legal rules, the law will not “teach good morals,”¹⁷⁹ but will instead teach “cynicism about legal institutions.”¹⁸⁰

A. *Law and the Priority of Culture*

Although Skeel and Stuntz do not explore the idea of “culture” in any depth, they do seem to understand that culture enjoys a kind of priority over law in ordering society.¹⁸¹ Here again, Skeel and Stuntz could have benefited from a wider engagement with the Christian intellectual tradition, in particular the social teaching of Pope John Paul II.¹⁸² Indeed, the late Pope clearly recognized “the priority of culture over politics and economics as the engine of historical change”¹⁸³ precisely because “culture” is a given society’s answer to the question of value. The interior dispositions, unspoken norms, habits, attitudes, and institutions that constitute a particular culture receive concrete expression not only in the customs and traditions of a people, but in their language, art, history, commerce, and politics. These attitudes and practices constitute a collective answer to the question of what is truly worth pursuing in life, such that “[d]ifferent cultures are basically different ways of facing the question of the meaning of personal existence.”¹⁸⁴ Viewed from this perspective, law is itself a cultural artifact that tends to reflect rather than challenge the values that define the culture.

178. *Id.* at 838.

179. *Id.* at 828.

180. *Id.* at 829.

181. *See id.* at 838–39.

182. For a more thorough exposition of the idea of “culture” as set forth in Catholic social thought, and in particular the writings of Pope John Paul II, see John M. Breen, *John Paul II, the Structures of Sin and the Limits of Law*, 52 ST. LOUIS U. L.J. 317 (2008).

183. George Weigel, *John Paul II and the Priority of Culture*, FIRST THINGS, Feb. 1998, at 19 (commenting on John Paul II’s understanding regarding the place of culture in social life).

184. *Centesimus Annus*, *supra* note 115, ¶ 24.

As Stuntz suggests elsewhere, “law follows the culture, not the other way around.”¹⁸⁵

While Skeel and Stuntz are right to acknowledge both the priority of culture over law and law’s limited capacity to bring about fundamental social change, they neglect the many ways in which the law can significantly inform the development of culture. Indeed, culture is not monolithic and unchanging. It is dynamic, and the process by which culture changes over time is not somehow immune from the influence exerted by the emerging forms of behavior that are encouraged or suppressed by the law. Thus, Skeel and Stuntz fail to appreciate the way in which law and culture “stand in a mutually informing, formative, and reinforcing relationship.”¹⁸⁶ Likewise, although Skeel and Stuntz acknowledge the possibility that law can teach, they fail to notice how law has in fact taught. Nowhere are these failures more pronounced than in their discussion of abortion and the law.

B. The Perils of a Single Source—A Hollow Hope Indeed

Skeel and Stuntz argue that any attempt to use the law to address the problem of abortion or other morally contested issues almost certainly would prove to be ineffective.¹⁸⁷ They contend that such efforts would only serve to drive the practice underground, leading to a pattern of selective enforcement, thereby undermining the rule of law.¹⁸⁸ This argument is premised on the empirical claim that the law was ineffective at reducing the frequency of abortion in the era of criminalization. Simply put, Skeel and Stuntz believe that the social norms that justified recourse to the procedure prior to its legalization continue unabated in the post-*Roe* era. Because the law cannot flow upstream against the cultural current, any effort at criminalization now would be unavailing, and thus harmful to both the legal system and society.

In making this argument, the only source of empirical data on which Skeel and Stuntz rely¹⁸⁹ is Gerald Rosenberg’s discus-

185. Stuntz, *supra* note 5, at 1740.

186. Francis Cardinal George, *Law and Culture*, 1 AVE MARIA L. REV. 1, 9 (2003).

187. See Skeel & Stuntz, *supra* note 1, at 838.

188. *Id.* at 819–32.

189. *Id.* at 829 n.84.

sion of abortion in his book *The Hollow Hope*.¹⁹⁰ Regrettably, on a basic level, the authors do not engage the substance of Rosenberg's arguments. Rather, they merely conclude—citing only Rosenberg's work—that the law can do very little to change the social practice of abortion. Skeel and Stuntz assert that “[c]riminal bans on abortion did not reinforce the social norm against that practice; on the contrary, the norm fell apart while those bans were still in place.”¹⁹¹ A careful reading of Rosenberg's text, however, shows that his empirical data do not provide any support for this contention. Furthermore, in relying on Rosenberg as their sole authority, Skeel and Stuntz ignore the substantial literature that calls into question the empirical claims upon which their normative claims concerning law are predicated.

1. *Skeel and Stuntz's Uncritical Use of Rosenberg's Claims Regarding the Incidence of Abortion Prior to Legalization*

Skeel and Stuntz rely entirely on Rosenberg's assertions regarding the frequency of abortion prior to legalization and in a wholly uncritical manner. They summarize Rosenberg's data as demonstrating that “[c]ommon estimates of the number of illegal abortions during the 1960s . . . range from 500,000 to 1.5 million.”¹⁹² Needless to say, this range covers an enormous span in the frequency of the practice. Rosenberg himself cautions that “one should approach estimates of the number of illegal abortions with care.”¹⁹³ At the same time, he expresses confidence that the figure of one million illegal abortions a year “is probably not a grossly unreasonable estimate.”¹⁹⁴ Writing on the same topic elsewhere, again relying solely on Rosenberg, Stuntz is more emphatic. “By most estimates,” he says, “there were about a million illegal abortions per year during the 1960s.”¹⁹⁵

The baseline figure of one million illegal abortions per year is open to serious challenge. Indeed, there is a substantial litera-

190. GERALD N. ROSENBERG, *THE HOLLOW HOPE: CAN COURTS BRING ABOUT SOCIAL CHANGE?* 353–55 (1991).

191. Skeel & Stuntz, *supra* note 1, at 829.

192. *Id.* at 829 n.84 (citing ROSENBERG, *supra* note 190, at 353–55 tbl.A1).

193. ROSENBERG, *supra* note 190, at 355.

194. *Id.*

195. Stuntz, *supra* note 133, at 1886.

ture disputing this estimate concerning the frequency of abortion prior to legalization—a literature Rosenberg does not engage and that Skeel and Stuntz ignore entirely.¹⁹⁶ These sources present a number of reasons to doubt the accuracy of Rosenberg’s conclusion that following the state legislative reform efforts in the late 1960s and early 1970s, and the Supreme Court’s decision in *Roe v. Wade* in 1973, “in all likelihood the total abortion rate did not change a great deal.”¹⁹⁷ That Skeel and Stuntz appear oblivious to the debate surrounding the frequency of abortion prior to legalization does not cast doubt on the sincerity of their efforts to articulate a Christian understanding of legal modesty. It does, however, substantially dull the edge of any “critical bite” their work has as legal scholarship.¹⁹⁸

The very sources on which Rosenberg relies contradict his conclusion concerning the effect of legalization on the rate of abortion. For example, Rosenberg cites a study by researchers at the Guttmacher Institute for data on the number of abortions performed between 1966 and 1985.¹⁹⁹ The same study makes clear that the “abortion rate”—that is, the number of abortions per 1,000 women ages 15 to 44—nearly doubled from 16.3 in 1973, the first year that abortion was legal throughout the United States, to a peak of 29.3 in 1981.²⁰⁰ The abortion “ratio”—that is, the number of abortions per 1000 pregnancies—

196. For works that dispute the figures upon which Rosenberg, Skeel, and Stuntz rely, see Forsythe, *supra* note 137, at 196–200; GRISEZ, *supra* note 89, at 35–42; CALLAHAN, *supra* note 92, at 132–36; KRASON, *supra* note 169, at 301–03; Barbara J. Syska, Thomas W. Hilgers & Dennis O’Hare, *An Objective Model for Estimating Criminal Abortions and Its Implications for Public Policy*, in NEW PERSPECTIVES ON HUMAN ABORTION 164, 178 (Thomas W. Hilgers, Dennis J. Horan & David Mall eds., 1981) [hereinafter NEW PERSPECTIVES] (stating that a reasonable estimate of the number of illegal abortions that took place annually prior to 1967 “would be from a low of 39,000 (1950) to a high of 210,000 (1961) and a mean of 98,000 per year”). For a recent, extraordinarily well-researched evaluation of the topic, see JOSEPH W. DELLAPENNA, DISPELLING THE MYTHS OF ABORTION HISTORY 532–73 (2006). I discuss this literature in greater detail in response to Skeel and Stuntz’s claim that anti-abortion laws were not merely ineffective but “purely symbolic” in Breen, *supra* note 182.

197. ROSENBERG, *supra* note 190, at 355.

198. Cf. Stuntz, *supra* note 5, at 1709 (faulting Christian legal scholarship for its lack of “critical bite”).

199. ROSENBERG, *supra* note 190, at 180 tbl.6.1, (citing Stanley K. Henshaw, Jacqueline Darroch Forrest & Jennifer Van Vort, *Abortion Services in the United States, 1984 and 1985*, 19 FAM. PLAN. PERSP. 63 (1987)).

200. Henshaw et al., *supra* note 199, at 64 tbl.1.

also increased during this time.²⁰¹ The most recent Guttmacher study of the incidence of abortion nationwide confirms these increases.²⁰²

Similarly, Rosenberg relies on the Guttmacher Institute's claim that 744,600 legal abortions were performed in 1973.²⁰³ If Rosenberg's estimate of one million abortions per year prior to legalization is correct, then one must suppose one of two scenarios, both of which are, at the very least, counterintuitive. One could conclude that, following *Roe*, nearly a quarter of a million women chose to terminate their pregnancies outside the legal medical establishment, notwithstanding its assurance of greater care and safety. In the alternative, one could conclude that legalization of the procedure resulted in a dramatic decrease in the overall number of abortions performed. That neither alternative is plausible casts substantial doubt on the figure of one million abortions per year prior to legalization,²⁰⁴

201. See *id.* Sometimes the "abortion ratio" is described as the number of abortions per 100 pregnancies as opposed to 1000 pregnancies. See *infra* notes 316–18 and accompanying text.

202. See FINER & HENSHAW, *supra* note 140, at 5 tbl.1.

203. ROSENBERG *supra* note 190, at 180 tbl. 6.1. Like the Guttmacher Institute, the Centers for Disease Control ("CDC") also compiles statistics concerning the incidence of abortion. The figures generated by each of these two organizations frequently differ. For example, whereas the Guttmacher Institute reported that 744,600 legal abortions took place in 1973, and 898,600 in 1974, the CDC reported that 615,831 and 763,476 legal abortions took place for those same years, respectively. Compare Lawrence B. Finer & Stanley K. Henshaw, *Abortion Incidence and Services in the United States in 2000*, 35 PERSP. ON SEXUAL & REPROD. HEALTH 6, 8 tbl.1 (Jan.–Feb. 2003), available at <http://www.guttmacher.org/pubs/psrh/full/3500603.pdf>, with Lilo T. Strauss et al., *Abortion Surveillance—United States, 2003*, MORBIDITY AND MORTALITY WKLY. REP., Nov. 24, 2006, at 16 tbl.2, available at <http://www.cdc.gov/mmwr/PDF/ss/ss5511.pdf>. The use of different methods of data collection accounts for the difference in the reported figures. The CDC only reports figures it actually receives from the central health authorities for each of the fifty states plus the District of Columbia and New York City. See Strauss et al., *supra*, at 1–3, 8. By contrast, the Guttmacher Institute directly mails a questionnaire to the abortion providers it identifies. For those providers that fail to respond to either its mailings or to its subsequent efforts at contact, the Guttmacher Institute uses the numbers reported to the various state health authorities. Where such figures are not available, however, the Institute employs its own estimates. See Finer & Henshaw, *supra*, at 6–9.

204. See Forsythe, *supra* note 137, at 200 ("If hundreds of thousands of illegal abortions were performed annually in the United States before legalization, there is no reason why these *illegal* abortions would not be reflected in figures on *legal* abortions after legalization."). Forsythe cites to the experience in California as an example of the seemingly inexplicable disconnect between the

and on Skeel and Stuntz's suggestion that the law is unable to affect the frequency of abortion.

2. A "Re-Sourceful" Author: Rosenberg's Double Counting of Authorities

Plainly, Rosenberg can be faulted both for failing to cite the substantial literature that calls into question the figure of one million abortions per year, and for failing to appreciate the full significance of the sources to which he does cite. Beyond this, however, his reasons for supporting the one million per year figure are highly suspect.

In an appendix, Rosenberg lists twenty-three sources that offer various estimates of the annual number of abortions that took place prior to legalization. It is this compilation of estimates that supposedly compels his conclusion regarding the annual figure of illegal abortions. Rosenberg, however, seems to deliberately treat each of these sources as if it were an independent empirical study of the issue, which is plainly not the case. Indeed, many of the works on Rosenberg's list simply cite to another of his sources without offering any additional data to confirm the truth of the original claim.²⁰⁵ What is worse, the

alleged number of illegal abortions per year and the actual figure following legalization. He notes that "California reported only five thousand legal abortions in 1968, the first full year of legalized abortion after the new law became effective in November, 1967." *Id.* He then rhetorically asks, "If there were one hundred thousand illegal abortions annually in California before 1967, why were there only five thousand reported abortions in the first full year of legalization?" *Id.* The most plausible answer for such a great disparity is that the estimate for the number of abortions that Rosenberg asserts, and upon which Skeel and Stuntz rely, is wildly exaggerated.

205. For example, Rosenberg cites both the work of Taussig and the Kinsey Institute's materials on abortion. See ROSENBERG, *supra* note 190, at 354 tbl.A1 (citing FREDERICK TAUSSIG, ABORTION, SPONTANEOUS AND INDUCED: MEDICAL AND SOCIAL ASPECTS (1936) and PAUL H. GEBHARD, WARDELL B. POMEROY, CLYDE E. MARTIN & CORNELIA V. CHRISTENSON, INST FOR SEX. RESEARCH, PREGNANCY, BIRTH AND ABORTION (1958) (also known as "The Kinsey Report")). Rosenberg also cites to a law review article, Zad Leavy & Jerome M. Kummer, *Criminal Abortion: Human Hardship and Unyielding Laws*, 35 S. CAL. L. REV. 123 (1962), as if it were an independent source. In fact, however, this article simply relies on Taussig's study and the Kinsey materials. See *id.* at 123-24, nn.2, 5.

Rosenberg cites to another law review article, Roy Lucas, *Federal Constitutional Limitations on the Enforcement and Administration of State Abortion Statutes*, 46 N.C. L. REV. 730 (1968), that likewise cites to the Kinsey materials and Taussig's book as authority for the one million abortions per year figure. See *id.* at 730-31 n.6. Lucas describes Kinsey, Taussig, and a third work, Regine K.

appearance of these duplicative sources in Rosenberg's appendix gives the mistaken impression that an overwhelming amount of empirical evidence favors the estimate of one million abortions per year. As noted above, this figure is in fact highly contested. Although the news articles and opinion pieces Rosenberg cites from the *New York Times*, *Newsweek*, *Time*, and *The New Republic*²⁰⁶ may be of some interest, they do not lend additional credence to the estimate Rosenberg embraces.²⁰⁷

Stix, *A Study of Pregnancy Wastage*, 13 MILBANK MEM. FUND Q. 347 (1935), as "[t]hree independent major studies [that] have set the estimate at 1,000,000." Lucas, *supra*, at 730–31 n.6. However, Stix's article does not make any such estimate. Indeed, because her study is based on interviews of patients at a New York City birth control clinic, she expressly cautions that "any conclusions which may be drawn cannot be considered to have universal application, since they are based on the experience of a small group of women who expressed interest in birth control by attending a birth control clinic" and as such "may be less conservative than the average" and "more fertile than the population at large." *Id.* at 348. Stix acknowledges that "[b]oth these factors might lead them to resort to abortion more readily than would other women." *Id.* Stix does cite Taussig, but again, this is duplicative of other sources Rosenberg cites.

Perhaps most egregious of all, Rosenberg cites a statement by Senator Robert Packwood introducing abortion reform legislation in the Senate. Apparently, Rosenberg would have the reader believe that Packwood's statement should be treated as an independent authority. In fact, however, there is no indication that Packwood conducted any independent research in support of the figures he advances. He merely repeats the one million abortions per year figure that he undoubtedly obtained from another source he fails to cite. See 116 CONG. REC. 12,672–73 (1970) (statement of Sen. Packwood).

206. See, e.g., *Gynecology—More Abortions: The Reasons Why*, TIME, Sept. 17, 1965, at 82 (citing Dr. Harold Rosen, another source included in Rosenberg's appendix); James Ridgeway, *One Million Abortions: "It's Your Problem Sweetheart,"* NEW REPUBLIC, Feb. 9, 1963, at 14 (stating without attribution that between 200,000 and one million illegal abortions are performed each year).

207. Rosenberg's appendix could be faulted in other respects as well. For example, Rosenberg cites to Lawrence Lader, one of the founders of what was then known as the National Abortion Rights Action League ("NARAL"). Today the organization goes by the name NARAL Pro-Choice America. In the sources Rosenberg cites, Lader states that prior to legalization, approximately one million abortions took place each year. See LAWRENCE LADER, ABORTION II: MAKING THE REVOLUTION 20 (1973).

Rosenberg conveniently ignores Bernard Nathanson's recollection regarding the origins of the one million illegal abortions per year figure. This omission is somewhat surprising given that Nathanson was an important figure in the history of abortion in the United States. Indeed, prior to renouncing the practice of abortion and becoming an eloquent spokesperson on behalf of the unborn, Nathanson was a physician who performed thousands of abortions as the so-called "Abortion King" of New York City. In fact, Nathanson co-founded NARAL with Lader. See DELLAPENNA, *supra* note 196, at 764–65.

3. *The Misuse of Maternal Deaths as a Means of Calculating the Frequency of Illegal Abortion*

One reason Rosenberg believes the figure of one million illegal abortions per year is too low is that the studies upon which this figure is based "are derived, in part, from reported maternal deaths due to illegal abortions, deaths that are notoriously under-reported."²⁰⁸ That is, some women who obtained illegal abortions also experienced septic shock or some other life-threatening complication due to the incompetence of the abortion provider or to the unsanitary conditions under which the procedure was performed.²⁰⁹ Indeed, those who sought to relax the legal restrictions against abortion often cited this phenomenon in support of their cause.²¹⁰ The difficulties involved in calculating the incidence of illegal abortion have led some to extrapolate from the number of maternal deaths an estimate of

With respect to the one million illegal abortions a year, Nathanson candidly states that he and Lader

aroused enough sympathy to sell our program of permissive abortion by fabricating the number of illegal abortions done annually in the U.S. The actual figure was approaching 100,000, but the figure we gave to the media repeatedly was 1 million.

Bernard N. Nathanson, *Confessions of an Ex-Abortionist* (1996), available at <http://www.catholiceducation.org/articles/abortion/ab0005.html>.

208. ROSENBERG, *supra* note 190, at 353.

209. See Russell S. Fisher, *Criminal Abortion*, in *THERAPEUTIC ABORTION: MEDICAL, PSYCHIATRIC, ANTHROPOLOGICAL, AND RELIGIOUS CONSIDERATIONS* 8–10 (Harold Rosen ed., 1954) (describing the sometimes fatal medical complications that frequently accompany illegal abortions); PATRICIA G. MILLER, *THE WORST OF TIMES* 327–28 (1993) (describing similar illegal abortion complications).

210. See, e.g., Alan F. Guttmacher, *The Genesis of Liberalized Abortion in New York: A Personal Insight*, 23 CASE W. RES. L. REV. 756 (1972). To paraphrase John Hart Ely, it is a "strange argument" against the wisdom of a law "that those who evade it suffer." See Ely, *supra* note 172, at 923 n.26.

As John Noonan relates, the true number of maternal deaths was not sufficiently shocking and so not "serviceable" toward the political goal of legalization. Accordingly, a lie had to be invented. "The lie was that 8,000 women per year died from illegal abortions" whereas "[t]he true figure was between 250 and 500." NOONAN, *supra* note 121, at 65 (citing Christopher Tietze & Sarah Lewitt, *Abortion*, 220 SCI. AM. 21 (1969)). That the pro-choice movement intended to effect such a strategy of propaganda is confirmed by abortion advocate Marian Faux: "an image of tens of thousands of women being maimed or killed each year by illegal abortions was so persuasive a piece of propaganda that the movement could be forgiven for its failure to double-check the facts." MARIAN FAUX, *ROE V. WADE: THE UNTOLD STORY OF THE LANDMARK SUPREME COURT DECISION THAT MADE ABORTION LEGAL* 87 (1988). See also Brian W. Clowes, *The Role of Maternal Deaths in the Abortion Debate*, 13 ST. LOUIS U. PUB. L. REV. 327 (1993).

the number of abortions that took place during the years prior to legalization.

Unfortunately, estimating the number of maternal deaths prior to legalization has proven almost as controversial as calculating the number of clandestine abortions themselves—a fact that somehow escapes Rosenberg’s notice. Rosenberg also fails to acknowledge that abortion-related deaths did not remain constant over time. For example, the number of maternal deaths declined following the widespread introduction of antibiotics in the 1930s and 1940s, even as the practice of illegal abortion continued.²¹¹ It also appears that by the 1950s, most illegal abortions were performed by licensed physicians,²¹² which likely reduced the incidence of maternal death. As Dr. Mary Calderone, then-national medical director for the Planned Parenthood Federation, declared in a journal article in 1960, “[a]bortion is no longer a dangerous procedure.”²¹³ Indeed, Calderone believed that progress with respect to maternal mortality was objectively verifiable, noting that “[i]n New York City in 1921 there were 144 abortion deaths, in 1951 there were only 15,” and “[i]n 1957 there were only 260 deaths in the whole country attributed to abortions of any kind.”²¹⁴

211. See DELLAPENNA, *supra* note 196, at 548 (noting that “[t]he advent of antibiotics . . . reduced the incidence of the heretofore fatal infections and completed a dramatic reduction in the risk of death or injury from an abortion”); LUKER, *supra* note 170, at 74 (noting that “[l]argely because of the increasing use of antibiotic drugs, overall maternal mortality had been steadily declining for many years and had begun to drop dramatically after World War II”).

212. See DELLAPENNA, *supra* note 196, at 549 (citing Mary Steichen Calderone, *Illegal Abortion as a Public Health Problem*, 50 AM. J. PUB. HEALTH 948, 949 (1960) (estimating that in 1960 “physicians performed 90 percent of illegal abortions”) and Alan Guttmacher, *Abortion Now*, in THE CASE FOR LEGALIZED ABORTION NOW 69, 71–72 (Alan Guttmacher ed., 1967) (estimating that physicians performed 80 percent of illegal abortions in 1967)). Calderone served as the national medical director for the Planned Parenthood Federation, and Guttmacher was a long-time public proponent of abortion. DELLAPENNA, *supra* note 196, at 549; see also DAVIS, *supra* note 78, at 98–106 (discussing the experiences of physician-abortionists); CAROLE JOFFE, DOCTORS OF CONSCIENCE: THE STRUGGLE TO PROVIDE ABORTION BEFORE AND AFTER ROE V. WADE (1995) (describing interviews with numerous abortion physicians “of conscience” and distinguishing them from the stereotypical “back alley butcher”); LESLIE J. REAGAN, WHEN ABORTION WAS A CRIME: WOMEN, MEDICINE, AND LAW IN THE UNITED STATES, 1867–1973, 70–73 (1997) (discussing Chicago physicians who performed illegal abortions).

213. Calderone, *supra* note 212, at 949.

214. *Id.*

Given these statistics demonstrating sharp declines in maternal deaths, it is difficult to understand Rosenberg's reliance on Senate hearing testimony that in 1930 "abortion was the 'certified cause of death for almost 2,700 women'"²¹⁵ to bolster his assertions regarding maternal death rates just prior to legalization in 1973. Surely the deaths of these women were a tragedy then and remain so today, but this statistic does not reflect the number of maternal deaths due to illegal abortion just prior to legalization, let alone the incidence of illegal abortion itself. On this point Rosenberg is coy, refusing to offer his own estimate as to the annual number of maternal deaths.²¹⁶ He does, however, approvingly cite a law review article asserting that more than five thousand women may have died as a direct result of illegal abortions performed in 1962.²¹⁷

Here again, Skeel and Stuntz seem unaware of the substantial literature challenging Rosenberg's suggestion that illegal abortion resulted in the deaths of thousands of American women in the years leading up to legalization. Moreover, they seem oblivious to the fact that most of this literature was generated by supporters of legal abortion during the campaign for abortion liberalization.²¹⁸ For example, Christopher Tietze, the leading statistician for the Guttmacher Institute and a longtime advocate of legal abortion, wrote in 1969 that although the figure of 5,000 maternal abortion-related deaths per year was plausible for the 1930s, it "cannot be anywhere near the true rate now."²¹⁹ Indeed, Tietze concluded that "in all likelihood,"

215. ROSENBERG, *supra* note 190, at 353.

216. He begins his concluding sentence on the subject, "Whatever the figure . . ." ROSENBERG, *supra* note 190, at 353–54.

217. *Id.* at 353 n.1 (citing Leavy & Kummer, *supra* note 205, at 124).

218. In a survey of the contemporary literature concerning maternal deaths, Daniel Callahan concludes that, despite being put forth as "the crucial consideration" for abortion reform, "the statistical grounds for that argument seem considerably weakened." CALLAHAN, *supra* note 92, at 132–36.

219. Christopher Tietze & Sarah Lewit, *Abortion*, 220 SCI. AM. 21, 23 (1969). Dellapenna identifies as one source of the 5000 death figure an undocumented claim made in JEROME BATES & EDWARD ZAWADSKI, CRIMINAL ABORTION 3 (1964). See DELLAPENNA, *supra* note 196, at 552. As Dellapenna explains, Bates and Zawadski "apparently took their figure from the similarly undocumented estimates that Dr. Russell Fisher made in 1954" in which "Fisher estimated 8,000 maternal deaths per year in the 1930s and 5,000 per year in the 1950s." DELLAPENNA, *supra* note 196, at 552 (citing Fisher, *supra* note 209, at 8–9). Fisher's figure is merely an extrapolation from Frederick Taussig's guess. See Fisher, *supra* note 209, at 3 (citing FREDERICK TAUSSIG, ABORTION, SPONTANE-

the actual number was "under 1000,"²²⁰ a conclusion that subsequent demographic research tends to support.²²¹

Rosenberg is certainly not alone in turning to inflated estimates of maternal deaths as a way of bolstering estimates of the annual number of abortions prior to legalization. Although discredited, the figure of 5,000 to 10,000 deaths is still routinely cited today,²²² even by those in the legal academy who have a reputation for careful scholarship.²²³

OUS AND INDUCED: MEDICAL AND SOCIAL ASPECTS 177 (1936)). See also CALLAHAN, *supra* note 92, at 135 (citing sources that trace the 10,000 figure back to Frederick Taussig). Whatever its precise origin and notwithstanding its dubious basis in fact, Lawrence Lader, one of the co-founders of NARAL, certainly worked to popularize the 10,000 deaths per year figure. See, e.g., LAWRENCE LADER, *ABORTION* 3 (1966).

220. Tietze & Lewit, *supra* note 219, at 23.

221. Thomas W. Hilgers & Dennis O'Hare, *Abortion Related Maternal Mortality: An In-Depth Analysis*, in NEW PERSPECTIVES, *supra* note 196, at 69.

222. See DELLAPENNA, *supra* note 196 at 552 n.112 (listing fifteen sources that cite these figures).

223. See, e.g., Cass R. Sunstein, *Neutrality in Constitutional Law (With Special Reference to Pornography, Abortion, and Surrogacy)*, 92 COLUM. L. REV. 1, 37 (1992). As authority for this figure, Sunstein cites Lawrence Lader, a journalist who, together with Dr. Bernard Nathanson, co-founded the National Association for the Repeal of Abortion Laws ("NARAL"). See LADER, *supra* note 207, at 88-97. Sunstein does not cite Nathanson's later edifying remark, made after he abandoned the pro-choice movement and his own abortion practice:

How many deaths were we talking about when abortion was illegal? In N.A.R.A.L. we generally emphasized the drama of the individual case, not the mass statistics, but when we spoke of the latter it was always "5,000 to 10,000 deaths a year." I confess that I knew the figures were totally false, and I suppose others did too if they stopped to think of it. But in the "morality" of our revolution, it was a *useful* figure, widely accepted, so why go out our way to correct it with honest statistics? The overriding concern was to get the laws eliminated, and anything within reason that had to be done was permissible.

BERNARD N. NATHANSON & RICHARD N. OSTLING, *ABORTING AMERICA* 193 (1979); see also Bernard Nathanson, *THE HAND OF GOD: A JOURNEY FROM DEATH TO LIFE BY THE ABORTION DOCTOR WHO CHANGED HIS MIND* 89-90 (1996).

Indeed, in addition to this oversight, Sunstein seems unaware that Dr. Christopher Tietze, the Guttmacher Institute's longtime statistician, concluded in 1984 that maternal deaths before legalization were only 150 per year. See Christopher Tietze, *The Public Health Effects of Legal Abortion in the United States*, 16 FAM. PLAN. PERSP. Jan.-Feb. 1984, at 26 (stating that legalization helped avert 1500 maternal deaths over ten years); see also DELLAPENNA, *supra* note 196, at 552 (quoting Tietze as saying that the figure of 10,000 abortion-induced deaths prior to legalization is "unmitigated nonsense" (citing Fred Graham, *Fetus Defects Pose Abortion Dilemma*, N.Y. TIMES, Sept. 7, 1967, at 38)). Sunstein is not alone among abortion supporters who, without question, readily embrace the purported statistic of 5,000 to 10,000 maternal deaths per

Skeel is right to insist that Christian legal scholarship “must seriously engage the best secular scholarship treating the same issues.”²²⁴ Regrettably, Skeel and Stuntz have failed to satisfy this very standard. They have not “seriously engaged” the best scholarship on the subject of maternal deaths unless the phrase means nothing beyond a facile and entirely deferential citation to dubious authorities. What is worse, it seems that what many in the legal academy regard as “the best” scholarship on the subject is little more than the repetition of propaganda,²²⁵ or “the partisan projection of a pro-choice perspective onto the past.”²²⁶

4. *The Overlooked Phenomenon of Repeat Abortions*

Furthermore, if, as Rosenberg contends, the number of abortions did not substantially change following legalization, one would expect the number of repeat abortions to also remain roughly the same.²²⁷ The statistical data, however, indicate just the opposite. As the Guttmacher Institute recently reported, “[a]mong U.S. women having abortions in 2002, about one-half had already had a prior abortion.”²²⁸ This marks a dramatic in-

year due to illegal abortion. See Mark A. Graber, *The Ghost of Abortion Past: Pre-Roe Abortion Law in Action*, 1 VA. J. SOC. POL’Y & L. 309, 318 (1994) (“Evidence indicates that five to ten thousand women died each year from complications resulting from illegal abortions during the mid-twentieth century.”); see also JOFFE, *supra* note 212, at 29 (“Anywhere from one thousand to five thousand women per year are estimated to have died from illegal abortions in the pre-Roe era . . .”).

224. Skeel, *supra* note 8, at 31.

225. See *supra* notes 211–22 and accompanying text.

226. John Keown, *Abortion Distortion: A Review of Dispelling the Myths of Abortion History by Joseph Dellapenna*, 35 J.L. MED. & ETHICS 325, 328 (2007) (reviewing DELLAPENNA, *supra* note 196).

227. Others have made this observation as well. See Forsythe, *supra* note 137, at 200 (“The great rise in the number of abortions *after* abortion was legalized is confirmed by the rise in the *repeat* abortion rate after legalization.”). As Forsythe notes, “[t]he percentage of repeat abortions (the second or third abortion for the woman aborting) has almost tripled since 1973.” *Id.* (citing Lynn D. Wardle, *Time Enough: Webster v. Reproductive Health Services and the Prudent Pace of Justice*, 41 FLA. L. REV. 881, 985 app. D (1989)).

228. RACHEL K. JONES ET AL., GUTTMACHER INST., REPEAT ABORTION IN THE UNITED STATES 9 (2006), available at <http://www.guttmacher.org/pubs/2006/11/21/or29.pdf>. The incidence of repeat abortion raises a host of public policy issues that many advocates of the abortion license are reluctant to discuss. See Garance Franke-Ruta, *Multiple Choice: Liberal Concerns About Abortion*, NEW REPUBLIC, Nov. 28, 2005, at 14–15 (arguing that, given the incidence of repeat abortions, pro-choice advocates should “begin to treat abortion as a public health issue, rather than just a philosophical or political problem”).

crease since the end of criminalization. Indeed, the “proportion of women having abortions who were undergoing a repeat procedure increased rapidly in the first years following *Roe v. Wade*, more than doubling between 1974 and 1979 (from 15% to 32%),” while “increas[ing] at a slower pace between 1979 and 1993 (from 32% to 47%),” where it has remained since.²²⁹ If the changed legal status of abortion—from criminal act to constitutional right—did not affect the rate and number of abortions performed, as Skeel and Stuntz (following Rosenberg) maintain, then this phenomenon simply should not have occurred.²³⁰

5. *The Effects of Legalization: “Replacement” and Expansion*

Putting aside the myriad objections to Rosenberg’s methodology and baseline figure, still other serious questions remain. To support his thesis that the Supreme Court’s decision in *Roe* did not substantially alter the frequency of abortion, Rosenberg must show that most of the abortions that took place in a post-*Roe* legal world would have taken place under a legal regime that outlawed the procedure. In support of this contention, Rosenberg cites two substantive studies by abortion-rights supporters asserting that between two-thirds and three-fourths of

229. JONES ET AL., *supra* note 228, at 19.

230. The authors of the report attempt to account for this precipitous rise in repeat abortions by stating that the pattern simply “mirrors the rapid increase in the (legal) abortion rate that occurred after 1973.” *Id.* Indeed, they suggest that the large number of repeat abortions had long been predicted by demographers following legalization of the procedure. *Id.* at 11–13. In support of this assertion, the authors cite Christopher Tietze & Anrudh K. Jain, *The Mathematics of Repeat Abortion: Explaining the Increase*, 9 *STUD. IN FAM. PLAN.* 294 (1978). JONES ET AL., *supra* note 228, at 19, 51. Tietze and Jain contend that “the percent of repeat abortions among all legal abortions is directly associated with the level of the abortion rate.” Tietze & Jain, *supra*, at 294. However, the Guttmacher Institute’s own statistics show that the percentage of repeat abortions continued to rise or remained constant even as the abortion rate declined (a decline beginning in approximately 1982 and continuing on to the present day). See JONES ET AL., *supra* note 228, at 19, 25 chart 4.1; FINER & HENSHAW, *supra* note 140, at 5 tbl.1.

Moreover, the historical premise underlying Skeel and Stuntz’s claim that the law cannot affect the practice of abortion is that the change in the law marked by *Roe* did not bring about an increase either in the annual number of abortions performed or in the abortion rate (that is, the number of women between the ages of 15–44 per thousand who, within a given year, obtain an abortion). The Guttmacher Institute’s figures show, however, that these measures increased dramatically in the years immediately following legalization across the country. See JONES ET AL., *supra* note 228, at 19, 25 chart 4.1; FINER & HENSHAW, *supra* note 140, at 5 tbl.1.

all legal abortions replaced illegal ones.²³¹ In other words, these abortions would have taken place even if the procedure had remained illegal.

There are a number of reasons to doubt the conclusion that Rosenberg draws from these studies. In the first study, published in 1973, Christopher Tietze hypothesizes that the number of illegal abortions in New York City can be calculated by comparing the number of births that took place before and after the State's new abortion law came into effect. Tietze observes that there were approximately 17,300 fewer births in New York City in 1971 than in 1970 (the first year of New York's new permissive abortion law), and that 1972 witnessed a decrease of 16,400 births from 1971.²³² He also estimates that 67,400 legal abortions were performed on New York City residents during the first year after the law was passed, and that 75,100 residents received legal abortions in the statute's second year.²³³ Plainly the figures for legal abortion exceed the drop in live births for each of the years in question by a substantial margin. However, if abortion was not widely practiced prior to the new statute then one would have expected an even greater

231. ROSENBERG, *supra* note 190, at 355. In fact, Rosenberg cites four sources in support of his contention that most legal abortions were replacements for illegal ones. These include *The Buckley Amendment: Hearing Before the Subcomm. on Constitutional Amendments*, 93rd Cong. 244 (1976) (statement of Harriet Pilpel, Senior Partner, Greenbaum, Wolff & Ernst); Judith Blake, *The Supreme Court's Abortion Decisions and Public Opinion in the United States*, 3 POP. & DEV. REV. 45 (1977); June Sklar & Beth Berkov, *Abortion, Illegitimacy, and the American Birth Rate*, 185 SCIENCE 909 (1974); and Christopher Tietze, *Two Years' Experience with a Liberal Abortion Law: Its Impact on Fertility Trends in New York City*, 5 FAM. PLAN. PERSP. 36 (1973). Of these four, however, only the papers by Tietze and Sklar and Berkov present serious arguments with which one must contend. Indeed, Blake's article merely cites Tietze's paper, and Pilpel's testimony refers to "a recent study [that indicates] that at the very least, 70 percent of today's abortions which are being performed in proper medical facilities would have been performed anyway." Statement of Harriet Pilpel, *supra*, at 244. Although she does not indicate the specific study she has in mind, given the date of Pilpel's testimony, her affiliation with Planned Parenthood, and the precise figure she cites, it is fair to assume that she is relying on Tietze's paper. *See id.* at 244.

232. Tietze, *supra* note 231, at 40. Tietze also states that the "[a]pplication of age-specific fertility rates of 1970 to age distribution of women in 1971" indicates that the drop in fertility was even greater than the actual birth statistics reveal. *Id.* That is, the application of these rates and the age distribution "generates an expected total of 150,700 births, thus creating an imputed decline of 18,800 births." *Id.*

233. *Id.* at 37 tbl.1.

drop in fertility. That such a decrease in the number of live births did not occur leads Tietze to conclude that recourse to abortion was common in New York City prior to legalization. Indeed, he concludes that virtually all of the legal abortions that took place in 1970 and 1971 "terminated pregnancies which would otherwise have been terminated by illegal abortions in the earlier period."²³⁴ After taking into account other factors influencing fertility during the years in question,²³⁵ Tietze estimates that "70 percent of the legal abortions of resident women performed under the 1970 law replaced illegal abortions—about 50,000 illegal procedures each year."²³⁶

June Sklar and Beth Berkov, the authors of the second study, reach a similar conclusion using a different method. In their paper, published in 1974, Sklar and Berkov focus on the dramatic drop in the incidence of "illegitimate" or out-of-wedlock births that coincided with the passage of liberalized abortion statutes in fifteen states.

Indeed, Sklar and Berkov conclude that "legal abortion was of pivotal importance in the nationwide declines in illegitimacy between 1970 and 1971."²³⁷ They estimate that in 1971 there were "416,000 illegitimate births in the United States and an estimated 272,000 legal abortions performed for unmarried women."²³⁸ They note that if abortion had not been legal during this time, not "every pregnancy terminated by abortion would have resulted in an illegitimate birth," because some would have resulted in illegal abortion, others would have come to term in a "'forced' marriage," and others would have resulted in miscarriage or still-birth.²³⁹ By comparing actual out-of-wedlock births in 1971 to the higher number of projected illegitimate births, Sklar and Berkov conclude that approximately

234. *Id.* at 40.

235. *Id.* at 41 (discussing the possibility that the lower number of births can be accounted for by various social trends such as postponement of marriage, increased contraceptive use, and the decision to delay childbirth).

236. *Id.* at 41.

237. Sklar & Berkov, *supra* note 231, at 911. They estimate that in 1971 there were "416,000 illegitimate births in the United States and an estimated 272,000 legal abortions performed for unmarried women." *Id.* at 912–13.

238. *Id.* at 912–13.

239. *Id.* at 913.

39,000 “births [were] averted by legal abortion.”²⁴⁰ However, this figure accounts for only 14 percent of the 272,000 abortions performed on unmarried women. Of the remaining 86 percent of legal abortions performed in 1971, Sklar and Berkov estimate “that most would have ended as illegal abortions or as legitimate births.”²⁴¹ Indeed, they conclude that “well over half—most likely between two-thirds and three-fourths—of all legal abortions in the United States in 1971 were replacements for illegal abortions.”²⁴²

Although the studies by Tietze and Sklar and Berkov demonstrate that abortions took place in large numbers prior to legalization, they do not support Rosenberg’s far stronger claim, endorsed by Skeel and Stuntz, that the overall incidence of abortion “did not change a great deal” following the Supreme Court’s decision in *Roe*.²⁴³

First, although it is entirely reasonable to believe that some percentage of abortions in the years following legalization would have taken place even absent a change in the law, plainly some percentage of abortions would have been averted. Neither Tietze nor Sklar and Berkov claim that the replacement rate is 100 percent. At most, these studies show that approximately 70 percent of the nearly 486,000 legal abortions reported by the Center for Disease Control and Prevention (“CDC”) for 1971 likely would have taken place under a regime of legal prohibition.²⁴⁴ Neither study provides evidence that such a percentage remains constant—that a fixed percentage of women with unwanted pregnancies will obtain abortions—regardless of the legal treatment of abortion and the cultural message that this treatment conveys. Specifically, Tietze and Sklar and Berkov have not shown that 70 percent of the 586,000 abortions reported by the CDC in 1972 would have taken place in the ab-

240. *Id.* Sklar and Berkov compare the actual number of 416,000 out-of-wedlock births in 1971 with the projected number of 455,000 illegitimate births, a figure based on the assumption that the upward trend in illegitimate births from 1965-1970 would have continued. *Id.*

241. *Id.* at 915 n.20 (citing a study regarding the normal interruption of pregnancy resulting in fetal death).

242. *Id.* at 915.

243. ROSENBERG, *supra* note 190, at 355.

244. See Strauss et al., *supra* note 203, at 16 tbl.2. Here, I use the figures supplied by the Centers for Disease Control and Prevention, the source of Sklar and Berkov’s numbers. See Sklar & Berkov, *supra* note 231, at 915 nn.1, 17.

sence of a legal regime permitting the practice. Indeed, if one assumes that roughly the same number of unwanted pregnancies occurred in 1972 as in 1971, it would be nonsensical to assume that 70 percent of the abortions performed in each of these years would have occurred regardless of the legal treatment afforded the procedure. The same is true for the 615,000 reported abortions in 1973, the 763,000 reported in 1974, and the nearly 855,000 reported in 1975—not to mention the 1.3 million abortions reported by the CDC in 1981, a decade following the year that was the focus of both studies.²⁴⁵

Second, even if we assume, as Rosenberg contends, that “70 percent” (Tietze) or “between two-thirds and three-quarters” (Sklar and Bekov) of all legal abortions performed in later years would have taken place in any case under a regime of legal prohibition, then the number of abortions still increased by between one-quarter and one-third following *Roe* and the state legislative initiatives preceding it. Again, using Rosenberg’s figure of one million abortions per year prior to legalization, this means that the change in the law resulted in an additional 250,000 to 333,000 children being killed *in utero* each year. According to the Guttmacher Institute, the actual number of abortions rose from 744,600 in 1973 to over 1.55 million in 1980, and then peaked at over 1.6 million in 1990.²⁴⁶ For 2003, the most recent year for which data are available, the Guttmacher Institute estimates that nearly 1.3 million abortions took place.²⁴⁷ Thus, even assuming that the dubious figure of one million abortions per year is correct, legalization of the procedure has, at a minimum, resulted in an increase of well over a quarter-of-a-million abortions per year.

245. See Strauss et al., *supra* note 203, at 16 tbl.2. In order to more clearly understand what Tietze and Sklar and Berkov do not demonstrate, it might be helpful to think in terms of an analogy. Suppose it is easier for a hotel to fill its rooms during a holiday weekend than during a non-holiday weekend, just as it is easier to obtain an abortion under a legal system that permits the practice as opposed to one that does not. If a hotel fills 100 of its rooms on a holiday weekend, it *may* be able to show that it would have filled 70 of those rooms on a non-holiday weekend. Even if this is the case, however, one may not validly conclude that the hotel’s ability to fill 200 rooms on a holiday weekend means that it could have filled 140 rooms on the same non-holiday weekend. Indeed, it may be the case that it could only fill 70 rooms during that time.

246. FINER & HENSHAW, *supra* note 140, at 5, tbl.1.

247. *Id.*

It is hard to square these figures with Rosenberg's conclusions that "in all likelihood the total abortion rate did not change a great deal" following the Court's decision in *Roe*, and that the only change produced by the Court was "removing the need for women to seek dangerous, illegal abortions."²⁴⁸ Because the absence of change is the main conclusion that Rosenberg purports to draw from the data, one would have expected Skeel and Stuntz to have given their sole statistical authority more careful scrutiny.²⁴⁹

6. *Law as an Instrument of Social Change:
Legislative vs. Judicial Action*

The data upon which Rosenberg relies elsewhere in his book actually disprove the very point that Skeel and Stuntz attempt to make. Skeel and Stuntz contend that law should not be used to address the practice of abortion and similar cultural problems because the law, particularly the criminal law, is ill-suited to "teach good morals or promote healthy norms."²⁵⁰ The law should not attempt to fight the existing culture, go against the grain of established norms, or attempt to resolve contested moral claims. The folly of such an approach, according to Skeel and Stuntz, was vividly demonstrated by the failure of Prohibition.²⁵¹ Likewise, a widespread legal ban on abortion failed to stop the practice. Indeed, according to Skeel and Stuntz, the cultural norm against abortion "fell apart while those bans were still in place."²⁵² They argue that the law is therefore un-

248. ROSENBERG, *supra* note 190, at 355. Elsewhere Rosenberg stresses that the single most important aspect of the Court's decision in *Roe* was that, as a constitutional matter, it allowed for the provision of abortion services in clinics, thus giving abortion providers "a way around the intransigence of existing institutions, notably hospitals." *Id.* at 198. Because the reformers paid little attention to the issue of location, the Court itself was responsible for this crucial aspect of the decision. As such, Rosenberg concludes that in this respect the reformers "got very lucky." *Id.* at 201.

249. At least Rosenberg's assertion has the virtue of being direct. By contrast, Skeel and Stuntz hedge their bets by saying that "[c]ommon estimates" of illegal abortions range "from 500,000 to 1.5 million." Skeel & Stuntz, *supra* note 1, at 829 n.84. If the true figure was in fact closer to 500,000, then given the fact that there were 1.6 million abortions in 1990, it is implausible that, as Rosenberg suggests, "the total abortion rate did not change a great deal" following the Court's decision in *Roe*. ROSENBERG, *supra* note 190, at 355.

250. Skeel & Stuntz, *supra* note 1, at 828.

251. *See id.* at 829.

252. *Id.*

able to change settled practices, and that legal prohibition is ineffective in the face of widespread cultural support.

On the contrary, the data cited by Rosenberg prove just the opposite. These data demonstrate law's power to influence public opinion and shape cultural practices. Rosenberg does not address the broader question of law's efficacy as a general matter. Rather, he more narrowly argues that *judicial* action was not decisive in increasing the frequency of abortion. As such, Rosenberg's argument does not support Skeel and Stuntz's central claim. Instead, for Rosenberg, the most significant fact that emerges from a review of abortion history is that the number of legal abortions began to increase rapidly prior to *Roe*.

The largest increase over a two-year period is in 1969–71 with an increase of 463,100 legal abortions. Next is 1970–72 with 393,300, about 26 percent higher than the 1972–74 increase of 311,800. The 1971–73 increase is only 258,800. Even the 1973–75 increase is only 289,600. The largest increase over three years comes in the pre-*Roe* 1969–72 period where there were an additional 564,100 legal abortions. The 1972–75 period saw an increase of 447,400 legal abortions, and between 1973 and 1976 the increase was 434,700.²⁵³

Although Rosenberg mentions it only in passing, the causal explanation behind this enormous increase in the number of legal abortions in the years immediately prior to *Roe* is well known. Between 1967 and 1971, seventeen states either re-

253. ROSENBERG, *supra* note 190, at 179. Skeel and Stuntz cite Rosenberg for this very point. Skeel & Stuntz, *supra* note 1, at 833 n.104. They then cite a study by Finer and Henshaw published in 2003, containing the same data set forth in another study published in 2006. Compare FINER & HENSHAW, *supra* note 140, at 5 tbl.1 with Finer & Henshaw, *supra* note 203, at 8 tbl.1. Skeel and Stuntz incorrectly cite the 2003 study for the proposition that the number of abortions "has declined steeply in the years since 1980." Skeel & Stuntz, *supra* note 1, at 833. Both studies in fact show a marked increase in the number of abortions from 744,600 in 1973 up to a peak of 1.609 million in 1990, followed by a steady decrease to 1.313 million in 2000. See FINER & HENSHAW, *supra* note 140, at 5, tbl. 1. These studies do say that the abortion *rate*—that is, the number of abortions per 1000 women ages 15–44—has declined, not since 1980, but since 1981. *Id.* In both 1980 and 1981, the abortion rate reached a peak 29.3. *Id.* Since then it has declined, falling to 21.3 in 2000. *Id.* The most recent preliminary data available, published in 2006, include figures up to 2003. *Id.* They indicate that the number of abortions has continued to decline, to 1.287 million, as has the abortion rate, to 20.8. *Id.*

pealed or substantially liberalized their abortion laws.²⁵⁴ The most significant of these changes occurred in New York where, in New York City alone, 402,000 legal abortions were performed between July 1, 1970, when the new permissive law took effect, and June 30, 1972.²⁵⁵ These statistics strongly suggest that the legalization of abortion led to a dramatic increase in its incidence. Indeed, the studies on “replacement” abortions by Tietze and Sklar and Berkov, discussed above, and upon which Rosenberg relies, confirm that legalization in fact increased the incidence of abortion.²⁵⁶ This is the very opposite of what Skeel and Stuntz contend.

Although abortions took place in large numbers prior to legalization, the incidence of abortion rose precipitously in the years immediately following its decriminalization, first in the states that revised their laws and then nationally under *Roe*.²⁵⁷ This is to be expected. Indeed, some have argued that the legalization of abortion was responsible for a 5 to 8 percent drop in birthrates, a rise in women’s willingness to engage in inter-

254. See *Legal Abortion: Who, Why and Where*, TIME, Sept. 27, 1971, at 67 (reporting that 17 states had liberalized their laws as of 1971, and that during the first fifteen months after New York’s new abortion law became effective in 1970, 200,000 abortions were performed in New York, including 120,000 performed on women from outside the state); Ryan Lizza, *The Abortion Capital of America*, N.Y. MAG., Dec. 12, 2005 at 38, 45 (“In the two and a half years between July 1970, when New York’s new abortion law took effect, and January 1973, when the Supreme Court’s *Roe* decision legalized the procedure everywhere, 350,000 women came to New York for an abortion, including 19,000 Floridians; 30,000 each from Michigan, Ohio, and Illinois; and thousands more from Canada. By the end of 1971, 61 percent of the abortions performed in New York were on out-of-state residents.”).

