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POLICY ESSAY

COLLABORATION AS A MEANS TO FORMULATING MUTUALLY BENEFICIAL ENVIRONMENTAL POLICY

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In this Policy Essay, United States Senator Mike Crapo discusses the value of local collaboration in the development of mutually beneficial environmental policy. Using two examples of collaborative efforts in Idaho, Senator Crapo argues that policy development through collaboration at the local level is more efficient, avoids litigation, increases access to decision-making, and leads to more stable policy.

I. INTRODUCTION

"Collaboration" is a term used frequently in government, business, academic, and even personal circles. The general meaning is understood by most to be a system of decision-making in which people and groups from opposing sides work together to formulate a plan of action that is acceptable to all involved. Incorporating cooperation and a willingness to assist all parties in achieving their objectives, collaboration forms the basis for principled decision-making and provides a stable framework for a republican government. This Essay argues that the prevailing model of centralized policymaking and dispute resolution through litigation diminishes our capacity to create effective solutions to problems. This centralized model is not only inefficient, but also excludes local citizens from the real decision-making process. Using two examples from the State of Idaho, this Essay will demonstrate how, in the area of environmental regulation and land use, encouraging collaborative efforts by interested parties can be a powerful mechanism for policy development. In one of these cases, the Owyhee Initiative, I have pledged to develop legislation in Congress based on the joint recommendations of groups that previously opposed each other in land use disputes in Idaho. Although the efforts are ongoing and final results not yet determined, Congress should take notice of the efforts of the parties involved in the Owyhee Initiative. If agree-

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ment is reached, Congress should work to pass the resulting legislation. This approach represents an underused model of policy development. Rather than lobbying disinterested federal legislators and regulators, and then later confronting each other in the courts, interested parties are working together at the local level to propose legislation to be passed in Congress.

II. AIR QUALITY IN ADA COUNTY

Under the Clean Air Act, the Environmental Protection Agency ("EPA") designates certain areas that do not comply with federal air quality standards, known as National Ambient Air Quality Standards (NAAQS), as "non-attainment" areas.[1] Any area designated as a non-attainment area effectively cannot receive federal funding for road projects.[2] Northern Ada County was first designated a non-attainment area in the 1970s.[3] Of concern were particles known as PM-10, inhalable particulates smaller than 10 microns (about one-tenth the size of the tip of a human hair).[4] Particulate matter can accumulate in the lungs and cause a variety of diseases, especially in children and the elderly.[5] Studies have linked the particulates, as well as the smaller PM-2.5, to shorter life expectancy and increased susceptibility to asthma and infections.[6] This pollution also increases the risk of lung cancer.[7] Although the County had been designated a non-attainment area, Ada County had not exceeded the EPA's particulate limits since 1991, due to the efforts of local officials and community leaders.[8]

In September 1997, the EPA adopted new standards for particulate matter. The new NAAQS loosened restrictions on PM-10 pollution while adopting stricter standards for PM-2.5.[9] The stricter PM-2.5 standards were

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[1] Clean Air Act of 1970 § 107, 42 U.S.C. § 7407 (2000).

[2] *Id.* § 179. *See also* Craig Quintana, *Clean-Air Agreement May End Lawsuit Blocking Ada Road Work; Pact Requires Steps to Cut Pollutants*, IDAHO STATESMAN, Nov. 21, 2000, at 1A.

[3] Rocky Barker, *Feds Ease Air-Quality Rules; Pollution Decision Allows $21 Million in Ada County Road Projects to Go Forward*, IDAHO STATESMAN, Mar. 10, 1999, at 1A.

[4] Rocky Barker & Craig Quintana, *EPA Plan Jeopardizes Ada County Road Work; Agency Wants To Reinstate Rules To Protect Valley Air Quality*, IDAHO STATESMAN, June 6, 2000, at 1A.

[5] Quintana, *supra* note 2, at 1A.

[6] *See* Approval and Promulgation of State Implementation Plans and Designation of Areas for Air Quality Planning Purposes: Ada County/Boise, ID Area, 68 Fed. Reg. 44,715, 44,716 (July 30, 2003). *See also* Barker & Quintana, *supra* note 4, at 1A.

[7] *See* Rule To Reduce Interstate Transport of Fine Particulate Matter and Ozone (Interstate Air Quality Rule), 69 Fed. Reg. 4566, 4571 (Jan. 30, 2004). *See also* Barker & Quintana, *supra* note 4 at 1A.

[8] Craig Quintana, *Ada County Car Emissions Tests Will Get Tougher; Diesels Also Will Join the Line for Tests*, IDAHO STATESMAN, July 5, 2000, at 1A.

[9] *See* Determination That Pre-existing National Ambient Air Quality Standards for PM-10 No Longer Apply to Ada County/Boise State of Idaho, 63 Fed. Reg. 57,086, 57,088 (Oct. 26, 1998).

to go into effect in 2003.[10] In addition, in order to facilitate transition to the new PM-2.5 standards, the EPA promulgated a rule providing for the continued applicability of the old PM-10 standards until the states met certain criteria.[11] In particular, a locality would need to submit a "state implementation plan" (SIP) for EPA approval and also certify that it had sufficient resources to implement the new standards.[12] Pursuant to these provisions, the State of Idaho asked that the EPA make a determination that the pre-1997 PM-10 NAAQS no longer applied to the Northern Ada County/Boise area.[13] An important reason for doing so was the difficulty of bringing Ada County into compliance with older requirements.[14] According to one official, "The old standard was ineffective in allowing us to deal with the public health pollution of concern."—that is, pollution other than PM-10.[15] Removing the non-attainment designation from Ada County would allow state officials to focus on reducing pollution caused by the smaller PM-2.5 particulates and any other problems.[16] On March 12, 1999, the EPA revoked Ada County's two-decade-old designation as a non-attainment area.[17]

Two federal lawsuits complicated the EPA's revocation. First, unrelated to the events in Idaho, litigants had challenged the 1997 EPA rule strengthening industry standards in the area of PM-2.5 particulates. In May 1999, in *American Trucking Ass'ns v. EPA*,[18] the Court of Appeals for the D.C. Circuit struck down the rule as an unconstitutional delegation of legislative authority. This decision left the status of Ada County in an ambiguous state. The EPA based its revocation to a large extent on the understanding that the county would be required to meet the more stringent PM-2.5 requirements by 2003.[19] Although EPA Administrator Carol Browner indicated that the agency would appeal the D.C. Circuit's decision, she did not indicate what the effect of the Court's ruling would be on the situation in Idaho, saying only, "We are pursuing all options available to us to overturn this decision . . . in the interim, we will take

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[10] Barker & Quintana, *supra* note 4, at 1A.

[11] *See* National Ambient Air Quality Standards for Particulate Matter, 62 Fed. Reg. 38,652, 38,701 (July 18, 1997).

[12] *See* Determination That Pre-existing National Ambient Air Quality Standards for PM-10 No Longer Apply to Ada County/Boise State of Idaho, 63 Fed. Reg. 57,086, 57,087 (Oct. 26 1998).

[13] *See id.*

[14] Barker, *supra* note 3, at 1A.

[15] *Id.*

[16] Rocky Barker, *Suit Could Delay Ada Road Work; Environmentalists Hope to Reverse Pollution Decision*, IDAHO STATESMAN, Mar. 13, 1999, at 1A.

[17] *See* Determination That Pre-existing National Ambient Air Quality Standards for PM-10 No Longer Apply to Ada County/Boise State of Idaho, 64 Fed. Reg. 12,257 (Mar. 12, 1999).

[18] 175 F.3d 1027, 1038 (D.C. Cir. 1999). This aspect of the D.C. Circuit's ruling was subsequently overturned. *See Whitman v. Am. Trucking Ass'ns*, 531 U.S. 457, 475–76 (2001).

[19] Rocky Barker, *Court Overrules EPA on Ada County Air Quality; Change Imperils Flying Wye, Other Highway Projects*, IDAHO STATESMAN, May 23, 1999, at 1A.

whatever steps, consistent with the court's decision, so that we can secure these protections for all Americans."[20]

Second, a Plaintiff's coalition known as the Idaho Clean Air Force challenged the EPA's specific revocation of the county's non-attainment status.[21] Underlying the litigants' claims was the fact that the proposal by Idaho officials that served as the impetus for the EPA's decision relied to a large extent on voluntary reductions in emissions from neighboring Canyon County, which is in the same airshed as Ada County.[22] The litigants were skeptical that Canyon would undertake this effort without federal oversight.[23] If it did not, the EPA's decision would lead to a return of significant particulate pollution in Ada County and the resulting health consequences. One plaintiff in the case who suffered from cystic fibrosis said, "If I get any more, literally, I'm dead."[24]

County officials argued that the lawsuit threatened approximately $123 million in needed federal highway funds.[25] County officials such as Ada County Board of Commissioners Chairman Roger Simmons argued that losing the money would significantly hurt local economic interests without necessarily addressing public health concerns: "The impact of such a dramatic reduction would seriously set back our transportation plans and could cripple our economy for years to come."[26] Litigants countered that the loss of federal funds would be the fault of local officials. "If we lose those federal funds, it will be because [the] Ada Planning Association tried to get around federal statutes instead of developing projects that conform with the Clean Air Act," said Melissa Estes, an attorney for the Clean Air Force.[27] Estes suggested that other improvements to the county's transportation infrastructure, such as improvements to the bus system, and incentives for car pooling, would be both effective and environmentally friendly.[28] Local officials countered that if the EPA lost the suit, these improvements would benefit only the 25% of the population that used alternative transportation, while the 75% of the population that drove would get no new roads.[29]

Differences between these parties seemed to render the situation hopeless. The consequences of ongoing uncertainty, however, prompted

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[20] *Id.*

[21] Clean Air Force v. EPA, Nos. 99-70289 and 70576 (9th Cir.) *cited in* Approval and Promulgation of State Implementation Plans: Idaho, 66 Fed. Reg. 19,722, 19,723 (Envtl. Prot. Agency Apr. 17, 2001) (final direct rule).

[22] Rocky Barker, *Auto Pollution Casts Pall Over Ada Road Plans; Wrangle Holds Implications for Canyon County*, IDAHO STATESMAN, Jan. 9, 2000, at 1A.

[23] Barker, *supra* note 3, at 1A.

[24] Barker, *supra* note 16, at 1A.

[25] Barker & Quintana, *supra* note 4, at 1A.

[26] Rocky Barker, *Ada Leaders Join with Contractors To Save Road Funds*, IDAHO STATESMAN, June 15, 1999, at 1A.

[27] *Id.*

[28] *Id.*

[29] *Id.*

local officials to seek an alternative satisfactory to all parties. By early 2000, settlement discussions had begun between the parties.[30] In April 2000, the Idaho Department of Environmental Quality (DEQ) unveiled its new airshed strategy, which was intended to avert the legal battle.[31] The plan encouraged voluntary actions to reduce emissions while also establishing limits on specific pollutants throughout the Ada and Canyon County airshed.[32] "The goal is to be pro-active rather than react to federal regulatory actions," said one state official.[33] In June 2000, the EPA announced that it was reversing its March 1999 decision to revoke the non-attainment status of Ada County,[34] causing concern among county officials over the future of the highway projects.[35] This development furthered the desire of county officials to find a mutually acceptable solution. The Community Planning Association of Southwest Idaho (COMPASS) and the DEQ also asked me to convince the EPA to propose a collaborative solution that would avoid another court battle.

Over the subsequent months, settlement talks continued among all parties. The talks threatened to break down at times, but I convinced the EPA and others to stay involved in negotiations. In November 2000, Ada County officials tentatively approved a settlement that committed COMPASS to spend $330,000 on short-term pollution-control measures.[36] It also required the DEQ to commit to creating a $1 million plan to keep the air clean and placed new pollution-control requirements on local industries.[37] In return, the Clean Air Force ceased litigation.[38] The EPA also agreed to suspend its proposal to reinstate Ada County's non-attainment status.[39] At my request, the EPA agreed to oversee the fulfillment of settlement provisions.[40] In January 2001, the Department of Justice approved the settlement.[41]

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[30] Barker, *supra* note 22 at 1A.

[31] Rocky Barker, *Regulators Roll Out Air Pollution Plan; Idaho Hopes Treasure Valley Strategy Will Forestall Stricter Federal Rules*, IDAHO STATESMAN, Apr. 26, 2000, at 1B.

[32] *Id.*

[33] *Id.*

[34] *See* Rescinding the Finding That the Pre-existing PM-10 Standards Are No Longer Applicable in Northern Ada County/Boise, ID, 65 Fed. Reg. 39,321 (June 26, 2000).

[35] Craig Quintana, *Officials Ponder Potential Effects of EPA Proposal; ACHD Director Says Rule Change Might Not Stop All Projects*, IDAHO STATESMAN, June 6, 2000, at 6A.

[36] Craig Quintana, *Clean-Air Agreement May End Lawsuit Blocking Ada Road Work; Pact Requires Steps To Cut Pollutants*, IDAHO STATESMAN, Nov. 21, 2000, at 1A.

[37] *Id.*

[38] *Id.*

[39] *See* Proposed Settlement Agreement, Challenge to Final CAA Action, 66 Fed. Reg. 8229, 8230 (Jan. 30, 2001).

[40] Quintana, *supra* note 36, at 1A.

[41] Craig Quintana, *Agreement Drops Clean Air Lawsuit, Promises Changes; Activists, COMPASS Settle on Actions That Would Curtail Poor Air Quality*, IDAHO STATESMAN, Jan. 16, 2001, at 1B.

In April 2001, the EPA approved the plan submitted by the Idaho DEQ two months earlier in fulfillment of the settlement agreement.[42] The approval marked the end of the two-year dispute among state officials, environmental groups and other plaintiffs, and the federal government. Collaboration between interested parties, not intervention by the federal judiciary, provided the solution to a significant policy dispute. Moreover, the solution established a different role for a federal agency—rather than issuing regulations top-down, local parties collaborated to reach a solution and incorporated an oversight role for the EPA. This model for federal involvement in local issues is fundamental to our next example of collaboration in Idaho.

III. THE OWYHEE INITIATIVE

For decades, environmental conservation groups, local, state, and federal government agencies, and business interests, mainly farmers and ranchers, clashed over water-use and land-use policies in Owyhee County, Idaho. Rather than continue battling in the courts, the parties agreed to collaborate in creating a mutually acceptable solution in what has become known as the Owyhee Initiative. Eventually, the parties intend to propose a permanent solution to these old conflicts, and I will introduce it as legislation in the Senate. The Owyhee Initiative represents a new model for policy development. Like the Ada County air quality management described above, the strength of the Owyhee Initiative rests in its emphasis on locally developed solutions rather than federal intervention.

Located in southwest Idaho, the Owyhee Canyonlands is one of the largest and most remote areas in the United States.[43] The land covers an area larger than Yellowstone National Park and is home to dozens of rare plant and animal species.[44] State or federal agencies govern eighty-two percent of Owyhee's 4.9 million acres of public land.[45] Some areas, including hundreds of miles of streams, have been in poor condition at times.[46] Since the 1980s, environmental conservation groups, such as the Western Watersheds Project and the Committee for Idaho's High Desert, have battled ranchers over the effects of grazing in Owyhee County.[47] During that time, the U.S. Bureau of Land Management (BLM), charged with managing federal land, cut grazing by thirty-five percent in order to meet its

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[42] *See* Approval and Promulgation of State Implementation Plans: Idaho, 66 Fed. Reg. 19,722 19,723 (Apr. 17, 2001).

[43] Rocky Barker, *Worth the Risk to Compromise*, IDAHO STATESMAN, Dec. 1, 2002, at 1.

[44] Carissa Wolf, *Land Talks Heat Up Over Owyhee Canyonlands; Environmentalists Fear That Conservation Groups on Panel are "Selling Out,"* IDAHO STATESMAN, July 29, 2003, at 16.

[45] Brian Stempeck, *Talks Among Ranchers, Enviros And Local Officials Gain Steam In Idaho*, LAND LETTER, June 12, 2002.

[46] Barker, *supra* note 43, at 1.

[47] *Id.*

own regulations and the requirements of the Clean Water Act.[48] In addition, a federal district court ordered the BLM to issue further cutbacks in grazing by the end of 2003.[49] While protecting valuable environmental concerns, these cutbacks could have put dozens of ranchers out of business.[50] In order to survive economically, ranch families would then have to subdivide, develop, and thereby fragment what were once large, undeveloped landscapes.[51]

Ranchers were also concerned about the preclusion of grazing in the Owyhee Canyonlands entirely. As a result of a campaign by environmental groups, President Clinton strongly considered designating the Owyhee Canyonlands as a national monument in the last days of his administration.[52] This designation would have precluded further development of the area.[53] The effort was ultimately unsuccessful, as President Clinton said he lacked sufficient time to establish the national monument.[54] But the episode sent a strong signal to the region. As outgoing Interior Secretary Bruce Babbit said, "I predict within the next decade the Owyhee Canyonlands and Uplands will be protected by Congress as a national monument."[55]

This new challenge, combined with the specter of even further reduced grazing rights, motivated ranchers to explore a resolution of their dispute with the environmental groups.[56] The Owyhee County Commission ordered its attorney, Fred Kelly Grant, widely respected in the ranching community, to find legal protection for the ranchers.[57] Grant advised the ranching community, "The Owyhee Monument was within 24 hours of designation last time. . . . The next time it's going to be put at the top of the list."[58] Federal legislation represented the only way to protect the interests of ranchers, and passing such measures would require collaboration with environmental conservation groups.[59] In 2001, the Owyhee County Commission reached out to groups such as the Nature Conservancy, the Wilderness Society, and the Idaho Conservation League to encourage them to work with others to forge compromise legislation

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[48] *Id.*

[49] *Id.*

[50] *Id.*

[51] Telephone Interview with Chris Salove, Commissioner, Owyhee County Commission (Apr. 7, 2002).

[52] Barker, *supra* note 43, at 1. The President is authorized to designate federal lands as national monuments under the American Antiquities Act of 1906 § 2, 16 U.S.C. §§ 431 (2000).

[53] 16 U.S.C. § 431.

[54] Barker, *supra* note 43, at 1.

[55] *Id.*

[56] Stempeck, *supra* note 45.

[57] Barker, *supra* note 43, at 1.

[58] *Id.*

[59] *Id.*

that would protect the interests of all parties.[60] It was at this time that county officials contacted my office to provide support for their agenda. I agreed to work with them and to introduce legislation in the Senate resulting from their efforts, provided it had been drafted in a truly collaborative fashion.

In July 2001, county officials unveiled an effort to unite environmental conservation groups, ranchers, and Native Americans for the purpose of drafting legislation that protected both the Owyhee Canyonlands and local business interests, called the Owyhee Initiative.[61] The Owyhee County Commission also issued several guidelines to the Initiative. For example, the commission recommended the establishment of an independent scientific peer review panel in order to review controversial BLM decisions.[62] The commission also recommended establishing a system of monitoring grazing in the area. This plan may include establishing "grass banks," which would allow ranchers to lease land temporarily for grazing while adjacent land is left alone for ecological reasons; establishing long-term grazing plans with strict environmental standards;[63] and creating funds for invasive species management projects, among others.[64] Groups involved in the Owyhee Initiative include the Nature Conservancy, the Wilderness Society, the Idaho Conservation League, Owyhee Cattlemen's Association, the Owyhee Borderlands Trust, the Owyhee Soil Conservation Districts, the Owyhee County Commission, the Idaho Outfitters and Guides Association, People for the Owyhees (a recreational group), and the U.S. Air Force and the Shoshone-Paiute Tribes (as non-voting participants).[65] The Owyhee Initiative also came to include a representative from the Sierra Club as a voting participant.[66] In total, the group has ten voting members who are drafting legislation.[67] All of the Owyhee Initiative's full Working Group meetings are open to the public.[68]

In July 2003, the Work Group announced progress. Provisions of a preliminary agreement included several measures to protect environmental interests in the Canyonlands, such as designating more than 450,000 acres of land as federally protected wilderness areas and protecting hundreds of miles of rivers under the Wild and Scenic Rivers Act.[69] In return, 175,000 acres of land currently designated as Wilderness Study Areas

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[60] *Id.*

[61] Rocky Barker, *Owyhee County Officials Want To Take Lead Role In Preservation; Formerly Bitter Opponents Now Working Together*, IDAHO STATESMAN, July 27, 2001, at 1.

[62] *Id. See also* Barker, *supra* note 43, at 1.

[63] *See* Barker, *supra* note 61, at 1.

[64] OWYHEE INITIATIVE, OWYHEE INITIATIVE WORK GROUP PROPOSAL 9 (Jan. 8, 2004).

[65] *Id.*

[66] Rocky Barker, *Panel on Brink of Owyhees Canyonlands Deal; Compromise on Protection Won't Please Everyone*, IDAHO STATESMAN, July 12, 2003, at 1.

[67] Stempeck, *supra* note 45.

[68] Barker, *supra* note 66, at 1.

[69] *Id. See also* Wild and Scenic Rivers Act, 16 U.S.C. §§ 1271–1287 (2000).

would be released for grazing.[70] The preliminary agreement includes the purchase of certain private lands from ranchers to provide easement acquisition for public access to the area.[71] In addition, the package would establish a process whereby an interested party could request scientific review of BLM decisions. Such review could not automatically limit BLM decisions, but would become part of the record considered by an administrative law judge reviewing the decision.[72] Another key component to the Owyhee Initiative model is the creation of the Owyhee Initiative Board of Directors. The board would remain as a force to keep land management decisions in line with legislative intent.[73]

Of course, the Owyhee Initiative is not without its critics. There is concern about how the final legislative language will address water rights.[74] Some have criticized the initiative for secrecy, although, as mentioned earlier, meetings are open to the public.[75] The final product cannot provide everything to all parties, but the intent is to give them as many of their primary objectives as possible. All parties agree on two things. First, federal management of the land has been ineffective in meeting the needs of both ranchers and environmental conservation groups.[76] Second, and more importantly, the Owyhee Initiative participants understand they are testing a revolutionary model for land use and public-policy development—rather than resorting to litigation or federal intervention, interested groups are collaborating in policy development at the local level. I am confident that, like the parties to the Ada County air-quality dispute, the parties involved in the Owyhee Initiative will succeed in reaching an agreement regarding land-use in Owyhee County.

IV. Conclusion

The Owyhee Initiative is part of a greater movement in the West to seek local solutions in the management of federal lands. As both examples in this Essay demonstrate, by working together, interested parties can collaborate at the local level to forge solutions superior to top-down federal regulation. As John DeWitt writes,

> As states become leaders in environmental policy, they can work in partnership with federal agencies, nonprofit organizations, and local governments. States can convene forums where the fragmented array of federal, state, and local agencies come together,

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[70] Barker, *supra* note 66, at 1.
[71] *Id.*
[72] *Id.*
[73] Owyhee Initiative, Owyhee Initiative Work Group Proposal 9 (Jan. 8, 2004).
[74] *Id.*
[75] Wolf, *supra* note 44, at 16.
[76] Stempeck, *supra* note 45.

> along with leaders from the private sector, local communities, and the nonprofit community, to address local problems (like the preservation of valuable lands and waters), to explore opportunities for "greener" manufacturing processes, or to discuss broad issues, like the formulation of state and regional strategies for sustainable development.[77]

This "bottom-up" model of policy-development is superior to the alternatives for several reasons. First, local participants are most closely connected to the land and therefore have better information about the issues involved as well as about the possibilities for resolution. Second, because local participants are more closely connected to the land, they have the greatest incentive to manage the land appropriately—the interests of environmentalists and ranchers in Idaho are, after all, more closely aligned than either of their interests are with those of remote federal regulators. Third, local collaboration increases access to the legislative process. When legislation is made top-down, interested parties need large amounts of resources to make their voices heard.[78] In models such as the Owyhee Initiative, the very process of collaboration empowers interested groups regardless of access to resources. Finally, the current model of land management, which involves federal regulation, and litigation for dispute resolution, is simply inefficient. Litigation can drive actions that lead to policy changes but at incredible costs, in both financial expense and time delays. These costs render policy development through litigation inaccessible to those without the means to engage in litigation. The collaboration described here achieves meaningful results that are satisfactory for the people, and are far more efficient. The model of collaboration analyzed in this Essay increases access to decision-making, and reduces the need for costly litigation because parties voice their concerns during the process. I have promised to introduce legislation resulting from the Owyhee Initiative on the floor of the Senate. Congress should pass this legislation.

A challenge of the collaborative movement is whether bottom-up solutions can be blended with national interests. The current means of deciding public land management issues is bureaucratic and multi-layered. Bottom-up solutions rooted in collaboration make it possible to incorporate elements of deliberation and debate into the current land management decision-making process from the very beginning. Inviting participation from local, state, and national interests at the outset in a collaborative format will ensure a fusing of national concerns with local con-

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[77] JOHN DEWITT, CIVIC ENVIRONMENTALISM: ALTERNATIVES TO REGULATION IN STATES AND COMMUNITIES 290 (1994).

[78] *See, e.g.*, Gregory Comeau, Note, *Bipartisan Campaign Reform Act*, 40 HARV. J. ON LEGIS. 253, 260 (2003) (noting the importance of political donations to the political process as a result of soft money expenditures by both political parties—nearly $495 million in 2000).

cerns. As it stands now, federal, state, and local jurisdictional lines are blurred, and misunderstanding, misperceptions, and miscommunication are par for the course. The general trend in U.S. environmental policy over the past thirty years has been to shift authority away from state and local governments toward the federal government.[79] The examples in this Essay highlight the benefits of successful collaboration at the local level. Any collaborative process will encounter tough obstacles and is inherently difficult, but goals are also achievable when all parties agree to work together to achieve a mutually acceptable solution. This model produces stable outcomes and fosters long-term working relationships, which serve as a foundation for future cooperation on other problematic issues. The country should look to these examples as illustrative of an innovative and superior model for policy development in the area of environmental regulation.

[79] ROSEMARY O'LEARY, MANAGING FOR THE ENVIRONMENT 332 (1999).

POLICY ESSAY

WHY WE MUST END INSURANCE DISCRIMINATION AGAINST MENTAL HEALTH CARE

REPRESENTATIVE PATRICK J. KENNEDY*

In this Policy Essay, Representative Patrick Kennedy argues that insurance discrimination against those suffering from mental illnesses constitutes a serious and often overlooked deficiency of the modern American health care system. While the Mental Health Parity Act of 1996 was an important step toward resolution of this issue, many loopholes remain that allow insurance companies to deny much-needed coverage to those suffering from such illnesses. This Essay details how improving access to health insurance for the mentally ill is not only socially beneficial, but also economically sound; the cost of instituting mental health parity is far outweighed by the costs that employers bear because of the reduced productivity of untreated mental illness sufferers. Representative Kennedy recommends that these problems may be addressed by additional mental health parity legislation—specifically, the proposed Paul Wellstone Act.

I was less than a year old when my Uncle Bobby was assassinated. That year, in which Martin Luther King, Jr. also lost his life and President Nixon rode the "Southern Strategy" to victory, marked the denouement of what would later be known as the Civil Rights Era. The Movement had realized its landmark achievements in 1964 and 1965 with the passage of the Civil Rights Act and the Voting Rights Act. As the decade drew to a close, the war in Vietnam had eclipsed civil rights as the dominant social issue.

During the era's zenith, my uncles and father helped midwife some of the most significant advances in social justice in a century. I entered public service in the late 1980s eager to continue the struggle for civil rights that is my family's legacy. But by 1994, when I was elected to Congress, the great causes of the past seemed quite remote. Along with many of my fellow Democrats, I focused on beating back the "Republican revolution," which swept into power a new congressional majority ideologically hostile to most of the achievements of the twentieth century that liberal

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Democrats hold dear. As President Clinton would famously declare later, the era of big government was over.[1]

It is a measure of the invisibility of the issue of mental health that I, who was careful at the time to keep my own depression private, failed to see the pervasive discrimination against those with mental illness for what it is. I have come to realize that there is a civil rights struggle remaining to be fought on behalf of the 44 million adults and 6 to 9 million children in the United States with diagnosable mental illnesses.[2] In a society where millions must hide debilitating diseases for fear of prejudice, where potentially life-saving health care is routinely denied to a disfavored class, where states have policies requiring parents to give up custody of mentally ill children as a condition of treating them,[3] there are plenty of opportunities to strike a blow for justice. At the heart of this cause is "mental health parity" legislation to end health insurance discrimination against those with mental illness.

SOME BACKGROUND ON MENTAL HEALTH IN THE UNITED STATES

The treatment of mental illness has been consistently located on the fringes of the health care system in this country. The persistent belief that mental and physical well-being are unconnected, derived from Rene Descartes's theories about the separation of mind and body, continues to fuel the stigmatization surrounding mental health care.[4] Because treatment of the mind—and thus the status of mental health—has been considered non-scientific and non-medical, mental illnesses have historically been regarded as shameful personal failings, rather than treatable diseases.

During the colonial era, mental illness was primarily addressed by individual families.[5] As urbanization took hold across the country in the late eighteenth century, local and state governments were forced to address the problem.[6] They responded by building the first mental health facilities, also known as asylums, and by pioneering new methods of treatment.[7] Though initially successful, the quality of care at many asylums soon dete-

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[1] Address Before a Joint Session of the Congress on the State of the Union, 54 PUB. PAPERS (Jan. 23, 1996).

[2] U.S. DEP'T OF HEALTH & HUMAN SERVS., MENTAL HEALTH: A REPORT OF THE SURGEON GENERAL 46, 179 (1999) [hereinafter SGRMH].

[3] U.S. GEN. ACCOUNTING OFFICE, CHILD WELFARE AND JUVENILE JUSTICE: FEDERAL AGENCIES COULD PLAY A STRONGER ROLE IN HELPING STATES REDUCE THE NUMBER OF CHILDREN PLACED SOLELY TO OBTAIN MENTAL HEALTH SERVICES 11 (Apr. 2003), *available at* http://www.gao.gov/new.items/d03397.pdf.

[4] SGRMH, *supra* note 2 at 2. Descartes believed that, whereas physicians could tend to the physical body, the mind implicated the spiritual and should be ministered to by religion. *See id.*

[5] *Id.* at 75.

[6] *See id.*

[7] *See id.* at 78.

riorated as the promise of these treatments failed to meet expectations.[8] The situation was further complicated when local governments, in an effort to avoid spending public funds on mental health, began housing patients afflicted with mental illnesses in almshouses and jails.[9]

The early twentieth century brought a period of rapid change in the treatment of mental illness.[10] In the early 1900s, State Care Acts were passed centralizing the financial responsibility for the mentally ill within state governments.[11] The care provided in newly established state asylums varied greatly; often, funding was inadequate and asylums functioned as long-term housing rather than as treatment centers.[12] During this "Mental Hygiene" reform period, institutions that housed the mentally ill were renamed mental hospitals and there was a growing focus on prevention and treatment, and interest in the science of mental illness.[13] The reality for those with mental disorders did not change significantly, however, as mental hospitals administered varying levels of humane care, often maintained appalling conditions, and provided little successful treatment.[14]

A newfound optimism about the potential for treating mental illnesses, stemming from advances made by military mental health services during World War II, led to widespread deinstitutionalization beginning in the 1950s.[15] Passage of the Mental Retardation Facilities and Community Mental Health Center Construction Act in 1963 accelerated the process and heralded a shift in mental health care funding to community-based resources.[16] By the 1970s, the prevailing wisdom returned, in a sense, to the original colonial approach—that those with mental illness could best be treated in their communities.[17]

Today, unfortunately, many of the support services necessary to make a community-based system successful—housing, disability payments, and vocational opportunities—are poorly coordinated and largely unavailable to those without financial resources.[18] Over the years, the mentally ill and their families have waged individual battles to cobble together programs and services to meet individual needs.[19] Though a noble attempt to integrate sufferers into society, the modern deinstitutionalization movement gave rise to a makeshift mental health system largely separate from—and inferior to—the greater health care system.[20]

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[8] *See id.*
[9] *See id.*
[10] *See id.*
[11] *See id.*
[12] *See id.*
[13] *See id.*
[14] *See id.*
[15] *See id.*
[16] Pub. L. No. 88-164, 77 Stat. 282 (1963).
[17] SGRMH, *supra* note 2, at 79–80.
[18] *See id.* at 80.
[19] *See id.*
[20] *See id.*

Thus the archaic distinction between mental and physical health remains potent today, as does the resulting stigma.[21] To see what the legacy of this history looks like in 2004, examine the terms of your health insurance policy. The great likelihood is that even if you have a Cadillac plan, your policy covers fewer days in the hospital and fewer outpatient visits for mental health care than for physical health care.[22] According to a report by the General Accounting Office, Congress's investigative agency, eighty-seven percent of health plans offer less favorable terms for mental health care than for physical health care, with higher cost-sharing or more limitations on access.[23] Even if you rely on Medicare, it will cost you more in out-of-pocket co-payments to seek treatment for mental illnesses.[24]

Congress took its first stab at addressing this disparity in the Mental Health Parity Act of 1996 (MHPA).[25] That Act prohibited health plans from offering lower annual or lifetime benefits for mental health coverage than for physical health coverage.[26] For example, if the plan otherwise paid up to $1 million for medical services, it could no longer cap mental health coverage at $50,000. While this provision was an important first step toward ending insurance discrimination, its impact was slight. The GAO found that most plans came into compliance by imposing additional treatment limits or cost-sharing for mental health care, both of which remained legal under the MHPA.[27]

The bill that I have introduced in the House of Representatives[28] and Senator Pete Domenici (R-N.M.) has introduced in the Senate,[29] the Senator Paul Wellstone Mental Health Equitable Treatment Act of 2003,[30] would close this massive loophole in the MHPA, and require most health plans[31] that choose to cover mental health to end the discrimination between mental health and physical health coverage.[32] No longer, for example, would

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[21] *See id.* at 7.

[22] *See* U.S. Gen. Accounting Office, Mental Health Parity Act: Despite New Fededal Standards, Mental Health Benefits Remain Limited 3 (May 2000) [hereinafter GAO Report].

[23] Id., at 5.

[24] 42 U.S.C. § 1395l(c) (2000).

[25] Pub. L. No. 104-204, 110 Stat. 2944 (1996).

[26] *See* Mental Health Parity Act, Pub. L. No. 104-204, Title VII, § 702(c), 110 Stat. 2947 (codified as amended at 29 U.S.C. § 1185a(a) (2000)); *see id.* at Title VII, § 703(a), 110 Stat. 2947 (codified as amended at 42 U.S.C. § 300gg-5(a) (2000)).

[27] *See* GAO Report, *supra* note 22, at 12 (finding that sixty-five percent of plans that changed annual or lifetime limits to come into compliance with the MHPA made another feature of their plans more restrictive).

[28] H.R. 953, 108th Cong. (2003).

[29] S. 486, 108th Cong. (2003).

[30] Senator Domenici and I named the bill after Senator Paul Wellstone (D-Minn.), who was a passionate, tireless champion of mental health parity prior to his death in a plane crash in 2002.

[31] *See* H.R. 953 § 2. Small businesses, defined as those with fewer than 50 employees, are exempt from the provisions of the Wellstone Act. *See id.*

[32] *See id.* (excluding, as a concession to political realities, substance abuse diagnoses from its terms, despite their frequent co-morbidity with other mental illnesses and the fact

plans be able to require patients to pay 50% coinsurance for mental health outpatient services when other outpatient services require only 20% in cost-sharing,[33] or cap psychiatric inpatient stays at thirty days while allowing unlimited stays for treatment of other conditions.[34] The legislation also amends the Employee Retirement Income Security Act (ERISA) to correct for the fact that although many states have parity laws on the books of varying strength, ERISA preempts state regulation of many large employers.[35] The Wellstone Act's provisions would instead apply to all health plans serving groups of fifty or more, even if otherwise covered by ERISA.[36] At long last, under our parity legislation, the health care sector would recognize that Descartes was wrong and that mind and body are inextricably intertwined.[37]

THE PRINCIPLED CASE FOR PARITY

In the face of a growing body of scientific literature documenting the biochemical nature of mental illnesses, the status quo of insurance discrimination against those who suffer from such illnesses is indefensible. Former Surgeon General David Satcher wrote in his landmark report that the distinction between mind and body is arbitrary and not supported by science.[38] Indeed, brain research from the National Institute of Mental Health continues to illuminate the physiology of mental illnesses.[39] Yet our insurance policies continue to treat diseases of the brain as less worthy of coverage than diseases of other systems or organs.[40]

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that addictive disorders can be considered to be a subset of mental disorders).

[33] *See* GAO REPORT, *supra* note 22, at 12 (finding that more than a quarter of private health plans require greater cost-sharing for mental health care than physical health care); *see also* Colleen L. Barry et al., *Design of Mental Health Benefits: Still Unequal After All These Years*, HEALTH AFFAIRS, Sept.-Oct. 2003, at 127, 129 (finding that 22% of private health plans have greater cost-sharing for mental health care).

[34] *See* GAO REPORT, *supra* note 22, at 5; *see also* Barry et al., *supra* note 33 at 129 (finding that 65% of private health plans restrict hospital stays and 64% restrict outpatient visits for mental health care further than for physical health care).

[35] 29 U.S.C. § 1144(a) (2000) (stating that ERISA "shall supersede any and all State laws insofar as they may now or hereafter relate to any employee benefit plan" covered by ERISA).

[36] *See* H.R. 953 § 2.

[37] *See* SGRMH, *supra* note 2, at 2.

[38] *Id.* at 5–6.

[39] *See, e.g.*, NAT'L INST. OF MENTAL HEALTH, SCHIZOPHRENIA RESEARCH 2 (May 2000) (noting that NIMH investigators have "recently discovered specific, subtle abnormalities in the structure and function of the brains of patients with schizophrenia"); NAT'L INST. OF MENTAL HEALTH, BIPOLAR DISORDER RESEARCH 4 (Apr. 2000), (concluding that "[o]ne of the most consistent findings to date has been the appearance of specific abnormalities, or lesions, in the white matter of the brain in patients with bipolar disorder"); NAT'L INSTITUTE OF MENTAL HEALTH, ANXIETY DISORDER RESEARCH 3 (August 1999) (finding that animal research suggests "different anxiety disorders may be associated with activation in different parts of the amygdala [a structure in the brain]").

[40] *See supra* text accompanying note 33.

Discrimination in health insurance has immediate and drastic consequences for millions of people, pricing many out of the care they need.[41] I have heard too many stories like that of Katie Westin, a girl with anorexia who was prematurely discharged from a hospital when she exhausted her mental health benefits.[42] Lacking the medical care that had been slowly helping her get better, she lost her battle with anorexia and her body eventually shut down.[43]

While not all mental illnesses take as vicious a toll on the body as anorexia, the specter of suicide makes many afflictions potentially lethal. For every two homicides in this country, there are three suicides.[44] More than 30,000 Americans commit suicide every year; in 2001, it was the eleventh leading cause of death in the United States, the cause of 1.3% of all deaths.[45] Given that ninety percent of those who kill themselves have a mental illness, these statistics reveal the dangers of letting such illnesses go untreated.[46]

Even when they do not end lives, untreated mental illnesses can destroy them. As anybody who has walked down a city street knows, mental illness makes itself felt in the epidemic of homelessness. During any given week, an estimated 850,000 Americans sleep on the streets, twenty to twenty-five percent of whom have severe mental illnesses.[47] The inadequacy of mental health care has also made jails and prisons the de facto mental institutions of our age. The single largest mental health provider in the nation is the Los Angeles County jail.[48] The Department of Justice estimated in 1999 that more than a quarter of a million inmates in American jails and prisons have serious mental illnesses.[49] Among young inmates,

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[41] *See, e.g.*, Deborah Jasper & Spencer Hunt, *Everything Spent, and No Help*, Cincinnati Enquirer, Mar. 21, 2004 ("When her insurance ran out, she sold her $287,000 suburban home to cover treatment for both of her sons, who have bipolar disorders that cause them to swing from overly hyper to depressed or violent."), *available at* http://www.enquirer.com/editions/2004/03/21/mentalhealth/loc_mentalmikolic.html. The cost of residential treatment programs can exceed $250,000 per year. U.S. Gen. Accounting Office, *supra* note 3.

[42] *See* Kitty Westin, Remarks About Her Daughter's Eating Disorder at Press Conference Introducing H.R. 953 (Feb. 27, 2003); *see also* Kitty Westin, *When Your Child Dies of an Eating Disorder: A Mother's Story*, *in* EATING DISORDERS COALITION, A MATTER OF LIFE OR DEATH: A CONGRESSIONAL BRIEFING ON EATING DISORDERS AND ACCESS TO CARE 1 (June 13, 2002) [hereinafter Westin], *available at* http://www.eatingdisorderscoalition.org/congbriefings/061302/housebriefing061302.html#westin (last visited Apr. 20, 2004).

[43] *See* Westin, *supra* note 42.

[44] Elizabeth Arias, *Deaths: Final Data for 2001*, 52 NAT'L VITAL STAT. REP. 8 (Sept. 18, 2003), *available at* http://www.cdc.gov/nchs/data/nvsr/nvsr52/nvsr52_03.pdf.

[45] *Id.*

[46] SOUTHCENTRAL COUNSELING CTR., MENTAL HEALTH MATTERS FACT SHEET, *at* http://www.southcentralcounseling.org/mental_health_info.htm (last modified July 15, 2002).

[47] NAT'L RES. CTR. ON HOMELESSNESS & MENTAL ILLNESS, GET THE FACTS: WHO IS HOMELESS? 1, *available at* www.nrchni.samhsa.gov/facts/facts_question_2.asp (last modified June 6, 2003).

[48] L.A. COUNTY SHERIFF'S DEP'T, AUTOMED, *at* http://www.lasd.org/divisions/ correctional/medical_srvs/ovrview.html#automed (last visited Apr. 20, 2004).

[49] PAULA M. DITTON, U.S. DEP'T OF JUSTICE, SPECIAL REPORT: MENTAL HEALTH AND TREATMENT OF INMATES AND PROBATIONERS 1 (July 1999), *available at* http://www.ojp.

the numbers are perhaps even more disheartening: research shows that as many as one in five incarcerated youth have a serious mental health disorder, such as schizophrenia, major depression, or biopolar disorder.[50]

These are some of the consequences of our discrimination in health coverage. But these statistics do not speak to consequences more difficult to quantify—the broken families, the lost potential, the denial of participation in civic life. How to measure the heartbreak of parents forced to trade custody of their children to the state in exchange for potentially life-saving care?[51] In 2001, more than 12,700 children were placed in state custody solely to obtain mental health services, and private health insurance limitations have been identified as common catalysts for such difficult decisions.[52] Similarly, statistics cannot measure the impact of being fired for seeking counseling, or suffering other such discriminatory acts on a day-to-day basis. Forty-five percent of respondents in a recent study of the mentally ill reported that stigma and discrimination were barriers to employment.[53] Similar research revealed that 37.7% individuals with serious mental illnesses reported having suffered discrimination wholly or in part based on their mental illness in areas such as employment, housing, and interactions with law enforcement.[54]

As we have rejected other discriminatory policies, so must we reject discrimination against those with mental illnesses, and mental health parity is a key step in doing so. Under current policy, our health care system suggests that mental health care falls somewhere between cosmetic surgery, which is not covered at all, and "real" health care. Coming from the health care system itself, this is a powerful signal to the rest of society, including the mentally ill themselves. According to the Surgeon General's report, two-thirds of those with mental illnesses do not seek treatment,[55] and a leading reason is the stigma of mental illness.[56] Passage of mental health parity legislation would emphasize, as few other steps could, that there is no valid distinction to be drawn between mental and physical

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usdoj.gov/bjs/pub/pdf/mhtip.pdf.

[50] Joseph. J. Cocozza & Kathleen Skowyra, *Youth With Mental Health Disorders: Issues and Emerging Responses*, JUVENILE JUSTICE, Apr. 2000, at 3, 6.

[51] *See* BAZELON CTR. FOR MENTAL HEALTH LAW, RELINQUISHING CUSTODY: THE TRAGIC RESULT OF FAILURE TO MEET CHILDREN'S MENTAL HEALTH NEEDS 11 (Mar. 2000) (finding that families who turn to the public system for assistance when their children's intensive mental health needs quickly deplete their insurance often must relinquish custody to the state before assistance is made available).

[52] U.S. GEN. ACCOUNTING OFFICE, *supra* note 3.

[53] NAT'L ALLIANCE FOR THE MENTALLY ILL, SHATTERED LIVES: RESULTS OF A NATIONAL SURVEY OF NAMI MEMBERS LIVING WITH MENTAL ILLNESSES AND THEIR FAMILIES 20 (July 2003).

[54] Patrick Corrigan et al., *Perceptions of Discrimination Among Persons with Serious Mental Illness*, PSYCHIATRIC SERVICES, Aug. 2003, at 1102, 1105.

[55] SGRMH, *supra* note 2, at 8.

[56] PRESIDENT'S NEW FREEDOM COMM'N ON MENTAL HEALTH, ACHIEVING THE PROMISE: TRANSFORMING MENTAL HEALTH CARE IN AMERICA 21 (2003) ("Stigma is a pervasive barrier to understanding the gravity of mental illnesses and the importance of mental health.").

health. More than simply serving as a symbol of our intolerance for discrimination, though, parity would break down the barriers to mainstream America thrown up by mental illness. By increasing access to appropriate care, we also increase access to hope, opportunity, and the future.

THE PRACTICAL CASE FOR PARITY

For the end it would put to one of the most visible and damaging examples of discrimination today and for the larger symbolic blow it would strike for equality for those with mental illness, Congress should pass the Wellstone Act. But parity is not only well justified as a civil rights measure, it also makes good sense as a matter of health policy. For as long as stigma clouds decision-making around mental health, the majority of businesses will maintain a status quo that is as harmful in economic terms as it is in terms of health.

A few years ago, the World Health Organization, the World Bank, and Harvard Medical School teamed up to study the impact of disease.[57] Rather than simply measuring which diseases killed the most people, the Global Burden of Disease study looked at which diseases stole the greatest number of years of healthy life, through either premature death or disability.[58] They discovered that mental illnesses created the second-greatest burden of any class of diseases in industrialized nations, surpassed only by cardiovascular conditions and exceeding even cancers.[59] Moreover, they determined that mental illnesses and substance abuse together cause more lost days of healthy life than any other cause.[60]

Not surprisingly, then, the costs of mental illness to society are staggering. Although good numbers are hard to come by, it is safe to estimate that mental illnesses cost the United States at least $200 billion per year. In 1996, the direct cost of treating mental illnesses was $69 billion.[61] Since then, medical inflation has caused an increase in health care costs of more than twenty-five percent.[62] Moreover, spending on antidepressant drugs increased by more than twenty percent *each year* between 1999 and 2001, the most recent year for which data is available.[63] Given the explosion of psychopharmacological treatments, one can conservatively

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[57] *See* SGRMH, *supra* note 2, at 4.

[58] *See id.*

[59] *See id.*

[60] *See id.*

[61] SGRMH, *supra* note 2, at 49.

[62] BUREAU OF LABOR STATISTICS, U.S. DEP'T OF LABOR, CONSUMER PRICE INDEX—ALL URBAN CONSUMERS (2004), *available at* http://data.bls.gov/cgi-bin/surveymost?cu.

[63] NAT'L INST. FOR HEALTH CARE MGMT. RESEARCH & EDUC. FOUND., PRESCRIPTION DRUG EXPENDITURES IN 2001: ANOTHER YEAR OF ESCALATING COSTS 12 (May 6, 2002), *available at* http://www.nihcm.org/spending2001.pdf; NAT'L INST. FOR HEALTH CARE MGMT. RESEARCH & EDUC. FOUND., PRESCRIPTION DRUG EXPENDITURES IN 2000: THE UPWARD TREND CONTINUES 16 (May 2001), *available at* http://www.nihcm.org/spending2000.pdf.

assume that mental health costs as a whole have, at a minimum, kept even with medical inflation. Thus, a twenty-five percent increase in direct mental health care costs since 1996 yields a staggering $86 billion in direct costs today. Indirect costs, such as lost productivity, disability claims, and social program spending, were estimated in 1998 to be $113 billion annually.[64]

Lost productivity is the largest cost component resulting from a failure to address the problem of mental illness adequately. A recent study in the *Journal of the American Medical Association* examined the impact of depression on businesses, and concluded that while non-depressed workers average 1.5 hours per week of lost productivity due to health problems, workers with depression average 5.6 such hours.[65] This lost productivity due to depression, the authors conclude, cost businesses an estimated $31 billion per year.[66] Moreover, most of the lost productivity takes the form of "presenteeism," where people are at work but not working efficiently, rather than the more obvious absenteeism.[67] The result is that much of the lost productivity is invisible to employers.[68]

These estimates count only the cost to businesses of lower productivity, but there are also out-of-pocket costs to employers that result from allowing mental health needs to go untreated. As might be expected for the second-leading cause of disability nationwide, mental illnesses are a significant part of overall disability costs. A 1998 study determined that employers whose health plans offer relatively good access to outpatient mental health services have lower psychiatric disability claims costs than plans that maintain more restrictive arrangements.[69]

Paradoxically, skimping on mental health care may even raise overall health care costs. A study of more than 46,000 workers at major U.S. companies showed that employees who report being depressed or under stress are likely to have substantially higher health-care costs than coworkers without such ailments.[70] Employees who reported being depressed had health bills that were 70% higher than those who did not suffer from depression, and those reporting high stress had 46% higher

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[64] Dorothy P. Rice & Leonard Miller, *Health Economics and Cost Implications of Anxiety and Other Mental Disorders in the U.S.*, 172 BRIT. J. PSYCHIATRY 4, 4–9 (1998).

[65] Walter F. Stewart et al., *Cost of Lost Production Work Time Among U.S. Workers With Depression*, 28 J. AM. MED. ASS'N 3135, 3140 (2003).

[66] *See id.* at 3141.

[67] *See id.*

[68] *See id.*

[69] DAVID SALKEVER, UNUM LIFE INS. CO., PREDICTORS AND DESCRIPTORS OF PSYCHIATRIC DURATION, COST AND OUTCOMES STUDY (1998), *cited in* Mary Jane England, *Capturing Mental Health Cost Offsets*, HEALTH AFFAIRS, Mar. 1999, at 91, 92, *available at* http://content.healthaffairs.org/ cgi/reprint/18/2/91.pdf.

[70] Ron Z. Goetzel et al., *The Business Case for Quality Mental Health Services: Why Employers Should Care About the Mental Health and Well-Being of Their Employees*, 44 J. OCCUPATIONAL & ENVTL. MED. 320, 324 (2002).

health care costs.[71] Another study found that when workers with depression were treated with prescription medicines, annual medical costs declined by $822 per worker.[72]

Research by the National Institute of Mental Health into the connections between mental and physical diseases suggests a potential explanation. Depression, the most prevalent and most studied mental illness, may worsen high blood pressure,[73] and men with psychological distress are as much as three times more likely to suffer a fatal stroke than counterparts without such symptoms.[74] On average, people with depression are four times more likely to have a heart attack than those with no history of depression.[75]

In addition to the price that businesses pay, perhaps unwittingly, for the relative inaccessibility of mental health care, there are significant costs that society as a whole must bear, and not only in the costs associated with criminal justice and homelessness described above.[76] There is a heavy burden created by the unemployment of the mentally ill. In 2002, President Bush appointed a commission to examine barriers to mental health care and to make recommendations for improvements. The commission concluded that

> undetected, untreated, and poorly treated mental disorders interrupt careers, leading many into lives of disability, poverty, and long-term dependence. Our review finds a shocking 90 percent unemployment rate among adults with serious mental illness—the worst level of employment of any group of people with disabilities. Strikingly, surveys show that many of them want to work and report that they *could* work with modest assistance.[77]

The results of this needlessly high unemployment rate include public expenditures on disability payments and income supports, as well as lost tax revenue, all of which could be obviated by better mental health care.

While the costs to business and society of poor mental health care are significant, the price tag on mental health parity legislation is relatively small. The Congressional Budget Office has estimated that the bill I have

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[71] *Id.*

[72] John A. Rizzo et al., *Labour Productivity Effects of Prescribed Medicines for Chronically Ill Workers*, 5 HEALTH ECON. 249, 250 (1996).

[73] Jose Juan Lozano et al., *Meeting Report: Depression May Worsen High Blood Pressure* (Apr. 28, 2003), *at* http://www.americanheart.org/presenter.jhtml?identifier=3011335.

[74] Margaret May et al., *Does Psychological Distress Predict the Risk of Ischemic Stroke and Transient Ischemic Attack?: The Caerphilly Study*, 33 STROKE 7, 8–12 (2002).

[75] Laura A. Pratt et al., *Depression, Psychotropic Medication, and Risk of Myocardial Infarction*, 94 CIRCULATION 3123, 3127 (1996).

[76] *See supra* text accompanying notes 46–49.

[77] PRESIDENT'S NEW FREEDOM COMM'N ON MENTAL HEALTH, INTERIM REPORT TO THE PRESIDENT 11 (Oct. 29, 2002) (*citing* R. E. Drake et al., *Research on the Individual Placement and Support Model of Supported Employment*, 70 PSYCHIATRIC Q., 289, 299 (1999)).

introduced would raise group health insurance premiums by 0.9%.[78] Employers' premiums are predicted to increase by a mere 0.36%.[79] A study by PricewaterhouseCoopers echoes the CBO estimate, pegging the cost of parity legislation at 1%, or $1.32 per member per month.[80] With health care premiums predicted to continue rising by double-digit percentages annually, the difference parity would make falls within the estimates' margin of error.[81]

In fact, the experience of states that have implemented parity legislation confirms the reasonableness of these estimates. Some examples:

In 1998, Vermont instituted a far-reaching mental health and substance abuse parity law, which the U.S. Department of Health and Human Services recently found lowered mental health and substance abuse spending by 8% to 18% while increasing access to mental health care by 18% to 24%.[82]

In Maryland, after a small rise of less than one percentage point in the year of transition to parity, mental health costs held steady in year two and declined in year three.[83]

In Ohio, behavioral health costs for HMO enrollees fell following implementation of full mental health and substance abuse parity in 1993 and 1997, perhaps in part due to a nearly 50% drop in the number of inpatient days paid for.[84]

Those who would oppose parity legislation argue that if mental health care is so cost-effective, such legislation should not be necessary; the market would demand better mental health coverage because it would

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[78] JENNIFER BOWMAN ET AL., CONGRESSIONAL BUDGET OFFICE, CONGRESSIONAL BUDGET OFFICE COST ESTIMATE—S. 543 MENTAL HEALTH EQUITABLE TREATMENT ACT OF 2001, at 3 (Aug. 1, 2001), *available at* http://www.cbo.gov/showdoc.cfm?index=3013&sequence=0.

[79] *See id.* (estimating that costs would increase 0.9%, but 60% of that cost would be offset by behavioral responses from employers and employees).

[80] AM. PSYCHOLOGICAL ASS'N, THE COST OF FULL PARITY: 1–2%, OR LESS. PERIOD. (Mar. 2002), *at* http://apa.org/practice/parity_cost.html (*citing* PRICEWATERHOUSECOOPERS, AN ACTUARIAL ANALYSIS OF S. 543, MENTAL HEALTH EQUITABLE TREATMENT ACT OF 2001, at 6 (2001)).

[81] *See* HENRY E. SIMMONS & MARK A. GOLDBERG, NAT'L COALITION FOR HEALTH CARE, CHARTING THE COST OF INACTION 5 (May 19, 2003) (predicting average annual premiums for employer-provided coverage through 2006), *available at* http://www.nchc.org/materials/studies/Cost_of_Inaction_Full_Report.pdf.

[82] CTR. FOR MENTAL HEALTH SERVS. & CTR. FOR SUBSTANCE ABUSE TREATMENT, U.S. DEP'T OF HEALTH & HUMAN SERVS., EFFECTS OF THE VERMONT MENTAL HEALTH AND SUBSTANCE ABUSE PARITY LAW 58 (2003), *available at* ftp://ftp.health.org/pub/ken/pdf/SMA03-3822/CMHS9PRI.pdf.

[83] *See* HAROLD E. VARMUS, NAT'L. INSTS. OF HEALTH, PARITY IN FINANCING MENTAL HEALTH SERVICES: MANAGED CARE EFFECTS ON COST, ACCESS AND QUALITY 11 (May 1998).

[84] Roland Sturm et al., *Mental Health and Substance Abuse Parity: A Case Study of Ohio's State Employee Program*, 1 J. MENTAL HEALTH & ECON. 129, 132 (1998).

save on these other costs. The nature of mental illnesses, however, masks the costs and distorts normal market forces. First, as explained above, while there are great savings to be realized to companies' bottom lines overall, a great deal of the savings takes the form of productivity gains, which are harder to quantify than the health care expenditures with which they must be compared.[85] Moreover, as the Stewart study noted, a significant portion of the cost to employers of the status quo is invisible, because it involves "presenteeism."[86] Most importantly, though, as the Surgeon General wrote, "The stigma that envelops mental illness deters people from seeking treatment .... Powerful and pervasive, stigma prevents people from acknowledging their own mental health problems, much less disclosing them to others."[87] Out of simple embarrassment or justifiable fear of repercussions, employees with mental illnesses are far less likely to advocate for better coverage, as would employees with other diseases. Irrational prejudices can trump rational economic decision-making.

Where businesses have endeavored to improve their mental health care, they have seen favorable results. James Hackett, the CEO of Ocean Energy, said in explaining the decision of his firm and two other Houston companies to offer full parity between mental and physical health benefits, that the increase in annual health costs is "more than offset by avoided costs of lost employee productivity."[88] As long as stigma clouds decision-making around mental health, however, we can expect the majority of businesses to maintain the harmful status quo, making parity legislation necessary.

CONCLUSION

One major subtext of our national history is the struggle between the lofty principles on which our country was founded and the baser human instincts that have prevented us from reaching our founding ideals. What makes America great is that over time, we have consistently striven to move closer to achieving in reality the equality and opportunity promised to all in theory. It is time for us to take another such step and open the American dream to those who are afflicted with mental illnesses.

We can draw a direct line from the coverage limitations on mental health care to untreated mental illness to needless suicides, imprisonment, unemployment, and broken relationships. In an era when researchers are churning out ever more science exploring the biochemical and physiological causes and effects of mental illnesses, there is no excuse

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[85] *See* STEWART, *supra* note 65, at 3140.

[86] See *supra* text accompanying notes 65–68.

[87] SGRMH, *supra* note 2, at 454.

[88] *Insurance Coverage of Mental Health Benefits: Hearings Before the House Comm. on Energy and Commerce*, 107th Cong. 37 (2002) (prepared statement of James T. Hackett; Chairman, President, and CEO; Ocean Energy, Inc.).

for such differential treatment. By accepting the status quo, we as a society make a choice to deny effective health care to a disfavored class. That choice is a blot on our honor and a betrayal of our principles.

The Wellstone Act would repair this hole in the civil rights fabric of our country while also strengthening our health care system. The exclusion of diseases of the brain from health care is inefficient and costly. While it is possible that health savings of mental health parity will fully offset the additional costs it entails, it is a virtual certainty that the *overall* savings of parity—including greater productivity, fewer disability claims, and the myriad social benefits discussed above—will far outweigh the modest costs arising from increases in use of mental health care services. Indeed, as the Surgeon General and many others have noted, we already bear the costs generated by untreated mental illnesses. It would be more efficient and more humane to pay those costs in the form of effective treatment than it is to disburse funds for incarceration, disability payments, and welfare.

Forty-one years ago, on February 5, 1963, President Kennedy said: "We as a Nation have long neglected the mentally ill and the mentally retarded. This neglect must end, if our Nation is to live up to its own standards of compassion and dignity and achieve the maximum use of its manpower."[89] President Kennedy's words still hold force today. At the time, he was calling for deinstitutionalization, arguing that we must bring our mentally ill family members, friends, and neighbors back into our communities. We have made strides in forty years toward bringing Americans with mental illness into our physical communities, but we must complete that journey by bringing them into the mainstream of American life. Throughout our history we have measured ourselves against the principles we cherish, against "[our] own standards of compassion and dignity," and, though not without difficulty, improved our nation when we found ourselves falling short.[90] It is time to pass the Wellstone Act and take another step forward.

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[89] Special Message to the Congress on Mental Illness and Mental Retardation, 50 PUB. PAPERS (Feb. 5, 1963), *available at* http://www.presidency.ucsb.edu/site/docs/pppus.php?admin=035&year=1963&id=50.

[90] *Id.*

POLICY ESSAY

COMMERCE WITH A CONSCIENCE: BALANCING PRIVACY AND PROFIT IN A DIGITAL WORLD

REPRESENTATIVE EDWARD J. MARKEY*

In this Policy Essay, Representative Edward J. Markey discusses changes in regulations governing patient privacy that have been recently implemented by the Department of Heath and Human Services. Representative Markey argues that in the areas of patient consent and marketing, these changes have favored business interests at the expense of patient privacy. To correct this imbalance Representative Markey argues that Congress should pass the STOHP Act, which would protect patient privacy by restoring consent requirements and limitations on marketing by health care providers.

For centuries, clear and simple principles shaped the relationship between physicians and their patients: work for the good of the patient; do no harm; keep the patient's medical information confidential. The medical profession's respect for patient privacy is rooted in the foundation of medical practice, as evidenced by provisions included in the earliest versions of the Hippocratic Oath: "What I may see or hear in the course of the treatment or even outside of the treatment in regard to the life of men, which on no account one must spread abroad, I will keep to myself holding such things shameful to be spoken about."[1] In 1996, Congress passed, and President Clinton signed into law, the Health Insurance Portability and Accountability Act.[2] HIPAA was enacted to protect the portability of health insurance and to ensure the accuracy, confidentiality, and availability of health information that is transmitted electronically.[3] Among its other provisions, the Act declared that if Congress did not enact privacy legislation within three years of its passage, the Secretary of Health and Human Services would be required to develop and disseminate standards for the electronic exchange, privacy, and security of electronically transmit-

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[1] LUDWIG EDELSTEIN, THE HIPPOCRATIC OATH: TEXT, TRANSLATION, AND INTERPRETATION 3 (1943).

[2] Health Insurance Portability and Accountability Act of 1996, Pub. L. No. 104-191, 110 Stat. 1936 (codified as amended in scattered sections of 29 U.S.C. and 42 U.S.C.) (hereinafter "HIPAA").

[3] *See generally* H.R. REP. NO. 104-736 (1996).

ted health information.[4] When the deadline passed without congressional action, HHS issued a proposed rule and released it for public comment in November 1999.[5] The final regulation, referred to in this Essay as the "Clinton privacy rule," was published by the Clinton Administration on December 28, 2000.[6] This Essay discusses the development of the Clinton privacy rule, the Bush amendments, and the consequences of these changes for health care consumers. It also presents an alternative to the Bush amendments' privacy-weakening provisions, the Stop Taking Our Health Privacy (STOHP) Act,[7] bi-partisan legislation I introduced last spring to close significant privacy peepholes created by the Bush amendments.

I. BACKGROUND

Legal scholars have long identified the right of law-abiding citizens "to be let alone" as a cornerstone of the American systems of law and medicine.[8] When presented with cases in which an individual's personal medical information has been used or disclosed without permission, courts have repeatedly reaffirmed the rights of patients to determine whether their private health information may be shared or must be kept confidential. For example, in 2000 the Third Circuit ruled on a case involving a young man who had hidden his homosexuality from his family.[9] A police officer who knew about the man's sexual orientation confronted him and threatened to tell the man's family.[10] Rather than be forced to make this disclosure himself, the young man committed suicide.[11] When the man's estate sued the police department, the court found in the estate's favor, ruling that the "right not to have intimate facts concerning one's life disclosed without one's consent . . . is a venerable one whose constitutional significance we have recognized."[12]

In 2001, in *Ferguson v. City of Charleston*, the Supreme Court held that patients have the right to expect that health information, such as their

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[4] HIPAA § 264(c)(1).

[5] *See* Standards for Privacy of Individually Identifiable Health Information, 64 Fed. Reg. 59,918 (Nov. 3, 1999) (codified as amended at 45 C.F.R. pts. 160, 164).

[6] *See* Standards for Privacy of Individually Identifiable Health Information, 65 Fed. Reg. 82,462 (Dec. 28, 2000) (codified as amended at 45 C.F.R. Parts 160, 164).

[7] H.R. 1709, 108th Cong. (2003).

[8] Samuel Warren & Louis D. Brandeis, *The Right to Privacy*, 4 HARV. L. REV. 193, 193 (1890).

[9] Sterling v. Borough of Minersville, 232 F.3d 190 (3d Cir. 2000)

[10] *Id.* at 192–93.

[11] *Id.* at 193.

[12] *Id.* at 194 (quoting Bartnicki v. Vopper, 200 F.3d 109, 122 (3d Cir. 1999), *aff'd*, 532 U.S. 514 (2001)). Although information about sexual orientation may not be considered strictly medical information, the Court indicated that the privacy concerns involved in the case were similar to medical privacy concerns raised in cases such as *Griswold v. Connecticut*, 381 U.S. 479 (1965) (upholding right to privacy with respect to the the use of contraceptives), and *Roe v. Wade*, 410 U.S. 113 (1973) (upholding a woman's right to obtain an abortion on privacy grounds). *See id.* at 194–97.

laboratory results, will not be shared without their permission for purposes unrelated to their treatment.[13] The Court noted that failing to fulfill this expectation could undermine patients' access to health care: "[W]e have previously recognized that an intrusion on that expectation may have adverse consequences because it may deter patients from receiving needed medical care."[14] Last year, when privacy prerogatives collided with a health insurer's commercial interests, a Pennsylvania court ruled that a psychiatrist could not, as a condition of remaining a participating provider in the health plan, be compelled by a national health insurance company to disclose the mental health records of his patients without their consent.[15] The court determined that "public policy and the standard of care requires that a wall be erected around the confidentiality of the patient's psychiatric history."[16]

These legal precedents comport with public opinion about the importance of medical privacy. For example, a 2001 Gallup poll found that 78% of respondents thought it was "very important" that their medical records be kept private.[17] Another poll, conducted in 2000, found that 70% of respondents had concerns about doctors and researchers having access to their medical records.[18] More than 90% of respondents had concerns about giving their medical records to government agencies.[19] Despite these concerns, evidence indicated that sufficient safeguards were not being taken to ensure patients' privacy. A Congressional Research Service study reported that approximately 400 persons, including nurses, technicians, and other hospital staff, may have access to a patient's medical records during an average hospitalization.[20]

Patients worry about medical privacy for several reasons. Many patients fear that public knowledge of private medical information could lead to discrimination in the workplace.[21] Studies have found that more than one-third of Fortune 500 companies check medical records before they hire or promote employees.[22] In addition, many patients fear discrimina-

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[13] 532 U.S. 67, 78 (2001).

[14] *Id.* at 78 n.14 (citing Whalen v. Roe, 429 U.S. 589 (1977)).

[15] Shrager v. Magellan Behavioral Health, No. G.D. 00-015809, at 5 (Ct. Com. Pl. Alleghany County, Pa., Mar. 10, 2003), *available at* http://www.managedcareandpatientprivacy.com/court_opinion.doc.

[16] *Id.*

[17] Mary L. Durham, Note, *How Research Will Adapt to HIPAA: A View from Within the Healthcare Delivery System*, 28 AM. J.L. & MED. 491, 495 (2002).

[18] *Id.*

[19] *Id.*

[20] P. Greg Gulick, *E-Health and the Future of Medicine: The Economic, Legal, Regulatory, Cultural, and Organizational Obstacles Facing Telemedicine and Cybermedicine Programs*, 12 ALB. L.J. SCI. & TECH. 351, 382 (2002).

[21] Sharon J. Hussong, Note, *Medical Records and Your Privacy: Developing Federal Legislation to Protect Patient Privacy Rights*, 26 AM. J.L. & MED. 453, 455 (2002).

[22] *Id.* These companies generally have access to patient information through employer-provided health plans. Gulick, *supra* note 20, at 382.

tion in the marketplace, such as when applying for consumer loans.[23] Finally, and perhaps most importantly, many patients and doctors have argued that a lack of medical confidentiality would negatively affect doctors' abilities to provide appropriate medical treatment.[24] Patients may be reluctant to share crucial medical information if they are not certain it will remain confidential.[25] Moreover, physicians who are not confident in the privacy of their patients' medical records may be reluctant to report certain medical information to public health officials.[26]

In 1996, Congress passed, and President Clinton signed into law, the Health Insurance Portability and Accountability Act (hereinafter "HIPAA").[27] HIPAA was intended to streamline and improve the effectiveness of the health care system by expanding the use of technology to maintain and transmit health data electronically.[28] Although it has several benefits, technology can pose a risk to patients and patient care.[29] Technology can improve the quality of medical care by facilitating access to necessary medical information.[30] Technology also facilitates research into new drugs and treatments, thereby improving overall patient care.[31] These benefits, however, must be balanced against patients' rights to privacy. To ensure that increased electronic storage and transmission of health data would not undermine patient privacy, HIPAA was designed to be the first comprehensive federal law protecting the confidentiality of patient medical information.[32] Prior to HIPAA, privacy safeguards were contained in state law, which often differed depending on the particulars of each state's privacy statute, creating an increasingly confusing situation for consumers and health care providers as the health industry became national in scope.[33] HIPAA was intended to provide all health care consumers with a defined set of privacy protections.[34] Individual state laws can enhance these protections, but federal law preempts any provisions in state law deemed to be weaker than HIPAA standards.[35]

When it passed HIPAA, Congress understood that the same technological advances that enable increased efficiencies in the health care industry also could expose patients' most private medical information to the

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[23] Hussong, *supra* note 21, at 455–56.

[24] *Id.* at 456.

[25] *Id.*

[26] *Id.*

[27] Health Insurance Portability and Accountability Act of 1996, Pub. L. No. 104-191, 110 Stat. 1936 (codified as amended in scattered sections of 29 U.S.C. and 42 U.S.C.).

[28] *See id.* § 262.

[29] Hussong, *supra* note 21, at 454.

[30] *Id.*

[31] *Id.*

[32] *See id.*

[33] *See* Standards for Privacy of Individually Identifiable Health Information, 67 Fed. Reg. 53, 182, 53,198–201 (Aug. 14, 2002) (codified at 45 C.F.R. pts 160, 164).

[34] *Id.*

[35] 42 U.S.C. § 1320d-7 (2000).

prying eyes of marketers and other non-medical personnel who would use the data for commercial purposes.[36] HIPAA established a deadline of August 21, 1999 for the passage of privacy standards.[37] In the event that Congress did not act, the Department of Health and Human Services (HHS) was authorized to promulgate regulations establishing such standards.[38]

In March 1999, during the three-year period that HIPAA established for Congress to enact privacy legislation implementing HIPAA's provisions, I introduced the Medical Information Privacy and Security Act (MIPSA).[39] MIPSA was intended to ensure that consumers have three important rights to protect their medical privacy: the rights of "Knowledge," "Notice," and "No." Specifically, MIPSA was designed to provide individuals the right to full knowledge of who will have access to their medical information; the right to be given notice of the purpose of any disclosure of their health information; and the right to say "no" to disclosure of information to parties not directly involved with their health care.[40] Senators Edward Kennedy (D-Mass.) and Patrick Leahy (D-Vt.) introduced companion legislation in the Senate.[41] The period for congressional action expired before Congress completed consideration of the bill.

II. THE CLINTON PRIVACY RULE

When Congress did not enact privacy legislation by HIPAA's deadline, the Clinton Administration released a proposed rule for public comment in November 1999.[42] The depth of public concern about the confidentiality of medical information was reflected in the heavy volume of public comments submitted during the rulemaking process to implement HIPAA. During the rulemaking period, the Department of Health and Human Services (HHS) received an astounding number of public comments on the balance HIPAA struck between privacy and commerce—more than 52,000.[43] Many of the comments received by HHS related to the requirement that patients give their permission before their private medical information may be used for purposes such as treatment, bill payment, and so-called "health care operations," a category that includes commercial activities seemingly unrelated to patient care, such as the sale or merger of a health

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[36] Hussong, *supra* note 21, at 455.

[37] HIPAA § 264(c)(1).

[38] *Id.*

[39] Medical Information Privacy and Security Act, H.R. 1057, 106th Cong. (1999).

[40] *Id.* § 3.

[41] Medical Information Privacy and Security Act, S. 573, 106th Cong. (1999). The bill did not receive a vote in committee in either the House or the Senate.

[42] *See* Standards for Privacy of Individually Identifiable Health Information, 64 Fed. Reg. 59,918 (Nov. 3, 1999) (codified as amended at 45 C.F.R. pts. 160, 164).

[43] Standards for Privacy of Individually Identifiable Health Information, 67 Fed. Reg. 14,776, 14,777 (Mar. 27, 2002).

maintenance organization.[44] The final Clinton privacy rule was published in December 2000.[45]

The Clinton rule contained safeguards intended to address health care consumers' concerns that their medical secrets could be revealed and used to their detriment by employers, insurers, or others intent on capitalizing on their health data. An important component of the Clinton privacy rule was its emphasis on the right of individuals to give or withhold consent before their personal health information is used or disclosed for most routine purposes.[46] The definition of "routine uses and disclosures" was "treatment, payment and health care operations" which, along with other terms in the Clinton privacy rule, were defined to establish privacy protections for the most common types of uses and disclosures of health information.[47]

The Clinton privacy rule also empowered patients to block the unauthorized use of their prescription histories and other personal health information for marketing purposes. Under the Clinton rule, the term "marketing" was defined broadly to protect patients from most unwanted marketing pitches, such as unsolicited pharmaceutical company mailers promoting their latest remedies.[48] According to the Clinton privacy rule, if an entity covered by the rule, such as a pharmacy, was paid to recommend a health-related product or service to the consumer, the covered entity was required to identify the source of the communication, notify the consumer that the covered entity was being paid to make the communication (if applicable), and give the consumer the choice to opt out of receiving further communications.[49] The covered entity could not be paid to send consumers a mailing that was not related to health, such as information about vacation destinations for patients taking anti-depressants, without prior patient authorization.[50]

III. The Bush Amendments

On August 14, 2002, HHS announced the Bush amendments to the Clinton privacy rule. As in the case of the Clinton privacy rule, HHS received thousands of comments in response to the Bush amendments.[51]

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[44] *See* Standards for Privacy of Individually Identifiable Health Information, 65 Fed. Reg. 82,462, 82,472–73 (Dec. 28, 2000) (codified as amended at 45 C.F.R. pts. 160, 164).

[45] *Id.* at 82,462. Due to an administrative error, the December 2000 rules had to be withdrawn and re-issued on April 14, 2001. *See* Gulick, *supra* note 20, at 382.

[46] *See* Standards for Privacy of Individually Identifiable Health Information, 65 Fed. Reg. 82, 462, 82,810 (listing the final rule); *id.* at 82,472 (detailing the reasoning behind the rule).

[47] *See id.* at 82,488–98.

[48] *See id.* at 82,804.

[49] *See id.* at 82,819–20.

[50] *See id.*

[51] Standards for Privacy of Individually Identifiable Health Information, 67 Fed. Reg. at 53,183.

Unfortunately, the Bush amendments undermined patient protections contained in the Clinton privacy rule in several significant ways. First, the amendments repealed the right of individuals to block the use or disclosure of their personally identifiable health information for routine purposes. Second, the amendments enabled thousands of organizations and individuals, referred to as "covered entities" (i.e., organizations subject to the rule's provisions) and "business associates" (e.g., corporations such as law or accounting firms with a business relationship with a covered entity), to use and disclose individuals' health information for routine purposes without patients' knowledge or consent and even against their will.[52] Finally, the amendments narrowed the definition of marketing to exclude health-related communications such as new drug information.[53] They thereby allowed pharmaceutical companies to pay pharmacies to send patients unsolicited mailers about their new medicines without patient permission, and without informing the patient of the financial connection between pharmacy and pharmaceutical company or offering the patient the choice of opting out of such communications in the future.[54]

The Bush amendments removed the requirement contained in the Clinton privacy rule that patients must give their consent before their personally identifiable health information can be used or disclosed for purposes of health care treatment, payment for health care services, or health care operations.[55] The Bush amendments replaced the consent requirement with a mandate that organizations such as health providers, insurance companies, and similar entities covered by the amendments must merely notify patients of how their medical information will be used and disclosed, rather than seek consent before patients' personal medical files can be released.[56]

In the marketing arena, the Bush amendments also tilted the balance between confidentiality and commerce toward corporate interests, by making it easier for pharmaceutical companies to use patients' prescription history to send them unsolicited mailers promoting health-related products, even if the patient did not wish to receive the information and would prefer to have the communications stopped.[57] The Bush amendments shrunk the marketing definition established in the Clinton privacy rule, and as a result, pharmaceutical companies now have fewer restrictions on their health-related communications with consumers. If the communications are related to health products or services, companies do not need consumers' prior authorization to send them unsolicited mailings, do not need to provide the consumer with the choice to opt out of future communica-

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[52] *Id.* at 53,211.

[53] 45 C.F.R. § 164.506 (2003).

[54] *See* Standards for Privacy of Individually Identifiable Health Information, 67 Fed. Reg. 53, 182, 53,183–84 (Aug. 14, 2002) (codified at 45 C.F.R. pts. 160, 164).

[55] 45 C.F.R. § 164.506 (2003).

[56] *Id.* § 164.520.

[57] *Id.* § 164.501.

tions, do not need to inform consumers if the communications are being paid for by the pharmaceutical company that produces the product or service, and do not even need to identify the source of the mailing.

Health professionals are already warning that the Bush amendments will reduce patients' willingness to divulge the extent of their medical problems. During testimony in September 2002 before the House of Representatives, Deborah Peel, a Texas psychiatrist, described her patients' fears that information about the prevalence of Alzheimer's disease among their relatives could be used to deny health coverage or result in discrimination in the workplace.

