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The Dobbs Difference: the Rhetoric of Overruling in the United States Supreme Court

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ABSTRACT

This article examines the rhetoric used in the Supreme Court's decision in Dobbs v. Jackson Women's Health Organization to describe the decisions it overruled. We ask whether that rhetoric marked a stark departure in the way the Court has treated other cases in which precedent was overturned. To answer that question, we examine every overruling case in the history of the Court. We argue that, in some ways, Dobbs was continuous with developments in that history and, in other ways, marked a stark departure in the Court's rhetoric of overruling. We conclude by considering the implications of the rhetoric of overruling for legitimacy of the Supreme Court.

KEYWORDS

Legal rhetoric, overruling, precedent, stare decisis, legitimacy

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Introduction

On June 24th, 2022, the United States Supreme Court used its ruling in *Dobbs v. Jackson Women's Health Organization*[1] to declare that the Constitution does not include or recognize a right to abortion. Along the way, the Court overruled *Roe v. Wade*[2] and *Planned Parenthood of Southeastern Pa. v. Casey*,[3] two cases which scholars and judges, including some of the Justices who voted to overrule them in *Dobbs*,[4] regarded as having significant precedential weight.[5] Overruling previously decided cases is, of course, nothing new for the Supreme Court.[6] But what attracts our attention to *Dobbs* is not just that it overruled *Roe* and *Casey,* but what it said about the decisions that it overruled.

More than two years after *Dobbs*, it is safe to say that the decision divided the country and unleashed a firestorm of criticism. A Pew Research Center survey conducted in July 2022 found that 57% of adults disagreed with the decision, with 43% reporting strong disagreement.[7] In June 2023, a Gallup survey found that "A record-high 69% (of respondents) say abortion should generally be legal in the first three months of pregnancy," and "A 61% majority of Americans think overturning *Roe v. Wade*, thus ending constitutional protection for abortion rights and returning the matter to the states, was a 'bad thing.'"[8]

Scholars joined the chorus of *Dobbs* critics,[9] pointing out the danger of overturning long-established precedent and undermining the Court's doctrine of stare decisis.[10] They called attention not just to the fact of overruling precedent but also to what they saw as the unusually strident criticism that Justice Samuel Alito directed at *Roe* and *Casey* in his *Dobbs* majority opinion.[11] Explaining why *Roe* should be confined to the dustbin of history, Alito wrote: "*Roe* was egregiously wrong from the start. Its reasoning was exceptionally weak, and the decision has

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1 Dobbs v. Jackson Women's Health Organization, No. 19-1392, 597 U.S. 215 (2022). *See* Nina Varsava, *Precedent, Reliance, and* Dobbs 136 Harv. L. Rev. 1845, 1912 (2023) (*Dobbs* promotes a narrow conception of reliance interests and gives Justices "less reason going forward to refrain from overruling constitutional decisions that they object to on the merits").

2 Roe v. Wade, 410 U.S. 113 (1973).

3 Planned Parenthood of Southeastern Pennsylvania, v. Casey, 505 U.S. 833 (1992).

4 Devan Cole, *Alito Told Ted Kennedy that He Respected* Roe v. Wade*, According to Excerpts from Late Senator's Diary in the New York Times* | CNN Politics." *CNN*, Cable News Network, 25 Oct. 2022.

5 Risa E. Kaufman & Katy Mayall. "*One Year Later*: Dobbs v. Jackson Women's Health Organization *in Global Context*, American Bar Association, 26 July 2023.

6 Miles Mogulescu, *Scotus Trashes Precedent and Resegregates Higher Education*, The American Prospect, 29 June 2023.

7 Majority of Public Disapproves of Supreme Court's Decision to Overturn Roe v. Wade, Pew Research Center, 6 July 2022.

8 Lydia Saad, *Broader Support for Abortion Rights Continues Post*-Dobbs, Gallup News 7 July 202.

9 Tom Boggioni et al. '*Intellectually Bankrupt': Alito's* Roe v Wade *Opinion Trashed by Constitutional Scholar*, Raw Story*,* May 8, 2022 2:53PM ET, www.rawstory.com/alito-roe-v-wade/.

10 Kaufman & Mayall, *supra* note 5.

11 Lucian K. Truscott IV, *Cacophony of Dunces: When the Supreme Court Trashed the Constitution*. Salon, 9 July 2022, 8:00 AM (EDT).

had damaging consequences."[12] This kind of language, we believe, undermines the public's confidence in the Court and its respect for the Justices who sat on the bench when *Roe* was decided.

But Alito was not done. Later in his opinion, he again said that "*Roe* was also egregiously wrong" and added that it was "deeply damaging."[13] Adding insult to injury, Alito argued that "Roe's constitutional analysis was far outside the bounds of any reasonable interpretation of the various constitutional provisions to which it vaguely pointed."[14] He alleged that the Justices who decided *Roe v. Wade* "usurped the power to address a question of profound moral and social importance that the Constitution unequivocally leaves for the people."[15]

Alito claimed that *Roe's* analysis of the history of abortion and abortion regulation was "irrelevant"[16] and "plainly incorrect."[17] He called the legal reasoning contained in *Roe's* majority opinion "unprincipled"[18] and said it offered an "unfocused analysis."[19] He called its treatment of the Constitution "remarkably loose"[20] and "hard to defend."[21]

Alito went on to say that *Roe* "enflamed debate and deepened division"[22] and "cannot be allowed to stand."[23] He said that *Roe* demonstrated a striking "failure" to pay attention to important information,[24] and an "erroneous understanding" of common law.[25] Alito highlighted *Roe's* "damaging consequences"[26] and how it wrought "turmoil."[27] He claimed it was "on [a] collision course with the Constitution from the day it was decided."[28]

As Alito noted, "Those on the losing side (in *Roe* and *Casey*) — those who sought to advance the State's interest in fetal life — could no longer seek to persuade their elected representatives to adopt policies consistent with their views. The Court short-circuited the democratic process by closing it to the large number of Americans who dissented in any respect from Roe."[29] He heaped scorn on *Roe* and criticized what he called "the scheme Roe produced" for looking like "legislation" and providing "the sort of explanation that might be expected from a legislative body."[30] It is time, Alito concluded, "to heed the Constitution and return the issue of abortion to the people's elected representatives."[31]

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12 *Dobbs, supra* note 1, at 6.
13 *Id.* at 44.
14 *Id.*
15 *Id*. at 44.
16 *Id*. at 2, 47.
17 *Id. at* 2.
18 *Id.* at 14.
19 *Id.* at 10.
20 *Id.* at 9.
21 *Id.* at 2.
22 *Id.* at 6.
23 *Id.* at 44.
24 *Id.* at 48, 50, 70.
25 *Id.* at 48.
26 *Id.* at 6, 44.
27 *Id.* at 76.
28 *Id.* at 44.
29 *Id.*
30 *Id.* at 5.
31 *Id.* at 6.

Our interest in this article is not to contest what the Court did in *Dobbs* but to attend instead to how it did it or, more precisely, to what we call "the rhetoric of overruling" that Alito employed. We put Alito's rhetoric in historical context and ask how it compares to the rhetoric used throughout American history in other cases where the Supreme Court overruled precedent. We ask: Was *Dobbs* unprecedented in its overruling rhetoric? This article seeks to answer this question, and, in doing so, to create a more complete understanding of the rhetorical styles of Supreme Court cases that overrule precedent.

Part I offers a general overview of the literature on precedent and stare decisis. Precedent here refers to previous cases which have been decided by the Court, while stare decisis refers to the doctrine which suggests Justices should adhere to precedent. We examine what scholars have said about precedent's importance, how stare decisis is applied in constitutional and statutory cases, and how it is used as a tool by Justices to advance their own ideological agendas. While some scholars argue that stare decisis effectively constrains what Justices decide, much of the literature argues that in constitutional cases it is inconsistently applied[32] and used in an unprincipled fashion.[33] In statutory interpretation cases, it is often argued to be a similarly "inconsistent and incoherent" constraint.[34]

In Part II, we discuss the history of the Supreme Court's rhetoric of overruling. We divide the Court's overruling cases into four periods, defined by the rhetorical style used during those times. We label those periods *Founding*, *Developing*, *Escalating*, and *Pre-Dobbs*. We trace a gradual change in the form and intensity of criticism directed at cases the Court overrules, culminating in *Dobbs*. We conclude by describing the consequences and repercussions of our findings for the legitimacy of the Supreme Court.

I. Stare Decisis as a Guide to Supreme Court Decision Making

Stare decisis, or "to stand by things decided," is generally acknowledged to be an important norm in the Supreme Court.[35] This norm requires the Court to adhere to the principles, rules, or standards of its previous decisions when ruling on a case with similar facts.[36] Epstein and Knight suggest that precedent constrains Justices'

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[32] Michael J. Gerhardt, *The Role of Precedent in Constitutional Decisionmaking and Theory*, 60 Geo. Wash. L. Rev. 68, 146-7 (1991).

[33] Henry Paul Monaghan, *Stare Decisis and Constitutional Adjudication*, 88 Colum. L. Rev. 723, 753, 743 (1988).

[34] Jordan Wilder Connors, *Treating Like Subdecisions Alike: The Scope of Stare Decisis as Applied to Judicial Methodology*, 108 Colum. L. Rev. 681 (2008) at 714.

[35] The full Latin phrase is "*stare decisis et non quieta movere"* or stand by the thing decided and do not disturb the calm; *See generally* James C. Rehnquist, Note, *The Power That Shall Be Vested in a Precedent: Stare Decisis, The Constitution, and the Supreme Court*, 66 B.U. L. Rev. 345, 347 (1986). *See also* H. Campbell Black, *The Principle of Stare Decisis ,* 34 Am. L. Register 745, 747 (1886) at 747 ("[I]n our own country the maintenance of this doctrine is of peculiar importance on account of the deference which we are accustomed to pay to the decisions of the law courts, even in cases where their logical correctness is open to doubt".) at 747.

[36] *Stare Decisis*, Black's Law Dictionary (10th ed. 2014) (stare decisis is the doctrine of

decisions.[37] They note that attorneys often cite precedent in briefs and arguments because they believe it matters, and they report that individual Justices often refer to precedent in their private arguments after a case is briefed and argued. The purported values of stare decisis include fostering stability, predictability, uniformity of the law, certainty, continuity, convenience, permanence in jurisprudence, legitimacy (both decisional and institutional), efficiency, justice, equality, and fairness.[38]

Despite these values, the Supreme Court occasionally departs from stare decisis. Christopher Banks argues that there are 5 factors that Justices generally consider when determining whether to do so: the type of case, reliance interests, degree of unanimity in the court's previous opinion, a precedent's age, and the special justification offered by lawyers for overruling or distinguishing precedent.[39] Whether the precedent is statutory or constitutional is also significant.[40]

Reliance refers to whether there are substantial interests, such as property or vested commercial interests in a case. Decisional unanimity, or lack thereof, also influences the force of the precedent, with a non-unanimous or divided opinion having less force than a unanimous one. The age of the precedent means that more weight or deference will typically be afforded to a case if it is a longstanding authoritative rule.[41] But Banks argues that other considerations such as whether a prior decision was "wrongly decided," "badly reasoned," "unworkable," or "confusing" in light of changed circumstances, or whether there is some intervening legal development between a previous case and one which overrules it, do not play much of a role in explaining judicial overruling of precedent.[42]

Like Banks, Amy Padden says stare decisis is "not an inexorable command."[43] But contrary to Banks, she claims that precedent can be overruled in light of new

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precedent, under which a court must follow earlier decisions when the same points arise again in litigation); *Precedent*, Black's Law Dictionary (10th ed. 2014) (Precedent is a decided case that furnishes a basis for determining later cases involving similar facts or issues).

37 Jack Knight & Lee Epstein, *The Norm of Stare Decisis*, 40 Am. J. Pol. Sci. 1018 (1996).

38 S. Sidney Ulmer, *Stare Indecisis: The Alteration of Precedent on the Supreme Court, 1946–1992*, 90 Am. Pol. Sci. Rev. 418-19 (1996); James Wm. Moore & Robert Stephen Oglebay, *The Supreme Court, Stare Decisis and Law of the Case*, 21 Tex. L. Rev. 514, 523 (1943); Nina Varsava, *Precedent, Reliance, and* Dobbs, 136 Harv. L. Rev. 1845 (2023); Herbert C. Kaufman, *A Defense of Stare Decisis*, 10 Hastings L.J. 283 (1959); James H. Fowler & Sangick Jeon, *The Authority of Supreme Court Precedent*, 30 Soc. Networks 16 (2008); James F. Spriggs & Thomas G. Hansford, *The U.S. Supreme Court's Incorporation and Interpretation of Precedent*, 36 L. & Soc. Rev.139 (2002).

39 Christopher P. Banks, *Reversals of Precedent and Judicial Policy-Making: How Judicial Conceptions of Stare Decisis in the U.S. Supreme Court Influence Social Change*, 32 Akron L. Rev. (1999).

40 The impact this factor has on the likelihood of overruling is discussed later in this section.

41 *See also* James F. Spriggs II & Thomas G. Hansford, The Politics of Precedent on the U.S. Supreme Court 132 (2006) (concluding that "an element of stare decisis, the vitality of a precedent, influences the way in which justices on the U.S. Supreme Court interpret precedent." Similar to Bank's factor, vitality depends on the precedent's authoritativeness and is influenced by size of deciding coalition, presence of separate opinions, and age of precedent).

42 Banks, *supra* note 39 at 4.

43 Amy L. Padden, Overruling Decisions in the Supreme Court: The Role of a Decision's Vote, Age, and Subject Matter in the Application of Stare Decisis After Payne vs. Tennessee, 82 Geo. L.J. 1689-1732 (1994) at 1694.

developments in law, when the prior case is found to be unworkable, or if the "underlying reasoning is outdated or inconsistent with contemporary values."[44] This means that a case will be overruled if the Justices believe it would have been treated differently if it were decided for the first time in the present moment.

Other scholars think that Supreme Court Justices use stare decisis as a smoke screen to protect decisions they don't want to overrule for other reasons. For example, Frederick Schauer suggests that there really is no stare decisis norm on the Court.[45] He claims that it is merely a rhetorical weapon used against opponents in cases that Justices don't want to see overturned.[46]

In fact, as Saul Brenner and Harold Spaeth report, stare decisis is rarely used by Justices in the way other legal doctrines are used.[47] They claim that Justices deploy a kind of personal stare decisis. They adhere to their own previous holdings, rather than being bound by institutional stare decisis or precedent. Political ideology, Brenner and Spaeth argue, not precedent, is the best predictor of a Supreme Court Justice's behavior.[48]

Jeffrey Segal and Harold Spaeth, examining a series of cases decided between 1953 and 1995, found that Justices' decisions conform to their own ideological preferences over 90% of the time.[49] Only 9.2% of the time did a Justice adhere to precedent when it conflicted with those preferences. Brenner and Spaeth's results also indicate that "Justices' personal policy preferences substantially explain their behavior" and that 97% of votes in nonunanimous decisions were consistent with the Justices' political ideology.[50]

Spriggs and Hansford, like Brenner and Spaeth, argue that "Justices are motivated by their policy preferences."[51] But when deciding whether to overrule a previously decided case they are "also constrained by both informal norms and specific precedent characteristics."[52] They suggest "that legal norms exert a stronger substantive influence on the overruling of precedent than the Justices' policy preferences."[53] In "Supreme Court Reversals on Constitutional Issues," Charlotte C. Bernhardt analyzed 35 overruling cases and concluded that Justices do not agree

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44 *Id.*at 1694.

45 Frederick Schauer, *Stare Decisis—Rhetoric and Reality in the Supreme Court* , Supreme Court 2018 Rev. 121 (2019).

46 *Id.* at 30. *See also* Rehnquist, *supra* note 35, at 376 (Stare decisis is "nothing but the rhetorical ally of those in favor of yesterday's decisions").

47 Saul Brenner & Harold J. Spaeth, Stare Indecisis: The Alteration of Precedent on the Supreme Court, 1946–1992 (1995).

48 *Id.* at 110 ("If ideology–an attitudinal variable–is extant, it is most likely to be that which guides American political elites generally: liberalism and conservatism. Accordingly, liberal Courts should overrule conservative precedents, and conservative Court those that are liberal. This hypothesis was supported").

49 Jeffrey A. Segal & Harold J. Spaeth, *The Influence of Stare Decisis on the Votes of United States Supreme Court Justices*, 40 Am. J. Pol. Sci. 971 (1996).

50 Brenner & Spaeth, *supra* note 47, at 106 (Exactly 701 out of 719 votes). *See also* Michael S. Paulsen, *Does the Supreme Court's Current Doctrine of Stare Decisis Require Adherence to the Supreme Court's Current Doctrine of Stare Decisis,* 86 N.C. L. Rev.1165 (2007).

51 James F. Spriggs & Thomas G. Hansford, *Explaining the Overruling of US Supreme Court Precedent*, 64 J. Pol. 1091 (2001) at 1108.

52 *Id.*

53 *Id. See also* Kaufman & Mayall, *supra* note 5, at 1108.

upon a single doctrine of what she called "constitutional stare decisis."[54] Instead, the Court's treatment of constitutional cases depends upon its current composition.

George Costello examines the rationales used by the Court when overruling constitutional cases.[55] He concludes that the reasoning used in overruling constitutional precedent was neither consistent nor coherent.[56] Brendan J. Murrill analyzes 141 cases that overruled constitutional precedent and argues that Justices attempt to strike a balance between maintaining jurisprudential stability and being flexible enough to correct errors.[57] Other scholars call constitutional stare decisis unprincipled and unconstrained,[58] inconsistent,[59] and note that Justices serving on the same Court often have different views about constitutional stare decisis.[60]

Following this line of argument, Charles J. Cooper calls constitutional stare decisis "a doctrine of convenience" that is inherently subjective and manipulable.[61] Ilya Somin agrees with Cooper and argues that liberal and conservative Justices overrule constitutional precedents when they see them as wrong. "Both," he says, "wave the *stare decisis* flag whenever precedents they like are imperiled."[62]

Unlike the literature discussed thus far, some scholarship on stare decisis is clearly normative. For example, as far back as 1889, when D.H. Chamberlain analyzed the Legal Tender Cases,[63] he aimed to answer the question of "whether the doctrine ought to be, or is, less strictly applied to decisions of constitutional questions than to questions of mere private right."[64] Chamberlain concluded that only decisions "clearly wrong in principle or on the facts" should be overruled.[65]

Scholars who take a normative perspective on precedent generally agree that Justices should overrule a precedent if, and only if, it is more than just "wrong."[66] Bernhardt posits that constitutional overruling is only justified when it is necessary

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54 Charlotte C. Bernhardt, *Supreme Court Reversals on Constitutional Issues*, 34 Cornell L. Rev. 55 (1948); *See also* George Costello, Cong. Research Ser. RL33172, The Supreme Court's Overruling of Constitutional Precedent: An Overview (2005); *See also* Brandon J. Murrill, Cong. Research Serv., R45319, The Supreme Court's Overruling of Constitutional Precedent 6-7 (2018)

55 The Supreme Court had overruled 228 of its own precedents by this time.

56 We will discuss these considerations later in this section.

57 Murrill, *supra* note 54, at 19.

58 Monaghan, *supra* note 33.

59 Gerhardt, *supra* note 32.

60 Jon D. Noland, *Stare Decisis and the Overruling of Constitutional Decisions in the Warren Years*, 4 Val. U. L. Rev. 101 (1969).

61 Charles J. Cooper, *Stare Decisis: Precedent and Principle in Constitutional Adjudication*, 73 Cornell L. Rev. 401, 404 (1988).

62 Ilya Somin, *The Rights and Wrongs of Overruling Precedent*, Reason.Com, (June 26, 2019, at 11:27), reason.com/volokh/2019/06/26/the-rights-and-wrongs-of-overruling-precedent/.

63 Knox v. Lee & Parker v. Davis 79 U.S. (12 Wall.) 457 (1871).

64 D.H. Chamberlain, *The Doctrine of Stare Decisis as Applied to Decisions of Constitutional Questions*, 3 Harv. L. Rev. 125 (1889).

65 *Id.* at 131.

66 Monaghan, *supra* note 33, at 758; Earl M. Maltz, *Some Thoughts on the Death of Stare Decisis in Constitutional Law,* 1980 Wis. L. Rev. 467, 493 (1980); Cooper, *supra* note 61 at 410 (arguing that an erroneous decision shouldn't be overruled, only if it would cause great harm. He says the Legal Tender Cases would satisfy this stringent standard).

to adapt the law to changing social and economic conditions.[67] Some scholars offer a complex matrix that they say Justices must consider if they want to overrule a constitutional precedent.[68]

The literature on statutory overruling is similar to the literature on overruling in constitutional cases in its attempts to draw general conclusions about how statutory stare decisis functions.[69] Various studies analyze the factors the Supreme Court considers[70] or make normative arguments about how stare decisis should work in the statutory context.[71] For example, Lawrence Marshall finds that the justifications offered by Justices for overruling in general are ambiguous, but stare decisis in statutory interpretation does influence some members of the Court.[72] Yet Jordan Connors finds that the application of stare decisis in statutory cases is at best inconsistent.[73]

William Eskridge's 1988 article, "Overruling Statutory Precedents," provides the most in-depth analysis of the factors the Court considers when overruling precedents in cases about the meaning of statutes.[74] Eskridge says the Court generally accords a "super-strong presumption" of validity to precedent in those cases.[75] He identifies three exceptions to this super-strong presumption.

What he calls the "proceduralist exception" asks whether the precedent is procedurally flawed because it was decided after inadequate deliberation. The second exception occurs when Congress leaves it to the Court to determine the specifics of an ambiguous general policy. In those cases, the courts use a common law process to fashion specific rules and change or rescind rules that prove unworkable or inconsistent with the general policy. Finally, what Eskridge calls the "reliance exception" weighs how private parties have shaped their behavior in response to a precedent and whether Congress itself has relied on that precedent.

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67 Bernhardt, *supra* note 54, at 70.

68 Noland, *supra* note 60, at 128-129. These factors include age, number of cases upholding/applying doctrine, degree of historical support, subsequent factual/historical developments, new economic and political conditions, new policies or philosophies that undermine logical foundation, workability, practical consequences (of not overruling, new doctrine, and overruling), etc.

69 Lawrence C. Marshall, *"Let Congress Do It": The Case for an Absolute Rule of Statutory Stare Decisis*, 88 Mich. L. Rev. 177 (1989); *See also* Connors, *supra* note 34.

70 William N. Eskridge, Jr., *Overruling Statutory Precedents*, 76 Geo. L.J. 1361, 1362 (1988); [hereinafter Eskridge 1].

71 Marshall, *supra* note 69; *see also* William N. Eskridge Jr., *The Case of the Amorous Defendant: Criticizing Absolute Stare Decisis for Statutory Cases*, 88 Mich. L. Rev. 2450 (1990) [hereinafter Eskridge 2]; Frank H. Easterbrook, *Stability and Reliability in Judicial Decisions*, 73 Cornell L. Rev. 422 (1988).

72 *Id.* at 182.

73 Connors, *supra* note 34, at 684.

74 Eskridge 1, *supra* note 70. The super-strong resumption is made up of three arguments, but we will only briefly explain the most popular argument: legislative acquiescence. The argument contends that if Congress does nothing following a statutory interpretation, then the Court can assume that Congress has "acquiesced."

75 *Ruggero J. Aldisert, Precedent: What It Is and What It Isn't; When Do We Kiss It and When Do We Kill It*?, 17 Pepp. L. Rev. 627, 628 (1990) (Aldisert pushes back and argues that "[t]he Court is fond of saying that it is difficult to overrule statutory interpretations because theoretically Congress will correct the ruling if dissatisfied," but in practice, it is more "do as I say, not as I do.").

If a Justice recognizes one of those exceptions to the super-strong presumption, Eskridge says they will then undertake three further inquiries to decide whether to overrule a precedent:

> (1) Informed by criticisms of the precedent and its reasoning by commentators, lower court judges, and the Court's own opinions, can the Court now say with confidence that the precedent was wrongly decided? (2) Is the precedent not just wrong, but also pernicious, detracting from overall national policies? (3) Do the policy problems engendered by the rule outweigh the potential unfairness to private persons and create uncertainty about other rules that will occur if the precedent is overturned?[76]

Eskridge finds that the presumptions and exceptions to stare decisis in statutory interpretation cases are used in what he calls a "game of judicial hide-and-go-seek."[77] He argues that Justices often invoke the super-strong presumption when they don't want to overrule a precedent and then ignore it or invoke one of three exceptions when they want to do so. In another article, Eskridge argues that the Court should adopt an absolute rule of stare decisis in statutory interpretation cases. Doing so, he says, would encourage legislatures to update statutes constantly.[78]

The literature discussed so far provides insights into how and when the Supreme Court overrules or should overrule precedent, but does not address the rhetoric of overruling.[79] Only a few studies have focused on what Justices say when they overrule precedent and how they characterize the decisions they reverse. For example, Pintip Dunn analyzes overruled constitutional cases from 1971 to 2002 and argues that the rhetoric, rather than the reasoning, used to overrule a case is the Court's most persuasive tool.[80] Justices, he says, generally use language that is "nondescript enough to avoid the alarm bells set off when there is a departure from precedent."[81] The Court seeks to speak in ways that "sneak the act of overruling by with minimal damage to its legitimacy."[82]

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76 Eskridge 1, *supra* note 70, at 1388.

77 *Id.* at 1392.

78 Eskridge 2, *supra* note 71, at 2452; *See also generally* Easterbrook, *supra* note 71, also argues statutory precedents shouldn't have stronger stare decisis than constitutional precedent). Marshall, *supra* note 69, also advocated for stronger statutory stare decisis and criticized the conventional justifications, particularly how the Court interprets Congress' action and inaction for approval and disapproval of a ruling.

79 While other articles may have addressed overruling rhetoric in part, the articles in this section discuss the topic more directly and were found to be the most applicable to our research.

80 Pintip H. Dunn, *How Judges Overrule: Speech Act Theory and the Doctrine of Stare Decisis*, 113 Yale L.J. 493 (2003).

81 *Id*. at 513.

82 *Id*. *See also* Robert J. Hume, *The Use of Rhetorical Sources by the U.S. Supreme Court*, 40 L. & Soc'y Rev. 817, 838 (2006) (exploring the use of sources, like the Federalist Papers, when the Court overrules precedent. Hume argues that "Justices use rhetorical sources more often when the legitimacy of their actions is lowest, such as when they are overturning precedent").

Dunn also found that justices often use the passive voice to downplay the Court's responsibility for overruling precedent and to imply that they are merely observers, rather than makers, of the law. Justices use verbs like "bound" and "require," to suggest that "their hands are tied."[83] They structure their sentences to suggest that they merely adapt the law to new facts. They do so to try to convince their readers that departing from precedent is not unprecedented or that some earlier case has already implicitly overruled the case now actually being overruled.[84]

Finally, Dunn argues that when the Court overrules a precedent it frequently acts as if doing so is "universally accepted" and so "obvious that its utterance is not even necessary."[85] Alternatively, sometimes Justices say that they now know more than their predecessors or that important details were overlooked when the case they want to overrule was first decided.

Another study, this one by Andrew Jacobs, analyzed the development of overruling rhetoric from the 19th century to the late 20th century.[86] Jacobs found that "the Court's overruling rhetoric of the late twentieth century has fundamentally changed," resulting in what he calls a "postmodern rhetorical performance."[87] Jacobs describes this "postmodern rhetorical performance" as characterized by an emphasis on "the agency of particular Justices, fragmented discourse, the collapse of larger narratives within substantive areas of the law, and the absence of the nineteenth century's grand narrative of scientism."[88] This performance, he argues, "utterly fails to produce the effect of necessity…and creates a crisis of legitimation."[89]

Our research extends the work of Dunn and Jacobs and asks whether Alito's rhetoric of overruling in Dobbs was a departure from, or an extension of, the rhetoric used when the Supreme Court previously overruled precedent. We build on Dunn by examining both continuity and change in the rhetoric of overruling. We follow Jacobs in asking whether what Alito did and said in *Dobbs* contributes to a legitimation problem for the Supreme Court.

II. The History of Overruling Rhetoric in the Supreme Court

Our study of the rhetoric of overruling focuses on the 235 instances in which the Supreme Court overruled precedent from 1810 to 2022. We identified shifts in that

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83 *Id.* at 515; *See also* Shelby Bell, *Inventing the Rule of Law: A Rhetorical Analysis of U.S. Supreme Court Per Curiam Opinions* 130 (unpublished dissertation, Univ. of Mich. 2016) available at https://conservancy.umn.edu/items/2ac58bfd-5ed9-4196-b678-15750017a7c9 at 129, 130 (The Court in Brandenburg v. Ohio, 395 U.S. 444 (1969) avoided criticism for change without strong justifications by using "strategic ambiguity," and portraying law as "a kind of almighty power beyond human control…[which] denied the agency of legal subjects to shape the law").

84 *Id.* at 523.

85 *Id.* at 527.

86 Andrew M. Jacobs, *God Save This Postmodern Court: The Death of Necessity and the Transformation of the Supreme Court's Overruling Rhetoric*, 63 U. Cin. L. Rev. 1119, 1121 (1994).

87 *Id.* at 1121.

88 *Id.*

89 *Id*.

rhetoric corresponding to four distinct periods: 1810 to 1940, 1940 to the 1960s, the 1960s to the early 2000s, and the early 2000s to *Dobbs* in 2022.

To begin the research process, we used the Library of Congress' list of Supreme Court cases which overruled precedent.[90] We thoroughly examined each case on the list and compiled all mentions of the overruled case(s), with particular attention given to the rhetoric used when Justices discussed the overturned case(s) and the Court or Justices who decided the prior case(s).[91] Along with this overruling rhetoric, we examined whether the overruled case involved a constitutional, statutory, or procedural issue, and whether the precedent was expressly overruled.[92]

With respect to the rhetoric of overruling, we analyzed both how much and what was said about the prior case.[93] We sought to determine shifts in the pattern of overruling rhetoric and the years and cases that signaled changes in those patterns. We identified four distinct periods in the Supreme Court's overruling history.

We call the first period, lasting from 1810 to 1940, the *Founding Period*. Over the course of 130 years, the Court developed the foundations of its overruling rhetoric. We call the second period, lasting from 1940 to 1963, the *Developing Period*. During this period the Court explicitly introduced the doctrine of stare decisis and further developed the conventions of overruling rhetoric. During the third period (the *Escalating Period*), which lasted from 1963 to 2003, the frequency and intensity of overruling rhetoric increased significantly, and the Court introduced many new stare decisis considerations. The fourth period, the *Pre-Dobbs Period*, lasted from 2003 to 2022. During this period the Court established the rhetorical conditions that enabled Justice Alito's treatment of precedent in *Dobbs* and began developing a series of tests to determine when it would be appropriate to overrule precedent. These tests comprise what we call a "jurisprudence of overruling."

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90 Table of Supreme Court Decisions Overruled by Subsequent Decisions, Constitution Annotated: Library of Congress, constitution.congress.gov/resources/decisions-overruled/ (accessed 10 Aug. 2023). The list used strict criteria to determine which cases to include. As it says in Appendix 1.2 Methodology for the Table of Supreme Court Decisions Overruled by Subsequent Decisions, "for a decision to be listed as overruled, a majority of the Court must have explicitly stated, in a subsequent decision, that the case has been overruled or used language that is functionally equivalent." This list was "compiled by searching the LEXIS database for all Supreme Court decisions that use the word overrule in the headnotes, syllabus, or text of the Court's opinion. The results were then reviewed to ascertain the Court's exact meaning with respect to its earlier decisions. Decisions supported by a majority of the Court that expressly overruled an earlier decision or used functionally equivalent language were listed in the table. These findings were also cross-checked with other sources to ensure that the search had captured any relevant results."

91 In this context, relevant refers to anytime the overruled case(s) were mentioned in regards to 1) the general facts of the case(s), 2) why the case(s) were being overruled, 3) the words used to characterize the case(s) and/or the Court or Justices who made the prior decision(s), and 4) how the new decision will improve things or alter the Court's fidelity to law.

92 In this context, expressly (also directly/explicitly) overruled refers to language in the majority opinion which characterizes the overruled case(s) as overruled, overturned, or some close variation of the phrase (We did not count the term "reversed").

93 If the overruled case was referred to as "overruled" or "overturned," it was taken to be a direct overruling and thereby contributed to the overall harshness of rhetoric.

We discuss cases those exemplify the characteristics of overruling rhetoric in each period. We focus on cases that mark the start of a new period of overruling rhetoric, that introduced new overruling rhetoric, or contained notably critical rhetoric in each time period.

Founding Period: 1810-1940

The first Supreme Court case in which a precedent was overruled, *Hudson v. Guestlier,* was decided in 1810.[94] From then until 1940, the Court overruled precedent in only 48 cases. Of those cases, 41.7% involved direct overruling of precedent,[95] and the Court generally said relatively little about the case it was overruling.[96]

In *Hudson v. Guestlier*, the Court overruled *Rose v. Himely,*[97] a two-year old precedent concerning maritime jurisdiction. In contrast to Alito's *Dobbs* opinion, the Court said very little about why that case was overruled. *Rose v. Himely* held that a French tribunal did not have jurisdiction to order the seizure of a ship since it was more than two leagues, or about 6.9 miles, offshore. The Court reversed the judgment since the vessel was actually within one league of the coast.[98] It simply characterized *Rose v. Himely* as "differing factually."[99]

However, over the next one hundred and thirty years, the Court employed more developed and distinctive rhetoric when it overruled precedent. Words and phrases that were most commonly used to characterize overruled cases in this period include: "inconsistent," as in "we can find no justification for [the overruled case's] exception which is inconsistent;"[100] "unsound," as in "we feel constrained to pronounce [the case being overruled] ... essentially unsound;"[101] "untenable," as in "we are compelled to declare [the overruled case] untenable;"[102] not harmonious, as in "[the overruled] cases are out of harmony with the general current of the decisions of this court;"[103] "erroneous," as in "if we follow [the overruled case], we follow an erroneous decision;"[104] "confusing," as in "disturbance and confusion that must inevitably flow from an adherence to [the principles of the overruled case];"[105] "doubt," as in "[d]oubt was repeatedly expressed as to the [overruled case's] correctness;"[106] "irreconcilable," as in "the judgment in the instant case cannot be reconciled with the decision in [the overruled case];"[107] and "departure"

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94 Hudson v. Guestier, 10 U.S. (6 Cranch) 281 (1810).

95 From 1810 to 1940, the Court overruled 48 cases and directly overruled 20 (20/48 = 0.417).

96 From 1810 to 1940, the Court majorities characterized overruled cases a total of 144 times (144 total characterizations/48 cases = 2.958 characterizations per case).

97 Rose v. Himely, 8 U.S. (4 Cranch) 241 (1808).

98 *Hudson*, *supra* note 94, at 282.

99 *Id.* at 281.

100 Gleason v. Seaboard Air Line Railway, 278 U.S. 349 (1929).

101 Lee v. Chesapeake & Ohio Railway, 260 U.S. 653, 659, 660 (1923).

102 Farmers Loan & Trust Co. v. Minnesota, 280 U.S. 204, 209 (1930).

103 Chicago & Eastern Illinois Railroad v. Industrial Commission, 284 U.S. 296, 299 (1932).

104 The Propeller Genesee Chief et Al v. Fitzhugh, 53 U.S. (12 How.) 443, 456 (1851).

105 Gazzam v. Lessee of Phillips, 61 U.S. (20 How.) 372, 378 (1857).

106 Erie Railroad v. Tompkins, 304 U.S. 64, 72 (1938).

107 Fox Film Corp. v. Doyal, 286 U.S. 123, 131 (1932).

(from principle/precedent) as in "the decision in the [overruled] case was a departure from the true application of the principles [in this area of jurisprudence]."[108]

The Supreme Court first used the word "overrule" explicitly in *Knox v. Lee* (1871),[109] which overruled *Hepburn v. Griswold* (1869).[110] *Knox* found the Legal Tender Act to be constitutional, allowing paper treasury notes to be used as legal tender. The *Knox* majority observed that "it is no unprecedented thing in courts of last resort…to overrule decisions previously made" but acknowledged that overruling should not be done "inconsiderately."[111] In later constitutional cases such as *Leloup v. Port of Mobile* (1888),[112] holding that a state license tax on a telegraph company violates the commerce clause, and *Garland v. Washington* (1914),[113] holding that due process does not require the state to adopt a particular form of criminal trial procedure as long as the accused has sufficient notice and opportunity to defend himself, the Court also argued that what it called "great caution" should be used when changing "certain dicta and decisions."[114] It emphasized its "reluctance to overrule former decisions of this court."[115]

Toward the very end of what we call the *Founding Period*, a new development in overruling rhetoric occurred in *Erie Railroad v. Tompkins* (1938), a constitutional case holding that in diversity jurisdiction cases courts should apply substantive state law and federal procedural law unless there is a conflict between substantive state and federal law.[116] The *Erie Railroad* majority characterized *Swift v. Tyson,*[117] the case it overruled, as "oft-challenged."[118] The Court said, "Doubt was repeatedly expressed as to the correctness [of Swift's statutory construction]."[119] It noted that "criticism of [Swift's] doctrine became widespread after the decision,"[120] and that the doctrine "revealed its defects, political and social and the benefits expected to flow from the rule did not accrue;"[121] *Swift*, the Court said, "prevented uniformity,"[122] "developed a new well of uncertainties,"[123] and produced "mischievous results."[124] The Court criticized *Swift v. Tyson's* judge-made rule[125] and mentioned, for the first time, outside criticism, not only from Justices in previous cases but from legal

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108 West Coast Hotel Co. v. Parrish, 300 U.S. 379, 397 (1937).
109 Knox v. Lee, 79 U.S. (12 Wall.) 553 (1871) (Legal Tender Cases).
110 Hepburn v. Griswold 75 U.S. (8 Wall.) 603 (1869).
111 *Knox*, *supra* note 109, at 554.
112 Leloup v. Port of Mobile, 127 U.S. 640 (1888).
113 Garland v. Washington, 232 U.S. 642 (1914).
114 *Leloup*, *supra* note 112, at 658.
115 *Garland*, *supra* note 113, at 646.
116 *Erie Railroad, supra* note 106.
117 Swift v. Tyson, 41 U.S. (16 Pet.) 1 (1842).
118 *Erie Railroad*, *supra* note 106, at 69.
119 *Id.* at 72.
120 *Id.* at 73.
121 *Id.* at 74.
122 *Id.*
123 *Id.*
124 *Id.*
125 We observe similar treatment in the overruling of other judge-made rules/doctrines. *See also* Peyton v. Rowe, 391 U.S. 54 (1968), Moragne v. States Marine Lines, 398 U.S. 375 (1970), United States v. Reliable Transfer Co., 421 U.S. 397 (1975), Gulfstream Aerospace Corp. v. Mayacamas Corp., 485 U.S. 271 (1988), United States v. Dixon, 509 U.S. 688 (1993), and South Dakota v. Wayfair, No. 17-494 (U.S. June 21, 2018).

scholars, as a relevant factor in overruling a past decision.[126]

A year later, in *O'Malley v. Woodrough* (1939)[127] which decided that a judge's gross-income could be taxed if they were appointed after the Revenue Act of 1932, the Court insisted that *Miles v. Graham,128* which held that the Revenue Act of 1918 did not allow taxing the compensation of a judge appointed after its enactment, "cannot survive."[129] This was the first use of this phrase to justify overruling precedent, but it would soon be used often.[130]

The *Founding Period* slowly developed a set of rhetorical conventions as the Court explored how and when to overrule. The Court was generally respectful, even as it overruled a prior case, and often pointed to legal and social developments that occurred after the overruled case had been decided and which required it to change course.[131] It tried to stress that those developments were unknowable at the time the previous Court made its decision. It characterized the overruling decision as a necessary and unavoidable update of the Court's precedent rather than a function of the previous Court's defective or inadequate reasoning. This "overruling with regret" allowed the Court to preserve its own reputation and that of the previous Court whose decision it was reversing.[132]

Developing Period: 1940-1963

In the *Developing* period from 1940 to 1963, the Court overruled 43 cases, 21.95% of those directly,[133] and notably said more about each overruled case, mentioning

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126 *Erie Railroad*, *supra* note 106, at 73: "Criticism of the doctrine became widespread after the decision." (Check the footnote on this quote to see 9 mentions of outside criticism).