255. Tietze, *supra* note 231, at 36.

256. That is, the corollary to draw from Tietze’s conclusion that “70 percent of the legal abortions of resident women performed under the 1970 law replaced illegal abortions,” *Id.* at 41, and Sklar and Berkov’s conclusion that “most likely between two-thirds and three-fourths . . . of all illegal abortions in the United States in 1971 were replacements for illegal abortions,” Sklar & Berkov, *supra* note 231, at 915, is that between one-third and one-fourth of all abortions performed were not replacements but were “new,” adding to the cumulative total of abortions in a given year. In other words, these were abortions that would not have taken place if the procedure had remained illegal.

257. Forsythe, *supra* note 137, at 200 (“As a whole, the most dramatic rise in reported abortions came between 1966 and 1972, as nineteen states loosened their laws, not after *Roe*. The numbers grew as legalization grew.”). For estimates of the incidence of abortion prior to legalization, see the authorities cited in note 196, *supra*. For a fuller discussion of the effectiveness of legal restrictions against abortion, both before and after *Roe*, see Breen, *supra* note 182.

course, a drop in men's willingness to marry in the event of an unplanned pregnancy, and a decline in the rate of adoption and the number of "unwanted" children available for adoption.²⁵⁸ It would be odd if the legalization of abortion was responsible for all of these changes but was not responsible for a higher incidence of abortion itself. Moreover, it would defy common sense and experience to suggest that an act will be performed with no greater frequency once the law prohibiting it has been repealed.

Put another way, in the era just prior to the state reform efforts and national legalization under *Roe*, the law was effective not only as a *ruler* that proscribed certain conduct, but also as a *teacher* of important cultural values.²⁵⁹ Because Skeel and Stuntz's normative conclusion about the proper limits of law rests on the empirical claim that law cannot effect a change in this area—that is, that women will continue to seek abortion in the same numbers regardless of the law's treatment of the issue—one is left to wonder why they chose to accept this assertion in such a facile and uncritical manner.

V. THE LAW AS TEACHER AND THE CULTURE OF DEATH

The idea that law can act as a teacher to those whom it governs is not an idea of recent vintage.²⁶⁰ Although Skeel and Stuntz do not entirely reject the notion that law has a pedagogic role to play in society, they wish to restrict this role severely. Skeel and Stuntz are right to assert that "[i]n governance as in life, most people learn by example."²⁶¹ Thus, they

258. All of these phenomena have been attributed to the legalization of abortion. See Marianne Bitler & Madeline Zavodny, *Did Abortion Legalization Reduce the Number of Unwanted Children? Evidence from Adoptions*, 34 PERSP. ON SEXUAL AND REPROD. HEALTH 25, 32 (Jan.–Feb. 2002) (citing authority for each of the propositions set forth in the text above).

259. Cf. Skeel & Stuntz, *supra* note 1, at 812 ("Laws that aspire to teach citizens how to live and at the same time seek to govern the imposition of tangible legal penalties are likely only to teach lessons in arbitrary government and the rule of discretion.").

260. Writing in the thirteenth century, St. Thomas Aquinas made this idea central to his theory of jurisprudence. See M. Cathleen Kaveny, *Toward a Thomistic Perspective on Abortion and the Law in Contemporary America*, 55 THOMIST 343, 345 (1991) (referring to "Aquinas's concept of the law as a teacher of virtue").

261. Skeel & Stuntz, *supra* note 1, at 830.

contend that the slogans of “purely symbolic laws”²⁶² are unlikely to teach much of anything other than lessons in legislative gamesmanship. Moreover, they fear that when laws are especially susceptible to selective enforcement, such laws will teach lessons in “cynicism about legal institutions.”²⁶³ This is not, however, an argument against the criminalization of abortion. Rather, it is an argument for the consistent enforcement of such legal prohibitions, regardless of where one lives or how much wealth one possesses. It is an argument against selective enforcement and for the equal application of the law, a point that Stuntz appears to concede elsewhere.²⁶⁴

Nevertheless, any new effort to ban abortion would undoubtedly be the source of substantial social disruption. After all, *Roe* has itself changed the cultural landscape by creating a climate in which many women have come to expect the ready availability of abortion services.²⁶⁵ Indeed, the legacy of *Roe* and its progeny has been “a tragic obscuring of the collective conscience,”²⁶⁶ a loss of the sense of right and wrong that has had a corrosive effect on society as a whole.

This is the phenomenon that Pope John Paul II identified as the “culture of death,” a phenomenon that consists of a collection of attitudes, practices, laws, and beliefs “which encourage an idea of society excessively concerned with efficiency.”²⁶⁷ Under the criteria of efficiency, functionality, and usefulness, human beings “are considered not for what they ‘are,’ but for

262. *Id.* at 828.

263. *Id.* at 829.

264. See Stuntz, *supra* note 5, at 1740 (asserting that even if law is an effective teacher, “law surely teaches best when the relevant legal norms are enforced across the board”); see also Skeel & Stuntz, *supra* note 1, at 830 (concluding that the success of both the Civil Rights Act of 1964 and the Voting Rights Act of 1965 is in part attributable to the fact that each had “direct, tangible consequences that did not depend on discretionary decisions of police officers or prosecutors”).

265. Reliance on the relatively new cultural landscape that *Roe* created was a primary reason given by the Court in *Casey* for not overturning *Roe*. See *Planned Parenthood of Se. Pa. v. Casey*, 505 U.S. 833, 855–56 (1992) (arguing that in the wake of *Roe*, “for two decades of economic and social developments, people have organized intimate relationships and made choices that define their views of themselves and their places in society, in reliance on the availability of abortion in the event that contraception should fail”).

266. *Evangelium Vitae*, *supra* note 76, ¶ 70.

267. *Id.* ¶ 12.

what they 'have, do and produce.'"²⁶⁸ At its foundation, this view rests upon "a completely individualistic concept of freedom, which ends up becoming the freedom of 'the strong' against the weak who have no choice but to submit."²⁶⁹ Accordingly, from this perspective, anyone who "compromises the well-being or life-style of those who are more favoured tends to be looked upon as an enemy to be resisted or eliminated."²⁷⁰

According to John Paul, these attitudes and beliefs, in turn, lead to the "creat[ion] and consolidat[ion of] actual 'structures of sin' which go against life."²⁷¹ Here the freedom of the strong over the weak is justified by a kind of relativism according to which "only someone present and personally involved in a concrete situation can correctly judge the goods at stake [such that] only that person [is] able to decide on the morality of his choice."²⁷² Concretely, this "*conspiracy against life*"²⁷³ can be seen most vividly in the widespread practice of abortion, and in the elaborate legal regime that sanctions the killing of unborn children *in utero*.²⁷⁴ It can also be seen in the actions of men who encourage women to have abortions—either directly, by pressuring them to seek the procedure, or indirectly "by leaving [them] alone to face the problems of pregnancy."²⁷⁵ It can also be seen in the participation of medical professionals who "place at the service of death skills which were acquired for promoting life."²⁷⁶ The media contributes to this conspiracy by portraying the acceptance of abortion "as a mark of progress and a victory of freedom, while depicting as enemies of freedom and progress those positions which are unreservedly pro-

268. *Id.* ¶ 23.

269. *Id.* ¶ 19.

270. *Id.* ¶ 12.

271. *Id.* ¶ 24.

272. *Id.* ¶ 68.

273. *See id.* ¶¶ 12, 17.

274. *See id.* ¶ 58 ("The acceptance of abortion in the popular mind, in behaviour and even in law itself, is a telling sign of an extremely dangerous crisis of the moral sense, which is becoming more and more incapable of distinguishing between good and evil, even when the fundamental right to life is at stake."). Although I here focus exclusively on abortion, John Paul II also identifies the growing practice of euthanasia and the state's use of capital punishment in criminal convictions as further examples of sinful structures that contribute to the culture of death. *See id.* ¶¶ 55–56, 64–67.

275. *Id.* ¶ 59.

276. *Id.*

life."²⁷⁷ The practice of abortion is also supported by a "network of complicity which reaches out to include international institutions, foundations and associations which systematically campaign for the legalization and spread of abortion in the world."²⁷⁸ All of these social elements show that abortion "goes beyond the responsibility of individuals and beyond the harm done to them, and takes on a distinctly social dimension."²⁷⁹ Taken together, these institutions, practices, and attitudes constitute an immense "'structure of sin' which opposes human life not yet born."²⁸⁰

Where law is part of the "structure of sin" with respect to a particular practice, the cultural influence exerted by law is enormous. Institutions and methods of operation that condone injustice, whether silently or overtly, make the practice of injustice more socially acceptable, even legitimate, insofar as the absence of legal prohibition creates legitimacy. Under the protection afforded by law, the repetition of an act—even a "private" act performed in a doctor's office or clinic—can seduce the conscience with the alluring but mistaken notion that the frequency of a practice can transform its essential character from something wrongful into something advantageous and desirable, perhaps even noble and laudable.²⁸¹ In this way, the law teaches even the unschooled what is and is not acceptable.

277. *Id.* ¶ 17.

278. *Id.* ¶ 59.

279. *Id.*

280. *Id.* For a more elaborate discussion of the concept of "structure of sin" in Catholic social thought, see Breen, *supra* note 182.

281. Pope John Paul II was well aware of the tendency to want to transform one's wrongful act into a sign of virtue in order to avoid the painful consequences of guilt. See Pope John Paul II, Encyclical Letter, *Veritatis Splendor* ¶ 104 (Aug. 6, 1993), available at http://www.vatican.va/edocs/ENG0222/_INDEX.HTM ("It is quite human for the sinner to acknowledge his weakness and to ask mercy for his failings; what is unacceptable is the attitude of one who makes his own weakness the criterion of the truth about the good, so that he can feel self-justified."). Supporters of abortion often claim that having an abortion is not only morally permissible, but that it can in fact be a noble action. See, e.g., Robin L. West, *Taking Freedom Seriously*, 104 HARV. L. REV. 43, 83 (1990) (contending that "[t]he abortion decision typically rests not on a desire to destroy fetal life but on a responsible and moral desire to ensure that a new life will be borne only if it will be nurtured and loved"); Joan C. Williams & Shauna L. Shames, *Mothers' Dreams: Abortion and the High Price of Motherhood*, 6 U. PA. J. CONST. L. 818 (2003) (arguing in favor of a rhetorical strategy that portrays the decision to abort as often the best thing for a woman's existing and future children).

A. *False Choice: Changing the Culture vs. Changing the Law*

In recommending that law should be modest and so refrain from attempting to restrict abortion, Skeel and Stuntz are not alone. A number of commentators writing from a Catholic perspective have explored the hypothesis that the law should never be used to regulate the practice of abortion,²⁸² or that the law should be employed only after the culture has changed to the point where society will accept some form of legal restriction. Others suggest that the law should only be used in a non-coercive fashion, to support women in their decision to give birth rather than to discourage resort to abortion *per se*. Like Skeel and Stuntz, these authors stress the priority of culture over law and the need to persuade rather than compel those who would seek recourse to the procedure. Margaret O'Brien Steinfels succinctly expresses this point of view, first by confidently declaring that "[n]o Supreme Court is going to overturn *Roe*" because of the doctrine of *stare decisis*.²⁸³ Instead, she in-

282. See Mary C. Segers, *Murray, American Pluralism, and the Abortion Controversy*, in JOHN COURTNEY MURRAY AND THE AMERICAN CIVIL CONVERSATION 228 (Robert P. Hunt & Kenneth L. Grasso eds., 1992) (speculating how theologian John Courtney Murray might react to the modern abortion debate). Segers's essay has been subject to blistering critique. See, e.g., Susan J. Stabile, *John Courtney Murray and the Abortion Debate*, 4 J. CATH. SOC. THOUGHT 87 (2007); Todd David Whitmore, *What Would John Courtney Murray Say? On Abortion & Euthanasia*, COMMONWEAL, Oct. 7, 1994, at 16.

283. Margaret O'Brien Steinfels, *Time to Choose: Voting with a Catholic Conscience*, COMMONWEAL, Oct. 22, 2004, at 12. Steinfels gives no hint as to how such a cultural change is to be brought about, or how voting for John Kerry for President (the ultimate point of the article) will help to advance this cultural transformation. It is perhaps Steinfels's confidence in the inability to change the legal landscape surrounding abortion that simplifies her support for Kerry over Bush, notwithstanding the latter's public opposition to abortion. Although the matter is now plainly moot (at least in terms of the 2004 Election), it is telling that in her weighing of the candidates' relative merits, Steinfels seemingly never paused to consider how, given Senator Kerry's unwavering support for an absolute right to abortion, see Senator John Kerry, Address at the NARAL Pro-Choice America Dinner (Jan. 21, 2003) (transcript available at <http://www.gwu.edu/~action/2004/interestg/naral012103/kerr012103spt.html>), a Kerry presidency would have made matters worse by using the law to increase the availability and incidence of abortion simply by executive order, much as President Clinton did in the early days of his first administration. See Robin Toner, *Clinton Orders Reversal of Abortion Restrictions Left by Reagan and Bush*, N.Y. TIMES, Jan. 23, 1993, at A1 (describing President Clinton's orders lifting the ban on the use of federal money in family planning clinics that counsel abortion, authorizing the use of federal funds in international programs that provide abortion counseling and abortion related activities, authorizing abortions at U.S. military hospitals, lifting the ban on the use of federal funds in fetal tissue research, and calling for a review of

sists that “[t]he law will only change when the culture changes and women change their minds about abortion.”²⁸⁴

Similarly, Todd David Whitmore argues that because the law “is a bad vehicle” for shaping public opinion, prudence dictates that Christians and others who oppose abortion “should not focus primarily on using coercive law to restrict abortion.”²⁸⁵ Instead, they should “exemplify Christian charity by using [their] resources to assist women who are involuntarily pregnant.”²⁸⁶ Likewise, Kevin Quinn, S.J., argues that opponents of abortion “should not lead with coercive law but with systematic and evangelical efforts to promote the ‘culture of life.’”²⁸⁷ Quinn’s conferee, David Hollenbach, S.J., believes “the appeal to law, whether the matter be race or abortion, must generally follow the cultural consensus rather than lead or form it.”²⁸⁸ Thus, he recommends “the route of education and persuasion” over the “premature reach for law, which remains coercive even when it intends to be educative.”²⁸⁹

It is perhaps stating the obvious to note that cultural transformation and legal change are not mutually exclusive. Indeed, as Francis George has said, “we should not suppose that our choice is between reforming the law and working to change the culture. We must do both.”²⁹⁰ Moreover, efforts to reform the law need not wait, in sequential fashion, for a moral renovation of the culture to be completed. As George makes clear:

the ban on the importation of RU-486). One is left to wonder whether Steinfels will consider these sorts of factors in determining who to endorse in the 2008 campaign.

284. Steinfels, *supra* note 283, at 12. Elsewhere in the article, in discussing embryonic stem cell research, Steinfels fatalistically concludes that “Catholics will never convince their fellow citizens that fertilized eggs are protectible human life (indeed, most Catholics aren’t convinced).” *Id.* at 13.

285. Whitmore, *supra* note 282, at 19 (quoting Segers, *supra* note 282, at 247). Whitmore further developed this thesis in a subsequent essay. See Todd David Whitmore, *Arms Unfolded: The Search for Common Ground on Abortion*, NOTRE DAME MAGAZINE, Summer 2005.

286. Whitmore, *supra* note 282, at 19 (quoting Segers, *supra* note 279, at 247).

287. Kevin P. Quinn, S.J., *Whose Virtue? Which Morality? The Limits of Law as a Teacher of Virtue: A Comment on Cathleen Kaveny*, in CHOOSING LIFE, *supra* note 142, at 153.

288. David Hollenbach, S.J., *The Gospel of Life and the Culture of Death: A Response to John Conley*, in CHOOSING LIFE, *supra* note 142, at 43.

289. *Id.* at 43–44.

290. George, *supra* note 186, at 10.

The work of legal reform is a necessary, though not sufficient, ingredient in the larger project of cultural transformation. Yes, we must change people's hearts. No, we must not wait for changes of heart before changing the laws. We must do both at the same time, recognizing that just laws help to form good hearts, and unjust laws impede every other effort in the cause of the gospel of life.²⁹¹

Not surprisingly, Pope John Paul II articulated a similar view. That is, he argued for "a general mobilization of consciences and a united ethical effort to activate a great campaign in support of life."²⁹² At the same time, John Paul advocated legal change. He recognized that "[a]lthough laws are not the only means of protecting human life, nevertheless they do play a very important and sometimes decisive role in influencing patterns of thought and behaviour."²⁹³ Thus, despite the difficulties involved in "mount[ing] an effective legal defence of life in pluralistic democracies," he urges "all political leaders not to pass laws" which make abortion more widely available.²⁹⁴ Moreover, although "it is not enough to remove unjust laws," where such illegitimate measures already exist, political leaders must take steps that "will lead to the re-establishment of a just order in the defence and promotion of the value of life."²⁹⁵

B. *Legal Change and Recognizing the Moral Virtue
Necessary to Comply*

The proponents of a "culture first" approach to abortion rightly insist that law will not teach men and women how to respect nascent human life if it exceeds their capacity for moral action. It may simply be the case, as Todd David Whitmore reminds us, that "the public may not be ready to receive a law

291. *Id.*

292. *Evangelium Vitae*, *supra* note 76, ¶ 95(emphasis omitted).

293. *Id.* ¶ 90.

294. *Id.*

295. *Id.*; see also Pope John Paul II, *Address at the Commemoration of the Fifth Anniversary of the Encyclical Evangelium Vitae* ¶¶ 4, 6 (Feb. 14, 2000), available at http://www.vatican.va/holy_father/john_paul_ii/speeches/2000/janmar/documents/hf_jp-ii_spe_20000214_acd-life_en.html ("No effort should be spared to eliminate legalized crime or at least to limit the damage caused by these laws The changing of laws must be preceded and accompanied by the *changing of mentalities and morals* on a vast scale, in an extensive and visible way.").

that simply mirrors what is morally true.”²⁹⁶ Thus, Cathleen Kaveny warns that “[f]orging a pro-life jurisprudence for the United States requires that we take sober, clear-eyed account of the level of virtue our society currently possesses, not only of the virtue we earnestly hope that it will one day manifest.”²⁹⁷ Indeed, Kaveny has long argued that, in formulating a workable legal philosophy, the pro-life movement “needs to discern when criminal sanctions against abortion are inappropriate, because they do not take into account the capabilities of ordinary rather than superhuman virtue.”²⁹⁸ Likewise, Gregory Kalscheur, S.J., notes that “for law to be effective as a moral guide, some level of consent as to the goodness of the law must be obtained.”²⁹⁹ A law that far outstrips the virtue of those whom it governs may lead to contempt for that particular law and disrespect for the legal system as a whole.³⁰⁰

Plainly, in fashioning the rules that will govern society, lawmakers should gauge the virtue of their fellow citizens—the moral capacity of individuals to comply with the law. Although the human person always possesses the freedom necessary to obey a just law, virtue—the interior disposition and discipline necessary to exercise one’s freedom in a responsible manner—is not something that can be imposed. Instead, virtue is something that, for the most part, is either acquired or neglected through culture.³⁰¹ Thus, prudence demands both an appreciation of the relevant cultural setting, as well as a recognition of the values this setting teaches and fails to teach.

Prudence, however, does not simply caution the lawmaker against enacting rules that will not be followed—rules that may become a source of derision, that arouse public contempt for

296. Whitmore, *supra* note 282, at 19.

297. Kaveny, *supra* note 142, at 144.

298. Kaveny, *supra* note 260, at 380.

299. Kalscheur, *supra* note 75, at 257.

300. The idea that a difficult law may breed contempt for law as a whole can be found in Aquinas’s theory of law. See ST. THOMAS AQUINAS, *SUMMA THEOLOGICA*, *supra* note 114, I-II, Q. 96, art. 2; see also Whitmore, *supra* note 282, at 19 (discussing the idea of contempt for law brought about by legal measures that are overly ambitious in the thought of John Courtney Murray).

301. As discussed at length above, this sort of moral education takes place largely through the many constituent institutions that inhabit and make up a given culture, including, for example, the family, the market, schools, places of worship, places of work, and political organizations. See *supra* notes 180–85 and accompanying text; see also Breen, *supra* note 182.

law in general. Prudence also demands that laws should not be overly lax, legitimizing certain conduct through the absence of regulation and promoting a kind of ill-virtue through silence. Indeed, the law must challenge individuals to act in compliance with the rights of others and the common good, even though doing so may prove to be difficult. Thus, the law must strike a balance, in view of those subject to it, between being overly restrictive and unnecessarily indulgent. Knowing in advance that some individuals will fall short of what is expected does not mean that the law must abstain from regulation, because that will always be the case.³⁰²

Moreover, prudence should not be an excuse for doing nothing—for regarding the current incapacity of many to comply with the law as a fixed point that cannot and will not change. Although often invoked as a principle that guides political action in uncertain waters, prudence may instead reflect an all too comfortable accommodation to the status quo. An approach to abortion that treats current public attitudes and individual virtue as fixed points around which the law must revolve ends up demanding too little from people and, in effect, becomes an excuse for doing nothing under the guise of considered restraint.

If, however, laws severely restricting abortion were to again become a reality, then the kind of virtue education necessary for compliance would likely have already taken place.³⁰³ Those who oppose legal restrictions on abortion on prudential grounds often seem to forget the power of the political process to teach. Indeed, when politics fosters genuine dialogue and introspection about the nature of our society and what it might become, politics has enormous potential to help bring about genuine cultural transformation. That, I take it, is the point of Skeel and Stuntz's favorable view of the civil rights move-

302. See Forsythe, *supra* note 137, at 195 (arguing that the absence of perfect compliance with a statute is not a sufficient reason to repeal it).

303. Given the widespread practice of abortion, some women would likely still seek abortions even following a cultural change sufficient to bring about legislation protective of unborn life. As noted above, to refuse to regulate abortion based on the existence of some noncompliance with the law proves too much. It would justify striking down every law that is violated by those opposed to it. See *supra* notes 63, 132–38 and accompanying text.

ment—a movement that ultimately assumed political expression in effective legislation.³⁰⁴

C. *The Non-Coercive Use of Law: Public Assistance
and the Incidence of Abortion*

Although some commentators join Skeel and Stuntz in opposing the direct regulation of abortion on prudential grounds, others believe the law can be employed in a non-coercive manner to reduce the incidence of abortion. This, of course, is the position now routinely put forth by a number of avowedly Catholic and otherwise Christian politicians. As then-New York Governor Mario Cuomo argued in his now-famous address at Notre Dame in 1984, even those who unyieldingly support the abortion license can at the same time “support the development of government programs that present an impoverished mother with the full range of support she needs to bear and raise her children, to have a real choice.”³⁰⁵

Unfortunately, these sorts of programs are largely absent from the American legal landscape. In her justly celebrated book, *Abortion and Divorce in Western Law*, Professor Mary Ann Glendon argues that “[a]bortion cannot be disentangled from larger issues of social justice” that surround it.³⁰⁶ Here, drawing on the work of social scientists Shelia Kamerman and Alfred Kahn, Glendon notes that, unlike most European countries, the United States does not guarantee paid parental leave from work following childbirth, does not provide a comprehensive public system of day care for children ages three to five, does

304. See Skeel & Stuntz, *supra* note 1, at 829–30.

305. Mario M. Cuomo, *Religious Belief and Public Morality: A Catholic Governor's Perspective*, 1 NOTRE DAME J.L. ETHICS & PUB. POL'Y 13, 27–28 (1984). More recently, under the leadership of Rep. Rosa L. DeLauro, a group of fifty-five Catholic, Democratic members of the House of Representatives signed a “Statement of Principles” in which they collectively pledged themselves to “reducing the number of unwanted pregnancies and creating an environment with policies that encourage pregnancies to be carried to term” by “promoting alternatives to abortion, such as adoption, and improving access to children’s healthcare and child care, as well as policies that encourage paternal and maternal responsibility.” Press Release, Rep. Rosa L. DeLauro, House Democrats Release Historic Catholic Statement of Principles (Feb. 28, 2006), *available at* http://www.house.gov/delauro/press/2006/February/catholic_statement_2_28_06.html. Significantly, the statement studiously avoids the question of whether or not abortion should be legally restricted in any way.

306. MARY ANN GLENDON, *ABORTION AND DIVORCE IN WESTERN LAW: AMERICAN FAILURES, EUROPEAN CHALLENGES* 55 (1987).

not provide cash assistance to parents in addressing the financial burdens of child rearing, and does not provide favorable tax treatment to poor families.³⁰⁷ Thus, Glendon concludes that a stranger might infer “from our abortion and social welfare laws [that] . . . we had deliberately decided to solve the problem of children in poverty by choosing to abort them rather than to support them with tax dollars.”³⁰⁸ Regrettably, the situation has not improved in any appreciable manner since the publication of Glendon’s book.³⁰⁹

The idea that laws governing abortion should eschew the use of coercive force through criminal prohibition, and instead encourage women to continue their pregnancies to term by providing additional financial resources, raises an important empirical question: would such an approach significantly reduce the incidence of abortion? In other words, would a greater allocation of public resources to social services for both married and single women with unwanted pregnancies in fact encourage more women to see their pregnancies to term?³¹⁰

307. *Id.* at 53–55. The works Glendon cites include FAMILY POLICY: GOVERNMENT AND FAMILIES IN FOURTEEN COUNTRIES (Sheila B. Kamerman & Alfred J. Kahn eds., 1978); SHEILA B. KAMERMAN & ALFRED J. KAHN, CHILD CARE, FAMILY BENEFITS, AND WORKING PARENTS: A STUDY IN COMPARATIVE POLICY (1981); ALFRED J. KAHN & SHEILA B. KAMERMAN, INCOME TRANSFERS FOR FAMILIES WITH CHILDREN: AN EIGHT-COUNTRY STUDY (1983); SHEILA B. KAMERMAN, ALFRED J. KAHN & PAUL KINGSTON, MATERNITY POLICIES AND WORKING WOMEN (1983).

308. GLENDON, *supra* note 306, at 55.

309. See, e.g., Sheila B. Kamerman, *Gender Role and Family Structure Changes in the Advanced Industrialized West: Implications for Social Policy*, in POVERTY, INEQUALITY, AND THE FUTURE OF SOCIAL POLICY: WESTERN STATES IN THE NEW WORLD ORDER 231, 253–54 (Katherine McFate, Roger Lawson & William Julius Wilson eds., 1995) [hereinafter FUTURE OF SOCIAL POLICY] (concluding that the United States differs from continental European countries “in its failure to provide direct income transfers . . . to all or almost all families with children” and that “European countries and Canada are far ahead of the United States” in providing an adequate social infrastructure that supports mothers who work).

310. In the course of her book, Glendon discusses the abortion laws in various Western European nations and contrasts both the content of these laws and the manner in which they were created with the Supreme Court’s decision in *Roe v. Wade*. See GLENDON, *supra* note 306, at 15–39. Specifically, commenting on a famous West German decision, Glendon concludes that what was important to the court was “that the *totality* of abortion regulations—that is, all criminal, public health, and social welfare laws relating to abortion—be in proportion to the importance of the legal value of life, and that, as a whole, they work for the continuation of the pregnancy.” *Id.* at 28.

1. *Financial Concerns as a Factor in the Abortion Decision*

Among women who have had abortions, the available data has consistently shown that financial considerations do indeed play a role in the decision to abort. In 2004, researchers at the Guttmacher Institute conducted a structured survey of over 1100 women who had recently obtained abortions. Significantly, 73 percent of respondents listed “[c]an’t afford a baby now” as one of their reasons for choosing the procedure.³¹¹ A similar study conducted in 1987 revealed similar financial concerns. In this earlier survey, 68 percent of the 1,900 participat-

Aside from whatever influence such policies might have on the frequency of abortion, however, Glendon argues that law unavoidably exercises a pedagogical role, “contribut[ing] in a modest but not a trivial way to that framework of beliefs and feelings” that inform society. *Id.* at 139. It is precisely because law teaches that Glendon sees the value both of laws that provide financial assistance to pregnant women and families and of proposed legal compromises that would only marginally reduce the total number of abortions performed in the U.S. “At a minimum, replacing the right to abortion with a compromise should help to replace strident discord with reasoned discussion about the grounds and conditions under which abortion might be permitted.” *Id.* at 60.

Surely the goal of encouraging “reasoned discussion” on abortion is praiseworthy, and non-coercive laws may well encourage a higher level of public discourse. Still, Glendon’s thesis contains a prediction that should be tested. At the time of her book, the “compromise” positions on abortion adopted by France and Germany had only been in place for about ten years. These measures have now been in place for over thirty years. It now seems appropriate to ask whether the discussion of abortion in these countries has been elevated. Have such measures worked to encourage “reasoned discussion” of abortion in these countries? Is abortion discussed at all? Or is it now a matter of indifference—a question that is thought to have been definitively answered and so need not be re-examined?

Unfortunately, I fear the record shows that, notwithstanding the pro-life cultural messages communicated by the child-friendly legislation in place in many European countries, the prosperous, liberal democracies of Europe have not recoiled from the abyss. Instead, with few misgivings, they have plunged forward, advocating the recognition of abortion as an international human right. For a brief description of recent developments in European abortion law, see E.U. NETWORK OF INDEPENDENT EXPERTS ON FUNDAMENTAL RIGHTS, REPORT ON THE SITUATION OF FUNDAMENTAL RIGHTS IN THE EUROPEAN UNION AND ITS MEMBER STATES IN 2005, at 80–82 (2005), available at http://ec.europa.eu/justice_home/cfr_cdf/doc/report_eu_2005_en.pdf.

311. Lawrence B. Finer et al., *Reasons U.S. Women Have Abortions: Quantitative and Qualitative Perspectives*, 37 *PERSP. ON SEXUAL & REPROD. HEALTH* 110, 112–113 (Sept. 2005).

ing women indicated that their inability to afford a child was a factor in their decision to abort.³¹²

In addition, both of these studies reveal that the inability to afford a child was of great importance relative to other factors. The 2004 study reported that 23 percent of participating women listed financial constraints as the most important reason for seeking an abortion, and the 1987 study indicated that 21 percent listed this factor as the most important.³¹³ Indeed, in the 2004 study, only one reason to abort ranked ahead of financial concern. That is, 25 percent of the women surveyed responded they were "not ready" for a child, or another child, or that the timing of the pregnancy was "wrong."³¹⁴

As illuminating as these empirical studies are, however, they do not demonstrate that the high incidence of abortion in this country can be significantly lowered by providing greater financial assistance to women considering abortion. Part of this uncertainty is a result of the studies' indication that the decision to choose abortion is a complex one. In fact, the 2004 study found that "[o]f the 1160 women who gave at least one reason, 89% gave at least two and 72% gave at least three; the median number of reasons given was four, and some women gave as many as eight reasons out of a possible 13."³¹⁵ Although the survey asked the women to indicate what factor was most important to them, the survey did not ask how a different set of circumstances might have influenced their decision. That is, neither the 2004 study nor the 1987 study asked the participants whether, if sufficient financial assistance had been available, they would have taken their pregnancies to term. It is entirely possible that even with such support, a woman's education, career plans, familial circumstances, or relationship with the father would still lead her to choose abortion.

312. *Id.* at 113. The 2005 report states that 69 percent of the respondents in the 1987–1988 study indicated that their inability to afford a baby was a reason for choosing an abortion. Although the discrepancy is not statistically significant, the earlier report in fact states that 68 percent gave this as a reason. See Aida Torres & Jacqueline Darroch Forrest, *Why Do Women Have Abortions?*, 20 FAM. PLAN. PERSP., July–Aug. 1988, at 169, 170.

313. See *Finer et al.*, *supra* note 311, at 114; Torres & Forrest, *supra* note 312, at 170.

314. *Finer et al.*, *supra* note 311, at 114.

315. *Id.* at 113.

2. *Abortion Rates in Countries with More Generous Social Services*

The incidence of abortion in countries that provide greater public assistance to women facing unwanted pregnancies than the United States appears to confirm the inability of non-coercive methods to significantly reduce the number of abortions. For example, a 1999 study, also sponsored by the Guttmacher Institute, reported the frequency of abortion in fifty-nine countries with populations of at least one million where abortion is legal and generally available.³¹⁶ For each country, the study included three important statistics: the actual number of reported abortions within a given year; the "abortion rate," that is, the number of abortions per 1,000 women ages 15 to 44; and the "abortion ratio," that is, the number of abortions per 100 known pregnancies.³¹⁷ Thus, for 1996, the study reported that 1,365,700 abortions were performed in the United States. This means in that year, for every 1,000 women of childbearing age, 22.9 had an abortion, and a staggering 25.9 percent of all known pregnancies were terminated by abortion.³¹⁸

In the same year, Sweden, a country with a much more elaborate social service apparatus,³¹⁹ experienced only 32,100 abortions.³²⁰ Undoubtedly, this relatively small number is, at least in part, a consequence of Sweden's comparatively smaller population. Sweden's more generous support of families and pregnant women cannot, however, explain this lower number.

316. Stanley K. Henshaw, Susheela Singh & Taylor Haas, *The Incidence of Abortion Worldwide*, 25 INT'L FAM. PLAN. PERSP. (SUPPLEMENT) S30 (1999).

317. *Id.* at S34. The report includes a fourth statistic not relevant to the discussion above, namely, the "total abortion rate," which the authors say represents "[t]he number of abortions that would be experienced by the average woman during her reproductive lifetime, given present age-specific abortion rates." *Id.*

318. *Id.*

319. See Sara McLanahan & Irwin Garfinkel, *Single-Mother Families and Social Policy: Lessons for the United States from Canada, France, and Sweden*, in FUTURE OF SOCIAL POLICY, *supra* note 309, at 367 (comparing the incidence of poverty among single-mother families and the effectiveness of different strategies employed by the United States, Canada, Sweden and France); Siv Gustafsson, *Single Mothers in Sweden: Why is Poverty Less Severe?*, in FUTURE OF SOCIAL POLICY, *supra* note 309, at 291 (explaining the history and the policies behind the relatively good economic situation of single mothers in Sweden); Celia Winkler, *Mothering, equality and the individual: feminist debates and welfare policies in the USA and Sweden*, 1 COMMUNITY, WORK & FAM. 149, 149 (1998).

320. Henshaw et al., *supra* note 316, at S34.

If that were the case, one would expect to see a comparable drop in other abortion statistics. On the contrary, the report indicates that in 1996, 18.7 of every 1,000 women ages 15–44 had an abortion, and 25.2 percent of all known pregnancies were terminated by the procedure.³²¹ Thus, notwithstanding the greater social resources devoted to supporting families and pregnant women in Sweden, more than a quarter of all pregnancies ended in abortion, just as in the United States.

Like Sweden, Canada is often heralded as a model for social welfare policy for the United States. Although Canada's generous allocation of resources to public health and income assistance³²² may indeed be worthy of imitation, these policies do not seem to have dramatically lowered the incidence of abortion in that country. According to the study, 106,700 Canadian women obtained abortions in 1995. Again, Canada's significantly smaller population can explain the fact that this figure is significantly lower than the number of abortions performed in the United States. Yet, despite the higher level of social assistance available to Canadian women with unwanted pregnancies, resort to abortion remains alarmingly high. According to the report, in 1995, for every 1,000 Canadian women of child-bearing age, 15.5 had an abortion, and 22 percent of all pregnancies in Canada ended in abortion.³²³

The same study reported similar statistics for other economically advanced countries with well-developed social service policies in place, including Australia, Denmark, England and Wales, Norway, France, and Italy.³²⁴ Granted, the experience of abortion in each of these smaller, more homogeneous countries

321. *Id.*

322. See McLanahan & Garfinkel, *supra* note 319; Ruth Rose, *Lone Parents: The Canadian Experience*, in *FUTURE OF SOCIAL POLICY*, *supra* note 309, at 327 (describing the various benefits available to families with children in Canada, as well as the country's shortcomings with respect education and training and childcare).

323. Henshaw et al., *supra* note 316, at S34.

324. *Id.* at S34. For each of these countries the study reported the following statistics (number of abortions within a given year/ abortion rate/ abortion ratio): Australia (1995–1996) 91,900/ 22.2/ 26.4; Denmark (1995) 17,700/ 16.1/ 20.3; England & Wales (1996) 167,900/ 15.6/ 20.5; Norway (1996) 14,300/ 15.6/ 19.1; France (1995, reporting incomplete) 156,200/ 12.4/ 17.7; Italy (1996, reporting incomplete) 140,400/ 11.4/ 21.1. *Id.* at S34. The authors note that “reporting is incomplete in France and Italy,” suggesting that the incidence of abortion may be slightly higher than what these statistics suggest. *Id.* at S34.

may not translate directly into the American context. At the same time, given that each of these countries has an abortion ratio at, above, or approaching 20 percent strongly suggests that the provision of greater financial assistance would not significantly affect the incidence of abortion in the United States. Instead, the data appear to support the frank conclusion of long-time abortion-rights advocate Frances Kissling that “[t]here is absolutely no evidence that better economic benefits, jobs, child care or parental leave would lead to a significant decline in abortion.”³²⁵

This does not mean that measures involving the non-coercive use of law through the provision of greater social services to families and pregnant women should not be pursued. It does, however, mean that these measures should be pursued in their own right—as a means of supporting the disadvantaged people to whom they are directed—and not as a means to some other end. That expanded social services may dissuade some women from choosing abortion should be regarded as a welcome, additional benefit to laws that justice may demand in any case—laws which signify society’s solidarity with those in need.

*D. Culture and Law Working in Tandem:
MADD’s Response to Drunk Driving*

Those who genuinely hope for a reduction in the number of abortions may be forgiven for viewing with a jaundiced eye Kissling’s claim that non-coercive measures will meet with futility. Indeed, based on the data gathered by the Guttmacher Institute from other developed countries, some may still reasonably claim that providing greater financial assistance may help to reduce the incidence of abortion. After all, the two surveys, recounted above, of women who obtained abortions suggest that if adequate financial resources had been made available, some of them might not have chosen the procedure. At the same time, data from other countries suggest that even if such measures were successful, they would not radically alter the practice of abortion in this country. Simply put, non-coercive

325. Frances Kissling, *A Cautionary Tale*, CONSCIENCE, Autumn 2005, at 19, 22; see also Ann Furedi, *Some Messages Can’t Be Massaged*, CONSCIENCE, Winter 2006-07, at 22 (“Better nurseries and better financial support can mitigate some of the consequences of motherhood, but nothing can mitigate the impact of pregnancy itself, which is why women need the means to end it.”).

social welfare laws, no less than coercive measures, are limited in their ability to bring about genuine social transformation.

What is needed is a multifaceted approach that recognizes the dynamic and mutually reinforcing relationship between cultural norms and legal rules. Quite obviously, in a free and democratic society, laws must enjoy widespread support in order to ensure compliance. Thus, legal sanctions can work to underscore and solidify cultural norms and attitudes with respect to a given behavior. Conversely, laws that assume a contrary position can prevent cultural norms, which would otherwise flourish, from taking root.

Accordingly, contrary to those who insist on an exclusively non-coercive use of law, the criminal law has an essential role to play in this multifaceted approach. Indeed, the law must forthrightly prohibit the intentional killing of unborn human life. In its non-coercive dimension, the law should support women in carrying their pregnancies to term and raising their children,³²⁶ or, if they so choose, in placing them for adoption. Under such a regime, women facing unwanted pregnancies would not simply be told that abortion is a crime and warned of the consequences of unlawful behavior. They would also be given practical strategies for avoiding the choice that so many women today see as their only alternative in an otherwise impossible situation. These strategies would include not only financial assistance provided by the state, but also interpersonal advice and support provided by both public agencies and non-governmental mediating institutions. Under this approach, law and culture would work in tandem, teaching a single message of human dignity through word and example.

Fortunately, recent history provides a useful model of how such a comprehensive approach can achieve success, even when confronting a problem long thought to be intractable. The large number of drunk driving-related fatalities has long been regarded as "not only a national crisis, but a national disgrace."³²⁷ Still, the problem went largely unaddressed until the

326. See M. Cathleen Kaveny, *How Views of Law Influence the Pro-Life Movement*, 34 *ORIGINS* 560, 564 (2005) ("We must provide [women] with substantial assistance in meeting the challenge of their pregnancies, including the assistance (if they want it) of the baby's father.").

327. H. LAURENCE ROSS, *CONFRONTING DRUNK DRIVING: SOCIAL POLICY FOR SAVING LIVES* 48 (1992).

U.S. Department of Transportation in 1968 issued a report, *Alcohol and Highway Safety*, which found that "the use of alcohol by drivers and pedestrians leads to some 25,000 deaths and a total of at least 800,000 crashes in the United States each year."³²⁸ In 1970, the National Highway Traffic and Safety Administration initiated the Alcohol Safety Action Project, which directed \$88 million to thirty-five communities and prompted new efforts in enforcement, rehabilitation, and education. "Nevertheless, a significant reduction of drunk driving could not be confirmed and the program was terminated in 1977."³²⁹

Building on these earlier, incomplete efforts, the contemporary movement against drunk driving began in 1980 with the creation of a grass-roots organization, Mothers Against Drunk Driving ("MADD"). Founded by Candy Lightner, whose teenage daughter was killed by a drunk driver with a long history of DUI violations, and Cindi Lamb, whose five-and-a-half month old daughter was made a paraplegic by a drunk driver,³³⁰ MADD embodied the outrage of parents who believed that their tragedy was, at least in part, the result of a failure in public policy. Consistent with this view, the organization initially focused on the problem of the "killer drunk," the recidivist DUI driver who had been charged in the past but nevertheless allowed by judges and the law enforcement bureaucracy to continue to drive until his or her conduct resulted in the death of another individual.³³¹ By seeking further punitive measures against such individuals, MADD's legal model emphasized individual responsibility and sought to discourage future drunk driving through simple deterrence. Thus, MADD and its allies³³² encouraged legislatures to enact mandatory sen-

328. JAMES B. JACOBS, *DRUNK DRIVING: AN AMERICAN DILEMMA* xiv (1989) (quoting the report).

329. *Id.* at xv; see also Joseph R. Gusfield, *The Control of Drinking-Drivering in the United States: A Period in Transition?*, in *SOCIAL CONTROL OF THE DRINKING DRIVER* 109, 122 (Michael D. Laurence, John R. Snortum & Franklin E. Zimring eds., 1988) ("The ASAP projects were largely efforts to increase enforcement through more and better trained police.").

330. Janice Lord, *Really MADD: Looking Back at 20 Years*, *DRIVEN*, Spring 2000, at 7.

331. See, e.g., ROSS, *supra* note 327, at 176–80.

332. Two other organizations, Remove Intoxicated Drivers ("RID") and Students Against Drunk Driving ("SADD"), share many of the goals of MADD and have pursued similar legal and cultural agendas during roughly the same period of time. GERALD D. ROBIN, *WAGING THE BATTLE AGAINST DRUNK DRIV-*

tences and more stringent penalties for DUI violations. MADD was also instrumental both in Congress's 1984 decision requiring the States to adopt a mandatory drinking age of twenty-one as a condition for the receipt of federal dollars for highway projects,³³³ and in Congress' 2000 decision requiring the States to adopt a national standard of 0.08 blood alcohol level for drunken driving, also as a condition for the appropriation of federal highway funds.³³⁴

Although the organization's legal reform successes are impressive,³³⁵ MADD has also become a powerful cultural force that has changed the way in which drunk driving is morally perceived and socially discouraged. By raising the visibility of drunk driving as a social problem, MADD and other grassroots organizations have put "a human face on the victims of drunk driving" and so "mobilized the public's attention and sentiment."³³⁶ What is more, MADD and its allies "have been very imaginative in bringing programs to schools and other organizations."³³⁷ Although they maintain an active legislative agenda, on the local level these organizations "have increasingly defined their role in terms of public education."³³⁸

The results of these efforts, both legal and cultural, have been truly remarkable. In 1982, 43,510 people died in all traffic crashes in the United States. Of this total figure, 60 percent, or 26,173 people, were the victims of alcohol-related crashes. In 2005, by contrast, 43,443 people were killed in traffic crashes, but only 17,590, or 40 percent, were fatalities in which alcohol was a factor.³³⁹ This means that even though the number of

ING: ISSUES, COUNTERMEASURES, AND EFFECTIVENESS 11, 111–12 (1991) (describing RID and SADD); ROSS, *supra* note 327, at 177 (describing RID as a slightly older, though smaller, organization than MADD).

333. ROBIN, *supra* note 332, at 113–14. For an account of the federalization of the legal drinking age through the allocation of highway funds, see JACOBS, *supra* note 328, at 173–78.

334. Laurie Davies, *Twenty-Five Years of Saving Lives*, DRIVEN, Fall 2005, at 16.

335. *Id.* (discussing the organization's many legislative victories).

336. JACOBS, *supra* note 328, at 197.

337. *Id.* at 167.

338. *Id.*

339. Annual statistics from 1982–2005 for all traffic fatalities and those fatalities involving alcohol are conveniently gathered online by MADD. The organization's source for these statistics is the National Highway Traffic Safety Administration's Fatal Accident Reporting System ("FARS") data. MADD, Total Traffic Fatalities v. Alcohol Related Traffic Fatalities: 1982–2006, *available at* <http://www.madd.org/stats/1298> (last visited Oct. 10, 2007).

traffic fatalities remained almost exactly the same over this period of time, the number of fatalities that were alcohol-related decreased by nearly 35 percent. This substantial drop in alcohol related deaths is all the more remarkable given that during the same period of time, the number of licensed drivers, the number of registered vehicles, and the number of vehicle miles traveled continued to increase.³⁴⁰

The dramatic drop in drunk driving fatalities could be attributed to a number of different causes.³⁴¹ The dominant opinion among social scientists, however, is that it would be incorrect to attribute these positive changes primarily to increased fear of criminal prosecution and the possibility of jail time. Empirical studies have shown, with respect to drunk driving, that the deterrent effect of the criminal law is contingent upon not only the severity of the punishment, but also the certainty of apprehension and the swiftness with which justice is administered.³⁴² Stricter legal standards and more severe criminal sanctions concerning impaired driving may, by themselves, "be too subtle to be noticed, too technical to be understood, or too poorly implemented to be effective."³⁴³ The evidence suggests that because deterrence is largely a matter of perception,³⁴⁴ "the success of law enforcement campaigns depends more upon the image than the substance"³⁴⁵ of apprehension. Thus, "the inability of jail threats to deter drunk drivers lies in the very small actual and perceived chances of being caught."³⁴⁶ Moreover, even in those locales where enforcement is more of an actual, rather than merely a perceived, threat, "[m]aintaining

340. Nat'l Highway Traffic Safety Admin., Publ'n No. DOT HS 810 623, at 3 (2005) (providing statistics for these categories for 1995–2005).

341. Cf. JACOBS, *supra* note 328, at 192 ("Traffic fatalities have declined since the early 1970s, but we do not understand why. The fifty-five-mile-per-hour speed limit, safer vehicles, greater seat belt usage, and blunderbuss anti-drunk driving initiatives are all possible contributors, but the specific contribution of each is not known").

342. ROSS, *supra* note 327, at 54–76; JACOBS, *supra* note 328, at 105–122.

343. John R. Snortum, *Deterrence of Alcohol-impaired Driving: An Effect in Search of a Cause*, in *SOCIAL CONTROL OF THE DRINKING DRIVER* 189, 200 (Michael D. Laurence, John R. Snortum & Franklin E. Zimring eds., 1988).

344. JACOBS, *supra* note 328, at 112.

345. Snortum, *supra* note 343, at 202.

346. ROSS, *supra* note 327, at 61–62; *see also id.* at 73 (concluding that "there is considerable evidence that increasing the actual certainty of punishment for drunk drivers in ways that also ensure adequate publicity can effect reductions in drunk driving").

deterrence is problematic . . . because over time, enforcement efforts invariably wane or become half-hearted and 'predictably, illusory threats do not long prove effective.'"³⁴⁷

The social science literature does not, however, dismiss the significant role the criminal law has played and should continue to play in addressing the social problem of drunk driving and its often tragic consequences. As Mary Ann Glendon has observed, "sometimes a legal norm, even though it seems ineffective, can help to create a climate of opinion which impedes more extensive violations of the norm."³⁴⁸ Thus, although all of the recent positive trends cannot be attributed primarily to stricter laws and renewed efforts at criminal enforcement, "[i]f the police and public are led to believe that the whole legal-moral approach has failed . . . there is the risk that the current momentum will be lost."³⁴⁹ Even those commentators less enamored with the use of criminal law as a strategy for reducing drunk driving have conceded that "[r]easonable and credible threats belong in the arsenal of drunk driving countermeasures, on grounds that they independently reduce drunk driving and that they may interact with and reinforce countermeasures arising from other perspectives."³⁵⁰

This appreciation for the role of law in helping to bring about these positive changes derives from the fact that the law has an educative role beyond simple deterrence. Even though im-

347. ROBIN, *supra* note 332, at 115 (quoting James R. Acker, *Social Sciences and the Criminal Law: A Report on America's War Against Drunk Driving*, 25 CRIM. L. BULL. 385 (1989)).

348. GLENDON, *supra* note 306, at 60. This may also have been the case with Prohibition, Skeel and Stuntz's paradigmatic example of an immodest law. Although people continued to consume alcohol throughout the era of Prohibition, they consumed significantly less than they did prior to the adoption of the Eighteenth Amendment and the Volstead Act. See KYVIG, *supra* note 157, at 21-26 (concluding that Prohibition "caused a substantial drop in aggregate alcohol consumption" but that Prohibition was more effective in reducing the drinking of lower class groups); Paul Aaron & David Musto, *Temperance and Prohibition in America: A Historical Overview*, in ALCOHOL AND PUBLIC POLICY: BEYOND THE SHADOW OF PROHIBITION 165 (Mark H. Moore & Dean R. Gerstein eds., 1981).

349. Snortum, *supra* note 343, at 226 (also remarking that, although the confluence of factors is clearly complicated, "we are 'on the right track'").

350. ROSS, *supra* note 327, at 73-74 (arguing that, for example, the use of subsidized taxis "may be enhanced by the presence of a credible threat of punishment if their opportunity goes unused").

paired driving is an exceedingly common occurrence³⁵¹ and the chance of apprehension is slim,³⁵² the law continues to exercise authority beyond the apparent fact of non-compliance. The law stands as a public witness, a reminder to all of what is expected. It acknowledges the moral gravity of the behavior and makes clear what is and is not acceptable.³⁵³ Indeed, the “most important role of deterrence strategies” based on the criminal law “may be symbolic and long-term, contributing over time to new societal norms about the seriousness and wrongfulness of drunk driving.”³⁵⁴

All of this is to suggest that the changes that have taken place over the past twenty-five years with respect to drunk driving fatalities have been a function of the complex interaction of law and culture.³⁵⁵ Indeed, as legal and cultural norms reinforce one another, it becomes difficult to say with certainty whether a change in behavior is the result of one or the other.³⁵⁶ Given this

351. *See id.* at 27 (citing empirical reviews that conclude that 20 percent is a “reasonable general estimate” of the number of American drivers who drive while illegally impaired at least once a year).

