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# BRITISH JOURNAL OF AMERICAN LEGAL STUDIES

VOLUME 1 - ISSUE 1  
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Feminist Engagement and the Museum

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GRUESOME SPECTACLES: THE CULTURAL RECEPTION OF  
BOTCHED EXECUTIONS IN AMERICA, 1890-1920\*

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ABSTRACT

*This paper examines the cultural reception of botched executions in late nineteenth and early twentieth century America, a crucial period in the modern history of America's death penalty. We draw on newspaper accounts of botched executions to describe the ways they were presented to the public. We argue that, in an era when executions were moved behind prison walls, newspapers played a critical mediating role between the execution scene and the American public and that as newspapers competed for readership, stories about botched executions became more and more sensationalized. Newspapers generally presented two competing narratives: a sensationalist narrative, which played up the gruesomeness of botched execution, and an opposing, recuperative narrative, which sought to differentiate law's violence from violence outside of the law. The recuperative narrative helped to maintain the legitimacy of capital punishment in an era when the death penalty was already widely popular. However, the tension between these two narratives, and the constant public justifications of capital punishment in the wake of botched executions, points to a deeper ambivalence emerging during this period about whether or not the government can ever properly control the violence inherent in the death penalty.*

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I. ONE BUNGLED JOB: THE HANGING OF ARCHIE KINSAULS

On September 28, 1900, the state of North Carolina hanged Archie Kinsauls for a murder committed in Sampson County. Born in that county in 1865, Kinsauls lived there his entire life and married a local girl, Posunnie Gibsy Bass, in 1896. Even though Archie weighed only 110 pounds, he was said to be “tough as iron.”<sup>1</sup> He had the unfortunate habit of getting into violent arguments and carried on a long running feud with John C. Herring, his neighbor. One night, when he was in Archie Vann's Store at Beaman's Crossroad, an argument began. “Kinsauls reached into the meat box and got a sharp butcher knife and stabbed young Herring to such an extent that he died during the night.”<sup>2</sup>

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\* We are grateful to the Mellon Foundation for its support of Amherst College’s Project on Student-Faculty Research Collaboration in the Humanities and Social Sciences and to Amherst’s Dean of the Faculty, Greg Call, for his support of our work.

<sup>1</sup> See Claude Moore, *The Story Of Art Kinsauls*, OUR HERITAGE (Friday, October 18, 1991), <http://files.usgwarchives.net/nc/wayne/heritage/kinsauls.txt>.

<sup>2</sup> *Id.*

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Kinsauls was arrested a few days after Herring's death and taken to the county jail in Clinton. Helped by a group of his friends he soon escaped, avoiding capture for nine months. The sheriff and a posse only managed to recapture Kinsauls after a gunfight at his farm during which he was seriously wounded. Brought to trial in October 1899, he was found guilty of murder and sentenced to be hanged.

On the surface at least, there was nothing remarkable about North Carolina's plan for the Kinsauls execution. Hanging had been the primary method of execution in the United States since the founding of the American colonies. It was an inexpensive, low-tech way of putting people to death, allowed executions to be handled at the local level, and did not require an elaborate execution protocol.<sup>3</sup>

Awaiting his execution, Kinsauls refused to go quietly. Twice he tried to kill himself, first with an overdose of sleeping pills and later by trying to cut his throat. Both attempts failed, but each resulted in a postponement of his execution. In the meantime, North Carolina Governor Daniel Russell received many requests for a reprieve from influential Sampson County citizens, each of which were refused.

On the day of the hanging, hundreds of people travelled from all over the county to witness it. The gallows was erected near the jail where Kinsauls had originally been held. In this case, as in all its executions, Sampson County employed a stepladder as its gallows. However, it failed to do its job. Pushed off the stepladder, the drop height proved insufficient to break Kinsauls's neck. With Kinsauls suspended at the end of a rope, the attending physician quickly determined that he was still alive.

Compounding this problem was the fact that his neck had only partially healed from the last effort to take his own life. As a result, when Kinsauls fell from the stepladder, the rope ripped open his neck wound and left him bleeding profusely. The assembled crowd of friends and neighbors nearly rioted. Undaunted by the failure of the first execution attempt or the increasingly chaotic, bloody scene, officials cut him down, forced him up the ladder again, and repeated the drop. This time the execution succeeded and Kinsauls died. His was the last public hanging in Sampson County.<sup>4</sup>

Newspapers all over the country took note of the Kinsauls execution. Headlines in *The Atlanta Constitution*, *The New York Times*, *The Washington Post*, *The Republic (St. Louis, Missouri)* announced that it had not gone as planned. For example, *The Washington Post* titled its article "Murderer Hanged Twice."<sup>5</sup> The stories beneath such headlines used vivid language to convey the horror of Kinsauls's last minutes on earth. *The Post* described a "Ghastly Gallows Scene,"<sup>6</sup> and *The Virginian Pilot* said that his death resulted from a "revolting execution."<sup>7</sup>

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<sup>3</sup> *Id.*

<sup>4</sup> *Id.*

<sup>5</sup> *Murderer Hanged Twice*, WASH. POST, Sept. 29, 1900.

<sup>6</sup> *Id.*

<sup>7</sup> *Happenings in North Carolina*, VIRGINIAN PILOT, Oct. 21, 1900.

The news stories offered detailed accounts of the botched execution. *The Atlanta Constitution* noted that Kinsauls dropped from the stepladder the first time at 12:51 pm, that he had hung there for ten minutes, and that he remained hanging for another eight minutes after the second drop.<sup>8</sup> *The Post* and *The New York Times* reported that the first drop resulted in “severing the arteries, from which blood flowed profusely.”<sup>9</sup>

Nevertheless, newspaper coverage of Kinsauls’s execution neither questioned hanging as a method of execution nor the institution of capital punishment itself. While the papers did nothing to hide the fact that the execution was quite gruesome, their reporting suggested that the methods themselves were not unduly problematic. *The Virginian Pilot* observed that Kinsauls’s death resulted from “revolting *unavoidable* features so often experienced at hangings ...” as if the noose was a flawed, but still acceptable, response to crime.<sup>10</sup>

As to the reason his neck did not break on the first drop, newspapers observed that the noose had slipped<sup>11</sup> and attributed the failure to a “bungling job of a sheriff.”<sup>12</sup> *The Virginian Pilot* told its readers that “Sheriff Marshburn is of the opinion that he is an unmistakable failure as an executioner.”<sup>13</sup> News reports even blamed Kinsauls himself for the problems that plagued his execution. *The Atlanta Constitution*, *The New York Times*, and *The Washington Post* all wrote that the noose had torn “open the wound made when he attempted to take his own life with a knife on the 14th of September.”<sup>14</sup> *The Times* headline underscored this fact, noting that the “First Drop Opened Self-Inflicted Wound of the Convict.”<sup>15</sup>

At the same time, newspapers assured their readers that, despite its problems, the execution of Archie Kinsauls had been orderly, humane, and justified. *The Washington Post* story noted that “Kinsauls appeared perfectly composed” and did not make a scene throughout the execution procedure.<sup>16</sup> Characterizing the decision to hang him a second time as a gracious act, intended to hasten death, *The Post* said that he was “Placed on Drop a Second Time to End Life Quickly.”<sup>17</sup>

In what follows we offer a reading of the cultural reception of botched executions, like that of Archie Kinsauls, in late nineteenth and early twentieth century America. We focus on the period from 1890-1920 because it was, in our view, a crucial period in the transformation of America’s capital punishment from its traditional to its more modern form. It was, in ad-

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<sup>8</sup> *Bungling Job of a Sheriff*, ATLANTA CONSTITUTION, Sept. 29, 1900.

<sup>9</sup> *Murderer Hanged Twice*, N.Y. TIMES, Sept. 29, 1900.

<sup>10</sup> *Id.* (emphasis added).

<sup>11</sup> *Had to Hang Him Twice*, REPUBLIC.

<sup>12</sup> *Bungling Job of a Sheriff*, *supra* note 8.

<sup>13</sup> *Happenings in North Carolina*, *supra* note 7.

<sup>14</sup> *Murderer Hanged Twice*, *supra* note 5.

<sup>15</sup> *Murderer Hanged Twice*, *supra* note 9.

<sup>16</sup> *Murderer Hanged Twice*, *supra* note 5.

<sup>17</sup> *Id.*

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dition, a critical period in what death penalty historian Stuart Banner calls “the continual centralization and professionalization of punishment”<sup>18</sup> and in the development of new technologies of execution. While hanging continued to be the most common method of execution, “[b]etween 1888 and 1913 fifteen states adopted the electric chair as their means of execution.”<sup>19</sup>

The end of the nineteenth and the start of the twentieth century was also a period in which the legitimacy of capital punishment was under pressure both internally, due to new developments in the technologies of killing, and externally, from the persistence of lynching as well as the emergence of new, middle-class sensibilities about state killing. In this context, one might assume that botched hangings and electrocutions would have helped to undermine the death penalty’s legitimacy. As Chris Greer puts it:

Botched executions are of particular interest for at least two obvious reasons. First, they represent a direct challenge to the state’s desired presentation of capital punishment as quick, clean and painless. Secondly, by making the violence inherent in capital punishment clearly visible, and raising questions about the suffering of the condemned, they present abolitionists with an important opportunity to mobilize support against the continued use of the death penalty.<sup>20</sup>

Execution practices generally work to try to differentiate law’s violence from violence outside the law – to sharply contrast capital punishment and the crimes it is thought to condemn. Botched executions unmask, at least in theory, the brute violence of the law. Furthermore, this unmasking may call into question both particular methods of execution and capital punishment itself. Whether this unmasking occurs and whether its critical potential is realized, however, depends on how botched executions are conceptualized and portrayed. In the period of our study, newspapers played a central role in that process. They were important consumers of the gruesome spectacles of botched executions as well as key vehicles for the dissemination of information about them.

In this article we suggest that turn of the century American newspapers offered two different, but related, narratives about botched executions. The first of these narratives highlighted their gruesome, ghastly qualities. These were sensationalized narratives. At the same time, juxtaposed to the story of the botched execution’s gruesomeness, a recuperative narrative was also told, one that emphasized the continuing legitimacy of execution as a method of punishment, one that worked to differentiate law’s violence from both lynching and crime. These two narratives, we argue, sat uneasily together. The first put pressure on the second, forced the work of

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<sup>18</sup> STUART BANNER, *THE DEATH PENALTY: AN AMERICAN HISTORY* 206 (2002).

<sup>19</sup> *Id.* at 169.

<sup>20</sup> Chris Greer, *Delivering Death: Capital Punishment, Botched Executions and the American News Media*, in *CAPTURED BY THE MEDIA: PRISON DISCOURSE IN POPULAR CULTURE* 84, (Paul Mason ed., 2006).

legitimizing capital punishment to the surface, and, in so doing, revealed the anxiety that inevitably surrounds moments when law exercises dominion over life.

## II. CHANGES IN CULTURE AND PUNISHMENT: TRENDS IN TURN OF THE CENTURY AMERICAN LIFE

In any era, the way the two narratives work depends on the cultural context of the time. We can, therefore, only comprehend the meaning of accounts like those of Archie Kinsauls's botched execution by locating them in turn of the twentieth century American life. During that time, the continuing problem of lynching coupled with emergent middle-class sensibilities, which emphasized decorum and the belief in humane progress, helped shift the culture of capital punishment away from "embarrassing" public spectacles towards supposedly well-controlled events hidden from public view.

With respect to lynching, after the 1870s, their prevalence declined everywhere but in the South. There the number of lynchings actually increased after 1890 and "public torture lynchings," perpetrated before large crowds rather than under the cover of darkness, emerged for the first time.<sup>21</sup> Public torture lynchings served as displays of racial dominance and as summary criminal punishments.<sup>22</sup> Where whites felt their social and economic positions threatened, they used them to assert their superiority. As David Garland says in describing the lynching of Henry Smith, "his punishment was dictated not by the legal code – 'the law was laid aside' – but by the collective passions his act aroused."<sup>23</sup>

Lynchings were part of a structure of racial repression which deliberately took on the form of criminal punishment in order to create and reinforce contested social norms. Contemporaries in the South believed that lynchings were compatible with the spirit of the law, if not its letter.<sup>24</sup> Nonetheless, lynchings represented the very thing that law wanted to disclaim in its own dealings in death. Not only were they rituals of racial domination, they were also exceedingly violent, public, and were carried out by "mobs", not legal officials.<sup>25</sup>

At the same time, in the North, a newly sensitized middle-class wanted to shield itself from the brutalities of violence, whether private or public. As Annulla Linders explains, "... brutality had become a liability and

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<sup>21</sup> David Garland, *Penal Excess and Surplus Meaning*, 39 LAW AND SOC'Y REV. 793, 799 (2005).

<sup>22</sup> *Id.* at 828.

<sup>23</sup> DAVID GARLAND, PECULIAR INSTITUTION: AMERICA'S DEATH PENALTY IN AN AGE OF ABOLITION, 31 (2010).

<sup>24</sup> *Id.* at 29.

<sup>25</sup> *Id.* at 34.

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visible pain a sign of failure.”<sup>26</sup> Scenes of the body in pain were no longer fearsome representations of sovereign majesty, but came to be seen as indicators of the unjustifiable ferocity of state-operated vengeance.

Robert Blecker and Stuart Banner both note the same squeamishness that Linders describes. In the late nineteenth and early twentieth centuries, the middle class increasingly valued the private sphere as compared to public life. Blecker states that, as sights of dying and death moved to hospitals and out of the public eye, members of the middle-class came to believe that “only the ‘vulgar mob’ enjoyed watching the infliction of pain.”<sup>27</sup> As a result, they pushed for the privatization of punishment and the movement of executions from the public square to behind prison walls.

This privatization of punishment was followed closely by the further evolution of execution practices and methods. As Linders remarks, emerging bourgeois audiences “might tolerate the ghastliness of death itself, but not incompetence and mismanagement.”<sup>28</sup> Technological innovations at the end of the 1800s promised to reduce both while, at the same time, they offered penalties of death less gruesome and less violent than the gallows.<sup>29</sup> By the start of the twentieth century, painless death was not only thought to be possible, but was also considered the most desirable way to respond to even the most serious crimes.

Moreover, in contrast to early Puritan thought, which treated criminality as a sin, by the start of a new century Americans came to see crime as more of a disease than a personal failing. As a result, the way society responded to crime also had to be reoriented.<sup>30</sup> Thus, on the whole, “treatment replaced punishment as the response to crime.”<sup>31</sup> In the realm of capital punishment, however, this shift from religious to scientific views of crime and criminality translated only into a further desire to alter the methods of execution.

In 1888, a commission appointed by the Governor of New York considered whether lethal injection should be used instead of hanging. Lethal injection eventually was rejected as less civilized and more problematic than electrocution,<sup>32</sup> which was advertised as a way to “certainly and in-

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<sup>26</sup> Annulla Linders, *The Execution Spectacle and State Legitimacy: The Changing Nature of the American Execution Audience*, 36 *LAW & SOC’Y REVIEW* 607, 630 (2002).

<sup>27</sup> Robert Blecker, *Killing Them Softly: Meditations on a Painful Punishment of Death*, 35 *FORDHAM URB. LAW JOURNAL* 969, 976 (2005).

<sup>28</sup> Linders, *supra* note 26, at 629.

<sup>29</sup> RICHARD MORAN, *EXECUTIONER’S CURRENT: THOMAS EDISON, GEORGE WESTINGHOUSE, AND THE INVENTION OF THE ELECTRIC CHAIR* (2002).

<sup>30</sup> Banner, *supra* note 18, at 120. *See also* Blecker, *supra* note 27, at 976.

<sup>31</sup> Banner, *supra* note 18.

<sup>32</sup> Deborah W. Denno, *The Future of Execution Methods*, in *THE FUTURE OF AMERICA’S DEATH PENALTY: AN AGENDA FOR THE NEXT GENERATION OF CAPITAL PUNISHMENT RESEARCH* 489, (Charles S. Lanier, William J. Bowers, James R. Acker eds., 2009).

stantaneously destroy life.”<sup>33</sup> New York later became the first state to adopt electrocution as its sole method of execution.<sup>34</sup>

Yet even as other states began to follow New York’s lead and installed their own electric chairs, hanging did not disappear. This fact further complicated the cultural reception of botched executions. Where a hanging went awry, it added fuel to efforts to replace archaic death penalty methods and could be written off as a soon to be displaced vestige of an earlier era. Where electrocutions went wrong, those failures could be explained as regrettable glitches in a soon to be perfected, new technology. Botched executions served to focus attention only on the way America took life, not on the fact that it did so.

The increased focus on methods of execution is exemplified in two Supreme Court cases, *Wilkerson v. Utah* and *In re Kemmler*, the first of which involved a challenge to the firing squad, the other to electrocution.<sup>35</sup> In both cases, the Court held that the Eighth Amendment guaranteed freedom from “pain, terror, or disgrace” in punishment.<sup>36</sup> In *Kemmler*, it said that the Eighth Amendment bars any method of execution that causes “unnecessary” pain, violence, or mutilation to the body.<sup>37</sup> Executions would be unconstitutional, the Court determined, if they were “inhuman and barbarous, something more than the mere extinguishment of life”<sup>38</sup> Though the Court found both the firing squad and electrocution to be constitutionally acceptable, it concluded that “torture or a *lingering* death,” not the death penalty itself, constituted cruel and unusual punishment.<sup>39</sup> As the slogan of Fred Leuchter’s infamous execution hardware firm – American Engineering Inc. – would later announce, “Capital punishment, not capital torture.”<sup>40</sup>

Whether or not new methods of execution actually were less painful than hanging remained unclear. Linders describes, more specifically, the “unmistaken ambiguity around exactly *whose* humanity legislators and commentators have in mind” when they adapted new methods of capital punishment.<sup>41</sup> What is clear is that by the start of the twentieth century those methods had *to appear* less gruesome than hanging—at least to the few permitted to witness their operation. These shifts helped mask law’s violence, not eradicate it. They were nonetheless crucial in differentiating state imposed death from lynching and in satisfying middle-class reformers.

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<sup>33</sup> *Id.*

<sup>34</sup> Russell Canan, *Burning at the Wire: The Execution of John Evans*, in *FACING THE DEATH PENALTY: ESSAYS ON A CRUEL AND UNUSUAL PUNISHMENT* 67, (Michael L. Radelet ed., 1989).

<sup>35</sup> See *Kemmler*, 136 U.S. 436 (1890) and *Wilkerson v. Utah*, 99 U.S. 130 (1878).

<sup>36</sup> *Wilkerson*, 99 U.S. at 135.

<sup>37</sup> *Id.*

<sup>38</sup> *Id.* at 439.

<sup>39</sup> *Kemmler*, 136 U.S. 436, 447 (1890).

<sup>40</sup> Stephen Trombley, “Designing Death”, 43 *Grand Street* 33 (1992).

<sup>41</sup> Linders, *supra* note 26, at 637.

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In addition, the practice of state killing that emerged at the start of the twentieth century dispersed responsibility for the killing act. Channeling Robert Cover, Markus Dubber claims that “the modern system of capital punishment appears as one mad and futile scramble to deny personal responsibility for the necessarily violent aspect of law.”<sup>42</sup> In this process, the audience was the “epicenter” of the transformation in execution methods since it could either confer legitimacy on the executing authority or challenge it.<sup>43</sup> As Linders notes, “the struggle to control the execution audience is simultaneously an effort to control the perception and legitimacy of state-authorized killings.”<sup>44</sup>

Because privatization excluded most spectators from the execution site,<sup>45</sup> the press came to play an increasingly important role in that struggle. Then as now, media accounts of otherwise practically invisible executions held “up a magnifying looking glass to a precarious ritual that the authorities [take pains] to conceal from the general public.”<sup>46</sup> Reporters, in this way, became a primary audience for executions in general and especially for executions which were bungled.

At the end of the nineteenth and start of the twentieth century, botched executions, though not very frequent,<sup>47</sup> represented a potential threat to both the continued viability of hanging and the increasing popularity of death by electrocution. Whether that potential would be realized depended in large part on how newspapers chose to cover them. Press coverage of botched executions could uncover and broadcast the suffering and violence hidden behind the execution ritual. “The repeated history of botched executions,” Bienen asserts, “give[s] away the lie.”<sup>48</sup> Botched executions can turn organized, state-controlled killing into torture, solemn spectacles of sovereign power into spectacles of horror.<sup>49</sup>

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<sup>42</sup> Markus Dubber, *The Pain of Punishment*, 44 *BUFF. L. REV.* 545, 605-06 (1996).

<sup>43</sup> Linders, *supra* note 26, at 644.

<sup>44</sup> *Id.* at 614.

<sup>45</sup> WENDY LESSER, PICTURES AT AN EXECUTION 4 (1993). And yet, as Wendy Lesser emphasizes, capital punishment, “as a killing carried out in all our names, an act of the state in which we by proxy participate, is also the only form of murder that directly implicates even the witnesses, the bystanders.”

<sup>46</sup> Linders, *supra* note 26, at 618.

<sup>47</sup> Based on our work in putting together a complete archive of botched executions from 1890-2010, we estimate that approximately 3% of executions between 1900 and 1920 (we have no figures on the number of executions between 1890 and 1900) were botched (78 out of a total of 2477), with the rate behind slightly higher for hangings (69 out of a total 1791) and slightly lower for electrocutions (9 out of a total 675). In this period there were 11 executions by firing squad, none of which were botched.

<sup>48</sup> Leigh Bucanan Bienen, *Anomalies: Ritual and Language in Lethal Injection Ritual*, 35 *FORDHAM URB. L.J.* 857, 865 (2008).

<sup>49</sup> References to botched executions are frequently accompanied by direct witness accounts of the event (usually cited from newspaper articles). See Deborah Denno, *Getting to Death: Are Executions Constitutional?*, 82 *IOWA L. REV.* 319, 361 (1997).

### III. EXPANSION, COMPETITION, AND SENSATIONALISM IN THE AMERICAN PRESS

In the late nineteenth and early twentieth centuries, newspapers were the primary source of information for many Americans. As Shirley Biagi observes, “For the first 30 years of the 20th century – before radio and television – newspapers dominated the country. Newspapers were the nation’s single source of daily dialogue about political, cultural and social issues.”<sup>50</sup> To understand how they consumed and presented information about, and communicated representations of, botched executions, we must attend not only to the role they played as the public’s window into the world of the death penalty, but also to their profit-maximizing functions. Clearly, newspaper companies were in the business of selling a product. It is not surprising then that turn of the century newspapers employed “a range of creative language devices to produce short, attention-getting, highly memorable texts.”<sup>51</sup> Moreover, the language of newspapers was typically not only attention-grabbing but also “strongly emotionally loaded.”<sup>52</sup>

The role of early twentieth century newspapers is best understood within the context of the broader changes in American culture that we previously discussed. One telling symptom of these changes was the effort of a few states to prevent newspapers from covering executions at all.<sup>53</sup> Gag laws were an extension of the larger ethos of privatization that emerged in the second half of the nineteenth century. Newspaper companies, intent on selling copies and making money, saw the coverage of executions as one key to their success. Sales depended on having exciting, often melodramatic, news to report. All executions, and especially those that were botched, fit this description perfectly.<sup>54</sup>

The early twentieth century was “the era of the greatest newspaper competition for readers.”<sup>55</sup> At that time, New York had more than ten daily papers. Such intense competition meant that penny papers in particular had “to grab a bigger audience to survive.”<sup>56</sup> Innovations like the linotype machine, larger printing presses, cheaper paper-making techniques, and the telegraph, all enormously increased efficiency in printing.<sup>57</sup> It became feasible for large newspapers to emerge, and for prominent newspapers such as *The New York Times* to buy up smaller papers and consolidate business into one production facility.<sup>58</sup>

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<sup>50</sup> SHIRLEY BIAGI, *MEDIA/IMPACT: AN INTRODUCTION TO MASS MEDIA* 55 (2006).

<sup>51</sup> DANUTA REAH, *THE LANGUAGE OF NEWSPAPERS* 32 (1998).

<sup>52</sup> *Id.* at 93.

<sup>53</sup> John E. Hartman, *The Minnesota Gag Law and the Fourteenth Amendment*, *THE MINNESOTA HISTORICAL SOCIETY MAGAZINE* Dec. 1960 at 161.

<sup>54</sup> Biagi, *supra* note 50, at 12.

<sup>55</sup> *Id.*

<sup>56</sup> *Id.*

<sup>57</sup> JOHN D. STEVENS, *SENSATIONALISM AND THE NEW YORK PRESS* 62 (1991).

<sup>58</sup> *Id.* at 65.

## Gruesome Spectacles

Newspaper expansion and competition was further fueled by an increasingly literate American public. By 1900, more than nine of ten adults could read, though at a fairly low level.<sup>59</sup> Most people read “almanacs, weekly story papers, and dime (and then nickel) novels, all heavy on crime and scandal.”<sup>60</sup> These same readers supplied newspapers with a large readership. To compete for their attention, newspapers printed what most Americans at the time wanted to read: sensational stories full of crime and scandal. Biagi notes that newspapers of the period relied on “attention-grabbing crime headlines ... and highly emotional, exaggerated or inaccurate reporting that emphasizes crime, sex, and violence. By 1900 about one-third of the metropolitan dailies were following the trend towards yellow journalism.”<sup>61</sup> Stevens similarly argues that, by the 1890s, this type of melodramatic news reporting had become the norm.<sup>62</sup>

Joseph Pulitzer, publisher of *The New York World*, once said that to be successful “all New York journalism needed was a heavy dose of sensationalism,” and, as a result, he “sent reporters in pursuit of crime, sensation, and disaster stories, and told them to write in a racier narrative style.”<sup>63</sup> Other newspapers followed suit, and soon sensational media became the most common and profitable form of reporting. “The sensationalism of the average daily paper has, no doubt, created an appetite for things abnormal. A subscriber to a paper who has had a daily sensation dished up to him every morning resents it if that paper should fall short in its supply ... Certainly journals have developed in their readers a taste for blood in order to interest them, it must be necessary to provide fresh new abattoirs in which they may daily revel.”<sup>64</sup>

### IV. THE ULTIMATE MELODRAMA: NEWSPAPERS AND BOTCHED EXECUTIONS

Botched executions fit the needs of an increasingly sensationalist press to a tee.<sup>65</sup> They were abnormal, gruesome, and part of a larger narrative of

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<sup>59</sup> *Id.* at 63.

<sup>60</sup> *Id.*

<sup>61</sup> Biagi, *supra* note 50, at 65.

<sup>62</sup> Stevens, *supra* note 57, at 63.

<sup>63</sup> *Id.* at 69.

<sup>64</sup> *Id.* at 78.

<sup>65</sup> Today, we would expect wide variation in coverage of botched executions from newspapers of different sorts. We imagine that the treatment of botched executions by large national presses would differ from that of small-town papers, and we would also anticipate coverage to vary by region. In the first two decades of the twentieth century, however, this differentiation did not exist. As John Stevens notes: “It was extremely rare for one paper and not the other to report a crime; usually the coverage was quite similar.” (Stevens, *supra* note 57, at 69) For one, large publishing companies owned a variety of smaller regional newspapers. Also, with the rise of the Associated Press, it became quite normal for papers large and small from all over the United States to print virtually the same article. With the botched execution

blood and crime. While the length, style, and content of reports of botched executions varied considerably, news stories tended to use inflated rhetoric and provide detailed descriptions to convey the way the condemned died.<sup>66</sup> Death by botched execution was frequently deemed “revolting” by the press. This was the exact language used by *The Boston Globe* in its story about the botched electrocution of Antonio Ferraro in New York in 1900, who had been sentenced to die for his role in the 1898 killing of Luciene Mucho in Brooklyn.<sup>67</sup> The *Globe* reported that his “death was a revolting one.”<sup>68</sup> *The Atlanta Constitution* similarly called the botched hanging of Benjamin Snell in Washington, D.C. in 1900 “a spectacle that was most revolting.”<sup>69</sup>

*The Anaconda Standard*, of Anaconda, Montana, headlined its story about William Kemmler, the first person put to death by electricity in the United States, with “Horrible Death Scene” and promised a “Graphic Account of the Killing of the Unfortunate Murderer.”<sup>70</sup> It took several applications of 2000 volts of electric current to kill Kemmler who groaned and struggled throughout the procedure. Smoke rose from his head, and there was a smell of burning flesh and a curious crackling sound before he died.<sup>71</sup>

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of Frank White in 1904, for example, the *Chicago Tribune* and the *Washington Post*, but also the *Free Lance* from Fredericksburg, Virginia and the *Gainesville Sun*, all published versions of the same article. While some were shorter, or had been edited slightly, the articles were almost identical. This type of re-printing remained common throughout the period of our research.

<sup>66</sup> It should be noted that not all articles on known botched executions bring up the botched execution at all. These omissions are characteristic of certain types of botched execution and certain types of articles. First, our standards for what counts as a botched execution are quite inclusive (see Appendix One). Thus, any hanging which resulted in the condemned strangling to death rather than having his neck broken by the fall (sometimes determined by the length of time it took the prisoner to die) is included in our list of botched executions, as hanging protocol calls for the neck to break. However, this type of problem may not have been visibly apparent to those reporting on the execution, and articles on this type of execution tend not to mention that anything went wrong. On the whole, longer articles on visibly apparent botched executions almost always mention what went wrong and typically give a substantial amount of detail. Secondly, newswire-type articles of one to four sentences, without headlines, were a typical article style of the era. These articles, found most often in an entire column or page of similarly short news briefs, generally do not mention the botched execution, given the brief nature of the report. Thus, our analysis focuses most strongly on articles, not news briefs, regarding visibly botched executions.

<sup>67</sup> See *Ferraro Electrocuted*, S.F. CALL, Feb. 27, 1900.

<sup>68</sup> *Ferraro Died Hard, Five Shocks Required to Execute Him, Murderer Eight Minutes in Electric Chair Before Pronounced Dead*, BOS. DAILY GLOBE, Feb. 27, 1900.

<sup>69</sup> *Murderer Snell Dies on Gallows, Former Resident of Georgia Executed at Washington D.C. Killed a Girl of Thirteen, Murder Was One of Most Fiendish Known, Lizzie Weisenberger the Victim, He Had Ruined Her, and on Her Refusing to Live in His House Slew Her--Details of Crime*, ATLANTA CONST., June 30, 1900.

<sup>70</sup> *Horrible Death Scene*, ANACONDA STANDARD, Aug. 7, 1890.

<sup>71</sup> See Marlee Macloed, *The Electric Chair*, TRUTV,

[http://www.trutv.com/library/crime/notorious\\_murders/not\\_guilty/chair/6.html](http://www.trutv.com/library/crime/notorious_murders/not_guilty/chair/6.html).

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The execution of Kemmler, an illiterate, alcoholic, vegetable peddler in Buffalo who killed his common-law wife Tillie with a hatchet, was described by *The New York Times* as an “Awful Spectacle.”<sup>72</sup>

Descriptions like these were quite typical in newspapers of the day. Newspaper articles, from the mainstream New York and Boston presses to small-town journals, commonly used words such as “horrific,” “awful,” or “gruesome” to describe the scene of a hanging or electrocution gone wrong. Accompanying this rhetoric were detailed descriptions of the resulting death. The *Boston Globe* article on Ferraro’s execution bore the headline: “Ferraro Died Hard; Five Shocks Required to Execute Him; Murderer Eight Minutes in Electric Chair before Pronounced Dead.”<sup>73</sup> *The Atlanta Constitution* provided graphic details about Benjamin Snell’s death, stating that:

The affair was almost a decapitation. The heavy rope cut through the neck of the murderer and severed the windpipe and blood vessels, and practically pulverized the bones of the neck. The tough muscles at the back of the neck saved the total severance of the head from the body. Blood gushed from the severed arteries almost instantly, and dyed the white linen shirt and collar, and then flowed down the clothing, extending to the shoes.<sup>74</sup>

A small-town paper, *The Daily Capital Journal* of Salem, Oregon, reported that at the hanging of C.Y. Timmons, “the terrible plunge of six feet one inch, Timmons’ neck was not broken, and when he reached the end of the rope, the wound on his neck was torn open, and through this he breathed stertorously, continuing to breathe this way for several minutes.”<sup>75</sup> The article further noted the precise timing of each execution event: “At 12:27 today C.Y. Timmons was brought down from the death cell ... At 12:31 he was sent to eternity ... At 12:54 he was pronounced dead ... and at 1:01 he was taken down and put in the coffin.”<sup>76</sup> This level of detail was common in reports of botched executions during the late nineteenth and early twentieth century.

On the rare occasions when papers noted the reaction of witnesses to botched executions, they were described as “horrified” or “horror stricken.”<sup>77</sup> These characterizations generally fit in perfectly with the tenor of the larger story. As a result, they did not stand out and may not have drawn any real attention to just how uncomfortable witnesses to botched executions were with what they saw.

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<sup>72</sup> *Far Worse Than Hanging*, N. Y. TIMES, Aug. 7, 1890.

<sup>73</sup> *Ferraro Died Hard*, *supra* note 68.

<sup>74</sup> *Murderer Snell Dies on Gallows*, *supra* note 69.

<sup>75</sup> *C.Y. Timmons Pays All His Debts*, DAILY CAPITAL J., Feb. 26, 1909.

<sup>76</sup> *Id.*

<sup>77</sup> *Extreme Penalty Paid, Jesse Ruffin and Massie Hill Put to Death for Awful Crime, Hill Breaks Two Ropes and Displays Wonderful Nerve – Many Crimes Related*, FARMVILLE HERALD, May 18, 1907.

Most articles made some attempt to explain why executions were botched. However, rather than indicting the methods used to execute people or the death penalty itself, these articles often attributed problems, as they did in the Kinsauls case, to the actions/mistakes/malfeasance of a particular person. *The Spanish Fork Press* (of Spanish Fork, Utah) blamed the problem that occurred in the Timmons hanging on the hangman, who it said “bungled miserably.”<sup>78</sup> Reports of other botched executions, when they were not blaming the executioner, focused their attentions on specific attributes of the prisoner being executed (e.g. height or weight).<sup>79</sup> Thus, when Snell’s neck split open and blood spilt to the floor during his hanging, *The Atlanta Constitution* reported that “the flabby condition of Snell’s flesh ... was responsible for the cutting of the neck.”<sup>80</sup> In Ferraro’s case, *The New York Tribune* went as far as to claim that, while the electric chair had been tested and was in perfect condition, “Ferraro was of a brutish nature, and it has been the experience at Sing Sing that men of that stamp offer more resistance to the electric current than those of more delicate composition.”<sup>81</sup>

Occasionally, however, newspaper reports did point to some kind of technical failure. *The Anaconda Standard* (Anaconda, Montana) noted that at Kemmler’s execution, “imperfect registry of the current’s pressure or a faulty contact of the electrodes prevented instantaneous death.”<sup>82</sup> *The Dodge City Times* (Dodge City, Kansas) similarly explained what happened by mentioning a “slight defect in the electrical apparatus.”<sup>83</sup> Also following the Kemmler execution, a headline in *The Arizona Republican* announced that “The People of NY Excited and Denounce *That Mode of Inflicting Capital Punishment.*”<sup>84</sup> Here the emphasis is not on the penalty of death itself, but rather on the fact that a particular method of execution failed to live up to popular expectations.

Reports portraying those whose electrocutions were botched as victims of “scientific failure” reinforced the idea that this new technology had to be improved.<sup>85</sup> When hangings went wrong, articles frequently included explanations like: “the drop of seven feet with the running noose was too great for so heavy a man as Ketchum, who weighed about 170 pounds,”

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<sup>78</sup> *Condemned Murderer Was Slowly Chocked to Death, Bungling Hangman Adds to Horror of Execution of William Hayes at Montana State Prison*, SPANISH FORK PRESS, FEB. 26, 1909.

<sup>79</sup> See, e.g., *Narrow Escape from Bungle - Noose Slipped on the Neck of the Condemned Man, and He Was Slowly Strangled to Death*, PHILA. REC., May 9, 1900.

<sup>80</sup> *Murderer Snell Dies on Gallows*, *supra* note 69.

<sup>81</sup> *Antonio Ferraro Executed*, N. Y. TRIB., Feb. 27, 1900.

<sup>82</sup> *Horrible Death Scene*, *supra* note 70.

<sup>83</sup> *Legal Murder*, DODGE CITY TIMES, Aug. 15, 1890.

<sup>84</sup> *Kemmler’s Doom*, ARIZ. REPUBLICAN, Aug. 7, 1890 (emphasis added).

<sup>85</sup> *A Doctor to Blame*, PITTSBURGH DISPATCH, Aug. 7, 1890.

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suggesting that by more accurately calculating the length of the rope in a hanging, problems could be avoided.<sup>86</sup>

More often than not, newspaper reports of botched executions downplayed the pain and suffering of the condemned. They included such attenuating statements as “it is not believed, however, that he retained consciousness after the first charge” and “death was instantaneous. There was not even the twitching of a muscle.”<sup>87</sup> Returning again to Kemmler, *The Abilene Weekly* reported that he “was not dead after the first shock but probably did not gain consciousness.”<sup>88</sup> In the case of Elroy Kent, hanged in Vermont in 1912 for the murder of Delia Congdon, the rope broke and Kent fell to the floor before he was hanged a second time. Nonetheless, *The New York Times* reported that “he suffered no conscious thought and died from shock” after the first drop.<sup>89</sup> Statements like these reinforce an image of capital punishment as, if not always perfectly carried out, relatively humane and painless.

Newspaper articles, as they had in the Kinsauls’ case, frequently gave lengthy accounts of the events leading up to the botched execution, including detail after detail about the prisoner’s final meal, his or her conversations with clergy and potential last-minute discovery of religion, and dramatic descriptions of the condemned’s last words.<sup>90</sup> Many newspaper accounts emphasized the stoicism of the condemned throughout the execution process. Kemmler was described as “perfectly cool. He, by all odds, was the coolest man in the room,” according to *The Morning Call*, a San Francisco newspaper.<sup>91</sup> *The Daily Journal* of Salem, Oregon noted that Coleman Gillespie, who had often been described as a “wild and reckless young fellow” even before he murdered Christine Edson in 1899, “met his death with apparent unconcern.”<sup>92</sup> Similarly, *The Boston Daily Globe* said that William Clifford (hanged in 1900 in New Jersey) “met death coura-

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<sup>86</sup> *Black Jack's Head Severed From Body, Headless Trunk Pitched Toward Spectators and Blood Spattered the Scaffold, "Dig My Grave Deep," Last Words of Outlaw, The Trap Was Sprung and Jack Ketch's Rope Decapitated Him as Neatly as a Guillotine – Ketchum Wrote McKinley*, ATLANTA CONST., Apr. 27, 1901.

<sup>87</sup> *Antonio Ferraro Executed, supra* note 81. See also *Snell Put to Death, Paid Horrible Penalty for the Brutal Murder of Child, Victim's Father a Spectator, Murderer's Great Weight Almost Caused Decapitation – Went to His Doom Wearing Handkerchief About His Head and Muttering Incoherently – Condemned Man Finally Accepted Spiritual Advice – Funk Wins Cigars on a Wager with Warden*, WASH. POST, June 30, 1900.

<sup>88</sup> *Kemmler's Death*, ABILENE WKLY. REFLECTOR, Aug. 14, 1890.

<sup>89</sup> *Rope Breaks at Hanging, Accident Mars Vermont Execution but Slayer of Girl Died Swiftly*, N. Y. TIMES, Jan. 6, 1912.

<sup>90</sup> See, e.g., *Slow Torture*, MORNING CALL, Aug. 7, 1890.

<sup>91</sup> *Id.*

<sup>92</sup> *Coleman Gillespie, Hanged at Golden Beach, Curry County, Says Another Man Committed the Crime. All Efforts to Save Him from the Gallows were Unavailing – Governor Declined to Interfere*, DAILY J., Oct. 6, 1900. See also *Expiates His Crime. Coleman Gillespie Hanged in Oregon for Murder of Mrs. Edeon*, L.A. TIMES, Oct. 6, 1900.

geously.”<sup>93</sup> And accounts of the 1912 Wyoming execution of Joseph Seng, who helped spring the gallows trap door himself, said that he “met his death bravely, walking to the gallows with head erect and with a slight smile on his lips.”<sup>94</sup> By presenting the rituals of botched executions as nonetheless sensible and orderly, so sensible that even “fiendish murderers” complied with them, newspapers helped fit botched executions into the state’s desired logic of death as the appropriate response to extreme crime.

The way in which turn of the century newspapers depicted the crimes of those executed helped to further this logic. Coleman Gillespie’s murder of a fellow townswoman in Oregon was called by *The Daily Journal* “one of the most brutal and fiendish murders to be found in the annals of Curry County.”<sup>95</sup> *The Washington Post* headlined its story about Benjamin Snell, who was almost decapitated in the course of his hanging, “Paid Horrible Penalty for Brutal Murder of Child.”<sup>96</sup> *The Washington Post* noted that, though his death was horrific, Snell, “with his own life, paid the penalty for the life he had taken.”<sup>97</sup> In this way, the comparison of two violent deaths served not to undermine the logic of state killing, but to validate the execution of a vicious murderer.

From 1890 to 1920, articles on botched executions frequently included such explicit justifications for the death penalty. *The Chicago Tribune*, for example, suggested that it was appropriate for Antonio Ferraro to “pay the penalty” when he died after five shocks in the electric chair.<sup>98</sup> Baltimore’s *The Morning Herald* said of James Eagan’s 1900 death by hanging that “murderers expiate their crimes on the gallows.”<sup>99</sup> *The Keowee Courier* (Walhalla, South Carolina) reported that Warby Wine, “whose hands were stained with blood, had expiated his crime, and the majesty of the law was vindicated,” after he strangled to death on the gallows.<sup>100</sup> *The Daily Journal* reported that Coleman Gillespie’s execution “avenged” the brutal murder that led to his death.<sup>101</sup> Reporting on the 1902 double execution and botching of Joseph Wade’s hanging, *The San Francisco Call* wrote approvingly that “law takes two lives for one.”<sup>102</sup> In these reports it did not matter in the least how violently a prisoner met his death. Justice was

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<sup>93</sup> *Sentenced Seven Times to Hang, Edward Clifford, Who Committed Murder After a Protracted Spree, Finally Pays Death Penalty*, BOS. DAILY GLOBE, May 9, 1900.

<sup>94</sup> *Murderer Springs His Own Death Trap*, SPOKANE DAILY CHRON., May 24, 1912.

<sup>95</sup> *Coleman Gillespie, Hanged at Golden Beach*, *supra* note 92.

<sup>96</sup> *Snell Put to Death*, *supra* note 87.

<sup>97</sup> *Id.*

<sup>98</sup> *Calls to See Brother, Who Has Been Executed*, CHI. TRIB., Feb. 27, 1900.

<sup>99</sup> *Three Men Hanged, Murderers Expiate Their Crimes on the Gallows in Pennsylvania Cities*, MORNING HERALD, Jan. 10, 1900.

<sup>100</sup> THE KEOWEE COURIER, Walhalla, South Carolina, Oct. 31, 1900, p. 3.

<sup>101</sup> *Coleman Gillespie, Hanged at Golden Beach*, *supra* note 92.

<sup>102</sup> *Law Takes Two Lives for One - Murderers Dalton and Wade are Hanged in Portland*, S.F. CALL, Feb. 1, 1902.

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achieved. The fact that the execution was botched was made to seem irrelevant to the validity of the death penalty.

The apparent investment of the popular press in defending capital punishment takes on even greater salience when we remember the continued prevalence of lynching.<sup>103</sup> As Garland argues, the privatization of execution and efforts to improve the technology of killing were derived in part from the desire to again draw a sharp distinction between the lawless brutality of lynching and the death penalty.<sup>104</sup> “Viewed alongside the lynching ...” Garland contends, the “... death penalty suggests a radical inversion of form, a mirror image, a reformed present that vehemently rejects its past.”<sup>105</sup> Botched executions, in this context, might have been treated by newspapers as undermining this effort since they demonstrated the inability of the state to adequately control the violence of execution. In most cases, however, they were not.

Yet, in one way, news reports did remind readers – albeit implicitly – of the similarities between botched executions and lynchings. They did so by regularly highlighting the race of the condemned and of their victims. For example, *The Alexandria Gazette* called Elijah Chapman, who was hanged in Washington, D.C. in 1902, not simply a slayer, but a “negro slayer.”<sup>106</sup> News articles, from sources ranging from *The New York Times* to *The Hopkinsville Kentuckian*, continually pointed out when the “victim” of a botched execution was a “negro.”<sup>107</sup> Tallahassee, Florida’s *The Weekly True Democrat* noted that James Scudder, whose 1905 hanging in Tennessee was botched when the rope turned and failed to break his neck leaving him to strangle to death, was a “negro murderer.”<sup>108</sup> *The Boston Evening Transcript* described the botched execution of Henry Green in 1913 in these terms: “Negro Hanged at Capital. He Had Confessed to Assault on White Woman.”<sup>109</sup>

This focus on race was typical of an era in which racial tension remained high and the legacy of slavery was still painfully present. Nevertheless, by linking race and the gruesome spectacle of botched executions, news stories suggested that botched executions, like lynchings, “defiled and dismembered the human body in defiance of a modern humanist culture

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<sup>103</sup> We are not able to offer any evidence about the way newspapers covered lynchings nor about whether that coverage was similar to, or different from, their coverage of botched executions. Such a comparison would, no doubt, be interesting, but it is beyond the scope of our project and it is not central to our argument.

<sup>104</sup> *Law Takes Two Lives for One*, *supra* note 102.

<sup>105</sup> Garland, *Peculiar Institution*, *supra* note 24, at 34.

<sup>106</sup> *Hanged*, ALEXANDRIA GAZETTE, May 23, 1902.

<sup>107</sup> *The First Execution Under New Law Almost Causes Two Deaths Instead of One, Escape for Doctor Moss., James Buckner Pays the Penalty for the Murder of Lebanon Policeman*, HOPKINSVILLE KENTUCKIAN, Jul. 11, 1911.

<sup>108</sup> *Chanted “Old Time Religion:” Two Negro Murderers Pay Penalty for Crimes at Nashville, Tenn.*, WKLY. TRUE DEMOCRAT, Apr. 7, 1905.

<sup>109</sup> *Negro Hanged at Capital. He Had Confessed to Assault on White Woman – “Rum and Dope did This,” Are His Final Words*, BOS. EVENING TRANSCRIPT, June 9, 1913.

that regarded it as sacrosanct.”<sup>110</sup> Ultimately those stories conveyed “disturbing truths about the potential for raw violence that resides in American race relations and traditions of popular justice.”<sup>111</sup>

Not unlike the mobs who carried out lynchings in the name of innocent whites and against black criminals, “brutes,” “fiends,” and the perpetrators of “inhuman atrocity,”<sup>112</sup> newspaper accounts of botched executions ascribed a monstrous character to condemned prisoners.<sup>113</sup> *The Los Angeles Times* called Santiago Ortiz, whose hanging was botched in Arizona in 1900, “as low a specimen of humanity as ever existed”<sup>114</sup> while *The Richmond Dispatch* portrayed Tom Jones, whose hanging was botched in North Carolina that same year, as a “fiend.”<sup>115</sup> “Brutal slayer” was the term *The Seattle Star* chose to describe Martin Stickler after his botched execution in 1901.<sup>116</sup>

In the end, ewspaper articles on botched executions did not equate state killing with the lynchings of the American South. Instead, newspapers tried to separate the death penalty from lynching by maintaining that proper revenge can be obtained through law even when executions were botched. As Sarat notes, “if legitimacy is to be preserved, the state’s violence must, in the daily operations of the death penalty system, seem different from lawless violence.”<sup>117</sup>

## V. TWO STORIES: THE CULTURAL RECEPTION OF BOTCHED EXECUTIONS, 1890-1920

At a crucial time in the history of America’s death penalty, the gruesome spectacle of botched hangings and electrocutions had the potential to

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<sup>110</sup> Garland, *Peculiar Institution*, *supra* note 23, at 32.

<sup>111</sup> *Id.* at 30-31.

<sup>112</sup> *Id.* at 31.

<sup>113</sup> This paradigm of good versus evil, white versus black, pure versus deranged, however, is by no means confined in the criminal justice world to public torture lynchings. The dehumanization of criminals condemned to capital punishment, the turning of these men and women into monsters, is a relatively common phenomenon. Sarat argues that to this day, racial symbols used in trials which demonize young black men create a racialized “other.” AUSTIN SARAT, *WHEN THE STATE KILLS: CAPITAL PUNISHMENT AND THE AMERICAN CONDITION* 18 (2001). In modern-day trials, Sarat argues that prosecutors use racial stereotypes to create a racial “other” who is unreasonable and dangerous, serving to make state killing appear necessary. This same phenomenon is clearly evident in the differentiation between white victims and black killers in newspaper reports on botched executions.

<sup>114</sup> *Happenings at Yuma: Hanging of Murderer Ortiz*, L.A. TIMES, Nov. 21, 1900.

<sup>115</sup> *Tom Jones Hanged, He Met His Death at Raleigh Yesterday Morning. Had Killed Six People, A Woman and Her Five Children Were His Victims – A History of the Frightful Crime, Which Shocked North Carolina*, RICHMOND DISPATCH, Sept. 1, 1900.

<sup>116</sup> *Rope Avenges Three Murders, Martin Stickler Pays the Penalty at Kalama this Morning. Brutal Slayer of Shankey and the Aced Knapps Plunges into Eternity---Dies Without a Tremor*, SEATTLE STAR, Jan. 25, 1901.

<sup>117</sup> Sarat, *When the State Kills*, *supra* note 113, at 21.

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destabilize, if not undermine, capital punishment. The story of their cultural reception and transmission in popular culture is a story of critique. Yet, ultimately, it also is a story of recuperation and continuing legitimation. Botched executions were newsworthy because they fit extremely well into the style of newspapers which day in and day out printed stories overflowing with melodrama. And, in a story, on a page, in a newspaper where everything was sensationalized, it was difficult for stories of botched executions to stand out. By sensationalizing everything, from the crime to the last meal to the execution itself, the particular impact of executions gone wrong was effectively muted.

Newspaper reports of botched executions generally folded botched executions into a logic that worked to sustain the legitimacy of the death penalty. They situated such executions within a framework that justified capital punishment as the proper way to avenge violent crimes. Problems were attributed to unavoidable human errors or technological breakdowns, and executions, even when they became gruesome spectacles, generally did not seem to inflict undue suffering on the condemned. Moreover, news reports did not make explicit comparisons to lynching even when they racialized the execution scene. In this way, newspaper stories about botched executions in late nineteenth and early twentieth century America affirmed the boundary between law's violence and violence outside the law and, in so doing, tacitly supported capital punishment.<sup>118</sup>

Yet, the mere fact that the death penalty's justifications - the ways the condemned cooperated in their own executions, and their alleged lack of suffering were endlessly reiterated when newspapers reported botched executions - points, we think, to another possibility and perhaps to a deep discomfort with the death penalty. Such reiteration reminds us that the legitimacy of capital punishment, then as now, could not be taken for granted. Headlines like *The New York Times's* "Antonio Ferraro Executed. He Went Quietly to His Death, Much to the Relief of Molineux and Others in Sing Sing" demonstrate the very real possibility that the logical, orderly script of state killing could come undone.<sup>119</sup> As Sarat has argued, "In large measure, law seeks to authorize and legitimate its bloodletting as a lesser or necessary evil and as a response to our inability to live a truly free life without external discipline and restraint. Nonetheless, the proximity of law to, and its dependence on, violence raises a nagging question and

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<sup>118</sup> While newspaper coverage did not differ by size or region, one still might wonder why newspapers in general chose to offer the recuperative narrative and thus legitimate capital punishment. Why did the papers not stick to the sensationalist narratives that Stevens claims were so popular? The answer may lie in exactly this drive to play to popular desires. As Shirley Biagi argues in *MEDIA/IMPACT*, the early twentieth century was "the era of the greatest newspaper competition for readers." (Biagi, *supra* note 50, at 55) These newspapers had to play to an audience that was interested in blood and gore, but for whom, on a deeper level, the legitimacy of capital punishment was not in question. Thus, both narratives ultimately played to audiences' desires, and helped gain readership.

<sup>119</sup> *Antonio Ferraro Executed*, *supra* note 81.

a persistent doubt about whether law can ever be more than violence or whether law's violence is truly different from, and superior to, what lurks beyond its boundaries.”<sup>120</sup>

Botched executions bring that question and doubt to the forefront. Their cultural reception in turn of the twentieth century newspapers reveals, we believe, deep unease about the ability of the law to differentiate its violence from violence outside the law. While newspaper reports of botched executions generally shored up the legitimacy of capital punishment during a period of enormous importance in America's death penalty history, they also signaled the deeply-rooted anxiety that necessarily attached to the practices of the killing state.

#### APPENDIX ONE: STANDARDS FOR IDENTIFYING BOTCHED EXECUTIONS

An **execution of any kind** is botched if any of the following occur:

- 1) A technical problem with the execution equipment less than a day before the scheduled execution causes a delay.
- 2) The condemned resists prison staff violently and has to be subdued physically at the site of the execution.
- 3) The condemned bleeds profusely during the execution for any reason whatsoever, excepting of course a firing squad.
- 4) Prison staff decide to change execution protocol as a result of this particular execution.
- 5) The convict survives.

A **long-drop hanging** is botched if any of the following occur:

- 1) The rope breaks after the drop.
- 2) The condemned does not fall cleanly through the trap, hitting his head or another body part on the scaffold platform.
- 3) The drop fails to break the convict's neck.
- 4) The drop partially or fully decapitates the convict.

An **upright-jerker hanging** is botched if any of the following occur:

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<sup>120</sup> Austin Sarat, *Abolitionism as Legal Conservatism: The American Bar Association, the Death Penalty and the Continuing Anxiety about Law's Violence*, 1 *THEORY & EVENT* (1997). [http://muse.jhu.edu/journals/theory\\_and\\_event/v001/1.2sarat.html](http://muse.jhu.edu/journals/theory_and_event/v001/1.2sarat.html).

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- 1) The rope breaks after the weight is released.
- 2) The release fails to break the convict's neck.
- 3) The release partially or fully decapitates the convict.

An **electrocution** is botched if any of the following occur:

- 1) More than four shocks are required to kill the convict.
- 2) One or more of the shocks cause fire or smoke.
- 3) A strong odor of burning flesh fills the execution chamber.
- 4) The condemned is removed from the chair between shocks.

A **lethal gassing** is botched if any of the following occur:

- 1) The convict remains conscious for over three minutes after the activation of the cyanide tablets.
- 2) The convict remains alive for over ten minutes after the activation of the cyanide tablets.
- 3) The convict reacts with extraordinary violence (screaming, seizing, etc.) to the lethal gas.

A **lethal injection** is botched if any of the following occur:

- 1) The prison staff has difficulty finding a vein for the IV line, especially if the convict has to help the executioner.
- 2) The convict displays an unusually strong physical reaction to the drugs.
- 3) The IV line gets clogged.
- 4) The needle pops out of the vein during the course of the execution.
- 5) Death takes longer than 12 minutes after the drugs begin to flow.
- 6) Prison officials are forced during the course of the execution to use more than the standard dose of one of the drugs.

## APPENDIX TWO: BOTCHED EXECUTIONS FROM 1890 TO 1920

August 6, 1890. New York. **William Kemmler**. Electrocution. After the first shock failed to kill Kemmler, the executioners administered a second jolt. Kemmler began to bleed, and the room was filled with the smell of burnt flesh and hair.

July 27, 1893. New York. **William G. Taylor**. Electrocution. The electric chair in Auburn Prison failed to kill Taylor on the first shock. In fact, the prison dynamo broke down, and it took an hour to repair the system for the second, fatal jolt.

January 10, 1900. Pennsylvania. **James Eagan**. Hanging. Spectators to the execution were horrified by severe bleeding that “smeared the rope crimson.” Doctors present confirmed death fifteen minutes after the drop.

February 10, 1900. New Jersey. **James Brown**. Hanging. The *New York Times* described his execution as “brutal and clumsy.”

February 27, 1900. New York. **Antonio Ferraro**. Electrocution. The chair at Sing Sing Prison took five shocks and over eight minutes before the attending physician could pronounce death.

April 25, 1900. Tennessee. **Sonnie Crain**. His neck was not broken when he fell through the trap, and he strangled to death. He was cut down eight minutes after the sheriff sprung the trap.

May 8, 1900. New Jersey. **William Clifford**. Hanging. Before the execution Clifford expressed hope that the hangman would not bungle his execution like he had Brown's. After the drop, the rope nearly slipped off Clifford's neck, almost revealing his face to the horrified crowd. Clifford eventually died by strangulation.

June 1, 1900. New Mexico. **Jose P. Ruiz**. Hanging. Ruiz did not break his neck during his fall and it took twenty-three minutes for him to strangle to death.

June 30, 1900. District of Columbia. **Benjamin Snell**. Hanging. Snell, an especially heavy man, was nearly decapitated by the drop. The extra-wide rope cut through Snell's windpipe, carotid arteries, and vertebra, leaving his body hanging only on the muscles at the back of his neck.

August 31, 1900. North Carolina. **Tom Jones**. Hanging. Jones was hanged for murder in Raleigh, North Carolina. The drop fell at 10:29 in the morning. Jones's neck was broken in the fall of about six and a half feet. However, he was not pronounced dead until 10:43. There was, according to the *Charlotte Observer*, “much struggling of the body and limbs.” The failure of the execution to cause immediate death was attributed to Jones's light weight.

September 27, 1900. Tennessee. **A. Dillard Warren**. Hanging. Before the trap was sprung, the noose had to be adjusted because Warren said it wasn't right. When the trigger on the trap was pulled, the trap failed to release. Warren stated, “I reckon I had better get off.” He got off the trap, and the scaffold was rearranged. The trap was sprung again, and this time Warren fell through. However, Warren grabbed at the rope with his tied hands, and the four-foot drop was not enough to break his neck. He strangled to death, and was cut down after sixteen minutes.

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September 28, 1900. North Carolina. **Archie Kinsauls**. Hanging. Kinsauls was very light at only 110 pounds on the day of his execution. Sampson County, NC had only a stepladder for its gallows, and the fall proved insufficient to break Kinsauls's neck. In addition, Kinsauls was now bleeding profusely from partially healed wounds from a recent suicide attempt. Officials cut him down, forced him up the ladder again, and repeated the drop, this time with more success.

October 6, 1900. Oregon. **Coleman (Coalman) Gillespie**. Hanging. six-foot drop failed to break Gillespie's neck, and he slowly strangled before the witnesses. Death was announced fifteen minutes after the drop.

October 26, 1900. South Carolina. **Warby Wine**. Hanging. A hitch in the mechanism in Orangeburg, SC prevented a full and swift drop, and Wine eventually died by strangulation.

November 16, 1900. Arizona. **William Halderman**. Hanging. While his brother Thomas had his neck broken by the fall, William's neck was not broken and so his death was caused by shock, nerve compression, and strangulation.

November 16, 1900. Arizona. **Santiago Ortiz**. Hanging. Ortiz's neck was not broken but only partially dislocated by his fall.

December 21, 1900. Virginia. **John Holden**. Hanging. After the drop, Holden, convicted of attempted rape, clearly remained conscious, drawing his legs into his body several times and twitching visibly. He eventually died by strangulation.

January 25, 1901. Washington. **Martin Stickle**s. Hanging. The force of the drop partially severed the convict's head from his shoulders. Blood covered his clothing. Death followed quickly.

April 26, 1901. New Mexico. "**Black Jack**" **Tom Ketchum**. Hanging. The rope fully severed Ketchum's head. The outlaw's body fell to the ground doubled over, and horrified spectators watched blood spurt out intermittently.

July 5, 1901. Florida. **William Williams, Jim Harrison, Belton Hamilton, and John Simmons**. Hanging. Four black men were hanged in Vernon, Florida. The drop broke only one neck; the other three strangled to death. Newspaper coverage from the time does not specify which convict broke his neck.

August 6, 1901. Tennessee. **Nathan Caruthers**. Hanging. Caruthers fell smoothly, but the knot in the noose slipped to the back of his neck, and his neck did not break. Caruthers strangled to death, and his body quivered. He was cut down fourteen minutes after he fell.

January 31, 1902. Oregon. **Joseph Wade**. Hanging. The drop failed to break his neck. Wade was pronounced dead fifteen minutes later.

March 20, 1902. Mississippi. **Will Lanier**. Hanging. Full decapitation.

April 4, 1902. Florida. **Moses Robertson**. Hanging. Robertson was hanged in Jacksonville. The drop did not break Robertson's neck, and the man dangled with legs twisting and kicking convulsively. One of his arms was loosened from the straps and Robertson was able to remove the black cap from his face. He waved it in the air several times. It was over fifteen minutes before Robertson was pronounced dead.

May 23, 1902. District of Columbia. **Elijah Chapman**. Hanging. His neck was not broken in the fall. Chapman's body twitched for several minutes after the trap was sprung.

August 2, 1902. Florida. **George Robinson**. Hanging. At the drop, the rope snapped and Robinson fell to the ground. Now bleeding from his mouth, nose, and neck but still conscious, he was led back up the scaffold. After a second drop with a new rope, he eventually died by strangulation.

September 19, 1902. South Dakota. **Ernest Loveswar** (**Asaapila**). Hanging. Loveswar was hanged in Sturgis, South Dakota. According to the *Minneapolis Journal*, the execution was "bunglingly performed." The first drop was a failure and Loveswar was hauled up through the trap. The noose was adjusted and he strangled slowly.

February 20, 1903. North Dakota. **Jacob L. Bassanella**. Hanging. The drop failed to break his neck. Bassanella drew his legs up to his chest three times. Death followed by strangulation in seven and one-half minutes.

March 27, 1903. Oregon. **Alfred Belding**. Hanging. The condemned hit his head on the platform as he dropped through the trap. Nevertheless, his neck was broken.

July 31, 1903. Arizona. **Francisco Renteria**. Hanging. Renteria's neck was not broken by his fall and so he died by strangulation.

December 27, 1903. Philippines. **Nicholas Ancheta et al.** Garrote. Four condemned inmates in the Philippines, then a U.S. territory, were left in the gruesome device for over four hours. Their unconscious forms were then taken to a nearby Church to be picked up by relatives. A few hours later, three of the four were awake and asking for water, the fourth being actually dead. One of the three later died from shock. The two survivors were freed.

December 29, 1903. New York. **Frank White**. Electrocution. On December 29, Frank White, a black man, was put to death in the electric chair at the state prison of Auburn, New York. Six contacts, each of 1,740 volts  $7\frac{1}{2}$  amperes, were required to kill White. After the fourth contact a strange gurgling in his throat shocked and horrified both attending physicians and spectators. Even after the fifth contact, the stetho-

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scope still measured cardiac action. During the fifth and final shock the electrode was said to have flashed brilliantly as the odor of burning flesh and hair filled the execution chamber.

February 23, 1904. Montana. **James Martin**. Upright-jerker. The force of the counterweight drop proved insufficient to break the convict's neck. Martin pulled his knees up to his chest and took ten deep breaths after the cord was cut. Death took fifteen minutes.

April 22, 1904. Illinois. **Peter Neidermeyer**. Hanging. Peter Neidermeyer, the leader of three "Chicago bandits," was hanged in that city. He was reported to have been "crazed" at the sight of the gallows and had to be carried to his death. Too weak to stand on his own, Neidermeyer was hung from a chair perched on the platform. The executioner neglected to ask the condemned man for any last words. As the trap fell, the chair was removed from behind and the body shot downward. The shroud covering Neidermeyer's face however was partly disarranged and the "fearful muscular struggles" of the dying man continued for some fifteen minutes in full view of horrified spectators.

June 17, 1904. Ohio. **Mike Schiller**. Electrocutation. Mike Schiller's execution was termed "botched and brutal" under a Youngstown, Ohio newspaper headline. On June 17, fifty witnesses saw the death of Schiller in a Columbus death chamber. It was necessary to apply the current five times. After each, Schiller groaned and his body stretched and strained the straps of the electric chair. According to reporters, Schiller died on the last contact by partial cremation. At the points of contact, flesh sizzled and burned for several minutes as death surrounded the body.

July 28, 1904. Tennessee. **Ben Springfield**. Hanging. Hanged in the jail yard in Jackson, Springfield's neck was not broken by his fall, and he strangled to death.

March 23, 1905. Pennsylvania. **William J. Byers**. Hanging. On the morning of March 23, 1905, two attempts were needed to kill William Byers at the gallows in a Pittsburgh jail yard. When the trap fell the first time, the noose was unknotted and Byers fell to the ground. There was a red mark around the convicted man's neck and he obviously struggled painfully as he was returned to his cell. Soon after, Byers was hanged for a second time. He was pronounced dead twelve minutes after the trap fell.

April 5, 1905. Tennessee. **James Scudder**. Hanging. The rope around Scudder's neck turned, and failed to break his neck, so he strangled to death.

May 5, 1905. Montana. **Herbert Metzger**. Upright-jerker. The force of the counterweight drop proved insufficient to break the convict's neck. Metzger "convulsed" and "his shoulders drew upwards." Death took eleven and one-half minutes.

May 8, 1905. Missouri. **William Rudolph**. Hanging. The drop failed to break Rudolph's neck, and he died by strangulation after fourteen minutes.

May 13, 1905. Virginia. **Cloyd Hale**. Hanging. The drop failed to break Hale's neck; death by strangulation followed in fourteen minutes.

June 3, 1905. Washington. **Henry Arao**. Hanging. Probably due to Arao's light weight, the drop failed to break his neck. Death followed by strangulation.

July 17, 1905. New York. **James Breen**. Electrocution. Breen was executed at Sing Sing Prison. During the first shock, water from a wet sponge from the helmet dropped down, forming an arc of light above the collar of his shirt. The collar was slightly burned.

July 18, 1905. Tennessee. **Abraham Miles**. Hanging. Miles's neck was not broken by his fall. He convulsed and gurgled as he strangled to death on the rope.

August, 1905. New Jersey. **Gentz**. Hanging. Following the hanging of the murderer Gentz in the Hudson Country jailyard, Reverend E. A. Meury reported that the man, with a prearranged movement of his fingers, signaled that he was still conscious after the drop. His botching precipitated widespread controversy in New Jersey over the continued use of hanging.

October 27, 1905. Florida. **Edward Lamb**. Hanging. Lamb was hanged in Bradentown, Florida. It was necessary to drop him twice before he was formally pronounced dead.

December 9, 1905. Vermont. **Mary Rogers**. Hanging. Mary Rogers was hanged for the murder of her husband in Windsor, Vermont. The noose was apparently left a bit too long because Rogers's toes touched the floor when the drop fell. Due to this mishap, it is questionable whether her neck was actually broken. Some reports note that Rogers was not cut down after the fall, the noose was removed from around her neck - taking with it a piece of the woman's hair.

December 22, 1905. New Jersey. **Edwin Tapley**. Hanging. Edwin Tapley was hanged for murder at the gallows of Jersey City on December 22, 1905. He died of strangulation.

February 13, 1906. Minnesota. **William Williams**. Hanging. Williams was the last man to be hanged in Minnesota. The execution was marred by a miscalculation of rope length. The rope stretched, his feet touched the ground. In the end, Williams was hoisted up to strangle for over fifteen minutes.

February 15, 1906. Pennsylvania. **Jacob Hauser**. Hanging. Hauser's death was termed "one of the most sickening executions ever witnessed in Pennsylvania" by a *Los Angeles Times* headline. Hauser's

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neck did not break with the fall and he was left to strangle for ten minutes before he was pronounced dead.

March 30, 1906. Maryland. **Issac Winder**. Hanging. Winder was hanged in Baltimore. It was by no means an easy affair. In sight of a riotous mob of 2,000, Winder reportedly fought five men with the force of a “maniac” in order to avoid the gallows. Winder sank down on the floor of the trap and refused to rise. It took six men to eventually string him up and kill him.

April 20, 1906. Montana. **Lu Sing**. Upright-jerker. The force of the counterweight drop proved insufficient to break the convict’s neck. Death followed by strangulation in fifteen minutes.

May 25, 1906. New Mexico. **John Medlock**. Hanging. Medlock’s neck was not broken by his fall and it took thirteen minutes for him to strangle to death.

December 21, 1906. Missouri. **Joda Hamilton**. Hanging. The hanging of Joda Hamilton was termed a “horror” by the *Lewiston Morning Tribune*. Hamilton, the twenty year old son of a farmer, was put to death in Houston, Missouri on December 21, 1906. The first rope broke and spectators watched horrified as Hamilton's body writhed in pain on the ground below the gallows. Partially conscious, he was lifted and carried back to the gallows. The second attempt at his life was successful. Hamilton was pronounced dead shortly after the trap was sprung.

January 10, 1907. Tennessee. **John Thomas**. Hanging. The fall did not break Thomas’s neck. His legs and shoulders convulsed for several minutes as he strangled to death.

January 19, 1907. Arizona. **Clement Leigh**. Hanging. Leigh was bleeding and appeared “ghastly” during his execution because he hit his head against a metal projection in the bars of his cell when he learned he was to be executed.

February 15, 1907. Virginia. **Massie Hill**. Hanging. Massie Hill was executed at the gallows in Farmville, Virginia on the morning of February 15, 1907. After the trap was sprung the first time, the rope snapped and Hill fell to the ground in front of the stairs leading up to the platform. He did not lose consciousness and the noose was removed from his neck. When asked if he was much hurt, Hill responded that he was not, but that if the officers wanted him to walk back up the stairs they would have to remove the strapping around his legs. The rope was adjusted once more and again the trigger was pulled. Hill's body shot down past the swinging door. Nonetheless, the crowd looked on horrified as the rope again split into several pieces. Fifteen minutes later, Hill was pronounced dead on the ground where he lay.

April 29, 1907. Texas. **John Armstrong**. Hanging. Armstrong was hanged in Columbus, Texas. When the trap was sprung, his feet

touched the ground and it was necessary for the officers on the scaffold to hold him up.

July 19, 1907. Ohio. **Henry White**. Electrocutation. White was executed in the state prison of Columbus, Ohio. The *Free Lance* (out of Fredericksburg, Virginia) called the electrocution a “horrible fiasco.” The first two shocks failed to kill White. Witnesses watched as he writhed in agony, his strained muscles nearly bursting through the straps of the electric chair. With the third shock, a sheet of flame enveloped him. Nevertheless, the current was continued for several minutes. When it was finally stopped, physicians declared him dead.

August 28, 1907. Pennsylvania. **Carmine Renzo**. Hanging. Renzo was put to death in Indiana, Pennsylvania in the first execution in that country for more than twenty years. The rope snapped on the first attempt. Renzo, half-dead, was carried to the platform once more. The second attempt was a success.

January 3, 1908. Kentucky. **Clarence Sturgeon**. The nineteen year-old Sturgeon was hanged in Louisville, Kentucky. First, Sturgeon and witnesses were forced to wait for an excessive amount of time before the execution due to a malfunction with the machinery. Then, Sturgeon’s neck was not broken in the drop, and he strangled to death for seventeen minutes.

January 11, 1908. Tennessee. **Peter Turner**. Hanging. The night before his execution, Turner tried to commit suicide by slashing his wrists and neck, which caused his execution to be delayed by an hour. When Turner did fall through the trap, his neck wounds burst open, causing considerable amounts of blood to spurt out from his neck as he hung from the rope.

June 15, 1908. Montana. **George J. Rock**. Upright-jerker. The force of the counterweight drop proved insufficient to break the convict’s neck. Death followed by strangulation in ten minutes.

October 23, 1908. Louisiana. **Jacques Pierre**. Hanging. According to his hangman, it was apparently Jack Pierre's “own fault” that his neck was not broken in the fall that was to kill him. Because Pierre moved his head after the noose was adjusted, the knot slipped around the back of his neck.

February 26, 1909. Oregon. **C. Y. Timmons**. Hanging. During the alleged crime that sent him to the gallows, Timmons suffered a severe razor wound to his neck that partially severed his trachea. This wound was not fully healed on the date of his execution, and the force of the fall reopened the wound. Blood poured out, drenching his body, and Timmons continued to breathe through the hole in his neck “for some time.”

April 7, 1909. Montana. **William A. Hayes**. Upright-jerker. The force of the counterweight drop proved insufficient to break the convict’s

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neck. Hayes twitched convulsively and clutched at his neck. He strangled to death after eight minutes.

April 12, 1909. New York. **Barnard Carlin**. Electrocution. The execution, reportedly, would have been one of the quickest on record had it not been for a mishap just as the current was turned on. When the signal was given and the current turned on, there was no response from Carlin. It was soon determined that the electrode attached to Carlin's right leg had fallen to the floor—no circuit had been formed.

May 13, 1910. Washington. **Richard Quinn**. Hanging. He was eventually strangled even after asking to be dropped again when his neck was not broken on the first attempt.

September 9, 1910. Oregon. **Isaac B. Harrell**. Hanging. The drop severed the right jugular vein, and "great quantities of blood spurted from his neck." He was pronounced dead after only three minutes, his death presumably hastened by loss of blood.

December 2, 1910. Arizona. **Rafael Barela**. Hanging. Barela's neck was not broken by his fall and it took twenty minutes for him to strangle to death.

July 8, 1911. Kentucky. **James Buckner**. Electrocution. Buckner was put to death in the first electrocution to occur at the state penitentiary in Eddyville, Kentucky. It was a strange event—nearly taking the life of two men instead of one. Prison physician R.H. Mors, apparently ignorant to the warning cries of other officers, narrowly escaped death by electrocution. He approached Buckner to check his pulse before the current had been shut off.

January 6, 1912. Vermont. **Elroy Kent**. Hanging. Elroy Kent was hanged at the state prison in Windsor, Vermont. When the drop fell, the rope snapped under the weight of the condemned man. The rope was re-attached to the gallows and Kent was made to hang for another seventeen minutes after the attending physician found a partial pulse. The body was then cut down. According the *Boston Globe* report, the rope that broke under the weight of Elroy Kent was reportedly the same rope that stretched and allowed Mary Rogers (executed in 1905) to "fall to the ground."

May 24, 1912. Wyoming. **Joseph Seng**. Hanging. The drop failed to break his neck. He died by strangulation in nine minutes and forty-five seconds.

June 9, 1913. District of Columbia. **Nathaniel Green**. Hanging. The *Washington Post* called the 1913 hanging execution of Nathaniel Green "revolting." Members of Congress were at the time considering the substitution of electrocution or shooting for hanging in the District. The Green execution provided "striking support."

April 24, 1913. Pennsylvania. **John Harris**. Hanging. Harris was executed in Uniontown, Pennsylvania. The rope was about three feet too long. With the rope around his neck, Harris fell to the ground in front of the scaffold—landing on his knees and attempting to rise. The sheriff and his deputies quickly lifted Harris and held him hanging for eighteen minutes before he finally died of strangulation.

July 30, 1915. New York. **Charles Becker**. Electrocution. Becker was executed in the electric chair at Sing Sing in 1915. As the executioner pulled the lever and the current turned on, Becker's large body tautened and surged against the leather straps of the chair. As a result, the straps were loosened and the ensuing scene reportedly horrified witnesses. Moreover, the heavy belt that is meant to be fastened across the chest of the condemned was instead fastened across Becker's arms. With the jerk of Becker's body, the head and chin piece slipped, revealing his distorted face to the room of spectators. In the end, it took three shocks to kill him.

September 3, 1915. New York. **Thomas Tarpy**. The British veteran took five shocks from the electric chair at Sing Sing before he was pronounced dead. One of the guards exclaimed, "My God! What a Man!"

August 11, 1916. Wyoming. **Wilbur Palmer**. Hanging. The drop failed to break his neck. He died by strangulation in eight minutes.

September 13, 1916. Tennessee. **Mary the Elephant**. Hanging. On September 12, Mary, a large circus elephant, became enraged by a bull hook and killed one of her trainers in Erwin, Tennessee. Mayor Miller and Sheriff Hickman arrested the animal, and it was determined that the elephant would be hanged for her crime using a construction crane and heavy chain. The first chain broke, and Mary fell to ground, breaking her rear hips. The second chain held, and Mary strangled to death.

December 5, 1919. Maryland. **George Cummings**. Hanging. Cummings, a black man, was hanged in Upper Marlboro, Maryland in 1919. Cummings was pronounced dead sixteen minutes after the drop fell. The seven-foot drop was not sufficient to break the man's neck. He died of strangulation.

# Feminist Engagement and the Museum

Yxta Maya Murray\*

## ABSTRACT

*One day in the summer of 2011, Los Angeles law professor Yxta Maya Murray visited the Tate Britain and was shocked to see there Cathy Wilkes' installation (We are) pro-choice, a phantasmagoria involving a "weeping" naked mannequin sitting on a toilet, as well as a ladder and some banged up kitchenware. Murray gleaned that something feminist was in the offing, but couldn't tell quite what that might be. It seemed evident that Wilkes was making a case that women are miserable in today's brutalist western-capitalist society. However (she wondered), were there any other, more hopeful, conclusions to draw from the work? Pro-choice sent her off on a six-months long adventure of trying to understand this amazing art – intellectual travels that drew her to the lands of French/Bulgarian feminist Julia Kristeva, U.S. legal theorist Drucilla Cornell, and to the strange ways of Irish Wilkes herself. In the resulting essay, Murray asks the following questions: What is this suffering that Wilkes' describes in (We are) pro-choice? How can art and museums help us understand it? And what on earth should we do about it?*

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I. INTRODUCTION



1

A naked female mannequin sat on a toilet in a white-walled gallery of the Tate Britain. I circled the apparition, squinting, while my husband stood in the doorway and hissed “oh god.” The Creature’s hands clasped together; “her” long legs crossed like Sharon Stone’s in *Basic Instinct* as she squatted over the thunderbox, creating a simultaneously sinuous and crazy-looking *contrapposto*. The Creature was bald as a chemotherapy patient. I smoothed my hand over my own, luckily extant hair as I studied her plastic features. She glowed with a full face of “make up:” A simulacra of feathery eyebrows graced her frozen features, along with silver eye shadow and flushed lips. But her most striking accessory was the blindfold made of twine and what appeared to be barbed wire that had been strung over her ears. From this fetter the artist had hung a tear stream of soda cans, ribbons, dried flowers, and multiple bells.

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\* Professor, Loyola Law School, Los Angeles. Thanks to Anne Richardson Oakes, Cathy Wilkes, Drucilla Cornell, Mariah Wilkins, Catherine Grant, Cesare Romano, everyone at the Modern Institute, Edward St. John, Emma Dean, Elsa Benavides Hayes, Arizona State University, and the Design and Artists Copyright Society.

<sup>1</sup> TMI-WILKC-00161: Cathy Wilkes, *We Are Pro Choice* 2008, Mixed media. Dimensions Variable. Installation view Milton Keynes Gallery, Milton Keynes, 2008. Tate: Purchased 2008 Photo: Andy Keate

## *Feminist Engagement and the Museum*

On the floor, to the Creature's left-hand side, I found more melodrama: A heart made out of dried rosebuds had been scattered there, as if by a ruined romantic who had abandoned this scene long ago. Behind the weeping, evacuating goddess stood a small gas range, upon which had been littered the remnants of a busy breakfast. Here malingered an oleaginously dredged jar of *Bonne Maman* Apricot Conserve, a rifled amphora of the "natural" coffee substitute *Bambu*, a tea cup, and a hair doodle. Slabs of terracotta stacked on the ground before the stove along with a child's wee silver bear. These two mementos provided the bridge between this ground zero of alimentary despond and a rickety wood ladder rising up to nothing. Another crystal bell and a microwave safe bowl glittered at the Creature's feet.

(*We are*) *pro-choice* wailed the white sign on the wall, giving not just the installation's title but also the name of its demiurge, one Cathy Wilkes, a 2008 Turner Prize nominee. The installation was part of a larger show entitled *Has the Film Already Started?*, which included Marc Camille Chaimowicz's staged piece *Partial Eclipse* ("[a]n immersive environment where each aspect acts separately, but does not feel too disconnected"<sup>2</sup>), Corin Sworn's *Endless Renovation* (showing a small boat and some found slides), Cerith Wyn Evans' eponymous installation *Has the Film Already Started?* (band music, flashing lights, three palm trees), and Mike Nelson's *The Coral Reef* (a strange little house with pictures and blowing fans). A pamphlet explained that these works had been collected together because they all exhibited aspects of "performance."<sup>3</sup> I did not really understand what this meant. I also did not pay attention to the palm trees and fans. While my husband shimmered away to be horrified by yet other examples of contemporary art, I found myself transfixed by Wilkes' spectacle.

I thought I easily gleaned the first level of meaning of Wilkes' installation: Women's "choices" hadn't brought them happiness. But, what exactly *is* the matter, according to Wilkes, I wondered? Post-partum depression, joblessness, lack of child care, the brutality of love, or the Sisyphean task of staying alive day by day? Wilkes narrated a terrible wound in this diorama, and the scene was fragrant with misery, even suicidal violence. Yet the more I puzzled over this scene, which had elements of both a blast site and a cenotaph, the more difficult I found it to name. And what precisely did Wilkes *want*? That, too, I couldn't fathom from the installation.

After I returned home from London, I continued thinking about the Creature's jaunty crossed legs, the dried rosebuds, and her strange tears. Wilkes, I concluded, had wanted to display encrypted female pain, but her

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<sup>2</sup>Katherine Fishman, *Interface: Visual Art Exhibitions and Events With a Platform For Critical Writing, Review of Marc Camille Chaimowicz: Partial Eclipse*, (undated), <http://www.a-n.co.uk/interface/reviews/single/1541765>.

<sup>3</sup>I've lost this, but the same information is found on the Tate's website about the show. See *infra* note 128. Lizzie Carey-Thomas, *Clarrie Wallis, Andrew Wilson & Cerith Wyn Evans, Tate online: The Scene Is Set*, <http://www.tate.org.uk/tateetc/issue22/tbneedisplays.htm>.

wacky choices hinted that there was something more at stake in *(We are) pro-choice* than despair.

I began to do some research. My studies in the fields of feminism led me to the work of some strange and brilliant women who have devoted their lives to considering the mysteries of women's unhappiness, and how we should ever attend to it. These thinkers are the Bulgarian/French analyst and novelist Julia Kristeva, who considers *abjection*, the U.S. law professor Drucilla Cornell, who writes of the *imaginary domain*, and the Irish obscurantist Cathy Wilkes herself. As I studied these women and their almost tabloid-mesmerizing life stories, I discovered that while their biographies are quite different, they share three of the same passions: They are all fascinated by motherhood, the question of whether to work in a way that is *engagé*,<sup>4</sup> and, perhaps most of all, states of being that are beyond language. As such, the three women's world views and related personal fortunes offered insights that helped me better comprehend the complex, feminist meaning of *(We are) pro-choice*. Indeed, one of the discoveries I made was that just as *(We are) pro-choice* speaks to the intimate details of women's lives, I could only best comprehend Kristevan, Cornelian and Wilkesian glosses on the art after studying these women's available memorabilia.

Where did this journey take me? After spending months analyzing Wilkes' work, I discovered that its significance was shielded by its presentation at the Tate, as *pro-choice* speaks far less of performance than of women's painful secrets. It was only after privately brooding on the *tableau mort* with the aids of Kristeva, Cornell, and Wilkes' own riddling statements that I determined the installation offers its acolytes the largest vistas of women's possible futures, as well as miniature enfilades housing specific stories of women's disappointment, suffering, silence, and grief. I also found that I, personally, became as important a player in its interpretation as the three women I depended on for interpretive rescue. Furthermore, after my long immersion in the work, I discovered that when I surfaced I carried up not only these insights into *pro-choice*. I also bore critiques of museums as legal and ethical institutions, and ideas about the roles that law and ethics might claim they should play in the development of feminist consciousness.

What follows here, then, is a somewhat iconoclastic article. I like to think of it as an essay version of Homer's mythical Chimera, that female, fire-breathing monster triple bred from a dragon, a goat, and a lion, and who was such a peril to the Greek slayer Bellerophon: Here I will mingle scholarly exegesis, literary biography, and a study of museum law and eth-

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<sup>4</sup> That is, politically engaged. The concept of *littérature engagée* comes from Jean Paul Sartre's *What is Literature? See Sartre, What is Literature? in WHAT IS LITERATURE? AND OTHER ESSAYS* 36 (1988) ("[O]ne has the right to ask the prose writer form the very start, 'What is your aim in writing? What undertaking are you engaged in, and why does it require you to have recourse in writing?' In any case this undertaking cannot have pure contemplation as an end.").

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ics to discover the answers to the questions I began to form that day at the Tate Britain:

What is this suffering that Wilkes' describes in *(We are) pro-choice*? How can art and museums help us understand it? And what on earth should we do about it?

### A. JULIA KRISTEVA: ABJECTION

*(We are) pro-choice* possesses an eerie correspondence with Julia Kristeva's theory of the abject, which details women's purging, food-repulsed, mother-freaked lives. And just as *pro-choice* focuses on the cathartic pain found in women's secret biographies, Kristeva's ideas of abjection flow directly from her own sensational, emetic life.

Indeed, Kristeva might have developed her famous theory because she is lactose intolerant. As she wrote to Catherine Clement in 1996:

I was weaned very early, Mama had a breast infection, and, as [a] child, I had little tolerance for milk – sheep's milk, cow's milk, goat's milk, concentrated, skim, whole, nothing did the trick. The slightest dash of cream made me vomit. Necessarily, because I had been taken off my mother's milk very early, too early, said my mother.<sup>5</sup>

Kristeva, a dark-eyed enchantress<sup>6</sup> born in Bulgaria to Catholic parents,<sup>7</sup> suffered early traumas because of both of her parents, as well as the repressive regime in her native land. Her mother's withholding of milk, as well as the too-soon appearance of a sister, left Kristeva with extremely ambivalent feelings about motherhood.<sup>8</sup> Further, her father's Catholicism and rejection of the Communist party prevented her from entering the elite schools in the country, despite her early demonstrations of brilliance. This led her to be "total[ly] trauma[tized]" by the English language, which she

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<sup>5</sup> Catherine Clement and Julia Kristeva, *THE FEMININE AND THE SACRED* 115 (2001).

<sup>6</sup> Lucy Hughes-Hallet, *Egghead Out of her Shell*, *THE INDEPENDENT*, Feb. 9, 1992, at 26 (quoting her husband, Philippe Sollers, who wrote of his wife: "[She's] [a] splendor ... A dream icon ... The most intelligent woman I've met ... the black eyes alive everywhere in the face ... I couldn't keep away from her."); Lara Marlowe, *The Worst of Women, the Best of Women* *THE IRISH TIMES*, May 5, 2004 at 17 ("Kristeva is a warm, almost motherly figure with mischievous dark eyes who would like to have traded her reputation as a daunting intellectual for a place among 'popular' writers.").

<sup>7</sup> *Memories of Sofia*, in *JULIA KRISTEVA INTERVIEWS* 139 (1996) (hereinafter *Interviews*) ("My father, a faithful man whose beautiful voice added to the Saint Nedelia church choir, would bring me to the cathedral before dawn so I could take communion without being spotted.").

<sup>8</sup> Diana Kuprel, *In Defence Of Human Singularity: Diana Kuprel Speaks with Julia Kristeva* in *BOOKS IN CANADA* (Jan., 2000) ("My problem was a disconnection from my mother. I left her very quickly. I was the eldest daughter; three years later, my sister was born. So my mother was busy with her and I went over to the father's side. I was very much my father's daughter. I was always quite feminine ... . But I was disconnected from motherhood.").

had to teach herself.<sup>9</sup> At the age of twenty-six, she obtained a scholarship to study in France, and fled there during the 1965 winter season with five dollars in her pocket.<sup>10</sup> Soon after she was invited to join the avant-garde group *Tel Quel*, and married to one of its founders,<sup>11</sup> the novelist and womanizer Philippe Sollers.<sup>12</sup>

Milk, adultery, Communism, language betrayal, and mother separation have led Kristeva to undergo therapy, become an analyst,<sup>13</sup> and from this foundation form innovative if controversial theories about human relationships as well as personality. In her work, there is no closure, no harmony, but there is style. A man or a mother is just as likely to leave as to stay, but a woman negotiates her abandonment with a frazzled élan.<sup>14</sup> Also, there is no adhesion in the self, which continually suffers and rejoices in its own dismemberment. In other words, Kristeva believes that we are *abject*, a condition of mind that may be rooted in the love and dread of Mother –

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<sup>9</sup> *Id.* (“We thought that, because I was so brilliant, they would make an exception in my case. . . . Because of the rejection, my conscious option, then, was to learn to speak English beautifully. But I never did learn English as I would have liked. I think I had an unconscious identification with my father according to which I had to be in the same humiliated position with my English as he was with respect to the regime.”).

<sup>10</sup> *Id.* (“the famous five dollars.”); Lucy Hughes-Hallet, *Egghead Out of her Shell*, *supra* note 6 (“A couple of months after arriving in Paris she published her first article in *Tel Quel*. By the end of the year she was married to Sollers. Still only 26, she had taken the West (to Sixties Parisian intellectuals those four streets were the West) by storm.”).

<sup>11</sup> ROLAND A. CHAMPAGNE, PHILIPPE SOLLERS 7 (1996) (“In 1960, [Sollers] was one of the founders of the Paris-based avant-garde journal *Tel Quel*, which published ninety-four quarterly issues with Editions du Seuil until 1982.”)

<sup>12</sup> *Egghead Out of her Shell*, *supra* note 6. *See also id.*: (“Her private life can't have been easy. Sollers is a man of great brilliance and great charm who proclaims himself devoted to his wife, but who is also, equally publicly, promiscuous. They now live in separate apartments in the same building. Kristeva's coffee-table is covered with copies of his books, but they lead a life of ‘mutual adhesion to their respective independence’”).

<sup>13</sup> LUCASTA MILLER, A LIFE IN WRITING: *Julia Kristeva may be considered the high priestess of cultural theory, but her work – including psychoanalysis, novels, and biography—has been as varied as her past*, THE GUARDIAN April 7, 2007 p 11 (“[T]he one-to-one intimacy of seeing patients is as important to her as writing books. At the moment, she is seeing a number of Russians (talking to them in their own language), whom she admires for their passionate quest for self-knowledge in the context of their own exile from a country where oppression and corruption have been the norm.”).

<sup>14</sup> Perhaps it bears mentioning that while Kristeva's style in relationships is rife with admirable sang-froid, it may also resemble the paralysis exhibited by acolytes of the dating guide THE RULES. *See* Françoise Collin, *The Ethics and the Practice of Love in INTERVIEWS*, *supra* note 7, at 75-6:

Kristeva: [T]he reason I can have a partner may be precisely because I can leave him by reading Hegel, by going to Israel, or by realizing a scenario in which my erotic partner doesn't follow me at all.

Collin: Is it also because I accept that he will not be there when I return?

Kristeva: It may be true that the more I accept his leaving, the more he will leave with a desire to return to the woman who accepts his leaving.

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or, more precisely, what's known as the phallic mother, a construction of the psychoanalyst Jacques Lacan.<sup>15</sup>

Abjection is the state that human beings find themselves in when they try to divest themselves of the remnants of this engulfing, yet tantalizing matriarch. As Kristeva writes in her lofty book *Powers of Horror: An Essay on Abjection* (1982), the condition reaches its apex when a person realizes that she cannot unleash herself from maternal influences.<sup>16</sup> This dilemma is enlarged when diagrammed upon mature relationships or even society itself, an application that reveals some of the finer feminist implications of abjection.

For Kristeva, the maintenance of the self requires the ejection of all that which is supposedly unclean, and all that does not please the powerful.<sup>17</sup> Feces, menstrual blood, the maternal body, the leavings of food, vomit, spit, tears and phlegm are seen by these arbiters as barbarisms,<sup>18</sup> and women accomplish a rigorous, continual housecleaning of the self in paranoid service of the “structural order” – that is, the patriarchy.<sup>19</sup> These subjects, however, who are busy trying to wipe off what is, in fact, themselves, come to realize the thinness of the border between the “unclean” outside

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<sup>15</sup> See Jeanne L. Schroeder, *The Vestal and the Fasces: Property and the Feminine in Law and Psychoanalysis*, 16 CARDOZO L. REV. 802, 902 (1992) (analyzing Lacanian theory) (“[D]uring the mirror stage, the infant experienced the tragedy of separation from Mother/(m)other and Demanded that she come back. Now, he sees himself as a separate subject and Desires Mother. Mother is the object of his Desire. Mother is his Phallus – the Phallic Mother.”).

<sup>16</sup> JULIA KRISTEVA, *POWERS OF HORROR: AN ESSAY ON ABJECTION* 6 (1982) (Hereinafter *Powers of Horror*) (“What he has swallowed up instead of maternal love is an emptiness, or rather a maternal hatred without a word for the words of the father; that is what he tries to cleanse himself of, tirelessly.”); NICK MANSFIELD, *SUBJECTIVITY, THEORIES OF THE SELF FROM FREUD TO HARAWAY* 88 (2000) (abjection is the exquisite sensation of banishment or loss, which is “inalienably connected with the feminine, specifically the maternal.”).

<sup>17</sup> Martha J. Reineke, reading Kristeva, notes that civilization encourages “repetiti[ve] ... body-bounding practices of the emergent subject’s proper self,” and that these practices “also bind the social order.” Moreover, these practices “throw a veil over” the “abject menace,” that is, the recognition of the “fluctuation of inside/outside, pleasure/pain, word/deed.” *SACRIFICED LIVES: KRISTEVA ON WOMEN AND VIOLENCE* 96 (1997).

<sup>18</sup> “Abjection becomes manifest in the movements of ingestion and evacuation, at the various sites of transition between inside and outside – mouth, anus, genitals – through which the objects – food, vomit, spit, feces, urine (later semen and blood) —are ingested and evacuated.” LISA BLOOM, *WITH OTHER EYES: LOOKING AT RACE AND GENDER IN VISUAL CULTURE* 92 (1999).

<sup>19</sup> Kristeva, *Powers of Horror*, *supra* note 16, at 69: “[T]he danger of filth represents for the subject the risk of which the very symbolic order is permanently exposed, to the extent that it is a device of discriminations, or differences? But from where and from what does the threat issue? From nothing else but ... the frailty of the symbolic order itself.” In *Powers* Kristeva also notes that pollution is not “inherent” but rather created by the “prohibition that founds it.” *Id.*

and the “clean and proper” inside; it is this shaming recognition that marks them as abject.<sup>20</sup>

This isn’t necessarily all bad according to Kristeva. She celebrates abjection’s transcendent potential, finding that it proves the falsehood at the heart of patriarchy, which depends so dearly on “her” vs. “him,” “me” vs. “you” and “outside” vs. the “inside.” The abject, constantly forced to throw away that which is herself *and* not, begins to realize the permeability and connection of all things.<sup>21</sup> This creates opportunities for joy, or, in Kristeva’s language, *jouissance*, a term that is related to ecstasy.<sup>22</sup> “It follows that the *jouissance* alone causes the abject to exist as such.”<sup>23</sup>

Abjection gives us a remarkably precise grammar for reading (*We are*) *pro-choice*. Wilkes’ Creature is caught in the process of divesting herself of filth, or in the moment when she has abandoned the cleaning project in a

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<sup>20</sup> *Id.* See also J. BROOKS BOUSON, EMBODIED SHAME: UNCOVERING FEMALE SHAME IN CONTEMPORARY WOMEN’S WRITINGS 4 (2009). (“The abject, which is opposed to the clean and proper body, produces visceral feelings of loathing, shame, and disgust. Associated with bodily substances and waste products – such as tears, saliva, feces, urine, vomit, and mucus – the abject is defiling and disgusting, but because it is part of the self and body, it cannot be totally expelled or rejected.”)

<sup>21</sup> Mansfield, *supra* note 16, at 87 (“abjection ... offers[] us a freedom outside of the repression and logic that dominate our daily practices of keeping ourselves in order, within the lines, heads down.”). See also Adrienne Davis, *Bad Girls of Art and Law: Abjection, Power, and Sexuality Exceptionalism in (Kara Walker’s) Art and (Janet Halley’s) Law*, 23 YALE J. L. & FEMINISM, 1, 34 (2011) (“Hence, ‘from its place of banishment, the abject does not cease challenging its master.’ Rather, ‘the abject simultaneously beseeches and pulverizes the subject.’ Abjection wavers between the loss of meaning in ‘absolute degradation’ and the unbearable ecstasy in this suffering. The greatest threat posed by the banished is its ongoing power to fascinate, even as it repulses and disgusts. In the end, the ‘intimate side [of abjection] is suffering and horror its public feature.’ The agony and the ecstasy. This is the power of abjection.”)

<sup>22</sup> See *Powers of Horror supra* note 16: “The time of abjection is double: a time of oblivion and thunder, of veiled infinity and the moment when revelation bursts forth.”... *Jouissance*, in short.” See also Catherine Marchak, *The Joy of Transgression, Bataille and Kristeva*, 34 PHILOSOPHY TODAY 360 (1992): “[*Jouissance*] is not the pleasure that one can experience in the prosaic world; in the homogenous world, joy and pleasure arise from attaining some object, something tangible or definable, while *jouissance* arises from seeking the abject, a non-object. The search for this pseudo-object, the abject, leads to excluded ground, the ground that has been excluded by the paternally-imposed prohibitions, taboos and law;” Alicia Evans, *Strange yet Compelling: Anxiety and Abjection in Hospital Nursing*, in *ABJECTLY BOUNDLESS: BOUNDARIES, BODIES AND HEALTH WORK* 203 (Trudy Rudge, Dave Holmes, eds. 2010): “The French term ‘*jouissance*’ [] ... is not easily translated into the English language ... [In places it] corresponds with ... ‘pleasure,’ ... ‘enjoyment,’ ... [and] satisfaction ... *Jouissance* is ... associated with the abject, as while the abject is neither wanted or known, it can only be accessed via *jouissance* ... thus explaining how the abject both repels and attracts;” JEAN GRAYBEAL, LANGUAGE AND “THE FEMININE” IN NIETZSCHE AND HEIDEGGER 15 (1990) (quoting Leon Roudiez): “In Kristeva’s vocabulary, sensual, sexual pleasure is covered by *plaisir*; *jouissance* is total joy or ecstasy.”

<sup>23</sup> *Powers of Horror, supra* note 16.

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whirlwind of tears: The naked mannequin is positioned so as to make us think of a woman publicly expelling her waste. There are the curds and leavings of food that she has not cleaned.<sup>24</sup> Her love is also nearly turned into garbage, symbolized as nothing more than dried flowers spread out across the floor. Kristeva's work and life are rooted in the concept of motherhood; through the presence of the child's toy, the filthy *Bonne Maman* jar, and the installation's title's sly reference to abortion, Wilkes also means for us to understand that maternity has led the Creature to arrive at this state of degradation. Finally, there is the ladder, an icon that represents everything from corporate success to spiritual enlightenment.<sup>25</sup> It looks like it couldn't hold a soul over the 60 pounds, and it certainly does not lead to any money or heavenly treats. The creature, crying, friskily posed, and buried in muck, experiences her degradation and exaltation at the "bottom."

Kristeva's abjection and *jouissance* might hold out fruitful possibilities as a psychological state, at least when examined from particular angles: It may allow those who experience it some kind of insight into the futility of striving, the self-delusions of the exile, the fictions that suspend power, and the irony of tending one's garden which is itself a wasteland. This transcendence might even have mysterious aspects. It could allow us access to knowledge that is beyond language, beyond existing signs.

Kristeva's complicated work in the "semiotic" permits us to see such a promise in abjection.<sup>26</sup> With semiosis, Kristeva attends to the "translinguistic" or "nonlinguistic"<sup>27</sup> "pre-verbal sign"<sup>28</sup> that "poets and artists strive to express in their attacks against ... traditional forms."<sup>29</sup> This speechless but immensely creative space is, to Kristeva, related to the earliest stages of human life;<sup>30</sup> in her 1974 work *Revolution in Poetic Language*,<sup>31</sup> she illustrated the semiotic by relating it to avant-garde art's original structure and sometimes unfathomability,<sup>32</sup> though I personally link it to stories about

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<sup>24</sup> See Bloom, *supra* note 18, at 93: "Kristeva speaks of the abject in terms of three main categories: Food, bodily wastes, and signs of sexual difference."