127 O'Malley v. Woodrough, 307 U.S. 277 (1939).

128 Miles v. Graham, 268 U.S. 501 (1925).

129 O'Malley, *supra* note 127, at 283.

130 The rhetoric of "survival" is subsequently mentioned numerous times. By numerous times, we mean 9.57% of subsequent cases (18/188). For other mentions of the survival language, *see also* Olsen v. Nebraska ex rel. Western Reference & Bond Ass'n, 313 U.S. 236, 246 (1941); State Tax Commission v. Aldrich, 316 U.S. 174, 176, 181 (1942); Malloy v. Hogan, 378 U.S. 1, 6, 11 (1964); Warden, Maryland Penitentiary v. Hayden, 387 U.S. 294, 308 (1967); Lee v. Florida, 392 U.S. 378, 385 (1968); Andrews v. Louisville & Nashville Railroad, 406 U.S. 320, 323 (1972) ; Virginia State Board of Pharmacy v. Virginia Citizens Consumer Council, Inc., 425 U.S. 748, 759 (1976); Amalgamated Food Employees Union Local 590 v. Logan Valley Plaza, Inc., 391 U.S. 308, 518 (1968); Hughes v. Oklahoma, 441 U.S. 332, 325 (1979); United States v. Miller, 471 U.S. 130, 144 (1985); W.S. Kirkpatrick & Co. v. Environmental Tectonics Corp., 493 U.S. 400, 407, 408 (1990); United States v. Dixon, 509 U.S. 688, 712 (1993); 44 Liquormart, Inc. v. Khan, 522 U.S. 3, 534 (1997) (concurring); Minnesota v. Mille Lacs Band of Chippewa Indians, 526 U.S. 172, 174, 206-208 (1999) (in part); United States v. Hatter, 532 U.S. 557, 571 (2001) (explicitly referencing O'Malley's language); Ring v. Arizona, 536 U.S. 584, 603 (2002); Lawrence v. Texas, 539 U.S. 558, 599 (2003) (dissent); Ohio v. Roberts, 448 U.S. 56, 63, 64 (1980). *See also* United States v. Salvucci, 448 U.S. 83, 95 (1980) (used "outlived" to describe the overruled case).

131 West Coast Hotel Co. v. Parrish, 300 U.S. 379, 390 (1937) at 390. One of the reasons for overruling was "the economic conditions which have supervened" since the decision.

132 The court occasionally paid respect to the "eminent men" who decided over the previous case. *The Propeller Genesee Chief*, *supra* note 104, at 45.

133 From 1940 to 1963, the Court overruled 43 cases and directly overruled 9 (9/43 = 0.2195).

it an average of 3.58 times per decision.[134] The Supreme Court's decision in *Helvering v. Hallock* (1940),[135] overruling *Becker v. St. Louis Union Trust Co.* (1935)[136] and *Helvering v. St. Louis Union Trust Co*. (1935),[137] marked the start of the *Developing Period* in the history of the Court's overruling rhetoric. *Helvering* referred explicitly to stare decisis, describing it as "an important social policy" that preserved an "element of continuity in law" rooted in the "need to satisfy reasonable expectations."[138] But the Court added that "stare decisis is a principle of policy and not a mechanical formula of adherence to the latest decision."[139] *Helvering* was the first time that the Court explicitly acknowledged that it could, and sometimes should, correct itself.[140] After *Helvering*, the Court mentioned stare decisis more frequently as a factor to consider in deciding whether to overrule prior decisions.[141]

Tigner v. Texas (1940),[142] a constitutional case that upheld a Texas statute "punishing conspiracies in restraint of trade but expressly inapplicable to 'agricultural products or livestock while in the hands of the producer or raiser'" against an equal protection challenge,[143] overruled *Connolly v. Union Sewer Pipe Co*. (1902)[144] and introduced three oft-used rhetorical terms into the lexicon of overruling decisions: "vitality," as in "time and circumstances had drained [the overruled] case of vitality;"[145] "erosion," as in the "[overruled] case has been worn away by the

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134 154 characterizations/43 cases = 3.58 characterizations per case.

135 Helvering v. Hallock, 309 U.S. 106 (1940) [henceforth referred to as Helvering I].

136 Becker v. St Louis Union Trust Co., 296 U.S. 48 (1935).

137 Helvering v. St Louis Union Trust Co., 296 U.S. 39 (1935).

138 Helvering I, *supra* note 135, at 119.

139 *Id.* at 119.

140 The court mentions not just the ability to overrule itself but to overrule because the Court was wrong before: "This Court…has from the beginning rejected a doctrine of disability at self-correction," Helvering I, *supra* note 135, at 121. The dissent in Helvering I also provides the first explicit mention of how overruling affects the integrity of law and of the Court itself: "to upset these precedents now, must necessarily shake the confidence of the bar and the public in the stability of the rulings of the courts," Helvering I, *supra* note 135, at 129.

141 There are 43 cases in the *Developing Period* (1940 to 1963), and stare decisis is directly mentioned in 3 of those cases: Graves v. Schmidlapp, 315 U.S. 657, 665 (1942), Smith v. Allwright, 321 U.S. 649, 665 (1944), Commissioner of Internal Revenue v. Estate of Church, 335 U.S. 632, 647-648 (1949). That is 6.98% of the cases.

142 Tigner v. Texas, 310 U.S. 141 (1940).

143 *Id.* at 144.

144 Connolly v. Union Sewer Pipe Co., 184 U.S. 540 (1902).

145 *Id.* at 144: "drained that case of vitality." For other mentions of "vitality" (17 exactly and 9% of subsequent cases): Olsen v. Nebraska ex rel. Western Reference & Bond Ass'n, 313 U.S. 236, 246-7 (1941); Nye v. United States, 313 U.S. 33, 51 (1941); Reid v. Covert, 354 U.S. 1, 67 (concurring), 78 (dissenting) (1957) (possible use of vitality); Murphy v. Waterfront Commission of New York Harbor, 378 U.S. 52, 77 (1964); Marchetti v. United States, 390 U.S. 39, 41 (1968); Prices v. Georgia, 398 U.S. 323, 330 (1970); Griffin v. Breckenridge, 403 U.S. 88, 92, 93 (1971); Braden v. 30th Judicial Circuit Court, 410 U.S. 484, 497 (1973); Lodge 76, International Association of Machinist & Aerospace Workers v. Wisconsin Employment Relations Commission, 427 U.S. 132, 151 (1976); Craig v. Boren, 429 U.S. 190, 210 (1976); United States v. Salvucci, 448 U.S. 83, 86 (1980); Limbach v. Hoover & Allison Co., 466 U.S. 353, 361 (1984); Thornburgh v. Abbott, 490 U.S. 401, 426 (1989) (concurring/dissenting); Quill Corp v. North Dakota, 504 U.S. 298, 311 (1992); Hohn v. United States, 524 U.S. 236,

erosion of time;"[146] and whether or not a case is "controlling" (i.e., an authoritative precedent).[147] *Oklahoma Tax Commission v. Texas Co* (1949),[148] which held that, in the absence of Congressional legislation immunizing lessees, Oklahoma could tax petroleum produced from lessees of indigenous land, overruled *Oklahoma ex rel. Okla. Tax Comm'n v. Barnsdall Refineries* (1936),[149] *Large Oil Co. v. Howard* (1919),[150] *Howard v. Gipsy Oil Co*. (1918),[151] *Indian Territory Illuminating Oil Co. v. Oklahoma* (1916),[152] and *Choctaw, Oklahoma & Gulf Railroad v. Harrison* (1914).[153] *Oklahoma Tax Commission* introduced two other terms that would soon become standard in overruling rhetoric: "undermined," as in "[the court is deciding whether] the cases have been so undermined by later decisions…that they should now be overruled;"[154] and "foundation," as in "it is strongly urged that our later decisions…have stricken the foundation from beneath the [cases being overruled]... so that the latter no longer can stand in reason and consistency with the former."[155] In overruling cases, the Court began to justify its decision by arguing that subsequent cases "undermined" the basis or "stricken[ed] the foundation" of the case being overruled.

252, 253 (1998); Herrera v. Wyoming, 587 U.S. 329, 11 (2019) ; Edwards v. Vannoy, 593 U.S. 255, 15 (2021).

146 *Tigner, supra* note 142 at 147: "worn away by the erosion of time." For more uses of the erosion/eroded rhetoric, *see also* United States v. Raines, 362 U.S. 17, 25-6 (1960) (citing *Tigner*), Spevack v. Klein, 385 U.S. 511, 513 (1967), Katz v. United States, 389 U.S. 347, 353 (1967), Lodge 76, International Association of Machinist & Aerospace Workers v. Wisconsin Employment Relations Commission, 427 U.S. 132, 154 (1976) (citing Raines), Hughes v. Oklahoma, 441 U.S. 332, 329 (1979), Trammel v. United States, 445 U.S. 40, 47-8 (1980), Rodriguez de Quijas v. Shearson/American Express, Inc., 490 U.S. 477, 480 (1989), United States v. Gaudin, 515 U.S. 506, 521 (1995), State Oil Co. v. Khan, 522 U.S. 3, 21 (1997), Agostini v. Felton, 521 U.S. 203, 218 (1997), and Lawrence v. Texas, 539 U.S. 558, 576 (2003).

147 *Id.* at 148: "no longer controlling." *See also* Helvering I at 134, Olsen v. Nebraska ex rel. Western Reference & Bond Ass'n, 313 U.S. 236, 244 (1941), California v. Thompson, 313 U.S. 109, 116 (1941), Murdock v. Pennsylvania, 319 U.S. 105, 117 (1943), Brady v. Roosevelt Steamship, Co., 317 U.S. 575, 578 (1943), Commissioner of Internal Revenue v. Estate of Church, 335 U.S. 632, 636 (1949).

148 Oklahoma Tax Commission v. United States, 319 U.S. 598 (1943).

149 Oklahoma ex rel. Okla. Tax Comm'n v. Barnsdall Refineries, In., 296 U.S. 521 (1936).

150 Large Oil Co. v. Howard, 248 U.S. 549 (1919).

151 Howard v. Gipsy Oil Co., 247 U.S.503 (1918).

152 Indian Territory Illuminating Oil Co. v. Oklahoma, 240 U.S. 522 (1916).

153 Choctaw, Oklahoma & Gulf Railroad v. Harrison, 235 U.S. 292 (1914).

154 Oklahoma Tax Commission, *supra* note 148 at 343. For other uses of "undermined" rhetoric, *see also* Cosmopolitan Shipping Co. v. McAllister, 337 U.S. 783, 793 (1949), Ferguson v. Skrupa, 372 U.S. 726, 731 (1963), Jackson v. Denno, 378 U.S. 368, 387 (1964), Boys Markets, Inc. v. Retail Clerks Union, 398 U.S. 235, 238 (1970), Lehnhausen v. Lake Shore Auto Parts Co., 410 U.S. 356, 362 (1973), etc.

155 Oklahoma Tax Commission, *supra* note 148 . at 352: Case X has "stricken the foundation" of the overruled case. For other "foundation" variants, *see also* United States v. Reliable Transfer Co., 421 U.S. 397, 403 (1975), Shaffer v. Heitner, 433 U.S. 186, 206 (1977), Limbach v. Hoover & Allison Co., 466 U.S. 353, 358-9 (1984), Solorio v. United States, 483 U.S. 435, 450 (1987), Exxon Corp. v. Central Gulf Lines, Inc., 500 U.S. 603, 611 (1991), etc.

In *United States v. Darby* (1941),[156] a constitutional case interpreting the Commerce Clause,[157] the Justices described the overruled *Hammer v. Dagenhart* (1918),[158] which held that "production was not commerce, and thus outside the power of Congress to regulate. And the regulation of production was reserved by the Tenth Amendment to the states," as having been decided by a "bare majority,"[159] as having created novel and unsupported distinctions that have "long since [been] abandoned…[and] ceased to have force,"[160] as a "departure"[161] from prevailing principles/interpretations, and as having "long since…exhausted" its vitality as precedent.[162]

Such overtly critical characterizations of prior cases were also apparent in two cases interpreting tax law: *Commissioner of Internal Revenue v. Estate of Church* (1949)[163] and *James v. United States* (1961).[164] *Internal Revenue* characterized *May v. Heiner* (1930),[165] the case it overruled, eleven times, and *James* characterized the *Commissioner of Internal Revenue v. Wilcox* (1946)[166] nine times.

Internal Revenue notably described *Heiner* as "no longer be[ing] accepted as correct."[167] The Court argued that it was "not an overstatement to say that this Court's [previous controlling] opinion and holding treated *May v. Heiner* with scant respect."[168] That opinion "demolished the only reasoning ever advanced to support the *May v. Heiner* holding."[169] It concluded that *Heiner* was undeserving of "the sanctuary of stare decisis."[170]

James gave similar treatment to *Wilcox*. The Court characterized the case it overruled as "thoroughly devitalized,"[171] "effectively vitiated by this Court's decision in [a controlling precedent],"[172] and "repudiated"[173] in its reasoning. "*Wilcox*," the Court said, "was wrongly decided."[174] It concluded that "we should now correct the error and the confusion resulting from it."[175]

The *Developing* and *Founding Period* had very similar numbers of overruled cases and characterizations of those cases: 48 cases with 144 characterizations vs.

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156 United States v. Darby, 312 U.S. 100 (1941).
157 *Id.* at 108.
158 Hammer v. Dagenhart, 247 U.S. 251 (1918).
159 Darby, *supra* note 156, at 115.
160 *Id.* at 116.
161 *Id.* at 116-17.
162 *Id.*
163 Commissioner of Internal Revenue v. Estate of Church, 335 U.S. 632 (1949).
164 James v. United States, 366 U.S. 213 (1961).
165 May v. Heiner, 281 U.S. 238 (1930).
166 Commissioner of Internal Revenue v. Wilcox 327 U.S. 404 (1946).
167 *Id.* at 637: "can no longer be accepted as correct."
168 *Id.* at 648: Previous opinion "treated May v. Heiner with scant respect."
169 *Id.* : Previous opinion "demolished the only reasoning ever advanced to support the May v. Heiner holding."
170 *Id.* at 648: "May v. Heiner cannot be granted the sanctuary of stare decisis."
171 James, *supra* note 164, at 215.
172 *Id.* at 217: Overruled case "rationale was effectively vitiated by [subsequent decision]."
173 *Id.*: "repudiated its holding…certainly it repudiated the reasoning.
174 *Id.* at 221: "Wilcox was wrongly decided…we should now correct the error and the confusion resulting from it."
175 *Id*.

43 cases with 154 characterizations respectively.[176] From 1940 to 1963, the Court introduced new and more critical language to describe the cases it overruled. However, compared to the *Founding Period*, the overrulings in the second period were more indirect. In the *Developing Period*, the percentage of cases in which a precedent was explicitly overruled dropped to half of what it was in the previous 130 years.[177]

Escalating Period: 1963-2003

In what we call the *Escalating Period* from 1963 to 2003, the Supreme Court overruled precedent on a more regular basis. In this 40-year period the Court overruled precedent in 121 cases and did so explicitly and directly in 57.9% of its overruling decisions.[178] The Court also had more to say about the cases it overruled; it characterized the overruled cases 7.07 times on average.[179] Additionally, the Court mentions stare decisis more in this period than in the previous one.[180] The Supreme Court's 1963 *Gideon v. Wainwright* decision marked the start of the *Escalating Period*.[181]

Gideon overruled *Betts v. Brady*, a case that had upheld the denial of counsel to an indigent defendant.[182] *Gideon* reversed this decision by saying that the constitutional right to counsel applies to all defendants in state court proceedings. Justice Hugo Black, writing for a unanimous Court, explained that "Since 1942, when *Betts* v. *Brady*, 316 U.S. 455, was decided by a divided Court, the problem of a defendant's federal constitutional right to counsel in a state court has been a

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176 The rate of overruled cases was 0.369 (Founding) vs 1.870 (Developing) per year.

177 From 1810 to 1940, the court directly overruled 41.7% of cases. From 1940 to 1963, the court directly overruled 20.9% of cases. In the Founding *Period*, a case was twice as more likely to be directly overruled (41.7/20.9= 1.995)

178 The overruled 70 of the 121 cases directly (70/121 = 0.579).

179 From 1963 to 2003, the majority opinions characterized overruled cases a total of 855 times (855/121 = 7.066).

180 In the third period (1963 to 2003), there are 121 cases, and 23 mention stare decisis. That is 19.01% of the cases. Swift & Co. v. Wickham, 382 U.S. 111, 116 (1965), Moragne v. States Marine Lines, 398 U.S. 375, 402-4 (1970), Boys Markets, Inc. v. Retail Clerks Union, 398 U.S. 235, 240 (1970), Edelman v. Jordan, 415 U.S. 397, 671 (1975), Lodge 76, International Association of Machinist & Aerospace Workers v. Wisconsin Employment Relations Commission, 427 U.S. 132, 154 (1976), Oregon ex rel. State Land Board v. Corvallis Sand & Gravel Co,. 429 U.S. 363, 378 (1977), Continental T.V., Inc. v. GTE Sylvania, 433 U.S. 36, 47 (1977) , United States v. Scott, 437 U.S. 82, 101 (1978), Monell v. Department of Social Services, 436 U.S. 658 (1978) at 695 & 701, United States v. Ross, 456 U.S 798, 824 (1982), Payne v. Tennessee, 501 U.S. 808, 827-8 (1991), California v. Acevedo, 500 U.S. 565, 579 (1991), Quill Corp v. North Dakota, 504 U.S. 298, 317 (1992), Planned Parenthood of Southeastern Pa. v. Casey, 505 U.S. 833, 846 (1992), United States v. Dixon, 509 U.S. 688, 312 (1993), United States v. Gaudin, 515 U.S. 506, 521 (1995), Hubbard v. United States, 514 U.S. 695, 708 (1995), Adarand Constructors, Inc. v. Pena, 515 U.S. 200, 231-3 (1995), Seminole Tribe of Florida v. Faulkner, 516 U.S. 44, 66 (1996), State Oil Co. v. Khan, 522 U.S. 3 , 13, 20(1997), Agostini v. Felton, 521 U.S. 203, 235-236 (1997) , Hohn v. United States, 524 U.S. 236, 251 (1998), and Ring v. Arizona, 536 U.S. 584, 608 (2002).

181 Gideon v. Wainwright, 372 U.S. 335 (1963).

182 Betts v. Brady, 316 U.S. 455 (1942).

continuing source of controversy and litigation in both state and federal courts."[183] Black argued that "in deciding as it did…the Court in *Betts* v. *Brady* made an abrupt break with its own well-considered precedents"[184] and contended that "The Court in *Betts* v. *Brady* departed from the sound wisdom upon which the Court's holding in *Powell* v. *Alabama* rested."[185] Finally, Justice Black stated that "Twenty-two States, as friends of the Court, argue that *Betts* was 'an anachronism when handed down' and that it should now be overruled. We agree."[186] The Court majority directly overruled *Betts* by saying, "We conclude that *Betts v. Brady* should be overruled."[187]

In *Moragne* v. *States Marine Lines* (1970),[188] a statutory interpretation case discussing remedies for wrongful deaths in maritime law, the Court displayed the same disdain for the case it overruled as Black displayed in *Gideon*. Justice John Harlan's majority opinion was scathing in its criticism of *The Harrisburg*,[189] a case decided 84 years earlier.[190] In *The Harrisburg*, the Supreme Court ruled that a plaintiff could not pursue legal action for maritime wrongful deaths when such an action conflicted with the local wrongful death statutes.[191] *Moragne* ruled that legal action in such a situation is permitted. As Justice Harlan put it: "On fresh consideration of the entire subject, we have concluded that the primary source of the confusion is not to be found in *The Tungus*, but in *The Harrisburg*, and that the latter decision, somewhat dubious even when rendered, is such an unjustifiable anomaly in the present maritime law that it should no longer be followed."[192]

Harlan goes on to say that developments since *The Harrisburg* decision have led to "the wholesale abandonment of the rule in most of areas where it once held sway, quite evidently prompted by the same sense of the rule's injustice that generated so much criticism of its original promulgation."[193] Harlan explained that:

> We do not regard the rule of *The Harrisburg* as a closely arguable proposition–it rested on a most dubious foundation when announced, has become an increasingly unjustifiable anomaly as the law over the years has left it behind, and, in conjunction with its corollary, *The Tungus*, has produced litigation spawning confusion in an area that should be easily susceptible of more workable solutions. The rule has had a long opportunity to prove its acceptability, and instead has suffered universal criticism and wide repudiation.[194]

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183 *Gideon*, *supra* note 181, at 337-38.
184 *Id.* at 344.
185 *Id.* at 345. *Powell* v. *Alabama* refers to a case decided by the Court prior to *Betts* v. *Brady*, which the Court determined to be sounder and more controlling than *Betts* v. *Brady.*
186 *Id.* at 345.
187 *Id.* at 339.
188 Moragne v. States Marine Lines, 398 U.S. 375 (1970).
189 The Harrisburg, 119 U.S. 199 (1886).
190 *Moragne* is in the 99th percentile of cases in terms of age when overruled.
191 *Moragne*, *supra* note 188.
192 *Id.* at 378.
193 *Id.* at 388.
194 *Id.* at 404-05.

Harlan also noted that "the rule of *The Harrisburg*, […] had been rejected by '[e]very country of western Europe.'"[195] And in language of the kind Alito later used in *Dobbs*, he labeled it "'a disgrace to a civilized people'"[196] and directly overruled it by saying that "[w]e accordingly overrule *The Harrisburg*."[197]

United States v. Reliable Transfer Co. (1975)[198] offers another example of the increasingly harsh and critical language that characterized late 20th century's overruling decisions. *Reliable Transfer* ruled that in admiralty cases involving collisions all parties should be held liable in accordance with their comparative degrees of fault for the events which transpired.[199] This case overruled *The Schooner Catherine v. Dickinson* (1854), which previously held that in collision cases liability should be split evenly among the parties involved.[200]

Writing for a unanimous Court, Justice Potter Stewart explained that "It was true at the time of *The Catharine* that the divided damages rule was well entrenched in English law. The rule was an ancient form of rough justice, a means of apportioning damages where it was difficult to measure which party was more at fault"[201] and that "The courts of every major maritime nation except ours have long since abandoned that rule."[202] Justice Stewart also referred to, and adopted, the rhetoric used by the lower federal courts, stating that, "While the lower federal courts originally adhered to the divided damages rule, they have more recently followed it only grudgingly, terming it 'unfair,' 'illogical,' 'arbitrary,' 'archaic and frequently unjust.'"[203] Stewart argued that the *Dickinson* decision "is unnecessarily crude and inequitable in a case like this one where an allocation of disparate proportional fault has been made"[204] and that "There can be no question that subsequent history and experience have conspicuously eroded the rule's foundations."[205]

In a burst of particularly critical rhetoric, Stewart contended that:

> The rule of divided damages in admiralty has continued to prevail in this country by sheer inertia rather than by reason of any intrinsic merit. The reasons that originally led to the Court's adoption of the rule have long since disappeared. The rule has been repeatedly criticized by experienced federal judges who have correctly pointed out that the result it works has too often been precisely the opposite of what the Court sought to achieve in *The Schooner Catharine* – the 'just and equitable' allocation of damages.[206]

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195 *Id.* at 397.
196 *Id.*
197 *Id.* at 409.
198 United States v. Reliable Transfer Co., 421 U.S. 397 (1975).
199 *Id.* at 397.
200 The Schooner Catherine v. Dickinson, 58 U.S. (17 How.) 170 (1854).
201 *Reliable Transfer*, *supra* note 198, at 403.
202 *Id.* at 397, 398.
203 *Id.* at 404.
204 *Id.* at 407.
205 *Id.* at 403.
206 *Id.* at 410, 411.

Thirteen years later, in 1988, the Court overruled *Ettelson* v. *Metropolitan Life Insurance Co*[207] and *Enelow* v. *New York Life Insurance Co* (1935)[208] in *Gulfstream Aerospace Corp.* v. *Mayacamas Corp.* (1988),[209] a statutory interpretation case. *Ettelson* and *Enelow* previously held that a decision staying, or dismissing, a case on equitable grounds was immediately appealable.[210] However, *Gulfstream* determined that an immediate appeal is not permitted following a district court's decision when a similar suit is pending in state court.[211] It was decided unanimously, with Justice Thurgood Marshall writing for the Court.

Marshall's opinion picked up the critical tone Stewart used in *Reliable Transfer.* Marshall wrote, "This Court long has understood that the *Enelow-Ettelson* rule is deficient in utility and sense."[212] He argued that,

> A half century's experience has persuaded us, as it has persuaded an impressive array of judges and commentators, that the rule is unsound in theory, unworkable and arbitrary in practice, and unnecessary to achieve any legitimate goals. As an initial matter, the *Enelow-Ettelson* doctrine is, in the modern world of litigation, a total fiction. Even when the rule was announced, it was artificial.[213]

Justice Marshall quoted a Circuit Judge who "urged his court to reject the doctrine outright…Although a majority of the panel declined to do so, it agreed that the *Enelow-Ettelson* rule was 'artificial,' 'medieval,' and 'outmoded.'"[214] Marshall contended that "The historical analysis underlying the results in *Enelow* and *Ettelson* has bred a doctrine of curious contours"[215] and that "The case against perpetuation of this sterile and antiquated doctrine seems to us conclusive."[216] As Marshall put it, "The doctrine, and the distinctions it drew between equitable and legal actions and defenses, lost all moorings to the actual practice of the federal courts."[217] He explained that "The artificiality of the *Enelow-Ettelson* doctrine is not merely an intellectual infelicity; the gulf between the historical procedures underlying the rule and the modern procedures of federal courts renders the rule hopelessly unworkable in operation."[218] Marshall eventually directly overruled *Enelow* and *Ettelson*: "We therefore overturn the cases establishing the *Enelow-Ettelson* rule."[219]

Three years after *Gulfstream*, the Court used its decision in *Payne v. Tennessee*[220] to overrule *South Carolina v. Gathers* (1989)[221] and *Booth v. Maryland*

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207 Ettelson v. Metropolitan Life Insurance Co., 317 U.S. 188 (1942).
208 Enelow v. New York Life Insurance Co., 293 U.S. 379 (1935).
209 Gulfstream Aerospace Corp. v. Mayacamas Corp., 485 U.S. 271 (1988).
210 Ettelson and Enelow, *supra* notes 207, 208.
211 *Gulfstream*, *supra* note 209.
212 *Id.* at 282.
213 *Id.* at 283.
214 *Id.* at 287.
215 *Id.* at 280.
216 *Id.* at 287.
217 *Id.* at 284.
218 *Id.*
219 *Id.* at 287.
220 Payne v. Tennessee, 501 U.S. 808 (1991).
221 South Carolina v. Gathers, 490 U.S. 805 (1989).

(1987).[222] *Gathers* and *Booth* had prohibited admission of victim impact statements in capital cases.[223] *Payne* removed this restriction, ruling that a capital sentencing jury should be permitted to consider the impact of a victim's death on their family.[224] Justice Antonin Scalia used his concurring opinion, joined by Justice Sandra Day O'Connor and Anthony Kennedy, to introduce a new word into the Court's overruling vocabulary. As he put it, "Today, … Justice Marshall demands of us some 'special justification' – beyond the mere conviction that the rule of Booth significantly harms our criminal justice system and is egregiously wrong – before we can be absolved of exercising '[p]ower, not reason.'"[225] The phrase "egregiously wrong" would later be amplified by Justice Brett Kavanaugh in *Louisiana v. Ramos* (2020)[226] and, as we have already seen, would play a key role in Justice Alito's *Dobbs* opinion.[227]

A 1993 case, *United States v. Dixon* (1993),[228] provides another striking example of the kind of criticism that characterized the overruling rhetoric of the *Escalating Period*. *Dixon* was a constitutional case about the meaning of the Double Jeopardy Clause and whether it barred prosecution of a defendant for conduct for which they had previously been held in contempt of the court.[229] A 5-4 majority overruled *Grady v. Corbin* (1990), a case decided three years earlier, which held that the Double Jeopardy Clause prevented a person from being charged with a more serious crime after having already been tried, convicted, and punished for the same action in a contempt of court ruling.[230] *Dixon* ruled that while the Double Jeopardy Clause prevented a defendant from being charged with offenses for conduct for which they had previously been tried, the test for this situation depends upon whether the elements of the case remained consistent between the different prosecutions.[231] The Justices also concluded that a second prosecution was not barred by double jeopardy in either case.[232]

Justice Scalia wrote the majority opinion. As he put it, "*Grady* lacks constitutional roots."[233] He went on to explain that "[t]he 'same-conduct' rule it announced is wholly inconsistent with earlier Supreme Court precedent and with

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222 Booth v. Maryland, 482 U.S. 496 (1987).
223 *Gathers*, *supra* note 221. *See also id.*
224 *Payne*, *supra* note 220.
225 *Id.* at 834.
226 Ramos v. Louisiana, 590 U.S. 83 (2020).
227 The introduction of "egregious" into this case can be seen as a buildup to the "egregious" rhetoric seen in *Ramos* and *Dobbs*. Another potential instance of pre-"egregious" test language can be seen in United States v. Gaudin, 515 U.S. 506, 521 (1995) at 521, where the majority argues, in relation to the overruled case (Sinclair v. United States, 279 U.S. 263 (1929)), "And we think stare decisis cannot possibly be controlling when, in addition to those factors, the decision in question has been proved manifestly erroneous, and its underpinnings eroded, by subsequent decisions of this Court." The phrase "manifestly erroneous" had not been used by the Court until this point, and its harshness could potentially be seen as another steppingstone to the language used in *Ramos* and *Dobbs*.
228 United States v. Dixon, 509 U.S. 688 (1993).
229 *Id.* at 691.
230 Grady v. Corbin, 495 U.S. 508 (1990).
231 Dixon, *supra* note 228.
232 *Id.* at 696.
233 *Id.* at 689.

the clear common-law understanding of double jeopardy."[234] Justice Scalia also contended that "The case was a mistake."[235] He argued that "A hypothetical based on the facts in Harris reinforces the conclusion that Grady is a continuing source of confusion and must be overruled."[236] Scalia explained that stare decisis is not enough to save this case. He concluded, "We do not lightly reconsider a precedent, but, because *Grady* contradicted an 'unbroken line of decisions,' contained 'less than accurate' historical analysis, and has produced 'confusion'" the Court is forced to review Grady.[237]

Apart from criticizing the case itself, Scalia took the unusual step of criticizing Justice David Souter, who served on the Court that decided *Grady*, by name. Scalia wrote,

> [Justice Souter] has apparently been led astray by his misinterpretation of the word 'incidents' in the following passage of Nielsen: [W]here, as in this case, a person has been tried and convicted for a crime which has various incidents included in it, he cannot be a second time tried for one of those incidents without being twice put in jeopardy for the same offence.' He apparently takes 'incident' to mean 'event' or 'conduct.' What it obviously means, however, is 'element.'[238]

Justice Scalia extended his attack on Justice Souter by arguing that Souter "provides no authority whatsoever (and we are aware of none) for the bald assertion that 'we have long held that [the government] must sometimes bring its prosecutions for [separate] offenses together.'"[239] As Scalia put it, "We would mock stare decisis and only add chaos to our double jeopardy jurisprudence by pretending that *Grady* survives when it does not."[240] He concluded that "*Grady* must be overruled."[241]

In the *Escalating Period*, the overruling of precedent increased in frequency. The rate of overruling cases increased from 1.87 per year in the *Developing* period to 3.03 per year in the *Escalating* period.[242] The Court also directly overruled cases much more frequently. From the *Developing Period* to the *Escalating Period*, the percentage of direct overrulings increased from 20.9% to 57.85%, an increase of over 2.5x from what it was before. In addition, the Justices had more to say about the cases they overruled. They also were more openly critical in their characterizations of those cases than they were in earlier periods.

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234 *Id.* at 704.
235 *Id.* at 711.
236 *Id.* at 710.
237 *Id*. at 711.
238 *Id.* at 705 (in a footnote).
239 *Id.* at 705.
240 *Id.* at 712.
241 *Id.* at 704.
242 From 1963 to 2003, the Court overruled 121 cases over the course of 40 years (121/40 = 3.025).

Pre-Dobbs Period: 2003-Dobbs

Between 2003 and the *Dobbs* decision, the Court overruled a total of 22 cases, or 1.16 cases per year. The Court also had more to say about the cases it overruled, and the majority of cases were overruled directly.[243] The *Pre-Dobbs Period* began in 2003 when the Supreme Court decided *Lawrence v. Texas* (2003)[244] and legalized consensual same-sex activity. Lawrence overruled *Bowers v. Hardwick* (1986),[245] and Justice Kennedy, who wrote the majority opinion, described *Bowers* as a "failure to appreciate the extent of liberty at stake."[246] He argued, laying the ground for what Alito would say in Dobbs, that *Bowers* was "not correct when it was decided,"[247] and "not correct today."[248] It contained "deficiencies…[that] became even more apparent in the years following its announcement."[249] Kennedy called *Bowers* a "weakened"[250] precedent, and claimed that the "foundations of *Bowers* have sustained serious erosion."[251]

Justice Antonin Scalia used his dissent in *Lawrence*, which Chief Justice William Rehnquist and Justice Clarence Thomas joined, to launch a broadside against *Roe v. Wade* and the substantive due process decisions that it spawned. Scalia said the *Roe* majority was guilty of "judicially invent[ing] abortion rights."[252] He cited scholars and activists who argued that *Roe* was a "prime example of twisted judging,"[253] failed "to measure up to professional expectations regarding judicial opinions,"[254] and was an "embarrassing performanc[e]."[255] Scalia himself argued that *Roe* was "unrooted from the Nation's traditions"[256] and had been a "subject [of] unrelenting criticism."[257]

In *South Dakota v. Wayfair* (2018),[258] a constitutional case interpreting the Commerce Clause, Justice Kennedy ratcheted up the critical tone of the Court's rhetoric of overruling by characterizing the physical presence rule[259] established in *National Bellas Hess v. Department of Revenue of Illinois* (1967)[260] and later

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243 There were 13 direct overrulings, so 59.1% of the cases were directly overruled. (13/22 = 0.591). The Court overruled 22 cases in 19 years (22/19 = 1.16). The Court characterized the overruled cases a total of 236 times or 10.72 characterizations per case.

244 Lawrence v. Texas, 539 U.S. 558 (2003).

245 Bowers v. Hardwick, 478 U.S. 186 (1986).

246 Lawrence, *supra* note 244, at 567.

247 *Id.* at 578.

248 *Id.*

249 *Id.* at 573.

250 *Id.* at 576.

251 *Id.*

252 *Id.* at 587.

253 *Id.* at 589.

254 *Id.*

255 *Id*.

256 *Id.* at 588.

257 *Id.* at 589.

258 South Dakota v. Wayfair, 585 U.S. __ (2018).

259 The physical presence rule declared that states can't tax retailers with no physical presence in that state. Physical presence included retail outlets, solicitors, and property. This rule exempted all mail order companies from being taxed in states where they didn't have physical establishments.

260 National Bellas Hess v. Department of Revenue of Illinois, 386 U.S. 753 (1967).

reaffirmed in *Quill Corp v. North Dakota* (1992)[261] as imposing an "arbitrary, formalistic distinction;"[262] "simply mak[ing] no sense,"[263] "artificial in its entirety,"[264] an "extraordinary imposition by the Judiciary on States' authority,"[265] "unfair and unjust,"[266] creating "inequitable exceptions,"[267] "wrong on its own terms when it was decided,"[268] an "artificial, anachronistic rule,"[269] and "unsound and incorrect."[270] Kennedy said that subsequent developments made *Quill*'s error "all the more egregious and harmful."[271]

Ramos v. Louisiana (2020),[272] a Sixth Amendment case, offers another example of the sharply critical turn in the rhetoric of overruling. Justice Neil Gorsuch's majority opinion characterized the decision to allow non-unanimous jury verdicts in *Apodaca v. Oregon* (1972),[273] and Justice Powell's concurring opinion in *Johnson v. Louisiana* (1972),[274] as a "strange turn"[275] in Sixth Amendment rulings, and as a "badly fractured set of opinions."[276] He claimed that "no one has found a way to make sense of it."[277] He called it an "exception,"[278] "unusual,"[279] and said it used "breezy [and skimpy][280] cost-benefit analysis."[281] Gorsuch called *Apodaca* an "error,"[282] "gravely mistaken,"[283] and "unmoored from the start."[284] He labeled *Apodaca* a "mistaken decision,"[285] and "an outlier on the day it was decided, one that's become lonelier with time."[286]

The *Pre-Dobbs Period* also saw new efforts to solidify a jurisprudence of overruling by articulating new standards for overruling. These efforts built on decisions like *Payne* v. *Tennessee* (1991) and *Agostini v. Felton* (1997).