> In my practice, I have several people who are very worried about getting Alzheimer's disease because they have a parent with Alzheimer's disease, and they will not get the testing, even though this would be very important information for themselves and taking care of themselves, because they understand . . . what that would mean for employment and insurance in the future, and for all of their other close family relatives, close blood relatives.
>
> And so I don't think that the impact of protecting privacy or not protecting privacy is theoretical.[58]

While patients have long been concerned about the unauthorized public release of their private medical records, the Bush amendments increase the potential for prying eyes to access patients' personal health information without patients' consent. Unlike the Clinton privacy rule, the Bush amendments, which became effective in April 2003, permit the nonconsensual use and disclosure of patients' personal health information to the estimated 600,000 entities covered by the rule and their "business associates," as long as they assert it is needed for treatment, payment, or health care operations.[59] "Health care operations" is defined so broadly that it provides little, if any, discernable restriction. It includes activities such as business planning, management and administration, the sale or transfer of a covered entity, and fundraising.[60] Moreover, use of private information by these "business associates" is to a large extent left unregulated under the Bush amendments. Because they are not "covered entities," these associates are not subject to the privacy regulations. The regulations also do not require covered entities to contract with business associates or take any additional safeguards to ensure the confidentiality of patient informa-

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[58] *Privacy Concerns Raised by the Collection and Use of Genetic Information by Employers and Insurers: Hearing Before the Subcomm. on the Constitution of the House Comm. on the Judiciary*, 107th Cong. 106–08 (2002) (statement of Deborah Peel, President, Mental HealthCARE Foundation).

[59] 45 C.F.R. § 164.506 (2003).

[60] *Id.* § 164.501.

tion.[61] If it does contract to protect patient confidentiality, the covered entity is liable only if it was aware of a business associate's material breach of a contract and does not take reasonable steps to correct the breach.[62]

IV. Restoring Medical Privacy—The STOHP Act

When the Bush amendments became effective on April 14, 2003, longstanding medical privacy principles were abandoned. The Bush amendments stripped away strong privacy safeguards that had been established to preserve the confidentiality of patient records without impeding patients' access to health care or thwarting the ability of health care organizations to transmit and store patient records or bill for health care services. In the case of patient treatment, bill payment, and certain business transactions referred to as "health care operations," the Bush amendments permit patients' medical secrets to be used and disclosed to doctors, pharmacists, health insurers, and others without prior patient consent.[63] In addition, in the case of these health care operations—a vast category that has more to do with business mergers than medicine—patients' private health information can be used without patients' permission to serve the commercial interests of health care companies during transactions such as the sale of an HMO.[64] The patient information covered by the privacy rule, referred to as "individually identifiable health information," includes a patient's past, present, and future physical or mental health condition, as well as name, address, birth date, and Social Security number.[65] By eschewing essential, longstanding medical privacy practices, the Bush amendments open massive privacy peepholes into patients' most personal health information. These apertures not only are inconsistent with longstanding legal precedents and medical ethics, but also strike at the trust between doctor and patient that is critical to the delivery of quality health care.

Last year, I introduced the Stop Taking Our Health Privacy (STOHP) Act,[66] along with Rep. John Dingell (D-Mich.), ranking member of the House Energy and Commerce Committee, Rep. Henry Waxman (D-Cal.), ranking member of the House Government Reform Committee, and Rep. Dana Rohrabacher (R-Cal.). The STOHP Act has been endorsed by organizations such as the American Psychoanalytic Association, Public Citizen, and Citizens for Health and co-sponsored by twenty Members of

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[61] M. Susan Ridgely & Michael D. Greenberg, *Pharmacy, Facsimile, and Cyberspace: An Examination of Legal Frameworks for Electronic Prescribing*, 13 Alb. L.J. Sci. & Tech. 1, 7–8 (2002).

[62] *See id.* at 8.

[63] 45 C.F.R. § 164.506 (2003).

[64] *Id.*

[65] *Id.* § 160.103 (2003).

[66] Stop Taking Our Health Privacy Act, H.R. 1709, 108th Cong. (2003) (hereinafter "The STOHP Act").

Congress.[67] The purpose of the STOHP Act is to "restore patient privacy protections essential for high-quality health care that were undermined by [the Bush Amendments]."[68] STOHP would restore patient privacy by closing the pernicious privacy peepholes opened by the Bush amendments in two critical areas: patient consent and pharmaceutical marketing.

In the area of patient consent, the STOHP Act affirms that patients should have the right to decide for themselves whether to permit the release of their confidential health information.[69] Consent was at the core of the Clinton privacy rule.[70] The Bush amendments hollowed out this core by removing the consent requirement for a wide range of activities, including a one-time initial consent for re-use of information for business purposes that have nothing to do with treatment of the patient (i.e., "health care operations").[71] The elimination of patient consent may lead patients to withhold key information from their own doctors, which can severely undermine the quality of care that patients receive. According to one congressional witness, "people are withdrawing from full participation in their own health care" due to concerns that their medical information may fall into the wrong hands.[72]

The STOHP Act would restore patients' right to consent to the use and disclosure of their personal health information.[73] The primary criticism of this requirement is that it would decrease the quality of health care by impeding the free flow of patient information. While patients and their doctors should not have to "run all over town" to secure consent, patients' medical privacy should not be trampled by an overly permissive rule that exposes their private health information to third parties without their consent. Although efficient transfer of medical information is important for the delivery of quality care, serious, and potentially deadly, consequences may result when patients fearful of disclosure of their private health information withhold key details from their physicians. The STOHP Act recognizes that consent should not be an impediment to timely, effective

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[67] *See* Letter from Newell Fischer M.D., President, American Psychoanalytic Association, to Congressman Edward Markey 1 (October 16, 2002) (on file with author); Letter from Frank Clemente, Director, and Wendy Keegan, Regulatory Affairs Fellow, Public Citizen's Congress Watch, to Congressman Edward Markey 1 (October 16, 2002) (on file with author); E-mail from Michael Ostrolenk, Medical Privacy Coalition, to Mark Bayer, Senior Policy Associate, Office of Congressman Edward Markey (November 8, 2002) (on file with author); H.R. 1709, *available at* http://thomas.loc.gov/cgi-bin/bdquery/z?d108:HR01709:@@@P (noting 20 cosponsors as of Apr. 15, 2004).

[68] H.R. 1709, 108th Cong. § 3 (2003).

[69] *Id.* § 4(a).

[70] *See* Standards for Privacy of Individually Identifiable Health Information, 65 Fed. Reg. 82,262, 82,810 (Dec. 28, 2000) (codified as amended at 45 C.F.R. pts. 160, 164).

[71] 45 C.F.R. § 164.506 (2003).

[72] *Privacy Concerns Raised by the Collection and Use of Genetic Information by Employers and Insurers: Hearing Before the Subcomm. on the Constitution of the House Comm. on the Judiciary*, 107th Cong. 42 (2002) (statement of Joanne L. Hustead, Senior Counsel, Health Privacy Project).

[73] H.R. 1709, 108th Cong. § 4(a) (2003).

care. For this reason, our legislation includes several commonsense exceptions to the consent requirement. For example, pharmacists may fill prescriptions phoned in by an individual's health provider without receiving consent directly from the patient, as long as the patient has given that consent to her provider.[74] In addition, patient information may be shared with a health care provider in situations where obtaining consent would be impractical, and where consent could be "clearly inferred" from the circumstances.[75]

The STOHP Act also re-establishes individual privacy rights in the area of pharmaceutical marketing. When pharmacists recommend a new treatment, patients should not wonder whether they or the pharmacist and the drug company stand to benefit more. The Clinton privacy rule contained a basic requirement that removed any doubt about the loyalties of patients' health providers: when a drug company or other third party paid a health provider to communicate with patients about a new treatment or therapy, the provider had to tell the patient about the payment, the source of the communication, and the choice to opt out of future communications.[76] The Bush amendments eliminated this requirement and permit marketing schemes that can turn pharmacists into agents for drug companies without patients' knowledge.[77]

The STOHP Act contains tough provisions to protect a patient's privacy from intrusive marketing campaigns. First, the Act restores the Clinton privacy rule's definition of marketing so that it includes practices that are clearly promotional in nature.[78] Second, the Act requires that patients authorize the use and disclosure of their protected health information for marketing purposes.[79] Such authorization is invalid unless the request for authorization states that the purpose of the request is to authorize marketing and indicates potential uses of the authorization, including disclosure to business associates.[80] Finally, the Act forces health care providers to be honest with patients about any fees they receive for making recommendations.[81]

The STOHP Act also addresses a loophole created by the Bush amendments that can be exploited by pharmaceutical companies for marketing purposes. The Clinton privacy rule recognized that under certain tightly controlled and limited circumstances, nonconsensual release of a patient's medical records by health providers to drug companies could serve important public health purposes. For example, reporting serious side effects

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[74] *Id.* § 4(a)(2)(A).

[75] *Id.* § 4(a)(2)(B).

[76] *See* Standards for Privacy of Individually Identifiable Health Information, 65 Fed. Reg. at 82,462, 82,819–20 (Dec. 28, 2000) (codified as amended at 45 C.F.R. 160, 164).

[77] Standards for Privacy of Individually Identifiable Health Information, 67 Fed. Reg. at 53,184–88 (Aug. 14, 2002) (codified at 45 C.F.R. pts. 160, 164).

[78] STOHP Act, H.R. 1709, 108th Cong. § 4(b)(1) (2003).

[79] *Id.* § 4(b)(3).

[80] *Id.* § 4(b)(3).

[81] *Id.* § 4(b)(3)(d).

of a prescription drug could deliver potentially life-saving information to patients. For this reason, the Clinton privacy rule permitted such release to organizations controlled by the FDA, including pharmaceutical companies and medical device manufacturers, as long as the disclosure served specific public health priorities.[82] The Bush amendments expanded the narrow set of purposes for which medical information can be handed over to FDA-regulated entities without patient consent. Under the Bush amendments, these firms can access patients' medical secrets without their consent as long as the purpose "is related to the quality, safety, or effectiveness" of the product, a broad category that could include companies' efforts to learn about patient use of their products in order to market them more effectively.[83] This privacy peephole permits drug companies to peer into patients' health information and use and disclose it without their consent for activities that extend far beyond the sensible public health priorities specified in the Clinton privacy rule. The STOHP Act repeals the unwise expansion of unauthorized access to patient information afforded to FDA-regulated entities, restoring the narrower purposes permitted under the Clinton privacy rule.

V. Conclusion

As emerging technologies and groundbreaking medical discoveries revolutionize the health care industry, fundamental medical privacy rights remain as vital and relevant today as they were centuries ago. Longstanding principles must be adhered to: patients have the right to say "No" to the sharing of their medical secrets; patients must be told of any compensation their doctors receive to tell them about new treatments; any nonconsensual disclosure of medical information must be strictly limited to legitimate public health purposes such as product recalls or notifications about adverse reactions to prescription drugs. These are simple principles. Failure to adhere to them, however, will have dangerous consequences for patients, providers, and the credibility of the health care industry.

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[82] *See* Standards for Privacy of Individually Identifiable Health Information, 65 Fed. Reg. 82,462, 82,813–14 (Dec. 28, 2000) (codified as amended at 45 C.F.R. pts. 160, 164).

[83] 45 C.F.R. § 164.512 (2003).

SYMPOSIUM ESSAY

REGULATING INTIMIDATING SPEECH

ALEXANDER TSESIS*

In 2003, the Supreme Court decided in Virginia v. Black *that laws punishing intentionally intimidating cross burning were constitutional. Professor Alexander Tsesis argues that the Thirteenth Amendment grants Congress the authority to enact necessary and proper laws that, like Virginia's statute in* Black, *prohibit intentional public displays of symbols with a "long and pernicious history." He first discusses the effects that follow from the intimidating use of destructive messages. Professor Tsesis refutes the absolutist perspective that the First Amendment does not allow hate speech regulation, and he further argues that political speech has been exploited throughout history. Lastly, this Essay examines the ways in which the Court has interpreted section 2 of the Thirteenth Amendment and argues that the Amendment should be used to permit hate speech regulation.*

Hate speech that is intentionally used to intimidate others can drastically undermine public safety and social welfare. A federal statute could and should address the potential dangers posed by at least some such speech. Section 2 of the Thirteenth Amendment[1] authorizes Congress to punish the intimidating display of symbols associated with slavery and its incidents, including the display of burning crosses and similar badges of servitude.

The Court's decision in *Virginia v. Black* announced, for the first time, the constitutionality of laws punishing intentionally intimidating cross burning.[2] The Court determined that Virginia, in making it a felony for citizens to display a burning cross with the intent to intimidate, did not violate the First Amendment.[3] Justice O'Connor, writing for the majority, recognized that hate groups often use symbols linked to past destructive

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[1] The Thirteenth Amendment provides:

> Section 1. Neither slavery nor involuntary servitude, except as a punishment for crime whereof the party shall have been duly convicted, shall exist within the United States, or any place subject to their jurisdiction.
>
> Section 2. Congress shall have power to enforce this article by appropriate legislation.

U.S. CONST. amend. XIII.

[2] 538 U.S. 343, 362–63 (2003).

[3] *Id.*

events to incite violence and discrimination in the present.[4] Burning crosses refer to this country's history of involuntary servitude and mark vulnerable targets with a badge of supposed subordination.[5] This Essay argues that the Thirteenth Amendment grants Congress the authority to enact necessary and proper laws that, like Virginia's statute in *Black*, prohibit intentional public displays of symbols with "a long and pernicious history."[6]

Hate groups adopt intimidating symbols with a historical message linked to slavery or other subordination and oppression.[7] They target not only individuals, but also entire groups of people. Hate speakers clad their arguments in stereotypes about outgroups, using readily recognizable, but inaccurate, generalizations. Vituperative stereotypes cause various harms. They not only trigger collective prejudices but also diminish the objects' sense of welfare and security, making even mundane tasks, like going to the store, seem perilous.[8] Whether they are opportunistic or spiteful, destructive messages[9] directly limit victims' personal autonomy because they force them to avoid traveling in places where graffitied swastikas, burning crosses, or gay-bashing slogans bode danger.[10] When they live in the

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[4] *Id.* at 1546.

[5] Several authors have followed the same line of reasoning. *See, e.g.*, Akhil Reed Amar, *The Case of the Missing Amendments:* R.A.V. v. City of St. Paul, 106 HARV. L. REV. 124, 161 (1992) (suggesting that hate speech regulations are legitimate under the Thirteenth Amendment "to cleanse America of the badges and incidents of slavery, such as burning crosses in the yards of black families in the dead of night"); Daniel W. Homstad, Note, *Of Burning Crosses and Chilled Expression* 15 HAMLINE L. REV. 167, 185 (1991) ("In a historical context the burning cross reminds us of a society openly tolerant of slavery.").

[6] 538 U.S. at 363.

[7] *See* Thomas Kleven, *Free Speech and the Struggle for Power*, 9 N.Y.L. SCH. J. HUM. RTS. 315, 350 (1992) (discussing the "historical relationship between hate speech and oppression," and the fact that the burning cross and the Nazi swastika are "widely recognized hate symbols"); Laura Leets, *Responses to Internet Hate Sites: Is Speech Too Free in Cyberspace?*, 6 COMM. L. & POL'Y 287, 292 (2001) (describing Neo-Nazi use of the swastika to refer to Adolf Hitler's Third Reich); Mayo Moran, *Talking About Hate Speech: A Rhetorical Analysis of American and Canadian Approaches to the Regulation of Hate Speech*, 1994 WIS. L. REV. 1425, 1467–68 (recounting how the perpetrators of hate speech use messages with a historical link to violence against such groups as Jews and women).

[8] *See* Karins v. City of Atlantic City, 706 A.2d 706, 721 (N.J. 1998) (determining that hate speech "'harms the individual who is the target[;] . . . it perpetuates negative stereotypes [and] promotes discrimination . . . by creating an atmosphere of fear, intimidation, harassment, and discrimination'" (quoting LAURA J. LEDERER & RICHARD DELGADO, THE PRICE WE PAY 4–5 (1995))); *see also* Charles R. Lawrence III, *If He Hollers Let Him Go: Regulating Racist Speech on Campus*, 1990 DUKE L.J. 431, 452 (stating that discriminatory verbal attacks produce "an instinctive, defensive psychological reaction. Fear, rage, shock, and flight all interfere with any reasoned response.").

[9] I use "hate speech" and "destructive messages" synonymously in this Essay. My meaning, however, is semantically closer to "destructive messages" because I am referring to intentionally intimidating messages uttered against an identifiable group without regard for whether they are spoken out of hate, desire for personal gain, or some other motive.

[10] Mari J. Matsuda, *Public Response to Racist Speech: Considering the Victim's Story*, 87 MICH. L. REV. 2320, 2337 (1989) (citing EEOC v. St. Anne's Hosp., 664 F.2d 128 (7th Cir. 1981); Sambos Rest., Inc. v. City of Ann Arbor, 663 F.2d 686, 703 (6th Cir. 1981)).

very neighborhoods where the symbolic intimidation is perpetrated, victims may even be forced to move from their homes to avoid the foreseeable risk.[11] Once a cross has been burnt on its lawn, after all, a black family is likely to be leery about approaching its own house. Finally, the spread of bigotry signals a diminution of egalitarianism because it tends to undermine the ability of minorities to live as coequal citizens of a constitutional republic. While the United States is a country that values dialogue, it is also a nation committed to protecting racial and ethnic equality, which intentional intimidation aims to upset.[12]

I. THE INTIMIDATING USE OF DESTRUCTIVE MESSAGES

Hate groups committed to undermining equal citizenship rely on destructive messages to popularize their agenda.[13] In *The Nature of Prejudice*, one of the foremost authorities on the psychology of prejudice detailed the sequence of degenerative events: "Although most barking (antilocution) does not lead to biting, yet there is never a bite without previous barking. Fully seventy years of political anti-Semitism of the verbal order antedated the discriminatory Nürnberg [*sic*] Laws passed by the Hitler regime."[14] Almost immediately following the passage of these laws, the Nazis' "violent program of extermination" began.[15] Allport describes the typical progression: "antilocution → discrimination → . . . violence."[16] The more frequently a message is repeated, particularly when reputable and widely available sources broadcast it, the more valid it appears to the public.[17]

Destructive propaganda does not merely spark hatred against the targeted group. Hate speakers' calls to action, which couple derisive ideas with criminal solutions, pose a national threat.[18] Even a fringe group, given

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[11] *See, e.g.*, Matt Scallan, *Civil Rights Leader Still At It; McGee to Lead MLK Day March*, TIMES-PICAYUNE (New Orleans, La.), Jan. 19, 2004, at 1.

[12] *See* United States v. Johnson, 390 U.S. 563, 566–67 (1968) (determining that criminal penalties against intimidation and violence are aimed at securing equal access to constitutional rights and privileges (citing 18 U.S.C. § 241)); *see also* Steven H. Shiffrin, *Racist Speech, Outsider Jurisprudence, and the Meaning of America*, 80 CORNELL L. REV. 43, 67–69, 87 (1994) (explaining that hate speech regulation is part of America's egalitarian legal commitment that entitles all persons to respect and dignity); Johan D. van der Vyver, *Universality and Relativity of Human Rights: American Relativism*, 4 BUFF. HUM. RTS. L. REV. 43, 60 (1998) (stating that some limits on free expression are necessary where egalitarianism and human dignity are basic norms).

[13] I have developed this point at greater length at ALEXANDER TSESIS, DESTRUCTIVE MESSAGES: HOW HATE SPEECH PAVES THE WAY FOR HARMFUL SOCIAL MOVEMENTS 99–117 (2002).

[14] GORDON W. ALLPORT, THE NATURE OF PREJUDICE 57 (3d ed. 1979).

[15] *Id.*

[16] *Id.*

[17] *See* GEORGE E. SIMPSON & J. MILTON YINGER, RACIAL AND CULTURAL MINORITIES 305–07 (4th ed. 1972); TEUN A. VAN DIJK, COMMUNICATING RACISM 40, 123 (1989).

[18] *See* PAUL GILROY, AGAINST RACE 247 (2000) ("In many countries, hostile responses to cultural, linguistic, and religious differentiation and fascistic enthusiasms for purity lie

enough time to indoctrinate a popular audience with an emotive ideology, can become popular enough to win national elections. The most extreme example of this phenomenon was the way in which the National Socialist Party in Germany used anti-Semitism to develop from a group that was a laughingstock after the 1923 Munich Beer Hall Putsch[19] to a powerful political party: in 1928, the National Socialists received 2.6% of the popular vote; in 1932 they won 37% of the vote; and, in 1933, Adolf Hitler became the German Chancellor.[20] The Nazis were not elected in a cultural vacuum.[21] Years of anti-Semitic propaganda and indoctrination preceded their political successes.[22]

The instrumentality of destructive messages in mobilizing a coterie devoted to abusing outgroups raises the question of whether their intimidating communications should be restricted. In assessing the need for a hate speech statute, the freedom to intimidate must be balanced against the reasonable expectation of civic order. Speakers should not have an unlimited license to promote discrimination that infringes on the targeted groups' freedom to choose a profession,[23] to choose a spouse,[24] or to raise children.[25]

Supreme Court precedents indicate the constitutionality of balancing speech against other fundamental rights. In *Schenck v. Pro Choice Network of Western New York*, the Court balanced the right of abortion protestors against the government's interest in public safety, upholding an

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dormant within the most benign patriotic rhetoric and the glamour of national sameness it promotes."); G. Legman, *Psychopathology of Comics*, *in* BLACK SKIN, WHITE MASKS 146–47 (Frantz Fanon ed., 4th ed. 1986) (stating that the national conscience can be lulled by popular national prejudices).

[19] *See* Hanno Scheuch, *Austria 1918–55: From the First To the Second Republic*, 32 HIST. J. 177, 184 (1989) (noting the decline of the German Nazi party after the Beer Hall Putsch); Peter D. Stachura, *National Socialism and the German Proletariat, 1925–1935: Old Myths and New Perspectives*, 36 HIST. J. 701, 705 (1993) (discussing how little support from workers the Nazis had at the time of the Beer Hall Putsch).

[20] WILLIAM L. SHIRER, THE RISE AND FALL OF THE THIRD REICH 118, 185, 187 (1960); *see also* David Kretzmer, *Freedom of Speech and Racism*, 8 CARDOZO L. REV. 445, 464 (1987).

[21] *See* Dietrich Orlow, *The Conversion of Myths Into Political Power: The Case of the Nazi Party*, 72 AM. HIST. REV. 906 (1967) (discussing the centrality of anti-Semitic myths in the Nazi rise to power).

[22] *See* LUCY S. DAWIDOWICZ, THE WAR AGAINST THE JEWS 1933–1945, at 34–35 (1975) (discussing the nineteenth-century manifestations of political anti-Semitism); JOHN WEISS, IDEOLOGY OF DEATH 84 (1996) (discussing how Otto Glagau developed an anti-Semitic slogan in 1876 that continued to be popular into the Nazi era).

[23] *See* Conn v. Gabbert, 526 U.S. 286, 291–92 (1999) ("[T]his Court has indicated that the liberty component of the Fourteenth Amendment's Due Process Clause includes some generalized due process right to choose one's field of private employment . . . which is nevertheless subject to reasonable government regulation.").

[24] *See* Zablocki v. Redhail, 434 U.S. 374, 383 (1978) (determining that marriage is a fundamental civil right); Loving v. Virginia, 388 U.S. 1, 12 (1967) (holding that "[t]he Fourteenth Amendment requires that the freedom of choice to marry not be restricted by invidious racial discriminations").

[25] *See* Meyer v. Nebraska, 262 U.S. 390, 399 (1923) (finding that the Due Process Clause of the Fourteenth Amendment includes the right "to marry, establish a home and bring up children").

injunction against the protestors that burdened no more speech than was necessary to achieve security.[26] The Court has also balanced the rights of speakers against the right of the audience to be left alone. In *Frisby v. Schultz*, the Court upheld an ordinance prohibiting picketing in a residential area because the targeted doctor had become figuratively, "and perhaps literally, trapped within the home, and . . . [w]as left with no ready means of avoiding the unwanted speech."[27] In a different context, as W. Bradley Wendel has pointed out, the Illinois Bar Committee balanced the First Amendment rights of Matthew Hale, the leader of the supremacist World Church of the Creator, against the interests in racial equality and human dignity, and chose to deny Hale a license to practice law in Illinois.[28] Other countries have also recognized that the constitutional right to be free from intimidation tips the scales against the desires of speakers who aim to use words or signs that rally bigots to commit harmful actions.[29] Government has a significant interest in protecting the safety of groups against the cathartic interest of intimidating bigots.

II. ADDRESSING THE ABSOLUTIST PERSPECTIVE

Some free speech absolutists, such as Harvey Silverglate,[30] have argued that regulating the spread of destructive messages amounts to an unconstitutional intrusion into speakers' rights. The most prominent judicial advocate of the absolutist position was Justice Black.[31] He maintained that laws directly limiting speech were unjustifiable "by a congressional or judicial balancing process."[32] Any limitation on First Amendment freedoms, he

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[26] *See* 519 U.S. 357, 374–76 (1997); *see also* Madsen v. Women's Health Ctr., 512 U.S. 753, 770 (1994).

[27] 487 U.S. 474, 487 (1988).

[28] W. Bradley Wendel, *"Certain Fundamental Truths": A Dialectic on Negative and Positive Liberty in Hate-Speech Cases*, 65 LAW & CONTEMP. PROBS. 33, 35 (2002).

[29] *See* Bradley A. Appleman, *Hate Speech: A Comparison of the Approaches Taken by the United States and Germany*, 14 WIS. INT'L L.J. 422, 434 (1996) (giving examples of how the German Constitutional Court has a low tolerance for hate speech when balancing it against equal dignity interests); Kathleen Mahoney, *Recognizing the Constitutional Significance of Harmful Speech: The Canadian View of Pornography and Hate Propaganda*, *in* THE PRICE WE PAY 279 (Laura J. Lederer & Richard Delgado eds., 1995) (discussing the Canadian approach of balancing freedom of expression against Canadian Charter of Rights and Freedoms guarantee of equality); Alexander Tsesis, *The Empirical Shortcomings of First Amendment Jurisprudence: An Historical Perspective on the Power of Hate Speech*, 40 SANTA CLARA L. REV. 729, 774 (2000) (discussing Canadian balancing of hate propaganda and free speech).

[30] *See* Ben Lehrer, *Silverglate '67 Calls for Repeal of Sexual Harassment Guidelines*, HARV. L. REC., Mar. 5, 1999, *at* 7, *available at* http://www.law.harvard.edu/students/orgs/forum/silver6.pdf (last visited Mar. 24, 2004) (concerning Silverglate's self-characterization as a free speech absolutist).

[31] *See, e.g.*, Hugo Black, *The Bill of Rights*, 35 N.Y.U. L. REV. 865, 867 (1960); Edmond Cahn, *Justice Black and First Amendment "Absolutes": A Public Interview*, 37 N.Y.U. L. REV. 549 (1962).

[32] Barenblatt v. United States, 360 U.S. 109, 141 (1959) (Black, J., dissenting).

went on, not only "violate[s] the genius of our *written* Constitution, but it runs expressly counter to the injunction to Court and Congress made by Madison when he introduced the Bill of Rights."[33] Black's absolutism had textualist origins: "I do not subscribe to [the balancing] doctrine for I believe that the First Amendment's unequivocal command that there shall be no abridgment of the rights of free speech and assembly shows that the men who drafted our Bill of Rights did all the 'balancing' that was to be done in this field."[34] The majority of the Court never shared Black's conviction on this point.[35]

In fact, in *Nebraska Press Ass'n v. Stuart*, the Court explicitly stated that the "Court has frequently denied that First Amendment rights are absolute."[36] While free speech is essential to a robust exchange of ideas in our pluralistic, constitutional republic,[37] the Supreme Court has announced that some narrowly tailored exceptions do not violate the First Amendment, as long as they serve a compelling state interest. Contemporary jurisprudence recognizes the constitutionality of laws limiting a variety of speech, including: (1) a zoning limitation aimed at the secondary effects of operating adult theaters,[38] (2) a statutory prohibition against threatening the President,[39] (3) a restriction forbidding electioneering within 100 feet of a polling place on election day,[40] (4) a provision prohibiting the deceptive and misleading use of a trade name,[41] (5) a statute punishing the knowing destruction or mutilation of draft cards,[42] and (6) a prohibition of the dis-

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[33] *Id.* at 143 (Black, J., dissenting).

[34] Konigsberg v. State Bar of Cal., 366 U.S. 36, 61 (1961) (Black, J., dissenting).

[35] *See* Owen M. Fiss, *The Supreme Court and the Problem of Hate Speech*, 24 CAP. U. L. REV. 281, 283 (1995).

[36] 427 U.S. 539, 570 (1976).

[37] *See* Owen M. Fiss, *Free Speech and Social Structure*, 71 IOWA L. REV. 1405, 1409–10 (1986) ("The purpose of free speech is not individual self-actualization, but rather the preservation of democracy, and the right of a people, as a people, to decide what kind of life it wishes to live. Autonomy is protected not because of its intrinsic value . . . but rather as a means or instrument of collective self-determination.").

[38] City of Renton v. Playtime Theatres, Inc., 475 U.S. 41, 54–55 (1986). In *Renton*, the Court held that the adult theater zoning ordinance at issue was content-neutral and subject only to intermediate scrutiny because the law targeted the secondary effects of adult entertainment establishments. *Id.* at 47–48, 54. Both Justice Brennan and Justice Kennedy, however, used subsequent concurring opinions to criticize *Renton*'s "content-neutral" characterization. *See* City of Los Angeles v. Alameda Books, Inc., 535 U.S. 425, 448 (2002) (Kennedy, J., concurring); Boos v. Barry, 485 U.S. 312, 334 (1988) (Brennan, J., concurring in part).

[39] Watts v. United States, 394 U.S. 705, 707 (1969) (per curiam) (noting, in dicta, that a statute prohibiting a knowing and willful threat against the President was constitutional on its face, but reversing a conviction under it because the alleged threat was a mere "political hyperbole").

[40] Burson v. Freeman, 504 U.S. 191, 206, 211 (1992) (finding a Tennessee statute survived strict scrutiny, in part, based on a "widespread and time tested consensus" and "simple common sense").

[41] Friedman v. Rogers, 440 U.S. 1, 15 (1979) (finding that the use of a trade name is a commercial form of speech that the state can regulate).

[42] United States v. O'Brien, 391 U.S. 367, 376-77 (1968) (reasoning that the government interest in regulating the "non-speech" elements of the conduct warrants the "inci-

tribution of obscene materials appealing to prurient interests in sex and portraying "sexual conduct in a patently offensive way, and which, taken as a whole, do not have serious literary, artistic, political, or scientific value."[43]

Like obscenity and threats made against the President, hate speech has a very low social and political value.[44] Indeed, like fighting words, which the First Amendment does not protect, destructive messages should be deemed "of such slight social value as a step to truth that any benefit that may be derived from them is clearly outweighed by the social interest in order and morality."[45]

In addition to being at odds with constitutional jurisprudence, absolutists believe that restricting hate speech is as risky to a well-functioning polity, especially to its most disempowered members, as restricting political speech.[46] This perspective overlooks how vitriol that is actively bent on infringing some citizens' civil rights undermines the free exchange of political, philosophical, literary, and scientific views.[47] In fact, hate speech uses the façade of free speech to intimidate speakers from freely exchanging ideas on topics of public interest.

The phrase, "Congress shall make no law abridging freedom of speech," is not a blanket prohibition against all regulation of communicative acts. Its underlying idea is far more complicated. A court evaluating whether a speech regulation violates the First Amendment must deliberate on whether the regulation restricts more speech than is necessary to prevent foreseeable harms and whether it chills protected speech.[48] First Amendment issues are decided by considering the competing public and private con-

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dental restriction on alleged First Amendment freedoms").

[43] Miller v. California, 413 U.S. 15, 23–24 (1973).

[44] *See* Charles J. Ogletree, Jr., *The Limits of Hate Speech: Does Race Matter?*, 32 GONZ. L. REV. 491, 502 (1996) ("Hate speech raises the issue of a conflict between political participation by minorities and speech or action which threatens that participation. Like shouting 'fire' in a crowded theater, like child pornography and obscenity, hate speech is of little value to society, yet the consequences for its targets and for society are certainly of 'constitutional significance.'").

[45] Chaplinsky v. New Hampshire, 315 U.S. 568, 572 (1942) (holding the prevention of and punishment for "fighting words" to be constitutional).

[46] For instance, Nadine Strossen, the president of the American Civil Liberties Union, has argued that hate speech restrictions are disproportionately enforced against groups lacking political power. Nadine Strossen, *Incitement to Hatred: Should There Really Be a Limit?*, 25 S. ILL. U. L.J. 243, 266 (2001).

[47] Along these lines, Steven J. Heyman has pointed out that hate speech does not contribute to democratic self-government because it undermines mutual respect among citizens. Steven J. Heyman, *State-Supported Speech*, 1999 WIS. L. REV. 1119, 1185 n.413.

[48] *See, e.g.*, 44 Liquormart, Inc. v. Rhode Island, 517 U.S. 484, 499 (1996) (holding that "the greater 'objectivity' of commercial speech justifies affording the State more freedom to distinguish false commercial advertisements from true ones . . . and that the greater 'hardiness' of commercial speech . . . likely diminishes the chilling effect that may attend its regulation" (citing Va. Bd. of Pharmacy v. Va. Citizens Consumer Council, 425 U.S. 748, 771, n.24 (1976))); New York Times Co. v. Sullivan, 376 U.S. 254, 279–80 (1964) (holding that as long as liability for defamation is based on intentional or reckless falsehood, it does not impermissibly chill protected speech).

cerns involved in a particular case.[49] Justice Frankfurter explained that "[t]he demands of free speech in a democratic society as well as the interest in national security are better served by candid and informed weighing of the competing interests, within the confines of the judicial process, than by announcing dogmas too inflexible for the non-Euclidian problems to be solved."[50]

Numerous countries recognize the incongruity of inciteful hate speech with their governments' obligation to protect fundamental interests.[51] For instance, the German Basic Law, upon which that country's constitutional system is based, reflects the disjunction between political speech and expressions aimed at undermining democracy. Article 21, section 2, outlaws political parties that threaten democratic order.[52] Similarly, Canada prohibits hate speech because it subverts the democratic process.[53]

International conventions also recognize the incongruity. The European Convention on the Protection of Human Rights and Fundamental Freedoms provides that speech can be limited to preserve democratic order.[54] Likewise, Article 4(5) of the United Nations Convention on the Elimination of All Forms of Racial Discrimination commits signatories to outlawing incitement to engage in racial discrimination.[55]

The United States Supreme Court has similarly recognized that legislatures can restrict inciteful discourse based on defamation and group stereotypes. In *Beauharnais v. Illinois*, the Court upheld the constitutionality of a group libel statute that made it unlawful to portray "depravity, criminality . . . or lack of virtue of a class of citizens, of any race, color, creed, or religion" and to expose those citizens to "contempt, derision, or obloquy."[56] The majority found that based on Illinois's history of racial conflict, the legislature had the power to punish group libel when it threatened "the peace and well-being of the State."[57]

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[49] *See Barenblatt*, 360 U.S. at 126.

[50] Dennis v. United States, 341 U.S. 494, 524–25 (1951) (Frankfurter, J., concurring).

[51] Many democracies, including Austria, Finland, and Italy, prohibit inciteful hate speech. *See* § 283 StGB (Aus.); Penal Code ch. 11, § 8 (Fin.); Decree-Law 122 (Apr. 26, 1993), Law 205 (June 25, 2003) (Italy). For a fuller discussion, see TSESIS, *supra* note 13, at ch. 12.

[52] GRUNDGESETZ [GG] [Constitution] art. 21.2, *reprinted in* 7 CONSTITUTIONS OF THE COUNTRIES OF THE WORLD: GERMANY 115 (A. P. Blaustein & G. H. Flanz eds., official trans., 1994).

[53] *See* Regina v. Keegstra [1990] 3 S.C.R. 697, 764 (Can.) (finding that hate propaganda argues "for a society in which the democratic process is subverted and individuals are denied respect and dignity simply because of racial or religious characteristics"). The Supreme Court of Canada reaffirmed its commitment to this case in *Regina v. Keegstra* [1996] 1 S.C.R. 458 (Can.).

[54] Art. 10, 312 U.N.T.S. 22, E.T.S. 5, as amended by Protocol No. 3, E.T.S. 45, Protocol No. 5, E.T.S. 55, & Protocol No. 8, E.T.S. 118.

[55] UNITED NATIONS DECLARATION ON THE ELIMINATION OF ALL FORMS OF RACIAL DISCRIMINATION art. 4(5), *available at* http://wwww.unhchr.ch/html/menu3/b/9.htm (last visited Apr. 24, 2004).

[56] 343 U.S. 250, 251 (1952).

[57] *Id.* at 258–59. Erwin Chemerinsky and Nadine Strossen have argued that *Beauhar-*

III. Political Exploitation of Intimidation

Even political speech can exploit stigmatizing stereotypes to advocate restricting the civil liberties of disempowered minorities. An example of this phenomenon is the reliance of Tsar Nicholas II's secret police on anti-Semitism in fabricating the *Protocols of the Elders of Zion* in order to discredit revolutionary groups.[58] From Imperial Russia through Nazi Germany, the *Protocols* spurred on devoted anti-Semites.[59] Egypt's and Syria's current governments continue to use the forgery as proof of a Jewish conspiracy to dominate world politics.[60] The example of the *Protocols* demonstrates how an individual libel of an ethnic group can be used to further political ambitions and incite hate for nearly a century.

In the United States, parts of the Constitution as originally drafted reflected the effectiveness of vociferous pro-slavery demands of Georgia's and South Carolina's representatives to the Constitutional Convention.[61] Until states ratified the Reconstruction Amendments, the First Amendment coexisted harmoniously alongside constitutional provisions that specially protected the institution of slavery. These included the Three-Fifths Clause, the Fugitive Slave Clause, and the Importation Clause.[62] The First Amendment was, by itself, inadequate to rid the United States

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nais probably did not survive *New York Times v. Sullivan*, 376 U.S. 254 (1964), which announced an actual malice requirement for defamations against public figures. *See* Erwin Chemerinsky, Constitutional Law: Principles and Policies 978 (2d ed. 2002); Nadine Strossen, *Hate Speech and Pornography: Do We Have To Choose Between Freedom of Speech and Equality*, 46 Case. W. Res. L. Rev. 449, 459 n.41 (1996). This skepticism is unfounded because *New York Times* quotes *Beauharnais*, indicating its continuing precedential value. *New York Times*, 376 U.S. at 268. Moreover, even *R.A.V. v. St.* Paul, which was otherwise critical of a hate speech ordinance, quoted *Beauharnais* for the proposition that some categories of speech are "not within the area of constitutionally protected speech." 505 U.S. 377, 383 (1992). *New York Times*'s effect on *Beauharnais* extends only to cases where group libels are directed at public personalities. New York v. Ferber, 458 U.S. 747, 763 (1982).

[58] Stephen E. Bronner, A Rumor About the Jews: Reflections on Antisemitism and the Protocols of the Learned Elders of Zion 1, 4, 114 (2000) (concerning the sources of the forgery and its use of traditional myth and modern prejudices).

[59] Benjamin W. Segel, A Lie and A Libel 22–23, 87–93 (Richard S. Levy ed. & trans., Lincoln: University of Nebraska, 1995) (1926) (early warning about the dangers the pamphlet posed to Jews); Bronner, *supra* note 58, at 4, 114.

[60] Judea Pearl, *This Tide of Madness*, Wall St. J., Feb. 20, 2003, at A12 (discussing the recent Egyptian state media's production of a television special based on the Protocols, asserting the "fantasy that Jews are plotting to take over the world"); State Department Press Releases and Documents, *U.S. Will Press OSCE to Adopt New Measures to Fight Anti-Semitism—U.S. Envoy to Israel Previews OSCE Conference in Berlin in April*, 2004 WL 59149725 (stating that in 2003 Syria financed a twenty-nine-part Hizbollah broadcast "which was full of anti-Semitic and demonizing representations of Jews based on the 'Protocols of the Elders of Zion'").

[61] For a thorough discussion of South Carolina's and Georgia's demands, see Calvin C. Jillson, Constitution Making: Conflict and Consensus in the Federal Convention of 1787, at 140–50 (1988).

[62] *See* U.S. Const. art. I, § 2, cl. 3, *partly repealed by* U.S. Const. amend. XIV, § 2; *id.* art. IV, § 2 cl. 3, *affected by* U.S. Const. amend. XIII; *id.* art. I, § 9, cl. 1.

of slavery. Rather, in the antebellum period, the proponents of slavery often dominated the political discourse.

During that period, Southern politicians used the congressional forum to exact numerous legal compromises aimed at preserving and spreading slavery. The passionate Southern advocacy of race-based slavery led to the Missouri Compromise of 1820 and later the Compromise of 1850, which contained the Fugitive Slave Act. William S. Jenkins, one of the leading historians of pro-slavery thought, has noted how important the Missouri debates were in increasing support for slavery and subduing opposition to the institution.[63] These debates were not only legalistic but also accentuated philosophical and moralistic differences about human bondage.[64] At the end of the Missouri debates, the proponents of slavery were able to extend slavery into Missouri. Proslavery Southerners wanting to prevent slaves from escaping to the North later overcame passionate antislavery opposition and enacted the Fugitive Slave Act of 1850, which required ordinary citizens in the North to participate in the recapture of fugitive slaves.[65] Legislative successes of slavery's advocates indicate that they were more successful in the antebellum marketplace of ideas than those who opposed slavery.[66]

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[63] WILLIAM S. JENKINS, PRO-SLAVERY THOUGHT IN THE OLD SOUTH 66 (1935).

[64] During one congressional debate on admitting Missouri into the Union, Rufus King argued that natural law forbade one man to enslave another. *Quoted in id.* at 67–68 n.54. At another point of the Missouri controversy, Senator Jonathan Roberts of Pennsylvania overtly rejected the claim that slavery was a "right . . . I deny that there is any power in a State to make slaves, or to introduce slavery where it has been abolished, or where it never existed . . . ." 16 ANNALS CONG. 338 (1820). In light of Congress's decision to admit Missouri as a slave state, however, King's and Robert's views seem to have lost out to the diatribe of proslavery congressmen, such as the influential Senator William Smith of South Carolina. Smith disputed the view of those who lavished "opprobrious epithets . . . upon those who hold slaves; calling the practice cruel, derogatory to the character of the nation, opposed to Christian religion, the law of God, pagain in its principle . . . ." *Id.* at 264. Smith claimed that slaves were, in fact, well off because "no class of laboring people in any country upon the globe . . . are better clothed, better fed, or are more cheerful, or labor less, or who are more happy, or, indeed, who have more liberty and indulgence than the slaves of the Southern and Western States." *Id.* at 268. Smith considerably swayed some senators who understood him to be justifying the moral right of slavery and set the stage for later proponents of slavery. Philip F. Detweiler, *Congressional Debate on Slavery and the Declaration of Independence, 1819–1821*, 63 AM. HIST. REV. 598, 605 (explaining that Senator Smith's justification of slavery contributed to "a larger pattern of Southern responses to the increasing antislavery sentiment"); JENKINS, *supra note* 63, at 71 (quoting senators who, during the debate on the Missouri Compromise, lauded Smith's justification of slavery).

[65] The Fugitive Slave Act of 1850, ch. 60, 9 Stat. 462, repealed by Act of June 28, 1864, ch. 166, 13 Stat. 200.

[66] Anti-slavery activists amongst the Founders included John Jay, who presided over the New York Society for Promoting the Manumission of Slaves, and Benjamin Franklin, who was elected president of the Pennsylvania Society for Promoting the Abolition of Slavery. OSCAR REISS, BLACKS IN COLONIAL AMERICA 166 (1997). Leading figures in the revolutionary movement who propounded the anti-slavery position included James Otis, Thomas Paine, and John Adams. Andrew E. Taslitz, *Hate Crimes, Free Speech, and the Contract of Mutual Indifference*, 80 B.U. L. REV. 1283, 1306 n.150 (2000); R. B. Bernstein, *Rediscovering Thomas Paine*, 39 N.Y.L. SCH. L. REV. 873, 881 (1994); John R. Howe, Jr.,

Some politicians became folk heroes because of their proslavery apologetics. For instance, Senator John Calhoun influenced generations of Southern thought. Calhoun popularized slavery and affected followers who were willing to secede from the Union in order to preserve the South's peculiar institution.[67]

Clearly, not all racist deprecations are benign. When coupled with political power, racist deprecations can become part of a country's basic laws, cause harm for several generations, and disempower millions of people. Slavery did not end because of abolitionist discourse—although the voices of Theodore Weld, William Lloyd Garrison, and Frederick Douglass raised awareness about the hardships of slavery—but through a bloody Civil War.

IV. CONGRESSIONAL AUTHORITY TO REGULATE HATE SPEECH

Following the War, the Radical Republicans designed the Reconstruction Amendments, most conspicuously the enforcement clauses in section 2 of the Thirteenth Amendment and section 5 of the Fourteenth Amendment, to empower Congress to protect civil rights, particularly of formerly disempowered blacks. Akhil Reed Amar has pointed out that the Reconstruction Amendments shifted the constitutional paradigm, including the significance of the First Amendment.[68] Reconstruction, which for all practical purposes was woefully unsuccessful, constitutionally committed the country to the very pursuit of equality that hate speakers want to undermine.

The First Amendment does not exist in a historical void; evaluations of what speech it protects must be balanced against the anti-oppression principles embodied in the Thirteenth and Fourteenth Amendments.[69] After the

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John Adams's Views on Slavery, 49 J. NEGRO HIST. 201, 201–02 (1964).

[67] David A. J. Richards, *Comparative Revolutionary Constitutionalism: A Research Agenda for Comparative Law*, 26 N.Y.U. J. INT'L L. & POL. 1, 16 (1993) (asserting that *Dred Scott v. Sanford*, 60 U.S. 393 (1856), embodied Calhoun's constitutionalism). Calhoun argued that the relationship between blacks and whites in the South formed "the most solid and durable foundation on which to rear free and stable political institutions." Speech on the reception of Abolition Petitions (Feb. 6, 1837), *in* 2 THE WORKS OF JOHN C. CALHOUN 625, 632 (Richard K. Crallé ed., New York: D. Appleton 1883). He combined the fictitious view of biologically distinct races, having varying physical and intellectual abilities, with the self-serving conclusion that it was better for whites and blacks that the latter be enslaved in the United States than free in Africa. *See* Report on that portion of the President's Message which related to the adoption of efficient measures to prevent the circulation of incendiary Abolition Petitions through the Mail (Feb. 4, 1836), *in* 5 THE WORKS OF JOHN C. CALHOUN 190, 204 (Richard K. Crallé ed., New York: D. Appleton 1883). Along the same lines, South Carolina Governor James H. Hammond unapologetically argued before the U.S. Senate that white civilization was justified in benefiting from an unrecompensed black workforce. CONG. GLOBE, 35th Cong., 1st Sess. Appendix at 71 (Mar. 4, 1858), *quoted in* JENKINS, *supra note* 63, at 286.

[68] *See* Amar, *supra* note 5, at 155–60 (arguing that the second section of the Thirteenth Amendment provides a better constitutional argument for the regulation of hate speech than the First Amendment would on its own).

[69] I draw my analysis on the Thirteenth Amendment from the works of scholars who

passage of these two amendments, the expression of harmful intentions substantially likely to cause advocated misethnic subordination is no longer protected speech, as it was in the antebellum South.[70]

Of the Reconstruction Amendments, the Thirteenth Amendment is particularly relevant to the regulation of hate symbols and other destructive messages. Under the Thirteenth Amendment, Congress may rationally determine and legitimately pass necessary and proper legislation to eradicate any remaining badges and incidents of servitude.[71] In the landmark case *Jones v. Alfred H. Mayer*, the Supreme Court extended the Thirteenth Amendment's reach well beyond forced labor. *Jones* ruled that with the Civil Rights Act of 1866 Congress prohibiting private and public discrimination in the sale of real estate, and that doing so was "necessary and proper" to enforce the Thirteenth Amendment.[72] In the cases that followed *Jones*, the Court continued to interpret broadly Congress's section 2 authority to prohibit stigmatizing conduct.[73] *Runyon v. McCrary* is representative of the trend—in that case, the Court determined that § 1981, passed pursuant to Congress's Thirteenth Amendment enforcement authority, prevented a private school from refusing to enroll black children.[74]

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have argued for balancing First Amendment principles with Fourteenth Amendment values. *See, e.g.*, John A. Powell, *Worlds Apart: Reconciling Freedom of Speech and Equality*, 85 KY. L.J. 9, 89–90 (1997) (discussing how to balance First Amendment speech values with Fourteenth Amendment equality values); Charles R. Lawrence III, *If He Hollers Let Him Go: Regulating Racist Speech on Campus*, 1990 DUKE L.J. 431, 481 ("We must weigh carefully and critically the competing constitutional values expressed in the first and fourteenth amendments.").

[70] Andrew Taslitz has made a similar point in a different context, in regard to the applicability of the Reconstruction Amendments to the regulation of bias crimes: "The Fourteenth Amendment is best understood as denying constitutional protection to the expressive component of racial violence. First Amendment free 'speech' in a post-Reconstruction world cannot sensibly be understood as including the expression embodied in group-directed violence." Taslitz, *supra* note 66, at 1287.

[71] Jones v. Alfred H. Mayer Co., 392 U.S. 409, 440 (1968) ("Congress has the power under the Thirteenth Amendment rationally to determine what are the badges and the incidents of slavery, and the authority to translate that determination into effective legislation.").

[72] *Id.* at 439 (the Enabling Clause "clothed 'Congress with power to pass all laws necessary and proper for abolishing all badges and incidents of slavery in the United States'" (quoting *Civil Rights Cases*, 109 U.S. 3, 20 (1883))). The Court read section 1 of the Civil Rights Act of 1866, 42 U.S.C. § 1982 (2000), to prohibit private actors from discriminating against real property purchasers: "[T]he fact that § 1982 operates upon the unofficial acts of private individuals, whether or not sanctioned by state law, presents no constitutional problem. If Congress has power under the Thirteenth Amendment to eradicate conditions that prevent Negroes from buying and renting property because of their race or color, then no federal statute calculated to achieve that objective can be thought to exceed the constitutional power of Congress simply because it reaches beyond state action to regulate the conduct of private individuals." *Jones*, 392 U.S. at 438–39.

[73] *See, e.g.*, Tillman v. Wheaton-Haven Recreation Assn., 410 U.S. 431 (1973) (holding that racial membership requirements for neighborhood swimming pools are prohibited); Johnson v. Railway Express Agency, 421 U.S. 454 (1975) (filing with the EEOC did not toll the limitation to file suit under § 1981).

[74] 427 U.S. 160, 172–73, 179 (1976).

Both *Jones* and *Runyon* give Congress broad discretion to define the incidents of involuntary servitude. Substantive statutes passed under section 2 of the Thirteenth Amendment that protect the enjoyment of freedom can extend well beyond section 1's self-executing protections.[75] Congress can investigate and determine whether involuntary servitude is linked to modern forms of discrimination. In *Jones*, the Court determined that housing discrimination, which is not literally slavery, falls within congressional section 2 authority. The Court was not saying that Alfred H. Mayer Company's refusal to sell property to the Joneses was slavery. Nor did the Runyons enslave Michael McCrary when they refused to enroll him. Likewise, even though hate speech is not literally slavery, it should be prohibited under the broad protections against racial subordination to which the Thirteenth Amendment applies.

The Supreme Court has established that the Thirteenth Amendment extends to "varieties of private conduct . . . beyond the actual imposition of slavery or involuntary servitude."[76] The Amendment stands for the proposition that "former slaves and their descendants should be forever free."[77] Furthermore, freedom is guaranteed wherever the United States has jurisdiction, regardless of whether oppressions are committed against the direct descendants of slavery. Senator Lyman Trumbull, whose Judiciary Committee reported the language of the Thirteenth Amendment, explained Congress's enforcement authority: "If in order to prevent slavery Congress deem it necessary to declare null and void all laws which will not permit the colored man to contract, which will not permit him to testify, which will not permit him to buy and sell, and to go where he pleases, it has the power to do so, and not only the power, but it becomes its duty to do so."[78] Nor is the Thirteenth Amendment applicable only to discrimination against blacks. On another date, Trumbull explained that the Thirteenth Amendment granted Congress the authority to "pass any law which, in our judgment, is deemed appropriate, and which will accomplish the end in view, secure freedom to all people in the United States."[79]

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[75] *See* Akhil R. Amar, *Intratextualism*, 112 HARV. L. REV. 747, 822–23 (1999) (describing Congress's broad section 2 power to pass far-reaching, substantive statutes).

[76] Griffin v. Breckenridge, 403 U.S. 88, 105 (1971).

[77] *Id.*

[78] CONG. GLOBE, 39th Cong., 1st Sess. 322 (1866).

[79] CONG. GLOBE, 39th Cong., 1st Sess. 475 (1866). The Court maintained this position in the *Slaughter-House Cases*, in which it found that the Amendment applies to "Mexican peonage and the Chinese coolie labor system." 83 U.S. (16 Wall.) 36, 72 (1873). Contemporary decisions dealing with the Thirteenth Amendment have also understood "race" to include a variety of ethnic groups. In *Shaare Tefila Congregation v. Cobb*, the Court held that § 1982 applies to any group that Congress intended to protect when it enacted that statute in 1866, pursuant to its Thirteenth Amendment section 2 authority. 481 U.S. 615, 617 (1987). The Court held specifically that Jews and Arabs are part of the protected class that can bring a cause of action pursuant to § 1982. *Id.* at 617–18. In another case, the Court determined "Congress intended to protect from discrimination identifiable classes of persons who were subjected to intentional discrimination solely because of their ancestry or ethnic characteristics. Such discrimination is racial discrimination that Congress intended

Congress's role is to determine what the rubrics of freedom are and to safeguard their availability through necessary and proper legislation.

The Thirteenth Amendment therefore does far more than simply prohibit institutionalized slavery; it prevents any form of private or government-sponsored racial subordination. And courts should defer to Congress's findings on this point as long as there is any rational basis for those findings. Thus, if Congress finds that hate speech is rationally related to the badges or incidents of servitude, it may use its section 2 power to prohibit it.

For instance, Congress can investigate whether persons who seek to intimidate others with images that are historically linked to oppression are likely to achieve their purpose. Those images may include burning crosses and swastikas. If Congress finds that the risk of intimidation is high, it can legitimately invoke its section 2 authority to prohibit the intentionally intimidating display of those images. A symbol's meaning depends on the context in which it is used. Symbols can connect even disparate elements of people's experiences, filling them with cultural content.[80] The implication is that images such as burning crosses and swastikas can relay related static, supremacist, and violent messages.[81] It is reasonable to believe that Congress can determine the symbols that are used to terrorize populations perpetuate the badges and incidents of servitude.

Congress's Thirteenth Amendment authority to regulate the private use of destructive symbols is a better source of power than the Fourteenth Amendment. The Thirteenth Amendment grants Congress broader authority than the Fourteenth Amendment, which the Court long ago limited to the regulation of government conduct.[82]

Further, Congress's power under section 2 of the Thirteenth Amendment might be better suited to enacting a national hate speech law than the Commerce Clause. While Congress's Commerce Clause authority ex-

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§ 1981 to forbid, whether or not it would be classified as racial in terms of modern scientific thoery." St. Francis Coll. V. Al-Khazraji, 481 U.S. 604, 611 (1987).

[80] *See* Lawrence Lessig, *The Regulation of Social Meaning*, 62 U. CHI. L. REV. 943, 958 (1995) (explaining how social meaning is based on contextual associations of fact).

[81] *See* Matsuda, *supra* note 10, at 2365–66; Robin D. Barnes, *Standing Guard for the P.C. Militia, or, Righting Hatred and Indifference: Some Thoughts on Expressive Hate-Conduct & Political Correctness*, 1992 U. ILL. L. REV. 979, 979 n.1 (discussing the resurgence of supremacist groups using Confederate symbols and swastikas "as a reminder of their pledge to uphold racial violence, murder, and mutilation").

[82] *See, e.g.*, United States v. Harris, 106 U.S. 629, 640 (1882). Recently, the Court relied on the state action requirement in striking down the Violence Against Women Act of 1994. United States v. Morrison, 529 U.S. 598, 620–21 (2000). Although this is not the right place for an extensive discussion of the differences between Thirteenth Amendment section 2 and Fourteenth Amendment section 5 powers, suffice it to say that the Court's limitation of section 5 power seems artificially narrow in light of the changes the Reconstruction Amendments were meant to effectuate. *See* Amar, *supra* note 75, at 822–24 (arguing that section 2 and section 5 give Congress a similar breadth of interpretive power); *but see* Calvin Massey, *Federalism and the Rehnquist Court*, 53 HASTINGS L.J. 431, 493–94 (2002) (arguing that the section 2 and section 5 enforcement powers differ significantly because of the latter's state action requirement).

tends to many forms of private discrimination,[83] recently, in *United States v. Morrison* and *United States v. Lopez,* the Court reduced Congress's interpretive power under that clause.[84] The Court now requires that conduct regulated under the Commerce Clause have a "substantial effect" on interstate commerce,[85] which has altered the previous inquiry into whether Congress has a rational basis for believing the statute would have a significant effect on commerce.[86] In the name of federalism, the Court has both diminished Congress's power to act on rational findings that regulated action affects interstate commerce and has increased judicial oversight authority. *Morrison* and *Lopez* have made the Thirteenth Amendment ever more relevant because, since *Jones*, the Court has not deviated from the rational basis scrutiny of laws passed pursuant to the Thirteenth Amendment. Another reason why the Thirteenth Amendment might be preferable is that, unlike the Commerce Clause, the Amendment would allow the federal legislature to prohibit hate speech with either an intrastate or an interstate effect.[87]

A federal anti-intimidation law is preferable to state-by-state legislation. The enactment of a federal law will demonstrate a national commitment to preventing the terrorizing use of subordinating images. A federal, uniform law would provide a remedy for victims in states that lack any law against intimidating hate speech.

Such a federal law against racist incitement may be modeled after the Virginia Cross Burning Statute, which the Court, in *Virginia v. Black*, found partially constitutional in 2003. The statute provided,

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[83] *See, e.g.*, Katzenbach v. McClung, 379 U.S. 294, 303–04 (1964); Heart of Atlanta Motel, Inc. v. United States, 379 U.S. 241, 258 (1964).

[84] *See Morrison*, 529 U.S. at 617 ("We accordingly reject the argument that Congress may regulate noneconomic, violent criminal conduct based solely on that conduct's aggregate effect on interstate commerce."); United States v. Lopez, 514 U.S. 549, 558–59 (1995) (holding Congress may regulate three areas of commerce: channels, instrumentalities, and those activities having a substantial relation to interstate commerce).

[85] *Lopez*, 514 U.S. at 561–63.

[86] In a dissent to *Lopez*, Justice Breyer argued that Commerce Clause cases have not consistently used the "substantial effects" label: "I use the word 'significant' because the word 'substantial' implies a somewhat narrower power than recent precedent suggests. But to speak of 'substantial effect' rather than 'significant effect' would make no difference in this case." *Id.* at 616–17 (Breyer, J., dissenting) (citations omitted).

[87] The Thirteenth Amendment's prohibition obviously not only prohibits slavery with some substantial effect on the interstate economy, but applies to any form of involuntary servitude, even when its perpetration is completely centered in one state. The Anti-Peonage Act is an important prohibition against intrastate and interstate acts of involuntary servitude. 14 Stat. 546 (1867) (codified as amended at 18 U.S.C. § 1581 (2000)). The Act was enacted pursuant to section 2 of the Thirteenth Amendment. *See* Pollock v. Williams, 322 U.S. 4, 17 (1944). The intrastate uses of the Anti-Peonage Act has long been established. *See* Bailey v. State, 219 U.S. 219, 240–41 (1911); Clyatt v. United States, 197 U.S. 207 (1905). Circuit court holdings on the perpetration of peonage continue to hold on to the intrastate reach of the Thirteenth Amendment. *See, e.g.*, United States v. Harris, 701 F.2d 1095, 1097–98 (4th Cir. 1983) (concerning involuntary servitude occurring on a migrant farm in Wilson, N.C.).

> [i]t shall be unlawful for any person or persons, with the intent of intimidating any person or group of persons, to burn, or cause to be burned, a cross on the property of another, a highway or other public place. Any person who shall violate any provision of this section shall be guilty of a Class 6 felony. Any such burning of a cross shall be prima facie evidence of an intent to intimidate a person or group of persons.[88]

Justice O'Connor, writing for the majority, found Virginia's prohibition against intentionally intimidating cross burning to be a legitimate limitation on speech that was of "such slight social value as a step to truth that any benefit that may be derived from [it] is clearly outweighed by the social interest in order and morality."[89] Thus, the Virginia statute constitutionally limited a form of expression that posed an imminent threat of harm.[90] The Court also determined that the statute did not discriminate on the basis of the communicators' viewpoint because it prohibited any form of cross burning, regardless of whether it targeted the victims' race, religion, or other characteristics.[91] Virginia could selectively punish cross burnings, even though it did not criminalize all other forms of virulent intimidation, "in light of the cross burning's long and pernicious history as a signal of impending violence."[92] A plurality of the Court, however, found that the statute's prima facie evidence presumption was unconstitutional because it failed to contextualize "factors that are necessary to decide whether a particular cross burning is intended to intimidate" or only to arouse anger.[93]

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[88] Virginia v. Black, 123 S. Ct. 1536, 1541–42 (2003) (quoting VA. CODE ANN. § 18.2-423 (1996)).

[89] *Black*, 538 U.S. at 358–59 (citing Chaplinsky v. New Hampshire, 315 U.S. 568, 572 (1942)).

[90] The Court has repeatedly held that the First Amendment does not protect the "incitement of imminent lawless action." *Id.* at 359 (quoting Brandenburg v. Ohio, 395 U.S. 444, 449 (1969)).

[91] *Id.* at 362–63.

[92] *Id.* at 363. This conclusion was an apparent departure from the Court's holding in *R.A.V. v. St. Paul*, wherein the Court found that an ordinance banning fighting words singling out race, gender, color, creed, or religion, instead of altogether banning fighting words, was improper content-based discrimination. 505 U.S. at 391. In *Black*, however, the Court explicitly found its holding to be consistent with *Black*, 538 U.S. at 361–63.

[93] *Id.* at 3622. Chief Justice Rehnquist and Justices O'Connor, Stevens, and Breyer made up the plurality, opining that the prima facie element of the offense was unconstitutional. Justice Scalia, who had joined the Court in other parts of the opinion, thought that the prima facie element may have been a legitimate form of rebuttable presumption that the Virginia Court should have been required to construe on remand. *Id.* at 368–80 (Scalia, J., concurring in part, concurring in the judgment in part, and dissenitng in part). Scalia was joined on this point by Justice Thomas, who wrote a separate dissent. *Id.* at 388–400 (Thomas, J., dissenting). Justice Souter, concurring in the judgment in part and dissenting in part with Justices Kennedy and Ginsburg, never reached the prima facie issue, writing instead against the constitutionality of the entire statute: "In my view, severance of the prima facie evidence provision now could not eliminate the unconstitutionality of the whole statute at the time of the respondents' conduct." *Id.* at 387 (Souter, J., concurring in the judgment in part and dissenting in part).

Congress should follow the Court's guidance in *Black*, and, pursuant to its Thirteenth Amendment section 2 power, draft a comparable federal law that prohibits the intimidating use of historically inflammatory symbols. Because cross burning is not the only symbol with an established history that signals impending violence and ethnic subordination, the statute should also cover anything from swastikas (even though they harken back to enslavement in other countries) to some displays of Confederate symbols.[94] All of these symbols can intimidate persons regardless of their race, ethnicity, or religion. To avoid the charge of viewpoint discrimination, the legislators might refrain from listing these symbols in particular, and instead adopt an inclusive, general provision. The law would then not simply prohibit the use of some listed intimidating symbols; instead, it would prohibit the intimidating use of any symbol whose history is linked to slavery or involuntary servitude. The burden of proving that a particular symbol is intimidating should fall on the government, which may be able to strengthen its case by using the expert testimony of historians.

Such a law should meet all the rigors of any other criminal legislation (that is, it should require proof beyond a reasonable doubt both in the hearing and sentencing phases, the right to a speedy trial, etc.) and grant federal district courts jurisdiction to hear cases. The law should require prosecutors to prove intent as an element of the crime, which would avoid Virginia's error of making intent a prima facie presumption. The intent element could be satisfied by proof of purpose, recklessness, or knowledge.

I recognize that my proposal would probably somewhat increase the federal docket. However, such a sacrifice is part of the post-Reconstruction cost of maintaining a free society devoted to the protection of civil rights and civil liberties.

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[94] *See* Alexander Tsesis, *The Problem of Confederate Symbols: A Thirteenth Amendment Approach*, 75 TEMPLE L. REV. 539, 595–610 (2003); L. Darnell Weeden, *How to Establish Flying the Confederate Flag with the State as Sponsor Violates the Equal Protection Clause*, 334 AKRON L. REV. 521, 542 (2001) (asserting that the "Confederate flag was lost forever as a race-neutral symbol when the forces of racism used it for so many years to continue the violence and intimidation what could not be won on the Civil War battlefield").

SYMPOSIUM ESSAY

A MODERATE DEFENSE OF HATE SPEECH REGULATIONS ON UNIVERSITY CAMPUSES

W. BRADLEY WENDEL*

The regulation of hate speech on public and private university campuses is a fiercely contested and divisive issue. Professor Bradley Wendel defends the middle ground in this debate. This Essay argues that concerns about abuses of power by those in positions of authority are unfounded when an institution possesses greater expertise in a domain than the citizens who are affected by the institution's decision, provided that the institution is acting on the basis of reasons that are shared by the affected individual.

> There's nothing in the middle of the road but yellow stripes and dead armadillos.
>
> —Texas populist politician and political commentator Jim Hightower[1]

> I know thy works, that thou art neither cold nor hot: I would thou wert cold or hot. So then because thou art lukewarm, and neither cold nor hot, I will spue thee out of my mouth.
>
> —God[2]

Despite these forceful warnings of the perils of moderation, this Essay will defend the middle ground in the debate over the regulation of hate speech on public and private university campuses. The constitutional limitations on hate speech regulation vary according to whether a university is a state actor,[3] but this Essay will take a normative or policy-oriented perspective on the issue, rather than one focused primarily on First Amendment doctrine. With respect to both public and private universities, the case for expressive freedom is based largely on concerns about abuses of power by those in positions of authority—either government power in the instance of public schools, or the power of large, wealthy institutions in the case

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[1] JIM HIGHTOWER, THERE'S NOTHING IN THE MIDDLE OF THE ROAD BUT YELLOW STRIPES AND DEAD ARMADILLOS: A WORK OF POLITICAL SUBVERSION (1998).

[2] *Revelation* 3:15–16 (King James).

[3] *See* LAURENCE H. TRIBE, AMERICAN CONSTITUTIONAL LAW § 18-1 (2d ed. 1988).

of private universities.[4] Those concerns are unfounded, this Essay contends, when an institution possesses comparatively greater expertise in some domain than citizens who are affected by the institution's decision, provided that the institution is acting on the basis of reasons that are shared by the affected individual.

In a brief essay it is impossible to do justice to the complexity of the hate speech debate, even in the limited context of university education. Thus, this Essay will concentrate on one fairly narrow claim: Free speech proponents' arguments should not depend on epistemological skepticism,[5] because this attitude is inconsistent with the purpose of higher education, which is to inculcate knowledge and alter the beliefs of students. Credentialing reasons aside, students pay to attend college in order to learn something from people who know more about that subject than they do. By its very nature, education is not a content- or viewpoint-neutral process. At the same time, there are some aspects of university life that more closely resemble the constitutional image of the marketplace of ideas. In those domains, such as bulletin boards and student quadrangles, the university's greater expertise does not justify it in taking positions on contested issues.

There is something ironic about analyzing liberties of expression and belief in the higher education setting. To put the point bluntly, colleges and universities are in the business of controlling the speech of members of their communities, and trying to affect the beliefs of students.[6] These con-

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[4] *See, e.g.*, Ira Glasser, *Hate Crimes/Hate Speech*, *in* SPEECH AND EQUALITY: DO WE REALLY HAVE TO CHOOSE? 55, 59 (Gara LaMarche ed., 1996); Henry Louis Gates, Jr., *Let Them Talk: Why Civil Liberties Pose No Threat to Civil Rights*, NEW REPUBLIC, Sept. 20 & 27, 1993, at 37 (book review).

[5] The best known skeptical argument for expressive liberty is Mill's. He argues that government suppression of opinion is dangerous because "[w]e can never be sure that the opinion we are endeavoring to stifle is a false opinion." JOHN STUART MILL, ON LIBERTY 20 (Stefan Collini ed., Cambridge Univ. Press 1989) (1859). Holmes picked up on this argument in his famous dissent in *Abrams v. United States*, 250 U.S. 616, 630–31 (1919), the source for the "marketplace of ideas" metaphor that enshrines the attitude of epistemological skepticism in constitutional law: "[W]hen men have realized that time has upset many fighting faiths, they may come to believe . . . that the ultimate good desired is better reached by free trade in ideas—that the best test of truth is the power of the thought to get itself accepted in the competition of the market . . . ." *Id.* at 630. To the extent one believes the purpose of the First Amendment is something other than safeguarding the process by which truth is discovered, a different defense of hate speech regulations, beyond the scope of this Essay, is required. *See, e.g.*, LEE C. BOLLINGER, THE TOLERANT SOCIETY (1986) (arguing that acts of extreme tolerance strengthen society); STEVEN H. SHIFFRIN, DISSENT, INJUSTICE, AND THE MEANING OF AMERICA (1999) (arguing that regulation of hate speech promotes First Amendment goals of equality and justice).

[6] *See* CASS R. SUNSTEIN, DEMOCRACY AND THE PROBLEM OF FREE SPEECH 199–202 (1993); Robert Post, *Subsidized Speech*, 106 YALE L.J. 151, 164–76 (1996) (analyzing government support for speech in "managerial domains" such as the public university, the judicial system, and the military). A public university is a managerial domain in Post's sense, but notice that the objectives the government seeks to accomplish are not limited to circumstances in which it is speaking in its own voice. The central mission of the university is free inquiry, which requires the institution to make some viewpoint-based judgments

tent- and viewpoint-based limitations on the expressive activities of teachers and students are so familiar as to be taken for granted. Universities and their academic departments can impose restrictions on topics that may be discussed in the classroom and may make viewpoint-based judgments about the acceptability of certain positions. A familiar example is the response of history departments to the unfortunate persistence of Holocaust deniers.[7] A department would be well within its rights to punish a professor who taught students that there is doubt, based on the historical record, regarding whether the Holocaust occurred.

Presumably, departments may also require that students majoring in a discipline take certain courses, even though the courses may slant toward a particular point of view. Imagine a political science department that imposes a curriculum heavily weighted toward rational choice theory; it adopts one position among several competitors on a contestable issue, to be sure, but no one thinks it is engaging in some kind of invidious thought control. Universities make allocation decisions based, in part, on their sense of the school's mission and of what fields are worthy of long-term investment.[8] Finally, faculty hiring, promotion, and tenure decisions are often based on the same kind of contestable judgments, again without any suggestion of intellectual impropriety. These academic decisions sometimes lead to nasty fights, such as the well-documented feud at Harvard Law School between traditionalists and critical legal scholars,[9] but the terms of the battles assume that the university is acting properly by taking positions—the debate is over *which* position it should adopt.

Although this kind of content- and viewpoint-based discrimination is widespread, civil libertarians frequently express alarm at the possibility that, through education, "the state is able to engage in a dangerous form of political, social, or moral thought control that potentially interferes with a citizen's subsequent exercise of individual autonomy."[10] The use of the term "thought control," like that of its cousins "orthodoxy," "indoctrination," and "censorship," is a rhetorically effective technique to introduce the bogeyman of the state, but it is important to specify more precisely what kind of thought control one is objecting to, and what is wrong with it. For

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but to withhold judgment on some matters.

[7] *See generally* Stanley Fish, *Holocaust Denial and Academic Freedom*, 35 VAL. U. L. REV. 499 (2001).

[8] *See* Judith Jarvis Thomson, *Ideology and Faculty Selection*, 53 LAW & CONTEMP. PROBS. 155, 157–58 (1990).

[9] For representative accounts, see, for example, ELEANOR KERLOW, POISONED IVY: HOW EGOS, IDEOLOGY AND POWER POLITICS ALMOST RUINED HARVARD LAW SCHOOL (1994); Jerry Frug, *McCarthyism and Critical Legal Studies*, 22 HARV. C.R.-C.L. L. REV. 665 (1987) (reviewing ELLEN W. SCHRECKER, NO IVORY TOWER: MCCARTHYISM AND THE UNIVERSITIES (1986)).

[10] Martin H. Redish & Kevin Finnerty, *What Did You Learn in School Today? Free Speech, Values Inculcation, and the Democratic-Educational Paradox*, 88 CORNELL L. REV. 62, 67 (2002). *See also* Jim Chen, *Diversity and Damnation*, 43 UCLA L. REV. 1839, 1871–76 (1996).

example, it seems likely that no one would argue that a social psychologist could not tell her students that the methods of empirical investigation—observation, induction, testing, replication, peer review, and so on—are better tools for predicting human behavior than consulting horoscopes. The teacher is engaging in indoctrination in some sense, by inculcating a particular set of beliefs and dispositions in her students, but is this an illegitimate exercise of state power? Civil libertarians who worry about "selectively instilling in students a predetermined set of normative values and empirical assumptions"[11] cannot possibly mean that it is never permissible for a powerful institution, whether a state or private university, to inculcate values. Humanitarianism, tolerance, civility, rigor, precision, respect for inquiry, open-mindedness, empathy, and compassion are all values that society hopes are promoted by higher education.[12] A serious attempt to make education value-neutral would be incoherent, because the educational process itself aims at creating a reasonably well-informed, open-minded citizen, not a person who believes in nothing at all.

The government has occasionally engaged in invidious efforts at thought control through education, which should properly be the concern of all citizens, not just civil libertarians. A depressing example was furnished by a school board in Florida, which adopted a resolution declaring that state-mandated instruction about other cultures "shall include and instill in our students an appreciation of our American heritage and culture such as: our republican form of government, capitalism, a free-enterprise system, patriotism, strong family values, freedom of religion and other basic values that are superior to other foreign or historic cultures."[13] School administrators are susceptible to being caught up in patriotic fervor created by crises such as the Red Scare and the threat of terrorism, as familiar rituals such as flag-salutes and the Pledge of Allegiance indicate.[14] The reaction of courts, as in the decision in *Barnette*[15] striking down a requirement that children participate in saluting the flag and reciting the Pledge, and the controversial Ninth Circuit decision prohibiting forced recitation of the "under God" language in the Pledge,[16] reveals concern over the coercive effect of these rituals on the beliefs of schoolchildren. One can read these cases as standing for the proposition that, in

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[11] Redish & Finnerty, *supra* note 10, at 67.

[12] Steven H. Shiffrin, *The First Amendment and the Socialization of Children: Compulsory Public Education and Vouchers*, 11 CORNELL J.L. & PUB. POL'Y 503, 511–12 (2002).

[13] *School Board Will Recognize Other Cultures, but as Inferior*, N.Y. TIMES, May 13, 1994, at A16, *quoted in* NATHAN GLAZER, WE ARE ALL MULTICULTURALISTS NOW 1 (1997).

[14] *See, e.g.*, Redish & Finnerty, *supra* note 10, at 79–80 (describing "devotional rites of patriotism"); Shiffrin, *supra* note 12, at 512 (recounting Oregon's effort to preserve mandatory public schooling, in part to fight Communism and Catholicism).

[15] W. Va. State Bd. of Educ. v. Barnette, 319 U.S. 624, 642 (1943).

[16] Newdow v. United States Cong., 328 F.3d 466, 490 (9th Cir. 2003) (as amended on denial of rehearing en banc), *cert. granted in part sub nom.* Elk Grove Unified Sch. Dist. v. Newdow, 124 S. Ct. 384 (U.S. Oct. 14, 2003) (No. 02-1624) (argued Mar. 24, 2004).

some domains of belief, "the government must leave to the people the evaluation of ideas."[17] Granting that these cases tend to involve primary and secondary schoolchildren, similar concerns might be expressed about rituals and programs at colleges and universities that are aimed at inculcating certain kinds of values, beliefs, and dispositions.[18]

How can the requirement that government be agnostic among competing ideas in some cases be reconciled with the observation that education must inevitably occur through the selective transmission of ideas? Redish and Finnerty would permit the government to make "value-neutral educational choices" about what subjects to cover and what to say about those subjects.[19] Their choice of the label "value-neutral" obscures the question, because most of the educational choices they would permit are non-neutral among competing values—for example, the difference between open-minded inquiry and dogmatism.[20] Thus, rather than using the term "value-neutrality," it might be more helpful to think in terms of two categories of beliefs or values:

> (1) those about which it is permissible for an educational institution to inculcate beliefs, or on which the institution may take positions; and
>
> (2) those about which evaluations of truth or falsity must be left to individual students.

In this scheme, for any proposed restriction on speech, the question is not whether it is facially "neutral" in terms of value, content, or viewpoint, but whether the restriction is intended to further the permissible inculcation of belief (Category 1) or whether it is an impermissible interference with the autonomy of individuals respecting belief in some domain (Category 2). The question of whether an institution may permissibly take a position on a particular matter is, in turn, resolved by whether it is justifiable to trust that institution to make a better judgment on that matter than citizens (students, in the case of a university) are able to make, acting alone.[21] On a wide range of curricular issues, educators are reasonably trusted to make value judgments because they have greater expertise regarding these issues, as compared with others. Those cases

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[17] Am. Booksellers Ass'n v. Hudnut, 771 F.2d 323, 327 (7th Cir. 1985), *aff'd mem.*, 475 U.S. 1001 (1986).

[18] *See, e.g.*, ALAN CHARLES KORS & HARVEY A. SILVERGLATE, THE SHADOW UNIVERSITY 210–32, *passim* (1998) (describing freshman orientation, sensitivity-training, and diversity programming that the authors contend constitute an assault on freedom of conscience).

[19] Redish & Finnerty, *supra* note 10, at 103.

[20] Thomson, *supra* note 8, at 164 & n.9.

[21] *Cf.* JOSEPH RAZ, THE AUTHORITY OF LAW 21–22 (1979) (explaining the exclusionary nature of authoritative directives by analogy to authority of experts).

appear to deal with Category 1 judgments, on which it is permissible for government actors to behave in a manner that is not value-neutral. Still, the very idea of government actors making value judgments continues to trouble civil libertarians, who attempt to shift as many judgments as possible into Category 2.[22] Focusing on the notion of expert authority can help illuminate the source of this concern.