<sup>25</sup> Consider, for two examples, the story of Jacob's Ladder in Genesis 28:10-19, as well as the symbol of the ladder in the Jain religion. See NATUBHAI SHAH, *JAINISM: THE WORLD OF CONQUERORS*, vol. 1 90 (1998). ("[T]he path to liberation is compared in Jain works to a ladder: The two sides of the ladder represent Right Faith and Right Knowledge, and the rungs of the ladder represent the fourteen stages of Right Conduct.")

<sup>26</sup> This version of semiosis is Kristeva's own, and should not be confused with the science of signs. JULIA KRISTEVA, KELLY OLIVER, *THE PORTABLE KRISTEVA* xv (2002).

<sup>27</sup> *Id.* at xiv.

<sup>28</sup> ANNE-MARIE SMITH, *JULIA KRISTEVA: SPEAKING THE UNSPEAKABLE* 15 (1998).

<sup>29</sup> *Id.*

<sup>30</sup> That is, the stage concerning the "child's relationship with the mother prior to language acquisition and symbolic separation." *Id.*

<sup>31</sup> Published by Columbia University Press in 1984.

<sup>32</sup> *Id.*; see also Jonathan L. Owen, *AVANT-GARDE TO NEW WAVE: CZECHOSLOVAK CINEMA, SURREALISM, AND THE SIXTIES* 203 (2011) ("Kristeva originally defined her notion of 'semiotic' or 'poetic' language with reference to a tradition of avant-garde litera-

the oracles of ancient Greece, who sang or babbled prophecies that were later decoded by men.<sup>33</sup>

Kristeva's theory of the semiotic may buoy our readings of (*We are*) *pro-choice* as a mummery of unspeakable ecstasy.<sup>34</sup> There is no grid upon which we can place and name the Creature on the toilet. She moves between tears and self-possession (the crossed legs), self-indulgent disdain for housekeeping and self-flayage.

But there remains a serious problem with this: If *jouissance* is a code breaker of the unnamed and the suppressed, it may not be particularly useful. For all of Kristeva's subtle denotations of the unnamed states of mind that can flow from oppression, she still doesn't necessarily give us a way *up* the ladder:

The time of abjection is double: a time of oblivion and thunder, of veiled infinity and the moment when revelation bursts forth ... *Jouissance*, in short ... It follows that *jouissance* alone causes the abject to exist as such. One does not know it, one does not desire it, one joys in it [*on en-jouit*]. Violently and painfully. A passion. And, as in *jouissance* where the object of desire, known as object *a* [in Lacan's terminology], bursts with the shattered mirror where the ego gives up its image in order to contemplate itself in the Other, there is nothing either objective or objectal to the abject. It is simply a frontier, a repulsive gift that the Other, having become *alter ego*, drops so that "I" does not disappear in it but finds, in that sublime alienation, a forfeited existence. Hence a *jouissance* in which the subject is swallowed up but in which the Other, in return, keeps the subject from foundering by making it repugnant. One thus understands why so many victims of the abject are its fascinated

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ture stretching from Lautréamont (the most important proto-Surrealist) and Stéphane Mallarmé in the eighteenth and nineteenth centuries through to Alfred Jarry and Georges Bataille in the twentieth."); Leon S. Roudiez, *Introduction to JULIA KRISTEVA, REVOLUTION IN POETIC LANGUAGE* 3 (1984) ("Kristeva ... emphasizes the signifying process in Mallarmé's texts, which, along with those of Lautréamont, are seen as the prototypes of modern avant-garde practice. Pointing to manifestations of the semiotic disposition she shows how closely their writing practices parallels the logic of the unconscious, drive-ridden and dark as it might be.").

<sup>33</sup> See Michael Attyah Flower, *THE SEER IN ANCIENT GREECE* 217 (2008) ("An earlier generation of scholars took it for granted ... that the priestess of Apollo at Delphia ... uttered unintelligible sounds that the male prophets ... then formulated into oracles.").

<sup>34</sup> Estelle Barrett, *KRISTEVA REFRAMED: INTERPRETING KEY THINKERS FOR THE ARTS* 19 (2011) ("Kristeva's semiotic indicates a realm of meaning that is in excess of or cannot be contained by the signifier – a sensuous, bodily knowing that goes beyond the naming of objects of describing of scenes. What remains outside the signifier, or outside the symbolic is not an empty space or voice but a hyper-differentiated realm of latent or possible values and meanings."); J. Stephen Fountain, *Ashes to Ashes: Kristeva's Jouissance, Altizer's Apocalypse, Byatt's Possession and The Dream of the Rood*, 9 *LITERATURE & THEOLOGY* 193, 194 (1994) ("[T]he subject of *jouissance* is continually dissolved, displaced, and re-established in its displacement. *Jouissance* is driven by the play of negativity, by the loss of the unified, self-mastering subject in its encounter with its semiotic dimensions which have been marginalized and repressed in a system of patriarchal rationality.").

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victims—if not its submissive and willing ones. We may call it a border; abjection is above all ambiguity.<sup>35</sup>

This is a rather mystical and ghastly place to wind up, in an afterglow of oppression. It must be said that we *do* gain from Kristeva's theory in that it gives us a measure for (*We are*) *pro-choice*, as well as for other extreme states of female minds: The rapture of girls suffering from anorexia nervosa and the exalted states of martyrs seem to qualify as states of *jouissance* in abjection. And Wilkes' creature could be seen not just as a death figure, but also as a body double of a woman who has voluptuously released control, like Isabel Archer on the very last page of Henry James's *Portrait of a Lady* or the Woman in the Attic in *Jane Eyre*.

Perhaps some might like to stay here, sick and pleased. Crazy bliss has looked good on very, very few women – but it has really worked for some. *Monstres sacrés* Joan Mitchell and Tracey Emin come to mind, as do the destroyed artists actress Frances Farmer and singer Billie Holliday. Kristeva herself, with her self-drama, may also be seen as a successful citizen of this state.

But practical guidelines on how to fight the forces that lead women to go mad do not appear to fit in with the elegance of Kristevan theory. In the highly instructive book, *Julia Kristeva Interviews*, the theorist discusses with New York University English Professor Perry Meisel her views on the relationship between political engagement and art:

I think that the artist ... is never more *engagé* than in his work. To ask an artist to *s'engager* in order to justify himself is an imposture into which many artists falls for... the work presupposes a lot of solitude and a lot of risks. But you have to know that, and if you know that, you can carry out *engagement* with humor; when you can, you take your distance. If not, *engagement* is the antidote to art. There's nothing more murderous for art than *engagement*. This is not to say that I am for art for art's sake. Art for art's sake is the reverse of *l'art engagé*.<sup>36</sup>

Kristeva, who has been possessed by a Susan Sontag-like compulsion to write novels,<sup>37</sup> invokes the art for art's sake-engagement continuum for her own purposes. Though she may directly engage in problem solving in her work as a therapist,<sup>38</sup> comments such as the above as well as the failure to outline an escape route from *jouissance* to liberation indicate that she thinks that ecstasy is an end in itself. Another reading is that she is too enamored with abjection's aesthetics to disfigure it with safety bars and training wheels, leaving that task for other, more pragmatic thinkers. As legal scholar Adrienne D. Davis writes, “[i]n the end, abjection seems more help-

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<sup>35</sup> *Powers of Horror*, *supra* note 16.

<sup>36</sup> Kristeva, *Interviews* *supra* note 7, at 17.

<sup>37</sup> Among these are the thinly disguised autobiographical novel; *THE SAMURAI* (1992) and detective novels such as *POSSESSIONS*, an intellectual who-done-it that she published in 1998.

<sup>38</sup> Miller, *supra* note 13.

ful as psychoanalysis than as politics.”<sup>39</sup> For those who can’t abide the idea of remaining mired in the sublime agonies depicted in *(We are) pro-choice*, we need more than a gorgeous description of it.

We need help that is, from another theorist, another woman, who is willing to describe not only pain but also a better, conceivable future. In our search for this mapmaker, then, we may turn to the second theorist I have studied in my quest to understand *(We are) pro-choice*: Rutgers Law Professor and writer Drucilla Cornell and her theories of law and the imagination.

## B. DRUCILLA CORNELL: THE IMAGINARY DOMAIN

When I called Rutgers law professor Drucilla Cornell to do an interview for this paper, she didn’t really want to talk about *(We are) pro-choice*’s feminist engagement, as she doesn’t consider herself a “very visual person.”<sup>40</sup> She also wasn’t that interested in detailing her early work as a Teamsters union organizer, nor her years inventing feminist post-structuralism or working to foster equality in South Africa. Instead, when I asked her about her theory of the imaginary domain, and its possible relationship to works of art such as Wilkes’, Cornell began to bewitch me with tales about her grandmother, Mildred Francis Kellow, whom she has called “one of the miracles of my life.”<sup>41</sup>

Let us begin this analysis with Cornell’s memories of this much loved woman, then:

Kellow was the first woman president of the Carson, California printing company, Kellow Brown, which she took over after her husband died.<sup>42</sup> An epic figure to Drucilla, Kellow encouraged her young granddaughter to follow her dreams of becoming a mathematician, despite the grumblings of her son and Drucilla’s father, Clark Cornell. In order to sidestep Clark’s objections, Mildred would say that she and Drucilla were going shopping on Saturdays, and then drop Drucilla off at a tutor.<sup>43</sup>

Mildred was the kind of dream grandma who would speak to her granddaughter in parables, allow her to wade in department store book departments, take her on trips to Europe, Africa, and South America, and give her practical life lessons like “when you announce something unpopular to a group of men, announce it and then just leave.”<sup>44</sup> As Cornell elaborated in our phone interview, “[Kellow] just didn’t fit into this world

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<sup>39</sup> *Bad Girls of Art and Law*, *supra* note 21, at 43.

<sup>40</sup> Interview with Drucilla Cornell, Oct. 13, 2011.

<sup>41</sup> DRUCILLA CORNELL, *BETWEEN WOMEN AND GENERATIONS: LEGACIES OF DIGNITY* xv (2002) (Hereinafter *Between Women and Generations*).

<sup>42</sup> Interview with Drucilla Cornell, *supra* note 40; *see also Between Women and Generations*, *supra* at 11 (“I grew up with the vivid image of a woman exercising authority over men on a daily basis.”).

<sup>43</sup> Interview with Drucilla Cornell, *supra* note 40.

<sup>44</sup> *Id.* *See also Between Women and Generations* at 20.

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where everyone was a housewife ... she supported the idea that women could do everything, anything.”<sup>45</sup> Such notions would come in handy for the adolescent Cornell, as she lived in a “claustrophobic, right wing” Southern California “hellhole” where libraries were censored, “the democratic party didn’t exist,” and Cornell would witness acts of such intolerance that today she can say “I know what the Tea Party is all about.”<sup>46</sup>

Sadly, Cornell’s own mother, Barbara Cornell, was not blessed with the sturdy mental frame of Mildred. Cornell speaks and writes of her mother with great chagrin, noting that Barbara was a kind of epigone in the family in part because Mildred dominated and controlled her as much as she nourished and liberated Cornell herself. Mildred sabotaged Barbara’s love affair with a cherished suitor, John Church,<sup>47</sup> pushing Barbara to marry Clark at eighteen<sup>48</sup> and live like a zombie version of Virginia Woolf’s *Angel in the House*<sup>49</sup> – all while Mildred busied herself with terrifying male underlings at Kellow Brown and cackled subversive proverbs to her granddaughter. Barbara’s resulting Stepford Wife-like obsession with her appearance limited her ability to travel, socialize, and, basically, live.<sup>50</sup> In college she subjected herself to the functional equivalent of glass-eating, that is, rushing a sorority,<sup>51</sup> and as a mother she pressured Cornell to adopt the same despotic style regimes and social etiquette in order to fit in.<sup>52</sup>

Mildred yoked and tamed Barbara because she was afraid of losing her, Cornell theorizes today: Barbara had suffered a serious lung ailment as a child, and maternal fears of a child’s death were aggravated by Mildred’s superstition that some dark god would punish the female line for her uppity, money-making insubordination.<sup>53</sup> Yet, these reasons could not subvert

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<sup>45</sup> *Id.*

<sup>46</sup> *Id.*

<sup>47</sup> *Id.* at 17-19.

<sup>48</sup> *Id.* at 15.

<sup>49</sup> See VIRGINIA WOOLF, *KILLING THE ANGEL IN THE HOUSE: SEVEN ESSAYS* (1995).

<sup>50</sup> *Between Women and Generations supra* note 41, at 19: “My mother herself was enslaved by beauty parlors. She was not trying to impose on me something she did not demand of herself. Indeed, she did not like to go on vacations for more than a week because she did not like to have to do her own hair. She was determined that her hair be perfect in the sense that it would conform without flaws to the styles for a proper woman.”

<sup>51</sup> *Id.* at 15: “She also rushed for a sorority, an experience she remembered with loathing for the rest of her life. In the course of running for the right sorority, women were expected to show that they were perfect young ladies. You had to wear the right dress, the right jewelry. Your hair had to be just so. You had to nod in a certain manner, and on top of all that, you had to be able to walk daintily. My mother’s head spun; she feared she would never get it right.”

<sup>52</sup> *Id.* at 19: “[M]y mother[] attempt[ed] to reshape me so that I could fit into what my mother believed was a ‘normal’ girlhood.”

<sup>53</sup> *Id.* (“My mother’s lung disease terrified Nana. The irony is that in the name of protection, she smothered her daughter both by indulging and controlling her. I am now convinced that there was an unconscious fear of losing her. She had known death and the sudden way in which a loved one could be taken away. However, I believe there was something else going on, something that took me years to figure out. My grandmother was

the impressions of female possibility and pain that Mildred and Barbara scored into Cornell's memory. As she grew into a nimble-minded and ambitious woman, Cornell began to discern that the root difference between her grandmother and mother grew not just from fear or brute conventionality, but rather the particular relationship each woman had with her imagination:

"My grandmother's concern for the protection of my space for imagination and self-expression seemed to operate exactly opposite to the way in which she constrained my mother,"<sup>54</sup> Cornell writes in her autobiography, *Between Women and Generations*. But, "[l]ike so many of the white middle-class women of her generation, [Barbara] could not even imagine a career appearing on the horizon of her possibilities."<sup>55</sup>

Cornell's observations of the suppressed and unspeakable doings of her distaff side led to her conjuring the concept of "the imaginary domain." She drafted a jurisprudence around this concept in order to protect the state that Mildred, but not Barbara, had access to: "I was trying to articulate what my mother had lost. Because she didn't have a feminine symbolic. There were no words for her to describe her life and pass it down, whereas my grandmother [did]. She was so far ahead of her time. But she [her grandmother] never discussed it. It was almost like talking about it [Mildred's vigor] was too much."<sup>56</sup>

In Cornell's book, *The Imaginary Domain*, she argues that equality requires the "equal protection of certain minimum conditions of individuation ... Three conditions ... [are required] for [our] equivalent chance to transform ourselves into individuated beings who can participate in public and political life as equal citizens."<sup>57</sup> These three conditions are bodily integrity, "access to symbolic forms sufficient to achieve linguistic skills permitting the differentiation of oneself from others," and "the protection of the imaginary domain itself."<sup>58</sup>

Cornell dreams that law and society may be able to protect our abilities to imagine ourselves into existence, unhampered by oppression. She seeks to promote our constructions of what she calls the "imago," which "implicates our sexual imaginary."<sup>59</sup> "[I]n psychoanalytic theory, a sexual imago involves the idea that we do not see ourselves from the outside as men and women. Instead, we see ourselves so deeply and profoundly from the 'inside' as men and women that we cannot easily, if at all, separate ourselves from this imago. This imago is the basis of our unconscious assumed

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haunted by the fear that the freedom she claimed for herself could somehow lead her to be punished by society.").

<sup>54</sup> *Id.* at 19.

<sup>55</sup> *Id.* at 20.

<sup>56</sup> Phone interview, *supra* note 40.

<sup>57</sup> DRUCILLA CORNELL, *THE IMAGINARY DOMAIN: ABORTION, PORNOGRAPHY & SEXUAL HARASSMENT* 4 (1995).

<sup>58</sup> *Id.*

<sup>59</sup> *Id.* at 7.

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persona.”<sup>60</sup> Imago development can be hampered by abortion proscriptions, which reduce women to a “function which is then commanded for the use of others.”<sup>61</sup> Degradation, such as sexual harassment, can also impede the imago because the sexual shame that arises from degradation interferes with the “free play” of “sex and sexuality, [which are] formative to one’s being,” and “severely limits psychic space for [imagining one’s imago], if it does not cut it off altogether.”<sup>62</sup> Cornell seeks to ensure a precondition to feminist liberty, or the right to “struggle to become a person”<sup>63</sup> which is a “re-imagining and resymbolization of the feminine within sexualization which takes back ‘ourselves’ from the masculine imaginary.”<sup>64</sup>

The imago, then, is a place of possibility and liberty. To have the freedom to imagine oneself unconstrained means that one might, as Cornell emphasized to me in our interview, be able to find a new way of “being in the world.”<sup>65</sup>

But Cornell’s work does not just focus on imagining glorious possibility. She has also tried to imagine pain, more specifically pain that goes unexpressed by language. In her 1999 book *Beyond Accommodation: Deconstruction and the Law*,<sup>66</sup> Cornell consults the work of French postmodern literary theorist Jean-Francoise Lyotard and Belgian feminist philosopher Luce Irigaray in developing a name for undocumented suffering: The *differend*. Building upon Irigaray’s concept of *derelection*, which describes how “feminine difference cannot be expressed except as signified in the masculine imaginary or the masculine symbolic,”<sup>67</sup> Cornell re-reads Lyotard’s concept of the *differend*,<sup>68</sup> which is

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<sup>60</sup> *Id.*

<sup>61</sup> *Id.* at 66.

<sup>62</sup> *Id.* at 9.

<sup>63</sup> *Id.* at 5.

<sup>64</sup> *Id.* at 50.

<sup>65</sup> Interview, *supra* note 40.

<sup>66</sup> DRUCILLA CORNELL, *BEYOND ACCOMMODATION: ETHICAL FEMINISM, DECONSTRUCTION AND THE LAW* (1999) (Hereinafter *Beyond Accommodation*).

<sup>67</sup> *Id.* at 7. Luce Irigaray’s work on dereliction is beguiling and confusing. See LUCE IRIGARAY, *TO SPEAK IS NEVER NEUTRAL* 244 (2002) “Already constructed theoretical language does not speak of the mucous. The mucous remains a reminder, producer of delirium, or dereliction, of wounds, sometimes of exhaustion.”); Margaret Whitford, *Introduction to Section II: Psychoanalysis and language*, in Luce Irigaray, *THE IRIGARAY READER* 74 (1991) (“In psychoanalytic language, women do not become separate or have an autonomous identity, they remain merged with the mother. As a result, most women are dependent; they live in dereliction (abandonment) and their greatest terror is that of being abandoned, since they have no self-identity which would provide them with their own ‘home.’ Without an imaginary and symbolic home of their own, they live in the world of the *quantitative*, and so find themselves in competition with each other. The imaginary which Irigaray uses is a way of speaking of and symbolizing the sexuate woman’s body in non-phallic and non-maternal terms: the mucous (membrane).”)

<sup>68</sup> See *Beyond Accommodation*, *supra* note 66, at 213, citing JEAN-FRANCOIS LYOTARD, *THE DIFFEREND: PHASES IN DISPUTE* 141 (1988).

precisely that which has been shut out of the traditional legal discourse and the social conventions of meaning ... . The silencing of women, because of *derelection*, can be understood as the *differend*. The resultant harm to women either disappears, because it cannot be represented as a harm within the law, or it is translated in a way so as to be inadequate to our experience.<sup>69</sup>

However, Cornell posits, if we form a language to make articulate these untold sufferings and silences – and the dreams of possibility, as well, that are portended by the imago – then the “truth” can be more aptly expressed by women, who in doing so will play an active role in “creating our experience.”<sup>70</sup>

Cornell’s imago and *differend* emerge as augural afterimages left by Mildred and Barbara. With the aid of the imago, Mildred may have been able to speak about what she has accomplished; it wouldn’t be “too much.” And, too, by articulating her *differend*, Barbara might have described the traumas that kept her confined to the kitchen, the beauty parlor, and a spiritual death state. As Cornell told me, “When I came up with the idea of the imaginary domain my mother said ‘these are the words I was looking for to describe what I never had;’ it was an unconscious haunting.”<sup>71</sup>

As such, Cornell offers us what Kristeva does not. Kristeva’s ecstasy exists precisely because it does not pronounce these forms of unnamed possibility and pain. Ecstasy exists once one realizes that there *is* no differentiation, a cosmic state that, again, may be good for therapy, spiritual transcendence, or pure escape – but not for politics. As noted above, Kristeva may be sanguine about the political uselessness of abjection because she does not regard herself as being fully *engagée*. However, Cornell does. In my interview with her, she emphasized “I certainly consider myself an engaged writer,”<sup>72</sup> and she has in *Beyond Accommodation* criticized Kristeva for “clearly leav[ing] us in a state of *derelection*.”<sup>73</sup>

How, exactly, though, are we to harness these ideas into a revelation that can help us rewrite our lives? And, relatedly, how can we use them to understand the meaning of *(We are) pro-choice*?

It turns out that Cornell’s work with the imaginary may be invoked with great profit as we study visual art, even if Cornell did not appear to write with such representations in mind. Though Cornell’s theory of the imagination focuses on the roles of literature and myth for the development of crucial feminist imaginaries,<sup>74</sup> it is easy to apply her ideas to the

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<sup>69</sup> *Beyond Accommodation* at 60.

<sup>70</sup> *Id.*

<sup>71</sup> *Interviews*, *supra* note 40.

<sup>72</sup> *Id.*

<sup>73</sup> *Beyond Accommodation*, *supra* note 66, at 73.

<sup>74</sup> In *Beyond Accommodation*, for example, Cornell describes the importance of utopian thinking within feminism: “Without utopian thinking ... feminism is inevitably ensnared in the system of gender identity that devalues the feminine. To reach out involves the

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visual world. And such cross planting readily bears fruit in the case of (*We are*) *pro-choice*: Upon viewing the Creature after reading Cornell's thoughts on the imagination and the *differend*, we can now see not just the Creature's filthy, weirdly jaunty abjection. We may also see her as representing a state of suffering that has not been named, but should be.

This reading of *pro-choice*, moreover, is supported by the somewhat ditzzy interpretation that London art critic and party god Nick Hackworth<sup>75</sup> gives of Wilkes' work in a Tate-produced, filmed introduction to artists (including Wilkes) who were shortlisted for the 2008 Turner. In the film, Hackworth enters a gallery that holds a slightly different version of (*We are*) *pro-choice*, titled *I Give You All My Money*.<sup>76</sup> In that installation, we again spy the Creature on her toilet, but now, there is no stove. There is also yet another mannequin, and what appears to be some sort of kitchen island or supermarket checkout counter. Upon introducing the installation, Hackworth's first words are:

Coming into this room ... I think viewers who are not necessarily engaged with contemporary art on a daily basis will find themselves confronted with work that perhaps fits the stereotype of what difficult contemporary art is. I think visitors who see this work who aren't necessarily contemporary art fans will find work like this potentially difficult because the assumption is this is an assembly of worthless objects. And the standard question is, 'Where's the art?' in there, and what does it all mean anyway? In a way the incomprehensibility and the ambiguity of this work is part of the point ... . It is about the difficulty in communication, the impossibility of ever truly understanding what someone else feels. And I think emotively, through the small emotional cues and clues that she sets up, she succeeds in at least communicating that.<sup>77</sup>

Apart from the fact that Wilkes has already said explicitly that her work deals in part with the distances between people that cannot be

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imagination, and with imagination, the refiguration of Woman. ... [T]his kind of shift in the presentation of Woman is particularly important in legal discourse if the wrongs of women are to appear at all." *Beyond Accommodation* at 169. She goes on to then cite the work of Helene Cixous, and her work with myth, as a resource for the reconfiguration of Woman: "For Cixous, we can read and reread certain important myths, particularly as they have been retold, as routes 'out.' For example, in her reading of Penthesileia she finds signs that indicate the possibility of the elsewhere, a woman's community not dominated by men." *Id.* at 174.

<sup>75</sup> Hackworth is the former art critic for the Evening Standard. A list of his essays can be found here: <http://www.thisislondon.co.uk/arts/Nick%20Hackworth-critic-47-archive.do>. Hackworth is also the author of *THE HEDONIST'S GUIDE TO ISTANBUL* (2007).

<sup>76</sup> The title of this installation is verified by the following undated clip from THE TELEGRAPH web-site: *Turner Prize nominations at Tate Britain*, <http://www.telegraph.co.uk/news/picturegalleries/uknews/3103290/Turner-Prize-nominations-at-Tate-Britain.html?image=6>.

<sup>77</sup> Nick Hackworth, *Tate Shots Issues 16 – Turner Prize 08 part One*, [http://www.youtube.com/watch?v=kkMtx5WUrDc\\_at](http://www.youtube.com/watch?v=kkMtx5WUrDc_at) 3:24-4:37.

crossed,<sup>78</sup> Hackworth falls woefully short on originality of interpretation, enthusiasm, and thus as an ambassador to Wilkes' sculpture. Hackworth here seems like a whipping boy for the *differend*: He cannot name the richness and depth in *pro-choice* that an observer more alert to anguish, ennui, and female stasis may suspect. When we are conscious of female pain, as well as the insights provided by first Kristeva, and then Cornell, we can read (*We are*) *pro-choice* as an essay in ineffable female longing, and not just as an exercise in the "incomprehensible."

Better yet, Cornell's engagement encourages us to think of ways in which this kind of *differend* may be redressed. Anna Marie Smith's work on the "just society's" obligation to reverse the depredations of neoliberalism, and to organize state supports, Rawls-style, around the figure of the single mother come immediately to mind,<sup>79</sup> as does Martha Fineman's work on the state, vulnerability, and law.<sup>80</sup> Wilkes' installation also en-

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<sup>78</sup> See *infra* note 92 and accompanying text.

<sup>79</sup> ANNA MARIE SMITH, WELFARE REFORM AND SEXUAL REGULATION 218 (2007) ("A significant fraction of the women's movement, namely the neoliberal feminists, actively contributed to the passage of welfare reform ... . They warmly embraced the Gingrich-Clinton attack on redistribution; in fact, they generally take a free-market approach to women's rights in all issue areas. From their perspective, reproductive rights should be understood in an extremely narrow manner as the liberty of the women who are endowed with their own economic resources to purchase contraception and abortion services from private health care providers."). See also *Id.* at 227 ("Taking the poor single mother – a figure who has been ideologically demonized in neoliberal and racial-patriarchal discourse – as the paradigmatic subject in a progressive feminist utopian vision, we need to consider the socioeconomic, cultural, and political conditions that would be required to establish a just society... adequate income support that is not tied to mandatory participation in the wage labor market; the elevation of poverty assistance to the status of an inalienable citizenship right and the legal empowerment of the poor, such that they can successfully press the State to meet its redistributive obligations including enhanced antidiscrimination laws, equal protection, and due process rights; dignity; the right to the resources, goods and services – above and beyond mere subsistence —that make it possible for a low-income person to earn the respect of his or her peers, according to the prevailing sociocultural standards, along with the right to self-determination where adult intimacy and family structure are concerned, and the right of the poor to participate fully in the political process, to organize collectively, and to take a leading role in the design and oversight of redistributive programs.").

<sup>80</sup> See, e.g., Martha Albertson Fineman, *The Vulnerable Subject: Anchoring Equality in the Human Condition* 20, YALE J.L. & FEMINISM 1,1 (2008) ("To richly theorize a concept of vulnerability is to develop a more complex subject around which to build social policy and law; this new complex subject can be used to redefine and expand current ideas about state responsibility toward individuals and institutions. In fact, I argue that the 'vulnerable subject' must replace the autonomous and independent subject asserted in the liberal tradition. Far more representative of actual lived experience and the human condition, the vulnerable subject should be at the center of our political and theoretical endeavors. The vision of the state that would emerge in such an engagement would be both more responsive to and responsible for the vulnerable subject, a reimagining that is essential if we are to attain a more equal society than currently exists in the United States."). See also Maxine Eichner, *Dependency and the Liberal Policy: On Martha Fineman's The*

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courages us to make even more aggressive demands for what might be regarded as utopian reforms.<sup>81</sup> Her evocation of despair may energize demands for the basic conditions necessary to happiness,<sup>82</sup> to flourishing,<sup>83</sup> and to a radical peace politics that would address the unacknowledged yet keenly violent sufferings reported on in *(We are) pro-choice*.<sup>84</sup>

And once that exalted, more joyful regime was in place, it would look like ... sound like ... feel like ... what? What kind of society are we trying to build, exactly?

Up to now, my use of Wilkes' installation to leverage a feminist vision of female reality, and even state reform, has issued from Wilkes' evocation of Kristeva's abjection and Cornell's *differend*. But is there nothing positive and constructive to glean from *pro-choice*? Cornell's work encourages us to expound upon the bad *and* the good. Yet, armed only with her work

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*Autonomy Myth*, 93 CAL. L. REV. 1285, 1287 (2005) ("I assert that the state should support carework in a manner that would allow citizens to combine caretaking responsibilities with work in the labor market, rather than directly subsidize such carework in private homes. I also contend that the state's responsibility to support caretaking, which Fineman frames in terms of a debt that society owes to caregivers, is better conceptualized as a societal obligation to protect its most vulnerable citizens, as well as to develop their capabilities.").

<sup>81</sup> See Anne Mellor, *On Feminist Utopias*, 9 WOMEN'S STUDIES 241, 243 (1982): "Those seeking a viable model of a non-sexist society must ... look to the future; their model must be constructed first as a utopia."

<sup>82</sup> On such a demand in legal discourse, consider Susan Ekberg Stiritz's article, *Cultural Cliteracy: Exposing the Contexts of Women's Not Coming*, 23 BERKELEY J. GENDER L. & JUST. 243, 247-8 (2008), where Stiritz connects pleasure and power: "The first part of this study describes moments in Western history that illuminate the degree to which women's primary organ of sexual pleasure has been systematically attacked. The second part elaborates a new feminist view of the clitoris as a system as large, impressive and significant as the penis and surprisingly similar to it". See also Katherine M. Franke, *Theorizing Yes: An Essay on Feminism, Law, and Desire*, 101 COLUM. L. REV. 181, 205-6 (2001) ("Surely legal feminists would want to theorize the sexual nature of human sexuality that is the 'excess over or potential difference from the bare choreographies of procreation.' Is there a reason why we have neglected to take notice of the fact that women are substantially more likely to be unhappy about their sex lives than are men? Is there something that we, as legal feminists, should be doing to address the fact that forty-three percent of women in the United States are suffering from diagnosable sexual dysfunction, symptomized by a lack of interest in sex, inability to achieve orgasm or arousal, and pain or discomfort during sex?").

<sup>83</sup> On human flourishing, see e.g., Margaret Jane Radin, *Market-Inalienability*, 100 HARV. L. REV. 1849, 1912 (1987) (examining how legal and illegal markets may impede human flourishing).

<sup>84</sup> On a legal right to nonviolence, see MARTIN LUTHER KING & JAMES MELVIN WASHINGTON, *A TESTAMENT OF HOPE, THE ESSENTIAL WRITINGS AND SPEECHES OF MARTIN LUTHER KING* (1991). On women's sufferings that flow from forms of gendered violence that have been little recognized in law, see ROBIN WEST, *CARING FOR JUSTICE*, 105-16 (1999) (discussing motherhood, pregnancy, and the concept of forced nurturance, which is a kind of violence). See also generally, Yxta Maya Murray, *A Jurisprudence of Nonviolence*, 9 CONN. PUB. INT. L.J. 65 (2009) (arguing for a legal right to be free of gendered, raced, sexed, and classed violence).

and Wilkes' installation, we find that, while there is plenty of *differend* to be found, there is no imago to be discerned anywhere in *choice*. It's all Barbara, and no Mildred. Moreover, when I asked Cornell during our interview if she had a practice of independent imago development that could help me out of this quandary, she demurred. For these reasons, as I examined (*We are*) *pro-choice* at the Tate (cluttered, as it was, next to the obscurely performative pieces of Sworn, Evans, and Nelson), and later at home in pictures, I could only achieve the most morbid reading. The subject is sadness and despair and dead ends. The ladder is useless. Motherhood, in the present state of affairs, is murderous to the soul.

The interpreter of (*We are*) *pro-choice* thus may intelligently wonder if they will remain stranded at this juncture. Erected in the cool white walls of the Tate, the clunky tears of the potty-trained Creature keep pouring down over the scattered rosebuds and the ladder to nowhere. Despite Cornell's encouragement that we experience revelations of not only pain but possibility, we start to get the queasy feeling that the installation can only end in a Kristevan conclusion. Perhaps there isn't anything more to add, and this artistic and feminist legal journey resolves right here, on the crapper.

An engaged feminist, however, bristles at this possibility. *What good does that do me?* she might ask. In the same way that Davis and Cornell grew impatient with Kristeva, a feminist critic may reject (*We are*) *pro-choice* if all it does is wallow.

*Then maybe you shouldn't be looking for solutions in art*, the art-for-art's sake advocate might reply. It is true that the simple fact of female annihilation has been a ripe subject for artists from Homer to Picasso. And, perhaps, once art strives to do more than hold a mirror up to reality it ceases to function as art and veers into the gristly fields of propaganda.

So, maybe there *is* no Cornelian imago in here. Maybe Cathy Wilkes *is* doing nothing more than telling women that they are right to want to destroy themselves.

What a grim idea. When I found myself at this impasse, it made me wish that I'd never wandered into the Tate in the first place. Unless I was wrong, that is. Unless there was something amazing and hidden in the work that I haven't yet realized.

I could only hope that Cathy Wilkes is more subtle than the Tate seemed to be giving her credit for.

Eventually, I decided that I had to turn to her and see if she had any suggestions.

### C. CATHY WILKES: HIDE AND SEEK

At first, looking to Wilkes for answers seems to lead to the most demented of dead ends.

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Not only does Cathy Wilkes not want to tell you about her intention in making (*We are*) *pro-choice* – she doesn't even want you to know who she is. Except with rare exceptions, she refuses interviews,<sup>85</sup> and so it's nearly impossible to get the kind of intimate details on her life that enlivened my research of Julia Kristeva and Drucilla Cornell.

However, as I will show, Wilkes' reticence is far more eloquent than it appears.

During the time of her naming on the Turner shortlist, newspaper reporters snooping into her background revealed that Wilkes was born in east Belfast, and left Ireland to attend the Glasgow School of Art in the 1980's. She finished a Masters of Fine Arts at the University of Ulster in the early 1990s, and taught art at Duncan Jordanstown College of Art in Dundee until 2000.<sup>86</sup> She is based in Glasgow,<sup>87</sup> and is known for her work with the art collective *Elizabeth Go*.<sup>88</sup> In one small essay that she wrote for *Artforum*, she admitted to loving Walter Sickert, the musician Valerie Webb, and feminist performance artist Valie Export.<sup>89</sup> She also revealed a very keen class consciousness.<sup>90</sup> She was born in 1967 and has exhibited widely in the United States and Europe.<sup>91</sup>

Except for her admission that she cares about class, a spy looking into Wilkes' world will find mostly the sort of dreary details that belong in a C.V. There are two exceptions to this, however: One is a filmed interview she deigned to give the Tate Britain, and which is available on their website. The other is a tiny essay that she wrote for a wee Glaswegian literary magazine called *StopStop*, which appeared between bright pink covers in 1997.

First, the lavish Tate interview: Entitled *Cathy Wilkes: Turner Prize 2008 (artist interview)*<sup>92</sup>, the Tate's beautifully produced five minute clips reveals Wilkes to be a dark haired woman who spends most of the film

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<sup>85</sup> Moira Jeffrey, *Art Review: Crunch Time Fuels a Very Fine Mess*, SCOTLAND ON SUNDAY, Jul. 6, 2008, at 18 ("Glasgow-based Wilkes is about as far from the fictional figure of celebrity Turner artist as you might imagine. She doesn't do interviews, is rarely photographed or seen on the circuit.")

<sup>86</sup> Aidan Dunne, *Mixed-media artist says he is 'chuffed' to win Turner Prize*, THE IRISH TIMES, Dec. 2, 2008, at 5.

<sup>87</sup> *Id.*

<sup>88</sup> This is cited in her Modern Institute C.V. See <http://www.themoderninstitute.com/artists/34/bio?style=print>.

<sup>89</sup> Cathy Wilkes, *Top Ten*, 44 ARTFORUM INTERNATIONAL Oct. 1, 2005 at 96.

<sup>90</sup> See *id.* (citing in her top ten favorites an art work by Mary Kelly, who "listed the schedules of over 150 women who worked in a metal-box factory in South London. I have a photocopy of the schedule of twenty-one-year-old Joanna Martin, a mother and full-time shrink-wrap operator. The work is still radical today because it demonstrates the complex sexual divisions of labor in such a ruthlessly diagrammatic way.")

<sup>91</sup> See Modern Institute C.V., *supra* note 88.

<sup>92</sup> Cathy Wilkes: Turner Prize 2008, Artist interview, (30 Sept. 2008). Wilkes' interview may be downloaded at <http://channel.tate.org.uk/media/29405678001>. All quotes are taken from this film.

pursing her classical, clean-lined face into the kind of citric brood that would have mesmerized Andrew Wyeth or Ingmar Bergman. Wilkes faces the camera, and immediately begins talking at the outset of the film. After the observer spends several beats puzzling through Wilkes' dense thicket of references, it becomes more or less evident that she is immensely concerned with the "vast" fissures that exist between human beings.

The video reveals Wilkes in her studio and home, and director Tortsten Lasuschmann focuses mainly on a head-shot interview style of reportage, which he also intersperses with shots of Wilkes busily gathering readymades such as Disneyesque statuettes of fawns and Beatrix Potter cereal bowls strewn in a creepy rhapsody around her work space. Lauschmann also cuts in a few seconds of footage of Wilkes interacting with a lively small child whom I take to be her son. In monologue that sounds over all of these images, Wilkes echoes Nick Hackworth's slick reading of her oeuvre, by explaining that her art conveys the "inexpressible." She quickly wades into more arcane accounts of her work, though, as she kicks off the interview by citing Nietzsche's parable of noontime, which is when the day's shortest shadow makes "one" object into "two."<sup>93</sup> Wilkes interprets the philosopher's metaphor as a study of "where the shadows of objects sit on top of those objects, and are not visible as something outside the object." She takes a breath, then ponders the "separa[bility of] the reality of the object and the object;" that is, the times when she "ha[s] an understanding of [something], but once it leaves the place inside [her] it doesn't seem to mean the same thing anymore." This "split," between the "real, and the picture," "where it is one and it is the other but you can't see where that is," is for her a "useful" concept to understand reality. In order to communicate this gap, Wilkes allows that she uses her readymades, such as "shop mannequins," to grope toward the difficulty of "try[ing] to feel what someone else feels" which ultimately leaves her with the sense of a "separation ... between people."

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<sup>93</sup> Friedrich Nietzsche, *High Mountains: Epode*, in *BEYOND GOOD AND EVIL* 223 (R.J. Hollingdale trans., Penguin 1973):

Oh life's midday! Oh second youth! Oh garden of summer! I  
Wait in restless ecstasy, I stand and watch and wait --- it is  
Friends I wait, in readiness day and night, *new* friends. Come  
now! It is time you were here!

This song is done – desire's sweet cry died on the lips: a  
Sorcerer did it, the timely friend, the midday friend – no! ask  
Not who he is – at midday it happened, at midday one became  
Two ...

Now, sure of victory together, we celebrate the feasts of feasts:  
Friend *Zarathustra* has come, the guest of guests! Now the  
World is laughing, the dread curtain is rent, the wedding day  
Has come for light and darkness ...

## *Feminist Engagement and the Museum*

The “split” that she finds the most painful is the one revealed during the process of caring for another person: “When someone is caring for someone else or someone is nursing someone else and trying to feel what they feel and be a companion to them.” But “to try to feel what someone else feels and to accompany them in their experience of life and in their suffering is to [her] related to what” she is looking for in “language.”

Wilkes ends her interview with a reference to Moses’ mother “putting her baby in a basket and putting the basket in the water and pushing it out,” which is an image she has used to help her “fix[a]te on the actual details of conscience” in her art, that is, to “reassess what really happened, and what that physical experience has to do with the inner reality.”

Like in the case of the most turgid elements of Kristeva and abstract lingos of Cornell, for possibly too-grounded readers like myself, Wilkes’ analysis can come across as ethereal wing-flapping by unknowable angels singing gnostic riddles. To cope with this cipher, I typed out my own transcript of Wilkes’ monologue, studied it, researched Nietzsche, extracted the gnomic quote cited above in my footnotes, and finally figured that maybe Wilkes was onto something with the not talking much to reporters. Her art proves a great deal more expressive than her words – though after I had pondered her interview for some time I was able to see a multiplicity of parallels between Wilkes and Cornell, as well as Kristeva.

As in the case of Kristeva and Cornell, Wilkes is devoted to the ineffable, and her summoning of Nietzschean noon reveals her passion for dichotomies and liminalities. As Kristeva pondered the unspeakable abject edge between the inside and outside, and Cornell considered the mute *differend* and imago, Wilkes too has a nearly Hamlet-like obsession with the difference between “is” and “seems.” And, also like Kristeva and Cornell, she translates this fixation through a language of mothers and caring: She seeks to understand what she can’t yet grasp about love and nurturance.

This alone may show that (*We are*) *pro-choice* is not just an exercise in the abject, but rather a groping for connection between human beings that our capitalist and brutalist society obstructs. There is still plenty of *differend* here, but also a working toward something that sets the precondition for the discovery of Cornell’s imago: This precondition is the knowledge of the fracture between the thing and its shadow, between people and love.

One other document helps my case that Wilkes wants to describe more than confusion, or even pain, but rather to pave the way for some better world. In the ’97 *StopStop*, Wilkes wrote a brief, if often to me incomprehensible essay called *The Lion For Real: Freedom and Servitude*.<sup>94</sup> Here, one will find sentences fixed together according to an occult logic, though the themes of anti-corporatism, pro-musicalism, and the mandate that you “express yourself in your own language”<sup>95</sup> emerges through repeat-

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<sup>94</sup> STOPSTOP 58 (1997).

<sup>95</sup> *Id.*

ed readings. What also becomes clear in this sometimes exquisite fog of words is Wilkes' ambition to "confront[] one's own reality – hardcore and uncompromising – in detail and all its fullness."<sup>96</sup> Punctuating her essay twice with the word *POW* – rendered in huge, bolded, Space-Invaders-style font<sup>97</sup> – she endorses using "candid language, self-expression and the experience of living directly to try to transcend the darkness and brutality of subjugation, imposed identity and servitude."<sup>98</sup> Again seeming to parallel Kristeva and Cornell, who write of suffering and liberty as beyond institutional reckoning, Wilkes observes that this transcendence or freedom are not now within the realms of the state: "[We need to recognize our] unstead[y] and vagran[t] ... confrontation with reality ... how it is bent, condensed, pulled out, clarified, obscured. Somewhere *out there* and beyond the law the exchange of fearlessness for reality takes place."<sup>99</sup>

These passages demonstrate that Wilkes may be one of the most *engagée* artists working right now, which is curious considering how the Tate offered *pro-choice* as a case study of politics-free if performative jabberwocky. *The Lion for Real* convinced me that the maternal and otherwise female focus of Wilkes' work issued from her horror of women's "subjugation, imposed identity and servitude."

When I turned back to *(We are) pro-choice*, then, I realized that there must be more in the Turner installation than met the eye. If Wilkes takes as one of her prime objectives the liberation of the subjugated by causing them to "confront[]" a "reality" that is "out there" and "beyond the law," then that suggested her sculpture contained some kind of hidden map that might help the Creature up the ladder. As of yet, I had nothing but hopes and suspicions, as well as Wilkes' own hideout of language and muteness.

What I eventually determined was that, just as Wilkes shared obsessions over motherhood, silence, the liminal, and suffering with Kristeva and Cornell, she also, like them, had a strategy for tackling the problems inherent in these issues. Her strategy is opacity – but not fashioned in the loopy manner represented by Hackworth: In order to solve the problems of womankind, and in order to imagine a better future, her strategy requires the direct participation of the audience. She hides her message behind silence or a monsoon of strange sayings, and you must find it.

What this means is that you must also develop your own strategy.

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<sup>96</sup> *Id.* at 59.

<sup>97</sup> *Id.* at 59, 61.

<sup>98</sup> *Id.* at 59.

<sup>99</sup> *Id.* at 61.

## II. Yxta Maya Murray: The Detective

Thus I must become a part of this essay. I began this work at the Tate Britain, wondering if what I saw was all that I saw, and hoping that it was not. In my journey to discover the meanings that I thought I spied in the dark wood of *(We are) pro-choice*, I traveled to different countries of feminist thought. I discovered in Kristeva the abject, French style, the phallic mother, and the liminal. I was not happy with leaving my interpretation at abjection, for personal reasons. So I ventured forward to Cornell, again finding mothers, speechlessness, and the strange space that exists between pain and possibility. I became enraptured by the imago, again, for reasons of my own biography. Indeed, I wanted to find in the installation something engaged, positive, and fruitful for future days. But when putting a magnifying glass to Wilkes, I found that if my desires were going to be fulfilled in my interaction with *(We are) pro-choice*, then I was going to have to depend on my own resources. The question was how I was to do this. Inevitably, that question turns on the story of who I am.

I was born in Lakewood, California in 1968, and my family and I quickly moved thereafter to Long Beach, about half an hour away. My mother and grandmother are and were from Mexico, and my father was born poor white in Toronto, Canada. It became evident early that literature and thinking would be my pathway out of Long Beach, since I was one of those children who found sympathy among my teachers where I did not with my fellow students and their loves of softball, Christianity, white supremacy, gay bashing, and other assorted amusements.

My mild eccentricities and social awkwardness did not prevent me from marrying at a young age, thankfully, and I have been with my husband – the modern art hater Andrew – for twenty years now. My intransigence has also not prevented me from retaining my post as a professor of criminal law and feminist theory at Loyola Law School in Los Angeles since 1995. My more dubious qualities have, however, impeded my relationship with my own mother, with whom I have only sporadic contact. The one other difficulty in my life that I have endured is a diagnosis of cancer at the age of 31, and for which I have been treated intermittently ever since.

Supremely abject illness and mothers may be two of the causes that stopped me to take a closer look at the bald Creature last summer. But as to the analytic place I find myself in now – this pressure to make something out of the abjection that I refuse to conclude may be all that we can take away from Wilkes' installation – *that* can probably be attributed to my father, Fred MacMurray. A businessman, foreigner, plain speaker, and smoker, he had no patience for my grief when I was struck ill, nor had he ever understood my mincy emotional frailties before then. Commanding me always to be strong, and asking me “So, what are you going to do about it?” when I would complain of some injustice, he is one of the reasons why I went to law school, why I can't reside only in the abject, and why I look to codes and philosophies for solutions. In other words, he is

why I am *engagée*. The fact that I love art seems to come from a more original space somewhere inside of me, since art cannot be reduced to a code or box of suggestions for how to conduct oneself ethically or purposefully in life – or how to read an installation.

In any case, he passed away two years ago because of a blood disease, and I loved him very much. My own endurances with illness, as well as my experience nursing him on his deathbed, acquainted me well with the concept of the ineffable. Most of these rigors have simply been beyond speech, at least mine. But that doesn't mean that I am content with silence in the face of pain, or that I am satisfied with the speechless and unfair state of women's affairs. So, along with sharing interests in the maternal and *l'engagement* with Kristeva, Cornell, and Wilkes, I also partake of a passion for understanding silent suffering and for imagining ways to improve the lives of women.

My strategy for addressing oppression is that of the detective. I take refuge in my intellect and ability to make sometimes abstruse connections. My love of detection has led me to write three detective-like novels,<sup>100</sup> and inclined me to law school, with its emphasis on sometimes recondite facts. Also, when I became ill, I gamely researched to determine the nature of my disease and the best medical wisdom on how to treat it.

Thus, Kristeva posed the abject, Cornell the *differend* and imago, Wilkes plays hide and seek, and I investigate until I am able to compile enough facts that can help me devise a meaning that I can live with.

So, this is what I did with (*We are*) *pro-choice*.

Again, the questions with *choice* were: Is that all there is? Are we to be left with the abject?

After a fair amount of research, I found my answers. It turns out that Wilkes' installation may respond directly to a color silkscreen title *We Are Pro Choice*, which was made by the much-lauded feminist artist Nancy Spero. Created in 1992, and following a "black period"<sup>101</sup> where Spero primarily painted or drew images dealing with the horrors of war, Spero's own *We Are Pro Choice* shows female athletes, icons, and goddesses in jubilant attitudes against a bright pink backdrop. It is a great representation of Cornell's concept of the imago:

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<sup>100</sup> THE CONQUEST (2002), THE QUEEN JADE (2004), THE KING'S GOLD (2007).

<sup>101</sup> Brook Adams, *Review*, 17 PRINT COLLECTOR'S NEWSLETTER 11 (March/April 1986).



Art © Estate of Nancy Spero/Licensed by VAGA, New York, NY<sup>102</sup>

Once I found Spero, her precursor image satisfied me that Wilkes' work did contain the complexity that I look for in art, and that Wilkes was playing a hide and seek game with her audience: In her title, Wilkes has secretly disclosed the ecstatic origins of her own artistic process, which is hidden in plain sight like Edgar Allan Poe's purloined letter. What this means to me is that Wilkes' art is not just the installation itself, but also the work that one must put into it to fathom it. Only upon capturing this reference can one see the image of Cornell-like possibility tucked into the Kristevan panorama of pain. (*We are*) *pro-choice*, then, is both an art object and a grasping, caustic, and possibly hopeful reference to feminist art lineage. As such, it flickers between the abject in front of your eyes and the latent promise of female liberation.

It's altogether possible that Wilkes has never heard of Spero (though I doubt that) or that she intends the reference only to mean that what Spero dreamed of is a ridiculous impossibility, and that Wilkes' images are true reflections of a solid and monolithic reality. But Wilkes' interview and essay belie that reading, since she's so convinced that there is no such thing as a knowable and fixed orthodoxy. Instead, her work inspires the detection of worlds within worlds, Cornell's within Kristeva's, falsehoods that are truths, and a longer feminist art history of such journeyings between pain and transcendence.

What does this mean for law, for feminism, and for developing a strategy to overcome oppression?

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<sup>102</sup> Nancy Spero, Color silkscreen, "We are Pro Choice" (1992) Collection of Arizona State University Art Museum. Art © Estate of Nancy Spero/Licensed by VAGA, New York, NY.

It allows us to add yet another tool for building a feminist liberation. Kristeva urges us to see the abject, and Cornell encourages us to imagine its opposite, the imago. Cornell, however, does not give us very precise directions for how to develop such imaginaries. Wilkes lays out the pieces for the construction of both pain and possibility, but leaves her audience to devise their answers on their own. Feminists like me, the detectives, can add another sharp arrow to the ones that Kristeva, Cornell, and Wilkes have provided for our quiver. We can develop a feminist engagement devoted to hunting down and creating feminist possibilities, even in the seeming face of annihilation.

In my strategy, art holds a central place in this process. Through the engaged analysis, creation, and consumption of art, we can come to understand female pain in greater detail, as well as imagine new feminist worlds that we can work toward through legal reform and social policy efforts.

One problem is presented by this insight, however, which is the fact that the Tate seemed to *impede* the imaginings of such possibilities by its display of the installation and the copious unhelpfulness of the Hackworth video. In sum, the presentation was direly depressing, and *pro-choice* was confusingly defanged by its inclusion in the context of the other “performance” pieces made by artists known for their meditations on history and pop culture,<sup>103</sup> how “subjective experience becomes translated into history,”<sup>104</sup> “immateriality and weightlessness”<sup>105</sup> and “art’s representation of both personal and global histories.”<sup>106</sup> Hackworth, while not sneering at the installation, only added to the sensation that the work was the too-private febrile musings of an hysteric. I had to spend nearly six months and read dozens of books to finally arrive at its greater feminist meaning.

In the next section, then, I will argue that the Tate Britain erred in its presentation of (*We are*) *pro-choice*. And, in line with my role as a feminist legal critic, I will ponder the feminist, legal, and ethical implications of the curatorial decisions that eclipsed the complex and potentially liberatory meanings of the installation for the viewer.

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<sup>103</sup> Mark Prince, *Marc Camille Chaimowicz*, ART IN AMERICA, Nov. 18, 2011, <http://www.artinamericamagazine.com/reviews/marc-camille-chaimowicz/>.

<sup>104</sup> School of Fine Art: The Glasgow School of Art, *Corin Sworn*, 2009. [http://www.gsamfa.com/2009/corin\\_sworn.php](http://www.gsamfa.com/2009/corin_sworn.php).

<sup>105</sup> Cerith Syn Evans at Bergen Kunsthall, *Contemporary Art Daily: A Daily Journal of International Exhibitions*, Feb. 28, 2011, <http://www.contemporaryartdaily.com/2011/02/cerith-wyn-evans-at-bergen-kunsthall/>.

<sup>106</sup> Rachel Withers, *Mike Nelson at the Venice Biennale*, THE GUARDIAN, June 3, 2011, <http://www.guardian.co.uk/artanddesign/2011/jun/03/mike-nelson-venice-biennale>.

### III. The Engaged Museum

The Tate made a mistake in its display of *(We are) pro-choice*. While I have acknowledged that Wilkes' art engages in an intentional strategy of "hide and seek," if the work is displayed in a too-occluded setting, only detectives with the most luxurious amounts of spare time and energy will be able to discern the invisible map that might lead the Creature up the ladder. As in all detective work, some context is necessary for the observer to have the first inkling that all is not as it appears; without such encouragement, the vast majority of people who encounter *(We are) pro-choice* will never suspect the complexity that exists in the work. Presented alone, and only in the frame of other "performance" pieces, the installation leaves the observer confused or, worse, bereft. Borrowing from Cornell's critique of Kristeva, it strands us in *derelection*. If we are concerned with the ability of art to energize an engaged feminism, we may worry that its exhibition gives most patrons a too-narrow glimpse into women's worlds, and thus obstructs their ability to imagine better futures.

At its worst, the Tate's election may be interpreted as a nihilistic exercise in attention getting: They picked Wilkes' most depressing piece of feminist art they could lay their hands on in order to make a public relations splash,<sup>107</sup> without, for example, caring to put *pro-choice* in the context of Spero's earlier silkscreen. Moreover, the Tate could have purchased and then offered up some of Wilkes' more hopeful work so as to round out, or at least suggest, her message.

One such possible option would have been the installation *Non Verbal* (2005), a heady piece involving a baby stroller, a porridge bowl, a television, and mannequins with paintings affixed to their faces. It is based on a Walter Sickert's *Lazarus Breaks His Fast* (1927), showing a frowsy-looking Lazarus taking breakfast after his resurrection. In a newspaper interview, Wilkes explained *Lazarus* as a paean to "[a] new morning after death!"<sup>108</sup> So, as *Non Verbal* is an update on that painting, it may be seen as a corollary to the nightmare night described in *(We are) pro-choice*.<sup>109</sup>

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<sup>107</sup> And there was quite a splash. See *infra* note 132.

<sup>108</sup> Cathy Wilkes, *Top Ten*, 44 ARTFORUM INTERNATIONAL Oct. 1, 2005 at 96.

<sup>109</sup> Books LLC, SCULPTORS FROM NORTHERN IRELAND: LYCIA TROUTON, JOHN LUKE, CATHY WILKES, CLIFFORD RAINEY, JOHN KINDNESS, MAURICE HARRON, DEBORAH BROWN 3 (2010). In this pamphlet, the connection is made between Sickert's painting and Wilkes' installation. See also Ars Arcana, *Cathy Wilkes – Non Verbal Installation*, <http://farrung.com/arsarcana/?tag=lazarus-breaks-his-fast>. The Sickert image is reproduced from that site, and the small essay on *Non Verbal* also contains the revelation that the installation is based on *Lazarus*.



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©Estate of Walter R. Sickert. All rights reserved, DACS 2012.<sup>111</sup>

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<sup>110</sup> TMI-WILKC-00145: Cathy Wilkes, *Non Verbal* (version) 2006, Oil on canvas, mannequins, aluminium tray, corn oil, LCD screen, pram, motorcycle helmet and mixed media. Dimensions Variable, Installation view VOID Gallery, Derry 2007. Courtesy of the artist and The Modern Institute/ Toby Webster Ltd., Glasgow. Photo Paola Bernerdelli. In the version in Wilkes' monograph, both creatures have paintings affixed to their faces. See Cathy Wilkes, *Cathy Wilkes* 78 (2008).

<sup>111</sup> Walter Sickert, Painting, "Lazarus Breaks His Fast" (1927). © Estate of Walter R. Sickert. All rights reserved, DACS 2012. The relationship between the works is discussed in Farrung, *Cathy Wilkes – Non-Verbal Installation*, <http://farrung.com/arsarcana/?tag=lazarus-breaks-his-fast>. (accessed Jan 29, 2012).

## *Feminist Engagement and the Museum*

My call for the Tate to contextualize (*We are*) *pro-choice* in the larger body of Wilkes' *oeuvre* argues from a particular politics of museum funding and curating, which may in turn be supported by my readings of the legal and ethical duties of the Tate's administrators.

With respect to the law, there are both contractual and statutory duties that Tate administrators must abide by. The Tate is an exempt charity that receives some of its funding from the Department for Culture, Media, and Sport. Under its funding agreement with the Department, it has promised to be "inclusive ... by being more inviting and welcoming," as well as "diverse" and "open" to "encouraging debate and exchange, and being open to new ideas."<sup>112</sup> Furthermore, it is guided by a fourteen-member Board of Trustees, thirteen of whom are appointed by the Prime Minister; the other is a member of the National Gallery Board of Trustees.<sup>113</sup> Under the Museum Act of 1992, members of the Board agree, "so far as practicable,"<sup>114</sup> to "maintain a collection of British works of art and of documents relating to those works,"<sup>115</sup> and a "collection of ... contemporary works of art and of documents relating to those works."<sup>116</sup> It shall additionally "secure that the works of art are exhibited to the public" and "generally promote the public's enjoyment and understanding of painting and other fine art both by means of the Board's collection and by such other means as they consider appropriate."<sup>117</sup>

These responsibilities are also reflected in the United Kingdom's Museums Association's Code of Ethics,<sup>118</sup> which provides that museums shall "promote public awareness, understanding and appreciation of the museum,"<sup>119</sup> "take account of individuals' differing educational experiences, learning styles, abilities and ways of understanding,"<sup>120</sup> "seek the views of communities, users and supporters and value the contributions they make [in order to] actively involve them in developing policy," and "engage with changing needs and values."<sup>121</sup>

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<sup>112</sup> *Tate : Funding Agreement 2008-2011*,

<http://www.tate.org.uk/about/governancefunding/funding/accounts/docs/tatefundingagreement.pdf>.

<sup>113</sup> Tate Britain, *Board of Trustees*,

<http://www.tate.org.uk/about/governancefunding/boardoftrustees/>.

<sup>114</sup> *Museums and Galleries Act, 1992* (U.K.), c. 44, § (1).

<sup>115</sup> *Museums and Galleries Act, 1992* (U.K.), c. 44, § 2(2).

<sup>116</sup> *Id.*

<sup>117</sup> *Museums and Galleries Act, 1992* (U.K.), c. 44, § 2 (2) (b) and (d).

<sup>118</sup> See Museums Association, *Code of Ethics for Museums: Ethical Principles For All Who Work for or Govern Museums in the U.K.* (2008), available at <http://www.museumsassociation.org/download?id=15717>

<sup>119</sup> Code of Ethics section 3.4, see *Id.* at p. 12.

<sup>120</sup> *Id.* at 3.5.

<sup>121</sup> *Id.* at 4.0 at p. 13. The U.K. ethics code is a bit more elaborate than its U.S. counterpart, which provides that museums ensure that "collections in [their] custody support [their] mission and public trust responsibilities" and that "programs are accessible and encourage participation of the widest possible audience consistent with its mission and resources."

Consequently, the Tate Board and its employees are obligated by contract, statute, and ethics to display works of art, and attendant documents, in ways that invite, welcome, and gratify a diverse audience, while recognizing different “learning styles.” They are also compelled to encourage debate and ideas, and promote the public’s “understanding” of the fine art in its collection. And these duties will be achieved not only by the collection itself, but also by “other” “appropriate” means.

Is the Tate Board or other administrators breaching their duties by showing (*We are*) *pro-choice* out of context, and in a manner that creates a kind of gendered trauma for the viewer? A brief examination of critiques of museums or art institutions reveals support for the argument that it is. Early feminist assaults on museum policies primarily concentrated on the sheer unavailability of art made by women in the halls of such esteemed galleries as the Tate,<sup>122</sup> but feminist museum theory has moved beyond mere inclusion.<sup>123</sup> If (*We are*) *pro-choice* may be too easily read as simply another example of “Girl = Dumb, Girl = Bad, Girl = Weak,”<sup>124</sup> and polls reveal that patrons regard museums as being one of the most trustworthy of all informational institutions,<sup>125</sup> then a feminist interpretation of the

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American Association of Museums, *Code of Ethics for Museums*, <http://www.aamus.org/museumresources/ethics/coe.cfm>.

<sup>122</sup> See, e.g., RACHEL BAILEY JONES, POSTCOLONIAL REPRESENTATIONS OF WOMEN: CRITICAL ISSUES FOR EDUCATION 192 (2011) (describing the activism of the 1980’s Guerilla Girls, a “feminist organization using visual representation and art as a weapon of resistance against patriarchy.” The Guerrilla Girls plastered museums like the Metropolitan Museum of Art with posters that bore such maxims as “Do women have to be naked to get into the Met. Museum?”).

<sup>123</sup> See Katy Deepwell, *Feminist Curatorial Strategies and Practices Since the 1970s*, in NEW MUSEUM THEORY AND PRACTICE 80 (Janet Marstine ed., 2006) (“If the issue for women’s exhibitions is not about numbers or visible representation for women artists, then it is really a battle for ideas ... . To organize a feminist art exhibition is often thought of as taking too high a risk of failing, and this is something that museum curators are reluctant to do.”).

<sup>124</sup> This critique is from the *Riot Grrrrl Manifesto*. See Christina D’Angelica, *Beyond Bikini Kill: A History of Riot Grrrl, from Grrrls to Ladies 2* (2009) (unpublished dissertation, Sarah Lawrence College) (on file with author): “The Riot Grrrls were a loose collection of feminist musicians who confronted one of the institutions that is most damaging to their young lives – the media – and sought to produce their own alternative culture that reflected their desire to be zealous feminists.” See also [http://onewarart.org/riot\\_grrrl\\_manifesto.htm](http://onewarart.org/riot_grrrl_manifesto.htm).

<sup>125</sup> According to the American Association of Museums, a “recent national survey indicates” that “[a]lmost 9 out of 10 Americans (87%) find museums to be the most trustworthy or a trustworthy source of information among a wide range of choices, including 38% who see museums as one of the most trusted sources.” *Museums Working in the Public Interest*, [http://www.aamus.org/getinvolved/advocate/upload/AAM\\_Museums\\_Working\\_in\\_the\\_Public\\_Interest.pdf](http://www.aamus.org/getinvolved/advocate/upload/AAM_Museums_Working_in_the_Public_Interest.pdf). See also Philip M. Katz, *Research Round Up: Field Trips Down, Ignorance Holding Steady, Museum Visits Booming* (2008), citing a Institute for Museum and Library Services survey conducted by the University of North Carolina School of Information and Library Science, which focused on the reliability of museum web sites. It determined that

## *Feminist Engagement and the Museum*

Tate's duties calls for the museum to provide a more comprehensive survey of Wilkes' work, so as to help the patrons access deeper, more contradictory, and more positive meanings. Or, correspondingly, it may also require the Tate to "invite" "debate" and "the exchange of new ideas" in a public forum in order to spur patrons to develop a richer reading of *(We are) pro-choice* than is encouraged by its placement among a host of male-produced art,<sup>126</sup> in one of the most popular, and thus time-and-space-poor galleries in the world.

My inquiries to Tate administrators revealed that the Tate Britain did not put on a single program devoted to unearthing the meaning of *(We are) pro-choice*.<sup>127</sup> Moreover, while an interpretive web page for *Has the Film Started Yet?* gives short glosses on the other artworks in that exhibit, Wilkes is not analyzed except to acknowledge that her work was included in the show because it "features arrangements of objects that could be seen

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"[l]ibraries and museums rank higher in trustworthiness than all other information sources, including government, commercial and private websites." See <http://www.aamus.org/pubs/webexclusive/nclb.cfm>.

<sup>126</sup> The Tate Britain is not awash with art made by women. The gendered study that I have seen of museums in the Tate system relate to the Tate Modern, which one would expect to have more art by women than the T.B. See Arifa Akbar, *Tate admits need to buy more works by women artists*, THE INDEPENDENT March 26, 2007, <http://www.independent.co.uk/news/uk/this-britain/tate-admits-need-to-buy-more-works-by-women-artists-441939.html> ("Of the 2,914 artists represented in the Tate[] [Modern's] collection, only 348 – one less than 12 percent – are women, and only two of the 39 major works bought over the past two years were by female artists."). The purchase of Wilkes' work appears to have been not only a response to the Turner Prize nod, but also reflective of the "gallery's trustees ... resol[ution] to acquire more works by female painters and sculptors." *Id.* More recently, the Tate Modern's Frances Morris responded to critiques of the lack of inclusion of women in major galleries by saying "we are really trying to mainstream women." Though Morris says that women are doing "rather well in the arts world at the moment" she recognizes "centuries of neglect." *Today, Female artists' "century of neglect,"* (BBC Radio 4 broadcast, June 13, 2011), [http://news.bbc.co.uk/today/hi/today/newsid\\_9511000/9511406.stm](http://news.bbc.co.uk/today/hi/today/newsid_9511000/9511406.stm). Further, the Tate Britain's new director, Penelope Curtis, is the first woman to fulfill that position. When she was interviewed in *The Guardian* in 2010, she mentioned her goal of preserving patron "pleasure," as certainly she should. Curtis did not take care, however, to recognize how racism, classism, and sexism can impede patrons' enjoyment of the Tate Britain's offerings. See Charlotte Higgins, *Penelope Curtis: Beyond the Oil Painting*, THE GUARDIAN, Nov. 30, 2010, <http://www.guardian.co.uk/artanddesign/2010/nov/30/penelope-curtis-tate-britain-interview>.

<sup>127</sup> My correspondence with Tate curator Madeleine Keep and information assistant Richard Gray has confirmed that the Tate did not put on any presentations or program to help patrons understand the context of *pro-choice*. Email from Madeleine Keep to Yxta Maya Murray (October 30, 2011) (on file with author); Email from Richard Gray to Yxta Maya Murray (Nov. 1, 2011) (on file with author).

as settings for a performance,”<sup>128</sup> though a performance of precisely *what* is not described; Wilkes is then unhelpfully compared to artist Mike Nelson.<sup>129</sup> And while Wilkes had been invited to give a talk at the Tate Britain in honor of her nomination to the Turner shortlist, she declined, possibly in line with her current policy of avoiding public exposure.<sup>130</sup> This left her work almost bare of any interpretive aids or debate. The Tate *does* offer on its website the rare interview with Wilkes herself, wherein she talks about her love for Nietzsche and how she takes human alienation as her subject. But Wilkes, as I have shown, is an intriguingly indirect champion of her own work’s complexities. If what we are seeking from the museum is not just images of pain but also images that can pave the way to liberation, then more “new ideas” and “promotion[s] of understanding” must be offered by the gallery.

Patrons’ boredom, exhaustion, and impatience with difficult work, combined with crowding, which may deter lengthy contemplation of an installation, increase the need for such mind-opening programs – or, to be fussy about it, proper dispatch of the Tate’s legal and ethical duties.<sup>131</sup> Further, Wilkes’ being shortlisted for the Turner Prize was greeted with jeers from the media. Newspaper critics broadcasted savage readings of *I Give You All My Money*, the work similar to *(We are) pro-choice* in its use of a toilet, mannequins, and a stepladder; the ruckus critics caused would make it all the easier for patrons to isolate the abject and derelict aspects of

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<sup>128</sup> *The Scene is Set: Lizzie Carey-Thomas, Clarrie Wallis, Andrew Wilson, and Cerith Wyn Evans on Tate Britain New Displays*

<http://www.tate.org.uk/tateetc/issue22/tbneedisplays.htm>.

<sup>129</sup> *Id.* (“Both Mike Nelson’s *The Coral Reef* (2000), his first large-scale labyrinthine work, and Cathy Wilkes’s installation *(We Are) Pro-Choice* (2008), also a new acquisition by Tate, demonstrate how artists construct environmental tableaux in different ways. Nelson and Wilkes explore a distinctly personal vocabulary of domestic objects and materials that appear in ever-evolving assemblages and environments. As Nelson explains in respect to *The Coral Reef*: “I look for a particular type of object or thing to articulate different types of space. Certain objects and materials have a power or imbued knowingness to their own history. One object like that can articulate a whole space.”).

<sup>130</sup> See Keep, *supra* note 127: (“We invite all Turner Prize nominees to speak about their work in conjunction with the exhibition but Cathy was not able to contribute to the talks series that year.”).

<sup>131</sup> See, e.g., DAVID DEAN, MUSEUM EXHIBITION: THEORY AND PRACTICE 25-26 (1994) (“There are three basic types of museum visitor . . . . First, there are people who move through a gallery quickly and display exit-oriented behavior . . . . The second groups . . . show genuine interest . . . . However, they ordinarily do not spend much time reading, especially text that appear difficult or require too much effort to understand. These people prefer a casual, headline approach to information display. . . . The people in the third group are a minority. These are folks who will examine exhibitions with much more attention.”); Edward Rothstein, *Extreme Museum: The Rigors of Contemplation*, FINE ARTS & EXHIBITS SECTION OF THE N.Y. TIMES 6 Oct. 23, 2011 (“The evidence can be seen in every museum, as people rush through galleries, seeming to seek relief from something in hot pursuit.”) (describing “Museum Mind,” a state of near catatonia that can hit patrons.).

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Wilkes' creation,<sup>132</sup> which puts even greater pressure on the Tate to offer more context for its audience.

Yet, for all of my admiration for Cornellian engagement, I see powerful counterarguments to the formation of a blunt legal duty for the Tate or other museums to begin "helping the audience," since such "help" can easily backfire into the kind of kitschy and even offensive pabulum that artist John Baldessari has satirized in his own work to such great effect.<sup>133</sup> New York mayor Rudy Giuliani's obscene reading of Chris Ofili's *Madonna* in the 1999 Brooklyn Museum *Sensation* show demonstrates the hazards created by state actors who press upon the public official readings of art works.<sup>134</sup> Also, my suggestions may not be deemed "practicable."<sup>135</sup> The

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<sup>132</sup> *Whatever happened to the Turner Prize?* THE INDEPENDENT ON SUNDAY, NOV. 30, 2008, <http://www.independent.co.uk/arts-entertainment/art/news/whatever-happened-to-the-turner-prize-1041644.html> ("Despite a shortlist featuring a film about broken crockery, a mannequin sitting on a lavatory, a photo collage and an installation featuring, among other things, Felix the Cat, this year's prize, the winner of which will be announced tomorrow, has raised barely a murmur. Critics have panned it as the 'worst on record' and likened the exhibition at London's Tate Britain to an 'afternoon spent in a Heathrow departure lounge'. The standard of work showcased is so bad that some claim the future of the Turner Prize itself, regarded as one of the world's most prestigious contemporary art awards, is in question."). See also Aidan Dunn, *Turner Prize Fails to Capture Imagination*, THE IRISH TIMES, Oct. 11, 2008 at 6 ("It's a mess ... heavy ... obvious[.]"); Louise Jury, *Naked Models and a loo with a view at the Turner Show*, THE EVENING STANDARD, Sept. 29, 2008 at 3.

<sup>133</sup> See, e.g., *Quality Painting*, which is a text work reading: "Quality material – / Careful inspection – Good workmanship./ All combined in an effort to give you a perfect painting." <http://artworksmagazine.com/2009/10/the-sum-of-the-parts-equals-john-baldessari/>. See also Baldessari's *Commissioned Painting: A Painting by Elmiere Bourke*, showing a picture of a hairy hand pointing at what appears to me to be a paint splattered piece of wood. [http://www.nytimes.com/slideshow/2010/10/20/arts/design/201010122\\_BALD\\_SS-2.html](http://www.nytimes.com/slideshow/2010/10/20/arts/design/201010122_BALD_SS-2.html). Baldessari, however, shouldn't be regarded in the last word on art institutional critiques, as he seems to have caved into the capitalist temptations of the institutionalized art world – or at least lost hold of his own joke. See *Artistic Vision*, in *The Daily W*, *WMagazine.com*, Oct. 18, 2010, <http://www.wmagazine.com/w/blogs/thedailyw/2011/10/18/artistic-vision.htm> ("For his latest project, a collaboration with L.A. eyewear brand Freeway ... the conceptual-art pioneer has scrawled I will not look at any more boring art across an arm of the brand's L.A. Rays style and signed it. Available in an edition of 200, in white on black or black on cream (freewayeyewear.com, \$200).").

To get back on subject: It should be noted here that Cornell would also likely object to such state micromanaging of art museums. In our phone interview, Cornell stated that while she is an engaged writer she also believes that artists need freedom and space to create, an observation that might extend to curators and museum administrators as well. Interview, *supra* note 40.

<sup>134</sup> Carol Vogel, *Holding Fast to his Inspiration: An Artist Tries to Keep his Cool in the Face of Angry Criticism*, N.Y. TIMES., Sept 28, 1999 at E1 ("When Mayor Rudolph W. Giuliani threatened to cut off the museum's city subsidy and remove its board if the show was not canceled, he singled out 'The Very Holy Virgin Mary,' along with several other works, as 'sick stuff.'"); David Barstow, *Giuliani Ordered to Restore Funds for Art Museum*, N. Y. TIMES, Nov. 2, 1999, at A1. ("A Federal judge ruled yesterday that Mayor

degree of difficulty and precision required here and the multitude of different ideas that one could suggest to fill in the gaps left by the Tate's Wilkes installation – call for caution when considering how to best combine the harsh force of an strengthened legal duty with the delicacy required of curatorial work. Doing so, of course, risks the state's curbing of the free speech rights of the curators. And there is always the concern that putting additional burdens on museum administrators when they acquire the work of women or people of color will only deter the institution from broadening its holdings, particularly when the museum has a track record as bad as the Tate's.<sup>136</sup> These risks seems particularly severe when considering how court orders concerning British museums have risen to the level of international incidents,<sup>137</sup> and how other examples of state actors interfering with museum curation are object lessons in censorship.<sup>138</sup> Finally, courts are tra-

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Rudolph W. Giuliani violated the First Amendment when he cut city financing and began eviction proceedings against the Brooklyn Museum of Art for mounting an exhibition that the mayor deemed offensive and sacrilegious.”)

<sup>135</sup> Museums and Galleries Act of 1992, *supra* note 114, at (1).

<sup>136</sup> Akbar, *supra* note 126.

<sup>137</sup> Such as in the 2005 case, *Attorney-General v. British Museum Trustees*, [2005] EWHC (Ch) 1089. (U.K.). There, “the High Court of Justice in London, England, issued a ruling that sets a bad precedent for anyone, Nation-State or individual, seeking to reclaim looted property that has found its way into the British Museum's collection.” Michael J. Reppas II, *Empty “International” Museums’ Trophy Cases of Their Looted Treasures and Return Stolen Property to the Countries of Origin and the Rightful Heirs of Those Wrongfully Dispossessed*, 36 DENV. J. INT'L L. & POL'Y 93, 99 (2007). Though the Inter-Allied Declaration Against Acts of Dispossession Committed in Territories Under Enemy Occupation or Control appeared to require such a re-transfer, *Id.* at 101, the High Court ruled that “no moral obligation can justify a disposition by the Trustees of an object forming part of the collections of the Museum in breach of [Section 3(4) of the 1963 Act].” *Id.* at 102, citing *The Trustees of the British Museum* at 45. As might be expected, this decision caused much outrage and commentary. *See, e.g.*, Thomas Wagner, *Museum has no authority to return Nazi-looted art*, THE JERUSALEM POST, May 29, 2005 (The Commission for Looted Art in Europe, a group that represents the Feldmann family, criticized the decision.”). The law was finally changed in 2009 with the Holocaust (Stolen Art) Restitution Act,

<http://www.publications.parliament.uk/pa/cm200809/cmbills/035/2009035.pdf>.

<sup>138</sup> In Giuliani's case, he ordered that New York stop paying the Brooklyn museum a subsidy, and attempted to get the Brooklyn Museum evicted. *See* David Barstow, *Giuliani Ordered to Restore Funds for Art Museum*, THE N. Y. TIMES, Nov 2, 1999, at A1. The 1999 New Zealand case of MP John Banks, who sought to “prosecute” the Museum of New Zealand, Te Papa, for its display of two works, “Virgin in a Condom” and “Wrecked Last Supper,” is also instructive. Banks wanted to oust the Museum's Board under New Zealand's Museum Act of 1992, “which clearly states that museums are to be a place of pride for all New Zealanders.” *See McGrath's decision on museum exhibit nears*, THE DOMINION (WELLINGTON), Mar. 24, 1998, at 3. A more recent scandal involving state, here, U.S. Congressional, intervention in museum policies is found in the case of the 2010 Smithsonian exhibit Hide/Seek, which included the video of David Wojnarowicz. Showing images of crucifixes, ants, and the evanescence of life, it was deemed sacrilegious by members of Congress, who called for its removal. The Smithsonian's

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ditionally called in on “big” museum issues, like how to deal with art stolen by the Third Reich,<sup>139</sup> or whether to condemn a gallery for exhibiting works showing nude images of children.<sup>140</sup> Asking for a legal ruling on whether a particular curation was good enough, or feminist enough, will inevitably be viewed as a waste of judicial resources on an infraction that is *de minimis*, at worst.<sup>141</sup>

Thus, we may wonder if it would be wiser to found an argument for expanded feminist curatorial obligation based on ethics rather than on law’s mandate. Museum theorists such as Richard Sandell have noted that museums in a “good society” act as agents of “social change,” an argument that deeply connects museum curatorial practices to ethical systems.<sup>142</sup> Sandell is not alone in joining the museum with extensive social and ethical obligations;<sup>143</sup> museum administrators and critics have recognized at least since the 19<sup>th</sup> century that museums must benefit the public

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Board of Regents voted to pull it from the show. Sabrina Tavernise, *Smithsonian Official Defends Disputed Video’s Exhibit*, N.Y. TIMES, Feb 1, 2011, at A16.

<sup>139</sup> See note 137, *supra*.

<sup>140</sup> Isabel Wilkerson, *Cincinnati Jury Acquits Museum in Mapplethorpe Obscenity Case*, N.Y. TIMES, Oct. 6, 1990, at A1 (“The four men and four women on the mostly working-class jury left the courtroom without comments after what was believed to be the first criminal trial of an art museum arising from the contents of an exhibition.”). See also Barstow, note 138, *supra*.

<sup>141</sup> See *St. Helen's Smelting Co. v. Tipping*, (1865) 11 Eng. Rep. 1483, 1483 (H.L.) (“Where great works had been erected, and carried on, persons must not stand on their extreme rights, and bring actions in respect of every matter of annoyance.”).

<sup>142</sup> The “good society” has its first roots in ethics. Aristotle’s conception of the good society could not be uncoupled from an ethical society. See ARISTOTLE, *NICOMACHEAN ETHICS*, Book I, Chapter VIII, 28, (trans. Thomas Taylor 1818) (“the happy man lives well, and acts well; for nearly felicity will be a certain living well and acting well.”); ARISTOTLE, *POLITICS* 22 (trans. Benjamin Jowett 1885) (Dover edition, 2000) (“[T]he nature and character of the citizens must be determined with reference to the kind of happiness which we desire them to pursue. Happiness was defined in the *Ethics* as the perfect exercise of virtue. . . Now a man acquires virtues of this kind by the help of nature, habit, and reason. . . Habit and reason are the fruits of education . . . [In an Ideal State], citizens should be educated [to achieve these virtues.]”); JEFF CHUSKA, *ARISTOTLE’S BEST REGIME: A READING OF ARISTOTLE’S POLITICS VII. 1-10 9* (2000) (“Aristotle . . . contends that in order to investigate the good society correctly, we must first engage in an inquiry into ethics or at least we must rehearse the result of previous ethical researches . . . [F]or Aristotle, the results of ethical inquiry are not only a part of the study of the good society but [rather] are decisive for it.”).

<sup>143</sup> One of the most prominent thinkers along these lines is Stephen Weil, former deputy director of the Hirshhorn Museum and Sculpture Garden, Smithsonian Institution, who wrote that museums’ value lies in their capacity to “be a place for personal self-affirmation, to contribute importantly to the health of human communities, to be a place where the melting pot melts.” Stephen E. Weil, *The Museum and the Public*, 16 *MUSEUM MANAGEMENT AND CURATORSHIP*, 257, 267 (1997); see also STEPHEN WEIL, *MAKING MUSEUMS MATTER* (2002).

good.<sup>144</sup> The escalating standards created by such high ideals, Sandell continues, lead to the continuing development of “new working practices.”<sup>145</sup> Today, these “new working practices” stem from the knowledge that a museum’s social meaning is not just made by its purchase and bare display of art objects, but the atmosphere and context it creates around that art.

Contemporary museum theorists who work from a politics of anti-subordination observe that putting art in context, or otherwise engaging the audience in ways that do not forever alienate them from the art, flow from the museum’s ethical duty. As Jennifer Doyle writes: “There is a difference between curating Feminism, and being a feminist curator ... A museum might put on a big show about feminist art, but that doesn’t necessarily make it a feminist museum. ... The feminist curator, scholar or artist attempts to create a productive context within which we encounter art – a space to which one feels not invited, but welcome, a space to which one needs no invitation, that expands our sense of what art can do, rather than organizes art into discrete categories whose boundaries authorized experts then debate.”<sup>146</sup> Karen Mary Davalos has also made an ethical case for aware curatorial practices in the context of U.S. museums’ representations of Mexican-Americans, finding bias in curations that are “binary” and “bipolar.”<sup>147</sup> Sandell himself has made such arguments about the “dilemmas inherent in the attempts to address the cultural invisibility of disabled people.”<sup>148</sup> James H. Sanders III argues that museums can only challenge their own heteronormativity by engaging in “curatorial practices ... [that] serve both social justice and redistributions of power and authority.”<sup>149</sup>

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<sup>144</sup> CARLA YANNI, *NATURE’S MUSEUMS: VICTORIAN SCIENCE AND THE ARCHITECTURE OF DISPLAY* 23 (2005) (“Baconian philosophy emphasized that science should improve humankind, and to achieve this English gentlemen were urged to open the doors of their collections to a wider audience than on the continent, where museums were the purview of only courtiers and philosophers. By denying the strict boundary between scholar and commonfolk, English museums offended the Italian courtiers, who felt that any knowledge so easily accessible ... was suspect.”). This history of the museum and its goals is reflected in contemporary museum policies, such as those found in the Association of American Museums’ Code of Ethics Afterword: “[T]his commitment to service derived from nineteenth-century notions of the advancement and dissemination of knowledge that informed the founding documents of America’s museums. George Brown Goode, a noted zoologist and first head of the United States National Museum, declared in 1889: ‘The museums of the future in this democratic land should be adapted to the needs of the mechanic, the factor operator, the day laborer, the salesman, and the clerk, as much as to those of the professional man and the man of leisure ... . In short, the public museum is, first of all, for the benefit of the public.’” AAM Code of Ethics, *supra* note 121, at 5.

<sup>145</sup> RICHARD SANDELL, *MUSEUMS, PREJUDICE AND THE FRAMING OF DIFFERENCE* 5 (2007).

<sup>146</sup> Jennifer Doyle, *Feminism: Three Views* 105 *FRIEZE* (2007), [http://www.frieze.com/issue/article/feminism\\_three\\_views/](http://www.frieze.com/issue/article/feminism_three_views/).

<sup>147</sup> KAREN MARY DAVALOS, *EXHIBITING MESTIZAJE: MEXICAN (AMERICAN) MUSEUMS IN THE DIASPORA* 9 (2001).

<sup>148</sup> Sandell, *supra* note 145, at 25.

<sup>149</sup> James H. Sanders, III, *The Museum’s Silent Sexual Performance*, 3 *MUSEUMS & SOCIAL ISSUES* 15, 22 (2008). *See also id.* (advocating “repositioning understanding of the object

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Regina Faden argues that, as museums are places where people come to do raced “identity work,” curators should “design[] exhibits that allow visitors to ‘construct, maintain, and adapt [a] sense of personal identity.’”<sup>150</sup> And Edward Rothstein, writing about “ethnographic” displays at Paris’s Quai Branley, and of Native Americans at the National Museum of the American Indian in Washington D.C., critiques display choices that “strip” work of “context” and constitute a “form of curatorial abdication.”<sup>151</sup>

The Tate display of Wilkes’ work as an aspect of “performance” in the show *Has the Film Already Started?*, which went unaccompanied by any programs or context, created interpretive as well as political problems, as I have asserted. It may have impeded productive, meaningful readings of the installation. Borrowing from Rothstein, it may have also evidenced “curatorial abdication.” However, charging Tate as an ethical violator, for its failure to “take account of individuals’ differing educational experiences, learning styles, abilities and ways of understanding,”<sup>152</sup> “seek the views of communities, users and supporters and value the contributions they make,” and “engage with changing needs and values”<sup>153</sup> turns out to be, as in the case of legal enforcement, rife with the potential for scapegoating the less powerful members of the museum business. This is because the U.K.’s Code of Ethics for Museums seems prepared to come down the hardest on employees in the event of an ethical malfunction. The Code provides:

The Code represents the consensus view of members of the MA [Museums Association], which includes both those who work in museums and the institutions that employ them.

The MA therefore encourages employers to assure adherence to the Code of Ethics for Museums as a contractual requirement. An effective way of achieving this is to include reference to upholding and promoting the MA’s Code of Ethics for Museums in job descriptions that form part of an employee’s contract of employment.

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so viewers may participate in a relational embodied knowing that is concerned with balance, harmony, critical awareness, wholeness, and social consciousness.”)

<sup>150</sup> *Museums and Race: Living up to the Public Trust*, 2 MUSEUMS & SOCIAL ISSUES 77, 88 (2007) (quoting J. Rounds, *Doing Identity Work in Museums*, 49 CURATOR 133, 133 (2006)).

<sup>151</sup> *French Museums Atoned for a Colonial History*, N.Y. TIMES, Nov. 25, 2011, <http://www.nytimes.com/2011/11/26/arts/design/quai-branly-museum-in-paris-glorifies-the-other.html?ref=edwardrothstein>. With respect to concerns about democracy, history, pluralism, and how these are often times unrealized goals in the museum mission, see Benjamin Folkinshteyn, *Washington as First Action Hero: Museums Redefined*, 18 DEPAUL J. ART TECH. & INTELL. PROP. L. 1, 13 (2010) (“[T]he private, non-profit sector [museum] does not necessarily give as loud of a voice to pluralistic ideas as the idealists believe.”).

<sup>152</sup> See Code of Ethics, *supra* note 118, at 3.5 p. 12.

<sup>153</sup> *Id.* at 4.0 p.13

The MA also recommends that adherence to the Code should be used as a standard requirement in contracts between consultants and their clients.<sup>154</sup>

These enforcement mechanisms address problems that may find their easiest resolution in the dismissals or reprovings of employees, such as in the cases of curators who buy art on illegal markets,<sup>155</sup> or fail to report suspicions of illicit trade at the museum,<sup>156</sup> and should be fired for violating their contractual and ethical obligations.<sup>157</sup> Dismissal or censure of curators for failing to put on adequate programming in connection with artworks made by women, members of the LGBT community, or the disabled, however, seems a backwards gesture at best. It would only lead to the selective punishments of relatively minor power players in the museum industrial complex, and, again, as in the case of legal enforcement, would create speech as well as other justice problems. And, alas, it would also create an opportunity for condemnations of feminist legal miniaturism.<sup>158</sup>

However, having identified legal and ethical dilemmas at the Tate and its display of *(We are) pro-choice*, I am prepared to take a closer look at its Board of Trustees and the culture that it fosters at the museum.<sup>159</sup> The problems that I have described with legal and ethical enforcement of museum duties may be best dispatched by placing its burdens on Britain's executive branch. In other words, the Prime Minister should use legal and ethical mandates as guidelines for how to select the highly prized positions on the Tate Britain's Board.

The Tate Britain was founded by Henry Tate, a sugar magnate, who gained his fortune from the sales of sugar drawn from "Peru, Mauritius, and the East and West Indies."<sup>160</sup> As a brief study of the composition of the

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<sup>154</sup> *Id.* at 5.

<sup>155</sup> *Id.*, Section 5, at 14: "Acquire items honestly and responsibly."

<sup>156</sup> *Id.* at 5.14, p. 15.

<sup>157</sup> Such as in the U.S. case of Marion True, who worked as a curator for the Getty for twenty three years before resigning upon charges that she had engaged in a criminal conspiracy to receive stolen goods. See Suzanne Muchnic, *The Getty Villa: The ancient cast in a new light*, L.A. TIMES, Jan. 1, 2006, E1.

<sup>158</sup> See text accompanying note 141, *supra*.

<sup>159</sup> On engaging with a museum from the top down, see Chon Noriega, *On Museum Row: Aesthetics and the Politics of Exhibition*, 128 DAEDALUS 57, 60 (1999): "Museum scholars tend to look at [the] situation backwards, studying the content of exhibitions in order to abstract the museum's social authority, thereby leaving little sense of the museum as a hierarchical organization that bears an uneasy correspondence with the world in which it participates. Instead, the museum functions as a sort of 'black box' out of which emerge exhibitions that orchestrate the fragments of material culture for the purposes of the nation-state, the bourgeoisie, and social control."

<sup>160</sup> See BARBARA DINHAM, COLIN HINES, *AGRIBUSINESS IN AFRICA* 170 (1984). See also PHILIPPE CHALMIN, *THE MAKING OF A SUGAR GIANT: TATE AND LYLE, 1859-1989* 79 (1990): ("[Tate] donat[ed] ... the [Tate Gallery] ... which he had built on the banks of the Thames and which he endowed with a first collection, representative, it must be said, of a rather 'conventional' taste for the official British art of the 19<sup>th</sup> century. Henry Tate had

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Tate Trustees shows, the museum has retained its connection with the upper strata of society: The Board is made up of fourteen Trustees,<sup>161</sup> including its Chair, Lord Browne of Madingley (who served as the Chief Executive of BP from 1995-2007),<sup>162</sup> property developer Tom Bloxham,<sup>163</sup> investment banker Franck Petitgas,<sup>164</sup> art collector Maja Hoffman,<sup>165</sup> professor of 16th century Italian Renaissance paintings and drawings David Ekserdijan,<sup>166</sup> banker and woman of color Mala Gaonkar,<sup>167</sup> Monisha Shah, a BBC executive and the second of two trustees of color,<sup>168</sup> Lionel Barber, the Editor of the Financial Times,<sup>169</sup> businessman Gareth Thomas,<sup>170</sup> and Elisabeth Murdoch, Rupert's daughter,<sup>171</sup> who is also "[f]ounder, Chief Executive and Chairman of Shine Group, one of the UK's leading independent film and television companies."<sup>172</sup> Other Board members are Tomma Abts, a German artist,<sup>173</sup> the German photographer Wolfgang Tillmans<sup>174</sup> artist couple Bob and Roberta Smith,<sup>175</sup> and Patricia Lankester, who has worked to raise arts funding for disadvantaged groups.<sup>176</sup>

Though half of the Trustees are women, the list is obviously dominated by people who possess immense wealth and connections. The Trustees are also overwhelmingly Anglo. And, with the muted exception of Patricia Lankester,<sup>177</sup> none of the trustees describes feminist, anti-racist, or other

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the rather characteristic taste in art of a well-to-do bourgeois, seeking to confirm his social values." Tate's presentation of the art to the public took place in 1897. See ANDREA GEDDES POOLE, *STEWARDS OF THE NATION'S ART: CONTESTED CULTURAL AUTHORITY: 1890-1939* 33 (2010).

<sup>161</sup> *Tate Britain: Board of Trustees*,

<http://www.tate.org.uk/about/governancefunding/boardoftrustees/>.

<sup>162</sup> *Lord Browne of Madingley Appointed Chair of Tate Trustees*, Jan 26, 2009,

<http://www.tate.org.uk/about/pressoffice/pressreleases/2009/17767.htm>; *Lord Browne (Chair) Biography*,

<http://www.tate.org.uk/about/governancefunding/boardoftrustees/trustees/browne.htm>.

<sup>163</sup> <http://www.tate.org.uk/about/governancefunding/boardoftrustees/trustees/bloxham.htm>.

<sup>164</sup> <http://www.tate.org.uk/about/pressoffice/pressreleases/2008/14311.htm>.

<sup>165</sup> <http://www.tate.org.uk/about/pressoffice/pressreleases/2010/22234.htm>.

<sup>166</sup>

<http://www.tate.org.uk/about/governancefunding/boardoftrustees/trustees/ekserdijan.htm>.

<sup>167</sup> <http://www.tate.org.uk/about/governancefunding/boardoftrustees/trustees/gaonkar.htm>.

<sup>168</sup> <http://www.tate.org.uk/about/pressoffice/pressreleases/2007/11233.htm>.

<sup>169</sup> <http://www.tate.org.uk/about/pressoffice/pressreleases/2011/23747.htm>.

<sup>170</sup> <http://www.tate.org.uk/about/governancefunding/boardoftrustees/trustees/thomas.htm>.

<sup>171</sup> [http://en.wikipedia.org/wiki/Elisabeth\\_Murdoch\\_\(businesswoman\)](http://en.wikipedia.org/wiki/Elisabeth_Murdoch_(businesswoman)).

<sup>172</sup>

<http://www.tate.org.uk/about/governancefunding/boardoftrustees/trustees/murdoch.html>.

<sup>173</sup> <http://www.tate.org.uk/about/governancefunding/boardoftrustees/trustees/abts.htm>.

<sup>174</sup> <http://www.tate.org.uk/about/governancefunding/boardoftrustees/trustees/tillmans.htm>.

<sup>175</sup> <http://www.tate.org.uk/about/governancefunding/boardoftrustees/trustees/smith.htm>.

<sup>176</sup>

<http://www.tate.org.uk/about/governancefunding/boardoftrustees/trustees/lankester.htm>.

<sup>177</sup> See Lankester's profile, *id.* ("A central strand running through my life in education has been working to de-mystify culture and cultural institutions so as to enable children and

social justice commitments in their profiles, though these profiles include a section titled *Why I Wanted to Become a Tate Trustee*. As to sexuality, Tillmans appears to be the only voluntarily out gay member of the Board.<sup>178</sup> For his part, Lord Browne was outed by a former lover in a tabloid scandal; Browne resigned from his post at BP after lying about the nature of his relationship with his boyfriend, and attempting to kill the story in the *Mail on Sunday*,<sup>179</sup> a subterfuge that nearly earned him perjury charges.<sup>180</sup> Since his outing, Lord Browne has become more outspoken about homophobia,<sup>181</sup> but has also made clear that his sexuality is a private matter that does not influence his professional life.<sup>182</sup> To risk understatement, his track record bodes ill for his commitment to make homosexuals, as well as other minorities, more visible at august institutions such as the Tate. Thus, as the Tate's overseers have evidently not been appointed for specific feminist, anti-racist, anti-classist, or other anti-subordination values in mind, but rather are selected from an extremely privileged group, it may be no shock that the Tate Britain has not yet cultivated a culture that encourages avid collection of the art of the subordinated, much less a culture of careful feminist curation.

Accordingly, the ethical obligations in this case must fall to Prime Minister David Cameron, who appoints thirteen members of the Board.<sup>183</sup>

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young people, whatever their own cultural heartland, to enjoy visiting and participating in arts events in an easy and creative way. . . I wanted to be a trustee of Tate partly because of the vitality of the whole enterprise in bringing contemporary and historical visual art to so many people, and because I believe that my wide experience and involvement with arts and learning institutions can contribute an added perspective.”)

<sup>178</sup> See his profile on the website *Gay For Today: Gay For Today Celebrates the Incredibly Variety, Contribution, and Existence of Gay Men Throughout Our Culture and Recent History*, Wolfgang Tillmans profile, <http://gayfortoday.blogspot.com/2007/08/wolfgang-tillmans.html>.

<sup>179</sup> See Anthony Reuben, *Does the U.K. have a 'pink plateau'?* BBC News, May 2, 2007, <http://news.bbc.co.uk/2/hi/business/6614887.stm>. See also Ian Cobain and Clare Dyer, *BP's Browne quits over lie to court about private life*, THE GUARDIAN, May 1, 2007, <http://www.guardian.co.uk/business/2007/may/02/media.pressandpublishing> (identifying the *Mail on Sunday* as the tabloid).

<sup>180</sup> See *BP's Browne quits*, id. (“Mr Justice Eady said he had decided not to refer the matter to the attorney general, saying disclosure in the judgment of Lord Browne's behaviour was ‘probably sufficient punishment’.”).

<sup>181</sup> See Lia Creedon, *‘Homophobia is rife in public life and gays are forced to hide their sexuality,’ says ex-BP chief*, MAIL ONLINE, July 26, 2010, <http://www.dailymail.co.uk/news/article-1295189/Homophobia-rife-public-life-says-BP-chief-Lord-Browne.html/>.

<sup>182</sup> See *BP's Browne quits*, *supra* note 179: “In my 41 years with BP I have kept my private life separate from my business life. I have always regarded my sexuality as a personal matter, to be kept private. It is a matter of deep disappointment that a newspaper group has now decided that allegations about my personal life should be made public.”

<sup>183</sup> *Board of Trustees*, <http://www.tate.org.uk/about/governancefunding/boardoftrustees/>. The fourteenth member is a member of the National Gallery Board of Trustees. See note 113, *supra*.

## *Feminist Engagement and the Museum*

The Board takes it upon itself to set the tone of the Tate Britain's acquisitions, culture and policies,<sup>184</sup> and so is obliged to better represent the society that it serves as a cultural "guardian."<sup>185</sup> A Board that had a wider spectrum of sensitivities – and that includes more specific feminist, anti-racist, class, and queer consciousnesses – may be better equipped to, first, broaden the holdings of the Tate, so that a work like Wilkes' doesn't seem so off-kilter in comparison to the rest of the museum's holdings. Second, it may also foster an environment where curators would be better able to address the needs of art relating to women and minorities.<sup>186</sup> As it stands, the Tate seems eminently ill suited at the current time to make such leaps, particularly considering that its culture has become so degraded under recent regimes that the Tate Trustees recently had to take action to institute a "zero tolerance" policy against bullying of staff and patrons by senior management.<sup>187</sup> Yet, by changing the culture by reconfiguring the Board with a more diverse crew, the Prime Minister may avoid creating the speech and subordination problems that would come with denunciations of curators or other staff members chastised for their legal or ethical shortcomings. It would also avoid calling for the sorts of legal or ethical reprisals that may be criticized as exercises in querulously micro legal theory.<sup>188</sup> Yet a more diverse set of Trustees would hopefully transform the atmosphere that led (*We are*) *pro-choice* to be placed in a setting that starved it of meaning.

### IV. Conclusion

The problems that I describe in this article are, of course, not unique to the Tate Britain. As a United States citizen, I feel weirdly pompous criticizing British museum curatorial and administrative protocols, and have

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<sup>184</sup> It "determine[s] policy," "supervise[s] the Gallery, acting as [a] guardian[] for the public interest," "decides on major acquisitions and major resource issues," and "establishes the overall strategic direction of the Gallery." Tate, *Role of the Trustees*, <http://www.tate.org.uk/about/governancefunding/boardoftrustees/role.htm>.