352. *See id.* at 62 (“Nowhere in the United States is there good reason for a driver to think that a given trip taken while illegally impaired by alcohol is likely to result in apprehension, much less prosecution and conviction, for drunk driving.”).

353. *See id.* at 56 (“The importance of jail sentences in current drunk driving policy is that they affirm the seriousness of the offense, the grave criminality of what has been done.”). *Cf.* JACOBS, *supra* note 328, at 121 (“To say that community service is *by itself* an appropriate response to drunk driving is to define drunk driving as a minor offense.”).

354. JACOBS, *supra* note 328, at 126; *see also* ROBIN, *supra* note 332, at 117 (acknowledging the view that “the get-tough laws have a moral dimension that, through a very gradual and subtle process, fosters the development of personal attitudes that are intolerant of drinking-driving, and increase the number of role models and peer group members who eschew drinking-driving regardless of the perceived legal risks involved”).

355. *See* Snortum, *supra* note 343, at 225–226 (acknowledging as plausible the claim that the reduction was caused by “a diffuse, deterrent influence from [an] assortment of laws” and “the pervasive influence of thousands of news stories that announced the new laws and served to educate and threaten the public about legal consequences to violators” which were in part a consequence of “the moral indignation and the political pressures generated by groups such as MADD and RID”).

356. *See, e.g., id.* at 206 (noting that “it becomes more difficult to construe law as a simple independent variable, for law is both a cause and an effect of ‘moral climate’”); *id.* at 215 (observing that although “‘moral climate’ is, undoubtedly, desirable from the standpoint of traffic safety, . . . it creates headaches for the researcher who is responsible for assessing the effects of new laws”); JACOBS, *supra* note 328, at 106 (“As public policy defines drunk driving

sort of interaction, it is highly unlikely that MADD and its allied groups would have been nearly as successful in raising awareness of the problem of drunk driving and encouraging both young people and adults to alter their behavior without the firm moral injunction of the criminal law standing behind such efforts. Therefore, although "[t]he changing of attitudes and norms is the best hope for reducing drunk driving over the long run,"³⁵⁷ the criminal law has an indispensable role to play in helping to bring about this cultural transformation.

*E. Culture and Law Working in Tandem:
Overcoming the Culture of Death*

For precisely the same reasons, the criminal law will have an equally important role to play in reducing the incidence of abortion in the future. Because, as Skeel and Stuntz insist, rule-of-law values are of such great importance, this new law must be applied in an even-handed manner. Moreover, although the enforcement of this law will have real retributive consequences for the purveyors of abortion, the point of the law will not be to punish women.³⁵⁸ Instead, its primary function will be to remind women and society as a whole of the incalculable worth of every human life, most especially the lives of their own offspring.

This is not to say that the practice of abortion would cease to exist in an era of renewed criminalization. It would be naïve to suggest that, during the period of criminalization prior to *Roe* and the state reform efforts that preceded it, there was no incidence of abortion, or that women had no desire to rid themselves of unwanted pregnancies. Clearly, that was not the case.³⁵⁹ Law is not a panacea for this or any other social ill. Ac-

as a more serious offense and a higher priority, the citizenry may form a more negative view of drunk driving, may become more resistant to temptations to drive drunk, and may become more condemnatory of those who do.").

357. JACOBS, *supra* note 328, at 160.

358. See *supra* note 142 and accompanying text.

359. For a collection of personal accounts of women who obtained abortions prior to the time of legalization, see ELLEN MESSER & KATHRYN E. MAY, *BACK ROOMS: VOICES FROM THE ILLEGAL ABORTION ERA* (1994) and PATRICIA G. MILLER, *THE WORST OF TIMES* (1993). The stories of women struggling with the burden of unwanted pregnancies and their often harrowing experiences in obtaining illegal abortions are powerful. At the same time, Messer and May's book is deserving of severe criticism for its uniformly negative portrayal of adoption as a fate far worse than the lethal bloodletting recounted in the stories. For the standard history of abortion in the United States, see JAMES C.

cordingly, if abortion were once again criminalized, we can be certain the procedure would still occur, just as drunk driving persists today. Given the vast industry of abortion providers and the network of interests that have taken root around the abortion license—as well as the wide availability of the technology necessary for safe, effective abortion,³⁶⁰ and the deep-seated cultural bias favoring the termination of unwanted pregnancies now ingrained in nearly two full generations of American women—the law faces a monumental task in working to curb the incidence of the procedure.

Because, on its surface, the act of abortion appears to satisfy a natural desire—to offer the realization of freedom from an intolerable burden—no law could ever hope to completely eradicate the practice. Indeed, no culture or legal system, no matter how thoroughly pro-life it may be, will ever completely eliminate the initial desire many women and men will have to “get rid of the problem” when confronted with an unwanted pregnancy. It is a natural human instinct to look for means of escape when one feels trapped and one’s life choices are foreclosed as a result of circumstance. What culture and law can do is discourage people from acting on this initial response. Specifically, laws that prohibit abortion can give many women with unwanted pregnancies the courage to do what they already know is right, to resist the temptation to destroy the life developing within them.³⁶¹

Culture does indeed possess a kind of priority over law in influencing the lives of individuals and the choices they make. Thus, what has been said of drunk driving applies with equal force to abortion: “The changing of attitudes and norms is the best hope of reducing [the incidence of the conduct] over the long run.”³⁶² Still, law has a vital role to play in bringing about

MOHR, *ABORTION IN AMERICA: THE ORIGINS AND EVOLUTION OF NATIONAL POLICY, 1800–1900* (1978). Although Mohr’s account of this history has been criticized in the past, it recently has been subjected to a thoroughgoing critique. See DELLAPENNA, *supra* note 196.

360. NATHANSON & OSTLING, *supra* note 223, at 194 (noting that, given the ease and availability of the suction curettage method of abortion, “one can expect that if abortion is ever driven underground again even non-physicians will be able to perform this procedure with remarkable safety”).

361. See David C. Reardon, *Women Who Abort: Their Reflections on the Unborn*, in *THE SILENT SUBJECT: REFLECTIONS ON THE UNBORN IN AMERICAN CULTURE*, *supra* note 137, at 135.

362. JACOBS, *supra* note 328, at 160.

this cultural change. Indeed, as the experience of lowering drunk driving fatalities has shown, by reinforcing other social norms, the law can have a profound effect well beyond the particular instances in which it is enforced against specific individuals.³⁶³

The moral confidence people have for engaging in certain types of conduct is undoubtedly buoyed by the law's acquiescence insofar as legality implies some basic level of social approval. This sense of approval is likely even greater in a pluralistic society such as ours, where legal norms often provide a shared language that enables disparate groups to engage in public discourse.³⁶⁴ In *Roe v. Wade*, the highest court in the land declared that the most important document in the land approved of abortion. Indeed, the members of the Court said it was something of vital importance—something sacred—a right as precious in the eyes of the Constitution as the right to free speech or the right to freedom of religion.³⁶⁵ Not even the dullest student could have failed to learn the cultural message *Roe* taught.

VI. A NEW PEDAGOGY: UNLEARNING THE LESSONS OF *ROE*

The law can indeed teach, as it most surely did in the years prior to *Roe*. But *Roe*'s pupils have learned a different lesson, a lie, that must be unlearned through an honest conversation about the reality of abortion.³⁶⁶ It is, however, exceedingly diffi-

363. One might add that social scientists studying drunk driving have found that "alcohol-impaired driving is highly resistant to social control." Snortum, *supra* note 343, at 224. Nevertheless, the difficulties encountered have not prompted calls for its decriminalization. Rather, the harmful effects that drunk driving has on both its perpetrators and its victims call for both greater resolve and the use of creative means in addressing the problem. The same could be said for abortion. In the future, society may well find that recourse to abortion is likewise resistant to legal and cultural efforts to curb it. This does not mean that the practice should then be decriminalized. Instead, such a situation would similarly call for greater resolve and creativity.

364. See generally MARY ANN GLENDON, *RIGHTS TALK: THE IMPOVERISHMENT OF POLITICAL DISCOURSE* (1991).

365. Cf. Kaveny, *supra* note 326, at 564 (supporting the overturning of *Roe* "as much for pedagogical reasons as for practical reasons" because the Court "effectively denied" that abortion "was morally problematic").

366. Although such efforts are by no means representative of the general nature of conversation on the subject in this country, one should not overlook the sincere efforts of some to at least recognize the need for those with differing points of view on abortion to meet and converse in a spirit of mutual respect. See ABORTION: UNDERSTANDING DIFFERENCES (Sidney Callahan & Daniel Callahan eds., 1984); RUTH COLKER, *ABORTION & DIALOGUE: PRO-CHOICE, PRO-LIFE AND AMERI-*

cult for this conversation to take place while *Roe* still holds court, while it still stands at the podium instructing everyone who disagrees with its holding to shut up.³⁶⁷ As other commen-

CAN LAW (1992); ELIZABETH MENSCH & ALAN FREEMAN, *THE POLITICS OF VIRTUE: IS ABORTION DEBATABLE?* (1993); FAYE D. GINSBURG, *CONTESTED LIVES: THE ABORTION DEBATE IN AN AMERICAN COMMUNITY* (rev. ed. 1998).

367. The Court has shown its penchant for silencing its critics by, among other things, suggesting that abortion opponents stop mounting challenges to the right it created in *Roe*. See, e.g., *Akron v. Akron Ctr. for Reprod. Health, Inc.*, 462 U.S. 416, 419 (1983) (expressing frustration that legislative responses to *Roe* continue to be generated a decade after the Court's decision); *Thornburgh v. Am. Coll. of Obstetricians & Gynecologists*, 476 U.S. 747, 759 (1986) (expressing frustration that since *Roe* was decided, "States and municipalities have adopted a number of measures seemingly designed to prevent a woman . . . from exercising her freedom of choice" and insisting that the Constitution demands otherwise); *id.* at 813–14 (White, J., dissenting) (remarking that the Court's overreaction to the law at issue in *Thornburgh* is symptomatic of its "own insecurity over its handiwork in *Roe*" because "there are many in this country who hold that decision to be basically illegitimate"); *Webster v. Reprod. Health Servs.*, 492 U.S. 490, 538 (complaining that the plurality "implicitly invites every state legislature to enact more and more restrictive abortion regulations in order to provoke more and more test cases"); *Madsen v. Women's Health Ctr., Inc.*, 512 U.S. 753 (1994) (upholding an injunction against pro-life demonstrators at an abortion clinic and denying that the injunction was content based); *Nat'l Org. for Women, Inc. v. Schiedler*, 510 U.S. 249 (1994) (upholding application of RICO statute to pro-life demonstrators); *Schenck v. Pro-Choice Network of W. N.Y.*, 519 U.S. 357 (1997) (striking down part of injunction setting forth 15-foot floating buffer zones within which abortion clinic protestors could be barred, but upholding fixed buffer zones); *Hill v. Colorado*, 530 U.S. 703 (2000) (upholding 8-foot buffer zone prohibiting speech intended to protest, educate, or counsel as a permissible content-neutral restriction on speech). For some, the Court's decision to uphold state restrictions on the speech of pro-life advocates is akin to the Court's entire abortion jurisprudence, which silences the voice of democracy at the ballot box through judicial fiat. See *Hill*, 530 U.S. at 741 (Scalia, J., dissenting) ("Having deprived abortion opponents of the political right to persuade the electorate that abortion should be restricted by law, the Court today continues and expands its assault upon their individual right to persuade women contemplating abortion that what they are doing is wrong.").

Perhaps the most glaring example of the Court's desire to silence abortion opponents is that, for nearly 20 years after *Roe* was decided, the Court interpreted the abortion license it created to prohibit a state from giving a woman truthful information about the child developing inside her, the risks involved in abortion, and other available options. See *Akron*, 462 U.S. at 416; *Thornburgh*, 476 U.S. at 747. Much to the dismay of three dissenting justices, the Court in *Casey* upheld the Pennsylvania statute requiring abortion doctors to inform women seeking abortions about the nature of the procedure, the health risks of abortion and childbirth, and the "probable gestational age of the unborn child." The statute also required doctors to provide information concerning medical and financial assistance for childbirth and adoption agencies. See *Planned Parenthood of Se. Pa. v. Casey*, 505 U.S. 833, 881–887 (1992).

tators have observed, *Roe* has prevented the nation from having a serious dialogue about the moral and legal status of abortion through the normal political process.³⁶⁸ As such, the law in its current state effectively prevents the culture from developing as it should. It makes nearly impossible the very sort of education necessary for the foundation of a truly human culture.³⁶⁹

In place of serious conversation on the subject, silence rules the day, interrupted only intermittently by the shouts of partisans trading slogans. This silence serves the interests of those who support the status quo. Indeed, supporters of abortion, emboldened by the legal regime, have labored mightily to prevent any serious conversation from taking place.³⁷⁰ Here the American public needed little convincing to follow suit and avoid the topic altogether. It is a conversation few people want to have. After all, Americans have grown unaccustomed to thoroughgoing reflection and sustained deliberation.³⁷¹ A serious conversation about something as morally ponderous as abortion would require the participants to confront the very questions that the Catholic social tradition says define the heart of every culture: the meaning of personal existence and the value of birth, love, work, and death.³⁷² Given the national infatuation with entertainment and the other distractions of modern life, the abortion debate is something that most people would just as soon avoid. In light of this vexing situation—a

368. GLENDON, *supra* note 306, at 47 (“A decision leaving abortion regulation basically up to state legislatures would have encouraged constructive activity by partisans of both sides.”); *see also* Ginsburg, *supra* note 170, at 382 (agreeing with Paul Freund that the trend of more liberal abortion legislation might have continued absent *Roe*).

369. *See infra* Part IV.A.

370. *See, e.g.*, RAMESH PONNURU, *THE PARTY OF DEATH: THE DEMOCRATS, THE MEDIA, THE COURTS, AND THE DISREGARD FOR HUMAN LIFE* 206 (2006) (noting that in response to the television ad campaign “Life: What a Beautiful Choice,” which aired in 1992, “[t]he headquarters of Planned Parenthood got phone calls from several affiliates asking ‘whether or not there’s a way of blocking’ the ads”). Many supporters of the abortion license commonly use the rhetorical ploy of expressing indignation at having to defend their position. It is, they say, the sign of a backward society that they should be put in the position of having to defend and argue on behalf of a right which they regard as innate and self-evident, a necessary aspect of full human autonomy. Plainly, this tactic is not designed to foster dialogue. Instead, it is intended to end the conversation before it has begun.

371. This is in part the product of certain structural problems with our media. *See* C. EDWIN BAKER, *ADVERTISING AND A DEMOCRATIC PRESS* (1990).

372. *Centesimus Annus*, *supra* note 115, ¶ 24; *see also* Breen, *supra* note 182.

situation that includes not only the widespread practice of abortion but a media that has proven to be decidedly inhospitable to the pro-life message³⁷³—it is a sure sign of hope that public opinion has shifted away from support for an unlimited right to abortion toward a more restrictive view.³⁷⁴

Because the law in its current state stifles any dialogue on the subject, those commentators who assert the need for cultural transformation to precede legal change³⁷⁵ are promoting a strategy with little chance of success. Instead, the political question of legal reform must begin in order to stimulate the wider cultural conversation. This is not to put the legal cart before the cultural horse, contrary to Pope John Paul II, Skeel and Stuntz, and common sense. It is the case, however, that sometimes a lethargic animal needs to be spurred on from behind in order to begin moving in the right direction. Nothing sharpens the mind better than a question that has consequences. Proposed

373. For a history of the modern media's overwhelmingly favorable coverage of abortion rights, see MARVIN N. OLASKY, *THE PRESS AND ABORTION, 1838–1988*, at 83–151 (1988); see also NOONAN, *supra* note 121, at 69–79 (describing both journalistic support for the abortion license and the media's portrayal of opposition to abortion as religious and specifically Catholic); David Shaw, 'Rally for Life' Coverage Evokes an Editor's Anger, *L.A. TIMES*, July 3, 1990, at A1. Although complete objectivity in reporting is an admittedly difficult ideal to realize, given the passion that some journalists have for the pro-choice cause, perhaps the frustration over media coverage experienced by many pro-life advocates is understandable. See Howard Kurtz, *A Reporter with Lust in Her Hearts*, *WASH. POST*, July 6, 1998, at C01 (commenting on *Time* White House correspondent Nina Burleigh's fondness for President Bill Clinton and quoting her as saying "I'd be happy to give him [oral sex] just to thank him for keeping abortion legal"). For a recent example of how the institutional bias against the pro-life message precludes some media sources from employing certain language in its reporting, see Kenneth L. Woodward, *What's In a Name? The New York Times on "Partial-Birth" Abortion*, 19 *NOTRE DAME J.L. ETHICS & PUB. POL'Y* 427 (2005).

374. See, e.g., Carey Goldberg & Janet Elder, *Public Still Backs Abortion, But Wants Limits, Poll Says*, *N.Y. TIMES*, Jan. 16, 1998, at A1 ("[P]ublic opinion has shifted notably away from general acceptance of legal abortion and toward an evolving center of gravity: a more nuanced, conditional acceptance that some call a 'permit but discourage' model."). As Richard John Neuhaus observed shortly after the publication of this poll: "For the pro-abortion lobby, the January 16 headline story is a tacit admission of crushing defeat [precisely because] . . . despite a quarter century of all-out effort by almost every opinion-making establishment in the country, the American people overwhelmingly reject the idea that abortion should be permitted for any reason (or no reason) throughout the entire course of pregnancy." Richard John Neuhaus, *A Tacit Admission of Defeat*, *FIRST THINGS*, April 1998, at 60–61.

375. See *supra* Parts VI.A and VI.B.

legislation would lay the issue on the table in a concrete manner that, if properly presented in the media, would invite real deliberation. Without such a direct challenge to the most conspicuous “structure of sin” in American jurisprudence, people will continue to abstain from public discourse on the issue. Indeed, without the impetus of legal reform, the project of cultural transformation will likely remain only a heuristic ideal.³⁷⁶

Given the cultural milieu of “choice”—the cult of the autonomous self that provides the answers to so many of life’s questions—to propose a prohibition against abortion is surely ambitious. But so long as *Roe* remains good law, ambitious proposals for legal reform and Skeel and Stuntz’s cautionary tale of legal modesty are both beside the point. *Roe* is a dead weight that prevents the process of cultural transformation from ever taking flight. Despite the alarmist and hyperbolic commentary that followed in the wake of *Casey*,³⁷⁷ the central

376. The recent legislative initiative in South Dakota should be seen through the lens of these considerations. On March 6, 2006, Governor Mike Rounds signed into law the South Dakota Women’s Health and Human Life Protection Act, HB 1215. The bill prohibited all abortions except those necessary to save the life of the mother. Although it expressly exempted the mother from criminal penalty, it treated violations of the law by others as a class five felony. After the law’s signing, opponents of the statute made use of another South Dakota law to place the statute as a referendum on the fall ballot. See Peter Slevin, *S. Dakota Becomes Abortion Focal Point*, WASH. POST, Aug. 28, 2006, at A01. The law was defeated in the referendum by ten percentage points, in part, it seems, because of the lack of an exception for pregnancies involving rape and incest. *South Dakota Abortion Ban Rejected*, USA TODAY, Nov. 8, 2006. Even if the referendum had passed, the law would have been immediately challenged in court. Thus, it appears that one purpose of the measure was to start the kind of serious conversation on the issue that has long been lacking. As a spokeswoman for an abortion rights coalition remarked, “It’s an issue that most people weren’t talking about, and are now doing so.” Slevin, *supra*, at A07. South Dakota’s legislative effort drew on the Report of the South Dakota Task Force to Study Abortion. SOUTH DAKOTA TASK FORCE TO STUDY ABORTION, REPORT OF THE SOUTH DAKOTA TASK FORCE TO STUDY ABORTION (2005), available at <http://www.dakotavoice.com/Docs/South%20Dakota%20Abortion%20Task%20Force%20Report.pdf>. This document contains a wealth of information about both the nature of the abortion procedure and nascent human life that may serve as a common point of departure for further discussions on the subject.

377. See, e.g., Caitlin E. Borgmann, *Winter Count: Taking Stock of Abortion Rights After Casey and Carhart*, 31 FORDHAM URB. L.J. 675, 676 (2004) (asserting that, notwithstanding its purported preservation of the central holding of *Roe*, “*Casey* fundamentally changed the character of the right to abortion in this country, reinventing the right in a form more vulnerable to continued erosion”); April L. Cherry, *A Feminist Understanding of Sex-Selective Abortion*:

holding of *Roe* remains the law of the land. Ironically, reversing *Roe* judicially would not require an enormous cultural shift. Indeed, it would require the change of only a few votes on the Supreme Court. Such a change would be both modest and momentous at the same time. It would allow for a serious national conversation on abortion to begin, a conversation that the *Roe* Court's judicial fiat so severely truncated. One would hope that this sort of change is one Skeel and Stuntz could, upon further reflection, enthusiastically embrace.

CONCLUSION

Modesty is indeed a virtue—admittedly, a virtue that is often in short supply among lawmakers and those responsible for enforcing the law. David Skeel and William Stuntz are right to argue that, in many instances today, the law goes too far, bringing into question the rule of law by investing individuals with excessive discretion. The law also sometimes exceeds the limits of its competence to secure justice and to realize the common good.

When it is misunderstood, however, modesty can be a vice. This, unfortunately, is a quality that Skeel and Stuntz's article exhibits in a number of ways. Modesty, it seems, leads them to emphasize prudence and rule-of-law values over justice as the principles that inspire both legal ambition and legal restraint. Indeed, Skeel and Stuntz are overly modest in their thinking, stressing the importance of the rule of law while ignoring the substantive ends of justice that the law seeks to realize.

They are also exceedingly modest in their research, relying on only a single source in reaching the conclusion that the laws restricting abortion had no effect on the frequency of the prac-

Solely a Matter of Choice?, 10 WIS. WOMEN'S L.J. 161, 191 ("While calling abortion a fundamental right, the Court in *Casey* destroyed the protections it had previously required."); Sylvia Law, *Abortion Compromise: Inevitable and Impossible*, 1992 U. ILL. L. REV. 921, 931 ("From a pro-choice point of view, one plausible assessment of the *Casey* decision is that it represents the worst of all possible worlds. The joint opinion affirmed a woman's 'fundamental constitutional right' to abortion, but simultaneously allowed the state to adopt measures that effectively curtail many women's exercise of the abortion right."); Chris Whitman, *Looking Back on Planned Parenthood v. Casey*, 100 MICH. L. REV. 1980 (2002) (stating that the right created in *Roe* "has survived almost three decades," but that in the wake of *Casey* it "is now barely alive, apparently settled into a minimal existence, protected only against the most overwhelming of state incursions").

tice prior to the Court's decision in *Roe v. Wade*. There is, at the very least, a substantial literature that challenges the empirical claims upon which Skeel and Stuntz's normative conclusions rest. That Skeel and Stuntz's modest engagement with the subject matter leads them to ignore this literature while simultaneously proclaiming law's inability to shape cultural practices shows that modesty really can be immodest. Surely this sort of modesty has no place in legal academic scholarship, whether it purports to offer a Christian perspective on law or merely a secular one.

Furthermore, in trying to articulate the proper limits of law, Skeel and Stuntz fall into the trap of false modesty. A fuller engagement with the Christian intellectual tradition would have helped Skeel and Stuntz grasp the point that prudence does not always dictate a modest course. As one famous contributor to that wider tradition warned, justice can be destroyed not only by "the violent act of the man who possesses power" but also "by the false prudence of the sage."³⁷⁸ Law is neither modest nor prudent when it shirks its responsibility to protect innocent human life.

378. ST. THOMAS AQUINAS, ON THE BOOK OF JOB, ch. 8, sec. 1 (quoted in PIEPER, *supra* note 114, at 41).

MARRIAGE FACTS

MONTE NEIL STEWART*

Do constitutional norms, particularly of equality and liberty, require the redefinition of marriage from the union of a man and a woman to the union of any two persons? In the present judicial contest over this issue, the real dispute is not over principles of law but about the facts of marriage. This Article identifies the marriage facts presented by those on each side of the debate and articulates each side's responses to the other's factual position. A critical examination of the two accounts reveals that the factual description of marriage advanced by proponents of man-woman marriage is more accurate. The Article then analyzes the widely held assumption that judicial selection of the standard of review—rational basis, heightened (but not strict) scrutiny, or strict scrutiny—determines the outcome in cases addressing the constitutionality of traditional marriage laws. That analysis concludes that the choice of marriage facts, not the standard of review, is ultimately dispositive.

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INTRODUCTION

The marriage issue of our time is whether constitutional norms, particularly of equality and liberty, require the redefinition of marriage from the union of a man and a woman to the union of any two persons. Perhaps no great issue in American constitutional law has been so plagued by conflict, confusion, and carelessness regarding the relevant facts. This is not to say that divisiveness over certain facts has not influenced earlier constitutional contests.¹ Typically in those earlier contests, however, legislative or administrative action provided some coherent and even authoritative body of facts helpful to judicial consideration of the subject matter.² Even in the absence of such legislative or administrative guidance, courts have often

1. Samuel Freeman Miller, appointed to the Supreme Court in 1862 by Abraham Lincoln, is reported to have said: "In my experience in the conference room of the Supreme Court of the United States, . . . I have been surprised to find how readily those judges came to an agreement upon questions of law, and how often they disagree in regard to questions of facts." JEROME FRANK, *IF MEN WERE ANGELS: SOME ASPECTS OF GOVERNMENT IN A DEMOCRACY* 78 (Harper & Brothers 1942) (1930).

2. When deciding the constitutionality of the post-war restrictions on Communist Party activities, for example, the Supreme Court deferred to congressional findings of fact about the nature of the threat posed by the Communist Party and the international communist movement. *See Communist Party v. Subversive Activities Control Bd.*, 367 U.S. 1, 5-8, 96-97 (1961). Similarly, the Court considered testimony before congressional committees on the invidious effects of racial discrimination in sustaining the Civil Rights Act of 1964 against a Commerce Clause challenge. *See Heart of Atlanta Motel, Inc. v. United States*, 379 U.S. 241, 252-53 (1964). *But see Landmark Commc'ns, Inc. v. Virginia*, 435 U.S. 829, 843 (1978) ("Deference to a legislative finding cannot limit judicial inquiry when First Amendment rights are at stake.").

managed to develop clear understandings of the factual underpinnings of contested constitutional issues.³ By contrast, the treatment of constitutional facts in recent American appellate court decisions addressing the marriage issue⁴ has been confused and even careless.⁵

3. In striking down laws restricting non-whites from marrying whites, for example, the California Supreme Court in *Perez v. Lippold*, 198 P.2d 17 (Cal. 1948), and the United States Supreme Court in *Loving v. Virginia*, 388 U.S. 1 (1967), correctly found the origin of those laws to be in white supremacist dogma and political action. See Monte Neil Stewart & William C. Duncan, *Marriage and the Betrayal of Perez and Loving*, 2005 BYU L. REV. 555, 570–75, available at <http://marriagelawfoundation.org/mlf/publications/Betrayal.pdf>.

4. In chronological order, those appellate court decisions are: Minnesota: *Baker v. Nelson*, 191 N.W.2d 185 (Minn. 1971), *appeal dismissed for want of a federal question*, 409 U.S. 810 (1972); Kentucky: *Jones v. Hallahan*, 501 S.W.2d 588 (Ky. Ct. App. 1973); Washington: *Singer v. Hara*, 522 P.2d 1187 (Wash. Ct. App. 1974), *review denied*, 84 Wash. 2d 1008 (1974); Ninth Circuit: *Adams v. Howerton*, 673 F.2d 1036 (9th Cir. 1982), *cert denied*, 458 U.S. 1111 (1982); Pennsylvania: *De Santo v. Barnsley*, 476 A.2d 952 (Pa. Super. Ct. 1984); Hawaii: *Baehr v. Lewin*, 852 P.2d 44 (Haw. 1993); *id.* at 68 (Burns, C.J., concurring); *id.* at 70 (Heen, J., dissenting); District of Columbia: *Dean v. District of Columbia*, 653 A.2d 307 (D.C. 1995); *id.* at 361 (Terry, J., concurring); *id.* at 362 (Steadman, J., concurring); Vermont: *Baker v. State*, 744 A.2d 864 (Vt. 1999); *id.* at 889 (Dooley, J., concurring); *id.* at 897 (Johnson, J., concurring in part and dissenting in part); Arizona: *Standhardt v. Superior Court*, 77 P.3d 451 (Ariz. Ct. App. 2003); Massachusetts: *Goodridge v. Dep't of Pub. Health*, 798 N.E.2d 941 (Mass. 2003); *id.* at 970 (Greaney, J., concurring); *id.* at 974 (Spina, J., dissenting); *id.* at 978 (Sosman, J., dissenting); *id.* at 983 (Cordy, J., dissenting); Indiana: *Morrison v. Sadler*, 821 N.E.2d 15 (Ind. Ct. App. 2005); *id.* at 35 (Friedlander, J., concurring); New Jersey: *Lewis v. Harris*, 875 A.2d 259 (N.J. Super. Ct. App. Div. 2005); *id.* at 274 (Parrillo, J., concurring); *id.* at 278 (Colleston, J., dissenting); New York: *Hernandez v. Robles*, 805 N.Y.S.2d 354 (App. Div. 2005); *id.* at 363 (Catterson, J., concurring); *id.* at 377 (Saxe, J., dissenting); *Samuels v. N.Y. Dep't. of Pub. Health*, 811 N.Y.S.2d 136 (App. Div. 2006); *Seymour v. Holcomb*, 811 N.Y.S.2d 134 (App. Div. 2006); *Kane v. Marsolais*, 808 N.Y.S.2d 566 (App. Div. 2006); *Hernandez v. Robles*, 855 N.E.2d 1 (N.Y. 2006); *id.* at 12 (Grafano, J., concurring); *id.* at 22 (Kaye, C.J., dissenting); Washington: *Andersen v. King County*, 138 P.3d 963 (Wash. 2006); *id.* at 991 (Alexander, C.J., concurring); *id.* (Johnson, J., concurring); *id.* at 1027 (Bridge, J., dissenting); *id.* at 1040 (Chambers, J., dissenting); *id.* at 1012 (Fairhurst, J., dissenting); California: *In re Marriage Cases*, 49 Cal. Rptr. 3d 675 (Ct. App. 2006); *id.* at 727 (Parilli, J., concurring); *id.* at 731 (Kline, J., dissenting); New Jersey: *Lewis v. Harris*, 908 A.2d 196 (N.J. 2006); *id.* at 224 (Poritz, C.J., concurring in part and dissenting in part); Maryland: *Conaway v. Deane*, No. 44, 2007 WL 2702132 (Md. Sept. 18 2007); *id.* at *39 (Raker J., concurring in part and dissenting in part); *id.* at *81 (Bell, C.J., dissenting); *id.* at *50 (Battaglia, J., dissenting). This list is current as of November 20, 2007.

5. See, e.g., INST. FOR AM. VALUES, *MARRIAGE AND THE LAW: A STATEMENT OF PRINCIPLES* 18 (2006) (“[T]he basic understanding of marriage underlying much of the current same-sex marriage discourse is seriously flawed”); see also Maggie Gallagher, *Does Sex Make Babies? Marriage, Same-Sex Marriage and Legal Justifications for the Regulation of Intimacy in a Post-Lawrence World*, 23 QUINNIPAC L. REV. 447, 451–71 (2004) [hereinafter Gallagher, *Does Sex Make Babies?*]; Maggie Galla-

Such factual confusion in the marriage cases, although it does not bode well for constitutional adjudication, is at least understandable for three reasons. First, man-woman marriage is an ancient and virtually universal social institution;⁶ hence, those enacting or interpreting marriage laws in recent centuries apparently sensed little or no need to articulate the factual basis for the man-woman meaning reinforced by those laws.⁷ Even congressional deliberation leading up to the 1996 Defense of Marriage Act⁸ focused largely on the role of individual states in fashioning their own marriage laws; Congress did not con-

gher, *(How) Will Gay Marriage Weaken Marriage as a Social Institution: A Reply to Andrew Koppelman*, 2 U. ST. THOMAS L.J. 33, 35–65 (2004) [hereinafter Gallagher, *Reply*]; Monte Neil Stewart, *Eliding in Washington and California*, 42 GONZ. L. REV. 501, 516–46 (2007) [hereinafter Stewart, *Washington and California*]; Monte Neil Stewart, *Eliding in New York*, 1 DUKE J. CONST. L. & PUB. POL'Y 221, 231–58 (2006), available at <http://www.manwomanmarriage.org/jrm/pdf/ElidingInNewYork.pdf> [hereinafter Stewart, *New York*]; Monte Neil Stewart, *Genderless Marriage, Institutional Realities, and Judicial Elision*, 1 DUKE J. CONST. L. & PUB. POL'Y 1, 28–78 (2006), available at http://www.manwomanmarriage.org/jrm/pdf/Duke_Journal_Article.pdf [hereinafter Stewart, *Judicial Elision*]; Monte Neil Stewart, *Judicial Redefinition of Marriage*, 21 CAN. J. FAM. L. 11, 41–99 (2004), [hereinafter Stewart, *Redefinition*]; Monte Neil Stewart, *Dworkin, Marriage, Meanings—and New Jersey*, 4 RUTGERS J.L. & PUB. POL'Y 271, 280–81 (2007), available at <http://manwomanmarriage.org/jrm/pdf/Dworkin.pdf> [hereinafter Stewart, *Dworkin*]. Cf. F.C. DeCoste, *Courting Leviathan: Limited Government and Social Freedom in Reference re Same-Sex Marriage*, 42 ALTA. L. REV. 1099, 1102–03 (2005) [hereinafter DeCoste, *Leviathan*] (criticizing the Canadian Supreme Court's distinction between “civil” and “religious” marriage); F.C. DeCoste, *The Halpern Transformation: Same-Sex Marriage, Civil Society, and the Limits of Liberal Law*, 41 ALTA. L. REV. 619, 625–28 (2003) [hereinafter DeCoste, *Transformation*] (criticizing a Canadian Appeals Court decision for “ignoring, by defining away, the meaning of marriage at law and as cultural practice”).

6. See INST. FOR AM. VALUES, *WHY MARRIAGE MATTERS: TWENTY-SIX CONCLUSIONS FROM THE SOCIAL SCIENCES* 15 (2d ed. 2005).

7. See Bruce Hafen, *The Constitutional Status of Marriage, Kinship, and Sexual Privacy: Balancing the Individual and Social Interests*, 81 MICH. L. REV. 463, 472 (1983):

Perhaps because family life is so much a part of the unspecifiable bedrock of society, there has been a puzzling inattention in both legal and other literature to the broad social policies underlying the preference historically given by the law to family relationships. This contrasts remarkably with the voluminous scholarly work on individual rights. Domestic patterns universally accepted before the dawn of law and government have hardly seemed to require full-dress justification. Thus, the case law and other commentary on our traditional assumptions seldom go beyond platitudes and clichés. The objectives of a democratic society based on established patterns of marriage and kinship should not be terribly mysterious; serious scholars, however, have seldom felt a need to document them.

8. Pub. L. 104-199, 110 Stat. 2419 (1996), (codified at 1 U.S.C. § 7 & 28 U.S.C. § 1738(C) (1997)).

duct a thorough examination of the man-woman marriage institution or the factual consequences of replacing it with a marriage scheme in which the parties' genders are legally irrelevant and socially inconsequential.⁹ Second, at least until quite recently, the key players in the constitutional debates surrounding marriage (lawyers, judges, and legal scholars) had little specialized knowledge about marriage.¹⁰ Third, those participants *thought* they had a great deal of general knowledge about marriage. This is understandable because marriage is a ubiquitous social reality, encountered or experienced by nearly everyone; as a result, most people believe that they understand marriage. As we will see, however, that belief can impede defensible legal work on the marriage issue.

Before outlining the structure of this Article, a few notes about terminology are warranted. By "the facts of marriage" or "marriage facts," I mean those facts that almost fifteen years¹¹ of litigating the marriage issue in sixteen states and the District

9. The legislative history of the Act indicates that the bill was born out of concern that, because of the requirements of interstate comity (specifically, full faith and credit), a judicially mandated recognition of genderless marriage in Hawaii could limit the power of the other 49 states to decide their own marriage policies. See, e.g., H.R. REP. NO. 104-664, at 4-10 (1996), reprinted in 1996 U.S.C.C.A.N. 2905, 2908-2914. Opponents of the legislation also focused their discussion on "the legal history of the full faith and credit clause which is central to this dispute [sic]." *Id.* at 36, as reprinted in 1996 U.S.C.C.A.N. 2905, 2939. Testimony in committees focused mainly on issues of full faith and credit, the role of the federal government, and the constitutionality of the bill. See, e.g., *The Defense of Marriage Act: Hearing on S. 1740 Before the S. Comm. on the Judiciary*, 104th Cong. 23-41 (1996) (statement of Lynn D. Wardle, Professor of Law, Brigham Young University); *The Defense of Marriage Act: Hearing on H.R. 3396 Before the Subcomm. on the Constitution of the H. Comm. on the Judiciary*, 104th Cong. 87-117 (1996) (statement of Hadley Arkes, Ney Professor of Jurisprudence and American Institutions, Amherst College); *id.* at 202-211 (1996) (statement of David Saperstein, Director and Counsel, Religious Action Center of Reform Judaism). The Senate debate, 142 CONG. REC. S10100-123 (1996), and the House debate, 142 CONG. REC. H7441-83 (1996), had similar foci. None of the legislators, then, debated the fundamental policy issue: whether society as a whole would be better served by the existing marriage institution or by the newly proposed one.

10. See Gallagher, *Reply*, *supra* note 5, at 34 ("[F]or many years, the same-sex marriage debate has been a legal debate, mostly confined to lawyers, judges, and legal scholars, few of whom have any particular background in marriage at all.").

11. Although some litigated the same-sex marriage issue before 1991, see *supra* note 4, the commencement of the marriage litigation in Hawaii that year marked the beginning of the organized and strategic effort to redefine marriage by judicial mandate. See William C. Duncan, *The Litigation to Redefine Marriage: Equality and Social Meaning*, 18 BYU J. PUB. L. 623, 630-42 (2003) (discussing *Baehr v. Lewin*, 852 P.2d 44 (Haw. 1993)).

of Columbia¹² have shown to be relevant to that issue. Thus, the word “facts” is used in a narrow, lawyerly way; it includes those matters disputed in litigation other than legal principles and procedures, a distinction seen in such oft-used phrases as “issue of fact,” “question of law,” and “mixed question of law and fact.”¹³ As described by those terms, a fact is not necessarily “[s]omething that has really occurred or is actually the case”¹⁴ but rather what a judge, for purposes of resolving a case, will accept as such—or will accept as something that a reasonable legislator could accept as such. Thus, in the lawyer’s realm, the notion of “alleged fact” or even “false fact” is not unintelligible.¹⁵ References in this Article to the facts of marriage or marriage facts are of that realm.

On one side of the marriage issue are those who want marriage to be legally redefined to encompass “the union of any two persons,” with the law treating the parties’ genders as irrelevant to the meaning of marriage—hence, “genderless marriage.”¹⁶ On the other side are those who want to preserve “the union of a man and a woman” as a core meaning of the marriage institution—hence, “man-woman marriage.” I do not use the terms “same-sex marriage,” “homosexual marriage,” or “gay marriage” because they are misleading, in two related ways. First, nowhere in the world is marriage defined legally,

12. For a list of the cases since 1992 that have culminated in appellate court decisions, see *supra* note 4. Here, in chronological order, are the cases that have not yet had such a decision: *Brause v. Bureau of Vital Statistics*, No. 3AN-95-6562 CI, 1998 WL 88743 (Alaska Super. Feb. 27, 1998); *Li v. State*, No. 0403-03057, 2004 WL 1258167 (Or. Cir. Apr. 20, 2004); *In re Kandu*, 315 B.R. 123 (Bankr. W.D. Wash. 2004); *Wilson v. Ake*, 354 F. Supp. 2d 1298 (M.D. Fla. 2005); *Deane v. Conway*, No. 24-C-04-53900, 2006 WL 148145 (Md. Cir. Ct. Jan. 20, 2006); *Kerrigan v. State*, 909 A.2d 89 (Conn. Super. Ct. 2006); *Bishop v. Oklahoma ex rel. Edmondson*, 447 F. Supp. 2d 1239 (N.D. Okla. 2006); *Varnum v. Brien*, No. CV 5965 (Iowa Dist. Ct. Aug. 30, 2007), available at <http://data.lambdalegal.org/pdf/legal/varnum/varnum-d-08302007-ia-district.pdf>. This list is current as of November 20, 2007.

13. *Cf. Armour & Co. v. Wilson & Co.*, 274 F.2d 143, 155 (7th Cir. 1960) (Hastings, C.J.) (confirming that such terms are oft-used, but suggesting that they are not always helpful).

14. 5 OXFORD ENGLISH DICTIONARY 651 (2d ed. 1989) (definition 4a of “fact”).

15. See *id.* (definition 5 of “fact”).

16. Some proponents of genderless marriage have expressed discomfort with this particular shorthand phrase—suggesting that the phrase somehow neuters or paints as without gender those who enter into such a marriage. It does no such thing. “Genderless” modifies “marriage,” not the persons participating in the marriage. Each man or woman participating in a marriage, of course, is just that, a man or a woman.

socially, or otherwise as the union of two persons of the same sex. It is defined either as the union of any two persons, as in Massachusetts (at least legally), or as the union of a man and a woman, as in the other 49 states (both legally and socially). Second, when people confront the marriage issue, the term “same-sex marriage” and others like it often prompt them to think of a new, different, and separate marriage arrangement or institution that will coexist with the old man-woman marriage institution. But once the judiciary or legislature adopts “the union of any two persons” as the legal definition of civil marriage, that conception becomes the *sole* definitional basis for the *only* law-sanctioned marriage that any couple can enter, whether same-sex or man-woman. Therefore, legally sanctioned genderless marriage, rather than peacefully coexisting with the contemporary man-woman marriage institution, actually displaces and replaces it.

The opposing sides have repeatedly presented to the courts two quite different “packages” of marriage facts; each judge, in upholding man-woman marriage or mandating its replacement with genderless marriage, has to some degree both premised her ultimate legal conclusion on one package and attempted to counter the contents of the other package.¹⁷ Part I describes the contents of the two packages, *as presented in the litigation of the marriage issue*, and examines their divergence. This critical evaluation of marriage facts leads to the conclusion that the

17. Since the beginning of the organized and strategic effort to redefine marriage by judicial mandate—that is, since the beginning of the Hawaii litigation in 1991, *see supra* notes 4 and 11—the judges and lawyers involved in the litigation have proceeded in very large measure as if the marriage facts are not “adjudicative facts” as Professor Davis conceived such. Kenneth C. Davis, *An Approach to Problems of Evidence in Administrative Process*, 55 HARV. L. REV. 364, 402–03 (1942) (adjudicative facts are those particular to the dispute—the who, what, when, and where type of facts—and generally are within the province of the trier-of-fact). Rather, the courts and counsel have proceeded—and rightly so—as if the marriage facts are or are akin to “legislative facts,” *id.* (facts that transcend the particular dispute and help the court resolve questions of law, policy, and discretion), or, more narrowly, “constitutional facts,” including “constitutional-review facts,” *id.* (legislative facts and other understandings of broad social phenomenon underlying and interwoven through normative constitutional judgments). *See* David L. Faigman, “Normative Constitutional Fact-Finding”: *Exploring the Empirical Component of Constitutional Interpretation*, 139 U. PA. L. REV. 541, 552–55 (1991). Discernment of the constitutional facts is ultimately the province of the appellate courts and necessarily and appropriately involves them in “normative constitutional fact-finding.” *Id.* at 551–65; *see also* Henry P. Monaghan, *Constitutional Fact Review*, 85 COLUM. L. REV. 229, 233–40 (1985).

package supportive of man-woman marriage is decidedly more defensible. Part II then examines the conventional wisdom that, in adjudication of the marriage issue, judicial choice of a particular standard of review is generally dispositive. That analysis concludes that the choice of marriage facts, not the standard of review, actually determines the outcome.

I. THE FACTS OF MARRIAGE

This Part begins by identifying the marriage facts as they have been presented by litigants, starting with the factual basis of man-woman marriage's constitutionality.

A. *The Factual Basis of Man-Woman Marriage's Constitutionality*

"Marriage is a vital social institution."¹⁸ Like all social institutions, marriage is constituted by a unique web of shared public meanings.¹⁹ For important institutions, including marriage, many of those meanings rise to the level of norms.²⁰ Such social institutions affect individuals profoundly; institutional meanings and norms teach, form, and transform individuals, supplying identities, purposes, practices, and projects.²¹

18. *Goodridge v. Dep't of Pub. Health*, 798 N.E.2d 941, 948 (Mass. 2003); see also *Williams v. North Carolina*, 317 U.S. 287, 303 (1942) ("[T]he marriage relation [is] an institution more basic in our civilization than any other.").

19. See Peter A. Hall & Rosemary C.R. Taylor, *Political Science and the Three New Institutionalisms*, 44 POL. STUD. 936, 947-48 (1996); Stewart, *Judicial Elision*, *supra* note 5, at 9-10.

20. Professor Clayton defines an "institution" as: "[a]n organized system of social relationships (roles, positions, *norms*) that is pervasively implemented in the society and that serves certain basic needs of the society." RICHARD R. CLAYTON, *THE FAMILY, MARRIAGE, AND SOCIAL CHANGE* 22 (2d ed. 1979) (emphasis added); see also Victor Nee & Paul Ingram, *Embeddedness and Beyond: Institutions, Exchange, and Social Structure*, in *THE NEW INSTITUTIONALISM IN SOCIOLOGY* 19 (Mary C. Brinton & Victor Nee eds., 2001) ("An institution is a *web of interrelated norms*—formal and informal—governing social relationships."); William M. Sullivan, *Institutions as the Infrastructure of Democracy*, in *NEW COMMUNITARIAN THINKING: PERSONS, VIRTUES, INSTITUTIONS, AND COMMUNITIES* 170, 175 (Amitai Etzioni ed., 1995) ("Institutions . . . are normative patterns that define purposes and practices, patterns embedded in and sanctioned by customs and law."). For an "omnibus conception of institutions," see W. RICHARD SCOTT, *INSTITUTIONS AND ORGANIZATIONS* 48-58 (2d ed. 2001).

21. See SCOTT, *supra* note 20, at 54-58; HELEN REECE, *DIVORCING RESPONSIBLY* 185 (2003); MARY DOUGLAS, *HOW INSTITUTIONS THINK* 108 (1986); Stewart, *Judicial Elision*, *supra* note 5, at 9-10; Sullivan, *supra* note 20, at 175.

Those meanings, as the constitutive elements of social institutions, are therefore the source of the social goods that any institution provides. In other words, it is by teaching and transforming individuals across society that an institution's constitutive meanings generate social goods. These social goods lead to the institution's evolution and justify its perpetuation.²²

Across time and cultures, a core meaning constitutive of the marriage institution has nearly always been the union of a man and a woman.²³ This core man-woman meaning is indispensable for the marriage institution's production of at least six valuable social goods.²⁴ The man-woman marriage institution is:

1. Society's best and perhaps only effective means to secure the right of a child to know and be raised by her biological parents (with exceptions justified only when they are in the best interests of the child).²⁵
2. The most effective means yet developed to maximize the private welfare provided to children conceived by passionate, heterosexual coupling (with "private welfare" meaning not only basic requirements like food and shelter but also education, play, work, discipline, love, and respect).²⁶
3. The indispensable foundation for that child-rearing mode—that is, married mother-father child-rearing—that correlates (in ways not subject to reasonable dis-

22. See generally Stewart, *Washington and California*, *supra* note 5, at 503 n.9.

23. See INST. FOR AM. VALUES, *supra* note 6, at 15.

24. For a detailed discussion of these six goods, see Stewart, *Judicial Elision*, *supra* note 5, at 16–20.

25. See, e.g., COMM'N ON PARENTHOOD'S FUTURE, THE REVOLUTION IN PARENTHOOD: THE EMERGING GLOBAL CLASH BETWEEN ADULT RIGHTS AND CHILDREN'S NEEDS 32 (2006), available at <http://www.americanvalues.org/pdfs/parenthood.pdf> ("The legalization of same-sex marriage, while sometimes seen as a small change affecting just a few people, raises the startling prospect of fundamentally breaking the legal institution of marriage from any ties to biological parenthood."); Margaret Somerville, *What About the Children?*, in DIVORCING MARRIAGE: UNVEILING THE DANGERS IN CANADA'S NEW SOCIAL EXPERIMENT 63, 67 (Daniel Cere & Douglas Farrow eds., 2004) ("[A]ccepting same-sex marriage necessarily means accepting that the societal institution of marriage is intended primarily for the benefit of the partners to the marriage, and only secondarily for the children born into it.").

26. See Stewart, *Judicial Elision*, *supra* note 5, at 17–18; Stewart, *Redefinition*, *supra* note 5, at 44–48.

pute) with the optimal outcomes deemed crucial for a child's, and therefore society's, well-being.²⁷

4. Society's primary and most effective means of bridging the male-female divide.²⁸
5. Society's only means of transforming a male into husband-father, and a female into wife-mother,²⁹ statuses and identities particularly beneficial to society.³⁰
6. Social and official endorsement of the form of adult intimacy—married heterosexual intercourse—that society may rationally value above all other such forms.³¹

These are not the only social goods produced by the marriage institution, but they are the relevant ones for purposes of adjudicating the marriage issue. They are relevant because they are the social goods produced uniquely by the man-woman *meaning*, and that must, therefore, disappear when that meaning is deinstitutionalized.³²

In contemporary America, the man-woman meaning has *not* been deinstitutionalized by broad social trends anywhere, and

27. Putting aside for the moment the scientific adequacy of studies of the mother-lesbian partner child-rearing mode, discussed *infra* Part II.C.2.b, it is now uncontroversial that the married mother-father child-rearing mode significantly correlates with the optimal outcomes deemed crucial for a child's well-being. See, e.g., THE WITHERSPOON INST., MARRIAGE AND THE PUBLIC GOOD: TEN PRINCIPLES 16–38 (2006), available at <http://www.princetonprinciples.org/files/Marriage%20and%20the%20Public%20Good.pdf>; INST. FOR AM. VALUES, *supra* note 6, at 12–32 (listing twenty-six positive social effects of marriage).