In 1991, the Court used its *Payne* decision to lay out a multipart test for evaluating whether a prior case should be overruled. In his majority opinion, Justice William Rehnquist identified four factors for determining whether a case should be

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261 Quill Corp. v. North Dakota, 504 U.S. 298 (1992).
262 Wayfair, *supra* note 258 at 10.
263 *Id.* at 14.
264 *Id*.
265 *Id.* at 16.
266 *Id*.
267 *Id.* at 17.
268 *Id.* at 18.
269 *Id.* at 22.
270 *Id.*
271 *Id.* at 18.
272 *Ramos, supra* note 226.
273 Apodaca v. Oregon, 406 U.S. 404 (1972) (plurality opinion).
274 Johnson v. Louisiana, 406 U.S. 366 (1972) (Powell, J., concurring).
275 *Ramos*, *supra* note 226, at 7.
276 *Id.* at 8.
277 *Id*.
278 *Id.* at 10.
279 *Id.*
280 *Id.* at 14.
281 *Id.* at 13.
282 *Id.* at 15.
283 *Id.* at 21.
284 *Id.*
285 *Id.* at 26.
286 *Id.*

overruled: whether the case was unworkable or badly reasoned,[287] whether it was a deeply divided decision with strong dissents,[288] whether the Court has questioned the case in later decisions,[289] and whether it has defied consistent application by the lower courts.[290]

Six years later, *Agostini v. Felton* (1997),[291] a constitutional case on the Establishment Clause, overruled both *Aguilar v. Felton* (1985)[292] and *School District of Grand Rapids v. Ball* (1985).[293] Justice Sandra Day O'Connor identified two factors that Justices should consider when deciding whether a case should be overturned: whether there have been significant changes or developments in the field of law since the case had been decided[294] and whether more recent decisions of the Court have undermined support for the case.[295]

During the pre-Dobbs period, the Court made several other attempts to systematize its approach to overruling precedent. In *Leegin Creative Leather Products Inc. v. PSKS, Inc.* (2007),[296] a case interpreting the Sherman Act's prohibition of anticompetitive price fixing, the Court identified two factors that should be considered in determining the bindingness of a precedent: did the prior decision create an "unworkable legal regime" (anomalous/inconsistent results), and was the rule that it established part of "our national culture."[297] In *Montejo v. Louisiana* (2009),[298] a constitutional case that considered whether, after the appointment of an attorney, a defendant needs to take additional steps to accept the appointment in order to secure the protections afforded by the Sixth Amendment, the Court identified four factors that Justices should consider when determining whether to adhere to stare decisis: how old the case is,[299] whether there are reliance interests at stake, whether the decision was well-reasoned, and whether the decision/rule is workable.[300]

But perhaps the most comprehensive contribution to the jurisprudence of overruling made in the *Pre-Dobbs* period was made by Justice Brett Kavanaugh, who used his concurring opinion in *Ramos* not only to offer his own criticisms of *Johnson's* and *Apodaca's* holdings, but to try to add more structure to the Court's treatment of precedent.[301] Early in his *Ramos* opinion, Kavanaugh bemoaned the lack of a "consistent methodology or roadmap for how to analyze all the factors taken together" in deciding whether and when to overrule a precedent.[302] Without a

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287 Payne, *supra* note 220, at 827.
288 *Id.* at 829.
289 *Id.*
290 *Id.* at 830.
291 Agostini v. Felton, 521 U.S. 203 (1997).
292 Aguilar v. Felton, 473 U.S. 402 (1985).
293 School District of Grand Rapids v. Ball, 473 U.S. 373 (1985).
294 Agostini, *supra* note 291, at 236.
295 *Id.* at 236.
296 Leegin Creative Leather Products Inc. v. PSKS, Inc., 551 U.S. 877 (2007).
297 *Id.* at 924, 926.
298 Montejo v. Louisiana, 556 U.S. 778 (2009).
299 *Id.* at 793.
300 *Id.* at 792.
301 *Ramos* (concurring in part), *supra* note 226, at 10.
302 *Id.* at 7.

comprehensive methodology or roadmap, he worried that such decisions could not be neutral and consistent.[303]

In an attempt to describe such a roadmap, Kavanaugh drew upon tests which had been developed in the *Escalating* period, beginning in *Swift & Co. v. Wickham* (1965).[304] *Swift* was a statutory case deciding on court jurisdiction that partially overruled *Kesler v. Department of Public Safety* (1962).[305] Writing for the Court, Justice John Harlan mentioned three factors the Justices considered when deciding whether *Kesler* should be overruled: whether the decision had proved to be unworkable,[306] whether it had been regularly criticized since it was handed down,[307] and whether lower courts had difficulties in applying or interpreting the case.[308]

But Kavanaugh went beyond those three factors. He listed seven stare decisis factors used in previous cases and grouped them under three general questions. The first requires Justices to ask: "Is the prior decision not just wrong, but grievously or egregiously wrong?"[309] In considering this question, Justices should analyze the quality of the precedent's reasoning, its consistency and coherence with other decisions, changed law and facts, and its workability.

Kavanaugh argued that Justices should next ask, "Has the prior decision caused significant negative jurisprudential or real-world consequences?"[310] Kavanaugh's third question was, "Would overruling the prior decision unduly upset reliance interests?"[311]

Justice Kavanagh's *Ramos* opinion offered the most explicit and complete standard for applying stare decisis in the Supreme Court's history. His use of the term "egregiously wrong" set a high (but not insurmountable) bar for overruling precedents[312] and set the stage for *Dobbs.*

Between *Ramos* and *Dobbs*, there was only one other overruling case: *Edwards v. Vannoy* (2021), a case determining whether the new criminal procedures announced in *Ramos* would have retroactive effects.[313] Kavanaugh wrote the majority opinion but, oddly enough, did not apply his own test in laying out his reasons for overruling *Teague v. Lane'*s (1989), which held that new criminal procedure rules do not apply retroactively in cases decided on direct review around the time the new rule is decided.[314] Nonetheless, in keeping with the contemporary rhetoric of overruling, he called the *Teague* decision: "non-existent in practice,"[315] "moribund,"[316] "retaining no vitality,"[317] a "fiction,"[318] and "an illusory exception

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303 *Id.*
304 Swift & Co. v. Wickham, 382 U.S. 111 (1965).
305 Kesler v. Department of Public Safety, 369 U.S. 153 (1962).
306 Swift, *supra* note 304 at 116 and 124.
307 *Id.* at 124.
308 *Id.*
309 Ramos (concurring in part), *supra* note 226, at 8.
310 *Id.* at 8.
311 *Id.*
312 *Id.* at 9.
313 Edwards v. Vannoy, 593 U.S. __ (2021).
314 Teague v. Lane, 489 U.S. 288 (1989) (in part).
315 Edwards, *supra* note 313, at 15.
316 *Id.* at 15.
317 *Id.*
318 *Id.* at 18.

that misleads litigants and judges and needlessly expends the scarce resources of defense counsel, prosecutors, and courts."[319]

In the *Pre-Dobbs Period*, the Court spent more time describing and criticizing the cases it overruled than was true in earlier periods. Its rhetorical posture in overturning precedent was direct and very critical. And if judicial legitimacy is built on a framework of respect that courts show for the work of other courts, the Justices seemed to care more about achieving their desired results than in preserving the reputational capital built up by adhering to the doctrine of stare decisis. By the early twenty-first century, the jurisprudence of overruling had teed up a range of factors and tests that Justices could draw on when faced with a challenge to precedent. But, as in many other areas, rather than making decisions about overruling more predictable, the proliferation of tests offered Justices more room for maneuver.[320]

Conclusion: The Rhetoric of Overruling and the Supreme Court's Legitimacy Problem

Our survey of the history of Supreme Court decisions in which precedent has been overruled suggests a clear direction of change. The opinions of the modern Court are more critical of the decisions they overrule than were those that overruled precedent throughout most of American history. A review of that history suggests that Alito's *Dobbs* opinion was continuous with, but also an intensification of, the rhetorical style used in overruling decisions in the past sixty years.

Alito did not say anything that had not been said before in cases overturning precedent; what was different was the intensity and repetition of the criticism he offered of *Roe* and *Casey.* All told, he criticized those opinions 36 times in his *Dobbs* opinion. Never before had the Court directed such a barrage of criticism at a precedent it was overruling.[321]

If overruling precedent always has the "potential to undermine the rule of law and therefore the legitimacy of the Court,"[322] *Dobbs* certainly upped the ante. A 2023 survey done by the Pew Research Center found that 44% of Americans had a favorable view of the Court, while 54% had an unfavorable view.[323] But support for the Court has dropped 26% since 2020,[324] and Pew notes that this is the

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319 *Id.*

320 Thomas R. Lee, *Stare Decisis in Historical Perspective: From the Founding Era to the Rehnquist Court*, 52 Vanderbilt L. Rev. 645, 733, 734 (1999). Lee says "Rumors of the recent demise of the Supreme Court's doctrine of precedent are greatly exaggerated" and "History also supports the Rehnquist Court's notion that the rule of stare decisis is strongest in cases involving commercial reliance interests, but that error correction is freely available where no such interests are at stake." *See also* Carolyn D. Richmond, *The Rehnquist Court: What is in Store for Constitutional Law Precedent?* 39 N.Y.L. Sch. L. Rev. 511 (1994).

321 Dobbs characterized Roe and Casey for a total of 36 times. If included, Dobbs brings up the average characterizations per case for the final period from 10.73 to 11.83.

322 Bell, *supra* note 83, at 64.

323 Katy Lin & Carroll Doherty, *Favorable Views of Supreme Court Fall to Historic Low,* Pew Res. Ctr. (Jul. 21, 2023), www.pewresearch.org/short-reads/2023/07/21/favorable-views-of-supreme-court-fall-to-historic-low/.

324 In 2020, 70% of Americans held favorable views of the Court.

first time since they started polling in 1987 that the public's view of the Court is "significantly more negative than positive."[325] *Dobbs*' reversal of *Roe* and *Casey*, and Alito's intense criticism of those decisions are no doubt part of the reason for this shift in public sentiment.[326]

In the end, the rhetoric of overruling in *Dobbs* may be explained both by the contentiousness of the abortion issue[327] and the growing polarization of the Court.[328] But if *Dobbs* marks another ratcheting up in critical rhetoric when precedent is overruled, we can expect further damage to be done in future overruling cases to the public's faith in the Supreme Court as an impartial body dedicated to, and bound by, the rule of law.

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325 Lin & Doherty, *supra* note 323.

326 Favorability refers to public opinion, while legitimacy depends on adherence to the Court's decision. The Court can lose its favorability and still have legitimacy. The exact link between favorability and legitimacy is difficult to draw, but there most likely is a correlation.

327 *Ronald J. Placone, Incivility in Written Discourse: The United States Supreme Court and Abortion*, unpublished dissertation submitted to Carnegie Mellon University in partial fulfillment of the requirements for the degree of Doctor of Philosophy in Rhetoric, Department of English (May 1 2009). Placone discusses the deteriorating civility in abortion cases. He observed that language used to refer to other justices deteriorated over time and there was "less openness to opposing points of view, more frequent depictions of opposing arguments in negative terms, and a decline in adherence to group norms" from 1987-2007 (87).

328 *Id.* at 83.

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Can a U.S. Supreme Court Holding Die Without the Court Itself Administering the *Coup de Grâce?*

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ABSTRACT

Can a holding by the U.S. Supreme Court interpreting a provision of the U.S. Constitution—which holding the Court never reversed or qualified—ever be treated as a nullity by lower courts? Suppose the reasoning on which that holding stands has come to be recognized as so unsound, so contradicted by every interpretive theory one could deploy on its behalf, that the holding stands on thin air, with nothing to support it. Could such a holding properly be ignored by lower courts as having no force? Can a lower court act contrary to the holding, or must it continue to enforce the holding unless and until the Supreme Court explicitly repudiates it? This article explores that question through the vehicle of a case that squarely illustrates the issue.

KEYWORDS

Supreme Court precedent, constitutional interpretation, empirical evidence in judicial decision-making, jury size

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Introduction

Can a holding by the U.S. Supreme Court interpreting the Constitution—which the Court never reversed or qualified—ever be treated as a nullity by lower courts? Suppose the reasoning on which the holding stands is exceedingly poor, unsupportable, unsound, contradicted by every interpretive theory one could bring to it? (Yet it has never explicitly been repudiated by its authors or any subsequent Supreme Court.) Could such an opinion properly be ignored by lower courts as having no true force?

The power of a judicial opinion, after all, is thought to depend on its persuasiveness, not merely that it is a pronouncement from one or another node in the judicial hierarchy, including the top spot. That is why opinions are written—to convince the world that the holding is correct and therefore worthy of obedience. Otherwise, courts could simply announce their conclusions and leave it at that.

If a Supreme Court opinion—after decades of careful analysis and thoughtful consideration—has come to be viewed as utterly hollow (or worse: dead wrong), is its holding still entitled to deference? Is such a holding still "good law"?

Consider the remarkable example provided by Williams v. Florida (1970).[1] Over half a century ago, *Williams* held, by a vote of 7-1,[2] that the Constitution does not require juries to be composed of more than six individuals. Justice Byron White, for the majority, concluded that the traditional twelve-person jury was not mandated by the Constitution, despite its venerated existence for more than 600 years of common law history and nearly 200 years of constitutional history. How did Justice White and his colleagues reach that conclusion?

I. Interpreting the "Jury" Provision of the Sixth Amendment

Florida law authorized six-person juries for the trial of all felonies other than those punishable by death.[3] Johnny Williams challenged the constitutionality of his conviction for robbery by a jury of six, leading to a sentence of life in prison. When Williams v. Florida reached the U.S. Supreme Court, the question to be answered was whether the Sixth Amendment guarantee of trial by jury meant a jury of twelve or something less.[4]

The *Williams* majority noted that the constitutional text guaranteed a jury but did not specify the size of that jury. The Court acknowledged that the omission might reflect an understanding of the framers and adopters that "jury" was synonymous with twelve-person jury. Alternatively, the Court suggested, the omission might reflect an intention of the founders that the jury's size be free to vary. What size jury, then, was intended to be permitted or required by the Sixth Amendment?

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1 Williams v. Florida, 399 U.S. 78 (1970) (hereinafter, *Williams*).

2 Justice Marshall dissented and Justice Blackmun, having recently been appointed to the Court, took no part in the decision.

3 Fla. Stat. § 913.10 (1) (1967).

4 *Williams*. A second issue in the case had to do with timely disclosure of anticipated alibi defenses, which we need not address.

The Court's own precedents should be a major source of guidance on what various provisions of the Constitution mean. In an unbroken line of cases from Thompson v. Utah (1898)[5] until *Williams*, the Court had held that the jury referred to in the Sixth Amendment "is a jury constituted, as it was at common law, of twelve persons, neither more nor less."[6] The *Williams* justices found those precedents to lack binding force because, in summary, "The broad implications in early cases indicating that only a body of 12 members could satisfy the Sixth Amendment requirement arose in situations where the issue was not squarely presented and were based… on an improper interpretation of that amendment."[7]

As a guide to the "original public meaning" of a word or phrase, judges sometimes turn to dictionaries, especially dictionaries published around the time of a law's drafting. Samuel Johnson's Dictionary (1755) suggests that a jury was understood in the latter half of the Eighteenth Century to be "a company of men, as twenty-four or twelve," of which the larger were used for grand juries[8] and the smaller constituted "petit juries" to decide other matters, such as trial verdicts.[9] But the *Williams* court did not consult dictionaries or any similar contemporary reference source.

In other contexts, justices sometimes inquire about history and tradition. The Court was well aware that the common law had for centuries consistently tried cases to juries fixed at size twelve,[10] and that the "truth of every accusation" against a defendant "should afterwards be confirmed by the unanimous suffrage of twelve

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5 170 U. S. 343 (1898).

6 *Id.* at 349. The Supreme Court's other precedents were Capital Traction Co. v. Hof, 174 U.S. 1 (1899) (a trial by jury "in the primary and usual sense of the term at the common law and in the American constitutions, is . . . a trial by a jury of twelve."); Maxwell v. Dow, 176 U. S. 581 (1900) (expressing "no doubt" that "a jury composed, as at common law, of twelve jurors was intended by the Sixth Amendment."); Rassmussen v. United States, 197 U. S. 516 (1905) (stating that the Sixth Amendment guarantees "the right to be tried by a jury of twelve."); Patton v. United States, 281 U. S. 276 (1930) (stating that it was "not open to question" that the right to trial by jury for serious offenses "means a trial by jury as understood and applied at common law," including that it "should consist of twelve" members).

7 *Williams* (Black, J., concurring). By contrast, Marshall, J., in dissent: "I adhere to the decision of the Court in Thompson v. Utah." "[T]he Court has not made out a convincing case that the Sixth Amendment should be read differently than it was in *Thompson*, even if the matter were now before us *de novo*—much less that an unbroken line of precedent going back over 70 years should be overruled."

8 Employed "to consider of all bills of indictment preferred to the court; which they do either approve… or disallow…." *Juries*, in Samuel Johnson, A Dictionary of the English Language (1st folio ed. 1755).

9 *Id*. *See* also, William Shakespeare, Measure for Measure (1604), a play which had been in English culture for nearly two centuries when the Sixth Amendment was being written:

> The *jury,* passing on the prisoner's life, May in the sworn twelve have a thief or two Guiltier than him they try.

10 "At the beginning of the thirteenth century, twelve was indeed the usual, but not the invariable, number. But by the middle of the fourteenth century, the requirement of twelve had probably become definitely fixed. Indeed, this number finally came to be regarded with something like superstitious reverence." A. Scott, Fundamentals of Procedure in Actions at Law 75-76 (1922) (footnotes omitted).

of his equals and neighbours."[11] And, of course, the people who created, and the nation that was created by, the Constitution had relied on, and understood juries—in law and in popular culture—to consist of twelve persons right up until *Williams* declared otherwise.[12] A few years later, the Court's novel analysis of jury size was extended to federal civil juries.[13]

Recently, Justice Gorsuch wrote of *Williams* that, "for the first time and in defiance of centuries of precedent, this Court held that a 12-member panel 'is not a necessary ingredient' of the Sixth Amendment right to trial by jury…. *Williams* was wrong the day it was decided, it remains wrong today, and it impairs both the integrity of the American criminal justice system and the liberties of those who come before our Nation's courts."[14]

Whatever the likely meaning to the framers and the public, or the rootedness and longevity of that tradition, the *Williams* Court found the *basis* for it to be unworthy of respect:

> That history revealed a long tradition attaching great importance to the concept of relying on a body of one's peers to determine guilt or innocence as a safeguard against arbitrary law enforcement. That same history, however, affords little insight into the considerations that gradually led the size of that body to be generally fixed at 12. Some have suggested that the number 12 was fixed upon simply because that was the number of the presentment jury from the hundred, from which the petit jury developed. Other, less circular but more fanciful reasons for the number 12 have been given, "but they were all brought forward after the number was fixed," and rest on little more than mystical or superstitious insights into the significance of "12." Lord Coke's explanation that the "number of twelve is much respected in holy writ, as 12 apostles, 12 stones, 12 tribes, etc.," is typical.[15]

In the end, the Court found "absolutely no indication in 'the intent of the Framers' of an explicit decision to equate the constitutional and common law characteristics of the jury."[16]

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11 William Blackstone, Commentaries on the Laws of England *343 (1769).

12 Historical records of which the Court does not seem to have been aware suggest that the legal culture at the time of the founding understood juries to number twelve. In the Virginia Ratification Convention, Madison and others argued that several characteristics of the jury, including its size, were "incident to the trial by jury" and so it was unnecessary to enumerate its attributes in the Constitution's text. Governor Edmund Randolph explained that, "There is no suspicion that less than twelve jurors will be thought sufficient." Those historical sources are discussed in Richard S. Arnold, *Trial by Jury: The Constitutional Right to a Jury of Twelve in Civil Trials*, 22 Hofstra L. Rev. 1 (1993).

13 Colgrove v. Battin, 413 U.S. 149 (1973).

14 Gorsuch was writing a dissent to a denial of certiorari. Khorrami v. Arizona, 598 U.S. _ (2022). The Court had declined the opportunity to correct its earlier error. Gorsuch dissented yet again to another denial of cert. Cunningham v. Florida, 602 U.S. _ (2024).

15 *Williams*, at 87-88.

16 *Id*. at 99.

II. The Birth of the Functional Equivalence Test

If an answer to the question of what constitutes an acceptable jury within the meaning of the Sixth Amendment was not to be found in the language of the Constitution, in the nation's history and tradition, or in the Court's precedents, how then could one determine which features were necessary for a jury to be regarded as constitutional? To answer that question, the Court created a test of *functional equivalence*.

> The relevant inquiry, as we see it, must be the function that the particular feature performs and its relation to the purposes of the jury trial. Measured by this standard, the 12-man requirement cannot be regarded as an indispensable component of the Sixth Amendment.
>
> The purpose of the jury trial, as we noted in *Duncan*, is to prevent oppression by the Government.
>
> Providing an accused with the right to be tried by a jury of his peers gave him an inestimable safeguard against the corrupt or overzealous prosecutor and against the compliant, biased, or eccentric judge.
>
> Given this purpose, the essential feature of a jury obviously lies in the interposition between the accused and his accuser of the common sense judgment of a group of laymen, and in the community participation and shared responsibility that results from that group's determination of guilt or innocence. The performance of this role is not a function of the particular number of the body that makes up the jury. To be sure, the number should probably be large enough to promote group deliberation, free from outside attempts at intimidation, and to provide a fair possibility for obtaining a representative cross-section of the community.[17]

Elsewhere in the opinion, the Court identifies the "reliability of the jury as a factfinder," the ability of dissenting jurors to stand up to conformity pressure from the majority, and the "results reached" as additional criteria for evaluating the functioning of juries of different sizes.

Thus, the criteria can be summarized as: representative cross-section, group deliberation, influence of the majority on the minority, factfinding reliability, and the results reached by the two different-sized juries.

Under this functional equivalence test, the question before the Court could be answered only by inquiring into the behavior of different-sized juries. The Court proceeded to compare the performance of the six-person jury against that of the traditional twelve-person jury on the criteria it had specified.[18] If those functions were served equally well by smaller juries, then they were equally acceptable to the Constitution.

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[17] *Id.* at 100.

[18] Because these are legislative facts, the Court is unrestricted in its investigation of and conclusions about them. *See* Advisory Committee Comment to Federal Rule of Evidence 201.

On each of the functions specified, the *Williams* majority concluded that six-person juries provided process and outcome equal to those of twelve-person juries, and so the smaller juries were equally acceptable to the Constitution. But, it turns out, the justices misread their sources and relied on statistical intuitions which failed them. Let's examine their evidence and interpretations.

A. "Representative cross-section of the community"

The *Williams* Court addressed the possibility that six-person juries might deny criminal defendants the same degree of cross-sectional representation of the community that larger juries generally conferred:

> [W]hile, in theory, the number of viewpoints represented on a randomly selected jury ought to increase as the size of the jury increases, in practice, the difference between the 12-man and the six-man jury in terms of the cross-section of the community represented seems likely to be negligible. Even the 12-man jury cannot insure representation of every distinct voice in the community, particularly given the use of the peremptory challenge. As long as arbitrary exclusions of a particular class from the jury rolls are forbidden, the concern that the cross-section will be significantly diminished if the jury is decreased in size from 12 to six seems an unrealistic one.

Think of juries as samples drawn from the population. Reducing the size of those samples from twelve to six can have a substantial impact on cross-sectional representation, depending on the make-up of the population. If, say, 50% of the jury-eligible population were Black and 50% were White, then cutting the sample size in half would make no difference to how many Blacks (or Whites), would be found on randomly chosen juries in the aggregate. But as the population skews in either direction, representation can be altered dramatically. In a population that is, for example, 90% White and 10% Black,[19] 72% (plus-or-minus some variation) of juries of size twelve would have at least one Black juror. But on juries of size six, only 47% (plus-or-minus) of juries would contain one or more Black jurors.[20]

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[19] Or any other attribute: college educated versus not, above a specified income level versus not, in a certain age range versus not, etc.

[20] These quantities are simple to derive. To begin, if a sample of 1 is drawn from a population stratified 90%/10%, the probability that the sample will consist of a member of the 10% minority is .10. Suppose these were judges being randomly assigned to cases. The cases would be presided over by majority judges 90% of the time and minority judges 10% of the time.

Now, if a sample of 6 is drawn from a population stratified 90%/10%, the probability that the sample will consist *entirely* of member of the 90% majority is .90 to the sixth power. (.90 multiplied by .90 six times). That equals .53. The complementary probability, .47, is the proportion of juries that would *not* consist entirely of members of the 90% majority.

Finally, do the same for samples of 12. The probability that a sample will consist *entirely* of member of the 90% majority is .90 to the twelfth power. That equals .28. The complementary probability, .72, is the proportion of juries that would *not* consist entirely of members of the 90% majority.

This general principle of sampling has been demonstrated in several empirical studies of the composition of juries.[21] A more recent study found that jury size (six versus twelve) had a much greater impact on racial/ethnic representation than peremptory challenges did.[22]

B. "Group deliberation"

The Court did not elaborate on its concern for group deliberation—be it quantity or quality, nature, content or something else. Nor did the *Williams* opinion offer any evidence or reasoning on the possible impact that differences in group size might have on the behavior of concern. Among other things, studies conducted after 1970 have found that, in contrast to six-person juries, twelve-person juries engage in more total deliberation, have more vigorous and contentious discussions, bring more human resources into the discussion, and have more accurate recall of evidence as a group during the deliberation and as individuals when tested after deliberations.[23]

C. "Influence of the majority aligned against them"

One specific behavioral concern associated with deliberation was addressed, namely, the ability of one or two jurors holding beliefs opposed by their peers to resist pressure to surrender unreasoningly to the majority. The Court summed up what it took to be the findings of several studies: "Studies of the operative factors contributing to small group deliberation and decision making suggest that jurors in the minority on the first ballot are likely to be influenced by the proportional size of the majority aligned against them."[24]

Thus, a dissenter in a jury divided 5–1 was thought to be just as able to stand up to the majority as a minority faction in a jury divided 10–2. The critical factor, asserted the Court, was the proportion, not the absolute number, of jurors in the minority and majority factions. Remarkably, however, the studies on which the Court purported to rely all concluded essentially the opposite of what the Court said they found.[25]

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21 *See* studies analyzed in Michael J. Saks & Mollie Weighner Marti, *A Meta-Analysis of the Effects of Jury Size*, 51 L. & Human Behavior 451 (1997).

22 Shari S. Diamond et al., *Achieving Diversity on the Jury: Jury Size and the Peremptory Challenge*, J. Empirical Legal Studies (2008) (finding that only 2.1% of 12-person juries (in Cook County, Illinois) contained zero Blacks, while 28.1% of 6-person juries had zero Blacks on them. Similarly, 40.4% of 12-person juries had zero Hispanics compared to 66.3% of 6-person juries).

23 See discussions of the empirical research in Valerie Hans, *The Power of Twelve: The Impact of Jury Size and Unanimity on Civil Jury Decision Making*, 4 Del. L. Rev. 1 (2001); Saks & Marti, *supra* note 21; Nicole L. Waters, *Does Jury Size Matter? A Review of the Literature* (National Center for State Courts, August 2004). The principal advantage found for smaller groups was that the amount of speaking time was more evenly distributed among jury members.

24 *Williams*, n. 49.

25 *See* Harry Kalven, Jr. & Hans Zeisel, The American Jury 463 (1966) ("[F]or one or two jurors to hold out to the end, it would appear necessary that they had companionship at the beginning of the deliberations…. To maintain his original position, not only before

D. "Reliability of the jury as a factfinder"

Without elaboration, evidence, or analysis, the *Williams* Court concluded that "the reliability of the jury as a factfinder hardly seems likely to be a function of its size."

If the justices had in mind the *process* of factfinding—sifting through trial evidence and recalling, discussing, debating, to reach correct conclusions—as noted above, in regard to "group deliberation," larger groups appear to have the advantage.

More basic social psychological research on small-group decision-making has found that increasing group size improves group decisions up to the point where process inefficiencies begin to detract more than the accrued human resources add. The location of that tipping point varies with the kind of decision task the group is engaged in. The jury deliberation task is of a kind that benefits from increases up to fairly large sizes.[26]

If by "reliability of the jury as a factfinder" the Court meant the outcomes of deliberation, the verdicts, to that we turn next.

E. "Results reached by the two different-sized juries"

Regarding the outcomes of trials, the Court concluded that empirical research had found no differences between six-person and twelve-person juries: "What few experiments have occurred—usually in the civil area—indicate that there is no discernible difference between the results reached by the two different-sized juries."

Support for that conclusion consisted of six items listed in a footnote. The first did nothing more than quote another work, which stated that "it could easily be argued that a six-man jury would deliberate equally as well as one of twelve."[27] The second item's evidence consisted of a judge who stated that he had presided over numerous condemnation trials using five-man juries and had perceived no differences compared to larger juries.[28] The third citation reported on the

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others but even before himself, it is necessary for him to have at least one ally."); S.E. Asch, *Effects of Group Pressure upon the Modification and Distortion of Judgments*, in Readings In Social Psychology 2, 8 (Guy E. Swanson, Theodore M. Newcomb & Eugene L. Hartley et al. eds., rev. ed. 1952) ("a unanimous majority of 3 is, under the given conditions, far more effective than a majority of 8 containing 1 dissenter."); Note, *On Instructing Deadlocked Juries*, 78 Yale L.J. 100, 110 (1968) (footnotes omitted) ("Consistent disapproval by the majority can shake a small minority's faith even in judgments it believes to be right. Such pressures are most effective against a single dissenter and fall off rapidly in efficacy as the size of the dissenting coalition increases. A single ally gives most dissenters the courage to voice their true convictions.")

[26] Ivan D. Steiner, Group Process and Productivity (1972) (explaining in considerable detail how increases in group size and the associated human resource advantages are partially offset by the gradually increasing complexity of the group process required to incorporate the members' resources into the group's decision-making; at some point, the benefits brought by the next additional member are exceeded by the additional organization burden; at that point, the benefits of size peak and the group's performance starts to decline).

[27] Lloyd L. Wiehl, *The Six Man Jury*, 4 Gonzaga L. Rev. 35, 49-41 (1968).

[28] Edward A. Tamm, *The Five-Man Civil Jury: A Proposed Constitutional Amendment*, 51 Geo. L. J. 120, 134-136 (1962).

use of six-person juries in 43 civil cases in a state district court in Worcester, Massachusetts. The author spoke to a court clerk and three attorneys involved in trials, who said the smaller juries did not seem to them to behave differently.[29] The fourth item was to a summary of the third item.[30] The fifth citation was to an announcement that a *future* test of six-person juries was being planned for Monmouth County, New Jersey.[31] The final citation was to an article discussing possible financial savings that might accrue from reducing jury size, which was not one of the criteria the Court had enumerated.[32] Apart from this remarkably thin soup, the Court had nothing to offer on decision outcomes as a function of group size.

Again, a consideration of the statistics of sampling might have assisted the Court. On this concept, human intuition usually aligns well with the statistical phenomenon. Virtually everyone shares the intuition that larger samples are more reliable than smaller samples. All else equal, would you have more confidence in a public opinion poll that employed a large sample or a small one? If it was important to get the most accurate temperature reading you could, would you prefer to average the readings of twelve thermometers or six? The larger the sample, the more that each individual's random error is cancelled out, and the more nearly accurate the collective result is.

Now, suppose you had a civil case in which the only issue was damages. Imagine you had 100 juries observing the trial, and each jury reached its damage award independently. Now let's array those awards in (what will turn out to be) a bell-shaped curve distribution. (The mean of that distribution is the best estimate of a "correct" award that one could arrive at.[33])

Suppose you did this exercise twice, once using 100 juries of size twelve and a second time using 100 juries of size six, and drew their respective bell-shaped curves one on top of the other. The curve reflecting six-person jury awards would be spread wider than that of the twelve—more outliers, more error, fewer juries coalescing around the central "most nearly correct" average. Two scholars describe the effect: "over two-thirds of the twelve-person juries will have ... damage awards close to the community average, compared to just half of the six-person juries. The six-person juries are four times as likely to have extremely low or extremely high... damage awards."[34]

The same phenomenon occurs when the outcomes are categorical, like polling of voter preferences in an upcoming election, or liability verdicts in criminal trials. Larger samples will produce more consistent outcomes, outcomes that more nearly reflect what everyone in the population would conclude if all of them were making

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29 Phillip M. Cronin, *Six-Member Juries in District Courts*, 2 Boston B.J. No. 4, at 27 (1958). The first "appeal" from such district court verdict was a trial *de novo* as of right in the superior court in front of twelve jurors.

30 *Six-Member Juries Tried in Massachusetts District Court*, 42 J. Am. Jud. Soc. 136 (1958).

31 *New Jersey Experiments with Six-Man Jury*, 9 Bull. of the Section of Jud. Admin. of the ABA (May 1966).

32 Richard H. Phillips, *A Jury of Six in All Cases*, 30 Conn. B.J. 354 (1956).

33 *See* Michael J. Saks & Peter David Blanck, *Justice Improved: The Unrecognized Benefits of Aggregation and Sampling in the Trial of Mass Torts*, 44 Stan. L. Rev. 815 (1992).

34 Valerie Hans & Neil Vidmar, Judging the Jury 167 (1986).

the decision. Put simply: six-person juries produce less consistent verdicts, less predictability, more "errors" than twelve-person juries.[35]

F. Holding

After laying out the panoply of jury functions at issue, the Court sweepingly concluded regarding all of them: "[W]e find little reason to think that these goals are in any meaningful sense less likely to be achieved when the jury numbers six than when it numbers 12—particularly if the requirement of unanimity is retained."[36] Accordingly, based on its new functional equivalence test, the Court held that "the 12-man panel is not a necessary ingredient of 'trial by jury,' and that respondent's refusal to impanel more than the six members provided for by Florida law did not violate petitioner's Sixth Amendment rights as applied to the States through the Fourteenth."[37] The Court also observed that, "[w]e have no occasion in this case to determine what minimum number can still constitute a 'jury,' but we do not doubt that six is above that minimum."[38]

III. The Death of Functional Equivalence

Perhaps not surprisingly, states began to test the limits of the shrinking jury. If six was constitutional, how about five? This was the issue presented in Ballew v. Georgia (1978),[39] involving a conviction for obscenity by a jury of five.

Prompted by the purported reliance on empirical evidence in *Williams*, and the use of more of it in Colgrove v. Battin (1973),[40] a good bit of empirical research had been carried out on the jury-size question by the time *Ballew* reached the Court.[41]

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35 Michael J. Saks, *The Smaller the Jury, The Greater the Unpredictability*, 79 Judicature 263 (1996).

36 *Williams*, at 100.

37 *Williams*, at 86. And: "We conclude, in short, as we began: the fact that the jury at common law was composed of precisely 12 is a historical accident, unnecessary to effect the purposes of the jury system and wholly without significance 'except to mystics'." *Williams*, at 102.

38 *Williams*, n. 28.

39 435 U.S. 223 (1978) (hereinafter, *Ballew*).

40 Colgrove v. Battin, 413 U.S. 149 (1973). *Colgrove* extended the functional equivalence test to federal civil trials, concluding that the jury trial rights of the Seventh Amendment did not include twelve jurors. The Court cited the first four studies conducted after, and prompted by, *Williams*, all of which now appeared to confirm its earlier empirically ungrounded belief that small and large juries functioned equivalently. Properly evaluated, however, those studies also could not support the Court's conclusion. *See* Shari S. Diamond, *A Jury Experiment Reanalyzed*, 7 Univ. Michigan J. L. Reform 520 (1974); Hans Zeisel & Shari S. Diamond, *"Convincing empirical evidence" on the Six Member Jury*, 41 U. Chi. L. Rev. 281 (1974).

41 Georgia also resorted to pure logic when it took seriously the Court's avowal that it had "no occasion [in *Williams*] to determine what minimum number can still constitute a 'jury,' but we do not doubt that six is above that minimum." The Attorney General's brief argued that, "If six is above the minimum, five cannot be below the minimum. Because there is no number in between."

In conference following briefing and arguments, the justices agreed that the institution of the jury had to be rescued from the slippery slope the *Williams* Court had set it upon. Justice Blackmun was assigned to write the majority opinion.

Memos exchanged between Justice Blackmun and the law clerk assisting him with *Ballew* provide interesting insight.[42] The clerk's memo reporting on his library research alerted Blackmun that the conclusions in *Williams* went against the great weight of empirical research findings and statistical principles. *Williams* was, by its own test, in obvious error and, his clerk suggested, needed to be reversed.

Blackmun's response was that *Williams* was "on the books." In other words, it was now precedent and, if at all possible, precedents should not be overturned. But Blackmun also stated that he worried about the next case after *Ballew*, and the one after that, and after that.[43]

After concluding in *Williams* that reducing the jury by half, from twelve to six, made no difference to the performance of its constitutional functions, how does one now argue convincingly that a reduction from six to five would ruinously impair the jury's function?

Justice Blackmun's eventual opinion resembled a Brandeis Brief, with extensive presentation of the empirical and statistical evidence his clerk had found. Blackmun not only cited studies, he explained the findings in some detail. Overwhelmingly, that research compared the decision-making processes and products of groups of twelve to groups of six and found differences in their performance, mostly indicating inferior performance of the smaller groups.[44]

The essential logic of Blackmun's opinion is this:

> While we adhere to, and reaffirm our holding in Williams v. Florida, these studies, most of which have been made since *Williams* was decided in 1970, lead us to conclude that the purpose and functioning of the jury in a criminal trial is seriously impaired, and to a constitutional degree, by a reduction in size to below six members. … [T]he assembled data raise substantial doubt about

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[42] Justice Blackmun left his papers to the Library of Congress. Unlike most other justices, he made them available to the public immediately upon his death. https://www.loc.gov/rr/mss/blackmun/

[43] *See* Hans Zeisel, *...And Then There Were None: The Diminution of the Federal Jury*, 38 U. Chi. L. Rev. 710 (1971).

[44] In a concurrence, Powell, J., joined by Burger and Rehnquist, JJ., took a gratuitous swipe at Blackmun's opinion. Wrote Powell: "I have reservations as to the wisdom—as well as the necessity—of Mr. Justice Blackmun's heavy reliance on numerology derived from statistical studies. Moreover, neither the validity nor the methodology employed by the studies cited was subjected to the traditional testing mechanisms of the adversary process." *Ballew*, at 246.

Blackmun hit back at all three: "We have considered [the studies] carefully, because they provide the only basis, besides judicial hunch, for a decision about whether smaller and smaller juries will be able to fulfill the purpose and functions of the Sixth Amendment. Without an examination about how juries and small groups actually work, we would not understand the basis for the conclusion of Mr. Justice Powell that 'a line has to be drawn somewhere.' We also note that the Chief Justice did not shrink from the use of empirical data in Williams v. Florida, when the data were used to support the constitutionality of the six-person criminal jury, or in Colgrove v. Battin, a decision also joined by Mr. Justice Rehnquist." *Ballew*, n. 10 (internal footnotes omitted).

> the reliability and appropriate representation of panels smaller than six. Because of the fundamental importance of the jury trial to the American system of criminal justice, any further reduction that promotes inaccurate and possibly biased decisionmaking, that causes untoward differences in verdicts, and that prevents juries from truly representing their communities, attains constitutional significance.[45]

A fundamental incoherence is evident. The reaffirmation of *Williams* is plainly in tension with nearly all of the studies discussed in the opinion. The studies show a decline in the performance of six-person juries measured against the benchmark of twelve-person juries (which speaks to the issue in *Williams*). But those studies of six-versus-twelve are said to "raise substantial doubt" about five-person juries (the issue in *Ballew)*. This is an obvious disconnect. Data that clearly expose the error of *Williams* are used to inform *Ballew*, which the data are not well aimed to do.

A. Why?

Why did Justice Blackmun write the opinion he wrote? He surely knew what he was doing. So, we might ask, what was he doing? We must speculate, because he never publicly explained his purpose.[46] Blackmun probably shared his clerk's view that *Williams* was egregiously wrongly decided, though he was determined not to try to overturn it in *Ballew*. Had he insisted on reversing *Williams*, he would no longer have been in the majority and would have found himself writing a dissent.[47]

If Blackmun wanted to keep control of the lead opinion, so that the actual empirical evidence would be front and center for the world to see, he framed the opinion as he had to. The prominence of the evidence of *Williams's* folly would make it easier for some future Supreme Court, freed from defending its own mistakes, to overturn *Williams*. Incoherently "reaffirming" *Williams* while declaring that "the purpose and functioning of the jury in a criminal trial is seriously impaired… by a reduction in size to below six" was the price Blackmun had to pay to be able to announce the known facts with maximum prominence.