Free speech arguments are often animated by a concern that the government might choose up sides in debates on matters of public importance. According to Judge Easterbrook, writing for the Seventh Circuit in *Hudnut*, for example, citizens have an "absolute right to propagate opinions that the government finds wrong or even hateful."[23] In other contexts, however, the citizenry is perfectly comfortable with the idea of government agencies choosing up sides, because it assumes that those agencies have expert authority. No one gets upset if the FDA bans a fraudulent weight-loss remedy on the grounds that it does not help people lose weight—at least, no one claims that the case involves the denial of expressive freedom to the diet-pill manufacturer. The difference between the diet-pill case and the sort of disputes that are usually taken as implicating the First Amendment is that we have confidence that the FDA's decision is reliable, because we have faith in the methods of medical research relied upon by agency scientists. Citizens trust that the FDA can accurately identify a medical swindle because they have shared standards of medical truth. Moreover, they share the reasons that motivate the agency's scientists and regulators—namely, the desire not to be swindled by purveyors of quack medicines. Because these reasons are shared between affected individuals and the government agency, and individuals do better at achieving compliance with these reasons by deferring to the agency's expert judgment, the agency has legitimate authority over the individual.[24] Paradoxically, the state's authority does not reduce our freedom,[25] but enhances it, by increasing the reliability of our judgments on the basis of reasons that are *our* reasons.

By contrast, notice something about the quote from *Hudnut*: The words "the government finds"[26] indicate Judge Easterbrook's skepticism about truth in the moral domain. Easterbrook's rhetoric implicitly contends that, unlike in the diet-pill case, there is no truth of the matter regarding whether pornography is harmful to women, just the government's say-so. If all the government has as a basis for its judgment is its mere belief about the

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[22] *See* Redish & Finnerty, *supra* note 10, at 67.

[23] 771 F.2d at 328.

[24] RAZ, *supra* note 21, at 23 (explaining the force of authoritative directives issued by experts).

[25] Gary Wills has observed the popular American belief that "[a]ny power given to the government is necessarily subtracted from the liberty of the governed." GARRY WILLS, A NECESSARY EVIL: A HISTORY OF AMERICAN DISTRUST OF GOVERNMENT 16 (1999).

[26] 771 F.2d at 328.

matter in question, what is to stop it from abusing its power to suppress opinions with which it disagrees? In addition, the pornography case does not exhibit the same disparity of information between the government and individual citizens as the diet-pill case. Consumers may not have access to epidemiological and pharmacological data, but they know enough about pornography to reach a reasonably reliable judgment about the moral issues it raises. The American people may trust the government to protect them from scientific swindles, but at the same time, they do not believe that the government has greater expertise, as compared with citizens, in detecting moral swindles.

It is worth asking whether this attitude of universal moral skepticism is warranted. Surely there are some moral swindles. People do not have to be skeptical about the truth of every proposition just because it cannot be verified using the methods of natural science research. Although the processes of justifying these statements are different, they are equally true:

> The speed of light in a vacuum is 3.00×10^8 m/s.
>
> You cannot eat all the Krispy Kreme donuts you want and still lose weight while you sleep.
>
> State-enforced racial segregation is a great moral evil.

A person who denies the third proposition is just as wrong as someone who denies one of the first two.[27] More to the point, a university would be selling the educational equivalent of snake oil if it taught the negation of any of these three propositions. People tend to agree, with respect to the first two, because they have some degree of confidence in the ability of empirical science to deliver truths.[28] The methods of ethics do not work in the same way—for one thing, bridges don't fall down if one's ethical reasoning is wrong—and people should not expect normative argument to produce the same broad agreement as scientific investigation. Nevertheless, there are matters, such as the evils of slavery, segregation, and racial bigotry, about which there is no reasonable disagreement. In these cases, why is it a bad thing for universities to take sides? If there is a

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[27] For a non-technical philosophical overview of how moral propositions can be justified, see generally W. Bradley Wendel, *Teaching Ethics in an Atmosphere of Skepticism and Relativism*, 36 U.S.F. L. REV. 711 (2002).

[28] There is in fact considerable controversy in the philosophy of science over the extent to which truth in the sciences is relative to convention and the claim that there are no theory-independent criteria for scientific truth. *See generally* PAUL FEYERABEND, AGAINST METHOD (1988); THOMAS S. KUHN, THE STRUCTURE OF SCIENTIFIC REVOLUTIONS (1962). The argument here does not depend on any particular epistemological position in natural science or any other domain. Rather, the position of this Essay is that, because people's level of confidence in empirical science to deliver truth *in the relevant cases* is sufficient to warrant permitting universities to inculcate beliefs, universities should be allowed to inculcate beliefs on normative questions as well, as long as people have a comparable degree of confidence in the particular case.

normative matter on which university faculty have greater expertise than their students, the First Amendment is no more offended than it would be by a physicist teaching that the speed of light is a constant.

To return to the example of Holocaust denial, if one is interested in coming to a reliable conclusion about whether the Holocaust occurred, the best course of action would be to rely on professional historians who have long experience with the relevant evidence.[29] No non-specialist would be in a better position to reach a reliable judgment about the truth of this matter. Most people have never seen the minutes of the Wannsee Conference, and even if they had, they would require an expert evaluation for reassurance that the documents were not forgeries and to explain the context of the Conference in relation to other policies of the Nazi government. Surely the same is true for most college students. If a university refused to hire a Holocaust denier as a history professor, the rejected applicant would not have a claim against the university under the First Amendment because the university would be acting on the basis of a permissible (Category 1) evaluative position. The reason is that the university's expertise would be relevant to the subject matter on which the person intended to communicate. Civil libertarians might attempt to characterize this decision at a higher level of abstraction, calling it "thought control" instead of "refusing to hire someone who intends to peddle bunk to students." The reason for this move is to eliminate discretion from an untrusted decision maker,[30] but if we trust universities to make this decision reliably, there is no reason to limit their discretion in this way.

It is important to frame carefully the issues in which the university is supposed to have greater expertise. Consider the controversy over inviting poet Tom Paulin to give a lecture at Harvard University.[31] By the time he was invited, Paulin had achieved considerable notoriety for several anti-Semitic remarks and poems.[32] One can disaggregate two questions in

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[29] Fish, *supra* note 7, at 508–11. *See also* DEBORAH LIPSTADT, DENYING THE HOLOCAUST: THE GROWING ASSAULT ON TRUTH AND MEMORY 197–98 (1993) (recounting response by history department at Duke University to an ad in the student newspaper promoting Holocaust denial as simply another "view" or "idea" competing in the marketplace, and noting that there is no historical doubt about the actuality of the Holocaust). There seems to be a bootstrapping problem with Fish's advice simply to rely on criteria of truth put forward by historians. Reliance on the standards of historical truth constructed by historians is justified only if those standards have established a good record of separating truth from untruth. If there are no standards for historical truth separate from "what historians do," however, there appears to be no basis for making this assessment. Notice, however, that the argument is not that standards of historical truth are accessible *only* to historians, but that historians are better at making these judgments than non-experts. The truth of a matter is not the property of some community's judgment, even though that community may be more efficient or reliable at ascertaining truth in a particular domain.

[30] *See* Frederick Schauer, *Harry Kalven and the Perils of Particularism*, 56 U. CHI. L. REV. 397, 414 (1989).

[31] *See* Jeffrey Toobin, *Speechless: Free Expression and Civility Clash at Harvard*, NEW YORKER, Jan. 27, 2003, at 32.

[32] *Id.*

the free-speech fracas that followed the decision of the English department to disinvite Paulin.[33] One is whether the department is competent to judge the literary merit of Paulin's poems, to which the answer is fairly obviously yes. The other issue, however, is a much broader political and moral one, including considerations of the relevance of artists' characters to the evaluation of their works. An analogy might be the distinction between the questions of whether *Tristan und Isolde* is a great opera (on which musicians have particular expertise) and whether the works of Wagner should be played in Israel (on which musicians have no more or less expertise than other Israeli citizens). In the Paulin case, several law professors contended that the controversy over the invitation posed the second question, in which case there would be no reason to permit the English department to withdraw the invitation unilaterally.[34] Of course, a university is still free to choose not to invite anti-Semitic poets to give readings, but that ground for decision is not within the expertise of a specific academic department. Thus, the argument in this Essay for permitting content- and viewpoint-based discrimination would not apply.

The relatively easy case of denying a position in the history department to a Holocaust denier can be made more difficult in several ways. First, the nexus between the university's expertise and the speech in question can be loosened. Instead of being a candidate for a faculty position in the history department, imagine that the Holocaust denier was a professor of engineering who wished to publish an article in the campus newspaper claiming that the Holocaust was a hoax.[35] Assuming that the professor's classroom teaching and research in engineering always satisfied rigorous professional standards of competence, is there any ground for the university to deny him permission to print the article, or to discipline him (say, by denying tenure or promotion) for writing it? The university as a whole has comparatively greater expertise than the engineering professor with respect to the question of whether the Holocaust was a hoax. The professor's function within the university, however, is to teach engineering, not history. Arguably his article about the Holocaust is not germane to his function within the university, so the administration would have no business disciplining him.

One might respond that this is a rather cramped sense of germaneness. The professor's bigotry and contempt for Jews may interfere with his ability to interact with others, including colleagues and students, in a respectful

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[33] *Id.* at 35. There is some question over whether the English department revoked its invitation or whether the department and Paulin mutually agreed that he would not deliver the lecture. *Id.* This factual ambiguity is irrelevant to the analysis of whether the department could disinvite Paulin if it chose to do so.

[34] *See id.*

[35] *See generally* Geri J. Yonover, *Anti-Semitism and Holocaust Denial in the Academy: A Tort Remedy*, 101 DICK. L. REV. 71 (1996) (discussing the controversy generated by Northwestern University engineering professor Arthur Butz, a self-styled "Holocaust revisionist"). *See also* LIPSTADT, *supra* note 29, at 123–36 (same).

manner.[36] As Judith Jarvis Thomson recognizes in her perceptive article on academic freedom, however, a bigoted professor might not misbehave on campus.[37] If there were an instance in which a Holocaust-denying professor had accumulated a record of problem-free relationships with students and colleagues, including Jews, the evidentiary significance of his prejudice, *vis-à-vis* respectful interactions with others, would be minimal.[38]

A fairly tight nexus between the university's mission and the content of the speech is necessary to preserve liberty of expression and conscience for students in non-educational contexts. A university may properly decide to inculcate in students a belief in racial equality, and for this reason may refuse to permit a professor to praise *Plessy v. Ferguson*[39] in class. The commitment to teaching the value of racial equality does not necessarily empower the university to punish a student for sending an e-mail message disparaging students of color.[40] As the Supreme Court has recognized, public college and secondary school students have a right to dissent, agitate, protest, and organize, even if the messages they seek to communicate are antithetical to the beliefs the educational institutions seek to inculcate.[41]

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[36] *See* Thomson, *supra* note 8, at 165–68.

[37] *Id.* at 168.

[38] Compare the case of law school graduate and avowed white supremacist Matthew Hale, who passed the bar but was denied admission to practice law in Illinois on character and fitness grounds. The record in his admissions proceedings showed that when he had worked in a law office, he never engaged in acts of racism toward African American clients. *See In re Hale*, Comm. on Character & Fitness for the Third Appellate Dist. of the Supreme Court of Ill. (1998), *reprinted in* GEOFFREY C. HAZARD, JR. ET AL., THE LAW AND ETHICS OF LAWYERING 875, 877 (3d ed. 1999). Nevertheless, on appeal from the Inquiry Panel's decision, a different committee of the state bar denied Hale's application on the ground that his racist beliefs made it unlikely that he would comply with a state disciplinary rule prohibiting discriminatory treatment of participants in the litigation process. *See In re Hale*, Comm. on Character & Fitness for the Third Appellate Dist. of the Supreme Court of Ill. (1999), *reprinted in* GEOFFREY C. HAZARD, JR. ET AL., THE LAW AND ETHICS OF LAWYERING: TEACHER'S MANUAL app. C, at 290–96 (3d ed. 2000).

[39] 163 U.S. 537 (1896).

[40] Consider the example of the anonymous "gcrocodile" message sent to a Harvard Law School student who had complained about the use of the n-word in another student's outline posted on a website: "If you, as a race, want to prove that you do not deserve to be called by that word, work hard and you will be recognized. If you just complain and ask others to do the job for you, it will have the opposite effect." Toobin, *supra* note 31, at 36. The law school did not in fact punish "gcrocodile," whose identity was discovered by some technologically proficient students, but a professor proposed using the event as an opportunity to have a mock trial. *Id.* at 37. Ironically, the prospect of a trial seemed to cause more friction than the original e-mail. *Id.* at 37–38.

[41] *See* Widmar v. Vincent, 454 U.S. 263 (1981) (holding that a state university could not bar a registered student religious group from conducting meetings in university facilities); Healy v. James, 408 U.S. 169 (1972) (holding that there was a First Amendment associational interest in Students for a Democratic Society becoming an officially recognized campus organization at a state-supported college and that the college had the burden of justifying its nonrecognition of the group); Tinker v. Des Moines Sch. Dist., 393 U.S. 503 (1969) (offering First Amendment protection to public high school students wearing black armbands in protest of the Vietnam War).

The expertise of universities, which permits them to take positions with respect to the content or viewpoint of certain communications by members of university communities, however, does not compel a complete surrender of First Amendment liberties. To balance the need to discriminate on the basis of content and viewpoint in order to accomplish the university's educational mission against the expressive rights of teachers and students, any restriction on the content or viewpoint of a speaker's message must be as narrowly tailored as possible. Restrictions should not reach speech outside official educational channels such as classrooms, except to the extent permitted for restrictions on speech in traditional public forums. The argument that a restriction on student speech is germane to the university's educational mission will be unavailing with respect to communications in physical public spaces, such as quads, student union buildings, public areas of dormitories, and bulletin boards,[42] and in the university's corner of cyberspace, including e-mail systems and websites maintained by the university.

Apart from loosening the nexus between the university's expertise and the speech in question, the second way to make the easy case difficult is to imagine that the speaker does not express an ethical view that is itself false, but rather takes a position that can be made to sound false, perhaps through distortion by opponents in a political debate. This appears to be what happened during a well-publicized hate speech controversy at Harvard Law School. Consider the comment attributed to torts professor David Rosenberg, "the blacks have contributed nothing to torts."[43] Rosenberg later said he was referring to critical race theory scholars and expressed his alarm that a faculty member could be criticized or threatened with formal sanctions for making comments critical of a genre of scholarship.[44] The view that critical race theory has not made a contribution to torts scholarship, while wrong in my view, is defensible and well within the range of views that faculty members should be permitted to offer in class discussion. People can disagree about the scholarly merits of a particular school of thought, and professors are permitted to take sides in these disagreements, although as a matter of pedagogical effectiveness they probably ought to be more open to competing views. Rosenberg's inartful choice of words, however, makes his statement susceptible to an interpretation that is not within the range of views that a university should be permitted to offer—namely, that black lawyers, scholars, and litigants have contributed nothing to tort law. Because of his bluntness, Rosenberg's statement was easily portrayed as one that is false,

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[42] William W. Van Alstyne, *Academic Freedom and the First Amendment in the Supreme Court of the United States: An Unhurried Historical Review*, 53 LAW & CONTEMP. PROBS. 79, 124–25 (1990).

[43] Toobin, *supra* note 31, at 36.

[44] *Id.* at 37.

which considerably complicated the debate over the appropriateness of his remarks.

The final way to weaken the expertise-based case for permitting universities to select for particular viewpoints is to question the very idea of normative expertise.[45] On pure normative issues, the expertise-based case for the university's authority is more difficult to sustain because moderns tend not to believe in moral experts. In First Amendment discourse one frequently meets the aphorism attributed to Voltaire, "I disapprove of what you say, but I will defend to the death your right to say it."[46] This quotation means that expressive liberties should not depend on the truth of the speaker's assertion because, in a pluralistic society, we are bound to disagree sometimes with our fellow citizens. This claim is the most serious challenge to a moderate First Amendment position because it denies authority to universities over any purely normative domain, including matters implicated by hate speech regulations. If there is no such thing as a better or worse position on the civic, political, and social equality of people of color, women, gays and lesbians, and other historically disadvantaged groups, then the university has no business limiting speech that takes a hostile position toward the claims of equality by disadvantaged members of the university community. In the terms introduced earlier, all speech dealing with issues of race, sex, gender, ethnicity, and sexual orientation would be Category 2 speech, implying that the evaluation of truth or falsity must be left up to the consciences of individuals. Universities must be agnostic on questions about which there is reasonable disagreement and on which they do not have comparatively greater expertise than students.

There are good and bad arguments for shunting normative issues into Category 2, and it is important to distinguish them. Normative disagreement may be the result of reasonable ethical pluralism, which is the result of the complexity of human life and its engagement with numerous competing sources of value, which lead to incompatible rankings of ethical demands.[47] As Isaiah Berlin puts it, "[s]ome among the Great Goods cannot live together. That is a conceptual truth. We are doomed to choose, and every choice may entail an irreparable loss."[48] Ethical pluralism entails a wide range of reasonable disagreement over questions pertaining to rights, justice, the duties we owe to each other, and other political issues that are implicated by university education.[49] On the other hand, notwithstanding ethical pluralism, there are normative matters, such as the evil of segregation and the civic equality of women, about which there is

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[45] One could also quibble with the choice of Holocaust denial as a test case because the question of whether the Holocaust occurred is an empirical one, not a normative issue.

[46] BARTLETT'S FAMILIAR QUOTATIONS 317 (Justin Kaplan ed., 17th ed. 2002).

[47] *See* JOHN RAWLS, POLITICAL LIBERALISM 54–58 (1993).

[48] Isaiah Berlin, *The Pursuit of the Ideal*, *in* THE CROOKED TIMBER OF HUMANITY 13 (Henry Hardy ed., 1990).

[49] *See generally* JEREMY WALDRON, LAW AND DISAGREEMENT (1999).

no reasonable disagreement. These matters fall into Category 1, and a university may appropriately make content- and viewpoint-based judgments based on these principles. Another plausible reason to treat some matters under Category 2 is the worry that the university might abuse its power and attempt to preclude what would otherwise be an intellectually fruitful discussion by simply declaring a matter settled by fiat. This is essentially the argument of "political correctness" in universities.

Where there is reasonable normative disagreement, a university should be open to competing ideas and not engage in unwarranted viewpoint discrimination. To return to an earlier example, a political science department may decide to hire mostly rational choice theorists if it believes that this paradigm is likely to be the most fruitful avenue of inquiry in its discipline. At the same time, the ideal of open inquiry would counsel the department to be receptive to the possibility of hiring critics of rational choice theory as well, to enliven the debate and ensure that the department's views do not simply become dogma. Similar considerations extend to the classroom. A political science department that is enamored of rational choice theory should not set it up as an orthodoxy and require students to parrot those beliefs in order to obtain a good grade. Again, this view assumes the existence of reasonable disagreement within a discipline; a political science teacher need not give a good grade to a student who argues that consulting oracles is a superior method of predicting the outcome of elections.

It is necessary to point out, in conclusion, that the domain of reasonable ethical pluralism is a large one, because even in the case of clear Category 1 principles, there may be application questions, the resolution of which falls within Category 2. For example, it may be a matter beyond reasonable dispute that African Americans deserve full political and social equality, but that principle does not, by itself, resolve debates about affirmative action, race-based redistricting, vouchers, and the like, which touch on the civic rights of African Americans. Similarly, a commitment to the equal rights of women does not necessarily count for or against any particular proposed regulation of abortion, or decide the issue of whether certain kinds of expression are sexually harassing. As stated at the outset, this Essay takes a moderate position. It does not go as far as some progressive critics of traditional First Amendment civil libertarianism would probably favor.[50] The hope is that the debate over hate speech regulations in universities takes into account some of the observations made here. Education is not value-neutral and, as Stanley Fish wrote in a slightly different context, "it's a good thing, too."[51] The values that educators may in-

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[50] *See, e.g.*, Mari Matsuda, *Public Response to Racist Speech: Considering the Victim's Story*, 87 MICH. L. REV. 2320 (1989).

[51] STANLEY FISH, THERE'S NO SUCH THING AS FREE SPEECH, AND IT'S A GOOD THING, TOO (1994).

culcate in students include ethical ones. For all the rhetorical power of the marketplace of ideas metaphor, it has its limitations. The state has always been able to regulate transactions in the marketplace, with the aim of punishing hucksters and con artists. Those people exist in the moral marketplace as well, and it is properly the role of the university to fight moral swindles. For this, we should be thankful.

SYMPOSIUM ESSAY

AGREEING TO AGREE: A PROPONENT AND OPPONENT OF HATE CRIME LAWS REACH FOR COMMON GROUND

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FREDERICK M. LAWRENCE**

The debate over bias-crime laws is a continuing one. Proponents of bias-crime laws have largely focused on the special harm to victims from bias crimes, believing that punishment of these harms is consonant with First Amendment principles, while opponents have been concerned that these laws punish not only conduct, but also bigoted thought and belief, in violation of the First Amendment. In this Essay, a longtime proponent and opponent of bias-crime laws clarify their differences and then proceed towards common ground. The end product is a proposed model bias-crime statute that adopts a thoughtful approach to the twin concerns of punishing the infliction of special harms and protecting freedom of thought.

I. INTRODUCTION

For decades now, judges and legislators, scholars and lawyers, have discussed, debated, and deliberated upon the advisability, justification, and legality of laws singling out bias-motivated crimes, popularly known as "hate crimes," for special treatment in the criminal law and even for enhanced punishment. For much of that time, one of the authors has been an outspoken opponent of bias-crime laws,[1] while the other has been an outspoken proponent of them.[2] Having debated each other in print, we

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[1] *See, e.g.*, Susan Gellman, *"Brother, You Can't Go to Jail for What You're Thinking": Motives, Effects, and "Hate Crime" Laws*, 11 CRIM. JUST. ETHICS 24 (1992); Susan Gellman, *Hate Crime Laws Are Thought Crime Laws*, 1992/1993 ANN. SURV. AM. L. 509; Susan Gellman, *Hate Crime Laws After Wisconsin v. Mitchell*, 21 OHIO N.U. L. REV. 863 (1995); Susan Gellman, *Hate Speech and a New View of the First Amendment*, 24 CAP. U. L. REV. 309 (1995); Susan Gellman, *Sticks and Stones Can Put You in Jail, But Can Words Increase Your Sentence? Constitutional and Policy Dilemmas of Ethnic Intimidation Laws*, 39 UCLA L. REV. 333 (1991) [hereinafter *Sticks and Stones*].

[2] *See, e.g.*, FREDERICK M. LAWRENCE, PUNISHING HATE: BIAS CRIMES UNDER AMERICAN LAW (1999) [hereinafter PUNISHING HATE]; Frederick M. Lawrence, *Enforcing Bias Crime Laws Without Bias: Evaluating the Disproportionate-Enforcement Critique*, 66 J.L. & CONTEMP. PROBS. 49 (2003) [hereinafter *Enforcing Bias Crime Laws Without Bias*]; Frederick M. Lawrence, *Violence-Conducive Speech: Punishable Verbal Assault or Pro-*

first had the opportunity to meet and debate in person at the Symposium organized by this Journal, "Perspectives on Hate Speech and Hate Crimes," on March 6, 2003. When invited to submit papers for publication in the Journal, we decided to attempt something new in bias-crime scholarship. Instead of separately writing papers arguing the respective positions we have long advocated, we jointly wrote a single paper in which we seek to identify the common ground on which proponents and opponents of bias-crime statutes might agree. After all, by this time, we understand each other's positions well. There is less and less purpose to endless rounds of, "Yes, it is," and, "No, it is not." As we agree on the goal, it seemed likely that together we could develop a proposed statute with which we could both live. We have proposed such a statute in this Essay.

The Essay proceeds through four Parts. In Parts II and III, we separately sketch the central tenets of the arguments for and against bias-crime legislation, respectively. Part IV consists of both an exposition of shared ideas and a kind of "point-counterpoint," where a shared concern on a general level leads to some lack of agreement on a more specific application. This Essay concludes with an outline of a joint Model Statute, or, perhaps better put, the latest stage of an ongoing discussion about a potential Model Statute.

This Essay was written with two goals in mind. First, more specifically, we seek to probe for the common ground that may exist between us and thus perhaps between others in the long-running debate over bias-crime legislation. Second, more generally, we hope to offer a direction in which this and other debates might profitably proceed—after definition and distinction, toward compromise and conciliation. We do not intend to compromise that which cannot be compromised, but we do intend at the very least to clarify that which can be clarified. That is, after all, at least one model of the legislative process in a democratic society.

II. THE CASE FOR BIAS-CRIMES LAWS[3]

Bias crimes are the criminal manifestation of prejudice. They may be distinguished from parallel crimes—crimes that are identical in all respects save for the absence of bias motivation—in terms of the mental state of the actor as well as the nature of the harm caused.[4] A parallel

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tected Political Speech? in FREEDOM OF SPEECH AND INCITEMENT AGAINST DEMOCRACY 11 (David Kretzmer & Francine Kershman Hazan eds., 2000); Frederick M. Lawrence, *The Punishment of Hate: Toward a Normative Theory of Bias-Motivated Crimes*, 93 MICH. L. REV. 320 (1994) [hereinafter *The Punishment of Hate*]; Frederick M. Lawrence, *Resolving the Hate Crimes/Hate Speech Paradox: Punishing Bias Crimes and Protecting Racist Speech*, 68 NOTRE DAME L. REV. 673 (1993) [hereinafter *Hate Crimes/Hate Speech Paradox*].

[3] Part II was written by Professor Lawrence.

[4] This discussion of the nature of bias crimes and of their resulting harms is a condensed summary of LAWRENCE, PUNISHING HATE, *supra* note 2, at 29–44.

crime may be motivated by any one of a number of factors, whereas bias crimes are motivated by a specific, personal and group-based reason: the victim's real or perceived membership in a particular group. Different bias-crime laws cover different groups. In the United States, every federal and state bias-crime law covers race, ethnicity, and religion in some form.[5] All states with bias-crime statutes except Arkansas and Utah also include sexual orientation, gender, or other characteristics.[6] There is much that can be said about the legal and social implications of a particular legislative determination to include or exclude a given group characteristic from a bias-crime law.[7] In this Essay, "group" will be used as the generic term for a category included in a particular state or local bias-crime law. In our Model Statute, these groups will be referred to collectively as "defined communities."

The damage caused by bias crimes is not limited to physical harm. A bias crime strikes its victim at the very core of his or her identity, creating a sense of vulnerability greater than that normally found in crime victims. Perhaps most dramatically, members of racial minorities who are the victims of bias crimes experience the attacks as a violent form of racial stigmatization.[8] The stigmatized individual may experience both

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[5] *See, e.g.*, Federal Sentencing Guidelines, 18 U.S.C.A. § 3A1.1; ALA. CODE. § 13A-5-13 (1994); ALASKA STAT. § 12.55.155 (Michie 2002), *amended by* Act of Sept. 11, 2003, S.B. 85, 22d Leg. (Alaska 2003); ARIZ. REV. STAT. ANN. § 13-702 (West Supp. 2003); ARK. CODE ANN. § 16-123-106 (Michie Supp. 2003); CAL. PENAL CODE § 422.75 (West 1999); COLO. REV. STAT. § 18-9-121 (Supp. 2003); CONN. GEN. STAT. § 53a-181j (2003); D.C. CODE ANN. § 22-3703 (2001); DEL. CODE ANN. tit. 11, § 1304 (2001); FLA. STAT. ANN. § 775.085 (West 2000); HAW. REV. STAT. § 706-662 (1999), *amended by* Act of Apr. 23, 2003, S.B. 616, 22d Leg. (Haw. 2003); IDAHO CODE § 18-7902 (Michie 1997); 720 ILL. COMP. STAT. ANN. 5/12-7.1 (West 2002), *amended by* Act of Aug. 8, 2003, S.B. 407, 93rd Leg. (Ill. 2003); IND. CODE ANN. § 10-13-3-1 (West Supp. 2003); IOWA CODE ANN. § 712.9 (West 2003); KAN. CRIM. CODE ANN. § 21-4003 (West Supp. 2003); KY. REV. STAT. ANN. § 532.031 (Michie Supp. 2003); LA. REV. STAT. ANN. § 14:107.2 (West Supp. 2004); ME. REV. STAT. ANN. tit. 17-A, § 1151 (West Supp. 2003); MD. CODE ANN., CRIM. LAW § 10-305 (2002); MASS. GEN. LAWS ch. 265, § 39 (2002); MICH. COMP. LAWS ANN. § 750.147b (Michie 2003); MINN. STAT. ANN. § 609.749 (West 2003); MISS. CODE ANN. § 99-19-301 (1994); MO. REV. STAT. § 557.035 (2000); MONT. CODE ANN. § 45-5-222 (2002); NEB. REV. STAT. ANN. § 28-111 (Michie 2003); NEV. REV. STAT. ANN. 193.1675 (Michie Supp. 2003); N.H. REV. STAT. ANN. § 651:6 (Supp. 2003); N.J. STAT. ANN. § 2C:16-1 (West Supp. 2003); N.M. STAT. ANN. § 31-18B-3 (Michie Supp. 2003); N.Y. PENAL LAW § 485.05 (McKinney Supp. 2004); N.C. GEN. STAT. § 15A-1340.16 (2003); N.D. CENT. CODE § 12.1-14-04 (1997); OHIO REV. CODE ANN. § 2927.12 (Anderson 2003); OKLA. STAT. ANN. tit. 21, § 850 (West 2002); OR. REV. STAT. § 166.165 (2001); 18 PA. CONS. STAT. § 2710 (West 2003); R.I. GEN. LAWS § 12-19-38 (2002); S.D. CODIFIED LAWS § 22-19B-1 (Michie 1998); TENN. CODE ANN. § 40-35-114 (2003); TEX. PENAL CODE ANN. § 12.47 (Vernon Supp. 2004); UTAH CODE ANN. § 76-3-203.3 (2003); VT. STAT. ANN. tit. 13, § 1455 (Supp. 2002); VA. CODE ANN. § 18.2-57 (Michie 1996); WASH. REV. CODE ANN. § 9A.36.080 (West 2000); W. VA. CODE ANN. § 61-6-21 (Michie 2000); WIS. STAT. ANN. § 939.645 (West Supp. 2003); WYO. STAT. ANN. § 6-9-102 (Michie 2003).

[6] *See* sources cited *supra* note 5.

[7] *See* LAWRENCE, PUNISHING HATE, *supra* note 2, at 11–20.

[8] *See, e.g.*, GORDON W. ALLPORT, THE NATURE OF PREJUDICE 56–59 (1st ed. 1954); ERVING GOFFMAN, STIGMA: NOTES ON THE MANAGEMENT OF SPOILED IDENTITY 7–17, 130–35 (1963); ROBERT M. PAGE, STIGMA 1, 13–14 (1984).

clinical[9] and social[10] symptoms. The bias-motivated violence carries with it the unmistakable message that the victim and the group to which he or she belongs are of lesser worth.[11] Stigmatization of bias-crime victims is not limited to racially motivated bias crimes or to minority-group victims. Group-motivated crimes in general cause heightened psychological harm to victims over and above that caused by parallel crimes.[12]

Furthermore, bias crimes have a far broader impact than parallel crimes. They affect not only the immediate victim of the criminal behavior, but in addition both the "target community" that shares the victim's group characteristic and society as a whole.

Members of the target community do more than sympathize or even empathize with the immediate bias-crime victim.[13] They perceive the crime as though it were a direct attack on them.[14] A cross burning or a swastika scrawling will not just evoke similar feelings in other African Americans and Jews, respectively. Rather, members of these groups may perceive the criminal event as having threatened and attacked them personally.[15]

The harm to society at large from bias crimes stems from the violation not only of society's general concern for the security of its members, but also of its shared norms of equality among the citizenry and racial and religious tolerance.[16]

This societal harm is, concededly, highly contextual. In a society different from our own, the racial motivation for a crime may not implicate more significant social values than a criminal act motivated solely by dislike of the victim's eye color.[17] This contextuality helps determine which groups should and should not be included in a bias-crime law. The characteristics that ought to be addressed are those implicating societal fissure lines, i.e., divisions that run deep in the social history of a culture.[18] In the United States, the strongest case is for race. Racial discrimination, the

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[9] *See, e.g.*, Ernest Harburg et al., *Socio-Ecological Stress, Suppressed Hostility, Skin Color, and Black-White Male Blood Pressure: Detroit*, 35 PSYCHOSOMATIC MEDICINE 276, 292–94 (1973); KENNETH B. CLARK, DARK GHETTO: DILEMMAS OF SOCIAL POWER 82–90 (1965).

[10] *See, e.g.*, IRWIN KATZ, STIGMA: A SOCIAL PSYCHOLOGICAL ANALYSIS 1–4 (1981); HARRY H. L. KITANO, RACE RELATIONS 125–26 (1974); Ari Kiev, *Psychiatric Disorders in Minority Groups*, *in* PSYCHOLOGY AND RACE 416, 420–24 (Peter Watson ed., 1973).

[11] ALLPORT, *supra* note 8, at 49–65 (discussing the degrees of prejudicial action from "antilocution," to discrimination, to violence).

[12] *See* LAWRENCE, PUNISHING HATE, *supra* note 2, at 40–41.

[13] *See id.* at 41–42.

[14] *See id.*

[15] *See, e.g.*, ROBERT ELIAS, THE POLITICS OF VICTIMIZATION 116 (1986); ANDREW KARMEN, CRIME VICTIMS: AN INTRODUCTION TO VICTIMOLOGY 262–63 (2d ed. 1990); JACK LEVIN & JACK MCDEVITT, HATE CRIMES: THE RISING TIDE OF BIGOTRY AND BLOODSHED 205, 220–21, 234 (1993).

[16] *See* LAWRENCE, PUNISHING HATE, *supra* note 2, at 43–44.

[17] *See id.*

[18] *See, e.g.*, JENNIFER L. HOCHSCHILD, FACING UP TO THE AMERICAN DREAM: RACE, CLASS, AND THE SOUL OF THE NATION 214–21 (1996).

greatest American dilemma, has its roots in slavery, the greatest American tragedy.[19] Strong cases can also be made for the other classic bias-crime categories: ethnicity, religion, and national origin. The very act of determining which groups will be included in a bias-crime law is legislative, and thus, at least partly, a social evaluation of social fissure lines.

Once a legislature has rationally concluded that bias-motivated violence can be and is intended by perpetrators to cause special harm to direct victims, target communities, or the community at large, it is justified in enacting a bias-crime law, identifying bias-motivated violence as a crime both different from the relevant parallel crime and deserving of greater punishment. It is no more necessary for the legislature to conclude that all bias crimes cause more serious harm than all parallel crimes than for the legislature to conclude that all instances of armed robbery cause more serious harm than all robberies committed without firearms. Armed robbery is a more serious crime than simple robbery and deserves greater punishment because of the rational legislative judgment that armed robbery could, and generally is intended to, cause a greater harm. A similar judgment warrants enhanced punishment of bias crimes.

III. The Case Against Bias-crimes Laws[20]

A. Bias-Crimes Laws Punish Government-Disapproved Thought

Proponents of bias-crime laws have the best of intentions, but these laws, in the end, create thought crimes. As used here, "bias-crime law" refers to the common hate-crime statute (also commonly referred to as a "bump-up" statute) that enhances the penalty and/or grade of an already existing offense if the offense was motivated by bias.[21] The statute establishes one penalty for the underlying crime—assault or vandalism,[22] for instance—and another penalty for the defendant's bigotry that motivated the offense.[23]

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[19] *See, e.g.*, Andrew Hacker, Two Nations: Black And White, Separate, Hostile, Unequal 3–16 (1992).

[20] Part III was written by Ms. Gellman.

[21] *See, e.g.*, Ala. Code § 13A-5-13 (1994).

[22] The offenses covered by bias-crime laws vary among jurisdictions. In Ohio, only five offenses are subject to grade and penalty enhancement when they are committed "by reason of" another's race, religion, etc. *See* Ohio Rev. Code Ann. § 2927.12 (Anderson 2003). Those offenses involve only expressive conduct: aggravated menacing, menacing, criminal damaging or endangering, criminal mischief, and telecommunications harassment. *See* Ohio Rev. Code Ann. §§ 2903.21–.22, 2909.06–.07, 2917(A)(3)–(5) (Anderson 2003) (defining the five crimes in § 2927.12). It is interesting to note that assault and other violent crimes are not included. *See id.*

[23] The extra penalty is specifically for the bigoted or biased motive. "Those who developed the guidelines for hate crime data collection recognized that hate crimes are not separate, distinct crimes; instead they are traditional offenses motivated by the offender's bias." Fed. Bureau of Investigation, U.S. Dep't of Justice, Crime in the United States: Uniform Crime Reports 61 (2002), *available at* http://www.fbi.gov/ucr/cius_02/pdf/2sectiontwo.pdf.

The legislatures enacting these statutes are targeting bigoted, hateful thought, and the special harms that crimes associated with those thoughts are, reasonably, said to cause. The government's decision to take bigotry seriously and express disapproval of it is commendable. The idea was that although the First Amendment prevents punishment of having or expressing bigoted thoughts,[24] there would be no problem punishing the thought if it were coupled with conduct, conduct that is itself already a crime.[25]

But that is precisely the problem with these statutes: they punish defendants once for what they have done, and once for having had a government-disapproved thought. Thought or opinion that is not punishable on its own does not become punishable when it accompanies criminal conduct. The accompanying criminal conduct does not work some special alchemy to change the reality that there is an additional penalty—sometimes as large or even much larger than the penalty for the base crime[26]—imposed solely for the bigoted thoughts.

These statutes are not only content-based, they are viewpoint-based. The statutes are even-handed in the sense that they punish bias regardless of whether it is, say, anti-black or anti-white. At the same time, however, they do take sides on a political and social issue: the extra punishment is imposed only for the bigoted viewpoint, not the anti-bigoted viewpoint. For example, if a racist threatens an African American by reason of the victim's race, the extra penalty applies, but if a non-racist onlooker then threatens the racist, there is no extra penalty.[27]

It is true that the legal system does upgrade and even define certain offenses on the basis of purpose and intent. Those are—like motive—mental processes, so if purpose and intent constitute a permissible basis for punishment, proponents argue, motive can as well. Yet the law has long distinguished between purpose and intent, which determine what the offender is doing, and motive, which explains only why the offender is doing it.[28] The children of a wealthy father may have a motive to kill him

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[24] *See* Griswold v. Connecticut, 381 U.S. 479, 482 (1965) ("The right of freedom of speech and press includes . . . freedom of thought. . . ."); R.A.V. v. City of St. Paul, 505 U.S. 377, 391–93 (1992).

[25] *See* Gellman, *Sticks and Stones*, *supra* note 1, at 376–78 (citing U.S. v. O'Brien, 391 U.S. 367, 377 (1968) (holding that the government can infringe upon First Amendment interests in regulating conduct so long as the infringement is incidental and the government interest in regulating the conduct is "unrelated to the suppression of free expression")).

[26] *See, e.g.*, OHIO REV. CODE ANN. § 2927.12 (West 1997).

[27] To the authors' knowledge, almost everyone debating the issue, including the authors of this Essay, would agree that it is irrelevant that a bigoted viewpoint is "bad" and that an anti-bigoted one is "good." The First Amendment forbids the government from favoring either side of a social or political debate. *See* W. Va. State Bd. of Educ. v. Barnette, 319 U.S. 624, 642 (1943) ("If there is any fixed star in our constitutional constellation, it is that no official, high or petty, can prescribe what shall be orthodox in politics, nationalism, religion, or other matters of opinion. . . ."). After all, if this opinion were truly universal, there would be no bias crimes.

[28] *See* Gellman, *Sticks and Stones*, *supra* note 1, at 363–68 (citing People v. Weiss, 300

but no intent to do so; a psychopath may have no motive to kill but intend to do so anyway.[29] A purpose or intent is not an opinion on a social or political issue; bigotry (the motive for bias crimes), noxious though it may be, is. Intent and purpose are punishable only when coupled with conduct, not because they are protected by the First Amendment, but because they are inchoate. With the actual commission of an act, however, their inchoate quality disappears, and there is no bar to their punishment—that is, to punish intentional or purposeful conduct more harshly than conduct that is accidental. The same is not true of bigoted motive, because of the constitutional bar to punishing opinion, even when associated with unlawful conduct.

Many proponents of bias-crime laws are strong supporters of civil liberties. This has always been almost entirely a "liberal vs. liberal"[30] debate. Proponents—to their credit—care so deeply about the problems of bigotry and bigotry-related crimes that when what seemed like a simple solution was proposed, they were too eager to convince themselves that the First Amendment presented no bar. The undercurrent seems to be a feeling that bigotry is special, so abhorrent that it is fitting for the government to treat it as criminal in itself.[31]

People feel strongly that many other ideas are just as "wrong" and therefore deserving of special treatment. Occasionally, the Supreme Court agrees, and carves out a new category of so-called "unprotected" speech. But those cases are extremely rare, and fortunately so.[32] In any case, the Supreme Court has never created an unprotected class of speech—as it did for obscenity and fighting words—for bigotry.[33] Most likely, it is prevented from doing so by the First Amendment, just as it could not carve out exceptions for anti-American or blasphemous speech. In any event, until such time as the Supreme Court carves out such a class, if ever, government punishment of bigoted thoughts, even when accompanied by a crime, is constitutionally no different from government punishment of any other thought or opinion.

N.Y. 249, 255 (1937), *rev'd*, 12 N.E.2d 514 (1938); BLACK'S LAW DICTIONARY 813, 1034 (7th ed. 1999) ("Intent: the state of mind accompanying an act," and "Motive: something, esp. willful desire, that leads one to act")).

[29] *See* State v. Wyant, 64 Ohio St. 3d 566, 572 (1992), *vacated on other grounds*, 508 U.S. 969 (1993).

[30] *See* Gellman, *Sticks and Stones*, *supra* note 1, at 333–34.

[31] *See* Andrew E. Taslitz, *Condemning the Racist Personality: Why the Critics of Hate Crimes Legislation Are Wrong*, 20 B.C. L. REV. 739, 742 (1999).

[32] *See, e.g.*, New York v. Ferber, 458 U.S. 747, 763–64 (1982) (holding that child pornography is material that can be treated as "without the protection of the First Amendment").

[33] *See* JAMES B. JACOBS & KIMBERLY POTTER, HATE CRIMES: CRIMINAL LAW AND IDENTITY POLITICS 113 (1998). The idea of carving out a hate-speech exception to the First Amendment has been proposed by some scholars but it has not been accepted by the courts. *See, e.g.*, Mari J. Matsuda, *Public Response to Racist Speech: Considering the Victim's Story*, 87 MICH. L. REV. 2320, 2356–58 (1989).

Punishment of conduct, verbal or otherwise, for a bigoted viewpoint poses the identical problem. It is likely few proponents of bias-crime laws would think that a law increasing penalties for crimes committed "by reason of the offender's support of the war" or "by reason of anti-Americanism" would be constitutional. And by this rationale, what would stop a state with a pro-choice majority from enhancing penalties for crimes committed "by reason of opposition to a woman's right to choose," while a neighboring state enhanced penalties for crimes committed "by reason of promotion of the taking of innocent human life"? Once a motive that represents an opinion or belief on any social or political belief can be criminalized, so can any of the above examples.

B. Is What *Worth It?*

This is the point where reasonable people often wonder whether the costs of bias-crimes legislation are "worth it." That is, whether or not the laws are held to be constitutional, there is an indisputable cost to liberty inherent in any kind of punishment of opinion.[34] Perhaps, though, the effects of bias crimes are so damaging and far-reaching that a law successfully deterring them would be worth a small cost to liberty, particularly such an odious exercise of that liberty.

We need to ask first, however, is *what* worth it? We cannot decide if the cost is reasonable until we have identified the benefit. Strange as it seems, the need to measure or estimate the benefit before imposing the cost is frequently overlooked in the case of bias-crime laws, perhaps because we want so much for the hoped-for, gambled-on benefit from these laws to exist.

Unfortunately, in terms of deterrence, bias-crimes laws have been a failure. They appear to have made little difference in the incidence of bias crimes.[35] Admittedly, the direct impact of bias-crimes legislation is very

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[34] *See, e.g.*, Brian S. MacNamara, *Commentary: New York's Hate Crimes Act of 2000: Problematic and Redundant Legislation Aimed at Subjective Motivation*, 66 ALA. L. REV. 519, 535 (2003).

[35] For example; in 2002, Minnesota reported 203 hate crimes; Mississippi reported three. *See* FED. BUREAU OF INVESTIGATION, U.S. DEP'T OF JUSTICE, CRIME IN THE UNITED STATES 2002: CRIME INDEX OFFENSES REPORTED 63 tbl.2.36 (2002), *available at* http://www.fbi.gov/ucr/cius_02/html/web/offreported/02-nhatecrime12.html#t236 [hereinafter FBI CRIME STATISTICS]. Both states had both criminal and reporting laws. *See* ANTI-DEFAMATION LEAGUE, STATE HATE CRIMES STATUTORY PROVISIONS (2003), *available at* http://www.adl.org/learn/hate_crimes_laws/state_hate_crime_statutory_provisions_chart.pdf [hereinafter ADL LAWS CHART]. *See also* MINN. STAT. ANN. § 609.749 (West 2003) (imposing additional penalties where the offender selects his or her victim based on race, color, religion, sex, sexual orientation, disability, age, or national origin); MINN. STAT. ANN. § 626.5531 (West 2003) (requiring the reporting of crimes believed to have been motivated by the victim's race, religion, national origin, sex, age, disability, or sexual orientation); MISS. CODE ANN. § 99-19-301 (1994) (enhancing the penalty for crimes committed because of the victim's race, color, ancestry, ethnicity, religion, national origin, or gender). In 2002, South Carolina had only an institutional vandalism criminal statute and

difficult to measure with so many other factors (e.g., the overall drop in crime rates, the events of September 11, 2001)[36] affecting both the actual frequency of bias crimes and the reporting of bias crimes—both to and by the relevant authorities. Still, most of those factors are likely to affect the states equally, whether or not their legislatures had passed bias-crimes statutes, so if these laws had any deterrent effect, we would expect to see a difference between states in the number of bias crimes reported. That has not been the case.[37]

The Anti-Defamation League (ADL), a very early promoter of bias-crime laws, drafted in 1981 the "by reason of . . . " model bump-up statute that many jurisdictions adopted or adapted.[38] The ADL therefore had a strong interest in seeing and publicizing the success of these laws. For the first few years, it published an annual report with lists of states, showing what types of bias-crimes laws (mostly penalty bump-ups, statistics collection and reporting types) they had enacted, if any, and what their reported incidence of bias crimes had been.[39]

But when the numbers came in, there was no correlation between the existence of a bias-crime law and a drop in bias crimes.[40] Proponents, undaunted, found ways to explain the varying results in support of their position:

(1) Numbers are high where there is no bias-crime law: There is a grave need for this law![41]

(2) Numbers are low where there is no bias-crime law: There was under-reporting.[42]

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no reporting law. *See supra* ADL LAWS CHART. *See also* S.C. CODE ANN. § 16-11-535 (Law. Co-op. 2003) (imposing a penalty of imprisonment of not less than six months nor more than ten years, or a fine of not more than ten thousand dollars, or both, for malicious injury to a place of worship). It reported 70 hate crimes that year. *See supra* FBI CRIME STATISTICS at 63. Indiana and Arkansas, both with the same two types of laws, reported 77 and zero hate crimes, respectively. *See id.*; ADL LAWS CHART. *See also* IND. CODE ANN. § 10-13-3-1 (West Supp. 2003) (defining hate crimes); ARK. CODE ANN. § 16-123-106 (Michie Supp. 2003) (providing injunctive relief or civil damages against the perpetrators of hate crimes).

[36] *See* Amardeep Singh, *"We Are Not the Enemy": Hate Crimes Against Arabs, Muslims, and Those Perceived To Be Arab or Muslim After September 11*, 14 HUM. RTS. WATCH No. 6 (G) (2002); Associated Press, *Hate Crimes Decrease in 2002*, Nov. 12, 2003, *available at* http://www.cnn.com/2003/LAW/11/12/hate.crimes.ap/.

[37] *See supra* note 35.

[38] *See* ANTI-DEFAMATION LEAGUE, MODEL HATE CRIME LEGISLATION (1999), *available at* http://www.adl.org/ 99hatecrime/text_legis.asp.

[39] *See, e.g.*, ANTI-DEFAMATION LEAGUE, HATE CRIMES STATUTES: A RESPONSE TO ANTI-SEMITISM, VANDALISM AND VIOLENT BIGOTRY (1988); ANTI-DEFAMATION LEAGUE, HATE CRIMES STATUTES: A RESPONSE TO ANTI-SEMITISM, VANDALISM AND VIOLENT BIGOTRY (1990); ANTI-DEFAMATION LEAGUE, HATE CRIMES LAWS (1997); ANTI-DEFAMATION LEAGUE, HATE CRIMES LAWS (1998); ANTI-DEFAMATION LEAGUE, HATE CRIMES LAWS (1999). *See also infra* at note 48.

[40] *See* Shirley S. Abrahamson et al., *Words and Sentences: Penalty Enhancement for Hate Crimes*, 16 U. ARK. LITTLE ROCK L. REV. 515, 525 n.35 (1994) (noting the absence of evidence substantiating the deterrent effect of bias-crime legislation).

[41] *See generally* LAWRENCE, PUNISHING HATE, *supra* note 2, at 22–25.

[42] *See, e.g.*, Phillip Reed, *Agencies: Crimes Fueled By Hate Few, Arkansas Submits*

(3) Numbers are high where there is a bias-crime law: The existence of the law makes people feel safe to report bias crimes.[43]

(4) Numbers are low where there is a bias-crime law: Hurray! It worked! We told you so.[44]

But proponents could not explain all of these various results at the same time.

Next, something interesting happened: after a few years, the ADL stopped sending out these reports.[45] It seems reasonable to assume that the decision to stop publicizing these data was not because the laws were indeed creating the deterrent effect that supposedly justified them. That would have been trumpeted from the rooftops. Rather, it is difficult not to assume the opposite.[46] A recent ADL press release, published on its website, begins, "The number of anti-Semitic incidents remained at a consistent and disturbing level in 2003, according to newly released statistics from the Anti-Defamation League."[47]

So the question again arises: is *what* worth it? What is society getting in return for taking a bite—even assuming it is a Supreme Court-approved bite—out of First Amendment protection of thought and opinion? If nothing can be pointed to on that side of the balance, then the answer is clear: no, of course "it" is not worth it—there is no "it" there.

That would be true even if there were simply no measurable benefit, but at the same time, no cost (other than the cost to First Amendment protection). In fact, however, if we shy away from this question because we do not want to hear that the hoped-for decrease in bias crimes or any other improvements in society did not come to pass, there is a heavy cost to society in addition to the First Amendment infringement.

"Is *what* worth it?" is currently being asked (albeit not enough) in a challenge to another set of laws that, whether or not they will ultimately be upheld as constitutional, unquestionably carve into First Amendment

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Little Data to FBI, ARKANSAS DEMOCRAT-GAZETTE, Mar. 30, 2003, at A19.

[43] *See generally* LAWRENCE, PUNISHING HATE, *supra* note 2, at 22–25.

[44] *See* Project, *Crimes Motivated By Hatred: The Constitutionality And Impact of Hate Crime Legislation in the United States*, 1 SYRACUSE J. LEGIS. & POL'Y 29, 64–65 (1995).

[45] The ADL Audits are available on its website but the tables of statutes and the Audits are not presented together. In addition, the Audits are limited to anti-Semitic incidents, not any other types of hate crimes. *See, e.g.*, ANTI-DEFAMATION LEAGUE, AUDIT OF ANTI-SEMITIC INCIDENTS (1999), *available at* http://www.adl.org/1999_Audit/Executive_Summary.asp; http://www.adl.org/learn/hate_crimes_laws/state_hate_crime_statutory_provisions_chart.pdf (last visited Apr. 21, 2004). The FBI website gives greatly detailed statistics, but again, no indication of any correlation with hate-crimes statutes. *See, e.g*, FED. BUREAU OF INVESTIGATION, U.S. DEP'T OF JUSTICE, HATE CRIME STATISTICS (1999), *available at* http://www.fbi.gov/ucr/ucr.htm#hate.

[46] Although most states now have some sort of hate-crime statute, the FBI statistics show no clear correlation. *See* FBI CRIME STATISTICS, *supra* note 35.

[47] Press Release, ANTI-DEFAMATION LEAGUE, ADL Finds Anti-Semitic Incidents Remain Constant (Mar. 24, 2004), *available at* http://www.adl.org/PresRele/ASUS_12/4464_12.htm.

and other constitutional protections: the USA Patriot Act.[48] The USA Patriot Act's defenders assert that, due to the threat of terrorism, the constitutional infringements are justified by necessity; they are "worth it."[49] Yet here, too, little is said to explain why and how. It seems that if the intrusions and denials of rights had averted any terrorist attacks, the Department of Justice would have been eager to publicize those successes, particularly as many of the Act's provisions are currently under constitutional challenge.[50] But they have not done so, sometimes vaguely alluding to security concerns as the reason for failures to report successes.[51] It is hard to believe, however, that there has not been a single success story the report of which would not endanger the nation. It is even harder to believe that the Administration's choice not to report any successes is due to diffidence.

It is impossible to prove that willingness to sacrifice a bit of First Amendment protection for bias-crime laws "because bigotry is so important" paved the way for sacrifices of other constitutional provisions for the Patriot Act, "because terrorism is so important." But it is equally impossible to prove that it did not. Certainly *Mitchell v. Wisconsin*[52] created a precedent that can be used to defend the Patriot Act against constitutional challenge. There really are slippery slopes in the world, and we do slide down them occasionally.[53] And when we do, it is always with the best of intentions, always in the belief that the circumstances constitute a crisis, a special case. Senator McCarthy's followers sincerely thought they needed to save the world from the calamity of Communism.[54]

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[48] USA Patriot Act of 2001, Pub. L. No. 107-56, 115 Stat. 272 (2001) (codified in scattered sections of 18 U.S.C.). *See, e.g.*, John W. Whitehead & Stephen H. Aden, *Forfeiting "Enduring Freedom" for "Homeland Security": A Constitutional Analysis of the USA Patriot Act and the Justice Department's Anti-Terrorism Initiatives*, 51 AM. U. L. REV. 1081, 1098–1100 (2002); David Cole, *Enemy Aliens*, 54 STAN. L. REV. 953, 956–60, 975–77, 985–88 (2002).

[49] *See, e.g.*, Dana B. Weiss, *Protecting America First: Deporting Aliens Associated With Designated Terrorist Organizations That Have Committed Terrorism in America in the Face of Actual Threats to National Security*, 50 CLEV. ST. L. REV. 307, 324–34 (2002-2003).

[50] *See, e.g.*, Ctr. for Nat'l. Sec. Studies v. U.S. Dep't. of Justice, 331 F.3d 918 (D.C. Cir. 2003); *In re* Sealed Case, 310 F.3d 717 (For. Intel. Surv. Rev. 2002); Humanitarian Law Project v. Ashcroft, 2004 WL 112760 (C.D. Cal. 2004); Miller v. U.S. Parole Comm'n, 259 F. Supp. 2d 1166 (D. Kan. 2003); Padilla *ex rel.* Newman v. Bush, 233 F. Supp. 2d 564 (S.D.N.Y. 2002).

[51] *See, e.g.*, Frank Davies, *Secrecy Cloaks Patriot Act: Administration Loath to Spell Out How Law Being Used*, SEATTLE TIMES, Sept. 9, 2002, at A4.

[52] 508 U.S. 476 (1993) (upholding the enhancement of defendant's sentence for intentionally selecting his victim based on race as not violating defendant's right to free speech by purportedly punishing his biased beliefs).

[53] *See, e.g.*, Eugene Volokh, *The Mechanisms of the Slippery Slope*, 116 HARV. L. REV. 1026, 1130–33 (2003).

[54] *See generally* ARTHUR HERMAN, JOSEPH MCCARTHY: RE-EXAMINING THE LIFE AND LEGACY OF AMERICA'S MOST HATED SENATOR (2000).

C. A Greater Harm May Warrant a Greater Punishment, but It Does Not Make It Constitutional

Deterrence is not the only justification for a criminal statute. Retribution is another.[55] If it could be proven that there is a greater harm caused when a given offense is bias-motivated than when the same offense is committed without bias, could the government constitutionally punish the bias-motivated offender more heavily?

It is quite an assumption that one could adequately prove that bias crimes always (or even likely) cause greater harm than crimes motivated by other motives such as greed, personal hatred, and political terrorism. It does not seem impossible, however, and the notion feels right intuitively, so let us assume that they do. In that case, it seems both logical and permissible to punish bias crimes more heavily, the same way that the Constitution permits more severe punishment of an assault that causes serious physical harm than one that does not.[56]

There is a problem with that analogy, though, and it makes all the difference. Unlike the serious versus the minor physical assault, the greater harm caused by a hate-motivated crime is solely the effect of the offender's beliefs and/or expression of belief.[57] In a case such as this, the extra harm is caused solely by the part of the offender's conduct that is pure First Amendment activity. Thinking, believing, even hating, is simply not something government can punish.

Most often, opponents of bias-crime legislation not only often concede, but affirmatively agree that hateful ideas and their expression cause real harm. In fact, the expression of hateful ideas causes harm whether it is accompanied by criminal conduct, non-criminal conduct, or no conduct at all. Sometimes that extra harm amounts to offense, which, even in the case of deeply painful offense, is not punishable under the Constitution.[58] Other times, though, the harm is more than offense: "terror" might be the best word for that harm (in the sense of great fear, rather than connection to political terrorism). But that same fear also arises without an accompanying criminal act. For example, how might you feel upon seeing someone merely reading a copy of *Mein Kampf* or a Ku Klux Klan newsletter? Surely, though, the proponents of bias-crime laws do not approve banning reading or writing, let alone believing, hateful messages, despite the harm the ideas and their expression do cause. The First Amendment forbids punishing the expression of thought, even hateful and harm-

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[55] *See* LAWRENCE, PUNISHING HATE, *supra* note 2, at 46–48.

[56] *See* United States. *ex rel.* Jordan v. Bosse, 41 F.Supp. 2d 812, 817 (N.D. Ill. 1999).

[57] This may depend, however, on the facts of a specific assault. Sometimes the victim is not aware of the bias motive that really is there, and sometimes the victim, or someone else, mistakenly perceives a bias motive that the offender did not really have.

[58] *See* Michel Rosenfeld, *Hate Speech in Constitutional Jurisprudence: A Comparative Analysis*, 24 CARDOZO L. REV. 1523 (2003).

ful thought. That restriction on government power does not evaporate magically when the expression of hateful thought is accompanied by some punishable conduct.

What is left then but a symbolic effect? Bias-crimes laws arguably (although not demonstrably) make it slightly less politically correct to express bigotry. Even assuming there is any such shaming effect on anyone who would commit a bias crime, there are far more effective ways than criminalizing bigotry through bias-crime laws to accomplish this, either through government action or, better, socially.[59] Certainly a criminal statute that does not infringe on First Amendment rights would make this symbolic statement at least as well. The criminal code is too clumsy a tool for social change generally, let alone such an easy, cheap, and politically popular quick-fix as passing bias-crime laws.[60] It is worse when a statute is merely a symbolic gesture from the legislature that is then used as a cover for avoiding more difficult, and probably more expensive, action toward true equality. As James Jacobs and Kimberly Potter explained, "[H]ate crime laws may substitute for true 'institution building' in the area of community relations. Effectively, politicians may be getting off the hook too easily. Throwing laws at a problem costs no money and requires no political energy."[61]

The effects of bigotry and bigoted expression are certainly more than offensive. Still, we should not whack at the First Amendment, even a little bit, for the sake of letting government officials pose for the cameras as they "make a tough statement about hate and violence in our communities"—and then go home.

IV. The Search for Common Ground

This Part begins with some basic points of agreement. Along the way, we will touch on several areas of disagreement. Overall, however, there is sufficient common ground to proceed to the Model Statute set out in Part V.

A. The Limits of the Criminal Justice System in Making Social Policy

The criminal justice system is an awkward and blunt tool for making social policy, yet unavoidably, it deals with issues of social policy. Bias-crime laws are not a solution to the overall problem of discrimination in society. At best, bias-crime laws will address only a small aspect of the problem. Focusing too narrowly on bias crimes misses the heart of the

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[59] *See* Gellman, *Sticks and Stones*, *supra* note 1, at 389–91; Susan Gellman, *The First Amendment in a Time That Tries Men's Souls*, 65 Law & Contemp. Probs. 87, 89 (2002).

[60] *See* Gerald N. Rosenberg, The Hollow Hope: Can Courts Bring About Social Change? 336 (1991) (noting that efforts to use the courts to achieve social reform have thus far been disappointing).

[61] *See* Jacobs & Potter, *supra* note 33, at 91.

problem by overlooking the true breadth and depth of bigotry in society. Bigotry and intra-group animus is a serious and multi-tiered social illness, and it would be facile in the extreme to expect bias-crime laws to cure this condition completely or even to address all of its aspects. Some commentators have warned that bias-crime laws will keep us from seeing the full dimensions of racism and other forms of bigotry, and may distract us from non-criminal cures such as civil anti-discrimination laws and education programs.[62] Criminal law enforcement cannot address all aspects of any social pathology and should not be looked to for that purpose. Bias-crime law is no exception.

B. The Role of Harm in Assessing Severity of a Crime and Severity of the Resulting Criminal Sanction

If a legislature could demonstrate greater harm caused when an assault is motivated by bias than when it is not, it would be appropriate for that legislature to select those crimes for enhanced punishment. There are two caveats to this general proposition, however.

First, as developed further in Point of Agreement C below,[63] while expression cannot constitutionally be punished, the extent to which bias-crime regimes may implicate punishment of expression, if they do so at all, is subject to debate. That is, while we agree that harm caused by expression alone cannot be considered in the measurement of aggregate harm, we disagree as to how significant an obstacle this fact presents to the enterprise of punishing bias-motivated crimes. Gellman believes that the additional harm associated with bias crimes, while real, stems solely from the offender's bias motive, which is pure First Amendment activity.[64] Lawrence believes that the additional harm stems from criminal behavior made more serious and more dangerous by the attending intent and motivation behind the behavior.[65] Although this disagreement does not prevent us from reaching the agreement expressed in the Model Statute in Part V, the disagreement is significant and we do not minimize it in this project.

Second, this point of agreement is stated in the conditional form: that is, *if* a legislature can show greater harm, then there is a case for enhanced

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[62] *See, e.g.*, MARTHA MINOW, BREAKING THE CYCLES OF HATRED: MEMORY, LAW AND REPAIR 48 (2002) ("Hate crimes prosecutions zero in on the one with the gun, not the one with the hate-filled talk radio show, the anti-women rap music, the neo-Nazi website, or the homophobic preacher."); Gellman, *Sticks and Stones*, *supra* note 1, at 389; JACOBS & POTTER, *supra* note 33, at 91.

[63] *See infra* Part IV.C.

[64] *See generally* Gellman, *Sticks and Stones, supra* note 1; Gellman, *Hate Crime Laws After* Wisconsin v. Mitchell, *supra* note 1.

[65] *See generally* Frederick M. Lawrence, *The Case For a Federal Bias Crime Law*, 16 NAT'L BLACK L.J. 144 (1999-2000); Lawrence, *The Punishment of Hate*, *supra* note 2; Lawrence, PUNISHING HATE, *supra* note 2.

punishment.[66] Lawrence may be more inclined to believe that harm can be demonstrated and indeed has been demonstrated by social psychologists and sociologists.[67] But both authors agree that a penalty enhancement bias-crime statute requires that the case for greater harm be supported adequately by legislative findings. The case has not yet been adequately established, but we agree it is likely that special harms caused by bias-motivated crimes exist.

With those caveats in mind, it is worthwhile developing this point of agreement with respect to the role of harm in assessing punishment. The severity of a crime is a function of both the culpability of the actor and the harm caused.[68] Much has been said about the role of culpability in the assessment of the seriousness of a crime.[69] The entire thrust of the study and articulation of modern criminal law has been toward a focus on the state of mind or culpability of the accused. This focus does not mean that the results of the conduct are unimportant. Rather, punishment under the criminal law, whether based on a retributive or consequentialist argument, has been critically linked to the actor's mental state.[70]

In contrast to the doctrinally and theoretically well-developed understanding of the relationship between culpability and the level of punishment, the role of harm in determining the level of punishment has been largely unexplored. This discrepancy is surprising, because the intuitive case for harm as a key component in assessing a crime's seriousness is at least as strong as that for culpability. Holding either culpability or harm constant while varying the other demonstrates this point. The objective harm of a victim's death will be associated with the more serious crime of murder or the less serious crime of manslaughter solely on the basis of the actor's culpability.[71] Intentional murder, however, is a more serious crime than intentional assault because of the greater harm caused. Although the offender acts willfully in both instances, the murder victim is dead whereas the assault victim is only injured. The same point may be illustrated further down the homicide scale. Reckless conduct resulting in

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[66] *See, e.g.*, JACOBS & POTTER, *supra* note 33, at 79–88, 90–91.

[67] *See* sources cited *supra* notes 8–11.

[68] *See* Taryn F. Goldstein, *Cultural Conflicts in Court: Should the American Criminal Justice System Formally Recognize a "Cultural Defense"?*, 99 DICK. L. REV. 141, 156 (1994); *see also* Thomas E. Baker & Fletcher N. Baldwin, Jr., *Eighth Amendment Challenges to the Length of a Criminal Sentence: Following the Supreme Court "From Precedent to Precedent,"* 27 ARIZ. L. REV. 25, 26 (1985).

[69] *See* Jeffrey Fagan, *Atkins, Adolescence, and the Maturity Heuristic: Rationales for a Categorical Exemption for Juveniles From Capital Punishment*, 33 N.M. L. REV. 207, 241–42 (2003); Miguel A. Méndez, *Solving California's Intoxication Riddle*, 13 STAN. L. & POL'Y REV. 211, 221–22 (2002); Michael H. Hoffheimer, *Murder and Manslaughter in Mississippi: Unintentional Killings*, 71 MISS. L.J. 35, 105–12 (2001).

[70] *See* LAWRENCE, PUNISHING HATE, *supra* note 2; *see generally* Aaron J. Rappaport, *Rationalizing the Commission: The Political Premises of the U.S. Sentencing Guidelines*, 52 EMORY L.J. 557, 567–68 (2003).

[71] *See, e.g.*, MODEL PENAL CODE § 210 (1985) (demonstrating grades of criminal homicide determined by culpability of the accused).

death most often constitutes the felony of manslaughter.[72] If identical conduct with identical culpability does not result in death, however, the actor is typically guilty of a far lesser crime, often only a misdemeanor such as the Model Penal Code's "reckless endangerment."[73]

One further point should be made with respect to the relationship between culpability and harm and their roles in understanding the severity of a crime. Not only do both the actor's culpability and the harm caused by the actor's conduct play separate roles in comprising the severity of the crime, there is a mutual, interactive relationship between these two factors. An actor's culpability itself sometimes affects the level of harm caused. Consider the distinction between an intentional assault with a baseball bat and an unintended, and perhaps even non-negligent, accident in the midst of a baseball game; assume that the physical injury in the two cases is identical. It is not only true that there is a difference in culpability, as the actor in the first case acted intentionally whereas the actor in the second case at worst acted negligently.

It is also true that the very harm to the two injured parties is different. Although the physical harm is the same, the emotional and psychological harm to the assault victim is likely to be far greater than that caused to the unfortunate baseball catcher who was hit in the head with a bat. The catcher may be somewhat more wary or careful in the next game, but the catcher will not exhibit the victimological pattern of someone who was intentionally attacked with a bat. This will not always be the case. For example, a person injured in a fight with an acquaintance may be less traumatized than one receiving an identical injury at the hands of a deranged stranger attacking random victims. The point remains, however, that the full impact of a crime against the person is both physical and psychological, and the latter will be affected by the culpability of the perpetrator of the crime.

Both authors agree that harm matters in the assessment of the severity of a crime, that harm itself may be a function in part of the perpetrator's culpability, and furthermore, that harm is highly relevant in the determination of the appropriate measurement of a crime. A legislature might rationally conclude that bias-motivated crimes cause a greater level of harm to the individual direct victim and the victim community than an otherwise similar but non-bias motivated crime. Whether this greater harm should be taken into account in assessing criminal punishment is a more contentious question, to which the discussion now turns.

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[72] The Model Penal Code defines "criminal homicide" as "purposely, knowingly, recklessly or negligently causing the death of another." *Id.* § 210.1(1). Criminal homicide that is committed recklessly constitutes manslaughter. *See id.* § 210.3(1)(a).

[73] *See id.* § 211.2 (stating reckless risk of death is a misdemeanor). Twenty-one states follow this approach. *See* Appendix for complete list of state statutes and how each state characterizes reckless endangerment.

C. Thought and Expression May Not Be Punished, but Criminal Intents and Effects May Be Punished

We believe that thought and expression may not be punished, but that criminal intents and effects may. The line between the two, however, is not always easy to draw.

One of the classic criticisms of bias-crime laws is that they punish bigots for holding bigoted ideas, and punish speakers for expressing racist ideas or ideas that are perceived by the listener to be racist. Gellman was one of the very early critics to articulate this argument.[74] Other scholars expressed similar views, particularly where campus speech codes were concerned.[75] Even here, however, there was early common ground. Lawrence, in an argument for the enhanced punishment of bias crimes, nonetheless advocated against the criminalization of racist speech, asserting that the expressive behavior of racist speech could be distinguished from the *mens rea*-based criminal behavior of a bias crime.[76]

We agree, therefore, that racist speech is protected speech. The First Amendment protects behavior that has as its prime motivation the intent to communicate or express a view.[77] That the view is one of bigotry or asserted racial superiority is of no matter.[78] Moreover, that the expression of such views may in some instances cause offense is of no matter.[79] Expression of views that are severely disturbing to others cannot be criminalized constitutionally.[80] Only where behavior is accompanied by culpability, that is, intent to do harm, or *mens rea*, does the behavior cross the line into that which may be constitutionally proscribed.[81] In principle, therefore, we agree that bigoted speech must be protected and that bias-motivated crimes may be punished. Our points of disagreement arise from the application of these shared principles in the context of bias-crime law enforcement.

The areas of agreement and disagreement are well illustrated through discussion of the Supreme Court's decision in *Virginia v. Black*,[82] evaluating Virginia's half-century old cross-burning statute. That statute provided in pertinent part:

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[74] *See* sources cited *supra* note 1.

[75] *See, e.g.*, David E. Bernstein, *Defending the First Amendment from Antidiscrimination Laws*, 82 N.C. L. REV. 223, 240–41 (2003); Robert A. Sedler, *The Unconstitutionality of Campus Bans on "Racist Speech": The View from Without and Within*, 53 U. PITT. L. REV. 631, 683 (1992); Stephen Fleischer, *Campus Speech Codes: The Threat to Liberal Education*, 27 J. MARSHALL L. REV. 709, 738–40 (1994).

[76] *See, e.g.*, Lawrence, *The Hate Crimes/Hate Speech Paradox*, *supra* note 2, at 698–705.

[77] *See* R.A.V. v. City of St. Paul, 505 U.S. 377, 382 (1992).

[78] *See id.*

[79] *See id.* at 414.

[80] *See* Texas v. Johnson, 491 U.S. 397, 414 (1989).

[81] *See* Brandenburg v. Ohio, 395 U.S. 444, 447–48 (1969).

[82] Virginia v. Black, 538 U.S. 343 (2003).

> It shall be unlawful for any person or persons, with the intent of intimidating any person or group of persons, to burn, or cause to be burned, a cross on the property of another, a highway or other public place. Any such burning of a cross shall be prima facie evidence of an intent to intimidate a person or group of persons.[83]

Black arose out of two separate cases involving three defendants. Like textbook examples, the two cases represent the two poles of cross burnings, expression of White supremacy and domestic terrorism.[84] Barry Black led a Ku Klux Klan rally on private property, at the conclusion of which a twenty-five to thirty-foot cross was burned. At his trial, the jurors were instructed that to find Black guilty, they were required to find an "intent to intimidate"[85] and that "the burning of a cross by itself is sufficient evidence from which you may infer the required intent."[86] The cross burning for which Richard Elliott and Jonathan O'Mara were prosecuted was quite different. They attempted to burn a cross on the lawn of an African American, James Jubilee, who had recently moved next door, to "get back" at Jubilee.[87] At trial, the judge originally ruled that the jurors, like those in the *Black* trial, could infer the requisite intent for the crime of cross burning from the act of burning the cross itself.[88] The final instruction given to the jury, however, required the Commonwealth to prove that "the defendant had the intent of intimidating any person or group of persons."[89]

All three defendants appealed to the Supreme Court of Virginia.[90] That court struck down the cross-burning statute, relying heavily on *R.A.V. v. City of St. Paul*,[91] the 1992 case in which the Court struck down a cross-burning ordinance as a content-related proscription in violation of the First Amendment.[92] The United States Supreme Court granted certiorari on two related issues: whether the cross-burning statute violated the First Amendment as interpreted in *R.A.V.* (the *R.A.V.* issue), and whether the statutory presumption that cross burning itself is prima facie evidence of the defendant's intent to intimidate was unconstitutionally overly broad (the overbreadth issue).[93] In an opinion by Justice O'Connor, a majority of the

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[83] VA. CODE. ANN. § 18.2-423 (Michie 1991) (enacted in 1950). The prima facie provision was added to the statute in 1968.

[84] *See* Virginia v. Black, 538 U.S. at 352–58.

[85] *Id.* at 348.

[86] *Id.*

[87] *Id.* at 350.

[88] *See id.* at 350–51.

[89] *Id.* at 351.

[90] *See* Black v. Virginia, 555 S.E.2d 738 (Va. 2001).

[91] 505 U.S. at 377.

[92] *See* Black v. Virginia, 553 S.E.2d at 738.

[93] *See* Virginia v. Black, 538 U.S. at 351–52.

Court upheld the statute on the *R.A.V.* issue. Although there was no majority opinion on the overbreadth issue, a majority of the Court was of the view that the statutory presumption was constitutionally invalid.[94]

A blueprint for a constitutional cross-burning statute emerges from a consideration of the Court's treatment of the two issues, and with it, a clarification of points of both disagreement and agreement between us. The *R.A.V.* issue concerned the holding in that case that the St. Paul cross-burning ordinance was an unconstitutional content-based prohibition, proscribing only that conduct that would cause "anger, alarm or resentment in others on the basis of race, color, creed, religion or gender"[95] and not on any other basis. The Court in *Black* upheld the Virginia statute as a law aimed at *all* cross burnings that are intended to intimidate, regardless of the race or ethnicity of the victim.[96] The overbreadth issue concerned the prima facie evidence clause[97] of the cross-burning statute. Intimidation would have to be proved, not presumed, unless the presumption of intimidation is so easily rebutted that a statute would as a practical matter require the State to prove that the defendant intended to intimidate the victim.[98] Having disagreed on the correctness of the holding in *R.A.V.*, we may also disagree as to the correctness of the Court's refinement of that case in *Black*, but the area of disagreement is narrowing. Whereas Lawrence agrees generally with the approach adopted by the Court in *Black*, Gellman would challenge even a law aimed at all cross burnings, preferring a law aimed at vandalism, threats, harassment, and intimidation, however achieved.

Thus, while the authors agree that Virginia may not constitutionally punish Barry Black and further agree that Virginia may constitutionally punish Richard Elliott and Jonathan O'Mara, Lawrence would permit Virginia to prosecute Elliott and O'Mara for a bias-motivated crime of cross-burning, whereas Gellman would resist this focus on the racial bias-element of the crime. As discussed above, Gellman objects to so much of bias-crime laws as assigns enhanced punishment based solely on the offender's thoughts to conduct that is already a crime.[99] Citing the distinction between "motive" and "intent," Gellman would allow for the punishment of Elliott and O'Mara only because they intended to vandalize property, and threaten and terrify James Jubilee. Lawrence questions a strict distinction between motive and intent, and would permit the punishment of Elliot and O'Mara not only for intending to terrorize Jubilee, but also

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[94] *See id.* at 364–67 (O'Connor, J.); *id.* at 380–87 (Souter, J., concurring in part and dissenting in part).

[95] *R.A.V.*, 505 U.S. at 380.

[96] *See* Virginia v. Black, 538 U.S. at 362–63.

[97] *See* V.A. CODE ANN. § 18.2-423 (Michie 1991).

[98] *See* Virginia v. Black, 538 U.S. at 365–67 (O'Connor, J.); *id.* at 385–86 (Souter, J., concurring in part and dissenting in part); *id.* at 369–72 (Scalia, J., concurring in part and dissenting in part).

[99] *See supra* note 57.

for doing so with a further intent (motivation) to terrorize him because of his race and to cause fear and harm to other African Americans, assuming this intent could be proven.[100]

The authors do not intend to paper over this significant area of disagreement. However, there is a significant point of agreement to be stressed: both authors would permit the punishment of Elliot and O'Mara not only for intending to terrorize Jubilee but also for doing so with a further intent to cause fear and harm to other African Americans. This point of agreement, along with the substantial areas of agreement outlined above, permits progress on the type of joint model legislation explored in Part V below.

D. How Will We Know if Bias-Crime Laws Are "Working"? How Do We Measure Success?

Bias-crime legislation must be more than merely a symbolic expression of legislative recognition of a problem to be a proper exercise of the legislative function. It is therefore appropriate to ask what the measurable goals of a bias-crime law are, to then determine whether or not the law is working to achieve those goals.

To a certain extent, the question whether any criminal law is effective turns on the underlying justification for criminal punishment upon which one relies. A consequentialist will presumably articulate a goal of crime reduction, and will accordingly attempt to measure bias-crime levels after the enactment and implementation of a bias-crime law. A retributivist will ask a different set of more overtly normative questions about whether bias criminals deserve greater punishment than those who commit parallel crimes.