28. See, e.g., DAVID BLANKENHORN, THE FUTURE OF MARRIAGE 93 (2007) ("More than any other human relationship, marriage bridges the sexual divide in the human species."); COUNCIL ON FAMILY LAW, THE FUTURE OF FAMILY LAW: LAW AND THE MARRIAGE CRISIS IN NORTH AMERICA 12–13 (2005), available at http://www.marriagedebate.com/pdf/future_of_family_law.pdf (noting that marriage "provides an evolving form of life that helps men and women negotiate the sex divide").

29. See DeCoste, *Transformation*, *supra* note 5, at 625–27.

30. See, e.g., DAVID POPENOE, LIFE WITHOUT FATHER 139–88 (1996); THE WITHERSPOON INST., *supra* note 27, at 21–27.

31. Stewart, *Redefinition*, *supra* note 5, at 52–57; Gallagher, *Does Sex Make Babies?*, *supra* note 5, at 451.

32. What is important for my purposes is that all six social goods described in the text are the product of the institutionalized man-woman meaning and that, exactly because those goods do much to meet certain basic human and social needs, our society has a compelling interest in their perpetuation. In this light, deciding which of these vital social goods is most valuable or whether perpetuation of each, separate and alone, qualifies as a compelling governmental interest—although certainly an interesting intellectual endeavor—would seem to serve no large practical purpose relative to resolution of the marriage issue.

only in Massachusetts has a court by legal mandate attempted to perform that task. “The union of a man and a woman” continues as a widely shared, public, and core meaning constitutive of the marriage institution across the nation. That is not to say that the man-woman meaning is universally shared. An alternate view of marriage (the “close personal relationship” model) makes that meaning dispensable, and that model’s description of what marriage now *is*—after a process of evolution—is common in some American communities and in many Hollywood portrayals. But its description is inaccurate beyond those particular spheres because the man-woman meaning continues fully institutionalized as a widely shared public meaning in every state across the nation.³³

With its power to suppress social meanings, however, the law can radically change and even deinstitutionalize man-woman marriage.³⁴ The consequence of such deinstitutionalization must necessarily be the loss of the institution’s unique social goods.

Further, genderless marriage is a radically different institution than man-woman marriage. This does not mean, of course, that there is no overlap in formative instruction between the two possible marriage institutions; the significance is in the divergence. This significant divergence may be seen in the nature of the two institutions’ respective social goods (in the case of genderless marriage, only promised, not yet delivered).³⁵ Nor should this divergence be surprising: fundamentally different meanings, when magnified by institutional power and influence, produce divergent social identities, aspirations, projects, or ways of behaving, and thus different social goods.³⁶ To use contemporary terminology, the man-woman marriage institution will construct a society different from that constructed by the genderless marriage institution.³⁷ It could not be otherwise

33. See Stewart, *New York*, *supra* note 5, at 236–37; see also *infra* Part II.C.1.b.

34. See Stewart, *Judicial Elision*, *supra* note 5, at 11–13.

35. *Id.* at 20–24. For example, the man-woman marriage institution makes meaningful the child’s “bonding right”—a right to know and be reared by one’s own biological parents. *Id.* at 21–22.

36. *Id.* at 20–21.

37. See DOUGLAS, *supra* note 21, at 108 (“First the people are tempted out of their niches by new possibilities of exercising or evading control. Then they make new kinds of institutions, and the institutions make new labels, and the label makes new kinds of people.”); Hall & Taylor, *supra* note 19, at 948 (“Here, one can see the influence of social constructivism on the new institutionalism in sociology. . . . [I]nstitutions do not simply affect the strategic calculations of individu-

because the genderless marriage institution is radically different in its aims and teachings.³⁸ To say otherwise would be to ignore the undisputed effects that social institutions have in the formation and transformation of individuals.³⁹ Indeed, well-informed observers of marriage—regardless of their sexual, political, or theoretical orientations—uniformly acknowledge the magnitude of the differences between the two possible institutions of marriage.⁴⁰

The contemporary social institution of marriage in America has evolved in important ways over the centuries and undoubtedly now includes the ideal of “a partnership of equals with equal rights, who have mutually joined to form a new family unit, founded upon shared intimacy and mutual financial and emotional support.”⁴¹ Nonetheless, enduring aspects of

als, . . . but also their most basic preferences and very identity. The self-images and identities of social actors are said to be constituted from the institutional forms, images and signs provided by social life.”); Stewart, *New York*, *supra* note 5, at 240–41.

38. See Stewart, *New York*, *supra* note 5, at 240.

39. See *id.*

40. See BLANKENHORN, *supra* note 28, at 167; Daniel Cere, *War of the Ring*, in *DIVORCING MARRIAGE: UNVEILING THE DANGERS IN CANADA’S NEW SOCIAL EXPERIMENT* 11–13 (Daniel Cere & Douglas Farrow eds., 2004); Douglas Farrow, *Canada’s Romantic Mistake*, in *DIVORCING MARRIAGE*, at 1–5; LADELLE MCWHORTER, *BODIES AND PLEASURES: FOUCAULT AND THE POLITICS OF SEXUAL NORMALIZATION* 125 (1999); JOSEPH RAZ, *THE MORALITY OF FREEDOM* 393 (1986) (“I don’t think there can be much doubt that this post-institutional view of marriage constitutes a radical redefinition. Prominent family scholars on both sides of the divide—those who favor gay marriage and those who do not—acknowledge this reality.”); JUDITH STACEY, *IN THE NAME OF THE FAMILY: RETHINKING FAMILY VALUES IN THE POSTMODERN AGE* 126–28 (1996); Katherine K. Young & Paul Nathanson, *The Future of an Experiment*, in *DIVORCING MARRIAGE*, at 48–56; Angela Bolt, *Do Wedding Dresses Come in Lavender? The Prospects and Implications of Same-Sex Marriage*, 24 *SOC. THEORY & PRAC.* 111, 114 (1998); Devon W. Carbado, *Straight Out of the Closet*, 15 *BERKELEY WOMEN’S L.J.* 76, 95–96 (2000); Gallagher, *Reply*, *supra* note 5, at 53 (“Many thoughtful supporters of same-sex marriage recognize that some profound shift in our whole understanding of the world is wrapped up in this legal re-engineering of the meaning of marriage.”); E.J. Graff, *Retying the Knot*, 262 *THE NATION* 12 (June 24, 1996) (“The right wing gets it: Same-sex marriage is a breathtakingly subversive idea. . . . Marriage is an institution that towers on our social horizon, defining how we think about one another [S]ame-sex marriage . . . announces that marriage has changed shape.”); Nan D. Hunter, *Marriage, Law, and Gender: A Feminist Inquiry*, 1 *LAW & SEXUALITY REV. LESBIAN & GAY LEGAL ISSUES* 9, 12–19 (1991); Andrew Sullivan, *Recognition of Same-Sex Marriage*, 16 *QUINNIPIAC L. REV.* 13, 15–16 (1996).

41. *Hernandez v. Robles*, 805 N.Y.S.2d 354, 381 (App. Div. 2005) (Saxe, J., dissenting).

the institution go beyond that limited description of transformative meanings, and those enduring aspects are grounded in the man-woman meaning:

Conjugal marriage [that is, man-woman marriage] has several characteristics. First, it is inherently normative. Conjugal marriage cannot celebrate an infinite array of sexual or intimate choices as equally desirable or valid. Instead, its very purpose lies in channeling the erotic and interpersonal impulses between men and women in a particular direction: one in which men and women commit to each other and to the children that their sexual unions commonly . . . produce.

As an institution, conjugal marriage addresses the social problem that men and women are sexually attracted to each other and that, without any outside guidance or social norms, these intense attractions can cause immense personal and social damage.

. . . [Conjugal marriage] provides an evolving form of life that helps men and women negotiate the sex divide, forge an intimate community of life, and provide a stable social setting for their children.

. . . .

Another characteristic of conjugal marriage is that it is fundamentally child-centered, focused beyond the couple towards the next generation. Not every married couple has or wants children. But at its core marriage has always had something to do with societies' recognition of the fundamental importance of the sexual ecology of human life: humanity is male and female, men and woman often have sex, babies often result, and those babies, on average, seem to do better when their mother and father cooperate in their care. Conjugal marriage attempts to sustain enduring bonds between women and men in order to give a baby its mother and father, to bond them to one another and to the baby.⁴²

42. COUNCIL ON FAMILY LAW, *supra* note 28, at 12–13. For more on the meanings and purposes of man-woman marriage beyond those comprising the close personal relationship model, see Gallagher, *Does Sex Make Babies?*, *supra* note 5, at 451–71; Gallagher, *Reply*, *supra* note 5, at 43–51; Stewart, *Judicial Elision*, *supra* note 5, at 16–20; Stewart, *Redefinition*, *supra* note 5, at 41–57.

Regarding this last-mentioned marriage fact—the institutionalized objective and practice of bonding a man, a woman, and the children that their sexual relation produces—one judge said:

The institution of marriage provides the important legal and normative link between heterosexual intercourse and procreation on the one hand and family responsibilities on the other. The partners in a marriage are expected to engage in exclusive sexual relations, with children the probable result and paternity presumed. . . . Whereas the relationship between mother and child is demonstratively and predictably created and recognizable through the biological process of pregnancy and childbirth, there is no corresponding process for creating a relationship between father and child. Similarly, aside from an act of heterosexual intercourse nine months prior to childbirth, there is no process for creating a relationship between a man and a woman as the parents of a particular child. The institution of marriage fills this void by formally binding the husband-father to his wife and child, and imposing on him the responsibilities of fatherhood. . . . The alternative, a society without the institution of marriage, in which heterosexual intercourse, procreation, and child care are largely disconnected processes, would be chaotic.⁴³

None of this is to assert that an institutionalized purpose of man-woman marriage is to mandate or even to promote procreation; rather, one of its purposes is to ameliorate the consequences of heterosexual coupling. The institution of marriage responds to two essential realities of man-woman intercourse: its procreative power and its passion. One purpose of marriage is to provide adequate private welfare to children. Man-woman

43. *Goodridge v. Dep't of Pub. Health*, 798 N.E.2d 941, 995–96 (Mass. 2003) (Cordy, J., dissenting); see also Gallagher, *Does Sex Make Babies?*, *supra* note 5, at 451 (“[T]he justification for legal preferences for marriage for couples attracted to the opposite sex rests on three [factual] assertions: sex makes babies; society needs babies; and children need mothers and fathers. Marriage is about uniting these three dimensions of human social life.”); BLANKENHORN, *supra* note 28, at 91 (“In all or nearly all human societies, marriage is socially approved sexual intercourse between a woman and a man, conceived both as a personal relationship and as an institution, primarily such that any children resulting from the union are . . . emotionally, morally, practically, and legally affiliated with both of the parents.”). Blankenhorn notes that his definition of marriage “rests on a large and growing mountain of scholarly evidence. It incorporates widely shared conclusions about the meaning of marriage reached by the leading anthropologists, historians, and sociologists of the modern era.” *Id.*

sexual intercourse, as an act of passion often leading to childbearing, has important implications for society. Societal interests are corroded when childbearing occurs in a setting of inadequate private welfare; such interests are advanced when childbearing occurs in a setting of adequate private welfare. Passion-based procreation militates against the latter circumstance and is conducive to the former. Although rationality considers consequences nine months thereafter, passion does not, to society's detriment.

A fundamental purpose of marriage, then, is to situate heterosexual passion within a social institution that will to the largest practical extent assure that the consequences of procreative passion (namely, children) begin and continue life with adequate private welfare. Although the immediate objects of the protective aspects of this private welfare purpose are the child and the often vulnerable mother, society itself is the ultimate beneficiary.⁴⁴ The contemporary man-woman marriage institution advances, albeit imperfectly, this private welfare purpose. As a result, millions of Americans enjoy a significant incremental increase in happiness, health, and productivity.⁴⁵

A society can have only one social institution denominated "marriage."⁴⁶ Society cannot simultaneously have as shared, core, constitutive meanings of the marriage institution *both* "the union of a man and a woman" *and* "the union of any two persons"; one meaning necessarily displaces the other. Thus, every society must choose either to retain man-woman marriage or, by force of law, replace it with a radically different genderless marriage regime.⁴⁷ It must be remembered that when public

44. See Stewart, *Redefinition*, *supra* note 5, at 44–46; *Morrison v. Sadler*, 821 N.E.2d 15, 30 (Ind. Ct. App. 2005) ("The state of Indiana has a legitimate interest in encouraging opposite-sex couples to enter and remain in, as far as possible, the relatively stable institution of marriage.").

45. See INST. FOR AM. VALUES, *supra* note 6, at 12–32 (listing twenty-six positive social effects of marriage).

46. Stewart, *Judicial Elision*, *supra* note 5, at 24 ("Given the role of language and meaning in constituting and sustaining institutions, two 'coexisting' social institutions known society-wide as 'marriage' amount to a factual impossibility.").

47. A society actually has three options: man-woman marriage, genderless marriage, or no normative marriage institution at all. Stewart, *Washington and California*, *supra* note 5, at 510, n.40. Among elites worldwide, the third option has many effective advocates, and the Americans in their midst "came out of the closet" in July 2006 with the *Beyond Same-Sex Marriage* manifesto. See *Beyondmarriage.org*, *Beyond Same-Sex Marriage: A New Strategic Vision for All Our Families &*

meanings and norms are insufficiently shared, the social institution constituted by those meanings and norms disappears—as do the social goods uniquely provided by that institution. When the social institution of marriage disappears, what remains is a motley crew of lifestyles. A lifestyle without institutional context is like Monopoly money: it resembles true currency, but lacks the essential shared meaning that provides its value.⁴⁸

In addition, man-woman marriage is a pre-political institution; in contrast, genderless marriage is necessarily a post-political, law-constructed, and thus fragile institution.⁴⁹ Professor Raz captures the reality well when he observes that the law's role relative to man-woman marriage and other pre-political institutions is "to give them formal recognition, bring legal and administrative arrangements into line with them, facilitate their use by members of the community who wish to do so, and encourage the transmission of belief in their value to future generations."⁵⁰ Thus, when a same-sex couple successfully asserts a "right to marry," they are not imposing on the

Relationships (July 26, 2006), available at <http://www.beyondmarriage.org/BeyondMarriage.pdf>. Although the contemporary American political reality is limited to the first two options, many of the most influential advocates of genderless marriage correctly and gladly see that as leading quite naturally to no normative marriage institution at all. See Stanley Kurtz, *The Confession*, NATIONAL REVIEW ONLINE, Oct. 31, 2006, <http://author.nationalreview.com/> (follow "Stanley Kurtz Archive" hyperlink; then follow "The Confession" hyperlink); Stanley Kurtz, *The Confession II*, NATIONAL REVIEW ONLINE, Nov. 1, 2006, <http://author.nationalreview.com/> (follow "Stanley Kurtz Archive" hyperlink; then follow "The Confession II" hyperlink). The prospect of having no normative marriage institution whatsoever, then, may well be nearer than now appears.

48. See JOHN R. SEARLE, *THE CONSTRUCTION OF SOCIAL REALITY* 32 (1995):

[W]e can say, for example, in order that the concept "money" apply to the stuff in my pocket, it has to be the sort of thing that people think is money. If everybody stops believing it is money, it ceases to function as money, and eventually ceases to be money. . . . [I]n order that a type of thing should satisfy the definition, in order that it should fall under the concept of money, it must be believed to be, or used as, or regarded as, etc., satisfying the definition. . . . And what goes for money goes for elections, private property, wars, voting, promises, marriages, buying and selling, political offices, and so on.

49. See, e.g., Seana Sugrue, *Soft Despotism and Same-Sex Marriage*, in *THE MEANING OF MARRIAGE: FAMILY, STATE, MARKET, AND MORALS* 172, 180–81, 186–91 (Robert P. George & Jean Bethke Elshtain eds., 2006) ("Being entirely a creation of the state [the genderless marriage institution] is an institution that needs to be coddled, and which demands cocooning to protect it. Its very fragility demands a culture in which it is protected.").

50. RAZ, *supra* note 40, at 161; cf. DeCoste, *Transformation*, *supra* note 5, at 635.

state a correlative duty to allow them into the existing man-woman marriage institution—which the law is impotent to do,⁵¹ although it is sufficiently potent to deinstitutionalize man-woman marriage.⁵² Instead, they are imposing on government a duty to construct and maintain in all its fragility the radically different genderless marriage institution, in which every couple that professes to be married (whether same-sex or man-woman) must participate if the marriage is to have legitimacy.⁵³

Proponents of man-woman marriage have advanced other marriage facts,⁵⁴ but those discussed above are central to any intellectually serious resolution of the marriage issue. The next Part identifies marriage facts as presented by proponents of genderless marriage.

B. The Factual Basis of the Case for Genderless Marriage

Genderless marriage proponents assert that same-sex couples are just as capable as man-woman couples of forming and participating in loving, committed, enduring, and intimate relationships, and therefore of successfully entering into and continuing in marriage. Same-sex couples are likewise equally capable of being good parents. Moreover, committed same-sex couples—and the children they raise—need, just as much as do the adults and children now privileged by marriage, the many psychological, legal, economic, and wider social benefits that marriage provides in our society.

For all couples, same-sex and man-woman, “it is the exclusive and permanent commitment of the marriage partners to one another . . . that is the sine qua non of civil marriage.”⁵⁵ Or stated in slightly different words, “[m]arriage, as it is understood today, is . . . a partnership of two loving equals who choose to commit themselves to each other”⁵⁶ Marriage is thus accurately viewed as an “exclusive commitment of two individuals to each other [that] nurtures love and mutual sup-

51. See Stewart, *Redefinition*, *supra* note 5, at 84–85.

52. See Stewart, *Judicial Elision*, *supra* note 5, at 36–37.

53. See *id.* at 52 n.137.

54. See *id.* at 4.

55. *Goodridge v. Dep’t of Pub. Health*, 798 N.E.2d 941, 961 (Mass. 2003).

56. *Hernandez v. Robles*, 794 N.Y.S.2d 579, 609 (Sup. Ct. 2005), *rev’d* 805 N.Y.S.2d 354 (App. Div. 2005), *aff’d*, 855 N.E.2d 1 (N.Y. 2006).

port”⁵⁷ and as “a unique expression of a private bond and profound love between a couple.”⁵⁸

Marriage, however, is more than merely a loving commitment between two adults; it is also a very public celebration of their commitment.⁵⁹ Same-sex couples thus seek “what their friends, relatives, co-workers and neighbors already enjoy— participation with the one person each loves in the central rite of passage in American family life,”⁶⁰ as well as access to “society’s most significant public proclamation of commitment to another person for life.”⁶¹

This blend of personal commitment and public celebration is the essence of modern marriage:

Marriage is, without dispute, one of the most significant forms of personal relationships. . . . Through the institution of marriage, individuals can publicly express their love and commitment to each other. Through this institution, society publicly recognizes expressions of love and commitment between individuals, granting them respect and legitimacy as a couple. This public recognition and sanction of marital relationships reflect society’s approbation of the personal hopes, desires and aspirations that underlie loving, committed conjugal relationships.⁶²

Hence, “critical reflection upon the functions and purposes that society associates with civil marriage and the individual needs and goods that it promotes” points to “love and friendship, security for adults and their children, economic protection, and public affirmation of commitment.”⁶³

Given their equal capacity for marriage, it is deeply hurtful to same-sex couples for the law to exclude them from that institution. On a psychological level, the exclusion communicates to

57. *Goodridge*, 798 N.E.2d at 948.

58. Brief of Plaintiffs-Appellants at 21, *Hernandez v. Robles*, 855 N.E.2d 1 (N.Y. 2006) (No. SJ-C-08860).

59. *Goodridge*, 798 N.E.2d at 954 (“Civil marriage is at once a deeply personal commitment to another human being and a highly public celebration of the ideals of mutuality, companionship, intimacy, fidelity, and family.”).

60. Brief of Appellants at 3, *Lewis v. Harris*, 908 A.2d 196 (N.J. 2006) (No. 58,398).

61. Brief of Plaintiffs-Appellants, *supra* note 60, at 21.

62. *Halpern v. Canada*, [2003] 172 O.A.C. 276, 281–82, ¶ 5 (Ont. Ct. App.).

63. LINDA C. MCCLAIN, *THE PLACE OF FAMILIES: FOSTERING CAPACITY, EQUALITY, AND RESPONSIBILITY* 6 (2006).

same-sex couples and to society generally that their most important relationships and their very self-identity are less worthy than the corresponding relationships and self-identity of participants in man-woman marriage.⁶⁴ Contrariwise, allowing same-sex couples to marry “can only enhance [their] sense of self-worth and dignity.”⁶⁵

This harm of exclusion extends into the legal and economic spheres because various laws provide married people with hundreds of procedural and substantive benefits.⁶⁶ In the absence of genderless marriage, such benefits are available to committed same-sex couples only through expensive private ordering or, all too often, not at all.⁶⁷ Deprivation of these legal and economic benefits creates constant difficulties for committed same-sex couples that are not experienced by—or imaginable for—their married counterparts.⁶⁸

Those in committed same-sex relationships are not the only individuals who suffer from such deprivations. Hundreds of thousands of children in the United States are currently being raised by same-sex couples.⁶⁹ Most of those children are the product of one partner’s previous man-woman relationship, while some are the product of assisted reproductive technology.⁷⁰ Further, an increasing number of jurisdictions allow same-sex couples to adopt.⁷¹ The exclusionary nature of the man-woman meaning embedded in our marriage laws blocks all children in homes headed by same-sex couples from the well-

64. See Tobin A. Sparling, *All in the Family: Recognizing the Unifying Potential of Same-Sex Marriage*, 10 LAW & SEXUALITY 187, 191–92 (2001).

65. *Halpern*, 172 O.A.C. at 281–82, ¶ 5.

66. *Goodridge v. Dep’t of Pub. Health*, 798 N.E.2d 941, 955–56 (Mass. 2003).

67. Gay & Lesbian Advocates & Defenders, *Protections and Responsibilities of Marriage*, <http://www.glad.org/rights/OP2-protectionsbenefits.shtml> (last visited Jan. 2, 2008).

68. Lambda Legal Defense & Education Fund, *Why Marriage Equality Matters* (May 10, 2004), <http://www.lambdalegal.org/our-work/publications/facts-backgrounds/page.jsp?itemID=31988962>.

69. See Liz Seaton, *The Debate Over the Denial of Marriage Rights and Benefits to Same-Sex Couples and Their Children*, 4 MD. L.J. RACE, RELIGION, GENDER, & CLASS 127, 136–37 (2004).

70. See Madeline Marzano-Lesnevich & Galit Moskowitz, *In the Interest of Children of Same-Sex Couples*, 19 J. AM. ACAD. MATRIMONIAL LAW 255, 268–70 (2005).

71. See Eleanor Michael, Note, *Approaching Same-Sex Marriage: How Second Parent Adoption Cases Can Help Courts Achieve the “Best Interests of the Same-Sex Family,”* 36 CONN. L. REV. 1439, 1440–41 (2004).

demonstrated psychological, legal, economic, physical, and other benefits accruing to children whose caregivers are married.⁷²

In general, committed same-sex couples are as capable as married couples of being good parents.⁷³ Progressive adoption laws demonstrate political recognition of this fact. Moreover, a number of empirical studies show “no differences” in outcomes between the mother-lesbian partner child-rearing mode and the married mother-father child-rearing mode.⁷⁴ Accordingly, even if one views marriage as principally a child-centered and child-rearing institution, the demonstrated child-rearing capacity of committed same-sex couples makes them equally worthy of marriage’s benefits and responsibilities.

Furthermore, marriage has long been understood as exerting a “gentling” or “civilizing” influence on husbands. Historically, unmarried men have engaged in a wide range of social pathologies more frequently than their married counterparts. Public policy should therefore encourage men to marry rather than block their access to this refining institution. Marriage will presumably benefit gay men, as it has straight men, in ways redounding to the benefit of society generally.⁷⁵

Civil marriage is a legal construct. Its character as a creature of law gives it efficacy and influence in our society.⁷⁶ “[M]arriage draws its strength from the nature of the civil marriage contract itself and the recognition of that contract by the State.”⁷⁷ Civil marriage, like all other legal constructs, must conform to constitutional norms of equality, liberty, autonomy, and

72. See Lauren Schwartzreich, *Restructuring the Framework for Legal Analyses of Gay Parenting*, 21 HARV. BLACKLETTER L.J. 109 (2005); Michael S. Wald, *Same-Sex Couple Marriage: A Family Policy Perspective*, 9 VA. J. SOC. POL’Y & L. 291 (2001).

73. William Meezan & Jonathan Rauch, *Gay Marriage, Same-Sex Parenting, and America’s Children*, 15 FUTURE CHILD. 97, 97 (2005).

74. See Press Release, American Civil Liberties Union, Maryland Psychologists, Social Workers, and Child Welfare Advocates Speak Out in Support of Marriage for Same-Sex Couples (Nov. 30, 2006), available at <http://www.aclu.org/lgbt/relationships/27548prs20061130.html>.

75. This is the rather famous “conservative case for gay marriage.” See Andrew Sullivan, *The Conservative Case for Gay Marriage*, TIME, June 30, 2003, at 76; Andrew Sullivan, *Here Comes the Groom*, THE NEW REPUBLIC, Aug. 28, 1989, at 20; see also WILLIAM N. ESKRIDGE, JR., *THE CASE FOR SAME-SEX MARRIAGE: FROM SEXUAL LIBERTY TO CIVILIZED COMMITMENT* (1996).

76. See *Hernandez v. Robles*, 805 N.Y.S.2d 354, 377 (App. Div. 2005) (Saxe, J., dissenting) (“Civil marriage is an institution created by the state . . .”).

77. *Andersen v. King County*, 138 P.3d 963, 1018 (Wash. 2006) (Fairhurst, J., dissenting).

human dignity.⁷⁸ What is more, civil marriage is fully amenable to the usual refining and improving mechanisms of the law, both legislative and judicial.⁷⁹ Indeed, marriage has always been an evolving institution, largely through the operation of law.⁸⁰

Many legal changes important to the evolution of marriage logically support the next inevitable change in marriage law: the redefinition of marriage from the union of a man and a woman to the union of any two persons.⁸¹ Most important are legal changes that move away from gender-based rights and roles towards legal equality of spouses;⁸² away from “the procreation of children . . . as a central purpose of marriage, as . . . reflected in the common law concept of consummation” towards an emphasis on the close personal relationship between two committed individuals;⁸³ away from the denial of legal protection for (or even the imposition of penalties on) unwed, cohabiting couples and their offspring towards the provision of a variety of rights and protections to them;⁸⁴ and away from the recognition of biological parenthood towards the recognition of legal parenthood (that is, parenthood as

78. See *Goodridge v. Dep’t of Pub. Health*, 798 N.E.2d 941, 948 (Mass. 2003) (“The question before us is whether, consistent with the Massachusetts Constitution, the Commonwealth may deny . . . civil marriage to two individuals of the same sex The Massachusetts Constitution affirms the dignity and equality of all individuals.”); *id.* at 949 (“Barred access to . . . civil marriage, a person . . . is arbitrarily deprived of membership in one of our community’s most rewarding and cherished institutions. That exclusion is incompatible with the constitutional principle of respect for individual autonomy and equality under law.”); *id.* at 959 (“The individual liberty and equality safeguards of the Massachusetts Constitution protect both ‘freedom from’ unwarranted government intrusion into protected spheres of life and ‘freedom to’ partake in benefits created by the State for the common good.”).

79. See *id.* at 969 (noting that refining the common-law meaning of marriage through judicial remedy “is entirely consonant with established principles of jurisprudence empowering a court to refine a common-law principle” while still “leav[ing] intact the Legislature’s broad discretion to regulate marriage.”).

80. See, e.g., Nicholas Bala, *The Debates About Same-Sex Marriage in Canada and the United States: Controversy Over the Evolution of a Fundamental Social Institution*, 20 *BYU J. PUB. L.* 195, 228 (2006) (“Marriage is one of the oldest, most universal and important of social and legal institutions. It has, however, dramatically changed over the course of recorded history, and today there is great variation around the world in the laws and mores of marriage in different countries.”).

81. See *id.* at 202–03.

82. See *id.* at 201–02.

83. *Id.* at 198.

84. See *id.* at 199, 202–09.

solely a status conferred by law).⁸⁵ As gender rights and roles are eliminated, “[i]t [becomes] more difficult to argue that marriage law should require two spouses of opposite gender if there are, in fact, no longer legally specified gender roles,” particularly when “there is growing ambiguity about . . . the roles of ‘husband’ and ‘wife.’”⁸⁶ The creation of marriage-like legal arrangements governing unwed, cohabiting couples, as well as the recognition of their legal parenthood, has laid “the ground work for a more flexible approach for the more recent recognition of same-sex relationships.”⁸⁷

To a great extent, religion is the source of the man-woman limitation in our society’s marriage laws. Religion shapes not only the arguments advanced in support of that legal limitation but also the very meaning of man-woman marriage itself. Thus, the limitation of marriage to the union of a man and a woman “stems, in substantial part, from . . . animosity that is rooted in moral and religious objections,”⁸⁸ and from the intent both “to impose religious and moral restrictions on the state regulated civil institution of marriage” and “to impose religious sensibilities or religiously-based moral codes on others’ most intimate life decisions.”⁸⁹ This limitation, however, “reflects a *religious* viewpoint [and] *religious* doctrine should not govern state regulation of *civil* marriage.”⁹⁰ Religious marriages certainly may continue to conform to whatever doctrines the sponsoring religions proclaim.⁹¹ Civil marriage must be purged of religiously-based man-woman limitations because a civil marriage regime so tainted “reflects an impermissible State religious establishment.”⁹²

85. BLANKENHORN, *supra* note 28, at 155–56. The Canadian parliamentary enactment mandating genderless marriage contains several provisions containing the term “legal parent” and, in that way, the statute replaces natural parenthood with legal parenthood. *See also* Civil Marriage Act, 2005 S.C., ch. 33, §§ 6(1), 10(1)–(3), 11, 12(1) (Can.).

86. Bala, *supra* note 80, at 202–03.

87. *Id.* at 209.

88. *Andersen v. King County*, 138 P.3d 963, 1032 (Wash. 2006) (Bridge, J., dissenting).

89. *Id.* at 1034.

90. *Id.* at 1035.

91. *See, e.g.*, Brief for Religious Organizations as Amici Curiae Supporting Plaintiffs-Appellants at 10–13, *Samuels v. Dep’t of Pub. Health*, 811 N.Y.S.2d 136 (App. Div. 2006), available at http://www.aclu.org/FilesPDFs/samuels_religious.pdf.

92. *Andersen v. King County*, 138 P.3d 963, 1027–28 (Wash. 2006) (Bridge, J., dissenting) (quoting Brief for Libertarian Party of Washington State et al. as Amici Curiae Supporting Respondents at 11, available at <http://marriagelaw.cua.edu/Law/states/Washington%20State/Amici%20Curiae%20Brief%20of%20the%20Libertaria>

Same-sex couples in general have equal capacity to participate in modern marriage and equal capacity to be good parents. The ongoing refusal to include gay men and lesbians in civil marriage must therefore be understood as resulting from continuing social animus.⁹³ The absence of any rational, non-religious justification for excluding same-sex couples from marriage shows that the exclusion is, as a matter of fact, the present fruit of that same pervasive and powerful animus.⁹⁴

C. *Responses—and a Critical Examination*

1. *The factual basis of the narrow and broad marriage descriptions*

a. *Is, ought, and the relationship between the two descriptions*

The two competing packages of marriage facts provide much different descriptions of what marriage is in contemporary America. Before turning to the task of assessing factual accuracy, however, something must be said about *is* (as in what marriage *is*) and *ought* (as in what marriage *ought* to be). Discovering the facts of marriage has been made more difficult because of normative assertions about what marriage *ought* to be, disguised as positive descriptions of what marriage *is*. With more or less justification, each side accuses the other of failing to distinguish *is* from *ought*. Such failure may be understandable; motivated by its desires for society and its convictions about how things *ought* to be, each side views its particular version of marriage as essential to achieving its vision of the good

n%20Party%20of%20Washington%20State;%20Log%20Cabin%20Republicans%20of%20Washington.pdf).

93. See Barbara J. Cox, *Are Same-Sex Marriage Statutes the New Anti-Gay Initiatives?*, 2 NAT'L J. OF SEXUAL ORIENTATION L. 194 (1996), available at <http://www.ibiblio.org/gaylaw/issue4/cox3.html>.

94. See, e.g., *Goodridge v. Dep't of Pub. Health*, 798 N.E.2d 941, 968 (Mass. 2003) ("The absence of any reasonable relationship between . . . an absolute disqualification of same-sex couples who wish to enter into civil marriage and . . . protection of public health, safety, or general welfare, suggests that the marriage restriction is rooted in persistent prejudices against persons who are . . . homosexual."); M. Isabel Medina, *Of Constitutional Amendments, Human Rights and Same-Sex Marriages*, 64 LA. L. REV. 459, 474 (2004) ("Ultimately, it is hard to argue that opposition to same-sex marriage is not about animus or moral disapprobation of lesbian and gay individuals and couples.").

society. With that said about the *is/ought* problem, this Article turns to the relationship between competing packages of marriage facts.

The two previous Parts demonstrate a divergence on a fundamental question of fact: What *is* marriage? Close examination, however, reveals not so much a divergence as a broad description encompassing most but not all of a much narrower description. The man-woman marriage proponents' broad description encompasses a wider range of marriage-produced social goods than the genderless marriage proponents' much more narrow description. The same holds true relative to marriage's purposes, practices, formative powers, and interactions with other social institutions: the broad description encompasses much that the narrow description excludes.

The genderless marriage proponents' narrow description is premised on the "close personal relationship" model of marriage.⁹⁵ As one commentator has described it:

[The narrow description] focuses primarily on the nature of relationships between two people (or what is called "dyadic" relationships). For close relationship theorists, marriage becomes a subcategory of this core concept; marriage is simply one kind of close personal relationship. The structures of the discipline tend to strip marriage of the features that reflect its status and importance as a social institution.⁹⁶

Consequently, "marriage is seen primarily as a private relationship between two people, the primary purpose of which is to satisfy the adults who enter it. Marriage is about the couple. If children arise from the union, that may be nice, but marriage and children are not really connected."⁹⁷ Some scholars believe that we are in fact "moving from a marriage culture to a culture that celebrates 'pure relationship,'"⁹⁸ which is understood as a relationship "that has been stripped of any goal beyond the intrinsic emotional, psychological, or sexual satisfaction which the relationship currently brings to the [two adult] individuals involved."⁹⁹ Under the pure relationship model, marriage's social goods are "love and friendship, security for adults and

95. See Stewart, *Washington and California*, *supra* note 5, at 508–09, 527–31.

96. COUNCIL ON FAMILY LAW, *supra* note 28, at 14.

97. *Id.*

98. *Id.* at 15.

99. *Id.*

their children, economic protection, and public affirmation of commitment.”¹⁰⁰

The man-woman marriage proponents’ broad description encompasses most but not all of what the close personal relationship model describes. It encompasses, for example, the social goods of “love and friendship, security for adults and their children, economic protection, and public affirmation of commitment”¹⁰¹ as well as the ideal of “a partnership of equals with equal rights, who have mutually joined to form a new family unit, founded upon shared intimacy and mutual financial and emotional support.”¹⁰² The broad description, however, encompasses much more. The institutionalized man-woman meaning is the source of *additional* social goods, which include provision of the most effective (or only) means of supporting a child’s right to know and be reared by his mother and father (with exceptions only when in the best interests of the child), of maximizing the private welfare provided to the children conceived by heterosexual intercourse, of sustaining the optimal child-rearing mode (married mother and father), of bridging the male-female divide, and of furnishing the status and identity of “husband” or “wife.”

Acceptance of the broad description requires rejection of two salient aspects of the narrow description of marriage. First, it requires rejecting the notion that marriage is *no more than* what the narrow model describes. Although genderless marriage proponents rarely, if ever, expressly state that notion of “no more than,” the notion is always implicit in their arguments.¹⁰³

100. MCCLAIN, *supra* note 63, at 6.

101. *Id.*

102. *Hernandez v. Robles*, 805 N.Y.S.2d 354, 381 (App. Div. 2005) (Saxe, J., dissenting).

103. The always implicit “no more than” notion is examined in detail in the longer version of this Article found online, Monte Neil Stewart, *Marriage Facts and Critical Morality* 35–44, <http://marriagelawfoundation.org/mlf/publications/Facts.pdf> [hereinafter Stewart, *Long Version*]. This phenomenon merits close examination for two reasons. First, the notion itself goes to the heart of the veracity of the narrow and broad descriptions; if the “no more than” notion is factually accurate, it must follow that what the broad description depicts beyond the narrow description’s scope is factually false. Conversely, if the “no more than” notion is erroneous as a matter of fact, that error would be established by the validation of the broad description’s *additional* depictions. Second, if—as demonstrated elsewhere—the “no more than” notion is always or nearly always implicit and therefore not expressly stated and defended, that aspect is also important. *Id.* It is im-

Second, the broad description also requires rejecting the idea that children are not “the sine qua non of civil marriage”¹⁰⁴ and that “marriage and children are not really connected.”¹⁰⁵ The broad description portrays marriage as primarily a child-protective and child-centered institution, with most of the institution’s social goods pertaining to the quality of child-rearing. Conversely, the narrow model describes an adult-centered “partnership entered into for its own sake, which lasts only as long as both partners are satisfied with the rewards (mostly intimacy and love) that they get from it.”¹⁰⁶

This understanding of the relationship between the broad and narrow descriptions of marriage does not, in itself, answer the questions of which description is more accurate as a matter of fact. This Article now turns to that question.

b. The weight of the evidence

Genderless marriage proponents either agree with or are silent about a number of findings that emerge from social institutional studies.¹⁰⁷ The briefs, opinions, and scholarly pieces in which genderless marriage proponents engage the marriage facts do not deny that marriage is a vital social institution.¹⁰⁸ Nor do they deny that marriage is constituted by widely

portant because it constitutes probative evidence about how defensible the “no more than” notion is.

104. *Goodridge v. Dep’t of Pub. Health*, 798 N.E.2d 941, 961 (Mass. 2003) (“While it is certainly true that many, perhaps most, married couples have children together (assisted or unassisted), it is the exclusive and permanent commitment of the marriage partners to one another, not the begetting of children, that is the sine qua non of civil marriage.”).

105. COUNCIL ON FAMILY LAW, *supra* note 28, at 14.

106. Andrew J. Cherlin, *The Deinstitutionalization of American Marriage*, 66 J. MARRIAGE & FAM. 848, 853, 858 (2004) (reporting both that the “pure relationship is not tied . . . to the desire to raise children” and that scholarly “attempts to incorporate children into the pure relationship are unconvincing”).

107. This Article does not deal with *all* marriage facts, but only those used by each side of the marriage debate in briefs, judicial opinions, and the scholarly pieces on the cases addressing this issue. It seems fair to limit the search for responses to the same sources.

108. The judges in favor of judicially-mandated genderless marriage uniformly acknowledge this reality. Stewart, *Judicial Redefinition*, *supra* note 5, at 75; Stewart, *New York*, *supra* note 5, at 231; Stewart, *Washington and California*, *supra* note 5, at 517. In making his case for genderless marriage, Ronald Dworkin acknowledges, “The institution of marriage is unique; it is a distinct mode of association and commitment that carries centuries and volumes of social and personal meaning.” RONALD DWORIN, *IS DEMOCRACY POSSIBLE HERE?* 86 (2006).

shared social meanings, that these institutionalized meanings teach and transform individuals, and that these meanings provide valuable social goods. Likewise, they do not deny that, across different times and cultures, a core meaning constitutive of the marriage institution has nearly always been and still is “the union of a man and a woman.” Nor do they deny that the social institution premised on and constituted by that meaning provides a number of social goods beyond those offered by the close personal relationship model. Thus, genderless marriage proponents leave uncontested nearly all of the key realities undergirding the social institutional argument for man-woman marriage. Moreover, they *expressly accept* the most fundamental fact—that marriage is a vital social institution.¹⁰⁹

Genderless marriage proponents are also silent regarding other types of evidence that support the broad description. Such evidence includes recent demographic studies showing the predominant nature of the institutionalized man-woman meaning across the United States.¹¹⁰ The findings of these studies suggest that it is erroneous as a matter of fact to assert that the close personal relationship model is now —after a process of evolution—*all* that marriage is.¹¹¹ Although such an assertion accurately describes the prevailing sentiment in some American communities, it does not apply to most of the nation. In no state has the trend away from man-woman marriage and towards the close personal relationship model achieved demographic dominance.¹¹²

Recent political and marriage practices are further proof that the union of a man and woman continues as a strongly shared public meaning, among the complex of other meanings, constitutive of the contemporary marriage institution. One such proof is that, within the past few decades, forty-one states and the federal government have enacted “defense of marriage” acts or constitutional amendments, and sometimes both, which

109. See *supra* note 108.

110. These demographic studies have been addressed elsewhere at some length. See Stewart, *Long Version*, *supra* note 103, at 45–47; Stewart, *Washington and California*, *supra* note 5, at 532–34.

111. Ron Lesthaeghe & Lisa Neidert, *The Second Demographic Transition in the United States: Exception or Textbook Example?*, 32 *POPULATION & DEV. REV.* 669 (2006).

112. See *supra* note 110.

express that shared meaning.¹¹³ It bears repeating that these laws are very recent social expressions, not the vestiges of “long-accepted assumptions that . . . have eroded.”¹¹⁴ Furthermore:

[I]nstitutions are not worn out by continued use, but each use of the institution is in a sense a renewal of that institution. Cars and shirts wear out as we use them but constant use renews and strengthens institutions such as marriage [I]n terms of the continued collective intentionality of the users, each use of the institution is a renewed expression of the commitment of the users to the institution.¹¹⁵

In 2004, more than 4.5 million Americans made renewing use of the man-woman marriage institution by marrying.¹¹⁶ Over their lifetime, a substantial majority of Americans choose to enter man-woman marriage,¹¹⁷ and a substantial majority of American births are legitimate.¹¹⁸

Although the preceding evidence supports the factual accuracy of the broad description of man-woman marriage, the evidence also shows (and proponents of the broad description do not deny) that a number of trends have diminished the force and influence of the man-woman marriage institution. The Council on Family Law describes the trends as follows:

113. See William C. Duncan, *Marriage Amendments and the Reader in Bad Faith*, 7 FLA. COASTAL L. REV. 233, 233–34 nn.2–3 (2005) (collecting citations to statutes and amendments defining marriage as the union of a man and a woman).

114. *Hernandez v. Robles*, 805 N.Y.S.2d 354, 381 (App. Div. 2005) (Saxe, J., dissenting).

115. SEARLE, *supra* note 48, at 57.

116. 4,558,000 people married in the United States in 2004. Subtracting the people who married in Massachusetts (83,098), the number would be 4,474,902. CTRS. FOR DISEASE CONTROL & PREVENTION, BIRTHS, MARRIAGES, DIVORCES, AND DEATHS: PROVISIONAL DATA FOR 2004, 53 NAT’L VITAL STAT. REP. NO. 21, at 1, 6 (2005), available at http://www.cdc.gov/nchs/data/nvsr/nvsr53/nvsr53_21.pdf.

117. The National Marriage Project report for 2005 states: “For the generation of 1995, assuming a continuation of then current marriage rates, several demographers projected that 88 percent of women and 82 percent of men would ever marry.” NAT’L MARRIAGE PROJECT, THE STATE OF OUR UNIONS 2005: THE SOCIAL HEALTH OF MARRIAGE IN AMERICA 16–17 (2005), available at <http://marriage.rutgers.edu/publications/soou/soou2005.pdf>.

118. The births to married women in 2004 were 64.2 percent of all births. JOYCE A. MARTIN ET AL., CTRS. FOR DISEASE CONTROL & PREVENTION, BIRTHS: PRELIMINARY DATA FOR 2004, 55 NAT’L VITAL STAT. REP. NO. 1, 11 (2006), available at http://www.cdc.gov/nchs/data/nvsr/nvsr55/nvsr55_01.pdf. For a discussion of the key statistics, tracking the strength of the American marriage institution since 1970, see BLANKENHORN, *supra* note 28, at 217–22.

Of course close relationship theorists are not operating in a vacuum. Close relationship theory reflects real trends in society that are making marriage less connected to its classic purposes as a social institution. For example, while marriage remains a wealth-generating institution, other institutions of society (such as the market and government) have taken over large parts of the economic and social insurance functions marriage once had. While marriage remains a socially preferred context for sexual intercourse, the sexual revolution (including the growth in social acceptance for couples living together) has reduced the stigma for those who have sex outside of marriage. While marriage continues to have considerable connection to children in the public mind, large increases in unmarried childbearing have increased social acceptance of unwed parents and their children. In addition, high rates of divorce and the personal longings for a soul mate are changing the way young people think about marriage.¹¹⁹

But the question of fact is “What is marriage?” not “What will it be in twenty years?” or “Where do we guess current trends are taking marriage?” The man-woman meaning has not been deinstitutionalized but continues to be powerful in transforming the large portion of our nation’s population in very productive ways. Man-woman marriage still produces unique social goods in fulfillment of marriage’s “classic purposes as a social institution.”¹²⁰

The evidence advanced by genderless marriage proponents in support of the factual accuracy of the narrow description consists of four proofs: (1) robust descriptions of changes in marriage (“the evolving marriage paradigm”); (2) references both to the absence of any governmental requirements relative to procreation by married couples and to the absence among some married couples of any procreative intention or conduct; (3) bald assertions; and (4) a disguised argument of legal irrelevancy. Evaluation of each of these four proofs suggests that they, singly or together, do not undermine the broad description.

It is helpful to position the “evolving marriage” response in the context of the present debate on “What is marriage?” Four features of that debate are particularly important. First, thoughtful and informed observers uniformly acknowledge

119. COUNCIL ON FAMILY LAW, *supra* note 28, at 14–15 (footnotes omitted).

120. *Id.* at 14.

that marriage is not a static institution; it has evolved over the centuries in many ways, some dramatic.¹²¹ They further acknowledge that several recent societal changes have facilitated the emergence of the close personal relationship (whether formalized by a marriage or not) as a way of living embraced by a significant minority of the population, and that legal changes in the institution itself have rendered more plausible some arguments for the legal redefinition of marriage.¹²² Second, the notion that something inherent and static in marriage precludes legal redefinition is *not* a part of the debate.¹²³ Third, the notion that recent legal changes automatically compel legal redefinition to genderless marriage is *not* a part of the debate, at least for the large majority of mainstream participants.¹²⁴ Fourth, the fundamental factual issue remains: Is the man-woman meaning still institutionalized in the sense that it continues as a widely shared public meaning of marriage productive of valuable social goods?

Once the “evolving marriage” response is positioned in the context of the “What is marriage?” debate, the response’s weaknesses emerge. In particular, recitation of the uncontested fact of institutional change is unhelpful; “evolving marriage” proponents have no good answer to the question, “So what?”¹²⁵

121. See, e.g., BLANKENHORN, *supra* note 28, at 91 (“[Marriage] is constantly evolving, reflecting the complexity and diversity of human cultures.”); MCCLAIN, *supra* note 63, at 21 (“The long history of the institution of marriage offers an evolving, rather than a static, answer to the question ‘What is marriage for?’”).

122. See, e.g., MCCLAIN, *supra* note 63, at 22–23; COUNCIL ON FAMILY LAW, *supra* note 28, at 14–15; Bala, *supra* note 80, at 201–09; see also Stewart, *Redefinition*, *supra* note 5, at 86–95.

123. See Stewart, *Judicial Elision*, *supra* note 5, at 4; see also Stewart, *Dworkin*, *supra* note 5, at 302 n.121.

124. Most participants in the marriage debate do not publicly embrace the radical social constructionist conclusions that the differences between men and women do not (or should not) matter in the eyes of the law, that the prior legal changes in marriage reflect and enshrine that first conclusion, and that, therefore, there is no defensible basis under equality jurisprudence for defining civil marriage as a man-woman relationship rather than a person-person relationship. See Stewart, *Redefinition*, *supra* note 5, at 86–95.

125. The answer often implied and sometimes given expressly—“Because the changes show that genderless marriage is inevitable”—is not a good answer, for several reasons (see BLANKENHORN, *supra* note 28, at 235–36, 239–40, for a collection of examples of the inevitability argument). First, that answer presupposes that a judge’s constitutional duty is to perceive social trends and then to move the law in front of those trends. No serious student of constitutional law publicly champions such a formulation of the judicial duty, although a few judges have given hints of such a mandate. See, e.g., *Hernandez v. Robles*, 855 N.E.2d 1, 34 (N.Y. 2006) (Kaye, C.J., dissenting) (“I am confident that future generations will

The vital question in the debate concerns the *present* institutionalized nature of the man-woman meaning. Reference to changes in the marriage institution may provide useful context in considering that question but such references do not answer it.¹²⁶ That the no-fault divorce laws of the 1970's suppressed "permanence" as an institutionalized meaning may well be true,¹²⁷ but this development says nothing about the ongoing institutionalized status of the man-woman meaning. The same can be said of legal changes pertaining to gender equality in marriage, qualifications for adoptive parent status, disparate treatment of illegitimate children, and so on. The same may even be said (albeit more guardedly) of social changes pertaining to rates of unmarried cohabitation, out-of-wedlock births, and pursuit of the close personal relationship model. Although these social changes directly affect the force of the man-woman marriage institution and move it closer to the deinstitutionalization precipice, mere recitation of such changes does not answer the question, "How much closer?" The answer is important because no responsible observer says that man-woman marriage is already deinstitutionalized.¹²⁸ The "evolving mar-

look back on today's decision as an unfortunate misstep."'). Second, the assertion of inevitability—founded on a confidently made reading of where social currents in history will certainly carry the marriage institution—is a dubious intellectual proposition; it would seem to be worthy of about the same level of respect due to another message of inevitability clearly to be perceived in powerful social currents revealed by history, the message preached by Karl Marx. Third, a particularly toxic aspect of the inevitability argument in the judicial arena is its proclivity to become a self-fulfilling prophecy. Each judge who acts on the basis of the argument supplies further "evidence" of the inevitability of genderless marriage. In this context it merits mentioning that, but for *EGALE Canada Inc. v. Canada (Attorney General)*, [2003] 13 B.C.L.R. (4th) 1 (B.C. Ct. App.), and *Halpern v. Canada*, [2003] 172 O.A.C. 276 (Ont. Ct. App.), there would be no genderless marriage in Canada today, and but for *Goodridge*, there would be no genderless marriage anywhere in the United States today. See Stewart, *Judicial Elision*, *supra* note 5, at 63–64.

126. See Stewart, *Judicial Elision*, *supra* note 5, at 61–70.

127. See *id.* at 67–68; see also Stewart, *Long Version*, *supra* note 103, at 53 n.185 (collecting scholarly articles on the debate about whether no-fault divorce laws and the divorce revolution are causally related or simply correlated and examining the ill effects of the divorce revolution).