<sup>185</sup> *Id.*

<sup>186</sup> Art experts with commitments to anti-subordination politics could include Irit Rogoff, a professor of Visual Cultures at Goldsmiths, University of London, and author of *TERRA INFIRMA: GEOGRAPHY'S VISUAL CULTURE* (2000), which examines identity, visual culture, and geography; Mignon Nixon, a professor at the Courtauld Institute of Art, the author of *FANTASTIC REALITY: LOUISE BOURGEOIS AND A STORY OF MODERN ART* (2005), and a specialist on gender, art, sexuality and aggression; and Yinka Shonibare, an artist who works on issues dealing with colonialism, disability, and the complexities of cultural identity. See Yinka Shonibare, MBE, <http://www.yinkashonibaremb.com/past.html>.

<sup>187</sup> Ron Sharp, *Staff Paint a Grim Picture of Bullying Culture at the Tate: An Employee Survey Found that Thirteen Percent of the 586s Employees Questioned Said They Had Experienced Bullying*, THE INDEPENDENT U.K., Aug. 24, 2011, <http://www.independent.co.uk/arts-entertainment/art/news/staff-paint-a-grim-picture-of-bullying-culture-at-the-tate-2342745.html>.

<sup>188</sup> See *St. Helen's Smelting Co. v. Tipping*, (1865) 11 Eng. Rep. 1483, 1483 (H.L.) (setting forth the approach to de minimis legal problems).

wished during the course of the writing of this article that I might have experienced aesthetic dyspepsia upon viewing an insipid curation at the Museum of Modern Art in New York or, better yet, the Los Angeles County Museum of Art, which is situated in my hometown. But the dilemma that bloomed into life when I first witnessed Wilkes' strange pantomime is one that finds itself mirrored in museums across the United Kingdom and the United States. As the above review of museum criticism shows, critics, patrons, and curators from all walks of life struggle with the delicate questions of how to display art that addresses the fractured, intimately oppressed lives of women and minorities.<sup>189</sup> Yet, a review of museum boards in both nations demonstrates that Trustees in the U.K. and the U.S. are selected from a very narrow social band – they are intensely privileged people.<sup>190</sup> The wealth of Trustees proves so extreme that it seems beyond cavil that the primary reason that they are selected for their posts is their ability to draw money. But if museum Boards are responsible for setting the tone, culture, and politics of an institution, and the museum is an ethical institution that possesses as one of its missions the best display of work that can help foster a good society, then these Boards must be populated via standards that have more than economics in mind.

If such a democratic culture were fostered at the Tate, then there would be more support for a display of work, like Wilkes', that would en-

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<sup>189</sup> See text accompanying notes 146-151, *supra*.

<sup>190</sup> The British Library's Board is dominated by high-stakes businessmen and entitled philanthropists. <http://www.bl.uk/aboutus/governance/blboard/blregint.pdf>. London's Museum of Contemporary Art also boasts a board of wealthy and famous trustees. [http://www.moca.org/museum/us\\_popup\\_people\\_trustees.php](http://www.moca.org/museum/us_popup_people_trustees.php). The British Museum's Board is even more glittering. [http://www.britishmuseum.org/the\\_museum/management/trustees.aspx](http://www.britishmuseum.org/the_museum/management/trustees.aspx). Stateside, the Museum of Modern Art in New York's Board is amazing. <http://www.moma.org/about/trustees>. The Whitney Museum of American Art's Board is an index of the wealthy and the powerful. <http://whitney.org/About/Trustees>. The Guggenheim Foundation's Board of Trustees possesses some intellectual and creative diversity, but all of its trustees are white. <http://www.gf.org/history-people/trustees/>. I emailed the Metropolitan Museum of Art to find, first, the list of Trustees, and second, to enquire whether they possessed anti-racist, feminist, queer, and other social justice values. The publicity department wanted to know what paper I was writing for, and then never contacted me again. Email from Mikaela Dilworth, Associate Coordinator, Communications Department, The Metropolitan Museum of Art, (Dec. 2, 2011) (on file with author). Here in Los Angeles, I cannot find a listing for the board of L.A.'s Museum of Contemporary Art. The L.A. County Museum of Art provides a long list of names of its trustees, but does not provide any information about them. After individually looking up all 46 of them, I believe that only one, artist Gabriela Garza, is nonwhite. LACMA's trustees *all* seem to be culled from the wealthiest sector of society – with producers like Brian Grazer and talent like Barbara Streisand, and the now-notorious ex-wife of Frank McCourt, Jamie. There's also Dasha Zhukova, whom the Wall Street Journal described as a 29 year old lady who, "[w]ith the help of her Russian oligarch boyfriend, [ ]buys million-dollar paintings on a whim." Edward Helmore, *Dasha, Dasha, Dasha*, WSJ.COM, May 26, 2011, <http://online.wsj.com/article/SB10001424052748703421204576329420182131288.html>.

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courage viewers to understand the suffering of the oppressed and to imagine liberatory possibilities. Only very few people like myself will have the time and resources and interest to hunt down the subtle shadings of an installation they pass in the gallery. Yet, if properly supported, curators might put on programs that hinted at the difficult significance of the abject, of the possibilities of transcendence within suffering, of the imago, and how to ascertain the meaning of these concepts. Stories of women's lives – complete with the unspeakable realities of eating disorders, breastfeeding mishaps, depressed mothers, bossy grandmas, illness, bereavement, utopian futures, the impossibility of understanding Nietzsche, and other chimeras – might be sounded out in the cool white halls of the Tate's temples. The game of hide and seek might be encouraged. Gallery patrons might discover that that they, too, are detectives.

But as it stands that is not happening right now. It is a missed opportunity. More importantly, it is also a problem of legal and ethical dimensions.



## THE LONG SHADOW OF RACIAL PROFILING

Sora Y. Han<sup>1</sup>

“[I]n the interpretations of Laws, whether Divine, or Humane, there is no end; Comments beget Comments, and Explications make new matter for Explications: And of limiting, distinguishing, varying the signification of these moral Words, there is no end ... Many a Man, who was pretty well satisfied of the meaning of the Text of Scripture, or Clause in the Code, at first reading, has by consulting Commentators, quite lost the sense of it, and, by those Elucidations, given rise or increase to his Doubts, and drawn obscurity upon the place...”

John Locke, *An Essay Concerning Human Understanding* (1690)

In that regard, “slavery” becomes the great “test case” around which, for its Afro-American readers, the circle of mystery is recircumscribed time and again. This realization is stunning: as many times as we reopen slavery’s closure, we are hurtled rapidly forward into the dizzying motions of a symbolic enterprise ...”

Hortense Spillers, *Changing the Letter: The Yokes, the Jokes of Discourse, or, Mrs. Stowe, Mr. Reed* (1989)

### ABSTRACT

*This article explores the relationship between police racial profiling and legal interpretation. It argues that the two practices – one in the enforcement of criminal law and the other in the elaboration of civil rights – find common cause in writing over the origins and afterlife of slavery in American democracy. By introducing the notion of “racial profiling as legal interpretation”, this article argues that the sociolegal understanding of racial profiling should be expanded to include techniques of legal interpretation and the literary imagination of constitutional law which foreclose encounters with racial slavery as the generative source of the nation. The hope is*

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*that by this expanded conceptualization of racial profiling, neither policing nor law can continue to depend on each other and their respective imperatives of reasonable suspicion and neutrality to evade the issue of structural racism. For they are mutually imbricated in reproducing social institutions which continue to thwart efforts to give language to the enduring social effects of the constitutive omission of slavery from the founding Constitution birthing the nation.*

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### I. THE LIMITS OF SEXUAL PRIVACY

At approximately 10:30 p.m. on September 17, 1998, a local sheriff’s department received a call from a man reporting a weapons disturbance. The caller told the dispatcher that there was “a nigger going crazy with a gun.” Within minutes of the call, a deputy arrived on the scene, followed shortly thereafter by two other deputies. They entered the apartment complex and saw the caller – a 40-year-old white male – at the foot of the stairs leading to the second floor. Noticing that he was “highly upset, shaking, and crying a little,” the deputies asked him, “Where is the man with the gun?” The man replied, “He is in that apartment up there,” gesturing towards the second floor and reminding the deputies, “he has a gun.” The officers proceeded in a tactical stack up the stairs and found the door to the apartment closed, but not entirely shut.

Upon entering the apartment, the deputies announced their presence. Looking for the armed intruder, they searched the apartment room by room. They finally entered the bedroom where they found two men – one 31-year-old and African American, and the other 55-year-old and white.

## Long Shadow of Racial Profiling

The two, along with the caller, were arrested and taken to the county jail for arraignment.<sup>2</sup>

These are not all the known facts about this particular event, but I recount them here in this way to rehearse what would most likely be perceived as a case of racial profiling. Racial profiling today is understood in various ways: stopping African American drivers for minor traffic infractions; using suspect profiles that, except for the racial description, do not share other characteristics with individuals detained in the course of a police sweep; and incorporating scientific studies that claim to prove a higher rate of African American criminal activity into law enforcement policies in order to more effectively reduce general crime rates.<sup>3</sup> We can certainly imagine how the facts as presented above might have developed into a racial sweep of the vicinity or been part of a larger policy on the part of the sheriff's department to prioritize responses to calls about African American suspects.

Contrary to the caller's claims, there was no gun. There was no "nigger going crazy." This story of racial profiling was, in fact, as the police later learned, about a lover's quarrel. The caller, Robert Eubanks, was the white boyfriend of Tyron Garner, the African American man found in the bedroom. The police arrested Garner along with the other man in the bedroom, John Lawrence, for violating the 1973 Texas Homosexual Conduct Law,<sup>4</sup> which criminalized oral and anal sex between same-sex couples.<sup>5</sup> Earlier in the night, the three men had been hanging out and an argument erupted. Eubanks, jealous of the interest Garner and Lawrence showed in each other, stormed out of the apartment and decided he would punish Garner by calling the police on him. This was no small act of jealous rage, as Eubanks knew that Garner had been in trouble with the law several times before.<sup>6</sup>

Only Garner was supposed to get arrested. But what happened instead was the arrest of all three, resulting in the 2003 Supreme Court opinion in *Lawrence v. Texas*.<sup>7</sup> Reversing the 1986 Supreme Court decision, *Bowers*

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<sup>2</sup> The facts of this story were taken from Dale Carpenter's article, *The Unknown Past of Lawrence v. Texas*, 102 MICH. L. REV. 1464, 1508-15 (2004), where he offers an account of the arrests that led to the historic case, *Lawrence v. Texas*, 539 U.S. 558 (2003), based on interviews he conducted with the arresting deputies, the defendants' lawyers and public relations managers, as well as documents he obtained in his investigation.

<sup>3</sup> For a discussion of these various modes of racial profiling, see generally, Bernard Harcourt, *Rethinking Racial Profiling: A Critique of the Economics, Civil Liberties, and Constitutional Literature, and of Criminal Profiling More Generally*, 71 U. CHI. L. REV. 1275 (2004).

<sup>4</sup> TEX. PENAL CODE ANN. §21.06(a) (Vernon 2003).

<sup>5</sup> In 1973, the Texas legislature decriminalized various forms of intimacy previously prohibited by common law traditions – such as, adultery, fornication, and bestiality – for opposite-sex couples; and reserved criminal sanctions for engaging in oral and anal sex to same-sex couples. See Carpenter, *supra* note 2, at 1468-72 for a comprehensive history of the 1973 Texas Homosexual Conduct Law.

<sup>6</sup> Carpenter, *supra* note 2, at 1508-09.

<sup>7</sup> *Lawrence v. Texas*, 539 U.S. 558 (2003).

*v. Hardwick*,<sup>8</sup> which affirmed the constitutionality of anti-sodomy laws, *Lawrence* has been celebrated as the state's long-overdue recognition of equality between opposite- and same-sex intimacies, as well as a political step in the right direction toward same-sex marriage.<sup>9</sup> The racial dimensions of both the interpersonal sexual relationships at the heart of the case, as well as the encounter between the police and the defendants, are hardly perceptible in the public discourse of this case. To be clear, I am not taking issue with the ruling of the case. Instead, I want to explore why the case and its subsequent representations refused to or could not account for the racist wish that set the event in motion.<sup>10</sup>

Why have subsequent representations of *Lawrence* been silent about this racist wish? If we recast the dominant story of *Lawrence* as one about a lover's racist desire, where would racial profiling begin and possibly end?

This article is concerned with the structure of failure surrounding racial profiling claims and campaigns, caught as they are between the various legal doctrines of Fourteenth Amendment substantive due process and equal protection, and Fourth Amendment privacy protections against seizure by law enforcement. From this vantage point, *Lawrence*'s historicity is less its affirmation of sexual privacy and more the compelling racial politics to which sexual privacy is indebted. This article argues that it is this embedded racial politics that explains why legal change always falls short of even the best of political intentions and visions. For there is something independent about the legal form of writing that presents an overwhelming obstacle to effecting meaningful legal change.<sup>11</sup> Thus, I center the legal text and its rhetorical and interpretive landscape – what I approach as the dreamwork of the law<sup>12</sup> – to develop a deeper understanding of the rela-

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<sup>8</sup> *Bowers v. Hardwick*, 478 U.S. 186 (1986).

<sup>9</sup> However, the mainstream gay and lesbian investment in marriage has been thoroughly critiqued. See, e.g., Craig Willse and Dean Spade, *Freedom in a Regulatory State?: Lawrence, Marriage and Biopolitics*, 11 WIDENER L. REV. 309 (2005); and Katherine Franke, *The Politics of Same-Sex Marriage Politics*, 15 COLUM. J. GENDER & L. 236 (2006).

<sup>10</sup> To the extent *Lawrence* overrules *Hardwick*, and *Hardwick* hardly captured the violent nature of police enforcements of anti-sodomy laws against GLBT communities, *Lawrence*'s ruling does not address the history of homophobic police brutality. See Kendall Thomas, *Beyond the Privacy Principle*, 92 COLUM. L. REV. 1431, 1436-43 (1992).

<sup>11</sup> Although I note this problem of language as a challenge to the theory of intersectionality as it has been explicated and elaborated, I am in no way implying that the theory cannot incorporate or is opposed to the idea that language and culture are fundamental structures of power. For a more detailed elaboration of the relationship between intersectionality and language, see Sora Y. Han, *Intersectional Sensibility and the Shudder*, in FEMINIST INTERPRETATIONS OF ADORNO 173 (Renée Heberle ed., 2006).

<sup>12</sup> SIGMUND FREUD, *THE INTERPRETATION OF DREAMS* (James Strachley ed. & trans., New York: Basic Books 2010) (1955); and JACQUES LACAN, *THE FOUR FUNDAMENTAL CONCEPTS OF PSYCHOANALYSIS* (Jacques-Alain Miller ed., Alan Sheridan trans., New York: W. W. Norton and Co. 1978). For an elaboration of the continuing political relevancy of the ethics of the dream, see Catherine Liu et al., *Introduction: 'What Are You Doing Tonight?'*, in *THE DREAMS OF INTERPRETATION: A CENTURY DOWN THE ROYAL ROAD* xiii-xxv (Catherine Liu et al. eds., 2007).

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tionship between race and law. My hope is that a theory of racial profiling as legal interpretation might better attend to both the problem of policing and criminal justice.

The facts surrounding *Lawrence* demonstrate that the purported discovery of an illegal sex act would not have occurred but for the social practice of racial profiling. But also, and more compellingly, the language of the case's internal reasoning demonstrates that interpretation itself is a type of racial profiling. That the possibility of making a claim of racial injury is foreclosed despite evidence to the contrary is a function of the form of the Constitution and its interpretation, which requires a strict division between the written text of law and its imaginative domain. In this case, interpretation brings desires (privacy rights for same-sex couples in *Lawrence*) into symbolic existence at the level of the word by barring a consideration of how the imago – what in psychoanalysis is understood as an “unconscious representation” – of blackness informs both policing and its subsequent adjudication in the courts.<sup>13</sup> It follows then that civil rights must be read not only as positive values of legal production, but also as projections disavowing the social reality of black life determined by an essential national panic around black criminality. It is this projection at the heart of legal interpretation that I refer to as racial profiling. At this level, racial profiling has the power to make something out of nothing. Racial profiling bears a type of symbolic productivity bridging the aporetic relationship between the written and imaginative domains of the legal text.

The task of this article is to outline the racial shadow lurking in the word of law, what I see as the source of the fecundity of legal interpretation John Locke complains of prior to, and unwittingly in agreement with, Spillers.<sup>14</sup> It is to trace the force of the imago of black criminality from the depths of a legal case's factual origins to the heights of constitutional law's loftiest pronouncements on equality. The interpretive landscape of *Lawrence* and its relationship to the police practice of racial profiling is the main point of entry. However, it opens out on a landscape with many layers – factual, doctrinal, citational and structural. I analyze this landscape, discussing the intersection of the Fourteenth Amendment substantive due process doctrine of privacy with Fourth Amendment seizure doctrine- the web of prior state and federal cases dealing with sexual privacy found in

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<sup>13</sup> J. Laplanche and J.-B. Pontalis define “imago” as an “[u]nconscious prototypical figure which orientates the subject's way of apprehending others.” They go on, “The imago is often defined as an ‘unconscious representation.’ It should be looked upon, however, as an acquired imaginary set rather than as an image: as a stereotype through which, as it were, the subject views the other person. Feelings and behaviour, for example, are just as likely to be the concrete expressions of the imago as are mental images. Nor, it may be added, should the imago be understood as a reflection of the real world, even in a more or less distorted form ...” See J. LAPLANCHE AND J.-B. PONTALIS, *THE LANGUAGE OF PSYCHO-ANALYSIS*, 211 (1973).

<sup>14</sup> See Robert Cover, *The Supreme Court, 1982 Term--Forward: Nomos and Narrative*, 97 HARV. L. REV. 4 (1983) (discussing the notion of “jurisgenerativity”). Thanks to Fred Moten, who brought this term to my attention.

*Lawrence's* text- and constitutional law's indebtedness to the legal trouble posed by the foundational figure of fugitive slaves through a reading of the antebellum case, *Prigg v. Pennsylvania*.<sup>15</sup> The point of lingering with the law for so long, and with such detail, is to demonstrate just how deeply entangled the interpretive notion of racial profiling is with the law's language. At this level, racial profiling is the lasting source of slavery's symbolic productivity identified by Hortense Spillers in the opening epigraph as it bridges the aporetic relationship between the written and imaginative domains of the legal text.<sup>16</sup>

From the entry point of *Lawrence*, then, I move into a broader and deeper discussion of the interpretive notion of racial profiling. Instead of presenting an empirical case for the racial profile as I conceptualize it, I pursue how the conceptual problem of racial profiling is embedded in some of the more prominent legal theory on race and law, even if it is not seriously taken up there, or by anyone else for that matter. At stake in revisiting critical race theory is how to understand the aporetic relation between legal textuality and racial fantasy, and in particular, whether and where racial justice stands in that relation. The aporia is especially illuminated by Cheryl Harris's and Patricia Williams's writings on the law's perpetual misrecognitions of racial injury.<sup>17</sup> On my reading of Harris's and Williams's work on race and law, the law is constituted by terrible fantasies that thwart possibilities of fully recognizing the racial injury of blackness. The interpretive notion of racial profiling I elaborate helps to cast Harris's and Williams's narratives of the word of law in a new light, revealing that racial profiling as a form of legal writing is not typified by a particular character the law brings to life as its subject, nor the writing's coincidence with a larger political project, but rather, a constitutive foreclosure of the imago of blackness from the language of the law. It is my hope that by offering a new reading of Harris's and Williams's political thought, critical race theory can expand its focus from group recognition and ideology critique to include serious attention to the cultural structure of anti-blackness underwriting any struggle for civil rights.

## II. THE LONG SHADOW OF RACIAL PROFILING

Contrasting the facts of the *Lawrence* case as I presented them in the introduction to this article, with the facts presented in the opinion, we can

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<sup>15</sup> *Prigg v. Pennsylvania*, 41 U.S. 539, 550 (1842).

<sup>16</sup> Aporia here, and in the rest of the article, is used to reference the deconstructed logocentric relationship between writing and speech, and law and violence. See Jacques Derrida, *Signature Event Context*, in LIMITED INC. 1-24 (Gerald Graff ed., Jeffery Mehlman & Samuel Weber trans., Evanston: Northwestern University Press, 1988) (1977).

<sup>17</sup> Below, I offer close readings of their most widely read texts: Cheryl Harris, *Whiteness as Property*, 106 HARV. L. REV. 1709 (1993); and PATRICIA WILLIAMS, *THE ALCHEMY OF RACE AND RIGHTS*, Cambridge: Harvard University Press, 1991.

## Long Shadow of Racial Profiling

see how the potential to recognize the violation of Garner's privacy as a result of racial profiling is traded for the potential to recognize the violation of his privacy as a result of the exclusion of gay sexuality from the domestic sphere.<sup>18</sup> Prioritizing the statute enforced, rather than the reality of the police encounter in the first place, the opinion is forced into using the language of same-sex and heterosexual intimacies in posing the question of equality: "consenting adults," "two persons of the same sex", "free persons," "homosexual persons," etc. Perhaps Justice O'Connor's opinion does a little better by analyzing anti-sodomy law under an equal protection framework, but again, the language of the statute determines her analysis.<sup>19</sup>

Through this exchange, privacy in *Lawrence* becomes about the sovereignty of the individual to decide what kinds of interpersonal relationships she wants to have, and how. And this privacy is precisely *not* about privacy in the policing context – how to designate a certain threshold of the individual's sovereignty beyond which the state cannot encroach in the investigation of crime – despite the fact that the case could (should) have been all about the limits of policing.<sup>20</sup> Herein lies *Lawrence's* bad faith.<sup>21</sup>

Ironically, it is in the court's description of the defense's position that we encounter the most compelling reason to read it. We are told "The right

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<sup>18</sup> Of course, the court cannot decide an issue not presented to it by the parties. The court notes in *Lawrence v. Texas*, 539 U.S. 558 (2003) that Lawrence and Garner's attorneys did not challenge the issue of probable cause. As a matter of litigation, it is certainly understandable that the defendants' attorneys did not raise the issue of probable cause. There is a good deal of evidence suggesting that they would not have won on this point. However, as a matter of discursive struggle, questioning probable cause would have expanded the possibilities of registering the racial dynamics of the case in the historical and legal record.

<sup>19</sup> *Id.* at 579-85. O'Connor reasoned that although on its face the criminal statute did not criminalize a class of individuals, and instead criminalized acts between particular classes of individuals, it nonetheless was applied in a discriminatory fashion. Specifically regarding the rejection of a theory of equal protection to declare sodomy law unconstitutional, the majority opinion is striking. *Id.* at 574-75. It suggests that finding sodomy law unconstitutional because it interferes with everyone's right, as opposed to only gay and lesbian rights, will negate the law's production of homophobic stigma. Under the cover of a curious "cost-benefit" analysis of due process analysis in comparison to equal protection analysis, the opinion masks a most obvious illogic. It is illogical that the law can remedy its participation in and production of what it refers to as "social stigma" without recognition of discrimination in the first place.

<sup>20</sup> Fourth Amendment jurisprudence has developed a number of doctrines to determine the constitutionality of police encroachments into personal sovereignty. See ANDREW TASLITZ, *RECONSTRUCTING THE FOURTH AMENDMENT: A HISTORY OF SEARCH AND SEIZURE, 1789-1868* (2006) for an excellent history of search and seizure doctrine.

<sup>21</sup> LEWIS R. GORDON, *BAD FAITH AND ANTIBLACK RACISM* (1995). I should also note that I am not interested in a comparative analysis of the extent to which the current court is willing to affirm gay rights over minority rights, or vice versa. The meager language of racial equality in *Grutter v. Bollinger*, 539 U.S. 306 (2003), an affirmative action case announced during the same term as *Lawrence*, mirrors the meager language of sexual freedom in *Lawrence*. The more important issue is instead to draw our attention to the play of doctrine, precedence, and construction of facts in constitutional interpretation, and the way that this play is not innocent of racist investments in colorblindness.

of the police to enter does not seem to have been questioned”.<sup>22</sup> Noting what is not questioned, the case becomes an occasion to mourn the lost opportunity to raise circumstances and make claims challenging racial profiling and abuses of police power using a substantive due process framework. For racial profiling, currently trapped between race-neutral Fourth Amendment doctrine and formalistic equal protection doctrine, enjoys few, if any, legal doctrines capable of challenging it.<sup>23</sup>

Indeed, this kind of broadening of Fourteenth Amendment privacy had already been laid out in critiques of *Bowers v. Hardwick* (1986), the same case overruled by *Lawrence*.<sup>24</sup> Kendall Thomas, in his article, “Beyond the Privacy Principle,” provides the most comprehensive overview and critique of dominant conceptions of privacy – associational (e.g., same-sex marriage), decisional (e.g., how one ends their life), and spatial (e.g., body cavity searches) – in constitutional analysis.<sup>25</sup> Against these notions, he argues that constitutional interpretations of privacy should be guided by concerns for “bodily integrity,” “a presumptive right to simple physical existence in and of itself.”<sup>26</sup> This presumptive right, not insignificantly, could accommodate the kinds of claims made against police racial profiling and abuses of power more generally. In the circumstances giving rise to *Lawrence*, perhaps the defense could have made a Fourteenth Amendment substantive due process privacy argument that when the police entered the apartment with the belief that there was a “nigger going crazy with a gun,” this constituted a violation of Garner’s presumptive privacy right. Belief in the truth of black threat contained in the statement “nigger going crazy with a gun” is not simply the basis of probable cause. The belief, the racist assumed truth, degrades Garner’s bodily integrity by reducing his person to a fantasm. Race-based probable cause, it might have been argued, forecloses the possibility that a black person might be a rights-bearing citizen in the eyes of the law, and instead predictably casts him or her as a spectral being.

Of course, this kind of legal move would have had to argue against the historical drift of national policies on policing and criminal procedure. Officially-declared wars on crime and drugs have continually eroded the sanctity of home and personal sovereignty under the broader interests of public morality, safety, and effective law enforcement through the creation of racial panics.<sup>27</sup> Given this historical trend, it would have seemed more

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<sup>22</sup> *Lawrence*, 539 U.S. at 562-63.

<sup>23</sup> See *Whren v. United States*, 517 U.S. 806 (1996) (holding that pretextual traffic stops, even if based on racial profiling, do not violate the Fourth Amendment).

<sup>24</sup> *Bowers v. Hardwick*, 478 U.S. 186 (1986); *Lawrence v. Texas*, 539 U.S. 558 (2003).

<sup>21</sup> Thomas, *supra* note 10, at 1443-49.

<sup>26</sup> *Id.* at 1459.

<sup>27</sup> See generally, Ruth Wilson Gilmore, *Globalization and US Prison Growth: From Military Keynesianism to Post-Keynesian Militarism*, 20 RACE & CLASS, 171 (1999); DAVID COLE, NO EQUAL JUSTICE (2000); JONATHAN SIMON, GOVERNING THROUGH CRIME (2009); and MICHELLE ALEXANDER, THE NEW JIM CROW (2010).

## *Long Shadow of Racial Profiling*

likely that the court would rule against extending privacy protections to gays and lesbians, and for the equal enforcement of criminal sodomy statutes irrespective of sexual orientation. Indeed, this would have been more consistent with the entrenched political priorities of tough-on-crime and formal equality policies established in racial jurisprudence.

The outcome in *Lawrence*, instead, was a curious splitting in constitutional doctrine on privacy. On the one hand, privacy expanded in the Fourteenth Amendment substantive due process doctrine, but on the other, it contracted in the Fourth Amendment seizure doctrine. This split is no mere exception to the value of legal uniformity, no mere glitch in constitutional law's progression towards consistency in its commentary on privacy. Rather, it is symptomatic of the absent presence of race: the legal argument about police racial profiling that the defendants could have made; the "nigger" traded for the same-sex couple as the real target of police aggression; and the non-translation of Fourth Amendment privacy into Fourteenth Amendment substantive due process privacy. This obscurity of race – *Lawrence's* shadow – draws attention to just how illegible or difficult it is for the court to recognize the racial injury of blackness.

In other words, by rendering reality – real events, people, statements, gestures, and attitudes – into particular questions, constitutional interpretations of civil rights actually write over, rather than redress, racial injury. I am not suggesting here that reality should not be rendered for legal judgment at all. Rather, I am suggesting something more practical; that the process through which reality is turned into word – the work of constitutional interpretation – be taken as seriously as winning a favorable legal judgment, and with a value that is independent of legal instrumentalism. The political significance of *Lawrence*, then, is not what it does, but what it must not do in order to accomplish what it does. It is useful not because it declares the policing of a certain kind of behavior unconstitutional, but rather, because it is a refusal to declare a certain method of policing unconstitutional. It is precisely what *Lawrence* must redact in order to be successful that makes the case one of political possibility.

Beyond being an example of how interpretation based in legal instrumentalism and political expediency depend on the foreclosure of the factual basis of a case arising from racism, *Lawrence* also reveals additional troubling and troubled interpretive strategies that we might not otherwise recognize as such. These interpretive strategies are less about broaching fact and rule, and more about a formal structure of legal writing that depends on precedent and doctrinal consistency. For example, take one of the stronger points of the Supreme Court's reasoning in *Lawrence* for overruling *Bowers*. The court observes a certain incongruity between state constitutional law and federal constitutional law on what comprises a privacy violation, and relies on judgments from five states that had rejected the application of *Bowers v. Hardwick* to their substantive due process privacy

doctrine.<sup>28</sup> The Georgia Supreme Court's decision in *Powell v. State* (1998),<sup>29</sup> in particular, leaps out of the court's archive in supporting precedence and citational practices.<sup>30</sup>

In this case, the Georgia Supreme Court considered whether to overturn a defendant's criminal sodomy conviction based on his substantive due process claim that the criminal law unconstitutionally infringed on his privacy right. The defendant had already been acquitted of rape and aggravated sodomy charges when the jury found that the victim, the defendant's wife's 17-year-old African American niece, had consented to these various sex acts. Notably, the defendant was found guilty of this lesser count since it did not hinge on the issue of victim consent. The Georgia Supreme Court, heralding its state constitutional law on privacy to be the most expansive among other states and more inclusive than federal constitutional law, found for the defendant because it reasoned that enforcing general morality was not a compelling state interest that could justify the regulation of consensual adult sexual intimacy.<sup>31</sup>

Representing the facts of the case as "a non-commercial sexual act that occurs without force in a private home between persons legally capable of consenting to the act,"<sup>32</sup> the Georgia Supreme Court's majority opinion disavowed the scene of the case's origin which remained veiled under the covers of family and racialized assumptions about consent.<sup>33</sup> Lynne

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<sup>28</sup> *Lawrence v. Texas*, 539 U.S. 558, 576 (2003). The five cases relied on were: *Jegley v. Picado*, 349 Ark. 600 (2002) (Arkansas case, gay and lesbian citizens sought declaratory judgment on the constitutionality of a law criminalizing private consensual sexual intimacy between persons of the same sex, ruled unconstitutional); *Powell v. State*, 270 Ga. 327 (1998) (Georgia case, defendant acquitted of charges of rape and aggravated sodomy of his wife's 17-year-old niece, but found guilty of a lesser sodomy charge, conviction overturned because lesser sodomy law was ruled unconstitutional); *Gryczan v. State*, 283 Mont. 433 (1997) (Montana, similar to Arkansas); *Campbell v. Sundquist*, 926 S.W.2d 250 (Tenn.Ct.App., 1996) (Tennessee, similar to Arkansas and Montana, but regarding the "Homosexual Practices Act"); and *Com. v. Wasson*, 842 S.W.2d 487 (Ky., 1992) (Kentucky, defendant charged with solicitation to engage in deviant sexual intercourse when he propositioned an undercover police agent, conviction overturned because the criminal law was found to be unconstitutional).

<sup>29</sup> *Powell v. State*, 270 Ga. 327 (1998).

<sup>30</sup> Jerry Kang calls this textual move "noncontextual resurrection." See Jerry Kang, *Watching the Watchers: Enemy Combatants in the Internment's Shadow*, 68 LAW & CONTEMP. PROBS. 255, 278-80 (2005).

<sup>31</sup> *Powell v. State*, 270 Ga. 327 (1998), 335-336.

<sup>32</sup> *Powell*, 270 Ga. at 332.

<sup>33</sup> The above characterization of the facts of the case is arrived at after the following summary of how the question of consent was resolved: "Anthony San Juan Powell was charged in an indictment with rape and aggravated sodomy in connection with sexual conduct involving him and his wife's 17-year-old niece in Powell's apartment. The niece testified that [Powell] had sexual intercourse with her and engaged in an act of cunnilingus without her consent and against her will. Powell testified and admitted he performed the acts with the consent of the complainant. In light of Powell's testimony, the trial court included in its jury charge instructions on the law of sodomy. The jury acquitted Powell of the rape and aggravated sodomy

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Huffer, in her article, “Queer Victory, Feminist Defeat?” confirms that the victim, Quashana, was asked for graphic descriptions of the sexual encounter, provided oftentimes incoherent answers, and was presumed to want sex because she was familiar with the defendant.<sup>34</sup> She “never said the word, ‘no’”<sup>35</sup>. That is, the trial transcript indicated that the issue of consent was far from clear, or even resolvable. The silences, breaks, and lapses in her testimony, buried under the state’s interpretations of its Constitution, could never enter the judicial archive on their own terms. Digging through layers of legal authority and their interpretation, we see in *Powell* that neither side can completely do away with this issue of incest and the sexual exploitation of girls by male family members, as well as the overwhelming obstacle that black women face when testifying against the presumption that they are always sexually available.<sup>36</sup>

Thus, in both *Lawrence* and *Powell*, the implicit but fundamental issue is how to characterize the sex act in question in order to determine whether there is a right that falls under a substantive due process analysis. This implicit issue which produces the different outcomes of *Bowers* and *Lawrence* is one of interpretation. Each of their rulings turn on interpreting the sex act as consensual adult sex,<sup>37</sup> while the dissenting opinions in these two cases turn on interpreting the sex act as the antithesis of consensual

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charges and found him guilty of sodomy, thereby establishing that the State did not prove beyond a reasonable doubt that the act was committed ‘with force and against the will’ of the niece.” *Powell*, 270 Ga. at 327. The dissent notes that this is a superficial treatment of the question of consent, upon which the majority opinion against the constitutionality of anti-sodomy law rests. But the dissenting opinion was not, ultimately, concerned about power relations in the family. In fact, it was concerned with preserving the law’s capacity to legitimate and enforce the general social morality. *Powell*, 270 Ga. at 341-242.

<sup>34</sup> I am indebted to Lynne Huffer’s analysis of *Lawrence*, where she goes back to the trial transcripts for the case, *State of Georgia v. Anthony San Juan Powell*, Crim. No. 96-B-3448-6 (Gwinnett Superior Ct. Aug. 8, 1997), for this point. See Lynne Huffer, *Queer Victory, Feminist Defeat? Sodomy and Rape in Lawrence v. Texas*, in *FEMINIST AND QUEER LEGAL THEORY: INTIMATE ENCOUNTERS, UNCOMFORTABLE CONVERSATIONS* 411-32 (Martha Albertson Fineman, Jack E. Jackson & Adam P. Romero eds., 2009).

<sup>35</sup> Huffer, *supra* note 34, at 425.

<sup>36</sup> See, e.g., Kristin Bumiller, *Rape as a Legal Symbol: An Essay on Sexual Violence and Racism*, 42 U. MIAMI L. REV. 75, (1987); Kimberlé Crenshaw, *Race, Gender, and Sexual Harassment*, 65 S. CAL. L. REV. 1467, (1992); Saidiya V. Hartman, *Seduction and the Ruses of Power*, in *SCENES OF SUBJECTION: TERROR, SLAVERY, AND SELF-MAKING IN NINETEENTH-CENTURY AMERICA* 79-114 (1997).

<sup>37</sup> *Lawrence*’s majority opinion characterizes the sex act in this way: “The present case does not involve minors. It does not involve persons who might be injured or coerced or who are situated in relationships where consent might not easily be refused. It does not involve public conduct or prostitution. It does not involve whether the government must give formal recognition to any relationship that homosexual persons seek to enter. The case does involve two adults who, with full and mutual consent from each other, engaged in sexual practices common to a homosexual lifestyle.” *Lawrence*, 539 U.S. at 578.

adult sex – as “homosexual sodomy”<sup>38</sup> and “morally reprehensible,”<sup>39</sup> respectively. The point here is that how the court describes the sex act – what kind of language the court does and does not use – is absolutely critical in a case’s outcome and reasoning.

Pressing the interpretive work of *Lawrence*’s majority position, we can see that its characterization of the sex act as consensual adult sex relies on a desexualization of “deviant” sex. The effect of this desexualization allows the court to bring the sex act in question into the fold of Fourteenth Amendment substantive due process analysis, while at the same time erasing the dangers of racial and gender domination within the private realm that the Fourteenth Amendment should protect against. This elision is not obvious in the opinion, largely because consent between Lawrence and Garner is factually presumed. Nonetheless, it is still present in the opinion by the case’s reliance on *Powell*.<sup>40</sup>

As the majority opinion in *Lawrence* widens and domesticates the nature of the sex act in question – from “homosexual sodomy” to consensual adult sex in the privacy of a home – by relying on the authority of *Powell*, it both retains and expels the scene of sexual violation in *Powell*. This profound ambivalence of the finding of consent in *Powell* shadows the image of same-sex intimacy as non-violent, non-violative, monogamous, and loving, that we ultimately arrive at in *Lawrence*. At this point, we see that the narrowly specified widening of privacy in *Lawrence* is haunted by the more difficult issue of how the law is to redress not only Garner’s violations, but now Quashana’s as well. A future anterior emerges but not unburdened by an imago of blackness.

On this reading, *Lawrence* demonstrates how the interpretive trouble race causes for constitutional law is not about how to make a successful claim of racial injury, but how the possibility of making such a claim in the first instance is factually, doctrinally, and citationally foreclosed. It is a case demonstrating the complexity of how the positive rendering of civil rights requires the negation of racial blackness. Conceptualizing interpretive racial profiling in this way is an attempt to read civil rights cases literally.<sup>41</sup> It is to understand their racial politics less as a function of the racial identities of parties and organizations, and more as a function of whether and how racial injury can be expressed in legal language given the interpretive rules and priorities of a constitutional case’s reasoning. The crucial insight based on this conceptualization allows us to more fully grapple with the fact that civil rights cases contain the limits of their own racial politics; thus, we can bring these limits into view by reading the work of

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<sup>38</sup> The dissenting opinion described the sex act as “homosexual sodomy” no less than sixteen times, while the majority opinion used the term only twice (and once preceded by the additional adjective “consensual”).

<sup>39</sup> *Powell v. State*, 270 Ga. 327, 338 (1998).

<sup>40</sup> *Lawrence*, 539 U.S. at 576.

<sup>41</sup> JOAN COPJEC, *READ MY DESIRE: LACAN AGAINST THE HISTORICISTS* (1994).

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racial profiling in the legal text.<sup>42</sup> A case like *Lawrence* gestures towards the racial profile, despite the political choices made by the various parties and organizations involved in its writing, despite the public representations of the case's ruling, and despite the sedimentation of sexual violation under the law's drive towards doctrinal consistency and legal precedent. However, we can discern the racial profile's shadow only by the most careful attention to the interpretive practices of the text – how it relies on other legal authorities, uses prior legal judgments as historical memory, and represents legal rules and tradition – all in an attempt to bring new civil rights into existence.

### III. THE CONSTITUTION'S FOUNDING RACIAL PROFILE

One might say that *Prigg v. Pennsylvania* (1842)<sup>43</sup>, an antebellum case involving the criminal conviction of a slavechaser, Edgar Prigg, for kidnapping a fugitive slave, Margaret Morgan, is *the* foundational case for this type of reading. For *Prigg* is recognized as the first constitutional law case addressing the question of how expansively the Constitution permits the federal government to justify encroachments on civil liberties in the name of some state interest. Sanford Levinson notes that for Justice Story, the author of *Prigg*, the “[Fugitive Slave Clause’s] status as a ‘fundamental’ linchpin of the constitutional structure made it important that the states be prevented from placing any burden on its effectuation.” And for this reason, “*Prigg* may be, ironically enough, the debut in American constitutional analysis of the notion of a ‘fundamental interest’ that would be vigilantly protected by the Court.”<sup>44</sup>

What is singular to *Prigg* becomes generalized and formalized beyond any delimited substantive or historical matter that the case immediately reflects. A close reading of *Prigg* reveals that the structure of its constitutional question – arising from the singular position of a fugitive slave between federal and state laws – lives on despite the abolition of the legal institution of chattel slavery as its question is repeated well beyond legal decisions attempting to resolve the tension between slavery and the constitution. Through this repetition, the shadow of slavery appears a ghostly necessity to the elaboration and reproduction of constitutional law, the federal union, and the rights through which its citizens come to identify with the national body.<sup>45</sup>

For five years, Margaret Morgan lived with her husband and children in Pennsylvania until 1837, when Edward Prigg, a legal agent of Morgan's owner, Margaret Ashmore, went to Pennsylvania to recapture her. In order

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<sup>42</sup> DRUCILLA CORNELL, *THE PHILOSOPHY OF THE LIMIT* (1992).

<sup>43</sup> *Prigg v. Pennsylvania*, 41 U.S. 539, 550 (1842).

<sup>44</sup> Sanford Levinson, *Slavery in the Canon of Constitutional Law*, in *SLAVERY & THE LAW* 97 (Paul Finkelman ed., 2002) (1997).

<sup>45</sup> PAUL FINKELMAN, *AN IMPERFECT UNION: SLAVERY, FEDERALISM, AND COMITY* (1981).

to return Morgan to Ashmore, Prigg had to go through a state-mandated process established by Pennsylvania's Act of March 25, 1826, entitled, "An act to give effect to the provisions of the Constitution of the United States relative to fugitives from labor, for the protection of free people of color, and to prevent kidnapping."<sup>46</sup> The statute required that slavechasers like Prigg appeal to a Pennsylvania magistrate for a warrant directing a sheriff to arrest the alleged fugitive. The alleged fugitive would then come before the same magistrate who would then decide the verity of the slavecatcher's claim to repossession. The same statute further stated that the provisions of the Pennsylvania Act, and not those of Congress's 1793 Fugitive Slave Act, would adjudicate such claims of repossession.<sup>47</sup>

Prigg obtained the necessary warrant from a Pennsylvania magistrate, pursuant to which Pennsylvania sheriff, William McLearn, arrested Morgan. Although Morgan and Prigg appeared before the court, the magistrate, Thomas Henderson, did not. Prigg, as a result, failed to obtain a ruling in his favor. Prigg then forcibly took Morgan and her children, and returned them to Maryland. For this act, Prigg was arraigned and tried by a York County jury, which found him guilty of kidnapping.<sup>48</sup> Occasioned by Morgan's desire to be free and unite her family, the case, *Prigg v. Pennsylvania* (1842), came before Supreme Court justice Joseph Story, after a series of failed attempts by Prigg to overturn his conviction in the Pennsylvania state courts.<sup>49</sup>

The question of law before the court in *Prigg* was precisely this: where the Constitution is silent on the relationship between congressional and state legislative authority over the subject matter of fugitive slaves, is the Pennsylvania Act of 1826 constitutional to the extent that it derives its authority from the police powers of the states,<sup>50</sup> and excludes procedural redress through Congress' 1793 Fugitive Slave Act?<sup>51</sup> *Prigg* resolved the constitutional aporia by ruling the Pennsylvania Act unconstitutional.<sup>52</sup> There are three major steps in Story's line of reasoning. First, when a judge is faced with an ambiguous Constitutional provision, the judge must interpret and give meaning to the Constitution's language. In doing this, the judge must look first and foremost to the intent of the drafters and legisla-

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<sup>46</sup> *Prigg*, 41 U.S. at 550.

<sup>47</sup> *Prigg*, 41 U.S. at 550-57.

<sup>48</sup> *Prigg*, 41 U.S. at 556-57.

<sup>49</sup> *Prigg v. Pennsylvania*, 41 U.S. 539, 557-58 (1842).

<sup>50</sup> "The Congress shall have power to dispose of and make all needful rules and regulations respecting the territory or other property belonging to the United States; and nothing in this Constitution shall be so construed as to prejudice any claims of the United States, or of any particular state." U.S. CONST. art. IV, § 3.

<sup>51</sup> Note that this is the very same structure of the question posed in *Lawrence*.

<sup>52</sup> President Millard Fillmore then enacted the Fugitive Slave Law of 1850, the harshest fugitive slave measure the United States had ever seen. This law struck down abolitionist efforts, like the Pennsylvania law at issue in *Prigg*, across the several states. See James Oliver Horton and Lois E. Horton, *A Federal Assault: African Americans and the Impact of the Fugitive Slave Law of 1850*, 68 CHI.-KENT L. REV. 1179 (1993).

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tors of the Constitution. This intent is known neither from the “contemporary exposition”<sup>53</sup> of the provision, nor the “long acquiescence”<sup>54</sup> of actors to a particular interpretation of the provision at issue. It is known from the “historical fact” of the provision.<sup>55</sup> To that end, Story identified the Fugitive Slave Clause – the original authority for the 1793 Fugitive Slave Act – as a historical consequence of a necessary political compromise between northern and southern states without which the national government could not have been formed:

Historically, it is well known, that the object of this clause was to secure to the citizens of the slave-holding states the complete right and title of ownership in their slaves, as property, in every state in the Union into which they might escape from the state where they were held in servitude. The full recognition of this right and title was indispensable to the security of this species of property in all the slave-holding states; and, indeed, was so vital to the preservation of their domestic interests and institutions, that it cannot be doubted, that it constituted a *fundamental article, without the adoption of which the Union could not have been formed*. Its true design was, to guard against the doctrines and principles prevalent in the non-slave-holding states, by preventing them from intermeddling with, or obstructing, or abolishing the rights of the owners of slaves.<sup>56</sup>

Second, this intent, once identified, must then be given effect by the judge’s interpretation of constitutional language. In order to give effect to the Fugitive Slave Clause, Story’s interpretation separates the clause into two parts: a) “no person held to service or labor in one state, under the laws thereof, escaping into another, shall, in consequence of any law or regulation therein, be discharged from such service or labor ...”; and b) “... but shall be delivered up, on claim of the party to whom such service or labor may be due.”<sup>57</sup> The former part is found to be “self-executing” in that it establishes a positive, unqualified right to repossession. This part is also where the subject matter of the clause can be properly located. Story writes, “this clause in the constitution may properly be said to execute itself, and to require no aid from legislation, state or national.”<sup>58</sup>

The latter part is found to be prescriptive by providing that the right established in the first part should be enforced by creating legal remedies for slaveowners’ property right in slaves. Having recognized and established the positive right of slaveowners, the latter clause, according to Sto-

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<sup>53</sup> *Prigg*, 41 U.S. at 594.

<sup>54</sup> *Prigg*, 41 U.S. at 622.

<sup>55</sup> *Prigg*, 41 U.S. at 540.

<sup>56</sup> *Prigg*, 41 U.S. at 611 (my emphasis). *But see*, Barbara Holden-Smith, *Lords of Lash, Loom, and Law: Justice Story, Slavery, and Prigg v. Pennsylvania*, 78 CORNELL L. REV. 1086, 1129-30 (1993), where she argues that this “historical fact” upon which Story relies to arrive at the intent behind the Fugitive Slave Clause is severely overstated, or even patently untrue.

<sup>57</sup> *Id.*

<sup>58</sup> *Prigg v. Pennsylvania*, 41 U.S. 539, 613 (1842).

ry, “implies at once a guarantee and duty ... The fundamental principle, applicable to all cases of this sort, would seem to be, that where the end is required, the means are given; and where the duty is enjoined, the ability to perform it is contemplated to exist, on the part of the functionaries to whom it is intrusted [sic].”<sup>59</sup>

Third, if the Constitutional object is the positive right of the slaveowner to repossession, and this object implies a guarantee and duty, then any judicial or legislative authority required to make right on this guarantee and duty must come from the federal government, and not the states, because the object is founded in the federal Constitution. Whether a right or duty is constitutionally explicit or implicit, the Constitution gives Congress sole legislative authority.<sup>60</sup> Here, Story references the “necessary and proper” clause of the Constitution, which grants Congress the power to “make all laws which shall be necessary and proper for carrying into execution the foregoing powers, and all other powers vested by this Constitution in the government of the United States, or in any department or officer thereof.”<sup>61</sup>

Pennsylvania’s Act, therefore, was ruled unconstitutional because it prohibited the resolution of repossession claims by way of Congress’s Fugitive Slave Act. Such claims must be made, according to Story’s interpretation of the Constitution, to the federal government. If there was a conflict of law between Congress’ Fugitive Slave Act as a non-exhaustive remedy for a positive right established by the Constitution, and Pennsylvania’s Act as an exercise of the constitutionally recognized police power of the state, then Pennsylvania’s Act was unconstitutional because Congress has exclusive legislative authority over the subject matter.<sup>62</sup> On this reading, while Story’s reasoning centralizes the language of property rights, his overriding preoccupation is with encroachments on federal jurisdiction, not necessarily with injury to slaveowners’ rights.

Clearly, there are a number of logical flaws in Story’s reasoning, alongside sound evidence as to how the court reasoned in service of a political choice to vindicate slaveowners’ rights over the vision of abolition.<sup>63</sup> Story, in brief, gave little attention to Pennsylvania’s desire to protect its free black citizens and to the range of nonexclusive ways the federal subject matter of fugitive slaves could be regulated and legislated. However, beyond these substantive and political complications, what is striking to me is how the legal issue of injury to federal jurisdiction is repeated throughout the court’s analysis. At each step of Story’s reasoning, the primary legal issue is reiterated accordingly:

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<sup>59</sup> *Id.* at 614-15.

<sup>60</sup> *Id.* at 616.

<sup>61</sup> U.S. CONST. art. I, § 8, cl. 18.

<sup>62</sup> *Prigg*, 41 U.S. at 622.

<sup>63</sup> See generally, Holden-Smith, *supra* note 56, at 1128-34. See also, FREDERICK DOUGLASS, *The Constitution of the United States: Is It Pro-Slavery or Anti-Slavery?*, speech delivered in Glasgow, Scotland, March 26, 1860.

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- 1) Since this constitutional provision arose from the historical need for compromise between northern and southern states related to the problem of fugitive slaves, does the Pennsylvania Act, and state action related to the subject matter more generally, conform to this need?;
- 2) Given that the object of the Fugitive Slave Clause is to secure the positive right of slaveowners to repossess fugitive slaves, characterized by Story as one “for the first time, recognised and established [by the Constitution] in that peculiar character.” to whom does the Constitution provide the authority to deliver fugitive slaves up to the slaveowner?; and
- 3) Where the Constitution vests the federal government with sole legislative authority to guarantee individual constitutional rights (both those derived from the Constitution, and those encoded in the Bill of Rights), can states or other local forms of government use their inherent sovereign powers, also recognized by the Constitution, to derogate individual constitutional rights?

These reiterations reveal an important characteristic of constitutional interpretation founded in the trans-doctrinal body of law developed from the slave’s drive for emancipation.<sup>64</sup> They reveal the centrality of the text of the Constitution in both producing the constitutional issue and providing an answer to that issue. Thus, when Yifat Hachamovitch asks, “Isn’t it a rule of the juridical gaze that it only comes to dwell upon its own reflection?, upon its own kind?, upon good copies, well-founded likenesses, pure genealogies?”<sup>65</sup> Prigg’s interpretive world answers in the affirmative. Story spoke explicitly to this point when he stated that, “No court of justice can be authorized so to construe any clause of the constitution as to defeat its obvious ends, when another construction, equally accordant with the words and sense thereof, will enforce and protect them.”<sup>66</sup>

The circularity of constitutional interpretation is secured, then, by twin loops of reasoning: the procedural mandates of the Constitution require that disputes over its fundamental rights find resolution through the

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<sup>64</sup> This repetition effects a formal transcendence of doctrinal boundaries, and might be the unique quality of slave law. For broader studies of slave law, see, e.g., ROBERT COVER, *JUSTICE ACCUSED: ANTISLAVERY AND THE JUDICIAL PROCESS* (1975); DON E. FEHRENBACHER, *THE DRED SCOTT CASE, ITS SIGNIFICANCE IN AMERICAN LAW AND POLITICS* (1978); LAW, THE CONSTITUTION, AND SLAVERY (Paul Finkelman ed., 1989); *SLAVERY & THE LAW* (Paul Finkelman ed., 2002) (1996); MARK V. TUSHNET, *AMERICAN LAW OF SLAVERY, 1810-1860: CONSIDERATIONS OF HUMANITY AND INTEREST, 1810-1860* (1981); ALAN WATSON, *SLAVE LAW IN THE AMERICAS* (1989); and EDLIE L. WONG, *NEITHER FUGITIVE NOR FREE: ATLANTIC SLAVERY, FREEDOM SUITS, AND THE LEGAL CULTURE OF TRAVEL* (2009).

<sup>65</sup> Yifat Hachamovitch, *In Emulation of the Clouds: An Essay on the Obscure Object of Judgment, in POLITICS, POSTMODERNITY, AND CRITICAL LEGAL STUDIES: THE LEGALITY OF THE CONTINGENT* 56 (Costas Douzinas, Peter Goodrich & Yifat Hachamovitch eds., 1994).

<sup>66</sup> *Prigg v. Pennsylvania*, 41 U.S. 539, 612 (1842).

federal government because the federal government was founded by the Constitution; and the substantive rights guaranteed by the Constitution require that disputes over interpretation and enforcement find resolution through the federal government because the federal government founded the Constitution.

This tautology displays a curious fixation on the reparation of the Constitution's textual ambiguities through the more fundamental aporia of the federal government's origins in a constitutional compromise with slavery. This mythology of American democracy underwrites the symbolic production and distribution of rights, liberties, and limited sovereign powers of states and citizens. More compellingly, however, the legal traditions of American constitutional democracy are fantasmatically substantiated against the persistent return of the problem of slavery played out in interpretation. In order to resolve issues produced by its own obscurity, the self-referential hermeneutics of the Constitution call into being a national body to police the always disinterred presence of slavery. This national body is the federal government that Story refers to as the sole authority over the problematic presence of people of African descent in a white nation; a unified legal procedure through which white repossessory claims to black bodies were to be properly redressed. But it is also the mimesis of Story's constitutional question, a repetition incarcerating the racial experience of the slave to the imaginative domain on which the interpretive process of turning letter into law relies.<sup>67</sup>

This national body is produced on the back of a particular kind of internal image in law, one generated by what Tim Murphy calls the "eye of law."<sup>68</sup> *Prigg* demonstrates that this national body has a visual capacity that apprehends an internal image of black experience written over by the Constitution, at the same time that this internal image is disavowed as a matter of textual interpretation and symbolic representation. Curiously appearing in the section of the Constitution providing for the relation of states to each other, Article IV, Section 2 contains three clauses which together comprise the authority for Fugitive Slave Law.<sup>69</sup>

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<sup>67</sup> "The modern mind is so thoroughly [sic] attuned to the calculative sciences that it is difficult to accept that the body is made present for the subject by means of an image. Even if this is accepted, it is difficult to take the further step of admitting that the status of the body is thereby modified, that in its translation by representation the body loses its status as a biological object and becomes something fictional. In other words, the body is not the body. Its construction has been transposed into the domain of the image; the body which we inhabit is indissociable from the grip of the image." Peter Legendre, *Introduction to the Theory of the Image: Narcissus and the Other in the Mirror*, in *LAW AND THE UNCONSCIOUS: A LEGENDRE READER* 211 (Peter Goodrich ed., Peter Goodrich, Alain Pottage & Anton Schütz trans., 1997).

<sup>68</sup> Tim Murphy, *As if: camera juridical*, in *POLITICS, POSTMODERNITY AND CRITICAL LEGAL STUDIES: THE LEGALITY OF THE CONTINGENT* 92 (Costas Douzinas, Peter Goodrich and Yifat Hachamovitch eds., 1994).

<sup>69</sup> For a more complete history of the evolution of fugitive slave law, see Christopher L.M. Eisgruber, *Justice Story, Slavery and the Natural Law: Foundations of American Constitutionalism*, 55 U. CHI. L. REV. 273 (1988).

## *Long Shadow of Racial Profiling*

Clause 1. The Citizens of each State shall be entitled to all Privileges and Immunities of Citizens in the several States.

Clause 2. A Person charged in any State with Treason, Felony, or other Crime, who shall flee from Justice, and be found in another State, shall on demand of the executive Authority of the State from which he fled, be delivered up, to be removed to the State having Jurisdiction of the Crime.

Clause 3. No person held to Service or Labour in one State, under the Laws thereof, escaping into another, shall, in Consequence of any Law or Regulation therein, be discharged from such Service or Labour, but shall be delivered up on Claim of the Party to whom such Service or Labour may be due.<sup>70</sup>

The disavowed image can be located in the silence of the clauses as to the nation's class of slaves, a silence positioned between the written words "Citizens" and "person held to Service or Labour,"<sup>71</sup> and the actually unwritten word "slave."

We might say that these clauses are an apostrophe marking the absence of talk about slavery in the translation of political speech at the 1787 Convention the Constitutional text is said to represent. That Clause 3 would later be stricken with the abolition of slavery does not, obviously, do away with the apostrophe the entire Article IV, Section 2 denotes. And any legislation and case law that is established from the remaining Clauses 1 and 2, which continue to be the basis for federal jurisdiction over matters of interstate commerce, crime, and civil rights, are written from this grammatical mark. Today's racial profile is the Constitution's apostrophized slave.

In this way, Story's insistence, "it cannot be doubted, that [the Fugitive Slave Clause] constituted a *fundamental article, without the adoption of which the Union could not have been formed*"<sup>72</sup>, performs a profoundly anxious reading in response to the apostrophized slave. *Prigg's* ability to give substantive meaning to the Fugitive Slave Clause takes as its condition of interpretive possibility the *mise-en-jeu* of pathos aroused by the absent slave in constitutional law – the silence as to the racial difference between citizens and persons, the conspicuously unwritten word that fixes the meaning of those that are written, that render the writing readable. Pierc-

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<sup>70</sup> U.S. CONST. art. IV, § 2, cl. 1 and 3. Clause 3, the Fugitive Slave Clause, was then superseded in 1865 by the 13<sup>th</sup> Amendment, which reads, "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."

<sup>71</sup> Other relevant slavery provisions of the original Constitution repeat such silence, referring to slaves as "three-fifths of all other Persons" (art. I, § 2, cl. 3) or as "persons" whom the states shall think it proper to import (art. I, § 9, cl. 1).

<sup>72</sup> *Prigg*, 41 U.S. at 611.

ing this silence, the eye of the Constitution apprehends and substitutes the necessary absence of the slave in the word of law with an image in the law's imaginary domain – blackness is excluded from the text of law, as it is imprisoned within the law's imaginary. In legal writing, exclusion and imprisonment are two sides of the same coin.

The point here is that the ambivalent place of the slave in the Constitution is compensated for by the installation of a structural relationship between the silence of textual absences and the vision of a national body imagined by the text. Michael Foley has advised more generally that,

The unwritten in constitutions ... contains far more than merely that which can be objectified into material definition ... it is precisely those unwritten components of a constitution that represent its most integral features and its most fundamental properties.<sup>73</sup>

Notably, the silence of the Constitution's Fugitive Slave Clause – ambivalently designating slaves as “persons held in Service or Labour” and *not* Africans, Negroes, blacks, or any other racial designations used at the time – is imagined by the Supreme Court's judicial reasoning as persons “escaping.” This central textual absence – in which ambivalent constitutional designations by word are given meaning with the image of a national body in pursuit of an “escaping” slave – carves out an imaginative space in which a constant state of recapture is imposed on and against black experience for purposes of constitutional interpretation.

This imaginative space is the literary imagination in which, Toni Morrison argues, the foundations of American literature are entangled with “the four-hundred-year-old presence of, first, Africans and then African-Americans in the United States.”<sup>74</sup> In her book, *Playing in the Dark*, Morrison is concerned with mapping this “dark, abiding, signing Africanist presence” which “shaped the body politic, the Constitution, and the entire history of the culture”<sup>75</sup> despite the exclusion of black writers from the American literary canon. She writes further,

Through significant and underscored omissions, startling contradictions, heavily nuanced conflicts, through the way writers peopled their work with the signs and bodies of this presence – one can see that a real or

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<sup>73</sup> MICHAEL FOLEY, THE SILENCE OF CONSTITUTIONS: GAPS, “ABEYANCES” AND POLITICAL TEMPERAMENT IN THE MAINTENANCE OF GOVERNMENT 81 (1989).

<sup>74</sup> TONI MORRISON, PLAYING IN THE DARK: WHITENESS AND THE LITERARY IMAGINATION 5 (1993). Patricia Williams has also underscored the generative nature of the constitutional omission of slavery. “Blacks are the objects of a constitutional omission which has been incorporated into a theory of neutrality. It is thus that omission is really a form of expression, as oxymoronic as that sounds: racial omission is a literal part of original intent; it is the fixed, reiterated prophecy of the Founding Fathers.” PATRICIA J. WILLIAMS, THE ALCHEMY OF RACE AND RIGHTS 50 (1991).

<sup>75</sup> Morrison, *supra* note 74.

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fabricated Africanist presence was crucial to their sense of Americanness. And it shows.<sup>76</sup>

Where Morrison uses the language of racial restrictions and codes in law to argue for a similar structure in American culture and literature, she also suggests that to the extent that law is a literary production, this Africanist presence is crucial to what makes American law distinctly “American.” Implicitly, then, constitutional law as a genre of writing is part of the American literary canon Morrison critiques.<sup>77</sup> For what form of writing depends on omissions, contradictions, conflicts, and “peopling” more than the law? As such, *Prigg* and the interpretive technique it finds in the apostrophized slave of the Constitution confirm Morrison’s belief that this Africanist presence is “one of the most furtively radical impinging forces on the country’s literature.”<sup>78</sup>

This presence, this racial profile in the literary imagination of constitutional law is, in my mind, a most urgent issue.<sup>79</sup> The racial profile lurking in the silence of the Constitution is the visual impression constitutional interpretations leave on legal judgment.<sup>80</sup> Visual impression as a description of the racial profile is meant here in all senses of the word – as an imprint, impact, impersonation, and feeling. The relationship between the eye of the Constitution and the racial profile, then, is structured by a fantasy of blackness escaping, a fleeting image the law must capture in order to make sense out of its most troubling silences. As such, racial profiling is not simply a neutral interpretive technique. Racial profiling is American law’s core principle of interpretation.

### IV. RACIAL PROFILE, WHITE SHIELDS

Readings of constitutional law from the unwritten legibility of Margaret Morgan, Quashana, and Tyrone Garner, are always mediated by

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<sup>76</sup> *Id.* at 6.

<sup>77</sup> For a discussion of constitutional law as a canon, see Sanford Levinson, *supra* note 44, at 97.

<sup>78</sup> Morrison, *supra* note 74, at 5.

<sup>79</sup> Addressing this issue in part, Anthony Farley has argued that the legal discovery and enforcement of the African slave as commodity is survived today through the availability of blackness for consumption and pleasure through a field of vision. Anthony Farley, *The Poetics of Colorlined Space*, in *CROSSROADS, DIRECTIONS, AND A NEW CRITICAL RACE THEORY* 109-34 (Francisco Valdez, Jerome McCristal Culp & Angela P. Harris eds., 2002).

<sup>80</sup> The fundamental right of sexual privacy is not the only fundamental right haunted by the racial profile. A fundamental right protecting against state-based physical coercion, also derived from the substantive due process clause of the Fourteenth Amendment, is haunted by the history of lynching, inhabited forever by a profile of blackness. *Brown v. State of Miss.*, 297 U.S. 278 (1936). The police in this case testified that he had whipped one of the defendants before obtaining his confession, “Not too much for a Negro”. *Id.* at 284.

“bonds of representation”.<sup>81</sup> Not persons, but the Constitution’s imago of blackness, they remain imprisoned in a shape-shifting legal category beyond the symbolic world of the word of law, chained to the literary imagination of legal representation and interpretation. The racial profile cannot move from the category of object to subject, thing to person, fantasy to history because doing so would have required, and would require today, a radical rewriting of constitutional law and its foundations – to do the law justice, which is to say, to render for it a transformative interpretation.<sup>82</sup> Cheryl Harris’s landmark article, “Whiteness as Property,” is an exceptional meditation on the aporetic gap between race and law I have been trying to outline through *Lawrence*, *Powell*, and *Prigg*. As an exemplar of critical thought on race and law, it marks another scale of legal interpretation that, by its deconstruction of the legal status of the slave, offers the chance for a transformative reading.<sup>83</sup>

Harris’s article opens with an allegory about the history of passing in a white world – a history about “not merely passing, but trespassing.”<sup>84</sup> In contrast to this criminal existence of blackness under Jim Crow, Harris describes whiteness as a form of denial. “They [whites] remained oblivious to the worlds within worlds that existed just beyond the edge of their awareness and yet were present in their very midst.”<sup>85</sup> Between black trespass and white denial, the discourse of property Harris examines appears as circumlocutions of legally invested notions of white racial identity – through what she refers to as the “embrace of a lie.”<sup>86</sup>

What is this lie, exactly, at the heart of the legal rendering of whiteness as property? According to this allegory, it is less an acceptance of racial difference or superiority, and more a psychical formation – an unconscious relationship to blackness that symptomatically appears in anti-

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<sup>81</sup> HORTENSE J. SPILLERS, *BLACK, WHITE AND IN COLOR: ESSAYS ON AMERICAN LITERATURE AND CULTURE* 326 (2003) (emphasis in original).

<sup>82</sup> Such transformative interpretation might include renegeing on the Constitution’s promise of constitutional law. William Lloyd Garrison is said to have produced and burned copies of the Fugitive Slave Law and the Constitution, encouraging his audience to “perish all compromises with tyranny!” See BERNARD SCHWARTZ, *MAIN CURRENTS IN AMERICAN LEGAL THOUGHT* 232 (1993). Or subject it to a deconstruction. See Jacques Derrida, *Force of Law: The ‘Mystical Foundations of Authority’*, 11 *CARDOZO L. REV.* 920 (1990).

<sup>83</sup> My reading of Harris’s text is meant to gesture towards critical race theory in general as an historic attempt to negotiate the aporetic legacy of race in law with its central but largely inadequate methods of socio-historical and empirical analyses inherited from legal realism. Thus, as the racial profile that emerges upon close reading of legal cases like *Lawrence* demonstrates, it is possible to see how the aporia of race in law is not – cannot – be done away with by the historicism, constructionism and empiricism of critical race theory. Nevertheless, I lean on critical race theory, and not an empirical indexing of the entirety of civil rights law, to deepen and further support my argument about racial profiling for it is a political intervention that brings us that much closer to fully appreciating the stubbornness of the problem.

<sup>84</sup> Cheryl I. Harris, *Whiteness as Property*, 106 *HARV. L. REV.* 1707, 1711 (1993).

<sup>85</sup> *Id.* at 1711.

<sup>86</sup> *Id.*

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affirmative action rhetoric that Harris critiques at the end of her article. This suggests, then, that although the dominant tendency is to read Harris's piece as an analysis of how the legal ideology of property legitimizes the cultural values that accrue to white identity, in fact, the piece is also an immanent engagement with race in the dreamwork of the law.

Let us look at this latter engagement more closely. Harris arrives at whiteness's resemblance to property through a deconstruction of the historic position of the slave as both thing and person, and how the law deals with the most troubling reality of human "market-alienability."<sup>87</sup> This peculiarity is seen in various historical functions of law: for purposes of political representation, the slave is both citizen and property; for purposes of commodity production, the slave is both thing and human; and for purposes of exchange, the slave is both money and person. Against the idea of the slave as a hybrid thing/human, against the threatening capacity of humanity's "market-alienability," and against the universalizable "threat of commodification,"<sup>88</sup> Harris writes, somewhat in passing, "whiteness became a shield."<sup>89</sup>

Through her deconstruction, we are witness to how the expectations and capacities of whiteness<sup>90</sup> – through legal protections of benefits, values, capacities, and expectations accrued to the social identity of whiteness – become things. Few have appreciated Harris's focus on how the modern theory of property expands classical theories of property to include expectations and capacities in intangible things.<sup>91</sup> But no one has seized upon the even more crucial insight that under her legal metaphorization of whiteness as property is yet another literary move – not by metaphor but by a striking description, "whiteness became a shield" – that serves to further ground the concept.

Thus, we can extend Harris's formulation "whiteness as property" to "whiteness as property is shield." The resemblance between the syntagm "whiteness as property is shield" and Frantz Fanon's figuration "white masks"<sup>92</sup> is no mere coincidence, but offers a paradigmatic understanding of the fantasmatic structure of whiteness, of white culture's symbolic reliance on phobic fantasies of blackness.

On this extended formulation, when Harris finds that the "absence [of whiteness] meant being the object of property"<sup>93</sup> her analysis of formally recognized whiteness is also an implicit analysis of the imaginary sense of threat, anxiety, and defensiveness crucial to whiteness' cultural life. White-

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<sup>87</sup> *Id.* at 1720.

<sup>88</sup> *Id.* at 1721.

<sup>89</sup> *Id.* at 1720.

<sup>90</sup> *Id.* at 1725.

<sup>91</sup> *Id.* at 1729.

<sup>92</sup> FRANTZ FANON, *BLACK SKIN, WHITE MASKS* (Charles Lam Markmann trans., 1967). See also, Vicky Lebeau, *Psychopolitics: Frantz Fanon's Black Skin, White Masks*, in *PSYCHOPOLITICS AND CULTURAL DESIRES* 113-23 (Jan Campbell & Janet Harbord eds., 1998).

<sup>93</sup> Harris, *supra* note 84, at 1721.

ness as property attends to capacities, expectations, potentials, and as such is a performance of the dreamwork of the law in which whiteness is a projection – a thing that is produced not from some actual event, but an imagined event, a fantasy, an irrecoverable event remembered.

As a shield protecting one from being made an object, so the legal fantasy goes, whiteness as property gives rise to the assurance of personhood itself. This white shield is inalienable, something absolutely personal; it is available for use and enjoyment, can provide a source of pleasure; it is reputational, a marker of standing in a public community; and it is possessory, a mode of possession wherein a claim to a thing is recognized by negating all other possessory claims to it.<sup>94</sup> To this, I would add that this white shield is a figuration of a legal fantasy.

So when Harris writes further, “Owning white identity as property affirmed the self-identity and liberty of whites and, conversely, denied the self-identity and liberty of Blacks,”<sup>95</sup> we should understand her to be talking about a position from which claims to entitlement to various forms of value can be made; *and* from which representational acts can signify – both for the world and for the self – personhood. Whiteness, as an object of law, is private property; and whiteness, as a representational act in law, “self-identity”, is the cultural capacity to imagine oneself a person. Thus, Harris’s narrative about the relationship between race and law exceeds issues of unequal access to the privileges of private property, to encompass the larger cultural problem of blackness as a form of life lived on the other side of exclusion from language and its universe of meaning. It points us to the possibility of understanding (or at least how the law understands) blackness as the lived experience of what Lacan calls symbolic death.

How, exactly, are we to understand the relationship of blackness to “whiteness as property is shield”? This brings us to the central legal case for Harris’s text, *Plessy v. Ferguson* (1896), and an arresting recollection embedded in her discussion of it.<sup>96</sup> The case is historical for in it, the Supreme Court declares formal racial segregation constitutional. However, beyond this ruling, Harris recalls for us how Homer Plessy’s lawyer, Albion Tourgee, rhetorically challenged Jim Crow: “Probably most white persons if given a choice, would prefer death to life in the United States *as colored persons*. Under these conditions, is it possible to conclude that *the reputation of being white* is not property? Indeed, is it not the most valuable sort of property, being the master-key that unlocks the golden door of opportunity?”<sup>97</sup>

Tourgee’s larger argument here was about how the inexactness of formal racial categories applied to social practices results in arbitrary deprivations of property interests in racial identity. As Harris observes, the

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<sup>94</sup> *Id.* at 1736.

<sup>95</sup> *Id.* at 1743.

<sup>96</sup> *Plessy v. Ferguson*, 163 U.S. 537, (1896).

<sup>97</sup> Harris, *supra* note 84, at 1748 (quoting Tourgee).

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court evaded this argument by simply asserting that Plessy's racial classification was clear. On my reading of this evasion, the problem with it is not the court's refusal to acknowledge the mishaps of due process in the application of formal racial categories. It is that the evasion admits a more disturbing truth about the function of formal racial categories. Towards this end, the court pointed out that if Plessy was in fact a white man, according to Louisiana's rules of racial categorization, he would then have recourse to claiming money damages for defamation.<sup>98</sup> And in this dismissing gesture, we witness the court's affirmation of whiteness as property through and over the truth of the fantasy of a world where it is better to be dead than black.

"Under these conditions, is it possible to conclude that *the reputation of being white* is not property?"<sup>99</sup> By answering in the negative (that it is not possible to conclude that whiteness is not property), the court by implication also affirmed the truth of "these conditions" that blackness is an existence worse than biological, social, or civil death, as it invokes the terror of being cast under the sign of blackness as that which the law protects against. While the court acknowledges the possibility of injury to Plessy's whiteness, it sees the injury of how this property interest materializes over and against the worse-than-death condition of being black, the realness of the fantasy of black life in symbolic death,<sup>100</sup> of a black sociality beyond the boundary of any kind or form of representation.<sup>101</sup> Contained in *Plessy*, as well as in Harris's focus on this portion of the case, is the truth of the relation between law and projection, between rule and fantasy: whiteness as property is shield *against symbolic death*.

To be clear, I am not saying that the failure to represent black injury in the law has to do with any incompetence on the part of legal advocacy, or insufficient knowledge on the part of the court. Rather, I am arguing that the failure has to do with the form of constitutional law and its interpretation: the limited range of legal arguments and remedies in a system founded on the literary imagination of the racial profile, that necessarily bars against the symbolic representation of racial injury. In *Prigg*, overturning *Prigg*'s conviction relies on the representability of Morgan as either person or property. In *Plessy*, upholding the railroad's segregation policies

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<sup>98</sup> *Plessy v. Ferguson*, 163 U.S. 549 (1896).

<sup>99</sup> Harris, *supra* note 84, at 1748 (quoting Tourgee) (my emphasis).

<sup>100</sup> *Id.* at 1777-91. Harris states early in her article that the "purported benefits of Black heritage" (1712) – a projected and not real property interest in blackness – not only grounds an attack on affirmative action, but as well, grounds an "inability to see the property interest in whiteness" (1715).

<sup>101</sup> There is a striking similarity between *Prigg* and *Plessy* in this sense. A similar racial profile outlined by the unwritten slave of the Constitution – between art. IV, § 2, cl. 1 and 3 – is also outlined by the unwritten freedmen between the Thirteenth and Fourteenth Amendments at issue in *Plessy*. Subsequent legal interpretations of the two Amendments have been determined by principles of formal equality and equal treatment. See generally, Cheryl Harris, *Equal Treatment and the Reproduction of Inequality*, 69 *FORDHAM L. REV.* 1753 (2001).

relies on the representability of Plessy's racial categorization as white. And yet, in each of these cases, because interpretation is limited by the literary imagination of the racial profile, only injury to whiteness can turn over into symbolic representation in the word of law. In *Prigg*, the law writes of blackness as an owned human being, but only recognizes injury as the obstruction of white owners' rights to use and enjoy their property. In *Plessy*, the law writes of blackness as symbolic death, but only recognizes injury as the contamination of white racial identity.

The metaleptic relationship between black and white injury here turns on the law's encounter with the unbearable fantasy of symbolic death. Against, but mobilized by, this fantasy, racial injury is always appropriated by the grievance of a white constitutional subject,<sup>102</sup> always an exploitation of the spectacle of blackness haunting those most fundamental and most celebrated constitutional values providing an endless source of legal issues for judicial interpretation. Given this, the symbolic foreclosure of black racial injury has less to do with the practical limits of the law, and more with the unstated fact that redress never should have been asked for.

Indeed, Plessy did not ask for personal compensation. He asked for an injunction on Jim Crow law instead. And in the course of his pleading, the court gratuitously responded by noting what could have been asked for in an impossible hypothetical situation.<sup>103</sup> As a matter of legal argument, if Plessy was not Plessy, he could have asked the court to compensate him for his property interests in whiteness. Which is to say that Plessy could not ask for anything from his position, let alone ask the court to compensate him for passing, for his transgression from one biologically-given racial caste into another. But in the court's reproach that Plessy should not ask what cannot be asked for, it also admitted the reality of blackness as lived symbolic death. A devastating recognition if there ever was one.

## V. DREAMING THE LIFE OF THE RACIAL PROFILE

How to then render the reality of blackness as lived symbolic death in the face of law? This is perhaps *the* civil rights question. Patricia Williams's *The Alchemy of Race and Rights: The Diary of a Law Professor* (1991) engages with this question as the form of her writing struggles to pose an alternative relationship between the racial profile and the legal text to the one my previous discussions of *Lawrence*, *Powell*, and *Prigg* reveal. On my reading, Williams's characteristically fragmentary and imagistic form of writing is a direct engagement with the deeper problem of racial profiling I

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<sup>102</sup> *Regents of Univ. of Cal. v. Bakke*, 438 U.S. 265 (1978).

<sup>103</sup> Here is the court's language: "If he be a white man, and assigned to a colored coach, he may have his action for damages against the company for being deprived of his so-called 'property.' Upon the other hand, if he be a colored man, and be so assigned, he has been deprived of no property, since he is not lawfully entitled to the reputation of being a white man." *Plessy*, 163 U.S. at 549.

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identify; that is, a racial profile that supports not only the fantasy of black criminality, which turns a wallet into a gun in the eyes of the policemen who shot and killed Amadou Diallo, but also the fantasy of an insatiable black sexuality turning interracial gay sex into heteronormative sex in the judicial opinion of *Lawrence*, and incestuous rape into consensual adult sex in *Powell*. In this way, the form of Williams's writing and the truth it pursues is concerned, even obsessed, with the obscurity of this interpretive racial profile, the way that the modernist project of constitutional law's writing excludes the foundational force of racial fantasy from the realm of the word, casting it into the realm of imagination.

One of Williams's most compelling discussions of the interpretive problem at the heart of racial profiling is found in her chapter, "Fire and Ice (some thoughts on property, appearance, and the language of lawmakers)".<sup>104</sup> Analyzing the legal and media treatment of the 1984 police killing of Eleanor Bumpers, Williams argues that we must ask why some things appear so obvious to the law.<sup>105</sup> We must ask why Bumpers – an elderly, mentally ill, and poverty-stricken African American woman who refused to be evicted from her apartment – appears responsible for her murder by the NYPD?<sup>106</sup> What is this fear behind the metalepsis of responsibility?<sup>107</sup>

For Williams, the source of this "obvious" need to take Bumpers's life emerges not through an interrogation of personal biases held by the police, but through her reading of the event and its various legal, official, and media representations that ultimately acquitted Bumpers's killers from any criminal liability.<sup>108</sup> By reading the various logics of legal interpretation at work in the event, Williams scrutinizes the relationship between the written letter of the law and the cultural milieu in which these words are trafficked. According to Williams, by disavowing this cultural dimension that haunts interpretations of the law's word, the law becomes

... the technical embodiment of attempts to order society according to a consensus of ideals. When a society loses sight of those ideals and grants

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<sup>104</sup> Williams, *supra* note 74, at 133-45.

<sup>105</sup> *Id.* at 37.

<sup>106</sup> Williams uses the following examples to demonstrate how responsibility was publicly redistributed onto Bumpers:

--*Don't you think this officer was motivated by racism?* "She was psychotic; she said that she saw Reagan coming through her walls."

--*Wasn't the discharge of the shotgun illegal?* "She waved a knife."

--*Wasn't shooting her unnecessary?* "She made the officers fear for their lives."

--*Couldn't the officers have used tear gas?* "Couldn't her children have paid her rent and taken care of her?"

*Id.* at 142 (quoting answers given by various public officials and law enforcement personnel to questions posed by television reporter, Gil Noble).

<sup>107</sup> Williams asks specifically, why "the animus that inspired such fear and impatient contempt in a police officer that the presence of six other well-armed men could not allay his need to kill a sick old lady fighting off hallucinations with a knife"? *Id.* at 144.

<sup>108</sup> *Id.* at 136-38.

obesance to words alone, law becomes sterile and formalistic; lex is applied without jus and is therefore unjust.<sup>109</sup>

She further describes this legal interpretation as “punitive literalism,”<sup>110</sup> “the softened inverse of something akin to fascism,”<sup>111</sup> a “cool formality of language,”<sup>112</sup> a “sleight of tongue,”<sup>113</sup> and a “cruel form of semantic slipperiness.”<sup>114</sup> Williams’s painstakingly detailed descriptions of legal interpretation taken collectively give a body to law’s word and foreground the affective qualities of a cultural form defined precisely as not one.

Interestingly enough, based on this problem of *lex* absent *jus* (law absent justice), Williams does not proceed to prescribe what the word of law infused with *jus* would or should say. That is, her writing about legal interpretation does not tend towards policy or doctrinal strategy. Rather, Williams’s writing continues to press the interpretive problem of *lex* absent *jus*, and by this pressure opens up onto a lurking racial profile in the midst of the law’s dreamwork, where the law’s cold word is just as chilling as the NYPD’s purportedly necessary fear of Bumpers. The racial profile, both “something beyond” and “something about” her physical presence<sup>115</sup> – the black imago for which Bumpers is substituted – embellishes both police brutality and a law of police impunity.

Williams’s response, then, is to enter this dreamworld herself, to dream her relation to the law as much as the officials were hallucinating a response to the public about why they needed to kill Bumpers:

I dreamed about a black woman who was denied entry to a restaurant because of her color. In response she climbed over the building. The next time she found a building in her way, she climbed over it, and the next time and the next, and the next. She became famous, as she roamed the world, traveling in determined straight lines, wordlessly scaling whatever lay in her path, including skyscrapers. Well-meaning white people came to marvel at her and gathered in crowds to watch and applaud. But she never acknowledged their presence and went about her business in unsmiling silence. The white people were annoyed, angry that she did not appreciate their praise and seemed ungrateful for their gift of her fame; they condemned her. I stood somewhere on the periphery of this dream and wondered what unspoken rule, what deadened curiosity, it was that kept anyone from ever asking why.<sup>116</sup>

One is tempted to take this dream as an allegorization of how the place of responsibility is reversed in Bumpers’s death – how the law as *lex*

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<sup>109</sup> *Id.* at 139.

<sup>110</sup> *Id.*

<sup>111</sup> *Id.* at 140.

<sup>112</sup> *Id.* at 141.

<sup>113</sup> *Id.*

<sup>114</sup> *Id.* at 142.

<sup>115</sup> Williams, *supra* note 74, at 144.

<sup>116</sup> *Id.* at 143.

## Long Shadow of Racial Profiling

absent *jus* is unable to be just because of a failure to intervene in the audiences' perception of racial injury. The metalepsis of affect in the dream, and its correspondence with the metalepsis of responsibility in Bumpers's death is the dream's narrative, but it is not its kernel.<sup>117</sup> This kernel, what the dream circulates around but cannot represent, indicates a more profound legal problem, a more foundational paradox of blackness in the law.

The unfolding of affect – from marvel and acclaim to annoyance and anger, then betrayal and condemnation – begins with a statement of fact about a black woman's exclusion from a restaurant and her subsequent dazzling yet incomprehensible feats of magic. The evolution of racial envy, first sprouting from wonder and then lashing out as condemnation, goes unchecked by a social psyche that masks the founding ridiculousness of the scenario: that the law's citizens would watch and judge this figure defying all rules (civil and natural), but through a blindness towards the spectacle as a remnant of racial exclusion. White envy towards an ingratiating figure of blackness persists because it is prohibited by some "unspoken rule"<sup>118</sup> from asking why the "cynicism or rebelliousness that infects one's spirit."<sup>119</sup> In Williams's dream – and this is the striking feature of it, its kernel – the law is not the rule of law, nor is it the word of law, but instead, is a prohibition against imagination.

This is the curious taboo Williams is left wondering about at the margins of her dream's spectacle. By this fundamental racial prohibition – the curious taboo Williams is left wondering about at the margins of her dream's spectacle – white envy escalates as it continues to attach itself to an increasingly elaborate fantasy of black ingratitude. The result is, writes Williams, that "[t]he echos [sic] of both dead and deadly others acquire an hallucinatory quality."<sup>120</sup> We would be remiss in too quickly passing over this conclusion. As in her dream, suggests Williams, the objects of social practices like police brutality are rendered into visual images – hallucinations – because law as an unstated taboo prohibits their echoes from becoming legible words, "wordless" as the woman of Williams's dream was.

What would be the consequence of asking the prohibited questions, asking this spectacular woman of Williams's dream why she never returned

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<sup>117</sup> And here I'm gesturing towards the Lacanian Real which Williams's writing grapples with. Slavoj Žižek writes that "the Real designates a substantial hard kernel that precedes and resists symbolization and, simultaneously, it designates the left-over, which is posited or 'produced' by symbolization itself." SLAVOJ ŽIŽEK, TARRYING WITH THE NEGATIVE 36 (1993). Žižek's reading, of course, is engaged with Freud's observation that "There is at least one spot in every dream at which it is unplumbable – a navel, as it were, that is its point of contact with the unknown." Freud, *supra* note 12, at 135. Lacan continuously revisits and revises Freud's notion of the navel as that which is both in and in excess of the symbolic order through topological concepts such as the knot, the quilting point, etc. For a feminist reading of the navel, see SHOSHANA FELMAN, WHAT DOES A WOMAN WANT? 68-120 (1993).

<sup>118</sup> Williams, *supra* note 74, at 143.

<sup>119</sup> *Id.* at 139.

<sup>120</sup> *Id.*

her white audience's (mis)recognition, why the silence as she continued along her solitary and defiant path? Why the ingratitude?

One consequence would be the possibility of formulating an ethical response to this image of blackness as an image and all this implies. Notably, this is *not* how the white audience responds in Williams's dream. They mistake the ingratitude of the image as the woman's essential moral fallibility, instead of a thing that must be read in order to "have" feeling (like ingratitude) of any kind. Whatever the expectation that an image may have a will or the capacity to feel and express emotion, beneath the white envy is a non-recognition of the image's metamorphosis from an excluded something to something beyond human. And surely the rule of law did not foresee exchange in recognition, restitution for a wrong, or distribution of responsibility between a building-scaling woman – a non-human being – and ordinary people. Here we locate the abiding threat of the imago of blackness with its potential to collapse the rule of law by introducing the law's aporetic foundations in exchange, restitution, and distribution.<sup>121</sup>

Clearly, Williams's dream is symptomatic of the previous day's assault on her sense of Bumpers's death, as well as the irretrievability of truth in Bumpers's dementia as the police invaded her apartment. Though formally recognized as rights-bearing by the law, Bumpers had no legal standing by which to symbolically represent her claim – either before or after her death. While rights gave her a legal personality, they did not give her the "persona of stability."<sup>122</sup> One suspects that that would hold true for Garner's racial location in the factual world of *Lawrence*, a location which formally came with rights to equal protection and due process, but which nonetheless could not symbolically render these rights and make them real.

To write of dreams and law is to pose the question of *this* image, the imago of blackness, of lived symbolic death. We might call Williams's mode of legal interpretation a "speculative law" by virtue of the centrality of the associative nature of dreamwork in her writing. By her writing, the division between text and vision, interpretation and imagination, formal logic and free association, is challenged by the imago of blackness Williams writes of and through. So even as I have been laying out just how complex the foreclosure of racial injury in legal interpretation is, and have been perhaps rendering the grim social phenomenon of racial profiling even grimmer, I want to stress that writing (of) the law to contain the limit of its own racial politics, as Williams does, allows us to reimagine the possibilities for justice through our engagements with those limits. The problem with engagements with the law in the name of civil rights and social justice is not simply that we have conservatives on the bench, that civil rights groups do not have enough resources, that the law has no higher authority to which it is held responsible, or that the terms of legal recognition are exclusionary. It is that the law's ability to change is bound by the literary

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<sup>121</sup> JACQUES DERRIDA, GIVEN TIME. I COUNTERFEIT MONEY (Peggy Kamuf trans., 1992).

<sup>122</sup> Williams, *supra* note 74, at 149.

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imagination through which its hermeneutics – its writing and its rhetoric – issue the word of law against a spectral racial profile. Yet despite itself, the law's language renders and recognizes symbolic death as the position of blackness. Markedly, this social practice of law's writing waits to be taken up as a case or cause.



## DISPELLING THE FOG ABOUT DIRECT TAXATION

James R. Campbell \*

### ABSTRACT

*A full interpretation of capitation taxes in their historical context is here used as the key to a fresh understanding of the nature and practice of apportioned direct taxation under the Constitution. Contrary to common misconceptions, it appears that none of the key elements of the Federal powers of direct taxation – capitations, other direct taxes, and apportionment – are of uncertain meaning, or no longer of any relevance because of the abolition of slavery. Evidence for these conclusions is drawn from historical studies of taxation, records of the Constitutional Convention, Federal and state tax statutes of the period, contemporaneous economic and reference works, and from legal arguments presented in *Hylton v. United States* (1796). The decision in *Hylton* is analyzed on the basis of new documentary evidence, and found wanting – especially in the matter of the oft-repeated dicta of its Justices. Some recent discussions of direct taxation are critiqued from the vantage point of recognizing both *Hylton*'s misconstruals and the historical contexts of state taxation within which the provisions governing Federal taxation emerged. A clarification of the implicit criteria of indirect taxation is derived from Adam Smith's demonstrable influence on the Founders. It is then combined with a documented tripartite definition of capitation to critique recent tax proposals, as well as the controversial individual mandate penalty of the Patient Protection and Affordable Care Act of 2010. The body of the investigation is presented in four Parts, while the Introduction and Epilogue focus on the contemporary relevance of its insights.*

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The title of this paper is an allusion to James Madison’s comment about Alexander Hamilton’s performance before the Supreme Court in *Hylton v. United States* (1796)<sup>1</sup>: “...the great effort of his coadjutor [Hamilton] as I learn, was to raise a fog around the subject [of direct taxation].”<sup>2</sup> It is ironic that whatever fog Hamilton raised in the minds of his audience, Justice Iredell’s notes of oral arguments in the case show that Hamilton (and other counsel present) knew quite a lot about what the Framers of the Constitution meant by direct taxes, and that the Justices either ignored or misinterpreted what he told them when reaching their decision. Breaking through the fog of misconstruals hovering around and streaming from *Hylton* into a fresh understanding of direct taxation asks a good deal of the reader, but the value of clear-sightedness is not just a matter of historical veracity – it challenges and changes our understanding of a number of contemporary tax issues.

As a general principle of interpretation, it is the meaning of a text for its original audience that sets the standard for all sound interpretations – or “constructions” – of the text in the future. In any such interpretive process, uncovering the original meaning of a text begins with understanding the meaning of key terms for people of that time. Thus, in the present case, knowing what “capitation” and “direct taxes” meant to the generation of the Founders is a crucial step in establishing sound criteria for applying the Constitutional language about direct taxation to modern proposals or legislation – such as the recent Flat Tax or Unlimited Savings Allowance (USA) consumption tax proposals, or the individual mandate penalty in the Patient Protection and Affordable Care Act of 2010.<sup>3</sup>

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\* For Hazel.

<sup>1</sup> *Hylton v. United States*, 3 U.S. (3 Dall.) 171 (1796).

<sup>2</sup> MAEVA MARCUS, *THE DOCUMENTARY HISTORY OF THE SUPREME COURT OF THE UNITED STATES, 1789-1800* § 7, 494-5 (2003).

<sup>3</sup> Some of the more notable discussions of these contemporary issues are: Richard W. Lindholm, *The Constitutionality of a Federal Net Wealth Tax: A Socioeconomic Analysis of a Strategy Aimed at Ending the Under-Taxation of Land*, 43 AM. J. ECON. & SOC. 451 (1984); Erik M. Jensen, *The*

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## I. INTRODUCTION

### A. SOME RECENT DISCUSSIONS

In the case of “direct” taxes, it has often been claimed that the Founders and Ratifiers of the Constitution had a very unclear or confused notion of what was meant by the term. Perhaps the first person to claim uncertainty is Alexander Hamilton in his argument defending the federal Carriage Tax before the Supreme Court in 1796,<sup>4</sup> but he is certainly not alone in his claim. In our own time for example, Robin Einhorn writes, “Everyone knew that the new Congress was stronger than the old... [but] nobody knew what “direct taxes” were, how Congress would levy them, or who would benefit from the apportionment rule.”<sup>5</sup> This view seems to reflect an untested assumption that wherever there is controversy about the application of a legal term there must also be real uncertainty as to its meaning.

Evidence of uncertainty was, however, presented by Edwin Seligman a century ago in the form of five different uses he documented from the legislative ratification debates of the period: (1) “a tax on the states;” (2) “only a land tax;” (3) “[both] a land tax and a poll tax;” (4) “a poll tax together with a general assessment on property;” and (5) “a tax on land, together with the specific articles of personal property... [such as] a tax on coaches.”<sup>6</sup> This is certainly evidence of diverse usages, but these are not five mutually incompatible meanings. Each one reflects a partial understanding of the term, and the first one reflects the circumstance that the last tax to be levied directly on the states by Congress as a “requisition” was basically an apportioned property tax.

As for the term “capitation,” two Justices in *Hylton* (writing in 1796) took it as a synonym for “poll tax” despite ample evidence of a wider meaning, and their dictums to this effect have become the stock-in-trade of virtually all commentators since then. However, Erik Jensen (writing in 1997) is much closer to grasping the usages of 1787 when he says, “A

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*Apportionment of "Direct Taxes": Are Consumption Taxes Constitutional?*, 97 COLUM. L. REV. 2334 (1997) (hereinafter Jensen, *Apportionment of Direct Taxes*); Bruce Ackerman, *Taxation and the Constitution*, 99 COLUM. L. REV. 1 (1999); Lawrence Zelenak, *Radical Tax Reform, the Constitution, and the Conscientious Legislator*, 99 COLUM. L. REV. 833 (1999); Edward D. Kleinbard, *Constitutional Kreplach*, 128 TAX NOTES 755 (2010); Steven J. Willis & Nakku Chung, *Oy Yes, the Healthcare Penalty is Unconstitutional*, 129 TAX NOTES 725 (2010) and Erik M. Jensen, *The Individual Mandate and the Taxing Power*, 134 TAX NOTES 97, (2012) (hereinafter Jensen, *The Individual Mandate*).

<sup>4</sup> Marcus, *supra* note 2, at 465-67.

<sup>5</sup> ROBIN L. EINHORN, AMERICAN TAXATION, AMERICAN SLAVERY 183 (2006).

<sup>6</sup> EDWIN R. A. SELIGMAN, THE INCOME TAX: A STUDY OF THE HISTORY, THEORY, AND PRACTICE OF INCOME TAXATION AT HOME AND ABROAD 566 (1911). The example of a tax on coaches being a direct tax is attributed there to John Jay of New York.

lump-sum [head] tax is a capitation tax, but we should not assume that the term had such a limited meaning to all founders. ...[Hence], in focusing on “direct taxes,” we may have overlooked an expansive interpretation of the term “capitation taxes” ...[through] which the apportionment requirement imposes a real limitation on the taxing power.”<sup>7</sup> In fact, this same line of thought orients the present paper, which will argue that it is precisely these overlooked implications of the term “capitation” that offer a secure way of approaching the meaning of the direct tax clauses for the Founders.

Jensen also seems to be the only notable commentator on direct taxation to see the significance of some of Alexander Hamilton’s statements regarding direct taxation in the *Hylton* case. In his “Opinion” on the Carriage Tax of 1794 Hamilton (or his clerk) writes,

The following are presumed to be the only direct taxes.

Capitation or poll-taxes.

Taxes on lands and buildings.

General assessments, whether on the whole property

of individuals, or on their whole real or personal estate;

all else must of necessity be considered as indirect taxes.<sup>8</sup>

The logic of this is apparently to say that since carriages are not the whole of the taxpayer’s personal estate, taxes levied on them are indirect by definition. But as Jensen observes, this is a peculiarly precise enumeration of what counted as direct taxes to follow close on the heels of Hamilton’s claim that “there is no general principle which can indicate the boundary between the two... [direct and indirect taxes],” so it has to be drawn by a “species of arbitration... [that involves] neither absurdity, nor inconvenience.”

Unfortunately, in the exchange of papers that followed Jensen’s publication of his observations this particular line of investigation is not taken up by anyone else.<sup>9</sup> On the other hand, the publication in 2003 of Justice Iredell’s notes on the oral arguments in *Hylton* puts Hamilton’s anomalous non-definition of direct taxes in better perspective. Not only did Hamilton present the definition quoted above, but after his co-counsel Randolph Lee

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<sup>7</sup> Jensen, *Apportionment of Direct Taxes*, *supra* note 3, at 2391-93.

<sup>8</sup> *Id.* at 2358.

<sup>9</sup> In addition to the articles by Ackerman and Zelenak (*supra* note 3) major contributions to the scholarly exchange on the meaning of direct taxation initiated by Jensen’s 1997 article include: Calvin H. Johnson, *Apportionment of Direct Taxes: The Foul-Up in the Core of the Constitution*, 7 WM. & MARY BILL RTS. J. 1 (1998) (hereinafter Johnson, *The Foul-Up*); Erik M. Jensen, *Interpreting the Sixteenth Amendment (by Way of the Direct-Tax Clauses)*, 21 CONST. COMMENT. 355 (2004), Calvin H. Johnson, *Fixing the Constitutional Absurdity of the Apportionment of Direct Tax*, 21 CONST. COMMENT. 295 (2004) (hereinafter Johnson, *Fixing the Constitutional Absurdity*) and Joseph M. Dodge, *What Federal Taxes Are Subject to the Rule of Apportionment Under the Constitution?* U. PA. J. CONST. L. 839 (2009).

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(the Attorney General) had introduced a definition of capitation in oral argument, he offered two linked explanations of his own. The last and fullest of these presentations was recorded by Justice Iredell as:

Capitation – 3 meanings.

1. Person merely
2. Person having reference to property. See Hamilton’s speech [the prior day].
3. [Person having reference to] profession. 3 Smith 327

What left for other Taxes –

If Land only, – why not mentioned:<sup>10</sup>

Granted, this invaluable material was not yet available or known to the scholars exchanging views from 1997 through 2004. But it is disconcerting to observe how many times “capitation” is still taken to mean a tax on “person merely” and nothing else, simply because of what two *Hylton* Justices said in their dicta. Calvin Johnson in particular sees fit to follow in the footsteps of these dicta regardless of their illogic. For example, he quotes approvingly the reasoning of Justices Chase and Iredell who both (in the words of the latter) asserted that “as all direct taxes must be *apportioned*, it is evident that the Constitution contemplated none as direct but such *as could be apportioned*.”<sup>11</sup> From the examples these two Justices give in their opinions on *Hylton* it is clear that the criterion being used is that of not producing gross inequities in taxation when a tax is apportioned. But even so, their reasoning is patently fallacious – because it is circular:

No direct taxes are grossly unequal when apportioned.

This tax is grossly unequal when apportioned.

*Therefore*, this tax is not a direct tax.

Yet the same Justices believed land taxes are direct – even though it is manifestly impossible to impose an apportioned land tax that is not grossly unequal from state to state.<sup>12</sup> And stranger still, Calvin Johnson argues that

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<sup>10</sup> Marcus, *supra* note 2, at 480, 488; 475, 481, 489.

<sup>11</sup> Johnson, *The Foul-Up*, *supra* note 9, at 115.

<sup>12</sup> For example, a \$5,000,000 land tax could conceivably be apportioned according to the 3/5<sup>th</sup> rule and the results of the 1790 census. Combining each territory reported in the census (those being Maine, Kentucky, Vermont and Tennessee) with population figures for their parent state a tax quota can be calculated, and then divided by the acreage of the state (plus any territories reported in the census) to give the rate of taxation. [State total by rule / aggregate of 13 states by rule = per cent of aggregate by state x amount of tax = state tax quota / total state acreage = tax rate per acre.] Taking three examples from states whose boundaries have changed little since 1790, the following rates are obtained: Connecticut, 9.4; Pennsylvania, 2.1; and South Carolina, 1.4 *cents per acre*. The amount seems trifling to us, though it would not have been in the 1790s; and the inequity is glaringly gross. JAMES

for this very reason no apportionment should be required of a federal land tax<sup>13</sup> – despite the inclusion of land taxes in the apportioned direct tax acts of Congress in 1798 and 1813-16.