The authors agree, although not for precisely the same reasons, that consequentialist justifications for bias-crime laws are problematic. When it comes to bias crimes, incidence data are seriously flawed. Data compiled by local law enforcement agencies both for their own purposes and for reporting to the Department of Justice pursuant to the federal Hate Crimes Statistics Act[101] suffer from dramatic underreporting, for which there are systemic reasons.[102] At the same time, the reporting of bias crimes may increase as the problem of bias-motivated violence is better understood, with the numbers measuring less the level of the problem than the level of our awareness of the problem. Gellman argues above

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[100] *See* LAWRENCE, PUNISHING HATE, *supra* note 2, at 106–09.

[101] 28 U.S.C. § 534 (2000).

[102] *See* Lawrence, *Enforcing Bias Crimes Laws Without Bias*, *supra* note 2, at 55–60 (discussing how varying definitions of bias-based crime, lack of information from law enforcement agencies that chose not to voluntarily report statistical information to the FBI, and underreporting by bias crime victims who distrust the police or fear retaliation lead to flaws in data concerning the levels of bias-motivated crime).

that regardless of the statistics, supporters can and do argue that bias-crime law was effective, but Lawrence would contend, and Gellman concedes, that opponents can and do similarly make an argument that bias-crime law was not effective, whatever the data appear to indicate. Lawrence in turn concedes that the data that do exist have not demonstrated an effective deterrent effect of bias-crime laws.

The authors agree, although Gellman somewhat reluctantly, that the best answer to the question of how we will know if bias-crime laws are working is to be found in the recognition that, at least for now, we enact criminal laws not only to reduce crime, but also to punish criminal wrongs, and that this punishment may or may not lead to a reduction in crime at any given time. Bias crimes may thus be better understood from the perspective of a harms-based retributive punishment theory. So understood, the justification for bias-crime laws does not require a largely futile effort to determine whether at any particular time levels of bias crimes are rising or falling, or whether we are merely becoming more adept at measuring what, undoubtedly for some time yet to come, will be very hard to measure.

V. Toward a Model Statute Based on the Points of Agreement

The Model Statute that is presented in this Part is perhaps better thought of as a work in progress, and not as a formal model. The following draft legislation and explanatory notes outline the structure of a Model Statute along the lines of agreement developed above. Where the authors have not yet reached agreement, the issue is flagged and discussed in the explanatory notes.

Model penalty enhancement bias-crime statute

A. The penalty for any criminal offense may, at the discretion of the court, be increased by no more than the lesser of [number of years] or [fraction of the penalty applicable to base offense], where any of the following applies and has been proven beyond a reasonable doubt:

(1) the offender acted with the purpose to create terror in a definable community,

(2) the offender acted with the knowledge that he was likely to create a perception of a threat, to the victim or to others, of commission of further crime, by himself or others, against members of a definable community,

(3) the offender acted with the purpose to inflict or with the knowledge that he was likely to inflict serious emotional distress on the victim due to the victim's membership in or relationship to a definable community, or

(4) The offender acted with intent to interfere with another's

a. exercise of constitutional or statutory rights, or
b. enjoyment of or access to public facilities, or
c. enjoyment of or access to equal opportunity

based on the offender's belief as to the victim's membership in or relationship to a definable community.

B. For the purposes of this section,

(1) "terror" means fear of immediate or future serious harm where the victim or others experience that fear because of the victim's real or perceived membership in or relationship to a definable community;

(2) "definable community" includes, but is not limited to, any group defined by, identified by, or having in common race, color, national origin, religion, ethnicity, sexual orientation, or sex.

NOTES:

(a) The statute is directed toward the additional harm that bias crimes cause beyond that caused by the base offense without the bias element, rather than toward the offender's motive. In this way, the statute avoids the First Amendment prohibition against imposing additional penalties for the offender's beliefs and/or expression, while recognizing and punishing the additional harm.

(b) Some categories of groups perceived by the legislature to be frequent targets of bias crimes, such as groups defined by race or sexual orientation, are named in the statute. Limiting the categories to a finite list, however, may create a First Amendment problem of a content- and viewpoint-based list of government-disapproved biases that may be punished, while others are not. Gellman believes that it does; Lawrence does not. To avoid this potential problem, the statute is not limited to whatever categories (if any) a legislature chooses to list as *prima facie* examples, and the State is free to make the case that another category fits the definition of "definable community" in Subparagraph B(2). As the requisite culpability under the statute is either purpose or knowledge, the State would also need to demonstrate that the offender had a level of conscious awareness of or belief as to the victim's membership in or relationship to the putative "definable community."

For example, if an offender targets a doctor who performs abortions, the State should be able to show that "abortion providers" are a definable community within the meaning of the statute, because the attack against this victim was intended to create terror (within the meaning of subparagraph B(1)) among other abortion providers, to create the threat of further crime against other abortion providers, and to interfere with the exercise of constitutional rights. Although it is possible not to list any categories as examples, inclusion of markers such as sex and sexual orientation is

useful because it underscores that "community" is not limited to geographic neighborhoods or membership organizations.

(c) The statute does not require that the offender actually be wholly or primarily motivated by the victim's group membership, where the circumstances are such that the offender intends or knows that the victim or others will nevertheless suffer the same harm as if he were. For example, if an offender, motivated by some wholly unrelated reason, chooses to harass the victim through the use of symbols or language that are identified with bigoted threats, because the offender knows that the symbols or language will create an additional threat of serious harm to the victim or others, then parts of the statute will apply. On the other hand, if the offender does indeed harbor bigotry toward the victim, but nothing in the commission of the offense was intended to or would be likely to cause terror or threat to the victim or others based upon anyone's identity, then the additional harm addressed by the statute does not exist, and the statute does not apply.

(d) The statute does not require in all its parts that the victim actually be, or be perceived by the offender to be, a member of the definable community in question. The inclusion of victims who have a "relationship to a definable community" extends the statute to offenses committed against, for example, a white person married to an African American, a heterosexual supporting same-sex marriage, and a white civil rights activist.

(e) The range of the additional penalty is left blank. It will depend upon whether all offenses, or only selected offenses, are subject to the statute. In no case should the additional penalty be greater than the penalty for the base offense; preferably, it should be substantially lower. The court is empowered to refrain from imposing any additional penalty where circumstances so dictate.

VI. Conclusion

Neither author is fully satisfied with the Model Statute that is presented above, nor is either under the illusion that any Model Statute will solve the problem of racial or ethnic violence in this or any society. It is, however, a start. Moreover, for too long, the commentators for and against bias-crime laws have largely argued past one another. We have endeavored to try something different. While we have not reached full agreement, we have moved in that direction, and where an issue as significant and serious as the one under consideration in this Essay is concerned, that itself is, we think, highly worthwhile. We hope our efforts to engage in this exercise will encourage others to undertake this challenge as well.

APPENDIX

An actor is typically guilty of a far lesser crime, often only a misdemeanor such as the Model Penal Code's "reckless endangerment," if there are identical levels of culpability and conduct with different resulting harms. The Model Penal Code characterizes reckless risk of death as a misdemeanor. Twenty-one states follow this approach. *Compare* ALA. CODE § 13A-6-24(b) (1995) (classifying reckless endangerment a class A misdemeanor) *with* ALA. CODE § 13A-6-3(b) (1995) (classifying manslaughter a class B felony); ALASKA STAT. § 11.41.250(b) (1989) (classifying reckless endangerment a class A misdemeanor) *with* ALASKA STAT. § 11.41.120(b) (1993) (classifying manslaughter a class A felony); ARIZ. REV. STAT. ANN. § 13-1201(b) (West 2001) (classifying reckless endangerment a class 1 misdemeanor or, if there was a substantial risk of imminent death, a class 6 felony) *with* ARIZ. REV. STAT. ANN. § 13-1103(b) (West 2001) (classifying manslaughter a class 2 felony); COLO. REV. STAT. ANN. § 18-3-208(b) (West 1999) (classifying reckless endangerment a class 3 misdemeanor) *with* COLO. REV. STAT. ANN. § 18-3-104(2) (West 1999) (classifying manslaughter a class 4 felony); CONN. GEN. STAT. § 53a-63(b) (1985) (classifying reckless endangerment class A misdemeanor) *with* CONN. GEN. STAT. § 53a-55 (1993) (classifying first-degree manslaughter a class B felony); FLA. STAT. ANN. § 784.05(1) (West 2000) (classifying culpable negligence a second-degree misdemeanor) *with* FLA. STAT. ANN. § 782.07(1) (West 2000) (classifying manslaughter a second-degree felony); 720 ILL. COMP. STAT. 5/12-5(b) (2002) (classifying reckless conduct a class A misdemeanor) *with* 720 ILL. COMP. STAT. 5/9-3(d)(1) (2002) (classifying involuntary manslaughter a class 3 felony); IND. CODE ANN. § 35-42-2-2(b) (Michie 1998) (classifying criminal recklessness a class B misdemeanor) *with* IND. CODE ANN. § 35-42-1-5 (Michie 1998) (classifying reckless homicide a class C felony); LA. REV. STAT. ANN. §§ 14:2(6), 14:39 (West 1997) (classifying negligent injuring a misdemeanor) *with* LA. REV. STAT. ANN. §§ 14:1(4), 14:32(C) (West 1997) (classifying negligent homicide a felony); ME. REV. STAT. tit. 17-A, §§ 211(2), 1252(2)(D) (West 1983) (classifying reckless conduct a class D crime) *with* ME. REV. STAT. ANN. tit. 17-A, §§ 203(1)(A), 1252(2)(A) (West 1983) (classifying manslaughter a class A crime); MD. CODE ANN., CRIMINAL LAW § 3-204(b) (2002) (classifying reckless endangerment a misdemeanor) *with* MD. CODE ANN., CRIMINAL LAW § 2-207 (2002) (classifying manslaughter a felony); NEB. REV. STAT. ANN. §§ 28-309(2), -310(2) (Michie 2003) (classifying recklessly causing injury a class I misdemeanor or, if the injury is serious, a class IIIA felony) *with* NEB. REV. STAT. ANN. § 28-305(2) (Michie 2003) (classifying first-degree manslaughter a class III felony); N.D. CENT. CODE § 12.1-17-03 (2003) (classifying reckless endangerment a class A misdemeanor or, if circum-

stances manifested extreme indifference to the value of human life, a class C felony) *with* N.D. CENT. CODE § 12.1-16-02 (2003) (classifying manslaughter a class B felony); OHIO REV. CODE ANN. § 1903.13(B)-(C) (West 1997) (labeling reckless conduct resulting in physical harm as assault and making it a first-degree misdemeanor) *with* OHIO REV. CODE ANN. § 2903.041(b) (West 1997) (classifying manslaughter a third-degree felony); OR. REV. STAT. § 163.195(2) (2001) (classifying reckless endangerment a class A misdemeanor) *with* OR. REV. STAT. § 163.125(2) (2001) (classifying second-degree manslaughter a class B felony); S.D. CODIFIED LAWS § 22-18-1(2) (Michie 1998) (classifying recklessly causing of bodily injury to another a class 1 misdemeanor) *with* S.D. CODIFIED LAWS § 22-16-20 (Michie 1998) (classifying manslaughter a class 4 felony); TEX. PENAL CODE ANN. § 22.01(a)(1), (b) (Vernon 1994) (defining recklessly causing bodily injury as assault and making it a class A misdemeanor) *with* TEX. PENAL CODE ANN. § 19.04(b) (Vernon 1994) (classifying manslaughter a second-degree felony; UTAH CODE ANN. § 76-5-112(2) (2003) (classifying reckless endangerment a class A misdemeanor) *with* UTAH CODE ANN. § 76-5-205(2) (2003) (classifying manslaughter a second-degree felony); VT. STAT. ANN. tit. 13, § 1025 (1974) (classifying reckless endangerment a misdemeanor) *with* VT. STAT. ANN. tit. 13, § 2304 (1974) (classifying manslaughter a felony); WASH. REV. CODE § 9A.36. 050(2) (2000) (classifying reckless endangerment a misdemeanor) *with* WASH. REV. CODE § 9A.32.060(2) (2000) (classifying first-degree manslaughter a class A felony); WYO. STAT. ANN. § 6-2-504(c) (Michie 2003) (classifying reckless endangerment a misdemeanor) *with* WYO. STAT. ANN. § 6-2-105(b) (Michie 2003) (classifying manslaughter a felony).

Five states grade reckless endangerment as a felony, but in the majority of these jurisdictions it is not graded as severely as manslaughter. *Compare* DEL. CODE ANN. tit. 11, § 604 (2001) (classifying first-degree reckless endangerment a class E felony) *with* DEL. CODE ANN. tit. 11, § 632 (2001) (classifying manslaughter a class B felony); HAW. REV. STAT. ANN. § 707-713(2) (Michie 2003) (classifying first-degree reckless endangerment a class C felony) *with* HAW. REV. STAT. ANN. § 707-702(3) (Michie 2003) (classifying manslaughter a class A felony); MONT. CODE ANN. §§ 45-5-207(2), -208(2) (2003) (classifying criminal endangerment a felony punishable by imprisonment for not more than ten years) *with* MONT. CODE ANN. § 45-5-104(3) (2003) (classifying negligent homicide a felony punishable by imprisonment for not more than 20 years); N.Y. PENAL LAW § 120.25 (McKinney 1987) (classifying first degree reckless endangerment a class D felony) *with* N.Y. PENAL LAW § 125.20 (McKinney 1994) (classifying first degree manslaughter a class B felony); WIS. STAT. § 941.30 (1991–92) (classifying first degree reckless endangerment a class F felony) *with* WIS. STAT. § 940.06 (1991–92) (classifying manslaughter a class D felony).

In one state, both reckless endangerment and manslaughter caused by reckless conduct constitute misdemeanors, with the former offense still graded less severely than the latter. *Compare* 18 PA. CONS. STAT. § 2705 (2000) (establishing recklessly endangering another person as a second-degree misdemeanor) *with* 18 PA. CONS. STAT. § 2504 (2000) (classifying involuntary manslaughter a first-degree misdemeanor except when the victim is under the age of twelve and in the defendant's care).

In three states, reckless endangerment and manslaughter carry the same offense grade. *Compare* ARK. CODE ANN. § 5-13-205 (Michie 1993) (classifying reckless conduct creating a substantial risk of death or serious injury as first-degree assault and making it a class A misdemeanor) *with* ARK. CODE ANN. § 5-10-105 (Michie 1993) (classifying negligent homicide a class A misdemeanor if the negligence was not the result of operating a vehicle while intoxicated); GA. CODE ANN. § 16-5-60(b) (2003) (classifying reckless conduct a misdemeanor) *with* GA. CODE ANN. § 16-5-3(b) (2003) (classifying involuntary manslaughter a misdemeanor if the reckless act was otherwise lawful); KY. REV. STAT. ANN. § 507.060 (Michie 1999) (classifying first-degree wanton endangerment a class D felony) *with* KY. REV. STAT. ANN. § 507.050(2) (Michie 1999) (classifying reckless homicide a class D felony).

There are also six states in which reckless endangerment may or may not carry the same grade as manslaughter, depending on the level of harm and culpability involved in each offense. *Compare* KAN. STAT. ANN. §§ 21-3412, -3414 (1995) (prohibiting the reckless causing of injury under battery statutes and making it a severity level 5 person felony, a severity level 8 person felony, or a class B person misdemeanor depending on the level of injury and whether a weapon was used) *with* KAN. STAT. ANN. § 21-3404 (1995) (classifying involuntary manslaughter a severity level 5 person felony); MISS. CODE ANN. § 97-3-7(1)-(2) (1994) (classifying the reckless causing of bodily injury as assault and making it a crime punishable by a jail term of up to six months, but allowing sentence extensions of up to thirty years if the circumstances manifested extreme indifference to the value of human life or the victim is employed in certain government positions) *with* MISS. CODE ANN. §§ 1-3-11, 97-3-25 (1994) (classifying manslaughter a felony punishable by imprisonment for up to twenty years); MO. REV. STAT. §§ 565-060-070 (2000) (classifying reckless conduct resulting in injury as third-degree assault and making it a class A misdemeanor or, if the injury was serious, labeling it second-degree assault and making it a class C felony) *with* MO. REV. STAT. § 565.024(2) (2000) (classifying first-degree involuntary manslaughter a class C felony and second-degree involuntary manslaughter a class D felony); N.H. REV. STAT. ANN. § 631:3 (1996) (classifying reckless endangerment a misdemeanor if committed without a weapon and a class B felony if committed with a weapon) *with* N.H. REV. STAT. ANN. § 630:3 (1996) (classifying negligent homicide a class B felony or, if the injury

was caused by operating a vehicle while intoxicated, a class A felony); N.J. STAT. ANN. 2C:12-1 (West 1995) (classifying an attempt to recklessly cause injury as assault and making it a disorderly persons offense or, if circumstances manifested extreme indifference to the value of human life, a crime of the second degree) *with* N.J. STAT. ANN. 2C:11-4(b)–(c) (West 1995) (classifying recklessly causing a death a crime of the second degree or, if circumstances manifested extreme indifference to the value of human life, a crime of the first degree); TENN. CODE ANN. § 39-13-103(b) (2003) (classifying reckless endangerment a class A misdemeanor if committed without a weapon and a class E felony if committed with a weapon) *with* TENN. CODE ANN. § 39-13-212(b) (2003) (classifying criminally negligent homicide a class E felony).

Finally, fourteen states do not have a statute that covers reckless conduct generally but instead punish reckless conduct only in certain contexts, such as driving and handling firearms. *Compare* CAL. VEH. CODE § 23103 (West 2000) (making reckless driving a misdemeanor) *with* CAL. PENAL CODE §§ 17(a), 193 (West 2000) (classifying involuntary manslaughter a felony); IDAHO CODE §§ 18-111, 18-3312, 49-1401 (Michie 1997) (classifying reckless driving and reckless use of a firearm resulting in injury misdemeanors) *with* IDAHO CODE § 18-4007 (Michie 1997) (classifying involuntary manslaughter a felony); IOWA CODE §§ 321.277, 712.5, 724.30 (2001) (classifying reckless driving a simple misdemeanor, reckless use of explosives a serious misdemeanor, and reckless use of firearms a class C or D felony) *with* IOWA CODE § 707.5 (2001) (classifying involuntary manslaughter an aggravated misdemeanor or, if the act was illegal, a class D felony); MASS. GEN. LAWS ch. 90, § 24(2)(a) and ch. 274, § 1 (1998) (classifying reckless driving a misdemeanor) *with* MASS. GEN. LAWS ch. 265, § 13 (1998) (classifying manslaughter a felony); MICH. COMP. LAWS §§ 257.626, 750.8, 752.861 (2003) (classifying reckless driving and reckless use of firearms misdemeanors) *with* MICH. COMP. LAWS §§ 750.321, 750.324 (2003) (classifying manslaughter a felony and negligent vehicular homicide a misdemeanor); MINN. STAT. §§ 169.13, 609.66 (2002) (classifying reckless driving and reckless handling of dangerous weapons misdemeanors) *with* MINN. STAT. §§ 609.02(2), 609.205 (2002) (classifying second-degree manslaughter a felony); NEV. REV. STAT. § 484.377 (2003) (classifying reckless driving a category B felony, but only if it causes either death or serious bodily injury) *with* NEV. REV. STAT. § 200.090 (2003) (classifying involuntary manslaughter a category D felony); N.M. STAT. ANN. §§ 30-1-6, 66-8-113 (Michie 2003) (classifying reckless driving a petty misdemeanor) *with* N.M. STAT. ANN. § 30-2-3(B) (classifying involuntary manslaughter a fourth-degree felony); N.C. GEN. STAT. § 20-140 (2003) (classifying reckless driving a class 2 misdemeanor) *with* N.C. GEN. STAT. § 14-18 (classifying involuntary manslaughter a class F felony); OKLA. STAT. tit. 47, § 11-901 and tit. 21, §§ 5–6 (2001) (classifying reckless driving a misdemeanor) *with* OKLA. STAT.

tit. 21, §§ 716, 722 (classifying second-degree manslaughter a felony); R.I GEN. LAWS §§ 11-1-2, 31-27, 1.1 (2002) (classifying reckless driving so as to endanger a felony punishable by imprisonment for no more than five years) *with* R.I. GEN. LAWS § 31-27-1 (2002) (classifying reckless driving resulting in death a felony punishable by imprisonment for no more than thirty years); S.C. CODE ANN. §§ 16-1-10, 56-5-2920 (Law. Co-op. 1991) (classifying reckless driving a misdemeanor) *with* S.C. CODE ANN. § 16-3-60 (Law. Co-op. 2003) (classifying involuntary manslaughter a felony); VA. CODE ANN. §§ 18.2-51.3(B), -51.6(A) (Michie 1996) (classifying reckless endangerment a class 6 felony when it involves driving while intoxicated and the reckless handling of firearms a class 1 misdemeanor) *with* VA. CODE ANN. § 18.2-36 (Michie 1996) (classifying manslaughter a class 5 felony); W. VA. CODE ANN. §§ 17C-5-3, 6-11-1 (Michie 2000) (classifying reckless driving a misdemeanor punishable by imprisonment of no more than ninety days on a first offense) *with* W. VA. CODE ANN. § 61-2-5 (Michie 2000) (establishing involuntary manslaughter as a misdemeanor punishable by imprisonment for not more than one year).

SYMPOSIUM ESSAY

THE INHERENT UNFAIRNESS OF HATE CRIME STATUTES

DAVID GOLDBERGER*

Hate crime sentencing enhancement statutes create new offenses by making biased motivation an additional element of established underlying offenses. Once biased motivation is proven as an element of the offense, such statutes explicitly obligate or implicitly pressure judges to enhance the penalty for a crime, without regard to mitigating circumstances. Advocates favor such penalty enhancements because they send a message that hate crimes are worthy of special punishment, simultaneously deterring offenders and reassuring victims. In this Essay, Professor Goldberger criticizes hate crime sentencing enhancement statutes for granting prosecutors inordinate power over plea bargaining and sentencing. Because hate crime charges increase the applicable sentencing range or maximum, prosecutors can dictate the penalty defendants face simply by choosing whether to charge them with the hate crime or the underlying crime. This discretion over charge selection gives prosecutors a powerful chip in the plea bargaining process. At the same time, defendants feel pressure to avoid trial on a hate crime charge for fear of the likely presentation to the jury of inflammatory evidence of bias. Professor Goldberger concludes that legislatures should abandon hate crime sentencing enhancement statutes that include biased motivation as an element of the statutorily defined offense. He urges a return to a judge-based sentencing regime in which judges consider biased motive as an aggravating circumstance, but simultaneously are free to give mitigating circumstances appropriate weight. The result would restore the fairness guarantees provided by the criminal justice system's intended division of power between prosecutors and judges, leaving prosecutors to prosecute and judges to judge and to sentence.

America's embrace of hate crime statutes as weapons against crimes motivated by bias is proving to be a well-intentioned mistake. These statutes are applauded because they often require judges to impose enhanced penalties when biased motive is proven as an element of the offense, as opposed to permitting judges to treat biased motive as one factor among many to be considered at sentencing. Hate crime statutes are claimed to be an appropriate legislative response to the problem of bias-motivated crimes because these crimes are inherently worse than parallel crimes not

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motivated by bias.[1] Unfortunately, such statutes are not the valuable law enforcement tools their advocates claim them to be. They are not merely a strong social statement disapproving of bias-based crimes. On the contrary, because hate crime statutes limit judicial sentencing discretion, they serve as powerful prosecutorial weapons that transfer control over criminal proceedings from judges to prosecutors in a way that undermines the integrity of the criminal justice system.

The transfer of control over criminal proceedings from judges to prosecutors caused by hate crime statutes originated with the sentencing reform movement of the 1970s and 1980s. During that period, Congress and many state legislatures enacted sentencing laws that sharply limited judicial sentencing discretion.[2] One of the original purposes of enacting laws to limit this discretion was to achieve sentencing uniformity.[3] Using these initial reforms as their model, jurisdictions across the United States have adopted hate crime statutes requiring, or at least pressuring, judges to impose increased penalties for established crimes whenever the prosecution proves, as an additional element of the offense, that the defendant's crime was motivated by bias or prejudice against the victim.[4] Thus, a determination that biased motive is an element of the offense has the effect of either obligating or pressuring a conscientious sentencing judge to enhance the penalty for the crime whether or not there are mitigating circumstances.

The advocates of hate crime statutes justify them by pointing to crimes like the 1998 bias-based murders of James Byrd, Jr. in Jasper, Texas, because of his race, and of Matthew Sheppard in Laramie, Wyoming, because of his sexual preference.[5] These advocates argue that such statutes are desirable because, by imposing heavy penalties, they send a message that society regards hate crimes as unacceptable and worthy of special punishment.[6] Advocates assert that hate crime statutes are especially important because they simultaneously send a deterrent message to potential offenders and reassure actual and potential victims that they are not society's outsiders.[7]

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[1] *See generally* FREDERICK M. LAWRENCE, PUNISHING HATE: BIAS CRIMES UNDER AMERICAN LAW 175 (1999).

[2] *See* Gary T. Lowenthal, *Mandatory Sentencing Laws: Undermining the Effectiveness of Determinate Sentencing Reform*, 81 CAL. L. REV. 61, 69 (1993).

[3] U.S. SENTENCING GUIDELINES MANUAL ch. 1, pt. A, introductory cmt. n.3 (2003); *see also* Mistretta v. United States, 488 U.S. 361, 365–67 (1989).

[4] *See infra* notes 32–34 and accompanying text.

[5] *Statement of Anti-Defamation League on Bias Motivated Crimes and H.R. 1082—The Hate Crime Prevention Act*, 21 CHICANO-LATINO L. REV. 53, 54 (2000); *see also* Christopher Chorba, Note, *The Danger of Federalizing Hate Crimes: Congressional Misconceptions and the Unintended Consequences of the Hate Crimes Prevention Act*, 87 VA. L. REV. 319, 328–32 (2001).

[6] LAWRENCE, *supra* note 1, at 45–63.

[7] *Id.* at 169.

In their enthusiasm, advocates of hate crime statutes have routinely ignored at least two basic failings that severely undercut their argument. First, such statutes obligate or strongly encourage sentencing judges to impose remarkably harsh penalties without particularized consideration of the specific circumstances of each individual case.[8] Some current hate crime penalty enhancements even double or triple the penalty that would be imposed for the same criminal conduct without proof of the defendant's biased motivation.[9] Second, hate crime statutes have the practical consequence of expanding the already dominant control that prosecutors exercise over sentencing and plea bargaining.[10] As this Essay will demonstrate, the ability of prosecutors to dominate sentencing and plea bargaining with the threat of extremely heavy sentences creates a strong incentive for defendants to plead guilty, even if they are innocent. The incentive is generated when a risk-averse defendant prefers the certainty of a lighter sentence, resulting from a plea bargain, to the possibility of a much heavier sentence triggered by a hate crime statute's sentencing enhancement.

The adverse impact that hate crime statutes have had on the operation of the criminal justice system has been evident from the moment that the Anti-Defamation League (ADL) first proposed its model hate crime legislation in 1981.[11] This model statute created a new criminal offense by adding the element of biased motive to an existing offense. According to its provisions, when biased motive is proven, "the degree of criminal liability should be at least one degree more serious than that imposed for commission of the underlying offense."[12] Thus, the model statute could, depending on the overall sentencing scheme, automatically enhance the penalty so that it will be significantly more severe than the penalty for identical conduct not motivated by bias. When initially proposed, the model statute contained a simple innovation. It shifted consideration of biased motive from the sentencing phase, where it was a discretionary factor, to the adjudicatory phase where, when proven, it could automatically trigger a heavier sentence or higher sentencing range.[13]

At first look, the model statute seemed quite sensible. Bigotry is a major societal problem, and crimes motivated by bigotry can be fairly characterized as worse than similar crimes devoid of such a reprehensible moti-

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[8] *See* Anti-Defamation League, *Hate Crimes Laws*, I & II (2001), *available at* http://www.adl.org/99hatecrime/penalty.asp (last visited Apr. 19, 2004).

[9] *See infra* notes 35–41 and accompanying text.

[10] The sentencing reforms of the late 1970s and 1980s also led to harsher sentences for other offenses. *See* Lowenthal, *supra* note 2, at 119–20. For the most part, however, such sentences were the result of multiple aggravating and mitigating factors taken into account at sentencing. *See id.* The mandatory enhancements that characterize hate crimes and the like are designed to override all mitigating circumstances. *See id.*

[11] Anti-Defamation League, *supra* note 8, at I.

[12] *Id.* at II(b).

[13] Apprendi v. New Jersey, 530 U.S. 466, 477–90 (2000).

vation. As observed by Chief Justice Rehnquist, "Deeply ingrained in our legal tradition is the idea that the more purposeful is the criminal conduct, the more serious is the offense, and, therefore, the more severely it ought to be punished."[14] As a consequence, in a political democracy, it is permissible for legislatures to single out for special punishment "bias-inspired conduct because this conduct is thought to inflict greater individual and societal harm."[15] Closer examination reveals, however, that the sentencing enhancements employed by current hate crime statutes do not take into account the harmful structural impact that automatic sentencing enhancements have on the authority of judges. Nor do hate crime laws take into account the fact that by tying the hands of judges at sentencing, they undermine sentencing fairness and the reliability of determinations of guilt or innocence in hate crime cases.

In theory, decision-making in criminal cases is based on the "adversarial system of justice."[16] Decisions of guilt, innocence, and punishment are delegated to "a neutral decision maker who is to render a decision in light of the materials presented by the adversary parties."[17] The prosecution and defense have the responsibility to gather the facts and determine how best to present their cases. "Each party is expected to present the facts and interpret the law in a light most favorable to its side, and through searching counter-argument and cross-examination, to challenge the soundness of the presentations made by the other side."[18] The judge has the duty to act as a neutral decision-maker who carefully supervises the proceedings and assures fairness by making rulings that check any excesses by the prosecution or defense. Because the defendant is presumed innocent until proven guilty, the prosecutor has an ethical obligation to temper his adversarial zeal by acting to "seek justice and not merely to convict."[19] Finally, it is assumed that in the event of a guilty verdict, the impartial judge will impose an individualized sentence that fits the circumstances of the crime and the defendant.[20]

Unfortunately, this abstract theory is subverted by the reality of such modern sentencing reforms as hate crime statutes, which, by establishing defined sentencing consequences, aggrandize the already powerful role of prosecutors. Prior to the 1970s, criminal sentencing was largely based on judicial discretion.[21] Under that regime, judges had discretion to consider the individual circumstances of each offense and each offender; they could

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[14] Wisconsin v. Mitchell, 508 U.S. 476, 485 (1993) (quoting Tison v. Arizona, 481 U.S. 137, 156 (1987)).

[15] *Id.* at 487–88.

[16] WAYNE R. LAFAVE ET AL., CRIMINAL PROCEDURE 31 (3d ed. 2000).

[17] *Id.*

[18] *Id.*

[19] STANDARDS FOR CRIMINAL JUSTICE: CRIMINAL JUSTICE PROSECUTION FUNCTION AND DEFENSE FUNCTION STANDARDS, Standard 3-1.2(c) (1993).

[20] LAFAVE ET AL., *supra* note 16, at 23–24.

[21] KATE STITH & JOSÉ A. CABRANES, FEAR OF JUDGING 14–29 (1998).

tailor the penalty to fit the crime. Thus, they were free to choose among probation, an appropriate jail term, or an indeterminate sentence ending when parole authorities determined that the inmate was sufficiently rehabilitated to justify release.[22] Starting in the late 1970s and early 1980s, however, shortly before the development of the ADL's model hate crime statute, many jurisdictions began to reconfigure the sentencing process legislatively by restricting judicial discretion with determinate and mandatory sentencing laws.[23]

Reconfiguration occurred because liberals thought that discretionary sentencing led to unequal sentences for the same crimes and conservatives believed that judges were too lenient.[24] Both liberals and conservatives joined forces to enact sentencing reforms, the result of which reduced radically the role of the judiciary in sentencing.[25] These reforms generated a sentencing regime in most jurisdictions characterized by the requirement that judges impose determinate sentences or sentences within narrow ranges.[26] The sentences are augmented by mandatory sentencing enhancements that are triggered whenever prosecutors prove that the crime charged includes an aggravating element.[27] Jurisdictions not imposing determinate sentences or mandatory sentencing ranges often add mandatory enhancements requiring that a statutorily specified number of years be added to the sentence if the offense contains an element the legislature has designated as especially blameworthy.[28] As a practical matter, these reforms have resulted in longer sentences for most crimes than were imposed before the reforms.[29] Currently, the United States has an incarceration rate seven times greater than England, Italy, France, or Germany.[30]

Using the ADL's model statute as a point of departure, hate crime statutes follow the trend set by other sentencing reform laws. Generally, they require the imposition of sentencing enhancements that operate in one of three ways.[31] First, in some jurisdictions, proof of biased motive as

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[22] *Id.* at 18–22, 38–39.

[23] Lowenthal, *supra* note 2, at 61–62.

[24] STITH & CABRANES, *supra* note 21, at 29–35.

[25] At the federal level, this reform effort led to the establishment of a determinate sentencing system in which the Federal Sentencing Commission established narrow sentencing ranges with guidelines confining judicial sentencing discretion. Lowenthal, *supra* note 2, at 63. During the 1970s, many state legislatures adopted their own variants of determinant sentencing. For a discussion of determinate sentencing at the state level, see generally LAFAVE ET AL., *supra* note 16, at 1210–14.

[26] LAFAVE ET AL., *supra* note 16, at 1210–14.

[27] Lowenthal, *supra* note 2, at 70–71.

[28] *See, e.g.*, OHIO REV. CODE ANN. § 2941.145 (Anderson 2003) (imposing a three-year mandatory prison sentence for possession or use of a gun during a crime).

[29] Lowenthal, *supra* note 2, at 72.

[30] Justice Anthony M. Kennedy, Address at the 2003 Annual Meeting of the American Bar Association (Aug. 9, 2003), *available at* http://www.supremecourtus.gov/publicinfo/speeches/sp_08-09-03.html (last visited Apr. 19, 2004).

[31] Some states combine the three approaches in their penalty enhancement statutes. *See infra* notes 32–34 and accompanying text.

an element of a criminal offense automatically adds a specific number of years to the length of the sentence for the underlying felony.[32] Second, in other jurisdictions, a hate crime conviction automatically and substantially changes the sentencing range by simultaneously increasing both the minimum and the maximum sentence for an offense.[33] Third, in yet other jurisdictions, a conviction under a hate crime statute automatically increases the maximum sentence the defendant can receive.[34]

For example, Alabama's hate crime statute provides for a mandatory enhancement of an additional fifteen years when the felony is proven to be motivated by "the victim's actual or perceived race, color, religion, national origin, ethnicity, or physical or mental disability."[35] California's hate crime laws use an alternative approach. There, both the minimum and maximum sentences are increased. Thus, a defendant charged with first-degree murder faces a penalty of anywhere from twenty-five years to life, life imprisonment without parole, or the death penalty.[36] If, however, the same defendant is charged with hate crime murder, the only possible penalties become death or mandatory life without parole.[37] Finally, Ohio's hate crime statute employs the third approach. It increases the length of the maximum sentence that can be imposed without modifying the minimum sentence.[38] Thus, if an Ohio defendant commits aggravated menacing (i.e., knowingly causes another to believe that the offender will cause serious physical harm to the person or property of another) by verbally threatening another, the maximum penalty that can be charged is a first-degree misdemeanor punishable by up to six months in jail.[39] If, however, the defendant engages in the same conduct but was motivated by racial, religious, or ethnic bias, the maximum sentence that he can be charged becomes ethnic intimidation, a fifth-degree felony punishable by up to one year in jail, which is double the maximum sentence for the underlying offense.[40] Similarly, Florida's hate crime statute triples the maximum pen-

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[32] *See, e.g.*, ALA. CODE § 13A-5-13 (1994); GA. CODE ANN. § 16-11-37 (2002); R.I. GEN. LAWS § 12-19-38 (2002); TEX. PENAL CODE ANN. § 12.47 (Vernon 2003); VA. CODE ANN. § 18.2-57 (Michie 2002).

[33] *See, e.g.*, CAL. PENAL CODE § 190.2(a) (West 1999); HAWAII REV. STAT. §§ 706-661 & 706-662 (2002); IOWA CODE § 712.9 (2003); NEB. REV. STAT. § 28-111 (2002); N.Y. PENAL LAW § 485.10 (McKinney 2003); R.I. GEN. LAWS § 12-19-38 (2002).

[34] *See, e.g.*, ALASKA STAT. § 12.55.155(a)(22) (Michie 2003); ARIZ. REV. STAT. ANN. § 13-702 (West Supp. 2003); CONN. GEN. STAT. § 53a-40a (2003); DEL. CODE ANN. tit. 11, § 1304 (2003); FLA. STAT. ANN. § 775.085 (West 2002); 730 ILL. COMP. STAT. 5/5-5-3.2 (2003); MD. CODE ANN., CRIM. § 10-305 (2002); MINN. STAT. § 609.749 (2002); MONT. CODE ANN. § 45-5-221 (2002); N.M. STAT. ANN. § 31-1813-3 (2003); OHIO REV. CODE ANN. § 2927.12 (Anderson 2003); 18 PA. CONS. STAT. § 2710 (2003); TEX. PENAL CODE ANN. § 12.47 (Vernon 2003); WIS. STAT. § 939.645 (2003).

[35] ALA. CODE § 13A-5-13 (1994).

[36] CAL. PENAL CODE § 190(a) (West 1999).

[37] *Id.* § 190.2(a)(16).

[38] OHIO REV. CODE ANN. § 2927.12 (Anderson 2003).

[39] *Id.* § 2903.21.

[40] *Id.* § 2929.14(A)(5).

alty that could be imposed for the parallel offense in the absence of a finding of biased motive.[41] In short, a defendant convicted of a hate crime can usually count on a greater sentence than would have been imposed if he had been convicted only of the underlying offense.

It might be argued that hate crime statutes imposing increased *maximum* sentences but not increased *minimum* sentences are not as objectionable because they merely increase the maximum sentence a judge can impose. According to this argument, such statutes actually expand rather than limit judicial discretion. This argument is mistaken because it underestimates the actual power of hate crime and other similar sentencing enhancement laws to govern judicial behavior. If judges ignore the authorized enhancement, then they disregard the legislative decision to define hate crimes as aggravated offenses. This, in turn, means that the judges ignore their duty to apply the laws as they are written. According to Wisconsin Supreme Court Justice Shirley Abrahamson, judges feel duty-bound to apply such laws whether they like them or not. She explains that judges take the obligation imposed by hate crime statutes quite seriously even when they believe such laws to be unwise. "After all, judges cannot declare void those laws with which we disagree or to which we are opposed. Our personal views of the soundness of legislation are, in fact, irrelevant."[42]

The duty of judges to enforce hate crime laws faithfully results in a distortion of the adversarial system of justice. The distortion occurs because hate crime laws establish separate offenses with enhanced penalties that can be charged in addition to the charges based on established, underlying crimes. As a consequence, the prosecutor has discretion to charge a defendant with a single offense or, in the alternative, with two offenses: the hate crime offense plus the underlying offense. These options give the prosecutor power to control potential sentencing outcomes.[43]

The prosecutor accumulates power from the presence of the sentencing enhancement laws because, through charge selection, the prosecutor, rather than the judge, determines the applicable sentencing range or maximum penalty.[44] When the law of the jurisdiction requires judges to select the

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[41] FLA. STAT. ANN. §§ 775.085, 775.082 (West 2002).

[42] Shirley S. Abrahamson et al., *Words and Sentences: Penalty Enhancement for Hate Crimes*, 16 U. ARK. LITTLE ROCK L. REV. 515, 526 (1994).

[43] Angela J. Davis, *Prosecution and Race: The Power and Privilege of Discretion*, 67 FORDHAM L. REV. 13, 23 (1998) (arguing that the charging decision practically predetermines the outcome and sentence where judicial sentencing discretion is restricted by law); Jeffrey Standen, *Plea Bargaining in the Shadow of the Guidelines*, 81 CAL. L. REV. 1471, 1475 (1993) (arguing that charging decisions give prosecutors control over sentencing outcomes).

[44] This power is particularly problematic in hate crime cases because, unlike sentencing enhancements for offenses with objective elements like armed robbery, the added element that creates the hate crime—the defendant's biased motive—is subjective in nature. As a consequence, the evidence introduced against the defendant at trial is likely to include his bigoted statements or offensive associations with activist groups widely viewed as

sentence from a narrow sentencing range, they must do so. If a defendant is found guilty of only the underlying crime, the judge must sentence based on the sentencing provision applicable to that offense. If, however, the defendant is found guilty of the enhanced hate crime, the judge can sentence based only on the sentencing enhancement provision applicable to the hate crime. The judge is obliged by law to increase the length of the sentence if the sentencing enhancement statute requires additional time to be added to the defendant's sentence or increases the severity of the sentencing range.

Even if the law of the jurisdiction sets a higher maximum sentence without raising the minimum sentence, a conscientious judge is under an obligation to impose an enhanced sentence reflecting the legislature's judgment that hate crimes deserve more severe punishment. This duty is made clear by Justice Abrahamson of the Supreme Court of Wisconsin, a state with a hate crime statute that increases the maximum sentence without increasing the minimum sentence.[45]

In the course of discussing why the hate crime penalty imposed in *State v. Mitchell*[46] was legally proper, even if not to her personal liking, Justice Abrahamson explains that judges in jurisdictions with hate crime sentencing enhancement statutes believe they have a duty to impose the enhanced sentences created by such statutes, whether or not they believe them to be just, because it is the will of the legislature.[47] In Justice Abrahamson's view, a judge in a jurisdiction with hate crime statutes that increase maximum penalties without increasing minimums is obliged to impose the enhancement even though, theoretically, she could ignore it.[48] She believes that if a judge in such a jurisdiction ignores the enhancement, she fails in her duty to enforce the laws of the jurisdiction.[49] To the extent that other conscientious judges share Justice Abrahamson's view, their sentencing decisions in hate crime cases are structured or, at the very least, are constrained by the judicial obligation to apply the law as the legislature intended. As a consequence, a judge's sentencing discretion is limited by the prosecutor's decision whether to bring a hate crime charge in the first place.

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holding biases based on race, religion, gender, sexual preference, or national origin. Juries hearing such evidence may be tempted to convict based on the perception that the defendant is a bad person rather than based on his actual conduct. *See infra* notes 77–82 and accompanying text.

[45] WIS. STAT. § 939.645 (2003).

[46] 485 N.W.2d 807 (Wis. 1992), *rev'd*, 508 U.S. 476 (1993).

[47] *See* Abrahamson et al., *supra* note 42, at 526. Notwithstanding her apparent questions about the wisdom of hate crime laws, *see id.* at 526–27, Justice Abrahamson dissented from the decision of the Wisconsin Supreme Court to reverse the hate crime conviction of the defendant in *Mitchell*, 485 N.W.2d at 818–19 (Abrahamson, J., dissenting).

[48] *See* Abrahamson et al., *supra* note 42, at 526.

[49] *See id.*

Prosecutors' control over charging and sentencing also puts them in command of the entire adjudicatory phase of a criminal case, because control over charging means control over plea bargaining, the process by which more than ninety percent of all criminal cases are disposed.[50] Sometimes a plea bargain is struck so the prosecution is guaranteed a victory and the defendant is assured of a conviction for a lesser offense carrying a shorter penalty. In other cases, a deal is struck simply because the charges are serious and the defendant pleads guilty so the prosecutor will support a sentence shorter than the maximum allowed by law, even though the charge remains the same. Whatever the reason, plea bargaining completely bypasses trial and moves a case to the sentencing phase, where the judge's sole authority is to select among statutorily limited sentencing options.

Prosecutors' ability to dominate plea bargaining in jurisdictions that limit judicial sentencing discretion is based on their control over charge selection, which gives them an extraordinarily powerful bargaining chip in the plea-bargaining process.[51] Confronted with two charges, one of which carries a heavy mandatory penalty, or at least significant risk of a heavy penalty, the defendant faces enormous pressure to plead guilty to the lesser charge rather than go to trial and risk a much heavier sentence. Indeed, according to Gary Lowenthal, the bargaining chip is so powerful that the risk of a heavy sentence mandated by the particular offense charged "pressure[s] defendants, who might otherwise test the state's evidence, into accepting guilty pleas."[52] In light of this phenomenon, a prosecutor who is uncertain about the strength of his case has a strong incentive to maximize his bargaining leverage by charging every plausible offense that carries a heavy penalty in order to pressure a risk-averse defendant into pleading guilty to a lesser crime.

The same problem exists, if to a lesser degree, in a determinate sentencing regime that bases the penalty on an assessment of the defendant's actual conduct at the time of the offense rather than on the charge to which the defendant pleads guilty.[53] In such a system, known as conduct-based or real-offense-based sentencing, the sentence is determined based on a

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[50] Stephanos Bibas, *Judicial Fact-Finding and Sentence Enhancements in a World of Guilty Pleas*, 110 YALE L.J. 1097, 1150 (2001) (citing STATISTICS DIV., ADMIN. OFFICE OF THE U.S. COURTS, STATISTICAL TABLES FOR THE FEDERAL JUDICIARY: SEPTEMBER 30, 2000, tbl.D-4 (2001)).

[51] STITH & CABRANES, *supra* note 21, at 130; *see also* Bibas, *supra* note 50, at 1151–67.

[52] Lowenthal, *supra* note 2, at 78. As evidence of this type of pressure on defendants, Lowenthal cites the decreases in the percentage of cases proceeding to trial during the years following each of three mandatory sentence enhancement enactments in Arizona. *Id.* at 78–85.

[53] The Federal Sentencing Guidelines use a modified "real offense" approach to sentencing. For a discussion of this approach, see U.S. SENTENCING GUIDELINES MANUAL ch. 1, pt. A, introductory cmt. n.4(a) (2003).

post-trial or post-plea presentencing report prepared by a probation officer.[54] Included in the report is a description of the defendant's actual conduct at the time of the offense, which must be taken into account when determining the sentence. "Actual conduct" sentencing supposedly limits the prosecutor's ability to control sentencing by charge selection.[55] This purported limit arises from the judge's power to sentence based on "actual" offense facts rather than relying wholly on the facts set out in the plea agreement.

In actuality, however, prosecutors engaged in plea bargaining in conduct-based sentencing jurisdictions are often able to bypass the theoretical constraints on their power. After reaching a plea agreement, they can retain substantial control over sentencing by actively withholding from probation officers information that would lead to a sentence greater or lesser than the one agreed upon as part of the plea bargain. Studies indicate that federal prosecutors, at least, are often willing to exercise such control. According to a study of plea bargaining under the Federal Sentencing Guidelines reported by Stith and Cabranes, only twenty percent of the federal probation officers surveyed believed that the stipulations and calculations in plea agreements were accurate and complete in at least eighty percent of the cases.[56] Another twenty percent of the probation officers surveyed believed that such stipulations were inaccurate three-fourths of the time.[57]

In sum, the prosecutor's ability to control sentencing and plea bargaining carries with it the power to circumvent the trial's procedural safeguards, which are designed to assure the integrity of the outcome. As observed by Professor John Langbein, "Plea bargaining merges [these] accusatory, determinative, and sanctional phases of the procedure in the

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[54] STITH & CABRANES, *supra* note 21, at 128–30.

[55] *Id.* at 132–33.

[56] *Id.* at 138. The nationwide survey was conducted by the chief federal probation officer in the District of Massachusetts, in 1996. *Id.*

[57] *Id.* Stith and Cabranes continue:

> The survey also suggested that prosecutors play a larger role in determining the scope and content of presentence reports than the Sentencing Commission had anticipated. The description of the offense in most presentence reports in most districts is prepared largely or exclusively on the basis of information provided by the prosecutor. Fewer than half of the chief probation officers responding to the survey reported that prosecutors provide all of the available information.

Id. at 138–39 (footnotes omitted).

Lowenthal cites a study by the U.S. Sentencing Commission to suggest the degree to which prosecutors have been able to use plea bargaining to bypass purported limits on their control over sentencing in conduct-based systems, but in order to *shorten* rather than lengthen sentences. According to the study, "nearly forty percent of the actual sentences imposed [in a sample of federal guidelines cases] were less than the prescribed statutory minimum." Lowenthal, *supra* note 2, at 109 (citing U.S. SENTENCING COMM'N, MANDATORY MINIMUM PENALTIES OF THE FEDERAL CRIMINAL JUSTICE SYSTEM 59 (1991)).

hands of the prosecutor."[58] When this occurs, little is left of the adversarial system of justice.

Admittedly, the problem of excessive prosecutorial control over criminal proceedings is not unique to hate crime prosecutions. Such distortions of the criminal justice system can occur in any criminal case where the judge's control over sentencing and plea bargaining is severely limited by law. The distortions that result from excessive prosecutorial control, however, are even greater in hate crime cases than in run-of-the-mill criminal cases. Hate crime cases are distinctive in that their sentencing enhancements are based on allegations that the defendant was subjectively motivated by bias. They do not turn on objective facts such as the amount of money stolen[59] or whether a gun was used during the crime.[60]

Because hate crimes are based on the defendant's motivation of bigotry, they are more likely to be emotionally charged, attracting press attention and provoking strong feelings.[61] As a result, prosecutors anxious for public approval have a powerful incentive to treat a hate crime defendant more harshly than a defendant charged with a less emotionally charged but similarly serious crime. This incentive exists because most prosecutors are elected officials whose publicly visible conduct in office has an enormous impact on whether they will be reelected.[62] Indeed, the publicity value and voter appeal of taking a hard line in high visibility cases is so well known that prosecutors typically run on a "get tough on crime" platform.[63] Thus, tough action in hate crime cases is likely to be rewarded with press attention and public support.[64] Moreover, prosecuting under hate crime statutes is likely to gain particular approval from the groups whose members are frequently victims of hate crimes.[65]

Prosecutors interested in attracting publicity can hardly be blamed for taking advantage of the notoriety that results from charging a defen-

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[58] John H. Langbein, *Torture and Plea Bargaining*, 46 U. CHI. L. REV. 3, 18 (1978).

[59] *E.g.*, U.S. SENTENCING GUIDELINES MANUAL § 2B1.1(b)(1) (2003).

[60] *E.g.*, *id.* § 2B3.1(b)(2).

[61] *See* STEVEN M. CHERMAK, VICTIMS IN THE NEWS: CRIME IN THE AMERICAN NEWS MEDIA 54–57 (1995). Indeed, press coverage of the Byrd and Shepard murders in 1998 was so extensive that commentators on hate crime laws were able to call them to the minds of readers years later simply by naming the victims, without recounting the actual events. *See, e.g.*, Lu-in Wang, *Unwarranted Assumptions in the Prosecution and Defense of Hate Crimes*, CRIM. JUST., Fall 2002, at 4, 6.

[62] Robert L. Misner, *Recasting Prosecutorial Discretion*, 86 J. CRIM. L. & CRIMINOLOGY 717, 728–36 (1996) (describing the history of prosecutors as elected officials and the local nature of their constituencies).

[63] Davis, *supra* note 43, at 58–59.

[64] *Cf.* Wainwright v. Witt, 469 U.S. 412, 459 (1985) (Brennan, J., dissenting) (noting the dangers of political pressure in the context of capital cases).

[65] *See* JAMES B. JACOBS & KIMBERLY POTTER, HATE CRIMES: CRIMINAL LAW & IDENTITY POLITICS, 65–68 (1998) [hereinafter JACOBS & POTTER, LAW & IDENTITY] (arguing that victimized groups are sensitive to the threat of victimization, which motivates them to political action); James B. Jacobs & Kimberly A. Potter, *Hate Crimes: A Critical Perspective*, 22 CRIME & JUST. 1, 35 (1997) [hereinafter Jacobs & Potter, *A Critical Perspective*].

dant with a hate crime felony, even when the underlying crime, without the element of biased motive, is a misdemeanor.[66] Consider, for example, *State v. Wyant*,[67] Ohio's leading hate crime case:

> In 1989, David Wyant and his wife, both white, were playing loud music at their campsite in Ohio's Alum Creek State Park. Two black campers in the adjoining campsite, Jerry White and Patricia McGowan, complained to park officials. When asked by park officials to turn off the music, Wyant complied, but fifteen minutes later turned on the radio again. White and McGowan then overheard Wyant shouting that "[w]e didn't have this problem until those niggers moved in next to us. I ought to shoot that black motherfucker. I ought to kick his black ass."[68]

Notwithstanding the racist threats made by the defendant, no blows were delivered, and no physical harm was caused.[69] In the absence of a hate crime statute, Wyant would have been guilty of the misdemeanor of aggravated menacing,[70] an offense carrying a maximum penalty of 180 days in jail.[71] Because his statements included racist references, he was charged with ethnic intimidation, a hate crime felony punishable by up to one and one-half years in jail.[72] Additionally, the prosecution gained national attention because the basis for Wyant's conviction was violation of a hate crime law. As the *Wyant* case moved through the court system, it spurred media coverage throughout the State of Ohio[73] and appeared in the national press as well.[74]

Somewhat surprisingly, the *Wyant* case is a typical hate crime case in that it did not involve a serious felony inherently deserving special treatment. According to Jacobs and Potter, studies indicate that "[t]he typical

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[66] As observed by Jacobs and Potter, "The media seem enthusiastically to embrace the most negative interpretation of intergroup relations." JACOBS & POTTER, LAW & IDENTITY, *supra* note 65, at 51.

[67] 624 N.E.2d 722 (Ohio 1994).

[68] JACOBS & POTTER, LAW & IDENTITY, *supra* note 65, at 34.

[69] *See* State v. Wyant, 597 N.E.2d 450, 451 (Ohio 1992), *vacated by* 508 U.S. 969 (1993), *remanded to* 624 N.E.2d 722 (Ohio 1994).

[70] OHIO REV. CODE ANN. § 2903.21 (Anderson 2003).

[71] *Id.* § 2929.24.

[72] *Id.* § 2927.12.

[73] *See, e.g.*, Rodd Aubrey, *Ohio High Court Reviews State's "Hate Crimes" Law*, CLEVELAND PLAIN DEALER, Apr. 16, 1992, at 2G; James Bradshaw, *Ethnic Intimidation Law Gets a Second Look in Court*, COLUMBUS DISPATCH, Oct. 13, 1993, at 3B; James Bradshaw, *Justices Uphold Ethnic Intimidation Law*, COLUMBUS DISPATCH, Jan. 13, 1994, at 1C; Jill Reipenhoff, *Court's Reversal Pleases 2 Victims of Racial Hatred*, COLUMBUS DISPATCH, Jan. 17, 1994, at 3E.

[74] *See, e.g.*, Jesse Birnbaum, *When Hate Makes a Fist*, TIME, Apr. 26, 1993, at 30; Joan Biskupic, *Hate Crime Laws Face Free-Speech Challenge: High Court Considers Taking Up State Statutes that Stiffen Penalty When Bias is Shown*, WASH. POST, Dec. 13, 1992, at A10; *Ohio Ethnic Intimidation Law Passes Muster*, NAT'L L.J., Mar. 28, 1994, at B15.

hate crime offender is an individual, usually a juvenile, who . . . holds vague underlying prejudices which on occasion spill over into criminal conduct."[75] At least one federal study reports that the typical hate crime consists of "low-level criminal conduct."[76]

In brief, almost every case in which a hate crime charge can be brought against the defendant gives the prosecutor several advantageous options. First, if a hate crime actually is charged and the public is not too interested in the case, the prosecutor can use the threat of the enhanced penalty as leverage to force a bargain. Second, if the defendant has been charged with an ordinary crime and could also be charged with a hate crime, the prosecutor can threaten to amend the complaint or indictment as part of the plea bargaining process. By threatening to add a hate crime charge, but not starting the case with it, the prosecutor is in a position to minimize public attention to the case while using the threat as a bargaining chip during plea negotiations. Yet, if the prosecutor later prefers the visibility likely to be triggered by the filing of hate crime charges, he can cease negotiations and draw attention to the case simply by amending the indictment or information to include the hate crime charge. Finally, in a truly high-profile hate crime case, the prosecutor can bring hate crime charges at the outset and force the defendant to chose between a high-visibility plea bargain with a heavy sentence mitigated, somewhat, by a favorable sentencing recommendation, or he can force the defendant to undergo a high-profile trial with the risk of a maximum sentence based on inflammatory evidence and no favorable sentencing recommendation.[77]

Aggressive application of hate crime laws is particularly problematic because the presence of hate crime charges in an indictment increases the risk of an unfair conviction if the case goes to trial. In order to prove a hate crime violation, the prosecution must prove that the defendant was motivated by bias. This proof often consists of evidence about the defendant's prejudiced statements, bigoted ideas, and association with biased groups or individuals. It is this kind of evidence that jurors find offensive and inflammatory. According to Professor Lu-in Wang:

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[75] Jacobs & Potter, *A Critical Perspective*, *supra* note 65, at 21.

[76] *Id.* at 19 (citing FED. BUREAU OF INVESTIGATION, HATE CRIME STATISTICS: 1992 (1994) and FED. BUREAU OF INVESTIGATION, HATE CRIME STATISTICS: 1993 (1995)); *see also* John S. Baker, Jr., United States v. Morrison *and Other Arguments Against Federal "Hate Crime" Legislation*, 80 B.U. L. REV. 1191, 1203 (2000) (citing similar FBI studies of data from 1994 to 1998). *But see* LAWRENCE, *supra* note 1, at 39 (citing a study showing that about half of all bias crimes in Boston involved assaults, compared to the national average of seven percent of crimes generally involving assaults, and that nearly three-quarters of victims of bias-motivated assaults in Boston suffered serious physical injury, compared to the national average of thirty percent for assaults generally).

[77] For an example of the evidence that might be introduced at trial, see *People v. Slavin*, No. 19, 2004 WL 305600 (N.Y. Feb. 17, 2004), which upheld, against a Fifth Amendment challenge, the introduction of photographs of the hate crime defendant's tattoos depicting, among other things, a swastika and a caricature of a Jew, with a big nose and wearing a skullcap, being kicked in the hindquarters.

> The most common evidence of bias motive is the defendant's own words, for in many cases perpetrators utter racial or other derogatory, group-based slurs before, during, or after the crime. The Supreme Court has stated that the First Amendment is not violated when a defendant's speech is used to prove the elements of a crime or to establish motive or intent. However, prosecutors have not stopped at evidence of the defendant's statements made in direct connection with the crime charged. It has become increasingly common for the prosecution to introduce evidence of defendants' general racist philosophies or interest in racist organizations and even of defendants' possession of racist tattoos, clothing, and literature.[78]

Prosecutors know that such evidence draws favorable attention to the prosecution's case for heavy punishment, not the defendant's innocence.[79] As already noted, in hate crime cases such evidence is not introduced to establish an objective fact such as the number of grams of an illegal drug the defendant sold or the value of stolen goods. Instead, it is introduced to establish the contents of the defendant's thoughts at the time of the crime in order to demonstrate a subjective element—the defendant's bigotry—and its causal role in his or her criminal actions.

The fairness problem posed by prosecutions involving introduction of evidence about controversial and offensive beliefs, statements, and associations is well understood. In *Virginia v. Black*,[80] the Supreme Court explicitly acknowledged this problem when it invalidated a portion of a criminal statute creating a presumption that cross burning was *prima facie* evidence of a defendant's intent to intimidate others. Justice O'Connor wrote for a plurality of the Court that the presumption was impermissible because it "makes it more likely that the jury will find an intent to intimidate regardless of the particular facts of the case."[81] She noted that such a presumption "permits the Commonwealth to arrest, prosecute, and convict a person based solely on the fact of cross burning itself. It is apparent that the provision as so interpreted 'would create an unacceptable risk of the suppression of ideas.'"[82]

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[78] Lu-in Wang, *supra* note 61, at 7–8 (citation omitted); *see also supra* note 77 and accompanying text.

[79] *See* Dawson v. Delaware, 503 U.S. 159 (1992). In *Dawson*, the Supreme Court overturned the imposition of the death penalty where evidence of a white defendant's association with a racist group was introduced during the penalty phase of his case. *Id.* at 169. The Court explained, "[O]n the present record one is left with the feeling that the Aryan Brotherhood evidence was employed simply because the jury would find these beliefs morally reprehensible." *Id.* at 167.

[80] Virginia v. Black, 538 U.S. 343, 367 (2003) (plurality opinion).

[81] *Id.* at 365 (plurality opinion).

[82] *Id.* (plurality opinion) (quoting Secretary of State v. Joseph H. Munson Co., 467 U.S. 947, 965 n.13 (1984)).

Indeed, the Supreme Court has traditionally been very suspicious of the ability of factfinders to treat evidence of controversial communications and offensive viewpoints objectively. Evidence of this wariness is the Court's application of a higher standard of appellate review to the facts in First Amendment cases than in most other contexts. Instead of applying the "clearly erroneous" standard typically used by appellate courts to assess the accuracy of fact-finding at trial,[83] it has applied the far more demanding "de novo review" of facts where accurate findings of fact are inseparable from determining whether First Amendment rights have been violated.[84] The heightened standard of appellate review of facts ensures that case outcomes are not the product of fact-finding tainted by jury bias against a party for his or her offensive beliefs or statements.[85]

In addition to the distorting impact such evidence has on the trial process, it also gives the prosecutor unfair leverage during plea bargaining. Even under ordinary circumstances, plea bargaining is not bargaining between equals.[86] Where hate crimes are charged, however, defendants are even more vulnerable to the prosecutors' leverage. Defendants know that if they go to trial, the evidence against them likely will consist of their bigoted statements, beliefs, or associations. No rational defendant wants a judge or jury to hear such evidence. Thus, to the extent that defendants fear such evidence will be introduced, their incentive to plead guilty to a crime with a lighter sentence is increased—whether or not they are guilty of any wrongdoing. Similarly, defendants may choose to plead guilty, even if prosecutors do not offer to drop the hate crime charge, but, instead, promise to recommend a lenient sentence as an alternative to a trial accompanied by the introduction of evidence likely to offend a judge or inflame a jury.

It is indisputable that hate crime statutes expand the prosecutor's control over every stage of criminal proceedings up to and including sentencing. Such legislation replaces judicial discretion with prosecutorial discretion in a fashion that is inconsistent with basic considerations of fairness. In a recent address to the American Bar Association, Justice Kennedy argued that, as a general matter, the interests of justice would best be served by

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[83] FED. R. CIV. P. 52(a).

[84] Bose Corp. v. Consumers Union, 466 U.S. 485, 514 (1984) (holding that de novo review of facts by the Supreme Court is necessary to assess constitutional malice in a libel case); *see also* Henry P. Monaghan, *Constitutional Fact Review*, 85 COLUM. L. REV. 229, 276 (1985) (arguing that de novo review of facts in First Amendment cases should be mandatory in judicial review of administrative decisions but discretionary in appellate review of lower court decisions). De novo review is also employed in other constitutional contexts where the Court is concerned that inaccurate fact-finding at trial will impede proper application of constitutional principles. *See, e.g.*, Blackburn v. Alabama, 361 U.S. 199, 205 n.5 (1960) (reiterating the Supreme Court's authority to conduct a de novo review of facts to determine the voluntariness of a confession).

[85] Monaghan, *supra* note 84, at 239.

[86] *See supra* notes 50–57 and accompanying text.

reducing prosecutorial control over the entire sentencing process in the federal system. He observed,

> Under the federal mandatory minimum statutes a sentence can be mitigated by a prosecutorial decision not to charge certain counts. There is debate about this, but in my view a transfer of sentencing discretion from a judge to an Assistant U.S. Attorney, often not much older than the defendant, is misguided. The policy, nonetheless, gives the [sentencing] decision to an assistant prosecutor not trained in the exercise of discretion and takes discretion from the trial judge. The trial judge is the one actor in the system most experienced with exercising discretion in a transparent, open, and reasoned way. Most of the sentencing discretion should be with the judge not the prosecutors.[87]

A similar critique is applicable to the United States's heavy reliance on hate crime statutes, because they also diminish judicial control over the criminal justice system. Like other statutes limiting judicial sentencing discretion, hate crime statutes give far too much control over sentencing and plea bargaining to prosecutors, while crippling the authority of judges to ensure that trials and sentences of hate crime defendants are fair and impartial.

In order to remedy this problem, hate crime sentencing enhancement statutes should be abandoned. Rather than treating biased motive as an element of a criminal offense, legislatures should return to a judge-based sentencing regime that confines consideration of biased motive to the sentencing phase of the case. This change would permit judges to consider biased motive as an aggravating circumstance to be put into the balance with all other aggravating and mitigating circumstances, rather than as an automatic override of all mitigating factors. The result would preserve the intended power distribution of the legal system by leaving the job of prosecuting to prosecutors and the role of judging and sentencing to judges. The harsh sentences meted out to hate crime defendants under current hate crime statutes may make victims of bigotry and their defenders feel better. Such severe punishment, however, comes at the expense of basic fairness, making it inconsistent with a criminal justice system designed to generate trustworthy determinations of guilt and sentences genuinely tailored to fit each crime.

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[87] Kennedy, *supra* note 30, at 5.

ESSAY

THE BIPARTISAN CAMPAIGN REFORM ACT: UNINTENDED CONSEQUENCES AND THE MAINE SOLUTION

MICHAEL SAXL*
MAEGHAN MALONEY**

The Bipartisan Campaign Finance Reform Act of 2002 dramatically redesigned the rules of campaign finance for federal elections. Since passage, a loophole in the Act has led to a system where large private donations still play a domineering role in campaigns, albeit through unaffiliated organizations rather than the candidates themselves. This Essay argues that instead of pursuing legislation that merely regulates contributions and expenditures, the only way to ensure that big money does not dominate political campaigns is to replace the current system with public campaign financing, using the Maine Clean Elections Act as a model.

> Who are to be the electors of the Federal representatives? Not the rich, more than the poor; not the learned, more than the ignorant; not the haughty heirs of distinguished names, more than the humble sons of obscure and unpropitious fortune. The electors are to be the great body of the people of the United States . . . .[1]

The presumptive 2004 Democratic presidential nominee, Senator John Kerry, plans to raise $100 million for his campaign.[2] America Coming Together and its sister organization—two groups that oppose President Bush's re-election—project that they will spend $190 million in the course of the same election.[3] How is it that organizations dedicated to defeating an incumbent are able to raise more money than the candidate running to unseat that incumbent? Why would a donor choose to contribute to such an organization, rather than to the candidate himself? The answer is the

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[1] THE FEDERALIST NO. 57, at 390 (James Madison) (Edward Gaylord Bourne ed., 1961).

[2] *See* Jim VandHei & Thomas B. Edsall, *Kerry Capitalizing on Party Resources to Fill Coffers*, WASH. POST, Mar. 19, 2004, at A6.

[3] *See* Martin Kasindorf & Mark Memmott, *'04 Slugfest May Appeal To, Not Repel, Voters: Interest High Despite Early Start To Traditional Turnoffs*, USA TODAY, Mar. 12, 2004, at 1A.

Bipartisan Campaign Reform Act of 2002 (BCRA),[4] which, in seeking to decrease the role of money in federal elections, insufficiently addresses reform for organizations other than the national political parties.

While BCRA mandates unprecedented restrictions on the size of contributions that national parties can receive,[5] it fails to place equally stringent restrictions on contributions to state and local parties.[6] Contributions to non-party organizations face even fewer restrictions than do those to state and local parties.[7] As a result, the Act facilitates a greater power transfer from national parties to new non-party organizations, as BCRA either failed to anticipate the emergence of such entities or chose to ignore them altogether. The result has been a mere reorganization of the political clout that can be purchased by private fundraising, rather than a true reduction in the role that large-scale donations of private money play in federal elections. Thus, it seems that BCRA's legacy will be the continued domination of national political campaigns by private money, albeit through non-party associations rather than state and national parties.

Does this mean that campaign finance reform is doomed to failure? Not necessarily. The problem is that BCRA attempts to change campaign finance through regulation, and no matter how comprehensive the regulation, loopholes always form.[8] This Essay proposes a different approach to the issue of federal campaign finance reform: the Maine way. Maine's experience with campaign finance reform via public funding has been overwhelmingly positive. The chief difference between Maine's success and BCRA's failure is that Maine chose to approach reform with a carrot rather

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[4] Bipartisan Campaign Reform Act of 2002, Pub. L. No. 107-155, 116 Stat. 81 (codified in scattered sections of 2 U.S.C.). BCRA was challenged in *McConnell v. Federal Election Comm'n*, 124 S. Ct. 619 (2003). All of the Act's provisions that are relevant to this Essay were upheld.

[5] 11 C.F.R. § 110.1(c)(1) (2003); BCRA § 203(a), 2 U.S.C.A. § 441b(a) (West Supp. 2003). Regulated political contributions are commonly but imprecisely referred to as "hard money," while unregulated contributions are known as "soft money." Before BCRA, certain types of contributions to national parties were not regulated and were thus deemed "soft money." *See, e.g.*, Eric Schmitt, *House Also Plans a Debate on Campaign Finance Reform*, N.Y. TIMES, Sept. 25, 1997, at A24 (noting definitions of "hard" and "soft" money). *See also* Federal Election Campaign Act Amendments of 1979, Pub. L. No. 96-187, 93 Stat. 1339 (regulating certain political contributions). Because BCRA regulates contributions to national parties that were previously unregulated, it can be said to transform this formerly soft money into hard money. For a more thorough discussion of soft money, see Gregory Comeau, Recent Development, *Bipartisan Campaign Reform Act*, 40 HARV. J. ON LEGIS. 253, 261–62 (2003).

[6] *See infra* notes 14–19 and accompanying text.

[7] *See infra* notes 22–28 and accompanying text.

[8] In the words of the Supreme Court, "Money, like water, always finds an outlet." *McConnell*, 124 S. Ct. at 706. Indeed, the history of campaign finance reform shows that reform efforts have consisted of "insufficient provisions for administration and enforcement and sufficient loopholes to undermine the regulations on campaign contributions." Marty Jezer et al., *A Proposal for Democratically Financed Congressional Elections*, 11 YALE L. & POL'Y REV. 333, 333 (1993); *see also id.* at 342. *See generally* Harold E. Ford, Jr. & Jason M. Levien, *A New Horizon for Campaign Finance Reform*, 37 HARV. J. ON LEGIS. 307 (2000).

than a stick. By giving participating candidates money in exchange for their agreement to spending caps, Maine has ensured the near removal of fundraising from a legislator's job description.

I. BCRA'S RESTRICTIONS, THE CURRENT FEDERAL SYSTEM, AND CURRENT LOOPHOLES

A. Limits on Federal Contributions

1. National Parties

An analysis of BCRA's restrictions most fittingly begins with a discussion of national parties, for it is precisely the inability of such parties to receive uncapped contributions that will re-direct those contributions into the hands of other organizations.

Under BCRA, national parties cannot accept any contributions in excess of statutory limits.[9] According to the statute, they also cannot "solicit, receive or direct" political contributions to any other organization.[10] Significantly, the Federal Election Commission ("FEC") has interpreted this latter prohibition to mean merely that the national parties cannot directly "ask" a donor to contribute to another organization.[11] As the Supreme Court has noted, BCRA allows national party officials to aid state and local parties by advising them on how best to raise and spend money that, because it is not contributed to a national party, is not regulated by BCRA.[12]

2. Federal Candidates

BCRA also limits the size of contributions that federal candidates may receive from individuals, political action committees (PACs), and national parties.[13] The statute does not, however, limit contributions to

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[9] Under BCRA, the amount of money national parties can receive per election is limited to $25,000 from an individual and $15,000 from a multicandidate Political Action Committee (PAC). 11 C.F.R. § 110.1(c)(1) (2003). National parties cannot receive any money directly from corporations or unions. BCRA § 203(a), 2 U.S.C.A. § 441b(a) (West Supp. 2003).

[10] BCRA § 101(a), 2 U.S.C.A. § 441i(a) and (c) (West Supp. 2003).

[11] Prohibited and Excessive Contributions: Non-Federal Funds or Soft Money, 67 Fed. Reg. 49,064, 49,086–87 (July 29, 2002) (codified at 11 C.F.R. pt. 300 (2003)).

[12] *McConnell*, 124 S. Ct. at 670 ("Nothing on the face of § 323(a) prohibits national party officers, whether acting in their official or individual capacities, from sitting down with state and local party committees or candidates to plan and advise how to raise and spend soft money.").

[13] An individual can contribute $2,000 to a candidate per election. BCRA § 307, 2 U.S.C.A. § 441a(a)(1)(A) (West Supp. 2003). A state, district, or local party or a multicandidate PAC can contribute $5,000 per election per candidate (state, district and local parties share the limit unless independence can be demonstrated). 2 U.S.C.A. § 441a(a)(2)(A) (West Supp. 2003); 11 C.F.R. § 110.2(b)(1) (2003); *id.* § 110.3(b)(3). Additionally, national parties may contribute $35,000 per candidate, per campaign for Senate elections, although that amount is shared with the Senate campaign committee. *Id.* at § 110.2(e)(1).

state and local parties on behalf of a given federal candidate,[14] and federal candidates may participate in state and local candidates' campaign events. State and local parties may even finance these events as long as they do not refer to a federal campaign.[15] In other words, federal candidates can benefit from unregulated contributions to local campaigns by appearing and speaking at these fundraisers, because they technically are not promoting their own candidacy.

BCRA does, however, bar state parties from paying for activities specifically targeted at federal campaigns,[16] with some minor exceptions.[17] In the past, state parties used unregulated contributions to run what were known as "coordinated campaigns."[18] These shadow campaigns were aimed at benefiting federal candidates and consisted of get-out-the-vote and voter identification events, as well as issue advocacy.[19] Since BCRA now bars the contributions to state and local parties that fueled such activities, those contributions will now probably go to technically non-partisan national organizations, known as 527s,[20] with a nearly identical result.

B. Organizations Exempt from the Restrictions of BCRA

Title I of BCRA, described above, was written to address contributions to national, state, and local parties. Title II of BCRA restricts corporations and unions from influencing federal elections, essentially by prohibiting them from running campaign advertisements.[21]

BCRA leaves certain other organizations unregulated, however: 501(c)(3) corporations,[22] Qualified Nonprofit Corporations ("QNC")[23] (also known as

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BCRA allows opponents of self-financing candidates to raise money in larger increments. BCRA § 304, 2 U.S.C.A. § 441a(i) (West Supp. 2003).

[14] BCRA §§ 101(e)(2), 103(b), 2 U.S.C.A. § 441i(e)(2) (West Supp. 2003).

[15] BCRA § 101(a), 2 U.S.C.A. § 441i(e)(1) (West Supp. 2003).

[16] BCRA § 101(a), 2 U.S.C.A. § 441i(b) (West Supp. 2003).

[17] *See* BCRA § 101(a), 2 U.S.C.A. § 441i(b)(2) (West Supp. 2003); Prohibited and Excessive Contributions: Non-Federal Funds or Soft Money, 67 Fed. Reg. 49,064, 49,067–70 (July 29, 2002) (codified at 11 C.F.R. pt. 100 (2003)).

[18] BCRA § 202, 2 U.S.C.A. § 441b (West Supp. 2003).

[19] *See* Bart Jansen, *Familiar Fuel Heats Campaigns; Labor Unions Support Democratic Candidates, While Big Business Backs Republicans In Maine's Key Congressional Races*, PORTLAND PRESS HERALD, Oct. 6, 2002, at 1A.

[20] 527s are named for the section of the tax code in which they appear. I.R.C. § 527 (2000).

[21] BCRA § 203(a), 2 U.S.C.A. § 441b(b)(2) (West Supp. 2003).

[22] BCRA § 101(e)(4), 2 U.S.C.A. § 441i(e)(4) (West Supp. 2003). Section 501(c)(3) of the Internal Revenue Code exempts from taxation certain trusts and corporations organized and operated exclusively for religious, charitable, scientific, testing for public safety, literary, or educational purposes, or to foster national or international amateur sports competition, or to prevent cruelty to children or animals. I.R.C. § 501(c)(3) (2000). The tax code expressly prohibits organizations described in section 501(c)(3) from "participat[ing] in, or interven[ing] in . . . any political campaign on behalf of (or in opposition to) any candidate for public office." *Id.* For this reason, it was deemed unnecessary to include 501(c)(3) organizations in BCRA's prohibitions. Electioneering Communications, 67 Fed. Reg. 65,190, 65,200 (Oct. 23, 2002).

[23] BCRA § 101(e)(4), 2 U.S.C.A. 441i(e)(4) (West Supp. 2003). The characteristics of

"MCFL" corporations),[24] unincorporated 501(c)(4) organizations,[25] and 527 organizations.[26] Of these, 527s are the organizations with the widest latitude to engage in political activities.[27] Recently, however, the FEC has proposed rules that would limit 527s' influence.[28]

C. The Current Presidential Public Financing Program

In addition to BCRA, which limits contributions and expenditures, federal law provides a limited public financing system for presidential campaigns. Presidential candidates qualify for public financing under two sets of rules, one applying to the primary season and the other applying to the general election.[29] In order to qualify for public funds in the primary, candidates must raise $5,000 in at least 20 states in increments of $250 or less.[30] A candidate who agrees to a spending cap in the primary[31] will

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a "QNC" corporation are that

> (1) Its only express purpose is the promotion of political ideas;
> (2) It cannot engage in business activities;
> (3) It has no shareholders;
> (4) It was not established by a business corporation or labor organization, and it does not directly or indirectly accept donations of anything of value from business corporations or labor organizations; and
> (5) It is described in 26 U.S.C. § 501(c)(4) (2000).

11 C.F.R. § 114.10(c) (2003).

[24] The term "MCFL corporation" is derived from *Federal Election Comm'n v. Massachusetts Citizens for Life, Inc.*, 479 U.S. 238, 263 (1986) (holding that independent spending restrictions on a nonprofit, nonstock corporation are an unconstitutional infringement of the First Amendment). The FEC uses the term "QNC" corporation to mean "MCFL." Electioneering Communications, 67 Fed. Reg. 65,190 65,203–04 (Oct. 23, 2002).

[25] BCRA § 203(c), 2 U.S.C.A. 441b(c)(2) (West Supp. 2003). A 501(c)(4) organization is a civic league, an organization not organized for profit but operated exclusively for the promotion of social welfare, or a local association of employees, the membership of which is limited to the employees of a designated person or persons in a particular municipality, and the net earnings of which are devoted exclusively to charitable, educational, or recreational purposes. I.R.C. § 501(c)(4) (2000); 11 C.F.R. § 114.10 (2003).