If the intent of the author may be inferred from some of the consequences of his actions, then we can say that Blackmun's goals have been partially achieved. In a number of situations, the holding of *Ballew* has been brushed aside while the empirical facts it provided lit the path forward. Some examples:

- In 1981, the New Hampshire legislature wanted to reduce their own state's juries from twelve to six. First, however, they requested an advisory opinion from their supreme court. The New Hampshire Supreme Court responded by opining that, in light of the data presented in Blackmun's opinion in *Ballew*,

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45 *Ballew*, at 239.

46 Justice Blackmun's former clerk who worked on *Ballew*, whom I interviewed after the Justice's death, refused to share whatever he knew about Blackmun's goals for the opinion. Once, while visiting the law school at Northwestern University, dinner companion Professor Shari S. Diamond asked Justice Blackmun why he wrote the unusual opinion that he did in *Ballew*. He answered elusively: "You have to write something."

47 Or, at least, a partial dissent, since he would certainly still agree that the Constitution does not tolerate juries smaller than six.

juries smaller than twelve would be held to violate the New Hampshire Constitution because of their inferior performance.[48]

- Similarly, in 2015, citing the data in *Ballew*, an Illinois court held that a statutory reduction of jury size from twelve to six violated the Illinois Constitution.[49]
- In the mid-1980s, in an explicit effort to make damage awards more stable and predictable, the Model Medical Malpractice Act, promulgated by the Department of Health and Human Services for adoption by states, called for the use of twelve-person juries in medical malpractice cases.
- The ABA Jury Standards (2005) specified that juries trying criminal cases "should consist of Twelve persons if a penalty of confinement for more than six months may be imposed upon conviction."
- Rule 48 of the Federal Rules of Civil Procedure has been amended to permit as many as twelve jurors to be seated at the start of a trial, and to require that "each juror must participate in the verdict." As a result, larger juries decide cases than was anticipated after *Colgrove*.[50]

B. Opinions of the Other Justices

Though Justice Blackmun's opinion announced the judgment of a unanimous Court, and it accomplished the unanimously-agreed-upon goal of stopping the jury's slide toward extinction, it was joined by only a single other justice, Stevens. What did seven other justices dislike about Blackmun's opinion? Had his opinion been as hollow as their opinions, they probably would gladly have joined it. Instead, while claiming to reaffirm *Williams*, Blackmun implicitly repudiated it. He made far too obvious that *Williams* had been decided in error, and his colleagues apparently wanted no part of that.

What reasons did those justices offer for holding six to be the constitutional minimum?

White, who had been the author of *Williams* and was the father of functional equivalence, made no reference either to that case or that test. He stated in a single sentence that juries of fewer than six would not satisfy the fair-cross-section requirement of the Sixth and Fourteenth Amendments. He cited nothing to support that conclusion and engaged in no reasoning about it. But, whatever concerned him so about the step from six to five should have been far more concerning respecting the step from twelve to six. This is thinly veiled *ipse dixit.*[51]

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48 Opinion of the Justices, 121 N.H. 480, 431 A2d 135 (1981).

49 Kakos v. Butler, Illinois Circuit Court No. 2015 L 6691 (2015), *aff'd* 2016 IL 120377.

50 Patrick E. Higginbotham et al., *Better by the Dozen: Bringing Back the Twelve-Person Jury*, 104 Judicature 46 (Summer, 2020), collected data on the size of juries in 15 federal judicial districts between 2016-2018 and early 2019. Of the total of 1,831 civil trials, 11.7% began as juries of twelve, 61.4% as juries of eight, and 1.6% as juries of 6.

51 Justice White's opinion in *Williams* might be described as "an exercise in raw judicial power." After all, the decision was made "in defiance of centuries of precedent" (*see supra* note 14 and accompanying text) and in disregard of history and tradition as well as of the very empirical and statistical evidence his opinion called into relevance by framing the issue as he did. The holding has little or nothing to support it but votes. Ironically, three years later, in his dissent in Doe v. Bolton, 410 U.S. 179 (1973), a companion case to Roe v. Wade (1973), Justice White accused a majority of his colleagues of "an exercise in raw judicial power," *id*. at 222.

Brennan, joined by Stewart and Marshall, wrote that they agreed with the holding that the Constitution requires "juries in criminal trials to contain more than five persons," but they offered nothing to explain or justify their conclusion. This is mere *ipse dixit.*

Powell, joined by Burger and Rehnquist, simply asserted: "the line between five and six-member juries is difficult to justify, but a line has to be drawn somewhere if the substance of jury trial is to be preserved." No mention of *Williams* or functional equivalence or any other explanation. More *ipse dixit*.

Ballew, then, adds up to two justices purporting (unconvincingly) to employ the functional equivalence test to reach the result, six justices pretending the functional equivalence test never existed, and a ninth justice (White) claiming implausibly to be guided exclusively by the fair cross-section requirement.[52]

C. The State of Williams After the Functional Equivalence Test is Abandoned

The justices agreed on stopping the downhill slide of the jury, but not one of them could offer a coherent explanation of why six was the correct minimum—not twelve, not five. The one thing the justices seem to have been sure of was that the damage *Williams* had inflicted on the jury could not be allowed to get any worse and, apparently, they didn't care how incoherently they applied the judicial brakes.

If the question of what features of the institution of the jury pass constitutional muster truly could not be answered using conventional interpretive tools, the functional equivalence test made good sense. But to work properly, the test needed to be fed sound data and its output read with a sincere interest in learning the answer: Did six-person juries perform as well as twelve-person juries or didn't they?

The problem with *Williams* is that the majority seems to have adopted their conclusion before undertaking the inquiry they prescribed.[53] They fed the test non-studies claiming them to be studies, read actual studies backwards, and relied on statistical intuition to answer questions for which rigorous answers were readily available. When garbage goes in, we know all too well what comes out. Had the functional equivalence test been employed earnestly, the Court would have had to conclude that six did not a constitutionally acceptable jury make.

The problem in *Ballew* was the insistent effort to work around, and leave undisturbed, the holding in *Williams*. By making the relevant legislative facts inescapable, however, Justice Blackmun exposed the vapidity of *Williams* and then walked away from the wreckage. The *Ballew* justices might have done better to submit correct facts to the test *Williams* created, recognize that six did not equal twelve, confess error in the earlier application, and reverse *Williams*. Obviously, none chose that course. Another option was to make the facts irrelevant by

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[52] Though none of the justices in *Ballew* chose to do so, judicial admission of error is not unheard of. Baron Bramwell, for example, in Andrews v. Styrap, 26 L. T. R. (N. S.) 704, 706 (1872), conceded an earlier error by saying, "The matter does not appear to me now as it appears to have appeared to me then."

[53] Think of a doctor who has prematurely concluded the patient has disease X, and is so sure that that is the correct diagnosis that she pays no attention to the results of the test designed to diagnose whether it is X or not.

abolishing the test that made them relevant. Most of the justices implicitly chose this option by pretending the functional equivalence test never existed. That was the easiest way to ignore the facts made so evident by Blackmun's opinion.

But if the facts about the effects of jury size on group decision-making no longer mattered because the functional equivalence test was dead, what is left to justify a reading of the Constitution that permits six-person juries to replace twelve-person juries? The answer is: nothing. Functional equivalence is what justified the constitutionality of six-person juries. So, in abandoning the functional equivalence test, *Ballew* also erased the only justification for smaller-than-twelve juries. *Williams*, too, had become *ipse dixit*. The institution of the American jury had been sliced in half, and no justification for doing so any longer existed.

IV. The Ongoing Harm of Williams v. Florida

The story of Williams v. Florida is not a story of one mistake, now in the past, receding further every day. It is a story of ongoing harm.

In his dissents to denials of certiorari seeking to take up and correct the errors of *Williams*, Justice Gorsuch has emphasized the diminishment of the right to jury trial as it had been entrusted through the Constitution and respected for centuries:

> For almost all of this Nation's history and centuries before that, the right to trial by jury for serious criminal offenses meant the right to a trial before 12 members of the community."[54] "Acutely concerned with individuals and their liberty, the framers of our Constitution sought to preserve this right for future generations." Yet today, a small number of States refuse to honor its promise. [They do] what the Constitution forbids because of us.[55]

In addition, pertaining to the non-equivalence, functionally, of smaller juries, Justice Gorsuch refers to empirical data "suggesting that, in fact, 'smaller juries are less likely to foster effective group deliberation' and may not produce as reliable or accurate decisions as larger ones."[56]

Reference to diminished reliability and accuracy point to the more practical, daily damage caused by *Williams*. As detailed earlier in this Article, because smaller juries generally do not perform as well as larger juries on critical dimensions (recognized by the *Williams* Court as central functions of the jury),[57] wherever smaller juries are employed, cross-sectional representation on any and every attribute is diminished,[58] decisions are less reliable, more variable, more unpredictable, and have greater potential to produce aberrant verdicts (both civil and criminal verdicts as well as civil damage awards) than had been the norm with

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54 *Supra* note 14.
55 *Supra* note 14 (internal citations omitted).
56 *Cunningham*, *id*.
57 *See* Part II.
58 *See* Part II, Sec. A.

twelve-person juries.[59] In the aggregate, this leads to less fairness for parties and reduced public confidence in the trial process.

This undermining of the jury as a decision-making institution is an unforced error, entirely of the Supreme Court's doing. "Because of us," as Justice Gorsuch says.

V. Casting Aside a Supreme Court Precedent

A. The Argument a Lower Court Might Make to Cast Aside Williams

The power and legitimacy of a holding ultimately depends on the quality of the reasoning mustered in its support. In *Ballew*, the justices themselves fled from the reasoning in *Williams* and offered nothing in its place. Reasons are everything. *Ipse dixit* is nothing. If that sorry state is where the Supreme Court arrived in *Ballew*, we must recall how the journey began: with Justice White's opinion in *Williams*.

Williams has become a zombie — its vital organs (if it ever had any) rotted away to nothing, abandoned by those who created it, only seeming to be alive. If the Supreme Court fails to kill it, must other courts bow down to the zombie? Must the original holding continue to be enforced by lower federal and state courts unless and until the Supreme Court administers the *coup de grâce* to its unsafe creation? Or can other courts eradicate the zombie simply by ignoring it?

This was the choice facing the Arizona courts in *Khorrami*.[60] Feeling they were bound by *Williams*, they enforced its holding.[61] Had Arizona looked beyond the bare holding and considered the subsequent treatment of *Williams* by government agencies and private organizations, by rules committees, by other courts, by scholars of various disciplines, and by the Supreme Court itself (in *Ballew*), they'd have seen that whatever foundation *Williams* might initially have seemed to stand upon has long since crumbled to nothing.

If, in light of that more complete examination, the Arizona courts had concluded that *Williams* was a nullity, did they have the authority to cast it aside? The *Khorrami* court might have explained such a decision by noting the following:

- Ample historical evidence supports a conclusion that the intent of the framers,

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[59] *See* Part II, Sec. B, D and E. Only a handful of states use criminal juries smaller than twelve for non-capital felony trials, but in civil cases most federal district courts and a third or more of the states seat juries smaller than twelve. *See* Higginbotham et al., *supra* note 50; Erica J. Boyce, *Time to Reflect: Has the Research Changed Regarding the Importance of Jury Size?* (National Center for State Courts, December, 2021).

[60] *Supra* note 14.

[61] Arizona v. Khorrami (Arizona Court of Appeals), 2021 WL 3197499 (declining "Khorrami's invitation to reconsider the constitutionality of eight-person juries in Arizona."). The Arizona Supreme Court denied Khorrami's petition for review. The Arizona Constitution, Sec. 23, provides that "The right of trial by jury shall remain inviolate. Juries in criminal cases in which a sentence of death or imprisonment for thirty years or more is authorized by law shall consist of twelve persons. In all criminal cases the unanimous consent of the jurors shall be necessary to render a verdict. In all other cases, the number of jurors, not less than six, and the number required to render a verdict, shall be specified by law." By statute, A.R.S. § 21-102.B, Arizona authorizes criminal trials using 8-person juries.

the understanding of the ratifiers, and the original public meaning of the jury trial right guaranteed by the Sixth Amendment envisioned a "jury" to be a body of twelve.[62]

- If the intent of the framers and the understanding of the ratifiers and the public could not be determined, and a functional equivalence analysis is required to assess the constitutionality of juries smaller than twelve, ample empirical evidence supports a conclusion that six is not the functional equivalent of twelve.[63]
- The U.S. Supreme Court abandoned the functional equivalence test, and by so doing withdrew its rationale for the conclusion that six-person juries meet the constitutional requirement for jury trials.[64]
- The trial process incurs continuing harm from the use of juries smaller than twelve because juries smaller than twelve do not, in fact, perform as well as juries of twelve on critical dimensions specified by the U.S. Supreme Court. More specifically, such juries are less capable of representing the eligible population on any and all demographic attributes,[65] they make decisions that are less reliable, more unpredictable, and have greater potential to produce aberrant verdicts.[66] These deficiencies, in turn, contribute to erosion of public confidence in the trial process.

B. Justifications for Casting Aside a Supreme Court Opinion

However strong the reasons might be for casting aside a Supreme Court opinion that the Supreme Court itself did not reverse, are lower courts permitted to do so? Put the other way around: does stare decisis require blind obedience?[67]

Had these circumstances arisen in Canada, the answer would be straightforward. The Supreme Court of Canada recognizes the authority of lower courts to cast aside a precedent created by a higher court. "When a new legal issue is raised, or if there is a change in the circumstances or evidence that fundamentally shifts the parameters of the debate, a lower court may reconsider the precedents set by a higher court."[68] Although "the lower court cannot ignore an authoritative precedent, and the bar is high when it comes to justifying the re-examination of a precedent… re-examination is justified when a new legal issue arises or when there is a significant change in the situation or evidence. This approach balances the imperatives of finality and stability with the recognition that a lower court must be able to fully exercise its function when faced with a situation where it is appropriate to review a

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62 *See* Part I.

63 *See* Parts II and III. *See* also, Erica J. Boyce, *supra* note 50 (reviewing recent research on jury size, confirming earlier findings).

64 *See* Part III, Sec. B and C.

65 *See* Part II, Sec. A.

66 *See* Part II, Sec. C, D and E. Only a handful of states use criminal juries smaller than twelve for non-capital felony trials, but in civil cases most federal district courts and a third or more of the states seat juries smaller than twelve. *See* Higginbotham et al., *supra* note 50; Erica J. Boyce, *supra* note 50.

67 Four arguments are generally offered to support a rigid stare decisis: (1) predictability, certainty and reliability, (2) fairness and uniformity, (3) judicial economy and (4) preserving public respect for the courts.

68 Canada (Attorney General) v. Bedford, 2013 SCC 72.

precedent."[69] "[T]he principle of stare decisis does not constitute a straitjacket that condemns the law to inertia."[70]

The American context is different. On the one hand, the U.S. Supreme Court has asserted that it alone has the authority to review its own precedents.[71] On the other hand, in the more complicated reality of U.S. practice, under appropriate circumstances, Supreme Court precedents are from time to time—if not cast aside—nudged aside. Whether the specific concept that best describes what a lower court has done with a particular precedent is termed distinguishing,[72] treating it as a dead letter,[73] erosion,[74] narrowing (or expanding) from below,[75] anticipatory overruling,[76] or something else, what has happened is essentially the same: the most mechanical, direct, faithful reading of the precedent is not the one that the lower court has applied.

Bradford's explication of one of those concepts could, with slight adjustment, illuminate all of them:

> The Supreme Court's willingness to [overrule precedent and] change doctrine creates situations in which a lower court cannot be completely loyal to the Supreme Court: a Supreme Court precedent directly applies to the case at hand, but later Supreme Court cases cast doubt on that precedent, either rejecting its analysis or applying a different test to an analogous issue. If the lower court is convinced that the Supreme Court would no longer follow the doubtful precedent, must the lower court nevertheless pay heed to stare decisis and apply that precedent? Or should it be faithful to the later decisions and rule as it believes the Supreme Court, given the opportunity, now would?
>
> Two competing lines of decision arose in the lower federal courts. One line of cases, apparently a minority view, held that lower courts must blindly and absolutely follow Supreme Court decisions until the Supreme Court expressly overrules them. According to this view, lower courts owe allegiance to earlier Supreme Court precedent, regardless of how doubtful that precedent may have become in light of Supreme Court developments in other areas. The majority view rejected this wooden application of stare decisis, arguing that lower courts should recognize when a

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69 *Id.*

70 Carter v. Canada (Attorney General), 2015 SCC 5.

71 Rodriguez de Quijas v. Shearson/American Express, Inc., 109 S. Ct. 1917 (1989).

72 A state intermediate court of appeals judge, who will remain nameless, once told me that when he wished to avoid applying a precedent, he could almost always find a way to distinguish the case before him from the precedent-setting case.

73 "A law or practice that, although not formally abolished, is no longer used, observed, or enforced." Black's Law Dictionary (11th ed., 2019).

74 *See* the discussion, *infra*, of Plessy v. Ferguson, 167 U.S. 537 (1896).

75 Richard M. Re, *Narrowing Supreme Court Precedent from Below*, 104 Georgetown L.J. 921 (2016).

76 C. Steven Bradford, *Following Dead Precedent: The Supreme Court's Ill-Advised Rejection of Anticipatory Overruling*, 59 Fordham L. Rev. 39 (1991).

> Supreme Court precedent is effectively dead, whether or not the Supreme Court has acknowledged the murder. According to this view, lower courts should disregard Supreme Court decisions when they are reasonably sure that the Supreme Court would overrule them given the opportunity.[77]

To take one famous example, the Supreme Court has never overruled its holding, announced in Plessy v. Ferguson (1896), that separate-but-equal satisfies the Fourteenth Amendment's requirement of equal protection of the laws. Nevertheless, that doctrine has been chipped away, mostly by lower courts, so thoroughly that it is dead and gone.[78] Other examples of Supreme Court decisions eroded by lower courts include Miranda v. Arizona (1966),[79] Buckley v. Valeo (1976),[80] and United States v. Lopez (1995).[81] Imprecise precedents—like the "undue burden" test in abortion jurisprudence[82]—allow lower courts to pretend they are following a rule while progressively limiting it. Usually, the lower court decision is subtle in nudging aside a high court precedent, but not always. The trial judge in Gold v. DiCarlo (1964)[83] cast aside the Supreme Court's decision in Tyson & Brother v. Banton (1927)[84] in no uncertain terms:

> We would be abdicating our judicial responsibility if we waited for the Supreme Court to use the express words "We hereby overrule *Tyson*," as the plaintiffs contend we should, before recognizing that the case is no longer binding precedent but simply a relic for the constitutional historians. Judges do not have such mechanical or wooden attitudes nor are they devoid of all powers of interpretation, analogy and application of constitutional principles….

Soon thereafter, the Supreme Court affirmed that trial judge.[85]

In all events, reconsidering a holding of the highest court must be done with the greatest diligence. Only opinions that have been thoroughly scrutinized, carefully dissected, and overwhelmingly found to be unsound are candidates for being cast aside or nudged aside.

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77 *Id*. at 40-41 (internal citations omitted).

78 Brown v. Board of Education, 347 U.S. 483 (1954) can be read either to have carved out an exception to the general principle of separate-but-equal for public education, or to have applied *Plessy* and found that separating public school children by race caused the children psychological harm such that "Separate educational facilities are inherently unequal." Either way, *Plessy* was still alive the day after *Brown* was decided. Nevertheless, lower courts took the aura of disapproval toward segregation and extended it to all kinds of settings beyond that of public education. *Plessy* thereby died. But not because the Supreme Court reversed it. The lower courts' dismantling of *Plessy* was so effective that most people, including judges, today believe that *Brown* overturned it.

79 84 U.S. 436 (1966).

80 424 U.S. 1 (1976).

81 514 U.S. 549 (1995).

82 Planned Parenthood v. Casey, 505 U.S. 833 (1992).

83 235 F. Supp. 817, 819 (S.D.N.Y. 1964), aff'd. 380 U.S. 520 (1965).

84 237 U.S. 418 (1927).

85 *Supra* note 83.

The problem with Williams v. Florida and the constitutional meaning of a jury is that although the reasoning is universally deprecated (even by a unanimous Supreme Court, implicitly, in *Ballew*), the holding is so clear (juries as small as six are constitutional). There is no wiggle room for a lower court that would like to politely nudge *Williams* aside. Yet the alternative is to allow a legal zombie to live on, wreaking whatever havoc it will.

C. The Aftermath of Casting Aside

Suppose a state supreme court or a federal court of appeals cast aside *Williams*. The losing party (almost certainly the government) might choose to let the matter lie. Then, such as in a state like Arizona, the federal constitution would be understood to require twelve jurors, and that would trump state constitutional or statutory law permitting smaller juries.[86] More likely, the losing party would seek further review higher up the judicial ladder. This would be a helpful turn, whatever the outcome. The Supreme Court could refuse to grant cert, thereby allowing *Williams* to further erode and eventually evaporate. Or it could grant cert, rethink the issue, and either (a) offer sound reasons to interpret the Constitution to require juries of no more than six, or (b) agree with the prevalent assessment of *Williams's* speciousness and repudiate *Williams*, again accepting the constitutional requirement of twelve jurors. At the end of the day, the Supreme Court does get to have the last word. What casting aside one of its opinions does is to create pressure on the Court to responsibly declare that final word.

[86] In the federal system, at a practical level, rulemakers have already partially corrected the harm of *Williams* and *Colgrove*, *supra* note 13. *See supra* note 50 and accompanying text.

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Citing Jorge Luis Borges

Wes Henricksen*

ABSTRACT

The works and ideas of Jorge Luis Borges have had a major impact on literature, movies, art, philosophy, and pop culture. His influence in these areas has been documented and studied. To date, however, there has been no significant effort to catalog or discuss the impact Borges has had on legal scholarship. The impact is significant. Hundreds of law journal articles, essays, and book reviews reference Borges and his work. For instance, authors have used Borges stories as a lens through which to analyze legal doctrines and developments. Others have quoted Borges to help convey particular ideas or principles. This paper aims to identify all references to Borges and his work in the legal scholarly literature, and to analyze the ways authors rely on Borges to determine the nature and extent of Borges's influence on legal scholarship. My aim is primarily to evaluate the scholarly treatment as a whole, rather than focus on individual cases. As such, I have attempted to compile a comprehensive list of Borges references in the legal scholarship to date. If I have omitted any scholarly works that should be included, please let me know and I will happily add them.

KEYWORDS

law and literature, law and humanities, latin america, latin american literature, humanities

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I. Introduction

In 2005, the Texas Wesleyan Law Review[1] held a symposium on the intersection between law and the fictional universe of *Harry Potter*.[2] A dozen legal scholars contributed essays on topics like "the limitations of law and legal institutions as depicted in the *Harry Potter* narratives, the legal "failings" of the Ministry of Magic, and the "arbitrariness contrary to the rule of law" inherent in "the operation of the legal system [in the *Harry Potter* universe] through the lens of the 'Unforgivable curses'."[3] This was not the first attempt at incorporating J.K. Rowling's work into the legal scholarship, nor was it the last.[4]

Nor was this blending of literature and legal scholarship unique to *Harry Potter*. Numerous authors and their works have shown up in law journal articles. These include, for instance, Jane Austen, Charlotte Brontë, Miguel de Cervantes, Fyodor Dostoevsky, Herman Melville, William Shakespeare, Leo Tolstoy, Mark Twain, and Virginia Woolf.[5] To this list we can add the name of Latin America's most influential author, Jorge Luis Borges, who has been cited in hundreds of law review articles, essays, and book reviews.[6] Borges was an Argentine poet and short story writer who died in 1986, and is widely considered one of the most important writers of the twentieth century.[7] But while his influence in the legal scholarship—

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1 The Texas Wesleyan University School of Law was acquired by Texas A&M University on August 12, 2013. Press Release, *Acquisition by Texas A&M University*, Texas A&M University, https://law.tamu.edu/about-us/acquisition-by-tamu. At that time, the Texas Wesleyan Law Review became the Texas A&M Law Review.

2 *See generally Harry Potter and the Law*, 12 Tex. Wesleyan L. Rev. 427 (2005).

3 *Id.* at 430.

4 *See, e.g.*, Benjamin H. Barton, *Harry Potter and the Half-Crazed Bureaucracy*, 104 Mich. L. Rev. 1523 (2006); Elizabeth Kent & Susan Hippensteele, *The Bill of Rights, Mediation, and Harry Potter*, August 2008 Haw. B.J. 4 (2008); William P. MacNeil, *"Kidlit" As "Law-and-Lit": Harry Potter and the Scales of Justice*, 14 Law & Literature 545 (2002); Babak Zarin, *In the Restricted Section: Harry Potter and Unauthorized Sagas*, 9 Elon L. Rev. 459 (2017); Susan Hall, *Harry Potter and the Rule of Law: The Central Weakness of Legal Concepts in the Wizard World*, *in* Reading Harry Potter: Critical Essays 11, 147–62 (Giselle Liza Anatol ed., 2003); Paul R. Joseph & Lynn E. Wolf, *The Law in Harry Potter: A System Not Even a Muggle Could Love*, 34 U. Tol. L. Rev. 193 (2003).

5 George Anastaplo, *Law & Literature and the Austen-Dostoyevsky Axis: Explorations*, 46 S.D. L. Rev. 712 (2001); Rodger Citron, *Herman Melville's Billy Budd: Why This Classic Law and Literature Novel Endures and Is Still Relevant Today*, 36 Touro L. Rev. 17 (2020); Michael Newcity, *Why Is There No Russian Atticus Finch? Or Even A Russian Rumpole?*, 12 Tex. Wesleyan L. Rev. 271 (2005); Margaret Valentine Turano, *Jane Austen, Charlotte Bronte, and the Marital Property Law*, 21 Harv. Women's L.J. 179 (1998); H. Parkman Biggs, *Jousting at Windmills: Cervantes and the Quixotic Fight for Authorial Control*, 22 Marq. Intell. Prop. L. Rev. 213 (2018); Daniel J. Kornstein, *Mark Twain's Evidence: The Never-Ending Riverboat Debate*, 72 Tenn. L. Rev. 1 (2004); George Anastaplo, *Law & Literature and Shakespeare: Explorations*, 26 Okla. City U. L. Rev. 1 (2001).

6 *See infra* Section III.

7 *See* Jane Ciabattari, *Is Borges the 20th Century's Most Important Writer?*, BBC (Sept. 2, 2014), http://www.bbc.com/culture/story/20140902-the-20th-centurys-best-writer ("Today one could consider Borges the most important writer of the 20th Century." [quoting Suzanne Jill Levine, translator and editor of the Penguin Classics five-volume

the topic of this article—has not yet been examined seriously, his influence in other areas like literature, philosophy, and popular culture has been widely recognized, and in some cases studied.

Indeed, Borges is revered by a growing and diverse range of individuals, from academics and literary titans to heads of church and state.[8] Almost four decades after his death, Borges's fiction and poetry continue to be published, and he continues to be praised and discussed, in prestigious literary forums.[9] Indeed, like Kafka, Orwell, and Shakespeare, Borges's surname has become an adjective. According to Merriam-Webster's dictionary, "Borgesian" (or "Borgean"[10]) means "of, relating to, or suggestive of Jorge Luis Borges or his writings."[11] The term's popularity appears to be growing.[12]

To name Borges among the most important writers of the 20th Century is no so much an opinion as a universally-accepted truism, at least among the literary

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Borges series]); *Jorge Luis Borges said that football was 'stupid'*, NoticiasFinancieras (June 14, 2018), Westlaw 2018 WLNR 18359523 (noting that Borges was "one of the most important writers of the 20th century"); David Berry, *Art can be a beacon of hope or an explanation of the world*, Nat'l Post (Dec. 2, 2016), https://nationalpost.com/entertainment/art-can-be-a-beacon-of-hope-or-explanation-of-the-world-but-whether-it-can-shape-it-in-dark-times-is-uncertain (noting Borges was "unquestionably the most important Argentinian writer, if not one of the finest writers in the Spanish-language); *Culture of prevention lost in haze of Mexico fires*, Dallas Morning News (May 17, 2003), Westlaw 2003 WLNR 16519446 (noting Borges was "one of the most important short story writers and essayists of the last century").

8 Wes Henricksen, *Why Jorge Luis Borges Still Matters*, 6 Middle Atlantic Rev. Lat. Am. Stud. 128, 128–38 (2022), http://doi.org/10.23870/marlas.386.

9 Jorge Luis Borges, *The Other Tiger*, Atlantic, January 31, 2021 (illustrations by Miki Lowe), https://www.theatlantic.com/books/archive/2021/01/poem-jorge-luis-borges-other-tiger/617885; Nina Sharma, *Jorge Luis Borges and Nancy Meyers Pitch a Movie (Because, Admit It, You've Watched Everything Else)*, New Yorker, May 11, 2021, https://www.newyorker.com/humor/daily-shouts/jorge-luis-borges-and-nancy-meyers-pitch-a-movie-because-admit-it-youve-watched-everything-else; *Jorge Luis Borges, Master of the Mystical*, N.Y. Times, June 14, 2016, https://www.nytimes.com/interactive/projects/cp/obituaries/archives/jorge-luis-borges; Michael Greenberg, *A Road Trip With One of the 20th Century's Greatest Writers*, N.Y. Times, Aug. 18, 2020, https://www.nytimes.com/2020/08/18/books/review/jay-parini-borges-and-me.html.

10 Marco Jimenez, *Towards A Borgean Theory of Constitutional Interpretation*, 40 Pepp. L. Rev. 1 (2012).

11 *Borgesian*, Merriam-Webster Dictionary, accessed Feb. 1, 2024, https://www.merriam-webster.com/dictionary/Borgesian.

12 *See, e.g.*, Judith Shulevitz, *Ruth Ozeki's Borgesian, Zen Buddhist Parable of Consumerism*, N.Y. Times, Sept. 19, 2021, https://www.nytimes.com/2021/09/19/books/review/the-book-of-form-and-emptiness-ruth-ozeki.html; Thom Dunn, *Chinese woman spent a decade building Borgesian fake Russian history on Wikipedia*, BoingBoing (July 7, 2022), https://boingboing.net/2022/07/07/chinese-woman-spent-a-decade-building-borgesian-fake-russian-history-on-wikipedia.html; Lloyd Davies, *All that is Solid Melts into Air: Borgesian Variations on Translation, Fidelity, Citation and Plagiarism*, 39 Romance Stud. 138 (2021), https://www.tandfonline.com/doi/abs/10.1080/02639904.2021.1950359; Ilan Stavans & Verónica Albin, Knowledge and Censorship 73 (2008) (noting that Scottish lexicographer Sir James Murray is "a Borgesian character"); State v. Hurd, 734 N.E.2d 365, 366–67 (Ohio 2000) (noting that "it may seem that we are mired in a Borgesian Labyrinth . . . where there is a wrongdoing and yet no way to punish the perpetrator.").

establishment.[13] His eminence in the canon stems not only from the merits of his work, but also from the influence his work has had on art, culture, and society. The influence is significant.[14] One area where his influence is evident is, predictably, modern literature. He is credited as "the father of the Latin American novel" who "created a new literary continent."[15] His work is widely-acknowledge as having inspired, if not given birth to, the Latin American literary "Boom" and the magical realism movement.[16] Indeed, the Boom, which launched a group of young Latin American novelists onto the world stage, is widely credited with originating in Borges's fiction. Borges, one author noted, was the primary reason "Latin American literature emerged from the academic realm into the realm of generally educated readers."[17]

This worship of Borges is not merely popular among critics and readers; it is engaged in by many of the twentieth century's leading literary figures, such as Gabriel García Márquez, Mario Vargas Llosa, Isabel Allende, Carlos Fuentes, Julio Cortázar, Roberto Bolaño, and Augusto Monterroso.[18] Borges's literary influence extends far beyond Latin America.[19] His ideas and plots have been used by writers

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13 *See* Ciabattari, *supra* note 7 (remarking in the title that Borges might be "the 20th Century's Most Important Writer"); Jorge Luis Borges, Jorge Luis Borges: Conversations book jacket (Richard Burgin ed., 1998) (declaring Borges "one of the indisputably great writers of the twentieth century").

14 *See, e.g.*, Noam Cohen, *Borges and the Foreseeable Future*, N.Y. Times (Jan. 6, 2008), https://www.nytimes.com/2008/01/06/books/06cohenintro.html; Hector Tobar, *The Borges boom: he may be dead, but his legacy remains strong,* L.A. Times *(Aug. 1, 2013),* https://www.latimes.com/books/jacketcopy/la-et-jc-jorge-luis-borges-blindess-and-books-20130731-story.html; Valeria Sabater, *Jorge Luis Borges: One of the Most Influential Writers of All Time*, Exploring Your Mind (Jan. 6, 2022), https://exploringyourmind.com/jorge-luis-borges-one-of-the-most-influential-writers-of-all-time/.

15 Ciabattari, *supra* note 7.

16 Henricksen, *supra* note 8, at 134; *see also* Lanin A. Gyurko, *The Metaphysical World of Borges and Its Impact on the Novelists of the Boom Generation*, 14 Ibero Amerikanisches Archiv 215 (1988).

17 Emir Rodriguez Monegal, *Jorge Luis Borges: Argentine Author*, Encyclopedia Britannica (Aug. 20, 2021), https://www.britannica.com/biography/Jorge-Luis-Borges.

18 *See* Norman Thomas di Giovanni, The Lesson of the Master: On Borges and His Work 164 (2003). Julio Cortázar, in a 1977 interview on the Spanish program "A Fondo" referred repeatedly to Borges as "the great" or "the master" of his literary generation. Editrama, Julio Cortázar "In Depth" (1977), May 31, 2020, YouTube.com, https://www.youtube.com/watch?v=ppon2ldpJwU. Roberto Bolaño referred to Borges reverentially in interviews, clumping together three "brilliant prose writers," Cervantes, Quevedo, and Borges, the former two dating to the sixteenth and early seventeenth centuries, and Borges to the twentieth century. ThePostArchive, Roberto Bolaño Interview, Feb. 12, 2020, YouTube.com, https://www.youtube.com/watch?v=B0PMd4f80iQ. Gabriel García Márquez said that in his travel suitcase he carries Borges's complete works. Gabriel García Márquez & Mario Vargas Llosa, La novela en América Latina: Dialogo 36, 40 (Milla Batres, 1969). The Mexican novelist Carlos Fuentes said that without Borges's prose "there simply would not be a modern Spanish-American novel," and that Borges "constitutes a new Latin-American language." Carlos Fuentes, La Nueva Novela Hispanoamericana 26 (Joaquín Mortiz, 1969).

19 *See Rebirth of the true Georgie*, Guardian (Jan. 15, 1999), https://www.theguardian.com/books/1999/jan/16/jorgeluisborges (noting that John Barth, John Updike, Angela

in languages other than Spanish to create two of the most-read books in history. These are *The Alchemist* by Paulo Coelho, which has sold over 150 million copies, and *The Name of the Rose* by Umberto Eco, which has sold over 50 million.[20]

Borges has also had a significant impact on film, something studied and discussed in academic papers, doctorate dissertations, blogs, books, and websites.[21] At present, a professor of literature is writing a scholarly book on Borges's influence on Hispanic film.[22] Borges's stories and screenplays have served as the basis for over 30 movies[23] and he is credited as a writer on more than sixty films.[24] Recent Borges-inspired films include *Inception* (2010), *The Matrix* movie franchise (1999, 2003, 2021),[25] and the award-winning Argentine film *Extraordinary Stories* (2008).[26] There are several recent examples of additional movies with scenes or plotlines that draw on Borges and his fiction. For instance, in a scene in *Spider-Man: Across the Spider-Verse* (2023)—which draws heavily on the Borges story "The Aleph"—one character, Miguel O'Hara, shows another, Miles Morales, a pinpoint of light

Carter, Salman Rushdie, and others name Borges as a major influence on their writing); Allen B. Ruch, *Borges as an Influence*, Shipwreck Library, accessed Feb. 1, 2024, https://shipwrecklibrary.com/borges/borges-influence/ ("The work of Jorge Luis Borges has had a profound impact on modern [world] literature.").

20 *The Alchemist* has sold over 150 million copies. *See* Ezekiel Boone, *Nine books that sold more than 100 million copies and how they compare to my book*, Penguin Random House Canada, accessed Feb. 1, 2024, https://www.penguinrandomhouse.ca/532/nine-books-sold-more-100-million-copies-and-how-they-compare-my-book. *The Name of the Rose* has sold over 50 million copies. Gregory McNamee, *Umberto Eco's The Name of the Rose Turns 40*, Kirkus (Jan. 7, 2020), https://www.kirkusreviews.com/news-and-features/articles/umberto-ecos-name-rose-turns-40/.

21 *See* Héctor J. Freire, *Borges y el cine*, 57 INTI: Revista de literatura hispánica 153 (2003) (academic paper); Zavaleta Balarezo, *Jorge Borges y el cine: imaginería visual y estrategia creativa*, 39 Mester 111 (2010) (academic paper); David Oubina, *El espectador corto de vista: Borges y el cine*, 24 Variaciones Borges 133 (2007) (academic paper); Philip Swanson, *Borges and Popular Culture*, 19 Hispanic Rsch. J. 250 (2018), https://doi.org/10.1080/14682737.2018.1467855 (academic paper); Monica Sumihar Simorangkir, Borges in Hollywood: From Art House to Blockbuster Cinema (Oct. 27, 2017) (Ph.D. dissertation, Georgetown University), https://repository.library.georgetown.edu/handle/10822/1047823 (doctoral dissertation); Edgardo Cozarinsky, Borges en/y/sobre cine (Editorial Fundamentos, 1981) (book); Allen B. Ruch, *Borges and Film*, Shipwreck Library, accessed Feb. 1, 2024, http://shipwrecklibrary.com/borges/borges-films (website); Borges in/and/on Film, accessed Feb. 2, 2024, https://www.complete-review.com/reviews/borgesjl/bonfilm.htm (website based on Edgardo Cozarinsky's book).

22 *See* personal correspondence on file with the author.

23 Ruch, *supra* note 21.

24 Jorge Luis Borges, IMDB, accessed Feb. 1, 2024, https://www.imdb.com/name/nm0096566.

25 *See* Jaime Perales Contreras, *Inception and Jorge Luis Borges*, 62 Américas 41 (2010) (noting that both *Inception* and *The Matrix* are strongly influenced by Borges); Brian Durán Fuentes, *The Penrose Stairway: Jorge Luis Borges at the Center of Christopher Nolan's Inception*, 2 Cuaderna Vía 11 (2016) (same).