Given these anomalies, it is fair to suspect that to the degree our present understanding of direct taxation flows through the *Hylton* ruling and its frequently cited dicta, we are not on solid ground. Nor are we any better served by the way in which the apportionment requirement is so often tarred with the same brush as the “federal ratio” for counting slaves. Turning to Bruce Ackerman’s article on taxation in the Constitution, for example, we find him echoing Justice Iredell in saying the apportionment rule “...was, from the very beginning, understood to be a constitutional anomaly – it was part of the bargain with slavery, and should be respected as such, but ... [it] should not be extended by construction.”<sup>14</sup> Calvin Johnson, however, is not willing to accord it much respect at all: “Apportionment was a chip given to the North to acquiesce in allowing the South to count its slaves in determining representation in the House. When slavery ended, so ended the historical purpose of apportionment.”<sup>15</sup>

These examples could be multiplied, but to no good purpose. The basic problem with all such views is a historical one: Gouverneur Morris’ motion in the federal convention to apportion direct taxes (and representatives in the House) by population was voted separately from Edmund Randolph’s motion to incorporate the “federal ratio” of counting all free persons plus 3/5<sup>ths</sup> of slaves in the required enumeration. As the “chip” that turned the impasse of July 11<sup>th</sup> into the compromise of July 12<sup>th</sup>, the practice of apportioning direct taxation was not a novelty to the delegates, and it was adopted unanimously.<sup>16</sup> Also, the changed votes that resulted in passage of the “federal ratio” were equally from North and South, which shows that the compromise appealed to both sides of the slavery question.<sup>17</sup> Given the prevalence of slavery in Southern states, and its toleration in the Middle states, it was perhaps inevitable that the egalitarian principles of the Founders could be so readily compromised as to allow only fractional representation for some people. But the apportioning of direct taxation to population was a rough attempt to proportion taxes to wealth and the “ability to pay;” it may have fallen far short of its goal, but it is not just a vestigial trace of the Founders’ long-since repudiated “bargain with slavery.”

The recent dispute between Erik Jensen and Calvin Johnson regarding the purpose and effects of the apportionment requirement seems to have

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DUNWOODY BROWNSON DEBOW, *THE SEVENTH CENSUS OF THE UNITED STATES: 1850* ix (1853).

<sup>13</sup> Johnson, *The Foul-Up*, *supra* note 9, at 112.

<sup>14</sup> Ackerman, *supra* note 3, at 23.

<sup>15</sup> Johnson, *Fixing the Constitutional Absurdity*, *supra* note 9, at 332.

<sup>16</sup> JAMES MADISON, *THE DEBATES IN THE FEDERAL CONVENTION OF 1787 WHICH FRAMED THE CONSTITUTION OF THE UNITED STATES OF AMERICA* 242 (1920).

<sup>17</sup> *Id.* at 241, 246.

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resulted in little more than a polarization of viewpoints.<sup>18</sup> Jensen stoutly maintains that apportionment is an express limitation – not on the range of things Congress may tax – but on the way it taxes certain things. Johnson maintains, to the contrary, that nothing in the Constitution was intended to “hobble” the new federal power to levy and collect direct taxes. Both sides, however, acknowledge that apportioned taxes are in fact very difficult to enact; and that the Constitution usually means what it says. So it would seem that the burden of proof lies with supporters of Johnson’s view, and that they have yet to present sufficient evidence to prevail – if only because they have failed to convince Jensen.

Nonetheless, Johnson does provide in his earlier article valuable evidence of the way in which ratification debaters assimilated the concepts of direct versus indirect taxation to the earlier Colonial distinction between “internal” and “external” taxes.<sup>19</sup> Because “external” taxes were primarily customs duties on imports, the term “imposts” was used to characterize the “indirect” taxes that even Anti-Federalists agreed could readily be ceded by the states to the new federal authority. The “direct” taxes mentioned in the proposed Constitution were then naturally treated as “near synonyms” for the “internal” taxes levied by the states,<sup>20</sup> which “...include poll taxes, land taxes, excises, duties on written instruments, on everything we eat, drink, or wear; they take hold of every species of property, and come home to every man’s house and packet, ...[taxing] land, cattle, trades, occupations, &c. to any amount...” as dissenters to ratification in New York and Pennsylvania put the matter.<sup>21</sup> These “internal” taxes were commonly apportioned, and in some states included “excise” taxes<sup>22</sup> (eg. on whiskey and carriages) as well as “duties” not related to imports or exports.

There are two relevant points here: (a) the power of direct taxation covered a broad array of well-known “internal” taxes; and (b) when the Framers of the Constitution placed excises and duties in the same class as “external” imposts, they were deliberately narrowing the class of direct taxes. Bruce Ackerman chides Johnson for treating “...the mistaken usage indulged in by debaters as if it could displace the text itself;” but then goes on to heartily second Seligman’s opinion that “...land and poll taxes were considered direct taxes; but farther than that it is impossible to go.”<sup>23</sup> This is simply to revert to the conclusion of the Justices in *Hylton* with all its anomalies, including the presumption that poll taxes are the only form of “capitation” tax. Ackerman’s preference for the tradition of judicial re-

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<sup>18</sup> This polarization is reflected in two articles published in the same issue of *Constitutional Commentary* in 2004: Jensen, *Interpreting the Sixteenth Amendment*, *supra* note 9 and Johnson, *Fixing the Constitutional Absurdity*, *supra* note 9.

<sup>19</sup> Johnson, *The Foul-Up*, *supra* note 9, at 68-105.

<sup>20</sup> *Id.* at 69. Readers of the sections of Johnson’s essay that follow this heading may note that the qualification of the observed synonymy as “near” is not used in the text itself.

<sup>21</sup> *Id.* at 73.

<sup>22</sup> *Id.* at 81, 83.

<sup>23</sup> Ackerman, *supra* note 3, at 15-16 & n. 50.

straint that flows from *Hylton* allows him to portray direct taxes as a “relatively narrow” type of taxation,<sup>24</sup> and one that should be narrowed even further: “[...] [because] there is no longer a constitutional point in enforcing a lapsed bargain with the slave power[...], t]he express condemnation of “Capitation” taxes should be respected, but no others – not even a classical tax on land – should any longer be considered “direct” for constitutional purposes.”<sup>25</sup>

So despite their opposite characterizations of direct taxes as broad or narrow, the arguments of Ackerman and Johnson come to very similar conclusions – and share two other shortcomings. First, neither is able to see the very real influence of Adam Smith’s *The Wealth of Nations* on the understanding of direct taxes in the Constitution; and second, they both ignore the relevance of the Direct Tax of 1798 (and other apportioned taxes enacted by Congress) to an understanding of how apportionment works. On the first point, the idea that *The Wealth of Nations* became influential among Americans only after its 1789 reprinting in Philadelphia<sup>26</sup> is contradicted by a considerable body of evidence assembled by Samuel Fleischacker.<sup>27</sup> Also, the way in which Ackerman presents Smith’s concept of direct taxes follows in the footsteps of Alexander Hamilton’s use of a misplaced emphasis during *Hylton* to fog what Smith actually wrote.<sup>28</sup> It is indisputa-

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<sup>24</sup> For example, the Venn diagram in Figure 1 (which Ackerman endorses) purports to clarify the meaning of “taxes” in the phrase “...to lay and collect taxes, duties, imposts and excises...” in Section I.8 of the Constitution. It presents a nameless circular set divided into two portions; one labeled “Taxes,” and a much smaller one labeled “Direct Taxes.” *Id.* at 14. This clarifies nothing. If the full circle is intended to represent anticipated federal revenues under the new constitution it should be labeled “Federal Revenues;” and the larger portion, “Indirect Taxes” (or “Duties, Imposts and Excises). If, however, the full circle is meant to represent the totality of wealth subject to federal taxation, it should be labeled “Tax Base;” with the larger portion now labeled “Direct Taxes,” and the much smaller one, “Indirect Taxes.”

<sup>25</sup> *Id.* at 58. Joseph Dodge also holds a narrow view of direct taxation, based on giving some weight to arguments he initially characterizes as “incorrect:” namely, that the apportionment requirement (a) expired after fulfilling its initial purposes of compromise and being deleted from the representation clause, (b) was implicitly repealed in the abolition of slavery, (c) fails to find support in the Constitution for its implicit premise of state sovereignty, and (d) is either of no use because it is unfair when not redundant, or of limited use because a reasonable degree of uniformity is requisite but very difficult to achieve. Dodge, *supra* note 9, at 903-918. It not clear why arguments that have been shown to be wrong should be given any weight at all, nor is it clear whether Dodge views anything other than head taxes as capitations if apportionment applies only to “taxes on real estate, slaves, and states.” *Id.* at 903.

<sup>26</sup> Johnson, *The Foul-Up*, *supra* note 9, at 108 & note 314.

<sup>27</sup> Samuel Fleischacker, *Adam Smith’s Reception among the American Founders, 1776-1790*, LIX WM. & MARY Q. 3d Series 897 (2002). His preliminary historiographic conclusion is, “There is good evidence that Jefferson, Hamilton, Wilson, Adams, Webster, Morris, and the two James Madisons were some of Smith’s earliest readers [that is, between 1776 and 1790] and among the first to take him seriously in their own political lives.” *Id.* at 905.

<sup>28</sup> Ackerman writes, “[Smith] tended to call taxes on profits and wages “direct,” despite his belief that capitalists and workers could shift them away. Instead, Smith characteristically

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ble, however, that Justice Paterson knew and respected *The Wealth of Nations* well enough to quote from it twice in his opinion, and to use Smith's expenditure - revenue distinction as the primary support for his ruling.<sup>29</sup>

On the second point, it is remarkable that so little attention has been accorded the Direct Tax Acts of Congress subsequent to the Carriage Tax of 1794 that was so fiercely disputed in *Hylton*. Fortunately, Charles Bullock devotes a few pages to the various enactments of apportioned direct taxes from 1798 through 1861;<sup>30</sup> and more recently, Robin Einhorn has written an insightful history of the political forces at work in their formation.<sup>31</sup> The peculiar structure of the Direct Tax of 1798 – progressive rates on houses plus poll taxes on working age slaves, with the balance of the apportioned quota assessed on land – meant that, “The tax rate on land in any state would depend on the yields from the taxes aimed at elites, and there might be no land tax where the slave and house taxes met a state's quota. This plan favored small farmers everywhere in the country.”<sup>32</sup> From this it would appear that apportionment in 1798 worked across Sectional lines to protect one particular class in recognition of its lesser “ability to pay.”<sup>33</sup>

In light of this historical observation, and Einhorn's general position that apportionment imposes “a limitation on the power of majorities to decide how to tax,” it is surprising that her presentation of the Three-fifths Compromise is based on the idea that there were “two equally plausible interpretations of the politics of a direct tax apportionment.”<sup>34</sup> What she calls the “Southern Victory” gloss is purportedly a way of understanding the rule as allowing the South to have both partial representation for slaves

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used the term to denote the ease with which government could monitor the activity [ie. transactions] it aimed to tax.” Ackerman, *supra* note 3, at 18-19. There are two problems here. First, shiftability is definitely an identifying feature of indirect taxes for Smith, but when cost of a tax can not be immediately shifted to another person involved in the taxed transaction it falls directly on the person taxed – unless and until workers can pressure employers to raise their wages, or capitalists can factor increased tax or wage expenses into higher market prices without being undercut by their competitors. Second, transactions that are legally regulated, public transfers of wealth can be “directly” taxed when they take place. But being taxed “directly” does not make the tax fall on revenue rather than expenditure, which is the criterion for identifying a direct tax that impressed Justice Paterson. For Hamilton's use of this same feint see his “Opinion” and his oral argument in *Hylton*. Marcus, *supra* note 2, at 457, 477.

<sup>29</sup> *Hylton v. United States*, 3 US (3 Dall.) 171, 181 (1796).

<sup>30</sup> Charles J. Bullock, *The Origin, Purpose and Effect of the Direct-Tax Clause of the Federal Constitution II*, 15 POL. SCI. Q 452, 470-78 (1900).

<sup>31</sup> Einhorn, *supra* note 5, at 184-199.

<sup>32</sup> *Id.* at 192.

<sup>33</sup> Nonetheless, when this sophisticated tax – a product of the partisan struggles between Jeffersonian “Republicans” and “Hamiltonian” Federalists – was enacted by a Federalist majority in Congress, it sparked a dramatic shift in power to the Jeffersonian partisans in 1800. As Einhorn puts it, “For the purposes of winning votes, promises of tax equity are less effective than promises of tax cuts.” *Id.* at 194.

<sup>34</sup> *Id.* at 175, 198.

and lower taxes per free person. However, the figures in Table 4 that are said to illustrate this situation are in fact the tax burden per capita, not per free person.<sup>35</sup> The effect of this mistake is, unfortunately, to obscure the way the rhetoric of Southern Federalists and Northern Anti-Federalists was focused on the productive value of labor rather than the tax liability itself. That is, by framing the debate as springing from a real ambiguity in the situation Einhorn's interpretation inadvertently contributes to the Hamiltonian "fog" surrounding the nature of the direct taxation by apportionment.

## B. SOME NEW TAX PROPOSALS

Turning from the exegetical and historical aspect of the current discussion to matters of current relevance, a good place to begin is with Lawrence Zelenak's critique of Erik Jensen's constitutional objections to certain "consumption tax" proposals. Basically, Jensen holds that VAT (Value Added Taxes) and RST (Retail Sales Taxes) are excises on consumption expenditures and therefore indirect taxes, but that proposals for a Flat Tax or USA (Unlimited Savings Allowance) tax may be unconstitutional because they would impose direct taxes that do not qualify for exemption from apportionment as "income" under the 16<sup>th</sup> Amendment.<sup>36</sup> Zelenak, who agrees with Jensen's views about the legitimacy of limiting direct taxation through apportionment, rejects his criterion of "avoidability" as an adequate indicator of the indirectness of a tax: "Despite their formal indirectness, [VAT and RST] taxes may be too broadly based – and thus too hard to avoid – to qualify as indirect."<sup>37</sup>

In this, and in his analysis of the Flat Tax as a two-part VAT, Zelenak treats "avoidability" as the sole criterion of indirectness, or at least as the only criterion which is not pragmatically satisfied by a VAT.<sup>38</sup> But even though consumers faced with a broad-based VAT would pay a hidden tax on virtually everything, they could still "avoid" paying some particular taxes. That is, the VAT would have to be uniform in all the

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<sup>35</sup> *Id.* at 175-77. The formula for calculating the effect *per free person* of an apportioned tax incorporating the 3/5<sup>th</sup> ratio is "tax x (free + 3/5 slave) / free = tax per free person," and this is what we are given in Table 3 on page 176. What Table 4, however, gives us is the results of the following calculation: "tax x (free + 3/5 slave) / (free + slave) = tax per capita."

<sup>36</sup> Jensen, *The Apportionment of Direct Taxes*, *supra* note 3, at 2402-19.

<sup>37</sup> Zelenak, *supra* note 3, at 833. Jensen may have left himself open to this objection by focusing too exclusively on consumer choice in the passage Zelenak cites: "The tax liability falls directly on individual, with nothing hidden, no state intermediaries to buffer the effects, and no purchasing decision to serve as a protection against governmental overreaching." However, earlier in this same article Jensen says "it is not necessarily true that an indirect tax is "shiftable," but rather that the tax is *generally* passed on to a consumer. Jensen, *supra* note 3, at 2407, 2405, 2395.

<sup>38</sup> Other critical features of an indirect tax are its "shiftability" from the person liable for the tax to someone else (typically, the consumer), and its "falling on expense" rather than "revenue" – to use Adam Smith's terms.

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states, but the rate of taxation would almost certainly vary from one article of consumption to another – if only because Congress is pragmatic, and would not pass over the chance of using these taxes to influence economic activity in accordance with whatever policy objectives were currently in favor.

Regarding the proposed USA tax, Zelenak does not share Jensen's concern that exclusion of broad categories of income from the tax base "could leave a tax base that is not income in any generally accepted sense."<sup>39</sup> In its simplest form, the USA tax would exclude savings and investments from taxation as "income" – a term whose "generally accepted sense" is presumably congruent with its meaning in the 16<sup>th</sup> Amendment.<sup>40</sup> This feature is also found in the Flat Tax scheme, and carries with it the same difficulty in both cases: investments are treated as "savings" for purposes of exclusion from taxation. Zelenak touches on this difficulty in the Flat Tax proposal: "[when] returns to labor are taxed under the wage tax, and returns to capital are taxed under the business tax [and business investments are excluded, then] ...the flat tax only nominally taxes income from capital... [making it] more a wage tax than an income tax."<sup>41</sup> But he remains confident that this throwing of the greater part of the tax burden onto workers is not problematic: since unapportioned taxes have been collected from wages for decades to fund the Social Security entitlement, he considers that such taxes are either not direct taxes at all or are presumed to be income taxes.<sup>42</sup> In dismissing Jensen's reservations about the soundness of *Pollock's* affirmation of unapportioned taxes on wages being constitutional, however, he apparently endorses using non-judicial opinions and the dicta of Justices in the absence of substantive holdings.<sup>43</sup>

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<sup>39</sup> Zelenak, *supra* note 3, at 846 quoting Jensen, *The Apportionment of Direct Taxes*, *supra* note 3, at 2410.

<sup>40</sup> *Id.* at 854. The "public understanding" that broadens the meaning of taxing income to include taxing income as consumption does not, however, go so far as to assume that "net wealth, or rights to income are as readily used as a tax base as is income under the 16<sup>th</sup> Amendment." Lindholm, *supra* note 3, at 453.

<sup>41</sup> *Id.* at 853. Saying that this exclusion corrects current practice in which there is a double tax on invested income (on the income itself and then on the returns it generates when invested) is a facile excuse that ignores the distinction between capital and profits; between principal and interest.

<sup>42</sup> *Id.* at 843-44 & n. 58.

<sup>43</sup> The dictum Zelenak refers to from the *Pollock* case is described by Jensen as affirming that "a tax on income from "professions, trades, employments, or vocations" was an excise tax not subject to apportionment." *Pollock* 158 US at 637. Historically, one possible source for this idea is the opinion of Treasury Secretary Oliver Wolcott in his 1796 report to Congress regarding "taxes on the profits resulting from certain employments: ...It is presumed that taxes of this nature can not be considered as of that description which the Constitution requires to be apportioned among the states...." Jensen, *The Apportionment of Direct Taxes*, *supra* note 3, at 2334, 2343 & 2370; n. 43 & 190. Or perhaps the idea flows from Justice Chase's disavowal of such taxes being capitations – a statement he prefaced by saying, "I am inclined to think, but of this I do not give a judicial opinion...." *Hylton v. United States*, 3 U.S.(3 Dall.) 171, 175 (1796).

As for the USA tax scheme, Zelenak argues that excluding savings from an income tax base does not radically change its character, citing John Stuart Mill's opinion that "[n]o income tax is really just from which savings are not exempted" as early evidence that "income" is legitimately understood more narrowly than at present.<sup>44</sup> The problem, however, is not that portions of income are exempted from taxation (or even that large portions are exempted); the problem is that investments and savings are conflated into one exemption.<sup>45</sup> Savings could be described as income that is held in reserve for future consumption, but income diverted into investments is being used to purchase rights to share in the profits of others. In short, these untaxed expenditures would be exemptions that favor the accumulation of wealth,<sup>46</sup> and would thus cause the tax burden to be shifted toward those with a lesser "ability to pay." This outcome is certainly not what the 16<sup>th</sup> Amendment contemplated, nor is it at all likely that ratifiers of the amendment considered "income" and expenditures for consumption to be synonyms.<sup>47</sup>

For a final example of controversy partly flowing from confusion about the nature of direct taxation, there is the yet to be resolved question of whether or not the penalty for non-compliance with the "Individual Mandate" in the Patient Protection and Affordable Care Act of 2010 is constitutional. Supporters of the mandate, such as Edward Kleinbard, argue that Congress has the authority to enact such a regulation both under the Commerce Clause and as part of its Taxing Power. Even though this provision of the Act [Section 5000A(b)] is called a "penalty," Kleinbard argues that it can also be viewed as a tax whose primary function is to compel behavior rather than to collect revenue; and that the Court has come to recognize such regulatory taxes as valid provided they have "some reasonable relation" to the taxing powers granted to Congress by the Constitution – even when the revenue collected is "negligible."<sup>48</sup> He further argues that the "penalty" functions as an income tax, and that it is comparable to the private foundation excise tax penalty on undistributed wealth found in Section 4942 of the Internal Revenue Code. Those who doubt the constitutionality of the individual mandate penalty must, according to Kleinbard, demonstrate: (a) that the tax is a direct tax [and not an excise],

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<sup>44</sup> Zelenak, *supra* note 3, at 851.

<sup>45</sup> *Id.* at 850. Senator Domenici, one of the USA tax's Congressional sponsors is quoted there as saying that the USA tax proposal would "tax [all] income that is not saved or invested."

<sup>46</sup> These investment exemptions are in stark contrast to the "family allowance" exemptions that would be included in the USA tax to shield subsistence spending from taxation.

<sup>47</sup> It is unfortunate that Zelenak first criticizes experts who, for the sake of political advantage, "sow confusion in claiming that the flat tax is both a consumption tax and an income tax" – even though they offer plausible defenses for using that label – and then on the very next page writes, "Although the flat tax and the USA tax may be consumption taxes, they are also income taxes." Zelenak, *supra* note 3, at 854-55.

<sup>48</sup> Kleinbard, *supra* note 3, at 759-60.

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(b) that it is not an income tax exempted from apportionment, and (c) that apportionment of direct taxes “has survived the Reconstruction Amendments.”<sup>49</sup>

Responding to this challenge, Steven Willis and Nakku Chung have pointed out that with regard to (c), the apportionment requirement in Section I.9 of the Constitution has never been explicitly repealed, even when the 14<sup>th</sup> Amendment dropped the reference to direct taxation in Section I.2. With regard to (b) they argue that the payment is not an income tax because there is no “accession to wealth” when someone who could afford health insurance does not purchase a policy. Further, they point out that there is no certainty that any particular person – let alone everyone – who is uninsured will ever derive any economic benefits from having recourse to health care subsidized by taxes.<sup>50</sup> This leaves only one the key issue to be addressed: is this supposed tax a direct tax, or an indirect (excise) tax? Willis and Chung contend that the penalty can not be an excise like those imposed by Section 4942 on charitable foundations because it falls on natural persons, not on licensed legal entities.<sup>51</sup> Nor can it be definitively rejected as a direct tax, because *Hylton* is inconsistent and easily misconstrued: by its own criteria – that direct taxes do not lead to absurd results when apportioned – even direct taxes on land could not be “direct” taxes.<sup>52</sup> But further than this they do not go in trying to clarify what the purported tax really is.

Erik Jensen, however, has provided us with an insightful reflection on what the individual mandate penalty might look like if it were to be understood as a tax<sup>53</sup> – despite his oft-repeated view that the provision is better understood as a penalty that may or may not be a legitimate exercise of Congressional authority under the Commerce Clause. If the penalty charges were nonetheless somehow found to be excise taxes, Jensen (contrary to Willis and Chung) thinks that the necessary uniformity would be established by the fact that the amount of penalty imposed is tied to a national

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<sup>49</sup> *Id.* at 762.

<sup>50</sup> Willis & Chung, *supra* note 3, at 725. It should also be noted that uninsured people who end up receiving Public Aid healthcare have demonstrably exhausted all of their private resources – often because of paying directly for healthcare services.

<sup>51</sup> *Id.* at 732. Unfortunately, this response does not explicitly deal with Kleinbard’s use of the *Murphy* decision to bolster the legitimacy of treating a tax imposed directly on an individual as “an excise laid on the proceeds received from vindicating a statutory right through the medium of the legal system” (493 F.3d at 185-186), or as a transaction tax on “the [reversal of the] involuntary conversion of Murphy’s human capital.” Kleinbard, *supra* note 3, at 758. But since both of these reasons depend on Murphy’s having taken legal action for damages, they are not applicable to the penalty in question because (a) that penalty was imposed as a result of action rather than failure to act, and (b) the individual mandate penalty does not result from an exercise of federally mandated legal privileges for which an excise is due. See, Jensen, *The Individual Mandate*, *supra* note 3, at 11-13 & 18-24 for further discussion of the use of taxation to regulate behavior.

<sup>52</sup> Willis & Chung, *supra* note 3, at 727-28. See, text accompanying note 12 *supra*.

<sup>53</sup> Jensen, *The Individual Mandate*, *supra* note 3, at 23-44.

average cost of the required “bronze level” coverage.<sup>54</sup> More interestingly, with respect to possibly finding the penalty to be a direct tax, Jensen develops three reasons for rejecting Kleinbard’s assertion that Justice Chase’s view of capitations is “universally” accepted.<sup>55</sup>

First of all, Jensen argues that to say that “capitations” are nothing other than lump sum head taxes is to make the establishment of an apportionment rule for “capitations” superfluous, assuming (as the Constitution does) that the same people are being counted for taxation as were counted for representation.<sup>56</sup> This point is one that is challenged by those who see the whole reason for the apportionment of capitations to lie in the 3/5<sup>ths</sup> ratio for counting slaves. Jensen is willing to allow that “part – but only part – of the concern was slavery,” yet the controversy is far from settled thusly.<sup>57</sup> Without delving into the matter too deeply, it is still possible to point out in support of Jensen’s position that the word “capitation” was used in Section I.9 of the Constitution, rather than the more widely current term “poll tax.” If the latter term would have protected slavery just as fully, why was it not used?

Jensen’s second point is that if exempting *some* people from a head tax because of certain “circumstances” makes the tax levy no longer a capitation subject to apportionment, then the rule is eviscerated<sup>58</sup> – at least with respect to the “poll tax” the Founders knew and disliked. There were partial exemptions from virtually every tax in that era, and the head tax was no exception. For example, the federal head tax enacted in 1798 exempted all free person, and of enslaved persons – the infirm, those under 12 years of age and those older than 50; but the tax was nevertheless an apportioned one.<sup>59</sup> For his third point Jensen looks at a different kind of “circumstance,” saying that if a tax which reaches everyone and imposes different amounts of tax liability on statutorily defined sets of people is not a capitation in the sense of the Constitution, then Congress is at liberty to circumvent apportionment of “capitations” whenever it will.<sup>60</sup>

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<sup>54</sup> *Id.* at 25.

<sup>55</sup> Kleinbard, *supra* note 3, at 762. “But a capitation tax is universally understood as a tax imposed on an individual “without regard to property, profession or any other circumstances,” *Hylton v. United States*, 3 U.S. (3 Dall.) 171, 175 (1796) (Chase J).”

<sup>56</sup> Jensen, *The Individual Mandate*, *supra* note 3, at 32.

<sup>57</sup> Jensen, *Interpreting the Sixteenth Amendment*, *supra* note 9, at 372.

<sup>58</sup> Jensen, *The Individual Mandate*, *supra* note 3, at 32-33.

<sup>59</sup> “An act to lay and collect a direct tax in the United States,” Act of July 14, 1798, c.75 1 Stat. 597-98. For a good overview of the 1798 direct tax (and some valuable details concerning the direct taxes of 1813-1816), see Einhorn, *supra* note 5, at 192-193 & 196.

<sup>60</sup> Jensen, *The Individual Mandate*, *supra* note 3, at 32-34. Jensen provides a hypothetical example to illustrate his third point. Congress has provided historical examples in its Direct Tax enactments which show that acknowledged direct taxes (a) exempted certain persons from tax because of circumstances, and (b) varied tax liability for different sets of people. For example, the Direct Tax of 1798 imposed a head tax (called a “poll tax”) of 50 cents each on slaves only, and then also exempted the infirm, those over 60 years of age, and those under the age of 12. The same tax imposed varying tax burdens on owners of houses

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Jensen uses a hypothetical tax to illustrate his point, using income levels to define two sets of people who are then liable for two different lump-sum head taxes. Here too, Congress provides an intriguing historical example of something fairly similar to Jensen's hypothetical: in the Direct Tax of 1813 an apportioned tax of three million dollars was levied on "land, lots of ground with their improvements, dwelling houses and slaves, which several articles subject to taxation shall be enumerated and valued by the respective assessors, at the rate each of them is worth in money."<sup>61</sup> Here slaves are being taxed *ad valorem*, so it is the circumstance of estimated market value that changes tax liability from one slave to the next. Yet the tax is not therefore something other than a capitation that is subject to apportionment. One might, of course, object to this example by arguing that the tax on slaves was not a "poll tax," but a property tax. Yet we have to remember that slaves were 3/5<sup>th</sup> persons, and they were taxed based on their 3/5<sup>th</sup> of a person taxable status.

As the above example tangentially illustrates, there does not seem to be any way that property tax considerations could apply to the individual mandate charges: after all, how could someone be taxed for not having personal property in the form of healthcare insurance? So are there other things we can be fairly sure of regarding this penalty *cum* tax? For one thing, the purported tax liability does fall on *persons* – that much is certain. It also seems fair to say that (a) it is not imposed on expenditure, (b) it is not shiftable to someone else, (c) it is not an exaction on a privileged activity or transaction, (d) it is not imposed on an accession to wealth, and (e) it is not avoidable except in one prescribed way. As Jensen puts it, what Congress is saying is "Pay a tax (if the penalty will be a tax) or pay something else [equally costly]"<sup>62</sup> – namely, pay for a healthcare policy on you and your dependents from a particular list of certified providers, and at no less than the "bronze" level of coverage that experts have decided will be adequate and affordable for all. Thus, it seems the healthcare mandate imposes a costly exaction "for a detailed and specified course of conduct," a situation that the Court in *Bailey v. Drexel* (1922)<sup>63</sup> found to be inconsistent with the proper exercise of the taxing power.<sup>64</sup> In other words, the purported tax on not purchasing healthcare insurance behaves very much like a penalty, which is exactly what the legislation calls it.

At the end of his discussion of capitation, Jensen's conclusion is that *if* the individual mandate penalty really is a tax and not a penalty, then "the argument that Congress has enacted an unapportioned capitation tax

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depending on where their dwelling fell on a schedule of assessment rates: 0.1% on dwellings worth \$100-\$500; 0.2% on those in \$500-\$1,000 range; and so on up to those worth more than \$30,000 which were to be taxed at 1.0% of assessed value. Act of July 14, 1798, c.75, 1 Stat. 585, 598.

<sup>61</sup> *Id.* at § 3, 26.

<sup>62</sup> Jensen, *The Individual Mandate*, *supra* note 3, at 38.

<sup>63</sup> *Bailey v. Drexel Furniture Co.*, 259 U.S. 20 (1922).

<sup>64</sup> *Id.* at 22.

is not frivolous.”<sup>65</sup> Such an argument must rely on a deeper, more expansive and nuanced understanding of “capitation” than has been common in legal circles for a very long time. Jensen’s own appeal for a more complex understanding of direct taxation and capitation in the time of the Founders has grown stronger over the years from 1997 through 2010.<sup>66</sup> But there is yet more that can be done – as the present essay will demonstrate by bringing fresh evidence and analysis into the arena. The body of the essay is divided into four parts: *first*, a review of colonial capitation taxes with particular attention to “faculty” taxes; *second*, a reconsideration of *Hylton v. United States* (1796) based on new sources and including a fresh view of Adam Smith’s influence on the Founders; *third*, an investigation of what the Direct Tax Act of 1798 and the Convention record reveal about the nature of apportioned direct taxation; and *fourth*, a full interpretation of the purposes and effects of the apportionment requirement in the wake of a reappraisal of *Hylton*. An Epilogue then returns the focus of the essay to contemporary issues.

## II. CAPITATION IN ITS CONSTITUTIONAL CONTEXT

The relevant portion of the Constitution of 1787 reads, “No capitation, or other direct tax, shall be laid, unless in proportion to the census or enumeration herein before directed to be taken.”<sup>67</sup> A good place to begin an inquiry into what the phrase “capitation, or other direct tax” means is with the following passage from Adam Smith’s *The Wealth of Nations* (1776):

In the capitation which has been levied in France without any interruptions since the beginning of the present century, the highest orders of people are rated according to their rank by an invariable tariff; the lower orders of people, according to what is supposed to be their fortune, by an assessment which varies from year to year.<sup>68</sup>

The French capitation described above was in effect from 1695 to 1789, and Smith’s familiarity with this form of taxation creates a strong presumption that “capitation” by variable assessment of wealth was a recognized alternative to imposing a flat rate “poll tax” capitation in the 18<sup>th</sup> century. In fact, this form of taxation – generally known as a “faculty tax” in the colonies – was a well-established practice in Massachusetts and other

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<sup>65</sup> *Id.* at 38.

<sup>66</sup> See, Jensen, *The Apportionment of Direct Taxes*, *supra* note 3, at 2358; Jensen, *Interpreting the Sixteenth Amendment*, *supra* note 9, at 380; ERIK JENSEN, *THE TAXING POWER* 41-42 (2005); and Jensen, *The Individual Madate*, *supra* note 3, at 35-36, 38.

<sup>67</sup> U.S. CONST. art. I, § 9, cl. 4.

<sup>68</sup> Adam Smith, *An Inquiry Into the Nature and Causes of the Wealth of Nations* (1776) [Bk V, Pt II, Ch 2, Sect IV], in *GREAT BOOKS OF THE WESTERN WORLD* § 36, 428 (ADLER ed. 1990).

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parts of New England as well as in New Jersey and South Carolina. Faculty taxes were not, however, commonly imposed in most Middle and Southern colonies, and in some cases their enactment was temporary, or ended before 1780.<sup>69</sup> For example, in New York and Georgia, a faculty tax was never imposed. In Virginia, Maryland, Pennsylvania and Delaware faculty taxes imposed soon before the Revolutionary War did not take root, whereas in South Carolina, Rhode Island and New Hampshire decades of usage came to an end during the War years. In New Jersey early evidence of imposition is countered by evidence of no faculty taxes later, while in Connecticut and Vermont faculty taxes modeled on those of Massachusetts were limited by exempting farmers and laborers. In Massachusetts alone did broadly imposed faculty taxes persist beyond the 1780s.<sup>70</sup>

Massachusetts also had the longest history of imposing faculty taxes, the outlines of which first appeared in the Acts of 1643 and became more explicit with each iteration through 1777. The sweeping nature of the faculty tax in Massachusetts is evident from the following: in 1699 the tax act required assessment of “incomes by any trade or faculty which any persons do or shall exercise;” and in 1738, taxation was imposed on “the income or profit which any person or persons (except as before excepted) do or shall receive from any trade, faculty, business or employment whatsoever, and all profits which may or shall arise by money or other estate not particularly otherwise assessed, or commissions of profit in their improvement.”<sup>71</sup>

The language enacting these faculty taxes describes a practice very similar to the French capitation described by Adam Smith, and that similarity would hardly have escaped the notice of anyone as interested in the problems of taxation as the drafters of the Constitution undoubtedly were. Yet the legislature of Massachusetts may not have commonly thought of its faculty tax as a “capitation.”

When Massachusetts became a state in 1780, its new constitution declared that taxes were to be assessed “on polls and estates in the manner that has hitherto been practiced,” thus perpetuating the colonial faculty tax as a part of the state revenue system.<sup>72</sup> But there is no way of telling from this one fact whether the faculty tax was being carried over as a part of the taxes on polls (as a capitation), or on estates (as a tax on property or wealth). However, about 1821 the term “faculty” began to be replaced by “income,” so that by 1836 there was no faculty tax as such in

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<sup>69</sup> In a recent overview of early American taxation, Robin Einhorn mentions faculty taxes being levied by Massachusetts, Connecticut, Pennsylvania, and South Carolina during the Revolutionary period. Einhorn, *supra* note 5, at 78, 80, 91 & 99-100. Others, mentioned in Robert Becker’s earlier study, include New Hampshire, New York, New Jersey and Maryland. ROBERT A. BECKER, *REVOLUTION, REFORM, AND THE POLITICS OF AMERICAN TAXATION, 1763-1783* 129, 159, 172 & 213 (1980). See, Seligman, *supra* note 6, at 368-81.

<sup>70</sup> *Id.* at 372-373 and Becker, *supra* note 69, at 81 & 172.

<sup>71</sup> Seligman, *supra* note 6, at 373.

<sup>72</sup> *Id.*

Massachusetts, but there was a tax on income which was imposed thusly: “Personal property shall, for the purpose of taxation, be construed to include ...income from any profession, trade or employment, or from an annuity.”<sup>73</sup> From this it is clear that the old colonial “faculty tax” on incomes or profits was – fifty years later – considered to be a variety of property tax. So perhaps it had always been viewed thusly in Massachusetts.

If so, it appears there were at least two ways of understanding and classifying faculty taxes current (or at least implicit) at the time the Constitution was being drafted: as a variety of capitation after the French model, or as a species of property tax – as Massachusetts probably did. Both viewpoints squarely place faculty taxes in the general category of taxes on persons and estates, and were routinely considered direct taxes.<sup>74</sup> But Secretary of the Treasury Oliver Wolcott Jr. of Connecticut in his 1796 report on state taxation nonetheless described the faculty tax thusly: “*Taxes on the profits resulting from certain employments....* It is presumed that taxes of this nature cannot be considered as of that description which the Constitution requires to be apportioned among the states... [because] their operation is indirect....”<sup>75</sup> So opined Wolcott, a New Englander who served under the Federalist presidents Washington and Adams. He gives no reasons for his judgment; but then, he was not charged with writing his report until after the *Hylton* decision on March 2, 1796 had made it fairly clear that the courts were going to view the apportionment clause very narrowly indeed.<sup>76</sup>

On the other hand, Albert Gallatin of Pennsylvania – Secretary of the Treasury under the Republican presidents Jefferson and Madison – writes in that same contentious year of 1796 concerning the tax revenues of the

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<sup>73</sup> *Id.* at 390.

<sup>74</sup> Calvin Johnson, *supra* note 9, at 69-77 emphasizes the “near synonymy” of direct taxes with internal taxes, but does not pay attention to the way in which a capitation is different from a poll tax. The phrase “capitation or poll tax,” that occurs in the writing of the period is logically ambiguous; and when it is taken to imply equivalence, needs to be understood in the context of the variations on flat poll taxes the states sometimes imposed. For example, Pennsylvania traditionally imposed a poll tax only on single free men not otherwise taxed; during the War of Independence Connecticut cut poll taxes in half for men between the ages of 16 and 21 (Becker, *supra* note 69, at 149); and in 1777 Virginia’s poll tax on “tithables” (free men and both men and women slaves) exempted slaves under the age of 31, who were instead rated *ad valorem* as property – and then in 1779 substituted an average poll tax of £5 per slave (calculated at 1.5% of average value) with discounts for those who “shall be incapable of labour, and become a charge to the owner.” Becker, *supra* note 69, at 182, 149; Einhorn, *supra* note 5, at 47. This last shift illustrates the hybrid status of slaves with respect to taxation; so that when they were taxed as property, tiered or *ad valorem* assessments were used – as in Massachusetts, North Carolina, Maryland and New York – they were also still being implicitly taxed by the head. Einhorn, *supra* note 5, at 72, 81; 108; Becker, *supra* note 69, at 162.

<sup>75</sup> Seligman, *supra* note 6, at 386.

<sup>76</sup> Dodge, *supra* note 9, at 872.

## *Dispelling the Fog About Direct Taxation*

United States: “The most generally received opinion, however, is that by direct taxes in the Constitution are those meant which are raised on the capital or revenue of the people; by indirect, such as are raised on their expense.”<sup>77</sup> Since faculty taxes were levied in proportion to revenue in the form of profits or income, it seems inescapable that Gallatin, if queried, would have considered faculty taxes to be direct taxes, just as they were for Adam Smith, whose opinion Gallatin mirrored.

The origin of Wolcott’s concept of “indirect operation,” however, might reasonably be found in the way a tax on personal wealth was sometimes thought of as being levied “indirectly” whenever a faculty tax was imposed. In this view, the profits taxed were being used as a gauge of the total taxable value of a person’s estate or holdings, so that the tax collected would be roughly proportional to the wealth from which the tax was drawn. But this type of indirection in no way shifts the burden of the tax from wealth and profits (or, capital and revenues) onto expenditures (or, expenses) the way a straightforward excise tax does.

In support of Wolcott’s position, the tax historian Edwin Seligman asserts that colonial faculty taxes operated like land taxes that were assessed in terms of the value of the produce of the land because the actual market value of the land was unknown to the assessors. By this reasoning, the faculty tax was assessed “indirectly” on wealth, which was estimated by measuring income or profit derived from the exercise of a person’s economically productive “faculty.” But the faculty tax was levied directly on the person and paid directly out of that person’s revenues or capital, not through “expenditure” – in Adam Smith’s sense. Seligman’s comparison of faculty taxes to a particular land taxation practice is valuable evidence of the sense in which Wolcott may have meant “indirectly,” but his explanation establishes only that faculty taxes were closely associated with direct taxation of personal wealth and land.<sup>78</sup> The colonial penchant for lumping virtually all taxes other than imposts (meaning duties on imported goods) into the one category of direct internal taxes means that faculty taxes were considered just as “direct” as land, poll and excise taxes (or internal duties) were. However, the taxing provisions of the Constitution explicitly place duties and excises into the same category as imposts, so that in the new Federal scheme of taxation they also would be imposed as indirect, external taxes that must be uniform among the states. But what about faculty taxes?

When it comes to identifying what sort of common viewpoint on faculty taxes might have been shared by the drafters of the Constitution, there seems to be little explicit testimony. The Constitution itself is silent about faculty taxes: they are not named together with the “duties, imposts

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<sup>77</sup> Albert Gallatin, *A Sketch of the Finances of the United States (1796)* in THE WRITINGS OF ALBERT GALLATIN, § 3.1 (1879), available at <http://oll.libertyfund.org/title/1951>. Gallatin’s work was printed in November 1796; Wolcott’s report was submitted to Congress in December 1796.

<sup>78</sup> Seligman, *supra* note 6, at 380-81.

or excises”<sup>79</sup> as indirect taxes subject only to the rule of uniformity, nor are they mentioned as a species of direct tax or capitation subject to apportionment. But even if faculty taxes had been mentioned, their character would still have to be judged from the historical context, since none of the key tax terms used in the Constitution were actually defined.

Thus, when Rufus King of Massachusetts famously asked in the Convention what “the precise meaning of direct taxation” might be, James Madison Jr. of Virginia reported, “No one answered.”<sup>80</sup> This general reticence is often taken as a sign of how difficult a question it was to answer, but the general silence of the Convention on this point may well have been a sign that the delegates saw King’s question as an attempt to inject dispute into a matter that was clear enough already. For instance, in the Virginia ratification debates of 1788, John Marshall – the future Chief Justice – offered a confident definition of direct taxes in response to James Monroe’s discourse on their defects:

[Mr. Monroe] “What are the objects of direct taxation? Will the taxes be laid on land? One gentleman has said that the United States would select out a particular object, or objects, and leave the rest to the States. Suppose land to be the object selected by Congress: examine its consequences. The landholder alone would suffer by such a selection. A very considerable part of the community would escape. Those who pursue commerce and arts would escape. It could not possibly be estimated equally. Will the taxes be laid on polls only? Would not the landholder escape in that case? How, then, will it be laid? On all property?”

[Mr. Marshall] The objects of direct taxes are well understood: they are but few: what are they? Lands, slaves, stock of all kinds, and a few other articles of domestic property.<sup>81</sup>

It is noteworthy that Marshall omits mention of any kind of poll tax or capitation here, despite Monroe’s having used direct taxes on both polls and land as examples in his address. Marshall’s reply speaks only to Monroe’s very last question – perhaps because Virginia had just abolished its poll tax on free white men, transforming the traditional state tax on “tithables” into a tax on slaves only.<sup>82</sup> But in any case, the sort of narrow definition Marshall advanced could have been precisely what Rufus King wanted the Convention to debate and resolve upon, thereby explicitly excluding the broad range of faculty taxes collected in his home state of

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<sup>79</sup> U.S. Const. art. I, § 8, cl. 1.

<sup>80</sup> Madison, *supra* note 16, at 435.

<sup>81</sup> JONATHAN ELLIOT, *THE DEBATES IN THE SEVERAL STATE CONVENTIONS ON THE ADOPTION OF THE FEDERAL CONSTITUTION*, § 3, June 10, 1788 (2d ed. 1836).

<sup>82</sup> Einhorn, *supra* note 5, at 46,50. Also, faculty taxes were not part of Virginia’s tax legislation except in the form of a levy on non-military public salaries and income from “offices of profit.”

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Massachusetts from the requirement of apportionment – much as Oliver Wolcott did.

Be that as it may, the Convention appears to have bypassed the whole issue,<sup>83</sup> and ultimately one of the most frequently cited views of what constituted direct taxation became that formulated by Alexander Hamilton of New York in his “Opinion” of 1796, arguing that the Carriage Tax of 1794 was not a direct tax: “The following are presumed to be the only direct taxes – Capitation or Poll taxes, Taxes on lands and buildings, General assessments whether on the whole property of Individuals, or on their whole, real or personal estate. All else must of necessity be considered as indirect taxes.”<sup>84</sup>

Of these three categories, the first two were widely practiced methods of taxation. The third, however, that of “general assessments” was taken directly from the tax policies of Hamilton’s home state of New York. There, in the face of war-time financial difficulties, the state legislature reimposed in 1779 its old colonial system of apportioned tax quotas for each county, with one innovation: the elected assessors were directed to distribute the total tax burden among residents of each county “...according to the estates *and other circumstances and ability of each respective person to pay taxes collectively considered*.”<sup>85</sup> Property, income and capital – but not expenditures – were all to be taxed as part of one general assessment that was intended to reflect each person’s ability to pay.<sup>86</sup>

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<sup>83</sup> Although Madison’s secret notes are an invaluable window into the actions and ideas of the Convention, they are a partial record and inevitably selective. For instance, Robert Yates of New York took notes on some of the debates, and he records that on Thursday, June 28 Mr. Williamson of North Carolina said, as part of a longer speech: “A general government cannot exercise direct taxation. Money must be raised by duties and imposts, &c., and this will operate equally. It is impossible to tax according to numbers.” But when we look at James Madison’s report of that same speech, no reference to “direct taxation” or “duties and imposts” is to be found. Elliot, *supra* note 81, at § 1, *The Notes of the Secret Debates of the Federal Convention of 1787*, Taken By the Late Hon. Robert Yates, Chief Justice of the State of New York, and One of the Delegates From That State to the Said Convention, June 28, 1787 and The Founders’ Blog, *Debates in the Federal Convention* [from James Madison’s Notes], June 28, 1787, available at <http://founders-blog.blogspot.com/2007/06/thursday-june-28-1787-equally-sovereign.html>.

<sup>84</sup> Marcus, *supra* note 2, at 467. Editors of the *Documentary History of the Supreme Court* series have assigned a date prior to Hamilton’s arrival in Philadelphia on February 17<sup>th</sup> for both his “Brief” and “Opinion” on the Carriage Tax. Although the “Brief” appears to be intended as an outline for Hamilton’s oral argument before the Court on February 23<sup>rd</sup>-25<sup>th</sup>, his “Opinion” may have been written afterwards. But even so, it is in a clerk’s handwriting and incomplete. *Id.* at 456-57, note AD.

<sup>85</sup> Becker, *supra* note 69, at 159.

<sup>86</sup> Hamilton despised this form of taxation, and worked - without success - with his fellow Federalists Livingstone and Schuyler to replace these *ad valorem* general taxes with simple poll taxes and acreage land taxes. *Id.* at 159 & 163. Hamilton’s inclusion of general assessments in his “Opinion” as a form of capitation should not divert attention from the way he presented this form of taxation to the Hylton Court: “an incompetent sign of wealth – [which] will operate inconveniently & oppressively.” Marcus, *supra* note 2, at 488.

In adopting “ability to pay” as the just standard for taxation, New York expressed its general approbation for the same principle Adam Smith espoused.<sup>87</sup> His first principle of fair taxation was exactly this sort of proportionality: “The subjects of every State ought to contribute towards the support of the government, as nearly as possible, in proportion to their respective abilities; that is, in proportion to the revenue which they respectively enjoy under the protection of the State.”<sup>88</sup>

Because the total tax levied by the State of New York was divided among the different counties in proportion to their legislative representation before being directly imposed on each resident (as a “capitation” according to Hamilton’s summary in *Hylton*), this pre-Convention tax system of New York could well have served as one precedent for the conjunction of direct taxation with representation in the Constitution. This possibility is strengthened by the fact that Gouverneur Morris of Pennsylvania, who proposed in the Convention that direct taxation be in proportion to representation,<sup>89</sup> was very familiar with New York tax policies, having served in the provincial legislature as one of the principal drafters of the New York Constitution of 1777 before relocating to Pennsylvania. But as it turned out, the relative ease with which Morris’ initial resolution was first restricted to direct taxes and then adopted “*nemine contradicente*,” only set the stage for a protracted controversy about what was, or was not, a direct tax.

### III. THE CARRIAGE TAX OF 1794 v. THE CONSTITUTION

The question of what constitutes a direct tax in the Constitution was, of course, the main point of contention in *Hylton v. United States* (1796). This case was one the government – acting through Tench Coxe, U.S. Commissioner of Revenue – was so eager to bring before the Supreme Court that it arranged (with the cooperation of the defendant) to stipulate that Daniel Lawrence Hylton of Virginia had refused to pay the new Carriage Tax on 124 more carriages than he actually owned – in order to meet the monetary threshold for taking cases to the Supreme Court.<sup>90</sup> The initial case against Hylton was argued in Virginia before Cyrus Griffin and James Wilson (an Associate Justice of the Supreme Court) in 1795; and despite the split verdict, Hylton “confessed judgment” so that a pre-

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<sup>87</sup> Most of the documented evidence for early knowledge of Smith’s *Wealth of Nations* in America dates from the 1780s. For instance, Hamilton is reported to have written an extended commentary on it while a delegate to Congress in 1783, and to have relied on it heavily even though he “rejected its central teaching in favor of economic nationalism.” Fleischacker, *supra* note 27, at 901.

<sup>88</sup> Smith, *supra* note 68, at 405. [Book V, Part II, Chapter 2].

<sup>89</sup> Madison, *supra* note 16, at 241.

<sup>90</sup> Marcus, *supra* note 2, at 361.

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arranged Writ of Error could be submitted and the case be placed on the docket of the Supreme Court for 1796.

The arguments as heard by the Court in February 1796 are apparently lost to history as full texts, although their outlines can be traced in the notes Justice James Iredell took.<sup>91</sup> Alexander Hamilton, Secretary of the Treasury, and Charles Lee, the United States Attorney General, argued the case upholding the constitutionality of the tax; Jared Ingersoll, Attorney General of Pennsylvania, and Alexander Campbell, District Attorney of Virginia, represented the tax protestor Hylton. Each set of attorneys had ready to hand the extensive arguments presented in the Virginia trial, since lively public interest in the case had moved both John Taylor (for Hylton) and John Wickham (for the United States) to publish their briefs well before the 1796 hearing took place.<sup>92</sup>

The anticipated outcome was bemoaned by James Madison in a letter to Thomas Jefferson dated March 6, 1796: “The court has not given judgment yet on the Carriage tax. It is said the Judges will be unanimous for its constitutionality. Hamilton and Lee advocated it at the Bar against Campbell & Ingersoll. Bystanders speak highly of Campbell’s argument, as well as of Ingersoll’s. Lee did not shine, and the great effort of his coadjutor [Hamilton] as I learn, was to raise a fog around the subject, & to inculcate a respect in the Court for preceding sanctions....”<sup>93</sup> The “fog” that Madison complains about may partly refer to Hamilton’s contention that “...there is no general principle which can indicate the boundary between the two [direct and indirect taxes]... That boundary then must be fixed by a Species of Arbitration, and ought to be such as will involve neither absurdity, nor inconvenience.”<sup>94</sup>

This blanket statement from Hamilton’s 1796 “Opinion” was developed more fully in his oral argument before the Court.<sup>95</sup> There he gave examples of the “absurdity” of saying that tax duties on commodities are always indirect, or that taxes on land and labor are purely direct. In each case Hamilton described how the burden of the tax may ultimately fall on a person other than the one being directly (or indirectly) taxed: the laborer passes his capitation on to his employer by asking higher wages, the landlord shifts the cost of his tax onto his tenants as higher rents and the merchant may import for his own use, so that the duty he pays is not shifted anyone else.<sup>96</sup> Yet Hamilton abandoned such sophistries a little later in the same discourse while setting forth Adam Smith’s position:

2. Smith... 1<sup>st</sup> proposition.

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<sup>91</sup> *Id.* at 468-90.

<sup>92</sup> *Id.* at 383-409 & 424-36 (Taylor); and 410-24 (Wickham).

<sup>93</sup> *Id.* at 494-95.

<sup>94</sup> *Id.* at 466-67.

<sup>95</sup> *Id.* at 478-81.

<sup>96</sup> *Id.* at 78.

“Capitation Tax – goes directly to Income –

Income – [as] Wages, Labour & Profit.

[Excise Tax – goes to] Income thru expence...

Food – Clothing [are] Expence. Carriage tax – as an example –.

1. payable on importation
2. payable by the Consumer –.

*This much more rational....*

One as [going straight] to the source, the other going by a road back to the source –.

*Smith much the oracle of the Political Oeconomists here....*

Result – “Taxes [are] direct [when] applied to the elements or sources of wealth –

1. Tax on Land... [difficult not to include buildings] –
  2. Tax on Labour [thru] Capitation –
- Land & Capitation alone [are] direct.”<sup>97</sup>

Here Hamilton has evidently expounded the basic definition of direct taxes that Justice Paterson adopted, and has done so by linking “capitation tax” to the value of a person’s labor, rather than to sheer existence.

Hamilton’s stated goal in arbitrating the boundary between direct and indirect taxation was to avoid unwonted “inconvenience,” as well as total absurdity. But it seems that the primary inconvenience he wanted to avoid was that of trying to collect a tax through apportionment.<sup>98</sup> “It would be contrary to reason and to every rule of sound construction to adopt a principle for regulating the exercise of a clear constitutional power which would defeat the exercise of the power.”<sup>99</sup> That is, principles regulating taxation should not “inconvenience” Congress in the exercise of that power, so any principle that threatened to do so must be “contrary to reason” – for just that reason. Justices Chase and Iredell apparently adopted Hamilton’s view of the matter without hesitation.

But Hamilton’s position becomes palatable only if there is an irresolvable uncertainty about how to understand and apply the regulatory Constitutional principle. Hence, any new and potentially controversial Federal taxes had to be drawn into a rhetorical fog that confused the distinction between direct and indirect taxation. Two prime examples of

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<sup>97</sup> *Id.* at 80.

<sup>98</sup> A tax on carriages was imposed by Virginia as a direct tax, and by Massachusetts as an internal “excise” on personal property. These taxes would have been apportioned to the Towns for collection in Massachusetts, or equalized by County in Virginia. Einhorn, *supra* note 5, at 46, 49-50 ; 73-4, 77.

<sup>99</sup> Marcus, *supra* note 2, at 465.

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this tactic involved illustrations tied to the Whiskey Tax of 1791 and, of course, to the Carriage Tax of 1794. The former tax was not addressed by name (at least not in Justice Iredell's notes), but it fits Hamilton's rhetorical pattern of questioning how an indirect excise on an article ordinarily produced for sale (such as whiskey) could also be a direct tax when the article was retained by the maker. In the case of carriages, Hamilton proposed a variation in which the tax is "Direct, as paid by the Keeper for his own use [but] Indirect, as to Hackney Coachmen [who shift the tax to their clients]." This difference he then disparaged as being "...so capricious and variant it could not be the [correct] standard."<sup>100</sup> *Pace* Hamilton, this distinction between taxes is quite clear and workable, but it would inconvenience Congress in its rush to impose taxes on carriages by limiting the unapportioned excise tax to coaches for hire, and blocking collection of the much more lucrative taxes on the luxury carriages of the wealthy.<sup>101</sup> "Therefore" it must be absurdly wrong-headed.

In the end, what Hamilton construed as being neither absurd nor inconvenient was a simple categorization of carriages as commodities whose consumption was an expenditure that was subject to an excise tax. Being a tax incurred through an optional expenditure, the tax would fall only indirectly on the taxpayers' income and not be a direct tax subject to apportionment. As if to prove his point that the Carriage Tax was an optional expenditure, Hamilton reportedly commented in Court, "It so happens, that I once had a Carriage myself, and found it convenient to dispense with it. But my happiness is not in the least diminished."<sup>102</sup> This personal aside showed not only how simple it could be for someone to avoid the tax, but it also affirms that it could be more "convenient" to let the Hackney Coachmen pay the tax out of the fares collected from their wealthy clientele than to pay the full annual rate by oneself. So it seems that a distinction Hamilton found too "capricious" to take seriously was nonetheless good enough reason to sell his own Coach.<sup>103</sup>

Whether Hamilton's playing with the different senses of direct and indirect was the primary cause or only a contributing factor, the Court finally did – as Madison and others had anticipated – affirm the constitutionality of the Carriage Tax by declaring it an indirect tax not requiring apportionment. Three of the four Justices hearing the case wrote fairly extensive opinions with differing dicta on what constitutes a direct tax in the Constitution. Their opinions are often quoted without taking any notice of the reservations and qualifications each contains, yet these

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<sup>100</sup> *Id.* at 479.

<sup>101</sup> Carriages for husbandry and conveyances of goods were exempted from the tax of 1794, just as they were in the taxes levied by various states. Becker, *supra* note 69, at 144, 183, 207.

<sup>102</sup> Marcus, *supra* note 2, at 490-91.

<sup>103</sup> Hamilton's cash book shows that he paid a ten dollar tax on the coach in question once, and then sold it for \$450 - but only in April of 1796, after *Hylton* was decided. *Id.* at 491, n. 1.

features of their pronouncements are quite conspicuous and undoubtedly significant.

Thus, Justice William Paterson, a member of the Constitutional Convention from New Jersey, writes in *Hylton*, “I never entertained a doubt that the principal – *I will not say the only* – objects that the framers of the Constitution contemplated as falling within the rule of apportionment were a capitation tax and a tax on land.”<sup>104</sup> Justice James Iredell writes, “*Perhaps* a direct tax in the sense of the Constitution can mean nothing but a tax on something inseparably annexed to the soil – something capable of apportionment under all such circumstances. A land or a poll tax may be considered of this description.... Either of these is capable of apportionment. In regard to other articles there may possibly be considerable doubt.”<sup>105</sup> And Justice Samuel Chase writes, “I am inclined to think, *but of this I do not give a judicial opinion*, that the direct taxes contemplated by the constitution, are only two, to wit, a capitation or poll tax, simply, without regard to property, profession or any other circumstance; and a tax on land. I doubt, whether a tax, by a general assessment of personal property, within the United States, is included within the term direct tax.”<sup>106</sup>

The digests of *Hylton* frequently ignore these qualifications and reservations, and sometimes even pass down a shortened version of Justice Chase’s non-judicial opinion as authoritative. For example, James Kent’s 1826 digest of *Hylton* reads “The Constitution contemplated no taxes as direct taxes, but such as Congress could lay in proportion to the census... [so] the tax on carriages was considered as included within the power to lay duties; and *the better opinion seemed to be, that the direct taxes contemplated by the Constitution were only two, viz., a capitation, or poll tax, and a tax on land.*”<sup>107</sup>

What is remarkable about *Hylton* is not just the way its dicta were passed down in the law digests, but that two of the three Justices ignored

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<sup>104</sup> *Hylton v. United States*, 3 U.S. (3 Dall.) 171, 177 (1796) (emphasis added). Note that Paterson does *not* say “a poll tax and a tax on land” the way Iredell and Chase do, so it seems “capitation” was still a significant legal term in his mind.

<sup>105</sup> *Id.* at 183 (emphasis added).

<sup>106</sup> *Id.* at 174 (emphasis added). Chase here implicitly acknowledges that “capitations” could reasonably be taken to include the old “faculty” taxes as well as poll taxes. He then follows Hamilton in rejecting the use of “general assessments” such as were being levied in New York State. (For Justice Chase’s opinion online, see <http://press-pubs.uchicago.edu> version, not <http://supreme.justia.com>.)

<sup>107</sup> JAMES KENT, COMMENTARIES ON AMERICAN LAW § 1, 254-255 (15th ed. 2002). The text quoted has a footnote which contains the following, somewhat relevant, comment by a later editor: “This is sustained by the language of the Supreme Court in later cases, *with the possible addition* of taxes on personal property by general valuation and assessment of the various descriptions possessed within the several States. Chief Justice Salmon Chase (1864-1873) intimates that the definitions of direct taxes by political economists cannot be used satisfactorily for the purpose of construing the phrase in the Constitution (emphases added).”

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or rejected expert testimony about direct taxes, even when clearly presented by the counsels for the United States, Alexander Hamilton and Charles Lee.<sup>108</sup> Most conspicuously, Justice Chase directly – though non-authoritatively – contradicted Hamilton’s detailed exposition of what constituted a capitation. As we have already seen, Iredell’s notes on what Hamilton said are as follows:

Capitation – 3 meanings.

1. Person merely
2. Person having reference to property. See Hamilton’s [prior] speech
3. [Person having reference to] profession. 3 Smith [1789] 327.<sup>109</sup>

Justice Chase, however, was apparently determined to reduce “capitation” to the first of the three aspects Hamilton names, and insisted that a capitation is nothing but a poll tax on persons “simply, without regard to property, profession or any other circumstance.” On the other hand, Justice Iredell avoided using the term “capitation” at all, and diverted himself by speculating about how direct taxes, whether on polls or land, are properly levied only on something “inseparably annexed to the soil.” So of the three Justices writing opinions, it is only Paterson who retains the words “capitation tax” in tandem with “a tax on land” as the two principal kinds of direct tax. He thereby tacitly allows Hamilton’s threefold description of “capitations” to stand as a true exposition of what the Framers of the Constitution had in mind.

Another curious thing about the opinions of Justices Chase and Iredell is that both try to base their rulings on the exigencies of apportionment, perhaps because they are not confident in attributing their own narrow view of direct taxation to the authors of the Constitution. Thus, Justice Chase writes:

The constitution evidently contemplated no taxes as direct taxes, but only such as congress could [fairly] lay in proportion to the *census*. The rule of apportionment is only to be adopted in such cases, where it can reasonably apply; and the subject taxed, must ever determine the application of the rule... [and] it appears to me, that a tax on carriages cannot be laid by the rule of apportionment, without very great inequality and injustice.”<sup>110</sup> This argument is pure sophistry: the Constitutional rule affirms that direct taxes are fairly imposed only if they are apportioned, not that taxes are direct only if their apportionment results in fairly uniform tax obligations for individuals.<sup>111</sup>

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<sup>108</sup> There are three places where explanations of capitation appear in Iredell’s notes; two by Hamilton and one by Lee. Marcus, *supra* note 2, at 475 (Lee), 481-89 (Hamilton).

<sup>109</sup> *Id.* at 489. Hamilton’s page reference to *The Wealth of Nations* corresponds to p.428 in Adler’s 1990 edition.

<sup>110</sup> *Hylton v. United States*, 3 U.S. (3 Dall.)171,174 (1796).

<sup>111</sup> See text accompanying note 11 *supra* for a demonstration of its circularity.

Yet Justice Iredell falls into the same logical error: “As all direct taxes must be apportioned, it is evident that the Constitution contemplated none as direct but such as could be [fairly] apportioned. If this cannot be [fairly] apportioned, it is therefore not a direct tax in the sense of the Constitution. That this tax cannot be [fairly] apportioned is evident.”<sup>112</sup>

Neither Justice was willing to see that their method of interpretation made the apportionment rule meaningless and impotent.<sup>113</sup> As Erik Jensen says, “... if apportionment applies only where the tax base is ‘equal per capita among the States’ [then] apportionment applies only when it makes no difference. ... The [Direct-Tax] Clauses should mean that, in ordinary circumstances, a direct tax aimed at a sectionally concentrated tax base (that is, a base that isn’t at least approximately proportionate to population) won’t be enacted.”<sup>114</sup> Certainly, if the Founders did not intend the rule to restrain sectionally unfair Federal taxation, it could never have been seen as protecting Southern slaveholders from punitive capitations, and the Philadelphia Convention would have failed. That the Convention did not fail is *de facto* evidence that Justices Chase and Iredell are wrong in principle, and that the Founders did truly intend the direct tax rules to prevent or restrain certain possible Federal taxes.

Given the lively vocal criticism of the Carriage Tax throughout 1795, it is remarkable that two of the Justices in *Hylton* were apparently still unable to imagine a situation in which Congress would mistakenly enact a direct tax without providing for apportionment.<sup>115</sup> Justice Paterson alone tries to envision the possibility of a fairly apportioned direct tax: “If Congress, for instance, should tax, in the aggregate or mass, things that generally pervade all the States in the Union, then perhaps the rule of apportionment would be the most proper, especially if an assessment was to intervene. This appears by the practice of some of the States to have been considered as a direct tax. Whether it be so under the Constitution of the United States is a matter of some difficulty, but as it is not before the Court, it would be improper to give any decisive opinion upon it.”<sup>116</sup>

Fittingly, it was also Justice Paterson who alone enunciated the truly decisive principle on which *Hylton* really turned: “All taxes on expenses or consumption are indirect taxes. A tax on carriages is of this kind, and of course is not a direct tax.”<sup>117</sup> The basis for his distinction between direct

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<sup>112</sup> *Hylton*, 3 U.S.(3 Dall.) 171 at 182.

<sup>113</sup> Or, if they did see it, nonetheless approved of gutting any troublesome restriction on taxation for partisan reasons.

<sup>114</sup> Jensen, *Interpreting the Sixteenth Amendment*, *supra* note 9, at 372-73.

<sup>115</sup> A modern example of the same attitude can be found in Johnson, *Fixing the Constitutional Absurdity*, *supra* note 9, at 295, 295-54. Joseph Dodge joins with Jensen in rejecting the “absurdity” test as a valid way of deciding whether or not a tax is subject to apportionment. Dodge, *supra* note 9, at 916-17.

<sup>116</sup> *Hylton*, 3 U.S.(3 Dall.) 171 at 178.

<sup>117</sup> *Id.* at 181.

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and indirect taxes is the following passage from Adam Smith's *The Wealth of Nations*, which he quotes in his opinion:

The impossibility of taxing people in proportion to their revenue by any capitation seems to have given occasion to the invention of taxes upon consumable commodities; the state, not knowing how to tax directly and proportionally the revenue of its subjects, endeavors to tax it indirectly by taxing their expense, which it is supposed in most cases will be neatly in proportion to their revenue. Their expense is taxed by taxing the consumable commodities upon which it is laid out.<sup>118</sup>

Thus too, when Paterson wrote that in the minds of the Founders, the principal objects of direct taxation were “a capitation tax and a tax on land,” we can be reasonably confident that it was Adam Smith's understanding of capitation taxes that lay behind his – and their – use of the word.<sup>119</sup>

In choosing to invoke the prestige of the economist Adam Smith, Justice Paterson was also implicitly accepting John Wickham's rebuttal of John Taylor's appeal to the economics of James Steuart in the Virginia Circuit Court trial. There, Taylor introduced an analysis of the types of taxes based on Steuart's work *An Inquiry into the Principles of Political Oeconomy* (1767), saying that the direct taxes of the Constitution matched the “cumulative” taxes in Steuart's work; and that indirect taxes were the same as his “proportional” taxes on “alienations” of property.<sup>120</sup> Wick-

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<sup>118</sup> Smith, *supra* note 68, at 429. Commenting on the use of the word “capitation” in the text quoted by Paterson, Albert Gallatin writes, “The remarkable coincidence of the clause of the Constitution with this passage in using the word “capitation” as a generic expression, including the different species of direct taxes, an acceptation of the word peculiar, it is believed, to Dr. Smith, leaves little doubt that the framers of the one had the other in view at the time, and that they, as well as he, by direct taxes, meant those paid directly from and falling immediately on the revenue; and by indirect, those which are paid indirectly out of the revenue by falling immediately upon the expense.” Gallatin, *supra* note 77, at § 3.1 (Of the Revenues of the United States).

<sup>119</sup> Marcus, *supra* note 2, at 473. Fleischacker has documented that at least five influential delegates to the Convention can be shown to have had prior knowledge of Smith's *The Wealth of Nations*: Edmund Randolph (Virginia) was lent a copy by the financier Robert Morris (Pennsylvania) in December 1781; Alexander Hamilton (New York) is reported to have written a commentary on it in 1783 (see Fleischacker, *supra* note 27, at 901, and note 87 *supra*); James Madison (Virginia) put it on his 1783 list of core items for a proposed Congressional library; and James Wilson (Pennsylvania) used it to prepare for a speech on banking he gave in Philadelphia in 1783, and quoted from it at length in 1785. Fleischacker *supra* note 27, at 901-02.

In addition, Iredell's notes of *Hylton* show that Jared Ingersoll (Pennsylvania) was quoting from the 1776 (first British) edition of *Wealth of Nations*. Marcus, *supra* note 2, at 472, n. 35. And finally, it is certain that Benjamin Franklin (Pennsylvania) knew Adam Smith personally, and that he is reported (somewhat anecdotally) to have participated in Smith's final revisions to the first edition while in London from 1773 to 1776, many of which revisions deal with colonial or American experience. Thomas D. Eliot, *The Relations Between Adam Smith and Benjamin Franklin Before 1776*, 39 *Pol.Sci. Q.* 67, 69-73 (1924).

<sup>120</sup> Marcus, *supra* note 2, at 413-14.

ham, counsel for the United States, countered persuasively by observing that the Constitution speaks of “direct” taxes – a term clearly found in Adam Smith – rather than of Steuart’s “cumulative” taxes, so we must presume it does not have Steuart’s categories in view.<sup>121</sup> In arguing for Hylton before the Supreme Court, Jared Ingersoll also implicitly acknowledges the force of Wickham’s argument by citing Steuart only to point out that land and carriage taxes are classed together in his work.<sup>122</sup>

Given the clear definition in Smith of indirect taxes as taxes on expense, it would seem that if the Carriage Tax were simply a tax on expenditure levied at the time of purchase, there would have been no credible grounds for Hylton’s case. But the tax was not levied at the time of purchase. At the root of Hylton’s objection, then, was the way the tax was imposed. It was levied and collected as an annual tax on personal property kept for one’s own use, as we can see from the text of the act:

*Be it enacted by the Senate and House of Representatives of the United States of America in Congress assembled, That there shall be levied, collected and paid, upon all carriages for the conveyance of persons, which shall be kept by or for any person, for his or her own use, or to be let out to hire, or for the conveying of passengers, the several duties and rates following, to wit: For and upon every coach, the yearly sum of ten dollars; – for and upon every chariot, the yearly sum of eight dollars; – for and upon every phaeton and coachee, six dollars; – for and upon every other four wheel, and every two wheel top carriage, two dollars; – and upon every other two wheel carriage, one dollar. Provided always, That nothing herein contained shall be construed to charge with a duty, any carriage usually and chiefly employed in husbandry, or for the transporting or carrying of goods, wares, merchandise, produce or commodities.*<sup>123</sup>

It is worth noting that the tax, enacted June 5th 1794, was originally imposed for only two years, but was repealed and re-imposed with higher rates soon after the ruling in *Hylton*. In the successor bill a range of duties from fifteen dollars down to two dollars was to be collected yearly from 1796 to 1801.<sup>124</sup> In both cases, the provisions of the tax made it clear that any vehicle not “usually and chiefly” employed in husbandry, or for transporting merchandise, was to be proportionally rated and taxed according to its presumed market value – not its profitability as a coach for hire.

Nonetheless, in arguing for passage of the Carriage Tax in the House, Representative Ames of Massachusetts is reported to have countered Representative Madison’s opposition to the bill by saying:

...it was not to be wondered at if he [Madison], coming from so different a part of the country [Virginia], should have a different idea of this tax from the gentleman who spoke last. In Massachusetts, this tax had been

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<sup>121</sup> *Id.* at 418, 418, n. 12.

<sup>122</sup> *Id.* at 473.

<sup>123</sup> Act of June 5, 1794, c. 45, 1 Stat. 373-75.

<sup>124</sup> *Id.* at 375, 478-82.

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long known; and there it was called an excise. It was difficult to define whether a tax is direct or not. He had satisfied himself that this was not so. The duty falls not on the possession, but the use; and it is very easy to insert a clause to that purpose, which will satisfy the gentleman himself.<sup>125</sup>

Madison was not satisfied by this distinction, which only makes good sense if the excise was being collected as a license for use of the carriage on the public roads of the State of Massachusetts. The new Federal government was in no position to make such a proprietary claim about any roads, so the distinction between use and possession was an empty one with respect to a Federal Carriage Tax.

It seemed obvious to Madison, Hylton and others that taxes levied on personal property were direct taxes just as much as taxes on a person's land or slaves or dwellings were. In a somewhat off-handed reference to this basic concern, Justice Paterson quoted Smith yet again:

Consumable commodities, whether necessities or luxuries, may be taxed in two different ways: the consumer may either pay an annual sum on account of his using or consuming goods of a certain kind or the goods may be taxed while they remain in the hands of the dealer, and before they are delivered to the consumer.<sup>126</sup>

Paterson did not elaborate on how this passage was relevant to the case at hand – nor did Hamilton.<sup>127</sup> But what it does is paper over a very relevant distinction.

Smith's concern in this passage was solely with the convenience of collecting the tax, for in English law an "excise" was virtually any tax at all; and an excise on carriages was simply a tax on a luxury that might be collected in any way the Crown chose.<sup>128</sup> Collecting it in yearly payments was regarded by Smith as the better way; but he thereby inadvertently sanctioned an anomaly with respect to his own definitions – an indirect tax on consumption that falls directly on whatever annual revenue the owner of the vehicle has.

John Taylor points out this very problem, in the published version of his Virginia Circuit Court argument on behalf of Hylton: "An annual tax upon carriages, is a tax upon the use,<sup>129</sup> not upon the consumption

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<sup>125</sup> 4 ANNALS OF CONG. 729-30 (1794).

<sup>126</sup> Smith, *supra* note 68, at 432; Hylton v. United States, 3 U.S.(3.Dall.) 171,181 (1796).

<sup>127</sup> Marcus, *supra* note 2, at 478, 482.

<sup>128</sup> In Massachusetts the carriage excise would have been collected annually with other internal direct taxes as part of the apportioned quotas delegated to the various Town assessors. See text accompanying note 98 *supra*. Einhorn, *supra* note 5, at 73-4.

<sup>129</sup> For Taylor, "use" means continual possession and utilization, or "possession for use." Joseph Dodge, however, seems to follow Representative Ames' view of "use," when he maintains that the Carriage Tax was not a property tax, but rather an excise on use because it was not imposed both "periodically [and] on the [market] value of the item." Dodge, *supra* note 9, at 928. These criteria are avowedly inferred from a provision in the Internal Revenue Code [I.R.C. § 164(a)(2) (2000)] and treat the tax conceptually as a license fee. But this

[through acquisition]. The use goes on, so does the tax. Consumption is an idea of unity, and one tax covers it. [Under this tax act] an imported carriage pays both species....” And in a later, more rhetorical passage Taylor says:

To what class, it may be asked would a tax imposed upon a carriage in the hands of the manufacturer, payable but once – reimbursable on alienation – and voluntarily assumed by the buyer, belong? Is such a tax of the same nature with an annual tax, imposed upon the same article – after alienation – not reimbursable – and forcibly extorted? It is admitted on all hands, that the first would be an indirect tax.... What is the second?<sup>130</sup>

The principal argument against Taylor’s distinction between use and “consumption” is that of John Wickham, as published after the Virginia Circuit Court decision. Intending to follow Smith’s line of thought, Wickham contends that the yearly tax on a carriage (or other consumable commodity) is the result of “one gross sum... being divided into annual payments.”<sup>131</sup> But his description was simply contrary to the facts in *Hylton*. The gross sum contemplated by the 1794 tax, enacted for two years, was twenty dollars for every “coach.” But the Carriage Tax of 1796 imposed a tax of fifteen dollars in each of six years, for a gross sum of ninety dollars levied on every “coach” that continued to be owned during that entire period.<sup>132</sup> Thus it is clear that the gross sum of the tax had no fixed relationship to the market value of the coach, which is the measure of the expenditure made. The “gross sum” of Wickham’s discussion is purely hypothetical: it is in reality the sum of all yearly taxes actually collected, not a single tax levied in proportion to the expenditure and then divided into annual payments.

It is also clear from the provisions of the Carriage Tax that the obligation to pay the tax had nothing to do with when the expenditure was actually made. Hence, it is wrong to think of the yearly tax as an installment payment on the gross tax due at purchase. Further, when the gross sum to be collected is indefinite, the convenience of paying yearly is offset by the strong possibility that the buyer would end by paying more over the life of the carriage than the sum initially proposed – say, twenty dollars for each coach – because there was no limit to extensions of the yearly tax payments.

Taylor’s key point was that the law taxed simple “possession for use” of a carriage, and not expenditure for a carriage; but his point is apparently mentioned only once in Justice Iredell’s notes on *Hylton*. There it appears as a part of Ingersoll’s introductory exposition on types of taxes ra-

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presumes that the use of a carriage on the public roadways of each state is a Federal prerogative, even though there may be little or no basis in fact for making such a claim.

<sup>130</sup> Marcus, *supra* note 2, at 430 & 433-34.

<sup>131</sup> *Id.* at 421.

<sup>132</sup> Act of May 28, 1796, c. 37 1 Stat. § 1, 478-482.

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ther than as a key element of his summation.<sup>133</sup> Yet on this point the whole weight of Smith's relevance to how the tax was being collected rested: if Taylor's observation was cogent, the Carriage Tax was clearly a direct tax according to Smith's own criteria. Justice Paterson, however, passed over all such considerations by simply quoting Smith's opinion on collection of excises as authoritative, and thereby implicitly adopted Hamilton's cursory, "whatever" view of the matter.<sup>134</sup>

### IV. DIRECT TAXES BY APPORTIONMENT AS PER THE CONSTITUTION

#### A. APPORTIONMENT AND THE DIRECT TAX OF 1798

Having missed in the fog of Hamilton's oral argumentation the crucial distinction between possession for use and expenditure for acquisition, Justice Paterson went even farther afield to join his fellow Justices in rehashing the absurdity and inconvenience of trying to impose a Carriage Tax through apportionment by the "federal ratio" – a provision of the Constitution for which he exhibited little sympathy.

The provision was made in favor of the southern States. They possessed a large number of slaves; they had extensive tracts of territory, thinly settled and not very productive. A majority of the States had but few slaves, and several of them a limited territory, well settled, and in a high *state* of cultivation. The southern States, if no provision had been introduced in the Constitution, would have been wholly at the mercy of the other States. ... [The Constitution] was the work of compromise. The rule of apportionment is of this nature; it is radically wrong; it cannot be supported by any solid reasoning. Why should slaves, who are a species of property, be represented more than any other property? The rule therefore ought not to be extended by construction.<sup>135</sup>

Opponents of the Carriage Tax, however, saw a great principle at work within the requirement of apportionment – namely, restraint of the Federal powers of direct taxation. For example, John Taylor in his "Argument Respecting the Constitutionality of the Carriage Tax" wrote

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<sup>133</sup> "Tax on property in possession - part of stock of *State*." Marcus, *supra* note 2, at 469.

<sup>134</sup> *Id.* at 478.

<sup>135</sup> *Hylton v. United States*, 3 U.S.(3 Dall.) 171, 178-79 (1796). Paterson, a delegate from New Jersey at the Convention, regarded slaves purely as property. His objection was to the 3/5<sup>ths</sup> rule, not to the principle of apportionment itself. That is, slaves should not be represented in Congress at all, but should all be fully subject to federal taxation. This helps us understand why in Convention on July 12, 1787 his delegation voted "No" on Randolph's compromise motion to give 3/5<sup>ths</sup> weight to slaves when allotting representatives in the House and for calculating apportioned direct taxes, *and also* rejected Pinckney's proposed amendment to that motion making "blacks equal to whites in the ratio of representation." Madison, *supra* note 16, at 245-246.

The purpose of the Constitution is to bestow upon each State a substantial security against oppression by means of any species of taxation. ...The Constitution, according to my construction, is not providing for an equality of [direct] taxation among individuals, in proportion to their revenue, but for an equality of taxation between States in proportion to numbers.<sup>136</sup>

Edmund Pendleton, in his brief essay “Some Remarks on the Argument of Mr. Wickham” made the same point: “The great object, therefore, in the Federal terms, was to preserve to each State, according to its numbers, its due share in Representation, and to fix the like proportion of the public burthens; to prevent partial combinations, for *favour*, or *injury* to particular States.”<sup>137</sup> James Madison commended Pendleton’s presentation of the case,<sup>138</sup> so it is clear that in the minds of some of the more knowledgeable and influential of the founding generation the apportionment of direct taxation was seen as protections for all the states. Not only were the slave-holding Southern states protected from selectively unfair direct taxation of slaves by the rule of apportionment, but protection was also extended to the abundance of taxable buildings in the Northern states, and to the extensive but sparsely settled holdings of land in the Western territories.

When Congress did deliberately impose an apportioned Direct Tax in 1798, it was acknowledged on all sides as Constitutional, and was not levied on any one taxable object: assessments on dwellings, slaves and land were combined so as to achieve a legislatively acceptable parity in the tax burden falling on each state. The tax statute, designed by Wolcott, describes the way in which a total sum of two million dollars was to be raised:

Be it enacted by the Senate and House of Representatives of the United States of America in Congress assembled, That a direct tax of two millions of dollars shall be, and hereby is laid upon the United States, and apportioned to the States respectively [as listed below] ...and shall be assessed upon dwelling-houses, lands and slaves, according to the valuations and enumerations to be made pursuant to the act.

... And the whole amount of the sums so to be assessed upon dwelling houses and slaves within each State respectively, shall be deducted from the sum hereby apportioned to such State, and the remainder of the said sum shall be assessed upon the lands within such State according to the valuations to be made pursuant to the act aforesaid, and at such rate per centum as will be sufficient to produce the said remainder.<sup>139</sup>

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<sup>136</sup> Marcus, *supra* note 2, at 432-34.

<sup>137</sup> *Id.* at 452.

<sup>138</sup> In a letter of February 7, 1796 he wrote to Pendleton, saying the latter’s essay was “unquestionably a most simple & lucid view of the subject, and well deserving the attention of the Court which is to determine on it.” *Id.* at 450.

<sup>139</sup> Act of July 14, 1798, c.75, 1 Stat. 597-98.

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Apportionment as mandated in this Act has four general features: (1) no one species of property bore all the burden, (2) a graduated scale of taxation was applied to market value assessments of dwellings and land, (3) only a limited class of slaves was taxed “by the head” at a flat rate, and (4) rates of land taxation were set by assessors so as to supply the balance due after other portions of the tax had been collected.<sup>140</sup> One reason for these features – which clearly set this tax apart from the disputed Carriage Tax – lies in what one might call the politics of apportionment. Because no one taxable object was uniformly distributed throughout the states, and nowhere was wealth equally distributed among taxpayers, the only way a representative assembly could agree on what to do was by negotiating a composite tax scheme. The Tax of 1798 was just such a composite: it was enacted and collected, but not reiterated; and this was arguably just what the Founders had intended.

As it turned out, only one provision of the Tax of 1798 was hotly contested, and it was not the tax on slaves. It was the inclusion of an enumeration of each dwelling’s windows in the assessment of its taxable value. Popular resentment of counting windows was most likely rooted in the conviction that doing so resulted in an unfairly high tax on humbler dwellings; and popular revulsion at this practice was strong enough to induce Congress to repeal that provision of the Tax in early 1799.<sup>141</sup> Although the Direct Tax of 1798 precipitated the Federalist loss of the Presidency and control of Congress in the 1800 elections, no Constitutional challenges were mounted against its provisions.

The existence of widespread popular aversion to direct taxation was something proponents of the new Federal Constitution did not ignore in their arguments for ratification. Alexander Hamilton, the Federalist defender of the Carriage Tax, was eloquent about why a Federal power of direct taxation was needed, and in what circumstances it could justifiably be exercised. In the New York State ratification debates Hamilton said:

Sir, it has been said that a poll tax is a tyrannical tax; but the legislature of this State [New York] can lay it, whenever they please. Does, then, our Constitution authorize tyranny? I am as much opposed to capitation as any man.<sup>142</sup> Yet who can deny that there may exist certain circumstances which will render this tax necessary? In the course of a war, it may be necessary to lay hold of every resource; and for a certain period,

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<sup>140</sup> This method of collecting an apportioned tax quota was routinely used in Massachusetts, where assessors collected poll taxes first, and then set the rates for land so as to complete the quota due. Einhorn, *supra* note 5, at 74.

<sup>141</sup> Act of July 14, 1798, c.75, 1 Stat. 626.

<sup>142</sup> Since we know from his argumentation in *Hylton* that Hamilton did not think poll taxes were the only form of capitation, this passage from eight years earlier should not be read as implying the two were synonymous in his mind. See text accompanying notes 10 & 108 *supra*. If capitation meant nothing but poll tax, Hamilton’s saying he was “as opposed to capitations as any man” would have been ludicrous, given his well-known political stance in favor of levying poll taxes in New York State.

the people may submit to it. But on removal of the danger, or the return of peace, the general sense of the community would abolish it.<sup>143</sup>

The Direct Tax of 1798 was just such a tax even though it was not a poll tax on everyone. It was enacted for a specific purpose – to raise two million dollars for what looked like an impending war with France – and not for the ordinary operating expenses of the new Federal government. Once that sum was collected, the tax ended. This then, was in line with what proponents of ratification had envisioned.

Hamilton was not alone in presenting this sort of justification for the Constitutional provision authorizing direct taxation; his view was echoed in the record of ratification debates in both Massachusetts and Virginia:

[In Massachusetts, Judge Dana spoke] ...urging the necessity of Congress being vested with power to levy direct taxes on the States, and it was not to be supposed that they would levy such, unless the impost and excise should be found insufficient in case of a war ...<sup>144</sup>

[In Virginia, Mr. John Marshall]: We are told by the gentleman who spoke last [Mr. Monroe], that direct taxation is unnecessary, because we are not involved in war. This admits the propriety of recurring to direct taxation if we were engaged in war.<sup>145</sup>

Hamilton's position on poll taxes in his home state also calls attention to a fact of considerable relevance to the practice of direct Federal taxation: that *all the states* routinely used a variety of forms of direct taxation, and relied heavily on the revenues such taxes produced. Hence, no state could be expected to look kindly upon sweeping or long-term intrusions of the Federal tax collectors into this source of revenue; and all state politicians would see the value of apportionment as a prudent restraint on such taxations. That is, the difficulty of passing an apportioned direct tax would limit – but not forbid – adding Federal capitations and property taxes to those already imposed by the several states, each in its own way.

The strength of this general desire to restrain direct Federal taxation is visible in the record of the Convention itself, where it is noteworthy that the provision for apportionment of direct taxation according to a census was approved *before* the issue of how to enumerate slaves was finally settled. On July 12<sup>th</sup> an apportionment resolution was introduced by Gouverneur Morris, amended with the assistance of James Wilson and then accepted unanimously in the form “provided always that direct taxation ought to be proportioned to representation.”<sup>146</sup> In the ensuing debate over the necessary census, a resolution for adopting the 3/5<sup>ths</sup> rule, or “federal ratio,” for enumerating slaves was introduced by Edmund Randolph, and

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<sup>143</sup> Elliot, *supra* note 81, at § 3 (June 28, 1788).

<sup>144</sup> *Id.* at § 2 (January 18, 1788).

<sup>145</sup> *Id.* at § 3 (June 10, 1788).

<sup>146</sup> Madison, *supra* note 16, at 242. On that date, and the day before, only ten states had delegates present: Rhode Island, New Hampshire and New York were absent from the deliberations.

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eventually adopted with six states in favor, two opposed and two with divided delegations.<sup>147</sup>

It has often been noted that a resolution proposing a 3/5<sup>th</sup> ratio for enumeration of slaves in the census determining representation had failed the day before, after very acrimonious disputes over slavery erupted.<sup>148</sup> But once direct taxation was tied to representation, the 3/5<sup>th</sup> ratio immediately became an acceptable compromise. When we look more deeply into this remarkable change, two things have to be kept in mind: (a) it was the 3/5<sup>th</sup> rule that was controversial, not apportionment of taxation, and (b) the delegates who switched from voting “no” on July 11<sup>th</sup> to voting “ay” on July 12<sup>th</sup> were equally from Northern and Southern states.

First off, apportioning Federal taxation by population was simply not controversial. Calvin Johnson, for example, describes how one of the driving forces of the Philadelphia Convention was a determination to form a federal government with powers of taxation that could not be flouted the way Congressional requisitions were, or blocked by the vetoes of one or two states. In particular, delegates had in view the proposal for a general Federal tariff that Rhode Island had vetoed in 1781; and the 1783 proposal for apportioning by population the property tax requisitions Congress imposed on the states, a reform that New York and New Hampshire had vetoed.<sup>149</sup> Of these three “wicked states,” Rhode Island never sent any delegates to Convention, and attendance by the delegates from New York and New Hampshire was spotty enough that they both missed the July votes on taxation and representation. This absence left only delegates from states that had approved the measures of 1781 and 1783<sup>150</sup> on the floor and in control of the Convention – with predictable results.

Further, the idea that apportioned taxation should apply only to direct taxes and capitations was part of Charles Pinckney’s written proposal for a new plan of government submitted on May 29<sup>th</sup>, and thus constituted

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<sup>147</sup> *Id.* at 242-45. This ratio was proposed in the Congressional Resolution of April, 1783; but could not be implemented because it was not ratified by all the states.

<sup>148</sup> For example, Lynd, *supra* note 155, at 204-05; Finkelman, *supra* note 154, at 201-05; Jensen Apportionment of Direct Taxes, *supra* note 3, at 2386; Johnson, The Foul-up, *supra* note 9, at 153; Einhorn, *supra* note 5, at 164-65; Ackerman, *supra* note 3, at 9; and Bullock, *supra* note 30, at § I, 233.

<sup>149</sup> See CALVIN H. JOHNSON, *RIGHTEOUS ANGER AT THE WICKED STATES: THE MEANING OF THE FOUNDERS' CONSTITUTION* (2005). Although it is reasonable to see tax reform as one primary motive for seeking a new constitution, Johnson goes so far as to say: “Factors other than tax and the welled-up anger [at the delinquent states] are not significant contributory causes to adoption of the Constitution... [which] was not written to limit the national government, but to get it to run.” *Id.* at 277. Common sense, however, would see the matter differently: if government is like a vehicle, one that runs but has no brakes belongs in a garage.

<sup>150</sup> These two stymied tax reform measures were the work of Robert Morris, Superintendent of Finance of the United States from 1781 to 1784 and delegate from Pennsylvania to the Convention – the same Robert Morris who lent a copy of *Wealth of Nations* to Edmund Randolph in 1781. See text accompanying note 119 *supra*.

a reservoir of ideas that could be mined by any delegate at any time.<sup>151</sup> Pinckney's plan provided that "The proportion of direct taxation shall be regulated by the whole number of inhabitants of every description," and that there be no "capitation tax, but in proportion to the census before directed."<sup>152</sup> Because Pinckney was a delegate from South Carolina, his proposals could be presumed to be generally acceptable to the Southern states, and it would have been of particular interest to delegates casting about for ways to keep the Convention from dissolving over the slavery issue. It is not likely that Gouverneur Morris had Pinckney's language in mind when he first made his proposal, if only because he had to add the word "direct" during discussion on the floor.<sup>153</sup> However, it is likely that Morris had the basic framework of the Act of 1783 in mind, but had failed to take into account the fact that the Congressional "requisitions" in question were property taxes, and were therefore quite distinct from the unapportioned "imposts" that were the objects of the federal tax proposed in 1781.

With regard to the voting on the 3/5<sup>th</sup> rule, the record shows a good deal more than a simple reversal. The tallies are presented in Table 1 below, arranged for comparison.

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<sup>151</sup> That it was not forgotten is shown by its consideration being one of the major responsibilities explicitly delegated to the Committee of Detail. Elliot, *supra* note 81, at § 1 Journal of the Federal Convention, July 24, 1787.

<sup>152</sup> *Id.* at May 29, 1787.

<sup>153</sup> Madison, *supra* note 16, at 241-42.

*Dispelling the Fog About Direct Taxation*

July 11 <sup>th</sup> 1787		July 12 <sup>th</sup> 1787		
“No”	“Aye”	“No”	“Divided”	“Aye”
Massachusetts	Connecticut	New Jersey	Massachusetts	Connecticut
Pennsylvania	New Jersey	Delaware	Pennsylvania	Pennsylvania
New Jersey	Virginia	Maryland	Maryland	Maryland
Delaware	N. Carolina	Virginia	Virginia	Virginia
Maryland	S. Carolina	S. Carolina	S. Carolina	N. Carolina
S. Carolina	Georgia	Georgia	Georgia	Georgia

**Table 1: Votes on 3/5<sup>th</sup> Enumeration**

Not only have Pennsylvania and Maryland reversed their votes, but Massachusetts and South Carolina – the archetypal foes in the North-South rivalry – no longer have consensus in their delegations. The “no” votes, however, are also revealing: Delaware consistently voted against any scheme in which Congressional votes were determined by population, and New Jersey consistently voted against any resolution that treated slaves as anything other than property.<sup>154</sup> So the only firm vote against the 3/5<sup>th</sup> rule *per se* was that of New Jersey, and of Justice Paterson as a member of its delegation in Convention.

With these factual points in mind, it becomes easier to see what sorts of things lay behind the Three-fifths Compromise. First of all, Staughton Lynd pointed out decades ago that key agreements about the contentious Northwest Ordinance were reached by Congressional conferences in New York City within the same week that Convention delegates in Philadelphia reached and resolved the crisis over slave representation. His investigations led him to assert that it was at least possible that essential features of the Northwest Ordinance could have been known by enough delegates to influence the voting on July 12<sup>th</sup> thru the 14<sup>th</sup> in the Philadelphia Conven-

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<sup>154</sup> Paul Finkelman, *Slavery and the Constitutional Convention: Making a Covenant with Death*, in *BEYOND CONFEDERATION: ORIGINS OF THE CONSTITUTION AND AMERICAN NATIONAL IDENTITY 188-225*, n. 35, 43, 47 (1987).

tion.<sup>155</sup> With confidence that the new states in the Northwest would be free of slavery and few in number, Northern delegates could feel that their Senate majority was protected and the spread of slavery curtailed. But the Southern states could look at the Ordinance's fugitive slave law, and its implicit acceptance of slavery South of the Ohio River as protections for the western expansion of a slave-based economy and society. Thus, each side of the slavery question might well feel more confident in striking a bargain with the other.

A second line of interpretation follows from the simple observation that the rejected Congressional Act of 1783 contained the 3/5<sup>th</sup> "federal ratio" for counting slaves, as well as the basic idea of using population-based apportionment for Federal property tax "requisitions." This ratio had been painfully worked out during the years 1776 to 1783 as a rough expression of "the relative price of slave and free labor."<sup>156</sup> The implicit reasoning here is that the market price for labor is an adequate measure of the value of labor, and therefore of the economic productivity of workers – who are, naturally enough, persons.<sup>157</sup> Doing this effectively assumes and validates the humanity of slaves as laborers, and makes it an anomaly to tax them as property.

The apportionment rule for direct taxation lumps property taxes, poll taxes and capitations all together, without distinction. By itself, apportionment did not mandate treating slaves as persons or as property, and this was acceptable to even the staunchest opponents of recognizing the personhood of slaves. But for someone like Justice Paterson, who was firmly convinced that slaves are in law nothing but property, the 3/5<sup>th</sup> ratio was unacceptable in two respects: not only did it implicitly attribute a modicum of humanity to slaves, but it also – contrary to the Convention's original decision that *only persons* would be represented in Congress, *and not property* – gave slave owners the right to have some of their property count toward electoral representation. Consequently, the Constitutional compromise of which Justice Paterson said "it is radically wrong; it cannot be supported by any solid reasoning"<sup>158</sup> was necessarily the provision regarding 3/5<sup>th</sup> enumeration, and not the general requirement for apportionment of direct taxation.

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<sup>155</sup> Staughton Lynd, *The Compromise of 1787*, in CLASS CONFLICT, SLAVERY, AND THE UNITED STATES CONSTITUTION: TEN ESSAYS 210-213 (1967). The possible, but conjectural, link Lynd describes focuses on the arrival of Manasseh Cutler (principal drafter of the Ordinance) in Philadelphia on July 12<sup>th</sup>, and his meetings with various delegates including Alexander Hamilton (who was in town, but not attending the Convention) and Hamilton's good friend Gouverneur Morris.

<sup>156</sup> Johnson, *Fixing the Constitutional Absurdity*, *supra* note 9, at 304-05.

<sup>157</sup> Once it is accepted that *Wealth of Nations* was known to American intellectuals well before its 1789 reprinting in Philadelphia and New York, it becomes *possible* that having recourse to market price as the most adequate measure of the value of labor is a sign of Smith's growing influence in American politics. See text accompanying note 119 *supra*.

<sup>158</sup> *Hylton v. United States*, 3 U.S.(3 Dall.) 171,179 (1796).

## *Dispelling the Fog About Direct Taxation*

For these reasons, the view that apportionment was originally – and therefore remains – solely relevant to the issue of how to protect slaveholders from discriminatory taxation is wrong.<sup>159</sup> And further, it follows that to whatever degree a particular Justice’s decision in *Hylton* was based on this misconception, it becomes to that same degree dubious. For example, Justice Paterson, who based his decision primarily on Adam Smith’s definitions, derives from his misconstrual of apportionment mainly a refusal to “extend” its application from taxes on slaves to taxes on carriages. On its face his reluctance looks reasonable, but it shows how little sustained attention he gave to the nature of capitation; and how doggedly he resisted any implementation of the 3/5<sup>th</sup> ratio, even when it did not involve in any direct way the legal status of slaves as property or persons.

### *B. APPORTIONMENT AND THE CONVENTION*

When slaves were finally taxed directly in 1798, the difference between such a tax and a luxury tax on carriages is evident; and the way the tax was crafted is also very revealing. The Act does indeed apportion each state’s tax burden according to a census modified by counting only three out of every five slaves reported. But the uniform tax of fifty cents per slave was not simply a head tax, because only those slaves capable of productive and/or reproductive labor were to be counted. Those who were infirm, over the age of fifty, or under the age of twelve were excluded from taxation.<sup>160</sup>

Further evidence of how strongly taxes on slaves were tied to productive capacity in the minds of people during the 1780’s and 90’s comes from the post-revolutionary tax history of South Carolina. In Charleston, artisans who employed skilled slaves in their trades nonetheless sought from 1783 on to prohibit “Jobbing Negro Tradesmen” from working “at any mechanical occupation except under the direction of some White Mechanic.” Although the white artisans did not entirely succeed in this effort, after 1796 the owner of any skilled negro in Charleston who was not working under an artisan was taxed three dollars a year, and if more than six slaves

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<sup>159</sup> Two contemporary advocates of this mistaken view of apportionment are, of course, Calvin Johnson and Bruce Ackerman. See Ackerman, *supra* note 3, at 2-6 and Johnson, *Apportionment of Direct Taxes: The Foul-up*, *supra* note 9, at 2-3. A more judicious view is that of Jack Rakove, who writes “The three-fifths clause, then, was neither a coefficient of racial hierarchy nor a portent of the racist thinking of the next century. It was rather the closest approximation in the Constitution to the principle of one person, one vote – even if in its origins it was only a formula for apportioning representation among, as opposed to within, states; and even if it violated the principle of equality by overvaluing the suffrage of the free male population of the slave states.” JACK N. RAKOVE, *ORIGINAL MEANINGS: POLITICS AND IDEAS IN THE MAKING OF THE CONSTITUTION* 74 (1996).