[26] BCRA § 203(c), 2 U.S.C.A. § 441b(c)(2) (West Supp. 2003). A 527 organization is a political party, committee, association, fund, or other organization ("whether or not incorporated") that is organized and operated for the purpose of influencing or attempting to influence the selection, nomination, election, or appointment of any individual to any federal, state, or local public office, or the election of presidential or vice-presidential electors. I.R.C. § 527(e) (2000).

[27] I.R.C. § 527(e)(2) (2000).

[28] *See* Political Committee Status, 69 Fed. Reg. 11,735 (Mar. 11, 2004) (to be codified at 11 C.F.R. pts. 100, 102, 104, 106, 114). These regulations would limit contributions to groups whose publications advocate the election or defeat of a clearly identified candidate for federal office. *Id.* at 11,745. Exempted from these regulations would be all groups that have as their purpose "to elect candidates holding a particular position (e.g., pro-business candidates or pro-environmental candidates) without specifying which candidates hold those positions." *Id.*

[29] *See* 26 U.S.C. §§ 9001–9013, 9031–9042 (2000).

[30] 26 U.S.C. § 9033(b) (2000).

[31] 11 C.F.R. § 110.8(a)(1)(ii) (2003).

receive a one-to-one match of public funds for the first $250 of each individual's private contribution to that candidate,[32] with the total public grant not to exceed fifty percent of the spending cap in the primary.[33] In 2004, a candidate who agreed to spend no more than approximately $37 million in the primary was eligible to receive up to just more than $18.5 million in matching public funds.[34]

In the general election, only candidates nominated by a party that received at least five percent of the last presidential popular vote are eligible for public funds.[35] For 2004, that means that only the Republican candidate, George W. Bush, and the presumptive Democratic nominee, John Kerry, qualify for public funding.[36] The amount of money the candidate of a major party[37] is given to spend in the general election, which is also the overall cap on spending to which the candidate must agree,[38] is set according to an established formula.[39] In the 2004 election, the formula creates a general election spending cap for major party candidates of approximately $75 million.[40]

The presidential election campaign fund gets its money from a voluntary tax check-off on the federal income tax form.[41] Agreeing to the tax check-off does not increase the amount of money a taxpayer owes.[42]

Many feel that the presidential public financing system is in trouble.[43] Among other problems, in recent years, serious candidates often have had to forgo public financing for the primary in order to be competitive, only to opt back into the system during the general election.[44] Partly to blame for

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[32] 26 U.S.C. § 9034(a) (2000).

[33] *Id.* at § 9034(b) (2000).

[34] Candidates must also agree to state-by-state primary spending limits. 11 C.F.R. § 9035.1(a)(1) (2003). For specific state limits for 2004, see Fed. Election Comm'n, *2004 Presidential Spending Limits*, *at* http://www.fec.gov/pages/brochures/pubfund_limits_2004.html.

[35] 26 U.S.C. §§ 9002, 9004(a) (2000).

[36] *See, e.g.*, Dan Balz, *Bush, Gore Down to Wire; Automatic Recount in Florida Climaxes Dramatic Night of Ballot Counting to Fix Financing*, WASH. POST, Nov. 8, 2000, at A1.

[37] Major parties are those whose "candidate for the office of President in the preceding presidential election received, as the candidate of such a party, 25 percent or more of the total number of popular votes received by all candidates for such office." 26 U.S.C. § 9002(6) (2000).

[38] 26 U.S.C. § 9003(b)(1) (2000).

[39] 11 C.F.R. § 9004.1 (2003); 11 C.F.R. § 110.8(a)(1)(ii) (2003).

[40] *See* Fed. Election Comm'n, *supra* note 34.

[41] 26 U.S.C. § 6096(a) (2000).

[42] *See id.* § 6096(b).

[43] *See, e.g.*, David S. Broder, *Level the Presidential Playing Field*, WASH. POST, Oct. 19, 2003, at B7; E.J. Dionne Jr., *How to Fix Financing*, WASH. POST, Nov. 28, 2003, at A41; Thomas Edsall & Dan Balz, *Kerry to Forgo Public Campaign Financing; Democrat Says He Will Use His Own Money*, WASH. POST, Nov. 16, 2003, at A12; Pamela Yip, *Fewer Tax Filers Choose to Send $3 for Election*, SEATTLE TIMES, Apr. 11, 2004, at A7; Editorial, *Your Turn; Fix the Finance Rules for Presidential Races; The Public-Financing Program for Presidential Candidates, Designed to Even the Playing Field, is Broken*, SAN ANTONIO EXPRESS-NEWS, Nov. 12, 2003, at 6B.

[44] *See, e.g.*, Broder, *supra* note 43, at B7; Dionne, *supra* note 43, at A41. When a candidate opts out of the primary only to turn around and take public funds in the general

this opting out is that the political landscape has changed considerably since the system was created in the 1970s—now, primary races for the presidency begin long before the start of the election year.[45] The proposed legislation recommended in Part IV would address this concern as well as the broader concerns facing all federal candidates.[46]

II. THE MAINE CLEAN ELECTION ACT

Is BCRA as close as the federal government could get to fulfilling the vision of James Madison as described in the introduction? The approach to campaign finance reform taken by the State of Maine illustrates that that there is another, better way to achieve Madison's conception of voter equality. The Maine Clean Election Act[47] (MCEA) has established a workable system of campaign finance reform through the establishment of public election financing.

MCEA provides public funding to candidates for state office who agree to spending caps and limited fundraising.[48] The goal of MCEA was to reduce the influence of campaign contributors on elected officials and to encourage the participation of candidates averse to fundraising.[49] MCEA was amended in the last legislative session to require that candidates choose whether to run as a clean election candidate before entering the primary election, rather then after the primary election but before the general election.[50] As of 2003, fifty-five percent of legislators in Maine's House of Representatives and seventy-seven percent in its Senate had run exclusively on public funding.[51]

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election, it distorts the purpose of the public financing program. Campaign finance reform passed at the state level has addressed this problem. *See infra* note 50 and accompanying text. Legislation recently introduced by the authors of BCRA, Senators John McCain and Russell Feingold and Representatives Christopher Shays and Marty Meehan, proposes requiring candidates to participate in the entire public financing system, both primary and general election, or not at all. *See* Presidential Funding Act of 2003, S. 1913, 108th Cong. § 3 (2003); Presidential Funding Act of 2003, H.R. 3617, 108th Cong. § 3 (2003).

[45] *See, e.g.*, Broder, *supra* note 43, at B7; Dionne Jr., *supra* note 43, at A41.

[46] Other changes proposed to the presidential public financing system in the legislation introduced by Senators McCain and Feingold and Representatives Shays and Meehan include allowing candidates to begin receiving funds on July 1 the year before an election, increasing the federal match for contributions from one-to-one to four-to one, raising the primary spending limits, and increasing the amount that a taxpayer can check-off on the tax form. *See* Presidential Funding Act of 2003, S. 1913, 108th Cong. §§ 2(c), 2(a), 5(a) (2003); Presidential Funding Act of 2003, H.R. 3617, 108th Cong. §§ 2(c), 2(a), 5(a) (2003).

[47] ME. REV. STAT. ANN. tit. 21-A, §§ 1121–1128 (West Supp. 2003).

[48] *Id.*

[49] Nancy Perry, *Key Panel Backs Bill to Limit, Reform Campaign Spending*, PORTLAND PRESS HERALD, Mar. 15, 1996, at 1A.

[50] An Act to Amend the Laws Governing the Qualification of Candidates, 2003 Me. Laws 270 (codified at ME. REV. STAT. ANN. tit. 21-A, § 1125(5)(D-1) (West. Supp. 2003)).

[51] Peter Ross Range, *Running "Clean": In Maine and Arizona, Campaign Finance Reform Starts at the Grass Roots*, FORD FOUNDATION REPORT, Spring 2003, *at* http://www.fordfound.org/publications/ff_report/view_ff_report_detail.cfm?report_index=397. "In both Maine and Arizona, the number of legislative candidates who chose to use public financing for

A candidate becomes eligible for MCEA funds by raising qualifying contributions.[52] These contributions are mandatory, and require every MCEA candidate to raise $5 each from a certain number of registered voters in the jurisdiction in which he or she will campaign.[53] The number of qualifying contributions needed varies depending the level of state government at which a candidate chooses to run.[54]

In order to assist them with qualification, candidates may also raise a limited amount of seed money.[55] Unlike qualifying contributions, seed money is optional.[56] An MCEA candidate can raise seed money from individuals anywhere in Maine in $100 increments up to certain maximum amounts.[57]

All qualifying contributions must be given to the Maine Commission on Ethics and Elections.[58] In addition, any seed money not spent at the time that the candidate formally registers as an MCEA candidate must be turned over to the Commission.[59]

Once certified as an MCEA candidate, the candidate must limit all campaign expenditures and obligations to the amount distributed from the MCEA fund.[60] In addition to the initial disbursement, an MCEA candidate receives dollar-for-dollar matching funds, up to a statutorily defined cap, for any monies raised or spent by a non-participating opponent after the opponent raises, borrows, or spends more than the initial disburse-

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their campaigns increased greatly from 2000 to 2002. In the 2000 primary and general elections, approximately one of every three candidates in Maine and one of every four candidates in Arizona chose to participate in the state's public financing program. In the 2002 primary and general elections, participation increased significantly in both states, with about one-half or more of all candidates participating." U.S. GEN. ACCOUNTING OFFICE, CAMPAIGN FINANCE REFORM: EARLY EXPERIENCES OF TWO STATES THAT OFFER FULL PUBLIC FUNDING FOR POLITICAL CANDIDATES 8 (2003). "[A]fter the 2000 general elections, the elected legislators who had run with public funds held 33 percent of the total seats in Maine's legislature and 18 percent of the total seats in Arizona's legislature. After the 2002 general elections, the proportions increased to 59 percent of Maine's legislature and 36 percent of Arizona's legislature." *Id. But see id.* at 38–39 (stating that the competitiveness of the races as compared to pre-campaign finance reform is inconclusive due to the length of time that reform has been in place, and recent swings in electoral participation from 1996 to 2002).

[52] ME. REV. STAT. ANN. tit. 21-A, § 1125 (West Supp. 2003).

[53] *Id.* § 1125(3).

[54] A gubernatorial candidate must obtain contributions from at least 2500 registered voters, a candidate for the State Senate must obtain contributions from at least 150 registered voters, and a candidate for the State House of Representatives must obtain contributions from at least fifty registered voters. *Id.*

[55] *Id.* § 1125(2).

[56] *Id.*

[57] Seed money is limited to $50,000 for a gubernatorial candidate, $1,500 for a candidate for the State Senate; and $500 for a candidate for the State House of Representatives. *Id.*

[58] *Id.* § 1124(2)(A).

[59] *Id.* § 1124(2)(D).

[60] *Id.* § 1125(6). The initial disbursement equals the average expenditures made by all candidates for the same office in the two preceding elections. *Id.* § 1125(8).

ment allotted to the MCEA candidate.[61] Matching funds are also provided to correspond to independent expenditures made by entities making non-coordinated expenditures on behalf of a candidate.[62]

MCEA is financed through taxes taken from the General Fund and a voluntary tax check-off on the state income tax form, for which the tax payer receives a matching tax credit.[63]

MCEA and BCRA have a few important similarities. Both limit the size of donations to traditionally funded candidates.[64] But in stark contrast to BCRA, which applies to all federal candidates,[65] MCEA applies only to those who choose to participate.[66] Additionally, while candidates under BCRA must still spend a lot of their time raising funds, an MCEA candidate can access public funds as soon as he or she raises qualifying contributions.[67]

The latter distinction between MCEA and BCRA has generated a good deal of controversy among election pundits. Some argue that the Maine system allows non-traditional candidates who find fundraising distasteful, or who lack political connections, to attract enough donations to run.[68] Others think that the threshold is too low and wastes taxpayers' money.[69] For example, Green Party candidate for governor Jonathan Carter received more then $800,000 in public financing during the 2002 Maine gubernatorial campaign.[70] Yet he received as low a percentage of the vote as he had in a previous, non-publicly funded campaign. Public financing opponents relied upon that outcome to argue that Carter could not be considered a serious candidate and should never have received public funds.[71]

BCRA and MCEA also differ most significantly on the issue of campaign coordination. BCRA restricts whom federal candidates can coordi-

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[61] *Id.* § 1125(9).

[62] *Id.*

[63] *Id.* § 1124(2).

[64] *Id.* §§ 1015, 1123; BCRA, § 101, 2 U.S.C.A. § 441a(a) (West Supp. 2003).

[65] 2 U.S.C.A. § 431(2) (West Supp. 2003).

[66] ME. REV. STAT. ANN. tit. 21-A, § 1122(1) (West Supp. 2003).

[67] *Id.* § 1125(5).

[68] *See* Peter Ross Range, *supra* note 51, at 2. "As costs of election campaigns spiral upward in a media-saturated political environment, the field of potential candidates shrinks down to the independently wealthy and the well connected. Nationally, campaign expenditures have grown 700% since 1976. Several studies have documented that, increasingly, the winner of an election at any level is associated with a single factor: who raises the most money. The race for funding rivals the race for votes in what reform advocates call 'the wealth primary.'" *But see* Patrick Basham & Martin Zelder, Cato Inst., *Maine's "Clean" Elections Are Not More Competitive*, Oct. 17, 2002, *available at* http://www.cato.org/dailys/10-17-02.html.

[69] RAYMOND J. LA RAJA & MATTHEW SARADJIAN, CTR. FOR PUB. POLICY & ADMIN., CLEAN ELECTIONS: AN EVALUATION OF PUBLIC FUNDING FOR MAINE LEGISLATIVE CONTESTS 16 (Apr. 2004), *available at* http://pubpol1.sbs.umass.edu/docs/laraja_fullrpt.pdf.

[70] *Id.* at 33.

[71] Jeff Tuttle, *Maine Legislator Seeks Cleaner Election Act*, BANGOR DAILY NEWS, Dec. 4, 2002, at A1.

nate with and how.[72] By separating candidates from responsibility for messages associated with their campaigns, BCRA has encouraged the erosion of political dialogue.[73] Before BCRA, a negative advertisement might have emanated from a candidate, or at least from someone coordinated or affiliated with that candidate. Now, it will more often be from an organization like a 527 with no permissible contact with the candidate or her campaign. Such ads will be truly independent, seemingly excusing the candidate from all responsibility for them. MCEA, in contrast, allows candidates to continue to use the state party as the coordinating vehicle for their campaigns. Thus candidates remain visibly accountable for campaigning done on their behalf.

Ultimately, BCRA simply moves money around a broken system, while MCEA, although imperfect, fundamentally changes the nature of elections. Under BCRA, unregulated contributions are in no way eliminated, but are simply re-directed to non-party organizations, while under MCEA, the importance of private money in elections is significantly diminished. Overall, MCEA does a better job than BCRA at limiting fundraising and encouraging new voices to enter the political fray.[74]

III. Other Public Financing Reform Efforts

Maine is not the only state that has enacted clean election legislation. In 1998, the citizens of Arizona passed the Citizens Clean Elections Act (CCEA).[75] The purpose of the CCEA was to "improve the integrity of the Arizona state government by diminishing the influence of special-interest money" and to "encourage citizen participation in the political process."[76] Arizona's system is virtually identical to Maine's, with the following exceptions: (1) the number of qualifying donations a candidate must raise;[77] (2) the amount of seed money a candidate is allowed to raise;[78] (3) the cap on matching funds for candidates running against non-participating

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[72] BCRA § 202, 2 U.S.C.A. § 441a (West Supp. 2003).

[73] *But see* BCRA § 311(2), 2 U.S.C.A. § 441d(d)(1) (West Supp. 2003) (requiring that television or radio advertisements paid for by a candidate or "an authorized political committee of a candidate" be accompanied by an appearance or statement, respectively, stating that the candidate has approved the advertisement).

[74] *See* Rick Klein, *Clean Elections Act Alters Terrain in Maine*, Boston Globe, Feb. 26, 2001, at A1 (discussing the career of Representative Deborah Simpson, a single mother and waitress, who says, "With the Clean Elections, it seemed less daunting a task to run. I could do what I can do, which is talk to people, as opposed to raising money, which in my life, I didn't have any experience in.").

Interestingly, BCRA directed the General Accounting Office to study and report to Congress on the effects of the public financing laws passed in both Maine and Arizona. BCRA § 310, 2 U.S.C.A. § 431 (West Supp. 2003).

[75] Ariz. Rev. Stat. §§ 16-940 to 16-961 (West Supp. 2003).

[76] *Id.* § 16-940.

[77] *Id.* § 16-946.

[78] *Id.* § 16-945.

opponents and third-party expenditures;[79] (4) the candidates to whom the law applies;[80] and (5) the source of funds for the financing.[81] The CCEA has faced legal challenges, but has remained by and large intact.[82]

Like Maine and Arizona, Vermont has embraced public financing for elections, albeit on a more narrow basis. In 1997, Vermont enacted comprehensive campaign finance reform[83] that included a public finance option for governor and lieutenant governor candidates.[84] In order to qualify for public funds, a candidate for either of these offices must obtain a specified number of qualifying contributions.[85] If a candidate is able to obtain such contributions within the specified period,[86] has not accepted contributions totaling $500 or more during the two years preceding the general election cycle[87] or made expenditures of $500 or more,[88] agrees to refrain from soliciting, accepting, or expending any contributions except qualifying contributions and public funds,[89] and follows other minor restrictions,[90] then the candidate is entitled to public funds.[91] Funds are distributed separately for the primary and general elections.[92] In one of the more interesting provisions of the law, a candidate who is an incumbent

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[79] While MCEA caps the amount of matching funds a clean elections candidate can receive to respond to third party attacks or if running against a non-participating opponent at twice the general election amount, CCEA caps the same at three times the general election amount. ME. REV. STAT. § 1125(9) (West Supp. 2003); ARIZ. REV. STAT. § 16-952 (West Supp. 2003).

[80] CCEA applies to candidates for the state legislature, governor, secretary of state, treasurer, superintendent of public instruction, corporation commission, and mine inspector. ARIZ. REV. STAT. § 16-950(D) (West Supp. 2003).

[81] CCEA is funded through contributions made through tax forms (for which the payer receives a matching tax credit up to a specified limit), an increase in civil and criminal penalties, and an increase in the lobbying registration fee. *Id.* at §§ 16-954A, 16-954B, 16-954C, 16-944.

[82] *See* Lavis v. Bayless, 233 F. Supp. 2d 1217 (D. Ariz. 2001); Citizens Clean Election Comm'n v. Myers, 1 P.3d 706 (Ariz. 2000).

[83] 1997 Vt. Acts & Resolves 64 (codified at VT. STAT. ANN. tit. 17, §§ 2851–2883 (2002)).

[84] VT. STAT. ANN. tit. 17, §§ 2851–2856 (2002).

[85] *Id.* § 2854. For governor, a candidate must raise no less than $35,000 from no fewer than 1,500 individual contributors making a contribution of no more than $50 each. *Id.* § 2854(a)(1). For lieutenant governor, a candidate must raise no less than $17,500 from no fewer than 750 individual contributors making a contribution of no more than $50 each. *Id.* § 2854(a)(2). All contributions must come from individuals registered to vote in Vermont. *Id.* § 2854(b). No more than twenty-five percent of the total number of qualified individual contributors may be residents of the same county. *Id.*

[86] *Id.* § 2851.

[87] *Id.* § 2853(a).

[88] *Id.*

[89] *Id.* § 2853(b)(1).

[90] *Id.* § 2853(b)(2)–(3). Among other provisions, the law requires that a candidate who receives public funds must, no later than forty days after the general election, deposit in the Vermont campaign fund (the fund out of which the public funds for elections are drawn) the balance of any amounts remaining in the candidate's election account. *Id.* § 2853(b)(3).

[91] *Id.* § 2855.

[92] *Id.* § 2855(a).

of the office being sought is entitled to receive only eighty-five percent of grants available to other candidates.[93]

Although some have seen Vermont public financing as a positive example of campaign finance reform,[94] the current law has a number of problems. First, the public financing provisions of Vermont's campaign finance reform were passed as part of a larger package of reforms including mandatory limits on campaign expenditures for all candidates for state office.[95] In *Landell v. Sorrell*, however, a decision currently on appeal, such mandatory limits on expenditures were struck down as unconstitutional under the First Amendment to the U.S. Constitution.[96] Therefore, the law today does not work well to "level the playing field"[97] among candidates with different backgrounds or to decrease the need for private fundraising, because extra matching funds are not provided to candidates whose opponents are not clean election candidates or who face third-party attacks.[98] The second problem with Vermont's law is that it is limited to races for governor and lieutenant governor, providing no incentive at all for other statewide candidates to limit their fundraising or expenditures.

Massachusetts also joined the ranks of the clean election states, although only for a brief period. In 1998, the citizens of Massachusetts passed the Massachusetts Clean Election Law.[99] Simply stated, individuals could qualify for public financing by raising a minimum number of qualifying contributions, which could not exceed $5 per individual donation, from registered voters in their districts.[100] Once an individual qualified as a clean elections candidate, the candidate received public funding for his or her campaign, limits on which were set by the statute.[101] After the state leg-

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[93] *Id.* § 2855(b)(3).

[94] *See, e.g.*, Ford & Levien, *supra* note 8, at 313–15.

[95] *See* VT. STAT. ANN. tit. 17, § 2805(a) (2002).

[96] 118 F. Supp. 2d 459, 481 (D. Vt. 2000). For discussion of the case, see generally Kristen Kay Sheils, Note, Landell *Bodes Well for Campaign Finance Reform: A Compelling Case for Limiting Campaign Expenditures*, 26 VT. L. REV. 471 (2002).

[97] Memorandum from Vermont Secretary of State Deborah L. Markowitz to Vermont Senate Government Operations and Vermont House Local Government Committees (Jan. 9, 2001), *available at* http://vermont-elections.org/elections1/2001GAMemoCF.html.

[98] *See generally id.* The Secretary of State of Vermont has noted Maine's success in avoiding this problem. *See* Memorandum from Vermont Secretary of State Deborah L. Markowitz to Vermont Senator Peter Shumlin, Senate *pro tempore*, Senator John Bloomer, Minority Leader, Representative Walter Freed, Speaker of the House, Representative John Tracy, Minority Leader, and Representative Steven Hingtgen, Progressive Caucus Chair, (Mar. 29, 2001), *available at* http://vermont-elections.org/elections1/campfinmarch2001prop.html (stating that Vermont "would do well to look to Maine as a state whose public finance scheme was enormously successful"). In 2000, then-Governor Dean, the governor who had signed the campaign finance bill into law, facing a tough reelection, announced that his campaign was abandoning public financing. *See* Michael Kranish, *To Dean, Finance Law Is Familiar Dilemma*, BOSTON GLOBE, Sept. 6, 2003, at A1. Both Governor Dean and his opponent ended up spending about $1 million. *Id.*

[99] 1998 Mass. Legis. Serv. 395 (West) (codified at MASS. GEN. LAWS ch. 55A (West Supp. 2004)).

[100] MASS. GEN. LAWS ch. 55A, § 4(a) (West Supp. 2003).

[101] *Id.* § 6.

islature refused to fund the system, the Massachusetts Supreme Judicial Court held that the state constitution required the legislature "to appropriate such money as may be necessary to carry the law into effect."[102] Shortly following the 2002 elections, the only election in which the law applied, the state legislature repealed the law, and thus clean elections no longer exist in Massachusetts.[103]

IV. THE ARCHITECTURE OF A NEW SYSTEM

The drafting of a new federal system of publicly funded elections does not have to be done in a vacuum. The federal system can capitalize on the success of Maine and use the model that it has already put forth.[104]

A. Qualifying for Public Funds

One major consideration that a potential federal public financing system would need to address is exactly how a candidate would qualify for public financing. In this instance, Maine law provides an excellent starting point, by basing the number of qualifying contributions required on the number of signatures required of an individual to qualify as a candidate. For candidates affiliated with an official party,[105] Maine law requires a candidate for governor to collect at least 2000 signatures,[106] a candidate for state senate to collect at least 100 signatures,[107] and a candidate for state house representative to collect at least twenty-five signatures.[108] These signatures must be from registered voters affiliated with the candidate's party.[109] These numbers are very close to the number of qualifying contributions a candidate must collect to become a clean elections candidate under MCEA, 2500, 150, and 50, respectively.[110]

A new federal system could be modeled in a similar fashion, capitalizing upon existing state laws to determine the number of signatures needed to

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[102] Bates v. Dir. of the Office of Campaign & Political Fin., 763 N.E.2d 6, 11 (Mass. 2002).

[103] 2003 Mass. Acts 26, § 43(c). *See also* Rick Klein & Anand Vaishnav, *Without Roll Call, Senate Votes to End Clean Elections*, BOSTON GLOBE, May 30, 2003, at B6.

[104] Although the financial analysis of a new public financing system is beyond the scope of this Essay, some possible sources of revenue include increasing the voluntary contribution on income tax forms, additional penalties on campaign finance violations, and slightly increasing civil and criminal penalties. For further information on the cost of funding such a system, see Ford & Levien, *supra* note 8, at 320–21.

[105] Unaffiliated candidates, that is, candidates running with a party that does not have official party status, must gather a higher number of signatures, but they may be from any registered voter in the corresponding electoral division. ME. REV. STATE. ANN. tit. 21-A, §§ 353, 354(2), 354(5) (West Supp. 2003).

[106] *Id.* § 335(5)(A).

[107] *Id.* § 335(5)(F).

[108] *Id.* § 335(5)(G).

[109] *Id.* § 335(2).

[110] *See supra* note 54 and accompanying text.

qualify for public funds. The federal law would require a candidate to collect a certain number of qualifying contributions based on the number of signatures required under the laws of the state the individual is running in. For instance, in Maine, a candidate for the United State House of Representatives needs at least 1000 signatures to qualify as a primary candidate.[111] Based on that existing law, a federal public financing law would require a candidate for Congress from Maine to obtain at least 1000 qualifying contributions. As with the Maine law, those contributions should be required to come from the candidate's own party as a measure of viability.

If the candidate is not affiliated with a recognized party, the threshold should increase in a parallel fashion to the signatures required to qualify by petition.[112] As in the case of Maine law, these contributions could come from any registered voter within the electoral district.[113] This higher threshold would protect the interest of those worried about abuse of a publicly financed system.

Public financing for presidential candidates poses a more difficult problem. Because congressional elections are straightforward popular elections, the proposed qualifying rules for congressional public financing could sensibly be based on the signature requirements a congressional candidate is running under. Conditioning the number of qualifying contributions required on the population of the United States at large, however, is illogical, as it would fail to take into consideration that a presidential candidate cannot win an election by winning the popular vote alone. Likewise, requiring a presidential candidate to raise qualifying contributions in all fifty states is also illogical because it fails to consider that a presidential candidate need not receive support from every state in order to be successful.

As discussed above, the authors of BCRA have proposed revamping the current public financing system.[114] Their proposal would require a demonstration of viability by requiring small-dollar fundraising in twenty states to qualify.[115] Such a proposal fails to take into account regional and

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[111] ME. REV. STATE. ANN. tit. 21-A, §§ 335(5)(C) (West Supp. 2003).

[112] *See supra* note 105.

[113] ME. REV. STATE. ANN. tit. 21-A, § 354(2) (West Supp. 2003). Note that MCEA currently requires candidates affiliated with a recognized party and unaffiliated candidates to collect the same amount of qualifying contributions in order to qualify for clean elections money. *Id.* § 1125(3). Requiring an increased number of qualifying contributions for nonparty candidates (just as nonparty candidates are required to obtain a higher number of signatures than party candidates) might help counter the perception that clean elections money is wasted on nonviable candidates. *See supra* note 105.

[114] *See supra* note 45; Presidential Funding Act of 2003, H.R. 3617, 108th Cong. (2003); Presidential Funding Act of 2003, S. 1913, 108th Cong. (2003).

[115] Presidential Funding Act of 2003, H.R. 3617, 108th Cong. § 2(b)(1) (2003); Presidential Funding Act of 2003, S. 1913, 108th Cong. § 2(b)(1) (2003). Current law requires the candidate to raise aggregate contributions of at least $5,000 from at least twenty states. 26 U.S.C. § 9033(b)(3) (2000). The proposed legislation would increase the $5,000 amount to $15,000, but would not affect the requirement that no individual's donation that counts toward the aggregate amount from the state exceeds $250. *Id.* § 9033(b)(4).

size differences among the fifty states. Consequently, a presidential candidate with little viability could meet the qualifying requirements under such a system by raising the required donations in twenty smaller states. A better way to determine qualification for public financing might be to require a presidential candidate to raise qualifying contributions from the same number of people whose signatures a state requires of qualifying gubernatorial candidates,[116] and to do so in thirty states, ten each from states with small, medium, and large populations. Categories would be determined by electoral votes; states with fewer electoral votes than two-thirds of the rest of the states would be small states, those with fewer electoral votes then one-third of the rest would be medium states, and the remaining would be large states.[117] Such a formula borrows what is best about the electoral college—that all states have value, regardless of size.

B. Seed Money and Distribution Amount

Maine law allows a candidate to raise a small amount in seed donations while raising qualifying contributions toward becoming certified as a clean elections candidate.[118] Like MCEA's caps on seed money for state representative and senatorial candidates, caps on seed money in a federal public financing system should be ten percent of the total amount of public financing funds available to be distributed to the candidates.[119] Thus, if the total amount available for distribution is $500,000, the cap on seed money would be $50,000.

In order to determine both the amount of seed money allowed and the amount that could be distributed to presidential candidates, a formula simi-

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[116] For instance, in Maine, a presidential candidate would be required to raise qualifying contributions from at least 2000 residents of the state because a gubernatorial candidate must obtain that many signatures to qualify as a candidate. ME. REV. STATE. ANN. tit. 21-A, § 334(5)(A) (West Supp. 2003).

[117] For the 2004 presidential election (and through at least 2008), such a system would classify the states as follows: Small—Nebraska, New Mexico, Utah, West Virginia, Hawaii, Idaho, Maine, New Hampshire, Rhode Island, Alaska, Delaware, District of Columbia, Delaware, Montana, North Dakota, South Dakota, Vermont, and Wyoming; Medium—Arizona, Maryland, Minnesota, Wisconsin, Alabama, Colorado, Louisiana, Kentucky, South Carolina, Connecticut, Iowa, Oklahoma, Oregon, Arkansas, Kansas, and Mississippi; Large—California, Texas, New York, Florida, Illinois, Pennsylvania, Ohio, Michigan, Georgia, New Jersey, North Carolina, Virginia, Massachusetts, Indiana, Missouri, Tennessee, and Washington. *See* THOMAS H. NEALE, THE ELECTORAL COLLEGE: HOW IT WORKS IN CONTEMPORARY PRESIDENTIAL ELECTIONS 6, tbl.1 (Sept. 8, 2003), *available at* http://fpc.state.gov/documents/organization/28090.pdf. Note that while fifty states and the District of Columbia divide evenly into thirds, a state that has the same number of electoral votes as those in the bottom third or two-thirds cannot be classified as medium or large, respectively, because medium and large states must have more electoral votes than two-thirds or one-third of all other states.

[118] ME. REV. STAT. ANN. tit. 21-A, § 1125(2) (West Supp. 2003). *See supra* note 56 and accompanying text.

[119] *Compare* ME. REV. STAT. ANN. tit. 21-A, § 1125(2) (West Supp. 2003) *with id.* § 1125(8).

lar to the one applied to state representative and senate elections under MCEA should be used.[120] First, the average total expenditure in the last two federal elections in a district, or in the case of presidential elections, in the last two presidential campaigns, would be determined.[121] Ninety percent of that number would equal the total amount of funds available for distribution for both the primary and general election. Candidates would be allowed to raise seed money up to ten percent of the total distribution in increments not to exceed $100. Therefore, if a candidate raised the maximum amount of seed money allowed, his or her total campaign funds would equal the average amount spent in the last two elections in that federal district. As under MCEA, a candidate who failed to spend all of his or her seed money before registering for public financing must turn over the excess.[122] In one departure from MCEA, the federal public financing system should allow for matching contributions to counter independent and third-party expenditures during the primary, in an amount not to exceed three times the contested primary distribution limit. This would encourage candidates to run under clean elections without making them vulnerable to third-party attacks during the primary. Under MCEA, only a contested primary candidate receives distribution to respond to such attacks. This means that a candidate running uncontested in the primary election is unable to respond to attack ads promulgated by potential general election opponents. For example, the Democratic presidential hopefuls initiated attacks against President George W. Bush more than eight months before the general election.[123] If Bush was operating under clean elections and had no primary opponent, Bush would not be eligible to receive matching funds with which to defend against the attack ads.

The timing of raising seed money and qualifying for matching funds is critical given the changing landscape of political campaigns.[124] Presidential campaigns, for example, now begin four years or more before the

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[120] *Id.* § 1125(8)(A)–(D).

[121] Because campaign costs vary greatly from state to state, applying a one-size-fits-all distribution amount for all Senate and House races would be irrational. Any workable system needs to take into account the extraordinarily high media costs a congressional district in New York City faces, or even that a candidate in a rural state like New Hampshire must depend on expensive Boston media markets, while campaign costs in Maine, a similarly rural state, are generally low. Additionally, it is important not to use previous presidential elections as a complete guide. A battleground state one election may be decidedly in one party's camp in the next election. Instead, seed money should be fungible, used for the best strategic purpose and place as determined by the presidential candidate.

[122] ME. REV. STAT. ANN. tit. 21-A, § 1125(5) (West Supp. 2003).

[123] Wayne Slater, *Bush Troops Out In Force In NH; Giuliani, McCain and Pataki Canvass State to "Set the Record Straight,"* DALLAS MORNING NEWS, Jan. 28, 2004, at 10A.

[124] Under MCEA, the qualifying period for a gubernatorial candidate begins the November 1 before the election year and ends on April 15 of the election year. If an individual has not yet registered as a candidate by April 15, the qualifying period is extended to June 2. ME. REV. STAT. ANN. tit. 21-A, § 1122(8)(A) (West Supp. 2003). The qualifying periods for state Senate and House candidates are the same as that for the gubernatorial candidates, except that they do not begin until January 1st of the election year. *Id.* § 1122(8)(B).

election.[125] The acceleration of the political process places into question how and when a candidate becomes a candidate. Regardless of changing mores, however, we estimate that no one should need more than two years to engage in active campaigning for the presidency. We recommend that seed money can be raised following the formal declaration of candidacy, not to exceed two years prior to the general election.

V. CONCLUSION: THE HOPE FOR REPRESENTATIVE LEADERS

After a protracted debate, BCRA was passed with much fanfare.[126] There can be no doubt that the Act was an improvement over the pre-BCRA campaign finance system. There should also be no doubt, however, that BCRA's promise of a decreased role for large-scale private money in federal elections has largely rung hollow. In the past year, by collecting unlimited donations from what often are extremely wealthy individuals, 527s have carved out a role of ever-increasing prominence. Consequently, the nation's airwaves are saturated with ads sponsored by these groups—ads that to a layperson are virtually indistinguishable from traditional campaign ads. Although the FEC is slowly moving to tighten the loophole that has led to this development,[127] we suggest that it is inevitable that additional loopholes will be found.

In short, the problem with BCRA is not only that it does not have enough restrictions on organizations other than traditional political parties—though that is the case—but that it approaches campaign finance reform from the wrong direction. BCRA seeks to limit the corrupting influence of big money on federal elections by limiting the supply of such funds. Such an approach, however, is inherently flawed, because our system continues to reward the candidates who spend the most money.[128] The solution must be to attack the problem where it starts—on the demand side of the equation.

MCEA could become a national model for campaign finance reform. With little effort, BCRA could be expanded to include a public financing option. If federal candidates were allowed to qualify for public funds as they do in Maine, they could spend more time meeting voters instead of

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[125] *See* Raymond Hernandez, *Political Memo; A Wary Mrs. Clinton Runs a Perpetual Race*, N.Y. TIMES, Oct. 17, 2003, at B1 (discussing Hillary Clinton's potential as a presidential candidate in 2008 and her actions that affect and indicate such a candidacy).

[126] *See, e.g.*, David Rogers, *Bush Is Expected to Sign Campaign-Finance Bill; Court Challenges Loom*, WALL ST. J., Mar. 21, 2002, at A24 ("Once enacted, the measure promises the most sweeping revision to campaign-finance law since the post-Watergate overhaul.").

[127] *See* Political Committee Status, *supra* note 28.

[128] *See* Note, *The Ass Atop the Castle: Competing Strategies for Using Campaign Donations to Influence Lawmaking*, 116 HARV. L. REV. 2610, 2612–13 (2003) (reporting that in 2002, the biggest spender won seventy-eight of the open-seat (i.e., no incumbent) races in the House and five of the seven open-seat races in the Senate).

raising dollars, and more nights in debates, rather than at fundraisers.[129] And, when candidates get to office, they would be beholden to no particular industry or particularly successful check-bundler,[130] but to the whole of the electorate.

There is no question that public financing of elections is costly, and in a time of budget deficits and terrorism, such reform may seem like a luxury. But our current system is even more costly, as increasing numbers of people stop voting every year based partly on the understandable conviction that the federal government is run for the benefit of special interests alone.[131] Public financing of elections is an idea whose time has come. Government must be sponsored by all the people, or it will serve only some of the people.

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[129] "Former Congressman Bob Edgar (D-Pa.) resigned from Congress in frustration over the amount of time spent raising money. During an election, he said, 'Eighty percent of my time, 80% of my staff's time, 80% of my events and meetings were fundraisers. Rather than go to a senior center, I would go to a party where I could raise $3,000 or $4,000.'" Jezer et al., *supra* note 8, at 341 (citing PHILIP M. STERN, THE BEST CONGRESS MONEY CAN BUY 101 (1988)).

[130] *See* George Soros, *Why I Gave*, WASH. POST, Dec. 5, 2003, at A31. Check bundling is a process in which political action committees or individuals solicit personal checks from members and then passing them along to a candidate. *See id.*; John T. Cooke, *Making the Case for Campaign Finance: One Theory Explaining the Withdrawal of* Landell v. Sorrell, 27 VT. L. REV. 685, 690 n.38 (2003).

[131] *See* Farrah Nawaz, Note, *Campaign Finance Reform "Dollar for Dollar Votes"—the American Democracy*, 14 ST. JOHN'S J.L. COMM. 155, 167 (1999).

RECENT DEVELOPMENTS

FEDERAL MARRIAGE AMENDMENT

Amidst turbulent debate, while more and more companies extend employee benefits to domestic partners,[1] and numerous state legislatures pass bills to limit expansion of gay rights,[2] Representative Mary Musgrave (R-Colo.) introduced[3] House Bill 56[4] on May 21, 2003.[5] The bill, known as the Federal Marriage Amendment (FMA), states:

> Marriage in the United States shall consist only of the union of a man and a woman. Neither this Constitution or the constitution of any State, nor state or federal law, shall be construed to require that marital status or the legal incidents thereof be conferred upon unmarried couples or groups.[6]

At the time of its introduction, the FMA was co-sponsored by Representatives Jo Ann Davis (R-Va.), David Vitter (R-La.), Ralph M. Hall (D-Tex.), Collin C. Peterson (D-Minn.), and Mike McIntyre (D-N.C.).[7] At last count, the list of co-sponsors had grown to 117, which included 109 Republicans and 8 Democrats.[8]

Six months after the FMA was introduced in the House, Senator Wayne A. Allard (R-Colo.) introduced Senate Bill 26, which was substantively identical to House Bill 56.[9] Senate Bill 26 was initially co-sponsored by Senators Sam Brownback (R-Kan.), Jim Bunning (R-Ky.), James Inhofe (R-Okla.), and Jeff Sessions (R-Ala.)[10] and subsequently earned six additional co-sponsors.[11] Because of concerns over the ambiguous effects that

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[1] *See* HUMAN RIGHTS CAMPAIGN FOUND., THE STATE OF THE WORKPLACE FOR LESBIAN, GAY, BISEXUAL AND TRANSGENDER AMERICANS 2002, *available at* http://www.hrc.org/Template.cfm?Section=Resources1&Template=/ContentManagement/ContentDisplay.cfm&ContentFileID=593.

[2] *See infra* notes 47–57, 69–71 and accompanying text.

[3] According to Article V of the U.S. Constitution, a "proposed" amendment is one that has been approved by Congress and sent to the states for ratification. Thus, although most legislation introduced in Congress is considered "proposed," the FMA will be referred to here strictly as "introduced." Any references to "proposed" federal amendments are made in accordance with the language of Article V. U.S. CONST. art. V.

[4] H.R.J. Res. 56, 108th Cong. (2003).

[5] 149 CONG. REC. H4527 (daily ed. May 21, 2003) (statement of Rep. Musgrave).

[6] H.R.J. Res. 56.

[7] *Id.*

[8] Congressional Information Service, 2003 Bill Tracking, H.J.Res. 56, *available at* http://thomas.loc.gov/cgi-bin/bdquery/D?d108:1:./temp/~bdn0tx:@@@Pl/bss/d108query.html (last visited Apr. 21, 2004).

[9] S.J. Res. 26, 108th Cong. (2003).

[10] 149 CONG. REC. S15976 (daily ed. Nov. 25, 2003) (statement of Sen. Allard).

[11] *See* Congressional Information Service, 2003 Bill Tracking, S.J.Res 26, *available at* http://thomas.loc.gov/cgi-bin/bdquery/z?d108:SJ00026:@@@P (last visited Apr. 21, 2004).

Senate Bill 26 would have on legislatively enacted civil unions,[12] Senator Allard introduced a new resolution on March 22, 2004,[13] Senate Bill 30.[14] Representative Musgrave, while supporting the changes made by Senator Allard,[15] has not made the same alterations to House Bill 56.[16] Apart from possibly variant effects on civil unions,[17] however, the two resolutions are substantively identical. For that reason, both House Bill 56 and Senate Bill 30 will be referred to here as the "Federal Marriage Amendment" or "the FMA." Specific note will be made where the language or effects of the resolutions differ.

The purpose of the FMA is, as its language clearly indicates, to codify that a marriage in the United States can be only between a man and a woman. In practical terms, the FMA would prohibit any state from granting same-sex couples the right to marry. As previously mentioned, the FMA's effect on civil union or other similar laws potentially varies between the two proposals. The effects of House Bill 56 are debated.[18] Many, including Representative Musgrave, argue that House Bill 56 would still permit legislatively enacted civil unions.[19] Some liberals and libertarians, and at least two of the drafters of the resolution,[20] however, argue that the amendment would prevent state legislatures from either granting civil unions or conveying rights to same-sex couples traditionally reserved for married couples.[21] Both sides agree that if House Bill 56 does permit the enact-

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[12] *See* Mary Leonard, *Marriage Measure Revised to Allow Some State Rights*, BOSTON GLOBE, Mar. 23, 2004, at A1.

[13] 150 CONG. REC. S2859 (daily ed. Mar. 22, 2004) (statements by Sen. Allard).

[14] S.J. Res. 30, 108th Cong. (2003). Senate Bill 30 states: "Marriage in the United States shall consist only of the union of a man and a woman. Neither this Constitution, nor the constitution of any State, shall be construed to require that marriage or the legal incidents thereof be conferred upon any union other than the union of a man and a woman."

[15] *See* Leonard, *supra* note 12, at A1.

[16] Musgrave has always contended that House Bill 56 would not affect states' abilities to establish legislatively enacted civil unions, and thus may not see the need to amend the resolution. *See infra* note 19.

[17] *See infra* text accompanying notes 18–21.

[18] *See, e.g.*, Ramesh Ponnuru, *Marriage Amendment Jitters: The Social Right Tries To Get It Together*, NAT'L REV., Nov. 24, 2003, at 32–33.

[19] The proponents of this view argue that because the FMA refers only to "marriage," a state legislature could legalize civil unions or other such partnerships between same-sex couples, and in so doing, grant those couples the benefits of marriage within that state. *See id.* Additionally, the proponents argue that the FMA simply prevents courts from construing specific incidents of marriage as legal rights guaranteed to all people. Therefore, once a legislature deems that a legal right is no longer an incident of marriage, as happens when a legislature specifically grants a legal right (e.g., the ability to co-sign a loan) to individuals other than those legally married, the right is no longer "an incident of marriage" and can be granted to partners in same-sex unions (or whomever else the legislature decides). *See id.*

[20] *See id.* at 32.

[21] *See id.*; Alan Cooperman, *Opponents of Gay Marriage Divided; At Issue Is Scope of an Amendment*, WASH. POST, Nov. 29, 2003, at A1; Letter from Laura W. Murphy, Director, and Christopher E. Anders, Legislative Counsel, American Civil Liberties Union, to the House of Representatives (May 23, 2003), *at* http://www.aclu.org/LesbianGayRights/LesbianGayRights.cfm?ID=12718&c=101; *The Defense of Marriage Act: Hearing Before the Subcomm. on the Constitution, of the House Comm. on the Judiciary*, 108th Cong. (2003)

ment of civil unions, only state legislatures, and not the courts, could establish such laws, and that other states could not be required to recognize those laws.[22]

Senate Bill 30, however, was specifically introduced to resolve this debate, and its language would allow legislatively enacted civil unions. Because the bill does not include the language "nor state or federal law," courts could construe such laws to require that the "legal incidents" of marriage be granted to same-sex partners pursuant to a civil union law.[23] Just as in House Bill 56, judicially mandated civil unions would be prohibited under Senate Bill 30.

Additionally, both forms of the FMA ensure that states could not legalize same-sex marriage through either the legislature or the courts, meaning that civil unions would be the only form of same-sex partnerships allowed in the United States.[24] Furthermore, states could not be required to recognize laws of another state that confer benefits to same-sex couples.[25]

Thus far, the House has not held any hearings specifically concerning the FMA, although it was a major part of the discussion on the oversight hearing *The Defense of Marriage Act*.[26] Four additional House meetings concerning the definition of marriage are expected.[27] The Senate has already held two hearings related to the FMA,[28] and is expected to hold

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[hereinafter *House DOMA Hearing*] (testimony of Mr. Bob Barr, former Representative from Georgia) *available at* http://www.house.gov/judiciary/barr033004.pdf. The subcommittee hearing had not been published when this Recent Development went to press. Those who believe that House Bill 56 would prohibit legislatively enacted civil unions argue that if a state legislature confers "the incidents of marriage" to a non-married couple (such as via a civil union law that states that all couples joined in civil unions will enjoy the incidents and benefits of marriage), courts would be unable to enforce the law, because they would need to "construe" the new law to confer incidents of marriage to unmarried people. *See* Ponnuru, *supra* note 18, at 33; Letter from Laura W. Murphy and Christopher E. Anders to the House of Representatives, *supra*.

[22] *See* REPUBLICAN POLICY COMM., MASSACHUSETTS COURT EXPECTED TO LEGALIZE GAY MARRIAGES: THE THREAT TO MARRIAGE FROM THE COURTS 3 (July 29, 2003), *available at* http://rpc.senate.gov/_files/CIVILsd090403.pdf; Alliance for Marriage, *Legal Impact of the Federal Marriage Amendment*, *at* http://www.allianceformarriage.org/site/PageServer?pagename=clr_colorchart.

[23] In order for a proposed amendment to be sent to the states, the bill passed by each house of Congress would need to be reconciled.

[24] *See* REPUBLICAN POLICY COMM., *supra* note 22, at 11–12; Alliance for Marriage, *supra* note 22.

[25] *See* REPUBLICAN POLICY COMM., *supra* note 22, at 3.

[26] *See House DOMA Hearing*, *supra* note 21 (testimony of Mr. Bob Barr, former Representative from Georgia); *id.* (testimony of Sen. John Hanes, Wyoming State Senate).

[27] *See* Mary Leonard, *GOP Divided on Marriage Amendment; Republicans Grapple with Same-Sex Issue*, BOSTON GLOBE, Mar. 28, 2004, at A1.

[28] *See Judicial Activism vs. Democracy: What Are the National Implications of the Massachusetts Goodridge Decision and the Judicial Invalidation of Traditional Marriage Laws?: Hearing Before the Subcomm. on the Constitution, Civil Rights and Property Rights of the Senate Comm. on the Judiciary*, 108th Cong. (2003), *at* http://judiciary.senate.gov/hearing.cfm?id=1072; *A Proposed Constitutional Amendment to Preserve Traditional Marriage: Hearing Before the Subcomm. on the Constitution, Civil Rights and Property Rights of the Senate Comm. on the Judiciary*, 108th Cong. (2003), *at* http://judiciary.senate.gov/hearing.

more.[29] If a joint resolution is not passed by two-thirds of both chambers of Congress by the end of the current Congress,[30] the resolutions will expire and would need to be reintroduced in a future Congress to be reconsidered.[31] Upon congressional passage, a joint resolution containing the proposed amendment would need to be ratified by three-fourths of the state legislatures (thirty-eight states)[32] within seven years of its being submitted for ratification in order for the proposed amendment to become ratified.[33]

Given the number of hurdles that must be overcome before the FMA could become an amendment, it is unlikely that any form of it will be ratified. As intended by the framers, constitutional amendments are extremely difficult to pass,[34] and only seventeen have succeeded since passage of the Bill of Rights in 1791, although more than 10,000 attempts have been made.[35] While same-sex marriages have been the subject of growing opposition, that opposition seems unlikely to be sufficient to carry either version of the FMA to ratification.[36] Indeed, congressional head-counting

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cfm?id=1118 [hereinafter *Senate FMA Hearing*]. Although not specifically on the agenda, the FMA was also discussed at a Senate Judiciary Committee meeting. *What Is Needed to Defend the Bipartisan Defense of Marriage Act of 1996?: Hearing Before the Subcomm. on the Constitution, Civil Rights and Property Rights of the Senate Comm. on the Judiciary*, 108th Cong. (2003), *at* http://judiciary.senate.gov/hearing.cfm?id=906 [hereinafter *Senate DOMA Hearing*]. These subcommittee hearings had not been published when this Recent Development went to press.

[29] *See* Michael Sokolove, *Can This Marriage Be Saved?*, N.Y. TIMES, Apr. 11, 2004, § 6, at 26.

[30] The current Congress (the 108th) is scheduled to end on October 1, 2004.

[31] The only previous constitutional amendment introduced in Congress seeking to limit marriage to heterosexual unions did not fare well. House Bill 93, identical to the current House's proposed version of the FMA, was first introduced in the previous Congress by Representative Ronnie Shows (D-Miss.) in 2002. Proposing an Amendment to the Constitution of the United States Relating to Marriage, H.R.J. Res. 93, 107th Cong. (2002). The bill garnered twenty-two co-sponsors but saw no action after being referred to the House Subcommittee on the Constitution of the House Committee on the Judiciary. Congressional Information Service, 2002 Bill Tracking, H.J. Res. 93, *available at* http://thomas.loc.gov/cgi-bin/bdquery/D?d107:1:./temp/~bdJLZO:@@@L&summ2=m&l/bss/d107query.html.

[32] Constitutional amendments can also be ratified through state conventions, but the language of both House Bill 56 and Senate Bill 30 prohibit this form of ratification. DAVID C. HUCKABEE, RATIFICATION OF AMENDMENTS TO THE U.S. CONSTITUTION, 1 (Sept. 30, 1997), *available at* http://www.house.gov/judiciary/97-922.pdf; H.J.Res. 56, 108th Cong. (2003); S.J. Res. 30, 108th Cong. (2003). The only amendment to be ratified through the convention method was the Twenty-first Amendment, the repeal of Prohibition. Huckabee, *supra*, at 1.

[33] For information on state ratification procedures, see Huckabee, *supra* note 32, at 1. In keeping with tradition, both House Bill 56 and Senate Bill 30 state that the amendment is ratified upon being passed by and ratified by three-fourths of the state legislatures within seven years of its being submitted for ratification. Note that the seven-year deadline is imposed by the resolution itself and not all proposed constitutional amendments have such deadlines. *See id.* at 1–2.

[34] *See* Thomas E. Baker, *Towards a "More Perfect Union": Some Thoughts on Amending the Constitution*, 10 WIDENER J. PUB. L. 1, 5 (2000).

[35] *See* Michael J. Lynch, *The Other Amendments: Constitutional Amendments That Failed*, 93 LAW LIBR. J. 303, 309 (2001).

[36] The Nineteenth Amendment, guaranteeing women the right to vote, took 72 years

already suggests that the FMA is doomed,[37] and the lack of action on the amendment does not convey the impression of an inspired Congress.

The FMA is the result of a long-brewing battle in American politics over whether, and to what degree, homosexuals should be allowed to enter into marriages with members of the same sex, whether same-sex partners should have the right to receive the benefits that married couples receive, and who has the right to decide these questions. While the civil rights movement for gays became active in the 1950s,[38] the specific issues concerning marriage and marriage-related benefits were first raised in the 1971 case *Baker v. Nelson*.[39] In *Baker* the Minnesota Supreme Court relied on the dictionary definition of "marriage" to determine that Minnesota statutes did not contemplate same-sex marriages,[40] and held that neither the First, Eighth, Ninth, nor Fourteenth Amendments of the United States Constitution required the state to issue marriage licenses to same-sex couples.[41] Similar claims by gay and lesbian couples seeking marriage licenses continued to fail through the 1980s.[42] Most likely due to the lack of success of these claims, the same-sex marriage issue did not reach the forefront of American politics until the Hawaii Supreme Court's 1993 decision in *Baehr v. Lewin*[43] was announced. The *Baehr* court held that because sex-based discrimination was subject to strict scrutiny under the equal protection clause of the Hawaii state constitution, the Hawaii Department of Health had to provide a compelling government interest in limiting marriage

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and included 56 state-referenda campaigns, 480 state-legislative campaigns, 47 state constitutional conventions, 277 state-party conventions, 30 national-party conventions, and 19 campaigns before 19 successive Congresses before the measure was sent to the states for ratification. *See* Baker, *supra* note 34, at 18. Public sentiment vehemently opposed the outcome of *Texas v. Johnson*, 491 U.S. 397 (1989), in which the Supreme Court held that prohibitions on burning the American flag violated the First Amendment, but no amendment prohibiting flag desecration has yet been passed by Congress. *See* Norman Dorsen, *Flag Desecration in Courts, Congress and Country*, 17 T. M. COOLEY L. REV. 417, 424–33 (2000); H.R.J. Res. 36, 107th Cong. (2001); S.J. Res. 7, 107th Cong. (2003); H.R.J. Res. 4, 108th Cong. (2003); S.J. Res. 4, 108th Cong. (2003). *See also* Thomas E. Heard, *Proposed Constitutional Amendments as a Research Tool: The Example of Prohibition*, 84 LAW LIBR. J. 499, 502–07 (1992).

[37] *See infra* text accompanying notes 130–131.

[38] The first public gay organization in the modern era was the Mattachine Society, formed in 1951. MARTIN DUPUIS, SAME-SEX MARRIAGE, LEGAL MOBILIZATION, & THE POLITICS OF RIGHTS 14 (2002).

[39] 191 N.W.2d 185 (Minn. 1971).

[40] *Id.* at 185–86.

[41] *Id.* at 187. Challenges based on the First and Eighth Amendments were dismissed without discussion. *See id.* at 186 n.2. The court rejected challenges based on the Ninth and Fourteenth Amendments because restricting marriage licenses to heterosexual couples was not "irrational" or "invidious" discrimination due to marriage's purpose of "procreation and rearing of children within a family." *See id.* at 186–87.

[42] *See* Adams v. Howerton, 673 F.2d 1036 (9th Cir. 1982); Jones v. Hallahan, 501 S.W.2d 588 (Ky. 1973); De Santo v. Barnsley, 476 A.2d 952 (Pa. Super. Ct. 1984); Singer v. Hara, 522 P.2d 1187 (Wash. Ct. App. 1974).

[43] 852 P.2d 44 (Haw. 1993).

licenses to heterosexual couples.[44] The case was remanded to the Hawaii Circuit Court, which held on December 3, 1996 that the state had not met its burden.[45] The court, however, stayed its decision pending the state's appeal to the Hawaii Supreme Court.[46] Before the supreme court heard the case, two key legislative events occurred. First, the state legislature submitted to the voters an amendment to the state constitution declaring, "The legislature shall have the power to reserve marriage to opposite-sex couples," which was ratified in November of 1998.[47] Second, the state legislature enacted the Hawaii Reciprocal Beneficiaries Act,[48] which extended many of the benefits of marriage, such as inheritance rights and hospital visitation rights, to couples who registered as "reciprocal beneficiaries."[49] Because of these developments, when the case reached the Hawaii Supreme Court, the court declared the appellees' claims moot.[50]

Far to the north, another same-sex marriage lawsuit had been filed. In *Brause v. Bureau of Vital Statistics*,[51] a gay couple sued the state of Alaska for a marriage license. In February 1998 the Alaska Superior Court ruled that the denial of the marriage license restricted "the right to choose one's life partner," violating the equal protection[52] and privacy[53] clauses of the Alaska Constitution.[54] The remedy was postponed while the state appealed, but before any final result was reached through the courts, the Alaska state legislature passed a proposed constitutional amendment stating that "[t]o be valid or recognized in this State, a marriage may exist only between one man and one woman."[55] The amendment was ratified by the voters in November of 1998 (notably the same month the Hawaii electorate ratified its amendment) by a two-to-one margin.[56] Due to the amendment, the *Brause* case was dismissed in September 1999.[57]

While the Hawaiian and Alaskan legislatures worked to circumvent the decisions handed down by their state courts, a similar case, *Baker v. State*,[58] was pending in Vermont. Three same-sex couples had sought and were denied marriage licenses in Chittenden County, Vermont, and in

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[44] *See id.* at 67.

[45] *See* Baehr v. Miike, CIV. No. 91-1394, 1996 WL 694235, at *22 (Haw. Cir. Ct. Dec. 3, 1996).

[46] *See id. See also* Recent Developments, Elizabeth Kristen, *The Struggle for Same-Sex Marriage Continues*, 14 BERKELEY WOMEN'S L.J. 104, 109 (1999).

[47] HAW. CONST. art. I, § 23.

[48] HAW. REV. STAT. § 572C (Supp. 1997).

[49] *Id.* § 572C-4.

[50] *See* Baehr v. Miike, 994 P.2d 566, 566 (Haw. 1999).

[51] No. 3AN-95-6562 CI, 1998 WL 88743, at *1 (Alaska Super. Ct. Feb. 27, 1998).

[52] ALASKA CONST. art. I, §§ 1, 3.

[53] *Id.* § 22.

[54] *Brause*, 1998 WL 88743, at *5–*6.

[55] ALASKA CONST. art. I, § 25.

[56] *See* DUPUIS, *supra* note 38, at 75.

[57] *See* YUVAL MERIN, EQUALITY FOR SAME-SEX COUPLES 223 (2002) (citing *Judge Dismisses Same-Sex Lawsuit*, ANCHORAGE DAILY NEWS, Sept. 24, 1999, at 2B).

[58] 744 A.2d 864 (Vt. 1999).

July 1997, they sought an order compelling the town clerks to issue the licenses.[59] After the trial court granted summary judgment to the state, the plaintiffs appealed.[60] In December 1999, the Vermont Supreme Court held that the state constitution prohibited the state from denying same-sex couples the benefits of marriage.[61] The court did so under the Vermont Constitution's common benefits clause, which states in pertinent part that "government is, or ought to be, instituted for the common benefit, protection, and security of the people, nation, or community, and not for the particular emolument or advantage of any single person, family, or set of persons, who are a part only of that community."[62] The state's reasons for denying gays the benefits of marriage, the court concluded, did not survive the rational basis scrutiny required.[63] Like the Hawaiian and Alaskan courts, however, the *Baker* court did not order the issuance of the licenses, instead giving the state legislature "a reasonable period of time" to craft an appropriate remedy.[64] The court noted that the remedy needed only to address the requirement that same-sex couples be allowed to obtain the "benefits" of marriage, and did not require the legislature to allow same-sex couples the right to marry per se.[65] After a grueling legislative process,[66] Governor Howard Dean signed into law "An Act Relating to Civil Unions" in April 2000.[67] The law established civil unions and explicitly granted "[p]arties to a civil union . . . the same benefits, protections and responsibilities under law . . . as are granted to spouses in a marriage."[68]

The constitutional amendments in Hawaii and Alaska were not the only responses to the *Baehr*, *Brause*, and *Baker* decisions. Once those decisions brought the issue of same-sex marriages to the political forefront, many states enacted laws seeking to limit the effect of same-sex marriage within that state. By early 2004, thirty-six states had passed laws limiting the recognition of marriage within their borders to a union between a man and a woman, known as state Defense of Marriage Acts (state DOMAs).[69] Nebraska and Nevada have joined Alaska and Ha-

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[59] *See* WILLIAM N. ESKRIDGE, JR., EQUALITY PRACTICE: CIVIL UNIONS AND THE FUTURE OF GAY RIGHTS 48 (2002).

[60] *See Baker*, 744 A.2d at 867–68.

[61] *See Baker*, 744 A.2d at 886.

[62] VT. CONST. ch. I, art. 7.

[63] *Baker*, 744 A.2d at 886.

[64] *Id.* at 887.

[65] *See id.* at 886–87.

[66] For a comprehensive description of the process, see ESKRIDGE, *supra* note 59, at 57–79.

[67] An Act Relating to Civil Unions, 2000 Vt. Acts & Resolves 91 (codified at VT. STAT. ANN. tit. 15, §§ 1202–1207 (Supp. 2001)).

[68] VT. STAT. ANN. tit. 15, § 1204(a) (Supp. 2001).

[69] ALA. CODE § 30-1-19 (1998); ALASKA STAT. § 25.05.013 (Michie 2002); ARIZ. REV. STAT. ANN. §§ 25-101, -112, -125 (West 2000); ARK. CODE ANN. §§ 9-11-107, -109, -208 (Michie 2002); CAL. FAM. CODE § 308.5 (West Supp. 2004); COLO. REV. STAT. ANN. § 14-2-104 (West Supp. 2003); DEL. CODE ANN. tit. 13, § 101 (1999); FLA. STAT. ANN. § 741.212 (West Supp. 2004); GA. CODE ANN. § 19-3-3.1 (1999); HAW. REV. STAT. § 572-

waii[70] in taking the more decisive step of passing a constitutional amendment stating that only marriages between a man and a woman will be recognized in the state.[71] On the other side of the spectrum, four states, including Vermont, recognize civil unions or domestic partnerships.[72] A November 2003 ruling by the Massachusetts Supreme Judicial Court will make Massachusetts the first state to recognize same-sex marriages,[73] which the court ruled the commonwealth must do once the 180-day stay on the decision expires.[74]

State action was not the only response to the growing concern over the potential legalization of gay marriages or civil unions. In fact, before most states had passed such laws of their own, the United States Congress passed the Defense of Marriage Act (DOMA), which was signed into law by President Clinton in September 1996.[75] DOMA's first section allows states to decline to recognize same-sex marriages that occur in other states.[76] Its second section defines the word marriage to mean "only a legal union

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1, -3 (Supp. 1999); IDAHO CODE §§ 32-201, -209 (Michie 1996); 750 ILL. COMP. STAT. ANN. 5/201, /212-13 (West 1999); IND. CODE § 31-11-1-1 (1998); IOWA CODE § 595.2 (2001); KAN. STAT. ANN. §§ 23-101, -115 (Supp. 2002); KY. REV. STAT. ANN. §§ 402.005, .040, .045 (Michie 1999); LA. CIV. CODE ANN. art. 86 (West 1999), art. 3520 (West Supp. 2004); ME. REV. STAT. ANN. tit. 19-A, §§ 650, 701 (West 1998); MICH. COMP. LAWS ANN. §§ 551.1-.4, .271-.272 (West Supp. 2003); MINN. STAT. ANN. §§ 517.01, .03 (West Supp. 2004); MISS. CODE ANN. § 93-1-1 (Supp. 2003); MO. REV. STAT. § 451.022 (Supp. 2002); MONT. CODE ANN. § 40-1-103, -401 (2003); N.C. GEN. STAT. § 51-1.2 (2003); N.D. CENT. CODE §§ 14-03-01, -08 (Supp. 2003); 2004 Ohio Laws 272; OKLA. STAT. ANN. tit. 43, § 3 (West 2001); 23 PA. CONS. STAT. ANN. §§ 1102, 1704 (West 2001); S.C. CODE ANN. § 20-1-10, -15 (Law. Co-op. Supp. 2003); S.D. CODIFIED LAWS § 25-1-1, -38 (Michie 1999); TENN. CODE ANN. § 36-3-113 (2001); TEX. FAM. CODE ANN. § 6.204 (Vernon Supp. 2004); UTAH CODE ANN. § 30-1-2 (Supp. 2003), -4 (1998); VA. CODE ANN. § 20-45.2 (Michie 2000); WASH. REV. CODE ANN. § 26.04.010, .020 (West Supp. 2004); W. VA. CODE ANN. § 48-2-603 (Michie 2001). While Maryland, New Hampshire, Wisconsin, and Wyoming do not have laws that are considered "Defense of Marriage" statutes, they do have laws that restrict marriage to opposite-sex couples. These laws, however, do not mention marriages performed in other states. MD. CODE ANN., FAM. LAW § 2-201 (1999); N.H. REV. STAT. ANN. § 457:1 (1992); WIS. STAT. § 765.001 (2001); WYO. STAT. ANN. § 20-1-101 (Michie 2003).

[70] *See supra* text accompanying notes 43–57.

[71] NEB. CONST. art I, § 29; NEV. CONST. art. 1, § 21. Therefore, the total number of states that prohibit the recognition of same-sex marriages is thirty-eight, which is the minimum number required to ratify a constitutional amendment.

[72] The three other states are Hawaii (HAW. REV. STAT. 572C (Supp. 1999)), California (CAL. FAM. CODE § 297 (West Supp. 2004)), and New Jersey (Domestic Partnership Act, 2003 N.J. Laws 246) (enacted Jan. 12, 2004). For a comprehensive discussion of state legislative responses to same-sex marriage, see DUPUIS, *supra* note 38, at 71–89; Family Research Council, *In Focus, Marriage Laws: State by State*, *at* http://www.frc.org/get.cfm?i=IF03I01 (last visited Apr. 21, 2004); MarriageWatch, *State Defense of Marriage Acts (DOMAs)*, *at* http://www.marriagewatch.org/states/doma.htm (last visited Apr. 21, 2004).

[73] Goodridge v. Dept. of Public Health, 798 N.E.2d 941, 949 (2003).

[74] *Id.* at 970; *see also infra* text accompanying notes 90–95 (explaining the *Goodridge* decision and the subsequent Massachusetts legislative and judicial responses).

[75] Defense of Marriage Act, Pub. L. No. 104-199, 110 Stat. 2419 (1996) (codified at 28 U.S.C. § 1738C (2000) and 1 U.S.C. § 7 (2000)).

[76] 28 U.S.C. § 1738C (2000).

between one man and one woman" for purposes of federal law,[77] and thus serves to deny same-sex couples any federal benefits granted to heterosexual couples, even when those same-sex couples are entitled to state benefits (such as a couple joined in a civil union in Vermont). Many commentators argue that the second section of DOMA violates multiple provisions of the U.S. Constitution, including the Full Faith and Credit Clause,[78] the equal protection component of the Due Process Clause,[79] the Equal Protection Clause,[80] the Bill of Attainder Clause,[81] and the Privileges and Immunities Clause.[82] A decision on whether DOMA is constitutional must wait

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[77] 1 U.S.C. § 7 (2000).

[78] *See* 142 CONG. REC. 13,359–61 (1996) (Letter from Laurence H. Tribe, Professor of Constitutional Law, Harvard Law School, to Edward Kennedy, Senator, Massachusetts (May 24, 1996)); DUPUIS, *supra* note 38, at 91; ESKRIDGE, *supra* note 59, at 32–34; MERIN, *supra* note 57, at 234; MARK STRASSER, THE CHALLENGE OF SAME-SEX MARRIAGE 190–91 (1999); Scott Ruskay-Kidd, *The Defense of Marriage Act and the Overextension of Congressional Authority*, 97 COLUM. L. REV. 1435, 1447 (1997); Jon-Peter Kelly, Note, *Act of Infidelity: Why the Defense of Marriage Act is Unfaithful to the Constitution*, 7 CORNELL J.L. & PUB. POL'Y 165, 209–19 (1997); Melissa Provost, Comment, *Disregarding the Constitution in the Name of Defending Marriage: The Unconstitutionality of the Defense of Marriage Act*, 8 SETON HALL CONST. L.J. 157, 180–87 (1997). *But see House DOMA Hearing*, *supra* note 21 (statement of Mr. Bruce Fein); *id.* (statement of Mr. Vincent McCarthy, Senior Counsel of the American Center for Law and Justice); *Defense of Marriage Act: Hearing Before the Subcomm. on the Constitution of the House Comm. on the Judiciary*, 104th Cong. 109–12 (1996) (statement of Hadley Arkes, Professor, Amherst College); *id.* at 149–52 (statement of Maurice J. Holland, Professor of Law, University of Oregon School of Law); H.R. REP. NO. 104-664, at 6–10 (1996), *reprinted in* 1996 U.S.C.C.A.N. 2905, 2910–14; Jeffrey L. Rensberger, *Same-Sex Marriages and the Defense of Marriage Act: A Deviant View of an Experiment in Full Faith and Credit*, 32 CREIGHTON L. REV. 409, 410–56 (1998). States rely on choice of law rules to determine which states' laws govern a marriage and whether that marriage is valid. Generally, the state in which the marriage was "celebrated" (i.e., where the marriage took place) determines whether the marriage is valid, and if the marriage is valid in the state of celebration, the marriage is accepted as valid in all other states, even if the marriage would not have been permitted by the laws of other states. RESTATEMENT (SECOND) OF CONFLICT OF LAWS § 283(1) (1971). For instance, if a sixteen-year-old individual marries with her parents' consent in State *A*, where sixteen is the required age to be married with parental consent, the marriage will be recognized as valid in State *B*, where an individual must be eighteen to be married, with or without parental consent. If, however, the marriage offends the strong public policy of a state, it may choose not to recognize a marriage celebrated and valid in another state. *Id.* For a thorough explanation of choice of law rules and the public policy exception, as well as an argument that the policy exception is unconstitutional, see generally Larry Kramer, *Same-Sex Marriage, Conflict of Laws, and the Unconstitutional Public Policy Exception*, 106 YALE L.J. 1965 (1997).

[79] *See* MERIN, *supra* note 57, at 234; STRASSER, *supra* note 78, at 191–92; Kelly, *supra* note 78, at 219–33.

[80] *See* STRASSER, *supra* note 78, at 199–201; Andrew Koppelman, *Dumb and DOMA: Why the Defense of Marriage Act is Unconstitutional*, 83 IOWA L. REV. 1, 32 (1997); Kelly, *supra* note 78 at 233–47; Provost, *supra* note 78, at 187–96. *But see House DOMA Hearing*, *supra* note 21 (testimony of Chairman Steve Chabot).

[81] *See* STRASSER, *supra* note 78, at 204–10.

[82] *See id.* at 201–04; 142 CONG. REC. 13,359–61 (1996) (Letter from Laurence H. Tribe, Professor of Constitutional Law, Harvard Law School, to Edward Kennedy, Senator, Massachusetts (May 24, 1996)). *But see* Daniel A. Crane, *The Original Understanding of the Effects Clause of Article IV, Section 1 and Implications for the Defense of Marriage Act*, 6 GEO. MASON L. REV. 307, 314 (1998).

until a same-sex marriage occurs, because until then, there is no basis to challenge the law.[83]

In 2003, the Supreme Court raised the stakes in the gay marriage debate when it handed down its decision in *Lawrence v. Texas*.[84] The decision overruled *Bowers v. Hardwick*[85] and declared that state laws that criminalized sodomy violated the Due Process Clause and were therefore unconstitutional.[86] Both opponents and supporters viewed the decision as possibly setting the stage for legalizing homosexual marriages,[87] even though the majority's opinion stated specifically that its ruling "does not involve whether the government must give formal recognition to any relationship that homosexual persons seek to enter."[88] In his dissenting opinion, Justice Scalia wrote, "Today's opinion dismantles the structure of constitutional law that has permitted a distinction to be made between heterosexual and homosexual unions, insofar as formal recognition of marriage is concerned."[89]

Since the Fall of 2003, the issue of same-sex marriages has riddled newspaper headlines. It began with the Massachusetts Supreme Judicial Court's ruling in *Goodridge v. Department of Public Health*,[90] which relied on the Equal Protection Clause of the Massachusetts Constitution to hold that "barring an individual from the protections, benefits, and obligations of civil marriage solely because that person would marry a person of the same sex violates the Massachusetts Constitution."[91] The *Goodridge* court followed the lead of the Hawaii and Alaska courts, postponing a judicial remedy to allow the legislature 180 days to bring commonwealth laws into compliance.[92] After the court's subsequent advisory ruling that only marriage, and not civil unions, would satisfy the *Goodridge* holding,[93] the Massachusetts legislature responded by passing a proposal for a legislative amendment to the state Constitution that would prohibit same-sex marriages but establish civil unions.[94] The earliest the amendment could

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[83] *See* Brett P. Ryan, *Love and Let Love: Same-Sex Marriage, Past, Present, and Future, and the Constitutionality of DOMA*, 22 U. HAW. L. REV. 185, 224 n.280 (2000). Massachusetts same-sex marriages are scheduled to begin in May 2004, so a challenge may be available by the time of this Recent Development's publishing.

[84] 123 S. Ct. 2472, 2483–84 (2003).

[85] 478 U.S. 186 (1986).

[86] *Lawrence*, 123 S. Ct. at 2484 (2003).

[87] *See* REPUBLICAN POLICY COMM., *supra* note 22, at 4–5; Alan Cooperman, *Sodomy Ruling Fuels Battle Over Gay Marriage*, WASH. POST, July 31, 2003, at A1; Sheryl Gay Stolberg, *White House Avoids Stand on Gay Marriage Measure*, N.Y. TIMES, July 2, 2003, at A22.

[88] *Lawrence*, 123 S. Ct. at 2484.

[89] *Id.* at 2498 (Scalia, J., dissenting).

[90] 798 N.E.2d 941 (Mass. 2003).

[91] *Id.* at 969.

[92] *Id.* at 970.

[93] Opinion of the Justices to the Senate, 802 N.E.2d 565, 572 (Mass. 2004).

[94] Mass. H. Bill No. 3190, amended (2004). For a comprehensive source on the gay marriage issue in Massachusetts, see http://www.boston.com/news/specials/gay_marriage/.

take effect, however, is November 2006, because any Massachusetts constitutional amendment must be approved by two successive legislatures and then ratified by the voters before it becomes law.[95]

After *Goodridge* was handed down, other jurisdictions raced to become the first to recognize same-sex marriages. In February 2004, Gavin Newsom, the mayor of San Francisco, authorized same-sex marriages.[96] More than 3700 were performed[97] before the ceremonies were stopped in March by order of the California Supreme Court.[98] Later that same month, Mayor Jason West of New Paltz, New York began marrying same-sex couples.[99] That ended when Mayor West was charged with nineteen criminal counts of solemnizing unlicensed marriages and an injunction was issued ordering him to stop performing the ceremonies.[100] Additionally, county clerks in both New Mexico and Oregon began issuing same-sex marriage licenses around that time.[101]

Proponents of the FMA are primarily concerned with what they perceive to be the weakening of the sanctity of marriage,[102] the immorality of homosexuality,[103] and the need to preserve traditional family values.[104] Many proponents see marriage not as a legal status, but as an "anthropological and sociological reality."[105] Part of that reality, they argue, is that marriage exists, and always has existed, to foster the procreation and rearing

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[95] *See* MASS. CONST. art. XLVIII, pt. IV, §§ 2–5.

[96] *See* Joan Ryan, *Sanctity of Marriage Is Up To Its Practitioners; White House Stance Exceeds Jurisdiction*, S.F. CHRON., Feb. 13, 2004, at A25.

[97] Eric Gorski, *Evangelicals Gird for Gay Debate: Springs Event Brings Faithful Together as Battle For Marriage Amendment Looms*, DENVER POST, Mar. 14, 2004, at B-1.

[98] *See* Lockyer v. City & Council of San Francisco, 2004 Daily Journal D.A.R. 3230, No. S122923 (Cal. 2004).

[99] *See* Marc Santora & Thomas Crampton, *Same-Sex Weddings in Upstate Village Test New York Law*, N.Y. TIMES, Feb. 28, 2004, at A1.

[100] *See* Thomas Crampton, *In a Lawsuit, Same-Sex Couples Say New York State Ruined Their Wedding Plans*, N.Y. TIMES, Apr. 8, 2004, at B4.

[101] *See* Rona Marech, *Gay Unions in New Mexico; But State Forces County Clerk To Stop*, S.F. CHRON., Feb. 21, 2004, at A13; David Austin & Laura Gunderson, *Ties That Bind and Divide; Multnomah County Recognizes Same-Sex Marriage Amid Joy, Protest*, OREGONIAN, Mar. 4, 2004, A1.

[102] *See* William Booth, *Friend of the Brides; After the Wedding, San Francisco's Mayor is Reveling in the Reception*, WASH. POST, Mar. 15, 2004, at C01; Marilyn Musgrave, *Defending the Sanctity of Marriage in America* (Oct. 15, 2003), *at* http://wwwa.house.gov/musgrave/108th%20Web/op_031015_marriage_protection.htm.

[103] *See* Gwen Florio, *Issue Shifts from the Bedroom to the Altar; Gay Marriage Debate Moves to Mainstream*, DENVER POST, July 13, 2003, at A-01 (quoting The Rev. Lou Montecalvo of Redeemer Community Church as saying that that the "Bible makes it clear that homosexuality is a sin").

[104] *See id.* (quoting literature from Focus on the Family asserting, "Studies of previous civilizations reveal that when a society strays from the sexual ethic of marriage, it deteriorates and eventually disintegrates").