26 *See* Robert Koehler, *Extraordinary Stories*, Variety, May 6, 2008, https://variety.com/2008/film/reviews/extraordinary-stories-1200522660/ (noting that Borges and his collaborator, Adolfo Bioy Casares, were the film's "strongest" influences).

that contains "everything" in all universes of the spiderman multiverse.[27] In the film *Interstellar* (2014), the main character enters the fifth dimension—by way of a black hole—and finds himself surrounded by seemingly infinitely repeating patters along the walls, many of which are bookshelves, strongly reminiscent of Borges's infinite library in his story "The Library of Babel."[28] This reference to Borges is not surprising, given that the film's director, Christopher Nolan, reveres Borges and has used Borges's work as inspiration on numerous occasions.[29] Another recent example is a scene in the award-winning film *Birdman* (2014), which shows one of the leading characters reading *Labyrinths*, a short story collection by Borges.[30]

In addition to literature and film, Borges has also had a significant impact on philosophy, and is indeed sometimes credited with having greatly "inspired professional philosophers from both the continental and analytic traditions."[31] Borges has also had a strong influence within academia, and is one of the most widely read and studied writers in literature, creative writing, and Latin American studies programs.[32] There are today Borges collections at several American universities, including Michigan State, Texas, and Virginia, and the University of Pittsburgh houses the Borges Center, a vast repository of Borges manuscripts, criticism, and scholarship, as well as an academic journal dedicated to scholarship on Borges and his work.[33]

The influence Borges has exerted on literature, film, and academia—which has occurred despite an effort to suppress a significant portion of Borges's work[34]—

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27 Spider-Man: Across the Spider-Verse (Columbia Pictures 2023).

28 *Compare* Interstellar (Paramount Pictures 2014) with Jorge Luis Borges, *The Library of Babel*, *in* Ficciones 79 (A. Kerrigan ed. & trans. 1962) (1941).

29 *See, e.g.*, Swapnil Dhruv Bose, *Christopher Nolan named his favourite book of all time*, Far Out (March 13, 2022), https://faroutmagazine.co.uk/christopher-nolan-favourite-book-all-time/ (Nolan said the one book he'd take to a deserted island would be Borges's collected fiction and nonfiction works, and that, "[i]n a way, all stories are contained within his [Borges's] stories").

30 Birdman (Regency Enterprises 2014).

31 University of California Television, Jorge Luis Borges on War, February 13, 2016, YouTube.com, https://www.youtube.com/watch?v=5P1-q7hokE8.

32 *See* The eccentric Borges: Two UCL analyses, University College London, Dec. 1, 2006, https://www.ucl.ac.uk/news/2006/dec/eccentric-borges-two-ucl-analyses ("He has been identified as a key figure in post-modern literature, paving the way for a generation of writers to explore new ways of telling stories and thinking about the world. That he should be the subject of academics' attention is not surprising….").

33 Jorge Luis Borges: An Inventory of His Collection at the Harry Ransom Center, Univ. of Texas, accessed Feb. 2, 2024, https://norman.hrc.utexas.edu/fasearch/findingAid.cfm?eadid=00629; Donald Yates collection on Jorge Luis Borges, Michigan State Univ., accessed Feb. 2, 2024, https://findingaids.lib.msu.edu/repositories/4/resources/6429; Jorge Luis Borges Collection, Univ. of Virginia, accessed Feb. 2, 2024, https://small.library.virginia.edu/collections/featured/163-2/; Borges Center, Univ. of Pittsburgh, accessed Feb. 2, 2024, https://www.borges.pitt.edu/.

34 *See generally* Wes Henricksen, *Silencing Jorge Luis Borges: The Wrongful Suppression of the di Giovanni Translations*, 48 Vermont L. Rev. 208, 223–35 (2024) (discussing the possible copyright infringement resulting from the suppression of the di Giovanni translations of the works of Borges); Wes Henricksen, *Borges's Most Problematic Translator*, 56 Variaciones Borges 159, 166 n.3 (2023) (discussing the suppression of the di Giovanni translations).

has been widely observed and studied by others.[35] But Borges has also exerted a substantial impact on the law and legal scholarship. Unlike Borges's influence in the other areas discussed above, his impact on the law and legal scholarship has remained, to date, almost totally unexamined. I will leave Borges's influence on law in general for another day.[36] In this article, I aim to catalogue and examine Borges's influence on the legal scholarly literature. I approach this task from two angles. First, I have compiled an index of legal scholarly references to Borges and his work.[37] And second, I analyze and draw conclusions based on the data compiled in the index.[38]

This article was inspired by my repeated encounters with references to Borges in the legal academic literature over the years.[39] Because I am an admirer of the author, these references piqued my interest. They also raised several questions. How many legal scholarly papers cite to Borges? What is the nature of these references? Are they typically mere passing mentions, or are these references more substantive in nature? Are most citations to Borges made in the narrow field of law and literature, or do they occur in other doctrinal areas, such as constitutional law, civil procedure, intellectual property, and torts? Has anyone compiled all such references or analyzed them empirically? What would such an analysis entail? What would it reveal? In short, what influence has Borges had on the legal scholarship to date, and what conclusions can we draw from it?

In this article, I attempt to answer these questions. My method for completing this task is to locate, to the extent possible, all references to Borges in the legal

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35 *See, e.g.*, Hector Tobar, *The Borges boom: he may be dead, but his legacy remains strong*, L.A. Times (Aug. 1, 2013), https://www.latimes.com/books/jacketcopy/la-et-jc-jorge-luis-borges-blindess-and-books-20130731-story.html; Katy Waldman, *Jorge Luis Borges' 'Library of Babel' Is Now a Real Website. Borges Would Be Alarmed*, Slate (Apr. 30, 2015), https://slate.com/culture/2015/04/jonathan-basile-brings-borges-library-of-babel-to-life-with-an-eerie-gibberish-filled-web-site.html; sources cited *supra*, in notes 18, 19 & 21.

36 For example, Borges is quoted in numerous U.S. Supreme Court and court of appeals briefs. *See, e.g.*, Brief, Fourth Estate Public Benefit Corp. v. Wall-Street.com, LLC, U.S. Supreme Court, No. 17-571, 2018 WL 4293383 (Sept. 4, 2018); Brief, Sebelius v. Hobby Lobby Stores, Inc., U.S. Supreme Court, Nos. 13-354 & 13-356, 2014 WL 411293 (Jan. 18, 2014); Brief, NML Capital, Ltd. v. Republic of Argentina, U.S. Court of Appeals for the Second Circuit, 2013 WL 388620 (2d Cir., Jan. 25, 2013). See also New Jersey Div. of Child Prot. & Permanency v. J.E.M., No. A-1728-20, 2021 WL 5313109, at *2 n.2 (N.J. Super. Ct. App. Div. Nov. 16, 2021) (holding "[w]e assume the judge was not channeling the fictional Pierre Menard" and comparing a judge's cribbing large portions of a court filing in its opinion and order with how in Borges's story, "Pierre Menard, Author of the Quixote," a writer copies an earlier book word for word and passes it off as his own work); GMF ELCM Fund L.P. v. ELCM HCRE GP LLC, No. CV 2018-0840-SG, 2019 WL 3713844, at *1 (Del. Ch. Aug. 7, 2019) ("The writer Jorge Luis Borges opined that reading is a more intellectual activity than writing. Readers attempting to understand the history of the progress—if progress is the appropriate word—of this litigation may come to the same conclusion.").

37 *See infra* Part III.

38 *See infra* Part II.

39 *See, e.g.*, Jenny S. Martinez, *Human Rights and History*, 126 Harv. L. Rev. F. 221, 237 (2013) (discussing Borges as a lens used by Yale Law professor Samuel Moyn in his book, *The Last Utopia* (2010)); Mala Chatterjee, *Understanding Intellectual Property: Expression, Function, and Individuation*, 70 J. Copyright Soc'y U.S.A. 57, 73–74 (2023) (discussing a Borges story while framing an intellectual property issue).

scholarly literature, compile them into one list, review each source, and make observations based on what I find. Part II of this article contains a brief discussion and analysis of my findings. In it, I discuss trends I observed and offer some tentative conclusions. Part III contains the comprehensive index of law journal articles, essays, books, and book reviews that reference Borges or his work. Part IV concludes.

II. Observations Based on the Data

The first citation to Borges in the American legal scholarly literature appeared in Volume 43 of the Indiana Law Journal, in a book review by Gary S. Goodpaster, an Assistant Professor of Law at the University of Iowa, in the fall of 1967.[40] Professor Goodpaster wrote this book review at the beginning of what would be a long and distinguished career in the legal academy.[41] Notably, this first citation was not a *mere* citation, but a detailed discussion of a major Borges story, "The Library of Babel," in the body text of the review. Goodpaster gives a detailed description of the story in the second paragraph of the book review, and uses it as an interpretative device for demonstrating how the book at issue contains a voluminous "universe" of "encyclopedic" work.[42] Thus, Borges's entrance into American legal scholarship was rather abrupt and, from the outset, consequential. Even in this first scholarly mention, the author did not so much *refer to* Borges, as he *relied on* Borges to formulate the thesis he put forth in the book review.[43]

Goodpaster's Borges discussion did not open a floodgate of citations. In fact, more than ten years would pass until another legal scholar cited Borges.[44] The index in Section III of this article, which lists citations to all legal scholarly references to Borges, shows how slowly Borges and his work began to be cited. In the 1960s, there was only the Goodpaster citation.[45] In the 1970s, there was likewise only one citation.[46] It was not until the 1980s that Borges began to be cited regularly. In fact, that decade saw the first two consecutive years in which Borges was cited (1980–1981), first year in which he was cited by multiple authors (1985—three authors), and the first year Borges was cited in more than five separate articles

40 Gary S. Goodpaster, *Social Dimensions of Law and Justice by Julius Stone*, 43 Ind. L.J. 167 (1967).

41 After graduating from law school in 1965, Professor Goodpaster clerked for an appellate judge and then joined the law faculty at the University of Iowa. He published the book review in which he cited Borges less than a year later. In 1971, he joined the law faculty at the University of California, Davis, where he worked until his death in 2012. *King Hall Mourns Professor Emeritus Gary Goodpaster*, University of California, Davis, Dec. 5, 2012, https://law.ucdavis.edu/news/king-hall-mourns-professor-emeritus-gary-goodpaster; Gary Goodpaster, N.Y.U. Review of Law & Social Change, accessed Feb. 2, 2024, https://socialchangenyu.com/people/goodpaster-gary/.

42 Gary S. Goodpaster, *Social Dimensions of Law and Justice by Julius Stone*, 43 Ind. L.J. 167, 167–68 (1967).

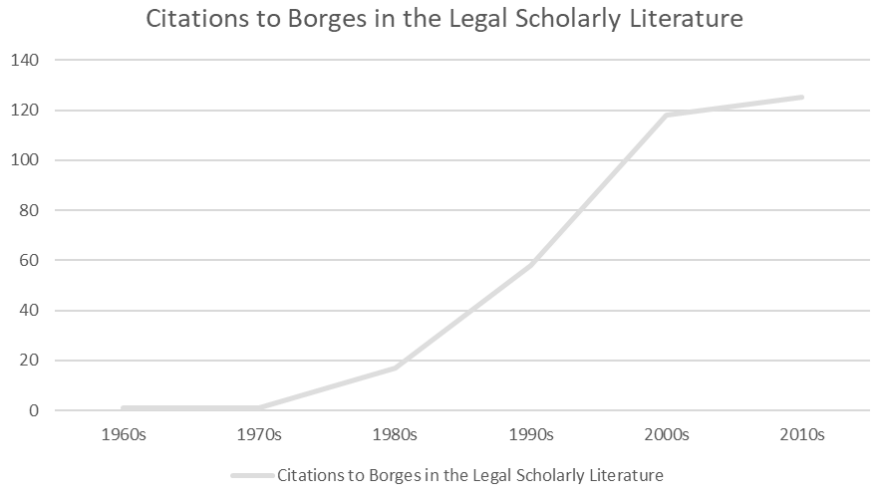
43 *Id.*

44 *See infra* Section III.

45 *Id.*

46 *Id.*

(1988).[47] Moreover, 1984 was the last year in which there was no citation to Borges, and 1989 was the last year in which there was only a single citation to Borges.[48] The number of citations to Borges has ballooned over the past couple decades, growing to more than 120 citations in the 2010s. The following chart shows the growth of citations to Borges over time.



Not all citations are equal, of course. There is a significant qualitative difference between an article that contains a single citation to Borges in a footnote, on one hand, and an article that discusses Borges at length throughout the work.[49] For this reason, the index in Section III assigns a numerical "depth" score to each citation, indicating the level of depth with which Borges is discussed in the publication. A "1" indicates Borges is mentioned or cited only in one or more footnotes. A "2" indicates Borges is mentioned or cited in the body or title of the article. A "3" indicates the publication contains at least a full paragraph discussing Borges or his work. And a "4" indicates a lengthy discussion of Borges or his work in at least a substantial portion of the publication, if not throughout the whole of it.

This numbering system has some obvious limitations and flaws, of course. Because there are only four categories, there is a wide range of depth of treatment within each category. For instance, an article might cite Borges only in footnotes, but contain several citations to Borges, while another might mention Borges only once in the body text, merely as a passing and mostly irrelevant reference. Yet, the former would be designated only a "1," while the latter would receive a "higher" designation of "2." Nevertheless, these numerical designations generally do reflect the relative depth of treatment the respective authors give to Borges in their work.

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47 *Id.*

48 *Id.*

49 *Compare, e.g.*, Steven R. Shapiro, *Ideological Exclusions: Closing the Border to Political Dissidents*, 100 Harv. L. Rev. 930 (1987) (single citation), *with* Shulamit Almog, *From Sterne and Borges to Lost Storytellers: Cyberspace, Narrative, and Law*, 13 Fordham Intell. Prop. Media & Ent. L.J. 1 (2002) (discussing Borges throughout the article).

One observation that can be made from an overview of the index is that, with few exceptions, there are almost no repeat-citers.[50] That is, the growth in the number and depth of citations to Borges is not a matter of a few Borges fans repeatedly inserting Borges references. Rather, more and more legal scholars are citing Borges and his work.[51] The number of citations rocketed up from the 80s to the 90s, and again from the 90s to the 2000s.[52] The rise was more modest moving from the 2000s to the 2010s.[53]

So, what can be made of these more than 300 citations? There really is an infinite number of interpretations. The aim of this article is not to focus on any particular analysis, which inserts subjective judgement, not only in the selection of the topic but in the interpretation of it, but rather to present the full data and let readers draw their own conclusions. Nevertheless, I will make a few brief remarks on some of the trends I observed while compiling the index.

A. Prestige and Impact

Borges has been cited in many of the most prestigious law reviews, as determined by current leading rankings,[54] including the Yale Law Journal, Harvard Law Review, Stanford Law Review, and others.[55] To date, Borges has been cited in three

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50 One exception is Paul Campos, who cited to Borges in five articles between 1992 and 1996. Paul F. Campos, *A Text Is Just a Text*, 19 Harv. J.L. & Pub. Pol'y 327 (1996); Paul F. Campos, *The Chaotic Pseudotext*, 94 Mich. L. Rev. 2178 (1996); Paul Campos, *Silence and the Word*, 64 U. Colo. L. Rev. 1139 (1993); Paul F. Campos, *Advocacy and Scholarship*, 81 Cal. L. Rev. 817 (1993); Paul Campos, *Against Constitutional Theory*, 4 Yale J.L. & Human. 279 (1992).

51 *See infra* Section III.

52 *Id.*

53 *Id.*

54 *See, e.g.*, W&L Law Journal Rankings, Washington and Lee Law School, accessed Feb. 2, 2024, https://managementtools4.wlu.edu/LawJournals/; Paul Caron, 2023 Meta-Ranking Of Flagship U.S. Law Reviews, TypePad, July 26, 2023, https://taxprof.typepad.com/taxprof_blog/2022/09/2022-meta-ranking-of-flagship-us-law-reviews.html; Bryce Clayton Newell, Law Journal Meta-Ranking, 2023 Edition, University of Oregon, accessed Feb. 2, 2024, https://blogs.uoregon.edu/bcnewell/meta-ranking/.

55 Mark A. Lemley & Jacob S. Sherkow, *The Antibody Patent Paradox*, 132 Yale L.J. 994 (2023); Daniel J. Solove, *Fictions About Fictions: Constitutional Law As Fiction: Narrative in the Rhetoric of Authority*, 105 Yale L.J. 1439 (1996); Gretchen A. Craft, *The Persistence of Dread in Law and Literature*, 102 Yale L.J. 521 (1992); Madhav Khosla, *Is A Science of Comparative Constitutionalism Possible? How Constitutional Rights Matter.*, 135 Harv. L. Rev. 2110 (2022); Barton Beebe & Jeanne C. Fromer, *Are We Running Out of Trademarks? An Empirical Study of Trademark Depletion and Congestion*, 131 Harv. L. Rev. 945 (2018); Carol G.S. Tan, *How A "Lawless" China Made Modern America: An Epic Told in Orientalism Legal Orientalism: China, the United States and Modern Law. by Teemu Ruskola*, 128 Harv. L. Rev. 1677 (2015); Jenny S. Martinez, *Human Rights and History*, 126 Harv. L. Rev. F. 221 (2013); Steven R. Shapiro, *Ideological Exclusions: Closing the Border to Political Dissidents*, 100 Harv. L. Rev. 930 (1987); Mark S. Nadel, *Customized News Services and Extremist Enclaves in Republic.com*, 54 Stan. L. Rev. 831 (2002); Teemu Ruskola, *Conceptualizing Corporations and Kinship: Comparative Law and Development Theory in A Chinese Perspective*, 52 Stan. L. Rev. 1599 (2000); Lawrence Lessig, *Understanding Changed Readings: Fidelity and Theory*, 47 Stan. L. Rev. 395 (1995); Angela P. Harris, *Race and Essentialism in Feminist Legal Theory*, 42 Stan. L. Rev. 581 (1990); Susan Mann, *The Universe and the Library: A Critique of James*

Yale Law Journal articles, five Harvard Law Review articles, and five Stanford Law Review articles.[56] Borges has also been cited in numerous specialty journals at top law schools, such as the Yale Journal of Law and the Humanities, the Columbia Journal of Law and the Arts, the Harvard Human Rights Journal, and the Harvard Journal of Law and Public Policy.[57]

Moreover, scholars who have cited to Borges count among their numbers some of the most influential and eminent scholars in the legal academy. These include, for instance, Lawrence Lessig, who cited to Borges in a 1995 Stanford Law Review article.[58] Lessig was called by the New Yorker "the most important thinker on intellectual property in the Internet era," and has been included on numerous most-cited-legal-scholars lists.[59] His accolades are many, and include authoring the third most cited law review article in 1995, and co-authored the second most cited article in 1994.[60] Another leading legal scholar who has cited Borges is Douglas Kysar. He cited to Borges in his 2003 article in Ecology Law Quarterly.[61] Kysar, like Lessig, has been included on numerous lists as one of the most-cited scholars in the modern era.[62] Yet another eminent legal scholar who has cited to Borges is Mark Lemley. He cited to Borges in a Yale Law Journal article he co-authored in 2023.[63] Lemley was recently acknowledged to be the eighth most-cited legal scholar of all time.[64]

Boyd White As Writer and Reader, 41 Stan. L. Rev. 959 (1989).

56 *See* articles cited *supra*, in note 55.

57 Paulo Barrozo, *Law in Time: Legal Theory and Legal History*, 31 Yale J.L. & Human. 316 (2021); Peter Brooks, *"Inevitable Discovery"- Law, Narrative, Retrospectivity*, 15 Yale J.L. & Human. 71 (2003); Shoshana Felman, *A Ghost in the House of Justice: Death and the Language of the Law*, 13 Yale J.L. & Human. 241 (2001); Peter Brooks, *A Slightly Polemical Comment on Austin Sarat*, 10 Yale J.L. & Human. 409 (1998); Peter Brooks, *Storytelling Without Fear? Confession in Law & Literature*, 8 Yale J.L. & Human. 1 (1996); Paul Campos, *Against Constitutional Theory*, 4 Yale J.L. & Human. 279 (1992); Benjamin L. W. Sobel, *Artificial Intelligence's Fair Use Crisis*, 41 Colum. J.L. & Arts 45 (2017); Agnieszka Kurant, *Phantom Capital, Hybrid Authorship, and Collective Intelligence*, 39 Colum. J.L. & Arts 371 (2016); Michael J. Madison, *The Narratives of Cyberspace Law (or, Learning from Casablanca)*, 27 Colum. J.L. & Arts 249 (2004); Patricio Nazareno, *Impunity Reconsidered International Law, Domestic Politics, and the Pursuit of Justice*, 33 Harv. Hum. Rts. J. 173 (2020); Paul F. Campos, *A Text Is Just A Text*, 19 Harv. J.L. & Pub. Pol'y 327 (1996).

58 Lawrence Lessig, *Understanding Changed Readings: Fidelity and Theory*, 47 Stan. L. Rev. 395 (1995).

59 James Surowiecki, *Righting Copywrongs*, New Yorker, Jan. 21, 2002, at 27; Fred R. Shapiro, *The Most-Cited Legal Scholars Revisited*, 88 U. Chi. L. Rev. 1595 (2021); Brian Leiter's Law School Rankings, Most Cited Law Professors, 2000-2007, Nov. 12, 2007, https://www.leiterrankings.com/faculty/2007faculty_impact_areas.shtml.

60 Fred R. Shapiro & Michelle Pearse, *The Most-Cited Law Review Articles of All Time*, 110 Mich. L. Rev. 1483, 1492 (2012). The articles were Lawrence Lessig, *The Regulation of Social Meaning*, 62 U. Chi. L. Rev. 943 (1995), and Lawrence Lessig & Cass R. Sunstein, *The President and the Administration*, 94 Colum L. Rev. 1 (1994).

61 Douglas A. Kysar, *Some Realism About Environmental Skepticism: The Implications of Bjorn Lomborg's the Skeptical Environmentalist for Environmental Law and Policy*, 30 Ecology L.Q. 223 (2003).

62 *See* Fred R. Shapiro, *The Most-Cited Legal Scholars Revisited*, 88 U. Chi. L. Rev. 1595 (2021).

63 Lemley & Sherkow, *supra* note 55.

64 Fred R. Shapiro, *The Most-Cited Legal Scholars Revisited*, 88 U. Chi. L. Rev. 1595, 1602 (2021).

B. Depth and Frequency

As discussed earlier, not all citations to Borges are equal. While any article that cites to Borges is counted as one on the table above, which tabulates the total number of citations to Borges from the 1960s to present, this includes a diverse range of treatment of Borges and his work. The "depth" numerical score ascribed to each article helps give better context to how much treatment the author gives to Borges. Thus, an article designated a "3" means the article discusses Borges in at least one full paragraph within the work,[65] and a "4" means the article discusses Borges throughout at least a substantial portion of the work, if not throughout all of it.[66]

But while certainly a higher number on this scale indicates a greater importance of Borges to the work in which he is cited, this should not be confused to mean that the greater the number the greater the influence. Paradoxically, a lower number might actually indicate more deference. This is because while the earliest citations—from 1967 and 1979[67]—were both designated as "3," an increasing number of later citations received the designation of "1."[68] This can be interpreted in two ways. It could be seen as later authors giving less treatment to Borges because his ideas or work is of less direct importance to the article in which he is cited. Alternatively, it could be seen as giving greater deference to Borges in later citations because there is no longer any need to explain citing to him by including a discussion in the body text. When authors merely drop in a citation to a source, without addressing that source in the body text, the cited authority is understood to stand for the point made. Early citations to Borges explained why the author was citing to Borges. Increasingly, later authors merely cited to Borges without giving such explanation, taking for granted that readers would understand the weight of Borges's authority.

Moreover, Borges appears to be becoming more ever-present in society and the academic literature, such that citations to him no longer come from literary specialists who happen to appreciate his work, but increasingly from authors who might not be a particular fan of the author but have encountered a quote or point ascribed to Borges that works to support the assertion for which they are citing Borges.

C. Borgesian Themes

Perhaps the most interesting use of Borges in the legal academic literature, at least from the perspective of Borges scholars, is how authors use Borgesian themes, ideas, and plots to explore legal doctrines and trends. This blending of the fictional

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65 *See, e.g.*, F.E. Guerra-Pujol, *Gödel's Loophole*, 41 Cap. U. L. Rev. 637, 638–44 (2013) (using "the infinite library in Jorge Luis Borges's beautiful short story The Library of Babel" as a lens through which to explore and discuss the topic of the article).

66 *See, e.g.*, Rosa Vila, *Emma Zunz by Jorge Luis Borges: the Concept of Justice*, 4 Oñati Socio-legal Series 1232 (2014), http://ssrn.com/abstract=2519490 (exploring concepts of formal and informal justice through the plot and characters of the Borges story "Emma Zunz"); James Grimmelmann, *Information Policy for the Library of Babel*, 3 J. Bus. & Tech. L. 29 (2008) (positing an information policy for the fictional Library of Babel in the Borges story of the same name).

67 Maria José de Queiroz, *Perón e o Peronismo: uma Visão Literária*, 48 Revista Brasileira Estudos Politicos 85 (1979); Gary S. Goodpaster, *Social Dimensions of Law and Justice by Julius Stone*, 43 Ind. L.J. 167 (1967).

68 *See infra* Section III.

world of Borges with real world legal principles and theories has been accomplished in creative ways by numerous scholars.

For example, Professor Pedro Cabán Vales of the Interamerican University of Puerto Rico published an article in which he explored how the criminal law in place at the time Borges wrote the story *Emma Zunz*[69] might have influenced the story's plot.[70] In the story, which Borges wrote and published in the 1940s, but which took place in Buenos Aires in the 1920s, "the protagonist creates a story aimed at disguising her revenge as an act of self-defense."[71] Professor Cabán Valdes summarized his thesis as follows: "[t]his paper analyzes *Emma Zunz* and the applicable Argentine criminal law of the time in order to determine to what extent the legal texts may have influenced the writing of the short story."[72] Other legal scholars have used the Emma Zunz story to explore legal doctrines and theories.[73]

In a law student comment on the fair use doctrine under copyright law—how a copyrighted work may be used by another in a transformative way—Brockenbrough Lamb used a Borges story[74] as a device for explaining how the doctrine should, or at least could, be interpreted.[75] "In 1939," Brockenbrough wrote, "decades before . . . the Copyright Act, or the concept of transformative use existed, the Argentinian Jorge Luis Borges wrote the short story *Pierre Menard, Author of the Quixote*, which illustrated the relationship between author, reader, and text by focusing on the transformation that occurs through contextual reading."[76] The story's plot, and what makes it useful as a scholarly device for Brockenbrough, centers a fictional French writer, Pierre Menard, whose ambition is to rewrite the classic novel *Don Quixote* by Miguel de Cervantes word for word, not by copying it down or channeling Cervantes, but by writing it verbatim in his own original voice. In the story, Menard succeeds.[77] Literary critics are astonished by the new version, even though it is verbatim the old version, judging it vastly superior because of the context in which it was written.[78] Brockenbrough concludes that this story reveals "the surprising relationship between author, reader, and text that appropriation artists . . . seek to expose: that authors lose authority once the texts are on the page."[79]

In another article, this one published in the Pepperdine Law Review, Professor Marco Jimenez likewise used the Borges story *Pierre Menard, Author of the Quixote* as a lens for scholarly exploration, but Professor Jimenez did so in the

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69 Jorge Luis Borges, *Emma Zunz*, *in* Labyrinths: Selected Stories & Other Writings 132–36 (Donald A. Yates & James E. Irby eds., New Directions 1964).

70 Pedro Cabán Vales, *Creación Literaria, Crimen Y Ley: Jorge Luis Borges Y Emma Zunz*, 54 Rev. Jur. U.I.P.R. 147 (2020).

71 *Id.* at 147.

72 *Id.*

73 *See* Vila, *supra* note 66 (using *Emma Zunz* as a lens to discuss and analyze issues of criminal law and evidence).

74 Jorge Luis Borges, *Pierre Menard, Author of the Quixote*, *in* Labyrinths: Selected Stories & Other Writings 36–43 (Donald A. Yates & James E. Irby eds., New Directions 1964).

75 Brockenbrough A. Lamb, *Richard Prince, Author of the Catcher in the Rye: Transforming Fair Use Analysis*, 49 U. Rich. L. Rev. 1293, 1296 (2015).

76 *Id.* at 1302.

77 *Id.* at 1302–04.

78 *Id.*

79 *Id.* at 1304.

realm of constitutional interpretation.[80] According to Jimenez, Borges's story "deals with important issues governing interpretation, the creation of meaning, and the ascertainment of original intent."[81] In the same way that Borges's fictional scholar, Pierre Menard, rewrote Cervantes's *Don Quixote* word for word, but purported to produce a version "almost infinitely richer," Jimenez reworks Borges's story but writes it in the context of the U.S. Constitution. The idea is that, like the words in Don Quixote, the meaning of the words in the Constitution have evolved over time and have taken on deeper context and meaning, producing a new text even if the exact same words are used today.[82] According to Jimenez, the antiquated words and phrases of the Constitution "have themselves remained the same, [but] are now viewed through the lens of historical events (e.g., the Civil War, Reconstruction, and New Deal) and judicial precedents (e.g., the Dred Scott decision, Plessy v. Ferguson, and Brown v. Board of Education) so powerful as to have changed the meaning (though not the spelling) of the words themselves!"[83]

In another law review article, *The Other Death of International Law*, Professor Ed Morgan of the University of Toronto analyzes the demise of Yugoslavia and the subsequent recognition of newly self-determining sovereign entities "through the lens of the fantasy stories of Jorge Luis Borges."[84] But not only does Morgan utilize Borges as a device, he also analyzes *why* Borges and his work are so useful to legal scholars for exploring legal doctrines. "The writings of Borges suggest themselves as a vehicle through which to examine legal developments for a number of reasons," Morgan writes.[85] These include that fact "his stories have the close texture of argument,"[86] and that Borges's world "is a closed one, with its own internal logic and a fundamental detachment from the author's actual surroundings."[87] According to Mortan, this helpful vehicle for scholarly exploration applies with particular force to the area of international law. "In other words," he added, "the Borgesian perspective helps bring into focus international law's relationship to the world of politics which it purports to govern."[88]

Although this Borges-as-a-lens method of using the author's work to analyze an area of law has been used in numerous doctrinal areas, it appears to be particularly prevalent in the area of intellectual property. A significant number of legal scholarly papers discussing IP topics cite to Borges.[89] On the other hand, Borges has been

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80 Marco Jimenez, *Towards A Borgean Theory of Constitutional Interpretation*, 40 Pepp. L. Rev. 1 (2012).

81 *Id*. at 1.

82 *Id*. at 1–2.

83 *Id*. at 2.

84 Ed Morgan, *The Other Death of International Law*, 14 Leiden J. Int'l L. 3, 3 (2001).

85 *Id.* at 4.

86 *Id.* (quoting John Updike, *The Author as Librarian*, New Yorker, Oct. 30, 1965, reprinted in Jaime Alazraki ed., Critical Essays on Jorge Luis Borges 62–63 (1987)).

87 Morgan, *supra* note 84, at 4; *see also* Alfred Kazin, *Meeting Borges*, N.Y. Times (May 2, 1971), https://archive.nytimes.com/www.nytimes.com/books/97/08/31/reviews/borges-meeting.html, reprinted in Jaime Alazraki ed., Critical Essays on Jorge Luis Borges 127, 129 (1987) ("Borges' Buenos Aires, which is his whole world, is ineffably far-flung, a multitude, yet strangely empty of everything except place names …. The great city seems as vague as the endless pampas.")

88 Morgan, *supra* note 84, at 5.

89 *See, e.g.*, John Tehranian, *Toward A New Fair Use Standard: Attributive Use and the*

cited in a diverse range of other doctrines, ranging from evidence and civil procedure to free speech and artificial intelligence.[90] Perhaps the most helpful and accurate summary of the citations to Borges is the list itself, as any summary or simplification of it arguably amounts to interpretation, if not misrepresentation.

III. Index of Legal Scholarly Articles, Essays, Books, and Book Reviews That Reference Borges

The index below contains the full list of scholarly references to Borges I have located in the legal academic literature. This search involved using digital databases available through Hein Online, Westlaw, LexisNexis, and the Social Science Research Network (SSRN).[91] The index is simple. It contains two columns. In column one is a citation to each legal article, essay, book review, or book. Column two contains the numerical "depth" score discussed above. It indicates the level of depth with which Borges is discussed in the cited paper in that row. Here is a key to the usage of the numerical "depth" score[92]:

1—the paper cites to Borges only in footnotes
2—the paper mentions or cites Borges in the body text or title of the article
3—the paper discusses Borges throughout at least a full paragraph
4—the paper discusses Borges throughout at least a substantial portion of the paper

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Closing of Copyright's Crediting Gap, 96 S. Cal. L. Rev. 1 (2022); E.S. Burt, *Translatable and Untranslatable: Discourse Theory and Copyright Law*, 9 UC Irvine L. Rev. 335 (2019); Shubha Ghosh, *Remapping copyright functionality: the quixotic search for a unified test for severability for PGS works*, 39 Eur. Intell. Prop. Rev. 90 (2017); Lemley & Sherkow, *supra* note 55; Timothy T. Hsieh, *A Tale of Seven Districts: Reviewing the Past, Present and Future of Patent Litigation Filings to Form a Two-Step Burden-Shifting Framework for 28 U.S.C. § 1404(A)*, 31 Tex. Intell. Prop. L.J. 131 (2023); Dan L. Burk, *AI Patents and the Self-Assembling Machine*, 105 Minn. L. Rev. Headnotes 301 (2021); Lucas R. Yordy, *The Library of Babel for Prior Art: Using Artificial Intelligence to Mass Produce Prior Art in Patent Law*, 74 Vand. L. Rev. 521 (2021).

90 *See, e.g.*, Alexandra D. Lahav, *The New Privity in Personal Jurisdiction*, 73 Ala. L. Rev. 539 (2022); Katie Rose Guest Pryal, *Genre Discovery 2.0*, 28 Barry L. Rev. 1 (2023); Daphne Keller, *Platform Transparency and the First Amendment*, 4 J. Free Speech L. 1 (2023); Thomas Halper, *Lying and the First Amendment*, 7 Brit. J. Am. Legal Stud. 401 (2018); Dimitris Xenos, *The Guardian's Publications of Snowden Files: Assessing the Standards of Freedom of Speech in the Context of State Secrets and Mass Surveillance*, 25 Info. & Comm. Tech. L. 201 (2016); Marc Jonathan Blitz, *The Freedom of 3D Thought: The First Amendment in Virtual Reality*, 30 Cardozo L. Rev. 1141 (2008); Jeffrey Abramson, *Searching for Reputation: Reconciling Free Speech and the "Right to Be Forgotten"*, 17 N.C. J. L. & Tech. 1 (2015); Yordy, *supra* note 89; Shlomit Yanisky-Ravid, *Cynthia Martens, From the Myth of Babel to Google Translate: Confronting Malicious Use of Artificial Intelligence-Copyright and Algorithmic Biases in Online Translation Systems*, 43 Seattle U. L. Rev. 99 (2019); Benjamin L. W. Sobel, *Artificial Intelligence's Fair Use Crisis*, 41 Colum. J.L. & Arts 45 (2017).

91 Searches of these digital databases were performed using the search term "Jorge Luis Borges" in quotation marks. All results were analyzed to determine whether the result is appropriate to include in this index and, if so, what depth score should apply to it. The index contains search results in these databases up through August 2024.