<sup>160</sup> Act of July 14, 1798, c.75 1 Stat. 585.

were thus employed the owner had to pay a triple tax.<sup>161</sup> Thus, during the same years that a slave's unskilled labor was being federally taxed at fifty cents each, that of a skilled slave was taxed at six times that rate through Charleston's licensing ordinance.

The importance of this kind of consideration was highlighted during the ratification debates in Massachusetts where the labor value of slaves was explicitly a concern:

[Judge Dana] observed, that the negroes of the Southern States work no longer than when the eye of the driver is on them. Can, asked he, that land flourish like this, which is cultivated by the hands of freemen? And are not three of these independent freemen of more real advantage to a *State* than five of those poor slaves?<sup>162</sup>

So the Act of 1798, by taxing the potential labor value of slaves instead of their sheer existence, effectively transformed the slave tax into a capitation levied on "person with reference to profession" – as Hamilton phrased the matter in *Hylton*. For it was the owner who was taxed, not the slave; and because of the 3/5<sup>th</sup> ratio, the slaveholder was in effect taxed only on that part of his property in slaves that was acknowledged to augment his yearly revenue. Thus, what sounded like a head tax, or property tax, operated substantially like a faculty tax on the employment of slave labor.

The Federal flat tax on productive slaves (unlike those imposed by the states) operated within an apportioned tax levy that was diminished by two-fifths of all slaves reported on the 1790 census for that state. In slaveholding states taxpayers also benefited in one or both of the following ways from the complex structure of the tax: (1) each slave owner was taxed only for productive slaves – whose numbers were some fraction of the actual numbers owned and provided with some simulacrum of subsistence; and (2) because land was the only elastic category of taxation, land taxes were significantly lowered for all landowners by the large collection of poll taxes on slaves. For taxpayers in states with few or no slaves, the non-elastic portion of the apportioned tax quota fell on dwellings, and worked to lighten the tax burden on rural landowners in states having centers of concentrated urban development. Thus, as Einhorn perceptively points out, "This plan favored small farmers everywhere in the country" because in it Wolcott "had figured out how to exploit the within-state effects of the apportionment rule."<sup>163</sup> The within-state effects coincided with a particular class interest that cut across state boundaries and sectional divisions, and even found common ground within slave state and free state factions.

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<sup>161</sup> RICHARD WALSH, *CHARLESTON'S SONS OF LIBERTY: A STUDY OF THE ARTISANS, 1763-1789* 125-126 (1959).

<sup>162</sup> Elliot, *supra* note 81, at § 2 (January 17, 1788).

<sup>163</sup> Einhorn, *supra* note 5, at 192.

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But was this possible despite apportionment, or because of it? In theory it would certainly be possible for Congress to impose a uniform national land tax that set lower rates for rural land than for commercial or plantation land. But rural lands are sparsely settled and would command relatively few votes in the House of Representatives, where tax bills originate. If this minority of “agrarian” representatives tried to function as a swing vote they would have to align with one of the two major power blocks – either the commercial interests of the North or the slaveholding interests of the South. But this would only be possible if the slave and free members of the agrarian vote could agree on which one to favor, which is something the major powers blocks would do their best to prevent. It has been said that apportionment of direct taxes is absurdly difficult, even though it has been done a few times. But it would seem that “favoring” – or better, protecting – the interests of minority classes is virtually impossible in a representative system of government unless some sort of Constitutional restraint is placed on the power of the majority. This is exactly the point of having a Bill of Rights, and it is also the purpose of the apportionment requirement.

The basic scenario of conflicting sectional interests had been touched on during the ratification debates in Virginia, where explicit concerns over the possible use of direct taxation to impoverish slaveholders were answered by pointing out how the apportionment requirement worked to ensure direct taxes were imposed on a range of taxable objects:

[Mr. George Mason] “But the general government was not precluded from laying the proportion of any particular State on any one species of property they might think proper...[and thereby] they might totally annihilate that kind of property [eg. slaves].

[Mr. Madison] “No gentleman [at the Convention] objected to laying duties, imposts, and excises, uniformly. But uniformity of [direct] taxes would be subversive of the principles of equality; for it was not possible to select any article which would be easy for one State but what would be heavy for another; [instead, it was agreed] that, the proportion of each State being ascertained, it would be raised by the general government in the most convenient manner for the people, and *not by the selection of any one particular object....*<sup>164</sup>

Apportionment, therefore, was understood as being designed to make Congress negotiate its selection of the most appropriate objects of direct taxation without ignoring the integrity of each self-constituting state polity, and in 1798 it did so. In order for such negotiations to work it is necessary that each state’s interest be adequately represented in the process of passing a direct tax, so that the resulting compromise legislation distributes the tax burden among the states more fairly than a uniform tax on one particular object would. The relative strength of each state in tax debates would be determined by how many representatives it had seated in the House, where tax bills originate. Since both a state’s representation and its direct tax

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<sup>164</sup> Elliot, *supra* note 81, at § 3, June 15, 1788 [Emphases added].

burden were to be based on the same enumeration, a rough parity of legislative power with a population-based estimate of ability to pay direct taxes was the rational end in view when apportionment was mandated. And this same reasoning continues to apply long after the 3/5<sup>th</sup> federal ratio became a dead letter, and was removed by the 14<sup>th</sup> Amendment.

As for the fairness of linking taxation to population, Hamilton contended that, “Neither the value of lands, nor the numbers of the people ... has any pretension to being a just representative [of national wealth].” He wanted the new Federal government to raise most of its revenue through indirect taxation because “Imposts, excises, and, in general, all duties upon articles of consumption, may be compared to a fluid, which will, in time, find its level with the means of paying them.”<sup>165</sup> Nonetheless, with the full range of national wealth being taxed in reasonably fair proportion to the individual’s ability to pay – as reflected in expenditures – Hamilton was willing to let direct taxes be apportioned by enumeration. Advocating ratification of the Constitution, he conceded that:

[Impositions] of the direct kind, which principally relate to land and buildings, may admit of a rule of apportionment. Either the value of land, or the number of the people, may serve as a standard. The state of agriculture and the populousness of a country have been considered as nearly connected with each other. And, as a rule, for the purpose intended, numbers, in the view of simplicity and certainty, are entitled to a preference.<sup>166</sup>

Enumeration, though relatively certain,<sup>167</sup> was nevertheless complicated by the institution of slavery. Fortunately, dispute over the taxation of slaves under the Articles of Confederation had resulted in a three-fifths compromise rule for enumerating slaves that could be presumed to have broad support. On a deeper level, however, it was because of one shared economic idea that the three-fifths compromise was possible: property in slaves was generally valued in terms of the productive capacity of forced, unskilled labor compared to free, unskilled labor. That is, a slave’s taxable value as a member of the polity was entirely determined by an estimate of their recognized capacity to produce wealth for their owners. Given their knowledge and experience of political economy, the Framers of the Constitution necessarily recognized that any universal poll tax would become *in effect* a proportional tax on productive capacity once enumeration following the three-fifths rule was adopted. Hence, their choice of language in the Constitution was not arbitrary. The term “capitation” clearly included

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<sup>165</sup> Alexander Hamilton (et al.), *The Federalist: A Collection of Essays (1788)* in GREAT BOOKS OF THE WESTERN WORLD, § 40, 79-80 [Federalist 21] (ADLER ed. 1990).

<sup>166</sup> *Id.* at 80.

<sup>167</sup> As Federalist 54 (by Hamilton or Madison) notes, “By extending the rule [of enumeration] to both objects [representation and direct taxation], the States will have opposite interests [in exaggerating or minimizing the enumeration] which will control and balance each other, and produce the requisite impartiality.” *Id.* at 172.

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such proportional taxations of productivity within its ambit; therefore it – or the even broader category of “direct” tax – was conspicuously used in preference to the much narrower term “poll tax.”

In fact, the term “capitation” was common enough in American jurisprudence of that era to find a place in the first edition of Bouvier’s Law Dictionary (1839): “Capitation: A *poll-tax*; an imposition which is yearly laid on each person according to his estate and ability.”<sup>168</sup> The extended title of this respected and influential dictionary says it is “Adapted to the Constitution and Laws of the United States of America, and of the Several States of the American Union;” and Bouvier’s preface describes his work as an earnest effort to compile “that knowledge which his elder brethren of the bar seemed to possess” but was not to be found in English legal works.<sup>169</sup> This older generation would have been that of the Founders, and Bouvier’s fidelity to their usages is attested by the way his definition of “capitation” matches point for point the one Hamilton presented in *Hylton*. Justices Chase and Iredell continued to press for reducing the word’s meaning to “poll tax,” but despite their preference for a simplified popular meaning, it was not until almost a century after the time of the Founders that the full meaning of “capitation” disappeared from the legal lexicons.<sup>170</sup>

Even more troublesome (to some) is the fact that the word has not disappeared from the Constitution; so it is fair to ask how it got there in the first place. “Capitation” appears only once in the text of the finished document, and is first presented on the floor of the Convention in the report of

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<sup>168</sup> JOHN BOUVIER, A LAW DICTIONARY ADAPTED TO THE CONSTITUTION AND LAWS OF THE UNITED STATES OF AMERICA, AND OF THE SEVERAL STATES OF THE AMERICAN UNION; WITH REFERENCES TO THE CIVIL AND OTHER SYSTEMS OF FOREIGN LAW § I, 154 (1st ed. 1839). This valuable resource for determining the late 18th century meaning of “capitation” is not mentioned in the scholarly work surveyed, but its sixth edition is cited in recent tax protestor literature. For example, Phil Hart cites it, but only to completely misread it as *excluding* taxes on persons according to estate and ability. PHIL HART, CONSTITUTIONAL INCOME: DO YOU HAVE ANY? 235 (3d ed. 2005). Peter Hendrickson, however, cites the same sixth edition of Bouvier without mistaking its meaning, but evidently has no interest in the earlier editions, or their significance for understanding the direct tax clauses. PETER ERIC HENDRICKSON, CRACKING THE CODE: THE FASCINATING TRUTH ABOUT TAXATION IN AMERICA 2 (2003).

<sup>169</sup> Bouvier, *supra* at § I, vi.

<sup>170</sup> By 1828 the relevant popular meaning of “capitation” was given by Webster’s Dictionary as, “2. A tax, or imposition upon each head or person; a poll-tax.” NOAH WEBSTER, AN AMERICAN DICTIONARY OF THE ENGLISH LANGUAGE (1828). The absence of the more nuanced part of Bouvier’s definition gave Justices Chase and Iredell the meaning they preferred, but the legal definition remained intact in Bouvier’s 1856 edition. BOUVIER, A LAW DICTIONARY (1856). It was not until the 15<sup>th</sup> edition of Bouvier in 1883 – under the editorial hand of Francis Rawle – that the definition was shorn of the decisive phrase “according to his estate and ability.” JOHN BOUVIER, A LAW DICTIONARY ADAPTED TO THE CONSTITUTION AND LAWS OF THE UNITED STATES OF AMERICA AND OF THE SEVERAL STATES OF THE AMERICAN UNION, FIFTEENTH EDITION, THOROUGHLY REVISED AND GREATLY ENLARGED § I, 283 (FRANCIS RAWLE ED. 1883).

the Committee of Detail on August 6<sup>th</sup>. There, it is the key term in one of the express limitations of the powers of Congress: “Article VII, Sect. 5. No capitation tax shall be laid, unless in proportion to the Census hereinbefore directed to be taken.”<sup>171</sup> John Rutledge of South Carolina chaired this committee,<sup>172</sup> and evidently drew extensively from Charles Pinckney’s plan of federation, which was presented on May 29<sup>th</sup> but had yet to be discussed on the floor. In fact, Pinckney’s language is virtually identical to that reported out of Rutledge’s committee.<sup>173</sup> From the extant records it appears that there was no dissent about this provision, probably because it mirrored the earlier decision to require direct taxation to be apportioned according to a census. Capitations were clearly considered to be direct taxes, so there was not much to discuss.

Toward the end of the Convention, however, George Read of Delaware moved to add the phrase “or other direct tax” to the “no capitation” clause, which was still in the form reported out of the Committee of Detail. When we look for the reason this motion was introduced, Madison reports only that “He was afraid that some liberty might otherwise be taken to saddle the states, with a readjustment by this rule, of past requisitions of Congress – and that his amendment by giving another cast to the meaning would take away the pretext.”<sup>174</sup> That is, in order to prevent the new Federal government from directly taxing the States with balances due from its past requisitions,<sup>175</sup> Read’s amendment classed such forced requisitions together with capitations levied directly on persons and requiring apportionment. But more importantly perhaps, the phrase explicitly tied direct taxes on land, dwellings, slaves, stock and luxury items<sup>176</sup> to the apportionment requirement. There is no record of any contentious debate on this change, which was moved and adopted on September 14<sup>th</sup>.

Nor does the record reflect any serious attention being given to rectifying a curious omission of the report from Rutledge’s committee. Some-

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<sup>171</sup> Einhorn, *supra* note 5, at 167. This text appears as Article VII, Section 5 of the committee report. See also at <http://founders-blog.blogspot.com/2007/08/monday-august-6-1787-report-of.html>.

<sup>172</sup> The other members were Edmund Randolph (Virginia), James Wilson (Pennsylvania), Oliver Ellsworth (Connecticut), and Nathaniel Gorham (Massachusetts). Of these, Rutledge, Randolph and Wilson were arguably the prime movers. Probably the best evidence of Rutledge’s acting as chair is that the two surviving working documents – an outline by Randolph and a second draft by Wilson – were both edited by Rutledge. DAVID O. STEWART, *THE SUMMER OF 1787: THE MEN WHO INVENTED THE CONSTITUTION* 164, 168 (2007).

<sup>173</sup> Elliot, *supra* note 81, at § 1, *Journal of the Federal Convention*, May 29, 1787. See also text accompanying note 152 *supra*.

<sup>174</sup> Madison, *supra* note 16, at 566.

<sup>175</sup> Delaware might well have been anxious about this possibility since it had paid only 39% of the amounts requisitioned from it by Congress. Ackerman, *supra* note 3, at 47.

<sup>176</sup> It seems likely that what John Marshall meant by direct taxes on “a few other articles of domestic property” were taxes on luxury items like plate and silverware, which some states levied – including Connecticut, New York, Pennsylvania and Virginia. Becker, *supra* note 69, at 149-62, 183. Einhorn, *supra* note 5, at 46.

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how it came about that no mention was made of “direct taxation” in the representation clause. The error was corrected sometime before the Committee on Style, chaired by Gouverneur Morris of Pennsylvania, presented their work on September 12<sup>th</sup>.<sup>177</sup> In the absence of any record of how the omission and its correction happened, two very different interpretations are possible. If “capitation” was taken as covering all direct taxes, the Committee of Detail was simply eliminating a redundancy. The Convention, however, if only in the guise of the Committee on Style, chose to restore the “direct taxation” language. Doing so might have (1) been motivated by nothing more than a prudent concern to preserve the exact language of a crucial resolution, or (2) the reversion might have also meant key delegates did not view “capitations” as the only possible direct taxes.

Since Rutledge’s committee was obviously using Pinckney’s draft plan, it may be worthwhile to look briefly at the tax milieu of South Carolina, the home state of both Pinckney and Rutledge. In South Carolina there was a tradition of imposing *ad valorem* property and faculty taxes in the town of Charleston, but collecting only flat land taxes outside the city. Reform efforts began in the 1760s and found expression in the tax acts of 1778 through 1784, which nominally imposed the same *ad valorem* rate on towns and land.<sup>178</sup> The statute levying taxes in 1784 imposes these new rates in two parts. Article I establishes nine tiers (with a total of 22 categories) of land taxes based on the type of terrain, with each flat rate set at roughly 1% of value per acre. Article II then lumps a number of other taxes together: namely, a poll tax on slaves, free negroes, and a tax on each wheel of a carriage (all set at 9sh 4p each), together with taxes on town real estate, stock in trade, and the profits of faculties and professions (all rated at 1% *ad valorem*).<sup>179</sup> This taxing regimen is noteworthy especially because all of the taxes in Article II are capitations; and they are clearly separated from the land taxes in Article I. Given this tax tradition, it is not realistic to think delegates from South Carolina took capitations to include land taxes; and it is therefore very unlikely that Rutledge’s committee omitted the “direct taxation” phrase because they thought it was redundant.

But what could possibly be the point of trying to exclude land taxes from the apportionment requirement? In general, flat acreage taxes – even when modified to reflect the potential productivity of different terrains – favor relatively small territories with relatively dense populations. On the face of it, then, excluding land from apportionment would benefit smaller

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<sup>177</sup> The other members of this committee were Alexander Hamilton (New York), James Madison (Virginia), Rufus King (Massachusetts) and William Samuel Johnson (Connecticut). Rakove, *supra* note 159, at 90.

<sup>178</sup> Einhorn, *supra* note 5, at 100, 103

<sup>179</sup> THOMAS COOPER, THE STATUTES AT LARGE OF SOUTH CAROLINA, § 4, 628 (1838).

Exceptions to the nominal uniformity of the *ad valorem* tax regimen were as follows: there was no poll tax on free white men; free negroes and mulattos under 10 and over 60 years of age were tax exempt; the wheels of wagons, carts and drays were not taxed; and clergy, schoolmasters and schoolmistress were exempted from the faculty tax.

states like Massachusetts and Connecticut and burden larger ones like Pennsylvania or Virginia, with a state like South Carolina perhaps benefiting slightly because of its limited size and the concentration of productive slave labor on its plantations. Perhaps, too, the Committee of Detail felt that since the motion to limit apportionment to direct taxation had worked well, limiting it to nothing but capitations could almost be taken for granted.<sup>180</sup>

That the Convention was vigilant and persistent in this regard shows that restraining direct taxation by means of apportionment was something of real significance for many delegates. Hence, when Gouverneur Morris wanted to remove the tax apportionment “bridge” to the Three-fifths Compromise, he was apparently unable to spark any debate that Madison felt worthy of being recorded. But why did Morris change his mind? We know that Morris was a good friend of Alexander Hamilton, and had in 1783 helped draft a proposal for levying a national land tax.<sup>181</sup> So perhaps he was by July 24<sup>th</sup> beginning to feel that he and Wilson had cast the net of apportionment too widely on July 12<sup>th</sup>.

These conjectures about the motives of Rutledge and Morris could provide starting points for further research, but the real importance of 1784 South Carolina tax policy for understanding the language of what is now the only remaining tax apportionment clause in the Constitution is to help establish what the phrase “no capitation” meant to delegates at the Convention. Pinckney and Rutledge introduced a specific tax term into the draft text of the Constitution, a term which closely reflects the South Carolina tax law of their time. In that tax law (a) poll taxes, taxes on real and personal property, and faculty taxes together comprised one type of tax, and (b) those capitation taxes were clearly distinguished from land taxes. These facts establish not only that Pinckney chose to use a tax term found in the writings of political economists, including *The Wealth of Nations*; but also that just prior to the Convention Pinckney and Rutledge were acquainted with the same three-part understanding of capitations that Hamilton described to the Supreme Court in 1796. It is also significant that when the Convention was given chances to modify its stance on apportionment of direct taxes by Rutledge, Morris and Read, it chose to adopt the only change that *strengthened* the original provision by ensuring that land taxes and requisitions would also have to be apportioned. Taken all in all, the Convention delegates consistently maintained their resolve to apportion every direct tax – acting for all the world as if they knew what “capitation” and “direct taxation” meant.

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<sup>180</sup> Also, it is not unheard of for parties in negotiation to “overlook” errors in the record when it is to their advantage to do so.

<sup>181</sup> Lynd, *supra* note 155, at 211. Einhorn, *supra* note 5, at 166.

## Dispelling the Fog About Direct Taxation

### V. THE LEGACY OF *HYLTON*

Turning again to *Hylton*, it is very doubtful the case could ever have been rightly decided given the Justices' manifest lack of interest in the nature of capitation taxes and the broader significance of apportionment. Even so, thanks to Justice Paterson the Court did settle on a clear way to distinguish between direct and indirect taxes, and based its view on the same economic viewpoint the Framers implicitly adopted – namely, that of Adam Smith. In retrospect, and despite his dismissive and misleading position on the value of apportionment, Paterson arguably based his decision entirely on Smith's distinction between direct and indirect taxes as he understood it.<sup>182</sup> This principle was, and remains, a sound legal touchstone for identifying taxes subject to apportionment under the Constitution, even though Justice Paterson himself failed to apply it rigorously enough in *Hylton*.

Curiously, Smith's seminal distinction is clearly presented in John Wickham's published brief defending the Carriage Tax in Virginia Circuit Court, but not used at all in Hamilton's written "Opinion."<sup>183</sup> Wickham writes, "I shall contend that, long before the Constitution of the United States was framed<sup>184</sup> a tax upon the revenue or income of individuals, was considered and well understood to be a *direct tax*, [and] a tax upon their expences, or consumption an *indirect tax*; [so] that this is a tax on expence or consumption, and therefore an indirect tax."<sup>185</sup> Although it is likely that some or all of the Justices in *Hylton* were familiar with Wickham's published argument, it is clear from Justice Iredell's notes that Smith's distinction was introduced into oral argument at least three times: by Jared Ingersoll for *Hylton*, and by both Charles Lee and Alexander Hamilton for the Defendant.<sup>186</sup> Also, Wickham's observation about the greater relevance of Adam Smith than James Steuart for understanding the meaning of the Constitutional tax terms seems to lie behind Hamilton's oral argument in one place.<sup>187</sup>

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<sup>182</sup> *Hylton v. United States*, 3 U.S.(3 Dall.) 171, 181 (1796) . Smith, *supra* note 68, at 429.

<sup>183</sup> Marcus, *supra* note 2, at 476-82, 489-90, 465-68.

<sup>184</sup> Or, dating at least from the enthusiastic reception of Smith's *Wealth of Nations* in the former colonies, which evidently began as early as 1780 in response to imported copies of the 1776 edition. In addition to the members of the Philadelphia Convention who knew the work, (See notes 118 & 119 *supra*), Fleischacker cites evidence that Thomas Pownall's 1780 "Memorial" paraphrased several sections Smith's work, which were then summarized in a letter by John Adams to Congress in that same year; that the James Madison who presided over the College of William and Mary added *Wealth of Nations* to its curriculum in 1784; and that Noah Webster is reported to have read the book avidly in 1784 and used it throughout his life as an authority on economics. Fleischacker, *supra* note 27, at 901-02.

<sup>185</sup> Marcus, *supra* note 2, at 413.

<sup>186</sup> *Id.* at 474-75, 489.

<sup>187</sup> *Id.* at 480-481. From these preliminary observations it seems very likely that Hamilton's "Opinion" is not a thorough presentation of his position. Further evidence of inadequacy is

As a formal distinction, Smith's view of the difference between direct and indirect taxes was quite adequate, but it was made with no knowledge of the peculiarly American requirement of apportionment. As we have seen, the inadequacy of following Smith completely stems from his further description of how to collect such indirect excise taxes. In the context of English law, Smith is correct in saying that it is simply a matter of preference whether the excise is collected at the point of sale from the seller, or collected as an "annual sum" from the buyer.<sup>188</sup> But in the context of the Constitution, where capitations are direct taxes, any tax collected from a person "with respect to property" is a capitation – and therefore subject to apportionment.<sup>189</sup>

It is also not clear that the "annual sum" Smith mentions was limited by anything other than the actual serviceable life of the commodity being taxed, so the total sum raised by such an annual collection might be noticeably more (or sometimes less) than a simple excise fee assessed on the value of that commodity at the time of sale. Because the term of the tax is not fixed and the total collected is not necessarily equivalent to any fairly assessed excise tax, it is a real stretch to say that both ways of collecting the money really tax the acquisition of the commodity rather than its possession. This is especially true in the case of the Carriage Tax of 1794, which taxed all carriages of the luxury class, not just those acquired after passage of the Act.<sup>190</sup>

As we may recall, Justice Chase believed that "...some taxes may be both direct and indirect, at the same time,"<sup>191</sup> thus introducing a Hamiltonian principle of equivocation which could legitimate seemingly direct annual taxes as also being indirect enough to escape apportionment. But neither of the other Justices took this tack. Consequently, *Hylton* set the pattern for later Court decisions on direct taxation – like *Pollock v. Farmers' Loan & Trust* (1895) – that presume all possible taxes are either direct or indirect, and follow Justice Paterson's construal of Adam Smith's distinc-

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its assertion "The only known source of the distinction between direct and indirect taxes is in the doctrine of the French Oeconomists, Locke and other speculative writers who affirm that all taxes fall ultimately upon land." *Id.* at 466. Yet Hamilton's oral argument contains a description of how the two great Funds, Land and Labor, are related in Smith's theory: "One as the source, the other going by a road back to the source – Smith much the Oracle of the Political Oeconomists here." *Id.* at 480. Thus, it seems that one of the "other speculative writers" who presumably had little or no influence on the wording of the Constitution turns out to be the author of *Wealth of Nations*.

<sup>188</sup> Smith, *supra* note 68, at 432. *Hylton v. United States*, 3 U.S. (3 Dall.) 171, 181 (1796), Smith is substantively "correct" only if the total tax collection is roughly equal in the two methods.

<sup>189</sup> Hence, in the taxing of slaves it makes no difference whether the tax is thought of as a capitation on person with respect to property in slaves, or person with respect to profession as a employer of slave labor, the apportionment requirement still stands.

<sup>190</sup> Act of June 5, 1794, c. 45, 1 Stat. 373-75

<sup>191</sup> See *Hylton*, 3 U.S. (3 Dall.) 171, at 174.

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tion.<sup>192</sup> In fact, from *Hylton* on the legal debate turns on the issue of direct versus indirect taxation to the virtual exclusion of discussion about what constitutes a capitation. This is a remarkable oversight considering the range of taxes considered to be capitations by Hamilton and others of his generation.

Although it is clear that a tax on luxury carriages was in no way a Federal requisition on the states or a tax on land or slaves, it is also clear that in its mode of operation the Carriage Tax functioned as a capitation on persons “with respect to property.” The mandate of the Act was to tax one particular class of luxury commodity in proportion to its market value; and thereby to adopt for Federal use a “tax on the rich” that was fairly popular in States that had imposed it.<sup>193</sup> As to intent, it was to be a luxury “excise” tax designed to fall on the wealthy and exempt others; and in that it succeeded. But in its operation it became a direct tax drawing indifferently from whatever revenue the owner enjoyed, not from the expenditure made in acquiring a carriage. Because the way the Carriage Tax was imposed and collected was either ignored or misunderstood, even Justice Paterson’s opinion ultimately fails to give a cogent reason for his ruling.

Justices Iredell and Chase agreed with Justice Paterson’s ruling without explicitly citing Adam Smith’s criterion for distinguishing direct from indirect taxes. Instead, both Justices base their decision on the same two inadequate grounds: (a) that only taxes on land or polls are direct taxes, and (b) taxes that are not uniform after apportionment are not direct taxes. Of the two, the latter is astonishingly inept. It takes the politically expedient position that Constitutional restraint of direct taxation was intended as a license for virtually unlimited taxation by uniform “excises.” And even worse, it ignores how the impossibility of taxing land uniformly through apportionment renders (a) and (b) mutually contradictory. Logically speaking, one of the two grounds for their rulings should have been discarded, and the better choice would have been to abandon (b) entirely.<sup>194</sup>

But that would have meant that (a) would have to stand alone, and neither Justice was ready or willing to unreservedly assert that his narrow understanding of “capitation or other direct tax” was binding. Why was that? Perhaps part of the reason lies in a tendency to project the systems of taxation that each Justice was most familiar with onto the new system of

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<sup>192</sup> Chief Justice Fuller, writing for the majority in *Pollock* says, “And although there have been from time to time intimations that there might be some tax which was not a direct tax nor included under the words “duties, imposts and excises,” such a tax, for more than one hundred years of national existence, has as yet remained undiscovered, notwithstanding the stress of particular circumstances has invited thorough investigation into sources of revenue.” *Pollock v. Farmers' Loan & Trust Co.*, 157 US 429, 557-58 (1895).

<sup>193</sup> Carriage taxes were being collected by several states prior to the Federal tax of 1794: Massachusetts [1782], Connecticut [1779], New York [1781], New Jersey [1778], Pennsylvania [1780], South Carolina [1778] and Georgia [c.1770]. Becker, *supra* note 69, at 126, 149, 162, 171, 183, 207, 212.

<sup>194</sup> See *Hylton*, 3 U.S. (3 Dall.) 171, at 174, 177, 183.

Federal taxation. Thus, Justice Iredell would not have been well acquainted with faculty taxes because none were imposed in North Carolina, and all taxes were tied to the per acre tax on 300 acres of land (as a flat tax or “modified” *ad valorem* tax). The state poll tax on each “tithable,” whether slave or free, and each £100 value of urban real estate were equivalent to that one key assessment. So when Iredell says “*perhaps* a direct tax... [is] nothing by a tax on something inseparably annexed to the soil,”<sup>195</sup> what he may be doing is trying to read North Carolina’s land-centric tax system into the Constitution. Certainly his main position here is indefensible, if only because free persons are not “inseparably annexed to the soil” and yet they are taxed by direct capitations – including poll taxes on “tithables.” Recognizing this, Iredell protects himself from ridicule by inserting a “perhaps.”

Conversely, Justice Chase would have been well accustomed to faculty taxes, and to the taxing of real estate and slaves *ad valorem* after the poll tax on “tithables” was abolished by Maryland’s Constitution of 1776.<sup>196</sup> Slaves were taxed purely as property in a four-tiered system of valuation with proportional rates at the margins of average productivity, buildings were taxed separately from the land on which they rested, and everyone’s real and personal property was taxed in proportion to its value. So when Chase tried to confine direct taxation to poll taxes and taxes on land it is as though he were looking at the Constitution through the eyes of the wealthy “country party” leaders like Charles Carroll who feared the leveling motives of the new state constitution and hoped for eventual relief from the tax burden they carried under a universal capitation *without* poll taxes.<sup>197</sup> That is, by taxing only polls and land, all real and personal property – including improvements to land – would be exempted. Yet Chase, too, is very guarded in reading his ideal into the federal Constitution, prefacing his view with “*but of this I do not give a judicial opinion.*”<sup>198</sup> But even this caution is judicially irresponsible, since Chase simply overrides the expert testimony of both counsels regarding the nature of capitations, and does so without introducing any fresh evidence or reasoning to support his non-judicial dictum.

Justices Paterson and Wilson were in somewhat identical situations. New Jersey relied on a faculty tax that levied 2sh per £ on everyone’s estate, measured by its annual income, and assessed so as to be proportionate to taxes on land. Pennsylvania had long imposed a broad faculty tax, as well as a land tax that included livestock and slaves – all rated by “yearly value” of the estate or trade. The only major difference between the two states seems to have been the method of assessment and collection: Pennsylvania apportioned its taxes to local assessors, while New Jersey used

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<sup>195</sup> See *Hylton*, 3 U.S. (3 Dall.) 171, at 183 (emphasis added).

<sup>196</sup> Becker, *supra* note 69, at 213

<sup>197</sup> *Id.* at 213-14.

<sup>198</sup> See *Hylton*, 3 U.S.(3 Dall.) 171, at 174 (emphasis added).

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state-appointed assessors.<sup>199</sup> Justice Paterson’s reasons for rejecting the 3/5<sup>th</sup> rule have already been discussed, as well as his indebtedness to Adam Smith’s distinction between direct and indirect taxes.<sup>200</sup> Justice Wilson, the only other Justice to actually hear the arguments in *Hylton*, had already ruled on the matter in the Virginia Circuit Court and did not feel it necessary to write an opinion adding anything to the reasons adduced by Justices Chase, Iredell and Paterson<sup>201</sup> – perhaps because he and Paterson (both delegates to the Convention) shared the same view, at least so far as the Carriage Tax itself was concerned. After all, a tax on luxury carriages was routine in New Jersey, much as the tax on “pleasurable carriages” was in Pennsylvania.<sup>202</sup> So long as it looked like expenditure was being taxed, each felt justified in helping the Federalists assert their newly won powers of taxation.

In the end, we are left with a ruling based on the misconstruals and logical errors of three Justices. But even so, enough material has been preserved in the arguments and other historical documents to construct a clear idea of what the Founders meant by the words “no capitation or other direct tax,” and to understand why they subjected such taxes to apportionment.

To recapitulate, two major points have emerged concerning the terms themselves. First, the direct taxes the Founders subjected to apportionment were three in number: (1) capitations, (2) land taxes, and (3) taxes on the states. Capitation taxes were commonly recognized as being of three kinds: poll taxes, personal property taxes, and faculty taxes. Each of these forms of capitation was known through colonial and state tax impositions,<sup>203</sup> and each type of tax was clearly recognized by the generation of the Founders as a form of tax levied directly on the person of the taxpayer.<sup>204</sup> Land taxes were commonly imposed by the future states of the Union either on acreage or by *ad valorem* assessment.<sup>205</sup> Such land taxes were recognized as direct taxation along with taxes on dwellings, slaves, livestock, “and a few other articles of domestic property” [such as plate and silverware].<sup>206</sup> Where slaves were not included in a poll tax on “tithables,” they were commonly rolled into land taxes along with the owner’s livestock – being seen as “inseparably connected with the land,” as Justice Iredell would

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<sup>199</sup> Becker, *supra* note 69, at 171-72 & 183. Einhorn, *supra* note 5, at 85.

<sup>200</sup> See text accompanying note 117 *supra*.

<sup>201</sup> See *Hylton*, 3 U.S.(3 Dall.) 171 at 184.

<sup>202</sup> Becker, *supra* note 69, at 171, 183.

<sup>203</sup> Seligman, *supra* note 6, at 367-81.

<sup>204</sup> Marcus, *supra* note 2, at 474-75 & 489. Bouvier, *A Law Dictionary* (1839) *supra* note 168, at § I, 154.

<sup>205</sup> Seligman, *supra* note 6, at 380-81. For a synopsis of the post-Revolutionary tax situation, with vacillation over how to tax land being particularly clear in the contrast between the practices of North and South Carolina, see Becker, *supra* note 69, at 219-29.

<sup>206</sup> Elliot, *supra* note 81, at § 3, June 10, 1788. For references to actual taxes, see note 176 *supra*.

have it. And as for possible Federal taxes on the states and their revenue, it is clear from the record of the Convention itself that such were regarded as the same as the old “requisitions” by Congress on the States, and were to be apportioned as direct taxes if ever imposed.<sup>207</sup>

Secondly, the implicit economic distinction between direct taxes and indirect taxes in the Constitution was taken by the Founders directly from Adam Smith’s work: a tax that falls on a person’s revenue is a direct tax; a tax that falls on a person’s expenditure is an indirect tax.<sup>208</sup> Further, it was accepted that an indirect tax was ordinarily collected from expenditures on commodities, and from the seller of the goods – who was expected to routinely pass the cost of the tax on to the purchaser as part of the price of the commodity.<sup>209</sup> Thus, the prevailing rate of taxation was expected to be limited by diminished consumption of goods whose price was inflated by excessive exactions.

And it is from the different elements of Smith’s account that the three classic criteria of indirect taxation are derived: (1) the tax burden falls on expenditure, not revenue; (2) the tax burden is shiftable, meaning the person from who it is collected routinely passes its cost on to someone else through a relatively immediate transaction; and (3) payment of the tax, being folded into expenditures for consumption, is either (a) avoidable entirely through substitution, and without being relegated to poverty levels of consumption, or (b) so variable in its operation that the consumer has significant discretion regarding how much is expended on taxes. A direct tax, however, would be collected from the incoming revenues of a person, regardless of their source – whether “from the rent of their land, from the profits of their stock, or from the wages of their labour,” as Adam Smith put it.<sup>210</sup> The person being taxed paid directly, having no one to immediately pass the burden on to through a transaction.<sup>211</sup>

With this understanding of what direct taxes were for the Founders, we can better understand what the apportionment requirement was intended to achieve. Apportionment was mandated for three basic purposes, for each of which we have direct evidence in the writings of that eminent Federalist, Alexander Hamilton. First, apportionment was intended to protect state and regional economies from discriminatory Federal taxes on any

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<sup>207</sup> Madison, *supra* note 16, at 566.

<sup>208</sup> Smith, *supra* note 68, at 429. *Hylton v. United States*, 3 U.S. (3 Dall.) 171, 181 (1796).

<sup>209</sup> The general agreement on this point is adumbrated in the first arguments formulated by Taylor and Whitcomb in *United States v. Hylton*, as published after the Virginia Circuit Court hearing. Marcus, *supra* note 2, at 392-93, 433-34 & 412.

<sup>210</sup> Smith, *supra* note 68, at 428.

<sup>211</sup> In this connection, it must be remembered that the assessment of an object of direct taxation such as land, might be commonly set by an indirect method - such as a multiple of the land’s annual yield - without becoming thereby an indirect tax. Seligman, *supra* note 6, at 380-81.

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particular taxable object.<sup>212</sup> Property in slaves was, as the Justices in *Hylton* point out repeatedly, the most conspicuous case in point. But land and dwellings – not to mention capitations of various kinds – were also matters of concern for the Framers of the Constitution. Hamilton put the matter this way in *The Federalist*: “A nation can not long exist without revenues.... Revenue, therefore, must be had at all events. In this country, if the principal part be not drawn from commerce, it must fall with oppressive weight upon land.”<sup>213</sup>

However, when Hamilton advocates limiting Federal taxes on land he is not necessarily referring to a flat per acre tax, but most likely had in view the fairly common practice of taxing land through an assessment of its general capacity of generating wealth – that is, together with its dwellings and livestock, including slaves. In evaluating possible sources of revenue for the new Federal government, Hamilton is quite forthright about the need be wary of taxing the farmers’ “houses and lands,” and wanted to eschew capitations on personal property altogether:

In America, it is evident that we must a long time depend for the means of revenue chiefly on such duties [on imported articles]. In most parts of it, excises must be confined within a narrow compass. The genius of the people will ill brook the inquisitive and preemptory spirit of excise laws. The pockets of the farmers, on the other hand, will reluctantly yield but scanty supplies, in the unwelcome shape of impositions on their houses and lands; and personal property is too precarious and invisible a fund to be laid hold of in any other way than by the imperceptible agency of taxes on consumption.<sup>214</sup>

Nor were the capitations that Hamilton did not want to see the Federal government collect limited to head taxes on slaves:

As to poll-taxes, I, without scruple, confess my disapprobation of them; and though they have prevailed from an early period in those States [the New England States – *Publius*]<sup>215</sup> which have uniformly been the most tenacious of their rights, I should lament to see them introduced into practice under the national government.<sup>216</sup>

Second, apportionment was intended to restrict imposition of Federal direct taxes to exceptional circumstances, and thereby to prevent such taxes from being levied routinely and permanently. Thus, Hamilton concludes

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<sup>212</sup> See Madison’s reply to Mason: “...and not by the selection of any one particular object,” *supra* note 16, at 159.

<sup>213</sup> Hamilton, *supra* note 165, at 58 [Federalist 12].

<sup>214</sup> *Id.* at 57.

<sup>215</sup> This brief footnote by the author of Federalist 36 refers to the way in which Massachusetts, for example, relied on poll taxes for 30% to 40% of their tax revenue. Einhorn, *supra* note 5, at 74. These poll taxes were imposed on the same set of tithable persons that Virginia and North Carolina taxed, and placed a disproportionate part of the tax burden on those with the least ability to pay, and who benefited the least from the state’s protection of property rights.

<sup>216</sup> Hamilton, *supra* note 165, at 117 [Federalist 36].

his above repudiation of poll taxes with this observation: “But does it follow because there is a power to lay them, that they will actually be laid? Every State in the Union has power to impose taxes of this kind; and yet in several of them they are unknown in practice.”<sup>217</sup> That is, the power to impose capitations of this form was one he thought and hoped would seldom be exercised. But what were the grounds for his hope? In the New York ratification debates he appeals to a “general sense of the community” as the final guarantor of liberty from such taxation:

Sir, it has been said that a poll tax is a tyrannical tax; but... in the course of a war, it may be necessary to lay hold of every resource; and for a certain period, the people may submit to it. But on removal of the danger, or the return of peace, the general sense of the community would abolish it.<sup>218</sup>

Looking at the early history of direct taxes, the expectation that apportioned direct taxes would be imposed only in time of war or threat of war seems fulfilled. The direct tax levies of 1798 and 1813-1816 all conformed to this expectation, and each was apportioned much along the lines of the tax of 1798.<sup>219</sup> The major innovation of the three later tax acts is that the states were allowed to “assume their quota” and collect the revenue as though it had been requisitioned – and even offered a 15% discount if they did.<sup>220</sup> In 1817, after the end of the War of 1812, all such direct taxation was repealed, so once again the expectation of the Founders seems to be justified: the general repugnance toward this kind of tax quickly put an end to direct federal taxation once the nation was no longer at war.

Calvin Johnson, however, seems to feel that direct taxation was abandoned because it was unworkable. He maintains that, “Because there is no distinction between war and peace in the Constitutional language, a tax without apportionment during peacetime follows from the necessity of a direct tax without hobble during war.”<sup>221</sup> Setting aside the wishful thinking here, Johnson’s basic claim seems to be that apportionment “hobbles” taxation in a way that endangers the nation in war. But is this so? When wartime collection of the apportioned direct taxes of 1813-1816 was reviewed

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<sup>217</sup> Maryland abolished its poll taxes in 1776, and Virginia followed suite (on the state level only) in 1787. Einhorn, *supra* note 5, at 107 & 50. Pennsylvania, however, levied a poll tax only on “single freemen not in the army and not paying other taxes,” which was collected from so few people that it was in effect a penalty for being an unmarried civilian exempt from other taxes. Becker, *supra* note 69, at 182-83. Einhorn, *supra* note 5, at 88.

<sup>218</sup> Elliot, *supra* note 81, at § 2, June 28, 1788.

<sup>219</sup> In the tax of 1815, however, excises were laid on the manufacture of a range of goods, and an annual tax on watches and furniture. The latter imposed a scale of flat rates on all furniture not made at home whenever a household had furnishings totaling more than \$200 in value. In this feature, the Federalist enacted Carriage Tax of 1794 reappears as a precedent that was seized upon by a Republican Congress desperate for money. Einhorn, *supra* note 5, at 196.

<sup>220</sup> *Id.* at 158.

<sup>221</sup> Johnson, *The Foul-Up*, *supra* note 9, at 55.

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by Charles Bullock, the overall collection rate was 87% as of 1817.<sup>222</sup> The shortfall was 13% of the total tax imposed, but that figure has to be seen in light of the fact that a few states took advantage the discounts offered for “assuming” their quotas. Indeed, by setting the discount rate at 15% Congress had already pegged its collection costs at that figure, and therefore could not have been counting on realizing more than 85% of the imposed tax anyway. But there is an even more sobering consideration to keep in mind: when a 13% shortfall is compared to the 23.5% shortfall reported for collections of the Federal Income Tax for 2001,<sup>223</sup> apportioned direct taxes begin to look quite workable. So we are left once again with public repugnance – or “the general sense of the community” – as the most probable reason apportioned direct taxation is not a staple of Federal tax legislation in peacetime.

Third, apportionment was intended to distribute direct tax burdens according to the measure of voting power in the House and thereby prevent majority coalitions of states from imposing excessive taxes on the minority. The inherent effect of linking both direct taxation and House representation to enumeration was to force those states with enough votes to impose taxes to also bear the brunt of the tax burden. As Hamilton put it:

Let it be recollected that the proportion of these [direct] taxes is not to be left to the discretion of the national legislature... [but] an actual census or enumeration of the people must furnish the rule, a circumstance which effectually shuts the door to partiality or oppression. The abuse of this power of taxation seems [therefore] to have been provided against [in the Constitution] with guarded circumspection.<sup>224</sup>

In this way too, the generally accepted principle of matching taxes to one’s “ability to pay” was given expression through apportionment of taxes among the states by census, based as it was on the idea that population was an adequate, though very approximate, general measure of wealth in a primarily agricultural economy.<sup>225</sup>

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<sup>222</sup> Bullock, *supra* note 30, at 472.

<sup>223</sup> The tax gap reported by the IRS for 2001 was 345 billion, of which 55 billion was recovered through later collections, leaving a shortfall of 290 billion. Initial collections for 2001 amounted to 888 billion after tax credits, to which 55 billion in late payments and the 290 billion shortfall can be added, to arrive at a total tax due figure of 1,233 billion. So the ratio of shortfall to total tax was  $290 / [888+55+290] = 290 / 1,233 = 23.5\%$ . IRS tax information for 2001 is available at

<http://www.irs.gov/newsroom/article/0,,id=154496,00.html> & <http://www.taxfoundation.org/news/show/250.html#table4>.

<sup>224</sup> Hamilton, *supra* note 166, at 116 [Federalist 36]. That tax bills originate in the House of Representatives where population determines representation is something Joseph Dodge overlooks when he opines that a majority of rich states could shift tax burdens to a minority poor states by means of apportionment. Dodge, *supra* note 9, at 897. Even so, Dodge admits apportionment could still “operate to preserve liberty” by partially sheltering personal endowments (like “wage-earning capacity”) from Federal taxation. *Id.* at 939. What Dodge seems to be describing here is essentially a faculty tax, or “capitation.”

<sup>225</sup> *Id.* at 80 [Federalist 21].

What is not so commonly recognized, however, is that apportionment also restrains direct taxes enacted by a political coalition drawn from many states. Thus, if the Federalist coalition that passed the Carriage Tax Act had been constrained to apportion that tax, the amount collected from owners of carriages in different states would indubitably have been disparate, and therefore politically awkward. Justice Iredell develops this point in some detail:

If this [tax] cannot be apportioned, it is therefore not a direct tax in the sense of the Constitution. That this tax cannot be apportioned is evident. Suppose \$10 contemplated as a tax on each chariot, or post chaise, in the United States, and the number of both in all the United States be computed at 105, the number of Representatives in Congress. This would produce in the whole \$1,050. The share of Virginia being 19/105 parts would be \$190. The share of Connecticut being 7/105 parts would be \$70. Then suppose Virginia had 50 carriages, Connecticut 2. The share of Virginia being \$190, this must of course be collected from the owners of carriages, and there would therefore be collected from each carriage \$3.80. The share of Connecticut being \$70, each carriage would pay \$35. If any state had no carriages, there could be no apportionment at all. This mode is too manifestly absurd to be supported, and has not even been attempted in debate.<sup>226</sup>

Granted an apportioned mode of taxation is not perfectly uniform for taxpayers, but is it therefore too “absurd” to be enacted? The likelihood of any state having no carriages is just about zero, and the variance in taxes paid by carriage owners in different states would very probably be much less than in Iredell’s example. Further, residents of different states were accustomed to paying more or less tax on a particular item than their counterparts across state lines. There is, of course, a potential legislative difficulty. But just as it is certain that Virginia’s nineteen votes would outweigh Connecticut’s seven, it is also certain that large states with many carriages could outvote small states with few carriages any time they chose – at least in the House of Representatives. The vote in the Senate would be more uncertain, yet the fact that the Federalist majority was able to pass the highly controversial Carriage Tax – and the Whiskey Tax before it – gives us some idea of the strength of its coalition among Senators, particularly when the tax bill in question did not strike at any vital economic interest in the majority of states.

So why did the Federalist majority coalition decide not to propose the Carriage Tax as an apportioned tax? There are at least three political reasons that come to mind: (1) a direct, apportioned tax would have to specify its total imposition, making it impossible for revenue collection to grow from year to year without repeated enactments of ever larger sums; (2) imposing a tax on carriages under the uniformity rule set a precedent for widening the scope of Federal direct taxation to more closely match that of the

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<sup>226</sup> See *Hylton*, 3 U.S. (3 Dall.) 171, at 182.

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states; and (3) given the deep hostility to direct taxes in many sectors of colonial society, imposing an apportioned tax would openly acknowledge its being a new direct tax, and that very admission could well end the political dominance of the Federalist coalition – as the enactment of the Direct Tax of 1798 arguably did.

Thus, it was politically expedient for any Federalist Justice on the Court hearing *Hylton* – that is, for all six Justices of the Ellsworth Court – to dismiss the apportionment requirement as irrelevant and unworkable. Given the illogicality of the Justices' preserved opinions in *Hylton*, it is very likely that political allegiances were being (somewhat openly) tested by means of the case. However, what the Federalist line of political pragmatism in the courts also reveals is that the apportionment requirement does in fact limit the ability of a majority coalition formed across Sectional boundaries to openly impose direct Federal taxes. Therefore apportionment had to be gotten around somehow, and *Hylton* was the method adopted. That the Federalists were able to impose a direct tax without apportionment for several years is unfortunate, and – again unfortunately – it is not just a historical anomaly.

That such a thing could happen at all showed that diversity of interests alone was not enough to preclude abuse of Constitutional rights – even for the wealthy minority subjected to the federal tax on carriages.<sup>227</sup> Madison had argued in Federalist 51 that abuses of minority rights were virtually impossible because of diversity of interests. “In the extended republic of the United States, and among the great variety of interests, parties and sects which it embraces, a coalition of a majority of the whole society could seldom take place on any other principles than those of justice and the general good.”<sup>228</sup> However, when the Justices in *Hylton* ruled wrongly on the Carriage Tax so early in the history of the republic, the validity of the principle itself was brought into question, and an avenue for future abuses was opened.

On the level of tax law, *Hylton* set a precedent not only for taxing personal property without apportionment, but also for tolerating four fundamental legal and logical errors. First, the ruling in *Hylton* treats the form of the legislative Act as more decisive than its substance, or actual effect. Second, the apportionment requirement in the Constitution is misconstrued and prevented from exercising its intended restraint on direct Federal taxation. Third, the nature of direct taxation is obscured by not treating the way in which a tax is collected as relevant to its nature. And fourth, with

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<sup>227</sup> Because the Carriage Tax was only imposed upon a wealthy minority it was therefore a fairly popular tax with other classes, and opposition to it was primarily rhetorical and legal. That opposition failed with the *Hylton* decision, but the tax itself did not outlast the Federalist party's dominance in Congress. The Whiskey Tax of 1794, however, which directly affected relatively poor minorities localized in rural regions, created vocal and violent popular resistance.

<sup>228</sup> Hamilton, *supra* note 165, at 164 [Federalist 51]. The argument here closely follows the analysis of Federalist 10, which is attributed entirely to Madison.

*Hylton* the meaning of the Constitutional term “capitation” begins to slip away into a fog of expedient misconstrual from which it has yet to fully escape.

Even so, *Hylton v. United States* clearly enunciates one valid principle for distinguishing direct from indirect taxes: direct taxes are drawn from revenues, and indirect from expenditures. This principle has rightly been influential in tax law, even though it has yet to be applied coherently, or used to thoroughly review case law depending in error on *Hylton*. And, even more significantly for our understanding and evaluation of later decisions of the Court about direct taxation, *Hylton* gives us – through Justice Iredell’s notes – a privileged window into the full meaning of the term “capitation” as used in the Constitution.

## VI. EPILOGUE: DEFOGGING TAX INNOVATIONS

Once we restore “capitation” to its full meaning, the constitutionality of various innovative tax proposals can be more cogently evaluated. So, for example, if we analyze the three tax innovations<sup>229</sup> discussed in the introduction according to the criteria for indirect taxation and with respect to all types of capitation, a coherent critique emerges. Looking at the USA tax proposal first, it clearly would not be an excise or other form of indirect tax: it would not be shiftable – nor avoidable except by exemption; and it would not fall on expenditure as part of particular transactions. Would it then be an income tax? If “income” is understood simply as “an accession to wealth,” then the USA tax would not be an income tax because it would fall on consumption rather than revenue. One could say it would *in effect* tax all income above a subsistence level that is not saved or invested, because the same effect could be achieved within the present income tax structure by exempting ordinary savings and investments from adjusted gross income. But doing that would make the present income tax *in effect* a direct tax on consumption. So, the USA tax – taken as a purported income tax – would be irretrievably deficient as to form.

By process of elimination, then, it becomes apparent that the proposed USA tax would be some sort of direct tax on consumption. But what would it be in constitutional language? It would be a “capitation with respect to property” – to use Hamilton’s phrase. More exactly, it could be described as a tax levied on a person’s aggregate wealth above a defined subsistence level, excepting only that held in reserve (as savings) or employed as capital (investment), and measured by annual income. Such a tax is on wealth, and not really on consumption or expenditure, for at least two reasons: first, it taxes things like gifts of money as though they were

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<sup>229</sup> For discussion of the USA and Flat Tax proposals, see text accompanying notes 36-47 *supra*; for discussion of the Individual Mandate “penalty,” see text accompanying notes 48-66 *supra*.

## *Dispelling the Fog About Direct Taxation*

expenditures for consumption; and second, it pointedly exempts expenditures for capital acquisition, which is a primary form of wealth. Hence, the effect of the proposed shift from taxing income to taxing consumption seems to be to shift tax burdens away from the accumulation of wealth and onto the enjoyment of wealth; that is, shifting the brunt of taxation from very wealthy persons to moderately prosperous ones.<sup>230</sup>

Analyzing the Flat Tax proposal along the same lines is complicated by the way the tax is to be divided into a business and a wage portion. Lawrence Zelenak draws attention to the way combining both portions gives a tax base similar to that of a VAT,<sup>231</sup> but it's not clear how that presumptive similarity has any relevance for characterizing the separate taxes. Applying the criteria of indirect taxation to the business portion first, we can determine that the proposed tax (a) would be collected based on business profits (*less investments*), but the cost would be shifted to others, (b) those bearing the costs would *presumably* do so through their expenditures, and (c) the tax burden would be somewhat avoidable – that is, it could be mitigated – *if* the rates of taxation for different products varied significantly, while still being geographically uniform. So far, the business portion of the flat tax is looking a lot like an excise on value added, measured as profits. But there are serious problems here: the exclusion of investments from profits compromises the accuracy of the measure; avoidability has to be crafted into the tax, not being inherent;<sup>232</sup> and it seems possible that costs of taxation can and may be shifted on to employees in a covert way – by not passing *all* the profits realized on value added by labor on to the workers as wages. As an excise on business profits, then, a Flat Tax could be problematic; but if we try to justify it as an income tax, it fails as to form: it would be imposed as a tax on the aggregate value added by transactions, measured by profits; and that is not a “tax on income.”

Turning to the employee or wage portion of the Flat Tax proposal, even more problems get in the way of thinking of it as some kind of VAT, or excise tax. The tax collected from employee wages is not shiftable *by them* onto others – unless those others are their employers, who then shift the cost on to customers; but that is realistically not an immediate part of payroll transactions, for it presupposes that a protracted course of negotiated pay adjustments has been completed. The wage portion of the tax is not avoidable by employees who earn more than the subsistence level exemption, and it can not be mitigated without undertaking the significant hardship of changing jobs – and even that move is effective *only if* other

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<sup>230</sup> The rates of taxation would range from 19% to 40%. Zelenak, *supra* note 3, at 836. This seems a relatively narrow and low range, especially when investment expenditures are being excluded.

<sup>231</sup> *Id.* at 836-837.

<sup>232</sup> Without some significant degree of variation in tax rates among products subject to a universal Flat Tax, the tax no longer really falls on expenditures as such but on the fact of being in the market at all – something that every member of a society does to some degree simply because of the sheer fact of being in that society.

comparable jobs are taxed less. Having met none of the criteria for an indirect tax, does it then qualify as an income tax? It is collected from wages, and wages are routinely taxed as income to their recipients, so the tax burden falls on the revenue stream of employees in the form of a “tax on incomes.” But the wages are taxed as an aggregate being paid out, and are used to measure the value being added by labor to particular products. What is really being taxed is productivity, so the wage portion of the Flat Tax is not in substance or in effect an income tax.

Nor does comparison of the Flat Tax on wages to Social Security taxation clarify the character of the tax, despite Zelenak’s assertion that the existing unapportioned social security tax on wages is either “not a direct tax (following [a dictum in] *Pollock*), or it qualifies as an income tax under the 16<sup>th</sup> Amendment, or both.”<sup>233</sup> But as Erik Jensen has pointed out, the Supreme Court has never said Social Security taxes are excises, nor that they are income taxes – though the latter “... has generally been assumed to be the case.”<sup>234</sup> So the question seems to be still unsettled. But regardless of how Social Security taxes relate to the taxing power of Congress, the wage portion of a Flat Tax would not share a couple of essential features with Social Security taxes. That is, the flat wage tax would not be credited to individual employees as any sort of future entitlement, and it would not receive a matching contribution from the employer. The business portion of a Flat Tax would presumably have the same rate of taxation that wages do, but no part of the business payment is credited to the wage portion of the tax. So what would the wage tax be, standing on its own? In Constitutional language, it could be described as a capitation imposed on a set of persons with respect to their productivity as measured through wages above a specified subsistence threshold.

With all these problematical features, what is the point of the Flat Tax innovation? Zelenak contends that when a bifurcated flat tax is compared to a subtraction-method VAT, “the only substantive difference is the flat tax’s exemption for subsistence wages.”<sup>235</sup> Yet we have already seen that the exemption of investments from the profits used to measure the business portion’s tax liability is a very significant feature of the proposal; and one that arguably shifts the value added tax burden away from profits and onto wages.<sup>236</sup>

The third “tax innovation” to be analyzed is the Individual Healthcare Mandate and its penalty for non-compliance. Thanks to Erik Jensen’s detailed analysis (which is briefly discussed above in the Introduc-

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<sup>233</sup> *Id.* at 843-844.

<sup>234</sup> Jensen, *The Individual Mandate*, *supra* note 3, at 43.

<sup>235</sup> Zelenak, *supra* note 3, at 840. To his credit, Zelenak also points out that a standard VAT coupled with a subsistence level rebate to workers could have the same effect as a wage exemption, and would avoid all the troubles bifurcation brings with it.

<sup>236</sup> Zelenak, *supra* note 3, at 853. It is curious that the political sponsors of the Flat Tax are generally conservative; and of the USA tax, liberal. Yet both tax innovations favor capital formation at the expense of livelihoods.

## *Dispelling the Fog About Direct Taxation*

tion, § 2) it is possible to apply the various criteria in a fairly summary fashion. Assuming that the mandated payment is not a penalty that can be sustained under the Commerce Clause,<sup>237</sup> it must be either a direct or indirect tax. As for the latter, the payment is not shiftable in any way, it is not part of some other expenditure (being in fact levied on non-consumption) and it is avoidable only by means of an equal or greater expenditure on healthcare insurance. So the payment does not have the character of an indirect tax in either its form or its substance. But if it is therefore a direct tax, it must be an income tax if it is to escape apportionment; and yet there is no “accession to wealth” present to be taxed because of a failure to buy healthcare insurance.<sup>238</sup>

Then if the “penalty” is a tax, what kind of a tax *would* it be? It would be a capitation: that is, a tax on persons with respect to a lack of property in healthcare insurance – as Hamilton might put it. Another way of putting it might be to say that the “penalty” is a regulatory tax that functions by taxing everyone “by the head” according to a series of rates, excepting only those living below federal poverty level or who own healthcare insurance from designated providers and pay for a mandated level of coverage.<sup>239</sup> This kind of regulatory “tax” verges on being a penalty in the guise of a tax,<sup>240</sup> as well as a tax on sheer existence. But the alternative way of viewing it – as a capitation on lack of property – makes it out to be both counter-intuitive *and* subject to apportionment. So perhaps it would be best to just expunge it from the tax rolls altogether.

Writing with reference to the Individual Mandate penalty, Jensen says “...we ignore the meaning of “capitation” or “capitation tax” at our peril.”<sup>241</sup> What peril? Naturally enough, the immediate peril is that of misconstruing the Constitution both as to the form and substance of taxation. In principle, we thereby also run the peril of jeopardizing the rule of law it-

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<sup>237</sup> Reasons that it might not be sustained would include: (a) the penalty is not needed to protect the mandated healthcare program because (i) state public aid and the federal “insurer of last resort” would be at no greater risk from non-compliance than they are at present, and (ii) any additional “free rider” costs would have already been factored in by the certified insurers; and further, (b) there is no vital federal interest at stake in the relatively few interstate insurance claims that are currently being made, and are being routinely handled by insurers without need for any mandated penalty.

<sup>238</sup> Someone who is uninsured will “reap the benefits” of public aid only after their own wealth has demonstrably been exhausted; and even though someone who buys healthcare insurance only after a potentially ruinous medical problem has been diagnosed (thus taking advantage of federally mandated coverage for all pre-existing conditions) may escape financial ruin, the insurance payments are not new wealth for that person. The payments go directly to creditors, and come at a price, for the newly insured person still has to pay insurance rates that have already been increased to cover the costs of mandated coverage, and still has to pick up whatever costs the “bronze level” coverage does not cover.

<sup>239</sup> Jensen, *The Individual Mandate*, *supra* note 3, at 38.

<sup>240</sup> According to the criteria of *Bailey v. Drexel Furniture Co.*, 259 U.S. 20 (1922) that Jensen describes. *Id.* at 22.

<sup>241</sup> *Id.* at 30.

self. For law to rule, and not money or mob, the power that flows through society must respect and sustain both the form and substance of its laws. Otherwise, we are in peril because – to paraphrase Paul Tillich: power that is without the form of justice and the substance of love degenerates into a coercive force that destroys itself and the politics based on it.<sup>242</sup>

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<sup>242</sup> PAUL TILlich, LOVE, POWER, AND JUSTICE: ONTOLOGICAL ANALYSES AND ETHICAL APPLICATIONS 8 (1954).

A LOCKEAN ARGUMENT AGAINST THE  
DEATH PENALTY

Vernon Thomas Sarver, Jr.\*

ABSTRACT

*Initially, I provide a formal characterization of Locke's argument for the death penalty, observing that the language of his *Second Treatise on Civil Government* subtly allows for restraint in the use of capital punishment. This observation is then augmented by attention to specific themes in his treatise, which collectively weigh against his affirmative conclusion. After this, I introduce an argument against the death penalty, one drawn entirely from Lockean assumptions and new to the literature on capital punishment and social contract theory. This argument, I urge, better reflects the prevailing tenor of his treatise and appears to be on more secure footing within the general framework of his theory of the social contract. Finally, I follow my analyses with a discussion of the relevance this negative argument may have for two public policy issues that have garnered attention recently in the American debate over capital punishment. In a concluding note, I suggest this argument may have merit as a basis for a new strategy by appellants and supporting amici in capital cases on appeal to the United States Supreme Court.*

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## I. INTRODUCTION

On the question of a government's prerogative to employ capital punishment, John Locke hardly appears diffident in his *Second Treatise on Civil Government* (1690),<sup>1</sup> or at least not when attention is given to some of his more celebrated passages. In the opening chapter of his treatise, he famously *defines* political power as "a right of making laws *with penalties of death*."<sup>2</sup> In later chapters he elaborates on what this means: namely, that whenever an act of (sufficient) "heinousness" is committed,<sup>3</sup> the offender forfeits any right to live and so "may be destroyed as a lion or a tiger, one of those wild savage beasts, with whom men can have no society nor security."<sup>4</sup> Locke especially minces no words for the offense of murder, citing "that great law of nature, *Whoso sheddeth man's blood, by man shall his blood be shed*."<sup>5</sup> In light of these and other passages with similar content,<sup>6</sup> few would look to his *Second Treatise* for the underpinning of an argument *against* the death penalty. Yet, this *will* be my aim in what follows. After identifying several themes in Locke's treatise that allow for restraint with respect to any *actual* use of the death penalty, I will appeal to a widely neglected and seemingly unrelated aspect of his thought. Oddly enough, it will be *this* feature of his treatise that will supply the basis for the argument I will present.

First, though, I will provide a formal characterization of Locke's affirmative position, commenting briefly on the assumptions underlying *that* position. Even this familiar argument, I will suggest, employs language in a way that subtly allows for restraint in the use of capital punishment. This observation will be augmented by mention of other texts in which Locke allows that even the guilty may be spared. After this, my attention will turn to two additional, but complementary themes, one reflecting a concern for preservation of the innocent and the other, a wider emphasis on the sanctity of life for *all*. When taken together, I will urge, the collective weight of these themes diminishes the point and force of his affirmative stance on capital punishment and lends credence to the view that Locke's enthusiasm

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<sup>1</sup> John Locke, *Second Treatise on Government*, in SOCIAL CONTRACT (Ernest Barker, ed., New York, Oxford Univ. P. 1962) (1690) (hereinafter *ST*); citations of the *Second Treatise* will be followed by chapter and section number, and will also appear in the text of the two arguments I discuss in the paper.

<sup>2</sup> *Id.*, I.3 (emphasis added).

<sup>3</sup> *Id.*, VII.87.

<sup>4</sup> *Id.*, II.11; use of the term 'forfeiture' in the *Second Treatise* appears at IV.23, where Locke asserts that a man has "forfeit[ed] his own life by some act that deserves death," and at XV.172 and XVI. 181, where he applies the term to an unjust act of war.

<sup>5</sup> *Id.*, II.11; (quoting 9 *Genesis* : 6 (KJV)) (emphasis Locke's).

<sup>6</sup> *Id.*, XI.139, XVI.181.

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for the death penalty may be far more apparent than substantive and far more tempered than his rhetorical flourishes would suggest and some of his commentators have assumed.<sup>7</sup> Indeed, the extent of restraint he appears to exercise may *even* be compatible with the possibility that Locke himself would have been willing to consider, on its own merits, an argument against the death penalty,<sup>8</sup> and this, perhaps all the more so for one claiming to be sustained by some of his *own* assumptions.

After attending to these preliminary matters, I will then proceed with the negative argument. In this enterprise my claim will be that, while both Locke's affirmative argument and my negative one rely on assumptions advanced in the *Second Treatise*, the latter better reflects the prevailing tenor of this treatise and appears to be on more secure footing within the general framework of his theory of the social contract.

As a concluding afterthought to my analyses, I will examine the relevance this negative argument may have for two public policy issues in the United States that have garnered attention recently in the debate over capital punishment.

### II. LOCKE'S AFFIRMATIVE ARGUMENT

For comment and analysis, then, Locke's familiar argument *for* the death penalty in the *Second Treatise* may be given the following characterization:

- (i) Everyone in a state of nature bears a right to punish any transgression of the natural law (*ST*, II.7, 8);
- ii) An act of murder is a transgression of the natural law that is punishable by death (*ST*, II.11);
- (iii) Hence, when an act of murder is committed in a state of nature, anyone there may punish the transgressor with death (i, ii);
- (iv) When a civil society is formed pursuant to a social contract, everyone's individual right to punish is transferred to the authorities of that society (*ST*, VII.87);

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<sup>7</sup> See, e.g., David Brion Davis, *The Movement to Abolish Capital Punishment in America, 1787-1861*, 63 *AM. HIST. REV.* 23, 24 (1957): Davis finds in Locke "the persistence of belief in revenge as the basis for punishment" and an attempt by him "to preserve the ancient doctrine of 'blood for blood' within his theory of social compact ... ." Among recent writers in the philosophical tradition, however, a more highly nuanced and far tamer view of Locke on capital punishment emerges. See Brian Calvert, *Locke on Punishment and the Death Penalty*, 68 *PHILOSOPHY*, 211, (1993); A. John Simmons, *Locke on the Death Penalty*, 68 *PHILOSOPHY* 471, (1993).

<sup>8</sup> Calvert, *supra* note 7, at 225 (1993). Calvert explores the utilitarian aspect of Locke's thought and speculates that his "confidence in execution as a deterrent" might have "disappeared completely" were he exposed to "modern empirical studies" that suggest the death penalty has "no unique deterrent value".

(v) Accordingly, when an act of murder is committed in a civil society formed pursuant to a social contract, the transgressor may be punished with death but *only* by the authorities of that society (iii, iv).

To be sure, this argument invites more questions than it answers: (1) Are there any natural laws? (2) If there are, can one be found that *permits* use of the death penalty? (3) If one can be found, does Locke employ a *reliable* method for identifying that law? (4) If he does, has he identified a law that confers permission on *everyone* in a state of nature to punish transgressions of that law? (5) If he has, *may* the state of nature right so conferred be *transferred* to the authorities of a civil society pursuant to a social contract? (6) If it may be transferred, do contractors in a state of nature have the option of *excluding* use of the death penalty as a feature of their social contract? (7) If they do, are there good and sufficient reasons for *exercising* this option? In what immediately follows, I will respond to questions (1)-(5); later, I will address (6) and (7) in the wider context of my concluding analyses.

The premise at (i) begs the question of whether any natural laws exist, a topic widely debated in the philosophical literature of the twentieth century.<sup>9</sup> Just how Locke's system would fare in this discussion is a matter for speculation. Here, I only make the observation that he uncritically assumes in the *Second Treatise* that natural laws exist<sup>10</sup> and relies repeatedly on biblical texts for the purpose of singling them out.<sup>11</sup> Later, I will have more to

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<sup>9</sup> The skeptic's challenge has been famously posed by the Danish jurist, Alf Ross, who writes: "The ideology does not exist that cannot be defended by an appeal to the law of nature. And, indeed, how can it be otherwise, since the ultimate basis for every natural right lies in a private direct insight, an evident contemplation, an intuition?" Ross invites the conclusion he presses with a further question: "Cannot my intuition be just as good as yours?" ALF ROSS, ON LAW AND JUSTICE, 261, (1959). *But see*, e.g., Edward Walter, A Pragmatic Version of Natural Law 24 J. VALUE INQUIRY 213-25 (1990). Walter's analysis is typical of those who take refuge in intuitions by relying on *only* those for which a consensus of society can be demonstrated or plausibly claimed; in this vein he writes: "A natural law hypothesis can be justified by comparing it with the generally accepted moral and legal points of view of humankind" *Id.* at 224. Interestingly, among social contract theorists of the twentieth century, the way forward amid this controversy has been to replace overt appeals to the natural law with rational choice analyses of what self-interested contractors would accept in a hypothetical bargaining situation. On this, *see especially* JOHN RAWLS, A THEORY OF JUSTICE (1971) and DAVID GAUTHIER, MORALS BY AGREEMENT (1986).

<sup>10</sup> *See* Andrew J. Reck, *Natural Law in American Revolutionary Thought*, 30 THE REVIEW OF METAPHYSICS 686,692 (1977): "Although Locke in his *Second Treatise* invoked the law of nature, he did not explicate it philosophically; indeed, he explicitly refrained from going into its 'particulars' [a reference to II.12]." Reck explores a further question of whether Locke's other writings, notably, his *Essays on the Law of Nature* (c. 1660) and *Essay Concerning Human Understanding* (1690), can yield any support for his appeals to the natural law in the *Second Treatise* (*Id.* at 693-94) but reaches a negative conclusion; of interest, too, he even finds in the earlier work a denial by Locke that the natural law can be discovered by attending to "the laws and customs of various nations" (*Id.* at 694).

<sup>11</sup> *See* ST II.11; V. 25, 31, 38; VI.52, 65, 67; XVI.196.

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say about his use of scripture, though my remarks will be narrowly focused on his claim of a natural law permission to employ the death penalty.

Another feature of (i) is the claim that the natural law allows for the punishment of offenders in a state of nature by *everyone*. Even Locke himself acknowledges this to be a “strange” doctrine.<sup>12</sup> His defense of this idea turns on the assumption that individuals in a state of nature are *equally* endowed with whatever rights they may have; and so, if one person may rightfully punish another, then anyone may do so.<sup>13</sup> Of course, this hardly explains why anyone would have a right to punish in the first place.<sup>14</sup> However this may be, his notion of everyone's having a right to punish in a state of nature is an idea not without contemporary support in some quarters.<sup>15</sup>

Theoretical worries aside, what is perhaps most compelling about his doctrine has to do with *practical* difficulties arising from its implementation. These are difficulties that can be easily imagined and, on Locke's account, easily addressed. One person in a state of nature, say, Faultless Freddy, may be very good about taking pains to punish only the guilty, and even then, never in excess of what their offences merit; while another person, say, Reckless Rupert, is a loose cannon who is sure to punish some innocent people erroneously and some of those who are guilty excessively. Interestingly, the inevitability of this sort of happenstance plays into Locke's hands and provides him with a rationale for his version of the social contract, which he touts as the “proper remedy” for the “inconveniences” of a state of nature.<sup>16</sup> By “inconveniences”, of course, he has in mind errors and abuses that inevitably occur when people are “judges in their own case.”<sup>17</sup> Accordingly, in his version of the social contract people are motivated to transfer their individual rights to punish to the civil authorities, an action they take out of an expectation that fewer errors and abuses will transpire under this arrangement. A similar analysis of the state of nature and civil society will have a role to play in the negative argument I will introduce later.

The *only* defense of (ii) expressly advanced by Locke in the *Second Treatise* is that a specific passage of the Old Testament identifies a breach

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<sup>12</sup> *Id.*, II.9; for a discussion of this doctrine, see Wolfgang von Leyden, *Locke's Strange Doctrine of Punishment*, in JOHN LOCKE: SYMPOSIUM WOLFENBÜTTEL 1979, 113-27 (Reinhard Brandt ed., 1981).

<sup>13</sup> *ST*, II.7, 9.

<sup>14</sup> The nearest Locke comes to a defense of this right is a challenge he poses to doubters: “I desire them to resolve me, by what right any prince or state can put to death, or punish an alien, for any crime he commits in their country” (*Id.*, II.9).

<sup>15</sup> See ROBERT NOZICK, ANARCHY, STATE, AND UTOPIA, 137-142 (1974); Daniel M. Farrell, *Punishment Without the State*, 22 *NOÛS* 437, (1988); A. John Simmons, *Locke and the Right to Punish*, 20 *PHIL. & PUB.AFF.* 311-49, (1991).

<sup>16</sup> *ST*, II.13.

<sup>17</sup> *Id.*

of the natural law for which death is the appropriate punishment.<sup>18</sup> That breach is the offense of murder and the passage on which he relies is Genesis 9: 6, which I cited earlier from his treatise. But now, how is Locke to be defended against the charge that his reliance on this text is *arbitrary*? The only way I see of doing this would be to invoke some sort of exegetical principle on his behalf. Here, the most likely candidate would be something like this: "If p is cited in a biblical text as an act worthy of death, then p identifies a breach of the natural law sufficiently heinous to warrant the death penalty." To be sure, this principle assumes the authority of scripture, an assumption not without its own challenges, but one that may be allowed for the sake of the point I want to make. Since Locke himself provides no guidance at all about how heinous an act would have to be in order to be *sufficiently* heinous to warrant the death penalty, the principle I have imputed to him at least has the virtue of clarifying *that* point, i.e., heinous enough to merit scriptural sanction. But now, it will be quickly seen that, if this principle is applied to certain *other* Old Testament texts, rather peculiar and in fact morally counterintuitive consequences follow. For example, at Exodus 21:15 there is the pronouncement, "Whoso strikes his father or mother shall be put to death," and at 21:17, "Whoso curses his father or mother shall be put to death."<sup>19</sup> Also, at Exodus 22:18 there is the statement: "You shall not permit a sorceress to live," and at Leviticus 21:10, "If a man commits adultery with the wife of his neighbor, both the adulterer and the adulteress shall be put to death." Even though these texts identify death as the appropriate punishment in each case, still there is not any reason to think that Locke seriously intends that unruly children, "sorceresses," adulterers, and adulteresses should follow murderers to the gallows. In fact, he appears to block this possibility when he later states in his treatise that "lesser breaches of the law [than murder]" should be punished with such severity as to cause the offender "to repent."<sup>20</sup>

In the absence of any reason why Genesis 9: 6 should be singled out as revelatory of natural law on capital punishment, while the other texts I have mentioned may be safely ignored, even though they also specify acts sufficiently heinous to warrant "penalties of death" (or at least do so under the exegetical principle I have imputed to Locke), I am left with one of two

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<sup>18</sup> Interestingly, Locke's using the Bible for the purpose of singling out instances of the natural law is compatible with his also believing that natural laws are directly accessible to reason. On this, see JOHN LOCKE, *Of Faith and Reason, and their Distinct Provinces* in AN ESSAY CONCERNING HUMAN UNDERSTANDING vol. 2 412-57 (Alexander Campbell Fraser ed., New York, Dover Publications 1959) (1690). Yet, apart from appealing to his *own* intuitions, he does nothing here to *confirm* reason as a separate ground.

<sup>19</sup> My citations of the Old Testament are from THE NEW OXFORD ANNOTATED BIBLE (RSV) (Herbert G. May & Bruce M. Metzger eds., 1962); see also 19 *Exodus*: 12, 21: 16, 29; 20 *Leviticus*: 2-5, 11-16, 24: 16; 17 *Deuteronomy*: 2-5, 19: 18-19, 22: 25, all of which identify offenses other than murder that merit the death penalty. For a more comprehensive listing of capital offenses in the Old Testament, see GARDNER C. HANKS, CAPITAL PUNISHMENT AND THE BIBLE, 53-54 (2002).

<sup>20</sup> *ST*, II.12.

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conclusions, neither of which bodes well for his claim at (ii). Either (1) he embraces the highly peculiar and counterintuitive side effects of the exegetical principle I have imputed to him (which would allow unruly children and others to follow murderers to the gallows), and this, in opposition to what he himself alleges regarding “lesser breaches of the law”; or (2) he abandons his appeal to Genesis 9: 6, in which case he must seek some *other* ground for a natural law defense of capital punishment apropos of murder (which he fails to do).

The intermediate inference at (iii) follows from the premises at (i) and (ii) and is embellished by a further appeal to scripture. Here, Locke invokes the plight of Cain, who, after murdering his brother, laments: “*Every one that findeth me shall slay me.*”<sup>21</sup>

The premise at (iv) is perhaps Locke's most compelling assumption, though its *relevance* turns on the context supplied by (i) and (ii), both of which are open to challenge, as I have explained.

Locke's conclusion at (v) follows from (i)-(iv); however, as with his intermediate inference at (iii), the *soundness* of his argument as a whole rests largely on whatever credence can be assigned to (i) and (ii). In the next section, I will identify and discuss several countervailing themes in Locke's treatise that independently appear to weigh against his conclusion at (v).

### III. COUNTERVAILING THEMES IN THE *SECOND TREATISE*

The first of these themes is latently present in Locke's affirmative argument. This is reflected by the language of (iii), which conveys the idea that anyone in a state of nature *may* punish a murderer with death. That is to say, a permission is granted, but no duty imposed. This emphasis mirrors the passage cited earlier, in which Locke reduces a murderer to the status of a “lion or tiger,” but all the while asserts *only* that the offender “*may* be destroyed.” His tempered view with respect to any *actual* imposition of punishment is also evident in an entire chapter devoted to the prerogative of the civil authorities to impose a more lenient punishment than the law specifies or even none at all.<sup>22</sup> Here, perhaps Locke's most emphatic identification with this theme appears in his discussion of the “end of government,” where, in a passage with specific relevance for the death penalty, he asserts: “... even the guilty are to be spared where it can prove no prejudice to the innocent.”<sup>23</sup> This is very different from Immanuel Kant (1797), I might add, who a century later would write: “Even if a civil society were to dissolve itself by common agreement of all its members ... , the last

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<sup>21</sup> *ST*, II.11; Locke cites 4 *Genesis*: 14 (KJV) (emphasis his).

<sup>22</sup> *Id.*, XIV, “Of Prerogative.” For other accounts of Locke's restraint in his position on the death penalty, cf. Calvert, *supra* note 7 and Simmons, *supra* note 7.

<sup>23</sup> *ST*, XIV.159; *see also*, II.11.

murderer remaining in prison must first be executed ... .”<sup>24</sup> Locke's more cautious view regarding *actual* use of the death penalty bears comparison to a similar restraint exercised by the ancient Hebraic culture responsible for the *lex talionis*, “life for life, eye for eye, tooth for tooth,”<sup>25</sup> While the Israelites who shaped the Old Testament shared Locke's embrace of the death penalty in *principle*, they, too, introduced considerations that greatly hampered its use in *practice*.<sup>26</sup> Indeed, this gap between principle and practice can be found even today in the modern state of Israel, which has carried out a death sentence only once since becoming a nation in 1948.<sup>27</sup>

Another theme in Locke's *Second Treatise* affirms his steadfast commitment to *preservation of the innocent*. Indeed, the principal motivation for which his contractors enter civil society is to protect the innocent from harms wrongfully inflicted, including, to be sure, wrongful *punishment*. “When all cannot be preserved,” he writes, “the safety of the innocent is to be preferred,”<sup>28</sup> and in another context, the “end” of positive laws is “to protect and redress the innocent.”<sup>29</sup> Even Kant, who is far more aggressive in advocating punishment for the guilty, agrees with Locke that punishment of the factually innocent is unacceptable. Indeed, for Kant, punishment is to be imposed on a criminal “*only* on the ground that he has committed a crime.”<sup>30</sup> Interestingly, here factual culpability is a necessary and sufficient condition for the administration of punishment, while for Locke, it is only a necessary one. This is because, in addition to factual culpability, Locke insists that *any* punishment administered must serve one of two ends, either reparation or restraint, and then *only* to the extent required to achieve *that* end.<sup>31</sup>

A third theme, one that is inclusive of the first two, finds expression in Locke's broader appeal to the *sanctity of life*. His embrace of this theme is succinctly captured by his observation that “life ... if lost is capable of no reparation.”<sup>32</sup> Indeed, the sanctity of life is so basic for him that “as much as may be, *all* the members of society are to be preserved.”<sup>33</sup> When applied within a political context, this sentiment inspires the affirmation that government “has no other end ultimately than the good of its people,”<sup>34</sup> an

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<sup>24</sup> IMMANUEL KANT, *THE METAPHYSICAL ELEMENTS OF JUSTICE*, 102, (John Ladd, trans. 1965); for a critique of Kant's *own* arguments for the death penalty, see Vernon T. Sarver Jr., *Kant's Purported Social Contract and the Death Penalty*, 31 J. OF VALUE INQUIRY 455, 456 (1997).

<sup>25</sup> From 21 *Exodus*: 23-25 (RSV); cf. 24 *Leviticus*: 20; 19 *Deuteronomy*: 18-21.

<sup>26</sup> See J. K. Miklitzanski, *The Law of Retaliation and the Pentateuch*, JOURNAL OF BIBLICAL LITERATURE LXVI, 295, (1947).

<sup>27</sup> ENCYCLOPÆDIA BRITANNICA (2010) s.v. “Eichmann, Adolf.”

<sup>28</sup> *ST*, III.16.

<sup>29</sup> *Id.*, III.20.

<sup>30</sup> Kant, *supra* note 24, at 100 (emphasis added).

<sup>31</sup> *ST*, II.8.

<sup>32</sup> *Id.*, III.19.

<sup>33</sup> *Id.*, XIV.159 (emphasis added).

<sup>34</sup> *Id.*, XI.142.

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end that is inexorably linked to the law of self-preservation, which, for Locke, is “fundamental, sacred, and unalterable.”<sup>35</sup>

### IV. A NEGATIVE ARGUMENT FROM LOCKEAN ASSUMPTIONS

These countervailing emphases in the *Second Treatise* serve, not only in mitigation of Locke's affirmative argument, but also in support of a Lockean foundation for the negative one I will present. Perhaps the best way of introducing the latter is by means of a thought experiment in which a sequence of scenarios conveys the relevant content.

Imagine what happens in a Lockean state of nature when someone is *wrongfully* punished. For example, suppose that Reckless Rupert is missing two of his cows and leaps to the erroneous conclusion that they were stolen by Faultless Freddy. Acting on his mistaken belief, Rupert improperly invokes two Lockean rights, the right to punish a wrongdoer, to which I alluded earlier, and the right to obtain restitution for harms wrongly inflicted, upon which I will comment shortly. Acting pursuant to this invocation, he takes two actions: (1) he burns Freddy's barn down to punish him; and (2) he seizes two of Freddy's cows to obtain restitution for his loss. Neither action, of course, is warranted under the facts I have presented.

At this juncture, I pause to provide an explanation of the right to obtain restitution for harms wrongly inflicted as it appears in the *Second Treatise*. Of this right, Locke affirms: “... he who hath received any damage, has, besides the right of punishment common to him with other men, a particular right to seek reparation from him that has done it.”<sup>36</sup> This “particular right,” I might add, is one with a long and storied pedigree that claims Aristotle among its early expositors.<sup>37</sup>

Now, returning to the scenario, Freddy, who is factually innocent of any wrongdoing, has been both wrongfully punished and subjected to a wrongful seizure of his property; consequently, he may *himself* legitimately punish Rupert for his wrongful actions and also obtain from him restitution for his losses. All of this would appear rather straightforward in a Lockean state of nature. But now, consider another version of this scenario in which the facts remain the same, but the venue for the offense shifts from a state of nature to a civil society formed pursuant to a social contract. Here, a fundamental difference emerges in the status of the two rights under Locke's theory. The right to punish has been transferred by Freddy to the civil authorities as a feature of the social contract; so, now only *they* can punish Rupert. In contrast, however, the right to restitution for harms wrongly inflicted has been *retained* by Freddy in civil society and

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<sup>35</sup> *Id.*, XII.149.

<sup>36</sup> *Id.*, II.10.

<sup>37</sup> Aristotle, *Nicomachean Ethics* (350 BCE), Book V, in THE BASIC WORKS OF ARISTOTLE (Richard McKeon ed., 1941).

there remains available to him for exercise solely at his discretion. On this solitary point, Locke is unequivocal and resolute:

From these two distinct rights, the one of punishing the crime for restraint, and preventing the like offence, which right of punishment is in everybody; the other of taking reparation, which belongs only to the injured party, comes it pass that the magistrate, who by being the magistrate has the common right of punishing put into his hands, can often, where the public good demands not the execution of the law, remit the punishment of criminal offences by his own authority, but yet cannot remit the satisfaction due to any private man for the damage he has received. That is, he who has suffered the damage has a right to demand in his own name, and he alone can remit: the damnified person has this power of appropriating to himself the goods or service of the offender, by right of self-preservation ...<sup>38</sup>

Unlike the right to punish, which is alienated with the emergence of a civil society, the status of the right to obtain restitution is unchanged by a shift in venue. Indeed, this right so securely resides with the individual in Locke's system that whoever acts for the civil authorities (here, the magistrate) has no power to remit the offense; only the "damnified person" can do that. In the latter scenario, therefore, while Freddy must leave the matter of punishing Rupert to the civil authorities, he alone is empowered to seek restitution for the damages he has incurred.

Consider next two versions of a sequel to my initial scenario. The first of these transpires in a state of nature. Assume that Freddy, with the help of his neighbors, has managed to recover his two cows and has successfully bullied Rupert into rebuilding his barn. Suppose, too, that he has punished Rupert, say, by seizing three of his prized goats. These actions by Freddy would appear to be a proper exercise of his Lockean rights in a state of nature. Note, too, that with a second version, which again entails a shift in venue to a civil society, these rights could be similarly exercised, the relevant difference once again being that, while Freddy can *still* seek restitution in his own name for harms wrongfully inflicted (probably, before a magistrate), the business of punishing Rupert must be left to the civil authorities.

Now, consider a final scenario in which Freddy and Rupert appear once more, only to suffer wrongful deaths: the former, at the hands of a murderer; and the latter, as a victim of wrongful punishment by the authorities of a civil society. After Freddy's murder, assume that substantial and compelling evidence of the crime is collected, and all of it points to Rupert as the killer. No one is surprised, therefore, when Rupert is apprehended by the authorities and subjected to a judicial process that leads to his trial and conviction and culminates in his execution. All the while, though, suppose that he just happens to be *factually innocent* of the crime. Moreover, following his execution, new and exculpatory facts come to light, and he is belatedly exonerated of the murder.

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<sup>38</sup> ST, II.11.

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This final scenario evokes a troubling question: who may be rightfully punished for Rupert's death? Well, the only candidate would be the civil authorities, who alone have the right to punish *anyone*. Would they now have a permission, under Locke's theory, to punish *themselves* with death? Furthermore, since they have merely acted on behalf of a government formed pursuant to a Lockean social contract, would the government itself now have a permission to cease existing? While these questions reflect possibilities logically implied by Locke's account of punishment, they may be without any practical import. That is, perhaps it would be enough to reply, on behalf of Locke, that in the event of a wrongful execution, the civil authorities could simply remit their own punishment and, by so doing, preserve both themselves and the government, a prerogative they would surely exercise; and so, the strange questions I have posed would be rendered academic, if not moot.

But now, another question arises that may indeed have practical ramifications. In the aftermath of a wrongful execution, would not Locke's doctrine of forfeiture come *immediately* into play with implications for the civil authorities and, by extension, the government itself? More specifically, would not a wrongful execution be enough to satisfy his criterion of (sufficient) heinousness? After all, some may argue, what act could be *more* heinous than the wrongful killing of a factually innocent person by the authorities of a civil society whose positive laws have as their *end* "to protect and redress the innocent"?<sup>39</sup> These questions are more troubling than my earlier ones because, *simultaneously* with the act of imposing a wrongful execution, the civil authorities would be deprived, as a consequence of forfeiture, of any *opportunity* to remit their own punishment. Moreover, with the cessation of the government's right to exist and with it their right to punish, everyone in society would be returned to a state of nature and therein have a permission to destroy, as they would a lion or tiger, those who are responsible for Rupert's death.

Not surprisingly, of course, Locke does not directly address any of the questions I have posed; however, unlike other social contract theorists of the 17th and 18th centuries, he *does* provide for a right of rebellion in the event that the abuses of government become *excessive* in a substantial way;<sup>40</sup> moreover, under *this* right, the people themselves may rise up and oppose the government with lethal force, if necessary. As an historical aside, his criterion of substantial excessiveness explains why the signers of the American *Declaration of Independence*, under the influence of Locke's theory,<sup>41</sup> and in anticipation of continuing armed insurrection, authorized a

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<sup>39</sup> *ST*, III.20.

<sup>40</sup> *Id.*, XIX.225.

<sup>41</sup> See Reck, *supra* note 10, at 692 (observing: "Certainly Locke's principles and phrases pervade American revolutionary writings; their presence in the *Declaration of Independence* has subjected its author to the charge of plagiarism.") Thomas Jefferson's long list of complaints, e.g., is a transparent attempt by him to satisfy Locke's criterion of substantial

document the better part of which consists of nothing more than a litany of complaints with the British throne under George III.

Still, perhaps a way around Locke's right of rebellion can be found for my final scenario. That is, perhaps I could simply stipulate that the authorities of my hypothetical society have applied the judicial process in a manner that only very rarely leads to the execution of an innocent person, hardly enough to satisfy Locke's criterion of substantial excessiveness. To be sure, they have erred in Rupert's case, but *that* was an anomaly and, in any event, certainly not enough of an abuse to satisfy Locke's criterion and so trigger his right of rebellion. Yet, I suppose, one may legitimately inquire, how *many* wrongful executions on Locke's theory would be *enough* to trigger his right of rebellion. Two? Three? A score of them? Interestingly, for a common murderer among the people, whether in a state of nature or civil society, just *one* victim would suffice to generate a permission, based on the natural law, to impose the death penalty.

One way out of this thicket of troubling questions would be for Lockean contractors to *exclude* use of the death penalty as a negotiated feature of their social contract. This arises as a possibility because, as I explained earlier, his theory does not compel use of the death penalty; it merely recognizes a natural law permission to impose it.<sup>42</sup> In this way, any question of how many wrongful executions would be necessary to trigger his right of revolution need not arise. But now, troubling questions aside, are there *other* reasons for exercising this option under his theory? While I have touched upon some of these in my review of countervailing themes in the *Second Treatise*, it is to the Lockean right to seek and receive restitution for harms wrongly inflicted that I turn now to secure the underpinning for the negative argument I will present.

In my final scenario, observe that, *if* Rupert had been punished with life in prison *instead* of death, and further, *if* he had been subsequently exonerated and released from custody following the discovery of exculpatory facts, he *then* would have been *able* to appear before the civil authorities and “in his own name” demand and receive restitution for the harm inflicted on him by his wrongful imprisonment. Moreover, because the authorities *themselves* were culpable in this matter, and by extension, the government *itself*, and accordingly, both were arguably deserving of “self-punishment” under Locke's theory, he could then petition the authorities for an even *greater* award than that necessary to restore his losses. In contemporary parlance, he could seek a remedy from the government for *both* compensatory *and* punitive damages; and while the authorities could remit satisfaction of the latter, they could not do so for the former. Finally, observe that a remedy for compensatory damages suffered could be demand-

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excessiveness (*ST*, ch. XIX), which requires “a long train of abuses” (§125) before any thought is given to dissolution of government.

<sup>42</sup> Cf. Simmons, *supra* note 7, at 472: “... a Lockean state *without* the right to punish with death *could* be created by the explicit consent of its members (however uncommon this might be in actual political life).” (emphasis his).

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ed of the government for almost any punishment they had wrongfully imposed, that is, *except for the punishment of death*, and this, for the reason expressed so well by Locke himself, “life ... if lost is capable of no reparation.”<sup>43</sup> It is precisely this insight that secures the underpinning for a Lockean argument against the death penalty:

- (a) The end of government is to preserve the innocent from harm (*ST*, III.20);
- (b) A factually innocent person who is punished by anyone has been wrongly harmed (a);
- (c) Everyone in a civil society has a right to demand and receive restitution for harm wrongly inflicted by others (*ST*, II.11);
- (d) A factually innocent person, who has been punished by the civil authorities, has been wrongly harmed and so has a right to demand and receive restitution for the harm inflicted (b, c) ;
- (e) Upon discovery of exculpatory evidence, the civil authorities, who have punished a factually innocent person, must afford that person an opportunity to demand and receive from them restitution for the harm that they have wrongly inflicted (a, d);
- (f) Life, if lost, admits of no reparation (*ST*, III.19);
- (g) No factually innocent person, who is punished with death, can be afforded an opportunity to demand and receive restitution for the harm that has been wrongly inflicted (f);
- (h) Hence, the authorities of a civil society may not impose the penalty of death on a factually innocent person (d, g).

Under the impress of this argument, Lockean contractors would have need of only one additional assumption, namely, *any society they might authorize would incur some risk of error in the use of any form of punishment*,<sup>44</sup> to conclude that *only* those forms for which restitution would be *possible* in the event of wrongful imposition may be approved for use; the death penalty is *not* such a form; and so, a fortiori, this punishment may not be imposed on *anyone*.

As a parting afterthought to my analyses, I will briefly touch upon the relevance this negative argument may have for two public policy issues that have garnered attention of late in the American dialogue and debate over capital punishment. The first of these concerns a question of whether a

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<sup>43</sup> *ST*, III.19.

<sup>44</sup> See MICHAEL L. RADELET, HUGO ADAM BEDAU, & CONSTANCE E. PUTNAM, IN SPITE OF INNOCENCE: ERRONEOUS CONVICTIONS IN CAPITAL CASES ( 1992); Bruce P. Smith, *The History of Wrongful Execution*, 56 HASTINGS L. J., 1185 ( 2005); See also Ernest van den Haag, *The Ultimate Punishment: A Defense*, 99 HARV. L. REV. 1662, (1986). Even van den Haag, for decades the most recognized proponent of the death penalty in academia, concedes: “I do not doubt that, over a long enough period, miscarriages of justice will occur even in capital cases,” (van den Haag, at 1664).

government has an obligation to facilitate discovery of evidence that may exonerate a victim of wrongful punishment; and the second, of whether it has a duty to provide an exonerated victim with compensation for the harm that has been wrongly imposed.

## V. PUBLIC POLICY DEVELOPMENTS IN THE UNITED STATES

In the past few years, the Congress of the United States has taken an affirmative stand on both of these questions, largely in response to a rash of DNA exonerations,<sup>45</sup> amid other developments.<sup>46</sup> The centerpiece for this legislative activity has been the *Justice for All Act* of 2004.<sup>47</sup> Among its many provisions, this act authorizes post-conviction access to DNA testing for federal prisoners “under sentence of imprisonment or death” and increases compensation for those who have been exonerated (§§ 411 and 431). It also conveys a “Sense of Congress” that the states “should provide reasonable compensation to any person found to have been unjustly convicted of an offense against the State and sentenced to death” (§ 432). These developments constitute an admission by Congress of its responsibility to facilitate exoneration of the factually innocent and provide adequate compensation for victims of wrongful punishment.

Soon after its enactment, the Justice for All Act received an unexpected endorsement from the executive branch of government. In his 2005 State of the Union Address, President George W. Bush affirmed: “In America we must make doubly sure no person is held to account for a crime he or she did not commit, [and so] we are dramatically expanding the use of DNA evidence to prevent wrongful conviction.”<sup>48</sup>

These developments attest to the contemporary relevance of the Lockean argument I have presented. Both Congress and the former President have affirmed the responsibility of government to facilitate exoneration of the factually innocent, and Congress has recognized a legislative duty to provide adequate compensation to victims of wrongful punishment. Moreover, underlying both of these admissions is an implicit recognition of the possibility of error in the administration of punishment. All

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<sup>45</sup> See Samuel R. Gross, Kristen Jacoby, Daniel J. Matheson, Nicholas Montgomery, and Sujata Patil, *Exonerations in the United States 1989 through 2003*, 95 J. CRIM. L. & CRIMINOLOGY 523 (2005).

<sup>46</sup> Other developments included the emergence of “innocence projects” at several prominent American law schools, among them Duke University School of Law, Northwestern University School of Law, University of North Carolina School of Law, University of Washington School of Law, and University of Wisconsin School of Law (see Smith, *supra* note 44); and a gubernatorial moratorium on the death penalty in Illinois, (for a brief overview of then Governor George Ryan's decision and a discussion of related issues, see Penny J. White, *Errors and Ethics: Dilemmas in Death*, 29 HOFSTRA L. REV. 1265 (2001).

<sup>47</sup> Justice for All Act of 2004, Pub. L. No. 108-405, 118 Stat. 2260 (2004)

<sup>48</sup> State of the Union Address, N.Y. TIMES A1, A23 (2 Feb. 2005).

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three of these concessions entail assumptions integral to or implied by the argument I have advanced.

A final area of relevance concerns the activity of the federal judiciary. In *Herrera v. Collins* the United States Supreme Court reiterated the threshold that must be attained by appellants who seek refuge in the due process clause of the 5th and 14th amendments to the Constitution. In brief, the process of law under challenge must be so egregious that it “offends some principle of justice so rooted in the traditions and conscience of our people as to be ranked as fundamental.”<sup>49</sup> The history of this Court has been littered with many failed attempts by appellants under sentence of death to find and invoke successfully such a principle. Yet, with a heritage that reflects the conscience of the American people, and with a tradition that has secured for them the cornerstone of tort law, the right to compensation for harm wrongly inflicted may be “ranked as fundamental.” Of all the forms of punishment a government may impose, *only* the death penalty is violative per se of any opportunity to redress harm wrongly inflicted upon a factually innocent person.<sup>50</sup>

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<sup>49</sup> *Herrera v. Collins*, 506 U. S. 390, 407–08 (1993) (quoting *Paterson v. New York*, 432 U. S. 197, 20 (1977)).

<sup>50</sup> It might be interesting to see what credence, if any, would be given to the negative argument of this paper were it to be adapted for use by an appellant or amicus curiae in a capital case on appeal to the United States Supreme Court.



SEXUAL MISCONDUCT WITH CONGREGANTS OR  
PARISHIONERS: CRAFTING A MODEL STATUTE

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ABSTRACT

*Contemporary studies and the media focus on children as the victims of the sexual misconduct by clergy from various religions but such misconduct can be directed towards adult congregants or parishioners and frequently occurs when the relationship is one where consent might not easily be refused. Several state legislatures have attempted to craft statutes that provide civil remuneration for the victims or criminal punishments for the assailing clergy. However, the majority of these statutes have been deemed unconstitutional because they, in effect, require a court to interpret and redirect church policy. This article proposes a model statute that focuses upon the position and authority of the clergyperson and the consequent vulnerability or susceptibility of the alleged victim as the predicates for the sexual misconduct, and not on the fact that the actor is a member of the clergy, performing his or her clerical duties, or in any other manner forcing a court to interpret church policy or doctrine.*

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I. INTRODUCTION

There has been much media coverage in recent years focusing upon sexual misconduct of Roman Catholic priests with children and minors and the response of dioceses and the Vatican to pedophilia in the ranks of the priesthood.<sup>1</sup> The issue of sexual misconduct by clergypersons<sup>2</sup> with their congregants or parishioners, however, is not limited to any particular denomination or faith tradition. Moreover, this kind of mis-

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<sup>1</sup>See Karen Ann Ballotta, *Losing Its Soul: How the Cipolla Case Limits the Catholic Church's Ability to Discipline Sexually Abusive Priests*, 43 EMORY L.J. 1431, 1435-37 (1994) (regarding media coverage of the Catholic Church's lack of discipline of its priests who have sexually abused minor children). See also Lisa M. Smith, *Lifting the Veil of Secrecy: Mandatory Child Abuse Reporting Statutes May Encourage the Catholic Church to Report Priests Who Molest Children*, 18 LAW & PSYCHOL. REV. 409, 409-10 (1994); Janice D. Villers, *Clergy Malpractice Revisited: Liability for Sexual Misconduct in the Counseling Relationship*, 74 DENV. U. L. REV. 1, 16 n. 94 (1996).