[105] *See Questions and Answers: What's Wrong With Letting Same-Sex Couples "Marry?,"* IN FOCUS (Family Research Council), Aug. 20, 2003, at 1, *available at* http://www.frc.org/get.cfm?i=IF03H01. *See also* Glen T. Stanton, CitizenLink, *Focus on the Family's Position Statement on Same-Sex "Marriages" and Civil Unions* (Jan. 16, 2004), *at* http://www.family.org/cforum/fosi/marriage/ssuap/a0029773.cfm.

of children.[106] Furthermore, a definition rooted in anthropology and sociological considerations cannot simply be altered at the government's whim. Additionally, many proponents believe that children should be raised by both a mother and a father.[107] Same-sex marriages threaten that norm by creating families that indicate that a mother and father are not both necessary.[108]

Not only does legalization of same-sex marriage raise morality concerns about weakening the traditional institutions of marriage and the family, it also incites fear that legally condoning same-sex marriages paves the way for the legalization of polygamy and incest.[109] If individuals have the freedom to enter into consensual sexual relationships of their own choosing, how can the state prevent people from entering into polygamous or incestuous relationships?[110]

Of course, individuals holding such beliefs have always held them, but the push for a constitutional amendment that defines marriage as between a man and a woman is only a recent phenomenon. While their beliefs about the inherent wrongfulness of same-sex relationships form the foundation of their activism, the impetus to act comes from recent judicial decisions concerning same-sex relationships.[111] Proponents of the FMA believe that "activist" courts are inevitably on the path toward not only recognizing a

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[106] *See* CONGREGATION FOR THE DOCTRINE OF THE FAITH, CONSIDERATIONS REGARDING PROPOSALS TO GIVE LEGAL RECOGNITION TO UNIONS BETWEEN HOMOSEXUAL PERSONS (June 3, 2003) *available at* http://www.vatican.va/roman_curia/congregations/cfaith/documents/rc_con_cfaith_doc_20030731_homosexual-unions_en.html; *House DOMA Hearing*, *supra* note 21 (statement of Vincent McCarthy, American Center for Law and Justice).

[107] *See Senate DOMA Hearing*, *supra* note 28 (statement of Rev. Dr. Ray Hammond.), *at* http://judiciary.senate.gov/testimony.cfm?id=906&wit_id=2541; *Senate FMA Hearing*, *supra* note 28 (statement of Reverend Richard Richardson) at http://judiciary.senate.gov/testimony.cfm?id=1118&wit_id=3075; Dick Foster, *Debate Gets Big Boost; Bush Statement on Gay Marriage Makes Springs Event Timely*, ROCKY MOUNTAIN NEWS, Feb. 25, 2004, at 27A; Musgrave, *supra* note 102.

[108] *See Senate DOMA Hearing*, *supra* note 28 (statement of Maggie Gallagher, President, Institute for Marriage and Public Policy), *at* http://judiciary.senate.gov/testimony.cfm?id=906&wit_id=2540 ("If two mothers are just the same as a mother and a father, for example, why can't a single mother and her mother do just as well as a married mom and dad?").

[109] *See* Yvonne Abraham, *O'Malley to Address Meeting of Gay Marriage Foes*, BOSTON GLOBE, Sept. 13, 2003, at B2.

[110] *See* John Witte Jr., *Response; Reply to Professor Mark Strasser*, *in* MARRIAGE AND SAME-SEX UNIONS 43, 44 (Lynn D. Wardle et al. eds., 2003). The FMA, however, does nothing to prevent the legalization of incest, because the definition of marriage proffered in the FMA says nothing about restricting marriage to individuals not closely related. Although it appears that the FMA would prohibit polygamous marriages because the language indicates that a marriage is between "a" man and "a" woman, whether it would actually do so is unclear. *See* Christopher Smith, *Gay-Marriage Foes Duck Polygamy Issue; Marriage Amendment: It Would Specify a Man and a Woman Not One Man and One Woman*, SALT LAKE TRIB., Mar. 23, 2004, at B5.

[111] *See* Carolyn Lochhead, *Alliance Backs Ban on Gay Marriages; Religious, Ethnic Leaders Join Forces*, S.F. CHRON., Sept. 18, 2003, at A3 (quoting Senator John Cornyn as saying that "judicial activism is indeed a serious threat to the institution of marriage"); REPUBLICAN POLICY COMM., *supra* note 22, at 3.

right to same-sex marriage, but recognizing that right through the U.S. Constitution, which would require all of the states to abide by it. In a letter supporting the resolution, Representative Musgrave commented on the forum shopping activities of the "gay and lesbian lobby," which has sought "activist" judges to take the decision out of the hands of elected officials and redefine marriage to include same-sex partnerships.[112] Alliance for Marriage, the organization that first promoted the amendment, argues on its website that "[t]he Federal Marriage Amendment is a reasonable response to the crisis for our democratic society created by those who would use the courts to overcome public opinion with respect to marriage."[113] Ken Connor, who at the time was president of the Family Research Council, a conservative advocacy group, called on the legislative and executive branches last year to "rein in this rampant judicial activism."[114]

Proponents may seek to enact the FMA to establish an enduring legal definition of marriage in keeping with their own beliefs while they still have a chance to do so. Public opinion polls concerning gay rights have seen dramatic movement in recent decades, with more and more Americans accepting gay culture and even the idea of same-sex marriages.[115] Proponents may feel that while the FMA is not the ideal solution,[116] it is the only solution that both fully protects against courts using a state or the federal Constitution to recognize a right for same-sex couples to marry[117] and will be extremely difficult to overturn should popular opinions continue toward acceptance of homosexual unions in the years to come.

Opponents of the bill approach the issue from many different positions across the political spectrum, and they frame their arguments accordingly. Those supporting gay rights have perhaps the simplest reason to object to the bill: they believe gays should be allowed to marry and

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[112] *See* Musgrave, *supra* note 102.

[113] Alliance for Marriage, *Multicultural Coalition Reintroduces Federal Marriage Amendment in Congress*, *at* http://www.allianceformarriage.org/site/PageServer?pagename=mac_fma (last visited Apr. 21, 2004).

[114] Stolberg, *supra* note 87, at A22.

[115] *See* American Enterprise Institute, *AEI Studies in Public Opinion, Attitudes About Homosexuality*, 2–9, 19–33 (Feb. 13, 2004), *at* http://www.aei.org/docLib/20040217_Homosexuality4.pdf. Support of gay marriage and opposition to a federal amendment prohibiting gay marriage both recently dropped, however, after the Supreme Court's ruling in *Lawrence v. Texas*. *See* Shawn Hubler, *The Nation: It Was a Surprisingly Quick Engagement; Acceptance of Gays Is Now Widespread—But Same-Sex Marriage Could Be the Biggest Battle*, L.A. TIMES, Aug. 31, 2003, at A1.

[116] *See* Alan Cooperman, *supra* note 21, at A1 (noting that "[m]uch of the debate within the anti-gay marriage movement revolves around what is politically feasible"). For reasons why proponents may not consider the FMA ideal, see arguments regarding the lack of desirability of using a constitutional amendment for social issues and concern that FMA does not go far enough, *infra* text accompanying notes 121–124.

[117] *See* Carolyn Lochhead, *Foes of Gay Marriage Renew Push For a Ban; "You Can't Rule a Constitutional Amendment Unconstitutional,"* S.F. CHRON., Aug. 13, 2003, at A1.

therefore strongly oppose anything that would limit their ability to do so.[118] While such opponents may not necessarily expect that same-sex marriages will be legal any time soon, they realize that a constitutional amendment prohibiting same-sex marriages would realistically close the door on the issue, for the foreseeable future at least.[119] Additionally, homosexual-rights supporters note that "[w]ith the exception of the Eighteenth Amendment instituting prohibition, the [United States] Constitution has never been amended to limit basic rights."[120]

Strong criticism of the FMA has also come from a seemingly unlikely source: some of the most well-known conservatives in Washington, D.C. Many of these opponents argue that the issue of same-sex marriages is a social issue that is best left to the individual states.[121] Indeed, perhaps the most vociferous promoter of that argument is Bob Barr, the former representative from Georgia who wrote in the *Washington Post,* "Make no mistake, I do not support gay marriages. But I also am a firm believer that the Constitution is no place for forcing social policies on states, especially in this case, where states must have the latitude to do as their citizens see fit."[122] Another well-known conservative who has made similar statements is Vice President Dick Cheney:

> [P]eople should be free to enter into any kind of relationship they want to enter into . . . . The next step, then is the question you ask of whether or not there ought to be some kind of official sanction, if you will, of the relationship, or if these relationships should be treated the same way a conventional marriage is . . . . That matter is regulated by the states. I think different states are likely to come to different conclusions, and that's appropriate. I

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[118] *See* Human Rights Campaign, *Top 10 Reasons for Marriage Equality*, *at* http://www.hrc.org/Template.cfm?Section=Civil_Marriage&CONTENTID=14392&TEMPLATE=/ContentManagement/ContentDisplay.cfm (last visited Apr. 21, 2004).

[119] *See* Lochhead, *supra* note 117, at A1 (quoting a gay activist saying, "as long as it's not written into the Constitution [groups concerned with the gay agenda] figure they can come back in 10 years when things have calmed down a bit and revisit it"); *see also* American Enterprise Institute, *supra* note 115, at 19–25 (demonstrating that public support for gay marriages is far short of what would be necessary to overturn a constitutional amendment prohibiting gay marriages, nor is it expected to be sufficient in the near future).

[120] *Senate DOMA Hearing*, *supra* note 28, *at* http://judiciary.senate.gov/member_statement.cfm?id=906&wit_id=85 (statement of Senator Russell D. Feingold, Member, Senate Comm. on the Judiciary).

[121] *See* Lochhead, *supra* note 117 (quoting Roger Pilon, Vice President for Legal Affairs, Cato Institute). Note that while Senate Bill 30 would not affect states' ability to legislatively enact civil unions, it would still prevent states from establishing same-sex marriage, and thus is still problematic, although arguably less so, to state-rights supporters.

[122] Bob Barr, *Leave Marriages to the States*, WASH. POST, Aug. 21, 2003, at A23. Then-Representative Barr sponsored the Defense Of Marriage Act of 1996. Defense of Marriage Act, Pub. L. No. 104-199, Sept. 21, 1996, 110 Stat. 2419 (1996) (codified at 28 USC § 1738C (2000) and 1 USC § 7 (2000)).

don't think there should necessarily be a federal policy in this area.[123]

While some conservatives oppose the FMA despite their belief that same-sex marriages are wrong, others oppose the FMA precisely because of their belief that same-sex relationships are wrong. Such groups argue that because the FMA would permit civil unions, the amendment does not go far enough, and they therefore refuse to support it.[124]

In the end, it seems very unlikely that the FMA will become part of the United States Constitution. First, it would need to pass both houses of Congress by a two-thirds majority.[125] Proponents of the bill argue that the success of DOMA, which passed the House and Senate by votes of 342-77[126] and 84-14,[127] respectively, demonstrates the widespread support for legislation of this kind.[128] While the federal DOMA may have passed by wide margins, it did not have the significance of being a constitutional amendment, nor did it infringe on states' abilities to enact their own laws concerning same-sex civil unions (in the case of House Bill 56) or marriage (in the case of both House Bill 56 and Senate Bill 30), a problem many supporters of states' rights see in the FMA.[129] Passing even the Senate would require the support of every Republican senator plus sixteen Democrats, given the composition of the Senate prior to the 2004 elections. Such success seems quite unlikely given that reports show that one-third of the Republicans in the Senate do not support the amendment.[130]

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[123] John Aloysius Farrell, *Amending "I Do"; Conservatives Push Constitutional Ban on Same-Sex Marriage After Court, Entertainment Gains by Gays This Summer*, DENVER POST, Aug. 25, 2003, at A-1 (quoting statements made by Vice President Cheney during the 2000 election debate). Vice President Cheney has been conspicuously quiet on the issue since that statement. That may be related to the position of the White House on the FMA, which while ambiguous for quite some time, was made clear in February 2004 when President Bush expressed outright support for the amendment. *See* Remarks Calling for a Constitutional Amendment Defining and Protecting Marriage, 40 WEEKLY COMP. PRES. DOC. 276 (Mar. 1, 2004).

[124] *See, e.g.*, Janet M. La Rue, Concerned Women for America, *Why Concerned Women for America Opposes the Federal Marriage Amendment* (Aug. 18, 2003), *at* http://www.cwfa.org/articledisplay.asp?id=4452&department=LEGAL&categoryid=family; Franklin Foer, *Marriage Counselor: Matt Daniels Believes He's Found a Solution to the Political Problem of Gay Marriage. So Why Do His Fellow Conservatives Want to Divorce Him?*, ATLANTIC MONTHLY, Mar. 1, 2004, at 39.

[125] *See* Huckabee, *supra* note 32, at 1.

[126] 142 CONG. REC. 17,094 (1996).

[127] *Id.* at 22,467 (1996).

[128] *See* Lochhead, *supra* note 117, at A1.

[129] *See id.* (discussing comments by Representative Barney Frank indicating that "DOMA passed in part on states' rights grounds: It allows a state not to recognize gay marriages from another state. A constitutional amendment forcing states not to recognize gay marriage, by contrast, 'is a total flip.'").

[130] *See* Leonard, *supra* note 27, at A1. *See also* Chris Bull, *Confused Conservatives: The GOP Can't Seem To Make Up Its Mind About the Proposed Constitutional Amendment to Ban Gay Marriages, and That, in the End, Might Be What Kills the Idea; Marriage*, ADVOCATE, Oct. 14, 2003, at 30 (discussing Senator Allen's "reluctan[ce] to sign on to [the

Winnie Stachelberg, Political Director of the Human Rights Campaign, the leading gay advocacy organization, claims "indications [of opposition to the FMA] from roughly 30 to 32 members of the Senate, and the numbers in the House are in the low 100s."[131] Opponents need 34 votes in the Senate and 146 votes in the House to prevent the bill from passing Congress.

If the FMA does pass Congress, it still must be ratified by three-fourths of the state legislatures within seven years of its congressional passage.[132] Here, supporters note that the exact number of states that would need to ratify the FMA for it to become law have passed state DOMAs—thirty-eight—as evidence of the FMA's likelihood of success in the states.[133] Thirty-eight states would need to ratify the FMA for it to become law. For now, it is difficult to predict the likelihood that the FMA would receive state ratification. While the number of states that have state DOMAs may indicate that the measure will be well received, simply because a state prohibits same-sex marriages within its own borders does not mean it wants to restrict the ability of other states to legalize them (although many may believe that the only way to uphold their own state's ability to determine whether same-sex marriage is legalized is through a federal constitutional amendment). Furthermore, states have varying rules on what is required to ratify a constitutional amendment: while some states require only a majority of those voting, other states require passage by supermajority of one or both chambers.[134] Therefore, even support from every state legislator who voted for a state DOMA—merely a statute requiring a simple majority—does not guarantee sufficient support for the FMA. History indicates, however, that the highest hurdle for a constitutional amendment lies in Congress: of the thirty-three proposed amendments that Congress has sent to the states, only six have not received ratification.[135]

Regardless of whether the FMA will pass, from a normative standpoint, the FMA should not pass. First and foremost, such an amendment would create an inconsistency in the Constitution's venerable history and

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FMA]"); Lochhead, *supra* note 111, at A3 (stating that Republican Senators Chafee, Collins, Hagel, and Snowe have spoken out against the FMA); Carolyn Lochhead, *Political Parties Skittish About Hot-Button Issue; Bush Is Finally Pushing Constitutional Ban; GOP Only Lukewarm*, S.F. CHRON., Mar. 22, 2004, at A1; Luiza Savage, *Hatch Denies Efforts to Derail Gay-Marriage Ban*, N.Y. SUN, Mar. 29, 2004, at 5 (reporting that Republican Senators McCain of Arizona and Specter of Pennsylvania have stated they do not plan to vote for the FMA); Stolberg, *supra* note 87, at A22 (discussing Senator Ensign's caution toward supporting the FMA).

[131] Lochhead, *supra* note 117, at A1.

[132] *See* Huckabee, *supra* note 32, at 1.

[133] *See* Kelley Beaucar Vlahos, *Conservatives Split Over Marriage Amendment*, FOX NEWS, Jan. 14, 2004, *at* http://www.foxnews.com/printer_friendly_story/0,3566,108278,00.html; *see also supra* notes 69–71 and accompanying text (explaining that only thirty-six states have DOMA laws, but two more have state constitutional amendments prohibiting same-sex marriages).

[134] *See* Huckabee, *supra* note 32, at 2.

[135] *See* Baker, *supra* note 34, at 9, 12.

identity as a safeguard of individual rights. Indeed, the original document itself was deemed incomplete and imperfect until the Bill of Rights was added, specifically for the purpose of guaranteeing individual rights.[136] The Eighteenth Amendment, which enacted Prohibition, is the only instance in the history of the Constitution that the document has been amended to limit individual rights.[137] The Eighteenth Amendment is also the only constitutional amendment that has been repealed.[138]

The FMA is part of the increasingly popular appeal to constitutional amendments as a solution to political issues,[139] and rejection of it should send a clear message not only that the discrimination underlying it is wrong, but that the Constitution is not a political tool. Such reactionary measures trivialize the Constitution by turning it from a founding document espousing the ideals and structure of a free society under a republican government into mere legal code, subject to the impulses of the moment of its populace.[140] Waging political wars in the text of the Constitution will threaten its esteemed place in American culture as a fundamental charter based not on political whim, but on justice and higher law.[141]

—*Melissa A. Glidden*

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[136] *See* DAVID E. KYVIG, EXPLICIT AND AUTHENTIC ACTS: AMENDING THE U.S. CONSTITUTION, 1776–1995, at 88–93 (1996).

[137] U.S. CONST. amend. XVIII, *repealed by* U.S. CONST. amend. XXI.

[138] *Id.*

[139] *See* CITIZENS FOR THE CONSTITUTION, CENTURY FOUND., GREAT AND EXTRAORDINARY OCCASIONS 2 (1999); John Conyers Jr., *Is the United States Constitution a "Rough Draft"? An Open Letter to the 105th Congress*, 6 WIDENER J. PUB. L. 323 (1997). *See generally* Kathleen M. Sullivan, *Constitutional Constancy: Why Congress Should Cure Itself of Amendment Fever*, 17 CARDOZO L. REV. 691 (1996).

[140] *See* McCulloch v. Maryland, 17 U.S. 316, 407 (1819) ("A constitution, to contain an accurate detail of all the subdivisions of which its great powers will admit, and of all the means by which they may be carried into execution, would partake of the prolixity of a legal code . . . . Its nature, therefore, requires, that only its great outlines should be marked, its important objects designated, and the minor ingredients which compose those objects be deduced from the nature of the objects themselves.").

[141] *See* Sullivan, *supra* note 139, at 695–96.

THE PARTIAL-BIRTH ABORTION BAN ACT OF 2003

The Partial-Birth Abortion Ban Act of 2003 [hereinafter "the 2003 Act"] was the third time in eight years that Congress attempted to ban the procedure referred to as "partial-birth abortion."[1] Similar bills passed Congress in 1996 and 1997 but were each vetoed by President Clinton.[2] In 2002, a new bill was passed by the House,[3] but was never voted on by the then Democrat-controlled Senate.[4] In 2003, however, the Senate was in Republican hands and President Bush had promised to sign a bill banning partial-birth abortion into law.[5] As a result, the 2003 Act easily passed both houses of Congress and was signed into law in early November 2003.[6]

Although the ban is at least a temporary victory for opponents of partial-birth abortion, and abortion opponents generally, it is likely that the 2003 Act does not represent the closing shot of what has been a long and bitterly contested struggle. Like previous attempts by states to regulate abortion processes and procedures, the Supreme Court will likely have the final word on the fate of this federal law.[7]

If a challenge to the Act reaches the Court as currently constituted, it will likely be found to be an unconstitutional violation of Substantive Due Process, following the precedent of *Stenberg v. Carhart*, because of its failure to include an exception for the health of the mother.[8] Proponents of the 2003 Act will probably find that their impassioned arguments concerning the grisly details of the procedure will not distract the Justices of the Supreme Court from this constitutional defect, as it may have members of Congress.[9]

By the time any such challenge might reach the Court, however, it is likely that one or more of the Justices in the *Carhart* majority will have retired, with Justices O'Connor and Stevens considered the most likely candidates.[10] It is therefore very difficult to predict how the Court might eventu-

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[1] *See* Sheryl Gay Stolberg, *Abortion Vote Leaves Many in the Senate Conflicted*, N.Y. TIMES, Oct. 23, 2003, at A22.

[2] *See id.*

[3] *See* 147 Cong. Rec. H5373–74 (daily ed. July 24, 2002) (voting 274-151 to pass H.R. 4965).

[4] Congressional Information Service, 2002 Bill Tracking, H.R. 4965, *available at* http://thomas.loc.gov/cgi-bin/bdquery/z?d107:HR04965:l/bss/d107query.html.

[5] *See* Debra Rosenberg, *A Firefight Over Abortion*, NEWSWEEK, Nov. 3, 2003, at 44.

[6] *See* Richard W. Stevenson, *Bush Signs Ban on a Procedure for Abortions*, N.Y. TIMES, Nov. 6, 2003, at A1.

[7] *See, e.g.*, Planned Parenthood of Southeastern Pa. v. Casey, 505 U.S. 833 (1992); Planned Parenthood Ass'n of Kansas City, Mo., Inc. v. Ashcroft, 462 U.S. 476 (1983); Bellotti v. Baird, 428 U.S. 132 (1976); Planned Parenthood of Central Mo. v. Danforth, 428 U.S. 52 (1976); Roe v. Wade, 410 U.S. 113 (1973).

[8] Stenberg v. Carhart, 530 U.S. 914, 938 (2000).

[9] *See infra* text accompanying notes 39–42.

[10] At the time this Recent Development was written, Justice O'Connor was seventy-four years old, and Justice Stevens was eighty-four years old. The decision in *Carhart* was 5-4, meaning that a single change in the personnel of the Court could lead to an opposite judgment in a future case.

ally rule. Ultimately, the determination of the 2003 Act's constitutionality may rest on the composition of the Supreme Court if and when it hears a challenge to the law.

Under the 2003 Act, any physician who, in or affecting interstate commerce, knowingly performs a partial-birth abortion, and thereby kills a human fetus, shall be fined, imprisoned for not more than two years, or both.[11] An exception is provided to save the life of a mother when she is endangered by a physical disorder, physical illness, or physical injury, including a life-endangering physical condition caused by or arising from the pregnancy itself.[12] No exception is made for health risks to the mother that are less than life threatening.[13] The 2003 Act defines partial-birth abortion as when "the person performing the abortion deliberately and intentionally vaginally delivers a living fetus . . . for the purpose of performing an overt act that the person knows will kill the partially delivered living fetus."[14]

While the 2003 Act does not specifically refer to any medically recognized procedure by name, the procedure that would most likely be affected is what is known as "dilation and extraction" or "intact dilation and evacuation," or simply "D&X."[15] According to the description provided by the American College of Obstetricians and Gynecologists (ACOG), D&X involves four steps.[16] First, the cervix of the woman is dilated over the course of approximately three days.[17] After sufficient dilation, the fetus is positioned in a "footling breach" position (i.e., feet first), and then the body is delivered except for the head.[18] The doctor then punctures the skull of the fetus, and removes the contents of the head by suction.[19] This collapses the skull, and allows for the removal of the fetal head from the mother.[20]

The wording of the 2003 Act responds to the Supreme Court's decision in *Carhart* striking down a Nebraska statute that sought to ban partial-birth abortion.[21] The Nebraska statute, in language similar to the 2003

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[11] *See* 18 U.S.C.A. § 1531(a) (West Supp. 2004).

[12] *See id.*

[13] *See id.*

[14] *See id.* § 1531(b).

[15] The use of the term "partial-birth abortion" to refer to the procedure at issue is itself a controversial aspect of the Act. The term was created by then-Representative (and now Judge) Charles Canady (R-Fla.) and his aides in 1995 while they prepared to introduce a ban on certain abortions. Debra Rosenberg, *Chipping Away At Roe*, NEWSWEEK, Mar. 17, 2003, at 40. Failing to find a name for the procedure in any medical texts, Canady and his aides created the name "partial-birth abortion." *See id.* The name has stuck, much to the dismay of the ban's opponents.

[16] *See* Brief of Amici Curiae American College of Obstetrics and Gynecologists et al. at 6, *Carhart* (No. 99-830).

[17] *See id.*

[18] *See id.*

[19] *See id.*

[20] *See id.*

[21] *Carhart*, 530 U.S. at 945–46.

Act, stated, "[n]o partial birth abortion shall be performed in this state, unless such procedure is necessary to save the life of the mother whose life is endangered by a physical disorder, physical illness, or physical injury, including a life-endangering physical condition caused by or arising from the pregnancy itself."[22] Therefore, evaluating the current ban's ability to withstand constitutional scrutiny requires a close look at what the Court found problematic in the Nebraska statute.

Writing for the majority, Justice Breyer set out the question presented to the Court: Did Nebraska's statute, making criminal the performance of a "partial birth abortion," violate the U.S. Constitution,[23] as interpreted in *Casey*[24] and *Roe*?[25] Justice Breyer answered the question in the affirmative and found the law unconstitutional for two separate reasons: (1) the law lacked a health exception for the mother, and (2) the procedure banned was described so vaguely as to apply to other permissible methods of abortion, and thus constituted an undue burden on the right to choose to have an abortion.[26]

In so finding, the Court rejected Nebraska's arguments that the absence of a health exception was permissible because the prohibited procedure would never be necessary to protect the health of the mother.[27] In arguments strikingly similar to those that would be made by congressional supporters of the 2003 Act, the petitioners asserted that "safe alternatives remain available" and that "a ban on partial-birth abortion/D&X would create no risk to the health of women."[28] The Court responded, "The problem for Nebraska is that the parties strongly contested this factual question in the trial court below; and the findings and evidence support Dr. Carhart."[29]

Undaunted by the unfavorable findings below, petitioners argued to the Court that those findings were "irrelevant, wrong, or applicable only in a tiny number of instances."[30] Nebraska also argued that the lack of medical studies establishing the procedure's safety as well as the lack of any specifically identified situation in which D&X was the only appro-

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[22] NEB. REV. STAT. ANN. § 28-328(1) (2003).

[23] *See Carhart*, 530 U.S. at 929–30.

[24] Planned Parenthood of Southeastern Pa. v. Casey, 505 U.S. 833 (1992).

[25] Roe v. Wade, 410 U.S. 113 (1973).

[26] *Carhart*, 530 U.S. at 930. Because the lack of a health exception seems to be the more obvious constitutional weakness of the 2003 Act, this Recent Development will deal only with that issue. Although the 2003 Act defines the procedure to be banned more specifically than did the one struck down in *Carhart*, some Congressmen argue that that the definition of the procedure similarly fails to pass constitutional muster. *See* 149 CONG. REC. H9143–44 (daily ed. Oct. 2, 2003) (statements of Rep. Nadler).

[27] *See Carhart*, 530 U.S. at 931–32.

[28] *See* Brief of Petitioners at 40, Carhart (No. 99-830).

[29] *Carhart*, 530 U.S. at 931–32.

[30] *Id.* at 933.

priate procedure combined to prove that no health exception was necessary.[31] Unconvinced, the Court responded:

> The upshot is a District Court finding D&X significantly obviates health risks in certain circumstances, a highly plausible record-based explanation of why that might be so, a division of opinion among some medical experts over whether D&X is generally safer, and an absence of controlled medical studies that would help answer these medical questions. Given these medically related evidentiary circumstances, we believe the law requires a health exception.[32]

In a familiar role, Justice O'Connor served as the crucial "swing" vote in *Carhart*. According to her concurring opinion, the Nebraska statute was "necessarily" irreconcilable with *Casey* due to the absence of a health exception.[33] Responding to the dissents of Justices Kennedy and Thomas, O'Connor joined the Court in denying that the necessity for a health exception arose from the "individual views of Dr. Carhart and his supporters."[34] Instead, she explained that

> where "a significant body of medical opinion believes a procedure may bring with it greater safety for some patients and explains the medical reasons supporting that view," then Nebraska cannot say that the procedure will not, in some circumstances, be "necessary to preserve the life or health of the mother."[35]

Accordingly, Justice O'Connor concluded, Supreme Court "precedent requires that the statute include a health exception."[36]

Despite her vote against the Nebraska statute, Justice O'Connor was careful to set out a partial-birth ban that she would support as constitutional. Citing statutes from Utah, Kansas, and Montana, she noted that these bans were more "narrowly tailored" to apply only to D&X.[37] If the Nebraska statute had included a health exception and had been limited to apply only to D&X, it would most likely have met with Justice O'Connor's approval.[38] The Nebraska statute at issue in *Carhart*, however, met neither of these requirements and thus failed either to gain her vote or attain constitutional status.

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[31] *See id.* at 933–34.
[32] *Id.* at 936–37.
[33] *See id.* at 947 (O'Connor, J., concurring).
[34] *Id.* at 948 (O'Connor, J., concurring).
[35] *Id.* (O'Connor, J., concurring).
[36] *Id.* (O'Connor, J., concurring).
[37] *Id.* at 950 (O'Connor, J., concurring).
[38] *Id.* at 951 (O'Connor, J., concurring).

Without question, D&X is a gruesome-sounding procedure, and congressional proponents of the 2003 Act were quick to use its gory details to their advantage. During the House debates, Representative Forbes asked, "Is there no limit, is there no amount of pain, is there no procedure that is so extreme that we can apply to this unborn child or this fetus that we are willing as a country to say that just goes too far?"[39] Other supporters of the bill asked if the line between murder and medical procedure should depend on the difference of a few more inches of delivery. If the baby's head were outside the mother's body, they argued, its destruction would be considered murder.[40] Only those few undelivered inches denied the baby autonomy separate from the right of its mother to choose treatments for her own body.[41] The bill's proponents noted that the American Medical Association had described partial-birth abortion as ethically distinct from other abortion procedures because the fetus is killed outside the womb.[42]

Emotional rhetoric aside, these appeals against D&X do not, in themselves, provide a sufficient constitutional reason to prohibit its use. Arguments against the procedure based on the unpleasantness of its specific details are overcome by a larger point: any abortion, regardless of the procedure used, results in a dead fetus. While D&X is certainly a procedure that many view as gruesome, unnecessarily exposing women to potentially serious health risks is arguably no less horrific, and carries the additional problem of being constitutionally impermissible. As one doctor said, "the goal of any abortion procedure is the destruction of the fetus. Given that that is the reality, it doesn't seem to me we ought to have a legislative mandate that likely increases the risk to the woman."[43]

This comment touches on a key issue in the debate, which was heavily disputed by both sides: is D&X ever medically necessary to preserve the health of the mother? The authors of the 2003 Act were aware that answering this question in the negative was essential if they hoped to gain the Supreme Court's approval. Their problem, however, was that this question had seemingly already been ruled upon in *Carhart*, which was now controlling precedent. *Carhart* held that because significant medical authority supported the proposition that partial-birth abortion would, in

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[39] 149 CONG. REC. H9146 (daily ed. Oct. 2, 2003) (statement of Rep. Forbes).

[40] *See* 149 CONG. REC. H4928 (daily ed. June 4, 2003) (statement of Rep. Pitts).

[41] *See* 149 CONG. REC. H4935 (daily ed. June 4, 2003) (statement of Rep. Stearns); *see also id.* at H4943 (daily ed. June 4, 2003) (statement of Rep. King) ("[The] child is one inch from screaming for its own mercy. If ultrasound could hear the silent scream, we would not be in this debate tonight.")

[42] *See* 149 CONG. REC.H8992 (daily ed. Sept. 30, 2003) (statement of Rep. Sensenbrenner).

[43] Mary Duenwald, *Likely Ban on Abortion Technique Leaves Doctors Uneasy*, N.Y. TIMES, Apr. 22, 2003, at F5.

some circumstances, be the safest procedure for pregnant women who wish to undergo an abortion, a health exception was constitutionally required.[44]

The 2003 Act's authors attempted to avoid the contrary precedent through a series of congressional findings, and by claiming that those findings would be given more weight by the Supreme Court than the factual findings of *Carhart*. Section 2 of the Act consists of fourteen separate congressional findings, which supporters of the bill believe demonstrate that D&X is never medically necessary to preserve the health of the mother. This alleged lack of medical necessity leads to the conclusion that the prohibition requires no health exception.[45] According to the Act, "a moral, medical, and ethical consensus exists that the practice of performing a partial-birth abortion . . . is a gruesome and inhumane procedure that is never medically necessary and should be prohibited."[46]

The Act further contends that partial birth abortion "is not only unnecessary to preserve the health of the mother, but in fact poses serious risks to the long-term health of women and in some circumstances their lives."[47] During the congressional debates, supporters of the Act referred to these findings while arguing not only that partial-birth abortion is a gruesome procedure that is never medically necessary, but that is also untested, unproven, and potentially lethal.[48]

In support of the argument that partial-birth abortion threatens women's health, the Act lists several serious risks posed by the procedure. Citing testimony before legislative hearings during the 104th, 105th, and 107th Congresses, the list includes: an increased risk of cervical incompetence, as a result of cervical dilation making it difficult or impossible for a woman to carry a subsequent pregnancy to term successfully; an increased risk of uterine rupture, abruption, amniotic fluid embolus, and trauma to the uterus as a result of converting the child to a footling breech position (which would otherwise rarely, if ever, be indicated, because head-first is the preferred method of delivering a child); and a risk of lacerations and secondary hemorrhaging (due to the doctor's blindly forcing a sharp instrument into the base of the unborn child's skull while he or she is lodged in the birth canal) that could result in severe bleeding, bringing with it the threat of shock, and could ultimately result in maternal death.[49]

In the Senate, Majority Leader Bill Frist (R-Tenn.) drew on his own medical background to argue in favor of the ban. After criticizing the procedure as "repulsive" because of the pain experienced by the fetus as

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[44] *See Carhart*, 530 U.S. at 932, *cited in* Partial-Birth Abortion Ban Act of 2003, Pub. L. No. 108-105, § 2(3), 117 Stat. 1201, 1201 (2003).

[45] *See* Partial-Birth Abortion Ban Act § 2(14)(O).

[46] *Id.* § 2(1).

[47] *Id.* § 2(2).

[48] *See* 149 CONG REC. H9142 (daily ed. Oct. 2, 2003) (statement of Rep. Sensenbrenner).

[49] Partial-Birth Abortion Ban Act § 2(14)(A).

the scissors are pushed into the back of its head,[50] he criticized the notion that partial-birth abortion could be necessary to preserve the health of the mother.[51] He contended that claims that D&X was the best alternative in medical emergencies were not true and that D&X is itself a dangerous procedure.[52] Senator Frist then boiled the entire debate down to one question: Does partial-birth abortion "carry the danger of doing unnecessary harm to a mother, to an infant, and to our conscience as a nation that values the sanctity of human life?"[53] His answer was yes.[54]

Other supporters of the Act pointed to the fact that partial-birth abortion is not taught in medical schools as proof that the procedure is never medically necessary.[55] Yet the majority of the arguments made by proponents of the Act ignored the constitutional problem of the a lack of a health exception, and dealt instead with fervent positions against the procedure itself.[56]

The 2003 Act's authors contend that its findings that partial-birth abortion is never medically necessary will save the Act from unconstitutionality. This is because, according to the authors, it was the district court's findings to the contrary in *Carhart* that led to the invalidation of the ban in that case.[57] Supporters of the Act noted that the factual findings of lower courts at times bind the Supreme Court, and that in *Carhart* the Court had been bound to accept the factual findings of the lower court due to the "clearly erroneous" standard of review applied in that case.[58]

The 2003 Act states that under this standard, "if the district court's account of the evidence is plausible in light of the record viewed in its entirety, the court of appeals may not reverse it even though convinced that had it been sitting as the trier of fact, it would have weighed the evidence differently."[59] As a result, the Act's authors argued, the Supreme Court had no choice but to accept the "very questionable findings" of the district court.[60] Senator Rick Santorum (R-Pa.), a leading supporter of the Act, defended this argument by stating that "in [*Carhart*] . . . it was a very weak record, and the court made a decision based on that record. They will have a different record before them in this case . . . and I be-

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[50] 149 CONG. REC. S3457 (daily ed. Mar. 11, 2003) (statement of Sen. Frist).

[51] *See id.* at S3458 (statement of Sen. Frist).

[52] *See id.*

[53] *Id.* at S3459 (statement of Sen. Frist).

[54] *See id.*

[55] *See* 149 CONG. REC. H4932 (daily ed. June 4, 2003) (statement of Rep. Brady).

[56] *See, e.g., id.* at H4946 (statement of Sen. DeLay) (arguing that D&X was a procedure that had "its violence . . . unleashed for the convenience of the doctor, not the health of the patient").

[57] *See* Partial-Birth Abortion Ban Act of 2003, Pub. L. No. 108-105, § 2(4), 117 Stat. 1201, 1202 (2003).

[58] *Id.* § 2(6).

[59] *Id.* (quoting Anderson v. City of Bessemer City, 470 U.S. 564, 574 (1985)).

[60] *See id.* § 2(7).

lieve the record will be clear and dispositive that no health exception is necessary."[61]

The authors of the Act argued that congressional findings were traditionally given "great deference" by the Supreme Court, and cited several cases in support of that view.[62] During Senate debate, Senator Santorum argued that Congress had the right to make a finding of fact on the health exception issue because it did "a heck of a lot more exhaustive study, in our deliberations with hearings and other testimony, than the Supreme Court can. They have to rely on the record of the lower court and the arguments made to that lower court."[63]

In the House, this argument was taken up by Representative James Sensenbrenner (R-Wis.), who said that the Supreme Court had previously recognized that the institutional structure of Congress put it in a better position than the judiciary to assess facts upon which policy determinations are made.[64] While he conceded that the Supreme Court was not required to accept congressional findings, Representative Sensenbrenner hoped that the Court would "give the same type of deference that it has done in the past civil rights and employment cases."[65]

Opponents of the Act argued that there was no meaningful difference between the 2003 Act and the Nebraska statute that had been declared unconstitutional just three years previously. Representative Jerrold Nadler (D-N.Y.) argued that the Supreme Court had never said Congress could use findings of fact to expand the legislative power, and that regardless of any past deference shown to congressional findings, case law showed that the Supreme Court, not Congress, was the final arbiter of fact.[66] He found the idea that congressional findings in the bill would eliminate the constitutional need for a health exception "laughable" and added, "I do not believe any Member who knows anything about constitutional law can seriously and honestly suggest anything other than that."[67]

Representative John Conyers Jr. (D-Mich.) was even more pointed in his criticism of the notion that congressional findings could overcome constitutional requirements. He noted that despite the fact that similar bills lacking health exceptions had been repeatedly struck down, the authors of the 2003 Act believed that somehow "this bill is now going to be okay

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[61] 149 CONG. REC. S3384 (daily ed. Mar. 10, 2003) (statement of Sen. Santorum).

[62] Partial-Birth Abortion Ban Act § 2(11) (citing Turner Broad. Sys., Inc. v. Fed. Communications Comm'n, 520 U.S. 180 (1997); Turner Broad. Sys., Inc. v. Fed. Communications Comm'n, 512 U.S. 622 (1994); City of Rome v. United States, 446 U.S. 156 (1980); Katzenbach v. Morgan, 384 U.S. 641 (1966)).

[63] 149 CONG. REC. S3384 (daily ed. Mar. 10, 2003) (statement of Sen. Santorum).

[64] 149 CONG. REC. H4925 (daily ed. June 4, 2003) (statement of Sen. Santorum) (citing Rostker v. Goldberg, 453 U.S. 54 (1981), Fullilove v. Klutznick, 448 U.S. 448 (1980), Columbia Broad. Sys., Inc. v. Democratic Nat'l Comm., 412 U.S. 94 (1973)).

[65] *Id.* at H4925 (statement of Rep. Sensenbrenner).

[66] *See id.* at H4926 (statement of Rep. Nadler).

[67] *Id.*

because we have congressional findings."[68] According to Representative Conyers, the key difference between cases in which the judiciary showed deference to congressional findings and the 2003 Act was that the latter simply stated that the District Court erred in its findings of fact and law.[69] "Gainsaying, no matter how presented, is not the same as fact-findings . . . . Congress cannot simply refute findings of fact made by the District Court by presenting its own 'findings' that are contrary to the evidence the Court depended upon to make its ruling."[70]

In addition to arguing against congressional findings to refute Supreme Court rulings, the ban's opponents also strenuously objected to the factual assertion that partial-birth abortion was never medically necessary for the health of the mother. Despite conceding that D&X was a particularly gruesome form of abortion, they argued that situations arise annually where D&X is necessary to protect the life and health of the mother.[71] Credible medical evidence has indicated that D&X is safer in some instances than other available procedures, and when such situations arise, Congress should ensure that women have safe and appropriate medical procedures available.[72] To support this assertion, they read into the record testimony of women who, due to unforeseen medical circumstances and on the advice of their doctors, had terminated wanted pregnancies through D&X.[73]

During the House debate, Representative Nancy Johnson (R-Conn.) pointed out that according to the American College of Obstetricians and Gynecologists, while D&X was never the only procedure that could be performed, in a particular circumstance D&X may be the best and most appropriate abortion procedure available.[74] She argued that despite the

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[68] *Id.* at H4925 (statement of Rep. Conyers).

[69] *See id.*

[70] *Id.*

[71] *See id.* at H4924–25 (statement of Rep. Green).

[72] *See id.* at H4932 (statement of Rep. Filner).

[73] *See* 149 CONG. REC. S3461 (daily ed. Mar. 11, 2003) (statement of Sen. Boxer) (reading testimony of Coreen Costello, "This procedure allowed me to deliver my daughter intact. My husband and I were able to see and hold our daughter . . . . Having this time with her allowed us to start the grieving process. I don't know how we would have coped if we had not been able to hold her . . . . We cannot tie the hands of physicians in these life-saving matters. It is simply not right."); *id.* at S3468 (statement of Sen. Durbin) (referring to the case of Vicki Stella, who relied on the advice of both her OB-GYN and her physician husband that a D&X was the most appropriate procedure to terminate her late pregnancy in which the fetus was found to have serious abnormalities and whose delivery would endanger her health). A proponent of the Act, Senator Santorum, replied by entering into the record a letter written by Dr. Curtis Cook, (Maternal Fraternal Medicine, Michigan State College of Human Medicine) who argued that Costello had been intentionally misled by bad medical advice. *See id.* at S3470 (statement of Sen. Santorum). Senator Durbin sharply criticized the idea that a doctor uninvolved with the case and Congress should overrule a woman's personal OB-GYN. *See id.* at S3471 (statement of Sen. Durbin).

[74] *See* 149 CONG. REC. H4943 (daily ed. June 4, 2003) (statement of Rep. Johnson) (citing News Release, American College of Obstetricians and Gynecologists, Statement on So-Called "Partial Birth Abortion" Laws by the American College of Obstetricians and

fact that Congress would not be present in the operating room if and when that circumstance arose, the bill's supporters were still prepared to "tell the physician you cannot do this."[75] In the view of many of the Act's opponents, it made little sense to foreclose medical options as a matter of law when medical experts were divided as to which of those options would be best for patients.[76]

To support the argument that it was incorrect to claim that partial-birth abortion was never medically necessary and that is was inappropriate for legislators to make medical decisions, Senator Barbara Boxer (D-Cal.) presented a letter written by Drs. Natalie E. Roche and Gerson Weiss.[77] The letter was written on behalf of Physicians for Reproductive Choice and Health, a group of practicing OB-GYNs and academics in obstetrics, gynecology, and women's health. Drs. Roche and Weiss stated that it is "wrong to assume that a specific procedure is never needed; what is required is the safest option for the patient, and that varies from case to case . . . . Until a surgeon examines the patient, she does not necessarily know which technique or procedure would be in the patient's best interest."[78]

The doctors responded to the contention that D&X had no support in the medical community by showing that many physicians thought it was dangerous to patients for Congress to take this option away from their obstetricians.[79] They cited both the American College of Obstetricians and Gynecology, representing 45,000 OB-GYNs, and the American Medical Women's Association, as holding this view.[80] The letter also mentioned the advantages of D&X, which included offering a woman a chance to see the intact outcome of a desired pregnancy, thus speeding up the grieving process; providing a greater chance of acquiring valuable information regarding hereditary illness or fetal anomaly; and decreasing risk of injury to the woman, as the procedure is quicker than induction and involves less use of sharp instruments in the uterus, providing a lesser chance of uterine perforations or tears and cervical lacerations.[81]

Gynecologists (Feb. 13, 2002), *available at* http://www.acog.org/from_home/publications/press_releases/nr02-13-02.cfm).

[75] *Id.*

[76] *See, e.g.*, 149 CONG. REC. S3471 (daily ed. Mar. 11, 2003) (statement of Sen. Durbin).

[77] *See* 149 CONG. REC. S3385–86 (daily ed. Mar. 10, 2003) (statement of Sen. Boxer). Dr. Roche is assistant professor of obstetrics and gynecology at New Jersey Medical College. Dr. Weiss is professor and chair of the Department of Obstetrics, Gynecology and Women's Health at New Jersey Medical College.

[78] *Id.* at S3385 (statement of Sen. Boxer).

[79] *See id.*

[80] *See id.* During the House debate, Representative Sheila Jackson-Lee (D-Tex.) stated that the American Nurses Association, the American Public Health Association, and other medical groups also opposed the bill. *See* 149 CONG. REC. H4937 (daily ed. June 4, 2003) (statement of Rep. Jackson-Lee).

[81] *See* 149 CONG. REC. S3385–86 (daily ed. Mar. 10, 2003) (statement of Sen. Boxer).

With Republicans in control of both Congress and the White House, getting the bill passed and signed into law presented only minor hurdles. Getting the federal courts to rule in favor of the law's constitutionality, however, will present a much more formidable obstacle. As mentioned previously, the fate of the 2003 Act may very well rest on the composition of the Supreme Court if it hears the case. If such a case were to come before the current Court, it would almost certainly meet the same 5-4 defeat that befell its Nebraska forerunner. The absence of a health exception would seem to prevent the Justices of the *Carhart* majority from changing their votes. It could be years before the law reaches the Supreme Court, however, and by then, Justice O'Connor, and perhaps Justice Stevens, may no longer be sitting on the bench. This possibility has likely not been lost on those supporting the ban. Opponents of the 2003 Act have speculated that its supporters are counting on the fact that the Court that hears the case will be more sympathetic than the one that decided *Carhart*.[82]

The disdain showed by many Members of Congress toward partial-birth abortion during the debate on the 2003 Act perhaps explains their attempt to pass a statute that clearly violates recent Supreme Court precedent. Despite various claims to the contrary, the 2003 Act unmistakably suffers from one of the same defects the Supreme Court declared unconstitutional in *Carhart*, the lack of an exception to the ban to protect the health of a patient. The idea that congressional findings alone will satisfy the requirements set out in *Carhart* is astonishing. If Congress could simply reverse a Supreme Court decision by "finding" facts different from those found in the case, the judiciary would be rendered a mere legislative tool.

The 2003 Act states that Congress "is entitled to reach its own factual findings . . . that the Supreme Court accords great deference."[83] It states further that Congress may "enact legislation based upon these findings so long as it seeks to pursue a legitimate interest that is within the scope of the Constitution, and draws reasonable inferences based upon substantial evidence."[84] In support of this assertion, the Act's authors cite *Katzenbach v. Morgan*[85] as providing evidence of the Supreme Court's "highly deferential review of congressional factual findings."[86] The Act also cites *Turner Broadcasting System, Inc. v. Federal Communications Commission* (*Turner I*),[87] and a case between the same parties three years later

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[82] *See* 149 CONG. REC. H4935 (daily ed. June 4, 2003) (statement of Rep. Maloney) (quoting Ruth Marcus, *"Partial Birth," Partial Truths*, WASH. POST, June 4, 2003, at A27).

[83] Partial-Birth Abortion Ban Act of 2003, Pub. L. No. 108-105, § 2(8), 117 Stat. 1201, 1202 (2003).

[84] *Id.*

[85] 384 U.S. 641, 653 (1966) ("It is not for us to review the congressional resolution of these factors. It is enough that we be able to perceive a basis upon which the Congress might resolve the conflict as it did.").

[86] *See* Partial-Birth Abortion Ban Act § 2(9).

[87] 512 U.S. 622 (1994).

(*Turner II*),[88] to reiterate the proposition that the Court's role with regard to congressional findings is limited to "assur[ing] . . . Congress has drawn reasonable inferences based on substantial evidence."[89]

These cases, however, are not all the Supreme Court has had to say on the issue of congressional findings. A case not cited in the Act is *United States v. Morrison*, in which the Supreme Court invalidated, as beyond congressional authority, the Violence Against Women Act.[90] In *Morrison* the Court noted that the statute at issue was supported by numerous findings regarding the serious impact that gender-motivated violence has on victims, and the relation between that impact and interstate commerce.[91] While the Court commented that the "existence of such findings may 'enable us to evaluate the legislative judgment,'"[92] it also stated bluntly that "[s]imply because Congress may conclude that a particular activity substantially affects interstate commerce does not necessarily make it so."[93] Indeed, in *Turner I*, one of the cases cited by Congress to show how much deference the Court pays its findings, the Court noted that "the deference afforded to legislative findings does 'not foreclose our independent judgment of the facts bearing on an issue of constitutional law.'"[94] So while a court faced with a challenge of the 2003 Act may desire to show deference to the congressional finding that there is a consensus in the medical profession about D&X never being a useful procedure, they will assuredly need to consider that statement against all of the physicians and physician groups that have expressed contrary opinions in *Carhart* and during recent congressional debates.[95] It is unlikely the Court will defer to a finding of medical "consensus" in the face of so much conflict of opinion. Instead, the Court will likely see this as an impermissible instance of congressional overreaching, due to the Legislature willfully blinding itself to the views of those in the medical community who disagree with their view of partial-birth abortion.

Justice O'Connor, always a key swing vote for the current Court, specifically stated in her concurring opinion in *Carhart* that she would not consider a ban on partial-birth abortion constitutional without a health exception.[96] Despite step-by-step instructions for how to win her vote,[97] the authors of the 2003 Act seem to have willfully ignored Justice O'Connor's requirements. Instead, knowing that they could get the bill both passed and signed into law, the 2003 Act's authors and supporters appear willing

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[88] Turner Broad. Sys., Inc. v. Fed. Communications Comm'n, 520 U.S. 180 (1997).
[89] *See* Partial-Birth Abortion Ban Act §§ 2(11)–(12).
[90] 529 U.S. 598, 617 (2000).
[91] *See id.* at 614.
[92] *Id.* at 612.
[93] *Id.* at 614.
[94] *Turner Broad. Sys*, 512 U.S. at 666.
[95] *See supra* text accompanying notes 73–74, 77–81.
[96] *See Carhart*, 530 U.S. at 947 (O'Connor, J., concurring).
[97] *See id.* at 950–51.

to gamble that by the time it is reviewed by the Supreme Court, Justice O'Connor (or another member of the *Carhart* majority) will be gone. The calculation is very straightforward: if one member of the *Carhart* majority is replaced by a Justice more sympathetic to the minority, the ban will be ruled constitutional. As Chief Justice Rehnquist reportedly remarked to a clerk in the late 1980s, "I used to worry about every little footnote. Now I realize you just need five votes."[98]

Legal challenges to the Act began almost immediately. Soon after President Bush signed the bill into law, U.S. District Judge Richard G. Kopf of Nebraska issued a temporary restraining order against the new law's enforcement because of the lack of a health exception.[99] Although the judge acknowledged Congress's finding that a health exception was not needed, he found it, "at the very least, problematic whether I should defer to such a conclusion when the Supreme Court has found otherwise."[100] Judge Kopf's opinion was quite narrow however, in that it applied only to the four doctors who had brought the suit before him.[101]

Shortly after Judge Kopf issued his ruling, U.S. District Court Judge Richard Conway Casey of the Southern District of New York similarly granted a temporary restraining order to the National Abortion Federation (NAF), a network of abortion providers, finding that they met the standard of showing both irreparable harm if he denied the order and a likelihood of success on the merits.[102] At oral arguments, the Assistant United States Attorney admitted that "there remains a disagreement in the medical community as to whether the abortion procedures covered by the Act are ever necessary to protect a woman's health, and that Congress did not find a consensus on the matter."[103] Judge Casey, citing *Carhart*'s health exception requirement, concluded that "the Court is constrained, at this time, to conclude that it is substantially likely that plaintiffs will succeed on the merits."[104]

Although the restraining order applied only to the plaintiffs, the ruling has potentially wide application because NAF has 350 clinics in forty-seven states and claims to perform half of the abortions done in the nation (which amounts to approximately 700,000 abortions performed by NAF per year).[105]

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[98] Richard Lacayo & Viveca Novak, *How Rehnquist Changed America*, TIME, June 30, 2003, at 25.

[99] *See* Carhart v. Ashcroft, 287 F. Supp. 2d 1015, 1015 (D. Neb. 2003).

[100] *Id.*

[101] *Id.*

[102] *See* Nat'l Abortion Fed'n v. Ashcroft, 287 F. Supp. 2d 525, 525–26 (S.D.N.Y. 2003).

[103] *See id.* at 525.

[104] *Id.* at 526.

[105] *See* Susan Saulny, *Court Blocks New Statute That Limits Abortion*, N.Y. TIMES, Nov. 7, 2003, at A18.

On March 19, 2004, however, Judge Casey refused to grant a request for summary judgment in favor of the NAF, finding that a "genuine issue of material fact exists as to whether a partial-birth abortion is ever medically necessary to protect a woman's health."[106] While holding that the constitutionality of the 2003 Act must be judged according to *Carhart*'s requirement that "abortion regulations must include a maternal health exception if 'a significant body of medical opinion believes a procedure brings with it greater safety advantages,'"[107] he stated that the court had to weigh "the factual findings that Congress reached after eight years of hearings," including the assertion that a "partial-birth abortion is never medically indicated to preserve the health of the mother."[108] Given the disagreement between the finding of medical opinion in *Carhart* with the congressional findings, the judge noted a need for additional facts "extrinsic to the Congressional record" to evaluate the truth of Congress's factual determinations.[109]

Few issues are as emotionally charged in the United States as abortion. The views expressed by groups and individuals on each side seem to be so fundamentally opposed that compromise on the matter appears nearly impossible. The debate since *Roe* has focused on the legality of regulations concerning abortions in general, leaving the details of the procedure to be used in the hands of physicians. The 2003 Act, however, goes beyond such regulations and takes the dangerous step of explicitly forbidding physicians from performing a specific medical procedure while other procedures that produce the same result are allowed, regardless of whether the physician believes that the banned procedure is the optimal one to preserve a woman's health. As opponents of the 2003 Act and the majority in *Carhart* point out, there is a serious problem with permitting members of a political branch to say that a medical procedure is *never* necessary under *any* circumstances. There is simply no way that they can make that determination. There is always the possibility that D&X *could* be the most appropriate procedure, in the judgment of a physician, for a particular patient.

Even among opponents of the 2003 Act, one would be hard-pressed to find anyone who explicitly favors D&X as a procedure. No one can credibly deny the gruesome nature of the particular procedure, but the nature of the procedure is not at issue. The main issue is whether or not legislatures, state or national, should be allowed to determine which medical procedures are available to physicians in order to preserve the health of their patients. That issue was squarely dealt with in *Carhart*, when the Supreme Court stated that any ban on an abortion procedure

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[106] *See* Nat'l Abortion Fed'n v. Ashcroft, No. 03 Civ. 8695(RCC), 2004 WL 540470, at *4 (S.D.N.Y. Mar. 19, 2004).

[107] *See id.* at *3 (quoting *Carhart*, 530 U.S. at 937).

[108] *See id.*

[109] *See id.* at 4.

requires an exception for the health of the mother. Given the 2003 Act's almost brazen disregard for this instruction, it should meet the same fate as the Nebraska statute in *Carhart*. It is only the potentially changing membership of the Supreme Court that even renders the ultimate fate of the 2003 Act an open question.

—*Alex Gordon*

LEGISLATIVE REFORM OF THE INDIAN TRUST FUND SYSTEM

On June 10, 1996, Elouise Pepion Cobell, a member of the Blackfeet Tribe of Montana, filed a class-action lawsuit against the federal government seeking an accurate accounting of trust funds that the government maintains for more than 300,000 individual Native Americans.[1] The class-action lawsuit on behalf of all present and former Individual Indian Money ("IIM") account beneficiaries[2] alleged that the federal government, including the Secretaries of the Interior[3] and Treasury, breached fiduciary duties owed to IIM beneficiaries by mismanaging IIM trust funds.[4] The lawsuit filed by Cobell and the other plaintiffs [hereinafter the "*Cobell* litigation"] prompted intense public focus on the longstanding mismanagement of the Native American trust fund system.[5] As the United States Court of Appeals for the District of Columbia Circuit noted in discussing the *Cobell* litigation, "The trusts at issue here were created over one hundred years ago through an act of Congress, and have been mismanaged nearly as long."[6]

Since at least the 1980s, Congress has attempted to reform the IIM system.[7] It has conducted hearings, commissioned reports, and even passed legislation implementing structural changes within the Department of the Interior.[8] These efforts culminated in 1994 with the passage of the American Indian Trust Fund Management Reform Act ("1994 Act").[9] As the *Cobell* litigation has demonstrated, however, and as those involved in the reform effort have argued for years, the 1994 Act and other congressional efforts have proved ineffective in providing meaningful reform.[10]

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[1] *See* Bill McAllister, *Indian Leaders Sue Government over Mismanaged Trust Funds; Clarification Sought for Individuals' Accounts Totaling $450 Million*, WASH. POST, June 11, 1996, at A15.

[2] Cobell and four other named plaintiffs were certified as class representatives for all present and former IIM account beneficiaries pursuant to FED. R. CIV. P. 23(b)(1)(A) and (b)(2). Cobell v. Babbitt, 30 F. Supp. 2d 24, 28 (D.D.C. 1998) (*Cobell I*).

[3] When the lawsuit was filed in 1996, Bruce E. Babbitt was Secretary of the Interior. In January 2001, Gale A. Norton became Secretary of the Interior and the caption of the case changed from *Cobell v. Babbitt* to *Cobell v. Norton*.

[4] Cobell v. Norton, 240 F.3d 1081, 1092–93 (D.C. Cir. 2001) (*Cobell VI*).

[5] *See* Douglas R. Nash & Christopher P. Graham, Cobell v. Norton—*Indian Trust Fund Management Litigation Takes Center Stage*, 46 ADVOCATE (Idaho) 15 (2003).

[6] *Cobell VI*, 240 F.3d at 1086. The district court noted, "It would be difficult to find a more historically mismanaged federal program . . . ." Cobell v. Babbitt, 91 F. Supp. 2d 1, 6 (D.D.C. 1999) (*Cobell V*).

[7] *See Cobell VI*, 240 F.3d at 1090.

[8] *See id.* at 1089–90.

[9] Pub. L. No. 103-412, 108 Stat. 4293 (1994) (codified as amended at 25. U.S.C. §§ 4001–4061 (2000)).

[10] *See Indian Trust Asset and Trust Fund Management and Reform Act of 2002: Hearing on S. 2212 Before the Senate Comm. on Indian Affairs*, 107th Cong. 28–29 (2002) [hereinafter *Reform Act Hearings*] (statement of Edward Manuel, Chairman, Tohono O'odham Nation).

Critics have cited several major problems with the government's current management of the IIM system, including the government's failure to provide an historical accounting of trust assets and account balances,[11] an ineffective Interior Department bureaucracy,[12] and turf battles between Congress and the courts in implementing reforms.[13] Any effective legislative reform of the IIM system must adequately address all of these issues or it likely will be prone to failure, as was the 1994 Act.

In July 2003, Senator John McCain (R-Ariz.) introduced the latest major reform proposal, the American Indian Trust Fund Management Reform Act Amendments Act (the "Reform Act").[14] It is important to note at the outset that although the Reform Act proposes sweeping reforms that might be included as part of any eventual legislative reform of the IIM system, two other less comprehensive reform bills have been introduced in Congress and complete congressional consensus does not yet exist on the topic of trust reform.[15] Accordingly, the Reform Act likely will be amended and revised as Congress continues to debate the issue.

The Reform Act goes a long way in attempting to provide needed reforms, such as by streamlining trust management duties at the Department of the Interior[16] and addressing the administrative problem of "fractionated interests."[17] The Reform Act, however, also has deficiencies, such as

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[11] *Id.* at 56–57 (statement of Michael Jandreau, Chairman, Lower Brule Sioux Tribe).

[12] *Management of Tribal Trust Funds: Oversight Hearing on the Status of the Dialog Between the Department of the Interior and American Indian and Alaska Native Leaders on Various Alternatives for the Reorganization of the Department of the Interior to Improve the Department's Management of Tribal Trust Funds Before the Senate Comm. on Indian Affairs*, 107th Cong. 13–14 (2002) [hereinafter *Reorganization Hearings*] (statement of Susan Masten, Chairwoman, Yurok Tribe).

[13] *See, e.g.*, Cobell v. Norton, 263 F. Supp. 2d 58, 65 (D.D.C. 2003).

[14] American Indian Trust Fund Management Reform Act Amendments Act, S. 1459, 108th Cong. (2003). Senator McCain introduced Senate Bill 1459 for himself and on behalf of Senators Tom Daschle (D-S.D.) and Tim Johnson (D-S.D.). House Bill 2981, 108th Cong. (2003), co-sponsored by Reps. Mark Udall (D-Colo.) and Nick Rahall (D-W. Va.), is the House companion bill to Senate Bill 1459.

Previously, Senator McCain introduced two other bills that sought to reform the IIM system. *See* Indian Trust Asset and Trust Fund Management and Reform Act of 2003, S. 175, 108th Cong. (2003); Indian Trust Fund Management and Reform Act of 2002, S. 2212, 107th Cong. (2002). The bills were nearly identical and meant to serve as "placeholder" bills until more dialogue occurred between all stakeholders in the trust fund reform process. *Reform Act Hearings*, *supra* note 10, at 41–42 (statement of Sen. McCain).

[15] In addition to the Reform Act introduced by Senator McCain, Senator Daschle introduced the Indian Trust Payment Equity Act, S. 1540, 108th Cong. (2003), and Senator Ben Nighthorse Campbell (R-Colo.) introduced the Indian Money Account Claim Satisfaction Act, S. 1770, 108th Cong. (2003).

[16] S. 1459, § 6.

[17] *Id.* § 3. The term "fractionated interest" refers to individuals' land ownership interests that are often less than one percent of an original trust estate. Some ownership interests have been passed down through many generations of Native Americans, and an individual's ownership interest can be quite small. Secretary of the Interior Norton testified before Congress that there are "single pieces of property with ownership interests that are less than 0.000002 of the whole interest." *Proposed Fiscal Year 2004 Budget Request for the Department of the Interior: Hearing Before the Senate Energy & Natural Res. Comm.*,

claiming not to interfere with judicial authority over the *Cobell* litigation and IIM reform efforts, while proposing reforms that would have just such an effect.[18] The Reform Act should, therefore, be viewed not as a comprehensive plan by Congress to cure the federal government's century-old neglect of the IIM system, but rather as a starting point from which Congress, the executive branch, and Native Americans can work together to implement meaningful reforms. To understand the complexity of the current IIM crisis, it is important to explore briefly the history behind the IIM trust system and the *Cobell* litigation.

The trust relationship between Native Americans and the government dates back to colonial times.[19] The relationship was first formally articulated by the Supreme Court in 1831 in the seminal case of *Cherokee Nation v. Georgia*,[20] in which Chief Justice Marshall analogized the relationship between Native Americans and the federal government to "that of a ward to his guardian." During the late nineteenth century, the federal government changed its policy toward Native Americans from one of forced relocation to one of assimilation.[21] Central to the assimilation strategy of the government was the allotment of tribal lands to individual tribal members.[22]

In 1887, with the passage of the General Allotment Act ("Dawes Act"), beneficial title to allotted Native American lands was vested in the United States as trustee for individual Native Americans.[23] The trust period was intended to last for only twenty-five years, during which the federal government would manage the land for the benefit of individual Native Americans and deposit fees and royalties from the use of the land into separate trust accounts (i.e., IIM accounts) for the allottees.[24] For example, if a commercial entity sought a license for grazing, timber sales, oil production, mining, or any other type of income-producing activity on the land of an individual allottee, the government, as trustee for the allottee, would negotiate a royalty with the commercial entity for the use of

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108th Cong. 10 (2003) [hereinafter *2004 Budget Hearings*] (statement of Sec'y Norton). *See also* Jessica A. Shoemaker, Comment, *Like Snow in the Spring Time: Allotment, Fractionation, and the Indian Land Tenure Problem*, 2003 WIS. L. REV. 729, 740 (2003) (discussing history of allotment policy and development of fractionation of ownership interests).

[18] *See* S. 1459, 108th Cong. §§ 3, 9 (2003).

[19] *See* Felix S. Cohen, *The Spanish Origin of Indian Rights in the Law of the United States*, 31 GEO. L.J. 1, 15 (1942); *see also* DAVID H. GETCHES ET AL., CASES AND MATERIALS ON FEDERAL INDIAN LAW 44–51 (4th ed. 1998).

[20] 30 U.S. (5 Pet.) 1, 17 (1831).

[21] *See Cobell VI*, 240 F.3d at 1087.

[22] For a discussion of changes in federal government policy toward Native Americans during the nineteenth and twentieth centuries, see generally GETCHES ET AL., *supra* note 19, ch. 4.

[23] The General Allotment (Dawes) Act of 1887, ch. 119, § 5, 24 Stat. 388, 389 (1887) (codified as amended at 25 U.S.C. § 348).

[24] *Cobell VI*, 240 F.3d at 1087.

the land and deposit the proceeds into an IIM account for the individual beneficiary.[25]

Under the Dawes Act, a fee patent to the land was to be issued to the allottees after the initial twenty-five-year trust period expired, allowing the allottees to manage their land without government supervision.[26] The Dawes Act, however, granted the president discretionary authority to extend the trust period.[27] With the passage of the Indian Reorganization Act of 1934, which ended the federal government's policy of creating new allotments, Congress summarily extended the trust period for lands already allotted (but not yet held in fee) indefinitely.[28] The trust accounts, most of which are based on allotments made pursuant to the Dawes Act from 1887 to 1934, are at the center of the *Cobell* litigation and current attempts to reform the IIM system.[29]

The federal government's financial management of IIM trust funds is divided between the Departments of the Interior and the Treasury.[30] Although Interior performs most of the federal government's trust duties, Treasury invests (at the direction of Interior) IIM funds and provides Interior with general accounting services.[31] According to trial testimony, instead of maintaining a separate IIM account for each beneficiary, the Department of the Treasury maintains only one pooled IIM account.[32] The task of maintaining an accounting for each IIM beneficiary belongs to the

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[25] *Cobell V*, 91 F. Supp. 2d at 9–10. *See also* Marguerite Michaels, *A Trust Betrayed? Native Americans Claim the U.S. Mismanaged Their Oil and Gas Legacies It Promised to Protect*, TIME, Jan. 26, 2004, at 52.

[26] Dawes Act § 5, 25 U.S.C. § 348 (2000).

[27] *Id.* Presidents routinely extended the trust period for allotments. *See, e.g.*, Exec. Order No. 10191, 15 Fed. Reg. 8889 (Dec. 13, 1950); Exec. Order No. 7001 (Apr. 5, 1935); Exec. Order No. 2512 (Jan. 15, 1917).

[28] Indian Reorganization Act of 1934, ch. 576, § 2, 48 Stat. 984, 984 (1934) (codified as amended at 25 U.S.C. § 462 (2000)).

[29] Although the *Cobell* litigation deals with trust funds for individual Native Americans, the federal government also maintains similar trust accounts for tribes. *See* 25 C.F.R. § 115.701 (2003). The Reform Act is meant to improve the Department of the Interior's management not only of IIM accounts, but also of tribal accounts. S. 1459, 108th Cong. §§ 2–3 (2003). According to congressional testimony by Secretary of the Interior Norton, the Interior Department maintains trust accounts for approximately 1,400 tribes. *2004 Budget Hearings*, *supra* note 17, at 10 (statement of Sec'y Norton). As of February 2004, twenty-five tribes had filed lawsuits seeking a full accounting of tribal trust funds. *Proposed Fiscal Year 2005 Budget for the Department of the Interior: Hearing Before the Senate Energy & Natural Res. Comm.*, 108th Cong. (2004) [hereinafter *2005 Budget Hearings*] (statement of Sec'y Norton).

[30] *See* 25 U.S.C. §§ 161, 162(a) (2000); 25 C.F.R. § 115.711 (2003); *see also Cobell V*, 91 F. Supp. 2d at 10–12 (discussing interaction between Interior and Treasury Departments in management of IIM funds).

[31] 25 U.S.C. § 161 (2000); *see Cobell VI*, 240 F.3d at 1088. The Interior Department generally keeps most of the funds within the IIM account at the Treasury Department. *Cobell VI*, 240 F.3d at 1088. The Interior Department, however, does have authority to invest the funds with commercial financial institutions. 25 U.S.C. § 162(a) (2000).

[32] *Cobell VI*, 240 F.3d at 1089.

Office of Trust Funds Management ("OTFM"),[33] an agency within the Department of the Interior.[34]

There are numerous examples of the government's mismanagement of the IIM system. As the district court overseeing the matter noted, "The United States, the trustee of the IIM trust, cannot say how much money is or should be in the trust."[35] Indeed, even the exact number of IIM accounts is unknown.[36] The Interior Department estimates the number of IIM accounts to be around 300,000, whereas the plaintiffs in the *Cobell* litigation place the number at more than 500,000.[37] In addition, the federal government does not have vital information for the accounts it maintains.[38] In 1998, there were more than 46,000 IIM accounts without the current address of the beneficiary and more than 123,000 accounts without the Social Security or tax identification number of the beneficiary.[39] The government has conceded that many records relating to the IIM trust system were regularly destroyed as part of a standard document destruction schedule promulgated by the National Archives and Records Administration.[40] On several occasions, the court has even ordered the Interior Department to disconnect its website from the Internet due to breaches in the security of trust fund data.[41] Commenting on Interior's mismanagement, the court noted, "The court knows of no other program in American government in which federal officials are allowed to write checks—some of which are known to be in erroneous amounts—from unreconciled accounts—some of which are known to have incorrect balances."[42]

In the *Cobell* litigation, the plaintiffs are seeking an accounting of the IIM accounts and, more fundamentally, to reform the manner in which

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[33] 25 C.F.R. § 115.711 (2003).

[34] Interior Dep't Sec'y Order Nos. 3001 (1994), 3139 (1997), 3319 (2000). In July 2001, Secretary of the Interior Norton created the Office of Historical Trust Accounting, which is part of the Office of the Secretary of the Interior, to help oversee the accounting of the IIM system. Interior Dep't Sec'y Order No. 3231 (2001).

[35] *Cobell V*, 91 F. Supp. 2d at 6.

[36] *Cobell VI*, 240 F.3d at 1089.

[37] *Id.*

[38] *Id.* at 1091.

[39] *Id.*

[40] *Cobell V*, 91 F. Supp. 2d at 23. *See also* Neely Tucker, *Norton Admits Some Indian Trust Records "No Longer Exist,"* WASH. POST, Feb. 14, 2002, at A31; David Whitman, *Why the U.S. May Owe Indians Untold Billions: An Angry Judge Demands an Accounting*, U.S. NEWS & WORLD REP., Mar. 8, 1999, at 24 ("Interior officials said they could not retrieve trust fund records in two Albuquerque storehouses because rodent droppings there might spread the deadly hantavirus.").

[41] *See* Cobell v. Norton, No. CIV.A.96-1285(RCL), 2004 WL 515470, at *2 (D.D.C. Mar. 15, 2004).

[42] *Cobell V*, 91 F. Supp. 2d at 6. When Alan L. Balaran, the court-appointed special master, resigned in April 2004, he cited the Interior Department's continued mismanagement of trust funds and its attempts to impede his investigation as the major reasons for his resignation. *See* John J. Fialka, *Balaran Resigns from Probe of Agency's Indian Trust Fund*, WALL ST. J., Apr. 7, 2004, at A8; John Files, *Indian Fund Investigator Angrily Quits*, N.Y. TIMES, Apr. 7, 2004, at A16.

the Interior Department manages the IIM system.[43] Elouise Cobell has testified before Congress that, "First and foremost, this lawsuit is about establishing an effective IIM trust management system."[44] The plaintiffs allege that if all royalties and fees due to IIM account holders since 1887 had been properly accounted for, the federal government's trust obligation to IIM beneficiaries would total nearly $137.5 billion.[45]

The vast amount of money involved in the IIM system and the high level of acrimony associated with the *Cobell* litigation[46] have led many

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[43] The original complaint sought five forms of relief: (1) a declaration of the federal government's trust obligations to IIM beneficiaries and that the federal government has breached those obligations; (2) a court order for the federal agencies to conform their accounting practices to their trust obligations; (3) an injunction prohibiting the defendants from interfering with the Office of Special Trustee for American Indians in carrying out its duties; (4) an accounting of the balances in the IIM accounts; and (5) recovery of court costs, expert witness costs, and attorneys' fees. *Cobell I*, 30 F. Supp. 2d at 29; *see* Carrie F. Fletcher, Recent Decision, *Duties of the Federal Government as Trustee of Individual Indian Money Accounts*, 70 GEO. WASH. L. REV. 452, 456 (2002) (praising use of equitable relief in enforcing Native American trust obligations); Billie Elliott McAuliffe, Casenote, *Forcing Action: Seeking to "Clean Up" the Indian Trust Fund:* Cobell v. Babbitt, 30 F. Supp. 2d 24 (D.D.C. 1998), 25 S. ILL. U. L.J. 647, 676 (2001) (suggesting that *Cobell* litigation might signify a shift in federal Indian law, whereby Native Americans seek to use equitable relief to enforce treaties and statutes). *But see* Gregory C. Sisk, *The Tapestry Unravels: Statutory Waivers of Sovereign Immunity and Money Claims Against the United States*, 71 GEO. WASH. L. REV. 602, 658 (2003) (discussing jurisdiction of the federal district court in *Cobell* litigation and suggesting venue in the Court of Federal Claims would be more appropriate).

[44] *Can a Process Be Developed to Settle Matters Relating to the Indian Trust Fund Lawsuit: Hearing Before the House Comm. on Res.*, 108th Cong. 42 (2003) [hereinafter *Process Hearings*] (statement of Elouise Cobell).

[45] *See* 149 CONG. REC. H6974 (daily ed. July 16, 2003) (statement of Rep. Taylor); *Official Says Class Action on Indian Fund is a Top Issue*, N.Y. TIMES, July 10, 2003, at A19; Ellen Nakashima & Neely Tucker, *Lost Trust: Billions Go Uncounted; Indians in Century-Old Fight to Tally Money Owed for Land Use*, WASH. POST, Apr. 22, 2002, at A1. In fact, some statements by the media and attorneys associated with the *Cobell* litigation have suggested that a complete historical accounting of the IIM system would be valued at closer to $176 billion. *Possible Mechanisms to Settle the Cobell v. Norton Lawsuit: Hearing Before the Senate Comm. on Indian Affairs*, 108th Cong. 45 (2003) [hereinafter *Settlement Mechanisms Hearings*] (statement of James Cason, Assoc. Dep. Sec'y of the Interior).

[46] Over the course of the litigation, the district court has held in contempt of court former Secretary of the Interior Bruce Babbitt, former Treasury Secretary Robert Rubin, and other government officials involved in the case. Cobell v. Babbitt, 37 F. Supp. 2d 6, 39 (D.D.C. 1999) ("*Cobell II*"). The court later held Secretary of the Interior Norton in contempt of court. Cobell v. Norton, 226 F. Supp. 2d 1, 161 (D.D.C. 2002) ("*Cobell VII*"). The United States Court of Appeals for the District of Columbia Circuit, however, reversed the contempt order against Secretary Norton. Cobell v. Norton, 334 F.3d 1128, 1150 (D.C. Cir. 2003) ("*Cobell VIII*"). As of April 2003, the Department of Justice authorized the retention of private counsel by more than eighty present and former officials at the Departments of the Interior, Treasury, and Justice in connection with the *Cobell* litigation. *Settlement Mechanisms Hearings*, *supra* note 45, at 60 (statement of Assoc. Dep. Sec'y Cason). Throughout the *Cobell* litigation, United States District Judge Royce C. Lamberth, the judge who has overseen the case since its inception in 1996, has expressed his outrage at the behavior of federal government officials. When officials at the Department of the Interior allegedly persuaded Congress to draft language in an appropriations bill to limit the hourly rate of the court-appointed special master in the case, Judge Lamberth noted that the actions of the Interior officials "appear to represent yet another attempt by defendants

members of Congress to take an active role in attempting to resolve the litigation and to reform the IIM system. In April 2003, Senators Ben Nighthorse Campbell (R-Colo.) and Daniel K. Inouye (D-Haw.), chairman and vice chairman, respectively, of the Senate Committee on Indian Affairs, sent a letter to Secretary Norton expressing their "strongly-held belief that the parties to [the *Cobell* litigation] should pursue a mediated resolution rather than the current course of continued litigation."[47] They went on to write, "If, within a reasonable amount of time, there is no progress made in such a resolution, we intend to introduce legislation that will accomplish the goal of resolving the *Cobell* matter in a mediated fashion."[48] Members of the House of Representatives also addressed the *Cobell* litigation and potential reform of the IIM system during a floor debate on an Interior Department appropriations bill.[49] In October 2003, a

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to evade the rule of law by any means available to them, no matter how duplicitous or underhanded. They also serve to demonstrate defendants' manifest hypocrisy." Cobell v. Norton, 263 F. Supp. 2d at 66. The court went on to note:

> But [the behavior of the Interior Department] only scratches the surface of defendants' profound hypocrisy. For in addition to drafting a provision that would restrict the ability of judicial officials to receive compensation, defendants were simultaneously ensuring that *their own* attorneys would be fully funded at taxpayer expense. Defendants thus have no problem with spending the taxpayers' money, as long as it benefits them. But when ordered to compensate judicial officers whose appointment was necessitated by their own misconduct, defendants suddenly become born-again fiscal conservatives.

Id.

[47] Letter from Senators Campbell and Inouye to Secretary of the Interior Norton, 1 (Apr. 8, 2003), *available at* http://indian.senate.gov/cobell.pdf.