128. Professor Coontz asserts that marriage in America has been deinstitutionalized; that is, that no public meanings (formerly) constitutive of the institution are now shared sufficiently widely to have institutional force. Stephanie Coontz, Remarks at UCLA Williams Institute Marriage Debates Conference (Apr. 21–22, 2006); see also BLANKENHORN, *supra* note 28, at 239. Critics from across the spectrum have questioned Professor Coontz's work. Compare Alan Wolfe, *The*

riage" response is unhelpful because it fails to engage directly the factual conclusion that, in contemporary America, the man-woman aspect of marriage remains a predominantly shared public meaning that produces valuable social goods. Thus, the response does not undermine the factual accuracy of the broad description of marriage.¹²⁹

Genderless marriage proponents also point out that government requires neither proof of procreative capacity and intention before marriage nor actual procreation after marriage and that a substantial minority of married couples do not ever bear children. These facts, it is argued, show that the child-centered nature of the broad description of contemporary American marriage is either false or is of such minimal importance as to make the narrow description more factually accurate.¹³⁰

These facts regarding governmental requirements and actual conduct relative to marital procreation are true but not probative. They are not probative because of three interrelated marriage facts that are equally accurate. First, and most relevant, marriage is society's mechanism to regulate and ameliorate the consequences of passionate and procreative heterosexual intercourse (that is, children).¹³¹ The "silly view of marriage as a mechanism *mandating* procreation"¹³² is just that, silly. By normalizing and privileging marriage as the situs for man-woman intercourse and thereby seeking to channel all heterosexual intercourse within that institution, society seeks to assure that when man-woman sex does produce children, those children receive from birth onward the maximum amount of private welfare. Even in our contraceptive culture, passionate heterosexual intercourse results in many unintended births.¹³³ "Almost a third of all [American] births between 1990 and 1995 were unintended. . . . Almost four in ten women aged 40–44 had had at least one unplanned birth."¹³⁴ Marriage laws are not aimed at making all married sex procreative but only seek to

Malleable Estate: Is marriage more joyful than ever?, SLATE, May 17, 2005, <http://www.slate.com/id/2118816>, with BLANKENHORN, *supra* note 28, at 236, 239–40.

129. See Stewart, *New York*, *supra* note 5, at 241–42, 247.

130. See, e.g., *Goodridge v. Dep't of Pub. Health*, 798 N.E.2d 941, 961 (Mass. 2003).

131. See Stewart, *Redefinition*, *supra* note 5, at 44–52.

132. *Id.* at 62 (emphasis added).

133. *Id.* at 50–52; Gallagher, *Does Sex Make Babies?*, *supra* note 5, at 454–56.

134. Gallagher, *Does Sex Make Babies?*, *supra* note 5, at 454–55.

encourage that all man-woman sex occurs in marriage, as a protection for when such sex *is* procreative—a protection for the baby, the often vulnerable mother, and society generally.¹³⁵

Second, although government does not require man-woman couples to prove procreative capacity and intent before receipt of a marriage license, or procreative conduct thereafter, the government does not, in neglecting to do so, endorse the close personal relationship model. The “don’t-ask, don’t-require” policy emerges from something else:

[O]ur societies have a long-standing sensibility against personalized governmental inquiries into marital procreative intentions and capacities Certainly the development of American common law and constitutional law suggests that the aversion to public and certainly governmental inquiries into an individual’s marital procreative intentions and capacities qualifies as a social norm of some antiquity. . . . [T]he norm has always been reinforced by certain pragmatic (and interrelated) considerations. These include sensible suspicion of the candour of responses regarding procreative intentions, equally sensible suspicion when it comes to responses about procreative capacities, the scientific (i.e., medical) difficulty or impossibility of securing evidence of such capacities, and the costs associated with that endeavour if attempted.

. . . .

The role of this social norm relative to man/woman marriage can be seen in this: Regulation of marriage, such as marriage licensure, stops short of any inquiry into procreative intentions and capacities. . . . It is troubling that the [the genderless marriage proponents have] identified a supposed societal lack of interest in procreation as the cause of the absence from the marriage laws of a procreation requirement, rather than identifying the much more plausible and robust explanation readily available: a strong social norm against

135. In a recent article, Professor McClain argues that certain legal and cultural changes in American society have eliminated, as a legal and social project, the channeling of sex into marriage. Linda McClain, *Love, Marriage, and the Baby Carriage: Revisiting the Channeling Function of Family Law*, 28 CARDOZO L. REV. 2133 (2007). For a critique of her argument, see Stewart, *Long Version*, *supra* note 103, at 56 n.193.

government inquiry into marital procreative intentions and capacities.¹³⁶

Third, it is clear that the social institution of marriage as it existed for centuries, even millennia, did encompass—quite centrally—child-bearing and child-rearing endeavors.¹³⁷ Yet during the centuries that laws regulated entry into and continuance in the historic child-centered institution of marriage, the same “don’t ask, don’t require” policy prevailed. The policy’s existence then certainly did not indicate that the institution’s child-bearing and child-rearing endeavors were of minimal importance. It does not do so now.

At this stage in the debate, a genderless marriage proponent may concede, if only *arguendo*, the factual accuracy of the broad description of contemporary American marriage¹³⁸—but then proceed to assert that our society should nevertheless allow same-sex couples to enter into marriage, because doing so will benefit them (and any children they raise) socially, psychologically, and economically, and will not harm the institution, and because man-woman couples will still marry at the same rate and still raise their children equally well. This is the ubiquitous “no-downside” argument, and it has serious factual defects of its own. The argument does not engage directly the contest between the broad and narrow descriptions of contemporary marriage. Because of its importance, however, the argument is discussed separately below.¹³⁹

Another approach, employed primarily by appellate judges favorable to genderless marriage, involves the bald assertion that contemporary American marriage consists solely of the

136. Stewart, *Redefinition*, *supra* note 5, at 58–60.

137. See, e.g., *Goodridge v. Dep’t of Pub. Health*, 798 N.E.2d 941, 961–62 n.23 (Mass. 2003).

138. Indeed, genderless marriage proponents must either concede the factual accuracy of the broad description or remain silent. It is impossible as a matter of fact to sustain the case for the completeness, and therefore fundamental accuracy, of the narrow description.

The evidence . . . shows overwhelmingly—I believe beyond any reasonable doubt—that marriage as a human institution is intrinsically connected to bearing and raising children. To argue otherwise is to argue like a lawyer looking for a loophole; it is not intellectually or morally serious . . .

BLANKENHORN, *supra* note 28, at 153.

139. See *infra* Part II.C.2.a.

close personal relationship. Among a number of possible examples of this phenomenon,¹⁴⁰ here is just one:

It is fair to say that both the law and the population generally now view marriage, at least in the abstract ideal, as a partnership of equals with equal rights, who have mutually joined to form a new family unit, founded upon shared intimacy and mutual financial and emotional support. . . . [T]he gender of the two partners to a marriage is no longer critical to its definition.¹⁴¹

All these assertions are “bald” in that they are made without reference to any supporting authority and are presented in true *ipse dixit* fashion. But facts are stubborn things, and bald assertions (even those coming from appellate judges) hardly qualify as evidence probative of the idea that contemporary American marriage encompasses no more than a close personal relationship.

Apparently recognizing two interrelated realities—namely, that the success of genderless marriage in the courts depends on the factual accuracy of the narrow description of marriage and that the broader description is much more accurate than the narrow alternative—a genderless marriage proponent in the judiciary recently devised an interesting strategy. In a California Court of Appeal case upholding man-woman marriage against constitutional challenge, Judge Kline characterized as legally irrelevant all of the many social realities of the marriage institution beyond those encompassed by the narrow description. His dissenting opinion, unlike earlier opinions calling for genderless marriage, did not commit the factual error of asserting that marriage in our society is nothing more than a close personal relationship between two adults. Rather, it began by identifying from the United States Supreme Court’s marriage cases “the attributes of marriage that account for the fundamentality of the right to marry.”¹⁴² Although the opinion identified intimacy, association, “a harmony in living,” and “bilateral loyalty” as among those attrib-

140. For collections of these bald assertions, see Stewart, *Redefinition*, *supra* note 5, at 97–98; Stewart, *New York*, *supra* note 5, at 232, 247; Stewart, *Washington and California*, *supra* note 5, at 528–29.

141. *Hernandez v. Robles*, 805 N.Y.S.2d 354, 381 (App. Div. 2005) (Saxe, J., dissenting).

142. *In re Marriage Cases*, 49 Cal. Rptr. 3d 675, 737 (Ct. App. 2006) (Kline, J., concurring in part and dissenting in part).

utes, it did not refer to child-bearing or child-rearing. The opinion then silently shed the link between the enumerated attributes and the right to marry and began speaking of “the attributes of marriage that are constitutionally significant.”¹⁴³ Finally, it elevated those attributes to a high status indeed: “the *constitutionally significant* attributes of marriage identified by the [United States] Supreme Court.”¹⁴⁴ Those honored attributes just happen to be the elements of the close personal relationship model of marriage—love, intimacy, “bilateral loyalty,” and public celebration. All other attributes of the marriage institution are simply ignored; they are, after all, not among “the constitutionally significant attributes of marriage.” Those other attributes of marriage—principally the institution’s child-bearing and child-rearing meanings, purposes, practices, and social goods—are not declared “unfactual” but rather become simply irrelevant.¹⁴⁵

This strategy has two fatal defects. First, although the dissenting opinion’s list of “the constitutionally significant attributes of marriage identified by the [United States] Supreme Court”¹⁴⁶ fits the close personal relationship model, it is far too short; the United States Supreme Court has more accurately described marriage than Judge Kline would have one believe.¹⁴⁷

143. *Id.* at 740.

144. *Id.* at 748 (emphasis added).

145. Judge Kline seems to grasp that a judge’s power over facts is constrained, unlike her power to determine relevancy and irrelevancy. Professor Linda McClain seems to move toward a similar strategy in her recent book, *The Place of Families*. See MCCLAIN, *supra* note 63, at 21–22.

146. *In re Marriage Cases*, 49 Cal. Rptr. 3d at 748 (Kline, J., concurring in part and dissenting in part).

147. See, e.g., *Lehr v. Robertson*, 463 U.S. 248, 256–57 (1983) (“The institution of marriage has played a critical role both in defining the legal entitlements of family members and in developing the decentralized structure of our democratic society. . . . [A]s part of their general overarching concern for serving the best interests of children, state laws almost universally express an appropriate preference for the formal family.”); *Quillion v. Walcott*, 434 U.S. 246, 256 (1978) (“[L]egal custody of children is, of course, a central aspect of the marital relationship, and even a father whose marriage has been broken apart will have borne full responsibility for the rearing of his children during the period of the marriage,” with his marriage thus reflecting his “commitment to the welfare of the child.”); *Zablocki v. Redhail*, 434 U.S. 374, 397 (1978) (Powell, J., concurring in judgment) (“On several occasions, the Court has acknowledged the importance of the marriage relationship to the maintenance of values essential to organized society.”); *Smith v. Org. of Foster Families for Equal. & Reform*, 431 U.S. 816, 843–44 (1977) (“The basic foundation of the family in our society [is] the marriage relationship [and] . . . its importance has been strongly emphasized in our cases. . . . Thus the importance of

Second, fundamental principles of constitutional jurisprudence make the supposedly “irrelevant” attributes of the marriage institution highly relevant. This Article focuses on the second defect.

In subjecting man-woman marriage to constitutional scrutiny, an initial premise must necessarily be that the relevant equality, liberty, dignity, and privacy rights are individual rights. The broad description of marriage, however, is not advanced to counter abstract notions of equality, liberty, dignity, or privacy. Rather, that description is advanced to give a clear understanding of the scope and power of the societal (and hence governmental) interests at stake in the decision to preserve or jettison the social institution of man-woman marriage.¹⁴⁸ Unless a court is prepared to hold that genderless marriage is an imperative of some absolute right, it must account for important societal interests when making its decision.¹⁴⁹ The constitutional jurisprudence of the United States Supreme Court rationally considers these important societal interests.¹⁵⁰ Certainly, rational constitutional decision making regarding the

the familial relationship, to the individuals involved and to the society, stems from . . . the role it plays in ‘promot[ing] a way of life’ through the instruction of children . . .”) (quoting *Wisconsin v. Yoder*, 406 U.S. 205, 231–33 (1972)); *Poe v. Ullman*, 367 U.S. 497, 546 (1961) (Harlan, J., dissenting) (“The laws regarding marriage which provide both when the sexual powers may be used and the legal and societal context in which children are born and brought up, as well as laws forbidding adultery, fornication and homosexual practices which express the negative of the proposition, confining sexuality to lawful marriage, form a pattern so deeply pressed into the substance of our social life that any Constitutional doctrine in this area must build upon that basis.”); *Williams v. North Carolina*, 317 U.S. 287, 298 (1942) (“The marriage relation creates problems of large social importance. Protection of offspring, property interests, and the enforcement of marital responsibilities are but a few of [the] commanding problems . . .”).

148. The constitutional equation seeks to value and appropriately accommodate both individual rights and societal (governmental) interests—a task that is particularly crucial relative to marriage and family. “As family law scholars observe, there are two sometimes conflicting vantage points from which to regard families: one looks at the individual’s interest in family life, the other at society’s interest in the family (and in marriage) as social institutions.” MCCLEIN, *supra* note 63, at 22; see also HAFEN, *supra* note 7, at 469.

149. See Stephen E. Gottlieb, *The Paradox of Balancing Significant Interests*, 45 HASTINGS L.J. 825, 828, 866 (1994); Roscoe Pound, *A Survey of Social Interests*, 57 HARV. L. REV. 1, 3–4 (1943).

150. See, e.g., *Grutter v. Bollinger*, 539 U.S. 306 (2003) (holding that although classifications based on race and ethnic origins are suspect and therefore subject to strict scrutiny, governmental interests in attaining a diverse student body at the university level are sufficiently compelling to render the university’s “affirmative action” program constitutional).

scope of personal rights requires a clear understanding and fair measurement of the societal interests at stake. As seen more fully below, in marriage cases that understanding is provided by the social institutional argument.¹⁵¹ The strategy employed by Judge Kline's dissenting opinion in the California Court of Appeal, however, obscures that understanding and thereby improperly refuses to measure societal interests.¹⁵²

In short, regarding the fact question "What is marriage?", the evidence decidedly favors the broad description. Much but not all of the narrow description—that is, the close personal relationship model of marriage—is factually accurate, and to that extent is encompassed by the broad description. The narrow description, however, errs in insisting that it is a complete description. The additional facts recognized by the broad description do not merely portray past relics; they reflect important features of the contemporary American marriage institution. The probative evidence sustains the accuracy of those additional descriptions: from those encompassing the institution's functions relative to child-bearing and child-rearing, to the statuses, identities, and projects of "wife" and "husband," to negotiation of the male-female divide, and to rational valuation of various forms of intimate, adult conduct and relations. That is not to say that the additional meanings, purposes, and practices seen in the broad description are universally shared, only that they are shared sufficiently widely in every state and across the nation that they continue to be institutionalized and therefore productive in fact of valuable social goods. In excluding those additional descriptions, the narrow description is profoundly misleading and supplies a quicksand foundation for constitutional analysis and adjudication.

The Article next examines the relevance of continuing institutionalization for constitutional analysis and adjudication.

151. See *infra* Part II.C.2.c.

152. The dissenting opinion in the California Court of Appeal rather clearly refuses to credit, and criticizes the majority opinion for crediting, the many attributes, meanings, norms, practices, and social goods inhering in the man-woman marriage institution and extending beyond what the close personal relationship model allows. See *In re Marriage Cases*, 49 Cal. Rptr. 3d 675, 736–49 (Ct. App. 2006) (Kline, J., concurring in part and dissenting in part); see also Stewart, *Washington and California*, *supra* note 5, at 530–31.

2. *Social institutional realities*a. *The “no-downside” argument, or “what’s the harm?”*

As noted earlier, the “no-downside” argument concedes (or, more often, ignores) the factual accuracy of the broad description of contemporary American marriage. According to this argument, our society should nevertheless allow same-sex couples to enter into marriage because doing so will benefit them and any children they raise socially, psychologically, and economically without harming the institution: man-woman couples will still marry at the same rate and still raise their children equally well.¹⁵³ “The argument’s conclusion is that it is irrational not to ‘open’ marriage to same-sex couples where there is no downside and such substantial upside.”¹⁵⁴

Social institutional realities, as set forth above,¹⁵⁵ point to a very different conclusion. It is sufficient to note that the currently institutionalized man-woman meaning produces unique and valuable social goods, that the law has the power to suppress that meaning and thereby eliminate those social goods, and that a society can have, at any one time, only one social institution denominated “marriage” (either genderless or man-woman). Officially recognizing genderless marriage, and thereby deinstitutionalizing man-woman marriage, will first diminish and then largely eliminate the latter institution’s valuable and unique social goods. It is quite wrong to say, therefore, that such a change has no downside. Those attracted to the close personal relationship model of marriage may denigrate the value of those social goods uniquely produced by the man-woman marriage institution, most of which, after all, are child-centered and child-protective and not much concerned with the “individualization” of adult personal life. Nonetheless, society’s interests in those endangered social goods are compelling, implicating as they do the quality of society’s practices of self-perpetuation. The nearly universal reality of the man-woman marriage institution—that is, its presence in nearly all cultures across nearly all times since pre-history—qualifies as evidence strongly probative of that conclusion of compelling societal interests.

153. Examples of the “no-downside” argument in judicial opinions are collected in Stewart, *Redefinition*, *supra* note 5, at 35–36; Stewart, *Washington and California*, *supra* note 5, at 519–25.

154. Stewart, *Redefinition*, *supra* note 5, at 36.

155. See *supra* text accompanying notes 18–56.

b. The optimal child-rearing mode

As previously discussed, man-woman marriage is the indispensable foundation for married mother-father child-rearing, the child-rearing mode that indisputably correlates with the optimal outcomes deemed crucial for a child's and society's well-being.¹⁵⁶ Genderless marriage proponents present evidence that the outcomes for same-sex couple child-rearing are just as good as those for married mother-father child-rearing.¹⁵⁷ The evidence is introduced to show that the particular social good just carefully described is *not* the product of the institutionalized man-woman meaning but of other factors—primarily two caring adults in a committed, loving relationship, serving as parents to the child; that to redefine marriage will thus not result in loss of this important social good; and that, indeed, to redefine marriage will maximize this social good by sustaining the relationship of the many same-sex couples engaged in child-rearing.¹⁵⁸

The proffered evidence, however, is swimming upstream against an ever-stronger current of social science findings and is doing so unaided by conclusions from studies meeting usual standards for scientific validity. Regarding that ever stronger current, rigorous social science studies have ever more firmly established that family form matters and that children receive maximum private welfare when they are raised by a married mother and father in a low-conflict marriage.¹⁵⁹ The measures of private welfare in such studies encompass physical, mental, and emotional health and development, academic performance and levels of attainment, and avoidance of crime and other forms of destructive behavior such as drug abuse and high-risk

156. See *supra* text accompanying note 26.

157. See *supra* notes 73–74 and accompanying text.

158. Another purpose is to affirm the equal capacity of gay men and lesbians to perform a socially valued task—child-rearing—as part of a larger project to enhance social acceptance and self-regard.

159. See, e.g., THE WITHERSPOON INST., *supra* note 27, at 21–43; INST. FOR AM. VALUES, RESEARCH BRIEF. NO. 1, FAMILY STRUCTURE AND CHILDREN'S EDUCATIONAL OUTCOMES (2005); Paul R. Amato, *The Impact of Family Formation Change on the Cognitive, Social, and Emotional Well-Being of the Next Generation*, 15 FUTURE OF CHILD. 75 (2005); see also LORRAINE BLACKMAN ET AL., INST. FOR AM. VALUES, CONSEQUENCES OF MARRIAGE FOR AFRICAN AMERICANS: A COMPREHENSIVE LITERATURE REVIEW 4–5 (2005); William C. Duncan, *The Social Good of Marriage and Legal Responses to Non-Marital Cohabitation*, 82 OR. L. REV. 1001 (2003).

sexual conduct.¹⁶⁰ These studies compare married mother-father child-rearing with virtually all other long-present (and therefore adequately studied) modes of child-rearing.¹⁶¹ This evidence has troubled many in the academy who believe that all family forms are normatively equal. Although this discomfort has caused some to downplay in various ways the mounting evidence indicating the superiority of man-woman marriage, all such attempts have proven unsuccessful.¹⁶²

The assertion that same-sex couples have equal child-rearing success lacks support from studies meeting usual standards for scientific validity. A related difficulty is the paucity of studies related to child-rearing by two gay men; most of the studies of same-sex couple child-rearing only examine outcomes for the mother-lesbian partner mode. These studies are sometimes referred to as the “no differences” studies, because they conclude that same-sex couple child-rearing outcomes do not fall below the optimal outcomes of the married mother-father mode. In 2001, the University of Virginia’s Steven Nock filed an affidavit in a Canadian court setting forth the threshold methodological requirements for a study’s conclusions to be considered scientifically reliable.¹⁶³ He found that none of the “no differences” studies met these “good-science requirements.”¹⁶⁴ Nor have any of the “no differences”

160. See *supra* note 159 and accompanying text.

161. See *id.*

162. See NORVAL GLENN & THOMAS SYLVESTER, *THE DENIAL: DOWNPLAYING THE CONSEQUENCES OF FAMILY STRUCTURE FOR CHILDREN*, INST. FOR AM. VALUES (2005), available at <http://www.family scholarslibrary.org/content/readingrooms/denial>. Although the correlations showing married mother-father child-rearing as the optimal mode are uncontroversial (except presently relative to same-sex couple child-rearing), inferences regarding causation and reasons are not; that is because of the difficulties of controlling for a rather long list of possible variables besides just the basic structure of the respective modes. But because the correlations established between various child-rearing modes and favorable outcomes (for two examples, high academic achievement and low crime) show the married mother-father mode as optimal, policy makers rationally can, with due caution, infer causation and, in turn, rationally privilege man-woman marriage.

163. Affidavit of Steven Lowell Nock, *Halpern v. Attorney General*, Ontario Superior Court of Justice, File 684/00, available at http://www.marriagewatch.org/Law/cases/Canada/ontario/halpern/aff_nock.pdf.

164. *Id.* Leading, qualified proponents of genderless marriage have acknowledged the validity of the good-science requirements, and also the validity of Professor Nock’s conclusion regarding the failure of the “no differences” studies. See William Meezan & Jonathan Rauch, *Gay Marriage, Same-Sex Parenting, and America’s Children*, 15 *FUTURE OF CHILD* 97, 104 (2005) (“We do not know how the normative child in a same-sex family compares with other children. . . . Those who say

studies published since Professor Nock filed his affidavit in 2001 met the good-science requirements.¹⁶⁵

These shortcomings, however, have not prevented several professional organizations from formally opining that no differences in outcomes exist between the married mother-father child-rearing mode and the same-sex couple child-rearing mode. These organizations include the American Academy of Pediatrics,¹⁶⁶ the American Psychiatric Association,¹⁶⁷ the American Psychological Association,¹⁶⁸ and the American Academy of Child and Adolescent Psychiatry.¹⁶⁹ The prestige of professional organizations, however, cannot alter the deficiencies of the studies on which their endorsements are based.

The problematic nature of the “no differences” studies and, therefore, of the associations’ endorsements, was illustrated in the only state appellate court decision to mandate genderless marriage, Massachusetts’s *Goodridge* decision.¹⁷⁰ Although the “no differences” argument was fully briefed,¹⁷¹ the four justices mandating genderless marriage did not write one word about it. In contrast, the three justices opposing the mandate wrote:

Conspicuously absent from the court’s opinion today is any acknowledgment that the attempts at scientific study of the ramifications of raising children in same-sex couple households are themselves in their infancy and have so far pro-

the evidence falls short of showing that same-sex parenting is equivalent to opposite-sex parenting (or better, or worse) are . . . right.”); Judith Stacey & Timothy J. Biblarz, (*How*) *Does the Sexual Orientation of Parents Matter?*, 66 AM. SOC. REV. 159, 166 (2001).

165. See Declaration of Alan J. Hawkins as Expert Witness for Defendant at 8–9, *Varnum v. Brien*, No. CV 5965 (Iowa Dist. Ct. Mar. 15, 2007), available at http://manwomanmarriage.org/jrm/pdf/Alan_Hawkins.pdf.

166. Am. Acad. of Pediatrics, *Coparent or Second-Parent Adoption by Same-Sex Parents*, 109 PEDIATRICS 339 (2002), available at <http://aappolicy.aappublications.org/cgi/reprint/pediatrics;109/2/339.pdf>.

167. AM. PSYCHIATRIC ASS’N, APA DOC. REF. NO. 200214, ADOPTION AND CO-PARENTING OF CHILDREN BY SAME-SEX COUPLES POSITION STATEMENT 1, (2002), available at <http://www.psych.org/edu/other-res/lib-archives/archives/200214.pdf>.

168. AM. PSYCHOLOGICAL ASS’N, RESOLUTION ON SEXUAL ORIENTATION, PARENTS AND CHILDREN (2004), available at <http://www.apa.org/pi/lgbc/policy/parentschildren.pdf>.

169. See AM. ACAD. OF CHILD AND ADOLESCENT PSYCHIATRY, GAY, LESBIAN, AND BISEXUAL PARENTS POLICY STATEMENT (1999), http://www.aacap.org/cs/root/policy_statements/gay_lesbian_and_bisexual_parents_policy_statement.

170. *Goodridge v. Dep’t of Pub. Health*, 798 N.E.2d 941 (Mass. 2003).

171. *Id.* at 979–80 (Sosman, J., dissenting).

duced inconclusive and conflicting results . . . [S]tudies to date reveal that there are still some observable differences between children raised by opposite-sex couples and children raised by same-sex couples . . . Interpretation of the data gathered by those studies then becomes clouded by the personal and political beliefs of the investigators, both as to whether the differences identified are positive or negative, and as to the untested explanations of what might account for those differences. (This is hardly the first time in history that the ostensible steel of the scientific method has melted and buckled under the intense heat of political and religious passions.) Even in the absence of bias or political agenda behind the various studies of children raised by same-sex couples, the most neutral and strict application of scientific principles to this field would be constrained by the limited period of observation that has been available. Gay and lesbian couples living together openly, and official recognition of them as their children's sole parents, comprise a very recent phenomenon, and the recency of that phenomenon has not yet permitted any study of how those children fare as adults and at best minimal study of how they fare during their adolescent years. The Legislature can rationally view the state of the scientific evidence as unsettled on the critical question it now faces: are families headed by same-sex parents equally successful in rearing children from infancy to adulthood as families headed by parents of opposite sexes? Our belief that children raised by same-sex couples *should* fare the same as children raised in traditional families is just that: a passionately held but utterly untested belief. The Legislature is not required to share that belief but may . . . wish to see the proof before making a fundamental alteration to [the marriage] institution.¹⁷²

More than four years later, this still remains the best factual and legal analysis of the "no differences" debate. The *Goodridge* dissent's analysis effectively counters the "no-differences" position with the following marriage fact: there is insufficient evidence that any other mode can or will achieve the optimal outcomes associated with the married mother-father child-rearing mode.

172. *Id.*

c. *The "large differences" and the "law's power" marriage facts*

A key marriage fact demonstrated by proponents of man-woman marriage is that the proposed genderless marriage institution differs radically from the old institution.¹⁷³ This can be called the "large differences" fact. In response, genderless marriage proponents offer little or nothing in the way of direct engagement.¹⁷⁴ They have, however, linked the "large differences" fact question with the "law's power" fact: that is, the law's power to suppress the man-woman meaning and, thus, the law's power to deinstitutionalize man-woman marriage.

That link appears rather starkly in the two Canadian and one American appellate court opinions mandating genderless marriage.¹⁷⁵ The authors of these three opinions had before them the "large differences" fact.¹⁷⁶ Moreover, the three courts acknowledged the large change their mandates would effect in the public meaning of marriage.¹⁷⁷ Contrary to the courts' assessment of "profound" and "significant" change of meaning is the same courts' contention that genderless marriage decisions do not and will not change the institution of marriage.¹⁷⁸ Thus, the *Goodridge* plurality opinion asserts that its redefining mandate "does not disturb the fundamental value of marriage in our society."¹⁷⁹ *EGALE* and *Halpern* manifest a similar view.¹⁸⁰

173. See *supra* notes 35–40 and accompanying text. Man-woman marriage proponents base their assertion on two arguments: (1) different institutionalized meanings intend and sustain different social selves; and (2) the genderless marriage institution cannot provide a number of social goods uniquely provided by man-woman marriage and, indeed, will effectively preclude some of them. See Stewart, *Judicial Elision*, *supra* note 5, at 15–24.

174. Genderless marriage proponents' presentations of the narrow description of contemporary marriage and of the "no differences" assertion regarding child-rearing are a form of indirect engagement. The absence of direct engagement may be because observers of marriage who are both rigorous and well-informed regarding the realities of social institutions (including some genderless marriage proponents) uniformly acknowledge the magnitude of the differences between the two possible institutions of marriage. See *supra* note 40 and accompanying text.

175. See *Goodridge*, 798 N.E.2d at 941; *Halpern v. Canada*, [2003] 172 O.A.C. 276 (Ont. Ct. App.); *EGALE Canada Inc. v. Canada (Attorney General)*, [2003] 13 B.C.L.R. (4th) 1 (B.C. Ct. App.). The Quebec Court of Appeal also mandated genderless marriage but did so on grounds akin to the doctrine of collateral estoppel. *Hendricks v. Quebec (Attorney General)*, [2004] 238 D.L.R. (4th) 577 (Que. C.A.).

176. See Stewart, *Redefinition*, *supra* note 5, at 77–78.

177. *Id.*

178. *Id.*

179. 798 N.E.2d at 965.

A troubling inconsistency plagues this judicial analysis. The *EGALE*, *Halpern*, and *Goodridge* courts all proceeded with a full awareness of the social institutional nature of marriage.¹⁸¹ As noted, they also repeatedly acknowledged the large change the courts' mandates must effect in the public meaning of marriage. Furthermore, the opinions never deny that marriage, like all social institutions, is constituted by widely shared public meanings.¹⁸² All this means that the opinions' assertions of "no change" to the institution of marriage are plainly contradicted by uncontroversial social institutional realities:

Social institutions are constituted by—are nothing other than, if you will—shared public meanings. To change those meanings is to change the institution, including the quantity and quality of its social goods. To change those meanings radically is to deinstitutionalize the old institution (and thereby lose its social goods) and to replace it with a new one.¹⁸³

In short, the opinions' factual assertion of no institutional change lacks evidentiary support.¹⁸⁴

The *EGALE*, *Halpern*, and *Goodridge* courts acknowledged the law's strong "educative" (or "expressive") function and made that function a lynchpin of many of their arguments.¹⁸⁵ Yet the acknowledged educative function of law reinforces the lessons of social institutional studies showing that law has a purpose and a power to preserve or change public meanings and thus social institutions.¹⁸⁶ The social institution of marriage, in par-

180. See *Halpern v. Canada*, [2003] 172 O.A.C. 276, 304, ¶¶ 133–34 (Ont. Ct. App.).

181. Indeed, the plurality opinion in *Goodridge* begins: "Marriage is a vital social institution." 798 N.E. 2d at 948. The opinions in that case then go on to refer to "institution" in the context of marriage over 80 times. *Halpern* has more than 40 such references; *EGALE* has more than 35.

182. See BLANKENHORN, *supra* note 28, at 139. With respect to the importance of "marriage's public meaning . . . for people interested in institutions and social change, public meaning is everything. All the rest flows from it." *Id.*

183. Stewart, *Judicial Elision*, *supra* note 5, at 35.

184. For a critique of the evidence advanced in *Halpern* and *Goodridge* to support their "no change" conclusion, see *id.* at 35–36.

185. See, e.g., *Goodridge*, 798 N.E.2d at 962; *Halpern v. Canada*, [2003] 172 O.A.C. 276, 298, ¶ 94 (Ont. Ct. App.).

186. *Lewis v. Harris*, 875 A.2d 259, 278 (N.J. Super. Ct. App. Div. 2005) (Parrillo, J., concurring) (citing Monte Neil Stewart, *Judicial Redefinition of Marriage*, 21 CAN. J. FAM. L. 80 (2004)).

ticular, is open to fundamental change resulting from a profound legal redefinition of marriage. The *EGALE*, *Halpern*, and *Goodridge* courts manifested a readiness to acknowledge law's educative and hence society-changing power when some preferred value was, in their view, being advanced, but stubbornly refused to acknowledge that same power when its use places the goods of man-woman marriage at risk. The law, however, cannot be both potent and impotent in the very same endeavor.¹⁸⁷ The fundamental inconsistency of approach to the law's institution-changing power exhibited in these three cases is intellectually indefensible.

d. Child welfare

Its proponents assert, as a marriage fact, that the man-woman marriage institution is the best arrangement for children. They support this fact with references to the institution's child-centered and child-protective nature as seen in a number of its unique social goods. Genderless marriage proponents also advance, as a marriage fact, that their model is the best arrangement for children. They support this fact with references to the increased health, wealth, and achievement enjoyed by children in married households—benefits denied to the not insignificant number of children in the United States who are being raised by same-sex couples. Genderless marriage proponents proffer these facts in support of the proposition that government will advance child welfare by giving those children and their two adult caregivers access to the marriage institution.

This particular battle of marriage facts is particularly hard fought because child welfare is probably the ultimate emotional and moral high ground, and the side that captures it may well prevail. In any event, there is a disturbing deficiency in the genderless marriage proponents' approach to the question of child welfare. As shown below, government has two different child welfare endeavors. Genderless marriage proponents evade one of those endeavors and ignore difficulties relative to child welfare inhering in the close personal relationship model of marriage.

187. For a strong rejection of the "impotent law" argument by a leading scholar on historical and contemporary marriage in America, see Nancy F. Cott, *The Power of Government in Marriage*, 11 *THE GOOD SOCIETY* 88 (2002).

As already discussed, a number of the unique social goods provided by the institutionalized man-woman meaning—which would almost certainly be lost if that meaning were deinstitutionalized—focus on the welfare of children.¹⁸⁸ For this reason, man-woman marriage is often understood (and accurately so) as primarily a child-centered and child-protective institution. Thus, government efforts to preserve that institution are child welfare endeavors. In contemporary America, government preserves the institution of marriage in large part by using the law to validate the core, constitutive man-woman meaning, thereby perpetuating the social goods associated with that meaning. But government also engages in another child welfare endeavor: providing public assistance in various forms (through protective laws, access to resources, material resources themselves, and so on) to individual children or their caregivers.

Reflection suggests that these two different governmental child welfare endeavors are just that, different. The former entails the protection, sustenance, and perpetuation of a social institution because that institution is good for children generally through the generations; the latter entails the present provision to each child, regardless of the child's circumstances, of those resources that society deems minimally due to every child. By engaging in both endeavors simultaneously, government attempts to maximize the well-being of all children, both those now among us and those of future generations.

Genderless marriage proponents, however, ignore the institutionally protective nature of the first endeavor, which seeks to preserve the man-woman meaning. Genderless marriage proponents allude to the second endeavor, which seeks to provide at least minimal resources to every child, to cultivate an ethos of government-assured equality of circumstances for all children. In doing so they seek to persuade society that, for the sake of all children, it must embrace genderless marriage.

The phenomenon just described looms particularly large in the opinions of American appellate judges favoring genderless marriage.¹⁸⁹ In *Goodridge*, for example, Massachusetts pled for the preservation of man-woman marriage by pointing to its

188. See *supra* Part II.A.

189. See Stewart, *Judicial Elision*, *supra* note 5, at 37–38; Stewart, *New York*, *supra* note 5, at 251–53; and Stewart, *Washington and California*, *supra* note 5, at 525–36.

status as the optimal child-rearing mode. The plurality opinion studiously avoided disputing the reality of that social good. The opinion instead shifted the asserted state interest from protecting the optimal child-rearing mode (man-woman marriage) to “[p]rotecting the welfare of children.”¹⁹⁰ On that basis, the opinion argued that limiting marriage to opposite-sex couples would not promote the present welfare of all children, that it is contrary to the Commonwealth’s policy and practice of helping children whatever their family situation, and that it “penalize[s] children by depriving them of State benefits because the State disapproves of their parents’ sexual orientation.”¹⁹¹

Judicial opinions of this sort demonstrate how those who favor genderless marriage ignore an important aspect of “child welfare” in order to achieve their objective. They ignore the following reality: To mandate genderless marriage and thereby deinstitutionalize man-woman marriage is to thwart the first of the two government child welfare endeavors—protection, sustenance, and perpetuation of a social institution demonstrably beneficial for the vast majority of our children, now and through the generations. They further ignore that the law is impotent to usher same-sex couples and their children into the child-centered and child-protective social institution of man-woman marriage,¹⁹² although the law’s power is certainly sufficient to deinstitutionalize it.¹⁹³ Also ignored is the reality that to legally redefine marriage, especially in the name of “constitutional” law, is to create a radically different social institution with no track record relative to child-rearing and then to usher into that institution *all* the children of *all* married couples, both same-sex and man-woman.¹⁹⁴

There are good reasons to believe that genderless marriage, by the very nature of its core constitutive meanings, is an adult-centered, adult-promoting institution that is unlikely to sustain those practices most beneficial to children. One such reason is that genderless marriage is premised on, and infused with, the

190. *Goodridge*, 798 N.E.2d at 962.

191. *Id.* at 964.

192. See Stewart, *Redefinition*, *supra* note 5, at 83–85.

193. See *supra* notes 175–87 and accompanying text.

194. See Stewart, *Redefinition*, *supra* note 5, at 85; Stewart, *Judicial Elision*, *supra* note 5, at 46–49, 52 n.137.

ideology of the close personal relationship model,¹⁹⁵ which is preeminently about adult desires and interests.¹⁹⁶

All of this suggests two deficiencies in the “child welfare” argument made by genderless marriage proponents. First, the argument ignores the institutionally protective nature of a vital government child welfare endeavor. Moreover, when that endeavor calls for continuing legal support for, rather than legal suppression of, the man-woman meaning at the core of the child-centered and child-protective marriage institution, the argument disparages that institutionalized meaning as an expression of animus. Second, the child welfare argument would have government create and perpetuate the genderless marriage institution, which is legally and socially premised on a model of marriage ill-suited for—indeed, inimical to—the successful fulfillment of society’s child-bearing and child-rearing endeavors. The irony in such an argument is inescapable and tragic.

3. *Religion, law, and the singularity of the marriage institution*

Competing marriage facts are also at the center of another important element of the debate over marriage: the singularity, or not, of the marriage institution. Genderless marriage proponents argue that civil marriage and religious marriage are two separate and distinct phenomena in our society,¹⁹⁷ that the state creates civil marriage by law,¹⁹⁸ and that religion is the source

195. In fact, every American appellate court judge who has ruled in favor of genderless marriage has also adopted the close personal relationship model. See Stewart, *Washington and California*, *supra* note 5, at 527–28; Stewart, *New York*, *supra* note 5, at 246–47. In addition, that connection is also evident in the larger social-cultural sphere. See *supra* notes 110–18 and accompanying text.

196. To repeat Professor Cherlin’s conclusions: the close personal relationship model describes “an intimate partnership entered into for its own sake, which lasts only as long as both partners are satisfied with the rewards (mostly intimacy and love) that they get from it.” Cherlin, *supra* note 106, at 853. “The pure relationship is not tied . . . to the desire to raise children,” *id.*, and scholarly “attempts to incorporate children into the pure relationship are unconvincing,” *id.* at 858.

197. *E.g.*, Brief for Religious Organizations as Amici Curiae Supporting Plaintiffs-Appellants at 10–13, *Samuels v. Dep’t of Pub. Health*, 811 N.Y.S.2d 136 (App. Div. 2006), available at http://www.aclu.org/FilesPDFs/samuels_religious.pdf; see DeCoste, *Leviathan*, *supra* note 5, at 1102–03.

198. See, *e.g.*, *Goodridge v. Dep’t of Pub. Health*, 798 N.E.2d 941, 954 (Mass. 2003) (“We begin by considering the nature of civil marriage itself. Simply put, the government creates civil marriage. . . . [C]ivil marriage is . . . precisely what its name implies: a wholly secular institution.”); *Hernandez v. Robles*, 805 N.Y.S.2d 354, 377 (App. Div. 2005) (Saxe, J., dissenting) (“Civil marriage is an institution

of the man-woman meaning found in civil marriage.¹⁹⁹ They also contend that for civil marriage to enshrine that meaning violates the Establishment Clause,²⁰⁰ and that after civil marriage is purged of that religiously-based meaning, religious marriage can continue to exist in its own limited sphere.²⁰¹

These assertions overlook the singularity of our society's marriage institution; they postulate two separate and different kinds of marriage ("civil" and "religious") and identify the law as the creator of the former. These assertions, however, simply cannot overcome one uncontroversial fact: man-woman marriage is an ancient and nearly universal human social institution.²⁰² The institution's antiquity—it pre-dates governments and positive law—is particularly devastating for the notion that the law creates marriage. As John Locke noted, the institution's antiquity means that it is one of those "forms of social order the existence of which are independent of the state" because it originated before the state.²⁰³ Although there is an ongoing debate about when the law—whether secular or ecclesiastical—began interacting with the marriage institution,²⁰⁴ histories of Western marriage illuminate the institution's pre-political nature.²⁰⁵ In light of that reality, it is fair to conclude that

created by the state"); *Andersen v. King County*, 138 P.3d 963, 1018 (Wash. 2006) (Fairhurst, J., dissenting) ("[T]he exclusionary language [that is, a man-woman meaning] . . . does not lend the institution of marriage its power. Rather, marriage draws its strength from the nature of the civil marriage contract itself and the recognition of that contract by the State."); *id.* at 1034 (Bridge, J., dissenting) ("Civil marriage is a state-conferred legal status, the existence of which gives rise to benefits and burdens reserved exclusively to the citizens engaged in the marital relationship."); *see also* DeCoste, *Leviathan*, *supra* note 5, at 1102–04; Stewart, *New York*, *supra* note 5, at 243–46; Stewart, *Washington and California*, *supra* note 5, at 536.

199. *See* Stewart, *Washington and California*, *supra* note 5, at 537–38.

200. *E.g.*, *Andersen v. King County*, 138 P.3d 963, 1027–28, 1035 (Wash. 2006) (Bridge, J., dissenting) ("To ban gay civil marriage because some . . . religions disfavor it, reflects an impermissible State religious establishment. . . . The impugned man-woman marriage law reflects a *religious* viewpoint [and that] *religious* doctrine should not govern state regulation of *civil* marriage.") (internal quotation marks omitted).

201. *See, e.g.*, *supra* note 197.

202. For a discussion of the antiquity of the marriage institution, *see* BLANKENHORN, *supra* note 28, at 9. For a discussion of its universality, *see id.* at 105–06.

203. *See* SUGRUE, *supra* note 49, at 176.

204. *See, e.g.*, BLANKENHORN, *supra* note 28, at 123–24.

205. *See, e.g.*, DeCoste, *Leviathan*, *supra* note 5, at 1113.

marriage law no more “creates” the marriage institution than the Rule Against Perpetuities “creates” dirt.²⁰⁶

Moreover, although the marriage institution interacts with other social institutions—such as the law, private property, and religion—and thereby takes from each a certain hue,²⁰⁷ social institutional studies depict marriage as meaningfully distinct from those institutions.²⁰⁸ For example, Professor Clayton identifies “at least five basic institutions”: (1) education; (2) economics, which in our society encompasses private property, money, and markets; (3) government, which encompasses the law; (4) family, which encompasses man-woman marriage; and (5) religion.²⁰⁹

The import of these realities for the “law as giver of institutional life” proffer is clear. That proffer says that “civil marriage” is wholly a legal construct; that marriage, as experienced in our society, is something that the law gives to people; and that, therefore, marriage is something that, without the law, people would not have in any living or meaningful way. But that proffer cannot be taken seriously, except by those who ignore the man-woman marriage institution’s pre-political origins and development, as well as the law’s actual role relative to the institution—not as “creator” but as “facilitator.”²¹⁰ The genderless marriage proponents’ reason for eliding those realities is probably linked to a

206. See Richard W. Garnett, *Taking Pierce Seriously: The Family, Religious Education, and Harm to Children*, 76 NOTRE DAME L. REV. 109, 114 n.29 (2000).

207. It is a commonplace that, although marriage interacts with other important social institutions, it remains meaningfully distinct from them. See, e.g., Celia Kitzinger & Sue Wilkinson, *The Re-branding of Marriage: Why We Got Married Instead of Registering a Civil Partnership*, 14 FEMINISM & PSYCHOL. 127, 132 (2004) (“Marriage is a lynchpin of social organization: its laws and customs interface with almost every sphere of social interaction.”); Sullivan, *supra* note 20, at 173 (“[T]he realm of civil society is itself deeply interconnected with market and state, both through the market processes that sustain the lives of families, organizations, and associations of all kinds and by the state in the form of law, regulation, and direct subsidy.”).

208. See, e.g., SEARLE, *supra* note 48, at 32. In David Blankenhorn’s words:

No one denies that property and social status (and many other big realities as well) affect all spheres of human social life, from education to medicine to, yes, marriage. *But what affects something is different from the thing itself.* For almost all of humanity, marriage has always and in all places been “really” about the male-female sexual bond and the children that result from that bond.

BLANKENHORN, *supra* note 28, at 55 (emphasis added).

209. CLAYTON, *supra* note 20, at 22.

210. See *supra* note 50 and accompanying text.

strategy to make marriage appear to be an appropriate object of legal—that is to say, judicial—alteration, no matter how radical.

Just as man-woman marriage's antiquity is a troublesome problem for the "law as giver of institutional life" view, so the institution's universality does much to falsify the notion that religion is the source of the man-woman meaning. Because the man-woman meaning is found across nearly all societies since pre-history, "religion" can be its source only if religion has been omnipresent in all societies since pre-history *and* has universally preached that meaning *and* with that preaching was not merely reinforcing an already existing social reality but initiating it. No secular authorities sustain those three requisites, and, indeed, the literature consistently rebuts all three.²¹¹

In sum, the probative evidence falsifies those marriage facts that reject the singularity of our society's marriage institution. Chief among those falsified facts are two notions: first, that the law is the creator of a separate institution called "civil marriage" rather than a facilitator of a singular marriage institution; and, second, that religion is the source and sole perpetuator of the man-woman meaning constitutive of that institution.

II. THE FACTS OF MARRIAGE AND THE STANDARD OF REVIEW

The most contentious legal question relative to the marriage issue has been the standard of review—rational basis, heightened (but not strict) scrutiny, or strict scrutiny.²¹² Some have

211. For a rejection of the idea that religion is the source of the man-woman meaning of marriage, see BLANKENHORN, *supra* note 28, at 159–60.

212. The rational basis standard of review requires a judge to sustain a law (or other form of state action) against constitutional challenge if there is any conceivable basis which might support it; "empirical support is not even necessary." *Nguyen v. INS*, 533 U.S. 53, 76 (2001) (O'Connor, J., dissenting). Moreover, "[t]he burden is on the one attacking the legislative arrangement to negative every conceivable basis which might support it, whether or not the basis has a foundation in the record." *Id.* at 75 (internal quotation marks omitted). Under heightened scrutiny, a state seeking "to defend a statute . . . must carry the burden of showing an exceedingly persuasive justification" and can meet this burden "only by showing at least that the classification serves important governmental objectives and that the . . . means employed are substantially related to the achievement of those objectives." *Id.* at 74–75 (internal quotation marks omitted). Under strict scrutiny, the government has the burden of proving that the challenged law "[is] narrowly tailored . . . [to] further [a] compelling governmental interest." *Johnson v. California*, 543 U.S. 499, 505 (2005) (internal quotation marks omitted). The concept of

posited that if judges would consistently adopt and apply strict scrutiny, or perhaps merely heightened scrutiny, then the resulting decisions would necessarily mandate genderless marriage. Although Professor Gunther's description of strict scrutiny as "strict in theory and fatal in fact"²¹³ remains true as a general proposition,²¹⁴ a judge applying strict scrutiny will nevertheless sustain man-woman marriage against all constitutional attacks—if she accepts the factual accuracy of the broad description and the social institutional argument emerging from that description. At the same time, a judge applying the rational basis test will declare man-woman marriage unconstitutional—if he accepts the factual accuracy of the narrow description and the close personal relationship ideology from which that description emerges. The last suggestion is not exceedingly brave; a number of American appellate judges have already done just that.

The man-woman meaning in marriage, the social goods that meaning provides, and the susceptibility to loss of both the meaning and the goods—as described by the broad description of contemporary American marriage and analyzed by the social institutional argument—satisfy strict scrutiny review. Those social goods, especially the ones pertaining to child-bearing, child-rearing, and child welfare, qualify as compelling societal, and thus governmental, interests; "a society without the institution of [man-woman] marriage, in which heterosexual intercourse, procreation, and child care are largely disconnected processes, would be chaotic."²¹⁵ The compelling nature of the societal interests at stake are not diminished by the

narrow tailoring is also expressed in terms of what would be "overinclusive" or "underinclusive." See *Church of the Lukumi Babalu Aye, Inc. v. City of Hialeah*, 508 U.S. 520, 578 (1993) (Blackmun, J., concurring) ("A State may no more create an underinclusive statute, one that fails truly to promote its purported compelling interest, than it may create an overinclusive statute, one that encompasses more protected conduct [or burdens more people] than necessary to achieve its goal.").

213. Gerald Gunther, *In Search of Evolving Doctrine on a Changing Court: A Model for a Newer Equal Protection*, 86 HARV. L. REV. 1, 8 (1972).

214. See, e.g., *McIntyre v. Ohio Elections Comm'n*, 514 U.S. 334, 346–49 (1995); *Richmond v. J. A. Croson Co.*, 488 U.S. 469, 506–08 (1989); *Regents of Univ. of Cal. v. Bakke*, 438 U.S. 265, 298–303 (1978). But see *Adarand Constructors v. Peña*, 515 U.S. 200, 237 (1995) ("Finally, we wish to dispel the notion that strict scrutiny is 'strict in theory, but fatal in fact.'").

215. *Goodridge v. Dep't of Pub. Health*, 798 N.E.2d 941, 996 (Mass. 2003) (Cordy, J., dissenting).

growth of the close personal relationship ideology and the concomitant increase in unmarried cohabitation and births out of wedlock. The interests remain compelling because the social goods derived from man-woman marriage are even more central to societal well-being the scarcer that they become. One of the principal benefits of these social goods is children grown to adulthood blessed with significant increases in educational attainments and in physical, mental, and emotional health,²¹⁶ with a complete sense of who they are and from whom they came,²¹⁷ and not hampered by the consequences of significant incremental increases in criminal conduct and other forms of destructive behavior.²¹⁸ Another benefit is adults secure as “husband” or “wife,”²¹⁹ with all the significant incremental increases in health, happiness, and productivity associated with those statuses.²²⁰

Nor do notions of “overinclusive” and “underinclusive” lead to a conclusion of unconstitutionality.²²¹ That is because society, if it is to have a normative marriage institution, has *only* two choices. Either it will choose genderless marriage or it will choose man-woman marriage. To choose genderless marriage is to cause the loss of the man-woman meaning and therefore the loss of its valuable social goods. Man-woman marriage is neither overinclusive nor underinclusive because, to sustain society’s compelling interests in the perpetuation of the man-woman meaning’s social goods, it *must be only what it is*—the source of institutional power to that meaning.