<sup>2</sup>The term "clergyperson" will hereafter refer to all the principal leadership roles at the head of a congregation, synagogue or parish, e.g., ministers, rabbis, priests, imams, etc. Statutory definitions of "clergy" generally encompass these terms. See ARK. CODE ANN. § 9-11-802 (2008); CAL. PENAL CODE § 11165.7 (West Supp. 2008); COLO. REV. STAT. ANN. § 12-37.5-103 (West Supp. 2008); MICH. COMP. LAWS § 722.622 (LexisNexis 2005). The characterization of a person as a member of the clergy can itself be problematical because of the diversity of formal and functional roles within various faith traditions, ranging, e.g., in the Protestant tradition from clergy so designated by sanctioned ordination within a hierarchical structure to certain lay preachers who are self-appointed and not formally credentialed or ordained. As with all statutory materials, the interpretation of words depends on many factors, including legislative intent and history, definitional words, context, etc. The characterization of a person as a clergyperson can have an impact on assessing whether the counseling rendered by such a person may be characterized as secular in nature or as religious or spiritual in nature, or as having elements of each.

## *Sexual Misconduct with Congregants*

conduct extends beyond the abuse of children and minors and most faith communities also have had to deal with the issue of clergyperson sexual misconduct involving adults -- typically female adults -- who are congregants or parishioners. Such misconduct typically arises out of counseling relationships, but also may arise within the context of the clergyperson's non-counseling interactions with congregants or parishioners.<sup>3</sup>

According to recent studies, there is a growing problem across an array of faith traditions. Christianity, Judaism, Islam, Buddhism and Hinduism, as well as less prominent faith traditions, are affected by clergyperson sexual misconduct. To illustrate, one study of the Church of England has found that sixty-seven percent of clergypersons responding have known a colleague who has engaged in sexual misconduct with a congregant.<sup>4</sup> Another study has indicated that seventy percent of Southern Baptist ministers have known of other ministers who have engaged in sexual misconduct with a congregant.<sup>5</sup> American rabbis have been dismissed<sup>6</sup> and Buddhist religious leaders have faced allegations of this kind of impropriety.<sup>7</sup>

No faith tradition or denomination can finesse away the obligation to deal effectively with sexual misconduct on the part of its clergy. Such misconduct undermines the fundamental basis of the relationship between clergypersons and those who look to them for guidance and instruction on matters of faith and morality. As the interpreters of spiritual knowledge and the guardians of a transcendent tradition, clergypersons occupy a distinctive role, but despite the growing revelation of the problem and increased exposure in the media, it appears that most clergyperson sexual misconduct is not prosecuted.<sup>8</sup> Many explanations can be pos-

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<sup>3</sup>See Eduardo Cruz, *When the Shepherd Preys on the Flock: Clergy Sexual Exploitation and the Search for Solutions*, 19 FLA. ST. U. L. REV. 499, 502 (1991); Villiers, *supra* note 1, at 1-2.

<sup>4</sup>See Thaddeus Birchard, *Clergy Sexual Misconduct: Frequency and Causation*, 15 SEXUAL & RELATIONSHIP THERAPY 127, 135 (2000). See also Emily C. Short, *Torts: Praying for the Parish or Preying on the Parish? Clergy Sexual Misconduct and the Tort of Clergy Malpractice*, 57 OKLA. L. REV. 183, 184 (2004).

<sup>5</sup>Gayle White, *Sexual Misconduct: Keeping Vigil: How Various Faiths Protect the Innocent in Their Flocks*, ATLANTA J. & CONST., Sept. 14, 2002, at B1. See also Short, *supra* note 4, at 185 (2004).

<sup>6</sup>James T. O'Reilly & Joann M. Strasser, *Clergy Sexual Misconduct: Confronting the Difficult Constitutional and Institutional Liability Issues*, 7 ST. THOMAS L. REV. 31, 43 (1994). See also Short, *supra* note 4, at 185-86 (2004).

<sup>7</sup>See Short, *supra* note 4, at 185-86.

<sup>8</sup>There are many reasons why most sexual misconduct by clergypersons is not prosecuted. Prosecutions may not come to fruition on account of the unwillingness of a victim to advance a prosecution against the victim's priest, pastor, etc. See MARIE M. FORTUNE, REPORTING CHILD ABUSE: AN ETHICAL MANDATE FOR MINISTRY, IN ABUSE AND RELIGION: WHEN PRAYING ISN'T ENOUGH (1998) confirming that often, due to the patriarchal nature of some churches, women's accusations of sexual abuse or misconduct are often discounted. Also, as noted in this article, relatively few jurisdictions' penal codes specifically provide for criminal sanction in the case of a clergyperson engaged in counseling, seemingly the most common

ited as to why this might be so. Most states, to be sure, do not have penal statutes that *specifically* criminalize sexual misconduct by clergypersons. Only thirteen states and the District of Columbia have penal statutes that, in at least some circumstances, support the criminal prosecution of clergypersons engaged in sexual misconduct with congregants or parishioners. These statutes, enacted by Arkansas, Connecticut, Delaware, Iowa, Kansas, Minnesota, Mississippi, New Mexico, North Dakota, Texas, South Dakota, Utah, Wisconsin and the District of Columbia<sup>9</sup> turn on various linguistic formulations, including most commonly, the specification that the misconduct occur within the confines of a counseling relationship. Only a handful of state penal statutes, to be discussed, address clergyperson sexual misconduct *outside* of the context of a counseling relationship.<sup>10</sup>

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venue giving rise to clergyperson sexual misconduct. This is not to suggest that a clergyperson cannot arguably be said to be implicitly included within the definition of, e.g., a “mental health professional” or the like, assuming statutory language or rules of construction do not preclude such an inclusion. Such terminology is used in many penal statutes dealing with sexual misconduct in the counseling relationship. See Jeffery A. Barker, *Professional – Client Sex: Is Criminal Liability an Appropriate Means of Enforcing Professional Responsibility?*, 40 UCLA L. REV. 1275, 1317 n. 165 (1993) and Catherine S. Leffler, Note, *Sexual Conduct Within the Physician-Patient Relationship: A Statutory Framework for Disciplining this Breach of Fiduciary Duty*, 1 WIDENER L. SYMP. J. 501, 507 (1996). The reasons also include statutes of limitations, an important factor bearing upon the prosecution of clergyperson abuse given the embarrassment that the victim may experience, as well as the congregational criticism and disdain that may follow an accusation against a clergyperson that may lead the victim to conceal the alleged wrong for a lengthy period until other accusations are ultimately made by other alleged victims. See e.g., MINN. STAT. ANN. § 541.073 (West 2002), stating “[a]n action for damages based on personal injury caused by sexual abuse must be commenced within six years of the time the plaintiff knew or had reason to know that the injury was caused by the sexual abuse.”

<sup>9</sup>See Patricia J. Falk, *Rape and Fraud by Coercion*, 64 BROOK L. REV. 39, 99-101 (1998). Each of the thirteen jurisdictions noted explicitly name clergypersons as falling within the ambit of the psychotherapy or counseling professionals encompassed by the statute. See, for example, Minn. Stat. ANN. § 148A.01 (West 2005), S.D. CODIFIED LAWS § 22-22-27 (2006), CONN. GEN. STAT. ANN. § 19A-600 (West Supp. 2008), UTAH CODE ANN. § 76-5-406 (2008), WIS. STAT. ANN. § 940.22 (West 2005).

<sup>10</sup>See, for example, the following statutes refer to a perpetrator having a “position of authority” over the victim. ARK. CODE ANN. § 5-14-126 (Supp. 2007); TEX. PENAL CODE ANN. § 22.001 (Vernon Supp. 2008); ARK. CODE ANN. § 5-14-126 (Supp. 2007); N.M. STAT. ANN. § 30-9-10 (West Supp. 2008); N.M. STAT. ANN. § 30-9-12(A) (West 2003); ALASKA STAT. § 11.41.434-440 (2006); CAL PENAL CODE § 261 (West 2008); CONN. GEN. STAT. ANN. § 53a-71 (West 2007); Kansas, H.R. 2100, 2009 Leg. (Kan. 2009). A bill introduced into the Kansas House of Representatives, H.R. 2100, 2009 Leg. Sess. (Kan. 2009), would criminalize instances in which “the offender is a member of the clergy and is engaging in consensual sexual intercourse, lewd fondling or touching ... acting as a member of the clergy carrying out the clergy member’s pastoral duties.” See also the following statutes that criminalize a sexual perpetrator but do not specifically incorporate the phrase “position of authority” or like non-counseling specific language into the statute. ALASKA STAT. § 08.86.204 (2008); ARIZ. REV. STAT. ANN. § 13-1418 (Supp. 2008); FLA. STAT. ANN. § 491.0112 (West 2001);

## II. THE PRINCIPAL BASES OF LIABILITY FOR SEXUAL MISCONDUCT WITH ADULTS

This article does not focus upon the familiar instances of clergy-person sexual misconduct involving children or minors. The fundamental obligation of trust and care owed by an adult to a young person and the innocence and vulnerability of the underage and immature is well understood and accepted. The sexual abuse of children is uniformly criminalized<sup>11</sup> and its frequency is well documented.<sup>12</sup> There is no special religiously-based constitutional free exercise prerogative that is recognized to enable a perpetrator to counter penal law sanctions against sexual misconduct involving children and minors.<sup>13</sup>

### A. CIVIL LIABILITY IN RESPECT OF ADULT CONGREGANTS AND PARISHIONERS

#### i. General Principles

Absent application of the constitutionally based entanglement doctrine,<sup>14</sup> the civil liability of clergypersons for sexual misconduct, even if facially consensual, with adult congregants or parishioners in the context of counseling relationships (in which they are typically referred to as “clients”) is sometimes couched as “clergy malpractice.” The action is one for professional malpractice seeking to hold a counselor liable for a

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COLO. REV. STAT. ANN. § 18-3-405.5 (West 2004); S.D. CODIFIED LAWS § 22-22-28 (2006); S.D. CODIFIED LAWS § 22-22-27 (2006); IOWA CODE ANN. § 709.15 (West Supp. 2008); N.D. CENT. CODE § 12.1-20-06.1 (2005); WIS. STAT. ANN § 940.22 (West 2005); WIS. STAT. ANN. § 895.441 (West 2008).

<sup>11</sup>See *L.M. v. Karlson*, 646 N.W.2d 537, 543 (Minn. Ct. App. 2002) (reasoning that sexual abuse of children is a paramount concern because the children are so young, vulnerable, easily manipulated, and cannot communicate well). Civil liability for sexual misconduct with children generally lies in the tort law of assault and battery. See *Worcester Ins. Co. v. Fells Acres Day Sch., Inc.*, 558 N.E.2d 958, 963-64 (Mass. 1990); *Silveira v. Snatos*, 490 A.2d 969 (R.I. 1985).

<sup>12</sup> *People v. Burnidge*, 279 Ill. App. 3d 127 (Ct. App. 1996); see also *Kos v. State*, 15 S.W.3d 633 (Tex. App.—Dallas 2000, pet. ref’d).

<sup>13</sup>See *Roman Catholic Diocese of Jackson v. Morrison*, 905 So.2d 1213, 1230 (Miss. 2005) (stating the Establishment Clause of the First Amendment did not deprive a state court of jurisdiction regarding a suit against a Catholic diocese stemming from accusations of child sexual abuse. Further, a prosecution of such claims does not excessively entangle a court in ecclesiastical matters. The matter of the “entanglement doctrine” is discussed further herein).

<sup>14</sup>See discussion, *infra* note 22; JOHN E. NOWAK & RONALD D. ROTUNDA, CONSTITUTIONAL LAW (7th ed., 2004). See also *Ayon v. Gourley*, 47 F. Supp. 2d 1246, 1249-50 (D. Colo. 1998), aff’d on other grounds, 185 F.3d 873 (10th Cir. 1999); *Lemon v. Kurtzman*, 403 U.S. 602, 615 (1971).

breach of duty under the applicable secular standard of care for clergy<sup>15</sup> or for breach of the fiduciary obligation owed by the counselor to a client.<sup>16</sup> The factors that characterize a fiduciary relationship -- trust, reliance, emotional intimacy and vulnerability -- that may arise between a counselor and a client, including the phenomena of transference and counter-transference,<sup>17</sup> are such that liability is imposed even if the sexual contact is facially consensual and imposed without regard to the wrongdoer incidentally occupying the role of a clergyperson.

Liability, then, generally turns upon the following factors: i) the existence of a concept of duty owed by the counselor to a client to provide a prescribed standard of care, and a determination that the duty has

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<sup>15</sup> Some cases have held the standard of care for clergy is that a clergyperson should exercise the level of care and diligence that a reasonable clergyperson of a particular sect would exercise, given the specific education and training offered or required by that sect. *See Fortin v. Roman Catholic Bishop of Portland*, 871 A.2d. 1208, 1220 (Me.2005).

<sup>16</sup>*See* Ira C. Lupu & Robert W. Tuttle, *Sexual Misconduct and Ecclesiastical Immunity*, 2004 BYU L. REV. 1789, 1824 (2004). This article states “a fiduciary is a person having a duty, created by his undertaking, to act primarily for the benefit of another in matters connected with the undertaking. A fiduciary has a duty to deal ‘with utmost good faith and solely for the benefit’ of the beneficiary. A fiduciary’s obligations to the beneficiary include, among other things, a duty of loyalty, a duty to exercise reasonable care and skill, and a duty to deal impartially with beneficiaries.” A person standing in a fiduciary relationship with another is subject to liability to the other for harm resulting from a breach of the duty imposed by the relationship.

<sup>17</sup>*See* *Webb v. W. Va. Bd. of Med.*, 569 S.E.2d 225, 238 (W. Va. 2002) (stating that in a psychotherapist/counselor-patient relationship, “dependence arises, and may even be encouraged in many cases, from the psychiatrist-patient relationship - no matter how brief or supportive the relationship lasts. Such dependence results in extreme vulnerability on the part of the patient.”). *See also* *State v. Dutton*, No. C8-89-680, 1989 WL 77391, at \*4 (Minn. Ct. App. 1989) (stating “the legislature has clearly set forth its intent that patients and former patients are to be protected from sexual encounters with their counselors or therapists. Further, “the unique psychotherapist-patient relationship gives rise to an emotional vulnerability irrespective of age, intelligence or education.”). *See also* *St. Paul Fire & Marine Ins. Co. v. Love*, 459 N.W.2d 698 (Minn. 1990) (explaining the phenomena of transference as “the process whereby the patient displaces on to the therapist feelings, attitudes and attributes which properly belong to a significant attachment figure of the past, usually a parent, and responds to the therapist accordingly. Transference is common in psychotherapy. The patient, required to reveal her innermost feelings and thoughts to the therapist, develops an intense, intimate relationship with her therapist and often ‘falls in love’ with him. The therapist must reject the patient’s erotic overtures and explain to the patient the true origin of her feelings. A further phenomenon that may occur is counter-transference, when the therapist transfers his own problems to the patient. When a therapist finds that he is becoming personally involved with the patient, he must discontinue treatment and refer the patient to another therapist.”). *See also* S. WALDRON-SKINNER, A DICTIONARY OF PSYCHOTHERAPY (1986); Thomas L. Shaffer, *Undue Influence, Confidential Relationship, and the Psychology of Transference*, 45 NOTRE DAME L. REV. 197 (1970) and C.G. JUNG & R.F.C. HULL, THE PSYCHOLOGY OF TRANSFERENCE (1969).

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been breached; or ii) the existence of a fiduciary relationship<sup>18</sup> between the counselor and a client which calls for the fiduciary (the counselor) to fully subordinate his or her interests to the interests of the client.

### ii. The Entanglement Doctrine

When the counseling has a religious or spiritual dimension, the constitutional doctrine of “entanglement” can disable the courts from adjudicating civil liability under the noted theories unless the secular nature of the clergy relationship with the congregant or parishioner can be defined with reasonable sharpness, which is possible given the right facts in litigation.<sup>19</sup> Most often it is difficult, if not impossible, to untwine the secular aspects of counseling by a clergyperson from any religious or spiritual components of the same interaction. Only when a clergyperson functions as a counselor in a secular practice setting such that his or her religious identity and expression become both inconsequential and dormant does the counselor differentiate his or her identity as a secular therapist from his or her identity as a member of the clergy, thereby setting aside entanglement doctrine issues.

Under the Establishment Clause of the First Amendment of the United States Constitution and its judicial interpretations, any legal principle or statute that includes a “sect preference” is constitutionally infirm.<sup>20</sup> To determine whether such a legal principle or statute violates the Establish-

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<sup>18</sup>*In re Phillips*, 867 N.Y.S.2d 20 (N.Y. App. Div. 2008) (stating that a fiduciary “is held to something stricter than the morals of the market place. Not honesty alone, but the punctilio of an honor the most sensitive, is then the standard of behavior. There has developed in respect of this a tradition that is unbending and inveterate. Uncompromising rigidity has been the attitude of courts of equity when petitioned to undermine the rule of undivided loyalty by the ‘disintegrating erosion’ of particular exceptions, only thus has the level of conduct for fiduciaries been kept at a level higher than that trodden by the crowd.”); *See also Moses v. Diocese of Colo.*, 863 P.2d 310, 321 n.13 (Colo. 1993) (stating that a breach of fiduciary duty claim is actionable against a member of the clergy for a violation occurring during secular counseling).

<sup>19</sup>*People v. Bautista*, 77 Cal. Rptr. 2d 824 (Ct. App. 2008) stating “a standard of care and its breach ... [cannot] be established without judicial determinations as to the training, skill, and standards applicable to members of the clergy in a wide array of religions holding different beliefs and practices.” This court expressed concern that applying uniform standards could restrict the free exercise of religion and “result in the establishment of judicially accepted religions.” *See also Westbrook v. Penley*, 231 S.W.3d 389, 396 (Tex. 2007) (noting “when a pastor who holds a professional counseling license and engages in marital counseling with a parishioner, the line between the secular and the religious may be difficult to draw.”); *But see F.G. v. MacDonell*, 696 A.2d 697, 702 (N.J. 1997), *aff’d* 683 A.2d 1159 (N.J. 1996) (stating that courts can resolve claims that arise from an alleged violation of a fiduciary duty, that involve inappropriate sexual conduct by clergy, and that arise purely from secular counseling or conduct and are not defended upon a basis of sincerely held religious belief or practice.).

<sup>20</sup> U.S. CONST. amend. I. *See also* JOHN E. NOWAK & RONALD D. ROTUNDA, CONSTITUTIONAL LAW (7<sup>th</sup> ed., 2004).

ment Clause, courts consider the “*Lemon* test.”<sup>21</sup> This test requires that: (1) the law in question has a secular purpose; (2) the law must not have the primary effect of either advancing or inhibiting religion; and (3) the law must not result in an excessive entanglement between government and religion.<sup>22</sup> If a law fails on any of these three requirements, it is constitutionally invalidated. To be sure, the components of the *Lemon* test are linked and cannot be viewed in isolation.<sup>23</sup> The United States Supreme Court has looked particularly at the *effect* of a statute to determine whether it creates an excessive entanglement between government and religion.<sup>24</sup> In examining the effect the Court considers the character and purpose of the institution benefited or inhibited.<sup>25</sup> The Court also scrutinizes the resulting relationship between the government and religious authority.<sup>26</sup>

Notwithstanding the holistic nature of the approach taken in considering the individual prongs of the *Lemon* test, the third prong of the test -- regarding whether the law creates excessive entanglement between government and religion -- is the component that principally governs whether a court will enjoy judicial competency to adjudicate civil liability under the previously described theories regarding clergyperson sexual misconduct in the counseling context or any other context involving a congregant or parishioner. This follows from the fact that the imposition of civil liability for sexual misconduct with a client by a mental health therapist, including a clergyperson engaged in counseling as a therapist, has a clear secular purpose of penalizing the misappropriation of a professional mental health counseling relationship for sexual gratification, and the primary effect of imposing liability is to protect the integrity of such counseling relationships and not to advance or inhibit religion.

In considering the applicability of the third prong of *Lemon*, if the adjudication of civil liability by a court is accomplished pursuant to a theory that calls for the court to become, as a governmental entity, excessively entangled with the interpretation or specification of religious practice, standards or custom, the court is constitutionally disabled from going forward to adjudicate liability on the merits. In other words, if the issue is whether the religiously or spiritually based counseling aspects of the relationship between the clergyperson and the congregant or parishioner were a factor in the negation of the victim’s ability to effectively consent, then the court is constitutionally impaired from examining or predicating liability upon such religious or spiritual components of the relationship.

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<sup>21</sup>*Lemon v. Kurtzman*, 403 U.S. 602, 615 (1971).

<sup>22</sup>*Id.* at 612-13; *See also* JOHN E. NOWAK & RONALD D. ROTUNDA, CONSTITUTIONAL LAW (7<sup>th</sup> ed., 2004).

<sup>23</sup>*Lemon*, 403 U.S. at 612-13.

<sup>24</sup>*Agostini v. Felton*, 521 U.S. 203, 233 (1997), *rev’g* 519 U.S. 1093 (1997).

<sup>25</sup>*Waltz v. Tax Comm’n of City of N.Y.*, 397 U.S. 664, 674 (1970).

<sup>26</sup>*Lemon*, 403 U.S. 602.

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To illustrate the doctrine's application in respect of civil theories of liability, one court has held that the "First Amendment bars claims of negligent hiring, negligent supervision, and outrageous conduct ... [against an archdiocese] because such claims require inquiry into church policy and doctrine."<sup>27</sup> Such a requirement of inquiry, and the consequent possible direction of church policy and doctrine by the court, are deemed to be an excessive entanglement between a court as a governmental entity and a church as a religious institution.<sup>28</sup> So likewise, a court also has held that the First Amendment bars breach of fiduciary duty claims against pastors due to excessive entanglement of the courts in religion if required to articulate a generalized standard of care for clergymen.<sup>29</sup>

Accordingly, there is a problematic constitutional dimension involved in recognizing claims of clergy malpractice in the context of counseling relationships with a congregant or a parishioner, whether the action is premised upon a theory of breach of duty of care (as measured by a reasonable standard of care) or upon a theory of breach of a fiduciary duty. The adjudication of such claims would require courts to articulate or interpret church policy and doctrine, and then further to intervene in the inner workings of religious institutions.<sup>30</sup> Duty of care claims call for a

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<sup>27</sup>*Ayon v. Gourley*, 47 F. Supp. 2d 1246, 1249-50 (D. Colo. 1998), *aff'd on other grounds*, 185 F.3d 873 (10<sup>th</sup> Cir. 1999). Negligent hiring, negligent supervision and the tort of outrageous conduct are other theories, aside from the actions for breach of the duty of care (invoking a reasonable standard of care) or breach of fiduciary obligation that are advanced in clergyperson sexual misconduct cases in counseling contexts.

<sup>28</sup>*Id.*

<sup>29</sup>*Schmidt v. Bishop*, 779 F. Supp. 321, 326 (S.D.N.Y. 1991).

<sup>30</sup>*Nally v. Grace Cmty. Church*, 763 P.2d 948 (Cal. 1988). This is a seminal case regarding clergy malpractice, rejecting a claim for clergy malpractice based upon an entanglement analysis. See also Janice D. Villiers, *Clergy Malpractice Revisited: Liability for Sexual Misconduct in the Counseling Relationship*, 74 DENV. U. L. REV. 1 (1996); *Richelle v. Roman Catholic Archbishop*, 130 Cal. Rptr.2d 601, 608 (Cal. Ct. App. 2003) (holding an action for clergy malpractice cannot be reconciled with the First Amendment because a standard of care and its breach could not be established without judicial determinations as to the training, skill, and standards applicable to members of the clergy in a wide array of religions holding different beliefs and practices. Even if a reasonable standard could be devised, which is questionable, it could not be uniformly applied without restricting the free exercise rights of religious organizations which could not comply without compromising the doctrines of their faith); and *Handley v. Richards*, 518 So.2d 682 (Ala. 1987) (one of many cases to reject clergy malpractice). *But see* for the opposing, albeit minority, view *Odenthal v. Minn. Conference of Seventh-Day Adventist*, 649 N.W.2d 426, 437 (Minn. 2002) (holding "adjudication of negligence claim brought against member of clergy by church member, based on neutral standards of conduct set forth in statutes governing conduct of unlicensed mental health practitioner, for alleged improprieties in counseling member's wife, did not require excessive entanglement with religion, so as to violate the First Amendment."); *Doe v. Evans*, 814 So.2d 370, 376 (Fla. 2002) (holding that the Establishment Clause did not bar parishioner's breach of a fiduciary duty claim against pastor and church based upon alleged sexual misconduct during marriage counseling between parishioner and pastor, where imposition of liability based upon a breach of fiduciary duty had a secular purpose and the primary effect

determination of whether the alleged wrongdoer breached the duty to afford the victim the “reasonable standard of care” within the given profession, e.g., the reasonable standard of care for a secular therapist, or for an obstetrician, or for a certified public accountant. Because such an action against a clergyperson calls for a determination of a reasonable standard of care for a clergyperson rendering religious or spiritual guidance within a given religious tradition, the courts have generally declined to recognize such an action because of constitutional implications of the court applying civil law standards of reasonable care to counseling rendered within a spiritual venue.<sup>31</sup>

Other courts have likewise declined relief in cases in which a claimant premised clergy liability for religious or spiritual counseling upon the concept of breach of a fiduciary obligation owed by a clergyperson to a congregant or parishioner. In *Langford*,<sup>32</sup> the court, while denying relief

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of imposing liability neither advanced nor inhibited religion, and resolution of the dispute did not depend on an extensive inquiry by civil courts into religious law and polity or interpretation and resolution of religious doctrine.”); *Olson v. First Church of Nazarene*, 661 N.W.2d 254, 261-62 (Minn. Ct. App. 2003) (stating the Establishment Clause does not preclude the exercise of subject-matter jurisdiction when making a determination of an allegation which occurred during a counseling session which was secular in nature); *Malicki v. Doe*, 814 So.2d 347, 354 (Fla. 2002) (in dealing with a physical tort, as opposed to a determination of a standard of care or as opposed to assessing the nature of breach of fiduciary duty, holding “the First Amendment does not preclude a secular court from imposing liability against a church for harm caused to an adult and a child parishioner arising from the alleged sexual assault or battery by one of its clergy.”); and *Sanders v. Casa View Baptist Church*, 134 F.3d 331, 336-37 (5<sup>th</sup> Cir. 1998), *aff’d*, 898 F. Supp 1169 (N.D. Tex. 1995) (upholding a “finding of breach of fiduciary duty against minister for sexual relations in the counseling setting, as he held himself out to possess qualifications of professional marital counselor,” and stating “the constitutional guarantee of religious freedom cannot be construed to protect secular beliefs and behavior, even when they comprise part of an otherwise religious relationship between a minister and a member of his or her congregation. To hold otherwise would impermissibly place a religious leader in a preferred position in our society.”).

<sup>31</sup>See *Roman Catholic Diocese of Jackson v. Morrison*, 905 So.2d 1213, 1254 (Miss. 2005) (holding “any effort by this Court to instruct the trial jury as to the duty of care which a clergyman should exercise, would of necessity require the Court or jury to define and express the standard of care to be followed by other reasonable Presbyterian clergy of the community. This in turn would require the Court and the jury to consider the fundamental perspective and approach to counseling inherent in the beliefs and practices of that denomination. This is as unconstitutional as it is impossible. It fosters excessive entanglement with religion.”). See also *Richelle L. v. Roman Catholic Archbishop*, 106 Cal. App.4<sup>th</sup> 257, 273-74 (Cal. Ct. App. 2003); *H.R.B. v. J.L.G.*, 913 S.W.2d 92, 98 (Mo. Ct. App. 1995) (holding “defining the scope of fiduciary duty owed persons by their clergy would require courts to define and express the standard of care followed by reasonable clergy of the particular faith involved, which in turn “would require the Court and the jury to consider the fundamental perspective and approach to counseling inherent in the beliefs and practices of that denomination. Such an approach would offend the First Amendment, the court concluded, because it would foster ‘excessive entanglement’ with religion.”).

<sup>32</sup>See *Langford v. Roman Catholic Diocese of Brooklyn*, 677 N.Y.S.2d 436, 899-900 (N.Y. Sup. Ct. 1998, *aff’d* 705 N.Y.S.2d 661 (N.Y. App. Div. 2000) (holding “a cause of action to

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on a breach of fiduciary theory, noted the following requirements for establishing a fiduciary relationship and the breach of duty that arises from such a relationship within a specific religious setting: the vulnerability of one party to the other which results in the empowerment of the stronger party by the weaker, where that empowerment has been solicited or accepted by the stronger party, and prevents the weaker party from effectively protecting itself.<sup>33</sup> These cases involve the problematical analysis of whether the parties are in a fiduciary relationship, a fact sensitive inquiry that calls for an assessment of the perceptions of the clergyperson or the congregant or parishioner (or both) of the character of the counseling relationship and that may involve the court in constitutionally impermissible prescriptions of the character of a religiously based counseling relationship.<sup>34</sup> Even if a fiduciary relationship is assumed, the standard of fi-

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recover damages for breach of fiduciary duty arising out of sexual relationship between a parishioner and a member of the clergy properly dismissed as it would require courts to venture into forbidden ecclesiastical terrain.”).

<sup>33</sup>See *Moses v. Diocese of Colo.*, 863 P.2d 310,322 (Colo. 1993) (stating a “claim for breach of fiduciary duty ... involves a party who used his superior position as a counselor, a bishop, and a final arbiter of problems with the clergy to the detriment of a vulnerable, dependent party.”). See also Eileen A. Scallen, *Promises Broken vs. Promises Betrayed: Metaphor, Analogy, and the New Fiduciary Principle*, 1993 U. ILL. L. REV. 897, 922 (1993).

<sup>34</sup>*Lowery v. Cook*, No. 20061086-CA, 2007 WL 772782, at \*1 (Utah Ct. App. Mar. 15, 2007)(mem. op.) (stating “a claim for breach of fiduciary duty in an ecclesiastical setting is, in essence, a claim for clergy malpractice or would otherwise require excessive entanglement with religion, the claim is barred”). See *Ayon v. Gourley*, 47 F. Supp. 2d 1246 (D. Colo. 1998) (holding that “a negligent hiring claim asserted against a Roman Catholic archdiocese by a plaintiff who was allegedly sexually abused by a priest was precluded, as requiring excessive entanglement with, and inquiry into, church policy and doctrine, in violation of the Free Exercise and Establishment clauses of the First Amendment. The court stated that the choice of individuals to serve as ministers is one of the most fundamental rights belonging to a religious institution and is one of the most important exercises of a church’s freedom from government control. For the court to insert itself into the process by which priests are chosen would substantially burden the defendants’ free exercise of a crucial power to control the future of the church and therefore constitute interference with the practice of their religion, the court determined. Also, the court said, it would cause excessive entanglement in church operations by fostering inappropriate government involvement, since the application of even general tort law principles to church procedures on the choice of priests would require an inquiry into present practices with an intent to pass on their reasonableness”). *But see Doe v. Evans*, 814 So.2d 370 (Fla. 2002) (holding that “claims for negligent hiring and supervision and breach of fiduciary duty against a religious institution based upon alleged sexual misconduct by one of its clergy with a parishioner in the course of an established marital counseling relationship” are not completely barred by the First Amendment, and are possible theories of liability. This court further held “we hold that the First Amendment does not provide a shield behind which a church may avoid liability for harm caused to a third party arising from the alleged sexual misconduct by one of its clergy members during the course of an established marital counseling relationship”). See also *Malicki v. Doe*, 814 So.2d 347, 365 (Fla. 2002) (holding that the “First Amendment cannot be used at initial pleading stage to bar claims founded on a religious institution’s alleged negligence in failing to prevent harm from sexual assault on a minor or adult parishioner by one of its clergy.”).

duciary care within a religious setting must be prescribed. Hence, in like manner to the difficulty of assessing a proper standard of care for counseling for clergy in a religious setting, the court will become impermissibly called upon to define the standard for breach of the fiduciary duty.

Accordingly, the imposition of civil liability on clergy, whether the theory is breach of the duty of care or breach of fiduciary duty, inevitably calls for judicial determination of religious and spiritual issues that lie, at least for most courts, beyond the competency of the court.<sup>35</sup> Hence, if a clergyperson acting in his capacity as such and not as a secular counselor has sexual contact with a congregant or parishioner, by the estimation of most courts, any proposed basis for *civil* liability will be precluded by reason of the application of an entanglement analysis.

B. CRIMINAL LIABILITY FOR SEXUAL CONTACT WITH  
CONGREGANTS OR PARISHIONERS

i. Unquestioned Bases of Liability

a. *Children and minors*

As earlier noted, state penal laws uniformly criminalize sexual contact<sup>36</sup> with children.<sup>37</sup> Because of the minor's incapacity to consent (es-

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<sup>35</sup> To be sure, such judicial inquiry may come into play in cases involving tort liability of religious organizations in cases in which the tortious behavior of the wrongdoer involves a child or another person deemed incapable of consent. As noted in this article, the state interest clearly outweighs the free exercise claims of the wrongdoer, and it likewise will outweigh the interests of the religious origination in asserting any jurisdictional impediments. See Cheryl B. Preston: *An Itty-Bitty Immunity and Its Consequences for the Church of Jesus Christ of Latter-Day Saints*, 2004 BYU L. REV. 1945, 1950-52 (2004) (depicting an analysis of theories of primary or derivative institutional civil liability). See also *Bear Valley Church of Christ v. DeBose*, 928 P.2d 1315 (Colo. 1996) (holding "priest inappropriately touched child during counseling" ... and the "First Amendment provides no shield to Church or priest from tort liability."); See also *Rosado v. Bridgeport Roman Catholic Diocesan Corp.*, 716 A.2d 967 (Conn. Super. Ct. 1998) (holding "church defendants not entitled to First Amendment protection for claim of negligent supervision regarding plaintiff's allegations that that priest sexually abused them as minors.").

<sup>36</sup> Note that "contact" as defined in the penal provisions generally specifically provides that the contact is for sexual arousal, gratification or abuse, etc. See COLO. REV. STAT. ANN. § 18-3-401 (West 2004); MICH. COM. LAWS SERV. § 750.520(a) (LexisNexis Supp. 2008); OHIO REV. CODE ANN. § 2907.01 (LexisNexis 2006).

<sup>37</sup> There are other defined classes or persons who, as with minors, are deemed to have no capacity to consent, such as the mentally disabled, an unconscious person or an intoxicated person. See N.Y. PENAL LAW § 130.00 (Consol. 2000 & Supp. 2008) ("Mentally disabled means a person suffers from a mental disease or defect which renders him or her incapable of appraising the nature of his or her conduct."); See also R.I. GEN. LAWS § 11-37-1 (2002) ("Physically helpless means a person who is unconscious, asleep, or for any reason is physically unable to communicate unwillingness to an act. Mentally incapacitated means a person who is rendered temporarily incapable of appraising or controlling his or her conduct due to the influence of a narcotic, anesthetic, or other substance administered to that person without

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pecially considering such factors as trust, reliance, emotional intimacy and vulnerability), the nature of the relationship between the perpetrator and the child victim is of no consequence in establishing criminal liability, except in cases in which the perpetrator's relationship to the minor is otherwise used to identify certain classes of perpetrators for the purposes of differential punishment.<sup>38</sup> Accordingly, the societal interest in safeguarding the welfare of children supersedes any claim that might be advanced by a clergy person, as perverse as it may be, that the clergy's constitutional religious exercise prerogatives extend to sexual relations with children.<sup>39</sup>

### *b. Persons incapable of giving effective consent*

In the same broad policy vein, aside from the cases involving the incapability of a child giving valid consent to a sexual act, all states likewise deem mentally disabled, unconscious or intoxicated persons incapable of rendering a valid consent, and all states criminalize various forms of sexual contact, including intentional intimate contact without the effective consent of the victim,<sup>40</sup> coerced or induced contact,<sup>41</sup> and sexual contact accomplished by fraud.<sup>42</sup> Also, even some consensual forms of sexual conduct are criminalized for public policy reasons, including incest and bigamy.<sup>43</sup>

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his or her consent, or who is mentally unable to communicate unwillingness to engage in the act.”)

<sup>38</sup> Some penal statutes regarding sexual conduct identify specific perpetrators, such as coaches, juvenile authorities, etc. for the purpose of differential punishment. *See* CONN. GEN. STAT. ANN. § 53a-71 (West 2007); ALASKA STAT. § 11.41.434-440 (2008). These statutes typically refer to such actors as being in a “position of authority” enabling them, by virtue of the trust, reliance, emotional intimacy and vulnerability involved in the character of the relationships, to potentially exercise undue influence over children or minors with whom they have unusually close association. This consideration of the effect of a “position of authority,” albeit in a different context, will play a part in this discussion regarding clergy person sexual misconduct outside of any counseling relationship with a congregant or parishioner.

<sup>39</sup> The following cases which involved minors have drawn much public and media attention. *See* *State v. Gauthe*, 731 So.2d 273 (La. 1998); *Schultz v. Roman Catholic Archdiocese of Newark*, 472 A.2d 531 (N.J. 1983); *See also* Thomas P. Doyle & Stephen C. Rubino, *Catholic Clergy Sexual Abuse Meets the Civil Law*, 31 *FORDHAM URB. L.J.* 549 (2004).

<sup>40</sup> As noted, some state statutes render specific individuals as incapable of consenting to certain actions due to mental disorder or developmental or physical disability. *See* Cal. Penal Code §§ 261, 288a, (West 2008); ARIZ. REV. STAT. ANN. § 13-1401 (2001).

<sup>41</sup> Tex. Penal Code Ann. § 22.011 (Vernon Supp. 2008).

<sup>42</sup> N.H. Rev. Stat. Ann. § 632-A:2 (2008).

<sup>43</sup> *See* the discussion below regarding *Lawrence v. Texas* and the constitutional status of penal statutes criminalizing sodomy.

*c. Clergypersons rendering secular based counseling to congregants or parishioners*

Consistent with the theory of imposing civil liability upon a therapist (or clergyperson) in a secular counseling context, and in acknowledgment of the elements of trust, confidence and emotional vulnerability that characterize a counseling relationship, nearly all state penal statute schemes, aside from applicable civil liability theories, also explicitly criminalize sexual acts or contacts between those who render secular counseling and their clientele.<sup>44</sup>

In the criminal context, the query in the case of a clergyperson having sexual contact with a congregant or parishioner is whether the characteristics of such a relationship that is recognized as dealing with a conclusively assumed vulnerable population – children and minors – can also characterize a clergyperson’s relationship with some adult congregants or parishioners, given appropriate circumstances surrounding the emotional content of the relationship.

The providers of secular counseling services are most typically referred to in the penal statutes as “psychotherapists,” “psychologists” or “medical professionals.” The statutes also may include language describing other providers (including clergypersons) of mental health services that fall well beyond the ambit of what is regarded as classical psychology, which has a fairly constrained definition.<sup>45</sup> Indeed, in the context of the criminal law, apart from the prosecutor’s usual burden to establish the elements of the criminalized act, i.e., the nature of the relationship, the sexual act or contact, etc., the statutory language challenge is to accurately specify in a penal statute all the types of practitioners who render secular counseling, given that the meaning of “psychotherapy” extends well

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<sup>44</sup> See Patricia J. Falk, *Rape and Fraud by Coercion*, 64 *BROOK L. REV.* 39, 99-101. Numerous penal statutes specifically include clergy in their definition of counselors. See e.g., IOWA CODE ANN. § 709.15 (West Supp. 2008); N.D. CENT. CODE § 12.1-20-06.1 (2005); S.D. CODIFIED LAWS §22-22-27 (2006); TEX. PENAL CODE ANN. § 22.011 (Vernon Supp. 2008); WIS. STAT. ANN § 940.22 (West 2005); WIS. STAT. ANN. § 895.441 (West 2008); ARK CODE ANN. § 5-14-126 (Supp. 2007); N.M. STAT. ANN. § 30-9-10 (West Supp. 2008); Kansas, H.R. 2100, 2009 Leg. (Kan. 2009).

<sup>45</sup> TEX. PENAL CODE ANN. § 22.011 (Vernon Supp. 2008). This Texas statute defines a “mental health services provider” as a “(F) psychologist offering psychological services as defined by Section 501.003, Occupations Code.” (Section 501.003 states “(b) A person is engaged in the practice of psychology within the meaning of this chapter if the person: (1) represents the person to the public by a title or description of services that includes the word ‘psychological,’ ‘psychologist,’ or ‘psychology’; (2) provides or offers to provide psychological services to individuals, groups, organizations, or the public; (3) is a psychologist or psychological associate employed as described by Section 501.004(a)(1) who offers or provides psychological services, other than lecture services, to the public for consideration separate from the salary that person receives for performing the person’s regular duties; or (4) is employed as a psychologist or psychological associate by an organization that sells psychological services, other than lecture services, to the public for consideration.”

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beyond the ambit of traditional practice by psychiatrists and psychologists.<sup>46</sup>

Given, however, that a clergyperson is charged and the relationship can be characterized as a secular-based counseling relationship, the application of the penal laws criminalizing sexual contact by a clergyperson does not appear to invoke the entanglement doctrine, which (unlike with civil liability actions) does not preclude enforcement of the public interest as expressed through the penal laws, irrespective of any asserted religious practice or motivation, because there is no need for inquiry into any standard of care or obligation of a fiduciary duty. As in the case of sexual assault of a minor, public policy alone will categorize the behavior as penal.

### ii. Less well established bases of liability

Sexual contact between legitimately consenting adults (in the absence of factors such as fraud, bigamy or incest) is not generally criminalized.<sup>47</sup> Hence, to criminalize a sexual contact relationship between a member of the clergy and a congregant or parishioner (again, most such cases involve an alleged victim who is an adult female), it would appear, as already discussed, that such behavior must rest upon a determination that, in like circumstances, outside the religious context in which the adults involved occupy the roles of clergy and congregant or parishioner, the sexual contact between the adults would also be criminalized, as in

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<sup>46</sup> American Psychiatric Association: Legal Sanctions for Mental Health Professional-Patient Sex Resource Document:

<http://www.psych.org/Departments/EDU/Library/APAOfficialDocumentsandRelated/ResourceDocuments/199302.aspx> (giving a definition of a “mental health professional,” stating “there are many arguments in favor of including a broad range of mental health professionals within the ambit of the criminal statute . . . . Patients may not be aware of the discipline of their treating clinician; furthermore, they deserve protection from professional misconduct, regardless of the discipline of the offender. It is undesirable to characterize mental health professionals as “psychotherapists” or to confine a criminal statute to those practicing psychotherapy, as opposed to somatic treatments. It is not necessary to rely on transference and other psychological mechanisms to explain the special vulnerability of patients. While these concepts offer a valuable way of understanding and describing certain instances of sexual misconduct, the justification for criminal sanctions does not rest upon any particular theory of psychotherapy or the mode of practice of the mental health professional. The justification for criminalization is found in the high frequency of patients who are harmed as a consequence, and the morally repugnant nature of the exploitative behavior.”).

<sup>47</sup> Formerly, however, in many jurisdictions, there was recognized tort liability for a form of sexually linked behavior characterized most frequently as “alienation of affection.” See *Destefano v. Grabrian*, 763 P.2d 275, 279-80 (Colo. 1988) (Defining alienation of affection as an injury that consists of “loss of affection and consortium, including loss of society, companionship and aid. The action required on the part of a defendant in such a case is simply inducing the spouse of the plaintiff to leave, or, once having left, to remain separated from the plaintiff. The action necessarily involves intent to induce the spouse to separate.” Such separation results in “loss of society, loss of services, pain, suffering and humiliation.”).

the case of a clergyperson rendering what is, in setting and contact, a solely secular form of therapy.<sup>48</sup>

Given this, and in the absence of a theory of penal liability that does not turn on a counseling relationship, if sexual contact between a clergyperson and a congregant or parishioner unfolds in a relationship in which no counseling of any sort occurs, or counseling is restricted solely to unadorned, purely theological advice (e.g., “this is an approach that you may want to consider in interpreting Scripture”) or religiously related guidance (e.g., “this sort of choral anthem may be appropriate for the season of the Epiphany”) without engaging the factors or traversing the limit that would extend the relationship to the level that encompasses an amalgam of relational factors that characterize a counseling relationship - trust, reliance, emotional intimacy and vulnerability, or the phenomenon of transference -- criminal liability for the sexual contact does not arise. Moreover, when the counseling of a congregant or parishioner is mixed in character (both secular and religious), but the inducement to sex arises solely from spiritual, religious or theological advice or guidance; the en-

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<sup>48</sup>What about the circumstance in which the nature of the counseling is mixed – both secular and faith-based elements are found? As noted, it is difficult to untwine the secular from the religious or spiritually based components of counseling, however, the discussion of faith-based counseling herein and the recognized bases of civil and criminal liability arising from each assumes that the character of the counseling can be so described in whole or in part as with faith-based or secular. The concurrency and convergence of secular and faith-based values, morals and ethical thought is well recognized. Nonetheless, case law and experience in the interpretation of penal statutes dealing with spiritual and religious counseling appears to find such categorization to be accessible to a fact finder. *Sanders v. Casa View Baptist Church*, 134 F.3d 331, 334 (5<sup>th</sup> Cir. 1998), *aff'g* 898 F. Supp. 1169 (N.D. Tex. 1995) (stating “members of the clergy enjoy no constitutional protection for misconduct as professional marriage counselors simply because they may occasionally discuss scripture within the context of that relationship,” and also noting “the First Amendment does not categorically insulate religious relationships from judicial scrutiny because to do so would impermissibly extend constitutional protection to the secular components of these relationships and place religious leaders in a preferred position in our society”); *Westbrook v. Penley*, 231 S.W.3d 389, 403 (Tex. 2007), *rev'g*, 146 S.W.3d 220 (Tex.App.—Fort Worth 2004) (reasoning that to successfully prove a court’s handling of an alleged sexual misconduct by a clergy-person results in excessive entanglement, one must show the alleged misconduct was rooted in religious behavior). In a penal law setting, the entanglement doctrine appears to be engaged only if the accused clergyperson makes religious or spiritual artifacts such a part of the counseling that such artifacts are the inducement to sex with the congregant or parishioner; i.e., the counseling is not solely secular, but neither is its religious dimension restricted to unadorned, purely theological advice or religiously related guidance. To the extent that a court must determine whether such religious or spiritual artifacts in fact induced the victim and negated consent, it would appear that the court would be required to identify, characterize and determine the causal connection of the act to that which is religious or spiritual in nature. *Ehrens v. Lutheran Church-Mo. Synod.*, 269 F. Supp. 2d 328, 328-29 (S.D.N.Y. 2003) (mem. op.; entanglement case).

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tanglement doctrine may be invoked as a constitutional impediment to prosecution.

But is there a theory of abuse of positional authority that can premise criminal liability not on the secular counseling characteristics of the underlying relationship, but instead upon the reality of unequal positional power and influence between the parties and linked with the emotional fragility or vulnerability of the victim? Such a penal statute offers the possibility of reaching clergysexual misconduct with a congregant or parishioner beyond the secular counseling relationship. When the clergysexual does not use a secular counseling relationship as a conduit to sex, or when counseling is restricted solely to unadorned, purely theological advice (not relevant to any sexual relationship), there still ought be a means of reaching a sexually offending clergysexual. Specifically, a member of the clergy who, by virtue of occupying a position of authority -- as perceived by the congregant or parishioner -- and by virtue of such a position having knowledge or notice of the emotional dependence or vulnerability of an adult congregant or parishioner, can take advantage of the position of authority and engage in sexual acts or contacts with the congregant or parishioner. A theory of abuse of positional authority would provide a viable basis for the imposition of criminal liability in such a circumstance by drawing upon positional authority and its characteristics to negate facial consent. Moreover, the theory, by eschewing focus upon any religious or faith based aspects of the relationship, does not invite application of the constitutional impediment of the entanglement doctrine.

Further, the impropriety of clergysexual contact in such circumstances arises not from a breach of professional duty of the clergysexual qua psychotherapist or counselor, and not from the duties of a clergysexual as a legitimate spiritual advisor, but rather from a misuse of the clergysexual's peculiar position of authority in a realm in which the guise of spiritual favor and discernment is employed to prey upon the emotionally vulnerable who are susceptible to inappropriate sexual manipulation. This basis of criminal liability for sexual contact is akin to the state statutory provisions (such as fraud, or in the case of children, their legal incapacity to consent) that criminalize sexual contact by negating what appears to be the consent given to sexual contact. The phrase "position of authority" is used in certain current penal statutes to describe, usually in reference to those accused of sexual misconduct with a child or minor, a group of persons who are regarded as being in a position that calls for greater culpability, e.g., a grouping such as "teacher, coach, or juvenile authority."<sup>49</sup>

The theory of positional authority as a trigger for criminalization of sexual contact of a congregant or parishioner by a clergysexual appears viable, with the U.S. Supreme Court case of *Lawrence v. Texas* ren-

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<sup>49</sup>See ALASKA STAT. §§ 11.41.434-440 (2006); CAL PENAL CODE § 261 (West 2008); COLO. REV. STAT. § 18-3-401 (2008); CONN. GEN. STAT. ANN. § 53a-71 (West 2007).

dering support.<sup>50</sup> The Supreme Court held in *Lawrence* that a state may not generally criminalize sexual contact between consenting adults in the privacy of their home, given that such sexual conduct is a protected liberty right under the Due Process Clause of the Fourteenth Amendment. However, the Court implied that this general rule may not apply in cases where the consent is not legally effective, mentioning cases involving “minors,” “persons who might be injured or coerced,” or persons who are “situated in relationships where consent might not easily be refused.”<sup>51</sup> This latter phrase, people “situated in relationships where consent might not easily be refused” appears, relying upon a concept of positional authority, to open the door for legislation criminalizing sexual misconduct by clergy outside of a counseling relationship.<sup>52</sup>

### III. CRAFTING A MODEL STATUTE

Outside the counseling relationship, the criminalization of sexual contact then must rest on statutory language proscribing sexual contact where the victim is a person who is situated in relationships where consent might not easily be refused. The statute should focus upon the position and authority of the actor and the consequent vulnerability or sus-

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<sup>50</sup> *Lawrence v. Texas*, 539 U.S. 558, 578 (2003), *rev'g*, 537 U.S. 1044 (2002).

<sup>51</sup> *Id.* at 560.

<sup>52</sup> In *Lawrence v. Texas*, 539 U.S. 558 (2003), the Court took up this question: Does a state statute making it a crime for two persons of the same sex to engage in certain intimate sexual conduct violate the Constitution's Due Process Clause? The Court held no it did not, if specific criteria were met. In an earlier 1986 case, *Bowers v. Hardwick*, 478 U.S. 186 (1986), overruled by, *Lawrence v. Texas*, 539 U.S. 558 (2003), the Court held that there was no “fundamental right” to engage in same-sex sodomy. In *Lawrence*, the Court based its decision on a broad, encompassing rationale that went in a different direction. In deciding the case, the Court relied upon the broad Due Process Clause which extends not only to matters of procedure, but also to the protection of what the Court refers to “liberty” interests, which the Court has found innate in Due Process Clause and which formed the analytical framework for the recognition of the right to an abortion in *Roe v. Wade*, 410 U.S. 113 (1973). The following quote illustrates how Justice Anthony Kennedy, the author of the majority opinion in *Lawrence*, shifted the issue from a question of whether the right to engage in an act of sodomy is a fundamental right, the position rejected by the Court in *Bowers*, to a much broader question of whether the act is protected as a counterpart of a liberty interest to engage in a homosexual sexual relationship: “Liberty protects the person from unwarranted government intrusions into a dwelling or other private places ... Freedom extends beyond spatial bounds. Liberty presumes an autonomy of self that includes freedom of thought, belief, expression, and certain intimate conduct.” The case unquestionably turns on a constitutional privacy right when the sexual activity is *intimate* in character, occurs within the context of an *intimate* relationship, and takes place in a *private* location such as a dwelling. Justice Kennedy also emphasized some limits of his majority opinion: “The present case does not involve minors. *It does not involve persons who might be injured or coerced or who are situated in relationships where consent might not easily be refused.* It does involve public conduct or prostitution. It does not involve whether the government must give formal recognition to any relationship that homosexual persons seek to enter.

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ceptibility of the alleged victim as the predicates for the sexual misconduct.

The following phraseology appears to be appropriate for a model statute, based upon the foregoing discussion and the policy, case law and constitutional issues that attach to the criminalization of sexual misconduct by a clergyperson with a congregant or parishioner. This model statute language is not presented as an exclusive articulation; we recognize that there are other sources of law that may be invoked to reach such misconduct but consider that these typically are likely to be ineffective for various reasons.<sup>53</sup>

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<sup>53</sup> While it may appear that it would be possible to hold a clergyperson criminally accountable for assault or battery upon a congregant or parishioner, consent of a victim (by words or conduct, express or implied) is recognized in most jurisdictions as a defense to prosecution. The criminal assault and battery statutes and developed law do not (aside from instances of contact induced through fraud) address whether an actor can give consent to the contact, but yet have that consent negated by reason of the character of the relationship with the alleged perpetrator. Achieving this end is the purpose of the proposed statute that relies upon the character of the relationship, and the position of authority of the clergyperson, to impose criminal liability. Furthermore, criminal sanctions for criminal assault and battery are generally significantly less severe than are criminal sanctions for sexual assault. *See* TEX. PENAL CODE ANN. § 22.011 (Vernon Supp. 2008) (an offense under this section may be prosecuted as a Class C misdemeanor, or as a third degree felony); *But see* TEX. PENAL CODE ANN. § 22.011 (Vernon Supp. 2008) (an offense under this section may be prosecuted as either a first or second degree felony.); *See also* FLA. STAT. ANN. § 784.001 (West 2007) (a conviction of a simple assault in Florida carries the legal consequence of a second degree misdemeanor); *But see* FLA. STAT. ANN. § 794.001 (West 2007) (a conviction of a sexual battery in Florida may result in the legal penalty of a life felony or a capital felony); *See also* IND. CODE ANN. § 35-42-2-1 (West 2004) (a conviction of a battery in Indiana, without aggravating circumstances, results in a class B misdemeanor); *But see* IND. CODE ANN. § 35-42-4-8 (West 2004) (a conviction of a sexual battery in Indiana may result in either a class C or D felony); *See also* KY REV. STAT. ANN. § 508.030 (LexisNexis 2008) (a conviction of an assault in Kentucky may result in a class A misdemeanor); *But see* KY. REV. STAT. ANN. § 510.110 (LexisNexis 2008) (a conviction of sexual abuse (e.g., sexual assault) in Kentucky may result in a class D felony).

The federal Racketeer Influenced and Corrupt Organization (RICO) statutes, 18 U.S.C.A. §§ 1961-1968 (2000 & Supp. 2009), provide both criminal and civil remedies, but are ill-equipped to reach the sexual misconduct of a clergyperson in regard to a parishioner or congregant, given the elements of proof required, including proof of an “enterprise,” and predicate acts in a “pattern of racketeering activity.” *See, however, Miskovsky v. State*, 31 P.3d 1054, 1059 (Okla. Crim. App. 2001) for a state court RICO prosecution involving a distinctive set of facts bearing upon these statutory requirements.

The federal sexual harassment provisions, Title VII of the Civil Rights Act of 1964 and its corresponding regulations at 29 C.F.R. § 1604.11 (2008), are triggered by sexual misconduct, i.e., unwelcome sexual advances and harassing conduct of a sexual nature, but the act applies only to employers with 15 or more employees, is limited to the context of an employment relationship and focuses upon the aggrieved individual’s work performance and the work environment. Moreover, only civil sanctions are provided. *See Bollard v. Province of the Coc’y of Jesus*, 196 F.3d 940, 944 (9<sup>th</sup> Cir. 1999).

The federal Violence Against Women Act, 42 U.S.C.A. § 13981 (2005) was enacted by Congress in 1994 and created federal domestic violence crimes, including interstate travel to

*i A person commits an offense when ...*

The statute must reference to the jurisdiction's definition of sexual conduct that is subject to penal sanction. These provisions describing forms of sexual contact appear in a broad array of articulations and statutory structural schemes in the penal laws of the various jurisdictions. The operative provisions generally address: i) conduct involving the intentional, coerced or induced touching of intimate parts of the body of the victim by the perpetrator or by another person acting at the instance of the perpetrator; ii) the forced, coerced or induced touching of intimate parts of the body of the perpetrator or another person by the victim acting at the instance of the perpetrator; or iii) the forced, coerced or induced penetration of a bodily orifice (e.g., the vagina, the anus or the mouth), of the perpetrator, of another person, or of the complainant, by the perpetrator, by another person acting at the instance of the perpetrator, by the complainant, or by an object used by one of these parties. The penetration language is intended to encompass forced, coerced or induced acts of sexual intercourse, cunnilingus, fellatio, or anal intercourse, involving any intrusion, however slight, as well as other sexual conduct involving penetration by objects. The statutory language should typically address the nature of consent and related concepts such as force, coercion and inducement, mental impairment or incapacitation, physical helplessness, fraud, and other concepts bearing upon the character of consent, as well as many other concepts, including matters of age, relationship, and aggravating circumstances that bear upon the range of punishment for an act.<sup>54</sup> The language of a model statute addressing clergy person sexual misconduct will have to be adapted in any particular jurisdiction to the over-

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commit domestic violence, to violate a protective order, or to stalk). The VAWA also established programs, policies and practices aimed at comprehensively engaging federal resources to address domestic violence, sexual assault, date-related violence and stalking. The VAWA requires in certain provisions that a violent crime be committed in the course of the proscribed conduct, or that bodily harm accrue to the victim and hence is not of special use in regard to criminalizing sexual misconduct of a clergy person with a congregant or parishioner. A similar Iowa state law is prefaced upon the requirement that a felony be committed that constitutes a pattern or practice or scheme of conduct to engage in sexual conduct. In *Doe v. Hartz*, 134 F.3d 1339, 1342-43 (8<sup>th</sup> Cir. 1998), this provision was invoked, but only one act of sexual violence was alleged. Therefore, the court held that the accused priest could not be prosecuted for a felony under Iowa state law. Subsequently, the court held in this case VAWA did not apply. Some studies have suggested that when a pastor or other religious leader is having a sexual relationship with a congregant, he is usually having multiple sexual relationships with numerous congregants. See Janice D. Villiers, *Clergy Malpractice Revisited: Liability for Sexual Misconduct in the Counseling Relationship*, 74 DENV. U.L. REV. 1, 14 n.87 (1996).

<sup>54</sup>MINN. STAT. ANN. § 609.344 (West 2003), *invalidated by State v. Bussman*, 741 N.W.2d 79, 83 (Minn. 2007) (The Minnesota statute correctly addressed these concepts such as force, coercion and inducement, however the legislation failed when it required a government entity to interpret church policy to prevent such malevolent actions)

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all structure of the jurisdiction's statutory scheme addressing sexual crimes.

ii     *“Psychotherapist” or “mental health professional” includes ... minister, priest ... etc.*

For circumstances involving counseling, the statute should include clergypersons within the definition of “psychotherapist” or “mental health professional,” or any other terminology used to define the actor in the case of prohibited sexual conduct within the context of a counseling relationship.

iii     *A sexual offense is without consent if the actor is a member of the clergy, and in such capacity is in a position of trust or authority over the victim and uses this position of trust or authority to exploit the victim's emotional dependency on the member of the clergy to engage in [the statutorily defined conduct constituting the offense; see above] with the victim.*

This is the operative provision that extends criminal liability to circumstances outside of the counseling relationship when a clergyperson engages in sexual misconduct with a congregant or parishioner. As earlier noted<sup>55</sup>, only thirteen states and the District of Columbia have penal statutes that, in at least some circumstances, support the criminal prosecution of clergypersons engaged in sexual misconduct with congregants or parishioners. Of these jurisdictions, only two have language that is designed to criminalize such conduct by clergypersons outside of the counseling context.<sup>56</sup> Note that the provision suggested here includes the notation that the conduct is without consent. This characterizes the conduct as without consent even if the conduct appears facially to be consensual. The sexual conduct of clergypersons with congregants or parishioners that is criminalized by this language is deemed to be without consent by virtue of the relationship of the parties and the circumstances in which the sexual conduct occurs, as is the case with mental impairment or incapacitation, the physically helpless, etc.

Such language is used in an Arkansas statute which provides that a person commits a sex crime if the person is a “member of the clergy and is in a position of trust or authority over the victim and uses the position of trust or authority to engage in sexual intercourse or deviate sexual activity (defined terms).”<sup>57</sup> The statute contemplates a clergyperson taking advantage of another person's (presumably a congregant or parishioner) emotional deference and parlaying that deference into a sexual encounter.

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<sup>55</sup> See, for example, Minn. Stat. ANN. § 148A.01 (West 2005), S.D. CODIFIED LAWS § 22-22-27 (2006), CONN. GEN. STAT. ANN. § 19A-600 (West Supp. 2008), UTAH CODE ANN. § 76-5-406 (2008), WIS. STAT. ANN. § 940.22 (West 2005).

<sup>56</sup> ARK. CODE ANN. § 5-14-126 (Supp. 2007). See also TEX. PENAL CODE ANN. § 22.001 (Vernon Supp. 2008).

<sup>57</sup> ARK. CODE ANN. § 5-14-126 (Supp. 2007).

The statute does not further describe what characterizes a “position of authority,” but the elements of trust, reliance, emotional intimacy and vulnerability necessarily would be in play.

Unlike the case in which the entanglement doctrine comes into play to preclude an action for breach of the duty of care or breach of fiduciary duty when the counseling provided by the clergyperson to a congregant or parishioner is not indisputably secular in character, but instead, in whole or in part, is religiously or spiritually based, the language in the Arkansas statute is not likely to be deemed to excessively entangle government regulation with religion. The statute does not require: i. that the clergyperson be a spiritual or religious advisor to a congregant; ii. that the congregant be seeking spiritual advice or theological guidance from the clergyperson; or iii. that the operative relationship between a clergyperson and the congregant or parishioner that leads to the sexual engagement pertain at all to religious or spiritual matters. Instead, the statute only requires a clergyperson be in a position of trust or authority over the victim and use that trust or authority to engage in prohibited sexual contact by taking advantage of the trust, reliance, emotional intimacy and vulnerability that arise between the actor and the victim by virtue of the relationship.

In focusing solely upon positional authority and not requiring that the prohibited conduct occur in the context of the clergyperson rendering spiritual or theological advice or otherwise acting in a pastoral capacity, the Arkansas statute deftly avoids the issue of entanglement. The statutes and pending legislation of the other jurisdictions that have criminalized clergyperson sexual contact with a congregant or parishioner outside of a counseling relationship inadvisably have used phraseology that invites inquiry into whether the statute is criminalizing conduct in circumstances that call for the court to act beyond its competence, i.e., to invoke the entanglement doctrine. In Kansas, a proposed bill required that a member of the clergy engaging in the prohibited sexual contact “[act] as a member of the clergy carrying out the clergy member’s pastoral duties.” The Texas statute, for example, requires that the actor be a clergyperson who is “exploiting the other person’s emotional dependency on the clergyman in the clergyman’s professional character as spiritual advisor.” The emphasis in these formulations upon the need for the clergyperson to be discharging “pastoral duties” or acting as a “spiritual advisor” invites inquiry into matters theological and spiritual that are beyond a court’s competency and hence amenable to entanglement doctrine analysis. While statutes of other jurisdictions do not purport to reach sexual misconduct outside of the counseling relationship, they nonetheless fall over this same line and into the territory that invites entanglement doctrine application. The Delaware statute requires that the actor be engaged in “pastoral counseling.”<sup>58</sup> The District of Columbia statute requires a professional re-

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<sup>58</sup>DEL. CODE ANN. tit. 11, § 761 (2007).

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lationship of trust combined with counseling “whether legal, spiritual, or otherwise.”<sup>59</sup> The New Mexico statute requires the clergyperson to be “acting in his roles as a pastoral counselor.”<sup>60</sup>

Hence, the statute must not reference the matter of the victim seeking or receiving spiritual or religious advice, aid or comfort, etc. from the clergyperson in an encounter or during the period of the criminalized conduct (or the analogous reference to the clergyperson acting in a pastoral capacity or as a spiritual advisor). To further illustrate, the Minnesota statute is an example of such language which can lead to constitutional invalidation of a penal statute under an entanglement doctrine analysis.<sup>61</sup> The relevant full text of the Minnesota statute provides that “a person who engages in sexual penetration with another person is guilty of criminal sexual conduct in the third degree if the actor is or purports to be a member of the clergy, the complainant is not married to the actor, and the sexual penetration occurred during the course of a meeting in which the complainant sought or received religious or spiritual advice, aid, or comfort from the actor in private; or the sexual penetration occurred during a period of time in which the complainant was meeting on an ongoing basis with the actor to seek or receive religious or spiritual advice, aid, or comfort in private.”<sup>62</sup> Consistent with the concept that the statute is criminalizing conduct that is facially consensual, the statute specifically provides that consent by the complainant is not a defense.<sup>63</sup>

The Minnesota statute was held unconstitutional by a court reasoning that the provision violated the entanglement doctrine.<sup>64</sup> The statute was held to not have a secular purpose and to foster an excessive government entanglement with religion.<sup>65</sup> The court reasoned that an unmarried clergyperson who dated a congregant and had sexual contact would be guilty of the crime if the two were also discussing spiritual and religious matters on an ongoing basis.<sup>66</sup> Likewise, a parishioner who initiated and persistently pursued a sexual relationship with a member of the clergy would nevertheless be deemed to be incapable of effectively consenting to that relationship so long as the two discussed spiritual or religious issues, however disconnected with the sexual contact that discussion may have been.<sup>67</sup> The absence of secular standards to label or characterize the discussions as pertaining to religious or spiritual matters supported the court’s conclusion that the statute tread into constitutionally illegitimate

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<sup>59</sup>D.C. CODE ANN. §§ 22-3015-16 (LexisNexis Supp. 2008).

<sup>60</sup>N.M. STAT. ANN. § 30-9-10 (West Supp. 2008).

<sup>61</sup>MINN. STAT. ANN. § 609.344 (West 2003), *invalidated by* State v. Bussman, 741 N.W.2d 79, 83 (Minn. 2007).

<sup>62</sup>*Id.*

<sup>63</sup>*Id.*

<sup>64</sup>State v. Bussmann, 741 N.W.2d 79, 99-100 (Minn. 2007).

<sup>65</sup>Bussman, 741 N.W.2d at 88.

<sup>66</sup>*Id.* at 89.

<sup>67</sup>*Id.*

territory.<sup>68</sup> The Texas statute does no better than the Minnesota statute as a model for criminalizing sexual misconduct of clergypersons with congregants or parishioners. This statute provides that sexual assault is without consent if “the actor is a clergyman who causes the other person to submit or participate by exploiting the other person’s emotional dependency on the clergyman in the clergyman’s professional character as spiritual advisor.”<sup>69</sup> The language “in the clergyman’s professional character as spiritual advisor”<sup>70</sup> may be deemed as excessive entanglement with religion, in like fashion to the entanglement issues attached to the Minnesota statute. Nevertheless, the Texas statute has not yet been challenged on constitutional grounds.

In an Arkansas case, *Talbert v. State*,<sup>71</sup> objections were raised to the language regarding a position of authority that appears not to run afoul of the pitfalls of the Minnesota and Texas statutes. As noted, the Arkansas penal statute<sup>72</sup> provides that a person commits a sex crime if the person engages in a sexual criminal act and the actor is “a member of the clergy and is in a position of trust or authority over the victim and uses the position of trust or authority to engage in sexual intercourse or deviate sexual activity.” The statute – notably using language that, unlike the Minnesota and Texas statutes, did not reference the clergyperson engaging in the misconduct in circumstances in which pastoral duties were involved, including the rendering of religious or spiritual advice -- was alleged to be unconstitutional, not on entanglement grounds (apparently because of the adept use of language), but instead on substantive due process grounds, equal protection grounds, constitutional right to privacy grounds and associational grounds. The defendant, a minister, was convicted under the statute for having used a position of trust and authority to have sexual intercourse with a congregant who had confided in him and for whom the defendant was “someone she could turn to for help.” Against the contention based upon *Lawrence v. Texas* that the state cannot impede upon an adult’s right to engage in private, consensual sex with other adults, the court answered that the statute in *Lawrence* criminalized consensual sex between adults when each participant freely consented to the relationship, in contrast to the inducement that the defendant employed an abuse of his position of trust and authority to entice the victim into having sexual intercourse with him.<sup>73</sup> Moreover, the court

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<sup>68</sup>*Id.* at 88.

<sup>69</sup>TEX. PENAL CODE ANN. § 22.001 (Vernon Supp. 2008).

<sup>70</sup>*Id.*

<sup>71</sup>*Talbert v. State*, No.CR05-1279, 2006 Ark. LEXIS 446, at \*8-11 (Ark. Ct. App. Sept. 21, 2006)(not designated for publication).

<sup>72</sup>ARK. CODE ANN. § 5-14-126 (Supp. 2007).

<sup>73</sup> *Talbert v. State*, No.CR05-1279, 2006 Ark. LEXIS 446, at \*11-12 (Ark. Ct. App. Sept. 21, 2006)(not designated for publication).

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found no liberty interest attaching to abuse of such a position for the benefit of obtaining sexual favor.<sup>74</sup>

The defendant also contended that the statute was constitutionally invalid under the Equal Protection Clause of the U.S. Constitution in that the statute singled out a specific sub-group, i.e., ministers, and imposed a sanction upon them for engaging in consensual sex with other adults. The court applied a rational basis test<sup>75</sup> analysis in assessing this claim. Under a rational basis analysis, the court found that there was a rational basis for the classification that held clergypersons accountable for a breach of a position of trust and authority leading to sexual relations with congregants or parishioners because clergypersons are held in high regard and esteem and, as with professional mental health providers, persons seek out clergypersons in time of need, being led to the clergyperson on account of reliance and trust in the ability of clergypersons to give needed and sound guidance and counsel.<sup>76</sup>

The defendant also asserted that the statute violated his Equal Rights Amendment rights and right to privacy rights under the Arkansas Constitution. The court disposed of the Equal Rights Amendment state constitutional claim consistent with the U.S. Constitution Equal Protec-

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<sup>74</sup> *Id.*

<sup>75</sup> A classification which does not involve a fundamental right or a suspect class is examined under the relatively relaxed rational basis standard which requires only that the classification reasonably further, or be related to, a legitimate governmental purpose, objective, or interest. *Exxon Corp. v. Eagerton*, 462 U.S. 176, 195 (1983), *aff'g in part*, *Eagerton v. Exch. Oil & Gas.Corp.*, 404 So.2d 1 (Ala. 1981). The classification must be reasonable and not arbitrary, and must rest upon some ground of difference having a fair and substantial relation to the object of the legislation, so that all persons similarly circumstanced are treated alike. *Greenville Women's Clinic v. Comm'r*, 317 F.3d 357 (4<sup>th</sup> Cir. 2002). To pass muster under the equal protection analysis the legitimate stated purpose of the statutory classification need not be the main objective of the statute, or be readily ascertainable upon the face of the statute. *McGinnis v. Royster*, 410 U.S. 263, 271-72 (1973), *rev'g*, 405 U.S. 986 (1972); *See also* *State v. Knoefler*, 279 N.W.2d 658, 663 (N.D. 1979).

A classification is valid and will be upheld under this test if it is rationally related to a legitimate government interest or purpose. *Regan*, 641 U.S. at 549. If the classification is neither capricious nor arbitrary and rests on some reasonable consideration, difference, or policy, there is no denial of equal protection. *Allegheny Pittsburgh Coal Co. v. County Comm'n of Webster County*, 488 U.S. 336, 344-45 (1989), *rev'g*, 485 U.S. 976 (1998). Conversely, a challenged classification scheme may be invalidated only if it is arbitrary or bears no rational relationship to a legitimate state purpose, or if the classification rests on grounds wholly irrelevant to the achievement of the state's objective, and if no set of facts can reasonably be conceived to justify it. *Clements v. Fashing*, 457 U.S. 957 (1982), *rev'g* 452 U.S. 904 (1981). A party challenging a statute or regulation must negate any reasonably conceivable justification for the classification in order to prove that the classification is wholly irrational. *Gusewelle v. City of Wood River*, 374 F.3d 569 (7<sup>th</sup> Cir. 2004). If no reasonably conceivable set of facts could establish a rational relationship between the act and a legitimate end of government, such an act will be struck down. *Colo. Soc'y. of Cmty. & Institutional Psychologists, Inc. v. Lamm*, 741 P.2d 707 (Colo. 1987). *Kimel v. Fla.*, 528 U.S. 62 (2000).

<sup>76</sup> *Talbert*, No.CR05-1279, 2006 Ark. LEXIS 446, at 12-13.

tion analysis and on the privacy claim noted that there could be no right of privacy adhering to a relationship that was criminal in nature and that was used to obtain sex from emotionally vulnerable persons with disparate bargaining power.<sup>77</sup> An assertion that the statute was unconstitutionally vague was rejected by the court on the observation that the defendant's conduct fell clearly within the purview of the statute, in regard to predicate relationship of trust and authority as well as in regard to describing the prohibited conduct.<sup>78</sup>

The court found neither any argument made nor authority offered regarding how this freedom had been impaired by the penal statute. In any event, associational rights are for the mutual benefit of those in the relationship of association. In this case, the statute is aimed at protecting one who is emotionally vulnerable; the relationship involves parties in disparate positions of power vis-à-vis one another.

#### IV. CONCLUSION

In summary, although the media recently has had a persistent focus upon clergy sexual misconduct against children, an overwhelming number of adult congregants and parishioners, primarily females, have been subjected to clergyperson sexual misconduct. The large majority of these instances remain unreported and/or unpunished in courts of law. Various reasons explain why such sexual misconduct is not properly penalized in a criminal court, such as a congregant's or parishioner's fear of making a report, or failure to make a timely report. Yet, much of the onus is upon state legislatures for not promulgating penal laws that properly define clergyperson sexual misconduct as a criminal behavior in language that does not violate the First Amendment.

Many attempts have been made to hold clergypersons civilly liable for sexual misconduct using legal theories such as clergy malpractice, or professional malpractice requiring a fiduciary standard, yet these attempts run afoul of the First Amendment by requiring a civil court (a government entity) to interpret or shape a church's (a religious entity) policy, dogma, doctrine, or other religious beliefs. Attempts also have been made to criminally prosecute clergypersons for sexual misconduct that occurs during counseling that blends a secular approach with religious overtones. These prosecutorial attempts fail due to First Amendment entanglement issues when the counseling includes religious elements.

Therefore, a need exists for a model criminal statute that can be implemented to prosecute and penalize clergypersons who commit sexual misconduct primarily based on the clergyperson's position of authority over his or her congregant/parishioner victim, and where a victim's con-

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<sup>77</sup> *Id.* at 13-15.

<sup>78</sup> *Id.* at 15-17.

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sent might not be easily refused due to the vulnerable state of the victim and the level of trust placed in the clergyman. The model criminal statute proposed in this article solely focuses on a clergyman committing sexual misconduct against a congregant or parishioner when the clergyman is deemed to have positional power over the victim, deftly eluding entanglement and First Amendment barriers to prosecution.

In the future, state legislatures need to promulgate laws similar to the model statute proposed in this article. Numerous state legislatures such as Kansas and Texas have recently proposed or passed bills into law to attenuate this sexual misconduct problem, however, most of these bills passed into law include language that requires a court to interpret church policy or doctrine. Consequently, these laws have either encountered or potentially could meet constitutional entanglement issues. In drafting penal statutes to address this problem, state legislatures should focus upon phraseology that focuses solely on clergyman positional authority and does not utilize language that will require a court to examine religious doctrine. Such a focus on positional authority will safeguard against constitutional conflicts and will equip governmental authorities with appropriate ammunition to prosecute clergyman sexual predators.



THE CONFLICTED CONSTITUTION: THE TEXTUAL  
ABSOLUTISM OF JUSTICES BLACK AND THOMAS VERSUS  
THE BALANCED RESTRAINT OF JUSTICES FRANKFURTER  
AND BREYER

Zachary Baron Shemtob \*

ABSTRACT

*Justices Hugo Black and Felix Frankfurter advocated two distinct methods of constitutional interpretation. Whereas the former treated amendments as absolute protections of individual rights, the latter took a more balanced approach, generally favoring state over individual interests. These approaches can be seen on today's Supreme Court: Black's closest comparison is Clarence Thomas, who treats constitutional language as absolute. Frankfurter's approach is reflected in the jurisprudence of Stephen Breyer, who often weighs the different interests before him.*

*This article begins by tracing Black and Frankfurter's competing judicial philosophies. Nowhere were Black and Frankfurter's competing philosophies more pronounced than in cases concerning the First Amendment's free speech clause and the Fourteenth Amendment's guarantee of due process. I then outline the parallel philosophies of Clarence Thomas and Stephen Breyer. I conclude by highlighting some substantive difference between the two generations of Justices, and the advantages and disadvantages of their conflicting approaches to constitutional law.*

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## I. INTRODUCTION

Justices Hugo Black and Felix Frankfurter waged one of the most prominent intellectual battles in Supreme Court history.<sup>1</sup> Both men cited a common goal, seeking to prevent judges from enshrining their own personal values into law. Yet each advocated distinct methods to achieve this. Whereas Black treated amendments as absolutes and adhered to the fixed language of the text, Frankfurter preferred a jurisprudence of restraint, where judges balanced individual and governmental concerns, generally deferring to the latter.

Although the context has changed, Black and Frankfurter's competing approaches can be seen on today's Supreme Court. Ironically, the liberal Black's closest comparison is the ultra-conservative Clarence Thomas, who treats constitutional language as absolute. Frankfurter's balancing approach is embodied in the pragmatic jurisprudence of Stephen Breyer, who cautions against fixed categories, preferring to weigh the competing interests in play.

This article begins by tracing Black and Frankfurter's competing judicial philosophies. I pay particular attention to the Justices' treatment of the First and Fourteenth Amendments. I then outline the parallel (though distinct) philosophies of Clarence Thomas and Stephen Breyer. I conclude by highlighting some substantive difference between the two generations of Justices, and the advantages and disadvantages of their conflicting approaches to constitutional law.

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<sup>1</sup> See, e.g., Richard G. Stevens, *Justices Black and Frankfurter: Conflict in the Court*, 3 WM. & MARY L. REV. 206 (1961); JAMES F. SIMON, *THE ANTAGONISTS: HUGO BLACK, FELIX FRANKFURTER AND CIVIL LIBERTIES IN MODERN AMERICA* (1989); NOAH FELDMAN, *SCORPIONS: THE BATTLES AND TRIUMPHS OF FDR'S GREAT SUPREME COURT JUSTICES* (2010).

## II. JUSTICE BLACK'S LITERALISM

Kathleen Sullivan identifies two types of jurisprudence: that of rules and standards.<sup>2</sup> While judges may switch between the two, each denotes a distinct theory of judicial decision making. So-called rule-based judgments identify the facts of the case, and then resolve the pertinent issues according to a determinate rule. This demands categorization, finding “bright-line boundaries” and “classifying fact situations as falling on one side or the other.”<sup>3</sup>

Though rules simplify law, many judges view them as inadequate. These judges demand more flexibility, preferring general standards to stringent absolutes. Standard-based judgments thus consider the context of the facts in play, and seek to balance each case's competing interests.<sup>4</sup>

Justice Hugo Black epitomized Sullivan's rule-based judge. Black argued the Constitution's framers meant to restrain legislative supremacy through clear directives. According to Black, The Bill of Rights established absolute safeguards, which were ratified “by men who knew what words meant, and meant their prohibitions to be absolutes.”<sup>5</sup> Anything less than an absolute reading would allow the State to violate constitutional rights at will, establishing “hasty and oppressive laws” at legislators' whims.<sup>6</sup> Equally pernicious, by deviating from these absolutes, Black believed judges risked enshrining their own preferences into law. Liberties remained tenuous when the Court could rewrite legal directives in the name of subjective interpretation.

Nowhere was Black's literalism clearer than in the First Amendment's free speech clause. According to Black, the Bill of Rights arose “largely to protect the weak and the oppressed from punishment by the strong and powerful,” “who wanted to stifle the voices of discontent raised in protest against oppression and injustice in public affairs.”<sup>7</sup> As Black often repeated, “the phrase “Congress shall make no law”” was “composed of plain words, easily understood.”<sup>8</sup> The Founding Fathers recognized the paramount importance of free expression and a free press, which could only be preserved with the strictest protection.

Black's First Amendment absolutism was reflected in his dissent in *Dennis v. United States*.<sup>9</sup> Eugene Dennis, general secretary of the Communist Party USA, was arrested for attempting to overthrow the United

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<sup>2</sup> See Kathleen M. Sullivan, *The Supreme Court 1991 Term: Foreword: The Justices of Rules and Standards*, 106 HARV. L. REV. 22 (1992).

<sup>3</sup> *Id.* at 59.

<sup>4</sup> *Id.* at 60 (“Balancing is standard-like in that it explicitly considers all relevant factors with an eye to the underlying purposes of background principles or policies at stake.”).

<sup>5</sup> *Id.*

<sup>6</sup> *Id.*

<sup>7</sup> *Id.* at 12.

<sup>8</sup> *Id.* at 7.

<sup>9</sup> See *Dennis v. United States*, 341 U.S. 494 (1951).

States government. Though little proof was offered for conspiracy, Dennis's Marxist publications were used as evidence to convict him. When a Court majority (including Justice Frankfurter) determined the state had acted "reasonably,"<sup>10</sup> Black objected that "Congress shall make no law abridging the freedom of press" meant "no law. It doesn't make any exceptions." Suppressing the freedom of speech on "notions of mere 'reasonableness'" rendered absolutes into admonitions, sacrificing "First Amendment liberties" on the altar of "pressures, passions, and fears."<sup>11</sup>

Black's position intensified a year later in *Beauharnais v. Illinois*.<sup>12</sup> Dissenting from the Court's decision to uphold a group libel law criminalizing the circulation of racist pamphlets, the Justice attacked the Court's legislative deference. According to Black, The First Amendment "'absolutely' forbids such laws without any 'ifs' or 'buts' or 'whereases.'"<sup>13</sup> According to the Justice, the only way to change this was by repealing the First Amendment itself. The justice further opposed obscenity laws, declaring any such censorship "the deadly enemy of freedom and progress. The plain language of the Constitution forbids it."<sup>14</sup> Similar were defamation and libel suits, which, in Black's view, had to be rejected "as the minimum guarantee of the First Amendment."<sup>15</sup>

The Justice's rigid stance on speech did not extend to conduct however. In the case of *Cohen v. California*, for example, Black refused to protect a Vietnam protestor for wearing a jacket with the phrase "Fuck the Draft."<sup>16</sup> Since this was conduct and not speech, Cohen was not protected from state enforcement by Black's literal reading of the First Amendment. The Justice treated children as another exception; according to Black, the Founding Fathers believed the young needed parental permission to obtain pamphlets or attend speeches, and only when they reached adulthood were they entitled to the absolute protections that their parents enjoyed.<sup>17</sup>

Black's constitutional philosophy was further reflected in his absolutism towards the Fourteenth Amendment's due process clause, and his arguments for full incorporation. Black believed this Amendment's framers meant to impose the entire Bill of Rights on the states, although primarily through the privileges or immunities clause. According to Black, "one of the chief objects of this" section "separately, and as a whole ... was to

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<sup>10</sup> *Id.* at 506.

<sup>11</sup> *Id.* at 581.

<sup>12</sup> See *Beauharnais v. Illinois*, 343 U.S. 250 (Black, J., dissenting).

<sup>13</sup> *Id.* at 275.

<sup>14</sup> See *Smith v. California*, 361 U.S. 147, 160 (1959) (Black, J., concurring)).

<sup>15</sup> See *New York Times Co. v. Sullivan*, 376 U.S. 254, 297 (1964) (Black, J., concurring).

<sup>16</sup> See *Cohen v. California*, 403 U.S. 15 (1971) (Black, J., dissenting).

<sup>17</sup> See *Tinker v. Des Moines School District*, 393 U.S. 503 (1969) (Black, J., dissenting) ("I wish ... wholly to disclaim any purpose on my part to hold that the Federal Constitution compels the teachers, parents, and elected school officials to surrender control of the American public school system to public school students.").

## The Conflicted Constitution

make the Bill of Rights applicable to the States.”<sup>18</sup> Since this clause had been neutered in the late nineteenth-century *Slaughterhouse cases*,<sup>19</sup> however, Black attempted incorporation through the Amendment’s due process provision.

In *Palko v. Connecticut*,<sup>20</sup> a Court majority only partially endorsed Black’s due process claims. Imposing the Fifth Amendment’s double jeopardy clause on the states, Justice Cardozo established a policy of “selective” rather than “full” incorporation, only applying those rights “found to be implicit in the concept of ordered liberty.”<sup>21</sup> Though Black voted with the majority, he protested that such halfway measures went against each amendment’s absolutist nature.<sup>22</sup>

The justice’s intentions were more fully expressed in what Black later declared his single most important dissent, *Adamson v. California*.<sup>23</sup> Disagreeing with the majority’s refusal to incorporate the right of self-incrimination, Black condemned the Court’s decision to determine which rights were fundamental on a case-by-case basis. Black feared “the consequences of the Court’s practice of substituting its own concepts of decency and fundamental justice”<sup>24</sup> (as Cardozo and Frankfurter advocated) would “frustrate the great design of a written constitution,” allowing justices to “roam at large in the broad expanses of policy and morals.”<sup>25</sup> Black also attached a lengthy appendix to his dissent, outlining the historical evidence for full incorporation.

Black’s argument was further refined in *Duncan v. Louisiana*.<sup>26</sup> Concurring with the Court’s decision to apply the right of jury trial to the states, Black again declared “selective incorporation” open to judicial discretion. Though the Justice supported full incorporation through due process, he invoked the privileges and immunities clause, suggesting “any reading” of this passage “which excludes the Bill or Rights’ safeguards

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<sup>18</sup> See *Duncan v. Louisiana*, 391 U.S. 145, 166 (1968) (Black, J., concurring).

<sup>19</sup> See *Slaughter-House Cases*, 83 U.S. 36, 78-79 (1873) (Miller, J.). (“Where it is declared that Congress Shall have the power to enforce that article, was it intended to bring within the power of Congress the entire domain of civil rights heretofore belonging exclusively to the States?...We are convinced that no such results were intended by the Congress which proposed these amendments, nor by the legislatures of the States which ratified them.”).

<sup>20</sup> See *Palko v. Connecticut*, 302 U.S. 319 (1937).

<sup>21</sup> *Id.* at 325.

<sup>22</sup> See *Adamson v. California*, 332 U.S. 46 (1947) (Black, J., dissenting), at 89 (“If the choice must be between the selective process of the *Palko* decision applying some of the Bill of Rights to the States, or ... applying none of them, I would choose the *Palko* selective process. But rather than accept either of those choices, I would follow what I believe was the original purpose of the Fourteenth Amendment—to extend to all the people of the nation the complete protection of the Bill of Rights.”).

<sup>23</sup> *Id.* at 89.

<sup>24</sup> *Id.* at 89.

<sup>25</sup> *Id.* at 90.

<sup>26</sup> See *Duncan v. Louisiana*, 391 U.S. 145,(1968).

renders the words of this section of the Fourteenth Amendment meaningless.”<sup>27</sup>

Interestingly, while Black’s absolutist advocacy of free speech and full incorporation made him a leader of the Court’s liberal wing, his literalist stance towards substantive due process cast him among its most conservative. Again, Black feared that a non-textual reading of the Constitution would allow for untrammelled judicial discretion.

This led Black to stand against the unenumerated right of privacy. While the Justice dryly noted he “enjoyed his privacy as much as the next guy,” he dismissed this right as an “imaginary and unknown fragment.”<sup>28</sup> Since no “right of privacy” existed in the Bill of Rights, Black refused to enshrine one into law.<sup>29</sup>

Perhaps Black’s most fervent stance against unenumerated rights came in *Griswold v. Connecticut*.<sup>30</sup> In this landmark case, the Court struck down a Connecticut law banning contraceptives. Particularly notable was Justice Harlan’s concurrence, which recognized a substantive component of due process.<sup>31</sup> While Black personally thought the Connecticut law “abhorrent” and “viciously evil,”<sup>32</sup> he singled out Justice Harlan’s opinion. Declaring “substantive due process” a code phrase for the Court’s personal ideas of fairness, Black denied the judiciary wielded such “blanket power.”<sup>33</sup> Black found “no provision of the Constitution which either expressly” or even “impliedly vests” substantive “power in this Court,”<sup>34</sup> warning that acting otherwise would “amount to a great unconstitutional shift of power” ultimately “bad for the Courts and worse for the country.”<sup>35</sup> Black dismissed the idea of a living constitution, proclaiming the document’s original meaning “good for our Fathers, and ... good enough for me.”

### III. JUSTICE FELIX FRANKFURTER’S BALANCED RESTRAINT

If Justice Hugo Black embodies Sullivan’s rule-based judge, Felix Frankfurter reflects the judge of standards. Though equally cautious of judicial fiat, Frankfurter was a student of legal pragmatism’s skepticism of

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<sup>27</sup> *Id.* at 166 (from this it appears that Black, if given the opportunity, would simply have overruled the *Slaughterhouse* cases).

<sup>28</sup> See ROGER K. NEWMAN, HUGO BLACK: A BIOGRAPHY 556 (1994).

<sup>29</sup> *Id.*

<sup>30</sup> See *Griswold v. Connecticut*, 381 U.S. 479 (1965).

<sup>31</sup> *Id.* at 500 (“In my view, the proper constitutional inquiry in this case is whether this Connecticut statute infringes the Due Process Clause of the Fourteenth Amendment because the enactment violates basic values “implicit in the concept of ordered liberty.”).

<sup>32</sup> See Newman, *supra* note 28, at 557.

<sup>33</sup> See *Griswold*, 381 U.S. 479 at 512.

<sup>34</sup> *Id.* at 521.

<sup>35</sup> *Id.*

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absolutes.<sup>36</sup> As Oliver Wendell Holmes, Jr. remarked, and Frankfurter firmly agreed, “General Propositions do not determine concrete cases.”<sup>37</sup> Or as Frankfurter himself declared, “no single principle can answer all of life’s complexities.”<sup>38</sup> Frankfurter believed that courts could not mask their every decision behind inflexible absolutes, but had to recognize the contextual nature of judging.

Frankfurter, like Black, continually cautioned against turning the Court into a policy-making institution.<sup>39</sup> Frankfurter highlighted that legislation reflected “public needs and feeling,”<sup>40</sup> and therefore striking state or federal law was an inherently counter-majoritarian activity. Justices thus needed to suppress their own personal preferences and defer to the legislature whenever possible. According to Frankfurter, “the duty of Justices is not to express their personal will and wisdom,” but to “transcend ... the limits of their direct experience.”<sup>41</sup>

While Frankfurter agreed with Black’s admonitions against judge-made law, he rejected Black’s literalism as overly stringent and unworkable. In Frankfurter’s view, words’ meanings are not fixed and absolute, but contextually fluid: “there are varying shades of compulsion for judges behind different words,” which depended “on the words themselves, their setting in a text” and “their setting in history.”<sup>42</sup> No single standard or concept could therefore serve in place of pragmatic determination.

To Frankfurter, the Constitution was written for an “unknown future” and “bounded with outlines” that could only be defined through temporary experience.<sup>43</sup> Frankfurter also denied the Constitution “was ... conceived as a doctrinaire document, nor was the Bill of Rights intended as a collection of popular slogans.”<sup>44</sup> While the Justice did agree that certain provisions were concrete, “defined once and for all,”<sup>45</sup> the majority of rights were purposely general, “left by the Framers to be filled by history and experience.”<sup>46</sup> Chief among these were the freedom of speech and due process clauses, which Frankfurter believed only intelligible on a case-by-

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<sup>36</sup> See Gary J. Jacobsohn, *Felix Frankfurter and the Ambiguities of Judicial Statesmanship*, 49 N.Y.U. L. REV 1 (1974) (“a judicial pragmatist in the Holmesian tradition.”).

<sup>37</sup> See *Lochner v. New York*, 198 U.S. 45, 76 (1905) (Holmes, J., dissenting).

<sup>38</sup> See *Minersville School District v. Board of Education*, 310 U.S. 586, 594 (1940) (Frankfurter, J., concurring).

<sup>39</sup> See *Trop v. Dulles*, 356 U.S. 86, (1958) (Frankfurter, J., dissenting).

<sup>40</sup> See Jeffrey D. Hockett, *Justices Frankfurter and Black: Social Theory and Constitutional Interpretation*, 107 POL. SCI. Q. 479, 484 (1992).

<sup>41</sup> See Felix Frankfurter, *Foreword*, 55 COL. L. REV 1 (1955).

<sup>42</sup> Felix Frankfurter, *Some Reflections on the Readings of Statutes*, 47 COLUM. L. REV. 527, 532 (1947)

<sup>43</sup> See Felix Frankfurter, *The Constitutional Opinions of Justice Holmes*, 29 HARV. L. REV. 683 (1916).

<sup>44</sup> See *Bridges v. California*, 314 U.S. 252, (1941).

<sup>45</sup> Such as double jeopardy and self-incrimination.

<sup>46</sup> See HELEN S. THOMAS, FELIX FRANKFURTER, SCHOLAR ON THE BENCH 129 (1960).

case basis: These provisions' meanings were not revealed within the Constitution," but had to be "derived from without."<sup>47</sup>

Justice Frankfurter's fluid approach towards free speech led to a series of clashes with Black. While Black almost reflexively upheld the freedom of speech as absolute, Frankfurter questioned the very nature of this freedom. In Frankfurter's view, "the language of the First Amendment" could not be read as barren words in a dictionary," but served as "symbols of historic experience illuminated by those who employ them."<sup>48</sup> It was the Court's duty to understand the state's motives for regulating (or in Black's view, suppressing) speech on a case-by-case basis, always evaluating what interests were affected.

In *Dennis v. United States*,<sup>49</sup> for example, Frankfurter denied the founders sought to give "unqualified immunity to every expression that touched on matters within the range of political interest."<sup>50</sup> According to Frankfurter, and directly in opposition to Black, "the demands of free speech in a democratic society were better served by candidly weighing the competing interests "than by announcing dogmas too inflexible for non-Euclidian problems to be solved."<sup>51</sup> More than anything else, Frankfurter's concurrence here was built on restraint; the Justice recognized the judiciary as the least-representative branch, giving primary responsibility to the legislature. Frankfurter refused to challenge such legislation's constitutionality if Congress could supply a reasonable basis for its actions.

Frankfurter's careful balancing approach was further illustrated in *Barenblatt v. United States*.<sup>52</sup> In an opinion written by his ally, Justice John Harlan II and joined by Frankfurter, the Court upheld the conviction of a Vassar College Professor who had refused to answer Congress's queries regarding his membership in the Communist party. Adopting Frankfurter's contextual approach, Harlan sought to balance the "competing private and public interests at stake in the particular circumstances of the case."<sup>53</sup> Finding the government's interest as "nothing less than the right of self-preservation,"<sup>54</sup> Harlan voted against the defendant. The Justice concluded by emphasizing that Congress had "wide power to legislate in the field of Communist activity."<sup>55</sup>

Frankfurter did not always take the government's side. In *Sweezy v. New Hampshire*,<sup>56</sup> the Justice voted to overturn a professor's conviction for refusing to reveal the (supposedly Socialist) contents of his classroom lec-

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<sup>47</sup> *Id.* at 131.

<sup>48</sup> See *Dennis v. United States*, 341 U.S. 494, 523 (1951) (Frankfurter, J., concurring).

<sup>49</sup> *Id.*

<sup>50</sup> *Id.* at 521.

<sup>51</sup> *Id.* at 524.

<sup>52</sup> See *Barenblatt v. United States* 360 U.S. 109 (1959) (Harlan, J.).

<sup>53</sup> *Id.* at 126.

<sup>54</sup> *Id.* at 128.

<sup>55</sup> *Id.* at 129.

<sup>56</sup> See *Sweezy v. New Hampshire* 354 U.S. 234 (1957) (Frankfurter, J., concurring).

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tures.<sup>57</sup> Frankfurter couched this issue as “balancing the right of a citizen to political privacy” with “the right of the state to self-protection.”<sup>58</sup> While state security was important, Frankfurter found academic freedom a particularly difficult threshold to overcome: “[w]hen weighed against the grave harm resulting from governmental intrusion into the academic life,” the government’s justification for forcing a Professor to reveal his classroom lecture was “grossly inadequate.”<sup>59</sup>

Frankfurter’s rejection of absolute principles was also reflected in his approach to the Fourteenth Amendment’s due process clause. Frankfurter argued that Black’s call for full incorporation not only conflicted with a hundred years of precedent, but would force states to prosecute crime through a grand jury system they had long since abandoned.<sup>60</sup> Instead, Frankfurter believed due process required states to maintain “civilized standards of law.”<sup>61</sup> The Justice admitted defining such civility was difficult. While declaring “due process comports with the deepest notions of what is fair and right and just,” Frankfurter recognized “the more fundamental the beliefs are the less likely they [were] to be explicitly stated.”<sup>62</sup>

In *Malinski v. New York*<sup>63</sup> Frankfurter attempted to define some implicit provisions of the due process clause. Here the Justice concurred with the Court’s decision to reverse the confession of a man who had been held naked and continually beaten by police.<sup>64</sup> Frankfurter found the state’s brutality a clear violation of basic “canons of decency and fairness,”<sup>65</sup> betraying “those fundamental principles of liberty and justice” lying at the “base of all our civil and political institutions.”<sup>66</sup> In *Haley v. Ohio*,<sup>67</sup> the Justice voted to overturn the confession of a 15-year old boy arrested for murder, held incommunicado for five days, and eventually sentenced to death. The Justice’s concurrence recognized the “vague contours” and “subtle and elusive” nature of due process.<sup>68</sup> Nevertheless, Frankfurter believed the boy’s treatment had clearly offended the “deeply rooted feelings of the community.”<sup>69</sup>

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<sup>57</sup> Frankfurter’s decision here may have partially been rooted in his own experience as a professor and his own personal love for the Academy.

<sup>58</sup> *Sweezy* 354 U.S. at 267.

<sup>59</sup> *Id.* at 261.

<sup>60</sup> See Newman, *supra* note 28, at 354 (explaining Frankfurter’s opposition to incorporation). Frankfurter’s opinion here may have been motivated by his former experience as a law professor.

<sup>61</sup> See *Malinski v. New York*, 324 U.S. 401, 414 (1945) (Frankfurter, J., concurring).

<sup>62</sup> See *Solesbee v. Balcom*, 339 U.S. 9, 16 (1950) (Frankfurter, J., dissenting).

<sup>63</sup> See *Malinski*, 324 U.S. 401.

<sup>64</sup> Joined by Justice Black.

<sup>65</sup> *Malinski*, 324 U.S. at 417.

<sup>66</sup> *Id.* at 414. Frankfurter took this language from Justice Van Devanter. See *Hebert v. Louisiana*, 272 U.S. 312 (1926) (Van Devanter, J.).

<sup>67</sup> See *Haley v. Ohio*, 332 U.S. 596 (1948).