[48] *Id.* Indeed, on October 21, 2003, Senators Campbell and Inouye introduced a bill, along with Senator Pete Domenici (R-N.M.), to establish a "voluntary claims resolution process" for IIM trust beneficiaries. *See* S. 1770, 108th Cong. § 2(b) (2003).

[49] 149 CONG. REC. H6974 (daily ed. July 16, 2003) (statement of Rep. Taylor) ("[I]f this contentious [*Cobell*] litigation continues, we will be forced to redirect resources away from Indian education, health, wildlife, law enforcement and other important Indian programs."); *see also id.* (statement of Rep. Norman Dicks (D-Wash.)) ("We can no longer let this slide or neglect or not bring this to attention, because millions and millions of dollars are being wasted on lawyers and accountants instead of going out for Indian health service and all the other issues.").

House Bill 2691, 108th Cong. (2003), included a provision, Section 137, before it was stricken on the House floor, that would have given the Secretary of the Interior broad discretion in settling claims regarding IIM disputes. 149 CONG. REC. H6973–74 (daily ed. July 16, 2003). *See also* Letter from Rep. J.D. Hayworth (R-Ariz.) and Rep. Dale Kildee (D-Mich.) to Rep. Taylor and Rep. Dicks, 1 (Oct. 17, 2003), *available at* http://www.indianz.com/docs/congress/hayworthkildee101703.pdf. The House report that accompanied House Bill 2691 expressed the House Appropriation Committee's view regarding the *Cobell* litigation:

> After six years of litigation in the *Cobell v. Norton* class action law suit, the Committee has appropriated hundreds of millions of dollars in litigation related activities. These funds could have been better used to fund health and education programs in Indian country or directed towards reforming the outdated trust systems in the Department . . . .

resolution was introduced in the Senate declaring that a legislative remedy was needed to resolve the *Cobell* litigation and to reform trust fund management.[50]

Congressional attempts to reform the IIM system occurred well before the *Cobell* litigation. As early as 1989, Congress held hearings to investigate the Interior Department's mismanagement of the IIM system.[51] In 1992, after a review of the IIM trust system by the General Accounting Office and outside auditors, the House Committee on Government Operations issued a report titled "Misplaced Trust: the Bureau of Indian Affairs' Mismanagement of the Indian Trust Fund."[52] The report chronicled decades of mismanagement by the Interior Department.[53] Despite Congress's awareness of the problems with the IIM system, the first significant reform did not occur until the 1994 Act.[54]

The central feature of the 1994 Act was the creation of the Office of the Special Trustee for American Indians ("OST").[55] The OST is headed by the Special Trustee, who reports directly to the Secretary of the Interior.[56] The office was established to oversee and streamline the Interior Department's reform of the IIM system.[57] The 1994 Act, however, essentially gave the OST only advisory duties, while most substantive authority to reform the IIM system remained with the Secretary of the Interior.[58] Several years after the passage of the 1994 Act, many members of Congress realized that little reform had taken place, and they once again expressed their frustration at the continued mismanagement of IIM trust funds.[59] The enormous proposed cost associated with conducting a full historical accounting of IIM account balances only intensified efforts in Congress to provide for further legislative reform of the IIM system.[60]

> The Committee believes that this contentious litigation has prevented any rational resolution regarding the individual Indian money accounts.

H.R. REP. No. 108-195, at 83–84 (2003).

[50] S. Res. 248, 108th Cong. (2003).

[51] *See, e.g., Review of the Bureau of Indian Affairs' Management of the $1.7 Billion Indian Trust Fund: Hearing Before the Subcomm. on Environment, Energy, & Natural Res. of the House Comm. on Government Operations*, 101st Cong. (1989).

[52] *See generally* H.R. REP. No. 102-499 (1992).

[53] *See id.* at 8–59.

[54] *See* Pub. L. No. 103-412, 108 Stat. 4293 (1994) (codified as amended at 25 U.S.C. §§ 4001–4061 (2000)).

[55] 25 U.S.C. § 4042(a) (2000).

[56] *Id.*

[57] *Id.* § 4041.

[58] *Id.* § 4043; *see also Cobell V*, 91 F. Supp. 2d at 13; *Reform Act Hearings*, supra note 10, at 28–29 (statement of Edward Manuel, Chairman, Tohono O'odham Nation).

[59] *See* Letter from Senators Campbell and Inouye to Senator Don Nickles (R-Okla.) and Senator Kent Conrad (D-N.D.), chairman and ranking member, respectively, of the Senate Committee on the Budget, 10–11 (Mar. 11, 2003), *available at* http://indian.senate.gov/FY04Views.PDF.

[60] *See Trust Fund Reform Task Force: Hearing on Legislative Proposal of the Department of Interior/Tribal Trust Fund Reform Task Force Before the Senate Comm. on Indian*

While the initial cost estimate was at a minimum $2.4 billion, current projections place the cost at between $6 billion and $12 billion.[61]

All major stakeholders agree that reform of the IIM system is needed. There is generally consensus that the Interior Department needs to be reorganized.[62] There is further agreement that the problem of fractionated ownership interests needs to be addressed.[63] As is often the case, however, there is disagreement about how best to achieve these objectives. There is also substantial disagreement about the proper roles of Congress and the courts, though most parties agree that some form of congressional involvement is necessary.[64] The following analysis provides a detailed examination of the substantive provisions of the Reform Act—the latest IIM reform proposal in Congress—and highlights the key policy debates on some of the most contentious issues in the IIM reform process.

The Reform Act contains five major provisions. First, it would reaffirm the trust obligation that the United States owes to Native Americans.[65] Second, it would consolidate trust fund responsibilities within the Department of the Interior under a new agency: the Office of Trust Reform Implementation and Oversight ("OTRIO").[66] In doing so, the Reform Act would abolish the OST.[67] The OTRIO would be headed by the newly created position of Deputy Secretary for Indian Affairs ("Deputy Secretary").[68] Third, the Reform Act would specify minimum standards for the Interior Department in accounting for IIM funds and address the administrative problem of fractionated ownership interests.[69] Fourth, it would provide for significant tribal involvement not only in the management of trust funds, but also in a general advisory role to the Interior Department.[70] Fifth, the Reform Act directly states that it would not affect the authority of the court over the ongoing *Cobell* litigation.[71]

Section 4 of the Reform Act would explicitly reaffirm the duties, as trustee, that the federal government owes to IIM beneficiaries.[72] Such a

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Affairs, 107th Cong. 1 (2002) [hereinafter *Legislative Proposal Hearings*] (statement of Sen. Inouye).

[61] H.R. CONF. REP. NO. 108-330, at 117 (2003); *see also* Mike Soraghan, *Congress Grants Interior Reprieve on Indian Trusts*, DENVER POST, Nov. 4, 2003, at A7.

[62] *See infra* notes 78, 104.

[63] *Indian Land Consolidation Act: Hearing on S. 550 to Amend Indian Land Consolidation Act to Improve Provisions Relating to Probate of Trust and Restricted Land Before the Senate Comm. on Indian Affairs*, 108th Cong. 59–64 (2003) [hereinafter *Consolidation Act Hearings*] (statement of Wayne Nordwall, Dir. for the Bureau of Indian Affairs, Western Region); *id.* at 70–71 (statement of John Berrey, Chairman, Quapaw Tribal Bus. Comm.).

[64] *See infra* notes 192, 211.

[65] S. 1459, § 4.

[66] *Id.* § 6(a).

[67] *Id.* §§ 6(a), 6(b).

[68] *Id.* § 6(a).

[69] *Id.* § 3.

[70] *Id.* §§ 5, 7.

[71] *Id.* § 9.

[72] *Id.* § 4.

clarification of the government's trust duties is significant because the exact extent of the government's trust responsibilities was contested early in the *Cobell* litigation.[73] Specifically, the government claimed that the 1994 Act limited the number of IIM beneficiaries to whom it owed a fiduciary duty as trustee.[74] The court of appeals, however, upheld the district court in holding that the 1994 Act did not limit the trust responsibility of the federal government, but rather reaffirmed that the government owes a fiduciary duty to all IIM account holders based, in part, on the "elaborate control" the government exercises over IIM accounts.[75]

Section 4 of the Reform Act not only cites the general trust responsibility of the United States, but also clarifies more specific responsibilities of the Department of the Interior in the management of trust funds. For example, it would confirm the Secretary of the Interior's responsibility to distribute income to account beneficiaries in a timely fashion, maintain verifiable records, invest trust funds in a "reasonably productive" manner, and communicate with trust fund beneficiaries regarding the management and administration of the assets.[76] By restating the federal government's general trust obligation to Native Americans as well as listing discrete duties regarding the management of trust funds, Section 4 of the Reform Act should help to clarify the federal government's responsibility and reaffirm that the government owes a fiduciary duty to all IIM trust beneficiaries.

Probably the most sweeping provision of the Reform Act is the proposed creation of the new Deputy Secretary position and the establishment of the OTRIO. The goal of this plan is to establish a direct line of authority within the Department of the Interior to oversee and manage the trust fund system.[77] The federal government has acknowledged that coordination is needed among the numerous agencies within the Interior Department responsible for performing trust management duties.[78] Interior Department

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[73] *See Cobell V*, 91 F. Supp. 2d at 40–41; *Cobell I*, 30 F. Supp. 2d at 28–29.

[74] *Cobell V*, 91 F. Supp. 2d at 40–41.

[75] *Cobell VI*, 240 F.3d at 1098–01. The "elaborate control" test used by the court of appeals derives from the *Mitchell* cases, which established the current doctrine for determining when the government owes a fiduciary duty to Native Americans. *See* United States v. Mitchell, 463 U.S. 206, 225 (1983) (*Mitchell II*); United States v. Mitchell, 445 U.S. 535, 542–43 (1980) (*Mitchell I*). In *Mitchell II*, the Supreme Court held that "a fiduciary relationship necessarily arises when the Government assumes such *elaborate control* over forests and property belonging to Indians." *Mitchell II*, 463 U.S. at 225 (emphasis added). In two recent cases, the Supreme Court confirmed that the *Mitchell* cases are the "path-marking precedents" on the matter. *See* United States v. Navajo Nation, 537 U.S. 488 (2003); United States v. White Mountain Apache Tribe, 537 U.S. 465 (2003). It is noteworthy that while the *Mitchell* test is usually associated with claims against the United States for monetary damages, and the *Cobell* litigation consists of claims for equitable relief, the court of appeals still applied the *Mitchell* test in holding that the government owes a fiduciary duty to all IIM account holders. *See Cobell VI*, 240 F.3d at 1098.

[76] S. 1459, § 4.

[77] *See* 149 CONG. REC. S9964 (daily ed. July 25, 2003) (statement of Sen. McCain).

[78] *See Management of Indian Tribal Trust Funds: Hearing on the United States' Trust*

officials testified before Congress that "the Department is not well structured to focus on its trust duties. Trust responsibilities are spread throughout the Department."[79]

Currently, nearly a dozen agencies within the Interior Department play some role in trust fund management.[80] Some of the agencies involved in administering trust funds include the OST (responsible for managing actual trust accounts),[81] the Bureau of Indian Affairs ("BIA") (responsible for leasing trust lands and maintaining title records of land ownership),[82] the Minerals Management Service ("MMS") (responsible for collecting royalties),[83] the Bureau of Land Management ("BLM") (responsible for surveying trust lands and monitoring lease operations),[84] the Office of Surface Mining ("OSM") (responsible for approving mining permits and inspecting mining activities on trust lands),[85] and the Office of Hearings and Appeals (OHA) (responsible for hearing complex probate cases determining heirs and distributions).[86]

In addition to trust responsibilities being widely dispersed among various Interior Department agencies, trust duties traditionally have been equally diffuse within particular agencies. For example, until the OST was reorganized in April 2003,[87] the OST contained the Office of Trust Records (responsible for protecting, preserving, cataloging, and storing trust records),[88] the Office of Trust Risk Management (responsible for developing and implementing a risk management program for the trust funds),[89] and the OTFM (responsible for overseeing the general policies and procedures governing the Interior Department's management of trust funds).[90] While the 2003 reorganization of the OST attempted to localize decision-making by increasing the number of regional trust officers, it did not significantly consolidate the trust functions of the various OST offices.[91] Two other offices, both established within the Office of the Secretary of the Interior, also had substantial trust management responsibilities. The

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Relationship with the Sovereign Governments of Indian Country Before the Senate Comm. on Indian Affairs, 107th Cong. 143–45 (2002) [hereinafter *Management of Trust Funds Hearings*] (statement of James Cason, Assoc. Dep. Sec'y of the Interior and Neal A. McCaleb, Assistant Sec'y of the Interior for Indian Affairs).

[79] *Id.* at 145.

[80] *See* U.S. DEP'T OF THE INTERIOR, COMPREHENSIVE TRUST MANAGEMENT PLAN 3-17 TO 3-18 (Mar. 28, 2003) [hereinafter COMPREHENSIVE PLAN], *available at* http://www.doi.gov/indiantrust/pdf/doi_trust_management_plan.pdf.

[81] *See* 25 U.S.C. § 4043 (2000).

[82] *See* 25 C.F.R. §§ 150.3, 212.20 (2003).

[83] *See id.* § 212.6.

[84] *See id.* § 212.4.

[85] *See id.* § 212.5.

[86] *See id.* § 15.205.

[87] Interior Dep't Sec'y Order Nos. 3586–89 (2003).

[88] Interior Dep't Sec'y Order Nos. 3208 (1999), 3208A1 (1999), 3208A2 (2000).

[89] Interior Dep't Sec'y Order No. 3321 (2000).

[90] Interior Dep't Sec'y Order Nos. 3001 (1994), 3139 (1997), 3319 (2000).

[91] *See* Interior Dep't Sec'y Order No. 3588 (2003).

Office of Historical Trust Accounting ("OHTA") was created to oversee the historical accounting of IIM accounts.[92] The Office of Indian Trust Transition ("OITT") was responsible for coordinating the Department of the Interior's reorganization of trust duties among all the agencies.[93] The district court referred to the creation of these agencies as "a new alphabet soup of bureaucracies."[94]

Section 6 of the Reform Act, which would create the new Deputy Secretary position and establish the OTRIO, is an attempt to streamline authority and increase accountability within the unwieldy bureaucracy at the Interior Department.[95] The Deputy Secretary would have broad discretion to "oversee all trust fund and trust asset matters of the Department [of the Interior]."[96] The Deputy Secretary would oversee the BIA and assume *all* other functions of the Assistant Secretary for Indian Affairs, even those not trust related.[97] The Deputy Secretary would be appointed by the president and confirmed by the Senate; the term of office would be six years.[98] Because the position of Deputy Secretary would replace the position of Assistant Secretary for Indian Affairs, Section 6 would allow for the Assistant Secretary at the time of enactment of the Reform Act to become the new Deputy Secretary without Senate approval, as long as the president and the Secretary of the Interior approve.[99]

The OTRIO, the new central agency within the Department of the Interior that would be created under Section 6, would have wide-ranging authority to coordinate trust management functions at Interior.[100] It would be headed by the new Deputy Secretary and be responsible for supervising and directing the "day-to-day activities" of the Commissioner of the Bureau of Reclamation, the Director of the BLM, and the Director of the MMS "to the extent [they] administer or manage any Indian trust assets or funds."[101] The new OTRIO would replace the current OST.[102] Section 6 of the Reform Act lists specific responsibilities of the OTRIO, including developing an accurate inventory system for trust assets, promptly post-

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[92] Interior Dep't Sec'y Order No. 3231 (2001). According to Interior Dep't Sec'y Order No. 3231A1 (2002), the OHTA is authorized to exist until at least July 1, 2004.

[93] Interior Dep't Sec'y Order Nos. 3235 (2001), 3235A1 (2002). Pursuant to Interior Dep't Sec'y Order No. 3248 (2003), the OITT was abolished because its work was completed in April 2003. According to Order No. 3248, the projects of the OITT were either phased out or incorporated into the OST or the BIA.

[94] Cobell v. Norton, 283 F. Supp. 2d 66, 230 (D.D.C. 2003) (*Cobell IX*).

[95] *See* 149 CONG. REC. S9964 (daily ed. July 25, 2003) (statement of Sen. McCain).

[96] S. 1459, § 6(a). The term "trust asset" is defined as tangible property (e.g., land, minerals, water, forest resources, etc.) held by the Secretary of the Interior for the benefit of a tribe or IIM account holder. *Id.* § 2(2). The term "trust funds" is defined as all monies or proceeds derived from trust assets. *Id.*

[97] *Id.* § 6(a).

[98] *Id.*

[99] *Id.*

[100] *Id.*

[101] *Id.*

[102] *Id.* §§ 6(a), 6(b).

ing revenue derived from trust assets, annually auditing trust fund accounts, and providing for regular consultation with account beneficiaries.[103]

Although most stakeholders in the trust fund reform effort agree that consolidation of trust responsibilities under a single Interior Department official is needed, there is substantial disagreement about how best to achieve that objective.[104] In November 2001, the Interior Department proposed the creation of a new Assistant Secretary position in charge of trust reform.[105] In response, tribal leaders from around the country joined with government officials to form a task force to study alternative options for consolidating trust responsibilities at the Interior Department.[106] Although several alternatives were explored,[107] the tribal leaders and government officials eventually recommended creating a new position of Under Secretary of the Interior for Indian Affairs, which would have direct-line authority over all Native American issues within the Department, not only trust management.[108]

The task force reasoned that a new Under Secretary position for all Native American programs would be more effective and powerful than a new Assistant Secretary in charge of merely trust reform, as was originally proposed by the Interior Department.[109] Generally, within a cabinet department, an Assistant Secretary has a topic-specific mandate and does not possess much control over other department agencies outside of that particular field.[110] The task force also concluded that an Under Secretary would be more feasible, politically and administratively, than a second Deputy Secretary position (as had been proposed in Congress),[111] yet still provide badly needed direct-line authority.[112] Within a cabinet depart-

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[103] *Id.* § 6(a).

[104] *See generally* TRIBAL LEADER/DEPARTMENT OF THE INTERIOR TASK FORCE ON TRUST REFORM, REPORT FOR THE SECRETARY OF THE INTERIOR (June 4, 2002) [hereinafter TASK FORCE REPORT], *available at* http://www.doi.gov/news/finaltfreport.html.

[105] The proposal called for the Assistant Secretary to head a newly created agency, the Bureau of Indian Trust Asset Management ("BITAM"), which would have consolidated trust management authority within the Interior Department. *See* Press Release, U.S. Dep't of the Interior, Secretary Norton Announces Plan to Improve Management of Indian Trust Assets; Plan Calls for Consolidating Trust Reform Functions Under a Separate Organizational Unit (Nov. 15, 2001), *at* http://www.doi.gov/news/011115b.html.

[106] *See* TASK FORCE REPORT, *supra* note 104, § I.

[107] *See id.* § VII.

[108] *See Legislative Proposal Hearings*, *supra* note 60, at 28 (statement of J. Steven Griles, Dep. Sec'y of the Interior). Although the proposal would have placed all Native American affairs within the Interior Department under the direct authority of the newly created position, the proposal also would have created a Director of Trust Accountability, who would have managed the daily operations of the trust system and reported to the Under Secretary. *See id.*

[109] *See* TASK FORCE REPORT, *supra* note 104, § X.

[110] *See, e.g.*, CONGRESSIONAL QUARTERLY, INC., FEDERAL STAFF DIRECTORY 596 (41st ed. 2003).

[111] As early as April 2002, bills had been introduced in Congress calling for the creation of a new Deputy Secretary of the Interior to oversee trust reform efforts. *See* S. 2212, 107th Cong. § 2(b) (2002).

[112] *See* TASK FORCE REPORT, *supra* note 104, § X. *See also Reform Act Hearings*, *supra*

ment, the Deputy Secretary typically does not have a topic-specific mandate, but rather performs the general administrative role of assisting the cabinet Secretary and serving as Acting Secretary when the Secretary is absent.[113] No cabinet department within the executive branch has more than one Deputy Secretary.[114] The task force concluded that attempting to challenge this organizational norm by suggesting a second Deputy Secretary position within the Interior Department and giving that position a topic-specific mandate would not be a viable option.[115]

There is also disagreement regarding whether the proposed OTRIO is the best organizational unit under which to consolidate the trust management functions of the Interior Department.[116] Although the Reform Act would clearly give the OTRIO authority over the Bureau of Reclamation, the BLM, and the MMS, the bill fails to address explicitly the OTRIO's authority over other Interior Department agencies that play a role in trust management such as the OSM and OHA.[117] Questions remain as to whether the consolidation of authority as proposed under Section 6 of the Reform Act will provide true direct-line accountability or resemble the OST created by the 1994 Act and essentially leave trust management functions widely dispersed throughout the Interior Department.[118]

Moreover, while the Reform Act addresses trust reform at the Interior Department, it is silent as to the Treasury Department. Although Interior unquestionably performs the vast majority of the federal government's IIM trust duties, revenues from trust assets are actually deposited for account holders at the Treasury Department.[119] In its early stages, the *Cobell* litigation demonstrated that reform was needed at the Treasury Department as well.[120] Issues raised regarding Treasury's mismanagement of trust funds included lag time between deposits and authorization for investment,[121] insufficient interest paid to beneficiaries,[122] and the failure of

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note 10, at 33 (statement of James T. Martin, Exec. Dir., United South and Eastern Tribes, Nashville, Tenn.).

[113] *See, e.g.*, CONGRESSIONAL QUARTERLY, INC., *supra* note 110, at 584.

[114] *Reform Act Hearings*, *supra* note 10, at 45 (statement of Neal McCaleb, Assistant Sec'y of the Interior for Indian Affairs).

[115] *See* TASK FORCE REPORT, *supra* note 104, § X.

[116] *See id.*

[117] *See* S. 1459, 108th Cong. § 6(a) (2003).

[118] Senate Bill 2212, 107th Cong. (2002), contained a similar provision to Section 6 of the Reform Act calling for the establishment of the OTRIO. *See* S. 2212, 107th Cong. § 2 (2002). Several tribal leaders questioned the effectiveness of such an office in light of past mismanagement at Interior. *See Reform Act Hearings*, *supra* note 10, at 28–29 (statement of Edward Manuel, Chairman, Tohono O'odham Nation); *id.* at 27 (statement of Geraldine Small, President, Northern Cheyenne Tribe).

[119] *See* 25 U.S.C. §§ 161, 162a (2000).

[120] *See, e.g.*, *Cobell V*, 91 F. Supp. 2d at 21–24 (discussing the trust fund management role of Treasury Department).

[121] *Id.* at 22.

[122] When the OTFM delivers IIM revenues to the Treasury Department to be deposited for an IIM beneficiary, the Treasury Department places the funds in a pooled, interest-bearing account. *See id.* Once a check is issued to an IIM beneficiary, the amount of the

Treasury to maintain records of trust assets.[123] Although the district court overseeing the *Cobell* litigation recently lauded the Treasury Department for improvements it has made in performing its trust duties,[124] it is noteworthy that the Reform Act proposes no changes at Treasury given the Treasury Department's past mismanagement of IIM funds.

Overall, while the proposed consolidation of authority under Section 6 of the Reform Act is commendable as an attempt to increase accountability, opposition to this provision is likely. Particularly, questions will likely arise as to whether a second Deputy Secretary position will achieve the needed streamlined authority—especially because the task force opposed just such a proposal.[125]

Section 3 of the Reform Act would specify minimum standards for the Interior Department in accounting for IIM funds. Similar to requirements in the 1994 Act,[126] the Reform Act would require the Secretary of the Interior to provide a statement of performance for each IIM account to the beneficiary of the account within twenty business days after the close of each calendar quarter.[127] The statements would be required to include the source of the funds, the beginning balance of the account, gains and losses, receipts and disbursements, and the ending balance of the account.[128]

There is, however, a key difference between the 1994 Act and the Reform Act with respect to the Interior Department's audit responsibilities for accounts based on fractionated interests. The 1994 Act requires an annual audit of all IIM accounts.[129] While the Reform Act would still require an annual audit for all IIM accounts, it would allow for the use of statistical sampling procedures to audit accounts with less than $1,000 in value in an attempt to ease the administrative problems associated with fractionated ownership interests.[130]

The fractionated interest dilemma arises out of the history of the allotment policy.[131] Many of the allotments that are at the center of the current IIM crisis originated more than a century ago, some of them as early as 1887, the year of the Dawes Act.[132] A substantial number of the original allottees died intestate and their ownership interest in the land passed

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check is debited from the general interest-bearing account and placed into a non-interest bearing account until the check is cashed. *See id.* at 23. In the period between the check's issuance and the time that it is cashed by the beneficiary, the beneficiary earns no interest. *See id.*

[123] *Id.* at 23.

[124] *Cobell IX*, 283 F. Supp. 2d at 238.

[125] *See supra* text accompanying notes 111–112.

[126] 1994 Act § 102, 25 U.S.C. § 4011 (2000).

[127] S. 1459, 108th Cong. § 3 (2003).

[128] *Id.*

[129] 1994 Act § 102(c), 25 U.S.C. § 4011(c) (2000).

[130] S. 1459, 108th Cong. § 3 (2003).

[131] *See, e.g.*, Shoemaker, *supra* note 17, at 740.

[132] *See Cobell V*, 91 F. Supp. 2d at 17 n.14.

to their heirs.[133] After this process repeated through many generations, current land ownership interests are often quite small and divided among dozens of co-owners. For example, in 2002, there were 1.4 million fractional ownership interests in land where the owner possessed less than a two percent ownership interest.[134] The average land allotment has forty or more co-owners.[135] As of 2003, there were approximately 18,000 IIM account holders who had almost no trust fund income and account balances of one dollar or less.[136] Regardless of the size of the ownership stake, however, the Interior Department is required under the 1994 Act to account for each beneficiary's interest.[137]

The significant administrative task[138] the Interior Department faces in accounting for fractionated ownership interests is only part of the problem. Equally significant is the backlog in the probate system that determines the lawful owners of Native American lands once a landowner dies.[139] Such probate issues necessarily must be resolved before the Interior Department knows exactly to whom it owes a trust obligation.[140] A 2001 report filed with the court overseeing the *Cobell* litigation indicated that the Interior Department had a probate backlog of approximately 15,000 actions.[141]

The Department of the Interior has attempted to reduce the number of fractionated interests through a pilot program that purchases the interests from voluntary sellers and returns them to tribal ownership.[142] The goals of the program are to increase productive economic use of the land, reduce record-keeping expenses, and decrease the number of interests subject to probate.[143] Since the program began in 1999, it has purchased 63,869 ownership interests, representing 37,750 acres.[144]

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[133] *See id.*

[134] *Management of Trust Funds Hearings*, *supra* note 78, at 142.

[135] *Cobell V*, 91 F. Supp. 2d at 17 n.14.

[136] COMPREHENSIVE PLAN, *supra* note 80, app. at A-1.

[137] 1994 Act § 102(a), 25 U.S.C. § 4011(a) (2000); *see Management of Trust Funds Hearings*, *supra* note 78, at 142.

[138] *See Special Trustee: Hearing on the Role of the Special Trustee within the Department of the Interior Before the Senate Comm. on Indian Affairs*, 107th Cong. 23 (2002) [hereinafter *Special Trustee Hearing*] (testimony of Assoc. Dep. Sec'y Cason). Additionally, it is estimated that the Department of the Interior possesses approximately 195,000 boxes of trust records containing between 300 to 500 million pages. *Cobell IX*, 283 F. Supp. 2d at 148.

[139] *See Cobell V*, 91 F. Supp. 2d at 17.

[140] *See id.*

[141] U.S. DEP'T OF THE INTERIOR REPORT TO THE COURT NUMBER EIGHT 102 (Jan. 16, 2002) [hereinafter STATUS REPORT], *available at* http://www.doi.gov/indiantrust/pdf/report8.pdf.

[142] *Settlement Mechanisms Hearings*, *supra* note 45, at 57 (statement of Assoc. Dep. Sec'y Cason).

[143] *Id.*

[144] OFFICE OF MGMT. & BUDGET, BUDGET OF THE UNITED STATES, FISCAL YEAR 2005, at 201 (2004), *available at* http://www.whitehouse.gov/omb/budget/fy2005/pdf/budget/interior.pdf. According to testimony before Congress, as of 2003, there were approximately

By requiring the Secretary of the Interior to conduct an actual annual audit only on accounts with values in excess of $1,000, while using statistical sampling to audit accounts with values less than $1,000, Section 3 of the Reform Act demonstrates an awareness by members of Congress of the significant burden the Interior Department faces in dealing with fractionated interests.[145] Although the Reform Act would allow for statistical sampling in *auditing* small accounts, however, the bill would still require the Department to *account for* and send quarterly statements to all IIM account holders, regardless of the size of their accounts.[146]

Section 3 of the Reform Act would also impose a few additional responsibilities on the Secretary of the Interior. Most notably, it would require the Interior Department to provide "adequate systems for accounting."[147] The accounting system and computer software used by the Interior Department to manage the trust fund system was heavily criticized in the *Cobell* litigation for containing inconsistent data, failing to maintain necessary information, lacking schedules for payments due on leases, and having insufficient internal controls.[148] Section 3 would require the Secretary of the Interior to publish in the Federal Register procedures for trust fund management and accounting.[149]

Those involved in the reform effort agree that the issue of fractionation needs to be addressed.[150] Section 3 of the Reform Act concedes this point by providing the ex post relief of allowing Interior to use sampling

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four million ownership interests in ten million acres of land. *2004 Budget Hearings*, *supra* note 17, at 10 (statement of Sec'y Norton). The Interior Department estimates that by 2030, the four million ownership interests could expand to more than ten million interests if an "aggressive approach" to fractionation is not taken. *Id.* Congress has attempted to remedy the fractionated interest problem since at least the 1980s. *See* Indian Land Consolidation Act, Pub. L. No. 97-459, 96 Stat. 2515 (1983) (codified as amended at 25 U.S.C. §§ 2201–2211 (2000)) (providing for certain fractional ownership interests that comprised less than two percent of the total acreage in an allotment and earned less than $100 annually to escheat to the tribe upon devise or descent). The Supreme Court, however, twice declared such legislation unconstitutional as a taking of property without just compensation. *See* Babbitt v. Youpee, 519 U.S. 234, 244–45 (1997); Hodel v. Irving, 481 U.S. 704, 716–18 (1987). Congress again tried to address the fractionated interest problem with the Indian Land Consolidation Act Amendments of 2000, Pub. L. No. 106-462, § 103, 114 Stat. 1991, 1995 (2000) (codified at 25 U.S.C. § 2206 (2000)) (drastically curtailing scope of prior escheat provision). In the current Congress, Senator Campbell introduced the American Indian Probate Reform Act, S. 1721, 108th Cong. (2003), in a further attempt to address the fractionation problem and to improve the efficiency of the probate process. *See generally* Jeremy R. Fitzpatrick, Note, *The Competent Ward*, 28 AM. INDIAN L. REV. 189, 196–202 (2003) (discussing fractionation policy and arguing for more direct Native American control over land holdings and trust assets).

[145] *See, e.g.*, Letter from Senators Campbell and Inouye to Tribal Leaders, 2 (June 13, 2003), *available at* http://indian.senate.gov/CobellTribalLeaders.PDF.

[146] S. 1459, 108th Cong. § 3 (2003).

[147] *Id.*

[148] *Cobell V*, 91 F. Supp. 2d at 18–20.

[149] S. 1459, § 3.

[150] *See, e.g.*, *Settlement Mechanisms Hearings*, *supra* note 45, at 57 (statement of Assoc. Dep. Sec'y Cason); Campbell and Inouye, *supra* note 145, at 2; *Reform Act Hearings*, *supra* note 10, at 25 (statement of Geraldine Small, President, Northern Cheyenne Tribe).

procedures to audit small IIM accounts.[151] While Section 3 would provide some relief from auditing responsibilities, however, it still would require the Interior Department to account for small IIM accounts[152]—even an account, for example, with a revenue stream based on an ownership interest as small as 0.0002% of the total ownership interest in the property.[153] Accordingly, the Interior Department will continue to face an enormous administrative burden in accounting for IIM accounts until an ex ante approach is taken to decrease the number of fractionated ownership interests.[154]

The fourth major provision of the Reform Act would reaffirm a tribe's authority to manage trust funds on its own[155] and allow tribes to advise the Department of the Interior on trust management functions through the creation of an advisory commission.[156] Pursuant to authority initially provided under the 1994 Act,[157] Section 5 of the Reform Act would permit a tribe to enter into a self-determination contract or compact with the Interior Department under which the tribe would develop a plan to manage its own trust funds.[158] Section 5 explicitly states that if a tribe did choose to manage its own funds, such action would not terminate the trust responsibility that the federal government owes to the tribe.[159] Because Section 5 uses the phrase "Indian trust funds" to describe the funds that a tribe may manage, it is unclear whether a tribe would be allowed to manage IIM trust funds or solely tribal trust funds.[160]

Section 5's allowance for increased tribal control over trust fund management is consistent with the federal government's general Native American policy over the past thirty years.[161] Following the enactment of the

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[151] S. 1459, § 3.

[152] *Id.*

[153] *See, e.g., 2004 Budget Hearings*, *supra* note 17, at 10 (statement of Sec'y Norton). The use of statistical sampling has been divisive in the *Cobell* litigation. *See Cobell IX*, 283 F. Supp. 2d at 187. Although the court previously allowed for limited use of statistical sampling by the Interior Department to audit accounts, it explicitly rejected the use of statistical sampling to account for IIM funds. *Id.* at 188, 195–96. As the court noted, "The terms 'accounting' and 'audit' are by no means synonymous." *Id.* at 188.

[154] *See, e.g., Special Trustee Hearing*, *supra* note 138, at 23 (testimony of Assoc. Dep. Sec'y Cason). The obvious challenge that Congress and the Interior Department face in attempting to decrease the number of fractionated interests is the Supreme Court's *Youpee* decision regarding unconstitutional takings, discussed *supra* note 144.

[155] S. 1459, § 5.

[156] *Id.* § 7.

[157] 1994 Act § 202, 25 U.S.C. § 4022 (2000).

[158] S. 1459, § 5.

[159] *Id.*

[160] *Id.* Although the Reform Act's language is ambiguous as to tribal authority to manage IIM funds, several tribes currently manage IIM accounts. *See Cobell V*, 91 F. Supp. 2d at 9. Under contracts with the Interior Department in which the tribe agrees to manage IIM accounts, the money that the Interior Department would have used to manage those accounts is transferred to the tribe. *Id.*; 25 U.S.C. § 450j (2000).

[161] *See, e.g.*, GETCHES ET AL., *supra* note 19, ch. 4(D) (providing overview of federal government's self-determination policy since 1961).

landmark Indian Self-Determination and Education Assistance Act of 1975,[162] tribes gradually began to assume greater responsibility for carrying out functions such as education, health care, and resource management that previously had been performed by the BIA or other agencies in the Interior Department.[163] Section 5 of the Reform Act is a typical application of the government's self-determination policy in that it transfers authority from the Interior Department to tribes.

The creation of the Commission for Review of Indian Trust Fund Management Responsibilities ("Commission") in Section 7 of the Reform Act is a further effort to give trust fund beneficiaries a significant role in the management of trust assets.[164] Under Section 7, the Commission would be composed of twelve members,[165] a majority of whom must be representatives of federally recognized tribes and one of whom must represent an IIM beneficiary.[166] The membership would include individuals with experience in trust management, fiduciary investment management, federal Indian law, and financial management.[167] The duties of the Commission would include reviewing current trust law,[168] recommending improvements in trust fund management,[169] and issuing a report detailing its findings.[170] The Commission would have broad authority to gather information from government agencies[171] and would be allowed to hire a staff to assist it in its duties.[172] Section 7 provides that the Commission would dissolve three years after it holds its initial meeting.[173]

A similar tribal advisory board was created under the 1994 Act.[174] Critics claimed, however, that the 1994 Act failed to give the advisory board sufficient independence from the Interior Department or adequate resources to carry out its mandate.[175] The advisory board under the 1994 Act is appointed solely by the Special Trustee.[176] In order to provide independence to the Commission, the Reform Act would allow Congress to appoint two-

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[162] Pub. L. No. 93-638, 88 Stat. 2203 (1975) (codified as amended at 25 U.S.C. §§ 450(a)–450(n) (2000)).

[163] *See Cobell V*, 91 F. Supp. 2d at 9; *see also* GETCHES ET AL., *supra* note 19, at 224–33.

[164] *See* S. 1459, 108th Cong. § 7 (2003).

[165] *Id.* § 7(b)(1). Four members would be appointed by the president; two by the Senate majority leader; two by the Senate minority leader; two by the Speaker of the House; and two by the House minority leader. *Id.* §§ 7(b)(1)(A)–(E).

[166] *Id.* § 7(b)(2)(A).

[167] *Id.* § 7(b)(2)(B).

[168] *Id.* § 7(d)(1).

[169] *Id.* § 7(d)(2).

[170] *Id.* § 7(e).

[171] *Id.* § 7(f)(2).

[172] *Id.* § 7(g)(3).

[173] *Id.* § 7(j).

[174] 1994 Act § 306; 25 U.S.C. § 4046 (2000).

[175] *See Reform Act Hearings*, supra note 10, at 67–68 (statement of Edward Manuel, Chairman, Tohono O'odham Nation); *Special Trustee Hearing*, *supra* note 138, at 28–29 (statement of Paul M. Homan, former Special Trustee for American Indians).

[176] 1994 Act § 306(a), 25 U.S.C. § 4046(a) (2000).

thirds of the members of the Commission, while the president would appoint the remaining one-third.[177] To increase the authority and resources of the Commission, the Reform Act would require heads of government agencies to provide information to the Commission when requested,[178] allow the Commission to hold hearings,[179] and permit the Commission access to staff at the Departments of Interior, Treasury, and Justice.[180] Additionally, the Reform Act includes a separate authorization of appropriations solely for the Commission.[181]

Overall, both Section 5 and Section 7 of the Reform Act would provide increased opportunity for trust fund beneficiaries to take an active role in trust fund management. Although such an opportunity for direct control is consistent with the federal government's self-determination policy, two issues remain. First, it is important to determine the extent to which tribes and IIM beneficiaries actually desire direct tribal control over trust funds. Tribal leaders and IIM beneficiaries involved in trust fund reform have suggested that they would prefer for the government to remain actively involved in trust fund management.[182] Second, the government must continue efforts to remedy its past mismanagement rather than simply passing along the problem to tribes and IIM beneficiaries. At the very least, the federal government would need to provide an accurate historical accounting of assets and funds within the IIM system before promoting self-determination.

The last major provision of the Reform Act is arguably its most controversial. Section 9 of the Reform Act declares that the bill would not affect the authority of the court over the ongoing *Cobell* litigation.[183] Unlike another IIM bill in Congress, Senate Bill 1770, which directly attempts to resolve part of the *Cobell* litigation,[184] Section 9 of the Reform Act specifically states, "Nothing in this Act limits the findings, remedies, jurisdiction, authority, or discretion of the courts in the matter entitled *Cobell v. Norton* . . . ."[185]

Throughout the course of the contentious *Cobell* litigation, many members of Congress expressed dismay at the case's significant costs—both financial and personal.[186] Frustration over the case even led to direct con-

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[177] S. 1459, § 7(b)(1); *see supra* note 165 and accompanying text.

[178] S. 1459, § 7(f)(2)(B).

[179] *Id.* § 7(f)(1).

[180] *Id.* § 7(f)(3).

[181] *Id.* § 7(i).

[182] *See, e.g.*, *Reorganization Hearings*, *supra* note 12, at 13–16 (statement of Susan Masten, Chairwoman, Yurok Tribe).

[183] S. 1459, § 9(a).

[184] S. 1770, § 2(b).

[185] S. 1459, § 9(a).

[186] *See, e.g.*, Campbell and Inouye, *supra* note 47, at 1; *Settlement Mechanisms Hearings*, *supra* note 45, at 46 (statement of Assoc. Dep. Sec'y Cason) ("Our employees, however, are wearing down over the strain of the contentiousness and tension associated with this single case.").

gressional involvement in the litigation. In an appropriations bill passed in February 2003, Congress limited the compensation of the court-appointed special master in the case.[187] Additionally, before it was stricken on the House floor based on parliamentary grounds, Section 137 of the fiscal year 2004 Interior Department appropriations bill would have given the Secretary of the Interior broad authority to settle claims regarding IIM accounts.[188] Prior to these two instances of direct congressional intervention in the litigation, the vast majority of congressional involvement had been indirect, such as by recommending that the litigants settle the case through mediation.[189]

Gradually, however, momentum built in Congress to provide a legislative settlement to the *Cobell* class action.[190] Even members of Congress who previously urged the parties themselves to settle the dispute conceded that a legislative resolution of the case might be warranted.[191] More remarkably, both sides in the *Cobell* litigation indicated that congressional involvement in settling the case would be welcome. In testimony before Congress, John E. Echohawk, one of the attorneys for the plaintiffs, said, "[W]e believe that it is critical that senior members of the authorizing committees of both houses of Congress must be personally involved in [any mediation proceedings] to ensure that all parties come and discuss resolution in good faith."[192] Associate Deputy Secretary of the Interior Cason testified, "With respect to . . . the settlement of the *Cobell* lawsuit, I can honestly say I don't think we can get there without the involvement of Congress."[193]

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[187] Consolidated Appropriations Resolution, 2003, Pub. L. No. 108-7, § 132, 117 Stat. 11, 243 (2003).

[188] *See supra* note 49.

[189] *See, e.g.*, Campbell and Inouye, *supra* note 47, at 1 (urging a "mediated resolution rather than the current course of continued litigation."). In February 2004, parties to the *Cobell* litigation tentatively agreed to resume mediation efforts after more than a three-year break in negotiations. *See* Anne C. Mulkern, *Indians, Feds to Resume Talks; Mediation Explored to Lift Impasse in Trust-Fund Case*, DENVER POST, Feb. 24, 2004, at A1. In April 2004, the plaintiffs and government officials agreed to the selection of retired federal judge Charles B. Renfrew and professional mediator John G. Bickerman as co-mediators. Press Release, U.S. House Comm. on Res., Steady Progress in Cobell v. Norton Class Action Lawsuit: Plaintiffs, U.S. Agree to Mediators in Trust Fund Lawsuit (Apr. 6, 2004), *at* http://resourcescommittee.house.gov/Press/releases/2004/0406cobell.htm.

[190] *See, e.g.*, 149 CONG. REC. H6974, (daily ed. July 16, 2003) (statement of Rep. Taylor); *id.* (statement of Rep. Dicks).

[191] *See, e.g.*, Campbell and Inouye, *supra* note 47, at 2 (stating that they intended to introduce legislation to settle the *Cobell* litigation if litigants did not resolve the matter "within a reasonable amount of time").

[192] *Settlement Mechanisms Hearings*, *supra* note 45, at 64 (statement of John E. Echohawk, Exec. Dir., Native American Rights Fund); *see also Process Hearings*, *supra* note 44, at 47 (statement of Elouise Cobell).

[193] *Settlement Mechanisms Hearings*, *supra* note 45, at 58 (statement of Assoc. Dep. Sec'y Cason).

Congress soon directly addressed the litigation. Although the Reform Act would not attempt to settle the *Cobell* litigation,[194] Senate Bill 1770, introduced by Senator Campbell, would allow for a "voluntary alternative claims process" to settle claims by class-action members.[195] Senate Bill 1770 would create a nine-member Indian Money Account Claim Satisfaction Task Force (IMACS), which would use financial modeling and other techniques to determine balances for all IIM accounts.[196] After the IMACS determined the balance of an IIM account, the beneficiary would have three options. The beneficiary could accept the finding and receive payment from the Interior Department, thus being dismissed from the class action.[197] The beneficiary could reject the IMACS finding and submit the claim to arbitration before a newly established Indian Money Claims Tribunal.[198] Lastly, the beneficiary could remain a member of the class action.[199] Despite the billions of dollars involved in the *Cobell* litigation,[200] Senate Bill 1770 would authorize only $40 million over the next four years to settle claims.[201]

Another bill, Senate Bill 1540, introduced by Senator Daschle, would also create a fund to provide payments to IIM beneficiaries for past mismanagement,[202] but ostensibly would not attempt to settle the direct claims of litigants in the *Cobell* litigation.[203] According to Senator Daschle, Senate Bill 1540 is designed to complement the Reform Act's proposed structural reforms of the IIM system by "jumpstart[ing] the process of repayment."[204] The Indian Trust Payment Equity Fund, which would be created by Senate Bill 1540, would provide $2 billion each fiscal year from 2004 through 2008 to trust fund beneficiaries.[205] The bill does not provide procedures by which claims would be settled. Rather, the bill simply authorizes the Secretary of the Interior to settle claims by "pro-vid[ing] to Indian tribes payments of amounts owed by the United States to individual Indian money account holders as a result of mismanagement of the individual Indian money fund."[206]

Currently, both Senate Bill 1540, introduced by Senator Daschle, and Senate Bill 1770, introduced by Senator Campbell, are stalled in the Senate Committee on Indian Affairs.[207] There are major deficiencies in both

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[194] S. 1459, § 9(a).
[195] S. 1770, § 2(b).
[196] *Id.* § 4.
[197] *Id.* § 4(g)(1).
[198] *Id.* §§ 4(g)(2)(A), 5(a).
[199] *Id.* § 4(g)(2)(B).
[200] *See supra* note 45.
[201] S. 1770, § 7.
[202] S. 1540, §§ 4(a), 5.
[203] *Id.* § 4(c)(2).
[204] 149 CONG. REC. S10671 (daily ed. July 31, 2003) (statement of Sen. Daschle).
[205] S. 1540, § 4(a).
[206] *Id.*
[207] Senate Committee on Indian Affairs: Legislative Update, *at* http://indian.senate.

bills. Senate Bill 1770, by authorizing only $40 million over four years, fails to acknowledge the magnitude of the multi-billion-dollar *Cobell* proceedings.[208] While Senate Bill 1540 would authorize $10 billion over five years, it does not provide any intelligible principle by which the Secretary of the Interior would be authorized to settle the claims.[209] It is also unclear how payments authorized under the bill would relate to nearly identical claims in the ongoing *Cobell* litigation.[210] Despite such concerns, the most imminent threat to a potential congressional resolution of the ongoing *Cobell* litigation is likely to come from the judiciary, based on the separation of powers doctrine.[211]

With the passage of the fiscal year 2004 Interior Department appropriations bill, Congress set the stage for a showdown with the court. Congress explicitly delayed, for at least one year, the historical accounting of IIM funds that the district court ordered the Interior Department to conduct in a September 2003 opinion.[212] Given the court's past criticism of congressional interference with court orders,[213] it is doubtful that the court will uphold such an assault on judicial authority by Congress.

Considering the active role that Congress has assumed in the *Cobell* litigation, it is noteworthy that Section 9 of the Reform Act states that the bill would in no way impair the court's authority. This mandate of Section 9 is illusory. In particular, it is unlikely that Congress can implement all of the structural reforms to the IIM system that are included in the other sections of the Reform Act, yet still maintain that such reforms would have no effect on any potential remedy that the court might order in the *Cobell* litigation. In fact, some of the provisions of the Reform Act, such

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gov/108_leg.htm.

[208] *See Indian Money Account Claims Satisfaction Act of 2003: Hearing on S. 1770 Before the Senate Comm. on Indian Affairs*, 108th Cong. 66 (2003) [hereinafter *Claims Satisfaction Hearings*] (statement of Tex G. Hall, President, National Congress of American Indians). Critics of Senate Bill 1770 have also questioned Section 3 of the bill, which uses the ambiguous phrase "to the maximum extent practicable" when defining the government's responsibility to determine accurate IIM account balances. *Id.* at 65.

[209] *See* S. 1540, § 4(a).

[210] *See id.* § 4(c)(2).

[211] The court harshly criticized Congress when, in February 2003, it passed a rider to an appropriations bill that limited the compensation of the court-appointed special master in the *Cobell* litigation. *See supra* note 46 and accompanying text. The court noted, "The appropriations provision at issue [limiting the compensation of the special master] attempts to undermine the finality of an order issued by the judicial branch, which may constitute an unwarranted invasion of the authority vested in the federal courts by Article III of the U.S. Constitution." Cobell v. Norton, 263 F. Supp. 2d at 65 n.4. Congress again limited the compensation rate for the court-appointed special master in the 2004 Interior Department appropriations bill. Department of the Interior and Related Agencies Appropriations Act of 2004, Pub. L. No. 108-108, § 127, 117 Stat. 1241, 1269 (2003).

[212] *See* 117 Stat. at 1263; H.R. CONF. REP. No. 108-330, at 117–18 (2003); *Cobell IX*, 283 F. Supp. 2d at 288 (ordering historical accounting), Cobell v. Norton, Nos. 03-5262, 03-5314, 2004 WL 210700, at *1 (D.C. Cir. Jan. 28, 2004) (stay of historical accounting pending appeal).

[213] *See supra* notes 46, 211.

as mandating an accounting of trust assets,[214] are identical to remedies that the district court has ordered.[215] The reality of the matter is that any congressional reform of the IIM system will affect the eventual judicial remedy to some extent.

Overall, the Reform Act represents a significant effort by Congress to overhaul the federal government's management of the IIM system. The Reform Act's proposed consolidation of trust duties under a sole Interior Department official, its mindfulness of the fractionated interest dilemma, and its imposition of minimum accounting standards on the Interior Department are all steps that could lead to increased accountability in the IIM system. At the same time, the Reform Act must state more explicitly the specific authority of the new Deputy Secretary and the OTRIO vis-à-vis other Interior Department officials and agencies. The bill must also include stronger provisions to ensure that direct tribal control over trust fund management is actually desired by tribes and not simply a means by which the Interior Department can pass along a long-standing problem without accepting responsibility for its own mismanagement of the IIM system. It is critical that Congress also address the precise effect that the Reform Act will have on any judicial remedy in the *Cobell* litigation, rather than simply, and unrealistically, stating that there would be no such effect.

It has been ten years since the 1994 Act was passed in an attempt to reform the IIM trust system. While some reform has taken place over the past decade, substantial problems persist in the government's management of trust funds. The 1994 Act has served as yet another broken promise of reform.[216] It is essential that Congress capitalize on the current momentum that has built in favor of legislative reform and that Congress learn from its mistakes in the 1994 Act.

As Congress revises the proposed Reform Act to remedy its deficiencies, it must continue to seek and incorporate the input of all relevant stakeholders.[217] The neglect and mismanagement of the IIM system has occurred for well over 100 years. It is unrealistic to believe that complete reform of trust fund management can be accomplished overnight. Nevertheless, the Reform Act could serve as an important first step in reforming a system that is badly in need of repair.

—Thomas V. Panoff

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[214] S. 1459, § 3.

[215] *See Cobell IX*, 283 F. Supp. 2d at 288.

[216] *See, e.g., Reform Act Hearings*, supra note 10, at 28 (statement of Edward Manuel, Chairman, Tohono O'odham Nation).

[217] *See Process Hearings*, *supra* note 44, at 79 (statement of Rep. Kildee).

THE PROTECTION OF LAWFUL COMMERCE IN ARMS ACT

In the late 1990s, the firearms industry was confronted with a pronounced rise in lawsuits emulating the deluge of actions brought against the tobacco industry earlier that decade.[1] Facing soaring legal costs and potentially crippling jury verdicts,[2] gun manufacturers sought broad protection through legislation and on April 9, 2003, the House of Representatives passed the Protection of Lawful Commerce in Arms Act.[3] The bill appeared certain to pass in the Senate, but was defeated 90-8, after the addition of two amendments that were opposed by the bill's chief sponsors.[4] The amendments would have renewed the expiring ban on assault weapons[5] and required background checks of buyers at gun shows.[6]

As the bill was defeated by parliamentary maneuvers, however, rather than on its merits, efforts to immunize the firearms industry are likely to resurface.

The Act, which would have prohibited civil liability actions from being brought or continued against manufacturers, distributors, dealers, or importers of firearms or ammunition for damages resulting from the criminal or unlawful misuse of their products by the injured party or others, is an unprecedented attempt to insulate an industry from liability.[7] The Act also represents a sea-change in political strategy for the gun-rights lobby, which appears to have discovered the virtues of legislation under a Republican-led Congress.[8] The bill is an unnecessarily expansive attempt to usurp

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[1] *See When Lawsuits Make Policy,* ECONOMIST, Nov. 21, 1998, at 17.

[2] *See* Sharon Walsh, *Gun Industry Views Pact as Threat to Its Unity*, WASH. POST, Mar. 18, 2000, at A10 (quoting John Coale, one of the personal injury lawyers suing the firearms industry, saying that "[t]he legal fees alone are enough to bankrupt the industry"). A National Shooting Sports Foundation attorney's conservative estimate of the industry's legal costs to date to defend itself exceeded $100 million. Chris W. Cox, NRA Inst. for Legislative Action, *One Big Victory, Now Another Big Battle* (Aug. 6, 2003), *at* http://www.nraila.org/Issues/Articles/Read.aspx?ID=110. *See also* Dean E. Murphy, *$50 Million Award in a Gun Liability* Case, N.Y. TIMES, May 8, 2003, at A34.

[3] H.R. 1036, 108th Cong. (2003).

[4] *See* Helen Dewar, *Gun Bill Dies After Sponsors Drop Support*, WASH. POST, Mar. 3, 2004, at A4.

[5] S. 1805 §§ 5, 110105 (2004) (as amended by S. AMDT. 2637). *See also supra* note 4.

[6] S. 1805 §§ 201–209 (2004) (as amended by S. AMDT. 2636). *See also supra* note 4.

[7] No other industry enjoys the level of immunity from liability that the Act provides. *See* 149 CONG. REC. H2969 (daily ed. Apr. 9, 2003) (statement of Rep. Watt). Although it was argued that similar legislation immunizing an industry had been passed, *see* 149 CONG. REC. H2970 (daily ed. Apr. 09, 2003) (statement of Rep. Stearns), the closest comparison is the General Aviation Revitalization Act of 1994. Pub. L. No. 103-298, 108 Stat. 1552 (codified at 49 USCS §§ 40101). That Act, which generally protects manufacturers of small planes more than eighteen years old against personal injury lawsuits in both federal and state courts, is far less sweeping in its reach, protecting only small-plane manufacturers, and bears closer resemblance to a statute of limitations than to an outright ban on civil liability. Pub. L. No. 103-298, 108 Stat. 1552 (codified at 49 USCS §§ 40101). *But See* H.R. 552, 108th Cong. (2004) (approved House bill barring people from suing restaurants on the ground that their food makes customers fat); Carl Hulse, *Vote in House Offers a Shield In Obesity Suits* N.Y. TIMES, Mar. 11, 2004, at A1.

[8] *See From the Hip: Gun Safety Reconsidered*, ECONOMIST, Nov. 23, 2002, at 34 [herein-

roles arguably given to the judiciary. Ultimately, the Act would have provided unnecessarily broad federal legislative protection for a problem properly and adequately addressed by the courts and the states. Consequently, the Act would have constituted a windfall for the firearms industry and diminished incentives for safer designs and distribution, at the expense of gun consumers and bystanders alike.

On October 30, 1998, the City of New Orleans, aided by the Brady Center to Prevent Gun Violence's Legal Action Project, filed the first lawsuit by a government entity against the firearms industry, seeking to recover for harm it had allegedly suffered because of the industry's failure to implement safer designs.[9] Since 1998, thirty-three municipalities and one state attorney general have filed lawsuits against gun manufacturers, distributors, or trade associations, seeking to recoup expenses attributable to gun violence, including police, health care, and social-service costs.[10] Suits also aim to eradicate marketing and distribution schemes that allegedly placed guns in criminal hands.[11]

The majority of the municipal lawsuits have been, in part, an attempt to regulate the gun industry.[12] With legislative action foreclosed to gun-control supporters, groups such as the Brady Center to Prevent Gun Violence have resorted to lawsuits as the instrument to implement their agenda. Of the thirty-four public entities that have filed suit, the Brady Center's Legal Action Project represents twenty-five and has provided assistance to others, while also serving directly as plaintiff's counsel in some of the individual lawsuits.[13] The motivation behind these lawsuits to bankrupt the gun industry is not clandestine; Andrew Cuomo, Secretary of Housing and Urban Development in the Clinton Administration and a leading proponent for gun-control,[14] threatened the gun industry with "death by a thousand cuts."[15]

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after *From the Hip*].

[9] Morial v. Smith & Wesson Corp., No. 98-18578 (La. Div. Dist. Ct. Feb. 28, 2000), *rev'd*, 785 So. 2d 1 (La. 2001). *See* Legal Action Project, Brady Ctr. to Prevent Gun Violence, *Morial v. Smith & Wesson Corp.*, *at* http://www.gunlawsuits.org/docket/casestatus.asp?RecordNo=1 (last visited Apr. 16, 2004).

[10] *See* Legal Action Project, Brady Ctr. to Prevent Gun Violence, *City Lawsuits*, *at* http://www.gunlawsuits.org/docket/cities/index.asp (last visited Apr. 16. 2004). Municipalities that have filed suit, as of April 2004 include Atlanta, Ga.; Boston, Mass.; Bridgeport, Conn.; Camden City, N.J.; Camden County, N.J.; Chicago, Ill.; Cincinnati, Ohio; Cleveland, Ohio; Detroit, Mich.; the District of Columbia; Gary, Ind.; Jersey City, N.J.; L.A. City, Cal.; L.A. County, Cal.; Miami-Dade County, Fla.; Newark, N.J.; New Orleans, La.; N.Y. City, N.Y.; Phila., Pa.; S.F., Cal.; St. Louis, Mo.; Wayne County, Mich.; and Wilmington, Del. New York State has also filed suit. *Id.*

[11] *Id.*

[12] *See* Robert Reich, *Don't Democrats Believe in Democracy?*, AM. PROSPECT ONLINE (Jan. 12, 2000) <www.prospect.org/web/page.ww?section=root&name=ViewWeb&articleId=265>.

[13] Legal Action Project, *supra* note 10. *See also* Legal Action Project, Brady Ctr. to Prevent Gun Violence, *Lawsuits Brought by Individual Victims of Gun Violence*, *at* http://www.gunlawsuits.org/docket/individual/index.asp (last visited Apr. 16. 2004).

[14] *See* Gun Control Hall of Fame, *Andrew Cuomo*, *at* http://vikingphoenix.com/public/gchof/acuomo.htm (last visited Apr. 5, 2004).

[15] Timothy Wheeler, *Litigation Without Justification Is Tyranny*, NAT'L REV. ONLINE

These municipal actions have relied on an array of legal theories including public nuisance, negligent product distribution, and products liability for manufacturing products with inadequate safety systems.[16] The overwhelming and harrowing magnitude of these lawsuits is apparent in Chicago's $433 million lawsuit accusing twenty-two gun manufacturers, four gun distributors, and twelve gun shops of creating a public nuisance by facilitating the trafficking of guns into the city, knowing they would be sold illegally.[17]

The Act's supporters decry these lawsuits as a blatant attempt to circumvent the legislative process, arguing that the legislatures, rather than the courts, have the power to regulate firearms.[18] Although the lawsuits seeking damages and reimbursement for gun violence costs arguably have interests outside the purview of bankrupting the industry, those seeking injunctive relief are evidently attempting to regulate the industry through judicial intervention. Industry reform was also attempted in the NAACP's dismissed lawsuit against the gun industry, which sought to restrict distributors, prohibit sales to gun show dealers, and limit individual buyers to one handgun a month.[19] Indeed, some courts have condemned the impropriety of municipal efforts to achieve injunctive relief, declaring these requests to be a "round-about attempt" to regulate firearms and contending that a government entity's "frustration [in its inability to regulate firearms directly] cannot be alleviated through litigation as the judiciary is not empowered to 'enact' regulatory measures in the guise of injunctive relief."[20] A consequence of these attempts at judicial regulation, according to the bill's proponents, has been an erosion of the government's separation of powers.[21] The tenuousness of the legal theories behind municipal lawsuits is most apparent in the fact that none have succeeded in achieving a favorable final verdict.[22] Consequently, supporters of the Act assert that these frivolous lawsuits represent an improper attack on a law-abiding industry.

The use of lawsuits to compel improvements in product safety has historical underpinnings dating back to the automobile industry in the

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(July 24, 2003) <www.nationalreview.com/comment/comment-wheeler072403.asp>.

[16] *Theories In the Lawsuits Brought by Cities and Counties Against the Gun Industry*, The Legal Action Project, Brady Ctr. to Prevent Gun Violence, *at* http://www.gunlawsuits.org/docket/cities/theories.asp (last visited Apr. 16. 2004).

[17] *See* Amanda B. Hill, Comment, *Ready, Aim, Sue: The Impact of Recent Texas Legislation on Gun Manufacturer Liability*, 31 TEX. TECH. L. REV. 1387, 1412 (2000); *City of Chicago v. Beretta U.S.A. Corp.*, The Legal Action Project, Brady Ctr. to Prevent Gun Violence, *at* http://www.gunlawsuits.org/docket/cities/cityview.asp?RecordNo=4 (last visited Apr. 16. 2004).

[18] Wheeler, *supra* note 15.

[19] *Nation in Brief*, WASH. POST, May 15, 2003, at A9.

[20] Penelas v. Arms Tech., Inc., 778 So. 2d 1042, 1045 (Fla. Dist. Ct. App. 2001) (affirming dismissal with prejudice).

[21] H.R. REP. NO. 108-59, at 10, 17, 28 (2003).

[22] *See infra* note 86.

1960s, when a series of lawsuits led to dramatic improvements in automobile safety features including, among others, the airbag.[23] The lawsuits against the gun industry, however, are the immediate successor to the barrage of suits against the tobacco industry, which culminated in 1998 in a $246 billion settlement between forty-six states and the major U.S. tobacco companies.[24]

The resemblance of these actions to the efforts against the tobacco industry is unmistakable, and was decried by supporters of House Bill 1036.[25] Just as state governments received reimbursement for the costs of smoking-related treatment from the tobacco industry, government plaintiffs have sought reimbursement for police and hospital expenses incurred from gun violence;[26] individuals are employing the very same lawyers against the firearms industry who were previously involved in the tobacco litigation.[27] Even the arguments espoused by gun-control advocates uncannily echo those used against the tobacco industry, condemning the firearms industry for failing to make safe products and accusing the gun industry of marketing its products to criminals, much like the claims that the tobacco companies had marketed cigarettes to minors.[28] Moreover, the composition of the battlefield again pits frustrated officials unable to implement desired reform on a dangerous product against a besieged industry forced to pool resources to fight the lawsuits, pay for extensive lobbying, and initiate advertising campaigns.[29] Considering the success of

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[23] *See* Larsen v. Gen. Motors Corp., 391 F.2d 495 (8th Cir. 1968) (holding that manufacturers have a duty to make reasonably crashworthy vehicles due to the foreseeability of collisions). *See also From the Hip*, *supra* note 8, at 34.

[24] *When Lawsuits Make Policy*, *supra* note 1, at 17. *See also* Campaign for Tobacco-Free Kids, *State Tobacco Settlement*, *at* http://tobaccofreekids.org/reports/settlements/ (last visited Apr. 16, 2004) ($246 billion settlement). The settlement is to be paid out over twenty-five years. *Id.* Despite the settlement with the states, individual and class-action lawsuits against the tobacco industry have continued. *See, e.g.*, Myron Levin, *Tobacco Firms Lose in Louisiana*, L.A. TIMES, July 29, 2003, at C3.

[25] *See* 149 CONG. REC. H2969 (daily ed. Apr. 9, 2003) (statement of Rep. Sensenbrenner).

[26] *See Gun Lawsuits: The Fog of Battle*, ECONOMIST, Feb. 20, 1999, at 26 [hereinafter *Gun Lawsuits*]. In one municipal lawsuit the judge noted that the city "must have envisioned [the tobacco] settlements as the dawning of a new age of litigation during which the gun industry . . . would follow the tobacco industry in reimbursing government expenditures and submitting to judicial regulation." Ganim v. Smith & Wesson Corp., No. CV 990153198S, 1999 WL 1241909, at *5 (Conn. Super. Ct. Dec. 10, 1999) (McWeeny, J.).

[27] *From the Hip*, *supra* note 8, at 34 (citing, among others, Bob Montgomery, the plaintiff's lawyer in *Grunow v. Valor Corp. of Florida*, who fashioned the $11.3 billion tobacco settlement with the state of Florida). The Castano Group, a law-firm coalition that sought a nationwide class-action lawsuit against the cigarette industry, is involved in municipal lawsuits against gun manufacturers. *See* David E. Rosenbaum, *Echoes of Tobacco Battle in Gun Suits*, N.Y. TIMES, Mar. 21, 1999, at A32.

[28] *See* Rosenbaum, *supra* note 27, at A32.

[29] *Id.* Gun manufacturers formed an umbrella group called HSSF to fight the legal attack—each member vowed to contribute one percent of its sales in an effort to raise an annual budget as large as $20 million for litigation expenses, lobbying, and advertising. *Id.*

tobacco litigation,[30] the gun industry's fear of lawsuits seems warranted at first glance.

The firearms industry responded to the gun-control's death-by-litigation strategy by seeking limitation of its tort liability from both state and federal governments. In 1998, the firearms industry initiated a nationwide political campaign[31] targeting state legislatures, which rallied to the gun industry's defense.[32] At present, twenty-three states have laws granting some form of immunity or protection to the firearm industry against lawsuits.[33]

Action on the federal front was soon to follow. Although House Bill 1036 was introduced on February 27, 2003, its origins can be traced to a pair of bills presented two years earlier. Lawmakers took no action on the first, the Firearms Heritage Protection Act of 2001.[34] The second, the Protection of Lawful Commerce in Arms Act,[35] introduced in May 2001, was marked up in the House Energy and Commerce and Judiciary Committees, reported out and placed on the Union Calendar in early October 2002, and co-sponsored by more than half of the House.[36] Days after the bill was placed on the House calendar, however, the Washington, D.C., area was besieged by snipers John Allen Muhammad and Lee Boyd Malvo, who killed randomly with a high-caliber rifle; following these shootings, no further action was taken on the bill.[37] House Bill 1036, like its predecessors, would have prohibited civil liability actions from being brought or continued against the gun industry for damages resulting from the misuse of their products by others.[38] The bill had received strong political support: it had fifty-four Senate co-sponsors[39] and passed the House by a 2-

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[30] *See supra* text accompanying note 24.

[31] The National Shooting Sports Foundation (NSSF), along with its newly created Hunting & Shooting Sports Heritage Foundation (HSSHF), a nascent political organization, raised $100 million, primarily from the nation's largest gun manufacturers, to pressure lawmakers to support legal immunity for the gun industry. *See* Jim VandeHei, *Gun Firms on the Verge of Winning New Shield; Liability Bill Reflects Industry, NRA Clout*, WASH. POST, May 5, 2003, at A1. The political emergence of the NSSF during the fall of 1998 coincided with the first municipal lawsuits against the gun industry. *Id.*

[32] *See From the Hip*, *supra* note 8, at 34. Louisiana's passage of a state law barring municipal lawsuits in June 1999, less than eight months after the city of New Orleans filed the first municipal lawsuit, provides an example of the celerity with which state legislatures foreclosed attempts at industry reform through lawsuits. *See Morial*, 785 So. 2d at 1(citing LA. REV. STAT. ANN. § 40:1799 (West 1998)).

[33] *See* Legal Action Project, Brady Ctr. to Prevent Gun Violence, *Lawsuit Preemption Statutes*, *at* http://www.gunlawsuits.org/docket/cities/preemption.asp (last visited Apr. 5, 2004).

[34] H.R. 123, 107th Cong. (2001).

[35] H.R. 2037, 107th Cong. (2002).

[36] Bill Summary & Status for the 107th Congress, *H.R. 2037*, at http://thomas. loc.gov/cgi-bin/bdquery/D?d107:1:./temp/~bdFbaZ:@@@L&summ2=m&l/bss/d107query.html (last visited Apr. 17, 2004).

[37] H.R. REP. NO. 108-59, at 98 (2003).

[38] H.R. 1036, 108th Cong. § 2(b) (2003).

[39] Most notably, Senate Minority Leader Tom Daschle (D-S.D.) crossed party lines and agreed to co-sponsor the original Senate version of the bill. S. 659, 108th Cong. (2003). *See* Juliet Eilperin, *Daschle Joins Move to Shoot Down Some Liability of Gun Merhcants*,

to-1 margin, with sixty-three Democrats voting for it.[40] The bill had also received President Bush's endorsement.[41] The legislation was regarded as virtually certain to pass until opponents succeeded in adopting two gun-control amendments that were opposed by the bill's chief sponsors.[42] After the Senate voted to extend the assault weapons ban, 52-47,[43] and to close a gun show background check loophole, 53-46,[44] the National Rifle Association urged senators to defeat the bill to prevent passage of these gun-control provisions.[45] As a result, Senator Larry Craig (R-Idaho) the bill's chief sponsor, urged colleagues to reject the bill, having been "so dramatically wounded," and the bill was swiftly defeated 90-8.[46]

The bill's support in Congress mirrored the escalating influence of the gun lobby,[47] which has been resurrected after the defeats of the early 1990s when the gun-control movement was at its political zenith.[48] As a corollary, the bill's resounding support represents a major transformation of the political landscape, as the gun-control movement, which passed sweeping legislation in the 1990s, now clings to the judicial system as one of its few remaining venues for potential reform. Meanwhile, the gun-rights lobby, on the wane a decade ago, currently holds a tight grip on the federal and state legislatures and the executive branch.

The Act would have prohibited civil liability action in any federal or state court "brought by any person against a manufacturer or seller of a qualified product, or a trade association, for damages or injunctive relief resulting from the criminal or unlawful misuse of a qualified product by the person or a third party."[49] The Act also would have dismissed all pending

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WASH. POST, Oct. 20, 2003, at A21. A few Senate Democrats, however, including Dianne Feinstein (D-Cal.) and Charles Schumer (D-N.Y.), threatened a filibuster. *Protection of Lawful Commerce in Arms Act*, The Hunting & Shooting Sports Heritage Foundation, *at* http://www.heritagefund.org/ (last visited Feb. 22, 2004).

[40] The vote was 285-140. 149 CONG. REC. H2994–96 (daily ed. Apr. 9, 2003).

[41] Executive Office of the President, Statement of Administration Policy, H.R. 1036—Protection of Lawful Commerce in Arms Act (Apr. 9, 2003), *available at* http://www.whitehouse.gov/omb/legislative/sap/108-1/hr1036sap-h.pdf (last visited Apr. 22, 2004) ("The Administration strongly supports House passage of H.R. 1036").

[42] *See* Dewar, *supra* note 4, at A4.

[43] 150 CONG. REC. S1971 (daily ed. Mar. 2, 2004).

[44] 150 CONG. REC. S1971 (daily ed. Mar. 2, 2004).

[45] *See* Dewar, *supra* note 4, at A4.

[46] 150 CONG. REC. S1976 (daily ed. Mar. 2, 2004). *See also* Dewar, *supra* note 4, at A4.

[47] *See infra* text accompanying notes 70–81.

[48] Congress, during the Clinton Administration, enacted the first gun-control acts since 1968: The Domestic Violence Offender Gun Ban of 1996, Pub. L. No. 104-208, 110 Stat. 3009 (codified at 18 USCS §§ 921–922, 925–926); The Violent Crime Control and Law Enforcement Act of 1994, Pub. L. No. 103-322, 108 Stat. 1796 (codified at 18 USCS §§ 921–922, 924(a)(1)(B)); The Brady Handgun Violence Prevention Act of 1993, Pub. Law No. 103-159, 107 Stat. 1536 (codified at 18 USCS §§ 922). Gun-control proponents were almost successful in enacting gun show restrictions after the shootings at Columbine in 1999, winning passage in the Senate, but failing in the House. *See* Dewar, *supra* note 4 at A4.

[49] H.R. 1036, 108th Cong. §§ 3(a), 4(5)(A) (2003).

actions.[50] It justified this broad, retroactive limitation of liability by noting that the rise in lawsuits against the gun industry jeopardizes the economic stability of other economic sectors,[51] threatens the constitutional right to bear arms,[52] and, given that the industry is not—and should not—be liable for the harm caused by the misuse of their products by others,[53] represents a clear abuse of the legal system.[54]

There were exceptions to the Act's limitation of liability.[55] Under the bill, five causes of tort action could still have been brought against the gun industry: (1) actions against a transferor who has been convicted of "knowingly transfer[ing] a firearm, knowing that such firearm will be used to commit a crime of violence . . . or drug trafficking crime,"[56] when the conduct leading to conviction was the cause of the harm for which relief is sought;[57] (2) actions alleging negligent entrustment, as defined by the Act,[58] or negligence *per se*;[59] (3) actions in which a party knowingly and willfully violated a State or Federal law relating to the sale or marketing of the product, when the violation was the proximate cause of the harm;[60] (4) breach of contract or warranty claims;[61] and (5) actions for injury or damage directly due to the "design or manufacture of the product, *when used as intended*."[62]

There is little need for such blanket immunity. First, the lawsuits against firearm manufacturers have consistently failed, as their tenuous legal claims and the pro-gun political environment create formidable barriers to success. Moreover, nearly half of the states have passed legislation addressing the rise in lawsuits. Even if reform were necessary, it should have come from the courts first. If the courts were failing to address these lawsuits, then they should be overridden by state legislatures, not Congress, as tort law is traditionally left to the states. More disturbingly, reform through broad immunization would have eliminated industry incentives for improvements in gun design and distribution. The narrow exceptions in the Act were insufficient to maintain those incentives because they failed to preserve any meaningful right to sue and consequently give firearm manufacturers free rein to externalize the costs of their products on the public.

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[50] *Id.* § 3(b). Some critics assert that the bill's retroactivity could be unconstitutional. *See* H.R. REP. NO. 108-59, at 108 (2003).

[51] H.R. 1036, § 2(a)(5).

[52] *Id.* §§ 2(a)(5), 2(b)(2).

[53] *Id.* § 2(a)(4).

[54] *Id.* § 2(a)(5).

[55] *Id.* §§ 4(5)(A)(i)–(v).

[56] 18 USC § 924(h) (2003).

[57] H.R. 1036, § 4(5)(A)(i).

[58] *Id.* § 4(5)(B).

[59] *Id.* § 4(5)(A)(ii).

[60] *Id.* § 4(5)(A)(iii).

[61] *Id.* § 4(5)(A)(iv).

[62] *Id.* § 4(5)(A)(v) (emphasis added).

Despite the parallels between the litigation against the gun and tobacco industry, the composition of the gun industry, the distinctive legal issues surrounding gun ownership, and the potency of the gun-rights movement present unique challenges for those hoping to achieve the triumph seen in the tobacco litigation.

First, gun manufacturers, with annual domestic sales of around $1.5 billion, could not withstand financial burdens similar to those imposed upon the cigarette companies, which have sales of $45 billion.[63] This disparity could discourage contingency-fee lawyers hoping to repeat the spoils reaped during the tobacco litigation.[64]

Furthermore, claims against gun manufacturers face legal hurdles not encountered during the tobacco litigation. Whereas cigarettes are always harmful when used as intended, guns have several safe and recreational uses, including hunting and target shooting.[65] Moreover, criminal actions taken by gun owners are intervening acts that diminish, if not eliminate, the liability of the gun industry, as manufacturers have no duty to control the conduct of third parties.[66] The liability of manufacturers is further reduced as guns are passed on to subsequent owners; this further attenuation of liability is significant because only twenty percent of criminals obtain their guns from a legitimate gun dealer.[67] Additionally, gun ownership is a revered and celebrated constitutional right protected by the Second Amendment's directive that "the right of the people to keep and bear Arms, shall not be infringed."[68] Accordingly, efforts by gun-control advocates to reform or eliminate the gun industry through judicial action potentially face constitutional problems. Ultimately, the distinguishing structural and legal obstacles facing litigants against the gun industry

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[63] Rosenbaum, *supra* note 27, at A32.

[64] *See id.*

[65] There are approximately 32 million hunters and recreational target shooters in the nation. *Economic Impact of the Sporting Firearms and Ammunition Industry in America*, The Reload Bench, *at* http://www.reloadbench.com/gloss/impact.html (last visited Apr. 16, 2004).

[66] Leslie v. United States, 986 F. Supp. 900, 911–13 (D.N.J. 1997) (holding that gun and ammunition manufacturers "owe no duty to control the distribution of their products or to prevent their misuse by criminals").

[67] According to the 1997 Survey of State Prison Inmates, eighty percent of those possessing a gun obtained it through family, friends, a street buy, or an illegal source. BUREAU OF JUSTICE STATISTICS, U.S. DEP'T OF JUSTICE, FIREARMS AND CRIME STATISTICS *at* www.ojp.usdoj.gov/bjs/guns.htm (1997).

[68] U.S. CONST. amend. II. The controversy surrounding the Second Amendment is an intricate topic that is not addressed here. *See, e.g.*, LAURENCE TRIBE, AMERICAN CONSTITUTIONAL LAW 299 n.6 (2d ed. 1988). It is sufficient to note that gun ownership is protected to some extent by the Constitution, either collectively or as an individual right. Accordingly, efforts jeopardizing such a right potentially face an additional barrier to successful litigation. Constitutional defenses, however, have rarely been used in the gun industry lawsuits. *See* Jerry J. Phillips, *The Relation of Constitutional and Tort Law to Gun Injuries and Deaths in the United States*, 32 CONN. L. REV. 1337, 1339 (2000). The committee report for House Bill 1036, nonetheless, discussed the litigation's threat to the Second Amendment and included it as a reason for the legislation. *See* H.R. REP. NO. 108-59, at 25 (2003).

will significantly impede efforts to emulate the success from the tobacco litigation, even if no legislation similar to House Bill 1036 ever becomes law.