92 Some limitations of this numerical "depth" scoring system are discussed *supra* in Section II.

Law Journal Citations 2020–2024	Depth
2024	
Ioan-Radu Motoarcă, Ai, Copyright, and Pseudo Art, 26 Yale J. L. & Tech. 430 (2024)	***3***
Leonard Brahin, The Real Persons Are the Corporations We Made Along the Way, 22 DePaul Bus. & Com. L.J. 1 (2024)	***3***
Richard Delgado & Jean Stefancic, What's Your Name? I Don't Like It, Please Change, 15 Ala. C.R. & C.L.L. Rev. 131 (2024)	***3***
Eyal Brook, From Mozart to Danger Mouse: Musical Parody, Humor and Copyright Law, 60 Cal. W. L. Rev. 425 (2024)	***2***
Dustyn Sams, Thinking About the Public Trust Doctrine in A Modern Context as Applied to Non-Fungible Tokens, 64 Nat. Resources J. 87 (2024)	***2***
Alan D. Miller, The Problem of Obscenity, 16 Wash. U. Jurisprudence Rev. 185 (2024)	***1***
2023	
Anaëlle Martin, Un regard borgesien sur l'État et le droit international: Tlön Uqbar Orbis Tertius (A Borgesian View of the State and International Law: Uqbar, Tlön, Orbis tertius), Hal Open Science (2023), available at https://ssrn.com/abstract=3893049 or https://hal.science/hal-04084232	***4***
Wes Henricksen, Silencing Jorge Luis Borges: The Wrongful Suppression of the Di Giovanni Translations, 48 Vt. L. Rev. 208 (2023)	***4***
Mala Chatterjee, Understanding Intellectual Property: Expression, Function, and Individuation, 70 J. Copyright Soc'y U.S.A. 57 (2023)	***3***
Daniel Markovits, Through Thin and Thick: Comments, 38 Conn. J. Int'l L. 121 (2023)	***2***
Daphne Keller, Platform Transparency and the First Amendment, 4 J. Free Speech L. 1 (2023)	***2***
Mark A. Lemley & Jacob S. Sherkow, The Antibody Patent Paradox, 132 Yale L.J. 994 (2023)	***2***
Katie Rose Guest Pryal, Genre Discovery 2.0, 28 Barry L. Rev. 1 (2023)	***2***
Daniel Markovits, Through Thin and Thick: Comments, 38 Conn. J. Int'l L. 121 (2023)	***2***
Timothy T. Hsieh, A Tale of Seven Districts: Reviewing the Past, Present and Future of Patent Litigation Filings to Form a Two-Step Burden-Shifting Framework for 28 U.S.C. § 1404(A), 31 Tex. Intell. Prop. L.J. 131 (2023)	***2***
Evan D. Bernick & Christopher R. Green, What Is the Object of the Constitutional Oath?, 128 Penn St. L. Rev. 1 (2023)	***1***
2022	
Harlan Grant Cohen, Journeys Through Space and Time While Reading International Law and the Politics of History, Found on A Palimpsest, Translated for You, the Reader, 36 Temp. Int'l & Comp. L.J. 129 (2022)	***3***

Law Journal Citations 2020–2024	**Depth**
William F. Patry, Independent creation— Arnstein v. Edward B. Marks Music Group, 3 Patry on Copyright § 9:35 (2022)	***3***
David Plunkett & Daniel Wodak, The Disunity of Legal Reality, 28 Legal Theory 235 (2022)	***3***
Xavier Bioy, Artistic Censorship and Freedoms in French Public Law, 50 Int'l J. Legal Info. 7 (2022)	***2***
Juan Pablo Scarfi, Francisco de Vitoria and the (geo)politics of canonisation in Spain/America, 35 L.J.I.L. 479 (2022)	***2***
Mira Moldawer, Myths and Clichés: The Doctrinal Myopia of Publicity Right, 22 UIC Rev. Intell. Prop. L. 50 (2022)	***2***
Travis Henry-Reid, Invaluable: Value Added Tax, Post-Colonialism, & the United States of America, 47 Brook. J. Int'l L. 527 (2022)	***2***
Jack M. Balkin, Constitutional Memories, 31 Wm. & Mary Bill Rts. J. 307 (2022)	***1***
John Tehranian, Toward A New Fair Use Standard: Attributive Use and the Closing of Copyright's Crediting Gap, 96 S. Cal. L. Rev. 1 (2022)	***1***
Alexandra D. Lahav, The New Privity in Personal Jurisdiction, 73 Ala. L. Rev. 539 (2022)	***1***
Amadou Korbinian Sow, On Reaching A Crime Scene Ahead of the Criminal: Dreams of Police and Technology from the 1970s to Today, 23 German L.J. 597 (2022)	***1***
Madhav Khosla, Is A Science of Comparative Constitutionalism Possible? How Constitutional Rights Matter., 135 Harv. L. Rev. 2110 (2022)	***1***
2021	
Tobias Smith, Borges, *The Keystone* and the Legal Imagination, in The Cabinet of Imaginary Laws (Discourses of Law) 1st Edition, edited by Peter Goodrich and Thanos Zartaloudis (Routledge, 2021)	***4***
Gustavo Tepedino, Texto e Contexto na Teoria da Interpretacao, 29 Revista Brasileira Direito Civil 11 (2021)	***3***
Shivprasad Swaminathan, Analogy reversed, C.L.J. 2021, 80(2), 366-396 (2021)	***2***
Paulo Barrozo, Law in Time: Legal Theory and Legal History, 31 Yale J.L. & Human. 316 (2021)	***2***
Dan L. Burk, AI Patents and the Self-Assembling Machine, 105 Minn. L. Rev. Headnotes 301 (2021)	***2***
Bernard Keenan, Carrier Bag Law, in The Cabinet of Imaginary Laws (Discourses of Law) 1st Edition, edited by Peter Goodrich and Thanos Zartaloudis (Routledge, 2021).	***2***
Aaron J. Walayat, China's Alaskan Jurisprudence, 28 U.C. Davis J. Int'l L. & Pol'y 43 (2021)	***1***

Law Journal Citations 2020–2024	Depth
Lucas R. Yordy, The Library of Babel for Prior Art: Using Artificial Intelligence to Mass Produce Prior Art in Patent Law, 74 Vand. L. Rev. 521 (2021)	*1*
Brian L. Frye, Deodand, 44 Seattle U.L. Rev. Supra 55 (2021)	*1*
Margaret Foster, Compulsory DNA Testing in Argentina: The Right to Truth Versus the Right to Privacy, 46 Brook. J. Int'l L. 703 (2021)	*1*
Gilad Abiri, Sebastián Guidi, The Pandemic Constitution, 60 Colum. J. Transnat'l L. 68 (2021)	*1*
Brian L. Frye, The Right of Reattribution, 5 Bus. Entrepreneurship 22 (2021)	*1*
2020	
Pedro Cabán Vales, Creación Literaria, Crimen Y Ley: Jorge Luis Borges Y Emma Zunz, 54 Rev. Jur. U.I.P.R. 147 (2020)	*4*
Alice Ristroph, Criminal Law as Public Ordering, 70 U. Toronto L.J. 64 (2020)	*3*
Margaret Montoya, "Who Is a Latcrit?": Jerome Culp and Angela Harris Provide Answers and Ways of Being, 18 Seattle J. for Soc. Just. 217 (2020)	*3*
Nicoleta Rodica Dominte, Originality in a Juridical and Non-Juridical Dimension, 66 Analele Stiintifice Ale Universitatii Alexandru Ioan Cuza Din Iasi Stiinte Juridice 49 (2020)	*3*
Antonia Layard, Researching Urban Law, 21 German L.J. 1446 (2020)	*2*
Patrick Barry, Errors and Insights, 99-Oct Mich. B.J. 54 (2020)	*2*
Ioannis Kalpouzos, Double elevation: autonomous weapons, and the search for an irreducible law of war, L.J.I.L. 2020, 33(2), 289-312 (2020)	*2*
Deb Candy, Beauty in the Bestiary, 45 Alternative L.J. 236 (2020)	*2*
Alberto Alvarez-Jimenez, International investment law, time, and economics: fixing the length of economic crises as a costs-allocation tool between host states and foreign investors, 19 World Trade Rev. 91 (2020)	*2*
Miriam A. Cherry, A Global System of Work, A Global System of Regulation?: Crowdwork and Conflicts of Law, 94 Tul. L. Rev. 183 (2020)	*2*
Patricio Nazareno, Impunity Reconsidered International Law, Domestic Politics, and the Pursuit of Justice, 33 Harv. Hum. Rts. J. 173 (2020)	*2*
Andrés L. Córdova Phelps, Contra Natura Y Otras Profanaciones, 54 Rev. Jur. U.I.P.R. 161 (2020)	*1*
Perry Dane, Law Clerks: A Jurisprudential Lens, 88 Geo. Wash. L. Rev. Arguendo 54 (2020)	*1*
Camilo A. Romero, May It Please the Soul: On the Practice of Law and Vulnerability, 69 J. Legal Educ. 662 (2020)	*1*

Law Journal Citations 2010–2019	Depth
2019	
Vilobaldo Cardoso Neto, Samyle Regina Matos Oliveira, Guilherme Guimaraes Santos Meneses, Plagio, Literatura e Breves Reflexoes sobre o Artigo 184 do Codigo Penal Brasileiro, 7 Rev. Electronica Direito Sociedade 257 (2019)	*4*

Law Journal Citations 2010–2019	**Depth**
Gabriel Schulman & Marcelo Luiz Francisco de Macedo Burger, Responsabilidade por Danos e Seguranca Juridica - Legislacao e Jurisdicao nos Contextos Alemao e Brasileiro, de Ramos, 22 Revista Brasileira Direito Civil 267 (2019)	***3***
Nicolae Popa, In Memoriam Vasile Stanescu - The Separation from a Coryphaeus of Science, Education, and Law Practice, 2019 Revista de Drept Public (n.s.) 13 (2019)	***3***
E.S. Burt, Translatable and Untranslatable: Discourse Theory and Copyright Law, 9 UC Irvine L. Rev. 335 (2019)	***2***
Vedant Tapadia & Mridushi Damani, The Right to Be Forgotten: An Aspect of Data Privacy, 1 LexForti Legal J. 80 (2019)	***2***
Sarika J. Angulo, Hon. Pedro A. Delgado-Hernández Judge, U.S. District Court for the District of Puerto Rico, Fed. Law., May/June 2019	***2***
Shlomit Yanisky-Ravid & Cynthia Martens, From the Myth of Babel to Google Translate: Confronting Malicious Use of Artificial Intelligence-Copyright and Algorithmic Biases in Online Translation Systems, 43 Seattle U. L. Rev. 99 (2019)	***2***
Sarika J. Angulo, Hon. Pedro A. Delgado-Hernandez, 66 Fed. Law. 26 (2019)	***2***
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IV. Conclusion

Legal scholars have cited Borges with increasing frequency over the past few decades. Indeed, citations to Borges and his work have increased every decade since the author's death in 1986. Others have noted that Borges has grown in popularity, and perhaps even in relevancy, since his death[93]—though he certainly was a literary giant even in his own time—and it should be no surprise his impact in the legal scholarship mirrors this trend. My aim here has been to make a record of this growing scholarly impact, while at the same time giving it context and trying to explain why it is relevant.

The time and effort required to compile the index above almost certainly outweighs its scholarly value or significance. This is not to say that academics will not find it useful—no doubt, some will—but the task of building the index has required months of work, and it is speculative, at best, to predict that others will make significant use of it. One consolation is that the nature of the index is such that it can be updated and revised as needed moving forward. This task will be lighter work now that the foundation has been laid.

The current index focuses almost exclusively on American law journals, although certainly law journals from other jurisdictions belong on the list just as much as those from the United States. Accordingly, I anticipate supplementing the index in the future not only with future American law journal articles, but also with current and future international law journal articles. In this task, I invite readers to send me any legal scholarly article, essay, book review, book, or book chapter I have left out of the index, but which belongs on it because the author references Borges. With such contributions, the index will become more complete, and therefore better. Accordingly, although the index can and hopefully will continue to grow,[94] it will never, God willing, ever be finished.

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93 *See* authorities cited *supra*, in note 14.

94 Updated versions of the index may be posted to this article's Social Science Research Network (SSRN) page, available here: Wes Henricksen, *Citing Jorge Luis Borges*, British Journal of American Legal Studies (forthcoming 2025), https://ssrn.com/abstract=4774873.

Br. J. Am. Leg. Studies 14(1) (2025), DOI: 10.2478/bjals-2024-0004 sciendo

Imagining Justice and Cancel Culture Through Iris Murdoch's "enchanter" Characters

Tracy Reilly[1]

ABSTRACT

In The Judicial Imagination: Writing After Nuremburg, *Lyndsey Stonebridge weaves a multi-faceted reminiscence of how twentieth-century literary and philosophical authors like Hannah Arendt, Rebecca West, and Iris Murdoch "forge[d] new literary idioms of judgment in their post-war encounters with the law."*[2] *Living and writing during the Nazi war crime trials, these astute female authors gave unique voice to the unprecedented juridical dilemmas of their time. Presciently, they each sensed an entire new world whose inhabitants were quite literally unable to imagine a form of legal justice adequate enough for the unspeakable crimes against humanity that the Adolf Eichmann and Nuremburg courts were attempting to adjudicate. In this article, which is an interdisciplinary examination of how literature can reveal solutions to the problems faced both in law and our broader societal forms of justice, I will examine how one of these writers—British novelist Dame Iris Murdoch—imagined this new genre of post-war evil as emanating principally from the acts of her characters in the everyday modern world. I will show how Murdoch saw modern evil not only as existing in the intentional acts of the murderous tyrants and dictators of the twentieth century, but also within our day-to-day egoistic actions in which we routinely—and largely unconsciously—fail to pay attention to the lives and needs of other people. My aim is to demonstrate how today's extra-juridical trend known as "cancel culture" is a direct consequence of the inattention and lack of love we often exhibit towards others, which Murdoch repeatedly decried in her literary and philosophical works, as well as a continued failure in our contemporary ability to imagine this modern brand of evil and the appropriate methods of justice for its consequences. By applying Murdoch's metaphysics regarding both the individual and collective task of achieving true moral growth—as exemplified by the complex plots, themes, and evil "enchanter" characters in her novels—to the trend of cancel culture, one can achieve an historically informed understanding of why the practice is alluring yet ultimately dangerous to both the legal system and our contemporary societal structure writ large.*

KEYWORDS

Iris Murdoch, enchanter characters, cancel culture, modern evil, post-critique, law and literature

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[2] Lyndsey Stonebridge, The Judicial Imagination: Writing After Nuremberg 3 (2014).

CONTENTS

> *A lawyer without history or literature is a mechanic, a mere working mason; if he possesses some knowledge of [literature], he may venture to call himself an architect.*
>
> *—Sir Walter Scott*[2]

Introduction

The obvious connections between the legal system and the "arts of language" date as far back to the beginnings of law in European history.[3] The modern Law and Literature movement, however, is widely thought to have had its origins in the 1973 publication of *The Legal Imagination* by James Boyd White, "who took seriously the possibility that legal rhetoric had something to learn from the language of fiction."[4] In a 1986 law review article examining the interdisciplinarity of the then-bourgeoning movement, Jane B. Baron reflects on the role of literature as contributing to the understanding of law:

> Literature, it is said, sheds light on law's gaps, rhetoric, and moral stance. It elucidates law's limits and highlight law's exclusions. Interpretive methods conventionally applied to fictional texts can be applied productively to legal texts, and narrative techniques that draw readers into novels and plays can be employed in the service of legal arguments.[5]

Almost a decade later, in her article *Outside the Tradition: Literature as Legal Scholarship,* Nancy L. Cook wrote to:

> encourage legal theorists and practitioners . . . whose struggles within the profession have drawn them, both forward and back, into other worlds of experience, to listen to the voices coming from all of those worlds, to experiment with speaking the languages that they hear, and to share with others the evolving products of their experimentation.[6]

In that same period, Law and Philosophy Professor Martha Nussbaum—known for her insightful and relevant interdisciplinary works—maintained that the

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2 Scott Horton, *Scott on Lawyers and History,* Harper's Magazine, 2023, https://harpers.org/2007/07/scott-on-lawyers-and-history/ (last visited on Aug. 18, 2023).

3 James Boyd White, *The Cultural Background of the Legal Imagination, in* Teaching Law and Literature 29, 29-39 (A. Sarat, C. Frank, and M. Anderson, eds., 2011).

4 Paul J. Heald, *The Death of Law and Literature: An Optimistic Eulogy*, 33 The Comparatist 20 (2009). *See also*, William H. Page, *The Place of Law and Literature*, 39 Vand. L. Rev. 391, 394 (1986) (noting that "law and literature were fused both professionally and intellectually" in American history between 1765 and 1840, when most lawyers were well-educated in literature, especially in the Greek and Roman classics, and thus "viewed a knowledge of these literary works as a professional necessity in an era in which oratorical eloquence and reference to universal principles were keys to success in the courtroom").

5 Jane B. Baron, *Law, Literature, and the Problems of Interdisciplinarity*, 108 Yale L.J. 1059, 1060 (1999).

6 Nancy L. Cook, *Outside the Tradition: Literature as Legal Scholarship*, 63 U. Cin. L. Rev. 95, 97 (1994).

novel constructs "potentially universalizable concrete prescriptions by bringing a general idea of human flourishing to bear on a concrete situation, which we are invited to enter through the imagination."[7]

Duly encouraged by these integrative approaches to legal justice, I will attempt in this piece—as a lawyer and legal scholar—to apply what I have learned from my recent formal studies in literature[8] to the concrete, contemporary problem of 'cancel culture,' an extra-juridical form of social justice aimed at correcting the moral wrongs of its perpetrators. In the traditional spirit of the increasingly unpopular Law and Literature movement,[9] I will show how a close examination of the works of twentieth-century British author, Dame Iris Murdoch (1919-1999) in conjunction with various core legal tenets may shed light on the demoralizing practice of cancel culture. Exploring how Murdoch's works of both fiction and metaphysics reveal her unique prescription for achieving moral good after the unprecedented human evils that had been committed across the globe in the twentieth century, I posit that her original theories can also be utilized today as tools to expose both the practical and moral inefficacies of cancel culture to achieve its supposed purpose.

To assist in this endeavor, I will draw heavily from Lyndsey Stonebridge's book The Judicial Imagination: Writing After Nuremberg, which provides a comprehensive examination of how Murdoch and other influential female authors attempted to find a way of writing that was "capable of rescuing political and juridical life from the abyss into which it had been thrown" after the war,[10] from within what has been termed "the morbid age" or "nighttime of civilization."[11] According to Stonebridge, having witnessed the Nazi trials' attempts at administering a form of justice appropriate for the unprecedented brand of crimes committed against humanity, Murdoch and other authors of her time such as Rebecca West, Hannah Arendt, and Muriel Spark understood that "[i]t was not simply a return to the law that was so desperately needed in the wake of Nazi lawlessness, but a way of imagining how what had happened profoundly changed the ways in which it was possible to think about justice and judgment in the first place."[12]

Thus, my aim in this article is to demonstrate that Murdoch imagined a modern theory of justice by illuminating how she uniquely perceived what Stonebridge calls a "new kind of evil"[13] on the rise after the world wars. This "banal" type of evil,

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7 Martha C. Nussbaum, Poetic Justice: The Literary Imagination and Public Life 8 (1995).

8 In May 2022, I received my M.A. in Literary & Cultural Studies from the University of Dayton. I am grateful to Dr. David J. Fine, my faculty advisor for my thesis, from which this work was derived. I would also like to thank all the professors throughout my six-year journey who made my return to a formal study of literature so rewarding.

9 *See,* Paul J. Heald, *The Death of Law and Literature: An Optimistic Eulogy*, 33 The Comparatist 20, 22 (2009) (lamenting that "even when Law in Literature scholarship is done well, the legal profession seems to yawn" because *inter alia,* "it is usually done by non-lawyers who, no matter how sophisticated and correct their legal analysis, find it hard to get the attention of those with law degrees)".

10 Stonebridge, *supra* note 2, at 3.

11 Benjamin J.B. Lipscombe, The Women are up to Something: How Elizabeth Anscombe, Phillipa Foot, Mary Midgley, and Iris Murdoch Revolutionized Ethics 63 (2022).

12 Stonebridge, *supra* note 2, at 2.

13 *Id.* at 27.

rather than presenting itself in the colossal figure of a tyrannic world ruler having supernal demonic traits, is subtly existent in the shallow, insidious personality traits in everyday humans, as Hannah Arendt famously observed in Adolf Eichmann's mannerisms as he stood trial.[14] Ironically, while cancel culture purports to be today's social cure-all for the perceived immoral acts of its perpetrators, I will reveal that, in actuality, the banality of evil is evident in a widespread proclivity to support and participate in this insidious movement.

To demonstrate in this article Murdoch's imaginings of a modern theory of justice for evil acts and how this specifically relates to cancel culture, I will proceed in several movements. In Section I, I will first briefly summarize cancel culture and explain why the legal community in particular should closely scrutinize its practices, which are dangerous to the core principles of First and Fourteenth Amendment jurisprudence. In Section II, I will provide a fulsome background of the post-war rise of Stonebridge's concept of 'modern evil' and discuss how literary and other authors of the time generally responded to this novel brand of immorality.

The next two sections will demonstrate how Murdoch herself contributed to that modern conversation regarding evil. More specifically, in Section III, I will examine how the evil figures in several of her novels known as her 'enchanter' characters epitomize the banality of evil that contributed to the rise of the highly destructive twentieth-century political regimes. In Section IV, I will turn to Murdoch's non-fiction writings on metaphysics, primarily interpreting her 1961 essay, *Against Dryness*, a robust critique of the inability of modern authors to appreciate and account for the moral conundrums that individuals experience in a post-war world that has lost its transcendent and religious values which had guided humanity towards the 'good' in previous centuries. Due to this conundrum of 'dryness', we have been left in the twentieth century with a dangerous, egoistic fantasy that humans are "totally free and responsible, knowing everything we need to know for the important purposes of life,"[15] which is a 'dry' view according to Murdoch because it fails to consider that humans are complex, contingent, and morally muddled.

Section V will consist of an original analysis and solution to Murdoch's problem of dryness, or our modern inability to look at and attend to the proclivities of evil that exist in everyday man, which I argue has grown even deeper and more palpable within today's societal framework. By uncovering the manifest traits of modern banal evil exemplified by Murdoch's individual characters and their complex relationships to one another, primarily in her novels The Flight from the Enchanter (1956) ("Flight") and A Fairly Honourable Defeat (1970) ("Defeat"), I will argue that Murdoch's sense of dryness portended dangerous mainstream ideological movements such as cancel culture, which can only be tempered by embracing and understanding the full particulars of individual experience. This intervention will be achieved by studying and scrutinizing cancel culture from Murdoch's lens of dryness, which illustrates how egoistic inattention

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[14] Stonebridge, *supra* note 2, at 30-31. *See also,* Amos Elon, Introduction to Hannah Arendt, Eichmann in Jerusalem: A Report on the Banality of Evil xii-xiv (2006) (observing that Eichmann's demeanor on the stand was not sinister or demonic, but rather ordinary, unthinking, and shallow or in a word, "banal").

[15] Iris Murdoch, *Against Dryness*, in Existentialists and Mystics: Writings on Philosophy and Literature 292, 287-295 (Peter Conradi ed., 1997) [hereinafter *Dryness*].

and fantasy has become our modern brand of post-war evil, and how to combat it by paying attention to and loving even the most fallen of our fellow individuals.

In Section VII, I will propose that the solutions to dryness intimated by Murdoch's philosophy are twofold: on the moral side, we must first recognize the egoism that invariably clouds our ability to see others as complex human beings and instead imagine a goodness that emerges from approaching others (and their particular circumstances) with a just and loving gaze. On the literary side, I will explain my own interpretation of her moral tenets by asserting that dryness is also the unfortunate result of our postmodern academic proclivity to shun the extremely difficult and often "messy" responsibility of truth-seeking that is achieved only by attending to and unpacking the full background of the individual.

I conclude the article by alleging that Murdoch would rather support a metaphysical-literary discourse that is predicated not upon the depersonalization and reduction of the individual and/or the text in favor of group-identity theorizing that today prevails in both cancel culture and literary critique, but rather upon the liberal values of viewpoint diversity and robust yet honest debate in the search for truth and the good and within the ability to understand, forgive, and even love those who are morally flawed within a Murdochian model of modern justice.

I. Why the Legal Academy Should Pay Attention to Cancel Culture.

Many people perceive the cancel culture movement[16] as an innocuous (and even beneficial) extra-judicial mechanism of accountability that is used to judge the misdeeds of an allegedly morally errant person. Contrarily, I submit that the disproportionate emphasis it places on the acts of the cancelled individual obscures an equally important moral problem that directly betrays several of Murdoch's metaphysical premises: the human proclivity to summarily reject and publicly castigate others for their past moral indiscretions.

Engaging in a systematic unpacking of Murdoch's literary and metaphysical writings as will be provided in this article will help to demonstrate that cancel culture acutely fails to acknowledge and attend properly to the uniquely obscure issue of postmodern evil. Such a conundrum inevitably leads to a skewed sense of both human volition and justice because it displaces the source of malice and immorality solely upon the bad deeds of the cancelled, yet abjectly fails to acknowledge its own moral problem: the inattentive and often self-righteous act of cancelling in its own right.

Since cancel culture unrealistically views humanity as basically good—as judged purely by its own, often illogically, ideologically, and politically motivated, standards—it is unable to imagine, tolerate, or understand any moral transgression within individual behavior. Nor can it account for or remedy the reality of the existence of evil on any level, unlike Christianity or other formal religious systems

[16] For a fulsome analysis of how cancel culture rapidly progressed from an innocuous practice of boycotting behavior or ceasing to support a person, business, or cause to a full-blown campaign to destroy the careers and lives of ordinary people, *see* Tracy Reilly, *Cancel [©opyright] Culture: A Legal Analysis of George Orwell's Nineteen-Eighty Four*, 21 Chi.-Kent J. Intell. Prop. 23, 26-27 (2021).

that preceded it. Like Murdoch's famous criticism of the modern novel of the twentieth century in which she stated that the inner lives of its characters are identifiable only by "dryly" applying public concepts to their morals, "which can only be constructed on the basis of overt behaviour,"[17] cancel culture creates a non-fictional, real-life social climate that is outward-looking because it manifestly rejects the slow, difficult, and messy process of inner moral growth, as it concomitantly dispenses with the reality of human imperfection and redemption.

Although cancel culture is a cultural/societal—rather than legal—form of justice, it directly implicates a bedrock principle of the U.S. Constitution: the First Amendment guarantee of free speech. From the time that human beings have cultivated the skill of language, they have debated and challenged each other's commonly held values and belief systems. As a democratic principle, the notion of 'free speech'—or the right to express one's opinions candidly without government restraint—dates back to the end of the fifth-century B.C. when it first appeared in Greek literature.[18] The Greek term for free speech, *parrhesia*, means "all saying" and encompasses the idea of speaking freely or frankly, which "implied openness, honesty, and the courage to tell the truth, even when it meant causing offense."[19]

Indeed, both throughout her history and today "America has uniquely expansive free speech protections, even for the most intolerant, offensive speech."[20] The traditional legal rationale for the protection of free speech in a democratic society has been advanced by the "marketplace of ideas" model first espoused by Justice Oliver Wendell Holmes, which maintains that "speech must be protected because it brings diversity, competition and efficiency to the collective search for truth."[21]

Notwithstanding the fact that the concept of free speech has been a bedrock principle in America since it was established in the First Amendment of the United States Constitution in 1791—along with freedom of religion, freedom of the press, and the right to assemble—it is currently undergoing an unprecedented attack by the rampant social media phenomenon of cancel culture. A form of online boycotting, cancel culture originated rather innocuously on Black Twitter in 2014 "as a way to show disapproval for a person's actions as a joke or lighthearted criticism."[22]

Certainly, the practice of boycotting public figures, corporate brands, or media outlets that advocate morally objectionable practices or opinions contrary to one's own has long been a tool to not only express widespread discontent but also to hold people responsible for their actions and policies, thus serving to help effectuate social change. Today's cancel culture, however, proceeds with an altogether different collective spirit and intent, as it has detrimentally intervened in the lives and livelihoods of regular, non-public individuals who have had their college

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17 Murdoch, *supra* note 15, at 288.

18 *Freedom of Speech,* History, Oct. 7, 2021, https://www.history.com/topics/united-states-constitution/freedom-of-speech.

19 Teresa M. Bejan, *The Two Clashing Meanings of 'Free Speech'*, The Atlantic, Dec. 2, 2017.

20 Erica Goldberg, *Free Speech Consequentialism,* 116 Columbia L. Rev. 687, 694 (2016).

21 Patrick Garry, *The First Amendment and Freedom of the Press: A Revised Approach to the Marketplace of Ideas Concept*, 72 Marquette L. Rev. 187, 191 (1989).

22 Christopher Brito, *'Cancel Culture' Seems to Have Started as an Internet Joke. Now It's Anything But*, CBS News, April 5, 2021, https://www.cbsnews.com/news/cancel-culture-internet-joke-anything-but/.

applications rejected due to social media tweets they made in high school and their jobs lost after making legitimate and often only "mildly offensive" comments.[23] In the wake of COVID-19, cancel culture has escalated from a relatively innocent practice of openly disagreeing with a person's actions or their cultural or political beliefs into a mal-intended form of scathing public punishment "that can turn a person or a brand into a pariah in a matter of tweets."[24]

Indeed, "the idea that a person can be 'cancelled'—in other words, culturally blocked from having a prominent public platform or career—has become a polarizing topic of debate."[25] While some believe that cancel culture is a method for holding people accountable for their actions and achieving social justice, others contend that it has become "a senseless form of social media mob rule" that encourages lawlessness, mutes voices, and violates the core principles of free speech.[26] Within the spirit and original intent of the First Amendment, Salman Rushdie candidly shared in a recent interview that he is not a fan of cancel culture, in part because "there is no right not to be offended" and more importantly, "you don't change unpleasant beliefs by suppressing them"; according to him, it is better to know where those unpleasant truths lie and where the enemy is, rather than having him "skulking in the shadows."[27] Philosopher and historian Christophe Van Eecke has observed a structural similarity between today's cancellations and the public executions and acts of torture that occurred in pre-industrial Europe, claiming that "their aims are disturbingly similar means of enforcing political or cultural conformity."[28]

Despite its vehement critics, however, the cancel culture movement is not without an army of staunch supporters who view it "as a way of defending the weak against higher powers" and providing the marginalized with "an amplified voice and a way to challenge damaging narratives promoted by the status quo."[29] In a world in which minority voices are routinely stifled and the underprivileged are denied access to political platforms on which to effectuate change, cancel culture is viewed as a mechanism to show that they are no longer participating in the social status quo.[30]

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23 Kelly Sadler, *Top 10 Recent Examples of Cancel Culture*, The Washington Times, Feb. 16, 2021, https://www.washingtontimes.com/news/2021/feb/16/top-10-recent-examples-cancel-culture/.

24 *See* Brito, *supra* note 22.

25 Aja Romano, *Why We Can't Stop Fighting About Cancel Culture*, Vox, Aug. 25, 2020, https://www.vox.com/culture/2019/12/30/20879720/what-is-cancel-culture-explained-history-debate.

26 *Id.*

27 Salman Rushdie, *Author Salman Rushdie: "Truth Is a Battle",* PBS.Org, June 16, 2021, https://www.pbs.org/wnet/amanpour-and-company/video/author-salman-rushdie-truth-battle-jrgobn/.

28 Christophe Van Eecke, *The Good Death—Cancel Culture and the Logic of Torture,* Quillette, Sept. 9, 2021, https://quillette.com/2021/09/09/the-good-death-cancel-culture-and-the-logic-of-torture/.

29 Ella Alexander, *Cancel Culture: A Force for Good or a Threat to Free Speech?*", Harper's Bazaar, July 14, 2020.

30 Nicole Dudenhoefer, *Is Cancel Culture Effective?,* Pegasus: The Magazine of the University of Central Florida, Fall 2020.

Moreover, according to the proponents of cancel culture, the right to free speech does not provide one with an entitlement to engage in hate speech.[31] Viewed in this context, cancel culture serves as an important social tool for those who have been perpetually victimized by bigotry, hatred, and racism, and who have no other political or social platform on which to counter such personal attacks. In other words, "'Cancel culture' forces people to recognize that their words and actions have consequences. There are no laws against you openly speaking your mind, but there are also no laws protecting you from being held personally accountable for the views you express."[32]

Many have also observed that relatively often the person who was supposed to be cancelled ironically winds up enjoying more media airtime and success from unduly and often irrationally sympathetic fans and observers.[33] On the other hand, as Aja Romano observes, "[e]ven though cancel culture seems to generate few lasting consequences for celebrities and their careers, some people view it as part of a broader trend they find deeply disturbing: an inability to forgive and move on."[34] Without doubt, cancel culture as holistically viewed from the perspectives of both the cancellers and the cancelled is, in itself, a complex and muddled form of discourse, the serious study of which should concomitantly consider and scrutinize both sides of the problem.

When analyzing the phenomenon of cancel culture from a Murdochian perspective as will be further accomplished in this article, it becomes apparent that neither the cancellers nor the cancelled are paying sufficient attention to the backgrounds and contingencies of their fellow human beings. To the extent that a cancelled person has truly engaged in race, sex, culture, religious, or gender discrimination, those inattentive acts serve to reduce the targets of their discrimination to harmful stereotypes. By the same token, when cancellers irresponsibly use the movement as an ideological tool not only to chill free speech and eviscerate valid viewpoints that run counter to the current moral majority, they also fail to conceive of their targets as fallible, imperfect persons who make mistakes along their arduous paths of cognitive and behavioral development. Moreover, the shutdown in communication that ensues from the acts of cancellers serves to weaken the democratic foundations upon which our free republic stands.

Either way, when taken to the extreme by either the canceller and/or the cancelled in this reductive and depthless manner, cancel culture negatively contributes to a society that: (1) is far too optimistic regarding the human propensity to consciously or subconsciously engage in thoughtless or even evil behavior; and (2) given the inevitable human propensity for evil, fails to provide any imaginative space for acceptance, love, or goodness to intervene and counter it. In this sense, I contend that cancel culture represents a contemporary, technologically enabled form of the postmodern brand of inattentive evil that concerned Murdoch in the twentieth century.

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31 Alexander, *supra* note 29.

32 Tommy Delp, *Creating a Culture of Accountability,* Reporter, Sept. 9, 2021, https://reporter.rit.edu/views/creating-culture-accountability.

33 Grace Walsh, *What Is Cancel Culture and Who Has Been Cancelled in 2022,* GoodToKnow, Feb. 7, 2022, https://www.goodto.com/entertainment/what-is-cancel-culture-607262.

34 Romano, *supra* note 25.

Even more profound, some experts in psychology contend that applying cancel culture to complicated human personality and behavioral traits is a "toxic way of simplifying complex issues and encouraging snap judgments that can easily result in overly harsh consequences in less offensive situations."[35] It can even be viewed as a result of psychological "splitting," which occurs primarily when young children separate the world into either good or bad and are not able to integrate or tolerate the two sides of someone or something.[36] Whereas grownups should ideally be "able to hold in our hearts the idea that someone can have different views from us and still be a good or decent person," cancel culture will not allow for such nuances.[37]

From a Christian perspective, cancel culture is particularly inimical because it fosters an unrealistic society in which humans should be flawless and atonement for sin is impossible—and worse, undesired. By the standards of cancel culture, "who you were in the past is who you are in the future," creating a hopeless society where there is no grace or forgiveness and no room for redemption or change.[38]

Most importantly with respect to this article, from a juridical perspective, cancel culture does not depend upon fact checking and truth-seeking, neither does it afford the cancelled individual an opportunity to be heard or a chance to publicly defend the assertions made against him/her. In her recent book, Citadels of Pride: Sexual Assault, Accountability, and Reconciliation, Martha Nussbaum describes a nuanced, forward-looking type of justice that she envisions with respect to the #MeToo movement, and which can equally be applied to cancel culture:

> Punishment is useful, and often necessary, to deter the offender, to deter others from offending, to express society's most important norms, and to educate society as a whole about the importance of good behavior. But punishment accomplishes its legitimate goals only if it is law-based, fair and nuanced, calibrated to the severity of the offense. Our #MeToo moment has seen its share of cases in which punishment has not been nuanced or calibrated, in which mass shaming takes the place of procedural justice. It has also spawned narratives in which reconciliation is dismissed in favor of retributive triumphalism.[39]

Like Nussbaum's observation of #MeToo, in which some women "prefer an apocalyptic vision in which the former oppressor is brought low,"[40] some cancellers are similarly bent upon this type of vision that Nussbaum believes merely "parades as justice."[41] Similar to Murdoch, however, Nussbaum envisions for #MeToo an

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35 Steven A. Hassan, *Why Cancel Culture by Anyone Is Harmful and Wrong,* Psychology Today, March 23, 2021, https://www.psychologytoday.com/us/blog/freedom-mind/202103/why-cancel-culture-anyone-is-harmful-and-wrong.

36 Alexander, *supra* note 29.

37 *Id.*

38 Genevieve Wilson, *No Room for Forgiveness in Our Cancel Culture,* Christian Today, Oct. 25, 2021, https://www.c.hristiantoday.com.au/news/no-room-for-forgiveness-in-our-cancel-culture.html.

39 Martha C. Nussbaum, Citadels of Pride: Sexual Assault, Accountability, and Reconciliation, xi (2021) [hereinafter Citadels].

40 *Id.*

41 *Id.*

altogether different brand of justice "that seeks reconciliation and a shared future,"[42] and this is the justice that should also be applied to both sides of the cancel culture spectrum.

Moreover, while it may be true that in some cases the accusations made against the cancelled person are true and warranted, "increasingly often, the accusation is highly interpretive and its reasoning tortuous."[43] And although it is a difficult enough process to understand a person whom we know well, it is practically impossible to realize and appreciate the actions of strangers based on limited and subjective information we receive via the ethernet that is often not vetted for accuracy. Contrarily, "Murdoch's ideal is a person who refuses to judge others, and who realises it is never possible to know other persons well enough to judge them."[44] This rings particularly true on the social media platforms where today cancel culture judges harshly, but safely from afar.

As further discussed in the next section, our contemporary penchant to flatten out, reduce, and dismiss the fulsome and complex life of another individual—whether that is accomplished by engaging in a cancellable act or actively cancelling someone based on such an act—is a unique brand of modern behavior bred out of our post-war culture which Iris Murdoch widely criticized for a variety of reasons related to her lifelong metaphysical journey to find good in what she perceived as a muddled world.

II. Literary Observations of Modern Evil and Justice

In her 2002 book, Evil in Modern Thought, Susan Neiman writes that the problem of evil is both "the guiding force of modern thought"[45] and "the root from which modern philosophy springs."[46] Ironically, she also observes that after the world witnessed the unspeakable and unprecedented acts of human evil that shaped the events of World War II, Hannah Arendt remained for quite some time the only major philosopher who reflected conceptually upon the subject—as opposed to others who offered mere historical and eyewitness reports of the atrocities committed across the globe—and that this was likely due to "the magnitude of the task" of attempting to unravel and understand the atrocities that occurred in the Nazi and Gulag death camps and, more urgently, how and why they manifested on such a global scale.[47]

Stonebridge observes Arendt's tenacity in recounting the "real story of the Nazi-constructed Hell," as she professed that "[h]uman history has known no story

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42 *Id.*

43 Helen Pluckrose & James Lindsay. Cynical Theories: How Activist Scholarship Made Everything about Race, Gender, and Identity—and Why This Harms Everybody 14 (2020).

44 Gillian Dooley, *Good Versus Evil in Austen's Mansfield Park and Iris Murdoch's A Fairly Honourable Defeat,* 1 Transnational Literature 9 (2009).

45 Susan Neiman, Evil in Modern Thought: An Alternative History to Philosophy 2-3 (2015).

46 *Id.* at 13.

47 *Id.* at 2.

more difficult to tell."[48] Stonebridge, however, provides a compelling picture of how Murdoch and other twentieth-century British novelists—among them, Muriel Spark and Rebecca West—also attempted to reimagine new forms of justice after Nuremberg. Murdoch, she claims, spent her literary life attempting to discover what kind of love is possible in our post-war world in which there exist "moral monsters" and "man is fox to man."[49]

Roula Ikonomakis similarly explains this point in time as "the dawn of a new, disquieting age where man, irrevocably disconnected from God and made mute by the horrors he himself begot has to redefine his world and his position in it by means he has not yet recognized."[50] Nonetheless, she (like Neiman) believes this task remains important because even though World War II is over, in many ways it refuses to end since its after-effects are still felt today and it continues to provide psychological explanations for the evil ways in which we remain prone to behave towards one another.[51]

Observing that "[o]ur understanding of evil has changed sharply over time,"[52] Neiman states that her goal in writing the book is "to use different responses to the problem of evil as a means of understanding who we have become in the three centuries that separate us from the early Enlightenment"[53] and "to explore what changes in our understanding of the problem of evil reveal about changes in our understanding of ourselves, and of our place in the world."[54] To achieve this goal, Neiman provides a provocatively original narrative describing how numerous authors throughout modern history have reflected upon the problem of evil through their works, claiming that "[s]eeing how earlier thinkers developed their views in response to real, historical problems makes it easier to see how contemporary thinkers might do the same."[55]

Neiman acknowledges that the map of modern evil she sketches in her book is not complete; therefore, she encourages her readers to expand upon the framework she offers with respect to the numerous "essential" authors she was unable to consider, but who may nonetheless vastly contribute to advancing the conversation.[56] In the following sections of this piece, I will answer Neiman's call by providing an analysis of Murdoch's unique picture of modern evil as shaped by her own experiences living in post-World War II England, and as imagined in her literary and metaphysical works of authorship. By pondering the subtle and often profoundly Gothic-themed images of human wickedness that Murdoch develops in her novels, I will offer an analysis of how she perceived the age-old problem of evil as it inevitably continued to persist in the modern and postmodern human consciousness, despite all of our Western attempts at civilization.[57]

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48 Stonebridge, *supra* note 2, at 6.

49 *Id.* at 155.

50 Roula Ikonomakis, Post-War British Fiction as 'Metaphysical Ethography': 'Gods, Godgames and Goodness' in John Fowles's The Magus and Iris Murdoch's The Sea, The Sea 19 (2008).

51 *Id.* at 13.

52 Neiman, *supra* note 45, at xiii.

53 *Id.* at 10.

54 *Id.* at 9.

55 *Id.* at xvii.

56 *Id.*

57 Murdoch refers to the modern age in which she wrote as an "age when warfare and

During the twentieth century Murdoch experienced the burgeoning advances in innovative technology and communication, as well as the pivotal developments in philosophy, psychology, and spiritualism that arose after the decline of Christianity and the secularization of British society that had begun in the late eighteenth century with industrialism and the growth of large cities.[58] The then-nascent study of psychology by pioneers, Abraham Maslow, Sigmund Freud, and Carl Jung (who also incorporated alchemy and mysticism in his work) also found influence by theosophists and spiritualists such as Aleister Crowley, Annie Besant, and Dion Fortune, each of whom proscribed an amalgam of moral philosophies never before witnessed by mass audiences in the past.