Through twenty cases,²²² only three American appellate judges have concluded that the constitutionality of man-woman marriage should be decided under the strict scrutiny standard. In voting for the unconstitutionality of man-woman

216. See *supra* notes 159–161 and accompanying text.

217. See *supra* note 25.

218. See *supra* notes 159–161 and accompanying text.

219. See DeCoste, *Transformation*, *supra* note 5, at 625–27.

220. See Blankenhorn, *supra* note 28, at 145; see also INST. FOR AM. VALUES, *supra* note 6; LINDA J. WAITE & MAGGIE GALLAGHER, *THE CASE FOR MARRIAGE: WHY MARRIED PEOPLE ARE HAPPIER, HEALTHIER, AND BETTER OFF FINANCIALLY* (2000).

221. See generally *Church of the Lukumi Babalu Aye, Inc. v. City of Hialeah*, 508 U.S. 520, 578 (1993) (Blackmun, J., concurring) (“A State may no more create an underinclusive statute, one that fails truly to promote its purported compelling interest, than it may create an overinclusive statute, one that encompasses more protected conduct [or burdens more people] than necessary to achieve its goal.”).

222. See *supra* note 4 and accompanying text.

marriage, all of these judges ignored the broad description of marriage and the social institutional argument.²²³ Only two American appellate judges have argued for the application of heightened (but not strict) scrutiny. Although both of these judges ignored the broad description of marriage and the social institutional argument, one said that man-woman marriage could continue if civil unions were provided;²²⁴ the other insisted on genderless marriage.²²⁵ All of the other American appellate judges to address the issue have held either that rational basis review was appropriate,²²⁶ that rational basis review could be applied because man-woman marriage was unconsti-

223. See *Conaway v. Deane*, 2007 WL 2702132, at *51 (Md. Sept. 18, 2007) (Battaglia, J., dissenting); *id.* at *81 (Bell, C.J., dissenting); *Baehr v. Lewin*, 852 P.2d 44 (Haw. 1993); *id.* at 68 (Burns, J., concurring in the judgment).

224. *Baker v. Vermont*, 744 A.2d 864, 889 (Vt. 1999) (Dooley, J., concurring).

225. *Id.* at 898 (Johnson, J., concurring in part and dissenting in part).

226. See *Adams v. Howerton*, 673 F.2d 1036, 1042 (9th Cir. 1980); *Standhardt v. Superior Court*, 77 P.3d 451, 457 (Ariz. Ct. App. 2003); *id.* at 727 (Parilli, J., concurring); *In re Marriage Cases*, 49 Cal. Rptr. 3d 675 (Ct. App. 2006); *Dean v. District of Columbia*, 653 A.2d 307 (D.C. 1995); *id.* at 361 (Terry, J., concurring); *id.* at 362 (Steadman, J., concurring); *Morrison v. Sadler*, 821 N.E.2d 15, 35 (Ind. Ct. App. 2005); *id.* at 36 (Friedlander, J., concurring); *Jones v. Hallahan*, 501 S.W.2d 588 (Ky. Ct. App. 1973); *Conaway v. Deane*, 2007 WL 2702132 (Md. Sept. 18, 2007); *id.* at *40 (Raker, J., concurring in part and dissenting in part); *Goodridge v. Dep't. of Pub. Health*, 798 N.E.2d 941, 974 (Mass. 2003) (Spina, J., dissenting); *id.* at 978 (Sosman, J., dissenting); *id.* at 983 (Cordy, J., dissenting); *Baker v. Nelson*, 191 N.W.2d 185, 187 (Minn. 1971), *appeal dismissed for want of a federal question*, 409 U.S. 810 (1972); *Lewis v. Harris*, 875 A.2d 259, 274 (N.J. Super. Ct. App. Div. 2005); *id.* at 274 (Parrillo, J., concurring); *Hernandez v. Robles*, 7 N.Y.3d 338 (N.Y. 2006); *id.* at 366 (Grafteo, J., concurring); *id.* at 380 (Kaye, C.J., dissenting); *Hernandez v. Robles*, 805 N.Y.S.2d 354 (App. Div. 2005); *id.* at 363 (Catterson, J., concurring); *id.* at 377 (Saxe, J., dissenting); *Seymour v. Holcomb*, 811 N.Y.S.2d 134 (App. Div. 2006); *Kane v. Marsolais*, 808 N.Y.S.2d 566 (App. Div. 2006); *Samuels v. Dep't. of Pub. Health*, 811 N.Y.S.2d 136 (App. Div. 2006); *DeSanto v. Barnsley*, 476 A.2d 952 (Pa. Super. Ct. 1984); *Andersen v. King County*, 138 P.3d 963 (Wash. 2006); *id.* at 991 (Alexander, J., concurring); *id.* at 991 (J. Johnson, J., concurring); *id.* at 1028 (Bridge, J., dissenting); *id.* at 1040 (Chambers, J., dissenting); *id.* at 1012 (Fairhurst, J., dissenting); *Singer v. Hara*, 522 P.2d 1187, 1196 (Wash. Ct. App. 1974), *review denied*, 84 Wash. 2d 1008 (1974).

tutional under even that lenient standard,²²⁷ or did not address the standard of review at all.²²⁸

That history of those twenty cases makes clear two salient points. First, no American appellate judge has yet subjected man-woman marriage to strict scrutiny while simultaneously accepting the broad description of contemporary marriage and the social institutional argument. Second, only by accepting the narrow description as a complete and therefore accurate picture of marriage (a judicial act that cannot pass the blush test²²⁹) can a judge say, without making herself immediately ridiculous, that there is no rational basis for the legally sanctioned man-woman meaning in our marriage institution. A third salient point is this Article's earlier demonstration of the man-woman meaning's constitutionality even when subjected to strict scrutiny. Together those three points lead quite certainly to the following conclusion: it is the choice of marriage facts, not the choice of a standard of review, that ultimately determines the outcome of man-woman marriage cases. The corollary to that conclusion is that man-woman marriage will comport with American constitutional norms of equality and liberty for as long as: (1) the man-woman meaning remains institutionalized as a core, constitutive meaning of the American marriage institution; and (2) the man-woman marriage institution continues to produce social goods related to child and adult health, happiness, and achievement.

CONCLUSION

It bears repeating in conclusion that the facts come first. The constitutional arguments advanced by genderless marriage proponents fail not so much because of flaws of logic or coherence but primarily because those arguments are premised on a

227. See *In re Marriage Cases*, 49 Cal. Rptr. 3d 675, 731 (App. 2006) (Kline, J., dissenting); *Goodridge v. Dep't. of Pub. Health*, 798 N.E.2d 941 (Mass. 2003); *id.* at 970 (Greaney, J., concurring); *Lewis v. Harris*, 908 A.2d 196 (N.J. 2006); *Lewis v. Harris*, 875 A.2d 259, 278 (N.J. Super. Ct. App. Div. 2005) (Collester, J., dissenting); *Hernandez v. Robles*, 805 N.Y.S.2d 354, 377 (App. Div. 2005) (Saxe, J., dissenting); *Andersen v. King County*, 138 P.3d 963, 1027 (Wash. 2006) (Bridge, J., dissenting); *id.* at 1040 (Chambers, J., dissenting); *id.* at 1012 (Fairhurst, J., dissenting).

228. See *Lewis v. Harris*, 908 A.2d 196 (N.J. 2006); *Baker v. Vermont*, 744 A.2d 864 (Vt. 1999).

229. See *supra* notes 110–53 and accompanying text.

quicksand foundation—that is, the factually inaccurate narrow (or close personal relationship) description of contemporary American marriage. The successful constitutional arguments advanced in support of man-woman marriage succeed because they are ultimately premised on the factually accurate broad (or institutional) description of a complex whole—the marriage institution—that guides individual activity, sustains identity, gives sense and purpose to the lives of its participants, and thereby produces valuable social goods.

NOTE

“PLAY IN THE JOINTS”: THE STRUGGLE TO DEFINE PERMISSIVE ACCOMMODATION UNDER THE FIRST AMENDMENT

INTRODUCTION

In the two decades since the Supreme Court left open the door for permissive religious accommodation in *Employment Division v. Smith*,¹ the Court has only obscured the doctrine further by creating multiple and overlapping analytical frameworks.² Public schools in particular have been caught in the crossfire between the mandate of the Free Exercise Clause and the prohibition of the Establishment Clause. They must attempt to walk a tight rope over a jurisprudential minefield, while trying to meet the needs of increasingly diverse student bodies.³

1. 494 U.S. 872 (1990).

2. See Martha McCarthy, *Religious Influences in Public Schools: The Winding Path Toward Accommodation*, 23 ST. LOUIS U. PUB. L. REV. 565, 567 (2004) (“Th[e] stringent test [set forth in *Lemon v. Kurtzman*, 403 U.S. 602 (1971)] has been replaced by a judicial approach that employs an endorsement standard, a coercion test, a modified *Lemon* analysis, or perhaps all three, depending on the situation. . . . Some courts have appeared to fold the endorsement standard into the coercion test or have otherwise combined elements from different standards in evaluating the constitutionality of specific claims.” (footnotes omitted)).

3. See, e.g., *Good News Club v. Milford Cent. Sch.*, 533 U.S. 98 (2001) (requiring an elementary school to allow a religious club access to its facilities after school); *Santa Fe Indep. Sch. Dist. v. Doe*, 530 U.S. 290 (2000) (prohibiting student-led prayer at football games); *Zobrest v. Catalina Foothills Sch. Dist.*, 509 U.S. 1 (1993) (allowing a school district to provide a sign language interpreter to a student at a parochial school); *Wallace v. Jaffree*, 472 U.S. 38 (1985) (prohibiting Alabama public schools from leading a one-minute moment of silence); *Engel v. Vitale*, 370 U.S. 421 (1962) (prohibiting a school board from requiring daily prayer at its schools); *Zorach v. Clauson*, 343 U.S. 306 (1952) (upholding a school’s “released time” program that provided off-site religious education); see also *Wallace*, 472 U.S. at 111 (Rehnquist, J., dissenting) (discussing the absurd results of the Court’s Establishment Clause jurisprudence, and noting that “[r]eligious instruction may not be given in public school, but the public school may release students during the day

As the Roberts Court begins to take a fresh look at the First Amendment,⁴ Congress has recently sought to encourage the Court to clarify the scope of the “play in the joints”⁵ between the Free Exercise and Establishment Clauses, and the authority of state actors to accommodate their constituents’ religious practices. An important component of the balance Congress has struck in this area, 42 U.S.C. § 1988, rewards those successful in bringing § 1983⁶ suits for Establishment Clause violations with attorneys’ fees.

The statute, however, does more than simply give incentives to plaintiffs bringing § 1983 suits. In practice, § 1988 has placed schools in an impossible position. With no standard to assess the risk that they will lose a § 1983 claim and face paying plaintiffs’ legal fees, schools must either risk losing budgetary funds at a time when school programs are already being cut for lack of funding⁷ or give in to the demands of plaintiffs’ lawyers. As a result, powerful interest groups are given the green light to intimidate schools into accepting their interpretations of the First Amendment rather than allowing such important constitutional questions to be decided by the courts.

The proposed Veterans’ Memorials, Boy Scouts, Public Seals, and Other Public Expressions of Religion Protection Act of 2007 (PERA) would prohibit courts from awarding attorneys’ fees under § 1988 for Establishment Clause violations, thereby re-

for religion classes elsewhere, and may enforce attendance at those classes with its truancy laws”).

4. Although the Roberts Court has not taken any cases that substantively interpret the Establishment Clause, Chief Justice Roberts delivered the opinion for a unanimous Court in *Gonzales v. O Centro Espirita Beneficente Uniao do Vegetal*, 546 U.S. 418 (2006), interpreting the Religious Freedom Restoration Act of 1993, 42 U.S.C. § 2000bb, and holding that the government had not shown a compelling interest when it outlawed a sacramental tea used by a religious sect. Chief Justice Roberts also joined Justice Alito’s opinion in *Hein v. Freedom from Religion Foundation, Inc.*, 127 S. Ct. 2553 (2007), in which the Court denied taxpayer standing to challenge actions of the White House Office of Faith-Based and Community Initiatives for violations of the Establishment Clause.

5. *Walz v. Tax Comm’n of the City of New York*, 397 U.S. 664, 669 (1970).

6. 42 U.S.C. § 1983 (2000).

7. For example, California faces a “\$366 million funding gap in the education part of the state budget,” which has resulted in cuts to several school programs. Carol Ness, *State budget woes spoiling Fresh Start*, S.F. CHRON., June 6, 2007, at B1. For a national perspective, see Joseph Van Harken, *Budgets Cut Student Experience*, CNN.com, Aug. 20, 2003, <http://www.cnn.com/2003/EDUCATION/08/13/sprj.sch.cuts/>.

moving one of the burdens on schools attempting to accommodate minority religious practices.⁸ This statute would recalibrate the balance between litigants to the default American rule,⁹ thus allowing each party to stand on equal footing when making strategic litigation decisions.

This Note is in three Parts. Part I examines the current state of the Court's free exercise jurisprudence and the state of permissive religious accommodation in public schools, arguing that a lack of clear guidance from the Court has led to inconsistent results that shrink the space between what the Establishment Clause forbids and what the Free Exercise Clause demands. Part II provides a case study on the state of religious accommodation in public schools, discussing the experience of a public elementary school that recently attempted to accommodate minority religious beliefs. Finally, Part III explores the Public Expression of Religion Act as a possible legislative solution to expand the ability of schools to accommodate religious practices that fall between the Establishment and Free Exercise Clauses.

I. PERMISSIVE ACCOMMODATION: RELIGIOUS FREEDOM IN A PLURALISTIC SOCIETY

The First Amendment of the United States Constitution provides that "Congress shall make no law respecting an establishment of religion, or prohibiting the free exercise thereof."¹⁰ These sixteen words were written by "a group of statesmen . . . who proposed a guarantee with contours not wholly worked out, leaving the Establishment Clause with edges still to be determined."¹¹

The Court has stated that "the common purpose of the Religion Clauses 'is to secure religious liberty.'"¹² In 1952, the Court stated that "[w]hen the state encourages religious instruction or

8. See H.R. 725, 110th Cong. (2007).

9. The American rule provides that "all litigants, even the prevailing one, must bear their own attorney's fees," subject to "bad-faith and other statutory and contractual exceptions." BLACK'S LAW DICTIONARY 92 (8th ed. 2004).

10. U.S. CONST. amend. I.

11. *McCreary County v. Am. Civil Liberties Union of Ky.*, 545 U.S. 844, 879 (2005).

12. *Santa Fe Indep. Sch. Dist. v. Doe*, 530 U.S. 290, 313 (2000) (quoting *Engel v. Vitale*, 370 U.S. 421, 430 (1962)).

cooperates with religious authorities by adjusting the schedule of public events to sectarian needs, it follows the best of our traditions . . . [by] respect[ing] the religious nature of our people and accommodat[ing] the public service to their spiritual needs.”¹³ At the same time, however, the “vast majority of Establishment Clause cases have either cited or relied upon Jefferson’s ‘wall of separation’ metaphor.”¹⁴ This contradiction has led to a Court that is “unwilling or unable to take a unified stand on what the Constitution really means when it comes to the relation between religion and government.”¹⁵ One federal appellate court has referred to the Court’s Establishment Clause case law as “suffer[ing] from a sort of jurisprudential schizophrenia.”¹⁶

Nevertheless, it is clear that some accommodation of religious practices by public schools is not only permitted but required by law.¹⁷ A high school in Richardson, Texas, for example, recently clarified its policy on prayer, recognizing Muslim students’ legal right to pray during the school day and providing them with a designated place to do so.¹⁸ Although the Court has generally held that a non-accommodation school policy does not violate the Free Exercise Clause “if [the school] has pursued its secular policies without reference or regard to religion—even if the exercise of a religion is thereby seriously

13. *Zorach v. Clauson*, 343 U.S. 306, 313–14 (1952).

14. Patrick M. Garry, *A Congressional Attempt to Alleviate the Uncertainty of the Court’s Establishment Clause Jurisprudence: The Public Expression of Religion Act*, 37 CUMB. L. REV. 1, 19 (2006).

15. Noah Feldman, *A Church-State Solution*, N.Y. TIMES MAGAZINE, July 3, 2005, at 28.

16. *Thomas v. Anchorage Equal Rights Comm’n*, 165 F.3d 692, 717 (9th Cir. 1999).

17. See *Donovan ex rel. Donovan v. Punxsutawney Area Sch. Bd.*, 336 F.3d 211 (3d Cir. 2003) (holding that a mandatory activity period was non-instructional time for the purposes of the Equal Access Act); *Ceniceros ex rel. Risser v. Bd. of Trs.*, 106 F.3d 878 (9th Cir. 1997) (holding that a religious club at San Diego’s University City High School could not be denied permission to meet at lunch when secular student clubs were allowed to do so, as lunch was “non-instructional time” under the Equal Access Act); *Hsu v. Roslyn Union Free Sch. Dist.*, 85 F.3d 839 (2d Cir. 1996) (holding that a mandatory activity period was non-instructional time for the purposes of the Equal Access Act).

18. See Press Release, Becket Fund for Religious Liberty, Muslim Prayer Protected in Texas Public School (Dec. 20, 2005), available at <http://www.becketfund.org/index.php/article/453.html>.

disadvantaged, or even destroyed,"¹⁹ schools must show that the policy is neutral to religion. For example, if a school has forbidden students to leave class to pray, but allows students to be excused for medical reasons, extracurricular activities, and athletic practices, the school is no longer pursuing a religiously neutral policy.²⁰

Other schools have voluntarily attempted to accommodate minority-religion students through what the courts have called permissible or permissive accommodation—that is, through policies not required by the Free Exercise Clause but not forbidden by the Establishment Clause.²¹ The Court has repeatedly emphasized that "[not] *all* benefits conferred exclusively upon religious groups or upon individuals on account of their religious beliefs are forbidden by the Establishment Clause unless they are mandated by the Free Exercise Clause."²² Put differently, "the state may extend benefits to religious observers where denying those benefits would effectively penalize them for not *violating* their faith."²³

Rather than endorsing religion, permissive accommodations for religious observance show "secular respect for the needs of religious people."²⁴ As then-Professor Michael W. McConnell

19. Michael W. McConnell, *Accommodation of Religion: An Update and a Response to the Critics*, 60 GEO. WASH. L. REV. 685, 685 (1992).

20. Cf. *Fraternal Order of Police v. City of Newark*, 170 F.3d 359 (3rd Cir. 1999) (opinion by Alito, J.) (striking down a mandatory shaving policy for police officers that included an exemption for medical, but not religious, reasons because it demonstrated hostility to religion); *Church of the Lukumi Babalu Aye v. City of Hialeah*, 508 U.S. 520, 532 (1993) ("[T]he First Amendment forbids an official purpose to disapprove of a particular religion or of religion in general.").

21. See, e.g., *Cutter v. Wilkinson*, 544 U.S. 709, 720 (2005) ("[T]he Act qualifies as a permissible legislative accommodation of religion that is not barred by the Establishment Clause."); *Children's Healthcare Is a Legal Duty, Inc. v. Min De Parle*, 212 F.3d 1084, 1104 (8th Cir. 2000) ("[T]here can be constitutionally permissible accommodations beyond what is required by the Constitution. . . ."); see also McConnell, *supra* note 19, at 710 ("[*Employment Division v. Smith* obviously did not shrink the scope of permissible accommodation, and in light of its grounding in judicial restraint, the opinion may augur an expansion.>").

22. *Tex. Monthly, Inc. v. Bullock*, 489 U.S. 1, 18 n.8 (1989); see also *Employment Div. v. Smith*, 494 U.S. 872, 890 (1990) ("[T]o say that a nondiscriminatory religious-practice exemption is permitted, or even that it is desirable, is not to say that it is constitutionally required . . .").

23. Jonathan E. Nuechterlein, *The Free Exercise Boundaries of Permissible Accommodation Under the Establishment Clause*, 99 YALE L.J. 1127, 1146 (1990).

24. *Id.* at 1129.

observed, a theory of the Establishment and Free Exercise Clauses that demands formal neutrality “would make the Religion Clauses violate the Religion Clauses, since the Religion Clauses ‘single out’ religion by name for special protections.”²⁵ To avoid this absurdity, the courts must recognize that “religion is constitutionally distinctive from all other human enterprise, [that] its distinctiveness requires special constitutional treatment,”²⁶ and that a country that leads the charge against terrorism abroad “may have more success generating loyalty [at home] from religiously diverse citizens by allowing inclusive governmental manifestations of religion than by banning them.”²⁷

Both the original meaning of the Constitution and historical practice support the constitutionality of permissive accommodations. In the years before the ratification of the First Amendment, the colonies and states passed religious exemptions to protect religious observances in the few cases where religious tenets conflicted with the civil law.²⁸ An examination of the ratification debate suggests that “[a]t a minimum, the message of history is that religious accommodations are permissible and desirable, even if not constitutionally compelled.”²⁹ Today, the pervasiveness of the regulatory state requires more than formal neutrality.³⁰ But perhaps more than any other factor, it is the “pervasive embrace of religion from the founding of the United States until the present day [that] clearly demonstrates that the Establishment Clause was intended to accommodate religion.”³¹

Permissive accommodations can take many forms. As many as seventeen universities have installed or are installing foot

25. McConnell, *supra* note 19, at 691.

26. Ira C. Lupu & Robert W. Tuttle, *The Faith-Based Initiative and the Constitution*, 55 DEPAUL L. REV. 1, 4 (2005).

27. Feldman, *supra* note 15, at 28.

28. Then-professor McConnell pointed to Madison’s proposed amendment to exempt religious objectors from military service. The defeat of this provision actually bolsters the strength of permissive accommodations as a historical practice because it was defeated by those who argued that such exemption should be left to the legislatures. See McConnell, *supra* note 19, at 693, 714.

29. *Id.* at 693.

30. See *id.* at 692 (“Under conditions of the modern welfare-regulatory state, benign neglect ceases to be benign.”).

31. Tara P. Beglin, Note, “One Nation under God,” *Indeed: The Ninth Circuit’s Problematic Decision to Change Our Pledge of Allegiance*, 20 ST. JOHN’S J. LEGAL COMM. 129, 149 (2005).

baths to allow Muslim students to wash their feet before praying.³² The University of Michigan has announced that foot baths will be installed with student funds, as opposed to taxpayer dollars, “as this is an issue of trying to make . . . bathrooms safer and improve plumbing—not of endorsing a religion.”³³

Christian students, of course, are already granted accommodations by not having school on Sundays or over Christmas.³⁴ But in Dearborn, Michigan, where the Muslim population is as high as thirty-three percent at some schools, schools have started to offer students lunch meat slaughtered in accordance with Islamic law and to give two days off during Ramadan.³⁵ Other schools grant exemptions from dress codes for head coverings, release students from strenuous exercise during times of religious fasting, or decline to administer tests on Yom Kippur.³⁶

There are boundaries to what constitutes a permissible accommodation. It would be nonsensical to argue that “the free exercise clause of the first amendment was intended to give persons or churches the right to disobey laws with impunity provided they had religious reasons for wishing to do so.”³⁷ The state may not act “entirely motivated by a purpose to advance religion,”³⁸ or grant religious exemptions for burdens that fall equally on religious organizations and the general public.³⁹ Even critics, however, acknowledge that “those practices that are, beyond reasonable controversy, at the spiritual

32. Oren Dorell, *Some say schools giving Muslims special treatment*, USA TODAY, July 26, 2007, at 4A, available at http://www.usatoday.com/news/nation/2007-07-25-muslim-special-treatment-from-schools_N.htm.

33. P.J. Huffstutter, *A Safety Hazard or Special Treatment?*, L.A. TIMES, July 30, 2007, at A9.

34. See Randy Dotinga, *Public schools grapple with Muslim prayer*, CHRISTIAN SCI. MONITOR, July 12, 2007, at 1, available at <http://www.csmonitor.com/2007/0712/p01s03-ussc.html>. Professor Feldman referred to this as an example of “dual use” permissive accommodation, whereby “things can be at once secular to one person and religious to another.” Noah Feldman, *Universal Faith*, N.Y. TIMES MAGAZINE, Aug. 26, 2007, at 13.

35. See Dotinga, *supra* note 34.

36. See *id.*

37. Ellis West, *The Case Against a Right to Religion-Based Exemptions*, 4 NOTRE DAME J.L. ETHICS & PUB. POL’Y 591, 632 (1990).

38. *Wallace v. Jaffree*, 472 U.S. 38, 56 (1985) (striking down a moment of silence because the enacting legislature was motivated by an explicitly religious purpose).

39. See, e.g., *Tex. Monthly v. Bullock*, 489 U.S. 1 (1989) (striking down a tax exemption for religious periodicals).

core of a religious tradition certainly deserve the most forceful and focused constitutional attention.”⁴⁰

Continued uncertainty in the area of permissive accommodation accompanied the arrival of two new Justices to the Court in 2005. If their backgrounds are any guide, Chief Justice Roberts and Justice Alito seem most likely to join Justices Scalia, Kennedy, and Thomas to form a new “accommodationist” majority.⁴¹ Additionally, the Bush Administration has “support[ed] [the] accommodationist trend with administrative policies and its position in amicus curiae briefs.”⁴²

In the final analysis, it may be useful to analogize religious liberty in the public schools to free speech in the public square. A free society must encourage more protection and practice greater accommodation of religious observances, whether of majority or minority faiths, to maintain a healthy, pluralistic society.⁴³ The Court will never be able to shield religious minorities from all references to the majority religion. The only thing left to do then is either to allow the government to censor all religious expression in the public square or to “strengthen [religious minorities’] own identities and be proud of who they

40. Ira C. Lupu, *The Trouble with Accommodation*, 60 GEO. WASH. L. REV. 743, 757 (1992).

41. See Julie F. Mead, Preston C. Green & Joseph O. Oluwole, *Re-examining the Constitutionality of Prayer in School in Light of the Resignation of Justice O'Connor*, 36 J.L. & EDUC. 381, 405–06 (2007); Christopher B. Harwood, *Evaluating the Supreme Court's Establishment Clause Jurisprudence in the Wake of Van Orden v. Perry and McCreary County v. ACLU*, 71 MO. L. REV. 317, 349 (2006) (discussing briefs written by John Roberts before he became a judge, in which he “urged the Court to replace the *Lemon* test with an Establishment Clause test allowing for more government support for religion,” and noting Justice Alito’s vote to allow for student-initiated prayer at high school graduation ceremonies and his statement that “he became interested in constitutional law primarily because of his ‘disagreement with the Warren Court’s decisions’ with respect to, *inter alia*, the Establishment Clause”).

42. McCarthy, *supra* note 2, at 595–96. McCarthy notes that “the [No Child Left Behind] Act requires school districts to certify to the state educational agency that no school policy prevents or denies participation in constitutionally protected prayer in public elementary and secondary schools.” *Id.* at 592.

43. Professor Feldman offered an example of such a society during a prayer service commemorating the victims of the attacks of September 11th, 2001, which was officiated by a Roman Catholic archbishop, an African-American Methodist minister, the Baptist preacher Billy Graham, a rabbi, and an imam. Feldman, *supra* note 15, at 28.

are [rather than] insist that the majority give up its own celebration to accommodate them.”⁴⁴

II. CARVER ELEMENTARY SCHOOL: A CASE STUDY IN PERMISSIVE ACCOMMODATION

In April 2007, an elementary school found itself at the center of a national firestorm over the limits of permissive accommodation for Muslim students.⁴⁵

A. *The Arabic Language Program*

Carver Elementary School, a primary school with students in kindergarten through eighth grades, has traditionally served a diverse immigrant population.⁴⁶ In the years following the 1993 raid on Mogadishu, thousands of Somali Muslim refugees came to San Diego to escape the violence.⁴⁷ Days before the 2006-2007 school year began, an experimental Arabic language charter school that had served many of these Somali refugees was closed and more than 100 students were relocated to Carver Elementary School.⁴⁸

The Superintendent for the San Diego Unified School District had long been trying to make the district’s schools competitive by “offer[ing] culturally relevant and academically unique programs to lure students back from charter and private schools.”⁴⁹ With little time to plan, administrators decided to keep the Arabic program students separated from the rest of the Carver students; in addition, the Arabic program students were given a separate lunchtime and separate recess time to accommodate their prayer schedules.⁵⁰ The principal at Carver hoped to “create a magnet program that would attract students from

44. *Id.*

45. Carver is located in California’s second largest school district.

46. See Helen Gao, *Arabic program offered at school*, SAN DIEGO UNION-TRIB., Apr. 12, 2007, at B-1.

47. See Carl A. Cohn, Op-Ed., *A good school gets a bad rap*, SAN DIEGO UNION-TRIB., Aug. 1, 2007, at B-7.

48. See Helen Gao, *Legality of Arabic class questioned*, SAN DIEGO UNION-TRIB., Apr. 11, 2007, at B-1.

49. Gao, *supra* note 46.

50. *Id.*

throughout the district...[with] foreign-language programs [that would] appeal to non-Arabic and non-Muslim families.”⁵¹

In response to requests from the predominantly Muslim parents of the transferred students, Carver administrators attempted to find a way to allow these students time for their daily noon prayer.⁵² The school officials consulted the Department of Education’s guidelines and decided that students would be allowed the option to pray during their afternoon recess.⁵³ Similarly situated Muslim high school students are constitutionally entitled to use non-instructional time to pray or engage in religious study.⁵⁴ However, primary school children require constant supervision during breaks and free time. To accommodate prayer in such a setting, the school asked a Muslim teacher’s aide to be in the room during the afternoon recess.⁵⁵

B. *The Rising Controversy*

In early April, a substitute teacher at Carver went on a conservative radio talk-show and alleged that the school was engaged in “religious indoctrination.”⁵⁶ The substitute said that she was handed a lesson plan that included one hour of time set aside for prayer. According to the substitute’s statement, a teacher’s aide came into the classroom during this hour, closed the blinds, and led the students in prayer, making the substi-

51. *Id.*

52. According to Islamic teachings, prayers must be said five times a day while facing Mecca. Specific times, dress, and rituals must be observed. See Bilal Zaheer, *Accommodating Minority Religions Under Title VII: How Muslims Make the Case for a New Interpretation of Section 701(j)*, 2007 U. ILL. L. REV. 497, 501–02 (2007). The Zuhr prayer usually falls between 1 p.m. and 2 p.m.—squarely within the school day for most Muslim students. Helen Gao, *Prayer OK at lunch, not classes at Carver*, SAN DIEGO UNION-TRIB., July 27, 2007, at B-1.

53. These guidelines advise school administrators that students may “pray or study religious materials with fellow students during recess, the lunch hour, or other noninstructional time to the same extent that they may engage in nonreligious activities.” DEP’T OF EDUC., GUIDANCE ON CONSTITUTIONALLY PROTECTED PRAYER IN PUBLIC ELEMENTARY AND SECONDARY SCHOOLS (2003), available at http://www.ed.gov/policy/gen/guid/religionandschools/prayer_guidance.html.

54. See *supra* note 17.

55. See Gao, *supra* note 48.

56. Zaid Shakur, *Conservative media attacks kids’ program in San Diego*, S. CAL. INFOCUS, August 2007, <http://www.infocusnews.net/content/view/15946/346/>.

tute feel “extremely uncomfortable, [and] intimidated.”⁵⁷ After investigating the incident, the district determined that the aide was praying alongside the children but was not leading the prayer.⁵⁸ The district believed that her conduct fell squarely within the Department of Education guidelines⁵⁹ and accommodated the religious needs of students as mandated by a previous court ruling.⁶⁰

In the months that followed the substitute’s allegations, a media frenzy engulfed the school district. The school was condemned as an “embryonic madrassa” on the Fox News program, *The O’Reilly Factor*.⁶¹ An editorial that appeared in *Investor’s Business Daily* referred to the school as a “budding madrassa” engaged in a “stealth jihad” and compared the program to the Taliban, stating that Islam “wish[es] us ill [and] pray[s] for the demise of our system of government.”⁶² Even some Muslims criticized the program, urging fellow Muslims to “stand up to attempts by Islamists to Islamize western society on behalf of the name of Muslims.”⁶³

The Superintendent of the San Diego Unified School District defended Carver’s program:

At Carver, we provide afternoon recess for students to play, pray, talk, study or just have a break. Some Muslim students use this time for a prayer that, according to their faith, must be prayed during a specific time window each af-

57. *Paula Zahn Now* (CNN television broadcast July 11, 2007).

58. See Gao, *supra* note 52.

59. The Guidelines state that teachers and administrators “are prohibited by the Establishment Clause from encouraging or discouraging prayer, and from actively participating in such activity with students,” but that they “may, however, take part in religious activities where the overall context makes clear that they are not participating in their official capacities.” DEP’T OF EDUC., *supra* note 53.

60. In *Ceniceros ex rel. Risser v. Bd. of Trs.*, 106 F.3d 878 (9th Cir. 1997), the Ninth Circuit held that a high school within the San Diego Unified School District had discriminated against a group of students when it refused to let a bible study group meet during lunchtime while allowing meetings for secular groups.

61. *The O’Reilly Factor* (Fox News Network television broadcast July 10, 2007); see also Frank J. Gaffney Jr., *Good and bad news*, WASH. TIMES, July 31, 2007, at A17; *Paula Zahn Now*, *supra* note 57.

62. Editorial, *Jihad in Schools?*, INVESTOR’S BUS. DAILY, July 10, 2007, at A12, available at <http://www.ibdeditorials.com/IBDArticles.aspx?id=268874251390676>.

63. M. Zuhdi Jasser, *Accommodation as an Islamist Political Instrument*, FAMILY SECURITY MATTERS, July 27, 2007, <http://www.familysecuritymatters.org/homeland.php?id=1186309>.

ternoon. That occurs at recess. Students of other faiths are free to pray or not pray, as they wish, but teachers and staff are prohibited from encouraging or discouraging prayer or from praying with students.

Carver students are growing daily in their understanding of and respect for America. Each morning they salute the flag and participate in patriotic exercises. . . .

All San Diegans should be proud that this community, without fear or prejudice, opened its arms to these refugee children from a different land, language, culture and religion, and in typical American fashion, gave them the great gifts of education, freedom and hope.⁶⁴

Parents of Carver students seemed accepting of the district's plan. One guardian, who is a Christian with two grandchildren in the Arabic-language program, argued that the Muslim children should be "'given the freedom' to pray."⁶⁵ Another parent whose Carver student was not in the program said that he supported giving Muslim students the opportunity to pray, so long as the "teachers are doing their job, and his son's education is not affected."⁶⁶

Supporters in the community also defended the school, noting that the accommodation was "legal, if not mandatory."⁶⁷ In one letter to the editor, a member of the community urged others to "be proud of the school and community for accommodating these children from a war-torn world."⁶⁸ The community member also urged San Diego residents to "applaud[] Carver Elementary for taking the steps to make these children feel comfortable and welcome here in their new home."⁶⁹

64. Cohn, *supra* note 47.

65. Helen Gao, *Muslim prayers in school debated; S.D. elementary at center of dispute*, SAN DIEGO UNION-TRIB., July 2, 2007, at A1 (quotation marks omitted).

66. *Id.*

67. *Id.*

68. Azaam Samad, Letter to the Editor, *Superintendent praised for Carver school support*, SAN DIEGO UNION-TRIB., Aug. 9, 2007, at B9.

69. *Id.*

C. Threatened Legal Action

The Carver program brought more than just media attention; it brought legal controversy. Lawyers from all sides of the accommodation debate were quick to weigh in on behalf of powerful interest groups. An attorney for the school argued that the district was well aware of the “hazards of making the wrong decision”⁷⁰ after the Ninth Circuit had forced the district to permit students at a high school to hold a Bible study during lunch.⁷¹ As a result of that ruling, the school was “careful about restricting students’ right to their own private religious expression.”⁷² The school’s attorney further noted that “[t]he district’s obligation in response to a request that a prayer must be performed at a particular time is to treat that request the same as it would treat a student’s request to receive an insulin shot at a particular time.”⁷³

The legal justifications offered by the school, however, did not prevent several groups from threatening to bring civil actions against the district. Americans United for Separation of Church and State called the school’s policy “a violation of the First Amendment’s establishment clause.”⁷⁴ The Thomas More Law Center referred to the policy as a “double standard that favor[ed] one religious group over others.”⁷⁵ Although the American Civil Liberties Union decided to “remain[] silent” until the school announced a resolution,⁷⁶ its San Diego legal director added that “his organization will monitor . . . changes related to accommodating prayer.”⁷⁷ On the other side, the Pacific Justice Institute called on the school to expand the policy to make a “‘daily prayer time’ for students of all faiths to pray and invit[e] religious leaders in to facilitate the prayer times.”⁷⁸ When local reporters asked one law professor to comment on

70. Dotinga, *supra* note 34.

71. See *Ceniceros ex rel. Risser v. Bd. of Trs.*, 106 F.3d 878 (9th Cir. 1997).

72. Gao, *supra* note 65 (quotation marks omitted).

73. *Id.*

74. Charles C. Haynes, *School prayer in San Diego: New twist in old debate*, GANNETT NEWS SERV., July 25, 2007.

75. *Id.*

76. Dotinga, *supra* note 34.

77. Gao, *supra* note 52.

78. Haynes, *supra* note 74 (quotation marks omitted).

the constitutionality of the Carver program, he simply said that the Supreme Court's First Amendment jurisprudence was "notoriously erratic."⁷⁹

D. The Future for Carver

In the end, Carver Elementary School officials were unable to justify the risk of litigation and bowed to the mounting legal and media pressures. Less than four months after the substitute teacher brought her accusations on the radio, the school announced that it would end the afternoon recess that students had used for prayer. Instead, the school stated that the children would be able to use their lunch period to pray. The year-round school traditionally had staggered 30-minute lunch periods. Although the school has not announced the exact time, it is assumed that one of the lunch periods will fall during the Zuhra prayer time.⁸⁰ Younger students who are not required to pray will be assigned to the earlier lunch, while older students will have the option to pray during the later lunch period.⁸¹ Unfortunately, this new policy will mean that students are "ultimately forced to choose between eating lunch and praying the mid-day prayer required by their faith."⁸²

Given the increasing pressure on public schools to compete for students and the shrinking budgets for extracurricular programs, it comes as no surprise that Carver decided not to roll the dice in court. Although it is unclear whether the result at Carver would have been different if the Court's permissive accommodation jurisprudence were more clear or if the state of attorney fees were different, Carver is nevertheless an important example of the shrinking space that exists between the Establishment and Free Exercise Clauses, as well as the practical pressures faced by school boards around the country.

79. Gao, *supra* note 65.

80. See Gao, *supra* note 52.

81. *Id.*

82. Press Release, Becket Fund for Religious Liberty, *supra* note 18.

III. PERA: AN END TO FIRST AMENDMENT BLACKMAIL

On January 29, 2007, just months before Carver Elementary School was thrust into the limelight, Senator Sam Brownback re-introduced the Veterans' Memorials, Boy Scouts, Public Seals, and Other Public Expressions of Religion Protection Act of 2007 (PERA) as S.415. His action received a flurry of media attention.⁸³ More than a year after the House of Representatives had passed a version of PERA in the waning days of a Republican-controlled Congress,⁸⁴ Senator Brownback explained that "many small towns [continue to] comply with the demands of the ACLU rather than risk going to trial and paying hundreds of thousands of dollars in legal fees to the ACLU if they lose the case."⁸⁵

If PERA becomes law, it will be instrumental in redefining the "play in the joints" between the Free Exercise and Establishment Clauses and enhancing religious tolerance in the United States. Currently, fear of litigation "can often cause governmental entities to enact policies that discriminate against religious speech or practice"⁸⁶ even before those entities consider permissive accommodation policies. Although the incentives to avoid litigation exist in every area of constitutional law, they are considerably stronger in permissive accommodation cases. The inconsistent status of current constitutional doctrines governing the Establishment Clause and the added threat of attorneys' fees under § 1988 "inevitably lead governmental units to discourage or even to prohibit public expressions of religion, even if those expressions do not violate the Establishment Clause."⁸⁷

83. Press Release, Office of U.S. Senator Sam Brownback, Brownback Reintroduces Public Expressions of Religion Act (Jan. 29, 2007), available at <http://brownback.senate.gov/pressapp/record.cfm?id=268117>.

84. See Diana B. Henriques, *In the Congressional Hopper: A Long Wish List of Special Benefits and Exemptions*, N.Y. TIMES, Oct. 11, 2006, at A20 (reporting that H.R. 2679 passed by a vote of 244-173 on September 26, 2006).

85. Dustin McNab, *Bill would halt legal fees for ACLU in church-state cases*, CHRISTIAN EXAM'R ONLINE, Apr. 2007, available at http://www.christianexaminer.com/Articles/Articles%20Apr07/Art_Apr07_12.html.

86. Garry, *supra* note 14, at 1-2.

87. *Id.* at 3.

A. *Why PERA Will Prevent Future Abuses like the Chilling of Carver's Program*

Establishment Clause jurisprudence has developed significantly since the Court's decision in *Engel v. Vitale*⁸⁸ in 1962. Forty-five years later, the passage of PERA would acknowledge that § 1988 no longer serves its original purpose. Rather than permitting plaintiffs to have their day in court, the attorneys' fee provision may be preventing the litigation of many Establishment Clause claims.

The result of this change in § 1988's function threatens the very religious liberty that the Establishment Clause was designed to protect. Courts, then, are not currently determining the "edges"⁸⁹ of religious liberty; rather, interest groups with narrow agendas are drawing those boundaries further and further away from the Founders' original understanding. Section 1988 has become a thumb on the scale in favor of anti-accommodationist policies, not because courts are ruling that the Establishment Clause demands that result, but because school boards like San Diego's cannot afford to risk the enormous sums of money that a loss in court would take away from their children's educations.

Instead, national interest groups provide school boards with a simple choice: stop doing a certain activity or run the risk of a costly lawsuit. This choice is exactly the kind of choice that would be unconstitutional if it were offered by the federal government.⁹⁰ Although there is no constitutional prohibition on groups like the ACLU creating such choices, the potential for a narrowing of free exercise rights in these circumstances is nevertheless real. Individual, one-time actors such as schools may be willing to cut deals with repeat litigants like the ACLU. When aggregated with the deals cut by many other one-time players, these deals hurt society's interest in religious freedom.

88. 370 U.S. 421 (1962)

89. See *supra* note 11 and accompanying text.

90. See *Nollan v. Cal. Coastal Comm'n*, 483 U.S. 825 (1987) (holding that conditioning a building permit on the granting of an easement was unconstitutional without the offer of just compensation by the government); see also *South Dakota v. Dole*, 483 U.S. 203, 211 (1987) (noting that federally-imposed conditions are unconstitutional if they are "so coercive as to pass the point at which 'pressure turns into compulsion.'" (quoting *Steward Machine Co. v. Davis*, 301 U.S. 548, 590 (1937))).

B. The History of PERA

The impetus behind PERA can be traced back to the Court's decision in *Employment Division v. Smith*.⁹¹ The *Smith* Court held that the Free Exercise Clause is not violated by a "valid and neutral law of general applicability on the ground that the law proscribes (or prescribes) conduct that his religion prescribes (or proscribes)."⁹² Believing that "the Supreme Court had erred in its interpretation of the free exercise clause in *Smith*," Congress then passed the Religious Freedom Restoration Act of 1993 (RFRA)⁹³ to "restore free exercise law to the status that existed prior to *Smith*, when the Court applied the compelling government interest test to most religious liberty challenges."⁹⁴

In 1997, the Supreme Court, in *City of Boerne v. Flores*,⁹⁵ invalidated RFRA as it applied to the States, thereby gutting the majority of the protection created by RFRA.⁹⁶ Justice Kennedy, writing for the majority, and joined by Chief Justice Rehnquist and Justices Stevens, Scalia, Thomas, and Ginsburg, held that "[l]egislation which alters the meaning of the Free Exercise Clause cannot be said to be enforcing the Clause [under the Fourteenth Amendment because] . . . Congress does not enforce a constitutional right by changing what the right is."⁹⁷

In the aftermath of *City of Boerne*, Congress again sought to introduce legislation that would protect religious freedom. In the Religious Land Use and Institutionalized Persons Act of 2000 (RLUIPA),⁹⁸ Congress once again attempted to apply strict scrutiny to burdens on the free exercise of religion. RLUIPA,

91. 494 U.S. 872 (1990).

92. *Id.* at 879 (quoting *United States v. Lee*, 455 U.S. 252, 263 n.3 (1982) (Stevens, J., concurring in the judgment)) (quotation marks omitted).

93. 42 U.S.C. § 2000bb *et seq.*, *invalidated by* *City of Boerne v. Flores*, 521 U.S. 507 (1997).

94. Carolyn N. Long, *Congress, the Court, and Religious Liberty: The Case of Employment Division of Oregon v. Smith*, in CONGRESS CONFRONTS THE COURT: THE STRUGGLE FOR LEGITIMACY AND AUTHORITY IN LAWMAKING 79, 85–86 (Colton C. Campbell & John F. Stack, Jr. eds., 2001).

95. 521 U.S. 507 (1997).

96. *Id.*

97. *Id.* at 519.

98. 42 U.S.C.A. § 2000cc *et seq.*

however, was more narrowly drawn than RFRA.⁹⁹ RLUIPA applied only to prisoners and land use and made numerous references to enumerated powers to buoy its constitutionality.¹⁰⁰ In 2005, the Court upheld RLUIPA.¹⁰¹

PERA, like RLUIPA, is part of Congress' ongoing attempt to protect religious freedom and free exercise of religion in the states. Although RLUIPA made it easier for some religious liberty claimants to prevail in the courtroom, Congress sought to find other ways of chipping away at the damage done by *Smith* and *Boerne*. In a statement on the floor of the House of Representatives, Representative John Hostettler argued that PERA would "prevent mere threats of the legal system to intimidate communities, States, and groups like the American Legion into relenting" in the face of "the exorbitant attorneys fees of the [Indiana Civil Liberties Union]."¹⁰²

In light of this history of Congress' legislative attempts to protect religious freedom, PERA's limitation on attorneys' fees for plaintiffs litigating Establishment Clause violations makes sense from two perspectives. First, from a functional standpoint, permissive religious accommodations are most likely to be challenged as establishments of religion, and PERA puts both parties on equal footing. Second, as a formal matter, the other rights protected by § 1983 "generally relate to violations of individuals rights, whereas Establishment Clause claims relate more to violations of a structural provision of the Constitution."¹⁰³ PERA recognizes this distinction by redrawing the lines of § 1988.

99. Compare RFRA, 42 U.S.C. § 2000bb *et seq.*, with RLUIPA, 42 U.S.C.A. § 2000cc *et seq.*

100. See CHRISTOPHER L. EISGRUBER & LAWRENCE G. SAGER, RELIGIOUS FREEDOM AND THE CONSTITUTION 268 (2006); see also RLUIPA.com, <http://www.rluipa.com>.

101. See *Cutter v. Wilkinson*, 544 U.S. 709 (2005).

102. 152 CONG. REC. H7389, H7393 (2006).

103. Garry, *supra* note 14, at 1; see also *Lee v. Weisman*, 505 U.S. 577, 591 (1992) ("The Free Exercise Clause embraces a freedom of conscience and worship that has close parallels in the speech provisions of the First Amendment, but the Establishment Clause is a specific prohibition on forms of state intervention in religious affairs with no precise counterpart in the speech provisions.").

C. Constitutionality of PERA

Not everyone, however, has been convinced of PERA's merits. Professor Erwin Chemerinsky has described PERA as "a disturbing achievement by those who seek to undermine our nation's commitment to fundamental freedoms laid out in the Constitution," adding that "[s]uch a bill could have only one motive: to protect unconstitutional government actions advancing religion."¹⁰⁴ The ACLU has sent letters, issued press releases, and waged multiple campaigns opposing PERA, arguing that "the very purpose of this bill is to make it more difficult for citizens to challenge violations of the Establishment Clause, raising serious constitutional concerns."¹⁰⁵

Despite these concerns, there are strong arguments that the Court should uphold PERA. First, Congress has the power to pass PERA. Because Congress has indicated that PERA would affect only "program[s] or activit[ies] that receive Federal financial assistance," not state governments per se, PERA would probably not be invalidated for the reasons that doomed RFRA.¹⁰⁶

Second, PERA would not violate the Establishment Clause. PERA's purpose is facially neutral and entirely secular. The Supreme Court has traditionally used the three-prong test originally developed in *Lemon v. Kurtzman*¹⁰⁷ to assess the constitutionality of statutes that are challenged under the Establishment Clause. First, the government's actions must have a legitimate secular purpose.¹⁰⁸ The Supreme Court has been reluctant to find that the government was motivated by an illegitimate purpose under *Lemon*, and this prong may be dispositive.¹⁰⁹ Indeed, the

104. Erwin Chemerinsky, *Legislating Violations of the Constitution*, WASHINGTON-POST.COM, Sept. 30, 2006, <http://www.washingtonpost.com/wp-dyn/content/article/2006/09/29/AR2006092901055.html>.

105. Press Release, American Civil Liberties Union, Letter to the Senate Urging Opposition of (S. 3696) the Public Expressions of Religion Protection Act of 2006 (Aug. 2, 2006), available at <http://www.aclu.org/religion/gen/26316leg20060802.html>.

106. See *Gonzales v. O Centro Espirita Beneficente Uniao do Vegetal*, 546 U.S. 418 (2006) (applying RFRA to constrain the federal government).

107. 403 U.S. 602 (1971).

108. See *id.* at 612.

109. See, e.g., *McCreary County v. Am. Civil Liberties Union of Ky.*, 545 U.S. 844, 859 (2005) ("[W]e have found government action motivated by an illegitimate purpose only four times since *Lemon*, and 'the secular purpose alone may rarely

McCreary County Court held that “a legislature’s stated reasons will generally get deference.”¹¹⁰ In the case of PERA, Congress’ stated purpose is entirely secular: “to prevent the use of the legal system in a manner that extorts money from State and local governments, and the Federal Government, and inhibits such governments’ constitutional actions.”¹¹¹

Under the second prong of the *Lemon* test, the government’s action must have “a principal or primary effect . . . that neither advances or inhibits religion.”¹¹² Like RLUIPA, PERA is narrowly drawn so as to permissibly advance a legitimate legislative end within Congress’ authority.¹¹³ Opponents might argue that PERA advanced religion by making it marginally harder for plaintiffs to bring claims, but just as the Court found that the “removal of government-imposed burdens on religious exercise is more likely to be perceived ‘as an accommodation of the exercise of religion rather than as a Government endorsement of religion,’”¹¹⁴ so too can PERA be seen as a removal of a thumb on one side of the scale rather than the addition of a thumb to the other. No one has argued that PERA would violate *Lemon*’s third prong, which requires that the government’s actions must not result in excessive entanglement with religion.¹¹⁵

In addition, analysis under the Establishment Clause rubric would have to recognize that PERA is a law affecting the remedies available to litigants, not a “law respecting an establishment of religion.”¹¹⁶ As such, any analysis “driven both by

be determinative.” (footnote omitted)) (quoting *Wallace v. Jaffree*, 472 U.S. 38, 75 (1985) (O’Connor, J., concurring in the judgment)).