<sup>68</sup> *Id.* at 602.

<sup>69</sup> *Id.* at 604.

This contrasted with Frankfurter's opinion in *Louisiana v. Resweber*.<sup>70</sup> In this case, a death row inmate had survived a botched execution attempt in the electric chair, and state officials questioned whether re-electrocuting him would violate due process. Frankfurter, after careful deliberation, sided with Louisiana. The Justice admitted that he was personally against the death penalty, but a second execution attempt did not seem "repugnant to the conscience of mankind."<sup>71</sup>

Unsurprisingly, Justice Black criticized Frankfurter's "civilization test," claiming that it was more based around the Justice's personal preferences than any objective rules.<sup>72</sup> In Black's view, determining the "deeply rooted feelings of the community" was an inherently subjective exercise, allowing Frankfurter to declare void whatever state actions the Justice found personally distasteful. Yet this criticism misunderstood Frankfurter's philosophical moorings. Though Frankfurter believed the best judges ordinarily deferred to Congress, he also dismissed any exact formula to determine when or how this should be done. As he remarked in *Malinski*, "canons of decency and fairness ... are not authoritatively formulated anywhere as though they were prescriptions in a pharmacopoeia."<sup>73</sup> Contrary to Black, Frankfurter believed judicial decision making was irreducible to a series of absolute rules, and the outer limits of law, whether unprecedented scenarios or vaguely worded provisions, therefore forced judges to make admittedly subjective determinations. Oliver Wendell Holmes, Jr. had previously and explicitly recognized this, and it was a lesson his protégé took to heart.<sup>74</sup>

Justice Frankfurter once remarked "if facts are changing, law cannot be static."<sup>75</sup> Such a sentiment stands directly opposed to Black's fixed and unchanging literalism. In Black's view, without absolute standards judges would be free to enshrine their own preferences into law. Frankfurter denied the plausibility of such absolutes, arguing that deferring to the legislature would best prevent unbridled judicial discretion. While the Court's ideological makeup has changed dramatically, this debate remains alive and well in the clashing jurisprudences of Justices Clarence Thomas and Stephen J. Breyer.

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<sup>70</sup> See *Louisiana v. Resweber*, 329 U.S. 459 (1947) (Frankfurter, J., concurring).

<sup>71</sup> *Id.* at 471.

<sup>72</sup> See Newman, *supra* note 28, at 353 (declaring it a 'natural law' formula).

<sup>73</sup> See *Malinski v. New York*, 324 U.S. 401, 417 (1945).

<sup>74</sup> See *Southern Pacific Co. v. Jensen*, 244 U.S. 205, (1917) (Holmes, J., dissenting) ("I recognize without hesitation that judges do and must legislate, but they can do so only interstitially.").

<sup>75</sup> See Joseph Gumina, *From Austria to Sacco and Vanzetti: The Development of Frankfurter's "Fundamental Rights" Theory*, 30 W. NEW ENG. L. REV. 389, 404 (2008).

IV. JUSTICE CLARENCE THOMAS'S NATURAL LAW LITERALISM

It seems odd that today's most rule-based Justice, Clarence Thomas,<sup>76</sup> stands on the opposite ideological pole to Justice Black. While Thomas and Black's politics differ tremendously, however, their interpretive methods are strikingly similar. Akin to Black, Thomas advocates an absolutist approach to the Bill of Rights and its succeeding Amendments, arguing only a literalist reading of the Constitution can constrain state tyranny and untrammelled judicial discretion.

Justice Thomas has couched his judicial philosophy as grounded in natural rights.<sup>77</sup> Thomas claims these rights are not abstract and nebulous however,<sup>78</sup> but explicitly enshrined in the Constitution itself.<sup>79</sup> Like Black, Thomas prides himself on "calling it as he sees it," ruling on the law and not his personal opinions: "If we are to be a nation of laws and not of men, judges must be impartial referees."<sup>80</sup> Such impartiality demands judges suppress "those passions, interests, and emotions that beset every frail human being."<sup>81</sup> While legislators must consider "personal and group interests," the judiciary must be "blind to such things."<sup>82</sup>

Thomas's categoricalism has led him to explicitly criticize Frankfurter-esque balancing tests. Acknowledging such tests may be "appropriate for trial courts," Thomas believes federal courts should endorse rules rather than flexible standards.<sup>83</sup> The Justice contends these "bright-line rules" should be as intelligible to gas station attendants as law professors, further

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<sup>76</sup> Justice Scalia has also been compared to Black. See, e.g., Michael J. Gerhardt, *A Tale of Two Textualists: A Critical Comparison of Justices Black and Scalia*, 74 B.U. L. REV 25 (1994). Scalia's occasional acceptance of standards and greater deference to precedent makes him a less clear fit, however.

<sup>77</sup> See generally Kirk A. Kennedy, *Reaffirming the Natural Law Jurisprudence of Justice Clarence Thomas*, 9 REGENT U. L. REV. 33 (1997).

<sup>78</sup> See Clarence Thomas, *Be Not Afraid*, AM. ENT. INST. (Feb. 13, 2001) (available at: <http://www.aei.org/speech/15211>) ("We the people" adopted a written Constitution precisely because it has a fixed meaning, a meaning that does not change.").

<sup>79</sup> Interestingly, Thomas has acknowledged certain Amendment's vagueness, suggesting the Declaration of Independence as a complementary source. See Adam J. Hunt, *The Liberal Justice Thomas: An Analysis of Justice Thomas's Articulation and Application of Classical Liberalism*, 4 N.Y.U. L.J & LIBERTY 557, 570-571 ("One of the best sources of ... "American" higher law principles, Thomas argues, is the Declaration of Independence, which he believes must be used to interpret the open-ended provisions of the Constitution."). Black would almost certainly reject this synthesis.

<sup>80</sup> See SCOTT DOUGLAS GERBER, *FIRST PRINCIPLES: THE JURISPRUDENCE OF CLARENCE THOMAS* 39 (1999).

<sup>81</sup> *Id.*

<sup>82</sup> *Id.*

<sup>83</sup> *Id.* at 3.

echoing Justice Black's disdain for highly technical rather than clear-cut decisions.<sup>84</sup>

Nowhere is Thomas's rule-based jurisprudence clearer than in cases involving free speech. Thomas has treated the First Amendment as a nearly categorical ban on speech's suppression.<sup>85</sup> Interestingly, Thomas has occasionally dealt with matters foreign to Black, most notably being commercial speech. Here Thomas has proven especially strict, refusing to differentiate between different manners of speech.<sup>86</sup>

Justice Thomas's first major free speech case was *McIntyre v. Ohio Elections Commission*,<sup>87</sup> where the Court threw out a protestor's fine for anonymously leafleting against a school tax ballot initiative. Thomas agreed with John Paul Stevens's majority opinion, but established a more absolutist approach in his concurrence. Thomas demanded a clearer-cut decision, criticizing Stevens for attempting to balance the different interests in play,<sup>88</sup> and especially stressed the importance of protecting protestors' anonymity.<sup>89</sup> According to the Justice, the founders' intended not only to protect speakers, but their identities' as well.<sup>90</sup>

The Justice's absolutism proved even more pronounced in *44 Liquormart v. Rhode Island*.<sup>91</sup> In this case, the Court threw out a state law banning liquor stores from displaying the price of alcohol. Writing for the majority, Justice Stevens found the ban unreasonable, but stressed that commercial speech was of lower value than political speech.<sup>92</sup> Thomas again criticized John Paul Stevens's use of balancing tests, declaring that there was no textual basis for ranking one form of speech above another. According to Thomas, "the near impossibility of severing "commercial" speech from speech necessary to democratic decision-making," combined with the First

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<sup>84</sup> *Id.* ("Whenever possible, the Court and judges generally should adopt clear, bright-line rules that, as I like to say to my law clerks, you can explain to the gas station attendant as easily as to the law professor"); see Newman, *supra* note 28, at 325 ("Black wanted litigants, people in barber shops, "your momma", he once told a clerk, to understand his opinions."). This is strikingly similar to a remark Thomas made to one of his law clerks, that he wanted opinions which his "mom could understand." See KEVIN MERIDA & MICHAEL A. FLETCHER, SUPREME DISCOMFORT: THE DIVIDED SOUL OF CLARENCE THOMAS, 301 (2007).

<sup>85</sup> Which will be discussed below. See *infra* notes 87 and accompanying text.

<sup>86</sup> *Id.*

<sup>87</sup> See *McIntyre v. Ohio Elections Commission*, 514 U.S. 334 (1995) (Thomas, J., concurring).

<sup>88</sup> *Id.* at 370 ("I cannot join the majority's analysis because it deviates from our settled approach to interpreting the Constitution and because it superimposes its modern theories concerning expression on the constitutional text").

<sup>89</sup> *Id.* at 358 ("We should determine whether the phrase "freedom of speech, of or of the press," as originally understood, protected anonymous political leafleting.").

<sup>90</sup> *Id.* at 361 ("the historical evidence indicates that founding-era Americans opposed attempts to require that anonymous authors reveal their identities on the ground that forced disclosure violated the 'freedom of press.'").

<sup>91</sup> See *44 Liquormart v. Rhode Island*, 517 U.S. 484 (1996) (Thomas, J., concurring).

<sup>92</sup> *Id.* at 498 (Stevens, J.) ("our early cases recognized that the State may regulate some types of commercial advertising more freely than other forms of protected speech.").

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Amendment's "antipaternalistic premise," demanded a blanket view towards all forms of speech.<sup>93</sup> Thomas reiterated this a few years later, remarking that "[c]alls for limits on expression" are most pronounced when "some threatened harm is looming."<sup>94</sup> Regardless of a threat's reality, Thomas declared "advocates of harmful ideas ... all entitled to the protection of the First Amendment."<sup>95</sup>

Thomas's free speech absolutism was also clear in *McConnell v. Federal Elections Commission*.<sup>96</sup> Challenging a law restricting the form and structure of campaign contributions, Thomas dramatically declared it "the most significant abridgment of the freedoms of speech ... since the Civil War."<sup>97</sup> Thomas again argued the particular form speech was irrelevant, calling for a categorical recognition that "Congress shall make no law ... abridging the freedom of speech" meant exactly that.<sup>98</sup>

Interestingly, Thomas, like Black, has refused to grant free speech protections to minors. In *Morse v. Frederick*,<sup>99</sup> Thomas upheld a student's expulsion for revealing an inappropriate banner during a school-supervised parade.<sup>100</sup> The Justice, after reviewing the historical record, found the school's role *in loco parentis* to trump any free speech concerns.<sup>101</sup> Thomas more recently argued for limiting minors' speech rights in *Brown v. Entertainment Merchants Association*, concerning whether children could be banned from purchasing video games without parental supervision.<sup>102</sup> According to Thomas, "the practices and beliefs of the founding generation establish that "the freedom of speech" did not "include a right to speak to minors ... without going through the minors' parents or guardian" first.<sup>103</sup>

Justice Thomas further echoes Black in his treatment of the due process clause. Thomas, like Black, has advocated incorporation principally through the privileges and immunities provision.<sup>104</sup> He has also rejected the notion of substantive due process. Thomas criticized the Court's privacy balancing tests in *Sternberg v. Carhart*, for example, refusing to carve out new rights "whole cloth" from such a nebulous provision.<sup>105</sup> Thomas again

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<sup>93</sup> *Id.* at 520 (Thomas, J., concurring).

<sup>94</sup> See *Lorillard Tobacco v. Reilly*, 535 U.S. 525, 590 (2001) (Thomas, J., dissenting). *Id.*

<sup>95</sup> *Id.*

<sup>96</sup> See *McConnell v. Federal Elections Commission*, 54 U.S. 93 (2003).

<sup>97</sup> *Id.* at 264 (Thomas, J., concurring in part and dissenting in part).

<sup>98</sup> *Id.*

<sup>99</sup> See *Morse v. Frederick*, 551 U.S. 393 (2007).

<sup>100</sup> *Id.* at 410 (Thomas, J., concurring).

<sup>101</sup> *Id.* at 414 ("A review of the case law shows that *in loco parentis* allowed schools to regulate student speech.").

<sup>102</sup> *Brown v. Entertainment Merchants Association*, 131 S.Ct. 2729 (2011).

<sup>103</sup> *Id.* at 2751, 2761 (Thomas, J., dissenting).

<sup>104</sup> See *Saenz v. Roe*, 562 U.S. 498, 527 (1999) (Thomas, J., dissenting) ("at the time of the Fourteenth Amendment was adopted, people understood that "privileges or immunities of citizens" were fundamental rights"); *id.* at 526.

<sup>105</sup> See *Stenberg v. Carhart*, 530 U.S. 914, (2000) (Thomas, J., dissenting).

rejected substantive due process in *Lawrence v. Texas*.<sup>106</sup> In this case, the Court ruled Texas's anti-sodomy statute violated the due process clause's presumption of personal autonomy. Thomas found the Texas law "uncommonly silly,"<sup>107</sup> but saw no textual reason to oppose it. According to the Justice, neither a "general right of privacy" nor the "liberty of the person both in its spatial and more transcendent dimensions" (as the majority contended) was constitutionally protected.<sup>108</sup> Though Thomas's personal sympathies lay with the petitioners (as Black's had in *Griswold*),<sup>109</sup> his textual fidelity trumped any recognition of substantive due process rights.

Though they may occasionally differ on specifics, Justices Black and Thomas share an equally categorical approach to constitutional law. Neither man accepted deviations of free speech nor endorsed the "vague contours"<sup>110</sup> of the due process clause. As Thomas once remarked in words strikingly similar to those of Black, "We adopted ... a written Constitution precisely because it has a fixed meaning, a meaning that does not change."<sup>111</sup>

## V. JUSTICE STEPHEN BREYER'S LIBERAL BALANCING

Few contemporary justices have outlined their constitutional approach more extensively than Stephen Breyer. Justice Breyer denies having any overarching philosophy of constitutional law. Nevertheless, Breyer clearly rejects absolutes for a more balanced and flexible approach to the Bill of Rights and the Fourteenth Amendment.<sup>112</sup>

According to his biographer, Justice Frankfurter found it most "debilitating to democracy when the legislature and people of a nation refuse to face up to their responsibility."<sup>113</sup> Justice Breyer bases much of his book *Active Liberty* around this very theme.<sup>114</sup> In Breyer's view, the Constitution's purpose is and was twofold: To prevent government tyranny, and to have as inclusive and robust a democracy as possible. Quoting Pericles that "a man who fails to participate in politics ... is a man who has no business here,"<sup>115</sup> Breyer argues that "principles of freedom" entail not only "free-

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<sup>106</sup> See *Lawrence v. Texas*, 539 U.S. 558 (2003).

<sup>107</sup> *Id.* at 605.

<sup>108</sup> *Id.*

<sup>109</sup> *Id.* ("If I were a member of the Texas Legislature, I would vote to repeal it.")

<sup>110</sup> See Frankfurter, *supra* note 70, at 604.

<sup>111</sup> See Clarence Thomas, *Be Not Afraid*, AM. ENT. INST. (Feb. 13, 2001) (available at: <http://www.aei.org/speech/15211>).

<sup>112</sup> See generally Stephen Breyer, ACTIVE LIBERTY: INTERPRETING OUR DEMOCRATIC CONSTITUTION 15 (2005).

<sup>113</sup> See Thomas, *supra* note 46, at 283.

<sup>114</sup> See Breyer, *supra* note 113.

<sup>115</sup> *Id.* at 134.

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dom from government coercion” (as Justice Thomas contends), but also “freedom to participate in the government itself.”<sup>116</sup>

Breyer’s faith in democratic principles has influenced him to advocate a policy of judicial deference similar to that of Justice Frankfurter’s. According to Breyer, since the people themselves must develop “the political experience” necessary to correct their mistakes, judges should always avoid enshrining their own values into law.<sup>117</sup> Breyer believes that judicial decision risks “short-circuiting, or preempting, the “conversational” lawmaking process ... that embodies our modern understanding of constitutional democracy.”<sup>118</sup> This was perhaps best reflected in his stinging dissent in *Bush v. Gore*.<sup>119</sup> As the Justice remarked in this case, “however awkward or difficult it may be for Congress to resolve difficult electoral disputes,” it “expresses the people’s will far more accurately than does an unelected Court.”<sup>120</sup>

Justice Breyer’s standard-based approach is reflected in his free speech jurisprudence. As Breyer remarks in *Active Liberty*, the absolute claim that “speech is speech”<sup>121</sup> gets one nowhere; to treat all speech cases alike lumps “together too many different kinds of activities under a single standard.”<sup>122</sup> The Court should instead evaluate the distinct interests in play, weighing legislatures’ reasonable needs against those “ideas necessary to maintain the health of our democracy.”<sup>123</sup> Breyer believes that “in applying First Amendment presumptions,” judges must always “distinguish among areas, contexts, and forms of speech.”<sup>124</sup>

In one of his earliest First Amendment cases, *Bartnicki v. Vopper*,<sup>125</sup> Breyer concurred with the Court’s decision to favor speech over privacy rights. Acknowledging competing interests “on both sides of the equation,” Breyer couched “the key question” as “one of proper fit.”<sup>126</sup> Concluding that the statute struck a “reasonable balance between speech restrictions and privacy interests,”<sup>127</sup> Breyer refrained from overruling the legislature. In words that Frankfurter would surely approve of, Breyer warned against “adopting overly broad or rigid constitutional rules, which would unnecessarily restrict legislative flexibility.”<sup>128</sup>

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<sup>116</sup> *Id.* at 3.

<sup>117</sup> *Id.* at 5.

<sup>118</sup> *Id.* at 71.

<sup>119</sup> *Bush v. Gore*, 531 U.S. 98 (2000).

<sup>120</sup> *Id.* at 155 (Breyer, J., dissenting).

<sup>121</sup> See Breyer, *supra* note 112, at 40.

<sup>122</sup> *Id.* at 41.

<sup>123</sup> *Id.* at 42.

<sup>124</sup> *Id.* at 55.

<sup>125</sup> *Bartnicki v. Vopper*, 532 U.S. 514 (2001).

<sup>126</sup> *Id.* at 536.

<sup>127</sup> *Id.* at 537.

<sup>128</sup> *Id.* at 541.

Breyer's decision in *Ashcroft v. American Civil Liberties Union* was also anchored around the importance of legislative discretion.<sup>129</sup> Here the Court struck a child pornography law it found overbroad. Writing in dissent, Breyer conducted an examination of three factors: the burdens of the Act, the measure's necessity, and any less restrictive alternatives.<sup>130</sup> Concluding the law was reasonably constructed, Breyer chastised his brethren for denying Congress any "legislative leeway."<sup>131</sup>

The Justice adopted a similar position in the more recent *Brown v. Entertainment Merchants Association*.<sup>132</sup> Dissenting from the Court's decision to overturn California's ban on the sale or rental of violent video games to minors, Breyer evaluated the Act's burden, its necessity, and what interests it sought to further. Concluding there were "sufficient grounds" to defer to Congress, the Justice criticized the majority for granting "the legislature no deference at all."<sup>133</sup>

While Justice Breyer is often sympathetic to state interests in restricting free speech, he does not always side with the government. In *Snyder v. Phelps*,<sup>134</sup> for example, Breyer concurred with the Court's decision to protect a hate group picketing outside military funerals. Even here, however, Breyer offered a more balanced approach than his colleagues: the Justice wrote separately in order to stress that the law should only apply to picketing, and highlighted that online publications (which the group published) need not always warrant the same First Amendment protections.<sup>135</sup>

Breyer's due process jurisprudence has also sought to balance competing interests. In *McDonald v. Chicago*,<sup>136</sup> the Justice urged a nuanced approach to incorporation. Breyer admitted neither the text nor previous precedent gave any concrete answer to determine what rights were fundamental and should be enforced by the states, highlighting different factors to help settle this debate. Most important was whether incorporation would allow government institutions to best carry out their "constitutional promises."<sup>137</sup>

The Justice's views on substantive due process also stress the importance of context. Breyer appears willing to recognize substantive due process rights<sup>138</sup> so long as these are narrowly cast and the interests in play concretely outlined. In *Washington v. Glucksberg*, Breyer agreed with a unanimous Court that the Fourteenth Amendment did not protect a right

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<sup>129</sup> *Ashcroft v. American Civil Liberties Union*, 542 U.S. 656 (2004).

<sup>130</sup> *Id.* at 677.

<sup>131</sup> *Id.* at 690.

<sup>132</sup> See *Brown v. Entertainment Merchants Association*, 564 U.S. \_\_\_, 131 S.Ct. 2729 (Breyer, J., dissenting).

<sup>133</sup> *Id.* at 2270.

<sup>134</sup> See *Snyder v. Phelps*, 131 S. Ct. 1207 (2011).

<sup>135</sup> *Id.* at 1221 ("the opinion does not ... say anything about internet postings").

<sup>136</sup> *McDonald v. City of Chicago*, 130 S. Ct. 3020 (2010) (Breyer, J., dissenting).

<sup>137</sup> *Id.* at 3123.

<sup>138</sup> Having voted along with the majority in *Lawrence v. Texas*, 539 U.S. 558 (2003).

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to assisted suicide.<sup>139</sup> The Justice suggested the “right to die with dignity”, however, might be constitutionally viable.<sup>140</sup> According to the Justice, “were the legal circumstances different,” such as the state’s refusal to administer “drugs as needed to avoid pain at the end of life,” the law’s impact upon serious and otherwise unavoidable physical pain (accompanying death) would be more directly at issue.”<sup>141</sup>

Justice Breyer’s approach to free speech and due process is strikingly similar to that of Frankfurter’s. Believing that no single rule can “substitute for the exercise of legal judgment,”<sup>142</sup> Breyer rejects absolutes for a more balanced form of restraint. Like Frankfurter, Breyer contends laws are not “prescriptions in a pharmacopoeia,”<sup>143</sup> but flexible directives meant to order a variety of conflicting interests.

### VI. KEY DIFFERENCES<sup>144</sup>

Despite their similar philosophies, Black and Thomas, as well as Frankfurter and Breyer, share some notable differences.

#### A. BLACK AND THOMAS

##### i. Positive v. Natural Law

Justice Black continually proclaimed Frankfurter’s “fundamental principles of liberty and justice” a vague and unduly subjective standard, continually deriding it as a form of natural law.<sup>145</sup> According to Black, “conduct believed ‘decent’ by millions of people may be believed ‘indecent’ by millions of others.”<sup>146</sup> In Black’s view, if natural law exists God alone knows it; a judge’s job is to strictly apply positive law.

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<sup>139</sup> See *Washington v. Glucksberg*, 521 U.S. 702 (1997).

<sup>140</sup> *Id.* at 790.

<sup>141</sup> *Id.* at 792.

<sup>142</sup> See *Van Orden v. Perry*, 125 S. Ct. 2854, 2868 (2005) (Breyer, J., concurring).

<sup>143</sup> See *Malinski v. New York*, 324 U.S. 401, 417 (1945).

<sup>144</sup> Since this paper focuses solely on each Justice’s underlying philosophy and their corresponding approaches to free speech and due process, I refrain from covering any additional conflicts. Many others surely exist, perhaps most interestingly around the Establishment Clause; whereas Black advocated an absolute separation between church and state, Thomas seems to think no such constitutional barrier exists. See, e.g., Rupal M. Doshi, *Nonincorporation of the Establishment Clause: Satisfying the Demands of Equality, Plurality, and Originalism*, 98 GEO. L.J. 459 (2010).

<sup>145</sup> See Newman, *supra* note 28, at 350 (“Time and again he would return from conference scoffing, ‘Felix invented this. It’s natural law,’ that undefinable scourge which resided only in each judge’s mind.”).

<sup>146</sup> See William M. Wiecek, *Felix Frankfurter, Incorporation, and the Willie Francis Case* 26 J. SUP. CT. HIST. 53 (2001).

Justice Thomas has proven considerably more sympathetic to natural law claims. Indeed, Thomas believes that judicial and legislative power ultimately derives from these “higher law principles.”<sup>147</sup> Thomas has described such rights as essentially Lockean, being “those of life, liberty, and property.”<sup>148</sup> According to the Justice, these three principles are “inalienable ones, given to man by his Creator,” and not simply derived from a paper document.<sup>149</sup> This is perhaps clearest regarding the privileges and immunities clause. In Thomas’s view, at the time of the Fourteenth Amendment’s introduction, “people understood that “privileges or immunities of citizens” were fundamental rights, rather than every public benefit established by positive law.”<sup>150</sup> Thomas has even identified some rights this provision may implicitly protect, such as “the right to acquire and possess property of every kind” and a right to inter-state travel.<sup>151</sup>

Justice Black would surely cringe at this invocation of implicit fundamental principles. And so long as the privileges and immunities clause lies dormant, Thomas has restrained himself from traveling beyond the text. If this provision was resuscitated, the two Justices’ jurisprudence could undoubtedly stray. It is impossible to say how severely, however, devoid a specific case context.

## ii. Corporate Interests and Commercial Speech

Some of Justice Thomas’s most notable opinions concern commercial free speech. Here the justice has refused to recognize tiers of speech, arguing that commercial and political dialogue are equally worthy of constitutional protection. He has especially sought to protect anonymity in everything from publishing leaflets to political donations.<sup>152</sup>

When it comes to free speech, severing Thomas’s legal and political opinions is rather difficult. Thomas has expressed admiration for Ayn Rand,<sup>153</sup> and has publicly praised an unfettered free market with a sharp divide between state and corporate matters.<sup>154</sup> Justice Black, on the other hand, was, as one biographer describes, “a New Dealer before there was a

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<sup>147</sup> See Hunt, *supra* note 79, at 570.

<sup>148</sup> *Id.* at 571.

<sup>149</sup> *Id.* at 570.

<sup>150</sup> See Saenz (Thomas, J., dissenting), *supra* note 104, at 527.

<sup>151</sup> *Id.* at 525.

<sup>152</sup> See *Citizens United v. Federal Elections Commission*, 558 U.S. \_\_\_, 130 S.Ct. 876, (2010) (Thomas, J., dissenting).

<sup>153</sup> See Merida & Fletcher, *supra* note 84, at 163 (“In Rand’s work, Thomas saw a model of independence and self-sufficiency.”).

<sup>154</sup> Thomas embraces the free market for “its ability to nourish individual freedom and growth.” See Steven B. Lichtman, *Black Like Me: The Free Speech Jurisprudence of Clarence Thomas*, 114 PENN ST. L. REV. 415, 447 (2009).

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New Deal.”<sup>155</sup> Although distrustful of government overreach, Black was equally suspicious of unchecked business interests.<sup>156</sup>

How these policy disagreements would manifest themselves in practice is hard to discern. It is unlikely Black would equate money with speech.<sup>157</sup> Even more difficult to determine would be his constitutional stance on speakers’ anonymity. In *Talley v. California*,<sup>158</sup> the Justice overruled a Los Angeles ordinance requiring handbill printers to have their name on the cover. Remarking that such a requirement would clearly “restrict freedom of expression,”<sup>159</sup> Black declared the ordinance “void on its face.”<sup>160</sup> How far Black would allow anonymity in the Internet age (and for campaign contributors) is impossible to say. Equally uncertain is Black’s stance on commercial speech. Clearer is that the Justice would always be careful to separate conduct from (in his words) “actual speech.”<sup>161</sup>

### *B. FRANKFURTER AND BREYER*

#### *i. The Extent of Judicial Restraint*

Perhaps the greatest difference between Justices Frankfurter and Breyer lies in their respective adherence to judicial restraint (or particular lack thereof). Felix Frankfurter generally refused to nullify federal and state laws.<sup>162</sup> While Breyer has been reluctant to challenge the constitutionality of congressional statutes,<sup>163</sup> he has shown no such restraint regarding state laws. Indeed, on the current Court, Breyer has shown himself one of the most willing justices to strike state legislation.<sup>164</sup>

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<sup>155</sup> *Id.*

<sup>156</sup> *Id.* Black dissented against recognizing corporate personhood. See *Connecticut Gen. Life Ins. Co. v. Johnson*, 303 U.S. 77, 85 (1938) (Black, J., dissenting).

<sup>157</sup> As he opposed corporate personhood altogether (*id.*).

<sup>158</sup> See *Talley v. California*, 362 U.S. 60 (1960) (Black, J.).

<sup>159</sup> *Id.* at 64.

<sup>160</sup> *Id.* at 65.

<sup>161</sup> Thomas has not encountered many cases specifically dealing with conduct. In perhaps his most notable, he found a statute banning cross-burning constitutional. The Justice declared such behavior to be “only conduct,” and therefore unworthy of First Amendment Protections. See *Virginia v. Black*, 548 U.S. 343, 395 (2003) (Thomas, J., dissenting). Justice Black would undoubtedly have agreed here.

<sup>162</sup> In a detailed analysis, Stefanie Lindquist and Frank Cross found him the least likely to strike federal statutes from a sample of 22 Justices and the third least likely to strike state laws. See STEFANIE A. LINDQUIST & FRANK B. CROSS, *MEASURING JUDICIAL ACTIVISM*, 55, 77 (2009).

<sup>163</sup> See Orin Kerr, *Judicial Deference to Congress Versus Judicial Deference to State Legislatures*, *The Volokh Conspiracy* (Sept. 28, 2010), <http://volokh.com/2010/09/28/judicial-deference-to-congress-versus-judicial-deference-to-state-legislatures/> (“Breyer has been less willing than his than any of his fellow Justices to overturn acts of Congress.” (quoting Jeff Shesol)).

<sup>164</sup> *Id.* (“he [Breyer] is among the Justices most likely to strike down *state* (emphasis his) legislation.”); also see *supra* note 160, at 55, 77.

Breyer's state-specific activism likely ties into his larger judicial philosophy. Unlike Frankfurter—an advocate of Brandeis's view of states as "laboratories of democracy"<sup>165</sup>—Breyer's primary concern lies in allowing access to the democratic process. Breyer has therefore shown little problem in overruling state laws he sees as interfering with this.<sup>166</sup> As Breyer remarks in *Active Liberty*, the Founding Fathers were well aware how easily "state government experiments" could bring about "a new form of despotism," and empowered the Court to act appropriately to prevent this.<sup>167</sup>

## ii. Fair Procedures v. Substantive Due Process

Both Frankfurter and Breyer recognize a normative component to the due process clause. Despite agreeing on the subjective nature of this provision, however, they offer very different perspectives of its extent.

Frankfurter viewed due process claims as primarily involved around the state's method of ascertaining guilt.<sup>168</sup> According to the Justice, the Fourteenth Amendment was written to prevent authorities from acting in a manner that upset fundamental fairness.<sup>169</sup> Ryan Williams has described this as "fair procedures" due process. Here the due process clause chiefly requires "adjudication satisfy some normative conception of fairness."<sup>170</sup> Most of today's Justices (Breyer included), endorse the more extensive "fundamental rights due process."<sup>171</sup> This approach not only concerns itself with fair adjudication, but also identifies a category of liberty interests so "fundamental" that states must show a compelling interest in violating them.<sup>172</sup>

"Fundamental rights due process" first arose in the early twentieth century, largely to protect an un-enumerated "freedom of contract."<sup>173</sup> By the time of Frankfurter's ascension to the bench, however, this approach had largely fallen out of favor.<sup>174</sup> Justice Frankfurter himself had opposed

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<sup>165</sup> See *New State Ice. Co. v. Liebmann*, 285 U.S. 262, (Brandeis, J., dissenting).

<sup>166</sup> *Id.* Kerr, *supra* note 164.

<sup>167</sup> See Breyer, *supra* note 112, at 31.

<sup>168</sup> See Thomas, *supra* note 46, at 165 ("Observance of due process has to do not with questions of guilt of innocence but the mode by which guilt is ascertained.")

<sup>169</sup> See, e.g., *Malinski v. New York*, 324 U.S. 401, (1945) (Frankfurter, J., concurring).

<sup>170</sup> See Ryan C. Williams, *The One and Only Substantive Due Process Clause*, 120 *YALE L.J.* 408, 421 (2010).

<sup>171</sup> *Id.* at 427 ("This new approach ... is the Court's currently prevailing framework for dealing with due process claims.")

<sup>172</sup> *Id.*

<sup>173</sup> *Id.* (the most representative case here being *Lochner v. New York*, 198 U.S. 45 (1905).

<sup>174</sup> *Id.* ("With the Supreme Court's retreat from its *Lochner*-era substantive due process jurisprudence in the 1930s, substantive due process centered an era of uncertainty.")

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such nebulous economic rights as a law professor,<sup>175</sup> and (presumably) continued to do so while on the Court.

Ironically, Frankfurter's closest disciple, John Harlan II, almost single-handedly resurrected this form of substantive due process, although for social rather than economic issues. In *Poe v. Ullman* and *Griswold v. Connecticut*, Harlan argued that a state law banning the sale of contraceptives violated the very concept of "ordered liberty,"<sup>176</sup> as the petitioners had a fundamental right to freedom from "arbitrary impositions and purposeless restraints."<sup>177</sup> This was invoked as precedent only a few years later in *Roe v. Wade*,<sup>178</sup> and eventually came to legitimate a host of fundamental social rights even Harlan would have likely opposed.<sup>179</sup>

Whether Frankfurter would have agreed with Harlan's original stance in *Griswold* is unclear. It is almost certain he would refuse to recognize (as Breyer has) any right to "die with dignity" or acknowledge that liberty contains so-called "spatial and transcendent dimensions."<sup>180</sup> Regardless of where he may have stood, however, Frankfurter's acknowledgement of due process's vagueness eventually allowed for un-enumerated rights' recognition.

## VII. EVALUATING EACH APPROACH

In this section I shall not argue whether the Black/Thomas or Frankfurter/Breyer approach is superior, but identify some advantages and disadvantages of each. According to Kathleen Sullivan, the most obvious advantage of absolute rules is their "fairness as formal equality."<sup>181</sup> By demanding a bright-line in each case, rules (supposedly) reduce the chance of arbitrary or biased decisions.

There is no doubt absolute rules reduce the potential for arbitrariness. Yet this benefit may be somewhat illusory. As Justice Frankfurter recognized, "absolute rules ... inevitably lead to absolute exceptions, and such exceptions ... eventually corrode the rules" themselves.<sup>182</sup> Contextual events cannot be reduced to mere formula, as two seemingly identical situations

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<sup>175</sup> Indeed, Frankfurter had helped write the brief for a case that eventually (tacitly) overturned *Lochner*. See Howard Gillman, *De-Lochnerizing Lochner*, 85 B.U. L. REV 859, 860 (2005).

<sup>176</sup> See *Griswold v. Connecticut*, 381 U.S. 479, 499 (1965) (Harlan, J., concurring).

<sup>177</sup> A position originally taken in *Poe v. Ullman*, 367 U.S. 497, 543 (1961).

<sup>178</sup> See *Roe v. Wade*, 410 U.S. 113 (1973).

<sup>179</sup> See TINSLEY E. YARBROUGH, JOHN MARSHALL HARLAN 313 (1992) ("In his *Poe* dissent, Harlan had included abortion laws among the reflection of a state's moral judgment he would be reluctant to disturb."). He also included "homosexual practices" among these. See *Poe*, 367 U.S. at 547.

<sup>180</sup> See *Lawrence v. Texas*, 539 U.S. 558, 562 (2003). (Kennedy, J.).

<sup>181</sup> See Sullivan, *supra* note 2, at 62.

<sup>182</sup> *Id.* at 97.

are rarely exact. By seeking a bright-line, judges may therefore impose stringent criterion on naturally fluid situations.

This is perhaps most obvious in First Amendment law. Justice Breyer correctly recognizes that saying “speech is speech” leads one only so far; there is a substantive difference between suppressing controversial but passive ideas, and regulating information that tangibly threatens national security.<sup>183</sup> And despite their protestations to the contrary, even the absolutists have recognized Frankfurter’s “absolute exceptions.” Regarding speech in school, for example, both Black and Thomas denied “speech is speech,” valuing parental consent over student utterances.<sup>184</sup>

Another supposed advantage of rule-based jurisprudence lies in its utility. According to Sullivan, “rules afford certainty and predictability to private actors.”<sup>185</sup> Since categorical rulings will follow a basic, predictable course, people can plan their business without fear of being tangled in unforeseen penalties or lawsuits. Here again, however, advocates of rule-based jurisprudence seem to overstate the case. Having standards does not mean everything becomes uncertain, with judges imposing their subjective rulings at will. And a key to stability is adherence to precedent, to which both Black and Thomas demonstrate only mixed loyalty.<sup>186</sup>

Recognizing these weaknesses may lead one to conclude standards are a more practical form of adjudication. Frankfurter and Breyer, in acknowledging few cases are truly identical, allow for flexible decision-making adapted to changing circumstances. For example, while a right to “bodily integrity” may not have seemed essential in the early-twentieth century, changing social mores demanded a more open society. Standard-based judging thus makes the Court “confront the parties in the flesh” rather than allowing it to take false refuge in supposedly objective proclamations. As one critic of Thomas remarked, to the Justice “there are no grey areas and no mitigating factors”; his “abstract principles generate a series of categorical judgments that need never yield to a human dimension.”<sup>187</sup>

Justices Black and Thomas would counter this by arguing that changed social mores (adapted to the so-called “human dimension”) are for legislatures rather than Courts to determine. Of course, Frankfurter and Breyer’s counter-response would be to press for judicial restraint. The nature of this restraint, however, also demands balancing. This is especially true in the case of Breyer, who is a restraintist or activist depending on where one stands. As Orin Kerr recognizes, if you want to make Justice Breyer “a paragon of judicial restraint, you recite” his continual deference

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<sup>183</sup> *Id.*

<sup>184</sup> See Lichtman, *supra* note 152, at 454.

<sup>185</sup> *Id.* at 62.

<sup>186</sup> See Lindquist & Cross, *supra* note 162, at 128 (the authors’ analysis of twenty two Justices found Thomas the most likely to overrule precedent, with Black somewhere in the middle).

<sup>187</sup> See Merida & Fletcher, *supra* note 84, at 239.

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to federal laws.<sup>188</sup> “If you want Breyer to come off as a judicial activist,” however, you simply note his common nullification of state legislation.<sup>189</sup>

A final defense of standard-based judging is its candor. Walter Mendelson argued that “open balancing compels a judge to take full responsibility for his decisions,”<sup>190</sup> making it “more difficult for judges to rest on their predispositions without ever subjecting them to the test of reason.” Indeed, Justice Frankfurter clearly displayed this in *Haley v. Ohio*,<sup>191</sup> where he painstakingly outlined his personal views before grounding his decision in legal precedent.<sup>192</sup>

### VIII. CONCLUSION

Despite their deep philosophical differences, Justices Black and Frankfurter had a good deal in common. Both men believed the best judges focused on process rather than outcome, often subordinating political philosophies to legal analysis. Justices Thomas and Breyer have acted similarly: Although perhaps more difficult to accept in the age of *Bush v. Gore*, both justices often refuse to impose their personal opinions on the public.<sup>193</sup> This was clear for Thomas in *Lawrence* and Breyer’s decisions cur-tailing (or attempting to curtail) free speech.<sup>194</sup>

Ultimately, it is unclear which method, adhering to textual absolutes or a restrained form of balancing, is better at preventing the counter-majoritarian difficulty. While the latter opens the door to substantive due process and judge-made law, the former subordinates popular will to a specific, often subjective textual interpretation. Far clearer is that Justice Black and Frankfurter’s judicial duel has long outlived both men.

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<sup>188</sup> See Kerr, *supra* note 163.

<sup>189</sup> See Sullivan, *supra* note 2, at 68.

<sup>190</sup> *Id.* at 68.

<sup>191</sup> See Haley, *supra* note 67, (Frankfurter, J., concurring).

<sup>192</sup> *Id.* at 602 (“I deem it appropriate to state as explicitly as possible why, although I have doubts and difficulties, I cannot support affirmance of the conviction.”).

<sup>193</sup> *Bush v. Gore*, 531 U.S. 98 (2000).

<sup>194</sup> *Lawrence v. Texas*, 539 U.S. 558 (2003).



# (PRO)MOTION TO DISMISS? CONSTITUTIONAL TORT LITIGATION AND THRESHOLD FAILURE IN THE WAR ON TERROR

Matthew Windsor<sup>1</sup>

“The Age of Terrorism cannot, should not, be allowed to supersede the Age of Rights”.

Louis Henkin<sup>2</sup>

“[I]n the absence of any groundswell of popular revulsion against torture, political actions by individual citizens seem unlikely to have any practical effect. Yet perhaps, pursued doggedly and in a spirit of outrage, such actions will at least allow people to hold their heads up.”

J.M. Coetzee<sup>3</sup>

## ABSTRACT

*This article introduces the concept of threshold failure as a way of understanding the accountability vacuum in post 9/11 constitutional tort litigation, where victims of counterterrorism detention and interrogation policies in the United States have unsuccessfully sought civil remedies for torture against government officials. Doctrinal hurdles at the motion to dismiss stage are canvassed including the “special factors counseling hesitation” exception to the Bivens remedy and the “clearly established” tenet of the qualified immunity analysis. Judicial reliance on these threshold failure techniques preclude a consideration of the merits and thwart torture claimants in their efforts to seek redress. The article considers the litigation posture of government lawyers, public interest lawyers and federal court judges as a way of illuminating how the counterterrorism objectives of the ex-*

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<sup>2</sup> Louis Henkin, *War and Terrorism: Law or Metaphor*, 45 SANTA CLARA L. REV. 817, 827 (2005).

<sup>3</sup> J.M. COETZEE, *DIARY OF A BAD YEAR*, 35 (2007).

*ecutive have been accorded normative priority over the vindication of individual rights in the national security context.*

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I. INTRODUCTION

Threshold failure is an astonishingly frequent occurrence in post 9/11 constitutional tort litigation, which seeks civil remedies against government officials for their implementation of counterterrorism detention and interrogation policies. Such lawsuits are characterized by a complex series of doctrinal hurdles at the motion to dismiss stage, which together present an insurmountable barrier for plaintiffs claiming to be victims of torture (torture claimants). Almost without exception, these suits are extinguished at the outset of litigation, prior to a consideration of the merits. The implications of threshold failure are immense. Without the opportunity to proceed to trial, torture claimants are potentially left without a forum in which to vindicate their claims. Meanwhile, government officials are cloaked with impunity to the detriment of government accountability. By “short-

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circuit[ing] judicial scrutiny,”<sup>4</sup> access to justice is significantly curtailed and the availability of effective remedies is limited.

The argument in this article is structured as follows. Parts II and III discuss two recurrent threshold failure techniques in the “doctrinal stew”<sup>5</sup> of post 9/11 constitutional tort litigation: the denial of the *Bivens* monetary remedy for constitutional violations on the basis that national security is a special factor counseling hesitation, and the application of the qualified immunity doctrine where the illegality of official action was not clearly established at the relevant time. Part IV situates the availability of the *Bivens* remedy and the qualified immunity doctrine against the panoply of barriers that face torture claimants in their efforts to seek redress which, taken together, create an accountability vacuum. An examination of the typical litigation strategies of government and public interest lawyers, as well as the deferential stance of federal court judges, helps demonstrate why constitutional tort litigation has not yet proven itself to be an effective mechanism for redressing post 9/11 abuses.

### II. THE DECLINE AND FALL OF *BIVENS*

#### A. AN IMPLIED REMEDY FOR CONSTITUTIONAL VIOLATIONS

In *Bivens v Six Unknown Named Agents of Federal Bureau of Narcotics*,<sup>6</sup> the Supreme Court created a damages action against federal officials as an implied remedy for constitutional violations (in that case, the Fourth Amendment prohibition against unreasonable searches and seizures).<sup>7</sup> In recognizing a right to monetary relief, the Court created doctrinal parity by filling in an “incomplete statutory framework” that would have authorized damages had the narcotics agents been state officers pursuant to a 42 U.S.C. 1983 action.<sup>8</sup> Although the Fourth Amendment did not explicitly provide for enforcement by an award of damages, the Court upheld the implication of such a remedy in cases “involv[ing] no special factors counseling hesitation in the absence of affirmative action by Congress.”<sup>9</sup> The absence of Congressional authorization of private remedies against federal officials and the specter of “judicial legislation” motivated

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<sup>4</sup> American Civil Liberties Union, *SLAMMING THE COURTHOUSE DOORS: DENIAL OF ACCESS TO JUSTICE AND REMEDY IN AMERICA* 15 (2010).

<sup>5</sup> PETER H SCHUCK, *SUING GOVERNMENT: CITIZEN REMEDIES FOR OFFICIAL WRONGS* 51 (1983).

<sup>6</sup> *Bivens v. Six Unknown Named Agents of Federal Bureau of Narcotics*, 403 U.S. 388 (1971).

<sup>7</sup> See generally ERWIN CHEMERINSKY, *FEDERAL JURISDICTION* 605-628 (5th ed., 2007) and Lawrence Rosenthal, *A Theory of Governmental Damages Liability: Torts, Constitutional Torts and Takings*, 9 U. PA. J. CONST. L. 797 (2006).

<sup>8</sup> Henry Monaghan, *The Supreme Court 1974 Term – Foreword: Constitutional Common Law*, 89 HARV. L. REV. 1, 23 (1975).

<sup>9</sup> *Bivens*, 403 U.S. 388 at 396 (Brennan, J).

the dissenting judgments in *Bivens*.<sup>10</sup> However, as Justice Harlan articulated in his concurring judgment, “it is important, in a civilized society, that the judicial branch of the Nation’s government stand ready to afford a remedy in these circumstances.”<sup>11</sup>

In the aftermath of *Bivens*, the Supreme Court allowed claims involving implied monetary remedies for constitutional violations in two additional circumstances: employment discrimination that violates due process (*Davis v Passman*)<sup>12</sup> and conduct of prison officials that violates the Eighth Amendment (*Carlson v Green*).<sup>13</sup> In *Carlson*, Justice Brennan clarified that the victims of a constitutional violation by a federal agent have a right to recover damages against the official in federal court despite the absence of any statute conferring such a right. The only exceptions to this right were if the defendant demonstrates “special factors counseling hesitation,” or if “Congress has provided an alternative remedy which it explicitly declared to be a substitute for recovery directly under the Constitution and viewed as equally effective.”<sup>14</sup>

Although it has never been overruled, cases subsequent to *Davis* and *Carlson* have retreated from the expansive remedial stance articulated in *Bivens*.<sup>15</sup> In *Bush v Lucas*, the Court considered that Congress could preclude *Bivens* “by statutory language, by clear legislative history, or perhaps even by the statutory remedy itself.”<sup>16</sup> This decision significantly expanded the class of cases in which congressionally-created remedies would be regarded as precluding recovery under *Bivens*. Later, *Schweiker v Chilicky* inaugurated “an open-ended balancing approach whereby judges attempt to decide whether a damages claim serves the public good.”<sup>17</sup>

In *Wilkie v Robbins*, the Court declined to extend the *Bivens* remedy to retaliation against the exercise of ownership rights.<sup>18</sup> The majority judgments were characterized by an antipathy towards *Bivens*. Justice Souter feared that “a general *Bivens* cure would be worse than the disease,”<sup>19</sup> while Justice Thomas asserted that he would not extend *Bivens* even if its reasoning logically applied.<sup>20</sup> Following *Schweiker*, the opinion of the Court construed the “special factors counseling hesitation” inquiry

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<sup>10</sup> *Id.*, at 430 (Blackmun, J., dissenting).

<sup>11</sup> *Id.* at 411 (Harlan, J., concurring).

<sup>12</sup> *Davis v. Passman*, 442 U.S. 228 (1979).

<sup>13</sup> *Carlson v. Green*, 446 U.S. 14 (1980).

<sup>14</sup> *Id.* at 30 (Brennan, J.,dissenting).

<sup>15</sup> Cf. Alexander A Reinert, *Measuring the Success of Bivens Litigation and its Consequences for the Individual Liability Model*, 62 STAN. L. REV. 809 (2010)(challenging this received wisdom and submitting that *Bivens* claims succeed at a higher rate than previously thought, compared to other civil rights litigation).

<sup>16</sup> *Bush v. Lucas*, 462 U.S. 367, 378 (1983) (Stevens, J).

<sup>17</sup> *Schweiker v. Chilicky*, 487 U.S. 412 (1988). See Gene R Nichol, *Bivens, Chilicky, and Constitutional Damages Claims*, 75 VA. L. REV. 1117, 1150 (1989).

<sup>18</sup> *Wilkie v. Robbins*, 551 U.S. 537 (2007).

<sup>19</sup> *Id.* at 561 (Souter, J).

<sup>20</sup> *Id.* at 568 (Thomas, J., concurring).

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as “the weighing [of] reasons for and against the creation of a new cause of action, the way common law judges have always done.”<sup>21</sup> By deemphasizing the need for a remedy that protects constitutional rights, the Court was able to find that “difficulty in defining a workable cause of action” might outweigh a constitutional interest.<sup>22</sup> Leading constitutional law scholar Laurence Tribe has criticized this open-ended special factors methodology as follows:

It is one thing for a cause of action to redress constitutional violations to be deemed presumptively available in the absence of a narrow set of judicially defined exceptions, but quite another for the Supreme Court to assume virtually unchecked power to decide which constitutional rights, and which kinds of constitutional violations, yield an implied cause of action for damages.<sup>23</sup>

Justice Ginsburg dissented in *Wilkie*, objecting to the Court identifying the floodgates fear of an “onslaught of *Bivens* actions” as a “special factor counseling hesitation.”<sup>24</sup> Invoking Justice Harlan’s concurrence in *Bivens*, she considered that “when we automatically close the courthouse door solely on this basis, we implicitly express a value judgment on the comparative importance of classes of legally protected interests.”<sup>25</sup>

Accordingly, there is a sharp division on the Supreme Court as to the viability of the *Bivens* remedy going forward. In *Correctional Services Corp v Malesko*, Justice Scalia acerbically derided *Bivens* as a “relic of the heady days in which [the] Court assumed common-law powers to create causes of action.”<sup>26</sup> Meanwhile, the dissenting justices in *Malesko*, who favored the *Bivens* remedy, identified the “driving force behind the Court’s decision [as] a disagreement with the holding of *Bivens* itself.”<sup>27</sup> Nevertheless, retrenchment has occurred to such a degree that some query whether *Bivens* is “sufficiently alive that it is capable of being reinvigorated.”<sup>28</sup>

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<sup>21</sup> *Id.* at 554 (Souter, J.).

<sup>22</sup> *The Supreme Court – Leading Cases – Constitutional Remedies – Bivens Damages – Takings Clause Retaliation*, 121 HARV. L. REV. 185, at 193 (2007).

<sup>23</sup> Laurence H Tribe, *Death by a Thousand Cuts: Constitutional Wrongs without Remedies after Wilkie v. Robbins*, CATO SUPREME COURT REVIEW 23, 71 (2007)

<sup>24</sup> *Wilkie v. Robbins*, 551 U.S. 537, 562 (2007) (Ginsburg, J., concurring in part and dissenting in part).

<sup>25</sup> *Id.* 561 (Souter, J.).

<sup>26</sup> *Id.* at 577 (Ginsburg, J., concurring in part and dissenting in part).

<sup>27</sup> *Correctional Services Corp’n v. Malesko*, 534 U.S. 61, at 75 (2001) (Scalia, J., concurring in part and dissenting in part). In that case, the Court refused to extend *Bivens* to allow recovery against a private contractor that operated a prison facility for the Federal Bureau of Prisons.

<sup>28</sup> *Id.* at 82 (Stevens, J., dissenting).

<sup>29</sup> RICHARD H FALLON JR ET AL, HART AND WECHSLER’S THE FEDERAL COURTS AND THE FEDERAL SYSTEM 740 (6th ed., 2009). In *Sossamon v. Texas* 131 S. Ct. 1651 (2011), a hardening of the doctrinal arteries with respect to monetary relief for rights violations could be discerned. A majority of the Supreme Court held that “appropriate relief against a government” in the Religious Land Use and Institutionalized Persons Act 2000 did not

B. ARAR V ASHCROFT: CATEGORICAL DEFERENCE?

If *Wilkie* suggested that *Bivens* was on “life support with little prospect of recovery,”<sup>29</sup> the decision of the Second Circuit Court of Appeals in *Arar v Ashcroft* signaled a death knell for the implied remedy, at least where national security issues were at stake.<sup>30</sup> Although it is hard to do justice here to the nuanced reasoning of a 184-page judgment, including four impassioned dissents, this section will focus on the contribution of new context and “special factors counseling hesitation” analyses to threshold failure.

*Arar* concerned the practice of extraordinary rendition, deployed as an “integral adjunct to coercive interrogation in the war on terrorism.”<sup>31</sup> Maher Arar, a dual Syrian and Canadian citizen, alleged that he was detained while changing planes at John F. Kennedy International Airport in New York in September 2002, based on a warning that he was a member of Al Qaeda from Canadian authorities. Arar was mistreated for twelve days while in United States custody and then removed to Syria via Jordan pursuant to an intergovernmental understanding that he would be detained and interrogated under torture by Syrian officials. He remained in Syria for the next ten months where he claims he was repeatedly tortured.

Arar’s complaint alleged violations of the Torture Victim Protection Act and Fifth Amendment substantive due process rights arising from conditions of detention and denial of access to counsel and courts while in the United States, and detention and torture in Syria.<sup>32</sup> His complaint was directed against the Attorney-General of the United States, the Secretary of Homeland Security, the Director of the FBI and others. By a vote of 7-4 in an en banc rehearing, the Second Circuit dismissed Arar’s case in its entirety for failing to state a *Bivens* claim. The chief reason for dismissal, articulated by Chief Judge Jacobs for the majority under the rubric of special factors counseling hesitation, was as follows:

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include monetary damages. In her dissent, Justice Sotomayor considered that “the unavailability of monetary relief will effectively shield unlawful policies and practices from judicial review in many cases” (at 1669). To that end, she cited *Bivens*, 403 U.S. 388, 395 (1971): “Historically, damages have been regarded as the ordinary remedy for an invasion of personal interests in liberty”.

<sup>29</sup> Tribe, *supra* note 23, at 26.

<sup>30</sup> *Arar v. Ashcroft* 585 F.3d 559 (2d Cir. 2009).

<sup>31</sup> STEPHEN DYCUS ET AL, NATIONAL SECURITY LAW 804 (4th ed., 2007).

<sup>32</sup> The Torture Victim Protection Act provides a civil remedy in the federal courts for individuals, including non United States citizens, who have been victims of torture or extrajudicial killing. However, it only provides a cause of action for torture or extrajudicial killing “under color of law, of any foreign nation”. In *Arar*, the majority opinion concluded that the relevant conduct was insufficient to establish that the defendants were clothed with the authority of Syrian law or that the conduct may be attributable to Syria: *Arar*, 585 F.3d 559 at 568 (Jacobs, C.J., majority opinion).

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A suit seeking a damages remedy against senior officials who implement an extraordinary rendition policy would enmesh the courts ineluctably in an assessment of the validity and rationale of that policy and its implementation in this particular case, matters that directly affect significant diplomatic and national security concerns.<sup>33</sup>

The methodology applied by the majority was, first, to determine whether Arar's claim invoked *Bivens* in a new context; second, whether an alternative remedial scheme was available to Arar; and third, whether special factors counseled hesitation. Chief Judge Jacobs held that "extraordinary rendition" was a context new to *Bivens* claims.<sup>34</sup> He avoided a categorical ruling on alternative remedies because of the clear existence of special factors counseling hesitation. A review of the case law on special factors led the majority to conclude that no account should be "taken of countervailing factors that might counsel alacrity or activism,"<sup>35</sup> and that hesitation is a "remarkably low" threshold: "a pause, not a full stop, or an abstention ... [and] whenever thoughtful discretion would pause even to consider."<sup>36</sup> Thus, separation of powers concerns – that judicial interference with extraordinary rendition would "affect diplomacy, foreign policy and the security of the nation"<sup>37</sup> – motivated the following abdicator stance:

[I]f a civil remedy in damages is to be created for harms suffered in the context of extraordinary rendition, it must be created by Congress, which alone has the institutional competence to set parameters, delineate safe harbors, and specify relief.<sup>38</sup>

The dissenting judgments, described by the majority opinion as "emotional and ... overwrought", refused to facilitate threshold failure on the *Bivens* point.<sup>39</sup> Judge Pooler chastised the majority opinion for:

... its hyperbolic and speculative assessment of the national security implications of recognizing Arar's *Bivens* action, its underestimation of the institutional competence of the judiciary, and its implicit failure to accept as true Arar's allegations that defendants blocked his access to judicial processes so that they could render him to Syria to be tortured, conduct that shocks the conscience and disfigures fundamental constitutional principles.<sup>40</sup>

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<sup>33</sup> *Arar*, 585 F.3d at 575 (Jacobs, C.J., majority opinion).

<sup>34</sup> For background, see Jane Mayer, *Outsourcing Torture: The Secret History of America's 'Extraordinary Rendition' Program* in *THE UNITED STATES AND TORTURE: INTERROGATION, INCARCERATION, AND ABUSE* 137 (Marjorie Cohn ed, 2011).

<sup>35</sup> *Arar v. Ashcroft*, 585 F.3d 559 (2d Cir. 2009), at 574 (Jacobs, C.J., majority opinion).

<sup>36</sup> *Id.* at 574 (Jacobs, C.J., majority opinion).

<sup>37</sup> *Id.* at 574 (Jacobs, C.J., majority opinion).

<sup>38</sup> *Id.* at 564 (Jacobs, C.J., majority opinion).

<sup>39</sup> *Id.* at 581 (Jacobs, C.J., majority opinion).

<sup>40</sup> *Id.* at 627 (Pooler, J., dissenting).

Judge Sack argued that the correct context comprised all Arar's allegations of mistreatment, not solely those pertaining to extraordinary rendition, and accordingly did not present a new context.<sup>41</sup> Both Judge Sack and Judge Calabresi regarded national security concerns as better dealt with in terms of the state secrets privilege to prevent "double-counting" in the special factors analysis.<sup>42</sup> For Judge Calabresi, the insistence on foreclosing *Bivens* demonstrated an "unwavering willfulness" to violate the constitutional avoidance canon;<sup>43</sup> his preferred option was to remand the case to see whether it might be dismissed on state secrets grounds. Judge Sack regarded it as "mistaken" to withhold *Bivens* on the basis of "a citation or compilation" of special factors, and observed that a factor counseling recognition of a *Bivens* action was that Arar had no other remedy for the harms inflicted on him.<sup>44</sup>

The new context inquiry may prove beneficial to torture claimants in future litigation, as a prior analytical step to the two-pronged *Wilkie* analysis, because "it encourages judges to give real consideration to the question whether *Bivens* precedent dictates that the *Wilkie* test not apply."<sup>45</sup> In relation to special factors, Vladeck has argued that national security may counsel in favor of liability, contrary to the majority opinion in *Arar* that precluded consideration of countervailing matters:

The existence of defenses and other mechanisms to vindicate the government's claimed need to avoid inappropriate judicial interference with national security and foreign policy is the opposite of a special factor counseling hesitation. If anything, it is a special factor counseling *in favor of* a remedy, since the courts can have faith that these other doctrines will provide the sorting mechanism that *Bivens* was never meant to – and to bar relief on the merits in cases in which the government's concerns are justified.<sup>46</sup>

Ultimately, the "categorical deference" exemplified by the majority opinion in *Arar* is at odds with the torture claimant-friendly stance adopted by the dissenting judges.<sup>47</sup> The tension between a rights-enhancing and prudentially deferential approach means that post 9/11 *Bivens* litigation is at something of an impasse.<sup>48</sup> Judge Parker's dissent astutely notes the dif-

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<sup>41</sup> *Id.* at 583 (Sack, J., dissenting).

<sup>42</sup> *Id.* at 601 (Sack, J., dissenting) and 635 (Calabresi, J., dissenting).

<sup>43</sup> *Id.* at 630 (Calabresi, J., dissenting).

<sup>44</sup> *Id.* at 600 (Sack, J., dissenting).

<sup>45</sup> *Constitutional Law – Bivens Actions – Second Circuit Holds that Alleged Victim of Extraordinary Rendition Did Not State a Bivens Claim*, 123 HARV. L. REV. 1787, 1791-92 (2010).

<sup>46</sup> Stephen I. Vladeck, *National Security and Bivens after Iqbal*, 14 LEWIS & CLARK L. REV. 276 (2010).

<sup>47</sup> Peter Margulies, *Judging Myopia in Hindsight: Bivens Actions, National Security Decisions, and the Rule of Law*, 96 IOWA L. REV. 195, 201 (2010).

<sup>48</sup> See George D. Brown, *Counter-Counter-Terrorism via Lawsuit: The Bivens Impasse*, 82 S. CAL. L. REV. 841 (2009).

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ference between “being deferential and being supine in the face of governmental misconduct”:

At the end of the day, it is not the role of the judiciary to serve as a help-mate to the executive branch, and it is not its role to avoid difficult decisions for fear of complicating life for federal officials. Always mindful of the fact that in times of national stress and turmoil the rule of law is everything, our role is to defend the Constitution. We do this by affording redress when government officials violate the law, even when national security is invoked as the justification.<sup>49</sup>

The dissenting judgments in *Arar* skillfully expose the chilling implications of the majority opinion for the future trajectory of the *Bivens* remedy. The result-fixing characterizations of extraordinary rendition as a new context and national security as a special factor counseling hesitation deviates from the central thrust of *Bivens* and its use of the Constitution as a sword.<sup>50</sup> The threshold failure that ensues expresses a “value judgment on the comparative importance of classes of legally protected interests” by prizing categorical deference over the vindication of individual rights.<sup>51</sup>

### III. QUALIFIED IMMUNITY

#### A. FROM SAUCIER TO PEARSON

The qualified immunity doctrine in constitutional tort litigation is a pervasive threshold failure technique; if a defendant invokes it successfully, the suit is over. Qualified immunity shields government officials from civil liability where their alleged misconduct “does not violate clearly established statutory or constitutional rights of which a reasonable person would have known.”<sup>52</sup> It operates as “an immunity from suit rather than a mere defense to liability,”<sup>53</sup> enabling courts to balance citizens’ interests in having remedies for violations of constitutional rights with officials’ interests in fulfilling their duties without fear of legal reprisal.<sup>54</sup>

In *Saucier v. Katz*, the Supreme Court articulated a mandatory two-step sequence for resolving government officials’ qualified immunity claims.<sup>55</sup> First, a court must decide whether the facts that a plaintiff has

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<sup>49</sup> *Arar v. Ashcroft* 585 F.3d 559, 611 (2d Cir. 2009) (Parker, J., dissenting).

<sup>50</sup> See Walter Dellinger, *Of Rights and Remedies: The Constitution as a Sword*, 85 HARV. L. REV. 1532 (1972).

<sup>51</sup> *Bivens v. Six Unknown Named Agents of Federal Bureau of Narcotics*, 403 U.S. 388, 411 (1971) (Harlan, J., concurring).

<sup>52</sup> *Harlow v. Fitzgerald*, 457 U.S. 800, 818 (1982) (Powell, J.). See also RICHARD H FALLON JR ET AL, *supra* note 28, at 740.

<sup>53</sup> *Mitchell v. Forsyth*, 472 U.S. 511, 526 (1985) (White, J.).

<sup>54</sup> See Louis L Jaffe, *Suits Against Governments and Officers: Damage Actions*, 77 HARV. L. REV. 209, 216-7 (1963).

<sup>55</sup> *Saucier v. Katz*, 533 U.S. 194 (2001).

alleged demonstrate a violation of a constitutional right. Secondly, if so, the court must decide whether the right at issue was clearly established at the time of the defendant's alleged misconduct. By requiring courts to reach the merits before ascertaining whether a constitutional right was clearly established, *Saucier* was alive to the danger of constitutional stagnation.<sup>56</sup> This mandatory sequencing approach was subject to a pejorative critical reception. A common criticism was that deciding new constitutional rights in dictum risked making bad constitutional law and violated the doctrine of constitutional avoidance.<sup>57</sup>

Eight years later, in *Pearson v Callahan*, the Supreme Court unanimously overruled *Saucier*, holding that mandatory sequencing for all qualified immunity claims was no longer an "inflexible requirement":<sup>58</sup>

On reconsidering the procedure required in *Saucier*, we conclude that, while the sequence set forth there is often appropriate, it should no longer be regarded as mandatory. The judges of the district courts and the courts of appeals should be permitted to exercise their sound discretion in deciding which of the two prongs of the qualified immunity analysis should be addressed first in light of the circumstances in the particular case at hand.

Although its reversal of the *Saucier* "order of battle" aligned with constitutional avoidance and meant that cases might be determined by deciding whether an asserted right was clearly established,<sup>59</sup> the Supreme Court in *Pearson* continued to extol the virtues of the *Saucier* analysis in some cases:

In addition, the *Saucier* court was certainly correct in noting that the two-step procedure promotes the development of constitutional precedent and is especially valuable with respect to questions that do not frequently arise in cases in which a qualified immunity defense is unavailable.<sup>60</sup>

Thus, the possibility of the merits of constitutional tort claims being adjudicated "even when they do not control immediate outcomes, in order to achieve "clearly established" rights capable of enforcement in the fu-

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<sup>56</sup> Jack Beerman, *Qualified Immunity and Constitutional Avoidance*, Boston Univ. Sch. of L. Working Paper No 09-51, 2 (2009).

<sup>57</sup> Pierre Leval, *Judging Under the Constitution: Dicta about Dicta*, 81 N.Y.U.L. REV. 1249, 1275-1277 (2006). John C Jeffries goes further, arguing that the Supreme Court's "transsubstantive" conception of constitutional tort law "suppresses clear thinking" about the availability of alternative proceedings and remedies: *Disaggregating Constitutional Torts*, 110 YALE L. J. 259, 259 (2000). For Jeffries, the "crucial variable" in ascertaining the "desirability of merits-first adjudication" is "whether money damages provide the chief or substantial vehicle for vindicating the right in question": John C Jeffries, *Reversing the Order of Battle in Constitutional Torts*, SUP. CT. REV. 115 (2009).

<sup>58</sup> *Pearson v. Callahan*, 555 U.S. 223, 223 (2009).

<sup>59</sup> *Qualified Immunity – Order of Analysis*, 123 HARV. L. REV. 272, 273 (2009).

<sup>60</sup> *Pearson v. Callahan*, 555 U.S. 223, 236 (2009).

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ture” is a matter of judicial discretion.<sup>61</sup> *Pearson* can be criticized for failing to articulate a standard that federal courts should apply to decide whether to reach the constitutional merits,<sup>62</sup> and for failing to clarify what it means for a right to be clearly established.<sup>63</sup> The constitutional ramifications of threshold failure based on the clearly established test are significant:

Dismissing challenges early in litigation on the ground that a claimed right was not clearly established does little to help parties structure future conduct. Though the Court’s concern with constitutional avoidance is admirable, it comes at the expense of the clarification of constitutional doctrine and the creation of legal certainty.<sup>64</sup>

The reversal of the “order of battle” in *Pearson* is a “remarkable exercise of judicial creativity in re-fashioning the system by which plaintiffs pursue constitutional tort claims.”<sup>65</sup> Indeed, it has been suggested that the changes in qualified immunity doctrine have functioned as a substitute for summary judgment<sup>66</sup> and discovery reform.<sup>67</sup> The swift transition from *Saucier* to *Pearson* demands to be understood as “an effort on the Court’s part to strike its own balance between the interests of victims and the government.”<sup>68</sup>

### *B. RASUL V MYERS: UNQUALIFIED IMPUNITY?*

The facilitation of threshold failure by avoiding the merits and according the clearly established prong primacy is well illustrated by *Rasul v Myers*.<sup>69</sup> *Rasul* was a suit brought by former Guantanamo detainees seeking

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<sup>61</sup> Jeffries, *supra* note 57, at 116.

<sup>62</sup> Beerman, *supra* note 56, at 34. “The stakes are high because the difference between mandatory or discretionary sequencing may bear on the frequency with which courts address substantive constitutional rights questions, which in turn impacts the “rate” at which constitutional rights are “clearly established” through precedents”: Greg Sobolski and Matt Steinberg, *An Empirical Analysis of Section 1983 Qualified Immunity Actions and Implications of Pearson v Callahan*, 62 STAN. L. REV. 523, 525 (2010).

<sup>63</sup> David Cleveland responds to the argument that unpublished opinions cannot create clearly established rights in circuit courts by maintaining that “unpublished decisions are by definition applications of settled law; they apply that law to factual setting that again, by virtue of qualifying for an unpublished opinion, are routine rather than questionable”: *Clear as Mud: How the Uncertain Precedential Status of Unpublished Opinions Muddles Qualified Immunity Determinations*, 65 U. Miami L. Rev. 45, 76 (2010)

<sup>64</sup> *Qualified Immunity – Order of Analysis*, *supra* note 59, at 282.

<sup>65</sup> James E Pfander, *Iqbal and Constitutional Torts: Iqbal, Bivens and the Role of Judge-Made Law in Constitutional Litigation*, 114 PENN. ST. L. REV. 1387, 1389 (2010).

<sup>66</sup> John C Jeffries Jr, *What’s Wrong With Qualified Immunity?*, 62 FLA L. REV. 851, 852 (2010).

<sup>67</sup> David Noll, *Qualified Immunity in Limbo: Rights, Procedure, and the Social Costs of Damages Litigation Against Public Officials*, 83 N. Y. U. L. REV. 911 (2008).

<sup>68</sup> Pfander, *supra* note 65, at 1417.

<sup>69</sup> *Rasul v. Myers*, 512 F.3d 644 (DC Cir. 2008), *vacated and remanded* 129 S.Ct. 763 (2008); 563 F.3d 527 (DC Cir 2009), *cert denied* 130 S.Ct. 1013 (2009).

redress for torture and religious discrimination from former Secretary of Defense Donald Rumsfeld and various members of the military chain of command.<sup>70</sup> The plaintiffs alleged:

... various forms of torture, which include hooding, forced nakedness, housing in cages, deprivation of food, forced body cavity searches, subjection to extremes of heat and cold, harassment in the practice of their religion, forced shaving of religious beards, placing the Koran in the toilet, placement in stress positions, beatings with rifle butts, and the use of unmuzzled dogs for intimidation.<sup>71</sup>

The Obama administration filed a motion to dismiss. Regarding the constitutional tort claims brought pursuant to *Bivens*, the administration argued that the plaintiffs had failed to allege the violation of any right protected by the Constitution under the *Saucier* test for qualified immunity.<sup>72</sup> This was because Guantanamo detainees did not possess constitutional rights as aliens located outside sovereign United States territory at the time of the alleged violations. In any event, in *Saucier* parlance, such a right was not clearly established at the time of the violations.<sup>73</sup> The District of Columbia Court of Appeals dismissed the constitutional claims:

Based on the plain text of the lease and on case law, it was not clearly established at the time of the alleged violations – nor even today – that a reasonable officer would know that Guantanamo is sovereign United States territory.<sup>74</sup>

The Supreme Court subsequently granted certiorari,<sup>75</sup> vacated the Court of Appeals ruling and remanded the case for reconsideration in light of its decision in *Boumediene v. Bush*.<sup>76</sup> *Boumediene* held that Guantanamo detainees had constitutional habeas corpus rights to challenge their detention in United States courts.

On remand, the Court of Appeals reinstated their judgment, holding that *Boumediene* had not changed the outcome in the earlier *Rasul* case.<sup>77</sup> They considered that the Supreme Court in *Boumediene* had “disclaimed any intention to disturb existing law governing the extraterritorial reach of any constitutional provisions, other than the Suspension Clause.”<sup>78</sup> How-

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<sup>70</sup> For a comprehensive discussion of the case, see Jaykumar A Menon, *Guantanamo Torture Litigation*, 6 J. INT'L CRIM. JUST. 323 (2008).

<sup>71</sup> *Rasul v. Rumsfeld*, 414 F. Supp. 2d 26, 27 (D.D.C. 2006).

<sup>72</sup> The claims arising under the Alien Tort Statute, the Geneva Conventions and the Religious Freedom Restoration Act are not canvassed here.

<sup>73</sup> *Saucier v. Katz*, 533 U.S. 194 (2001).

<sup>74</sup> *Rasul v. Myers*, 512 F.3d 644, 667 (DC Cir. 2008) (Henderson, J.). In a separate concurring opinion, Brown J. ruled against the petitioners on alternate “special factors” grounds: *Id.* at 672-77.

<sup>75</sup> *Rasul v. Myers*, 129 S.Ct. 763 (2008).

<sup>76</sup> *Boumediene v. Bush*, 553 U.S. 723 (2008).

<sup>77</sup> *Rasul v. Myers*, 563 F.3d 527 (DC Cir. 2009).

<sup>78</sup> *Id.* at 529.

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ever, the Court of Appeals rested its decision on qualified immunity grounds: “considerations of judicial restraint favor exercising the *Pearson* option with regard to plaintiffs’ *Bivens* claims.”<sup>79</sup> (As discussed above, the *Pearson* option permits resort to the clearly established prong of the analysis first.) At the time of the alleged misconduct, the Court of Appeals concluded that it was not clearly established that “aliens captured on foreign soil and detained beyond sovereign US territory had any constitutional rights.”<sup>80</sup> In the course of their subsequent (unsuccessful) certiorari petition to the Supreme Court, the plaintiffs argued:

Respondents selected Guantanamo as petitioners’ detention facility in a cynical attempt to avoid accountability for conduct that had long been held unconstitutional when it occurred in US prisons. But Guantanamo is not a Hobbesian enclave where respondents could violate clear prohibitions on their conduct imposed by statute and regulations and then point to a purported constitutional void as a basis for immunity.<sup>81</sup>

Threshold failure in *Rasul* on the basis that the illegality of official action was not clearly established, without consideration of the merits of the constitutional claims, is of great concern. There was no dispute as to the lawfulness of the primary conduct alleged; rather, the suit was disposed of because the extraterritorial reach of the Constitution was not clearly established at the relevant time.<sup>82</sup> The clarification of the extraterritorial issue by the Supreme Court in *Boumediene* provides “little comfort to those allegedly injured by US action prior to 2008.”<sup>83</sup> However, the Supreme Court in *Pearson* granted the federal courts discretion to revert to *Saucier* mandatory sequencing in some cases.<sup>84</sup> Detainee *Bivens* actions raise precisely the type of questions that are best ventilated in a *Saucier*, rather than *Pearson*, sequence.<sup>85</sup> Unlike *Rasul*, the Ninth Circuit in *Al-Kidd v Ashcroft* advocated the *Saucier* merits-first sequence, extolling its virtue in promoting constitutional development and addressing detainee rights that do not arise in alternative legal proceedings.<sup>86</sup>

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<sup>79</sup> *Id.* at 530.

<sup>80</sup> *Id.* at 530.

<sup>81</sup> *Rasul v. Myers*, Petition for Writ of Certiorari, WL 2607787 (U.S.) (Appellate Petition, Motion and Filing), 39 (Aug. 24 2009).

<sup>82</sup> In *Rights beyond Borders*, 36 YALE J. INT’L L. 55 (2011), Chimene I Keitner engages in a comparative analysis of whether a country’s domestic rights regime constrains government action beyond national borders. She considers that there are three basic approaches to reasoning about rights beyond borders: country-based reasoning (where did the government act?); compact-based reasoning (who did the government harm?) and conscience-based reasoning (what did the government do?). Keitner would likely analyze the arguments of the plaintiffs and the administration in *Rasul* under the rubric of compact/conscience and country-based reasoning respectively.

<sup>83</sup> *Id.* at 80.

<sup>84</sup> *Pearson v. Callahan*, 555 U.S. 223, 223 (2009).

<sup>85</sup> See Sarah Lynn Lochner, *Qualified Immunity, Constitutional Stagnation and the ‘War on Terror’*, 105 NW. U. L. REV. 829 (2011).

<sup>86</sup> *Al-Kidd v. Ashcroft*, 580 F.3d 949 (9<sup>th</sup> Cir. 2009).

The *Rasul* court's failure to reach the merits, by virtue of a preference for *Pearson* sequencing, has the effect of completely insulating government officials from *Bivens* claims. Along with the characterization of special factors counseling hesitation in *Arar*, the aversion to the merits in *Rasul* also demands to be perceived as a "value judgment on the comparative importance of classes of legally protected interests".<sup>87</sup>

#### IV. AN ACCOUNTABILITY VACUUM

The incidence of threshold failure in post 9/11 constitutional tort litigation, at the motion to dismiss stage, means that alleged abuses are not dealt with on the merits. The closing of courtroom doors on the basis of special factors counseling hesitation or because of the lack of a clearly established right, in the *Bivens* and qualified immunity contexts respectively, results in the unavailability of redress and a failure of accountability.<sup>88</sup> However, the problem of threshold failure is not overcome by, for example, adopting the approach of the dissenting judges in *Arar* regarding *Bivens* or rejecting the *Rasul* court's approach to qualified immunity in favor of the Ninth Circuit's analysis in *Al-Kidd*. Even if the doctrinal challenges canvassed in Parts II and III are successfully overcome, constitutional tort claims are still susceptible to being thrown out at the motion to dismiss stage on the basis of the state secrets privilege or insufficient pleadings. These threshold failure techniques are discussed briefly.

The state secrets evidentiary privilege forecloses relief for violation of rights that may have occurred by foreclosing discovery of evidence that they did occur.<sup>89</sup> Under the privilege, the government may prevent the disclosure of information in a judicial proceeding if "there is a reasonable danger" that such disclosure "will expose military matters which, in the interest of national security, should not be divulged."<sup>90</sup> As the Fourth Circuit observed in *El-Masri v United States*, the application of the privilege results in a plaintiff's "personal interest in pursuing his civil claim [being] subordinated to the collective interest in national security."<sup>91</sup> In *Mohamed et al. v Jeppesen Dataplan Inc.*, which was dismissed in its entirety on state secrets grounds, Judge Fisher's majority opinion conceded that this denial of a judicial forum:

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<sup>87</sup> *Bivens v. Six Unknown Named Agents of Federal Bureau of Narcotics*, 403 U.S. 388, 411 (1971) (Harlan, J., concurring).

<sup>88</sup> See ELIZABETH STUBBINS BATES ET AL., *TERRORISM AND INTERNATIONAL LAW: ACCOUNTABILITY, REMEDIES AND REFORM* (2010).

<sup>89</sup> STEPHEN DYCUS ET AL., *supra* note 31, at 1037.

<sup>90</sup> *El-Masri v. United States*, 479 F.3d 296, 302 (4<sup>th</sup> Cir. 2007) (citing *U.S. v. Reynolds*, 345 U.S. 1, 10 (1953)). For a discussion of the jurisprudence of state secrets, see David E. Pozen, *Deep Secrecy*, 62 STAN. L. REV. 257 (2010).

<sup>91</sup> *Id.* at 313.

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... poses concerns at both individual and structural levels. For the individual plaintiffs in this action, our decision forecloses at least one set of judicial remedies, and deprives them of the opportunity to prove their alleged mistreatment and obtain damages. At a structural level, terminating the case eliminates further judicial review in this civil litigation, one important check on alleged abuse by government officials and putative contractors.<sup>92</sup>

The introduction of heightened pleading standards, under the auspices of the Federal Rules of Civil Procedure, can also lead to threshold failure for torture claimants. In *Ashcroft v Iqbal*, a 5-4 majority of the Supreme Court held that Iqbal's complaint failed at a threshold stage because he did not plead sufficient facts to state a claim for unlawful discrimination that led to harsh conditions for incarcerated suspects.<sup>93</sup> The assumption of truth was replaced by a subjective plausibility standard for many of Iqbal's allegations. This onerous standard has made it much easier for lawsuits to be dismissed immediately after filing by a "skeptical judicial gatekeeper."<sup>94</sup> This treatment of pleadings and pretrial motions "undermine[s] important system values – meaningful citizen access, the quality of justice, governance and private enforcement, and the societal values of litigation."<sup>95</sup>

Given the formidable range of hurdles facing torture claimants, threshold failure can occur on alternative bases and is not ameliorated by strategic sequencing of the hurdles. For instance, even if a defense of qualified immunity is rejected, a suit remains susceptible to being thrown out in its entirety on the basis of the state secrets privilege. Rather than transforming doctrinal debates and helping to surmount attendant hurdles, the right to redress established at international law seems to float over threshold failure in the domestic fora like oil over water.<sup>96</sup> While threshold failure contributes to the exhaustion of domestic remedies, which is a precondition to state responsibility in international fora,<sup>97</sup> torture claimants must

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<sup>92</sup> *Mohamed v. Jeppesen Dataplan Inc.*, 614 F.3d 1070, 1091 (9<sup>th</sup> Cir. 2010) (Fisher J).

<sup>93</sup> *Ashcroft v. Iqbal*, 129 S.Ct. 1937 (2009).

<sup>94</sup> See Adam Liptak, *9/11 Case Could Bring Broad Shift on Civil Suits* (N.Y. TIMES July 21 2009) (available at: [www.nytimes.com/2009/07/21/us/21bar.html](http://www.nytimes.com/2009/07/21/us/21bar.html)) (observing that "under *Iqbal*, federal judges will now decide at the very start of a litigation whether the plaintiff's accusations ring true, and they will close the courthouse door if they do not").

<sup>95</sup> Arthur R Miller, *From Conley to Twombly to Iqbal: A Double Play on the Federal Rules of Civil Procedure*, 60 Duke L. J. 1, 130 (2010).

<sup>96</sup> United Nations General Assembly, "Basic Principles and Guidelines on the Right to a Remedy and Reparation for Victims of Gross Violations of International Human Rights Law and Serious Violations of International Humanitarian Law", A/Res/60/147, 21 March 2006. Bardo Fassbender has criticized the United States in this regard for failing to comply with art 14(1) of the Convention Against Torture: *Can Victims Sue State Officials for Torture? Reflections on Rasul v. Myers from the Perspective of International Law*, 6 J. INT'L CRIM. JUST. 347, 364-7 (2008).

<sup>97</sup> International Law Commission, *Draft Articles on the Responsibility of States for Internationally Wrongful Acts*, adopted on first reading, Report of the ILC, 48<sup>th</sup> Session, *ILC Yearbook 1996*, Vol II(2), 58, art 44(b) (2001): "The responsibility of a state may not be

endure costly and drawn out proceedings before invoking international mechanisms for redress.

A. THE GOVERNMENT LAWYER

The litigation strategies of the government have contributed to the drawn out nature of constitutional tort proceedings, particularly in the pre-merits motion to dismiss phase. Despite the argument that they have greater duties to serve the public interest than their counterparts in private practice,<sup>98</sup> government lawyers have treated threshold failure techniques, and their interaction, as loopholes to liability. The conduct of government lawyers in post 9/11 constitutional tort suits has been described as “consist[ing] of elaborate maneuvers to exclude evidence, intimidat[ing] litigants into dropping cases, or prevail[ing] by exhausting the adversary’s resources.”<sup>99</sup> The government’s assertion of every available threshold failure technique at the motion to dismiss stage, utilizing national security as a rhetorical prophylactic to conceal a multitude of sins, recalls Professor Jeremy Waldron’s admonition to the government lawyer:

Government lawyers should not be in the business of looking for pockets of unregulated discretion or loopholes in such regulations as do exist. They should not be advising their political bosses that they are entitled to avoid the impact of legal constraint where it is ambiguous or unclear. Nor should they complain when their expectations of governmental freedom from constraint are frustrated – that is, when legal constraint turns up in an area where they had been under the impression that the government had a free hand. Instead, they should proceed on the basis that the government is to act in accordance with law in *all* its operations, bearing in mind all the time that this general sense of constraint is not applied gratuitously but applied precisely to foster the sort of environment in which *individuals* can enjoy their liberty.<sup>100</sup>

In short, by facilitating threshold failure, government lawyers become complicit with their clients in the administration in cutting off processes of public proof and accountability.

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invoked if [t]he claim is one to which the rule of exhaustion of local remedies applies and any available and effective local remedy has not been exhausted”. However, see art 33(2): “This part is without prejudice to any right, arising from the international responsibility of a state, which may accrue directly to any person or entity other than a state.” See generally CHITTHARANJAN FELIX AMERASINGHE, LOCAL REMEDIES IN INTERNATIONAL LAW (2d ed, 2004) and JAMES CRAWFORD ET AL, THE LAW OF INTERNATIONAL RESPONSIBILITY (2010).

<sup>98</sup> See Steven K Berenson, *Public Lawyers, Private Values: Can, Should, and Will Government Lawyers Serve the Public Interest?*, 41 B. C. L. REV. 789 (2000) and Steven K Berenson, *The Duty Defined: Specific Obligations that Follow from Civil Government Lawyers’ General Duty to Serve the Public Interest*, 42 BRANDEIS L. J. 13 (2003).

<sup>99</sup> David Luban, *Lawfare and Legal Ethics in Guantanamo*, 60 STAN. L. REV. 1981, at 1985 (2008).

<sup>100</sup> JEREMY WALDRON, TORTURE, TERROR AND TRADE-OFFS: PHILOSOPHY FOR THE WHITE HOUSE 323-324 (2010) (emphasis added).

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Threshold failure also carries with it the distinct risk of moral failure on the part of the government lawyer. By restricting their attention to premerits arguments, the government lawyer is unlikely to dwell on the underlying substantive conduct of their client, a confrontation that, it is hoped, would activate the lawyer's independent sense of professional moral responsibility. It has been suggested that the cabining of moral attention is a central characteristic of modern bureaucracy, where no actor sees themselves as responsible for overall policy outcomes.<sup>101</sup> Zygmunt Bauman has described this phenomenon as the "social production of distance," which either nullifies or lessens the pressure of moral responsibility.<sup>102</sup> Such cabining exacerbates the potential for "complicity with cruelty induced by passive faith in authority and the bracketing of personal responsibility under an explanation of just following the rules."<sup>103</sup>

The Milgram experiments effectively highlight the way in which the participants' denial of personal responsibility had the disturbing corollary of shutting down their moral evaluative capacities and sympathies.<sup>104</sup> These infamous social psychology experiments involved subjects who were set the task of punishing another subject with escalating electric shocks for getting wrong answers in a memorization exercise. One of the more compliant "teachers" in the experiments urged that investigation be made into the health of the "learner" when they no longer screamed and may have been dying or dead. However, the "teacher" quickly withdrew his request on the basis that it was not his responsibility to inquire.<sup>105</sup> This withdrawal, in effect a threshold dismissal of a pressing substantive inquiry, goes deeper than a renunciation of responsibility for injuries inflicted on the "learner". The attachment to a mode of reasoning or technique that permits the abdication of personal responsibility for acts undertaken pursuant to that technique has ramifications of the most disturbing variety. Indeed, Bauman has observed that "[t]he Holocaust could be accomplished only on the condition of neutralizing the impact of primeval moral drives, of isolating the machinery of murder from the sphere where such drives arise and apply, of rendering such drives marginal or altogether irrelevant to the task."<sup>106</sup>

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<sup>101</sup> HANNAH ARENDT, *EICHMANN IN JERUSALEM: A REPORT ON THE BANALITY OF EVIL* 289 (2006): "Of course it is important to the political and social sciences that the essence of totalitarian government, and perhaps the nature of every bureaucracy, is to make functionaries and mere cogs in the administrative machinery out of men, and thus to dehumanize them".

<sup>102</sup> ZYGMUNT BAUMAN, *MODERNITY AND THE HOLOCAUST* 199 (1989).

<sup>103</sup> Martti Koskeniemi, *Faith, Identity and the Innocent: International Lawyers and Nuclear Weapons* in *THE POLITICS OF INTERNATIONAL LAW* 198, 216 (2011).

<sup>104</sup> STANLEY MILGRAM, *OBEDIENCE TO AUTHORITY: AN EXPERIMENTAL VIEW* (1974). *See also* HERBERT C KELMAN AND V LEE HAMILTON, *CRIMES OF OBEDIENCE: TOWARDS A SOCIAL PSYCHOLOGY OF AUTHORITY AND RESPONSIBILITY* (1989).

<sup>105</sup> I am grateful to the Fellowships at Auschwitz for the Study of Professional Ethics program for providing access to Stanley Milgram's audiovisual records, held at Sterling Memorial Library at Yale University.

<sup>106</sup> Bauman, *supra* note 102, at 188.

This attachment to a technique bears grave parallels to the way that government lawyers have regularly deployed aspects of constitutional tort doctrine that permit threshold failure in post 9/11 litigation. Such threshold failure techniques might be described as semantic structures that help “gild the frame so that the real picture is disguised.”<sup>107</sup>

Something has gone horribly awry in litigation where government lawyers cease to “think in an emergency”<sup>108</sup> and assume the role of consiglieri. Notwithstanding the considerable exigencies of the national security context and the orthodox equality of arms rationales, government lawyers “should more or less always seek positively capably to promote justice rather than negatively capably assisting the government in pursuing its idiosyncratic ends as effectively as it can.”<sup>109</sup> For Daniel Markovits, restrictions on the zealous partisanship of government lawyers are mandated by the motto of the United States Department of Justice: that “the United States wins when justice is done.”<sup>110</sup>

#### B. THE “PUBLIC INTEREST” LAWYER

Given the range of threshold failure techniques available to the government at the motion to dismiss stage, constitutional tort suits might be regarded as “fruitless and wasteful.”<sup>111</sup> Yet public interest lawyers in organizations such as the American Civil Liberties Union and the Center for Constitutional Rights continue to bring such suits on behalf of torture complainants, conceiving of constitutional tort litigation as the “default accountability mechanism for questioning government conduct.”<sup>112</sup> Despite the threshold failure dictated results of these cases, there is a distinct political and legal mileage to be gained through bringing litigation of this nature. From a political perspective, suits that do not result in a favorable judgment can still have value in “bringing attention to the legitimacy or moral dimensions of the claims.”<sup>113</sup> The plaintiffs and public interest lawyers driving such litigation are “often in it for the process, and the prospect

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<sup>107</sup> PHILIP ZIMBARDO, *THE LUCIFER EFFECT: UNDERSTANDING HOW GOOD PEOPLE TURN EVIL* 273 (2008).

<sup>108</sup> See ELAINE SCARRY, *THINKING IN AN EMERGENCY* (2011).

<sup>109</sup> DANIEL MARKOVITS, *A MODERN LEGAL ETHICS: ADVERSARY ADVOCACY IN A DEMOCRATIC AGE* 173 (2008). For a theoretical account upholding contextual justice as the desideratum of all lawyers, see WILLIAM SIMON, *THE PRACTICE OF JUSTICE: A THEORY OF LAWYER'S ETHICS* (1998).

<sup>110</sup> *Id.*, at 173.

<sup>111</sup> Cornelia Pillard, *Taking Fiction Seriously: The Strange Results of Public Officials' Individual Liability under Bivens*, 88 *GEO. L. J.* 65, 66 (1999).

<sup>112</sup> George D Brown, *Accountability, Liability and the War on Terror: Constitutional Tort Suits as Truth and Reconciliation Vehicles*, 63 *FLA. L. REV.* 193 (2011).

<sup>113</sup> DINAH SHELTON, *REMEDIES IN INTERNATIONAL HUMAN RIGHTS LAW* 456 (2d ed., 2005). See also Abram Chayes, *The Role of the Judge in Public Law Litigation*, 89 *HARV. L. REV.* 1281 (1976).

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of distracting, confronting and wearing down officials that have aggrieved them, all in the most public of arenas.”<sup>114</sup> By utilizing the constitutional tort regime for purposes other than the resolution of disputes, public interest lawyers engage in “crossover advocacy,”<sup>115</sup> “calling attention to a policy and a plight.”<sup>116</sup>

Nevertheless, Luban has described the “private demon” of public interest lawyers as a sense of futility:

Few lawyers who win so few cases and lose so many are immune from the gnawing sense that they are merely wasting their time. It sometimes seems as though their voices accomplish little beyond making a historical record of rejected arguments on behalf of vanquished causes. But they do win sometimes, and even when they fail, the alternative is not making a historical record, so that the very fact that they had a cause disappears without a trace.<sup>117</sup>

The *Arar* and *Rasul* litigation, comprising a “record of rejected arguments” concerning threshold failure, may in time come to be regarded as anticanonical from the standpoint of constitutional interpretation.<sup>118</sup> In his dissenting opinion in *Arar*, Judge Calabresi was convinced that “in calmer times, wise people will ask themselves: how could such able and worthy judges have done that?”<sup>119</sup> Indeed, it has been suggested that *Rasul* may become:

... a *Dred Scott* for the modern era: a judicial pronouncement that is so shocking, and so blunt, that it helps bring about the end of the particular legal scheme the Court seeks to uphold.<sup>120</sup>

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<sup>114</sup> David Zaring, *Personal Liability as Administrative Law*, 66 WASH. & LEE L. REV. 313, 316 (2009). Judith Resnik has noted that the “information-forcing function of public adjudication spawns debate about the state’s practices”: *Detention, The War on Terror, and the Federal Courts*, 110 COLUM. L. REV. 579, 588 (2010).

<sup>115</sup> Peter Margulies, *The Detainee’s Dilemma: The Virtues and Vices of Advocacy Strategies in the War on Terror*, 57 BUFF. L. REV. 347, 348 (2009).

<sup>116</sup> Zaring, *supra* note 114, at 332.

<sup>117</sup> David Luban, *Taking Out the Adversary: The Assault on Progressive Public-Interest Lawyers*, 91 CAL. L. REV. 209 246 (2003).

<sup>118</sup> For a comprehensive treatment of the way in which the anticanon exposes constitutional interpretation as a site of contestation, see Jamal Greene *The Anticanon*, 125 HARV. L. REV. 379 (2011).

<sup>119</sup> *Arar v. Ashcroft*, 585 F.3d 559, 630 (2d Cir. 2009).

<sup>120</sup> Menon, *supra* note 70, at 343. See also Scott Horton “Second Circuit Affirms Dismissal of *Arar*”, HARPER’S MAGAZINE (Nov. 2 2009)(available at: <http://www.harpers.org/archive/2009/11/hbc-90006024>): *Arar* “offers all the historical foresight of *Dred Scott*, in which the Court rallied to the cause of slavery, and all the commitment to constitutional principle of the *Slaughter-House Cases*, in which the Fourteenth Amendment was eviscerated”.

C. THE JUDGE

The suggestion that *Arar* and *Rasul* may one day be regarded as anti-canonical obviously implicates the judiciary and their interpretative choices. Almost without exception, federal court judges have given their imprimatur to the government's deployment of threshold failure techniques.<sup>121</sup> Judges in post 9/11 constitutional tort litigation have frequently foreclosed viable interpretative avenues that would have allowed a *Bivens* remedy and a merits-first qualified immunity analysis. The judges' facilitation of threshold failure by granting motions to dismiss, acceding to government submissions and paying short shrift to the arguments of torture complainants, clearly expresses a "value judgment on the comparative importance of classes of legally protected interests."<sup>122</sup> This judicial posture reveals a hesitation to regard the constitutional tort suit as an appropriate vehicle for questioning government policy involving national security.<sup>123</sup> It also evokes Robert Cover's sage analysis of judicial deference:

The jurisdictional principles of deference are problematic precisely because ... they align the interpretative acts of judges with the acts and interests of those who control the means of violence. ... The commitment to a jurisgenerative process that does not defer to the violence of the administration is the judge's only hope of partially extricating himself from the violence of the state. ... Such a hermeneutic of jurisdiction is risky. It entails commitment to a struggle, the outcome of which – moral and physical – is always uncertain. It is easier by far to pursue the positivist hermeneutic of jurisdiction. Judges are surely right that the issue of power will rarely be in doubt if they pursue the office of jurisdictional helplessness before the violence of officials.<sup>124</sup>

Applying Cover's observation to post 9/11 constitutional tort litigation, one might argue that the judge who recurrently upholds threshold failure techniques can be characterized as "pursu[ing] the office of jurisdictional helplessness before the violence of officials."<sup>125</sup> However, Cover's crucial insight is that this commitment to deference can align the judge's interpretative acts with the administrations that have sanctioned torture as an acceptable counterterrorism policy. It is perhaps for that reason that the latest dismissal of a lawsuit in its entirety was described by the public interest community as a "blow to the rule of law."<sup>126</sup>

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<sup>121</sup> See e.g. *Padilla v. Yoo*, 633 F.Supp. 2d 1005 (D.C. Cal 2009) and the dissenting judgments in *Arar v. Ashcroft*, 585 F.3d 559 (2d Cir. 2009).

<sup>122</sup> *Bivens v. Six Unknown Named Agents of Federal Bureau of Narcotics*, 403 U.S. 388, 411 (1971) (Harlan, J., concurring).

<sup>123</sup> Brown, *supra* note 112, at 193.

<sup>124</sup> Robert M Cover, *Nomos and Narrative* in *NARRATIVE, VIOLENCE AND THE LAW: THE ESSAYS OF ROBERT COVER* 160, 162-3 (Martha Minow, Michael Ryan and Austin Sarat eds. 1992).

<sup>125</sup> *Id.*

<sup>126</sup> *Lebron v. Rumsfeld*, 2011 WL 554061 (D.S.C.) (Feb. 17 2011). See American Civil Liberties Union press release: "In a Blow to the Rule of Law, Court Dismisses Lawsuit to

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### D. ALTERNATIVE REMEDIAL MECHANISMS

How else might accountability be sought if not from the courts? Proposals for a Truth and Reconciliation Commission have foundered.<sup>127</sup> While the classic definition of transitional justice appears to oust consideration of redressing injustices within an established democracy,<sup>128</sup> there is a growing awareness that a discernable transition from a repressive to a democratic regime is not required for a transitional justice mechanism to have remedial efficacy.<sup>129</sup> A myopic focus on such transitions diminishes the “moral challenges facing ... mature democracies as they reckon with an unsavory past”.<sup>130</sup> In the absence of a “large-scale judicial course correction,”<sup>131</sup> it appears that U.S. constitutional jurisprudence, in its “dialectical relationship”<sup>132</sup> with a “Gitmo fatigue” afflicted national culture,<sup>133</sup> is not yet at the historic moment to acknowledge counterterrorism-related wrongdoing.<sup>134</sup>

An amelioration of threshold failure may be more successfully sought at present in political or administrative fora rather than the federal courts. Underlying judicial analysis at the motion to dismiss stage is the belief that Congress should have a heightened role in devising constitutional remedies for torture claimants. Congress could create a cause of action against government officials by amending the Torture Victim Protection Act so that it

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Hold Former Government Officials Accountable for Torture of Jose Padilla” (Feb. 17 2011) (available at <<http://www.aclu.org/national-security/blow-rule-law-court-dismisses-lawsuit-hold-former-government-officials-accountable>>). See also Glenn Greenwald, “U.S. Justice v. the World”, SALON (Feb. 18 2011) (available at <[http://www.salon.com/news/opinion/glenn\\_greenwald/2011/02/18/justice](http://www.salon.com/news/opinion/glenn_greenwald/2011/02/18/justice)> ).

<sup>127</sup> Brown, *supra* note 112, at 195. See Hendrik Hertzberg, *Prisoners*, THE NEW YORKER 46 (April 18 2011).

<sup>128</sup> Ruti G Teitel, *Transitional Justice Genealogy*, 16 HARV. HUM. RTS. J. 69, 69 (2003): “the conception of justice associated with periods of political change, characterized by legal responses to confront the wrongdoings of repressive predecessor regimes”. See also Paige Arthur, *How ‘Transitions’ Reshaped Human Rights: A Conceptual History of Transitional Justice*, 31 Hum. Rts. Q. 321 (2009).

<sup>129</sup> See LISA MAGARRELL AND JOYA WESLEY, *LEARNING FROM GREENSBORO: TRUTH AND RECONCILIATION IN THE UNITED STATES* (2008).

<sup>130</sup> David A Crocker, *Reckoning with Past Wrongs: A Normative Framework*, 13 Ethics & International Affairs 43, 44 (1999). See also Eric A Posner and Adrian Vermeule, *Transitional Justice as Ordinary Justice*, 117 HARV. L. REV. 761 (2004).

<sup>131</sup> *Developments in the Law – Access to Courts* 122 HARV. L. REV. 1151, 1163 (2009).

<sup>132</sup> Robert Post, *Fashioning the Legal Constitution: Culture, Courts, and Law*, 117 HARV. L. REV. 4, 8 (2003).