These and other figures of the twentieth century had inevitable influence on Murdoch's development of her own philosophy, as she directly or indirectly touched on many of their ideas in her works. Thus, reading Murdoch's novels from within the context of these unorthodox perspectives offers an uncommon backdrop that takes into consideration some of the more obscure, fascinating and—often terrifying—aspects of our modern human condition and universal quest for wisdom, as well as an all-encompassing picture of how and why evil exists, even within the consciousness of ordinary individuals who strive for goodness, yet often fail.

One of Murdoch's attributes as a writer is that she was on a deliberate and continuous journey towards insight and wisdom of the self and others in relation to the intricate universe of origin and being, which is often messy and always teetering upon the narrow plane that lies between the realms of good and evil. Murdoch, who openly did not believe in God, utilized in her novels an "apocalyptic vocabulary" that is "the essence of Gothic, which has classically equivocated about the natural/supernatural status of its data."[59]

Conradi observes that, "for [Murdoch] the supernatural has been internalised; we carry it, and the demonic around inside us, in the form of those secret imaginative lives in which we are always immersed, and which colour all we perceive."[60] In this manner, Murdoch often presents unconventional characters, situations, settings, and themes in her novels that defy the rigid and dogmatic depictions of good and evil that had been characteristic of the eighteenth and nineteenth-century novel. In her uniquely instructive style, Murdoch—along with other British authors of her age—offered transmundane and often mystically anagogical observations of the human condition that had not been previously portrayed in literature.

In The Place of Enchantment: British Occultism and the Culture of the Modern, Alex Owen explores the diverse role of *fin-de-siècle* or new occultism in British culture and writings that began in the late nineteenth century, which heralded an "acceptance of the idea that reality as we are taught to understand it accounts for only a fraction of the ultimate reality which lies just beyond our immediate senses."[61] According to Owen, this modern occultism became popular

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tyranny have achieved an intensity of cruelty which previous generations might have consigned to the barbaric past." *See* Iris Murdoch, Metaphysics as a Guide to Morals. Penguin 120 (1992) [hereinafter Metaphysics].

58 Callum G. Brown, The Death of Christian Britain: Understanding Secularisation, 1800-2000 16 (2001).

59 Peter Conradi, The Saint and the Artist 163 (2001).

60 *Id.*

61 Alex Owen, The Place of Enchantment: British Occultism and the Culture of the Modern 19 (2004).

because it "offered a spiritual alternative to religious orthodoxy, but one that ostensibly operated without the requirement of faith."[62]

It is not surprising that Murdoch would be attracted to the new movement since her novels "serve as mirrors of what it means to live in a modern world in which individuals look for meaning in a world without a personal God."[63] Even though Charles Taylor famously stated that "[e]veryone can agree that one of the big differences between us and our ancestors of 500 years ago is that they lived in an 'enchanted' world and we do not,"[64] Owen submits that modernists routinely utilized heterodox themes such as metaphysical quests and spiritual encounters in order to explore an innovative sense of self.[65]

Richard C. Kane further describes this "intriguing" phenomenon that emerged in several post-war British authors as an "odd combination of the moral and the macabre" in which authors like Murdoch who utilize their fiction to search for the good "within the realms of the grotesque" make significant moral statements by experimenting with a variety of demonic elements.[66] Describing this brand of writing as "the new morality" or "a rediscovered morality," Kane maintains that the "didactic intent of these more recent writers is to rout the demons—even though they use methods that themselves often seem diabolic."[67] Within this "gathering of devils" in modern British fiction, Kane observes how demonic imagery is often used by Murdoch and others to emphasize the dark powers of their exotic, charismatic figures, obviously believing that only such powerful compelling forces could "blast society out of its moral lethargy"[68] that Murdoch laments in *Against Dryness*.

According to Ikonomakis, Murdoch thought that the goal of the novel is "to speak human, the true universal language of love and hatred, pain and joy, suffering and pleasure, misery and happiness, the language of diversified experience."[69] It "has to make us see the human scene in both its dark and light moments, because that is how it is in real life."[70] While Murdoch experiments with a myriad of profligate personalities on the fringes of the demonic, no other characters exemplify her ability to shock us back to our sense of evil than Mischa Fox and Julius King, the primary "enchanter" figures in Flight and Defeat, respectively.

III. Murdoch's Fictional 'Enchanter' Characters

The character of the enchanter is the literary mechanism by which Murdoch often presents her Gothic picture of modern evil as being alive and well in Great Britain in the wake of the two world wars. Within various settings, these strange and elusive

62 *Id.* at 12.
63 Gary Browning, Why Iris Murdoch Matters 29 (2018).
64 Charles Taylor, *Western Secularity*, Rethinking Secularism 2 (2011).
65 Owen, *supra* note 61, at 7.
66 Richard C. Kane, Iris Murdoch, Muriel Spark, and John Fowles: Didactic Demons in Modern Fiction 11 (1988).
67 *Id.* at 14.
68 *Id.* at 125.
69 Ikonomakis, *supra* note 50, at 58.
70 *Id.*

figures surreptitiously float through the streets of London and the remote fringes of the British countryside and intentionally wreak havoc on the other characters in her novels, mainly from a psychological perspective. Within this theme in which the effects of diabolism are explored, there are characters who enchant and those who are enchanted "in an intricate network of flight and pursuit" from and to one another.[71]

The enchanter characters "are mysterious, magical figures who represent the forces at work in an ambiguous universe, while the enchanted suffer from ignorance and impotence and so regard these powerful beings with fascination and loathing."[72] With no higher being or metaphysical philosophy to guide them, "dominant types will mold more formless beings into servile dependency, so too will those in need of a controlling power often enslave themselves to an enchanter figure."[73]

Both Flight and Defeat are novels that explore the deadly dance that ensues among the enchanter and their enchanted. They are "open" novels in the sense that they contain a myriad of characters who interrelate through intertwined plots even though they are not integrated into a single system.[74] However, they both are also centered around a primary enchanter figure who utilizes his power, secrecy, and evil brand of magic negatively to influence influence all the other characters, often to the point where the enchanted themselves become secondary enchanter figures to even weaker personalities than their own. Both stories also begin remarkably similarly in that the reader is introduced to the primary enchanter by way of the other characters' anticipating and gossiping about his imminent return to London after an extended time overseas. The following sub-sections provide a brief introduction to the plots and characters in Murdoch's major enchanter novels, Flight and Defeat, both of which will be more fully explained in Section IV in conjunction with a discussion of Murdoch's metaphysics.

A. Mischa Fox as Enchanter in The Flight from the Enchanter

Murdoch first experimented with the enchanter character in Flight, her second novel published in 1956, the main themes of which include sex and power, the gender wars of the nineteenth century "and the inconvenient irrationality of our passions."[75] The novel follows the trials and tribulations of characters who fall under the enticing spell of antagonist Mischa Fox, a worldly and wealthy enchanter figure who, upon returning to London after spending a lengthy period of time in America, descends into a loosely interconnected group of characters and proceeds to create havoc in their lives. Upon hearing of Mischa's most recent arrival into London, one character, John Rainborough, while proclaiming that Mischa was one of his best friends, nonetheless admits that "yet in his heart he now felt fear and almost hatred of the man. He never felt easy in his mind so long as Fox was in the country."[76]

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71 Linda Kuehl, *Iris Murdoch: The Novelist as Magician/The Magician as Artist*, 15 Modern Fiction Studies 347, 348 (1969).

72 *Id.*

73 Kane, *supra* note 66, at 12.

74 Conradi, *supra* note 59, at 29.

75 Patricia Dunker, Introduction, The Flight From the Enchanter by Iris Murdoch vii-xiv, viii (2000).

76 Iris Murdoch, The Flight From the Enchanter, 29 (Vintage (Rand) 2000) [hereinafter Flight].

As the title of the novel intimates, Rainborough and most of the other characters are compelled to follow a hypnotic pattern of running to and then away from Mischa, who appears intermittently within their intimate circle yet who remains coldly and devilishly elusive and mysterious:

> No one knows Mischa's age. One can hardly even make a guess. It's uncanny. He could be thirty, he could be fifty-five . . . No one knows his age. No one knows where he came from either. Where was he born? What blood runs through his veins? No one knows. And if you try to imagine you are paralyzed. It's like that thing with his eyes. You can't look into his eyes. You have to look at his eyes. Heaven knows what you'd see if you looked in.[77]

On this particular return to London, Mischa becomes obsessively interested in purchasing the *Artemis*, a magazine that was first established to support women's emancipation, but is currently being managed by the original owner's son, Hunter Keepe, and has run out of ideas, relevance (and money). In order to achieve this goal, Mischa utilizes the services of his maniacal assistant, Calvin Blick, who is described as "the dark half of Mischa Fox's mind" who "does the things which Mischa doesn't even think of. That's how Mischa can be so innocent."[78] As such, Calvin can also be considered a secondary enchanter figure in his own right. Other secondary enchanters include brothers Stefan and Jan Lusiewicz, Polish immigrants who convince Rosa Keepe, Hunter's sister, to engage in sexual threesomes that will further complicate her relationship with Mischa.

Mischa has had a past romantic interlude with Rosa, the details of which the reader is told little, except that it manifested in a hellish, psychological power play:

> [W]eek after week and month after month it was as if Mischa were dragging her by the wrist through hell. There was a demon in Mischa which she had never been able to know and which had never allowed them to be at peace. Always and at the last moment and without apparent reason there would come the twist, the assertion of power, the hint of a complexity that was beyond her, the sense of being, after all that had passed between them, a pawn in Mischa's game.[79]

While Rosa manages at first to disentangle from this demented and one-sided relationship with Mischa, like the other characters, she is eventually drawn fully back into his charms upon his re-return to their London circle, as is Nina, Rosa's young dressmaker who emigrated to London from Eastern Europe. As Mischa's isolated and vulnerable servant, Nina ultimately commits suicide due to her overwhelming fear of being deported.

As is characteristic of Murdoch's enchanter novels, Mischa's evil character is juxtaposed against a "saint" figure who engages, however imperfectly and often ineloquently, in acts of goodness to contrast with those of the enchanter, even though it is ultimately the evil acts that prevail at the end of the novels. The character who is

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77 *Id.* at 35.
78 *Id.* at 33.
79 *Id.* at 241.

the closest to being considered a saint in Flight is Peter Soward, whose "good nature sometimes approaches imbecility."[80] Peter is another of Mischa's acquaintances who is an historian of ancient empires which rose and fell before Babylon and is the only character that has any meaningful, attentive interaction with Mischa.

In Defeat, fourteen years after the publication of Flight, Murdoch perfected her conception of the enchanter in the evocatively evil character of Julius King, who is arguably the most didactic and diabolical within her vast canon of fiction. Whereas Mischa worked most of his charms lingering in the background of Flight and indirectly through the overtly demonic Calvin Blick, Defeat literally opens, continues, and ends with the full and ominous presence of Julius and his undisguised and intentional machinations that cause devastation to most of the other characters in the novel.

B. Julius King as Enchanter in A Fairly Honourable Defeat

Very much like Mischa, Julius is a mysterious, international figure who floats in and out of London and re-engages with the same group of characters, who are as unaware as they are charmed by his devilish tricks and godgames employed to reveal their weaknesses and control their destinies. Whereas the reader of Flight is never told Mischa's career, we are informed in chapter one of Defeat via the gossip between husband-and-wife Rupert and Hilda Foster, that Julius comes from old money and recently gave up his career as a successful biochemist who was working in biological warfare to create a nerve gas and a type of anthrax that resists antibiotics.

The story opens as Rupert and Hilda are celebrating their twentieth anniversary in the backyard of their middle-class neighborhood and anticipating Julius's return to London. Rupert is a pseudo-intellectual who works in the Civil Service and is obsessively engaged in writing a book about morals. Hilda, who did not attend university because she married young, tends to the couple's materialistic home and their son Peter, who is a Cambridge dropout. Morgan Browne, Hilda's sister, is Julius's former lover who leaves her husband Tallis, the saint figure in the novel, to pursue a romantic relationship with Julius.

Like Rosa in Flight, even after being dropped and cruelly treated by her enchanter, Morgan remains under his dubious spell, which leads to much drama and chaos in the story, as described in the scene in which they first reunite: "The sheer physical authority of his presence almost reft her of breath. If only he would be quiet with her, stop somewhere and be quiet and let her experience that presence."[81] The other main characters who will be affected by Julius's machinations include Simon Foster, Rupert's brother, and his egoistic husband Axel Nilsson.

The unorthodox and eclectic occult revival that inspired Murdoch's major enchanter characters such as Mischa Fox and Julius King drew extensively from a wide array of spiritual traditions and practices, all of which were united by "a correspondence between things earthly and spiritual."[82] Although Murdoch was not conventionally religious, it is nonetheless within this supernal realm that she envisioned her unique Neoplatonic brand of metaphysics that enriches us with the

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80 *Id.* at 35.

81 Iris Murdoch, A Fairly Honourable Defeat 88 (Penguin 1970) [hereinafter Defeat].

82 *See* Owen, *supra* note 61, at 21.

possibility of a modern moral philosophy that explores the sovereignty of good as it may be achieved by love and attention to the other.

In this sense, as Ikonomakis observes, Murdoch's is a philosophy that envisions humans as both biological and spiritual beings who long for the divine, or "for ways to communicate with the world, which are beyond the narrow and deficient limits of reason or science," thus revealing a "neo-mystic tendency towards a new perception of the sacred and the godly."[83] Like Nietzsche, who before her debunked pre-modern theorems for "founding grand metaphysical systems upon the faith that the good man is the opposite of the evil man, rather than just a different expression of the same basic impulses that find more direct expression in the evil man,"[84] Murdoch's metaphysical perspective similarly embraces a frighteningly realistic portrait of the complex muddle of good and evil, which forms the basis of the portrayal in her novels of "two somehow connected magicians involved in a power struggle": the enchanter and the saint who are in a metaphysical battle between magic and goodness.[85] As will next be discussed, in addition to her fictional plots and characters of enchantment, Murdoch's unique brand of metaphysis exemplified in her non-fictional works assists in the unraveling of her modern picture of evil.

IV. Murdoch's Metaphysical Concept of 'Dryness'

Murdoch approaches the study of metaphysics by a reading of its history and an insistence on individual experience with an understanding that "[m]erely logical reasoning cannot generate experiential truths; rather, experiential evidence allows for ways of reading experience as exhibiting truth, goodness, and unity."[86] Browning describes Murdoch's brand of metaphysics as providing "an overall way of understanding experience, linking religion, art, personal development, morality and politics to one another and to an overall unity of experience that allows for difference and contingency."[87] He describes Murdoch's novels as being

> designed to comprehend experience. Characters are shown as seeking the good and straying from it in ways that show how the pilgrimage to goodness is a particular and arduous road. The novels disclose the singularities of roads to goodness and particular personifications of evil.[88]

By recognizing what Murdoch often refers to as the "messy" or "muddled" backgrounds that individuals bring to the table when confronted with making good (moral) or bad and sometimes evil (immoral) decisions when faced with situations that intertwine and affect themselves and others, she displays an appreciation of the myriad of complexities that are invariably embedded within the human psyche as a result of each person's unique life experiences, which make up their whole person.

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83 Ikonomakis, *supra* note 50, at 160.

84 *See* "Beyond Good and Evil." Wikipedia, https://en.wikipedia.org/wiki/Beyond_Good_and_Evil.

85 Ikonomakis, *supra* note 50, at 37.

86 Browning, *supra* note 63, at 21.

87 *Id.* at 20.

88 *Id.* at 22.

Indeed, in her 1961 essay, *Against Dryness*, which is a multi-level critique of the twentieth-century novel, Murdoch presents the key feature she believed distinguished the dilemma of the post-war, twentieth-century writer living in a scientific and anti-metaphysical age that has lost its religious backdrop: a "dramatic view of the individual as a solitary will"[89] who is "seen as capable of self-knowledge by methods agreeable to science and common sense."[90] From the confines of our post-war age of tension, chaos, and confusion, "a naturally human will to power, order and control emerges, that overlooks the indispensable details of the world and the complexities of human experience."[91]

This occurs because of our failure to "see man against a background of values, of realities, which transcend him"[92] which is due to the modern loss of the strength of society, the profound belief in God, and "a faith in the absolute significance and unity in the moral world."[93] Whereas our nineteenth and eighteenth-century ancestors lived during a time in which they experienced both confidence and consolation in the solidity of society, religion and reason, in the twentieth century "God, Reason, Society, Improvement and the Soul are being quietly wheeled off."[94]

In this realm, twentieth-century man "finds his religious and metaphysical background so impoverished that he is in some danger of being left with nothing of inherent value except will-power itself."[95] Murdoch, however, is highly suspicious of the ability of this supposedly self-adjusting, independently brave literary hero to continue to impart a moral philosophy "which has been unobtrusively supported by religious belief and which is now with frightful rapidity disappearing."[96]

Within this backdrop, Murdoch provides a critique of the modern existentialist novel, which "shows us freedom and virtue as the assertion of will."[97] It is "cheerfully Godless" and "obsessed with the powerful self-assertive figure of [the] hero" who exudes "Luciferian pride in the individual and in the achievements of science."[98] On account of the new values of science that modern man takes for granted, the twentieth-century novel has become either *crystalline* or *journalistic*; that is, it is either a small quasi-allegorical object portraying the human condition and not containing 'characters' in the nineteenth-century sense, or else it is a large shapeless quasi- object, the degenerate descendant of the nineteenth-century novel, telling, with pale conventional characters, some straightforward story enlivened with empirical facts. To continue to view man in this dry manner, Murdoch maintains will engender "a dangerous lack of curiosity about the real world, a failure to appreciate the difficulties of knowing it."[99]

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89 Murdoch, *Against Dryness, supra* note 15, at 287.
90 *Id.* at 288.
91 Ikonomakis, *supra* note 50, at 309.
92 Murdoch, *Against Dryness, supra* note 15, at 290.
93 Iris Murdoch, *Existentialists and Mystics,* Existentialists and Mystics: Writings on Philosophy and Literature 222 (Peter Conradi, ed., Penguin 1997) [hereinafter *Existentialists*].
94 *Id.* at 224.
95 *Id.*
96 *Id.* at 229.
97 *Id.* at 223.
98 *Id.* at 226.
99 Murdoch, *Against Dryness, supra* note 15, at 293.

From this context, Murdoch laments in *Against Dryness* the continued insistence on a "simple-minded faith in science, together with the assumption that we are all rational and totally free."[100] In a world in which nothing transcends man, the concept of a "facile idea of sincerity" has replaced that of the "hard idea of truth," leading us to suffer "a general loss of concepts" and "the loss of a moral and political vocabulary."[101] Murdoch blames this dilemma, in large part, on what she considered "[o]ur inability to imagine evil"[102] within the unjustifiably optimistic image in which modern man held of itself, especially in the wake of World War II and its horrors.

Indeed, Murdoch complained that one of the wrongs of our modern literature is that it morally envisions man as the "monarch of all he surveys" and thus "totally responsible for his actions" because he is imbued with a type of "utilitarian optimism" by virtue of which he is considered a free, rational actor and viewed as "eminently educable."[103] To disincentivize this far too sanguine picture of human nature, she utilized enchanter characters to employ "hellish imagery to jolt readers into an awareness of real evil"[104] with the purpose of understanding how good and evil operate in a Godless world.[105]

Concomitantly, Murdoch believed that one of the consequences of post-Enlightenment philosophical thinking—or the phenomenon in which humans are viewed as free, solitary, and "surrounded by an easily comprehended empirical world"[106]—is that after surviving two world wars, we now have such an optimistic picture of ourselves that we are unable to process the egoism that still persists within us, which she believed must be acknowledged, examined, and lessened in order to find true goodness. Murdoch blamed modern literature, in part, for this overly confident attitude, lamenting the irony that it is so concerned with violence, yet it contains few convincing 'pictures of evil'[107] that would better assist us in perceiving and practically achieving the good.

In The Sovereignty of Good, Murdoch states that "we have to accept a darker, less fully conscious, less steadily rational image of the dynamics of the human personality."[108] In the worlds represented in Murdoch's fiction, her troubled, failed, and often morally unscrupulous—if not, evil—characters provide the opportunity to present her readers with often uncomfortable portraits of the all-too-human, potentially evil traits that reside not only within the other, but also within ourselves. It is only by an uncompromising, often drastic, recognition of the depths of our own selfishness that true goodness may be discernable and achievable.

For example, in Defeat, one of Julius's deviously intricate plots is to concoct a fantastical love affair between Rupert and his sister-in-law Morgan. By forging love letters to and from the unaware and naive duo, Julius manages to have each

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100 *Id.*
101 *Id.* at 290.
102 *Id.* at 294.
103 *Id.* at 288.
104 *See* Kane, *supra* note 66, at 150.
105 Ikonomakis *supra* note 50, at 35.
106 Murdoch, *Against Dryness, supra* note 15, at 290.
107 *Id.* at 294.
108 Iris Murdoch, The Sovereignty of Good 42 (Routledge 1971) [hereinafter Sovereignty].

believe that the other has fallen hopelessly in love with them. Whereas Rupert is portrayed as a successful, content, and happily married man in the beginning of the novel, his character is easily manipulated as he egoistically engages with Morgan within his fantasy world concocted by Julius, fooling himself into believing that by reciprocating her love for him he is helping her:

> It's just a matter of steadying her through, he thought. In extremities human beings need love and nothing else will do. Morgan was hungry for a steady unviolent unpossessive love which neither Tallis nor Julius could give her. I cannot refuse this challenge, Rupert told himself. All my life as a thinking man has led me to believe in the power of love. Love really does solve problems. To adopt a mean safe casual solution here would be unjust to both myself and Morgan. She has called me wise; let me attempt to be so.[109]

Through this half-funny, half-tragic monologue in which Rupert pompously convinces himself to forge into new romantic grounds with Morgan (and deceive Hilda in the meanwhile), Murdoch exemplifies the central problem that defines dryness: it pretends that we are completely rational and self-transparent and that we should innately know to engage or not engage in certain acts. This fantasy inevitably leads us to be over-optimistic of our acts and intentions and those of others, as well as a failure of imagination regarding their likely outcomes.

As Conradi has astutely observed, Julius's brand of evil "wisdom" is exactly what Rupert's incomplete morality, which cannot correctly conceive of the nature of evil, "needs to accommodate if it is not to be vulnerable through its silly optimism."[110] Such optimism, along with Rupert's jejune inability to calculate Julius's mischief into the equation of his and Morgan's sudden love affair, serve to mark his tragic demise at the end of Defeat. As Gillian Dooley claims, "Rupert thinks that he can keep his life orderly, bestow love where it is needed, and live the good life openly and honestly, but disorder – or reality – overcomes him."[111]

Morgan also suffers for her naivety and inattention to her dilemma with Rupert, as Murdoch informs her readers that Morgan "had a capacity for dealing with one thing at a time, and not worrying about, almost not seeing, other features of the situation."[112] Amos Elon similarly unpacks Hannah Arendt's description of evil that corrupted the moral law under the Nazis: "it can spread like a fungus over the surface of the earth" and it "comes from a failure to think."[113] In a similar fashion, Murdoch brilliantly employs her wicked enchanter characters who ironically evoke and then manipulate the less than overt—yet nonetheless evil—tendencies that exist just below the surface of the other characters.

Indeed, there are more ways than one to to portray evil for Murdoch and so, unlike the psychologically powerful and bombastic enchanter figures, Murdoch's everyday characters do not always engage in neatly conscious and intentional acts of evil, but rather—like Rupert and Morgan—they exemplify a subconscious

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109 Murdoch, Defeat, *supra* note 81, at 232.
110 Conradi, *supra* note 59, at 206.
111 Dooley, *supra* note 44, at 12.
112 Murdoch, Defeat, *supra* note 81, at 286.
113 Elon, *supra* note 14, at xii-xiv.

solipsistic inattentiveness and thoughtlessness which, like Arendt, she equated to evil, or at least the precursor to evil.

For example, in Murdoch's 1973 novel THE BLACK PRINCE, the narrator and antagonist Bradley Pearson claims, when uncharacteristically reflecting on his "blameworthy" past deeds, "I daresay human wickedness is sometimes the product of a sort of conscious leeringly evil intent . . . But more usually it is the product of a semi-deliberate inattention, a sort of swooning relationship to time."[114] Dean Cocking and Jeroen Van den Hoven describe Murdoch's usage of the term "swooning relationship to time" here as an accrual of evil in which incremental harms accumulate over time, "in the everyday activities of life, which in itself, in moderation, is not so bad, but which may lead to loss of sight where one is headed, and of responsibility for one's conduct and oneself over time."[115]

This notion of covert or cumulative wickedness is also implicated in Arendt's famous term, "the banality of evil," which she coined in her 1963 book, EICHMANN IN JERUSALEM: A REPORT ON THE BANALITY OF EVIL, in order to describe former SS Officer Adolf Eichmann's actions throughout the Holocaust as thoughtless, unmotivated evil that is banal because it is mundane and ordinary.[116] In the sense that Eichmann defended himself during his trial on the grounds that he was merely acting as a "law abiding citizen" by following Hitler's orders that had "possessed the 'force of law,'"[117] he was similar to a Murdochian character who becomes enraptured by the spell of a powerful enchanter and compelled under his magic to commit wicked acts. In the Postscript of her book, Arendt concludes that

> Eichmann was not Iago and not Macbeth, and nothing would have been farther from his mind than to determine with Richard III "to prove a villain." Except for an extraordinary diligence in looking out for his personal advancement, he had no motives at all. And this diligence in itself was in no way criminal; he certainly would never have murdered his superior in order to inherit his post. He merely, to put the matter colloquially, never realized what he was doing.[118]

Pendas further explains the foundation of Arendt's insight on the notion of modern banal evil, maintaining it is not a claim that Eichmann was ignorant of the fate of the Jews he was deporting, in which case he would not have been criminally liable. Instead, what he failed to realize was the moral dimension of what he was doing. It was this that made his evil banal. The incapacity for judgment was no idiosyncratic glitch in Eichmann's personality but an inherent potential within the moral structure of modern life itself.[119]

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114 IRIS MURDOCH, THE BLACK PRINCE, 181 (Penguin 1973).

115 DEAN COCKING & JEROEN VAN DEN HOVEN. EVIL ONLINE 115 (Wiley Blackwell 2018).

116 Devin O. Pendas, *'Eichmann in Jerusalem', Arendt in Frankfurt: The Eichmann Trial, the Auschwitz Trial, and the Banality of Justice,* 100 NEW GERMAN CRITIQUE 77, 83 (2007).

117 HANNAH ARENDT, EICHMANN IN JERUSALEM: A REPORT ON THE BANALITY OF EVIL 24 (1963).

118 *Id.* at 287.

119 PENDAS, *supra* note 116, at 89.

Arendt further observes that Eichmann "was not stupid"; however, it was his "lack of imagination" and "sheer thoughtlessness" that "predisposed him to become one of greatest criminals of that period."[120] It is precisely within this subtler—yet equally morally destructive—pattern of inattention and egoistic fantasy that Murdoch places her enchanted characters in order to show that, while they may not intentionally concoct acts of wickedness, they nonetheless contribute to our modern moral malaise because they cannot accurately see and attend to those overt purveyors of evil who repeatedly enchant them, let alone witness the enchantment-like qualities that manifest within their own behavior.

In addition to Rupert and Morgan in Defeat, Rosa Keepe is perhaps the character in Flight who best portrays this less intentional, yet still destructive, brand of inattention that begets evil. Rosa is so preoccupied with her own fantasy involving her misconceived relationship with Mischa that she utterly fails to notice the fact that other characters—her brother and Nina, both of whom were similarly under Mischa's enchantment—are desperately reaching out to her for assistance, which she ignores on multiple occasions because she is too busy with her own dramas. It is not until the end of the novel when Calvin shakes Rosa out of her fantasy about Mischa that she realizes that she is likely responsible, at least indirectly, for Nina's suicide, which could have easily been prevented with a few facts about the status of her immigration that a friend like Rosa could have provided.

Equivalently, those who today participate in calling out to the world the moral failures of others through cancel culture also tend to view the human condition with far too much optimism, not fully appreciating the dark and often unconscious aspects of the undeveloped personality that leads individuals to act in the nefarious ways they do, in addition to not recognizing their own murkiness, self-absorption, and lack of self-transparency. I assert that while the participants in cancel culture sincerely believe they are instruments of justice who are vindicating the evil acts of those they cancel, like Murdoch's enchanters, they are so lost within their moral fantasy of picturing the evil of the cancelled that they cannot see that their own highly critical and one-sided actions may be equally destructive and, potentially, evil.

Instead of engaging in self-analysis or a deep analysis of the persons whom they cancel, they take the more comfortable route in reducing the complexity of the other to a flat stereotype which is buttressed by a single snapshot of the otherwise multitudinous life of the cancelled. Put differently, rather than acknowledging that: this is John, who is human and imperfect and so made some bad judgments in his past due in part to having grown up in a racist family and environment in the 1960s, cancellers reduce the individual complex life of John to a nameless, white, patriarchal racist who at age fifty deserves retribution rather than forgiveness, let alone a just, loving gaze. It is this banal and subconsciously covert evil that slowly swoons in time and sows the seeds for movements such as cancel culture.

While some cancellers—like those whom they cancel—may either engage in such evil acts intentionally (like Julius) or subconsciously (like Rupert, Morgan, Bradley and Rosa), a curious Murdochian journey unfolds before one who attempts to unravel and differentiate between the two. In fact, when applying Murdoch's moral vision, the same problem exists on both sides of the cancel culture equation: both the cancellers and cancelled are working within the "individual will"

[120] Arendt, *supra* note 117, at 287-88.

conception of ethics that Murdoch criticizes because they are not looking at one another either lovingly or justly, or as whole persons.

Through her adroit understanding that modern evil resides not only in deliberate and intentionally malicious acts witnessed within the totalitarian and communist dictatorships that prevailed during the twentieth century, but also as a result of our general lack of attention and love in our mundane everyday affairs, Murdoch's sense of historicity is illuminating even today. It can assist us in both naming and unraveling the postmodern malaise of inattention and fantasy which contributes to Arendt's banality of evil, and discovering more benign and mutually effective tools to diminish human wickedness than what cancel culture currently provides.

V. Murdoch's Historicity and Its Connection to Cancel Culture

Noting that Murdoch's metaphysics is both dialectical and historical, Gary Browning pays homage to her contribution to the present from the past when he observes that, throughout her works, "she engages with the historicity of the present and reflects upon the past from which it has emerged."[121] In this tradition, "[t]he historicity of the present entails the time-bound operations of metaphysics, in that its questions arise out of reflection upon contemporary experience and its form develops historically by a critical engagement with past metaphysics."[122] In addition to her notable capacity for understanding the present within the context of the past, Murdoch attempts to persuade her readers that our future depends upon the ability to connect morality with attention to human individuals who are flawed, fallen, and whose actions are not always preceded by "crystal-clear intentions."[123] Yet in our digitally-driven, post-pandemic world, we are resigned now more than ever to primary engagements with our fellow humans by way of monitor screens and so-called 'smart' phones.

In this mechanical and impersonal setting, cancel culture and other social media practices openly discourage individual contact, attention, relation, and love and—even worse—they encourage hatred, resentment, and bullying that thrives and grows within a perpetual vortex of continuously wicked acts. Since cancel culture is essentially a media and online-driven act, it serves as a convenient and dispassionate vehicle of attack by which targets are objectified and vilified by the masses via a vulgar crowd mentality. In short, the cancelling mob is not interested in seeing or treating the target as an individual who is invariably flawed and imperfect and, perhaps, in great need of redemption as opposed to abuse and public persecution.

Analogously, Julius's actions in Defeat can be compared to the self-righteous, resentful mob that jumps on the cancel culture bandwagon. The two enchanted characters in the novel who are arguably the most psychologically challenged and, thus, engage in morally questionable behaviors—Morgan and Simon—are called out, taunted, and used by Julius in order to alleviate his own psychological traumas that played out during his life, most importantly his imprisonment in a

[121] Browning, *supra* note 63, at 2-3.
[122] *Id.* at 27.
[123] Murdoch, Sovereignty, *supra* note 108, at 36.

concentration camp. The scene that exemplifies Julius's misbehavior toward both Morgan and Simon is when they each at turns find themselves naked and alone in Julius's apartment. Morgan first shows up to beg Julius to return to her, to which Julius responds with outright bitterness and contempt. Obviously in a state of psychological trauma—caused mostly by Julius after the abrupt and unexplainable ending of their relationship—Morgan undresses herself and lies naked on his bed.

In this vulnerable position in which she is desperately reaching out for closure and compassion, Julius cruelly responds to her assertion that he is still interested in her: "'A youngish and moderately good-looking woman half undressed attracts the attention,' said Julius. 'Now put your dress on and get out.'"[124] When Morgan refuses, Julius shreds her clothes, locks her naked in the apartment and leaves. After some time passes, Simon next arrives at Julius's apartment and Morgan convinces him to give her his shirt and trousers so she can go home to get new clothes for herself. In the interim, Julius comes home to find not Morgan, but Simon naked in his apartment. When Morgan finally comes back fully dressed to find Simon extremely stressed and uncomfortable, she and Julius laugh at him and mock him for his nakedness (and naivety). Further playing on Simon's fear of being continually dishonest with Axel at Julius's and Morgan's promptings, Julius commands him not to speak to Axel of the situation, claiming "Careless talk costs loves, my Simon" and "A necessary ingredient in a happy marriage is the ability to tell soothing lies to your partner."[125]

Just like players in today's cancel culture, Julius pays close attention to the naked vulnerabilities that are evident in the consciousnesses and actions of his psychologically challenged fellow human beings and instead of envisioning a loving solution that would obviate the misdeeds and attendant suffering of all involved, he perpetuates his own fantasy version of reality in order to manipulate flawed people like Rupert and Morgan, who similarly wish to submerge themselves in the illusion that there exist simple, clearly delineated acts of right versus wrong. Morgan is oddly consoled by Julius's manipulations of herself and others; she is utterly inattentive to the fact that she is, in effect, enchanting Simon in the same way that Julius has enchanted her, thus perpetuating the cycle of suspicion and criticism that eminently characterizes our postmodern world. Contrarily, after the extremely difficult process of self-analysis and correction, Simon at least is eventually able to see Julius's unworthy intentions with clarity and break (hopefully forever) the enchanter's spell over him.

In comparing Julius to his foil Tallis, the saint figure who has also witnessed his share of evil and trauma early in life, David J. Fine observes that they do not differ in their experience of evil, "but in how they respond to it. Julius pays wickedness forward. He detaches from the masses and plays his games," whereas Tallis keeps attempting to reattach to others despite all their messiness.[126] Indeed, both Tallis and Simon, by not paying forward the evil that descends upon them to the others, are the two characters who emerge from the novel the least scathed. Between the two, Tallis is the saint in the novel because he is the single character who pays full attention to

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[124] Murdoch, Defeat, *supra* note 81, at 156.

[125] *Id.*

[126] David J. Fine, *'What a Fuss About Probably Nothing': Iris Murdoch's Ordinary Queerness,* 51 Studies in the Literary Imagination 115, 131-32 (2018) [hereinafter *What a Fuss*].

the genesis of Julius's evil and openly discusses it with him, albeit briefly, whereas all the other characters run as far away from Julius as they possibly can. A close reading of the final exchange between Tallis and Julius, however, shows Murdoch's conviction that even the evil enchanters need and deserve friendship and moral guidance to overcome the events that occurred in their lives that make them act the way they do.

According to Browning, Murdoch believed that "philosophy is to eschew general formulations for moral conduct that sideline the responsibilities of individuals to attend closely to other individuals and the particular circumstances in which they are situated."[127] Indeed, Murdoch opined that "[t]he more the separateness and differences of other people is realized, and the fact seen that another man has needs and wishes as demanding as one's own, the harder it becomes to treat a person as a thing."[128] It is precisely this type of personal, empathic examination of human action—or love, for Murdoch—that is purposefully neglected by the enchanters and also when the mob rules to cancel individuals within today's traditional and social media outlets. Doubtless, the tendency of cancel culture warriors is to make uninformed, snap judgments regarding the perceived immoral or unethical decisions made by people that they do not even know, or care to understand.

Rallying for a "renewed attention" to Murdoch's distinctive metaphysical philosophy in our tangled post-pandemic culture, Ruth Murphy observes that Murdoch is "unrelenting in [her] belief that the messy reality in which we live must inform our philosophy - in opposition to philosophy dictating truths that risk ringing hollow when confronted with the complexity of life."[129]

By applying Murdoch's philosophy regarding both the individual and collective task of achieving (or, more usually, failing to achieve) true moral growth—as exemplified by the intricate and complex plots, themes, and characters in her novels—to the trend of cancel culture, one can thus achieve an historical understanding of why, like Murdoch's enchanters, the practice is both alluring yet ultimately dangerous to our contemporary society. As Ikonomakis observes, Murdoch's novels are valuable as "great parables of human existence, from which new ethical frames of reference can be drawn" in our contemporary search for the "new tool of Good."[130] Without doubt, Murdoch's attentive observations of the particular brand of human evil that persisted during the war-torn era in which she lived can help inform our even more complex world that has unfolded in the twenty-first century and assist us in understanding the particular brand of human perversity that lies within the heart of cancel culture: the elevation of a desire to be right over that of locating goodness and truth.

Murdoch describes this situation as "the disappearance of a permanent background to human activity: a permanent background, whether provided by God, by Reason, by History, or by the self," in which she laments "that the idea of goodness (and of virtue) has been largely superseded in Western moral philosophy by the idea of rightness."[131] Commenting on the "unsatisfactory" nature of current

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127 Browning, *supra* note 63, at 12.

128 Murdoch, Sovereignty, *supra* note 108, at 64.

129 Ruth Murphy, *Philosophers of the Intimate in a Time of Confinement: Iris Murdoch and Martha Nussbaum,* 110 Studies 241, 241 (2021).

130 Ikonomakis, *supra* note 50, at 27.

131 Murdoch, Sovereignty, *supra* note 108, at 52.

moral philosophy, Murdoch regrets that "it ignores certain facts and at the same time imposes a single theory which admits of no communication with or escape into rival theories."[132]

Instead, Murdoch thought that "[t]he critical scrutiny of all claims to knowledge is to be embraced."[133] Thus, Murdoch lamented that modern philosophy has not been performing the task "of sorting and classifying fundamental moral issues; it has rather been imposing upon us a particular value judgment in the guise of a theory of human nature."[134] What has been forgotten or "theorized away," according to Murdoch, is the fact that "[t]he definiteness of any thought process depends on the possibility of [its] being recognized, scrutinized and identified by observers from different points of view; this possibility is essential to any definite reality.[135]

In other words, "[w]hat is 'real' is open to different observers."[136] As such, Murdoch's view of human development openly adopted Simone Weil's philosophy that true morality depends upon a new vocabulary of attention to others that would go well beyond the base factual knowledge provided by a snapshot or tweet that captures a single moment of time in the fulsome, contingent, and often muddled life of an individual. Toril Moi explains that, "for Weil, to be *attentif* is to be waiting, watchful, open to what may arise"; most importantly, attention wishes to contemplate the truth and "[t]ries to understand, not destroy."[137]

Contrarily, cancel culture operates from a closed, resentment-based, and self-fulfilling system of justice that is inherently suspicious, as it insists upon one-sided "rightness" in the rigid application of its ideologies based only upon a set of alleged facts. While cancellers de-platform anyone who acts less than perfectly, according to its own standards, such acts are far from accordance with Weil's and Murdoch's notion of watching and waiting to unravel the mystery of a person, to understand the full picture from where they sit.