110. *Id.* at 864.

111. Veterans’ Memorials, Boy Scouts, Public Seals, and Other Public Expressions of Religion Protection Act of 2007, H.R. 725, 110th Cong. (2007).

112. *Lemon*, 403 U.S. at 612 (1971).

113. In *Cutter v. Wilkinson*, 544 U.S. 709 (2005), the Court upheld RLUIPA despite fears that “[the statute] ‘impermissibly advance[d] religion by giving greater protection to religious rights than to other constitutionally protected rights.’” *Id.* at 718 (2005) (quoting *Cutter v. Wilkinson*, 344 F.3d 257, 264 (6th Cir. 2003)).

114. *Id.* at 720 (quoting Corp. of Presiding Bishop of the Church of Jesus Christ of Latter-Day Saints v. Amos, 483 U.S. 327, 349 (1987) (O’Connor, J., concurring in the judgment)).

115. *Lemon*, 403 U.S. at 613.

116. U.S. CONST. amend. I. In fact, it was the old § 1988 that ran the risk of “fostering a pervasive bias or hostility to religion, which would undermine the very

the nature [of the challenged practice] and by our Nation's history"¹¹⁷ will militate in favor of PERA's constitutionality. Any incidental effect that PERA might have in discouraging the removal of religion from America's public life is no more than a "[r]ecognition of the role of God in our Nation's heritage" and a reflection of the "'unbroken history of official acknowledgment by all three branches of government of the role of religion in American life from at least 1789.'"¹¹⁸

Finally, PERA would not violate the Equal Protection or Due Process Clauses through its distinction between Free Exercise and Establishment claimants. PERA merely prevents prevailing Establishment Clause plaintiffs from recovering attorneys' fees; it does not affect plaintiffs' rights during the trial phase. Furthermore, the recovery of attorneys' fee is not a fundamental interest recognized in the Constitution.¹¹⁹ The situation created by PERA is more akin to the discharge of a fee that is related to a fundamental right.¹²⁰ Plaintiffs, however, are not being asked to pay a fee to the government to enjoy a fundamental right. They are paying an independent party after vindicating their fundamental right.¹²¹ In such a case, the denial of attorneys' fees does not rise to the level of a practical denial of a fundamental right.¹²²

neutrality the Establishment Clause requires." *Rosenberger v. Rector & Visitors of the Univ. of Va.*, 515 U.S. 819, 846 (1995).

117. *Van Orden v. Perry*, 545 U.S. 677, 686 (2005).

118. *Id.* at 686–87 (quoting *Lynch v. Donnelly*, 465 U.S. 668, 679 (1984)); *see also* *Marsh v. Chambers*, 463 U.S. 783, 786 (1983) (upholding a tradition of Judeo-Christian invocations before legislative bodies as a practice "deeply embedded in the history and tradition of this country").

119. *See Walker v. Bain*, 257 F.3d 660, 667 (6th Cir. 2001).

120. *See United States v. Kras*, 409 U.S. 434 (1973) (upholding a filing fee for discharge of debt in bankruptcy).

121. In some cases, plaintiffs argue that the government has a constitutional duty to pay interest groups like the ACLU, which has an annual budget of \$150 million. *See* Tony Perkins, Op-Ed., *Let ACLU Protest on its Own Dime*, SHREVEPORT TIMES, Nov. 25, 2006.

122. Unlike cases where the Court has mandated that a fee be waived, claimants have other means to vindicate their rights. They may, for example, represent themselves, retain a private pro bono attorney, or join with other plaintiffs with a similar interest. *Cf. Boddie v. Connecticut*, 401 U.S. 371 (1971) (holding that a state may not deny petitioners the right to divorce based solely on inability to pay a fee because the state has a monopoly on granting divorces).

Simply put, PERA would return plaintiffs to the status quo that existed before § 1988 was enacted thirty years ago.

IV. CONCLUSION

Thirty years ago, local school boards consistently, if unintentionally, violated the Establishment Clause under any of the Court's so-called tests.¹²³ Today, however, courts are refereeing much closer calls. If indeterminacies, such as found in the Establishment Clause, are the very thing that makes the Constitution endure,¹²⁴ Congress must be able to ensure that the questions concerning the application of the Establishment Clause are properly litigated.

Schools like Carver Elementary School must be encouraged to stand up for programs that seek to accommodate the religious needs of their students beyond what the Free Exercise Clause demands. Although one cannot be certain that Carver's program would have been upheld as constitutional, it is clear that its constitutionality was a question that should have been left to the courts and not to the veiled threats of narrowly focused interest groups. Because of those threats, bills like PERA may be the only way to give effect to students' free exercise rights.

As Alexis de Tocqueville observed nearly 150 years ago, Americans have long believed religion to be "necessary to the maintenance of republican institutions."¹²⁵ In order to preserve the American experiment of a pluralistic society, schools like Carver must be allowed to flourish within the play in the joints envisioned by the Framers of the First Amendment.

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123. See, e.g., *Sch. Dist. of Abington v. Schempp*, 374 U.S. 203 (1963) (striking down laws that required religious activity in public schools, such as reading the Bible).

124. As suggested by Justice Souter in *McCreary County v. Am. Civil Liberties Union of Ky.*, 545 U.S. 844, 879 (2005).

125. ALEXIS DE TOCQUEVILLE, *DEMOCRACY IN AMERICA* 293 (J.P. Mayer ed., 1969).

RECENT DEVELOPMENTS

ENEMY COMBATANTS AND A CHALLENGE TO THE SEPARATION OF WAR POWERS IN *Al-Marri v. Wright*, 487 F.3d 160 (4th Cir. 2007)

Few legal issues are more controversial today than the scope of the President's authority to detain individuals as enemy combatants. Although that enormous power is described nowhere in the Constitution, it was "the practice of our own military authorities before the adoption of the Constitution."¹ The Supreme Court has validated such detention as an "important incident to the conduct of war,"² even a "fundamental incident of waging war."³ Its purpose is "to prevent captured individuals from returning to the field of battle and taking up arms once again."⁴

Ali Saleh Kahlah al-Marri, a member of al Qaeda, is currently the only person known to be detained as an enemy combatant on the American mainland.⁵ On June 11, 2007, a divided panel of the United States Court of Appeals for the Fourth Circuit held that the President lacked the power to hold al-Marri as an

1. *Ex parte Quirin*, 317 U.S. 1, 31 (1942) (noting detention of enemy combatants during the American Revolution, as well as the Mexican-American War and the Civil War).

2. *Id.* at 28.

3. *Hamdi v. Rumsfeld*, 542 U.S. 507, 519 (2004) (plurality opinion). Although *Hamdi* was a plurality opinion, Justice Thomas in dissent, *id.* at 579 (Thomas, J., dissenting), agreed with the four-Justice plurality that Congress had authorized the President to detain enemy combatants, regardless of citizenship, until the end of hostilities. Thus, on this point, the decision will be treated as the majority view of the *Hamdi* Court.

4. *Id.* at 518.

5. See Adam Liptak, *Court Takes Second Look at Enemy Combatant Case*, N.Y. TIMES, Nov. 1, 2007, at A18. Two others, Jose Padilla and Yaser Hamdi, were also once detained as enemy combatants inside the United States. See Adam Liptak, *Judges Say U.S. Can't Hold Man as 'Combatant'*, N.Y. TIMES, June 12, 2007, at A1.

enemy combatant.⁶ The Fourth Circuit agreed to a rehearing en banc, and oral arguments were heard on October 31, 2007.⁷

In two separate holdings, the original panel sought to clarify the scope of the President's authority under the Constitution and enacted law to designate al Qaeda terrorists as enemy combatants. The court held that (i) the laws governing war are defined by international law, even when domestic statutes are to the contrary, and international law bars the detention of terrorists unless they are clearly acting on behalf of an enemy state,⁸ and (ii) Congress had already restricted the President's authority to subject al Qaeda terrorists captured inside the United States to military detention.⁹

In reaching these conclusions, the court departed from applicable Supreme Court precedent¹⁰ and a recent decision by the same circuit,¹¹ dramatically constricting the authority of Congress to authorize and the President to order the detention of terrorists who threaten grievous harm to the nation. Further, the court ignored clear language from Congress granting the President that power¹² and controlling case law recognizing it.¹³ These holdings, which largely invalidate the September 18, 2001, Authorization for Use of Military Force (AUMF),¹⁴ are contrary to the Define and Punish Clause of the Constitution,¹⁵

6. See *Al-Marri v. Wright*, 487 F.3d 160 (4th Cir. 2007), *reh'g granted*, No. 06-7427 (4th Cir. Aug. 22, 2007).

7. *Id.*; see also Liptak, *supra* note 5. At time of this writing, the en banc decision had not yet been issued; accordingly, this Comment addresses the decision of the original three-judge panel.

8. See *Al-Marri*, 487 F.3d at 184–86 (contending that “Common Article 3 and other Geneva Convention provisions applying to non-international conflicts [such as that between al Qaeda and the United States] . . . simply do *not* recognize the ‘legal category’ of enemy combatant”).

9. See *id.* at 189.

10. See, e.g., *Hamdi v. Rumsfeld*, 542 U.S. 507 (2004); *Ex parte Quirin*, 317 U.S. 1 (1942).

11. See *Padilla v. Hanft*, 423 F.3d 386 (4th Cir. 2005).

12. See Military Commissions Act of 2006 § 3(a)(1), 120 Stat. 2600 (codified at 10 U.S.C. § 5948a(1)(i)); Authorization for Use of Military Force, Pub. L. No. 107-40, 115 Stat. 224 (2001).

13. See *Padilla*, 423 F.3d at 386.

14. See Authorization for Use of Military Force § 2 (authorizing the use of force against “organizations” or “persons” such as al Qaeda and affiliates, and not only “nations,” responsible for the attacks of September 11, 2001).

15. See U.S. CONST. art. I, § 8, cl. 10 (granting Congress the power “[t]o define and punish . . . Offences against the Law of Nations”).

and depart from separation of powers principles as well as the courts' traditional deference to the political departments in construing war authorizations and related legislation.¹⁶ The consequence of the decision is to appropriate to the judiciary significant responsibility for determining with whom the nation is at war and what measures it will marshal against the enemy, thereby divesting the political branches of that power and the democratic controls and responsiveness they provide. If it became the law of the land, the panel decision would make it impossible for the United States military to detain the very terrorists who represent the greatest threat to the nation—those, like the September 11th hijackers, who operate within the United States and are unaffiliated or only nominally affiliated with a particular foreign government. The decision also has the potential to trigger major instability in war powers jurisprudence and to empower foreign states and organizations to define American law, even in the areas of domestic constitutional law and separation of powers.

A citizen of Qatar, al-Marri entered the United States legally with his wife and children on September 10, 2001.¹⁷ The morning after his arrival, al Qaeda terrorists used four hijacked commercial airliners to attack the Pentagon and the World Trade Center, killing thousands of Americans. Al-Marri was arrested by the FBI in connection with the attacks three months later, and was held in civilian custody for a year and a half before being designated an enemy combatant by the President on June 23, 2003. He was transferred to the Naval Consolidated Brig in Charleston, South Carolina shortly thereafter.¹⁸

Al-Marri then petitioned for a writ of habeas corpus in federal district court in South Carolina.¹⁹ The Government answered with a declaration by Jeffrey Rapp, Director of the Joint

16. See Samuel Issacharoff & Richard H. Pildes, *Between Civil Libertarianism and Executive Unilateralism: An Institutional Process Approach to Rights during Wartime*, 5 THEORETICAL INQUIRIES L. 1, 44 (2004) (canvassing Supreme Court decisions and concluding that, in the context of war, "[w]here both legislature and executive endorse a particular tradeoff between liberty and security, the courts have accepted that judgment").

17. Al-Marri *ex rel.* Berman v. Wright, 443 F. Supp. 2d 774, 776 (D.S.C. 2006).

18. *Id.*

19. *Id.* at 777.

Intelligence Task Force for Combating Terrorism,²⁰ asserting that al-Marri trained at an al Qaeda terrorist camp, was ordered by Osama bin Laden and September 11th mastermind Khalid Shaykh Muhammed to serve as a terrorist “sleeping agent,” and that he began gathering information on poisonous chemicals in anticipation of a terrorist strike.²¹

The district court explained that al-Marri could challenge his detention via the two-stage burden-shifting procedure announced in *Hamdi v. Rumsfeld*:

Hamdi provides that once the Government has offered evidence in support of its continued detention of an alleged enemy combatant, the detainee must be permitted “to present his own factual case to rebut the Government’s return [argument].” In so doing, the detainee must present “more persuasive evidence” to overcome the facts offered by the Government.²²

Applying the *Hamdi* framework to al-Marri’s case, the district court ruled that the so-called Rapp Declaration satisfied the Government’s initial burden, placing the onus on al-Marri to rebut the allegations.²³ In response, al-Marri “offered nothing more than a general denial in support of his burden.”²⁴ The district court then dismissed his habeas claim.²⁵ A Fourth Circuit panel, per Judge Diana Gribbon Motz, reversed, holding that the President lacked the authority to detain al-Marri militarily.²⁶ Judge Roger L. Gregory joined the opinion.

After determining that it could properly exercise jurisdiction over the case,²⁷ the court considered whether al-Marri had been

20. See Decl. of Jeffrey N. Rapp, Director, Joint Intelligence Task Force for Combating Terrorism, Sept. 9, 2004 [hereinafter Rapp Declaration]; see also *Al-Marri v. Wright*, 487 F.3d 160, 165–66 (4th Cir. 2007) (summarizing Rapp Declaration).

21. *Al-Marri*, 487 F.3d at 165–66.

22. *Al-Marri*, 443 F. Supp. 2d at 784 (citations omitted).

23. See *id.*

24. *Id.*

25. *Id.* at 785 (“Given Petitioner’s refusal to participate in the initial evidentiary process and his failure to offer *any* evidence on his behalf, it is beyond question that he has failed to present ‘more persuasive evidence’ to rebut Respondent’s classification and detention of him as an enemy combatant.”).

26. See *Al-Marri*, 487 F.3d at 160.

27. *Id.* at 167–68 (rejecting the Government’s argument that the Military Commissions Act of 2006 § 3(a)(1), 120 Stat. 2600 (codified at 10 U.S.C. § 948a(1)(i)), stripped the court of jurisdiction).

properly classified as an enemy combatant.²⁸ The court first summarized the Government's assertions of statutory and constitutional authority to detain al-Marri.²⁹ As statutory authority, the Government claimed that the AUMF,³⁰ as construed by the Supreme Court in *Hamdi*, allowed the President to detain al-Marri as an enemy combatant.³¹ In addition, the Government contended that Article II supplied the President with "inherent constitutional authority" to detain al-Marri.³²

In distinguishing the cases cited by the Government, the majority noted that American courts have looked to "careful distinctions made in the [international] law of war in identifying which individuals fit within the legal category of enemy combatants under our Constitution."³³ Thus, "[Yaser] Hamdi's detention was upheld because in fighting against the United States *on the battlefield* in Afghanistan with the Taliban, the de facto government of Afghanistan at the time, *Hamdi bore arms with the army of an enemy nation* and so, under the law of war, was an enemy combatant."³⁴ Similarly, the majority reasoned, the *Padilla* court "held that the AUMF authorized the President to detain as an enemy combatant an American citizen who *was armed and present in a combat zone in Afghanistan as part of Tali-*

28. *Id.* at 177.

29. *Id.*

30. The AUMF provides:

[T]he President is authorized to use all necessary and appropriate force against those nations, *organizations, or persons* he determines planned, authorized, committed, or aided the terrorist attacks that occurred on September 11, 2001, or harbored such *organizations or persons*, in order to prevent any future acts of international terrorism against the United States by such nations, *organizations or persons*.

Authorization for Use of Military Force, Pub. L. No. 107-40, § 2(a), 115 Stat. 224, 224 (2001) (emphasis added).

31. *Al-Marri*, 487 F.3d at 177-78.

32. *Id.* at 177 (emphasis omitted).

33. *Id.* at 179 (citing *Hamdi v. Rumsfeld*, 542 U.S. 507, 518 (2004) (plurality opinion); *Ex parte Quirin*, 317 U.S. 1, 30-31 & n.7 (1942); *Ex parte Milligan*, 71 U.S. (4 Wall.) 2, 121-22 (1866); *Padilla v. Hanft*, 423 F.3d 386, 391 (4th Cir. 2005) (quotation marks omitted)).

34. *Id.* at 179-80 (citing *Hamdi*, 542 U.S. at 518-20) (emphasis added). The effect for international law purposes of the relationship between al Qaeda and the de facto Taliban government of Afghanistan before the U.S.-led invasion of that country would likely affect the analysis of this question, but was not addressed by either the majority or the dissent and is beyond the scope of this Comment.

ban forces during the conflict there with the United States.”³⁵ *Quirin*, cited by the *Hamdi* Court as the “most apposite precedent,”³⁶ was also readily distinguishable from al-Marri’s case: the Supreme Court properly upheld the military detention of the Nazi spies and saboteurs in *Quirin*, including an American citizen, because “[c]itizens who associate themselves with the military arm of the *enemy government*, and with its aid, guidance and direction enter this country bent on hostile acts, are enemy belligerents [combatants] within the meaning of . . . the law of war.”³⁷

Having found that *Hamdi* and *Padilla* only validated detention of Taliban (rather than al Qaeda) affiliates, the panel suggested that al-Marri was more like Lambden Milligan, an Indiana resident detained as an enemy combatant during the Civil War.³⁸ In 1866, the Supreme Court voided Milligan’s detention and military commission conviction and announced that the “laws and usages [of war] . . . can never be applied to citizens in states which have upheld the authority of the government [that is, Union states], and where the courts are open and their process unobstructed.”³⁹

Addressing the Government’s counterarguments, the majority granted that the major precedents on executive detention over the past century and a half had departed from *Milligan*.⁴⁰ “*Hamdi*, *Quirin*, and *Padilla* distinguish *Milligan*,” wrote the court, but those cases nevertheless “recognize[d] that its core holding remain[ed] the law of the land”—which was, the panel urged, that “civilians within this country . . . may not be subjected to military control and deprived of constitutional rights.”⁴¹ Thus, the court held, the key cases on executive detention had only upheld, and international law only permitted,

35. *Id.* at 180 (quotation marks omitted) (emphasis added) (citing *Padilla*, 423 F.3d at 390–91).

36. *Hamdi*, 542 U.S. at 523 (plurality opinion).

37. *Al-Marri*, 487 F.3d at 181 (emphasis added) (quoting *Quirin*, 317 U.S. at 37–38).

38. See *Al-Marri*, 487 F.3d at 182 n.11.

39. *Ex parte* Milligan, 71 U.S. (4 Wall.) 2, 121–22 (1866) (adding that “Congress could grant no such power”).

40. See *Al-Marri*, 487 F.3d at 181–82.

41. *Id.* at 182 (citing *Milligan*, 71 U.S. at 121–22). The dicta from *Milligan* cited in support of this pronouncement were overruled by *Ex parte Quirin*, 317 U.S. 1 (1942) (validating the military detention and trial of enemy combatants, including a U.S. citizen, in the District of Columbia during World War II).

the detention of an enemy combatant when the individual was at the time of capture or shortly beforehand (a) engaged in combat or armed and prepared to do combat with the United States (b) in a combat zone, and (c) in the service of a foreign government, not a terrorist organization.⁴²

Having rejected the Government's argument that the AUMF granted "the President[] authority to detain 'enemy combatants' during the current conflict with al Qaeda" because it believed "[n]o precedent recognize[d] any such authority,"⁴³ the panel considered the Government's claim that the Constitution granted the President that power.⁴⁴ Applying Justice Jackson's canonical three-part framework for assessing claims of presidential power,⁴⁵ the court first asked whether Congress had spoken to the matter of detaining enemy combatants, and found that it had.⁴⁶ "[I]n the Patriot Act," the panel wrote, employing the *expressio unius*⁴⁷ mode of statutory construction, "Congress carefully stated how it wished the Government to

42. See *id.* at 178–85. The majority contended that *Hamdi* and *Padilla* "ground their holdings on this central teaching from *Quirin*, i.e., enemy combatant status rests on an individual's affiliation during wartime with the 'military arm of the enemy government,'" *id.* at 181, and found that "Common Article 3 and other Geneva Conventions provisions applying to non-international conflicts [such as that between al Qaeda and the United States] . . . simply do *not* recognize the 'legal category' of enemy combatant" without discussing the possibility or relevance of domestic legislation addressing that category, *id.* at 184–85.

43. *Id.* at 184.

44. See *id.* at 189–90.

45. See *Youngstown Sheet & Tube Co. v. Sawyer*, 343 U.S. 579, 635–38 (1952) (Jackson, J., concurring). In the Court's leading precedent on executive power, Justice Robert H. Jackson observed that "[p]residential powers are not fixed but fluctuate, depending upon their disjunction or conjunction with those of Congress." *Id.* at 635. Those fluctuations could be grouped into three categories, Justice Jackson wrote. In the first category, when the President acts with Congress' express or implied authorization, his authority is "at its maximum." *Id.* at 635. In the second category, the President "acts in absence of either a congressional grant or denial of authority, [and] can only rely upon his own independent powers." *Id.* at 637. In the third category, the President acts in the face of an express or implied congressional prohibition, and can thus only depend on his *exclusive* constitutional powers, those Congress cannot constitutionally restrict. See *id.* at 637–38.

46. *Al-Marri*, 487 F.3d at 190.

47. BLACK'S LAW DICTIONARY 620–21 (8th ed. 2004) (defining *expressio unius est exclusio alterius* as, "to express or include one thing implies the exclusion of the other, or of the alternative"). The *expressio unius* canon does "not even [enjoy] a mild presumption" without contextual support. *Id.* The Court's "context" here is the specificity of the Patriot Act provision on the one hand and the general grant of authority in the AUMF on the other.

handle aliens believed to be terrorists who were seized and held within the United States.”⁴⁸ By contrast, the AUMF was “silent on [the issue of detaining] asserted alien terrorists captured and held within the United States.”⁴⁹ By specifying a permissible procedure for the short-term detention of “terrorist aliens,” the court concluded, Congress in the Patriot Act⁵⁰ had “explicitly prohibit[ed] their indefinite detention.”⁵¹ The panel thus placed the President’s claim of independent constitutional authority to detain al-Marri in the third category of the Jackson scheme, where executive power is “at its lowest ebb.”⁵² Citing the Patriot Act provision and al-Marri’s due process rights, the majority held that the Government was free to prosecute al-Marri in a civilian court, deport him, hold him as a material witness, or detain him pursuant to the Patriot Act, but that the “military detention of al-Marri must cease.”⁵³

United States District Judge Henry E. Hudson, sitting by designation, dissented.⁵⁴ He found that the “clear congressional intent underlying the AUMF” and the statute’s plain language⁵⁵ had afforded the President “all the powers necessary,” including the power to order detention of al Qaeda terrorists like al-Marri, to combat and suppress those responsible for the September 11th attacks, and to prevent new attacks.⁵⁶

Judge Hudson contended that the panel had afforded too much importance to the locus of al-Marri’s arrest, noting that a panel of the same circuit in *Padilla* sitting only two years earlier

48. *Al-Marri*, 487 F.3d at 190.

49. *Id.*

50. Uniting and Strengthening America by Providing Appropriate Tools Required to Intercept and Obstruct Terrorism (USA PATRIOT ACT) Act of 2001 § 412(a), Pub. L. No. 107-56, 115 Stat. 272 (permitting the short-term “Detention of Terrorist Aliens”).

51. *Al-Marri*, 487 F.3d at 190; *see also id.* at 189 (noting that “a more specific statute will be given precedence over a more general one” (quoting *Busic v. United States*, 446 U.S. 398, 406 (1980))).

52. *Id.* at 191 (quoting *Youngstown Sheet & Tube Co. v. Sawyer*, 343 U.S. 579, 637 (1952) (Jackson, J., concurring)).

53. *Id.* at 195.

54. *Id.* at 195–99 (Hudson, J., dissenting).

55. Authorization for Use of Military Force, Pub. L. No. 107-40, § 2(a), 115 Stat. 224, 224 (2001) (authorizing the use of “all necessary and appropriate force” against “organizations or persons” such as al Qaeda and affiliates, and not only “nations,” that the President “determines” were responsible for the attacks of September 11, 2001).

56. *Al-Marri*, 487 F.3d at 196 (Hudson, J., dissenting).

had “unanimously rejected the argument that the locus of capture was relevant to the President’s authority to detain an enemy combatant.”⁵⁷ Furthermore, the detainee in that case—Jose Padilla, a U.S. citizen whose designation as an enemy combatant was upheld—was in a position similar to al-Marri’s.⁵⁸ Padilla came to the United States “for the purpose of blowing up apartment buildings . . . in continued prosecution of al Qaeda’s war of terror against the United States” after being directed to do so by Khalid Shaykh Muhammed;⁵⁹ similarly, al-Marri “volunteered for a martyr mission on behalf of al Qaeda, received funding from a known terrorist financier, and communicated with known terrorists by phone and e-mail,”⁶⁰ including Muhammed and Osama bin Laden.⁶¹ Neither Padilla nor al-Marri had been a “soldier in a formal sense, particularly while acting on U.S. soil.”⁶² Both had been “dispatched to the United States” as “sleeper agent[s]” by Muhammed.⁶³

The dissent then suggested that the major enemy combatant precedents counseled in favor of affirming the district court’s ruling.⁶⁴ Like the petitioners in *Quirin*, al-Marri had entered American territory with the intention of committing acts of war, and the *Quirin* Court found it no bar to military detention that petitioners had not “entered into the theatre or zone of active military operations,”⁶⁵ as al-Marri had not.⁶⁶ *Milligan* was similarly unhelpful to al-Marri, the dissent argued.⁶⁷ Whereas *Milligan* “did not associate himself with a rebellious State with which the United States was at war,”⁶⁸ the Government’s unre-

57. *Id.* at 197 (citation omitted) (citing *Padilla v. Hanft*, 423 F.3d 386, 394 (4th Cir. 2005)). Padilla, a U.S. citizen, was arrested by the FBI in Chicago. *Padilla*, 423 F.3d at 388.

58. *See Al-Marri*, 487 F.3d at 197 (Hudson, J., dissenting) (citing *Padilla*, 423 F.3d at 394).

59. *Id.* at 197 (citing *Padilla*, 423 F.3d at 390).

60. *Id.* at 198 (summarizing Rapp Declaration, § 8). The opinion incorrectly cites to § 7 of the Rapp Declaration; this statement in fact characterizes § 8.

61. *Id.*

62. *Al-Marri*, 487 F.3d at 198 (Hudson, J., dissenting).

63. *Id.*

64. *See id.* at 198–99.

65. *Ex parte Quirin*, 317 U.S. 1, 38 (1942).

66. *See Al-Marri*, 487 F.3d at 197–98 (Hudson, J., dissenting).

67. *See id.* at 198–99.

68. *Id.* at 198 (citing *Quirin*, 317 U.S. at 45; *Ex parte Milligan*, 71 U.S. (4 Wall.) 2, 131 (1866)).

butted evidence showed that al-Marri had, in fact, associated with, and was an agent of, al Qaeda, the very “organization targeted by the AUMF and the enemy with which the United States is at war.”⁶⁹ The dissent concluded that al-Marri’s detention as an enemy combatant had been properly “authorized under the AUMF ‘to prevent any future acts of international terrorism against the United States.’”⁷⁰

As discussed above, the majority grounded its finding that al-Marri had not been properly designated as an enemy combatant on two broad holdings:

1. The international laws of war determine who may be detained as an enemy combatant, and that body of law does not recognize terrorists who are not state actors as combatants. Therefore, even specific authorization from Congress cannot overcome the bar to detaining terrorists as enemy combatants set out in the laws of war.
2. The AUMF does not permit the military detention of al Qaeda terrorists inside the United States, the Patriot Act explicitly forbids it, and the President lacks the constitutional power to overcome the Patriot Act’s prohibition.

In support of the first holding, the majority contended that the laws of war are defined by “treaty obligations including the Hague and Geneva Conventions and customary principles developed alongside them.”⁷¹ The panel further contended that this body of international law “provides *clear rules* for determining an individual’s status during an international armed conflict, distinguishing between ‘combatants’ (members of a nation’s military, militia, or other armed forces, and those who fight alongside them) and ‘civilians’ (all other persons).”⁷²

The application of relevant treaties and customary international law,⁷³ however, is a more complicated exercise than

69. *Al-Marri*, 487 F.3d at 198.

70. *Id.* at 199 (quoting Authorization for Use of Military Force, Pub. L. No. 107-40, § 2(a), 115 Stat. 224, 224 (2001)).

71. *Id.* at 178 (majority opinion).

72. *Id.* (emphasis added).

73. Customary international law, as opposed to treaties and other formal instruments of state interaction, is the unwritten “law” of international relations that “results from a general and consistent practice of states followed by them from a sense of legal obligation.” RESTATEMENT (THIRD) OF THE FOREIGN RELATIONS LAW OF THE UNITED STATES § 102(2) (1987).

those statements suggest. Although the laws of war provide considerable guidance for the rights to which an individual is entitled once his status has been determined, they do not provide “clear rules” for reaching that determination *in the first place*. Indeed, much of the debate in international legal circles since September 11th has focused on the proper legal position of terrorists in the international system. American courts have not comprehensively addressed the question, perhaps because doing so would require them to “address the scope of [the President’s] constitutional authority” as Commander-in-Chief, an inquiry they are “understandably reluctant” to conduct, “especially during wartime, when the consequences of a constitutional error are potentially enormous.”⁷⁴ Although the *Al-Marri* panel treated it as a settled norm, the status of terrorists in international law in fact remains disputed.

The majority’s discussion on this point also neglected an additional, vitally important source of law. The authority of the United States government to detain individuals as enemy combatants derives not only from the international laws of war, but also from American domestic law. The Define and Punish Clause, which grants Congress the power “[t]o define and punish . . . Offences against the Law of Nations,”⁷⁵ allows Congress to define for domestic purposes the precise content and boundaries of customary international law.⁷⁶ For purposes of American law, therefore, Congress’ legislation concerning international law, including the laws of war, trumps non-self-executing treaties, the views of international law commentators, and other sources of customary international law. Al-

74. Curtis A. Bradley & Jack L. Goldsmith, *Congressional Authorization and the War on Terrorism*, 118 HARV. L. REV. 2051–52 (2005) (observing that “[i]nstead [of addressing the scope of that authority], courts have attempted, whenever possible, to decide difficult questions of wartime authority on the basis of what Congress has in fact authorized” by reference to Justice Jackson’s *Youngstown* framework).

75. U.S. CONST. art. I, § 8, cl. 10. The “law of nations” is known today as international law.

76. This power was the Founders’ response to their concern that extending the vague standards of international law domestically without congressional clarification would lead to unfairness. See 2 THE RECORDS OF THE FEDERAL CONVENTION OF 1787, at 614–15 (Max Farrand ed., 1911); see also J. Andrew Kent, *Congress’s Under-Appreciated Power to Define and Punish Offenses Against the Law of Nations*, 85 TEX. L. REV. 843, 898–900 (2007) (noting that “[Gouverneur] Morris’s desire for prior notice and clear definition [of international law by Congress prior to domestic application] sounds in the due process and legality principle concerns that we still have today about vague criminal statutes”).

though *Hamdan v. Rumsfeld*⁷⁷ clearly supports this view, the majority cited it for the contrary proposition: that that Court's finding that the war between the United States and al Qaeda in Afghanistan was "a conflict not of an international character" barred the Government from detaining al-Marri as an enemy combatant, because "Common Article 3 and other Geneva Convention provisions applying to non-international conflicts [such as that between al Qaeda and the United States] . . . simply do not recognize the 'legal category' of enemy combatant."⁷⁸

The panel read too much into *Hamdan*'s holding that the conflict between the United States and al Qaeda was "non-international." By suggesting that international law provided the exclusive basis for determining the eligibility of a terrorist for American military detention,⁷⁹ the panel departed from the *Hamdan* Court's conclusion, which itself echoed an established principle of constitutional law, that Congress was empowered⁸⁰ un-

77. 126 S. Ct. 2749 (2006).

78. *Al-Marri*, 487 F.3d at 184–85 (citations omitted) (internal quotation marks omitted). This statement contains two major errors. First, it neglects the preeminent importance the *Hamdan* Court accorded congressional intent on the subject. *Hamdan* noted that the Geneva Conventions applied because Congress had signaled in the Uniform Code of Military Justice (UCMJ) that it *wanted* them to apply, not because they were self-executing (that is, automatically effective for purposes of U.S. law). See *Hamdan v. Rumsfeld*, 126 S. Ct. 2749, 2780 (finding that Congress in the UCMJ had incorporated the laws of war, which include the Geneva Conventions). Second, in support of its contention that the Geneva Conventions on non-international conflicts "simply do not recognize the 'legal category' of enemy combatant," the panel cited a statement of the International Committee of the Red Cross (ICRC), Int'l Comm. of the Red Cross, Official Statement: The Relevance of IHL in the Context of Terrorism, 1, 3 (July 21, 2005), <http://www.icrc.org/Web/Eng/siteeng0.nsf/htmlall/terrorism-ihl-210705>, an organization that the Government rightly noted "is not a lawmaking body and does not have the power to make authoritative pronouncements of international law that would bind the United States." Petition for Rehearing and Rehearing En Banc at 14 n.5, *Al-Marri*, 487 F.3d 160 (No. 06-7427). Moreover, the Government argued persuasively that "read in context, the cited ICRC statement simply suggests that an individual fighting on behalf of a nonstate entity is not a *legitimate* combatant, not that he is somehow immune from capture or detention." *Id.*

79. See *Al-Marri*, 487 F.3d at 185 (contending that in conflicts recognized as "non-international" under the Geneva Conventions, "the 'legal category' of enemy combatant does not exist").

80. Every Justice on the *Hamdan* Court who reached the question either found that terrorists were already war criminals under the laws of war or that Congress was empowered to declare them as such. Of the eight Justices who decided *Hamdan*, four—Justices Stevens, Souter, Ginsburg, and Breyer—recognized that Congress possessed the authority under the Define and Punish Clause to "positively identifi[y]" conduct such as terrorism as a war crime and provide for the detention

der the Define and Punish Clause and the Necessary and Proper Clause⁸¹ to define violations of the laws of war, and thereby render terrorists eligible for enemy combatant designation. The majority also ignored unambiguous precedent holding that al Qaeda terrorists could be designated and detained as enemy combatants despite the “non-international character” of the conflict.⁸²

Whatever the precise legal status of terrorists in treaties and customary international law, Congress plainly exercised its constitutional authority to identify al Qaeda and affiliated terrorists as the enemy in the AUMF and the MCA for purposes of domestic law. In the AUMF, Congress clearly authorized force against al Qaeda⁸³ and “activated the President’s war powers,”⁸⁴ including the use of detention as a “fundamental incident of waging war.”⁸⁵ Congress’ choice of language in the AUMF—specifically targeting terrorist “organizations or persons”⁸⁶ connected to September 11th, rather than nation-states exclusively—reflected a legislative choice not to distinguish between al Qaeda and Taliban forces. Similarly, the MCA explicitly defines “unlawful enemy combatant” to include:

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 com-

and trial of individuals guilty of that conduct, even when it was not clearly considered a war crime under the common law of war. *See Hamdan*, 126 S. Ct. at 2779–80 & n.33. Justices Scalia, Thomas, and Alito already considered terrorism a war crime under the common law of war, and found that Congress had granted the President the authority to detain terrorists. *Id.* at 2833–34 (Thomas, J., dissenting). Justice Kennedy did not reach the question. *Id.* at 2809 (Kennedy, J., concurring); *see also Kent*, *supra* note 76, at 863 (noting that Congress and the courts have assumed that the Define and Punish Clause empowered Congress to pass legislation “regulating the conduct of individuals not [only] when that conduct violates customary international law by itself, but [also] when the conduct could impinge on interests . . . at the least[] related to the foreign affairs of the United States”).

81. U.S. CONST. art. I, § 8, cl. 18; *see also Kent*, *supra* note 76, at 864, 866–67 (contending that Congress relies on the Define and Punish Clause and the Necessary and Proper Clause to implement for domestic purposes norms and rules derived from, but broader than, what customary international law would otherwise prescribe).

82. *See Padilla v. Hanft*, 423 F.3d 386, 389 (4th Cir. 2005); *see also infra* pp. 405–06.

83. *See Authorization for Use of Military Force*, Pub. L. No. 107-40, § 2(a), 115 Stat. 224, 224 (2001); *Padilla*, 423 F.3d at 389.

84. *Hamdan*, 126 S. Ct. at 2775.

85. *Hamdi v. Rumsfeld*, 542 U.S. 507, 519 (2004) (plurality opinion).

86. *Authorization for Use of Military Force* § 2(a).

batant (including a person who is part of the Taliban, *al Qaeda*, or associated forces) ⁸⁷

In relying on the AUMF and the MCA, a President ordering the detention of *al Qaeda* forces as enemy combatants acts pursuant to the express or implied authorization of Congress, and his orders therefore merit “the strongest of presumptions and the widest latitude of judicial interpretation.”⁸⁸

The judiciary has generally deferred to the legislature and the executive’s combined interpretation of the AUMF’s “organizations or persons” language.⁸⁹ For example, courts have found that the AUMF applies to *al Qaeda* forces as well as the Taliban, recognizing the intent of the political branches to define the conflict between the United States and *al Qaeda* as a state of war.⁹⁰ The Fourth Circuit addressed the specific issue of detaining an *al Qaeda* terrorist captured and held inside the United States just two years before *Al-Marri*, holding in *Padilla* that “military detention as an enemy combatant by the President is unquestionably authorized by the AUMF as a fundamental incident to the President’s prosecution of the war against *al Qaeda* in Afghanistan.”⁹¹

The *Al-Marri* panel attempted to distinguish the Fourth Circuit’s *Padilla* holding, and the unavoidable inference that *al-Marri*’s detention as an *al Qaeda* terrorist is also warranted, by transforming former Chicago gang member José Padilla into a conventional belligerent. The majority states that Padilla “took up arms against United States forces in [Afghanistan] in the same way and to the same extent as did Hamdi,” and thus “un-

87. Military Commissions Act of 2006 § 3(a)(1), 120 Stat. 2601 (codified at 10 U.S.C. § 948a(1)(i)) (emphasis added).

88. *Youngstown Sheet & Tube Co. v. Sawyer*, 343 U.S. 579, 637 (1952) (Jackson, J., concurring).

89. Authorization for Use of Military Force § 2(a).

90. See *Hamdan*, 126 S. Ct. at 2804–05 (Kennedy, J., concurring) (discussing “our Nation’s armed conflict with the Taliban and *al Qaeda*” (emphasis added)); *id.* at 2798 (plurality opinion); see also *Hamdi*, 542 U.S. at 510 (plurality opinion) (noting that after September 11, “the President ordered United States Armed Forces to Afghanistan, with a mission to subdue *al Qaeda* and quell the Taliban regime that was known to support it” (emphasis added)); *Padilla*, 423 F.3d at 389 (finding that “*al Qaeda* . . . [is] an entity with which the United States is at war” (emphasis added)).

91. *Padilla*, 423 F.3d at 392 (emphasis added) (grounding this conclusion in the fact that Padilla “qualifie[d] as an enemy combatant under both the definition adopted by the Court in *Quirin* and the definition accepted by the controlling opinion in *Hamdi*”).

questionably qualifies as an ‘enemy combatant’ as that term was defined for the purposes of the controlling opinion in *Hamdi*.⁹² In a footnote urging a “narrow” interpretation of *Padilla*’s holding, the panel emphasized that it was Padilla’s support of the *Taliban* that made him an enemy combatant: “[a]lthough our opinion discussed Padilla’s association with al Qaeda, we held that Padilla was an enemy combatant because of his association with Taliban forces, i.e., Afghanistan government forces, on the battlefield in Afghanistan during the time of the conflict between the United States and Afghanistan.”⁹³ Even were the court to have set aside the unambiguous text of the AUMF and the MCA, along with clear Supreme Court and circuit precedent legitimating the use of force against al Qaeda,⁹⁴ its effort to distinguish al Qaeda from the Taliban would remain unpersuasive. The section of the *Padilla* case it cited for that formalistic proposition makes no distinction between those two groups, and explicitly justifies Padilla’s detention as an enemy combatant on grounds of his association with al Qaeda.⁹⁵ If the detention of al-Marri as an enemy combatant cannot be upheld because he associated with al Qaeda rather than an enemy state, and because he was captured and detained inside the United States rather than abroad, then neither can the detention of Padilla be justified. Nowhere, however, does the panel propose overturning that unanimous two-year-old circuit precedent.

In addition to finding that international law barred the political branches from defining terrorists as enemy combatants, the court held that a domestic statute, the Patriot Act,⁹⁶ restricted the President’s authority to detain aliens inside the United States as enemy combatants. Six years after the passage of that law, this suggestion appears to be unprecedented in the

92. *Al-Marri v. Wright*, 487 F.3d 160, 180 (4th Cir. 2007) (quoting *Padilla*, 423 F.3d at 391).

93. *Id.* at 180 n.10.

94. See *supra* note 90.

95. See *Padilla*, 423 F.3d at 391 (“[U]nder the definition of ‘enemy combatant’ employed in *Hamdi*, we can discern no difference in principle between Hamdi and Padilla. Like Hamdi, Padilla associated with forces hostile to the United States in Afghanistan. Compare [Joint Appendix] 19–23 (detailing Padilla’s association with al Qaeda in Afghanistan and Pakistan), with *Hamdi*, 124 S. Ct. at 2637 (describing Hamdi’s affiliation with the Taliban in Afghanistan).” (emphasis added) (citations omitted)).

96. Uniting and Strengthening America by Providing Appropriate Tools Required to Intercept and Obstruct Terrorism (USA PATRIOT ACT) Act of 2001 § 412(a), Pub. L. No. 107–56, 115 Stat. 272.

federal courts. If the Due Process Clause is no bar to detaining an American *citizen* as an enemy combatant,⁹⁷ it is hard to imagine that Congress intended the Patriot Act's *civil* detention provisions to restrict the President's authority to *militarily* detain *aliens* suspected of being terrorists as enemy combatants. Congress' authorization of detention in the AUMF⁹⁸ prior to the passage of the Patriot Act, its appropriation of funds for detention,⁹⁹ its subsequent authorization of detention in the MCA, and the canon of avoiding absurd results in statutory interpretation¹⁰⁰ all counsel against this reading. Because the President's power to detain enemy combatants in this war has a statutory basis¹⁰¹ in addition to a constitutional basis,¹⁰² the panel's location of the President's order in Justice Jackson's third category was incorrect. *Al-Marri* is best understood as falling within Justice Jackson's first category. Given that the executive has some constitutional authority to detain enemy combatants,¹⁰³ basic principles of constitutional avoidance¹⁰⁴ would confirm this reading of the relevant statutes, even if the court were inclined to find the President's actions and Congress' intent in conflict.

The military detention of al-Marri as an enemy combatant was authorized by the Constitution, statute, and controlling precedent, and was ordered by the President acting at the zenith of his powers.¹⁰⁵ By barring the President from detaining

97. See *Hamdi v. Rumsfeld*, 542 U.S. 507, 519 (2004) (plurality opinion); *Ex parte Quirin*, 317 U.S. 1, 37–38 (1942).

98. See *Hamdi*, 542 U.S. at 519 (plurality opinion) (holding that Congress had authorized detention of Taliban forces captured in Afghanistan). As discussed above, *Padilla* extended this logic to al Qaeda forces captured in the United States.

99. See *Hamdi v. Rumsfeld (Hamdi III)*, 316 F. 3d 450, 467–68 (4th Cir. 2003) (finding it “difficult if not impossible to understand how Congress could make appropriations for the detention of persons similar to prisoners of war without also authorizing their detention in the first instance” (quotation marks omitted)), *vacated and remanded on other grounds*, *Hamdi v. Rumsfeld*, 542 U.S. 507 (2004) (plurality opinion).

100. See *Church of the Holy Trinity v. United States*, 143 U.S. 457, 459–61 (1892).

101. See Military Commissions Act of 2006 § 3(a)(1), 120 Stat. 2601 (codified at 10 U.S.C. § 948a(1)(i)); Authorization for Use of Military Force, Pub. L. No. 107-40, § 2(a), 115 Stat. 224, 224 (2001); *Hamdi*, 542 U.S. at 519 (plurality opinion).

102. See *Quirin*, 317 U.S. at 26 (noting the President's power under the Commander-in-Chief, Vesting, and Take Care Clauses to wage war and carry statutes—here, the AUMF and the MCA—into execution).

103. See *id.*

104. See *Crowell v. Benson*, 285 U.S. 22, 62 (1932).

105. See *Youngstown Sheet & Tube Co. v. Sawyer*, 343 U.S. 579, 635–37 (1952) (Jackson, J., concurring).

as enemy combatants al Qaeda fighters like al-Marri—who was trained by al Qaeda in the use of poisons, raced to enter the United States before September 11, 2001, stored information about poisonous chemical distributors on his computer, volunteered to be a martyr for al Qaeda, and conspired with Osama bin Laden and Khalid Shaykh Muhammed to lead a second wave of attacks inside the United States¹⁰⁶—the court made it more difficult to prevent future attacks. Equally important, it elevated international norms over the constitutional power of Congress to define the enemy for purposes of American law, a strange and probably unconstitutional result,¹⁰⁷ and one that could prove problematic as the political branches inevitably seek to refine the scope of the war on terror.

Six years into a war already longer than either World War, America's present policy of placing enemy combatants in indefinite military detention "has harmed the reputation of the United States, disrupted alliances, [and] hurt us in the war of ideas with the Islamic world."¹⁰⁸ Alternatives abound. A former top terrorism prosecutor has proposed trying all terror suspects in civilian courts,¹⁰⁹ while Hamdan's lawyer and a former Justice Department official who helped formulate the Bush Administration's detention policies have proposed creating a specialized Article III court to deal with national security matters.¹¹⁰ But whatever the wisdom of the current policy, the President retains the authority to detain enemy combatants until the end of the conflict unless Congress revokes or restricts that power, and the Fourth Circuit was wrong to substitute its judgment for that of Congress and the President.

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106. See Rapp Declaration, §§ 8, 12. Al-Marri declined to respond to these allegations or "offer any evidence on his behalf." *Al-Marri v. Wright*, 443 F. Supp. 2d 774, 785 (D.S.C. 2006).

107. See Kent, *supra* note 76, at 930–36.

108. Jack L. Goldsmith & Neal Katyal, Op-Ed., *The Terrorists' Court*, N.Y. TIMES, July 11, 2007, at A19.

109. See Kelly Anne Moore, Op-Ed., *Take Al Qaeda to Court*, N.Y. TIMES, Aug. 21, 2007, at A19.

110. See Goldsmith & Katyal, *supra* note 108.

* The Author thanks Professors Jack L. Goldsmith and J. Andrew Kent, as well as Matthew S. Owen, and his father, Merton A. Shill, for comments on earlier drafts.

SAYING WHAT THE LAW SHOULD BE:
JUDICIAL USURPATION IN
Al-Marri v. Wright, 487 F.3d 160 (4th Cir. 2007)

*Al-Marri v. Wright*¹ is the most recent case in the struggle to define who qualifies as an enemy combatant in the Global War on Terror. In *Al-Marri*, the Fourth Circuit, in contrast with its previous ruling in *Padilla v. Hanft*,² found that the President's authority to designate a person detained on U.S. soil an enemy combatant was greatly limited. In so doing, the court inappropriately usurped legislative and executive powers.

Ali Saleh Kahlah al-Marri, a graduate student, was lawfully residing in Illinois when the FBI arrested him in December of 2001.³ After criminal proceedings against al-Marri stalled, President Bush declared al-Marri an enemy combatant and ordered him transferred to the custody of the Secretary of Defense.⁴ Since June 23, 2003, the military has held al-Marri as an enemy combatant at the Naval Consolidated Brig in South Carolina.⁵

Al-Marri's attorney petitioned for a writ of habeas corpus in federal district court in South Carolina.⁶ The government responded to the petition with a declaration from the Joint Intelligence Task Force for Combating Terrorism that asserted, among other things, that al-Marri had trained with al Qaeda and was a "sleeping agent" for al Qaeda in America.⁷ The district court dismissed al-Marri's habeas petition on the grounds that al-Marri had failed to rebut the accusations in the declaration.⁸ Al-Marri appealed.⁹

In an opinion written by Judge Diana Gribbon Motz, the Fourth Circuit reversed the denial of the writ by the district

1. 487 F.3d 160 (4th Cir. 2007).

2. 423 F.3d 386 (4th Cir. 2005).

3. *Al-Marri*, 487 F.3d at 164.

4. *Id.* at 165.

5. *Id.* at 164–65.

6. *Id.* at 165.

7. *Id.* at 165–66.

8. *Id.* at 166.

9. *Id.*

court.¹⁰ The court first addressed the question whether it had jurisdiction over the petition. The government argued that the Military Commissions Act of 2006 (MCA)¹¹ removed from the court's jurisdiction habeas petitions from declared enemy combatants.¹² Section 7 of the MCA provides:

No court . . . shall have jurisdiction to hear or consider an application for a writ of habeas corpus filed by or on behalf of an alien of the United States who has been determined by the United States to have been properly detained as an enemy combatant . . .¹³

The court held that the MCA did not strip it of jurisdiction over al-Marri's habeas petition because there had not been a review of his status as an enemy combatant after the President's initial decision to detain him. The court understood the statute to require two steps: a determination that a person is an enemy combatant, followed by a review of the appropriateness of that classification.¹⁴ The panel found that al-Marri had not received the second step of the review necessary to remove his habeas petition from the court's jurisdiction.¹⁵

Addressing the merits of the habeas appeal, the court found the government's two primary arguments unpersuasive. First, the government argued that the Authorization for Use of Military Force (AUMF)¹⁶ authorized the President to hold al-Marri as an enemy combatant.¹⁷ Second, the government argued that the President had inherent constitutional authority under his

10. *Id.* at 164.