<sup>133</sup> Linda Greenhouse, *Gitmo Fatigue at the Supreme Court*, New York Times (April 6 2011)(available at <<http://opinionator.blogs.nytimes.com/2011/04/06/gitmo-fatigue-at-the-supreme-court/>>).

<sup>134</sup> See Peter Margulies, *Changing of the Guard: The Obama Administration, National Security, and the Ethics of Legal Transitions*, Roger Williams Univ. Sch. of L. Legal Studies Research Paper Series (Sept. 2010) (available at <[http://papers.ssrn.com/sol3/papers.cfm?abstract\\_id=1673989](http://papers.ssrn.com/sol3/papers.cfm?abstract_id=1673989)>).

imposes liability for torture committed under color of domestic law. It could also create a federal analogue to 42 U.S.C. 1983, which permits plaintiffs to recover against state and local governments for violation of their constitutional rights.<sup>135</sup> In addition to having the authority to enact remedial legislation authorizing appropriate causes of action, Congress also has the power to enact private bills.<sup>136</sup> However, as a barometer of popular sentiment, Congress is unlikely to “look out for the rights of those swept up in the proverbial dragnet”.<sup>137</sup>

For that reason, the creation of an administrative compensation scheme may be a viable reform strategy.<sup>138</sup> While the purpose of the *Bivens* remedy is to “deter individual federal officers from committing constitutional violations,”<sup>139</sup> an administrative scheme could focus on compensating victims rather than deterring officials in the exercise of their national security duties.<sup>140</sup> The expansion of administrative remedies would not foreclose future doctrinal developments in the *Bivens* national security context, but would provide compensation in the interim:

For those who would worry about too much transparency, then, improving administrative remedies is an attractive option because it provides some compensation but gives the military leeway to design a system that protects US security interests. For those who worry about too much secrecy, however, improving administrative mechanisms is a good first step towards broader reforms and a necessary supplement to any appropriately robust compensation regime involving US federal courts.<sup>141</sup>

Administrative remedial mechanisms are not without precedent in this context. Other Western democracies have been far more introspective than the United States in providing redress in the aftermath of 9/11, “admitting culpability in their collusion with the US in the torture and detention of

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<sup>135</sup> See Richard Seamon, *US Torture as a Tort*, 37 RUTGERS L.J. 715 (2006).

<sup>136</sup> See the discussion of alternative remedies in *Mohamed v. Jeppesen Dataplan Inc.*, 614 F.3d 1070, 1091-92 (9<sup>th</sup> Cir. 2010).

<sup>137</sup> Stephen I. Vladeck, *Rights Without Remedies: The Newfound National Security Exception to Bivens*, 28(2) A.B.A. NAT'L SEC. L. REP. 1, at 5 (2006).

<sup>138</sup> Laura N Pennelle has recommended the creation of a Human Rights Ombudsman Commission: *The Guantanamo Gap: Can Foreign Nationals Obtain Redress for Prolonged Arbitrary Detention and Torture Suffered Outside the United States?*, 36 CAL. W. INT'L L.J. 303 (2006).

<sup>139</sup> *Correctional Services Corp'n v. Malesko*, 534 U.S. 61, 70 (2001) (Rehnquist, CJ).

<sup>140</sup> In *Making Government Pay: Markets, Politics and the Allocation of Constitutional Costs*, 67 U. CHI. L. REV. 345, 420, (2000), Daryl Levinson critiques the view that monetary remedies for constitutional violations effectively deter government officials: “Constitutional cost remedies make government pay dollars for constitutionally problematic conduct, but government cares not about dollars, only about votes. The challenge is to find ways of closing this gap”. Cf. John J Park who resists viewing the constitutional tort remedy solely in terms of the external effects of awarding money damages: John C. Park, *Constitutional Tort Action as Individual Remedy*, 28 HARV. C.R.-C.L. L. REV. 393 (2003).

<sup>141</sup> *Developments in the Law – Access to Courts*, *supra* note 131, 1151, at 1170.

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prisoners, and ... investigating, apologizing and paying reparations.”<sup>142</sup> Two examples suffice. First, in relation to the extraordinary rendition of Arar (discussed at Part III above), a Canadian commission of inquiry published a comprehensive public report detailing its culpable role in Arar’s abduction.<sup>143</sup> The Canadian Prime Minister also offered a public apology and announced that Arar would be paid \$10.5m in compensation plus legal fees for Canada’s role in the rendition.<sup>144</sup> Second, Mamdouh Habib, an Egyptian-born Australian citizen, reached a monetary settlement with the Australian government after winning the right to sue Australian officials for their collusion in his torture at Guantanamo.<sup>145</sup>

### V. CONCLUSION

This article has introduced threshold failure as an analytic device, to encapsulate how the focus on process rather than underlying substantive rights in post 9/11 constitutional tort jurisprudence has rendered civil remedies for torture claimants largely elusive.<sup>146</sup> Threshold failure techniques, such as the “special factors counseling hesitation” exception to the *Bivens* remedy and the “clearly established” prong of the qualified immunity analysis, often preclude a consideration of the merits and thwart torture claimants in their efforts to seek redress. The reliance on threshold failure techniques at the motion to dismiss stage of constitutional tort litigation expresses a “value judgment on the comparative importance of classes of legally protected interests”<sup>147</sup>, privileging the counterterrorism objectives of the executive over vindication of individual rights in the national security sphere. Due to the litigation strategy of government and public interest lawyers, and the value judgments made by federal court judges, torture complainants are left either to pursue litigation for collateral purposes or to seek accountability in political and administrative fora.

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<sup>142</sup> Greenwald, *supra* note 126.

<sup>143</sup> See Commission of Inquiry into the Actions of Canadian Officials in Relation to Maher Arar, *Report of the Events Relating to Maher Arar: Analysis and Recommendations* (2006).

<sup>144</sup> See Gloria Galloway, *Harper apologizes to Arar for torture in Syria*, THE GLOBE AND MAIL (January 26 2007) (available at <<http://www.theglobeandmail.com/news/national/article737948.ece>>).

<sup>145</sup> See Patricia Karvelas, *Mamdouh Habib to drop case against Canberra*, The Telegraph (January 8 2011) (available at <<http://www.dailytelegraph.com.au/news/national/mamdouh-habib-to-drop-case-against-canberra/story-e6freuzr-1225984020294>>).

<sup>146</sup> See Jenny S Martinez, *Process and Substance in the “War on Terror”*, 108 COLUM. L. REV. 1013 (2008).

<sup>147</sup> *Bivens v. Six Unknown Named Agents of Federal Bureau of Narcotics*, 403 U.S. 388, 411 (1971) (Harlan, J., concurring).



READING BETWEEN THE LINES: STATUTORY SILENCE  
AND CONGRESSIONAL INTENT  
UNDER THE ANTITERRORISM ACT

Jesse D. H. Snyder

ABSTRACT

*The Antiterrorism Act (ATA) provides plaintiffs with expansive rights to bring a civil action against those responsible for acts of international terrorism. Just how far this right extends is debatable, resulting in diverging case law. In 2002, the Seventh Circuit held that civil liability under the ATA extended to defendants that aid and abet international terrorism. Six years later, the Seventh Circuit sitting en banc revisited the issue of liability under the ATA and held that plaintiffs may not sue aiders and abettors of international terrorism because the statute does not expressly provide a cause of action against these parties. While the Seventh Circuit's 2008 decision failed to recognize aiding and abetting liability as a cause of action under 18 U.S.C. § 2333, this ruling ignored both Congress's intent to incorporate common law tort principles into the ATA and the administrative difficulties of parsing through which entities should ultimately be liable. As subsequent case law suggests, courts that apply aiding and abetting principles to § 2333 further the congressional intent to provide plaintiffs with a full array of tort remedies and ease judicial administration and application in a very complex area of the law. Furthermore, courts that validate aiding and abetting liability under the ATA also recognize the reality of fighting terrorism—the violent display of an ideology is only as powerful as those who support the act. While ideological motives will always be difficult to defeat, severing the financial support to these motives is a different matter entirely.*

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I. INTRODUCTION

The May 2010 National Security Strategy makes clear that the United States is waging a global campaign to defeat terrorism and that success “requires a broad, sustained, and integrated campaign that judiciously applies every tool of American power—both military *and civilian*.”<sup>1</sup> Twenty years prior to the 2010 National Security Strategy, well before the attacks on September 11, 2001, Congress passed legislation that provided private citizens with a powerful tool to further these aims.<sup>2</sup> Indeed, under 18 U.S.C. § 2333, the Antiterrorism Act (ATA), U.S. citizens injured by an act of international terrorism possess the legal right to bring a cause of

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<sup>1</sup> WHITE HOUSE, NATIONAL SECURITY STRATEGY (2010) 2 (emphasis added), available at [http://www.whitehouse.gov/sites/default/files/rss\\_viewer/national\\_security\\_strategy.pdf](http://www.whitehouse.gov/sites/default/files/rss_viewer/national_security_strategy.pdf).

<sup>2</sup> Anti-Terrorism Act of 1990, Pub. L. No. 101-519, § 132(b)(5), 104 Stat. 2250 (1990) (codified as amended at 18 U.S.C. §§ 2331-2338). Due to a latent defect in enactment, §§ 2331 & 2333 were repealed and subsequently re-enacted as part of the Federal Courts Administrative Act of 1992, Pub. L. No. 102-572, 106 Stat. 4506 (1992).

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action in federal court against those responsible for the harm.<sup>3</sup> As Senator Chuck Grassley boldly stated, “With the enactment of this legislation, we set an example to the world of how the United States legal system deals with terrorism.”<sup>4</sup>

Although civil actions under § 2333 are quite rare in practice, plaintiffs are now increasingly bringing suit and forcing courts to address the issue of who may be liable under the ATA.<sup>5</sup> In 2002, in *Boim I*, the Seventh Circuit reviewed the legislative history of the ATA and concluded that Congress intended to extend civil liability to those entities that aid and abet international terrorism.<sup>6</sup> Influenced by *Boim I*, several district courts in other circuits likewise extended civil liability to aiders and abettors.<sup>7</sup> Six years later, in *Boim IV*, the Seventh Circuit revisited the same issue and held the ATA does not provide a remedy against those that aid and abet international terrorism because “statutory silence on the subject of secondary liability means there is none.”<sup>8</sup> Interestingly, notwithstanding the *Boim IV* holding, several district courts outside the Seventh Circuit continue to follow the *Boim I* analysis and recognize aiding and abetting liability.<sup>9</sup> Taken together, all of these cases raise a very fundamental question that still lingers twenty years after Congress enacted the ATA—who should be held liable for acts of international terrorism?

To this end, this Paper argues that the ATA provides plaintiffs with a cause of action against those entities that aid and abet international terrorism. First, this Paper outlines the history of the ATA and examines the statutory requirements of § 2333. Second, this Paper reviews federal aiding and abetting liability and the Seventh Circuit’s holdings in *Boim I* and *Boim IV*. Finally, this Paper concludes by arguing that courts should return to the *Boim I* standard and recognize aiding and abetting liability under the ATA. Specifically, extending liability to defendants that aid and abet international terrorism supports the intent of Congress to sever terrorist financial networks and provide plaintiffs with a remedy against those entities that target victims “because they were Americans.”<sup>10</sup> Fur-

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<sup>3</sup> 18 U.S.C. § 2333(a) (2006) (codified as amended in scattered sections of 2, 18, 28, 41, 42 U.S.C.).

<sup>4</sup> 136 CONG. REC. S4568-01 (1990) (statement of Sen. Chuck Grassley).

<sup>5</sup> See Adam N. Schupack, Note, *The Arab-Israeli Conflict and Civil Litigation Against Terrorism*, 60 DUKE L.J. 207, 213 (2010) (“Use of the ATA was infrequent[;] however, until recently.”).

<sup>6</sup> *Boim v. Quranic Literacy Inst. (Boim I)*, 291 F.3d 1000, 1021 (7th Cir. 2002), *abrogated en banc sub nom. Boim v. Holy Land Found. for Relief & Dev. (Boim IV)*, 549 F.3d 685 (7th Cir. 2008), *cert. denied*, 130 S. Ct. 458 (2009). This interlocutory appeal arose from *Boim v. Quranic Literacy Inst.*, 127 F. Supp. 2d 1002 (N.D. Ill. 2001).

<sup>7</sup> *Linde v. Arab Bank, PLC*, 384 F. Supp. 2d 571, 583 (E.D.N.Y. 2005); *see also Morris v. Khadr*, 415 F. Supp. 2d 1323, 1330 (D. Utah 2006).

<sup>8</sup> *Boim IV*, 549 F.3d 685, 689 (7th Cir. 2008), *cert. denied*, 130 S. Ct. 458 (2009).

<sup>9</sup> *See, e.g., Wultz v. Islamic Republic of Iran*, No. 08-cv-1460 (RCL), 2010 U.S. Dist. LEXIS 111469, at \*120 (D.D.C. Oct. 20, 2010) (mem. op.).

<sup>10</sup> H.R. REP. NO. 102-1040, at 2 (1992) (statement of Sen. Chuck Grassley).

ther, this statutory interpretation avoids the potential confusion and uncertainty that may result under the *Boim IV* analysis, thereby leading to more consistent outcomes across the varied fact patterns of international terrorism.

## II. CIVIL REMEDIES UNDER THE ANTITERRORISM ACT— 18 U.S.C. § 2333

The concept of civil litigation against acts of international terrorism is best understood by: (1) exploring the ATA's legislative history, and (2) examining the actual text of § 2333.

### A. HISTORY OF THE ANTITERRORISM ACT—KLINGHOFFER

Until *Klinghoffer*, Congress largely stood on the sidelines and allowed statutes such as the Alien Tort Claims Act and the Death on the High Seas Act to suffice as remedies for plaintiffs who suffer injuries from acts of terrorism.<sup>11</sup> As a result, plaintiffs have historically struggled to litigate against terrorist organizations—many unable to even bring their case to trial.<sup>12</sup> The impetus for change arrived in 1985 when terrorists seized an Italian passenger ship in the Mediterranean Sea and murdered Leon Klinghoffer, a wheelchair-bound U.S. passenger.<sup>13</sup> Consequently, Klinghoffer's wife and daughters sued and alleged the Palestine Liberation Organization (PLO), among others, was responsible for the hijacking.<sup>14</sup> The PLO later moved to dismiss for lack of subject matter jurisdiction, lack of personal jurisdiction, and nonjusticiability.<sup>15</sup>

The district court in *Klinghoffer* found that it had subject matter jurisdiction under both federal admiralty jurisdiction and the Death on the High Seas Act because the alleged terrorist activities occurred on a ship in navigable waters.<sup>16</sup> Moreover, the presence of the PLO's U.N. mission in the state of New York satisfied personal jurisdiction.<sup>17</sup> Simi-

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<sup>11</sup> See *Klinghoffer v. S.N.C. Achille Lauro Ed Altri-Gestione Motonave Achille Lauro in Amministrazione Straordinaria (Klinghoffer I)*, 739 F. Supp. 854 (S.D.N.Y. 1990), *vacated*, 937 F.2d 44 (2d Cir 1991) (applying the Death on the High Seas Act, 46 U.S.C. §§ 761–768 (1982) (current version at 46 U.S.C. §§ 30301–30308 (2006)); *Tel-Oren v. Libyan Arab Republic*, 726 F.2d 774 (D.C. Cir. 1984) (*per curiam*).

<sup>12</sup> See *Tel-Oren*, 726 F.2d 774 (dismissing under the Alien Tort Act, 28 U.S.C. § 1350 (2006)).

<sup>13</sup> See Schupack *supra* note 5, at 212 (referencing Judith Miller, *Hijackers Yield Ship in Egypt; Passenger Slain, 400 are Safe; U.S. Assaults Deal with Captors*, N.Y. TIMES, Oct. 10, 1985, at A1.).

<sup>14</sup> *Klinghoffer I*, 739 F. Supp. at 856-7.

<sup>15</sup> *Id.* at 858.

<sup>16</sup> *Id.* at 858-59.

<sup>17</sup> *Id.* at 863.

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larly, the court found “acts of piracy” were within its jurisdiction, therefore rendering the case justiciable.<sup>18</sup> On appeal, the Second Circuit nevertheless remanded the district court’s findings on personal jurisdiction and service of process, holding that *only* the PLO’s non-U.N. activities could be a basis for jurisdiction.<sup>19</sup> After several years of litigation, the parties reportedly settled the case.<sup>20</sup> Although many in Congress viewed the outcome in *Klinghoffer* as favorable, it was inescapable that suits of this nature could only proceed under admiralty jurisdiction and fortuitous contacts with the United States.<sup>21</sup>

To avoid fortuity as a prerequisite for litigation success, members of Congress used *Klinghoffer* to springboard new legislation aimed against acts of international terrorism.<sup>22</sup> As the legislative history indicates, the crux of the ATA was to provide plaintiffs with certainty that a valid right of action against terrorist acts would be available to vindicate their injuries.<sup>23</sup> According to the House Report, “Only by virtue of the fact that the [Klinghoffer] attack violated certain [a]dmiralty laws and the organization involved—the Palestinian Liberation Organization—had assets and carried on activities in New York, was the court able to establish jurisdiction over the case. A similar attack occurring on an airplane or in some other locale might not have been subject to civil action in the [United States].”<sup>24</sup> Indeed, when drafting the ATA, Congress was not only cognizant of *Klinghoffer*, but actually sought to “expand” the jurisdictional reach for plaintiffs suing against acts of international terrorism.<sup>25</sup> In sum, Congress intended victims to have a “definitive” right to bring suit regardless of the incidental circumstances surrounding the terrorist act.<sup>26</sup>

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<sup>18</sup> *Id.* at 860.

<sup>19</sup> *Klinghoffer v. S.N.C. Achille Lauro Ed Altri-Gestione Motonave Achille Lauro In Amministrazione Straordinaria (Klinghoffer II)*, 937 F.2d 44, 50–51 (2d Cir. 1991).

<sup>20</sup> See Schupack *supra* note 5, at 212 (referencing Benjamin Weiser, *A Settlement with P.L.O. over Terror on a Cruise*, N.Y. TIMES, Aug. 12, 1997, at A6).

<sup>21</sup> See Schupack *supra* note 5, at 213 (referencing H.R. REP. NO. 102-1040, at 5 (1992)).

<sup>22</sup> *Boim I*, 291 F.3d 1000, 1010-11 (7th Cir. 2002), *abrogated en banc sub nom. Boim IV*, 549 F.3d 685 (7th Cir. 2008), *cert. denied*, 130 S. Ct. 458 (2009) (referencing H.R. REP. NO. 102-1040, at 5 (1992); 137 CONG. REC. S4511-04 (April 16, 1991); 136 CONG. REC. S4568-01 (1990)).

<sup>23</sup> H.R. REP. NO. 102-1040, at 5 (1992).

<sup>24</sup> *Id.*

<sup>25</sup> *Antiterrorism Act of 1990: Hearing Before the Subcomm. on Courts and Admin. Practice of Comm. on the Judiciary*, 101st Cong. 12 (1990) (statement of Alan Kreczko, Deputy Legal Advisor, Department of State) (“This bill expands ... the *Klinghoffer* opinion.”).

<sup>26</sup> 136 CONG. REC. S4568-01 (1990) (statement of Sen. Chuck Grassley) (“[§ 2333] codif[ied] [the *Klinghoffer*] ruling and [made] the right of American victims definitive.”).

B. CIVIL REMEDIES—18 U.S.C. § 2333

In 1990, Congress silenced mounting concerns that plaintiffs would be unable to recover against acts of international terrorism by passing the ATA under title 18 of the United States Code.<sup>27</sup> Congress initially enacted § 2333 as part of the 1990 legislation, but later repealed the section due to a latent technical deficiency.<sup>28</sup> After subsequent legislation, § 2333 became law in 1992.<sup>29</sup> Compared to other statutory grants, the ATA provides injured plaintiffs with a broad cause of action against international terrorism.<sup>30</sup> In particular, Congress enacted § 2333 to compensate the victims and survivors of terrorist attacks and to supplement criminal law enforcement.<sup>31</sup> Historically, plaintiffs have invoked the ATA in a variety of circumstances—the September 11 attacks,<sup>32</sup> U.S. embassy bombings,<sup>33</sup> attacks against U.S. nationals residing in Israel,<sup>34</sup> and even attacks by al-Qaeda against U.S. military members abroad.<sup>35</sup> Despite the adaptability of the ATA to cover a variety of terrorist acts, until recently, these suits were rare in the federal court system.<sup>36</sup>

The text of § 2333(a) provides, “Any national of the United States injured in his or her person, property, or business by reason of an act of

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<sup>27</sup> Anti-Terrorism Act of 1990, Pub. L. No. 101-519, § 132, 104 Stat. 2250 (1990) (codified as amended at 18 U.S.C. §§ 2331-2338).

<sup>28</sup> *Boim I*, 291 F.3d 1000, 1009 n.6 (7th Cir. 2002).

<sup>29</sup> Federal Courts Administrative Act of 1992, Pub. L. No. 102-572, 106 Stat. 4506 (1992) (codified as amended in scattered sections of 2, 18, 28, 41, 42 U.S.C.); see also *Boim I*, 291 F.3d at 1009 n.6.

<sup>30</sup> Christopher W. Robbins, *Finding Terrorists' Intent: Aligning Civil Antiterrorism Law with National Security*, 83 ST. JOHN'S L. REV. 1201, 1231 (2009).

<sup>31</sup> *Id.* at 1234.

<sup>32</sup> See *In re Terrorist Attacks on Sept. 11, 2001*, 349 F. Supp. 2d 765, 836-37 (S.D.N.Y. 2005), *aff'd*, 538 F.3d 71 (2d Cir. 2008), *cert. denied*, 129 S. Ct. 2859 (2009) (denying motions to dismiss ATA claims against charities that allegedly funded al-Qaeda during the September 11, 2001 attacks).

<sup>33</sup> See *In re Terrorist Bombings of U.S. Embassies in E. Afr.*, 552 F.3d 93, 102 (2d Cir. 2008); *Mwani v. bin Laden*, 417 F.3d 1, 4 (D.C. Cir. 2005) (addressing plaintiff's claim against Osama bin Laden for bombings of U.S. embassies in Kenya and Tanzania).

<sup>34</sup> See *Ungar v. Palestine Liberation Org.*, 402 F.3d 274, 276 (1st Cir. 2005) (evaluating claims for recovery from attacks by Hamas gunman on Israeli cars killing an American national); *Knox v. Palestine Liberation Org.*, 306 F. Supp. 2d 424, 426-27 (S.D.N.Y. 2004).

<sup>35</sup> See *Morris v. Khadr*, 415 F. Supp. 2d 1323, 1326 (D. Utah 2006) (evaluating claim against al-Qaeda member who committed a terrorist act against U.S. soldiers in Afghanistan); *Estate of Heiser v. Islamic Republic of Iran*, 466 F. Supp. 2d 229, 265 (D.D.C. 2006) (finding Iran liable for attacks on Khobar Towers in Saudi Arabia).

<sup>36</sup> Seth N. Stratton, *Taking Terrorists to Court: A Practical Evaluation of Civil Suits Against Terrorists Under the Anti-Terrorism Act*, 9 SUFFOLK J. TRIAL & APP. ADVOC. 27, 32 (2004) (noting prior to 2002, only two published opinions explored the scope of the ATA); Debra M. Strauss, *Enlisting the U.S. Courts in a New Front: Dismantling the International Business Holdings of Terrorist Groups Through Federal Statutory and Common-Law Suit*, 38 VAN. J. TRANSNAT'L L. 679, 684 (2005).

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international terrorism, or his or her estate, survivors, or heirs, may sue therefor in any appropriate district court of the United States and shall recover threefold the damages he or she sustains and the cost of the suit, including attorney's fees."<sup>37</sup> Upon review, the statute contains all of the traditional elements of a common law tort: breach of duty (*i.e.*, committing an act of international terrorism); causation (injured "by reason of"); and damages (*i.e.*, injury to person or property).<sup>38</sup> Thus, a plaintiff must satisfy the elements of a classic tort claim—fault, state of mind, foreseeability, and causation.<sup>39</sup> Most notably, the statute does not explicitly address those entities that support and aid international terrorism.

Accordingly, to succeed under § 2333, a plaintiff must adequately plead an act of international terrorism caused an injury in fact to his person, property, or business; or an injury to the deceased victim's estate, heirs, or survivors.<sup>40</sup> Under § 2331(1), activities must meet three statutory requirements to be considered an act of "international terrorism."<sup>41</sup> First, the act must "involve violent acts or acts dangerous to human life that are a violation of the criminal laws of the United States."<sup>42</sup> Second, the act must "appear to be intended—(i) to intimidate or coerce a civilian population; (ii) to influence the policy of a government by intimidation or coercion; or (iii) to affect the conduct of a government by mass destruction, assassination, or kidnapping."<sup>43</sup> Finally, to differentiate from domestic terrorism, the act must "occur primarily outside the territorial jurisdiction of the United States."<sup>44</sup>

In addition, some courts suggest that a "chain of incorporations" exists between § 2333 and other ATA criminal statutes.<sup>45</sup> As such, under § 2339A, it is a crime to provide "material support or resources ... knowing or intending that they are to be used in preparation for, or in carrying out" a terrorist act.<sup>46</sup> Although not an exhaustive list, a terrorist act may include killing a U.S. national,<sup>47</sup> using a weapon of mass destruction against a U.S. national,<sup>48</sup> or bombing a place of public use.<sup>49</sup> Importantly, "material support or resources" includes "financial ser-

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<sup>37</sup> 18 U.S.C. § 2333(a) (2006).

<sup>38</sup> *Boim I*, 291 F.3d 1000, 1010 (7th Cir. 2002), *abrogated en banc sub nom. Boim IV*, 549 F.3d 685 (7th Cir. 2008), *cert. denied*, 130 S. Ct. 458 (2009).

<sup>39</sup> *Boim IV*, 549 F.3d 685, 692 (7th Cir. 2008), *cert. denied*, 130 S. Ct. 458 (2009).

<sup>40</sup> *See Linde v. Arab Bank, PLC*, 384 F. Supp. 2d 571, 581 (E.D.N.Y. 2005).

<sup>41</sup> 18 U.S.C. § 2331(1) (2006).

<sup>42</sup> *Id.* § 2331(1)(A).

<sup>43</sup> *Id.* § 2331(1)(B).

<sup>44</sup> *Id.* § 2331(1)(C).

<sup>45</sup> *Boim IV*, 549 F.3d 685, 690 (7th Cir. 2008); 18 U.S.C. §§ 2339A, 2339B, 2339C (2006).

<sup>46</sup> § 2339A (2006).

<sup>47</sup> *Id.* § 2332(a).

<sup>48</sup> *Id.* § 2332a(a)(1).

<sup>49</sup> *Id.* § 2332f(a)(1).

vices.”<sup>50</sup> Similarly, § 2339B criminalizes knowingly providing “material support or resources to a foreign terrorist organization.”<sup>51</sup> Further, this section does not criminalize the terrorist attack itself, but rather the “aid that makes the attacks more likely to occur.”<sup>52</sup> Finally, § 2339C makes it a crime to knowingly collect funds that support acts intended to intimidate populations or coerce government action.<sup>53</sup>

Successful parties under ATA may pursue expansive remedies including treble damages, fees, and court costs.<sup>54</sup> In addition, some courts recognize non-pecuniary damages such as mental anguish and suffering.<sup>55</sup> Even so, property damages are limited to the diminution in value of government property.<sup>56</sup> Despite a variety of compensable damages, some courts have noted that an award of treble damages necessarily precludes the possibility of punitive damages.<sup>57</sup> As a bit of irony, plaintiffs who fail to obtain treble damages may actually receive a warmer welcome by overseas courts more willing to assist with the collection of assets, thus avoiding some of the enforcement problems generally encountered when U.S. courts award heavy damages.<sup>58</sup>

Although Congress clearly intended to provide plaintiffs with broad rights under the ATA, there are several statutory limitations to this cause of action. First, to be eligible for civil relief, a plaintiff must be a U.S. citizen or survivor of a U.S. citizen.<sup>59</sup> Second, there is a four-year statute of limitations period subject to a tolling provision if the defendant is absent from the United States.<sup>60</sup> Third, plaintiffs may not sue “a foreign state, an agency of a foreign state, or an officer or employee of a foreign state.”<sup>61</sup> Fourth, the ATA bars any action to recover losses by an act of war.<sup>62</sup> Finally, civil litigation and discovery may not interfere with ongoing criminal investigations or national security operations related to the incident.<sup>63</sup>

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<sup>50</sup> *Id.* § 2339A(b)(1).

<sup>51</sup> *Id.* § 2339B(a)(1).

<sup>52</sup> *Holder v. Humanitarian Law Project*, 130 S. Ct. 2705, 2728 (2010).

<sup>53</sup> 18 U.S.C. § 2339C(a)(1).

<sup>54</sup> *Id.* § 2333(a).

<sup>55</sup> *Goldberg v. UBS AG*, 690 F. Supp. 2d 92, 98 (E.D.N.Y. 2010).

<sup>56</sup> *Supra* note 53, § 2332b(b)(1)(D).

<sup>57</sup> *Smith ex rel. Smith v. Islamic Emirate of Afg.*, 262 F. Supp. 2d 217, 240 (S.D.N.Y. 2003); *see also* *Estates of Ungar ex rel. Strachman v. Palestinian Auth.*, 304 F. Supp. 2D 232, 239 (D.R.I. 2004) (denying prejudgment interest because treble damages provided the exclusive penalty).

<sup>58</sup> Debra M. Strauss, *Reaching Out to the International Community: Civil Lawsuits as the Common Ground in the Battle Against Terrorism*, 19 DUKE J. COMP. & INT'L L. 307, 311 (2009) (citing commentary).

<sup>59</sup> *See* 18 U.S.C. §§ 2331(2), 2333(a); *see also* 8 U.S.C. § 1101(a)(22) (2006).

<sup>60</sup> 18 U.S.C. § 2335.

<sup>61</sup> *Id.* § 2337(2).

<sup>62</sup> *Id.* § 2336(a).

<sup>63</sup> *Id.* § 2336(b).

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As national security interests increasingly implicate private citizens,<sup>64</sup> civil litigation over terrorist acts has attracted a lot of recent attention.<sup>65</sup> In the absence of a definitive ruling from the Supreme Court, courts have reviewed and continue to interpret what classes of actions fall within an “act of international terrorism” the under ATA.<sup>66</sup> Specifically, the Seventh Circuit addressed twice in the past ten years whether § 2333 extends liability to those entities that aid and abet international terrorism.<sup>67</sup> Although the Seventh Circuit implicitly overruled itself in a span of six years, both appellate opinions proved extremely persuasive among the other circuits and currently serve to define which defendants may be liable for acts of international terrorism.<sup>68</sup>

### III. *BOIM*: THE SEVENTH CIRCUIT’S HOLDINGS IN 2002 AND 2008

As a case of first impression, the Seventh Circuit addressed and then revisited whether the ATA provides plaintiffs a right to sue aiders and abettors of international terrorism.<sup>69</sup> In 2002, in *Boim I*, the Seventh Circuit held that aiders and abettors could be liable under the ATA, even though the statute was silent on the issue.<sup>70</sup> After a complicated procedural history, in 2008, the Seventh Circuit sitting *en banc* addressed the same issue again and reached the opposite conclusion.<sup>71</sup> To understand the evolution of aiding and abetting liability under the ATA, this Part of the Paper reviews: (1) aiding and abetting liability under federal law; (2) the substantive and procedural history of the *Boim* proceedings; (3) the *Boim I* opinion and rationale; and (4) the *Boim IV* opinion and rationale.

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<sup>64</sup> WHITE HOUSE, *supra* note 1, at 2.

<sup>65</sup> See John F. Murphy, *Civil Lawsuits as a Legal Response to International Terrorism*, in CIVIL LITIGATION AGAINST TERRORISM (John Norton Moore ed., 2004).

<sup>66</sup> See, e.g., *Boim I*, 291 F.3d 1000 (7th Cir. 2002), *abrogated en banc sub nom. Boim IV*, 549 F.3d 685 (7th Cir. 2008), *cert. denied*, 130 S. Ct. 458 (2009).

<sup>67</sup> *Id.*

<sup>68</sup> See, e.g., *In re Terrorist Attacks on September 11, 2001*, No. 03 MDL 1570 (GBD), 2010 U.S. Dist. LEXIS 96597, at \*94 (S.D.N.Y. Sept. 13, 2010) (“A defendant cannot be held secondarily liable, under § 2333, for the material support provided by others to a designated foreign terrorist organization.”); *In re Chiquita Brands Int’l, Inc. Alien Tort Statute and S’holder Derivative Litig.*, 690 F. Supp. 2d 1296, 1309-10 (S.D. Fla. 2010) (holding that plaintiffs stated a claim for civil aiding-and-abetting under the ATA); *Morris v. Khadr*, 415 F. Supp. 2d 1323, 1330 (D. Utah 2006) (holding that civil liability under the ATA extends to aiders and abettors who provide money to terrorists).

<sup>69</sup> *Boim I*, 291 F.3d at 1021; *Boim IV*, 549 F.3d at 689.

<sup>70</sup> *Boim I*, 291 F.3d at 1019.

<sup>71</sup> *Boim IV*, 549 F.3d at 689.

A. AIDING AND ABETTING GENERALLY UNDER FEDERAL LAW

Large scale terrorist acts are rarely the product of individual efforts alone.<sup>72</sup> Among the collective acts of wrong-doers, aiding and abetting is the typical way in which a secondary actor can contribute to an underlying offense.<sup>73</sup> Generally, aiding and abetting is associated with liability as an accessory and often denotes an actor of lesser importance—apart from the actual perpetrator of the offense—who offers assistance to the primary actor.<sup>74</sup> Aiding and abetting in the civil context is actually rooted in the doctrine of criminal aiding and abetting.<sup>75</sup> In criminal law, there is little federal uniformity on the mental state and causation requirements for liability under the legal theory of aiding and abetting. While some courts require the aider and abettor to specifically intend the primary actor to commit the underlying crime, other courts only require knowledge of the offense.<sup>76</sup> Likewise, the actual causation standard that plaintiffs must satisfy has been the subject of debate.<sup>77</sup>

Compared to the criminal field, aiding and abetting liability in the context of civil litigation is even more uncertain.<sup>78</sup> In contrast to federal criminal law, Congress has not enacted a federal civil aiding and abetting statute.<sup>79</sup> As a result, federal courts ultimately developed divergent standards in this vacuum of statutory law.<sup>80</sup> Even the Restatement (Second) of Torts has failed to gain widespread acceptance among the courts on this subject.<sup>81</sup> Another challenge associated with civil aiding

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<sup>72</sup> Andrei Takteyev, Note, *Who is to Blame? (and What Is to Be Done?): Liability of Secondary Actors Under Federal Securities Laws and Alien Tort Claims Act*, 74 BROOKLYN L. REV. 1539, 1539 (2009).

<sup>73</sup> See Tarek F. Maassarani, *Four Counts of Corporate Complicity: Alternative Forms of Accomplice Liability Under the Alien Tort Claims Act*, 38 N.Y.U. J. INT'L L. & POL. 39, 39 (2005-06).

<sup>74</sup> Adam Harris Kurland, *To "Aid, Abet, Counsel, Command, Induce, or Procure the Commission of an Offense": A Critique of Federal Aiding and Abetting Principles*, 57 S.C. L. REV. 85, 86 (2005).

<sup>75</sup> *Cent. Bank of Denver, N.A. v. First Interstate Bank of Denver, N.A.*, 511 U.S. 164, 181 (1994).

<sup>76</sup> *Compare* *United States v. Bancalari*, 110 F.3d 1425, 1430 (9th Cir. 1997) (holding a plaintiff must show a defendant aider and abettor "specifically intended" to aid in the commission of the principal's crime.), *with* *United States v. Ortega*, 44 F.3d 505, 508 (7th Cir. 1995) (requiring a plaintiff to only prove knowledge that act may assist in perpetration of a crime).

<sup>77</sup> Robert Weisberg, *Reappraising Complicity*, 4 BUFF. CRIM. L. REV. 217, 228-30 (2000).

<sup>78</sup> Takteyev, *supra* note 72, at 1544.

<sup>79</sup> *Cent. Bank of Denver*, 511 U.S. at 182.

<sup>80</sup> Nathan Isaac Combs, Note, *Civil Aiding and Abetting Liability*, 58 VAND. L. REV. 241, 249 (2005) ("There is no clearly defined test for civil aiding and abetting liability because courts apply different tests and often obfuscate their analyses.").

<sup>81</sup> See RESTATEMENT (SECOND) OF TORTS § 876 (1979) ("For harm resulting to a third person from the tortious conduct of another, one is subject to liability if he (a) does a tortious act in concert with the other or pursuant to a common design with him, or (b) knows that the other's

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and abetting is separating tort standards from criminal principles when civil liability is linked to the actual criminal conduct.<sup>82</sup> Consequently, civil aiders and abettors who defend against less favorable evidentiary burdens may also suffer large penalties and endure the social condemnation associated with criminal activity.<sup>83</sup> Given the potential for a limitless class of defendants, choosing which parties may be liable is often “politically charged” and “implicate[s] issues of social policy.”<sup>84</sup>

Notwithstanding these concerns, civil aiding and abetting remained relatively on the outskirts of mainstream litigation, first gaining prominence in the field of securities litigation.<sup>85</sup> In *Central Bank*, a case that ultimately proved very influential to courts interpreting the ATA, the Supreme Court held that liability under section 10(b) of the Securities Exchange Act of 1934 did not extend to those entities that aided or abetted a practice prohibited by the statute.<sup>86</sup> Section 10(b) prohibited, *inter alia*, an entity from manipulating, deceiving, or contravening the rules and regulations promulgated by the Security Exchange Commission.<sup>87</sup> The plaintiff alleged that Central Bank aided and abetted a wrongful bond sale by failing to order a new valuation of a lien when it had reason to believe the old valuation was inadequate.<sup>88</sup> The Court noted the absence of a federal statute on civil aiding and abetting and held “when Congress enacts a statute under which a person may sue and recover damages from a private defendant for the defendant’s violation of some statutory norm, there is *no general presumption that the plaintiff may also sue aiders and abettors.*”<sup>89</sup>

The Court contrasted the statutory silence in section 10(b) with other federal statutes that expressly stated a cause of action and reasoned, “Congress [knows] how to impose aiding and abetting liability [and failed to do so].”<sup>90</sup> The Court further noted an absence of documented congressional intent to reach aiders and abettors because the

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conduct constitutes a breach of duty and gives substantial assistance or encouragement to the other so to conduct himself, or (c) gives substantial assistance to the other in accomplishing a tortious result and his own conduct, separately considered, constitutes a breach of duty to the third person.”).

<sup>82</sup> Takteyev, *supra* note 72, at 1545.

<sup>83</sup> Richard C. Mason, *Civil Liability for Aiding and Abetting*, 61 BUS. LAW. 1135, 1135 (2006).

<sup>84</sup> Takteyev, *supra* note 72, at 1545-56.

<sup>85</sup> Combs, *supra* note 80, at 246 n.6, 263.

<sup>86</sup> *Cent. Bank of Denver, N.A. v. First Interstate Bank of Denver, N.A.*, 511 U.S. 164, 191-92 (1994).

<sup>87</sup> *Id.* at 172 (interpreting 17 C.F.R. § 240.10b-5 (1993) (amended and current version at 15 U.S.C. § 78j (2006))).

<sup>88</sup> *Id.* at 168.

<sup>89</sup> *Id.* at 182 (emphasis added).

<sup>90</sup> *Id.* at 176. (referencing federal statutes that impose aiding and abetting liability); *see also* 18 U.S.C. § 2 (2006) (criminal aiding and abetting) & 7 U.S.C. § 192(g) (2006) (civil aiding and abetting provision for deceptive trade practices involving livestock).

legislative history was completely void of any evidence that Congress intended aiders and abettors to be liable under section 10(b).<sup>91</sup> Important to the ATA analysis, the Court concluded by noting that imposing aiding and abetting liability in this situation would create: (1) uncertain legal standards; (2) lead to fact-intensive inquiries; (3) and result in excessive litigation.<sup>92</sup> Beyond this, the Court acknowledged that competing policy arguments may be advanced and limited its ruling to this specific statute.<sup>93</sup>

Apart from the securities context, aiding and abetting has gained traction under the Alien Tort Claims Act (ATCA).<sup>94</sup> Although there is no dispositive ruling from the Court, most lower courts recognize civil aiding and abetting liability under the ATCA.<sup>95</sup> Notably, the Second Circuit recently held a district court erred in concluding the ATCA did not provide federal jurisdiction over claims that alleged aiding and abetting violations of customary international law.<sup>96</sup> In a 2-to-1 decision, in separate opinions, the majority justified aiding and abetting liability on the basis of federal common law and international customary law.<sup>97</sup>

All told, although authority on aiding and abetting liability is far from definitive, case law reveals that the general presumption against such liability is not bulletproof and may be rebutted.

#### B. SUBSTANTIVE AND PROCEDURAL FACTS OF THE *BOIM* PROCEEDINGS

In the *Boim* proceedings, Seventh Circuit analyzed as an issue of first impression whether aiders and abettors could be liable under § 2333 of the ATA.<sup>98</sup> David Boim was a seventeen-year-old student with dual Israeli-U.S. citizenship.<sup>99</sup> In 1996, he was living in Israel while stud-

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<sup>91</sup> *Id.* at 183-84.

<sup>92</sup> *Cent. Bank of Denver, N.A. v. First Interstate Bank of Denver, N.A.*, 511 U.S. 164, 188-89 (1994).

<sup>93</sup> *Id.* at 189-90 (“The point here, however, is that it is far from clear that Congress in 1934 would have decided that the statutory purposes would be furthered by the imposition of private aider and abettor liability.”).

<sup>94</sup> 28 U.S.C. § 1350 (2006).

<sup>95</sup> *See, e.g.*, *Sarei v. Rio Tinto, PLC*, 487 F.3d 1193, 1202-03 (9th Cir. 2007); *Cabello v. Fernandez-Larios*, 402 F.3d 1148, 1158 (11th Cir. 2005); *Doe v. Rafael Saravia*, 348 F. Supp. 2d 1112, 1148-49 (E.D. Cal. 2004).

<sup>96</sup> *Khulumani v. Barclay Nat. Bank Ltd.*, 504 F.3d 254, 260 (2d Cir. 2007) (per curiam), *aff’d for lack of quorum sub nom.* *Am. Isuzu Motors, Inc. v. Ntsebeza*, 553 U.S. 1028, 128 S. Ct. 2424 (2008) (“We hold that in this Circuit, a plaintiff may plead a theory of adding and abetting liability under the ATCA.”).

<sup>97</sup> *Id.* at 264, 286 (Katzman & Hall, JJ., concurring).

<sup>98</sup> *Boim I*, 291 F.3d 1000, 1007-08 (7th Cir. 2002), *abrogated en banc sub nom. Boim IV*, 549 F.3d 685 (7th Cir. 2008), *cert. denied*, 130 S. Ct. 458 (2009).

<sup>99</sup> *Boim I*, 291 F.3d at 1002.

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ying at a yeshiva.<sup>100</sup> On May 13, 1996, David was murdered near the West Bank during a shooting attack that targeted students at a school bus stop.<sup>101</sup> He was struck by bullets fired from a passing car and pronounced dead within an hour of the shooting.<sup>102</sup>

As a result of these attacks, his parents sued a number of individuals and organizations in federal court under the ATA, including alleged Hamas supporters Muhammad Salah, the Quranic Literacy Institute (QLI), the Holy Land Foundation for Relief and Development (HLF), the Islamic Association for Palestine (IAP), and the American Muslim Society (AMS).<sup>103</sup> The plaintiffs alleged that Salah was the leader of a military wing of Hamas and that HLF supplied funds to Hamas.<sup>104</sup> The plaintiffs further alleged that both AMS and IAP—later found to be the same legal entity—supported Hamas through HLF.<sup>105</sup> In addition, the plaintiffs alleged that QLI was an organization that acted as a “front” for Hamas and employed Salah as a leader.<sup>106</sup>

In 2002, the Seventh Circuit granted an interlocutory appeal on several legal issues and ruled, *inter alia*, that aiders and abettors may be liable under the ATA (*Boim I*).<sup>107</sup> In 2004, the district court entered a jury verdict against QLI and granted summary judgment against HLF, AMS, IAP, and Salah (*Boim II*).<sup>108</sup> The jury later awarded \$52 million in damages, which the district court trebled to \$156 million.<sup>109</sup> In 2007, on direct appeal, the Seventh Circuit again addressed the issue of aiding and abetting under the ATA (*Boim III*).<sup>110</sup> In a 2-to-1 decision, the same panel that heard the interlocutory appeal ruled that aiding and abetting was a valid cause of action under the ATA and that the district court erred by failing to require the plaintiffs to show the defendants’ actions were a cause in fact of David’s death.<sup>111</sup>

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<sup>100</sup> *Id.*

<sup>101</sup> *Id.*

<sup>102</sup> *Id.*

<sup>103</sup> *Boim v. Quranic Literacy Inst. (Boim II)*, 340 F. Supp. 2d 885, 890 (N.D. Ill. 2004), *vacated sub nom. Boim v. Holy Land Found. for Relief & Dev.*, 511 F.3d 707 (7th Cir. 2007) (*Boim III*), *vacated en banc*, 549 F.3d 685 (7th Cir. 2008) (en banc), *cert. denied*, 130 S. Ct. 458 (2009).

<sup>104</sup> *Boim III*, 511 F.3d 707, 712-13 (7th Cir. 2007) (2-1 decision), *vacated en banc*, 549 F.3d 685 (7th Cir. 2008), *cert. denied*, 130 S. Ct. 458 (2009).

<sup>105</sup> *Id.*

<sup>106</sup> *Id.* at 713-14.

<sup>107</sup> *Boim I*, 291 F.3d at 1021. This interlocutory appeal arose from *Boim v. Quranic Literacy Institute*, 127 F. Supp. 2d 1002 (N.D. Ill. 2001).

<sup>108</sup> *Boim II*, 340 F. Supp. 2d at 931; *Boim III*, 511 F.3d at 710, 719 (summarizing the proceedings in *Boim II*).

<sup>109</sup> *Boim III*, 511 F.3d at 710, 719.

<sup>110</sup> *Id.* at 710, 741.

<sup>111</sup> *Id.* at 741.

In 2008, the Seventh Circuit vacated *en banc* the panel's decision (*Boim IV*).<sup>112</sup> Revisiting the issue of liability under the ATA, Judge Posner, writing for the majority, noted that since § 2333 did not expressly contain an aiding and abetting provision, "statutory silence on the subject of secondary liability means there is none."<sup>113</sup> Rather, through "a chain of explicit statutory incorporations by reference" the Seventh Circuit found "that a donation to a terrorist group that targets Americans outside the United States may violate" the ATA.<sup>114</sup> Ultimately, the court upheld the judgments against AMS, IAP, and QLI because each entity knew it was giving money to Hamas.<sup>115</sup> Nevertheless, the court reversed the judgment against Salah because he was in an Israeli prison between the effective date of the statute and David's murder.<sup>116</sup>

As subsequent case law highlights, both *Boim I* and *Boim IV* have proved quite influential as diverging views of liability under the ATA.<sup>117</sup> Just as notable, the Seventh Circuit remains the only federal appellate court to review this issue.

### C. *BOIM I*—LEGISLATIVE INTENT TO PROVIDE A LEGAL RIGHT AGAINST AIDERS AND ABETTORS

In *Boim I*, the Seventh Circuit distinguished the Court's ruling in *Central Bank* and held that civil liability under the ATA extended to defendants that aid and abet international terrorism because the legislature intended to incorporate general tort principles into the statute and sought to cut off the flow of terrorist financing.<sup>118</sup> In distinguishing *Central Bank*, *Boim I* first noted that the Court narrowly tailored its holding to a specific statute and that aiding and abetting liability may be appropriate under certain federal statutes.<sup>119</sup> To be sure, the general pre-

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<sup>112</sup> *Boim IV*, 549 F.3d 685, 705 (7th Cir. 2008), *cert. denied*, 130 S. Ct. 458 (2009).

<sup>113</sup> *Id.* at 689.

<sup>114</sup> *Id.* at 691.

<sup>115</sup> *Id.* at 701 (reversing the verdict against HLF on procedural grounds because the district court erred by estopping HLF from challenging a D.C. Circuit finding that it had funded Hamas).

<sup>116</sup> *Id.* at 691.

<sup>117</sup> See, e.g., *In re Terrorist Attacks on September 11, 2001*, No. 03 MDL 1570 (GBD), 2010 U.S. Dist. LEXIS 96597, at \*94 (S.D.N.Y. Sept. 13, 2010) ("A defendant cannot be held secondarily liable, under § 2333, for the material support provided by others to a designated foreign terrorist organization."); *In re Chiquita Brands Int'l, Inc. Alien Tort Statute and S'holder Derivative Litig.*, 690 F. Supp. 2d 1296, 1309-10 (S.D. Fla. 2010) (holding that plaintiffs had stated a claim for civil aiding-and-abetting liability under the ATA); *Morris v. Khadr*, 415 F. Supp. 2d 1323, 1330 (D. Utah 2006) (holding that civil liability under the ATA extends to aiders and abettors who provide money to terrorists).

<sup>118</sup> *Boim I*, 291 F.3d 1000, 1017-21 (7th Cir. 2002), *abrogated en banc sub nom. Boim IV*, 549 F.3d 685 (7th Cir. 2008), *cert. denied*, 130 S. Ct. 458 (2009).

<sup>119</sup> *Id.* at 1019.

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sumption against liability when a statute is silent on the issue is still rebuttable.<sup>120</sup>

To rebut the *Central Bank* presumption, the court emphasized that both the language and legislative history of § 2333 support the conclusion that Congress intended to import general tort principles into the statute.<sup>121</sup> Specifically, the court found the *Congressional Record* replete with statements evincing a concerted effort on behalf of Congress to provide plaintiffs with ample remedies generally associated with “American tort law”.<sup>122</sup> Moreover, the court described the definition of international terrorism and the complementary criminal statutes as “embracing” liability to the extent aiding and abetting involves violence.<sup>123</sup>

Similarly, the court held that failing to impose liability on aiders and abettors would “be thwarting [Congress’s] clearly expressed intent to cut off the flow of money to terrorists at every point along the causal chain of violence.”<sup>124</sup> The court reasoned that compensating plaintiffs for acts of terrorism simply could not be realized without recognizing liability beyond those directly involved in the acts of violence.<sup>125</sup> The court concluded by invoking the policy concerns that gave rise to the ATA:

Also, and perhaps more importantly, there would not be a trigger to pull or a bomb to blow up without the resources to acquire such tools of terrorism and to bankroll the persons who actually commit the violence. Moreover, the organizations, businesses and nations that support and encourage terrorist acts are likely to have reachable assets that they wish to protect. The only way to imperil the flow of money and discourage the financing of terrorist acts is to impose liability on those who knowingly and intentionally supply the funds to the persons who commit the violent acts.<sup>126</sup>

In addition, *Boim I* required a plaintiff to prove that an aider and abettor *knowingly* and *intentionally* sought to aid the success of terrorist activities, and that such actions *proximately caused* the plaintiff’s injuries.<sup>127</sup>

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<sup>120</sup> *Id.* at 1019-20.

<sup>121</sup> *Id.* at 1020.

<sup>122</sup> *Id.* at 1010 (citing 137 CONG. REC. S4511-04 (1991)); see also *Antiterrorism Act of 1990: Hearing Before the Subcomm. on Courts and Admin. Practice of Comm. on the Judiciary*, 101st Cong. 136 (1990) (statement of Joseph Morris).

<sup>123</sup> *Id.*

<sup>124</sup> *Boim I*, 291 F.3d 1000, 1021 (7th Cir. 2002), *abrogated en banc sub nom. Boim IV*, 549 F.3d 685 (7th Cir. 2008), *cert. denied*, 130 S. Ct. 458 (2009).

<sup>125</sup> *Id.*

<sup>126</sup> *Id.*

<sup>127</sup> *Id.* at 1012, 1021, 1023.

In sum, *Boim I* emphasized the ATA's legislative history to distinguish *Central Bank* and held that liability under § 2333 extended to aiders and abettors of international terrorism.<sup>128</sup>

D. BOIM IV—STATUTORY SILENCE ON LIABILITY MEANS NO LIABILITY

Six years after *Boim I*, the Seventh Circuit sitting *en banc* revisited the issue of liability under the ATA and held that plaintiffs may not sue aiders and abettors of international terrorism because the statute does not expressly provide a cause of action against these parties.<sup>129</sup> Judge Posner began the court's analysis by noting § 2333 does not plainly state "someone who assists in an act of international terrorism is liable".<sup>130</sup> Therefore, under *Central Bank*, "statutory silence on the subject of secondary liability means there is none."<sup>131</sup> The court further reasoned that to extend liability to aiders and abettors would enlarge the court's jurisdiction beyond the intent of Congress as expressed in the statute.<sup>132</sup> Notably, unlike *Boim I*, the court in *Boim IV* focused its analysis entirely on the text of the statute and failed to mention the legislative history of the ATA.

Although settling the issue of aiding and abetting liability, the *Boim IV* court further held that donors of international terrorism may still be within the grasp of § 2333 through a "chain of incorporations" between the various statutes under the ATA—including § 2339A which prohibits material support to international terrorism.<sup>133</sup> Specifically, the court ruled that a donation to a terrorist group that targets U.S. citizens abroad may violate § 2333.<sup>134</sup> As a matter of policy, the court reasoned that damages are most effective against financial institutions that fund terrorism, as opposed to the actual terrorist actors.<sup>135</sup> Interestingly, the court held that a chain of statutory incorporations imposed "primary liability" with the "character of secondary liability" to donors of international terrorism.<sup>136</sup> Therefore, a donor to terrorist activities may be liable under § 2333 without the need to impose secondary liability.

After holding a donor to terrorist activities could be liable under § 2333, the *Boim IV* court continued its analysis by addressing the re-

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<sup>128</sup> *Id.*

<sup>129</sup> *Boim IV*, 549 F.3d 685, 689 (7th Cir. 2008), *cert. denied*, 130 S. Ct. 458 (2009).

<sup>130</sup> *Id.*

<sup>131</sup> *Id.*

<sup>132</sup> *Id.* at 698-690.

<sup>133</sup> *Id.* at 690 ("By this chain of incorporations by reference (section 2333(a) to section 2331(1) to section 2339A to section 2332), we see that a donation to a terrorist group that targets Americans outside the United States may violate section 2333.").

<sup>134</sup> *Id.*

<sup>135</sup> *Boim IV*, 549 F.3d 685, 690-91 (7th Cir. 2008), *cert. denied*, 130 S. Ct. 458 (2009).

<sup>136</sup> *Id.* at 691.

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quirements to bring an action under the ATA.<sup>137</sup> To be liable in tort, a person who provides material assets to a terrorist organization has not committed intentional misconduct unless he either *knew* there was a “substantial probability” that the organization engages in acts of international terrorism, or is simply *indifferent* to its role as a terrorist organization.<sup>138</sup> Importantly, this is a subjective test—otherwise an objective test under a standard of reasonableness would impose liability for mere negligence.<sup>139</sup> While *Boim I* required proof of actual intent, in *Boim IV*, a donor to international terrorist activities is only liable if he *knew* the character of that organization.<sup>140</sup>

Similarly, the court “relaxed” the standard for causation and held plaintiffs are not required to show donors proximately caused their injuries because money is “fungible” and may be used for a variety of purposes that ultimately strengthen the aims of terrorism.<sup>141</sup> The court likened modern donors of terrorism to classic tort cases involving multiple fires joining together,<sup>142</sup> multiple hunters firing in the same direction,<sup>143</sup> and multiple firms polluting groundwater<sup>144</sup> because of the uncertain causal connection between the wrongful conduct among all potential tortfeasors and the actual injury.<sup>145</sup> As such, the court ruled that when a party knowingly contributes to an organization that engages in terrorist activities, there is a substantial probability that such a donation will enhance the risk of a terrorist act.<sup>146</sup> This action, in itself, satisfies the causation element.<sup>147</sup> All told, the court justified “relaxed” causation on the grounds that the plaintiff’s burden would be too onerous otherwise to prove which wrongdoer actually inflicted the injury.<sup>148</sup>

Even so, not all of the Seventh Circuit judges agreed with Judge Posner’s interpretation of § 2333. Both Judges Rovner and Wood advocated that the court return to the *Boim I* analysis and recognize aiding and abetting liability under the ATA.<sup>149</sup> Judge Rovner criticized the majority opinion for eliminating the plaintiff’s burden of proving causation by “declaring as a matter of law that any money knowingly given to a terrorist organization ... is a cause of terrorist activity, period.”<sup>150</sup> Judge Wood likewise argued that a plaintiff should have the burden to show

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<sup>137</sup> *Id.* at 691.

<sup>138</sup> *Id.* at 693.

<sup>139</sup> *Id.*

<sup>140</sup> *Id.* at 695.

<sup>141</sup> *Boim IV*, 549 F.3d 685, 691, 698 (7th Cir. 2008), *cert. denied*, 130 S. Ct. 458 (2009).

<sup>142</sup> *Id.* 695 (citing *Chicago & N.W. Ry.*, 211 N.W. 913 (Wis. 1927)).

<sup>143</sup> *Id.* 696 (citing *Summers v. Tice*, 199 P.2d 1 (Cal. 1948)).

<sup>144</sup> *Id.* (citing *Michie v. Great Lakes Steel Div.*, 495 F.2d 213 (6th Cir. 1974)).

<sup>145</sup> *Id.* at 695-97.

<sup>146</sup> *Id.* at 697-98.

<sup>147</sup> *Boim IV*, 549 F.3d 685, 691, 698 (7th Cir. 2008), *cert. denied*, 130 S. Ct. 458 (2009).

<sup>148</sup> *Id.* at 697.

<sup>149</sup> *Id.* at 707 (Rovner & Wood, JJ., dissenting).

<sup>150</sup> *Id.* at 705, 709 (Rovner, J., dissenting).

proximate cause under § 2333.<sup>151</sup> Finally, Judge Rovner expressed concerns that only requiring a plaintiff to prove knowledge of terrorist activities without intent to further those ends may implicate First Amendment rights and freedoms.<sup>152</sup>

Although *Boim IV* implicitly overruled *Boim I* on the issue of aiding and abetting liability,<sup>153</sup> the divergent analysis that the Seventh Circuit adopted in each of its opinions shows that there are reasonable grounds to differ on this issue. In *Boim I*, the court exhaustively reviewed the legislative history of the ATA and concluded plaintiffs may bring a cause of action against aiders and abettors.<sup>154</sup> Conversely, the *Boim IV* court only reviewed the statute on its face and determined that statutory silence forecloses any argument that Congress intended such a legal right to exist.<sup>155</sup> In addition, whereas *Boim I* required proof of intent and proximate cause, *Boim IV* relaxed both the mental state and causation requirements to broaden the scope of primary liability.<sup>156</sup> At first glance, it is worth pondering if *Boim IV* simply repackaged the same result that would be reached following *Boim I*—just under different analysis? To the contrary, subsequent case law suggests an analytical distinction because of the confusing standards imposed by *Boim IV*. Although *Boim IV* is controlling law within the Seventh Circuit, ensuing case law demonstrates a growing split of authority among the other circuits as some district courts disregard *Boim IV* and continue to apply the *Boim I* rationale.<sup>157</sup>

#### IV. WHY COURTS SHOULD REJECT *BOIM IV* AND RECOGNIZE AIDING AND ABETTING LIABILITY

In the wake of the Seventh Circuit's holding in *Boim IV*, subsequent case law interpreting liability under the ATA has splintered, creating recognizable splits of authority.<sup>158</sup> These splits are further exacerbated by a six-year time span between the Seventh Circuit's rulings, allowing for a considerable amount of jurisprudence to develop in favor of aiding and

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<sup>151</sup> *Id.* at 724 (Wood, J., dissenting).

<sup>152</sup> *Id.* at 713 (Rovner, J., dissenting).

<sup>153</sup> *Boim IV*, 549 F.3d 685, 689-90 (7th Cir. 2008), *cert. denied*, 130 S. Ct. 458 (2009) (majority opinion).

<sup>154</sup> *Boim I*, 291 F.3d 1000, 1021 (7th Cir. 2002), *abrogated en banc sub nom. Boim IV*, 549 F.3d 685 (7th Cir. 2008), *cert. denied*, 130 S. Ct. 458 (2009).

<sup>155</sup> *Boim IV*, 549 F.3d at 689.

<sup>156</sup> Compare *Boim I*, 291 F.3d at 1012, 1021, 1023, with *Boim IV* 549 F.3d at 695-99.

<sup>157</sup> See, e.g., *Wultz v. Islamic Republic of Iran*, No. 08-cv-1460 (RCL), 2010 U.S. Dist. LEXIS 111469, at \*120 (D.D.C. Oct. 20, 2010) (mem. op.); *In re Chiquita Brands Int'l, Inc. Alien Tort Statute and S'holder Derivative Litig.*, 690 F. Supp. 2d 1296, 1309-10 (S.D. Fla. 2010).

<sup>158</sup> See *Wultz*, 2010 U.S. Dist. LEXIS 111469, at \*112 (noting a circuit split of authority on aiding and abetting liability under the ATA).

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abetting liability.<sup>159</sup> As tension in this area continues to grow with increasing lawsuits,<sup>160</sup> courts going forward should recognize the legal right to sue aiders and abettors of international terrorism under the ATA. Specifically, courts should reject the confusing *Boim IV* analysis and return to the former *Boim I* standard for aiding and abetting liability. Applying subsequent case law, a cause of action against aiders and abettors under § 2333 is valid because: (1) the legislative history is uniform and rebuts the *Central Bank* presumption by clearly evincing an intent to provide a full range of tort remedies against those entities that support terrorism; and (2) despite the *Central Bank* policy concerns, imposing aider and abettor liability is more practical and avoids the potential for inconsistent outcomes that could deny recovery to otherwise successful plaintiffs.

### A. LEGISLATIVE INTENT-BASED ARGUMENT FOR AIDING AND ABETTING

Courts should recognize an aiding and abetting cause of action under the ATA because the legislative history of the statute evinces the congressional intent to afford plaintiffs with a full range of tort remedies and to sever support to terrorist organizations. Applying the Court's guidance in *Central Bank*, there is no general presumption that plaintiffs may sue aiders and abettors for the violation of a federal civil statute silent on the issue of liability.<sup>161</sup> Even so, this presumption may be rebutted by examining "whether aiding and abetting is covered by the statute."<sup>162</sup> Although a statute may not expressly provide for aiding and abetting liability, this does not prevent courts from recognizing liability under this legal theory.<sup>163</sup> The Second Circuit's 2007 interpretation of the ATCA supports this premise.<sup>164</sup> Although the actual text of a statute is always the starting point for statutory interpretation and analysis, *Central Bank* ultimately requires courts interpreting civil liability under a federal statute to determine what Congress intended when it enacted

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<sup>159</sup> See *Morris v. Khadr*, 415 F. Supp. 2d 1323, 1330 (D. Utah 2006) (citing *Boim I* and holding that civil liability under the ATA extends to aiders and abettors who provide money to terrorists); *Stutts v. De Dietrich Group*, No. 03-CV-4058 (ILG), 2006 U.S. Dist. LEXIS 47638 (E.D.N.Y. 2006) (mem. op.) (approving the theory of aiding and abetting liability under the ATA, but dismissing claim for insufficient allegations of causation); *Linde v. Arab Bank, PLC*, 384 F. Supp. 2d 571, 583 (E.D.N.Y. 2005) (holding that aiding and abetting liability and civil conspiracy liability are available under the ATA).

<sup>160</sup> See *Schupack supra* note 5, at 213 ("Use of the ATA was infrequent however, until recently.").

<sup>161</sup> *Cent. Bank of Denver, N.A. v. First Interstate Bank of Denver, N.A.*, 511 U.S. 164, 182 (1994).

<sup>162</sup> *Id.* at 177.

<sup>163</sup> *Khulumani v. Barclay Nat. Bank Ltd.*, 504 F.3d 254, 268, 287-88 (2d Cir. 2007) (per curiam), *aff'd for lack of quorum sub nom. Am. Isuzu Motors, Inc. v. Ntsebeza*, 553 U.S. 1028, 128 S. Ct. 2424 (2008).

<sup>164</sup> *Id.*

the statute.<sup>165</sup> Generally, courts review a statute's legislative history to ascertain legislative intent.<sup>166</sup> The legislative history includes the original bill, amendments, reports, transcripts of debates, and other published records.<sup>167</sup> These documents form the basis for courts to rebut the *Central Bank* presumption and recognize aiding and abetting liability under the ATA.<sup>168</sup>

Beginning with the *Congressional Record*, the legislative history of the ATA reflects a conscious intent to incorporate general tort principles and extend civil liability against acts of terrorism "to the full reaches of traditional tort law."<sup>169</sup> Specifically, "The [ATA] affords victims of terrorism the remedies of American tort law, including treble damages and attorney's fees."<sup>170</sup> The goal of providing general tort remedies to plaintiffs is further supported by congressional hearing testimony that, "The bill as drafted is powerfully broad, and its intention ... is to ... bring [in] all of the substantive law of the American tort law system."<sup>171</sup>

To complement these ends, the Senate Report notes "the substance of [an action under § 2333] is *not defined by the statute*, because the fact patterns giving rise to such suits will be as varied and numerous as those found in the law of torts. *This bill opens the courtroom door to victims of international terrorism.*"<sup>172</sup> This statement, in itself, highlights two important principles: first, it acknowledges the scope of terrorism is unpredictable; and second, because of this unpredictability, it is not practical to legislate every right of action since acts of international terrorism evolve over time. To underscore these principles, the same report offers, "[The ATA's] provisions for compensatory damages, treble damages, and the imposition of liability *at any point along the causal chain of terrorism*" would "interrupt, or at least imperil, the flow of money."<sup>173</sup> This "causal chain of terrorism" necessarily implicates aiders and abettors.

In addition to the documented intent to provide plaintiffs with broad remedies, Congress also realized the practical implications of assessing damages. Intuitively, if § 2333 creates a right of action for plain-

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<sup>165</sup> *Cent. Bank of Denver*, 511 U.S. at 173, 181 ("We thus have had 'to infer how the 1934 Congress would have addressed the issue[s] had the 10b-5 action been included as an express provision in the 1934 Act.'").

<sup>166</sup> *Id.* at 175, 183-90; DAVID S. ROMANTZ & KATHLEEN ELLIOTT VINSON, LEGAL ANALYSIS: THE FUNDAMENTAL SKILL 94 (2nd ed. 2009).

<sup>167</sup> *Id.*

<sup>168</sup> *Cent. Bank of Denver*, 511 U.S. at 181.

<sup>169</sup> *Boim I*, 291 F.3d 1000, 1010 (7th Cir. 2002), *abrogated en banc sub nom. Boim IV*, 549 F.3d 685 (7th Cir. 2008), *cert. denied*, 130 S. Ct. 458 (2009) (citing 137 CONG. REC. S4511-04 (1991)).

<sup>170</sup> 137 CONG. REC. S4511-04 (1991).

<sup>171</sup> *Antiterrorism Act of 1990: Hearing Before the Subcomm. on Courts and Admin. Practice of Comm. on the Judiciary*, 101st Cong. 136 (1990) (statement of Joseph Morris).

<sup>172</sup> S. REP. NO. 102-342, at 45 (1992) (emphasis added).

<sup>173</sup> *Id.* at 22 (emphasis added).

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tiffs to seize terrorist assets, damages are simply less effective against the terrorists themselves when compared to their aiding and abetting financiers.<sup>174</sup> As the *Congressional Record* states, “If terrorists have assets within our jurisdictional reach, American citizens will have the power to seize them.”<sup>175</sup> Furthermore, “Anything that could be done to deter money-raising in the United States, the repose of assets in the United States, and so on, would not only help benefit victims, but would also help deter terrorism.”<sup>176</sup> If the terrorist themselves have few assets and are truly dependent on “financial angels” as *Boim IV* noted,<sup>177</sup> it only seems logical that the best way to further congressional intent, as expressed in the legislative history, is to afford plaintiffs with a remedy under § 2333 against aiders and abettors. Indeed, as noted in the 1992 House Report, “while we have made a start in prosecuting the perpetrators of terrorist acts, it is still unfortunately the case that victims generally remain uncompensated.”<sup>178</sup> Extending liability to aiders and abettors addresses the concerns of the House Report.

Although legislative documents at the time of enactment are superior to *ex post facto* evidence,<sup>179</sup> analysis of statutory meaning is still susceptible to contemporary comparisons and further supports aiding and abetting liability under § 2333.<sup>180</sup> In *Lichter*, Justice Burton offered the following as rationale for upholding the Renegotiation Act of 1942, “In peace or in war it is essential that the Constitution be scrupulously obeyed ... . In time of crisis nothing could be more tragic and less expressive of the intent of the people than so to construe their Constitution that by its own terms it would substantially hinder rather than help them in defending their national safety.”<sup>181</sup> Although the Supreme Court in *Lichter* interpreted the Constitution, as opposed to a statute, the guiding principles remain the same—especially in the post-September

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<sup>174</sup> *Boim IV*, 549 F.3d 685, 690-91 (7th Cir. 2008), *cert. denied*, 130 S. Ct. 458 (2009).

<sup>175</sup> 136 CONG. REC. S4568-01 (1990).

<sup>176</sup> *Antiterrorism Act of 1990: Hearing Before the Subcomm. on Courts and Admin. Practice of Comm. on the Judiciary*, 101st Cong. 76 (1990) (statement of Joseph Morris); *see also id.* at 17 (statement of Alan Kreczko) (“Few terrorist organizations are likely to have cash assets or property located in the United States that could be attached and used to fulfill a civil judgment. The existence of such a cause of action, however, may deter terrorist groups from maintaining assets in the United States, from benefiting from investments in the U.S. and from soliciting funds within the U.S.”).

<sup>177</sup> *Boim IV*, 549 F.3d at 690-91.

<sup>178</sup> H.R. REP. NO. 102-1040, at 12 (1992) (statement of Alan J. Kreczko, Deputy Legal Advisor, Dep’t of State).

<sup>179</sup> ROMANTZ & VINSON, *supra* note 166, at 94.

<sup>180</sup> *Compare* *Carter v. Carter Coal Co.*, 298 U.S. 238, 300 (1936) (holding the test to determine if a law is valid under the Commerce Clause is whether the effect is direct or indirect in a sequence of events. “Commerce succeeds to manufacture.”), *with* *N.L.R.B. v. Jones & Laughlin Steel Corp.*, 301 U.S. 1, 37 (1937) (holding that test to determine that validity of a law under the Commerce Clause is “necessarily one of degree.”).

<sup>181</sup> *Lichter v. United States*, 334 U.S. 742, 779–80 (1948).

11, 2001 security era. Following the tragic terrorist attacks on September 11, President George W. Bush declared, “We will not only deal with those who dare attack Americans, we will deal with those who *harbor* them and *feed* them and *house* them.”<sup>182</sup> The President vowed no distinction would be made between those who commit terrorist acts and those who support them.<sup>183</sup>

Similarly, in response to the September 11 attacks, Congress passed a joint resolution authorizing the President to “use all necessary and appropriate force against those ... he determines planned, authorized, committed, or *aided* the terrorist attacks that occurred on September 11, 2001.”<sup>184</sup> Although Congress largely confined this joint resolution to the September 11 attacks, it is interesting that our legislature chose the word “aided.” Fast-forward nine years, the May 2010 National Security Strategy both empowers citizens and declares “[w]e are at war with a specific network, al-Qa’ida, and its terror affiliates who *support* efforts to attack the United States, our allies, and partners.”<sup>185</sup> Although these statements are years removed from when Congress enacted the ATA, as Justice Burton suggested, interpretation and meaning are susceptible to contemporary review when national security is at stake.

Subsequent case law as recent as the year 2010 further supports the position that plaintiffs may sue aiders and abettors of international terrorism.<sup>186</sup> In *Wultz*, the plaintiffs brought five claims against the Bank of China, Ltd. (BOC), including an allegation that BOC aided and abetted international terrorism.<sup>187</sup> On April 17, 2006, a Palestinian suicide bomber allegedly attacked a restaurant in Tel Aviv, Israel.<sup>188</sup> As a result of the attack, Daniel Wultz suffered severe injuries and later died.<sup>189</sup> His parents brought suit under the ATA and alleged that prior to the date of the attack, “BOC executed dozens of dollar wire transfers for the [Palestinian Islamic Jihad], totaling several million dollars.”<sup>190</sup> The district court noted a circuit split on the issue of aiding and abetting liability under the ATA and ruled that such liability does indeed exist because Congress provided an express private action under the ATA and intend-

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<sup>182</sup> Evan Thomas et al., *Bush: We’re at War*, NEWSWEEK, Sept. 24, 2001, at 29 (emphasis added).

<sup>183</sup> Serge Schmemmann, *President Vows to Exact Punishment for “Evil”*, N.Y. TIMES, Sept. 12, 2001, at A1.

<sup>184</sup> Authorization for Use of Military Force, Pub. L. No. 107-40, § 2(A), 115 Stat. 224 (2001).

<sup>185</sup> WHITE HOUSE, *supra* note 1, at 20.

<sup>186</sup> See, e.g., *Wultz v. Islamic Republic of Iran*, No. 08-cv-1460 (RCL), 2010 U.S. Dist. LEXIS 111469, at \*120 (D.D.C. Oct. 20, 2010) (mem. op.); *In re Chiquita Brands Int’l, Inc. Alien Tort Statute and S’holder Derivative Litig.*, 690 F. Supp. 2d 1296, 1309-10 (S.D. Fla. 2010).

<sup>187</sup> *Wultz*, 2010 U.S. Dist. LEXIS 111469, at \*3.

<sup>188</sup> *Id.* at \*4.

<sup>189</sup> *Id.*

<sup>190</sup> *Id.*

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ed to incorporate general tort principles into the action.<sup>191</sup> To support this ruling, the court reviewed both the ATA's statutory text and extensive legislative history, and concluded this evidence was sufficient to rebut the *Central Bank* presumption against aiding and abetting liability.<sup>192</sup> In its reasoning, the court was strongly persuaded by the analytic framework set forth in *Boim I* as well as similar district court cases that extended liability to secondary actors under the ATA.<sup>193</sup> Notably, the court both acknowledged *Boim IV* and then rejected its reasoning on aiding and abetting liability.<sup>194</sup>

Similar to *Wultz*, the district court in *In re Chiquita Brands* confronted the same issue of liability under the ATA, and again ruled in favor of aiding and abetting liability.<sup>195</sup> The plaintiffs were heirs and survivors of U.S. citizens allegedly kidnapped, held hostage, and murdered by the Columbian terrorist group Fuerzas Armadas Revolucionarias de Colombia (FARC) from 1993 to 1997—totaling twenty-three kidnappings and several murders.<sup>196</sup> On March 19, 2007, Chiquita pled guilty in a separate proceeding to violating antiterrorism laws and acknowledged that it had made payments to FARC in the process.<sup>197</sup> As a result, the plaintiffs subsequently brought suit against Chiquita for aiding and abetting international terrorism.<sup>198</sup> Specifically, the plaintiffs pled Chiquita concealed its relationship with FARC and funneled monthly payments ranging from \$20,000 to \$100,000 to support terrorist activities.<sup>199</sup>

Although partially granting Chiquita's motion to dismiss for failure to state a claim, the district court in *In re Chiquita Brands* gave strong deference to prior case law from other circuits and ruled that plaintiffs may sue aiders and abettors under the ATA.<sup>200</sup> Like *Wultz*, the court acknowledged *Boim IV* as a court proceeding that refused to recognize

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<sup>191</sup> *Id.* at \*114-15.

<sup>192</sup> *Id.* at \*118-20.

<sup>193</sup> *Wultz*, 2010 U.S. Dist. LEXIS 111469, at \*118-19 (citing *Linde v. Arab Bank, PLC*, 384 F. Supp. 2d 571, 583 (E.D.N.Y. 2005) (holding that aiding and abetting liability is available under the ATA); *Stutts v. De Dietrich Group*, No. 03-CV-4058 (ILG), 2006 U.S. Dist. LEXIS 47638 (E.D.N.Y. 2006) (mem. op.) (holding aiding and abetting liability under the ATA is a valid claim); *Morris v. Khadr*, 415 F. Supp. 2d 1323, 1330 (D. Utah 2006) (citing *Boim I* and holding that civil liability under the ATA extends to aiders and abettors who provide money to terrorists).

<sup>194</sup> *Id.* at \*119.

<sup>195</sup> *In re Chiquita Brands Int'l, Inc. Alien Tort Statute and S'holder Derivative Litig.*, 690 F. Supp. 2d 1296, 1309 (S.D. Fla. 2010).

<sup>196</sup> *Id.* at 1300-02.

<sup>197</sup> *Id.* at 1303.

<sup>198</sup> *Id.* at 1299-1300.

<sup>199</sup> *Id.* at 1302.

<sup>200</sup> *Id.* at 1309 (citing *Stutts v. De Dietrich Group*, No. 03-CV-4058 (ILG), 2006 U.S. Dist. LEXIS 47638 (E.D.N.Y. 2006) (mem. op.); *Morris v. Khadr*, 415 F. Supp. 2d 1323, 1330 (D. Utah 2006); *Linde v. Arab Bank, PLC*, 384 F. Supp. 2d 571, 583 (E.D.N.Y. 2005).

aiding and abetting liability.<sup>201</sup> Interestingly, the court reviewed *Boim IV* and found that upholding a claim against donors of terrorism through a “chain of incorporations” was essentially secondary liability—just under a different name.<sup>202</sup> The court drew support from Judge Rovner’s dissent that described the majority opinion as “straddl[ing] both primary and secondary liability.”<sup>203</sup> Therefore, at least for this district court, aiding and abetting liability is alive and well under the ATA and *Boim IV* does nothing to diminish this.

Taken together, the legislative history of the ATA, contemporary policy, and subsequent case law all support the proposition that § 2333 provides plaintiffs a right to bring suit against aiders and abettors of international terrorism and rebuts the *Central Bank* presumption. While statutory interpretation through text alone is certainly valid,<sup>204</sup> to ignore the ATA’s extensive uniform legislative history is folly and may deprive intended plaintiffs of their day in court.

#### B. A PRACTICAL ARGUMENT FOR AIDING AND ABETTING: WHY THE CENTRAL BANK COUNTERARGUMENTS FAIL

In addition to the legislature’s documented intent to provide a cause of action against aiders and abettors under the ATA, courts should return to the *Boim I* standard for liability because the Seventh Circuit’s opinion in *Boim IV* provides a confusing standard and creates the potential for bona-fide aiders and abettors of international terrorism to walk away free from liability. Specifically, in light of the *Central Bank* policy concerns against secondary liability, recognizing the right for a plaintiff to bring suit against aiders and abettors under § 2333 does not represent: (1) a lack of deference to Congress; (2) uncertainty in the law; (3) substantial litigation costs; or (4) excessive litigation in general.<sup>205</sup>

First, to the extent imposing aiding and abetting liability under the ATA encroaches on congressional authority,<sup>206</sup> these arguments neglect the practical implication of forcing the legislature to move its hand with each statutory ambiguity. While supporters of strict statutory construction may assert that if Congress wished an aiding and abetting action to

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<sup>201</sup> *In re Chiquita Brands Int’l, Inc. Alien Tort Statute and S’holder Derivative Litig.*, 690 F. Supp. 2d 1296 (S.D. Fla. 2010).

<sup>202</sup> *Id.*

<sup>203</sup> *Id.* (citing *Boim IV*, 549 F.3d 685, 707 n.5 (7th Cir. 2008), *cert. denied*, 130 S. Ct. 458 (2009) (Rovner, J., dissenting)).

<sup>204</sup> ROMANTZ & VINSON, *supra* note 166, at 87.

<sup>205</sup> *Cent. Bank of Denver, N.A. v. First Interstate Bank of Denver, N.A.*, 511 U.S. 164, 189 (1994).

<sup>206</sup> *Boim IV*, 549 F.3d at 689 (noting the after *Central Bank*, Congress enacted a statute providing relief to aiders and abettors).

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exist, it would have expressly created one<sup>207</sup>—as articulated in *Central Bank*, this is merely a rebuttable presumption.<sup>208</sup> Indeed, to sweepingly declare that “statutory silence on the subject of secondary liability means there is none”<sup>209</sup> misinterprets the Court’s guidance in *Central Bank*. Moreover, to force the legislature to express every intention—foreseen and unforeseen—in a statute ignores the reality of passing laws designed to protect our nation from asymmetric and ever-changing threats.<sup>210</sup> Just as statutory silence on aiding and abetting liability under the ATCA was not fatal to the Second Circuit,<sup>211</sup> the legislative history of the ATA evinces the intent to provide a similar remedy to plaintiffs. Although interpreting a statute through its text alone is the starting point for any court’s analysis,<sup>212</sup> recognizing aider and abettor liability under the ATA does not diminish the rules of statutory construction. Moreover, in areas of the law where our nation must be most agile and nimble, excessive formalism can be deadly.<sup>213</sup>

Second, insofar as considerable uncertainty surrounds the area of federal aider and abettor law, to apply the *Boim IV* standard of primary liability through a “chain of incorporations”<sup>214</sup> only invites more confusion and leads to a standard that could result in inconsistent outcomes for innocent victims of terrorist attacks. Under the ATA, there is divergent authority among the courts on the standards of causation (“relaxed” or “proximate cause”) and the requisite mental state for aiders and abettors (“knowingly” or “intentionally”).<sup>215</sup> The *Boim IV* majority imposed a legal standard where aiding and abetting is evaluated through the lens of primarily liability, reasoning that those who provide financial support to terrorist organizations are themselves committing an act of

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<sup>207</sup> *Id.*

<sup>208</sup> *Cent. Bank of Denver*, 511 U.S. at 182 (holding “when Congress enacts a statute under which a person may sue and recover damages from a private defendant for the defendant’s violation of some statutory norm, there is no general presumption that the plaintiff may also sue aiders and abettors.”).

<sup>209</sup> *Boim IV*, 549 F.3d 685, 689 (7th Cir. 2008), *cert. denied*, 130 S. Ct. 458 (2009).

<sup>210</sup> WHITE HOUSE, *supra* note 1, at 15, 21, 24, 27, 42.

<sup>211</sup> *Khulumani v. Barclay Nat. Bank Ltd.*, 504 F.3d 254, 268, 287-88 (2d Cir. 2007) (per curiam), *aff’d for lack of quorum sub nom.* *Am. Isuzu Motors, Inc. v. Ntsebeza*, 553 U.S. 1028, 128 S. Ct. 2424 (2008).

<sup>212</sup> *Boim IV*, 549 F.3d at 689; *see also* ROMANTZ & VINSON, *supra* note 166, at 87.

<sup>213</sup> *See cf.*, *Lichter v. United States*, 334 U.S. 742, 779–80 (1948).

<sup>214</sup> *Boim IV*, 549 F.3d at 690.

<sup>215</sup> *See, e.g., id.* at 694-97 (applying “relaxed” causation and knowledge as a mental state requirement); *In re Terrorist Attacks on September 11, 2001*, No. 03 MDL 1570 (GBD), 2010 U.S. Dist. LEXIS 96597, at \*96-98 (S.D.N.Y. Sept. 13, 2010) (applying “modified” causation and knowledge as a mental state requirement); *In re Chiquita Brands Int’l, Inc. Alien Tort Statute and S’holder Derivative Litig.*, 690 F. Supp. 2d 1296, 13010 (S.D. Fla. 2010) (applying knowledge as a mental requirement); *Rothstein v. UBS AG*, 647 F. Supp. 2d 292, 294-95 (S.D.N.Y. 2009), *aff’d*, 2010 U.S. Dist. LEXIS 139104 (2011) (applying “proximate” causation and intent to sponsor terrorist acts as the mental state); *Taktyevyev, supra* note 72, at 1544.

terrorism and can be held liable under § 2333.<sup>216</sup> In comparison, Judge Rovner's dissent described the majority's opinion as "straddl[ing] both primary and secondary liability."<sup>217</sup> Further, Judge Rovner concluded that although the majority rejected aiding and abetting liability, these concepts still have some uncertain "continued relevance."<sup>218</sup> This "continued relevance" is far from clear to some district courts.<sup>219</sup> Like Judge Rovner, several district courts outside the Seventh Circuit have questioned the *Boim IV* holding and, as a result, returned to the *Boim I* analysis.<sup>220</sup>

The ATA is not the first statute to suffer from confusing interpretations of the law. In fact, under the Foreign Intelligence Surveillance Act (FISA), courts wrestled with the procedural distinction and resulting "wall" between surveillance involving "foreign policy" and "criminal prosecution."<sup>221</sup> In *In re Sealed Case*, the FISA Court of Review examined this issue and held that "the line [*Truong* and its progeny] sought to draw was inherently unstable, unrealistic, and confusing."<sup>222</sup> Specifically, the court emphasized that the field of counterintelligence necessarily involved efforts to halt espionage and that subsequent criminal prosecution was interrelated with foreign policy concerns in this area.<sup>223</sup> Just as the FISA courts abandoned "confusing" distinctions,<sup>224</sup> courts ruling under the ATA should reject a standard that recognizes liability for donors of terrorism, but somehow denies a cause of action against aiders and abettors.

In addition to imposing a confusing standard, any argument that the *Boim IV* analysis will still hold donors of terrorism liable as primary actors ignores the practical application of a rigorous legal test under tort law. Since ATA suits are rare in nature,<sup>225</sup> it is difficult to predict how courts will react in the future to holding donors of terrorism liable under a theory of primary liability. As noted by some commentators on the *Central Bank* decision, denying aiding and abetting liability only invites clever plaintiffs to craft their pleadings under a guise of primary liability when the action truly falls under aiding and abetting.<sup>226</sup> As a result,

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<sup>216</sup> *Boim IV*, 549 F.3d 685, 690-93 (7th Cir. 2008), cert. denied, 130 S. Ct. 458 (2009).

<sup>217</sup> *Id.* at 707 n.5 (Rovner, J., dissenting).

<sup>218</sup> *Id.* (Rovner, J., dissenting).

<sup>219</sup> *In re Chiquita Brands*, 690 F. Supp. 2d at 1309.

<sup>220</sup> See *Rothstein*, 647 F. Supp. 2d at 295; *In re Chiquita Brands*, 690 F. Supp. 2d at 1309; *Wultz v. Islamic Republic of Iran*, No. 08-cv-1460 (RCL), 2010 U.S. Dist. LEXIS 111469, at \*119-120 (D.D.C. Oct. 20, 2010) (mem. op.).

<sup>221</sup> *In re Sealed Case* No. 02-001, 02-002, 310 F.3d 717, 721, 743 (FISA Ct. Rev. 2002) (referencing *United States v. Truong Dinh Hung*, 629 F.2d 908 (4th Cir. 1980)).

<sup>222</sup> *Id.* at 743.

<sup>223</sup> *Id.*

<sup>224</sup> *Id.*

<sup>225</sup> Stratton, *supra* note 36, at 32 (2004) (noting prior to 2002, only two published opinions explored the scope of the ATA); see also Strauss, *supra* note 36, at 684 (2005).

<sup>226</sup> Takteyev, *supra* note 72, at 1544.

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courts will be forced to sift through even more confusing lawsuits and parse whether entities are primary or secondary actors. At best, courts will interpret *Boim IV* as still recognizing aider and abettor liability, just under a different name. At worst, the rights of plaintiffs will turn on a court's interpretation of "donor" without the legal theory of aiding and abetting to support consistent judicial analysis. As a result, plaintiffs may be denied a legal right otherwise supported by the statute's legislative history.<sup>227</sup> Although these lawsuits are often the subject of legal and political maneuvering,<sup>228</sup> courts that uniformly apply aiding and abetting liability will ease this tension.

Third, just as recognizing aiding and abetting liability under the ATA bolsters certainty in the law, any assertion that litigation expenses may be too steep to maintain a legitimate cause of action<sup>229</sup> fails to recognize that Congress anticipated these suits would necessarily require fact-intensive inquiries to successfully combat terrorism.<sup>230</sup> As noted in the congressional hearings, "American victims seeking compensation for physical, psychological, and economic injuries naturally turn to the common law of tort. American tort law in general would speak quite effectively to the facts and circumstances of most terrorist actions not involving [acts by foreign governments]."<sup>231</sup> The facts and circumstances that Congress anticipated also underscore a grim reality of what is at stake—experts estimate that the underground terror economy ranges from \$600 billion to \$1.5 trillion. Put in perspective, this figure is more than five percent of the total legitimate world economy<sup>232</sup> and exceeds the Gross Domestic Product of the United Kingdom as well as many of the world's smaller national economies.<sup>233</sup> Indeed, many legitimate governments and corporations unknowingly conduct business with these underground entities.<sup>234</sup> Realizing the sheer amount of financial assets that organizations funnel simply to bring destruction, the burden of a fact-intensive inquiry may be exactly what the world needs.

Similarly, by providing plaintiffs with a right of action under the ATA against aiders and abettors, injured parties have access to the deep-

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<sup>227</sup> See, e.g., *In re Terrorist Attacks on September 11, 2001*, No. 03 MDL 1570 (GBD), 2010 U.S. Dist. LEXIS 96597, at \*94 (S.D.N.Y. Sept. 13, 2010) ("A defendant cannot be held secondarily liable, under § 2333, for the material support provided by others to a designated foreign terrorist organization.").

<sup>228</sup> John D. Shipman, *Taking Terrorism to Court: A Legal Examination of the New Front in the War on Terrorism*, 86 N.C. L. REV. 383, 383 (2004).

<sup>229</sup> *Cent. Bank of Denver, N.A. v. First Interstate Bank of Denver, N.A.*, 511 U.S. 164, 189 (1994).

<sup>230</sup> *Antiterrorism Act of 1990: Hearing Before the Subcomm. on Courts and Admin. Practice of Comm. on the Judiciary*, 101st Cong. 83 (1990) (statement of Joseph Morris).

<sup>231</sup> *Id.*

<sup>232</sup> LORETTA NAPOLEONI, *MODERN JIHAD: TRACING THE DOLLARS BEHIND THE TERROR NETWORKS* 198 (2003).

<sup>233</sup> *Id.*

<sup>234</sup> *Id.*

pocketed parties that make up this massive underground economy. It must never be forgotten, “A terrorist, for reasons nobody understands, for reasons beyond the concept of humanity, blows a plane out of the air or hijacks a ship or shoots a father, murders a wife, husband, sister or brother.”<sup>235</sup> Accordingly, a district court’s ability to treble damages against organizations that aid and abet terrorism will likely have financially crippling effects.<sup>236</sup> In addition, perhaps motivated by notions of justice and economic compensation, plaintiffs would be encouraged to supply resources toward researching, finding, and seizing terrorist assets.<sup>237</sup> This may even have a synergistic effect that further stimulates government activity in this area.<sup>238</sup> Moreover, similar to the *qui tam* statutes of old,<sup>239</sup> the ATA inspires “private attorneys general” to find and hold accountable the aiders and abettors of terrorism.<sup>240</sup> Although aiding and abetting liability may lead to extensive and costly litigation, these fact-intensive suits are the only way to penetrate an underground economy so vast and powerful. Moreover, it is a necessary inquiry to further justice.

Fourth, analogous to the unavailing arguments of unwieldy fact-intensive suits, recognizing aiding and abetting liability under the ATA will not open the flood gates of litigation because these suits are rare in practice and buffered with substantive and procedural safeguards.<sup>241</sup> While Congress intended to protect victims who “died because they were Americans,”<sup>242</sup> it did so in a narrowly defined way. First, only U.S. citizens or survivors of U.S. citizens may bring suit.<sup>243</sup> Second, there is a four-year statute of limitations period with a limited tolling provision.<sup>244</sup> Third, plaintiffs may not bring suit against a foreign state, agency, or officer.<sup>245</sup> As a final measure, the ATA affords no recovery for injuries suffered by an act of war.<sup>246</sup> These statutory limitations are furthered

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<sup>235</sup> H.R. REP. NO. 102-1040, at 1 (1992) (statement of Sen. Chuck Grassley).

<sup>236</sup> 18 U.S.C. § 2333(a) (2006).

<sup>237</sup> Stratton, *supra* note 36, at 54.

<sup>238</sup> *Id.*

<sup>239</sup> The Latin phrase *qui tam* is short for *qui tam pro domino rege quam pro se ipso in hac parte sequitur*, meaning a person “who pursues this action on our Lord the King’s behalf as well as his own.” *Vt. Agency of Natural Res. v. United States ex rel. Stevens*, 529 U.S. 765, 765, 769 (2000) (referencing 3 WILLIAM BLACKSTONE, COMMENTARIES \*160).

<sup>240</sup> *Flast v. Cohen*, 392 U.S. 83, 120 (1968) (Harlan, J., dissenting) (in *qui tam* actions, the courts have “repeatedly held that individual litigants, acting as private attorneys-general, may have standing as ‘representatives of the public interest.’ ” (quoting *Scripps-Howard Radio, Inc. v. F.C.C.*, 316 U.S. 4, 14, (1942)).

<sup>241</sup> Stratton, *supra* note 36, at 32 (2004) (noting prior to 2002, only two published opinions explored the scope of the ATA); *see also* Strauss, *supra* note 36, at 684 (2005).

<sup>242</sup> H.R. REP. NO. 102-1040, at 2 (1992) (statement of Sen. Chuck Grassley).

<sup>243</sup> 18 U.S.C. § 2333(a) (2006).

<sup>244</sup> *Id.* § 2335.

<sup>245</sup> *Id.* § 2337(2).

<sup>246</sup> *Id.* § 2336(a).

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underscored by the ATA's legislative history that acknowledged these suits would be rare: "It may be that, as a practical matter, there are not very many circumstances in which the law can be employed. To our knowledge ... few terrorist organizations are likely to have cash assets or property located in the United States that could be attached and used to fulfill a civil judgment."<sup>247</sup>

In addition to these statutory limitations, plaintiffs must also contend with the typical procedural hurdles to bring suit in federal court. For example, in *Gilmore*, family members of an American citizen killed during a terrorist shooting in Jerusalem brought an action under the ATA against the PLO and various other organizations and individuals.<sup>248</sup> While the court held that the plaintiffs stated a claim under the ATA, it ultimately dismissed the suit for want of personal jurisdiction under minimum contacts analysis.<sup>249</sup>

Similarly, in *Rothstein*, the district court dismissed an action brought on behalf of victims injured or killed by six Hamas and Hezbollah attacks in Israel between 1997 and 2006.<sup>250</sup> The plaintiffs alleged UBS AG (UBS) indirectly assisted the government of Iran in financially supporting Hamas and Hezbollah.<sup>251</sup> The court dismissed the case because the plaintiffs lacked standing and failed to state a claim for relief.<sup>252</sup> In particular, the plaintiffs did not have standing because the links between UBS's transfer of funds to Iran and the terrorist acts of Hamas and Hezbollah were too attenuated.<sup>253</sup> Moreover, the court found the plaintiffs failed to sufficiently plead that providing assets to Iran proximately caused their injuries because there was no indication that UBS knew or otherwise intended its funding to support Hamas and Hezbollah.<sup>254</sup>

Finally, failing these contentions, this Paper concludes by arguing in the alternative that Congress should amend § 2333 and expressly provide a cause of action against aiders and abettors of international terrorism.<sup>255</sup> In the face of an overwhelming consensus that suing an individual terrorist alone offers *de minimus* value when compared to attacking the financial centers that fuel these acts,<sup>256</sup> the only meaningful

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<sup>247</sup> H.R. REP. NO. 102-1040, at 17 (1992) (statement of Alan J. Kreczko, Deputy Legal Advisor, Dep't of State).

<sup>248</sup> *Gilmore v. Palestinian Interim Self Gov't Auth.*, 422 F. Supp. 2d 96 (D.C. Cir. 2006).

<sup>249</sup> *Id.* at 103.

<sup>250</sup> *Rothstein v. UBS AG*, 647 F. Supp. 2d 292, 293 (S.D.N.Y. 2009), *aff'd*, 2010 U.S. Dist. LEXIS 139104 (2011).

<sup>251</sup> *Id.*

<sup>252</sup> *Id.* at 294-95.

<sup>253</sup> *Id.* at 294.

<sup>254</sup> *Id.* at 295.

<sup>255</sup> *Boim IV*, 549 F.3d 685, 689 (7th Cir 2008), *cert. denied*, 130 S. Ct. 458 (2009) (noting the after *Central Bank*, Congress enacted a statute providing relief to aiders and abettors under the Securities Exchange Act).

<sup>256</sup> *Id.* at 690-91; *see also* NAPOLEONI, *supra* note 232, at 198.

way to arrive at Congress's intent of imposing "liability at any point along the causal chain of terrorism,"<sup>257</sup> is to allow plaintiffs to sue the aiders and abettors of international terrorism. Notwithstanding the ATA's uniform legislative history and supporting case law in favor of liability against aiders and abettors, an expressed statutory provision would silence strict construction critics and validate what the courts and legislature already know—dismantling financial support networks further the global campaign against terrorism to a much greater extent than targeting the actual terrorist actors alone.

All told, the *Central Bank* counterarguments against aiding and abetting under the ATA fail on all accounts. To recognize such liability does not encroach on the authority of Congress. Indeed, the legislative history of § 2333 provides ample support for a plaintiff's right to sue aiders and abettors of international terrorism. Moreover, the *Boim IV* standard actually creates more uncertainty in the judicial system. Furthermore, the fact-intensive nature of ATA actions is necessary to combat terrorism and the infrequent nature of these suits eases concerns of excessive litigation. Finally, even if courts ultimately refuse to recognize aiding and abetting liability, Congress should amend the ATA and provide plaintiffs with an express right to sue the aiders and abettors of international terrorism.

## V. CONCLUSION

"The power to wage war is the power to wage war successfully."<sup>258</sup> The global war on terrorism is no different. The ATA provides plaintiffs with expansive rights to bring a civil action against those responsible for acts of international terrorism.<sup>259</sup> Just how far this right extends is debatable, resulting in diverging case law.<sup>260</sup> While the Seventh Circuit's holding in *Boim IV* failed to recognize aiding and abetting liability as a cause of action under § 2333, this ruling ignored both Congress's intent to incorporate common law tort principles into the ATA and the admin-

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<sup>257</sup> S. REP. NO. 102-342, at 22 (1992).

<sup>258</sup> *Lichter v. United States*, 334 U.S. 742, 781 (1948) (quoting Charles E. Hughes, Address at the Am. Bar Ass'n, "War Powers Under the Constitution," (Sept. 5, 1917)); see also Charles E. Hughes, *War Powers Under the Constitution*, 2 MARQ. L. REV. 1, 9 (1917).

<sup>259</sup> 18 U.S.C. § 2333(a) (2006).

<sup>260</sup> See, e.g., *Boim I*, 291 F.3d 1000, 1021, 1021, 1023 (7th Cir. 2002), *abrogated en banc sub nom. Boim IV*, 549 F.3d 685, 695-99 (7th Cir. 2008), *cert. denied*, 130 S. Ct. 458 (2009); *In re Terrorist Attacks on September 11, 2001*, No. 03 MDL 1570 (GBD), 2010 U.S. Dist. LEXIS 96597, at \*94 (S.D.N.Y. Sept. 13, 2010) ("A defendant cannot be held secondarily liable, under § 2333, for the material support provided by others to a designated foreign terrorist organization."); *Morris v. Khadr*, 415 F. Supp. 2d 1323, 1330 (D. Utah 2006) (holding that civil liability under the ATA extends to aiders and abettors who provide money to terrorists).

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istrative difficulties of parsing through which entities should ultimately be liable. As subsequent case law suggests, courts that adopt the *Boim I* standard and apply aiding and abetting principles to § 2333 further the congressional intent to provide plaintiffs with a full array of tort remedies and ease judicial administration and application in a very complex area of the law. Furthermore, courts that validate aiding and abetting liability under the ATA also recognize the reality of fighting terrorism—the violent display of an ideology is only as powerful as those who support the act. While ideological motives will always be difficult to defeat, severing the financial support to these motives is a different matter entirely.

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