Compared to the tobacco industry, the gun industry's foremost advantage in the ensuing legal battle is its dedicated core of supporters with mounting political clout. Gun-control reached its apex under the Clinton Administration in the wake of the Oklahoma City bombing, as Congress enacted the most significant gun-control legislation since 1968 and NRA membership declined.[69] As the new millennium approached, however, fortunes reversed, and NRA membership now stands at 4 million.[70] The precipitous ascendancy of the gun-rights movement is best observed through recent legislative and electoral victories. At the behest of gun lobbyists, twenty-three states passed legislation immunizing the gun industry from municipal lawsuits, some going so far as to exempt gun manufacturers from all lawsuits.[71] These laws were often promulgated as a direct response to municipal lawsuits against gun manufacturers pending in the state.[72] Furthermore, the Republican-led Congress has announced its plans not to renew the federal ban on assault weapons, a prized gun-control law set to expire in 2004.[73] The Act's recent defeat, however, suggests that gun-control may now rest in a precarious balance. Gun-rights supporters were able to convince the House of Representatives and a majority of Senators to support industry immunization, but gun-control proponents successfully garnered a majority of senators to support the ban on assault weapons and require background checks of gun show purchasers.[74]

More striking has been the electoral dominance of gun-rights supporters in recent elections. Al Gore's narrow loss in the 2000 presidential election has been blamed, in part, on his failure to carry swing states with significant gun-rights support, including Arkansas, Missouri, Ohio, Ten-

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[69] *See* Brady Ctr. to Prevent Gun Violence, *A History of Working to Prevent Gun Violence*, *at* http://www.bradycenter.com/about/ (last visited Apr. 17, 2004). *See also supra* note 48.

[70] *See* Andrew Harris, *How Senators Shot Down Protection for Gun Makers*, 26 NAT'L L.J. 28, at 7, *available at* http://www.law.com/jsp/article.jsp?id=1079640439735 (last visited Apr. 05, 2004). Although the NRA has, at times, not sided with manufacturers, the association felt threatened by the effect that the lawsuits could have on the sources and prices of the industry's products. Rosenbaum, *supra* note 27, at A32.

[71] *See supra* note 33. *But see Legal Earthquake Jolts Gun Manufacturers; California Legislators Repeal Gun Industry Immunity*, U.S. NEWSWIRE, Aug. 23, 2002. California became the first state to repeal special legal immunity that had been previously granted to gun manufacturers. *Id.*

[72] Louisiana rushed through a law to end New Orleans's lawsuit. *See supra* note 32. In similar haste, Georgia legislators passed a law extinguishing Atlanta's pending lawsuits against the gun industry. *See Gun Lawsuits*, *supra* note 26, at 26 (citing GA. CODE ANN. § 16-11-184 (1999)).

[73] Jim VandeHei, *GOP Will Let Gun Ban Expire*, WASH. POST, May 14, 2003, at A1. *See* 18 U.S.C. § 922(v)(1) (2000). *See also* text accompanying notes 42–46 (noting that the successful addition to the Act of an amendment renewing the ban was partly responsible for the Act's resounding defeat in the Senate).

[74] *See* Helen Dewar, *supra* note 4, at A4.

nessee, and West Virginia.[75] An example of the enhanced stature of the gun-rights movement and the resulting retreat on gun-control was witnessed at the Democratic presidential debate in South Carolina in May 2003, when eight of the nine candidates running for the Democratic nomination refused to vigorously endorse federal licensing and registration of handguns.[76] (The Reverend Al Sharpton was the lone exception.) Not surprisingly, the rise of the gun industry's clout has coincided with its disparate generosity regarding political contributions.[77] While gun-rights groups gave $1.2 million to House members during the 2002 elections, gun-control supporters only gave $27,250.[78] With such a narrowly drafted bill[79] and the abundance of money from gun-rights lobbyists, accusations circulated that the Act was nothing more than special-interest legislation, politically motivated to appease gun-rights groups rather than to achieve legitimate tort reform.[80] Opponents of the bill criticized its conspicuous timing, noting that its passage coincided with the NRA's national convention, which convened two weeks later.[81]

Although the industry's fears of municipal lawsuits seeking sympathetic judges to impose exorbitant penalties are justified,[82] support for these lawsuits is waning. Boston and Cincinnati voluntarily terminated lawsuits, after mounting expenses and diminishing prospects of victory convinced the cities of the futility of their efforts,[83] while statutes passed by the Michigan, Louisiana and Georgia legislatures targeted pending law-

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[75] *See* VandeHei, *supra* note 73, at A1. *But see Shooting Blanks*, NEW REPUBLIC, May 19, 2003, at 7 (arguing that claims about the strength of gun-rights support, particularly its influence on the 2000 election, are empirically unfounded). In the 271 United States House and Senate races in which the NRA was involved in 2002, 253 of its candidates were elected. NRA Inst. for Legislative Action, *NRA Election Activity in 2002*, *at* http://www.nraila.org/About/ElectionActivity.aspx (last visited Apr. 16, 2004).

[76] *Shooting Blanks*, *supra* note 75, at 7.

[77] House members voting for House Bill 1036 averaged more than $173 from supporters of gun-rights for every $1 that those groups gave to the bill's opponents. *See* Jonathan D. Salant, *Votes in Congress Mostly Follow the Money*, SEATTLE TIMES, July 20, 2003, at A4.

[78] *Id.*

[79] The bill was narrowly drafted to reduce potential opposition from tort-reform opponents. Michael S. Gerber, *NRA Using Tort Reform to Fight Gun Control*, THE HILL, Jan. 29, 2003, at 46.

[80] *See* 149 CONG. REC. H2971 (daily ed. Apr. 9, 2003) (statement of Rep. Moran). *See also* 149 CONG. REC. H2970 (daily ed. Apr. 9, 2003) (statement of Rep. Watt).

[81] *See* 149 CONG. REC. H2970 (daily ed. Apr. 9, 2003) (statement of Rep. Watt).

[82] *See* COX, *supra* note 2. Walter Olson, a senior fellow at the Manhattan Institute, said that anti-gun litigators were seeking out activist judges, realizing that "even if defendants can fend off 98 percent of the cases, somebody somewhere is likely to break through, to the ruin of a given defendant or the entire industry." *Id.* The NAACP performed several maneuvers to ensure that Judge Jack Weinstein of the Eastern District of New York, who had previously ruled against the gun industry, would hear its case. *See* Katherine Mangu-Ward, *No Smoking Gun*, DAILY STANDARD (May 7, 2003) http://www.weeklystandard.com/Content/Public/Articles/000/000/002/650ucuge.asp?pg=1.

[83] *See* The Hunting & Shooting Sports Heritage Foundation, *Cincinnati To Drop Suit Against Gun Makers, To Use Money For Police Overtime*, *at* http://www.hsshf.org (last visited Apr. 17, 2004). *See also* 149 CONG. REC. H2970 (daily ed. Apr. 09, 2003).

suits in Detroit, New Orleans, and Atlanta respectively.[84] Similar statutes have been introduced in other states in which lawsuits have been brought, including Missouri and New York.[85] Accordingly, as states are enacting immunity statutes and support for the lawsuits is receding, the gun industry's need for near-absolute immunity from lawsuits has diminished.

With tenuous legal theories, it seems unlikely that the lawsuits against gun manufacturers could hamper the industry to the extent purported. The municipal lawsuits, in particular, have experienced little success over the past five years. Aside from the voluntary dismissals in Boston and Cincinnati, lawsuits have been fully adjudicated and dismissed in New Orleans, Bridgeport, Miami/Dade County, Camden County, Philadelphia, Atlanta, Newark, and Wilmington. Numerous other municipalities have dismissals on appeal, leaving only three cases pending before the trial courts; New York City, Cleveland, and Gary.[86] Additional recent defeats to gun-control litigation include the dismissal of the NAACP's case on July 21, 2003,[87] and a judge's decision to set aside the much-celebrated $1.2 million verdict in *Grunow v. Valor Corp. of Florida,* which was the first verdict "against a gun seller for distributing 'junk guns' without safety features to prevent their use by children and other unauthorized persons."[88]

Even the cascade of victories for the gun industry have a somewhat Pyrrhic quality—the escalating legal costs of defense are themselves a major financial drain. The total cost of the defense for the NAACP case alone reached $10 million.[89] Furthermore, the infrequency of plaintiff success in these actions is of little comfort, as it might take only a few verdicts to bankrupt the entire industry. The May 7, 2003, $50.9 million jury award in an accidental shooting in California for which a gun maker, its designer, and its main distributor were found partly liable, affirmed industry fears of devastating payouts from these lawsuits.[90] Meanwhile, a victory in a municipal lawsuit, albeit improbable, could knock out the in-

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[84] *See* Legal Action Project, *supra* note 10 (citing MICH. COMP. LAWS §28.435 (2000); LA. REV. STAT. ANN. §40:1799 (West 1998); GA. CODE ANN. § 16-11-184 (1999)).

[85] *Id.* (citing 2003 Mo. Laws 13; 2003 N.Y. Laws 10460).

[86] Industry Litigation, The Hunting and Shooting Sports Heritage Foundation, *Municipal Firearms Litigation Scorecard, at* http://www.hsshf.org/legal/ (last visited Apr. 5, 2004). *See also* Legal Action Project, Brady Ctr. to Prevent Gun Violence, *Public Entity Firearms Litigation, at* http://www.gunlawsuits.org/docket/cities/public.asp (last visited Apr. 17, 2004).

[87] NAACP v. Acusport Corp., 271 F. Supp. 2d 435, 526 (E.D.N.Y. 2003).

[88] Legal Action Project, Brady Ctr. to Prevent Gun Violence, *Grunow v. Valor Corporation of Florida, at* http://www.gunlawsuits.org/docket/casestatus.asp?RecordNo=60 (last visited Apr. 17, 2004).

[89] Wheeler, *supra* note 15.

[90] *See* Legal Action Project, Brady Ctr. to Prevent Gun Violence, *Maxfield v. Bryco Arms, et al., at* http://www.gunlawsuits.org/docket/casestatus.asp?RecordNo=80 (last visited Apr. 17, 2004). *But see* Dean E. Murphy, *$50 Million Award in a California Gun Liability Case,* N.Y. TIMES, May 8, 2003, at A34 (quoting Chuck Michel, a spokesman for the California Rife and Pistol Association, who predicted that the verdict would be overturned on appeal, stating "every time [gun-control proponents] get something like this, they claim it is a watershed issue and then it gets overturned on appeal, and no press release is released").

dustry in one fell swoop.[91] Although the chances of success remain slim, the lawsuits still have the potential to impair the industry. Nevertheless, the need for total immunity is unjustified, as courts have often dismissed the municipal actions, and juries in individual lawsuits have failed to award excessive final judgments.[92]

In addition to this diminished likelihood of crippling verdicts, it is worthwhile noting that prior efforts by individuals, municipalities, and states to use lawsuits against the automobile and tobacco industries to improve consumer product safety and implement industry reform, never led Congress to immunize an industry against escalating legal challenges.[93] Indeed, the rise in litigation should not be the taxpayers' burden if the industry cannot produce safe products at a profit. Legal immunization of an industry is tantamount to a cash subsidy. By allowing the industry to externalize the costs of its product on third-parties, many of whom have never chosen to interact with the firearms industry, it is the unwitting public that bears the cost of unsafe firearms.

The conflict between traditional tort law and the Act's position on foreseeable misuse[94] reveals a larger flaw in the Act: the gun industry, with this bill, has attempted to use the legislature to achieve what should be accomplished through the courts and state legislatures. Tort law has, in general, been developed through common law, often being reformed through state legislation when the courts have failed.[95] Consequently, Congress should give courts, at the least, a first attempt at handling the problem before intervening. Since the courts seem to be addressing the issue adequately, having yet to lay down a final verdict favorable to the plaintiff in any municipal lawsuit, it seems there would be no justification for congressional intervention. Claims that the lawsuits are frivolous and a gross misappropriation of tort law are questions of interpretation to be resolved by the judiciary, not Congress.[96]

Moreover, even when legislatures have stepped in to override courts' development of tort law, it has been state legislatures, not Congress.[97] It

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[91] *See, e.g.*, *supra* note 17 (Chicago, for example, seeks $433 million from the gun industry.).

[92] *See supra* note 86.

[93] 149 CONG. REC. H2969 (daily ed. Apr. 9, 2003) (statement of Rep. Watt) ("The reform that this bill would provide is not available to any other manufacturer in America. It is not available to the automobile industry. It is not available to the pharmaceutical industry . . . . It is not available to the tobacco or the cigarette industry. There is no industry in America that has this kind of immunity.").

[94] *See infra* text accompanying notes 122–137.

[95] *See, e.g.*, The T. J. Hooper, 60 F.2d 737, 740 (C.C.A. 2d Cir. 1932).

[96] *See* 149 CONG. REC. H2969 (daily ed. Apr. 9, 2003) (statement of Rep. Sensenbrenner) (justifying the Act, in part, because the "lawsuits threaten to rip tort law from its moorings in personal responsibility").

[97] H.R. REP. No. 108-59, at 108 ("The Supreme Court repeatedly has frowned upon Federal intervention into areas like liability law that have been traditionally reserved to the states.") (citing United States v. Lopez, 514 U.S. 549 (1995)). *See also* 149 CONG. REC. H2978 (daily ed. Apr. 9, 2003) (statement of Rep. Paul) (stating that despite being a gun-

is far from clear that there is a need for federal contravention of this tradition, as twenty-three states already have demonstrated their capacity to address these lawsuits on their own by enacting some form of legal immunity for gun manufacturers designed to preempt or block, at a minimum, the local governments' lawsuits.[98] Given the success of the states in dealing with firearms litigation, conservative Republicans, conventionally strong supporters of states' rights, may want to rethink this abdication of their historical position. Their support of the Act, which undoubtedly infringed on states' ability to legislate by imposing federal tort reform, is a concession that could re-appear in subsequent efforts to federalize tort legislation.[99] The bill was a setback for general tort reform, however, as it involved the commitment of tremendous political capital to an individual industry that has already received significant protection from state legislatures.[100]

Allowing suits to go forward, regardless of their ultimate resolution, is not only consistent with traditional legal norms, but it also creates incentives for safer firearm designs and distribution, which would disappear with the immunization of the gun industry.[101] The industry has few government bodies monitoring its behavior.[102] Consequently, consumer lawsuits are one of the few available avenues for imposing accountability on the industry. Despite the improbability of their success, the lawsuits have already proven to be a catalyst for the implementation of safer design and improved distribution.

Smith & Wesson, the largest handgun manufacturer, agreed in March 2000 to improve its monitoring of distributors and dealers and implement

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rights supporter and opposing lawsuits against the gun industry, he believed "[i]t is long past time for Congress to recognize that not every problem requires a federal solution . . . . Th[e] separation of powers strictly limited the role of the federal government in dealing with civil liability matters; instead, it reserved jurisdiction over matters of civil tort, such as gun related alleged-negligence suits, to the state legislatures from which their respective jurisdictions flow.").

[98] *See supra* note 33. *See also Tort Reform Gunned Down*, WASH. POST, Apr. 25, 2003, at A22.

[99] *See* Michael S. Gerber, *NRA Using Tort Reform to Fight Gun Control*, THE HILL, Jan. 29, 2003, at 46 (quoting Mark Behrens, a lobbyist who represents clients pushing for civil justice reform as saying, "For conservative Republicans who are very strong advocates of states' rights, having bills pass that they feel comfortable with can serve as a catalyst for future [federal] reforms . . . . Even though the NRA bill doesn't directly have impact on medical doctors or asbestos . . . they build on each other.").

[100] Proponents of tort reform did not consider House Bill 1036 one of their three major battleground bills, instead placing highest priority on efforts to reform class action lawsuits, asbestos litigation, and medical malpractice lawsuits. *See* Peter H. Stone, *Trial Lawyers on Trial*, 35 NAT'L J. 28 (July 12, 2003). The Institute for Legal Reform and other tort reform proponents did not celebrate the passage of House Bill 1036; because the bill was a major defeat for trial lawyers, it may spur heightened lobbying efforts by the American Trial Lawyers' Association and other tort reform opponents. *See id.*

[101] *See* 149 CONG. REC. H2980 (daily ed. Apr. 9, 2003) (statement of Rep. Engel); 149 CONG. REC. H2981 (daily ed. Apr. 9, 2003) (statement of Rep. Inslee).

[102] *See infra* note 137.

personalization technology for enhanced gun safety, in exchange for settling fifteen of the municipal lawsuits against it.[103] Disturbingly, the gun industry lambasted Smith & Wesson for the agreement and supported a boycott of the gun maker, while contending that the industry "only had the responsibility to obey the laws regulating gun sales" and warning against settling "without first consulting the rest of the industry."[104] This industry-wide collaboration threatens to stifle innovation and improvement in the industry and its practices.

The lawsuits are also crucial in discovering and judging the practices of the gun industry. Even though the NAACP lost its case against the industry, the federal judge presiding, having sifted through the evidence presented at the six-week trial, concluded that the NAACP had shown that gun manufacturers tolerate "careless practices" by their retailers and do little "to eliminate or even appreciably reduce the public nuisance they individually and collectively have created."[105] Uncovering "careless practices" and apathetic behavior toward consumer safety is a crucial step toward ascertaining if any culpability exists and, more importantly, improving gun safety.

Many simple technological safeguards are still far from universal on handguns.[106] Without fear of liability, gun manufacturers will have even less motivation to incorporate several basic safety features. Including these simple improvements would save the lives of more than 800 people annually, including 150 children.[107] Nearly one-third of all unintended shootings are the result of deficiencies in gun designs that could be easily incorporated.[108] Moreover, as the sole source of handguns for distributors, gun makers are uniquely positioned to regulate the manner in which guns are sold, and can therefore help prevent criminals from obtaining guns.[109] Consequently, the need for industry reforms, in both manufacturing and distribution, can only be discovered and subsequently implemented by leaving the gun industry accountable for their designs and distribution practices.

The five circumstances in which the bill permitted tort liability afforded an exceedingly narrow framework for litigation and provided little solace to gun-control advocates. The first permissible suit, against deal-

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[103] *See* Rachana Bhowmik, *Aiming for Accountability: How City Lawsuits Can Help Reform an Irresponsible Gun Industry*, 11 J.L. & POL'Y 67, 128–29 (2002); *see also* James Dao, *Under Legal Siege, Gun Maker Agrees to Curbs*, N.Y. TIMES, Mar. 18, 2000, at A1.

[104] Bhowmik, *supra* note 103, at 130.

[105] NAACP v. Acusport Corp., 271 F. Supp. 2d at 450 n.11 (E.D.N.Y. 2003).

[106] A recent survey of 263 types of pistols made in the United States found that only 13% had a loaded chamber indicator, 20% had a grip safety making it harder for children to use a gun, and 21% had a magazine safety, which stops a gun from firing once the magazine has been removed, even if there is a round in the chamber. Anil Ananthaswamy, *The Way of the Gun*, NEW SCIENTIST, July 12, 2003, at 8.

[107] *Id.*

[108] *Id.*

[109] Bhowmik, *supra* note 103, at 128.

ers convicted for illegal transfers,[110] represented a significant departure from existing civil liability standards, while essentially increasing the burden of proof from a preponderance to beyond a reasonable doubt.[111] As Representative Robert C. Scott observed, this requirement is analogous to only allowing suit in an automobile accident when a police officer has already issued the defendant a ticket (and gotten a conviction) for running a red light.[112] The exemption could have denied relief to those harmed by gun distributors who clearly violated the law, based on the whims of a prosecutor who chose not to prosecute or otherwise failed to convict.[113] Moreover, the third exception, which permitted a lawsuit against sellers who "knowingly and willfully"[114] violated a federal or state firearms statute, provided an exacting burden of proof that would have barred actions brought by those harmed as a result of reckless or negligent actions.[115] As a result of this demanding standard, the third provision would have applied only in the dubious event that a gun buyer clearly indicated his criminal intentions to the gun seller.[116]

The provision that permitted negligent entrustment actions failed to preserve any right of action against gun manufacturers, while preserving only a limited class of cases against gun distributors. Actions would have been permissible only when the dealer knows, or should know, that the person buying the gun is likely to, and does, misuse the product.[117] Consequently, there would still have been immunity for dealers who supplied gun traffickers and straw purchasers[118] knowing that the guns would be resold and used criminally, because the intermediary retailers did not themselves commit the violent crime.[119] Likewise, the negligence *per se* provision had limited significance, as some states, including Washington and West Virginia, do not recognize the doctrine.[120] Moreover, those states that

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[110] H.R. 1036, 108th Cong. § 4(5)(A)(i) (2003).

[111] *See* 149 CONG. REC. H2982 (daily ed. Apr. 9, 2003) (statement of Rep. Scott).

[112] *Id.*

[113] Rep. Scott's amendment to eliminate the requirement for a conviction before a defendant can be sued was defeated in the House. *See* 149 CONG. REC. H2982–84 (daily ed. Apr. 9, 2003).

[114] H.R. 1036 § 4(5)(A)(iii).

[115] *See* 149 CONG. REC. H2987 (daily ed. Apr. 9, 2003) (statement of Rep. Meehan) (proposing an amendment to allow actions brought under the theory of negligence). The amendment failed by a vote of 144 to 280. 149 CONG. REC. H2995 (daily ed. Apr. 9, 2003).

[116] *See* 149 CONG. REC. H2988 (daily ed. Apr. 09, 2003) (statement of Rep. Meehan).

[117] H.R. 1036, 108th Cong. § 4(5)(B) (2003).

[118] A straw purchaser is an individual hired to purchase firearms for an "individual who is either prohibited by law from making the purchase or does not want to be traced." Brady Campaign to Prevent Gun Violence, *"One-Gun-Per-Month" Laws: Questions & Answers*, *at* http://www.bradycampaign.org/facts/gunlaws/onegun.asp (last visited Apr. 17, 2004).

[119] *See* 149 CONG. REC. H2987 (daily ed. Apr. 9, 2003) (statement of Rep. Meehan).

[120] *See* Gillingham v. Stephenson, 551 S.E.2d 663 (W. Va. 2001); WASH. REV. CODE ANN. § 5.40.050 (West 1986) (abrogating negligence *per se*). The doctrine of Negligence *per se* is also not recognized as a basis for liability in a number of other states, including Arkansas, Maine, and North Dakota. *See, e.g.*, Berkeley Pump Co. v. Reed-Joseph Land

do recognize it often require a plaintiff to show that the distributor has violated a statute expressly designed to protect people from gun misuse.[121]

Although the Act's allowance of suits for manufacturing and design defects permitted basic product liability challenges against gun manufacturers and distributors, the provision's tapered criterion, permitting adjudication when the product is 'used as intended,' departed from established common law.[122] In cases when a gun is used as intended, but nevertheless malfunctions (e.g., exploding upon being fired), manufacturers would have remained liable. Generally accepted principles of products liability jurisprudence, however, establish that manufacturers also have a duty to implement reasonable safety features and precautions to prevent injury caused by foreseeable misuse, even if that use is not intended.[123] Although automobile manufacturers are liable for the crashworthiness of cars even if misused by consumers in a foreseeable manner (e.g., in an unintentional car accident), the legislation would have left gun manufacturers exempted from a duty to design their products to protect against such foreseeable misuse (e.g., in an unintentional discharge). Consequently, the Act protected gun manufacturers by circumventing a fundamental legal principle that revolutionized design and safety features in the automobile industry.[124]

Proponents of the Act justified the elimination of this foreseeability doctrine by pointing to its "infinite flexibility" and potential to topple entire industries.[125] They argued that holding manufacturers liable for criminal product misuse could lead down a slippery slope approaching strict liability in which knife manufacturers would be liable for all knife wounds and fast-food establishments would be liable for all harm caused by weight gain.[126] The recent proliferation of fast-food lawsuits exemplifies the rea-

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Co., 653 S.W.2d 128, 134–35 (Ark. 1983); Crowe v. Shaw, 755 A.2d 509, 512 (Me. 2000); Brandt v. Milbrath, 647 N.W.2d 674, 682 (N.D. 2002).

[121] *See* 149 CONG. REC. H2987–88 (daily ed. Apr. 9, 2003) (statement of Rep. Meehan) ("This means that if the seller has reason to think a buyer may give the gun to a criminal but the sale complies with statutory formalities, like the background check, negligence *per se* would not apply. This is the reason why my amendment is essential.").

[122] H.R. 1036, 108th Cong. § 4(5)(A)(v) (2003).

[123] The landmark case of *Larsen v. Gen. Motors Corp.*, 391 F.2d 495, 502–04 (8th Cir. 1968), established the crashworthiness doctrine, holding that an automobile manufacturer's duty encompassed using reasonable care to minimize the injurious effects of crashes, due to the foreseeability of collisions. As a corollary, product liability theory recognizes that products must be reasonably designed to protect against foreseeable misuse. *See* RESTATEMENT (THIRD) OF TORTS: PRODUCTS LIABILITY § 2 (1998).

[124] Concern for this deviation from established common law led to the Watt Amendment, which was eventually rejected, to strike the words "when used as intended" from the Act. *See* 149 CONG. REC. H2979 (daily ed. Apr. 9, 2003) (statement of Rep. Watt). The amendment failed by a voice vote 149 CONG. REC. H2981 (daily ed. Apr. 9, 2003). An example of an action traditionally covered by products liability theory, but exempted by the Act, would be a case in which a gun user accidentally drops a gun and it discharges, injuring the user or a bystander. *Id.*

[125] H.R. REP. NO. 108-59, at 25 (2003).

[126] *See, e.g.*, Patterson v. Rohm Gesellschaft, 608 F. Supp. 1206, 1212 (N.D. Tex. 1985)

son for the Act's apprehension of frivolous lawsuits,[127] which present increasing opportunities for courts to hold manufacturers liable for the misuse of their products.[128]

It is incontrovertible that "[k]nives and axes would be quite useless if they did not cut,"[129] but arguing against "foreseeable misuse" with the tautology that dangerous items necessarily injure misses the point; undoubtedly, the lethality of guns is intentional, not a design defect. Existing product liability theory does not require guns and automobiles to be designed to prevent their misuse—illegal or accidental shootings and crashes respectively. Instead, manufacturers must design their products to *minimize* harm arising from foreseeable misuse.[130] Thus, guns might be required to have child safety locks to prevent accidents or other mechanisms to prevent a discharge when dropped, just as automobiles are required to have airbags and other features to minimize harm incurred during a collision. The crashworthiness doctrine was established in *Larsen v. General Motors*, in which the court held that automobile manufacturers have a duty to make vehicles reasonably crashworthy due to the foreseeability of collisions.[131] *Larsen* and its progeny led to dramatic improvements in automobile safety features. The significance of the *Larsen* decision was not that the manufacturers were liable because of the collision, but rather that they were liable because they could have designed the car to minimize the injuries sustained.[132] Likewise, although gun manufacturers should not be responsible for a criminal's decision to use a gun, they should be liable for failing to reasonably design guns to prevent accidental discharges.[133] Therefore, circumventing the courts through legislated immunity rather than permitting the judicial examination of possible liability seems unwarranted.[134]

By excising all potential claims under the foreseeable misuse doctrine, the Act encompassed more than its stated concerns, banning le-

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(responding to the Plaintiff's design defect claim against the gun manufacturer that "if [the plaintiff's] unconventional theory were correct, then it should apply equally to other products besides handguns—to rifles, to shotguns, to switchblade and kitchen and Swiss Army knives, to axes, to whiskey, to automobiles, etc.—even though these products are not defective").

[127] H.R. REP. NO. 108-59, at 24 (2003).

[128] *See* H.R. 552, 108th Cong. (2004) (concern for such lawsuits led to House passage of a bill barring people from suing restaurants on the ground that their food makes customers fat); Hulse, *supra* note 7, at A1; Roger Parloff, *Is Fat the Next Big Tobacco?*, FORTUNE, Feb. 3, 2003, at 50.

[129] *See* H.R. REP. NO. 108-59, at 22 (2003) (quoting WILLIAM PROSSER, HANDBOOK OF THE LAW OF TORTS, § 99).

[130] *See* RESTATEMENT (THIRD) OF TORTS: PRODUCTS LIABILITY § 2 (1998).

[131] *Larsen*, 391 F.2d at 502–04.

[132] *Id.*

[133] *See* 149 CONG. REC. H2979 (daily ed. Apr. 9, 2003) (statement of Rep. Watt).

[134] *Tort Reform Gunned Down*, *supra* note 97, at A22 ("Should a gun maker that designs and markets products with few or no lawful uses be immune from suit when its guns are used illicitly? The House bill seems to offer unqualified protection here.").

gitimate as well as illegitimate claims arising from product misuse. This provision eliminated any meaningful right to sue. Consequently, despite several exemptions from the Act's comprehensive immunity, the Act was true to its purpose of removing practically all opportunities to bring an action against the gun industry.[135]

Although the legislation's acknowledged fear of frivolous litigation[136] had merit, this resounding and unrivaled exemption for a particular industry preemptively and unjustifiably denied victims of gun violence their day in court and further immunized an industry already well-insulated from product oversight and administrative intervention.[137]

The Protection of Lawful Commerce in Arms Act would have stayed true to its name, successfully safeguarding the firearms industry from the financial threat accompanying the spate of lawsuits by individuals and governments.[138] Yet, the bill's proponents fell short of justifying the need for this unprecedented immunity for a lone industry facing nothing more than lawsuits seeking to establish industry culpability. The failure, thus far, of these lawsuits to cause the calamitous consequences predicted by the bill's supporters, leaves one wondering if this bill is truly necessary. Admittedly, the costs of defending against the actions continue to rise, the motivations behind many of the suits are suspect, and the government lawsuits seek exorbitant sums and intrusive reforms. These threats cannot be easily overlooked and the gun industry has a legitimate cause for concern. Nevertheless, immunity from all lawsuits is an unnecessarily expansive solution with potentially serious consequences. The threat of individual lawsuits remains one of the few conduits for promoting safer design and distribution practices, as the gun industry already benefits from little product oversight.

Gun-rights advocates, including the NRA, should rethink their support for gun industry immunity if a similar bill is presented in future Congresses. After all, their firearm-bearing constituents are the precise consumers who have the most to lose from it; as gun owners, and thus the most likely victims of unintentional or accidental shootings, they are forfeiting both the potential for safer designs and the right to sue the manufacturer in the event of an unintended shooting. The concern of gun-rights advocates with

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[135] *Id.*

[136] *Id.* § 2(a)(5).

[137] The gun industry is among the least regulated in the country. Firearms are one of two consumer products expressly exempted from oversight by the Consumer Product Safety Commission. No federal agency has the ability to regulate firearms, and the Bureau of Alcohol, Tobacco, and Firearms (ATF) has no general authority over the safety of domestically manufactured firearms. *See* Coalition to Stop Gun Violence, *Why Firearms Litigation*, *at* http://www.csgv.org/issues/litigation/why_litigation.cfm (last visited Apr. 17, 2004). *See also From the Hip*, *supra* note 8, at 34. In addition, the ATF is restricted to one inspection per gun store each year. 149 CONG. REC. H2972 (daily ed. Apr. 9, 2003) (statement of Rep. McCarthy) ("[O]ur ATF agents cannot even go and inspect a gun store except once a year, [and] only if they call them first").

[138] *See Tort Reform Gunned Down*, *supra* note 97, at A22.

lawsuits that seek to regulate the industry could be addressed more precisely by barring only municipal lawsuits. By immunizing the industry against the municipal lawsuits, gun-rights supporters can be assured that regulations and reform will not be unnecessarily imposed on the gun industry, and bankrupting verdicts can be avoided. The states were in the process of implementing this precise solution, but the gun industry attempted to trump local efforts and opted for a federal bill that is far more intrusive. Blanket immunity threatens gun consumers and bystanders alike by further diminishing industry incentives to improve gun designs and regulate some truly abysmal distribution practices. In providing such protection, the Act proved to be little more than special-interest legislation benefiting a select industry at the expense of both gun consumers and the American public.

—Ryan VanGrack

PROPOSED FEDERAL RULE OF APPELLATE PROCEDURE 32.1 TO REQUIRE THAT CIRCUITS ALLOW CITATION TO UNPUBLISHED OPINIONS

Stare decisis is a defining principle of the United States's legal system, widely regarded as crucial to ensuring predictability, fairness, stability, and principled decision-making.[1] Nevertheless, only a small fraction of judges' decisions actually carry precedential value for subsequent litigants. Judges at all levels, and in all courts, frequently issue so-called "unpublished" opinions,[2] which are issued primarily for the benefit of the parties to the case and typically cannot be cited by future litigants as binding precedent, regardless of how similar the facts and issues in those decisions may be.

It is not surprising, therefore, that unpublished opinions are a source of considerable controversy wherever they are commonly issued, including in the federal Courts of Appeals. Although judges and scholars have vigorously debated the appropriateness of treating unpublished opinions as non-binding authority,[3] the Standing Committee on Rules of Practice and Procedure[4] is currently considering a rule change designed to alter the

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[1] *See* 3 JOSEPH STORY, COMMENTARIES ON THE CONSTITUTION OF THE UNITED STATES § 377 (1833) ("A more alarming doctrine could not be promulgated by any American court, than that it was at liberty to disregard all former rules and decisions, and to decide for itself, without reference to the settled course of antecedent principles.").

[2] Read literally, the term is misleading, given that such opinions are often posted on the issuing courts' websites, made available through online services such as Lexis and Westlaw, and published in traditional print in West's *Federal Appendix*, a case-reporter series consisting entirely of "unpublished" opinions from the federal circuits. *See* Stephen R. Barnett, *From* Anastasoff *to* Hart *to West's* Federal Appendix*: The Ground Shifts Under No-Citation Rules*, 4 J. APP. PRAC. & PROCESS 1, 2–3 (2002). In fact, "unpublished opinions" is a term of art given to those dispositions designated by the issuing court as having no (or limited) precedential value. *See* Memorandum from Judge Samuel A. Alito, Jr., Chair of Advisory Comm. on App. Rules, to Judge Anthony J. Scirica, Chair of Standing Comm. on Rules of Prac. & Proc., *Report of Advisory Committee on Appellate Rules* 27–36, 32 (May 22, 2003) [hereinafter *Committee Memorandum*], *available at* http://www.uscourts.gov/rules/app0803.pdf (last visited Mar. 12, 2004).

[3] *See infra* text accompanying notes 21–26.

[4] Congress has authorized the federal judiciary to prescribe the rules of practice, procedure, and evidence for the federal courts, subject to the ultimate right of Congress to reject, modify, or defer any of the rules. The authority and procedures for promulgating rules are set forth in the Rules Enabling Act. 28 U.S.C. §§ 2071–2077 (2000). The Judicial Conference's responsibilities as to rules are coordinated by its Committee on Rules of Practice and Procedure, commonly referred to as the "Standing Committee," *id.* § 2073(b), which has authorized the appointment of five advisory committees, including one specifically dealing with appellate rules. *Id.* § 2073(a)(2). The Standing Committee reviews and coordinates the recommendations of the five advisory committees, and recommends to the Judicial Conference proposed rule changes "as may be necessary to maintain consistency and otherwise promote the interests of justice." *Id.* § 2073(b). The process by which a new rule of appellate procedure becomes "law" is elaborate, involving a minimum of seven stages of formal comment and review that typically take two to three years to complete. *See The Rulemaking Process*, *at* http://www.uscourts.gov/rules/proceduresum.htm. Rule changes are typically proposed by various members of the legal community and considered by the appropriate advisory committee. *See id.* If an advisory committee votes to recom-

treatment of unpublished opinions in the Courts of Appeals without explicitly taking sides in the controversy over precedential effect.[5] The Advisory Committee on Appellate Rules has approved a proposed rule that prohibits courts of appeals from instituting any restrictions on litigants' ability to cite unpublished opinions for their merely persuasive value, without taking a position on whether the various courts of appeal must consider such opinions binding precedent.[6] Although offered principally to foster inter-circuit uniformity regarding litigants' ability to cite unpublished opinions in the federal courts of appeals,[7] ambiguities in the rule's construction and the Advisory Committee's refusal to require that unpublished opinions be considered binding authority would likely result in a regime subject to inconsistency, and therefore unpredictability, on a host of other, equally important issues. Designating unpublished opinions as merely persuasive authority grants judges the discretion to determine the precedential effect of unpublished opinions according to their individual perspectives both on the legitimacy of unpublished opinions generally and on the level of detail and precision required to make any given unpublished opinion sufficiently reliable. As long as judicial resources are inadequate to support a regime in which unpublished opinions are treated as binding, a simple no-citation regime is as, if not more, conducive to inter- and intra-circuit uniformity. It would also be preferable to the Advisory Committee's incremental approach on several other grounds.

The primary purpose of unpublished opinions is to preserve the time and resources both of judges who are overwhelmed by the sizes of their dockets and litigants who are overwhelmed by the amount of case law

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mend a rule change, it must obtain the Standing Committee's approval to publish the proposed amendment for public comment. *See id.* If, after considering public comment, the advisory committee votes to proceed, the Standing Committee then considers the proposed change. *See id.* If the Standing Committee accepts the rule change, the change then must be approved by the Judicial Conference and the Supreme Court, and then avoid rejection by Congress. *See id.* Congress need not, however, explicitly approve a rule for it to take effect. *See id.*

[5] *See infra* text accompanying notes 43–56.

[6] For the text of the rule, see *infra* text accompanying note 36. The Advisory Committee on Appellate Rules approved the rule change by a vote of 7-2. *See* Tony Mauro, *Judicial Conference Group Backs Citing of Unpublished Opinions*, LEGAL TIMES, Apr. 15, 2004, *available at* http://www.law.com/jsp/article.jsp?id=1081792928522; *Federal Rule-making, Advisory Rules Committees Actions: Spring 2004 Meetings*, *at* http://www.uscourts.gov/rules/index.html#advspring04. Nevertheless, there are several procedural hurdles that must be overcome before the rule change is finally implemented. The proposed rule will now be considered by the Standing Committee at its June 2004 meeting. *Federal Rulemaking, Advisory Rules Committees Actions: Spring 2004 Meetings*, *at* http://www.uscourts.gov/rules/index.html#advspring04. If the Standing Committee approves the rule, it will go to the Judicial Conference in September 2004 and, with its approval, to the Supreme Court, which will have until May 1, 2005 to decide whether to adopt it. *See Federal Rulemaking, Pending Rules Amendments Awaiting Final Action*, *at* http://www.uscourts.gov/rules/newrules6.html. If the Supreme Court does so, the rule will go to Congress and will take effect on December 1, 2005, unless Congress passes legislation blocking it. *See id.*

[7] *See infra* text accompanying notes 43–48.

potentially relevant to their arguments.[8] Because unpublished opinions are intended primarily for the parties to the case, they do not require as detailed discussions of facts and issues, or as careful attention to the particularities of language, as opinions intended to establish binding precedent.[9] As a result, the use of unpublished opinions enables judges not only to decide a greater number of cases, but also to take greater care with, and to improve the quality of, the opinions they do publish.[10]

Rules permitting judges to issue unpublished opinions are traditionally coupled with restrictions on their citation by subsequent litigants.[11] Such restrictions are supported by several reasons. Because unpublished opinions are often thought to contain lower-quality writing, reasoning, and detail than published opinions,[12] citation restrictions ensure that judges will not later have their hands tied by any inadequacies in prior, abbreviated dispositions. Meanwhile, restrictions on citation save parties from having to sort through presumably redundant precedent.[13] If unpublished opinions and the restrictions on citations thereof do in fact save resources, their efficiency benefits are substantial, because approximately eighty percent of the opinions issued by the courts of appeals in recent years have been designated as "unpublished."[14]

Currently, the various courts of appeals differ substantially in their rules governing the citation of unpublished or "non-precedential" opin-

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[8] *See, e.g.*, 1ST CIR. R. 36(a) (judges may issue unpublished opinions "in the interests . . . of expedition"); 2D CIR. R. 0.23 ("The demands of an expanding case load require the court to be ever conscious of the need to utilize judicial time effectively."). In addition to judicial efficiency, restrictions on the citation of unpublished opinions have also been thought to promote procedural fairness between litigants, on the grounds that poorer litigants may not have the same level of access to unpublished opinions as do their wealthier counterparts. *See Committee Memorandum*, *supra* note 2, at 34. This argument has lost force, however, since Congress mandated that courts of appeals post all of their opinions, including those designated "unpublished," in a "text searchable format" on their websites. *See* E-Government Act of 2002, Pub. L. No. 107-347, § 205(a)(5), 116 Stat. 2899, 2913 (2003). Unpublished opinions are also often published in the *Federal Appendix* and posted on Lexis and Westlaw, *see supra* note 2, although these latter sources may not be widely available to less wealthy litigants.

[9] *See* Marla Brooke Tusk, *No-Citation Rules as a Prior Restraint on Attorney Speech*, 103 COLUM. L. REV. 1202, 1214 (2003).

[10] *See id.*

[11] *See, e.g.*, 9TH CIR. R. 36-1 and 9TH CIR. R. 36-3(b).

[12] *See id.* at 1210.

[13] *See, e.g.*, 1ST CIR. R. 36(a) (Unpublished opinions are helpful in "saving time and effort in research on the part of future litigants."). This argument, however, seems to discount the ability of parties to narrow electronic research results through effective research techniques while, of course, providing little consolation to litigants who would benefit from citing unpublished opinions that are particularly helpful to their arguments.

[14] *See* ADMIN. OFFICE OF THE UNITED STATES COURTS, JUDICIAL BUSINESS OF THE UNITED STATES COURTS 2003, tbl. S-3 (2003), *at* http://www.uscourts.gov/judbus2003/tables/USCourtAppeals.pdf. The Circuit with the highest percentage of decisions by unpublished opinion or order, 91%, was the Fourth. The Circuit with the lowest percentage, only 39%, was the First. The Ninth Circuit, with a larger caseload than any other circuit, issued the highest aggregate number of unpublished opinions, over 4400, or 84% of its total caseload.

ions. Although all circuits permit the citation of unpublished opinions to establish facts about the case before the court, such as to support claims of res judicata and collateral estoppel,[15] circuits differ regarding the citation of unpublished opinions for more general propositions. Although a majority of circuits do allow citation of unpublished opinions more generally,[16] a minority of circuits flatly prohibit such citation.[17] Those that do allow it differ amongst themselves regarding the circumstances in which unpublished opinions may be cited.[18] Notably, only the D.C. Circuit mandates that unpublished opinions, like other circuit case law, be considered binding precedent,[19] while all other circuits treat such opinions as persuasive, rather than binding, authority.[20]

To date, most of the debate over unpublished opinions has focused on the narrow question of whether unpublished opinions should be given the same binding effect as published opinions from a controlling jurisdiction.[21] At the center of the issue is whether circuit rules allowing unpublished opinions to be designated as anything other than binding authority are consistent with the Article III judicial power.[22] The distinction be-

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[15] In some circuits, permission to cite unpublished opinions for these limited reasons is explicitly granted in the local rules. *See* 2D CIR. R. 0.23; 7TH CIR. R. 53(b)(2)(iv); 9TH CIR. R. 36-3(b). Although the local rules of other circuits do not explicitly permit citation for these reasons, no circuit has ever sanctioned an attorney for citing an unpublished opinion under these circumstances. *See Committee Memorandum*, *supra* note 2, at 3.

[16] The First, Third, Fourth, Fifth, Sixth, Eighth, Tenth, Eleventh, and D.C. Circuits permit the citation of unpublished opinions for their persuasive value. *See* 1ST CIR. R. 32.3(a)(2); 4TH CIR. R. 36(c); 5TH CIR. R. 47.5.4; 6TH CIR. R. 28(g); 8TH CIR. R. 28A(i); 10TH CIR. R. 36.3; 11TH CIR. R. 36.3 I.O.P. 5.

[17] *See* 2D CIR. R. 0.23; 7TH CIR. R. 53(b)(2)(iv); 9TH CIR. R. 36-3(b).

[18] Some circuits allow citation to an unpublished opinion only if it has precedential value with respect to a material issue that has not been addressed in a published opinion. *See* 4TH CIR. R. 36(c); 6TH CIR. R. 28(g); 8TH CIR. R. 28A(i); 10TH CIR. R. 36.3. The First Circuit is slightly more liberal in its citation rules. While it too does not favor citation of unpublished cases, it requires only that there be no published cases from *within* the circuit addressing the relevant issue. *See* 1ST CIR. R. 32.3(a)(2). The Fifth and Eleventh Circuits allow citation without restriction, but reliance on such opinions is disfavored. *See* 5TH CIR. R. 47.5.4; 11TH CIR. R. 36.3 I.O.P. 5. Third Circuit Rules seem to apply to the citation of unpublished cases by the court, not by litigants. *See* 3D CIR. I.O.P. 5.7 ("The court by tradition does not cite to its not precedential opinions as authority."). *See also* Stephen R. Barnett, *No-Citation Rules Under Siege: A Battlefield Report and Analysis*, 5 J. APP. PRAC. & PROCESS 473, 474 n.8 (2003).

[19] D.C. CIR. R. 28(c)(1)(B) provides that unpublished dispositions entered on or after January 1, 2002, "may be cited as precedent." D.C. CIR. R. 36(c)(2) cautions, however, that "a panel's decision to issue an unpublished disposition means that the panel sees no precedential value in that disposition." Unpublished dispositions issued prior to January 1, 2002, may be cited only for purposes of res judicata, collateral estoppel, and law of the case. *See* D.C. CIR. R. 28(c)(1)(A).

[20] *See* rule cited *supra* note 16.

[21] *See, e.g.*, Anastasoff v. United States, 223 F.3d 898, 904 (8th Cir. 2000).

[22] *Compare* Hart v. Massanari, 266 F.3d 1155, 1159–80 (9th Cir. 2001) (holding that U.S. CONST. Art. III does not explicitly or implicitly require that all case dispositions and orders issued by appellate courts be binding authority; on the contrary, an inherent responsibility of Article III judges is managing precedent to develop a coherent body of circuit law to govern litigation in the circuit court and the other courts of the circuit), *with Anasta-*

tween "persuasive" and "binding" authority has not played a significant role in the arguments on either side, nor has the distinction between rules focusing on the permissibility of citation and rules focusing on precedential effect. In *Anastasoff v. United States*, for example, the fact that the Eighth Circuit Rule in question permitted unpublished opinions to be cited for their "persuasive value" was irrelevant to Judge Arnold's holding that the rule was unconstitutional.[23] In *Hart v. Massanari*, Judge Kozinski, writing for the court, came to the opposite conclusion regarding the Ninth Circuit's rule that unpublished dispositions "are not binding precedent" that "may not be cited," but his analysis also focused almost entirely on the issue of "binding precedent."[24] Although Judge Kozinski briefly considered the practical problems with allowing citation for merely persuasive value, he did not separately analyze the constitutionality of the rule's prohibition on citation.[25] Admittedly, some arguments have focused on the prohibition against citing unpublished opinions while leaving aside the issue of what precedential effect courts should give them.[26] The thrust of the debate, however, has assumed that unpublished cases, if properly cited, would bind courts like any other case law from a controlling jurisdiction.

Since it began considering a change to the Federal Rules of Appellate Procedure regarding unpublished opinions, the Advisory Committee has proceeded extremely reluctantly, out of fear that judges would vigorously oppose any move to regulate unpublished opinions. The initial draft of Rule 32.1 was first proposed for the Committee's consideration by the Department of Justice, and the Committee's initial response was decid-

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soff, 223 F.3d at 900, 904 (holding that 8th Cir. R. 28A(i) providing that unpublished decisions are not binding on future panels violates Article III because the doctrine of precedent was "well-established" when the Framers drafted the Constitution; any exercise of the "judicial power" is binding upon future panels because to depart from such a rule would be "an approach to tyranny and arbitrary power, to the exercise of mere discretion, and to the abandonment of all the just checks upon judicial authority"), *vacated as moot on reh'g en banc* 235 F.3d 1054 (8th Cir. 2000). *See also* Symbol Tech., Inc. v. Lemelson Med., Educ. & Research Found., 277 F.3d 1361, 1366–68 (Fed. Cir. 2002) (wholly adopting the reasoning of *Hart*); Williams v. Dallas Area Rapid Transit, 256 F.3d 260, 260 (5th Cir. 2001) (Smith, J., dissenting from denial of reh'g en banc) (calling for en banc review of the circuit's "questionable practice of denying precedential status to unpublished opinions"). Some commentators have offered alternative constitutional objections to treating unpublished opinions as nonbinding. *See, e.g.*, Jon A. Strongman, Comment, *Unpublished Opinions, Precedent, and the Fifth Amendment: Why Denying Unpublished Opinions Precedential Value is Unconstitutional*, 50 U. KAN. L. REV. 195, 212 (2001) (treating unpublished opinions as non-binding violates due process because it allows courts to ignore prior decisions arbitrarily).

[23] *See* 223 F.3d at 904 (citing 8TH CIR. R. 28A(i)).

[24] *Hart*, 266 F.3d at 1159 (citing 9TH CIR. R. 36-3).

[25] *See Hart*, 266 F.3d at 1178.

[26] *See* Tusk, *supra* note 9, at 1226–30 (arguing that absolute prohibitions on citing unpublished opinions constitute a prior restraint on speech that is impermissible under the First Amendment). This objection, unlike many others, is met by the Advisory Committee's proposed rule mandating that parties be allowed to cite unpublished opinions at least for their persuasive value.

edly negative.[27] In its first discussion of the proposed rule, in April 2001, the Committee recalled that a similar provision had been considered three years earlier, but was rejected after the chief judges of the various circuits voiced their opposition to any such rule change with "unanimity and much passion."[28] Although the Committee ultimately decided to defer further discussion of the Justice Department's 2001 proposal to a subsequent meeting, the Committee Reporter warned that it would be "a waste of this Committee's time—and perhaps risk the appearance of a lack of respect for the chief judges who responded [negatively in 1998]—to take up this precise proposal again just three years later."[29] Judge Garwood, then chair of the Committee, agreed that "in light of the recent and vehemently negative reaction of the chief judges, he did not think this Committee should even 'stick its toe' in this area."[30]

Concerns about offending judges deeply opposed to the rule change remained the primary argument against the amendment, even after members voted 6–3 the following year to continue consideration of a national rule permitting the citation of unpublished opinions.[31] Supporters of the proposed rule change appeared to seize on support voiced previously by a few chief judges[32] as well as on recent changes to various circuits' rules that suggested increased openness to unpublished opinions.[33] Opponents pointed out that many chief judges, who make up half the membership of the Judicial Conference, continued to be strongly opposed, and that many circuit judges would view the change as the first step toward abolishing non-precedential opinions.[34] Ninth Circuit judges lobbied particularly

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[27] *Minutes of Spring 2001 Meeting of Advisory Committee on Appellate Rules* 64 (Apr. 11, 2001) [hereinafter *Spring 2001 Meeting*], *available at* http://www.uscourts.gov/rules/Minutes/app0401.pdf.

[28] *See id.* Judge Garwood, then chair of the Committee, wrote to the chief judges of the Courts of Appeals on January 28, 1998, asking their views on whether the rules should be amended to specify the circumstances, if any, under which "unpublished" opinions may be cited. *Id.* All of the chief judges responded, except two, and those who did answered "absolutely not." *Id.* They were adamant that they did not want the Advisory Committee to regulate unpublished decisions in any way. *See id.*

[29] *See id.* at 64–65.

[30] *See id.* at 65.

[31] *Minutes of Spring 2002 Meeting of Advisory Committee on Appellate Rules* 25 (Apr. 22, 2002) [hereinafter *Spring 2002 Meeting*], *available at* http://www.uscourts.gov/rules/Minutes/app0402.pdf.

[32] *Id.* at 23–24. In particular, another survey indicated the chief judges of the Third, Tenth, and Eleventh Circuits would support an amendment explicitly permitting citation of non-precedential opinions, while the chief judge of the Sixth Circuit indicated support only for a rule that mirrored the Sixth Circuit's existing rule, which disfavors but nevertheless permits citation if the unpublished opinion bears on a material issue and no published opinion is available. *See id.* at 23. The chief judges of the First, Fourth, Eighth, Ninth, and Federal Circuits expressed opposition, while the chief judge of the Fifth Circuit said the judges of her circuit were divided. *Id.* The chief judges of the Second, Seventh, and D.C. circuits did not respond to the survey. *Id.*

[33] *See id.* at 24. In particular, the Committee pointed to the D.C. Circuit's recent rule change permitting citation of unpublished opinions. *See id.*

[34] *See id.* at 25.

vigorously to convince Committee members to reject the amendment, arguing that unpublished opinions are an inevitable response to docket pressure, and that because caseloads differ among circuits (with Ninth Circuit caseloads being uniquely large), circuits should have the freedom to tailor rules regarding unpublished opinions to their own needs.[35]

Although opposition from judges was ultimately inadequate to stop the Advisory Committee from approving the rule change for public comment, it did inspire several modifications to the language and structure of the rule. After considering several alternatives to the Justice Department's initial proposal, the Advisory Committee ultimately settled on the following draft:

> No prohibition or restriction may be imposed upon the citation of judicial opinions, orders, judgments, or other written dispositions that have been designated as "unpublished," "not for publication," "non-precedential," "not precedent," or the like, unless that prohibition or restriction is generally imposed upon the citation of all sources.[36]

Rather than simply stating that unpublished opinions may be cited, the proposed rule ensures the free citation of unpublished opinions by prohibiting any "restriction" on their citation that is not similarly imposed on the citation of published opinions.[37] The Committee opted for the latter construction out of fear that, in the absence of an explicit prohibition on the imposition of restrictions, courts of appeals that are particularly hostile to unpublished opinions would impose enough conditions to defeat the purpose of the rule.[38] Also, the Committee included a list of synonyms for "opinions" to prevent resistant circuits from evading the rule by simply naming their unpublished decisions "orders" or "memorandum dispositions."[39] For the same reason, the Committee also opted to include

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[35] *Minutes of Fall 2002 Meeting of Advisory Committee on Appellate Rules* 36 (Nov. 18, 2002) [hereinafter *Fall 2002 Meeting*], *available at* http://www.uscourts.gov/rules/Minutes/app1102.pdf.

[36] PROPOSED FED. R. APP. P. 32.1(a). The rule also contains a second subsection:

> A party who cites a judicial opinion, order, judgment, or other written disposition that is not available in a publicly accessible electronic database must file and serve a copy of that opinion, order, judgment or other written disposition with the brief or other paper in which it is cited.

PROPOSED FED. R. APP. P. 32.1(b). This requirement is commonly required by circuits that permit citation of unpublished opinions. *See, e.g.*, 1ST CIR. R. 32.3(a)(3).

[37] *See* PROPOSED FED. R. APP. P. 32.1(a). The Committee acknowledged that its approach was not necessarily the easiest to understand. *See Minutes of Spring 2003 Meeting of Advisory Committee on Appellate Rules* 16 (May 15, 2003) [hereinafter *Spring 2003 Meeting*], *available at* http://www.uscourts.gov/rules/Minutes/app0503.pdf.

[38] *See Fall 2002 Meeting*, *supra* note 35, at 38.

[39] *See id.* at 39.

several possible terms for "unpublished," such as "not for publication" and "non-precedential," along with the catch-all phrase "or the like."[40]

Even as the Committee was taking steps to make it difficult for judges to evade the principal purpose of the rule, it also adopted language intended to demonstrate deference to judges who might disagree with the rule change. In particular, the rule was written passively (no restriction "may be imposed") rather than actively ("a court must not impose") because the passive voice sounds less confrontational and is therefore "less likely to raise the hackles of judges."[41] Also, the Committee rejected a draft of Rule 32.1 that included a separate section confirming that "[a] court of appeals may designate an opinion as non-precedential," because the members were unanimously opposed to using a procedural rule to support one side of the debate over the constitutionality of non-precedential opinions and instead wished to "limit the involvement of the Committee to the issue of citation."[42]

Although the Advisory Committee, by its own terms, does not resolve the existing constitutional and policy debates over whether unpublished opinions should be considered binding precedent, it does intend proposed Rule 32.1 to serve several important objectives. First and foremost, the proposed rule creates inter-circuit uniformity on the issue of citing unpublished opinions by overriding the various circuits' local rules, which differ dramatically, with a single, uniform requirement allowing for the citation of unpublished opinions in each of the thirteen courts of appeals.[43] According to the Advisory Committee, conflicting rules create various hardships for practitioners, particularly those who practice in multiple circuits.[44] First, they require practitioners to consult local rules in each circuit.[45] Second, where circuit rules regulate unpublished opinions from other circuits by permitting their citation whenever the issuing circuit would permit, local rule variations may result in the awkward situation of parties being permitted to cite the unpublished opinions of other circuits, but not those of the circuit in which they are litigating.[46] Further, the Advisory Committee believes that it is unfair, as a policy matter, for attorneys to be subject to sanction or charges of unethical conduct simply for citing

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[40] *See Spring 2003 Meeting*, *supra* note 37, at 16.
[41] *See id.* at 15–16.
[42] *See Fall 2002 Meeting*, *supra* note 35, at 35.
[43] *See Committee Memorandum*, *supra* note 2, at 27.
[44] *See id.*
[45] *See id.*
[46] As the Advisory Committee notes, *see id.* at 32–33, the Seventh Circuit prohibits the citation of its own published opinions except to support claims of res judicata, collateral estoppel, or law of the case, *see* 7TH CIR. R. 53(b)(2)(iv), but permits the citation of unpublished opinions of other courts when the rendering court permits. *See* 7TH CIR. R. 53(e).

unpublished opinions,[47] which is possible so long as courts of appeals can prohibit citing such opinions.[48]

The Advisory Committee cites additional policy objectives in support of the rule. First, it prevents circuits from prohibiting something that is, at worst, harmless.[49] According to the Committee, it is difficult to justify a system that permits parties to bring to a court's attention "an infinite variety of sources,"[50] including those found in decisions of inferior courts, overruled decisions, dissenting opinions, legislative histories, legal journals, decisions of foreign courts, op-ed pieces and news stories,[51] while at the same time excluding the court's own unpublished opinions.[52] As long as unpublished opinions are accorded the same precedential effect as all other kinds of persuasive authority, the argument goes, there is no cost to offering them for judges' consideration, because judges are always "free to decide whether or not to be persuaded."[53] Further, by giving courts of appeals the flexibility to treat unpublished opinions as merely persuasive authority, the proposed rule preserves the efficiency benefits of unpublished opinions because "[t]he process of drafting a precedential opinion is much more time consuming than the process of drafting an opinion that serves only to provide the parties with a basic explanation of the reasons for the decision."[54] Finally, in those circuits that permit the citation of unpublished opinions only under specific circumstances,[55] the Com-

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[47] *See Committee Memorandum*, *supra* note 2, at 27.

[48] *See Hart*, 266 F.3d at 1159 (noting that the attorney was ordered to show cause why he should not be disciplined for violating the no-citation rule); ABA Comm. on Ethics and Prof'l Responsibility, Formal Op. 94-386R (1995) ("It is ethically improper for a lawyer to cite to a court an 'unpublished' opinion . . . where the forum court has a specific rule prohibiting any [such] reference . . . .").

[49] *See Committee Memorandum*, *supra* note 2, at 32. Furthermore, according to the Committee, the rule is at best helpful, because it will "further the administration of justice by expanding the sources of insight and information that can be brought to the attention of judges." *See id.* at 35.

[50] *See id.* at 32.

[51] *See* Tusk, *supra* note 9, at 1232.

[52] *See Committee Memorandum*, *supra* note 2, at 32 (noting that parties have always been able to cite "an infinite variety of sources" for their persuasive value, including cases from "foreign jurisdictions, law review articles, treatises, newspaper columns, Shakespearian sonnets, and advertising jingles" and "[n]o court of appeals places any restriction" on their citation).

[53] *See id.* at 32.

[54] *See id.* at 33. The Advisory Committee rejects the notion that simply requiring that unpublished opinions be citable will significantly increase the workload of judges wary of greater public scrutiny, because the fact that unpublished opinions are already widely available itself provides judges with incentive to take care in drafting non-precedential opinions. *See id.* at 33. Judge Kozinski, for his part, disagrees. *See Hart*, 266 F.3d at 1178 ("Should courts allow parties to cite to these dispositions, however, much of the time gained would likely vanish."). On this issue, and in general, the Advisory Committee is walking a tightrope. If public availability of unpublished opinions itself forces judges to take care in drafting, one wonders how much more onerous it would be to make all opinions not only citable but binding as well and, therefore, how much judicial resources the Advisory Committee is preserving with its "limited" approach.

[55] *See supra* note 18.

mittee argues that Rule 32.1 would eliminate satellite litigation over whether the citation of an unpublished opinion was actually appropriate.[56]

Although Rule 32.1 is primarily intended to promote inter-circuit uniformity by replacing circuit-specific rules governing the citation of unpublished opinions with a single rule allowing citation in each of the thirteen courts of appeals,[57] the ambiguities in the rule's language and the Advisory Committee's unwillingness to require that such opinions be considered binding precedent creates the potential for inconsistencies that dwarf any meaningful gains in inter-circuit uniformity and predictability that the change would accomplish. The designation of unpublished opinions as merely persuasive authority allows judges the discretion to determine precedential effects of unpublished opinions according to their individual views of the legitimacy of unpublished authority and assessments of the quality of unpublished opinions. Given that resource constraints preclude requiring that unpublished opinions be treated as binding authorities, a rule change prohibiting citation of unpublished opinions to any court of appeals would be as, if not more, effective in achieving both inter- and intra-circuit uniformity, and would be preferable for a host of other reasons.

According to the Advisory Committee, the effect of proposed Rule 32.1 is "extremely limited."[58] The rule mandates only that courts of appeals permit parties to cite unpublished opinions in their arguments, which most circuits currently allow anyway.[59] It takes no position on the weight—binding or merely persuasive—that judges must give to unpublished opinions, nor does it indicate whether this choice is to be made by the Judicial Conference, the individual circuits, or judges themselves on a case-by-case basis.[60]

Despite the modesty, and apparent simplicity, of the rule's mandate, there are ambiguities in the rule's current language that, if resolved differently by the various circuits, could themselves undermine the Committee's purpose. First, there are several questions surrounding the meaning of the term "restriction." It is possible to view a circuit's limitation on the citation of unpublished opinions to merely persuasive value as itself a "restriction" not applied to published opinions and therefore contrary to the rule.[61] Only the Committee Note (a kind of legislative history to which some judges may not be willing to refer)[62] makes it clear that the rule is

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[56] *See Committee Memorandum*, *supra* note 2, at 34–35.

[57] *See supra* text accompanying notes 43–48.

[58] *Committee Memorandum*, *supra* note 2, at 28.

[59] *See* Barnett, *supra* note 18, at 474–75.

[60] *See Committee Memorandum*, *supra* note 2, at 28. The Advisory Committee's decision not to propose a uniform rule regarding the issue of precedential weight has some support in the literature. *See, e.g.*, Barnett, *supra* note 18, at 490 ("No equally forceful arguments require cited opinions to be accorded any particular weight, whether 'precedential' or only 'persuasive.'"); Tusk, *supra* note 9, at 1230.

[61] *See* Barnett, *supra* note 18, at 491.

[62] *See id.*

not intended to say anything "whatsoever about the effect that a court must give" to cited unpublished opinions.[63] Second, the rule itself is unclear as to whether the language courts of appeals currently use to discourage the citation of unpublished opinions, such as calling it "disfavored,"[64] constitute "restrictions" that violate the rule.[65] Once again, however, the Committee Note provides needed clarification, in this case indicating that these are restrictions to which unpublished opinions should not be subject.[66]

Although Rule 32.1 explicitly addresses only the issue of citation, the Advisory Committee's claim to have remained agnostic on the issue of precedential effect is unrealistic. The Advisory Committee seems to assume that binding and persuasive authority sit on a single continuum of precedential effect, with "binding authority" simply more frequently and effectively persuasive than "persuasive authority."[67] This assumption ignores fundamental differences in the nature of the two kinds of authority. Binding authority replaces judicial discretion with mandates that must be followed, except perhaps by courts of appeals sitting en banc,[68] while persuasive authority assists judges in coming to appropriate resolutions of legal issues for which existing law does not provide clear directives.[69] Those who argue that unpublished opinions should be treated as binding believe that, in a system based on principles of stare decisis, any prior adjudication of the same, indistinguishable legal issue provides the kind of clear directive that entitles litigants to certain outcomes, without their having to persuade judges of the merits of the previous decision.[70] Likening unpublished opinions to other kinds of authority commonly designated as persuasive, and thereby conferring on judges the freedom to decide "whether or not to be persuaded,"[71] indicates a conception of unpublished authority that is entirely inconsistent with the views of those who believe that unpublished opinions must be considered binding precedent and nothing else. By allowing unpublished opinions to be treated as persua-

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[63] *Committee Memorandum*, *supra* note 2, at 28.

[64] For examples from the rules of various circuits, see *supra* note 18.

[65] *See* Barnett, *supra* note 18, at 492.

[66] *See Committee Memorandum*, *supra* note 2, at 34.

[67] Viewing binding and persuasive authority on a single continuum is not uncommon. *See* Barnett, *supra* note 2, at 9 (describing a single "Spectrum of Precedent" that includes both binding and persuasive authorities).

[68] *See id.* at 9.

[69] *See id.* at 11. It is, of course, interesting that Barnett acknowledges these distinctions between binding and persuasive authority in the same article in which he describes a single "spectrum." *Id.* at 9.

[70] *See* Anastasoff v. United States, 223 F.3d 898, 899–900 (8th Cir. 2000) ("Inherent in every judicial decision is a declaration and interpretation of a general principle or rule of law . . . . This declaration of law is authoritative to the extent necessary for the decision, and must be applied in subsequent cases to similarly situated parties.").

[71] *See Committee Memorandum*, *supra* note 2, at 32.

sive authority, therefore, the Advisory Committee has, whether it likes it or not, taken a position in the debate over precedential effect.

The Advisory Committee's conception of unpublished opinions is not only incompatible with the views of those who believe that unpublished opinions must be binding, it is also incompatible with its own conception of persuasive authority. According to the Committee, opinions cited for their persuasive value are potentially useful in influencing the court through the depth of their research and the persuasiveness of their reasoning.[72] Unpublished opinions, which are defined primarily by the brevity of their analysis, seem unlikely to provide detailed research or particularly compelling reasoning and are, under this analysis, quite unlikely to be persuasive to judges.

Although Rule 32.1 spares attorneys the confusion and risk associated with inconsistent citation rules, its contribution to inter-circuit uniformity pales in comparison to the intra- and inter-circuit inconsistency that it ignores and arguably encourages. First, it is questionable how much of a "hardship" it is for lawyers to consult circuit-specific rules governing the permissibility of citing unpublished opinions, when lawyers must routinely consult circuit-specific as well as judge-specific rules on a variety of other procedural matters. Although a single citation rule is undoubtedly helpful to lawyers understandably wary about procedural rules and legal sanctions, it is important not to overstate its value when circuit rules, which do not change frequently or without notice, are freely available on courts of appeals's websites and via legal research services.

More significantly, Rule 32.1's failure to require judges to treat unpublished case law as binding precedent subjects attorneys and litigants to both inter- and intra-circuit inconsistency on the precedential effect, if any, such opinions will be given.[73] Litigants cite cases in order to obtain specific, substantive outcomes, which often critically depend on whether the judges deciding their cases treat unpublished opinions as binding.[74] Allowing circuits to treat unpublished opinions as persuasive authority, which many circuits currently do, subjects litigants to the different policy perspectives of individual circuits and judges on the propriety of unpublished opinions as legal authority, a subject upon which circuits and judges passionately disagree.[75] And unlike circuits' citation rules, which are easily available to litigants before they submit their arguments, the willingness of individual judges to be bound by unpublished opinions may be virtually unknowable, except perhaps in the case of judges who have publicly voiced their views on the appropriate precedential effect of unpub-

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[72] *See Fall 2002 Meeting*, *supra* note 42, at 25.

[73] *See* Barnett, *supra* note 18, at 489–90 ("If one of the goals of Rule 32.1 is to unify divergent citation rules of the circuits, that goal arguably applies as much to weight as to citability.").

[74] *See, e.g.*, *Anastasoff*, 223 F.3d at 899.

[75] *See Committee Memorandum*, *supra* note 2, at 27–28.

lished opinions. Formally designating unpublished opinions as "persuasive" authority, therefore, gives judges the unfettered discretion to operate under judicial regimes governed by their own personal notions of stare decisis.

The Advisory Committee might respond that inconsistency and unpredictability regarding whether judges treat unpublished opinions as binding is no different from the inter- and intra-circuit inconsistency that litigants commonly face, and have come to expect, on the full array of discretionary procedural and substantive judgments that determine the outcome of their cases. There are reasons to reject this counterargument, however. First, inconsistency on the issue of whether a given judge considers unpublished opinions binding authority is arguably less justifiable because, unlike many other kinds of inconsistency, it is relatively easy to avoid. Because appellate court judges are appointed by presidents with different ideological perspectives, panels are frequently composed of judges with different legal and policy perspectives. Although one cannot realistically envision an appellate rule that effectively requires judges to adopt a single judicial philosophy that guarantees consistent adjudications of complicated and value-laden legal questions, it is quite easy to envision an effective rule mandating that all opinions be treated as binding precedent, as the D.C. Circuit has done, and in the process avoid the kind of procedural inequality that would result if only some litigants—that is, those arguing before sympathetic judges—were entitled to the benefit of unpublished precedent.

Second, even to the extent that inconsistency regarding judges' approaches to unpublished opinions is qualitatively indistinguishable from inconsistency regarding their legal philosophies, their similarities do not justify the Advisory Committee's adopting a rule that increases intra- and inter-circuit inconsistency where, as here, greater uniformity and predictability are the Advisory Committee's primary stated policy objectives and where the Advisory Committee could adopt a rule change that achieves the consistency gains of proposed Rule 32.1 without suffering its criticisms. In particular, under a simple no-citation rule, which is currently the policy of some circuits, litigants and attorneys around the country would be aware not only that unpublished opinions cannot be cited but also, *a fortiori*, that the citations could have no precedential value.

Just as problematic as allowing judges to assign precedential value to an unpublished opinion according to their individual policy perspectives on unpublished opinions is allowing them the discretion to determine its precedential value according to their view of the "quality" of the unpublished opinion at issue. Some commentators have argued that all unpublished opinions should not be treated as binding authority because, by virtue of the fact that judges often dedicate less time and care in drafting

them, they are unreliable precedents, potentially plagued by cursory reasoning, imprecise wording, and incomplete fact descriptions.[76] Therefore, when litigants cite unpublished opinions as authority, judges should consider the soundness of their reasoning and the level of detail with which the facts are described and then decide, on an opinion-by-opinion basis, whether to consider the case as binding or not.[77] There are, however, several reasons to question whether the precedential effect of unpublished opinions should depend on judges' undertaking such an analysis.

First, it is difficult to understand how judges can, practically speaking, analyze the quality of an opinion without personal knowledge of all of the facts and issues in the case—something, of course, a judge reviewing an opinion is unlikely to have. As mentioned, opponents of allowing unpublished decisions to be cited as persuasive authority argue that they are often unreliable because they present the facts incompletely.[78] In order to determine if a given unpublished opinion is sufficiently reliable, judges would be required to ascertain the degree of detail and accuracy of the facts presented in a given case, but any such analysis seems necessarily to require that the judges have detailed knowledge of the actual facts themselves—something a judge reviewing an opinion is unlikely to have. And because different judges are likely to have different thresholds for the degree of precision and detail they require before they consider an unpublished decision binding, requiring judges to consider the quality of unpublished precedent is likely to create an additional source of intra- and inter-circuit inconsistency.

Concerns about practicality aside, there are additional reasons to reject a regime in which the precedential effect of unpublished opinions turns, at least in part, on judges' analyses of their quality. First, the quality of unpublished opinions, including their legal reasoning, language, and form, are arguably irrelevant to the major reason parties cite unpublished opinions: because the facts of those cases are closer to the facts in their cases than to those of any cases decided by published opinions.[79] Although abbreviated legal reasoning may not provide reliable precedent, even the most cursory descriptions of facts are likely to include at least those details that were ultimately dispositive—otherwise they would be of no value, even in informing parties of the reasons for the decision.[80] Allowing the precedential effect of unpublished opinions to formally depend on

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[76] *See* Tusk, *supra* note 9, at 1234.

[77] *See id.*

[78] *See id.*

[79] *See* Barnett, *supra* note 2, at 18 (noting "that the law is not what the judges *say*, it's what they *decide*") (emphasis in the original). *Cf.* Oliver Wendell Holmes, *The Path of the Law*, 10 HARV. L. REV. 460–61 (1897) (defining the law as what the courts "do in fact").

[80] *See* Barnett, *supra* note 2, at 18 ("Although imprecise language indeed may mask the true facts of a case, law clerks and staff attorneys are good at stating facts—they do it often enough in published opinions—and lawyers and judges have abundant experience in distinguishing cases on their facts.").

an arguably irrelevant issue leads to a related concern. In particular, it allows judges to mask their merits-based rejections of the holdings of unpublished opinions by simply attributing any apparent inconsistencies between their holding and the prior holdings to weaknesses in the unpublished opinions. If the facts and arguments from the prior case were spelled out in sufficient detail, judges might argue, the cases would easily be reconciled. Finally, allowing some unpublished opinions but not others to be treated as binding is arguably unfair both to the litigants in the case and to future litigants. The litigants in the case will be at a disadvantage if they seek a writ of certiorari on the basis of an unpublished opinion that may contain a sparser record, while only some future litigants will get the benefit of unpublished authority, depending on how much time and attention the judge deciding the prior case happened to dedicate to drafting the opinion.

The Advisory Committee's decision to require that unpublished opinions be available for citation, but not that they be treated as binding authority, provides judges with an extraordinary amount of discretion and results in a regime that fails to achieve meaningful gains in inter- or intra-circuit uniformity or predictability, while imposing additional sources of intra-circuit inconsistency on those circuits that currently prohibit citation entirely. If the Advisory Committee insists that unpublished opinions be available for citation, it must also require that they be accorded the same binding effect as other cases from controlling jurisdictions. The major obstacle to this approach, as the Advisory Committee recognizes, is that judges may simply not have the time or resources to produce fully precedential opinions in each of their cases.[81] Until the number of judges increases, or some other solution is found to reduce their caseloads, there are several reasons to favor a no-citation regime to the Advisory Committee's proposed approach.

Most importantly, a no-citation rule would, as mentioned, reduce the inter- and intra-circuit disuniformity inherent in a regime in which it is left to individual judges to decide whether unpublished opinions are legitimate sources of authority and whether the reasoning contained in any given unpublished opinion is sufficiently sound to justify reliance in a later case. Admittedly, the fact that unpublished cases are uncited by litigants does not necessarily imply that they will never enter judges' consideration of the issues in a case, because some judges who favor, or who are at least not opposed, to unpublished opinions could, in theory, look to them for guidance irrespective of a no-citation rule. Although there is force to this argument, there are several responses to it.

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[81] *See* Tusk, *supra* note 9, at 1208 n.30 (noting that circuit court filings grew by nine percent between 1960 and 1983 and the number of appellate judges grew by three percent between 1960 and 1995).

First, this argument ignores the extent to which a rule prohibiting parties from citing unpublished opinions would also act as a signal to judges that unpublished opinions are not to enter their deliberations. Second, it underestimates the importance of citation in limiting the arguments litigants expect judges to address and the authorities litigants expect judges to reconcile with their decisions. And, perhaps most importantly, a blanket prohibition on citation frees judges from the obligation of having to explain individual decisions not to follow holdings and reasoning arguably contained in unpublished opinions. As unpublished opinions differ from published opinions in the judicial time and attention they receive, later refusing to follow the rules and decisions of those cases implies that prior decisions may have been decided wrongly, and that the error was the result of carelessness.[82] Having to include such acknowledgements in widely available opinions calls additional attention to any actual or apparent inconsistencies, which increases public perception of judicial unpredictability and reflects negatively on the administration of justice. Prohibiting unpublished opinions from being cited, and therefore being included in the litigation process, forces such opinions out of sight and, to a certain extent, out of mind.

Beyond issues of consistency and predictability, there are additional reasons to favor a no-citation regime. First, excluding unpublished opinions, even as persuasive authority, is much more consistent with the commonly held conception of unpublished opinions as containing relatively unreliable fact descriptions and legal reasoning, and much more cognizant of the difficulties associated with attempting, after the fact, to identify useful unpublished opinions. Also, the fact that several circuits ban citation entirely suggests that at least some judges agree that there are unique costs to allowing citation by itself, and similarly minded judges may take steps to avoid the effects of the proposed rule. First, they might decide, individually or by circuit rule, to provide little or no explanation for decisions in cases that, under current rules, they might instead dispose of by a somewhat less detailed, non-precedential opinion.[83] Second, they may adopt rules preventing judges from citing unpublished opinions in their decisions,[84] thereby diminishing attorneys' incentives to cite such opin-

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[82] *See* Williams v. Dallas Area Rapid Transit, 242 F.3d 315, 318–19 n.1 (5th Cir. 2001) (declining to be persuaded by two prior, unpublished opinions because neither case delivered "a thoughtful and/or detailed argument" with respect to Eleventh Amendment immunity"). The *Williams* court's characterization of the unpublished opinions would likely be troublesome news to the prior, unsuccessful litigants. It would also be troubling, and likely embarrassing, to the judges responsible.

[83] *See Fall 2002 Meeting*, *supra* note 35, at 36–37; *see also* Howard Bashman, *How Appealing*, *Interview with Judge Posner*, *available at* http://20q-appellateblog.blogspot.com (suggesting that judges may reduce unpublished opinions to a single-line holding of "Affirmed" or "Reversed").

[84] *See, e.g.*, 3d Cir. I.O.P. 5.7 ("The court by tradition does not cite to its not precedential opinions as authority.").

ions in the first place.[85] Measures such as these arguably help judges create at least the appearance of judicial consistency by controlling the amount of case law that is publicly available and that therefore must be reconcilable. No-citation regimes serve a similar purpose, with the added benefit of making it more likely that litigants receive at least a short statement of the reasons they either won or lost their cases.

Although offered principally to achieve inter-circuit uniformity, the Advisory Committee's rule change would result in a regime that is equally, perhaps more, vulnerable to inconsistencies in judicial process, not only among circuits but also among judges. The Advisory Committee cannot make meaningful progress in clarifying or resolving the debate over unpublished opinions without either excluding unpublished opinions entirely or treating them no differently than published opinions. Until judges have the resources to give full attention to every case in their burgeoning caseloads, the Standing Committee would be better off, at least with respect to consistency and predictability, proposing a single, nationwide rule prohibiting citation or, in the least, withdrawing Proposed Rule 32.1 so that the no-citation rules that are currently in force in several circuits remain in place.

—*Niketh Velamoor*

[85] *See* Barnett, *supra* note 18, at 495.