11. Pub. L. No. 109-366, 120 Stat. 2600 (codified at 10 U.S.C. § 948a-950w).

12. *Al-Marri*, 487 F.3d at 167.

13. 28 U.S.C. § 2241(e).

14. *See Al-Marri*, 487 F.3d at 169.

15. *See id.* at 170-71.

16. Pub. L. No. 107-40, 115 Stat. 224 (2001). The statute authorizes the President to use all necessary and appropriate force against those nations, organizations, or persons he determines planned, authorized, committed, or aided the terrorist attacks that occurred on September 11, 2001, or harbored such organizations or persons, in order to prevent any future acts of international terrorism against the United States by such nations, organizations or persons.

Id.

17. *See Al-Marri*, 487 F.3d at 174.

Article II commander-in-chief authority to detain al-Marri as an enemy combatant.¹⁸

The court first rejected a literal reading of the AUMF's "all necessary and appropriate force" language, because such a reading would lead to "absurd results," including allowing the President to detain anyone who was in any way related to the attacks on September 11, 2001.¹⁹ The court then argued that the AUMF must be read in light of precedents such as *Hamdi v. Rumsfeld*²⁰ and *Padilla v. Hanft*,²¹ and by references to attempts to define the scope of the Government's authority to detain and try enemy combatants in *Ex parte Quirin*²² and *Ex parte Milligan*.²³ In *Hamdi*, the Supreme Court upheld the classification as an enemy combatant of an individual who fought with the Taliban, the *de facto* government of Afghanistan.²⁴ In *Padilla*, the Fourth Circuit allowed the detention as an enemy combatant of an individual who was armed and present in Afghanistan in opposition to American military action, even though the government captured that individual at Chicago's O'Hare Airport.²⁵ The *Al-Marri* court reasoned that these cases could be distinguished because the detainees in *Hamdi* and *Padilla* had been working at the direction of, or in concert with, Taliban forces rather than al Qaeda, the group with which al-Marri was allegedly associated.²⁶

The court also analyzed the Supreme Court's historical interpretations of the permissible scope of enemy combatant status. In *Quirin*, the Supreme Court upheld the designation as enemy combatants of several German nationals and one American national who, acting on behalf of Nazi Germany, secretly entered the United States to sabotage American war industries.²⁷ In

18. *See id.* at 190.

19. *Id.* at 177–78.

20. 542 U.S. 507 (2004).

21. 423 F.3d 386 (4th Cir. 2005).

22. 317 U.S. 1 (1942).

23. 71 U.S. (4 Wall.) 2 (1866).

24. *See Hamdi v. Rumsfeld*, 542 U.S. 507, 518 (2004) (plurality opinion).

25. *See Padilla v. Hanft*, 423 F.3d 386, 389–90 (4th Cir. 2005).

26. *See Al-Marri*, 487 F.3d at 181 ("*Hamdi* and *Padilla* ground their holdings on . . . an individual's affiliation during wartime with the 'military arm of the enemy government.' . . . [I]n *Hamdi* and *Padilla*, it was the Taliban government of Afghanistan.").

27. *See Ex parte Quirin*, 317 U.S. 1, 20–21, 30–31 (1942).

Milligan, the Court declined to find a southern Civil War sympathizer in Indiana to be an enemy combatant, reasoning that he was not aligned with the military arm of a foreign government.²⁸ From these cases, the *Al-Marri* court concluded that one can be an enemy combatant only if he takes up arms with the military arm of a foreign government.²⁹ The court argued that because the government had alleged only that al-Marri was part of an international terrorist organization, not the military arm of a foreign government, he did not fall into the category of enemy combatant as defined in *Quirin* and *Milligan*.³⁰

Having rejected the government's statutory argument, the court was no more sympathetic to the government's contention that the President had the inherent constitutional authority to detain al-Marri as an enemy combatant. The court held that Congress, in section 412 of the Patriot Act,³¹ had clearly identified the authority granted to the Attorney General to deal with suspected terrorists within the United States, and that the Patriot Act specifically forbade indefinite detention.³² The court briefly considered two cases dealing with the President's inherent authority over enemy combatants, *Johnson v. Eisen-trager*³³ and *Ludecke v. Watkins*,³⁴ but found that they allow the President special military authority only when dealing with subjects of foreign states at war with the United States.³⁵ The court concluded that the President had no inherent constitutional authority to detain as an enemy combatant one who was lawfully present on U.S. soil and who "is not a subject of a country with which the United States is at war."³⁶ Finding that the President had no authority to detain al-Marri, the court granted the habeas petition and ordered the government to end its military detention of al-Marri.³⁷

28. See *Ex parte Milligan*, 71 U.S. (4 Wall.) 2, 121–22 (1866).

29. See *Al-Marri*, 487 F.3d at 181–82.

30. See *id.* at 183.

31. Uniting and Strengthening America by Providing Appropriate Tools Required to Intercept and Obstruct Terrorism (USA PATRIOT ACT) Act of 2001, Pub. L. No. 107-56, 115 Stat. 272.

32. See *Al-Marri*, 487 F.3d at 190.

33. 339 U.S. 763 (1950).

34. 335 U.S. 160 (1948).

35. See *Al-Marri*, 487 F.3d at 192.

36. *Id.* at 193.

37. *Id.* at 195.

U.S. District Judge Henry E. Hudson, sitting by designation, dissented. Although he agreed with the majority that the court had jurisdiction over the habeas appeal, he found the court's analysis of the President's authority to classify an individual as an enemy combatant unpersuasive.³⁸ He argued that the AUMF, in granting the President the authority to act against those "nations, organizations, or persons" responsible for the attacks on September 11, authorized the President to act against those affiliated with al Qaeda.³⁹ Judge Hudson also argued that the Fourth Circuit's reasoning in *Padilla* (that the President may declare a person who is aligned with al Qaeda, but who is captured on U.S. soil, to be an enemy combatant) should govern al-Marri's case.⁴⁰

The court in *Al-Marri* was correct in its determination that the MCA did not strip it of jurisdiction. Its reliance upon a plain interpretation of the statutory language is, as the majority explained, the appropriate starting point when interpreting a statute.⁴¹ The court appropriately read the MCA to require a two-step process for removing a case from the court's jurisdiction, and the government's failure to complete the second step allowed the court to retain jurisdiction over al-Marri's habeas petition.⁴²

The manner in which the court answered the merits question, however, inappropriately usurped authorities rightfully held by Congress and the President. The court unjustifiably overturned a reasonable interpretation of the AUMF and misconstrued prior interpretations of the statute. Furthermore, the court failed to address adequately the argument that the President had inherent constitutional authority to detain enemy combatants, as the Patriot Act cannot remove authorities that the Constitution grants to the President.

The court's analysis of the AUMF ignored the express and implied intent of Congress. Specifically, the court neglected to engage in the same type of textual interpretation with respect to the AUMF as it had used in interpreting the MCA's jurisdiction-stripping provision. The baseline for the court's analysis of

38. *Id.* at 195–96 (Hudson, J., dissenting).

39. *Id.* at 196 (quoting Authorization for Use of Military Force, Pub. L. No. 107-40, § 2(a), 115 Stat. 224 (2001) (emphasis added)).

40. *Id.* at 197–98.

41. *See id.* at 170 (majority opinion).

42. *See id.* at 169–70.

the AUMF should have been the plain language of the statute.⁴³ The statute gave the President the authority to use “all necessary and appropriate force against those nations, organizations, or persons” involved with the attacks of September 11.⁴⁴ A textual interpretation of this statute would have found that the inclusion of the phrase “nations, organizations, or persons” showed Congress’ intent that its grant of authority to use force not be limited to use against nation-states.⁴⁵ Additionally, a textual interpretation would have shown that the use of the term “all necessary and appropriate force” included a lesser component of force: detention.⁴⁶ Instead of making this simple finding, the court found that such an interpretation would lead to “absurd” results and therefore rejected it.⁴⁷ The court said what the law should be—not what the law is—and therefore stepped far outside the bounds of the role of the judiciary.⁴⁸

Instead of accepting the plain language of the statute, the court instead interpreted the meaning of the statute in light of four cases: *Hamdi v. Rumsfeld*,⁴⁹ *Padilla v. Hanft*,⁵⁰ *Ex parte Quirin*,⁵¹ and *Ex parte Milligan*.⁵² In interpreting *Hamdi*, the court relied on the statement from the plurality that the AUMF explicitly authorizes the detention of individuals who were “part

43. See *Watt v. Alaska*, 451 U.S. 259, 265 (1981); see also *Al-Marri*, 487 F.3d at 168 (“As always in interpreting an act of Congress, we begin with the plain language of the statute.”).

44. Authorization for Use of Military Force, Pub. L. No. 107-40, § 2(a), 115 Stat. 224 (2001).

45. See *Hamdi*, 542 U.S. at 518 (plurality opinion) (“There can be no doubt that individuals who fought against the United States in Afghanistan as part of the Taliban, an organization known to have supported the al Qaeda terrorist network responsible for those attacks, are individuals Congress sought to target in passing the AUMF.”).

46. See *id.* (“The capture and detention of lawful combatants and the capture, detention, and trial of unlawful combatants, by ‘universal agreement and practice,’ are ‘important incident[s] of war.’” (citing *Ex parte Quirin*, 317 U.S. 1, 28, 30 (1942))).

47. *Al-Marri*, 487 F.3d at 177.

48. Cf. *Griswold v. Connecticut*, 381 U.S. 479, 527 (1965) (Stewart, J., dissenting) (Even if a law regulating contraception was an “uncommonly silly law . . . we are not asked in this case to say whether we think this law [regulating contraception] is unwise, or even asinine. We are asked to hold that it violates the United States Constitution. And that I cannot do.”).

49. 542 U.S. 507 (2004).

50. 423 F.3d 386 (4th Cir. 2005).

51. 317 U.S. 1 (1942).

52. 71 U.S. (4 Wall.) 2 (1866).

of or supporting forces hostile to the United States or coalition partners in Afghanistan and who engaged in an armed conflict against the United States there.”⁵³ Even though the AUMF was passed in response to attacks of September 11 and specifically referenced that date,⁵⁴ the Fourth Circuit interpreted the statute in a way that excepted from the AUMF’s coverage al Qaeda members (the group that planned, financed, and conducted the September 11th terrorist attacks) who were not directly associated with the Taliban.⁵⁵ Congress made it explicitly clear in the text of the AUMF that it intended that the grant of authority for the use of military force not be limited to one country or region but that it extend to terrorist organizations.⁵⁶ The Fourth Circuit used dictum from a plurality decision to ignore the plain text and congressional intent of a statute. This far exceeded the authority of the courts to “say what the law is.”⁵⁷

As the dissent persuasively argued,⁵⁸ *Padilla v. Hanft* strongly supported the government’s position in *Al-Marri*. In *Padilla*, a different panel of the Fourth Circuit had no trouble recognizing that “al Qaeda [is] an entity with which the United States is at war.”⁵⁹ The court in that case concluded that it was Padilla’s association with al Qaeda, not necessarily his association with the Taliban, that made him eligible for enemy combatant status.⁶⁰ If the court had applied its own precedent from *Padilla*, it would have found that the President had the authority to detain al-Marri and classify him as an enemy combatant.

The court’s reliance on *Milligan* and *Quirin* was also puzzling. The AUMF was passed in 2001, but *Milligan* and *Quirin*

53. *Hamdi*, 542 U.S. at 517 (plurality opinion) (quotation marks omitted).

54. See Pub. L. No. 107-40, 115 Stat. 224 (2001) (“Whereas, on September 11, 2001, acts of treacherous violence were committed against the United States and its citizens . . .”).

55. See *Al-Marri*, 487 F.3d at 183 (“[A]l-Marri is not alleged to have been part of a Taliban unit, not alleged to have stood alongside the Taliban or the armed forces of any other enemy nation, not alleged to have been on the battlefield during the war in Afghanistan, not alleged to have even been in Afghanistan during the armed conflict there . . .”).

56. See Pub. L. No. 107-40, 115 Stat. 224 (2001) (“Whereas, the President has authority under the Constitution to take action to deter and prevent acts of international terrorism . . .”).

57. *Marbury v. Madison*, 5 U.S. (1 Cranch) 137, 177 (1803).

58. *Al-Marri*, 487 F.3d at 197 (Hudson, J., dissenting).

59. *Padilla v. Hanft*, 423 F.3d 386, 389 (4th Cir. 2005).

60. See *id.*

were decided 135 and 59 years, respectively, before its enactment. It is difficult to understand how the Court interpreted a statute using judicial decisions related to different claims of executive authority, and made at a time before the AUMF had ever been contemplated. *Quirin* was decided at a time when the enemy of the nation was multiple foreign governments; the enemy of the nation is now international terrorist organizations.⁶¹ Furthermore, *Quirin* supports a finding contrary to that for which the court employed it, because *Quirin* held that enemy combatant status does not depend on the citizenship (or, by analogy, the status of lawful permanent resident) of the alleged enemy combatant.⁶² *Milligan's* usefulness in interpreting the AUMF is questionable at best: the word "combatant" does not appear anywhere in the court's opinion. Even if *Milligan* were applicable, it would not support the conclusion for which the court employed it, because *Milligan* is a case about agents of "states in rebellion,"⁶³ not agents of foreign powers.

The cases the court cited did not support its argument. Moreover, the court's belief that it had the ability to determine who is an enemy combatant is a usurpation of rightful legislative power best left to the legislature. In *Al-Marri*, the court made much of the fact that al-Marri was not alleged to be associated with any government.⁶⁴ The court asserted that there was a fundamental difference, for the purposes of enemy combatant status, between persons associated with foreign governments and those associated with international terrorist organizations.⁶⁵ It is difficult to imagine an area of discretion that is more properly held by Congress and the President than the authority to decide with whom the United States is engaged in armed hostilities.

The cases cited by the majority did not support the holding that enemy combatant status is appropriate only for those associated with the military arm of a foreign government. *Quirin*

61. See Authorization for Use of Military Force, Pub. L. No. 107-40, 115 Stat. 224 (2001).

62. See *Quirin*, 317 U.S. at 37 ("Citizenship in the United States of an enemy belligerent does not relieve him from the consequences of a belligerency which is unlawful because in violation of the law of war.").

63. See *Milligan*, 71 U.S. (4 Wall.) at 108 ("Milligan insists . . . he . . . had not been, since the commencement of the late Rebellion, a resident of any of the States whose citizens were arrayed against the government . . .").

64. See *Al-Marri*, 487 F.3d at 182–83.

65. *Id.* at 183.

and *Milligan* provide only minimal support for the court's broad contentions. These cases require only that an individual be acting at the behest of a foreign power, not a state. In its enemy combatant cases, the Supreme Court has never stated that courts may determine the form of that hostile foreign power—be it a non-governmental organization or a state. Quite the opposite, courts have recognized that al Qaeda is a hostile foreign power *because* the President has decided the United States is at war with it.⁶⁶

The court's analysis of the government's argument that the President had inherent constitutional authority to detain enemy combatants was flawed and incomplete. To address the government's argument about inherent constitutional authority, the court argued that the Patriot Act⁶⁷ limited the President's powers.⁶⁸ This analysis has two flaws. First, statutes cannot limit constitutional authority. If the President possesses exclusive constitutional authority to detain enemy combatants, no statute by itself can restrict that authority. The court should have engaged in an analysis of the text and meaning of Article II at the time of ratification to determine whether the President possessed the inherent authority to order the military to take an enemy combatant into custody for working in collaboration with a hostile foreign power, and if that power remained in effect despite the Patriot Act.⁶⁹ It is possible that a statute may limit the President's power, but a statute cannot limit an authority the Constitution vests solely in the President.

The second flaw in the court's reasoning was that, even assuming that the court's discussion of the Patriot Act was appropriate, it failed to answer the government's arguments. The Patriot Act's provisions relating to detention of terrorists referred to the authority of the Attorney General (a law-enforcement of-

66. See *Hamdan v. Rumsfeld*, 126 S. Ct. 2749, 2794 (2006) (referring to the "United States' war with al Qaeda"); *Padilla v. Hanft*, 423 F.3d 386, 389 (4th Cir. 2005).

67. Uniting and Strengthening America by Providing Appropriate Tools Required to Intercept and Obstruct Terrorism (USA PATRIOT ACT) Act of 2001, Pub. L. No. 107-56, 115 Stat 272.

68. See *Al-Marri*, 487 F.3d at 190–91.

69. See *Youngstown Sheet & Tube Co. v. Sawyer*, 343 U.S. 579, 635–38 (1952) (Jackson, J., concurring) (presenting a three-part analysis, part three of which recognizes that the President can retain inherent constitutional authority even in the face of a directly contradictory statute).

ficer) to hold suspected terrorists.⁷⁰ That is not the authority claimed by the President in *Al-Marri*; the President claimed that as Commander-in-Chief of the United States Armed Forces he had the authority to order the Secretary of Defense to hold an agent of a foreign power with which the United States is at war.⁷¹ The Attorney General's authority to hold suspected terrorists and the Commander-in-Chief's authority to hold suspected agents of a foreign power are two fundamentally different authorities. That Congress legislated on the law enforcement authority given the President by the Take Care Clause⁷² does not affect the President's authority to manage the armed forces through his role as Commander-in-Chief.⁷³ Of course, this argument does not demonstrate that the President possessed the inherent constitutional authority that he claimed. Rather, it establishes that the court failed to demonstrate that the President lacked the authorities that he claimed to possess.

Al-Marri was actually a narrow case that did not warrant a lengthy opinion. The scope of the conflict between the parties was relatively limited:

Both parties recognize[d] that it d[id] not violate the Due Process Clause for the President to order the military to seize and detain individuals who 'qualif[ied]' as enemy combatants for the duration of a war. They disagree[d], however, as to whether the evidence the Government . . . proffered, even assuming its accuracy, establishe[d] that al-Marri fit[] within the 'legal category' of enemy combatants.⁷⁴

The court needed to decide only whether the allegations about al-Marri, if true, would mean that he was properly classified as an enemy combatant. That question did not require an exhaustive inquiry into the scope of the President's authority to detain enemy combatants; it required only a determination of whether

70. See, e.g., Pub. L. No. 107-56, § 412, 115 Stat. 272, 351 (2001) ("The Attorney General shall take into custody . . .").

71. See *Al-Marri*, 487 F.3d at 165 ("The President determined that al-Marri's detention by the military was 'necessary to prevent him from aiding al Qaeda' and thus ordered the Attorney General to surrender al-Marri to the Secretary of Defense, and the Secretary of Defense to 'detain him as an enemy combatant.'").

72. See U.S. CONST. art. II, § 3 ("[H]e shall take Care that the Laws be faithfully executed . . .").

73. See U.S. CONST. art. II, § 2 ("The President shall be Commander in Chief of the Army and Navy of the United States . . .").

74. *Al-Marri*, 487 F.3d at 177.

al-Marri was one. The government alleged that al-Marri had come to the United States at the direction and instruction of al Qaeda,⁷⁵ an organization with which the United States is at war.⁷⁶ Under the AUMF, the President had the authority to detain those affiliated with al Qaeda to prevent a future terrorist attack. The question presented to the court in *Al-Marri* was relatively straightforward, and a simple answer was readily available. The court's wide-ranging usurpation of the authorities of Congress and the President was unnecessary and unsupported.

The court's opinion in *Al-Marri* is unlikely to be the final word on the status of the President's authority to detain enemy combatants. The Fourth Circuit has granted the government's request for en banc rehearing of the case,⁷⁷ and the case's treatment of important issues left unresolved in *Hamdi* means the Supreme Court is likely to grant certiorari if the case were to be appealed from the forthcoming en banc decision. The *Al-Marri* opinion represents a high-water mark in the attempt of some parts of the judiciary to usurp for themselves powers rightfully held by the President and Congress. The *Al-Marri* opinion is a sobering reminder that courts may have an agenda of their own in the debate over the status of enemy combatants in the Global War on Terror.

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75. *See id.* at 165–66.

76. *See Padilla v. Hanft*, 423 F.3d 386, 389 (4th Cir. 2005); Authorization for Use of Military Force, Pub. L. No. 107-40, 115 Stat. 224 (2001); *see also* Press Release, White House, Fact Sheet: Combating Terrorism Worldwide (Aug. 6, 2007), available at <http://www.whitehouse.gov/news/releases/2007/08/print/20070806-1.html>.

77. *Al-Marri v. Wright*, 487 F.3d 160 (4th Cir. 2007), *reh'g granted*, No. 06-7427 (4th Cir. Aug. 22, 2007).

JUSTICES IN THE JURY BOX:
VIDEO EVIDENCE AND SUMMARY JUDGMENT IN
SCOTT V. HARRIS, 127 S. Ct. 1769 (2007)

Some scholars have expressed concern that judges are encroaching on the fact-finding role of the jury through the use of summary judgment.¹ This concern is more acute in cases that turn on fact-specific inquiries, such as lawsuits where the defense claims qualified immunity.² Last term, in *Scott v. Harris*,³ the Supreme Court overturned the decisions of the district and appellate courts, which had denied summary judgment to a defendant who claimed qualified immunity.⁴ In *Harris*, the plaintiff

1. See, e.g., Arthur R. Miller, *The Pretrial Rush to Judgment: Are the "Litigation Explosion," "Liability Crisis," and Efficiency Clichés Eroding our Day in Court and Jury Trial Commitments?*, 78 N.Y.U. L. REV. 982 (2003); Patricia Wald, *Summary Judgment at Sixty*, 76 TEX. L. REV. 1897, 1917 (1998) (describing summary judgment as "a potential juggernaut which, if not carefully monitored, could threaten the relatively small residue of civil trials that remain"). But see John Bronsteen, *Against Summary Judgment*, 75 GEO. WASH. L. REV. 522, 525 (2007) (explaining that "detractors have been all but drowned out in a sea of support for" summary judgment); Randy J. Kozel & David Rosenberg, *Solving the Nuisance-Value Settlement Problem: Mandatory Summary Judgment*, 90 VA. L. REV. 1849, 1853 (2004) (arguing for mandatory summary judgment in some cases).

2. Qualified immunity is a defense available to government officials if they are sued over conduct committed during the discharge of their duties. Qualified immunity "offers complete protection for government officials sued in their individual capacities as long as their conduct violates no clearly established statutory or constitutional rights of which a reasonable person would have known." *Harris v. Coweta County*, 433 F.3d 807, 811 (11th Cir. 2005) (internal quotation marks omitted). Qualified immunity analysis is fact-intensive. See, e.g., *Anderson v. Creighton*, 483 U.S. 635, 641 (1987) (explaining that qualified immunity cases involve "objective (albeit fact-specific) question[s]"); *Armstrong v. City of Melvindale*, 432 F.3d 695, 699 (6th Cir. 2006) ("Whether qualified immunity applies [is] viewed on a fact-specific, case-by-case basis."); see also Alan K. Chen, *The Burdens of Qualified Immunity: Summary Judgment and the Role of Facts in Constitutional Tort Law*, 47 AM. UNIV. L. REV. 1, 6 (1997) ("[F]actual issues are an inherent part of the qualified immunity inquiry, notwithstanding the formal designation of qualified immunity as an issue of law.").

3. 127 S. Ct. 1769 (2007).

4. The doctrines of qualified immunity and summary judgment interact in many qualified immunity cases. To determine if an official merits qualified immunity, courts ask whether the official's actions violated a constitutional right and, if a violation occurred, if that right was "clearly established." *Saucier v. Katz*, 533 U.S.

argued that he had been unreasonably seized by a police officer who had rammed the plaintiff's car off the road to end a high speed car chase, leaving the plaintiff paralyzed.⁵ After reviewing video footage of the chase,⁶ the Court determined that there was no genuine issue of material fact as to whether the plaintiff posed a danger to the community, making the officer's seizure of the plaintiff objectively reasonable.⁷ Because an objectively reasonable seizure does not violate clearly established Fourth Amendment rights, the officer enjoyed qualified immunity from the suit. This Comment argues that the Court's decision in *Harris* encroached on the jury's role. Indeed, the number of judges who disagreed with the Court and the nature of the video evidence on which the Court relied suggest that a genuine issue of material fact did exist. Moreover, the Court's reliance on video evidence raises the concern that use of such evidence in summary judgment proceedings will lead judges to assume the jury's fact-finding role.

On the night of March 29, 2001, a Georgia police officer clocked nineteen-year-old Victor Harris's car speeding at 73 miles-per-hour in a zone with a 55 mile-per-hour speed limit.⁸ The officer turned on his flashing blue lights as he followed Harris's car, but Harris refused to slow down.⁹ Other police

194, 201 (2001). The official can be sued only if his conduct violated a clearly established constitutional right. *See id.* The first step in determining if a constitutional right has been violated is to "determine the relevant facts." *Harris*, 127 S. Ct. at 1774. When qualified immunity is invoked during summary judgment, the district court applies summary judgment principles to the determination of the facts needed for the qualified immunity analysis. *See id.* at 1774–75. The court views facts and draws inferences in favor of the non-moving party, *see, e.g.,* *United States v. Diebold, Inc.*, 369 U.S. 654, 655 (1962) (*per curiam*), and the suit must go to trial unless there are no genuine issues of material fact, *see, e.g.,* *Anderson v. Liberty Lobby, Inc.*, 477 U.S. 242, 247–48 (1986) ("[T]he mere existence of *some* alleged factual dispute between the parties will not defeat an otherwise properly supported motion for summary judgment; . . . there [must] be no *genuine* issue of *material* fact.").

5. *Harris*, 127 S. Ct. at 1773.

6. Because the majority relied so heavily on the video in its decision, it is instructive to watch the video, which is available at http://www.supremecourtus.gov/opinions/video/scott_v_harris.rmvb.

7. *Harris*, 127 S. Ct. at 1778.

8. *Harris v. Coweta County*, No. CIVA 3:01-CV-148-WBH, 2003 WL 25419527, at *1 (N.D. Ga. Sept. 25, 2003).

9. *Id.*

officers, including Deputy Timothy Scott, joined in the pursuit.¹⁰ At one point in the chase, Harris pulled his car into a parking lot and was nearly trapped by police cars.¹¹ He managed to get his car back on the highway, colliding with Scott's car in the process.¹² Scott, leading the pursuit at that point, then requested and received permission to disable Harris's car, and proceeded to push his bumper into Harris's vehicle.¹³ Harris lost control of his car, ran off the road, crashed, and suffered injuries that left him a quadriplegic.¹⁴ Harris filed suit, alleging, among other things, that Scott used excessive force to end the chase and thereby unreasonably seized Harris in violation of the Fourth Amendment.¹⁵ Scott responded by filing a motion for summary judgment based on a defense of qualified immunity.¹⁶

The District Court denied Scott's motion for summary judgment because it believed that the case presented "material issues of fact" that a jury would have to resolve.¹⁷ The court first decided that Harris had been seized.¹⁸ Drawing all disputed facts in favor of Harris, the court next determined that a jury could find the seizure to be objectively unreasonable. According to the court, a jury could find that Harris's initial speeding did not pose an immediate threat to others, and that his subsequent conduct during the chase, in which he "did not use his vehicle in an aggressive manner," did not create such a threat.¹⁹ Finally, the court considered whether Scott was protected by qualified immunity for his alleged violation of Harris's Fourth

10. *Harris*, 127 S. Ct. at 1773.

11. *Id.*

12. *Id.* There is some dispute about whether Scott hit Harris or Harris hit Scott. See *Harris*, 2003 WL 25419527, at *1 n.2.

13. *Harris*, 2003 WL 25419527, at *2.

14. *Id.*

15. *Id.* Harris's suit included various claims against other police officers and Coweta County itself. See *id.* at *3.

16. *Harris*, 127 S. Ct. at 1773.

17. *Harris*, 2003 WL 25419527, at *6 ("[T]here [were] material issues of fact on which the issue of qualified immunity turns which present sufficient disagreement to require submission to a jury."). The District Court resolved all of Harris's other claims via summary judgment, except for Harris's claims against Coweta County for failure to train its employees and negligence based on the acts of the police deputies. See *id.* at *12.

18. *Id.* at *4, *6.

19. *Id.* at *5.

Amendment right. Scott would not be entitled to such immunity if a jury determined that "it would have been clear to a reasonable officer that Scott's conduct was unlawful."²⁰ The court held that a reasonable jury could find that Scott did not know Harris's underlying crime, and that the evidence suggested that Harris posed little danger to officers or civilians.²¹ Because these findings created a genuine issue of material fact, the court denied summary judgment.²²

The Eleventh Circuit affirmed the District Court's decision to deny Scott summary judgment against Harris.²³ With Judge Rosemary Barkett writing, a unanimous panel²⁴ agreed with the District Court that Scott had seized Harris.²⁵ The panel also concluded that the question whether Harris's conduct "pose[d] a threat of serious physical harm, either to the officer or to others"²⁶ was "a disputed issue to be resolved by a jury."²⁷ A jury could find that Harris

remained in control of his vehicle, slowed for turns and intersections, and typically used his indicators for turns. He did not run any motorists off the road. . . . Nor was he a threat to pedestrians in the shopping center parking lot, which was free from pedestrian and vehicular traffic as the center was closed. Significantly, by the time the parties were back on the highway and Scott rammed Harris, the motorway had been cleared of motorists and pedestrians allegedly because of police blockades of the nearby intersections.²⁸

Because a jury could find that Harris posed no immediate threat, the Eleventh Circuit panel agreed with the District

20. *Id.* at *6.

21. *Id.*

22. *Id.*

23. *Harris v. Coweta County*, 433 F.3d 807, 821 (11th Cir. 2005). Sergeant Mark Fenninger, who authorized Scott to disable Harris's car, also appealed the District Court's denial of summary judgment; Judge Barkett concluded that the District Court erred in denying Fenninger summary judgment. *Id.* at 817.

24. Judge Barkett was joined by Judges Birch and Cox.

25. *Harris*, 433 F.3d at 813.

26. *Id.* (quoting *Tennessee v. Garner*, 471 U.S. 1, 11 (1985)).

27. *Id.* at 815.

28. *Id.* at 815–16 (citations omitted).

Court that the jury could find Scott's use of deadly force to seize Harris to be unreasonable.²⁹

The Supreme Court reversed. Writing for the Court, Justice Scalia³⁰ explained that the Court, when reviewing a summary judgment motion, "view[s] the facts and draw[s] *reasonable* inferences' in the light most favorable to the party opposing the [summary judgment] motion."³¹ But where the opposing party's story is "blatantly contradicted by the record,"³² there is no genuine issue of material fact and summary judgment is appropriate.³³ In this case, the videotape of the chase created an "added wrinkle" because it "quite clearly contradict[ed]" the respondent's story and the findings of the district and appellate courts.³⁴ The Court found that Harris moved "shockingly fast" down narrow roads, "force[d] cars" to the shoulder, and engaged in "hazardous maneuvers" as he led the police in a "Hollywood-style car chase of the most frightening sort, placing police officers and innocent bystanders alike at great risk of serious injury."³⁵ In light of the video evidence, "[r]espondent's version of events [was] so utterly discredited by the record that no reasonable jury could have believed him."³⁶

29. See *id.* at 820 ("A reasonable police officer would have known in 2001 that a vehicle could be used to apply deadly force, could be used to effectuate a seizure, and that deadly force could not be used to apprehend a fleeing suspect unless the conditions set out in *Garner* existed." (citations omitted)).

30. Justice Scalia was joined by Chief Justice Roberts and Justices Kennedy, Souter, Thomas, Ginsburg, Breyer, and Alito.

31. *Harris*, 127 S. Ct. at 1774 (emphasis added) (quotation marks omitted).

32. *Id.* at 1776.

33. See *id.*

34. *Id.* at 1775.

35. *Id.* at 1775–76. Even this description of Harris's actions makes him seem much less dangerous than the fleeing suspects in other car-chase cases in which appellate courts have found no genuine issue of material fact about the suspect's dangerousness. See, e.g., *Cole v. Bone*, 993 F.2d 1328, 1333–34 (8th Cir. 1993) (holding use of deadly force to be reasonable where an officer knew that a truck had been speeding for more than fifty miles down a crowded interstate, had run several road blocks, had survived shots at its tires and radiator, had tried to force police cars off the road, and had attempted to ram a police vehicle); *Smith v. Freland*, 954 F.2d 343, 347 (6th Cir. 1992) (holding use of deadly force to be reasonable where an officer shot and killed a suspect who had "proven he would do almost anything to avoid capture," and when, after a 90-mile-per-hour chase through residential streets, the suspect charged his car out of a dead-end alley at police officers).

36. *Harris*, 127 S. Ct. at 1776.

The Court next held that, given the facts of the chase, Scott's seizure of Harris was objectively reasonable and therefore did not violate the Fourth Amendment.³⁷ The Court balanced Scott's goal, elimination of the "imminent" threat to pedestrians and motorists, with his method, the use of deadly force against Harris.³⁸ Given Harris's dangerous driving, the Court found Scott's actions to be reasonable.³⁹ Finally, Justice Scalia dismissed the argument that the police should have let Harris go and tracked him down later, explaining that such an approach would create a perverse incentive for lawbreakers to initiate high-speed chases.⁴⁰

Justices Ginsburg and Breyer both concurred. Justice Ginsburg asserted that the Court's decision did not create a *per se* rule that the use of deadly force by police officers to prevent harm to civilians during a high speed chase was always reasonable.⁴¹ She explained that each situation requires a factual inquiry into such questions as "[w]ere the lives and well-being of others (motorists, pedestrians, police officers) at risk?"⁴² Justice Breyer observed that the "video footage of the car chase made a difference to my own view of the case" and encouraged readers of the opinion to view the video.⁴³ He also agreed with Justice Ginsburg that the Court had not established a *per se* rule.⁴⁴

37. *Id.* at 1776–79. The Court rejected Harris's contention that the analysis of whether use of deadly force was reasonable had to be guided by the conditions laid out in *Tennessee v. Garner*, 471 U.S. 1, 9–12 (1985): that the suspect posed an immediate threat of serious physical harm, that the deadly force was necessary to prevent escape, and that the officer gave the suspect a warning if feasible. *See Harris*, 127 S. Ct. at 1777. Instead, Justice Scalia explained that the test was simply whether Scott's actions were generally reasonable. *See id.*

38. *See Harris*, 127 S. Ct. at 1778.

39. *Id.*

40. *Id.* at 1778–79.

41. *Id.* at 1779 (Ginsburg, J., concurring). Justice Ginsburg disagreed with Justice Breyer that this case presented the opportunity to alter the order of inquiry in qualified immunity cases laid out in *Saucier v. Katz*, 533 U.S. 194 (2001). *See id.*

42. *Id.*

43. *Id.* at 1780 (Breyer, J., concurring).

44. *See id.* Justice Breyer also argued that the Court should change the requirement in *Saucier* that the qualified immunity inquiry must always begin with the question whether a constitutional right was violated. *See id.*

Justice Stevens dissented. He argued that “the tape actually confirms, rather than contradicts, the lower courts’ appraisal of the factual questions at issue.”⁴⁵ He offered his own interpretation of the video evidence, suggesting that Harris posed no immediate danger to the officers or pedestrians. Reiterating Judge Barkett’s analysis, Justice Stevens explained that most of the cars on the road had pulled to the side after hearing police sirens, the parking lot at the closed shopping center was empty at 11 p.m., and the video showed no pedestrians, sidewalks, or residences at any point.⁴⁶ The driver appeared to “retain[] full control of his vehicle,”⁴⁷ waiting for cars to pass in the other direction and using his turn signal—“hardly the stuff of Hollywood.”⁴⁸ The video did not show whether Harris ran any red lights,⁴⁹ and there was no evidence to indicate that Harris would have remained a danger if the police had let him go and looked for him later.⁵⁰

Justice Stevens further argued that the differing interpretations of the tape, offered by the district and appellate courts on one side, and the majority on the other, demonstrated the existence of a genuine issue of material fact.⁵¹ Referring to his “colleagues on the jury,”⁵² he contended that the majority had “usurped the jury’s factfinding function.”⁵³ Justice Stevens argued that the majority’s analysis of the video was not “dispassionate” enough.⁵⁴ For example, he suggested that the majority lacked experience driving on two-lane roads at night.⁵⁵ The dis-

45. See *id.* at 1781 (Stevens, J., dissenting).

46. *Id.* at 1782.

47. *Id.*

48. *Id.* at 1783.

49. *Id.* at 1782.

50. *Id.* at 1784.

51. See *id.* at 1785 (“If two groups of judges can disagree so vehemently about the nature of the pursuit and the circumstances surrounding that pursuit, it seems eminently likely that a reasonable juror could disagree with this Court’s characterization of events.”).

52. *Id.* at 1782.

53. *Id.* at 1784.

54. *Id.* at 1781 n.1.

55. See *id.* (“Had they learned to drive when most high-speed driving took place on two-lane roads rather than on superhighways—when split-second judgments about the risk of passing a slow-poke in the face of oncoming traffic were routine—they might well have reacted to the videotape more dispassionately.”).

strict and appellate courts, along with a Georgia jury, would be better able to evaluate conduct on roads with which they were more familiar.⁵⁶

The majority's decision in *Scott v. Harris* encroached on the traditional role of the jury and raises concerns about the use of video evidence in deciding motions for summary judgment. This Comment focuses on the circumstances surrounding the decision, and concludes that those circumstances suggest that there was a genuine issue of material fact, and that the case therefore should have gone to the jury. One reason the majority appears to have kept the case from the jury is its reliance on video evidence. This case illustrates the danger that such evidence—used with greater frequency and greater centrality at many trials—may lead judges to be too confident in their own interpretations of a video and less likely to defer to the non-moving party.

The strong disagreement about the facts of the case among the various federal judges who reviewed the video belies the majority's determination that no reasonable jury could believe Harris's articulation of the facts. Significantly, five federal judges⁵⁷ interpreted the "facts" in the videotape in a way that directly conflicted with the majority's interpretation of that recording.⁵⁸ This factual disagreement among reasonable judges suggests that there were multiple conclusions a reasonable jury

56. See *id.* at 1781 ("[T]he judges on both the District Court and the Court of Appeals . . . are surely more familiar with the hazards of driving on Georgia roads than we are.").

57. The district judge, three circuit judges, and Justice Stevens.

58. The chase described by Justice Scalia, *Harris*, 127 S. Ct. at 1775–76 ("Hollywood-style car chase of the most frightening sort"), sounds quite different from the one described by the district court judge, *Harris v. Coweta County*, No. CIV 3:01-CV-148-WBH, 2003 WL 25419527, at *5 (N.D. Ga. Sept. 25, 2003) ("did not use his vehicle in an aggressive manner"), the Eleventh Circuit judges, *Harris v. Coweta County*, 433 F.3d 807, 815–16 (11th Cir. 2005) ("remained in control of his vehicle, slowed for turns and intersections, and typically used his indicators for turns"), and Justice Stevens, *Harris*, 127 S. Ct. at 1783 (Stevens, J., dissenting) ("[P]assing a slower vehicle on a two-lane road always involves some degree of swerving and is not especially dangerous if there are no cars coming from the opposite direction. At no point during the chase did respondent pull into the opposite lane other than to pass a car in front of him; he did the latter no more than five times and, on most of those occasions, used his turn signal. On none of these occasions was there a car traveling in the opposite direction.").

could have drawn from the video.⁵⁹ In addition, the eight Justices who came to the legal conclusion that there existed no genuine issue of material fact have no special ability, when compared to trial judges, to determine whether there was a genuine issue of material fact in this case.⁶⁰ There will sometimes be close cases in which judges disagree about the existence of a genuine issue for trial, but in this case the clear disagreement among federal judges suggests that there is more than “[t]he mere existence of a scintilla of evidence in support of”⁶¹ Harris’s position. The disagreements about both facts and law suggest that the Court reached the wrong conclusion.

In addition, the judges with the greater local knowledge believed that Harris’s interpretation of the video and events was plausible.⁶² Local knowledge may have played a role in the lower courts’ decisions because judges in those courts may have better understood what it was like to drive on a Georgia

59. See *Harris*, 127 S. Ct. at 1785 (Stevens, J., dissenting); see also Paul W. Mollica, *Federal Summary Judgment at High Tide*, 84 MARQ. L. REV. 141, 180–81 (2000) (“Considering that the standard for summary judgment is whether there exists a genuine issue of material fact for a reasonable jury or judge to decide, it is anomalous that the majority judges in these cases [upholding summary judgment] apparently regard their dissenting colleagues’ views as irrational.”).

60. See *Johnson v. Jones*, 515 U.S. 304, 316 (1995) (“[T]he issue here at stake—the existence, or nonexistence, of a triable issue of fact—is the kind of issue that trial judges, not appellate judges, confront almost daily. Institutionally speaking, appellate judges enjoy no comparative expertise in such matters.”). But see Mollica, *supra* note 59, at 180 (arguing that the large number—35.5 percent—of appellate reversals of district court summary judgment grants should “humble anyone who believes that district court judges can routinely pick out the cases worthy of trial or deserving of summary judgment”).

61. *Anderson v. Liberty Lobby, Inc.*, 477 U.S. 242, 252 (1986).

62. *Harris*, 433 F.3d at 815 (“We reject the defendants’ argument that Harris’ driving must, as a matter of law, be considered sufficiently reckless to give Scott probable cause to believe that he posed a substantial threat of imminent physical harm to motorists and pedestrians. This is a disputed issue to be resolved by a jury.”); *Harris*, 2003 WL 25419527, at *5 (“[A] fact finder could conclude that when Scott rammed Harris’s vehicle, he faced a fleeing suspect who, but for the chase, did not present an immediate threat to the safety of others since the underlying crime was driving 73 miles per hour in a 55 miles-per-hour zone. A jury could also find that Scott’s use of force—ramming the car while traveling at high speeds—was not in proportion to the risk that Harris posed, and therefore was objectively unreasonable.”).

road at night.⁶³ By extension, these judges were also better able to imagine how a Georgia jury would weigh the video evidence and Harris's contentions. Furthermore, as in all trials, the district judge was the only judge who heard all the witnesses, so he was best positioned to evaluate the tape in the context of the entire record. The Court's rejection of this perspective suggests that the majority's "personal sense of whether [the] plaintiff's claim seems 'implausible' . . . subconsciously infiltrate[d]" its objective summary judgment analysis.⁶⁴

The Court's decision raises a concern that reliance on video evidence in summary judgment determinations may lead courts to assume the fact-finding role of the jury. In summary judgment, a court considers whether a reasonable jury could believe the non-moving party's story.⁶⁵ In answering that question, courts do not "find" the facts but rather view the facts and draw all inferences in favor of the non-moving party,⁶⁶ unless those inferences are implausible and unsupported by the rest of the evidence.⁶⁷

Courts are less likely to evaluate video evidence with as much deference to the non-moving party as they would other evidence. Video evidence, like that encountered by the Court in *Harris*, is seductive. Unlike witness testimony, courts "experience" video evidence firsthand, just as it was experienced by the actors involved in the case. This may lead courts to believe—overconfidently—that how they view the evidence with their own eyes⁶⁸ is the correct (and only) version of what hap-

63. See *Harris*, 127 S. Ct. at 1781 (Stevens, J., dissenting) ("[T]he judges on both the District Court and the Court of Appeals . . . are surely more familiar with the hazards of driving on Georgia roads than we are.").

64. Miller, *supra* note 1, at 1071.

65. See, e.g., *Anderson*, 477 U.S. at 249 ("[T]here is no issue for trial unless there is sufficient evidence favoring the nonmoving party for a jury to return a verdict for that party."). Cf. *Saucier v. Katz*, 533 U.S. 194, 216 (2001) (Ginsburg, J., concurring) ("Of course, if an excessive force claim turns on which of two conflicting stories best captures what happened on the street, [our decisions] will not permit summary judgment in favor of the defendant official. And that is as it should be.").

66. See, e.g., *United States v. Diebold, Inc.*, 369 U.S. 654, 655 (1962) (per curiam).

67. See, e.g., *Matsushita Elec. Indus. Co., Ltd. v. Zenith Radio Corp.*, 475 U.S. 574, 586 (1986) ("[The] opponent must do more than simply show that there is some metaphysical doubt as to the material facts.").

68. As Justice Scalia explained, the Court should view the facts "in the light depicted by the videotape." *Harris*, 127 S. Ct. at 1776.

pened.⁶⁹ Faced with such readily accessible evidence, judges “may be tempted to treat the evidence in a piecemeal rather than cumulative fashion, draw inferences against the nonmoving party, or discount the nonmoving party’s evidence by weighing it against contradictory evidence.”⁷⁰ Video evidence makes it more likely that judges will fall into what Judge Posner has identified as the first “trap” of summary judgment cases: “to weigh conflicting evidence (the job of the jury).”⁷¹ It is possible that the majority in *Scott v. Harris* fell victim to this “trap” and inappropriately ventured into the jury box when it relied heavily on the video of the police chase.

The tendency of video evidence to push courts towards an improper fact-finding role deserves particular attention because such evidence is likely to become more common in the courtroom. As technology proliferates, evidence from police cameras, recorded testimony, cellular phones, and surveillance cameras⁷² will appear more frequently at trial. For example, several recent decisions in the appellate⁷³ and district⁷⁴ courts

69. Here courts are essentially weighing the credibility of their own interpretation of the video. Similar subjective weighing of witness testimony is forbidden at the summary judgment stage because it crosses into the realm of the jury. See *Anderson*, 477 U.S. at 255.

70. Miller, *supra* note 1, at 1071.

71. *In re High Fructose Corn Syrup Antitrust Litig.*, 295 F.3d 651, 655 (7th Cir. 2002).

72. For example, investigations into the recent terrorist bombings in London and Glasgow were based on information from closed-circuit cameras. See Stephen Fidler, *Police hunt for West End car bomber*, FIN. TIMES, June 30, 2007, at 1 (“Police were . . . beginning to plough through CCTV footage of the area. . . . Central London is one of the most intensively photographed and video-taped areas in the world, and every driver that enters the centre of the city is photographed.”); Janet Stobart & Sebastian Rotella, *British manhunt widens; Three physicians are among eight suspects now held in bomb plots*, L.A. TIMES, July 3, 2007, at A1 (“The police had quickly pinpointed the suspects’ location using . . . surveillance footage from cameras in London and on highways beyond”); see also Graham Bowley, *The British Are Watching. Very Closely*, N.Y. TIMES, July 1, 2007, § 4, at 2 (“British cities have also been arrayed with closed-circuit television cameras focused on lobbies, sidewalks, roads and public spaces. There are more than 6,000 of the cameras on the London subway network alone.”). It is not difficult to imagine the use of such evidence in the United States as the networks of surveillance cameras in major cities expand. See, e.g., Spencer S. Hsu & Mary Beth Sheridan, D.C., *New York Get Biggest Increases in Counterterrorism Aid*, WASH. POST, July 19, 2007, at A1 (“DHS has been keen to finance . . . an expanded surveillance camera program in New York that is similar to ones in Chicago and Washington.”).

73. See, e.g., *Schneider v. Merritt*, No. 05-16317, 2007 WL 1853359, at *1 (9th Cir. June 26, 2007) (relying on police videos to find that there was no Fourteenth

featured video evidence similar to the evidence considered in *Harris*. The nation's highest court now seems willing to entertain that video evidence.⁷⁵ The Justices found the impact of video evidence significant in *Harris*.⁷⁶ Justices Scalia and Breyer encouraged readers of their opinion to view the video, and Justice Scalia had it posted on the Supreme Court's website.⁷⁷

The Court's decision in *Scott v. Harris* represents an improper invasion of judges into the jury box through the mechanism of summary judgment. The majority's decision that no genuine issue of material fact existed is questionable in light of the number of judges who disagreed and the nature of the video evidence on which the court relied. More broadly, *Harris* raises the concern that the seductive quality of video evidence may lead courts to conclude too quickly that genuine issues of material fact are absent, thereby usurping the jury's fact-finding role. The precedent set by *Harris* allows appellate courts to decide more cases involving video evidence during summary

Amendment claim because "[a] reasonable jury could not find anything beyond mere negligence on this record").

74. See, e.g., *Sharp v. Fisher*, No. 406-CV-020, 2007 WL 2177123, at *1 (S.D. Ga. July 26, 2007) ("[B]ecause [the] evidence includes three different videos of the incident in question, the Court 'views the facts in the light depicted by the video[s].'"); *Miller v. Jensen*, No. 06-CV-0328-CVE-SAJ, 2007 WL 1574761, at *4 (N.D. Okla. May 29, 2007) ("Here, as in *Scott v. Harris*, . . . there is 'an added wrinkle in the case: existence in the record . . . of videotape[s] capturing the [car chase] in question.'" (quoting *Scott v. Harris*, 127 S. Ct. 1769, 1775 (2007))); *Parker v. City of S. Portland*, No. 06-129-P-S, 2007 WL 1468658, at *10 n.41 (D. Me. May 18, 2007) (examining a videotape of police using a Taser on an individual to evaluate a claim of excessive use of force).

75. Though rare, *Harris* is not the first time the Court has considered video evidence. See *Cox v. Louisiana*, 379 U.S. 536, 547 (1965) ("Our conclusion that the entire meeting from the beginning until its dispersal by tear gas was orderly and not riotous is confirmed by a film of the events taken by a television news photographer, which was offered in evidence as a state exhibit. We have viewed the film, and it reveals that the students, though they undoubtedly cheered and clapped, were well-behaved throughout.").

76. Justice Breyer, for instance, noted that the video "made a difference to [his] own view of the case." *Harris*, 127 S. Ct. at 1780 (Breyer, J., concurring). The video's impact on the Justices raises an additional concern. If video evidence in *Harris* changed the Justices' view of the case, then perhaps video evidence would have also "made a difference" in other qualified immunity cases heard by the Court. Must the Court now seek out video evidence in every future case or risk getting those cases "wrong" as well?

77. See *Harris*, 127 S. Ct. at 1775 n.5.

judgment.⁷⁸ As use of video evidence becomes even more common, it is imperative that courts resist the urge simply to believe what they see with their own limited vision. Courts should allow juries to see with their own eyes.

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78. See Posting of Lawrence Lassiter to Scott & Scott LLP Business and Technology Law Blog, Supreme Court Grants Summary Judgment Based on Video Evidence, http://blawg.scottandscottllp.com/businessandtechnologylaw/2007/05/supreme_court_grants_summary_j.html (May 8, 2007 8:54 EDT). This ability of the appellate courts to use their own interpretations of the evidence is particularly problematic given that many of those courts have held that they can uphold a decision to grant summary judgment based on any evidence in the record regardless of whether that evidence was briefed or argued in the district court. See *id.*; see also *Iverson v. City of Boston*, 452 F.3d 94, 98 (1st Cir. 2006); *Reasonover v. St. Louis*, 447 F.3d 569, 578–79 (8th Cir. 2006).

* The Author would like to thank Professors Caleb Nelson, Martha Minow, and William Stuntz, and Sarah Bertozzi, Ishan Bhabha, Hayley Horowitz, Jeremy Kessler, Saritha Komatireddy, Greg Shill, and Lucas Watkins for their helpful guidance and comments.