Instead of relying on base facts that are viewed in a vacuum and often taken out of context to determine a person's moral worth—for example, a photo of them on social media wearing a Halloween costume thirty years ago that is today considered objectionable to some—Murdoch believed that we need more and deeper concepts "in terms of which to picture the substance of our being."[138] She often acknowledged that humans are fallen, or at least have "an inevitable imperfection," which we should acknowledge in our dealings with one another; thus, the real a priori truth to recognize is that "we are neither angels nor animals but human individuals."[139]

Interestingly, a chillingly demonic scene in Flight, as noted by Kane, involves a dry or "crystalline" interpretation of the pornographic photograph surreptitiously taken by Calvin Blick of Rosa, who is "writhing in the arms of [two Polish immigrant] brothers."[140] After enticing Hunter to follow him from the streets of London down into the bowels of Mischa's basement where he develops pictures

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132 *Id.* at 1.
133 Conradi, *supra* note 59, at 30.
134 Murdoch, Sovereignty, *supra* note 108, at 2.
135 *Id.* at 2-5.
136 *Id.* at 5.
137 Toril Moi, Revolution of the Ordinary 228 (2017).
138 Murdoch, *Against Dryness, supra* note 15, at 293.
139 Murdoch, Sovereignty, *supra* note 108, at 27.
140 Kane, *supra* note 66, at 30.

in a dark room, Calvin "drew forth a large crystalline object. 'This is my eye,' he said to Hunter. 'This is the truthful eye that sees and remembers. The lens of my camera.'"[141] According to Kane

> Calvin's photographs parallel the crystalline aesthetic object Murdoch has written about in that they both attempt to impose rigid forms upon contingent reality. In its static display a photograph catches a segment of life but freezes it and thus reduces it, just as Calvin tried to reduce the complex personality of Rosa into an unchangeable sexual object in a dirty picture. As the photographer attempts to encase life in a type of permanent form, so does the demonic mind try to confine reality in a permanent form.[142]

With his narcissistic, all-knowing, and judging eye, Calvin demonically "excludes the contingent aspect of [Rosa's] personality just as the camera excludes fluid reality."[143] Calvin has yet another opportunity at the end of the novel to taunt Rosa herself with the same photograph, gleefully watching her react to it and justifying its existence by exclaiming that she should have, as far as possible, all the "facts" of the situation before her:

> You will say,' he went on, 'quite rightly, that the problem is, what are all the facts? Let me reply at once that I do not presume to know, I am only concerned to help you on one or two very small points without in any way knowing what difference I shall be making to the whole picture as you see it.[144]

As suggested by his name, Calvin, like all of Murdoch's enchanters, is ever-ready to harshly judge both Rosa's past and be the author of her future based on a two-dimensional snapshot in time which, he admits, neither he nor Rosa fully understand. Sternly moralistic, he is not interested in her interpretation of the facts, nor does he care to understand the complex circumstances of her personal story. He merely puts her on trial according to his own smug and ill-intended rules of justice, acknowledging that he does not care about finding the truth: "'You will never know the truth, and you will read the signs in accordance with your deepest wishes. That is what we humans always have to do. Reality is a cipher with many solutions, all of them right ones.'"[145] Yet, unlike a real trial, and eerily similar to cancel culture, he tells Rosa he has "no wish to discuss or to persuade," but "merely to bring one or two small facts to your notice."[146] Sadly, just as her brother crumbles under the influence of Calvin's diabolical determinism, upon seeing the photo of herself, Rosa does not have either the acumen or ability to defend herself—similar to the common reaction of those who are cancelled today—and thus she flees from Mischa's Italian villa before having any meaningful discussion of the situation with

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141 Murdoch, Flight, *supra* note 76, at 160.
142 Kane, *supra* note 66, at 30.
143 *Id.*
144 Kane, *supra* note 66, at 276.
145 Murdoch, Flight, *supra* note 76, at 278.
146 *Id.* at 278.

him, leaving herself (and the reader) with an inadequate denouement of the full story of both their past and potential future relationships.

A similar attempted blackmail situation also occurs in Defeat among Julius, Axel, and Simon. After placing the bet with Morgan that he could break up Simon and Axel's relationship, Julius engages in sneaky and backhanded attempts to drive a wedge between the men and blackmail Simon from telling Axel the truth about their recent encounters. He does this by playing upon certain chinks in the armor of their marriage that he has paid attention to throughout the years of knowing them: the fact that Axel insists upon truthfulness and disdains any form of lie between them, as well as the differences between their sexual histories. Axel is described as "a naturally monogamous person," whereas Simon "was by nature frivolous, inconstant, impulsive, irrational, shallow"[147]—in other words, promiscuous.

Like Calvin in Flight, Axel tends to view people in a static, crystalline manner. He unjustifiably confines Simon's present persona within a past segment of his life as a single man and statically pictures him forever in that snapshot in his mind picking up men at gay bars or in the bathrooms at Piccadilly Circus, despite the fact that Simon is in love with Axel and is faithful to him. After their relationship begins to unravel as a consequence of Julius planting a seed in Axel's mind that Simon made a pass at Julius, Axel refuses Simon's pleas to discuss their problems, angrily exclaiming to him, "I imagined you would be capable of changing your habits for my sake. It was a pathetic error and most unfair to you."[148]

Unlike Rosa in Flight, however, Simon diligently works through his own fears and is able to break the spell of his enchanter by insisting that Axel pull the car over and listen to him as he unfolds the full truth about all the secrets he had been keeping from him. It is during this exchange that Axel is finally able to forgive Simon and see him with a loving gaze as a contingent, complex, and whole person. He is even able to better reflect upon his own misgivings, confessing to Simon that "I was stupid too. And I blame myself. You oughtn't to have been so afraid of me."[149] As a result of the difficult work of gaining a better understanding of themselves and each other, the two men experience a breakthrough in their relationship, which is strengthened as a result of their shattering the magical spell of the enchanter through love—a feat rarely achieved in Murdoch's novels.

These poignant scenes from Flight and Defeat also perfectly exemplify how cancel culture is a dry, crystalline form of morality and critique of the human condition, which like Murdoch's enchanters "attempt to contract the human personality into a knowable fixed object."[150] And often, as Nussbaum observes with respect to women who have been made into sexual objects, the cancellers are responding with a pay-it-forward reaction to having similar wicked acts done to them first, just like Julius responds as a survivor of a concentration camp.

Even though the photo of Rosa having sex with two men and Axel's depiction of Simon in his campy younger days scouting out sexual partners in Piccadilly Circus are accurate and factual depictions of historical reality provided by Calvin and Axel (who can also be considered minor enchanter characters) they do not—in truth, cannot—account for the full background and complexity of either Rosa or

147 Murdoch, Defeat, *supra* note 81, at 184-85.
148 *Id.* at 340-41.
149 *Id.* at 365.
150 Kane, *supra* note 66, at 32.

Simon. Just as the demonic minds of Murdoch's enchanters attempt to confine an individual's reality within a permanent form, cancel culture also utilizes similar reductive tactics to determine the moral value of a person based upon a sole photo, text, or event and purposefully do not make any space to consider the entire—invariably muddled, flawed, and complex—picture of the life of the individual they contemptuously excoriate and seek to cancel.

Murdoch would not take issue with depictions of factual situations in and of themselves; however, her moral vision is one which requires a careful untangling and understanding of their complexities in the context of what she termed a "just and loving gaze" that we should cast upon our fellow humans as opposed to a mission of perpetual condemnation resulting from the fog of egoistic thinking and fantasy-laden living.

VI. Egoistic Fantasy Versus Creative Imagination

Whereas the habit of attention is a task that requires conscious and continuous work, Murdoch did not believe that it was impossible to attain. In Metaphysics as a Guide to Morals (1992), she borrows from Plato to provide the tool to assist us in seeing our true selves (and others) more clearly, which is utilizing attention in order to distinguish between the act of engaging in egoistic fantasy as opposed to that of creative imagination:

> For Plato the lower level [of imagination] . . . is seen in human terms as the production of base illusions, or perhaps simply of the ordinary unimaginative egoistic screen of our conceptualising. Plato, teaching by images and myths, also acknowledges high imagination as creative stirring spirit, attempting to express and embody what is perfectly good, but extremely remote, a picture which implicitly allows a redemption of art.[151]

Thus, the untrained mind is besieged by a selfish, fantastical, or illusory dream life, as expressed by Plato using the word *eikasia*, which for him indicates "the most benighted human state, the lowest condition in the Cave" as connected to a lack of moral sense and an inability to reflect.[152]

Murdoch considered the dichotomy between fantasy and imagination along the lines of a spectrum. On the one side, fantasy is mechanical, egoistic, and untruthful; while on the other side, imagination is both truthful and free, culminating in forms of artistic genius in its highest form.[153] Moral improvement, thus, is achieved by "a progressive destruction of false images," which she considered an "imperfect activity"[154] but from which the concept of human genius emerges and is possible.[155] For Murdoch, coming out of fantasy and into imagination is a slow, lifelong process, as "[t]he Platonic soul, picturing the whole experience of a whole person,

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[151] Murdoch, Metaphysics, *supra* note 57, at 320.
[152] *Id.* at 317.
[153] *Id.* at 320-21.
[154] *Id.* at 317.
[155] *Id.* at 316.

is a mixture of knowledge and illusion, immersed in a reality which transcends it, failing or succeeding to learn in innumerable ways, the difference between true and false, good and evil."[156]

Yet due to the difficult process of self-examination, individuals tend to become self-deceptive and susceptible to egoism, fantasy, and neuroses, so they grasp at "principles deduced systematically by a watertight logical procedure" that depend not on the lived experience of real individuals, but rather "upon a set of rational deductions that are imported into experience from the outside."[157] In this regard, Murdoch recognized that the enemy of love is social convention and neurosis, or when we fail to see the individual either because (1) we see others as acting deterministically because "we are ourselves sunk in a social whole which we allow uncritically to determine our reactions" or (2) we are engaged within our own fantasy that makes the individual into a dream object of our own.[158]

It is as a result of this displacement of the transcendent and focus on the ego that systems like cancel culture operate. The suspicious, critical, and mean-spirited interpretations of individuals within cancel culture become the enemy of love because those who cancel desire to view the world of the other within a socially and philosophically deterministic lens that seeks fixity, clean facts, and easy answers to the otherwise opaque and complex problem of goodness and love. As such, Murdoch informs us that love is the proper utilization of imagination to overcome one's self and banish both fantasy and convention; it is the extremely difficult and painful, yet "infinitely extensible work of imaginative understanding, of two irreducibly dissimilar individuals. Love is the imaginative recognition of, that is respect for, this otherness."[159]

According to Nussbaum in the Introduction to The Black Prince, Murdoch herself struggled throughout her life to fight her own egoistic, fantastical tendencies and personally believed

> that we would only get to the right choices if we understood better the inner forces militating against goodness. And in her view, the main such force was our inability to see other people correctly. We are always representing people to ourselves in self-serving ways, she believed, ways that gratify our egos and serve our own ends.[160]

To understand this phenomenon, Nussbaum refers to what Dante's "Inferno" tries to teach us about love and the lessons that the proud must learn in purgatory: the proud are like hoops, bent over on themselves so that they see only the self and not the outer world. This sense of pride, which represents a fundamental deformation of love, "has an edge of anxiety: any threat to the proud person's

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156 *Id.* at 148-49.

157 Conradi, *supra* note 59, at 35.

158 Iris Murdoch, *The Sublime and the Good*, Existentialists and Mystics: Writings on Philosophy and Literature 216 (Peter Conradi, ed., Penguin 1997) [hereinafter *The Sublime and the Good*].

159 *Id.*

160 Martha C. Nussbaum, *Introduction*, The Black Prince by Iris Murdoch xiii, (Penguin, 1973) [hereafter The Black Prince].

superiority would definitely be felt as a painful wound."[161] Because all the dealings of the proud with the world are forms of instrumentalization, "they do not simply become objectifiers; they also become less than fully human" and they don't even look like people.[162]

In addition to being a dry and crystalline practice, cancel culture may also be scrutinized within the context of this solipsistic form of inattention, as it is also an enchanted, fantastical process in which both the canceller and the cancelled are engaged in inward-facing acts of anxious generalization regarding the mysterious other. Those cancelled people who commit overt and intentional acts of racism, sexism, and other objectional anti-social behaviors fail to pay attention to the targets of their behavior, resulting in reducing them to convenient stereotypes as opposed to taking into consideration the individual agents they are. The cancelled person who has intentionally engaged in immoral behavior fits within Dante's definition of the prideful because, as Nussbaum points out, the prideful are compartmentalizers who justify their acts "with lots of arguments about the inferiority or even the bestial quality of those on whom they look down."[163]

By the same token, cancellers, upon learning a "juicy" and culturally objectionable piece of information about the cancelled person, are often not compelled to vet or verify the situation, let alone understand the background or contingencies that surrounded the event and the cancelled person. Instead, cancellers, rushing to an ideologically based, pernicious determination, post the tidbit on social media sites, perpetuating the invidious cancel culture vortex. In this manner, cancellers similarly display resentment-oriented pride based on Dante's definition because they are "obsessive about their own entitlements and who has slighted them"; in that state of anger, they also do not see other people.[164] Like Murdoch's enchanter Julius in Defeat, who has personally experienced the pain of being a direct victim of the Holocaust and who feels entitled to persist in forward-paying acts of justice, cancellers pay no attention to the realities and circumstances surrounding the bad acts of the cancelled and thus they perpetuate the inattentive and incremental accrual of everyday modern evil.

Concomitantly, once the cat is out of the bag on social media, just like Simon in Defeat, the cancelled person engages in a similar form of enchantment whereby, regardless of the truth, he is compelled by fear of outcome to bow down to his canceller and the angry mob who follows along. And the saddest thing about this phenomenon is that, unlike Axel's eventual acceptance of Simon's true, difficult, and heartfelt apology, cancel culture never forgives, no matter how or how often the cancelled person attempts to apologize and publicly cow tow to his accuser. As online commentator Tim O'Brien observes:

> [F]rankly, a lot of demands for apologies we see online and in the media are not themselves genuine. The amount of faux anger driving so much of the discourse we see is incalculable. These dynamics, by design, lead to real, mass anger that only serve the purposes of those driving it. Some

[161] *Id.* at 25.
[162] *Id.*
[163] *Id.* at 26.
[164] *Id.* at 36.

> who demand an apology aren't even self-aware enough to realize that they themselves won't accept any apology. They expect contrition without a willingness on their part to forgive, and that presumes their ire is justified, which quite often it is not.[165]

In assessing whether a heartfelt apology will work, O'Brien further states that

> As humans, we are conditioned to believe that a good apology's goal is to seek forgiveness. This may be true in our personal lives. It may be true in our marriages. It may be true in our friendships. It may even be true in a one-on-one, offline customer service situation. But it is a myth when it comes to cancel culture and the current climate of mob aggression. The fact is, whether you are at fault or not, once the cancel mob decides to humble you or your organization, there is no such thing as forgiveness. If the mob decides you must pay, you will pay insofar as the cancel mob can help it. This theory that apologies do much to provide cover when under attack by cancel culture is often a fool's errand.[166]

Nussbaum similarly understands the propensity for victims of wickedness to engage in acts of retributivism, or easily imagining "that a counterbalancing pain on the other side annuls or undoes their pain or wrong"; however, like Murdoch, she warns against this vice of pride, instead encouraging the spirit of Martin Luther King's "type of inclusive love," which

> is closely connected to respect and involves the willingness to listen to the voices of others, rather than closing off those voices in lofty superiority . . . It involves seeing in all people a core of dignity and worth, and, further, a potential for change and growth, however obscured and blighted by the history of that person's deeds. So it draws a very strong distinction between deeds and the underlying person.[167]

Like Murdoch's enchanter characters, the canceller is only interested in administrating a one-sided and prideful form of justice based on surface facts rather than being open to interpretation of their individual contingencies or backgrounds, and of the possibilities of their redemption. Instead of focusing on a workable moral vision that sees the other realistically and fully—as an inevitably fallible human being in a contingent time and place—like Julius, they pay the evil of the cancelled forward even while they self-righteously convince themselves that their acts are fully just.

Murdoch's characters, like the participants of cancel culture, often have an uncanny inability to forgive the past mistakes of others—even of those whom they claim to love. In the opening pages of Murdoch's 1958 novel The Bell, Dora Greenfield is presented as an adulteress whose husband will not leave her, yet he

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165 Tim O'Brien, *Apologies: Cancel Culture Does Not Forgive*, O'Brien Communications, Feb. 9, 2021, http://obriencommunications.com/2021/02/apologies-cancel-culture-does-not-forgive/.

166 *Id.*

167 Nussbaum, Citadels, *supra* note 160 at 228.

will also never forgive her indiscretions. When she begrudgingly agrees to end her current affair and return to him, he exclaims upon her arrival:

> Nor do I subscribe to the view . . . that the lost sheep is more to be rejoiced over. And if you are expecting me to rejoice you will be disappointed. Your escapades have diminished you permanently in my eyes.[168]

Dora's reaction:

> She was deeply wounded by what Paul had said. How could he assess her like this because of something which had happened in the past? The past was never real for Dora. The notion that Paul might keep her past alive to torment her with, now occurred to her for the first time. She stopped thinking so as not to cry and went to open the two tall windows as wide as they would go.[169]

Dora, however, has the last word on the matter, as she finally musters the nerve at the end of the novel to leave the narcissistic and unforgiving Paul, which can be interpreted as Murdoch's admonishment of the dry and crystalline manner by which he coldly treats his wife and utterly fails to assess the roots of her unhappiness, because they invariably concern his failures.

This ending, as previously mentioned, is diametrically opposed to Axel's outcome in Defeat after he is able to overcome his own dryness by forgiving Simon and finally paying attention to him and seeing him as a full person, which for Murdoch is the primary way to combat egoism and which can also be utilized to mitigate our anxious and resentment-based desire to cancel people. For all his failings and propensities to insist upon convention in his romantic relationships, by finally being able to see and pay attention to Axel's reality, and truly look at him with a just and loving gaze, he overcomes his pride and has the opportunity for a renewed relationship with Simon.

VII. Murdoch's Two-Part Solution to Cancel Culture

In this section, I will proscribe my two-part Murdochian solution to combat the moral problems that are evident in the practice of cancel culture. The first solution is a moral one, effectuated by applying Murdoch's philosophy of attention and love to solve messy and muddled complexities of modern life, such as attempting to understand the realities of the human personality that led to cancel culture in the first place. The second solution is a literary one, implicating the academic practice of critique, or the "hermeneutics of suspicion" that pervasively dictates how literature today is analyzed from a skeptical spirit of condemnation over one that holistically integrates the author, text, and reader.

Whereas our natural human tendency is to engage in fantasy and reflect inwardly and primarily upon the self, Murdoch believed that the direction of attention should

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168 Iris Murdoch, The Bell 33 (Penguin 1958) [hereinafter The Bell].
169 *Id.*

instead be "outward, away from self . . . towards the great surprising variety of the world."[170] The only way this can occur is by turning away from what she considered the dry human symbol—the bogus individual or false whole—and towards the real impenetrable human person who, according to the fundamental tenets of liberalism, is substantial, individual, indefinable, and valuable.[171] This may be achieved by paying close attention to the manner by which we interact with ourselves and others, by not engaging in imaginative tactics that reduce other persons to fantastical and unreal forms in order to suit our own solipsistic needs and agendas, and by not treating human beings as either objects or mere substitutes for one another.

In Sovereignty of the Good, Murdoch extrapolates upon Weil's notion of attention "to express the idea of a just and loving gaze directed upon an individual reality," which she believed "to be the characteristic and proper mark of the active moral agent."[172] It is the difficult habit of paying attention to the full backgrounds and varying complexities—or the "otherness"—of persons by which, according to Murdoch, one may achieve moral goodness.

Further expanding Weil's notion of attention, Murdoch also uses the terms 'attend' and 'see' to describe patient, careful observation of other people's reality. Her term 'enchantment'—as epitomized by the actions of Julius King and Mischa Fox—characterizes the process whereby attention gives way to fantasy and preconceived forms are imposed upon contingent human beings. Fantasy becomes demonic when both people in a relationship give in to imaginary distortions. Servile creatures bow to their demonic masters, who reinforce the fantasies of their slaves. Murdoch often assumes the didactic task of demonstrating the illusory nature of this demonic power.[173]

Kane further observes that, for Murdoch, true evil is caused by a "deadly solipsistic process" in which "neurotic self-absorption . . . blurs the vision and prevents the individual from seeing the otherness of people who are not himself. As he fails to recognize their uniqueness, the self-absorbed individual imposes his private fantasies upon other real people."[174] Kane believes that this phenomenon is caused by a solipsism whereby "individuals act as if the existence of others depended upon a personal point of view: they transform real people into essentially imaginary characters for their own private fantasies[175] and instead of looking at them objectively like real people, they become mere characters in their private dramas.[176]

In Murdoch's novels, there are two different forms that inattention can take, each of which can lead to a fantastical mindset that invariably leads to a collapse of morality and the breakdown of self-growth: (1) one's failure to pay attention to those who are harming them; and (2) one's failure to pay attention to the backgrounds or inner lives of others. Both Defeat and Flight are instructional novels in the sense that Murdoch provides the reader with a host of characters who are wrapped up in their personal fantasies and who, thus, utterly fail to attend correctly to themselves or one another, and the devastating consequences that ensue as a result of such inattention.

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170 Murdoch, Sovereignty, *supra* note 108, at 65.
171 Murdoch, *Against Dryness, supra* note 17, at 294.
172 Murdoch, Sovereignty, *supra* note 108, at 33.
173 Kane, *supra* note 66, at 21.
174 *Id.* at 152.
175 *Id.* at 39.
176 *Id.* at 46.

Morgan is the primary character in FLIGHT who exhibits both of these traits in droves, as both her inattentive actions and inactions cause great harm both to herself as well as the other characters in the novel. Morgan, an academic who is engaged in writing a book on Glossematics, first meets Julius when she attends a conference in South Carolina and is immediately enraptured with him. Although she is married to Tallis Browne, Murdoch's saintly character in the novel who represents the virtuous opposite of the enchanter figure, Morgan embarks upon a lengthy romantic relationship with Julius in America. While Murdoch does not state in detail the nature of the ending of their romantic fling, it is obvious that Julius ended it in a curiously devious way, as Morgan describes it: "Well, literally I left Julius, but spiritually he left me. It was complicated and—awful. Awful, awful, awful."[177] When Morgan and Julius coincidentally end up back in London at the same time, Morgan is drawn back into his spell as she desperately proceeds to rekindle their relationship by continuously hounding him down and quite literally begging for the return of his affection.

It is at the end of Part One of DEFEAT during one of his encounters with Morgan when Julius's character is revealed as he spontaneously envisages a godgame in which he wages a bet with Morgan that in ten short days he would engineer a breakup between Simon and Axel. At this point, Julius reveals his dark, existentialist view of human relationships, which perfectly captures Murdoch's moral problem of dryness and inattentiveness:

> Human beings are roughly constructed entities full of indeterminacies and vaguenesses and empty spaces. Driven along by their own private needs they latch blindly onto each other, then pull away, then clutch again. Their little sadisms and their little masochisms are surface phenomena. Anyone will do to play the roles. They never really see each other at all. There is no relationship, dear Morgan, which cannot quite easily be broken and there is none the breaking of which is a matter of any genuine seriousness. Human beings are essentially finders of substitutes.[178]

It is this modern propensity of objectification—treating one person as a mere substitute for another—which is an abuse of power "by people encouraged to believe that they are above others and that others are not fully real"[179]. It is this insistence upon viewing the world within zero-sum-game, power-based hierarchies that has led to destructive postmodern movements such as cancel culture, which are exemplified by Julius's nefarious thought processes:

> I could divide anybody from anybody. Even you could. Play sufficiently on a person's vanity, sow a little mistrust, hint at the contempt which every human being deeply, secretly feels for every other one. Every man loves himself so astronomically more than he loves his neighbour. Anyone can be made to drop anyone.[180]

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177 MURDOCH, FLIGHT, *supra* note 76, at 44.
178 *Id.* at 214.
179 NUSSBAUM, THE BLACK PRINCE, *supra* note 160, at xv.
180 *Id.*

Undoubtedly, Julius is paying very close attention to the misdeeds and vain proclivities of his fellow characters, but it is not the type of attention envisioned by either Weil or Murdoch. Like those who participate in cancel culture, Julius is looking so that he can manipulate, generalize, criticize, and theorize away all the inconvenient truths and muddlings of life that—while they may be frightening to look at and wait for—nonetheless make living a worthwhile and good experience.

Drawn fully into Julius's charismatic charms, which are alluring because they serve to reduce, compartmentalize, and simplify real life and its vast complexity, Morgan's initial reaction is laughingly, although somewhat nervously, to accept the bet; however, she briefly hesitates after learning that Julius has chosen Simon and Axel, claiming, "It seems so unkind now it's real people."[181] Regardless, the bet is placed between the two, as Murdoch architects the subplot that will drive the second part of the novel, setting up the devastation that she believes will inevitably ensue as a result of Julius' and Morgan's godgames and their inability to see and attend to, much less love, those within their own circle of supposed friendship.

With this scene, Murdoch surreptitiously juxtaposes yet another layer of inattention that will play out in Part Two of the novel: both Simon's and Morgan's failure to pay closer attention to the motivations and consequences of Julius's actions. Though Morgan feels a brief moral pang at Julius' fiendish plot, and refers to him as a "monster," "mischief-maker," and "completely mad," she remains so spellbound by her contorted memory of their romantic interlude in America that she is unable to discern the true nature of either his feelings for her or of his persona, exemplifying what Margaret L. Pachuau observes as "a gradual attraction towards evil in many of [Murdoch's] protagonists."[182] Despite the fact that Julius continues to treat Morgan as both a disposable object and a puppet to assist him with his malicious plan to destroy Axel's and Simon's relationship, her egoistic fantasy of what their relationship means to him prevents her from truly listening to the words of rejection and objectification that he speaks to her, such as: "I really do not want to see you anymore. The interest is gone"[183] and "You remind me fruitlessly of things which are old and stale and dead."[184]

While Julius allegedly told Morgan at the outset of their relationship that his feelings were probably temporary "and should not be called by serious names."[185] through her inattention to Julius, she nonetheless becomes enraptured within her own love fantasy, which is entirely out of step with Julius's perception of their relationship:

> Morgan had loved Julius with her whole nature and in the first shock of that love she had found it impossible not to believe that Julius loved her. Such is the natural illusion of a lover. She had heard Julius's faintly accented, faintly stammering voice saying over and over again, 'I am not in love with you. I have nothing to offer you except completely superficial emotions. Such emotions do not endure. These will not.' But the sound

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181 *Id.* at 215.

182 Margaret L. Pachuau, Construction of Good and Evil in Iris Murdoch's Discourse 72 (Atlantic 2007).

183 Murdoch, Flight, *supra* note 76, at 128.

184 *Id.* at 131.

185 *Id.* at 131.

> throbbed in her ears like the ceaseless cooing of a dove which said, 'I love you, I love you, I love you.'[186]

It is also interesting to note that, while Morgan has had a two-year physical relationship with Julius, she never noticed the concentration camp tattoo on his arm, thus confirming how inattentive she is to mostly everything when it comes to Julius. Despite the fact that Morgan witnesses Julius as both capable of and willing to play such a nasty trick on Simon and Axel, she barely stops to ponder what similar evil tactics he may have played out in their own failed relationship, and what may he be continuing to contrive against her. If she had been more attentive, she may have been able to discern that Julius concocted the odd love affair that magically ensued between her and her brother-in-law Rupert, which ultimately leads to his tragic death.

Contrary to Morgan, Simon's initial failure to attend properly to his relationship with Axel is rectified by his eventual ability to overcome Julius's demonic stunt with goodness and love, which Murdoch believes is the anecdote to evil. In the beginning of the novel, Simon's character is cast as an empath who is hopelessly reliant upon the crumbs of affection intermittently thrown to him by others—especially his narcissistic and obtuse partner Axel. Unlike Morgan and others, however, he senses from the beginning that something is not quite right about Julius. When discussing Julius's arrival to England with Axel, Simon hesitatingly tells him: "I've always been a bit afraid of Julius really" and "He would not be a man to have as an enemy,"[187] thus foreshadowing Julius's menacing plot against them. At the end of the novel, Murdoch rewards Simon's attentiveness, as his is the only relationship that survives Julius's overt, malevolent attempts to destroy it. But, as previously discussed, that reward comes *only* after Simon has made some very painful observations about himself and has taken the monumentally difficult steps to stand up, not only to Julius, but also to Axel, whose love he is so afraid of losing.

By observing that human attachments such as Simon's to Axel are both selfish and strong, Murdoch acknowledges that the transformation from selfishness to what she terms "unselfing" is often impossible to conceive, as our attention often surreptitiously returns back to ourselves "with consolations of self-pity, resentment, fantasy and despair."[188] Observing that the work of morality begins in the inner space of individual consciousness, Fine explains how the ego complicates the process:

> The conscious mind does not, however, naturally envision the world with clarity and grace. On the contrary, human beings adopt self-protective illusions that block reality. Murdoch shows how effortlessly the egoism that arises from consciousness clouds awareness. Therefore, one must work to see clearly. This labour functions as the keystone of morality, since accurate perception depends on egoism's reduction. One must cultivate habits of attention and look outside the ego-soaked morass.[189]

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[186] *Id.* at 135.

[187] *Id.* at 25.

[188] Murdoch, Sovereignty, *supra* note 108, at 89.

[189] David J. Fine, *Disciplines of Attention: Iris Murdoch on Consciousness, Criticism, and Thought (MGM Chapters 6–8)*, Reading Iris Murdoch's Metaphysics as a Guide to

Indeed, Murdoch warned that "[i]t is a task to come to see the world as it is"; however, "[a] philosophy which leaves duty without a context and exalts the idea of freedom and power as a separate top level value ignores this task and obscures the relation between virtue and reality."[190] Whereas Simon proves to be up to this great task (and Axel eventually follows suit) Morgan, like most of the other characters in Defeat and Murdoch's other novels, monumentally fail it, due primarily to their inabilities to conquer their own egos and personal anxieties. As has been discussed in detail above, cancel culture—within this similar spirit of postmodern anxiety—also fails in picturing and attending to the full, if messy, muddled and even wicked, background of the other whom it is swift to criticize and castigate.

In addition to Murdoch's moral solution of attention and a loving gaze, I propose that a second literary solution may be applied from her philosophy in order to combat the ineffective practice of cancel culture: the movement by academics away from rigid forms of post-structuralist critique and toward a literary criticism that engages in "post-critique."[191] Despite the fact that Murdoch lived and wrote several years prior to the advent of social media platforms and cancel culture, a close exploration of her uncannily astute body of moral philosophy and fiction reveals that she actually predicted a future world in which, as a result of adhering to the structuralist precepts promulgated by Jacques Derrida and other postmodern theorists, "[w]e are being taught, in a new style . . . that the individual is a special kind of illusion," which she believed could result in "a return to barbarism."[192]

In Metaphysics as a Guide to Morals, Murdoch dedicates an entire chapter to Derrida, whom she considered the father of the postmodern structuralist movement. According to her, structuralism led to a demythologization and removal of the transcendent,[193] as well as the rejection of the Cartesian mandate of knowing oneself, whether from a psychological or metaphysical perspective, which leads to a loss of our concept of the individual altogether.[194] If this "new mood" is taken seriously, Murdoch maintained that all value, truth, and morality is removed and meaning becomes "an internally self-related movement or play of language."[195]

Because the postmodernists questioned the legitimacy of liberal post-Enlightenment concepts such as truth, value, and rationality, Murdoch decried structuralism as a non-workable and non-moral system in which "we lose the ordinary fundamental sense of contingency and accident which belongs with the concept of the individual" as well as "the curious messy phenomena of our actual experience."[196] Describing deconstruction as "a sort of plausible amoralistic

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Morals 109, (N. Hämäläinen & G. Dooley, eds., Palgrave Macmillan 2019) [hereinafter, *Disciplines of Attention*].

190 Murdoch, Sovereignty, *supra* note 108, at 89.

191 Postcritique is a recalibration of the academic penchant for "suspicious hermeneutics" or a "tendency to read individual texts as reflections, indices, or symptoms of larger cultural or social wholes" that academics use "in the service of combating social injustice." *See* Introduction. Critique and Postcritique, edited by Elizabeth S. Anker and Rita Felski, Duke University Press, 2017, p. 17.

192 Murdoch, Metaphysics, *supra* note 57, at 209-10.

193 *Id.* at 5.

194 *Id.* at 190.

195 *Id.* at 193.

196 Murdoch, Sovereignty, *supra* note 108, at 214-15.

determinism,"[197] she predicted that, as a political, literary, and metaphysical force, it "flies the flag of a new era" and is "disturbingly revolutionary,"[198] warning that we "ought to be more alarmed" by prophets who accept this "new realism."[199] Debunking the "structuralist nightmare," Murdoch forsakes moral relativism and claims we must seek the actual truth in order to live properly:

> While our motives and abilities to grasp and express truth differ, the conception of true and false is essential to human life, which without it would perish and go to ruin. A radical separation of meaning from truth not only 'removes' morally responsible truth-seeking speech in particular situations, it also leaves our ordinary conduct inexplicable.[200]

Relatedly, Murdoch observes that, while structuralism stands ever ready to depart from traditional logocentric and linguistic ideals, it offers no new moral sense "in which we abandon one truth in order to find another, or abandon God in favour of a differently conceived moral and spiritual mode of understanding."[201]

This growing insistence upon critique as the sole and undeniably proper method of literary analysis to the exclusion of the tradition of ordinary language philosophy has metamorphosized into what is today labeled the "hermeneutics of suspicion" or the rigid reading of texts strictly with a spirit of suspicion, as opposed to picturing texts as "action and expression" and "reading as a practice of acknowledgment."[202] Quoting Rita Felski in Critique and Postcritique, Moi laments that most postmodern literary critics—deconstructionists or otherwise—share a singular attitude of suspicion, as they are: "knowing, self-conscious, hardheaded, tirelessly vigilant."[203]

In The Limits of Critique, Felski further outlines the key elements of the hermeneutics of suspicion that have resulted from structuralism:

> a spirit of skeptical questioning or outright condemnation, an emphasis on its precarious position vis-à-vis overbearing and oppressive social forces, the claim to be engaged in some kind of radical intellectual and/or political work, and the assumption that whatever is not critical must therefore be uncritical.[204]

By the very same token, cancel culture fits precisely within Felski's description of theory since it is also keenly skeptical as it self-assuredly and radically condemns and censors the other in a ritualistic, social media frenzy that blindly refuses to acknowledge any background or moral theory other than its own.

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197 *Id.* at 198.
198 *Id.* at 158.
199 *Id.* at 161.
200 *Id.* at 210-11.
201 *Id.* at 200.
202 Moi, Revolution, supra note 137, at 5.
203 *Id.* at 31).
204 Rita Felski, The Limits of Critique 2 (2015).

Regardless of where one lands with respect to the efficaciousness of applying cancel culture to create desired social change, its performativity shares a spirit of critique and suspicion germane to postmodernist beliefs and teachings. In analyzing the origins and purpose of the cancel culture movement, Pluckrose and Lindsay observe that, in the pursuit of eliminating "cultural appropriation," it is the intent of postmodernist activists "to scrutinize texts, events, culture, activities, places, spaces, attitudes, mind-sets, phrasing, dress, and every other conceivable cultural artifact for hidden bigotry, then expose it and purge it and its sources from society—or at least access to the means of cultural production."[205]

The problem with suspicious reading (which leads invariably to the type of suspicious living that fuels cancel culture) is that, according to Moi, when we stop paying attention to the particulars and lose our sense of the meaning of words, we also lose our sense of reality,[206] which propels us into the type of illusory or crystalline fantasy renounced by Murdoch. Murdoch found structuralist utterances very disturbing; she thought them to have "a despairing prophetic tone," which concerned "the nature of language, the future of books, the meaning of the word 'writing.' Traditional ideas of truth, freedom and personality are at stake, and we must remind ourselves that the frightening future is not yet with us and can be resisted."[207]

Murdoch would be glad to know that there is still hope. Despite the fact that the hermeneutics of suspicion has overwhelmingly taken over the literary academy, Moi notes that there is now a push for the return to ordinary language philosophy, which challenges the "theory project" that has dominated much of the humanities since the 1970s. In so doing it clears the ground for ways of thinking that are more attentive to particulars, to individual experience, more attuned to the ways we actually use language, more open to the questions thrown up by actual human lives, than the standard attempts to "do theory."[208] Today, in the spirit of Murdoch's deepening process, literary critics are beginning to question "the ease with which a certain style of reading has settled into the default option," asking questions such as "[w]hy is it that critics are so quick off the mark to interrogate, unmask, expose, subvert, unravel, demystify, destabilize, take issue, and take umbrage" and, most importantly, "[w]hat are the costs of such ubiquitous criticality?"[209]

Without doubt, cancel culture is just one of the myriad costs that our society is suffering from in the wake of this suspicious brand of postmodernist critique. Bred by radical postmodernist thinking, cancel culture is suspicious and critical of everything outside of itself. Although proclaiming to be humanly beneficent, like a horse with blinders on, neither structuralism nor cancel culture are truly concerned with real individuals and their complex and potentially informative stories. Rather than paying close attention to the diverse and comples backgrounds of individual people, structuralism imposes only the theory that it brings to the text and cancel culture follows suit by insisting on implementing its own set of social judgments. By mechanistically and coldly proceeding only to deconstruct actions as viewed within its limited set of ideologies, structuralism and cancel culture both purvey

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205 Pluckrose & Lindsay, *supra* note 43 at 222.
206 Moi, Revolution, supra note 137, at 6.
207 Murdoch, Metaphysics, *supra* note 57, at 208.
208 Moi, Revolution, supra note 137, at 64.
209 Felski, *supra* note 204, at 5.

an ego-driven need to be right over any desire to do good. In this sense, Derrida can be viewed as the ultimate charismatic enchanter of literary theory, and all the academics who are charmingly drawn in and follow in his tradition are the enchanted Morgans and Ruperts of the real world.

Whereas literary theorists such as Moi, Felski, Fine, and others are today seriously taking notice of the deleterious effects of deconstruction and the hermeneutics of suspicion and, thus, are advocating a new form of "postcritique," Murdoch's philosophy actually predicted this refreshing contemporary trend in various ways, the most important of which for examining cancel culture is the observation that "she argues that theory's specialized jargon and counterintuitive ethos distance critics from ordinary language and common worlds," maintaining that "at worst, this distance leads critics to view, as Elizabeth Anker and Felski argue, 'the thoughts and actions of ordinary social actors as insufficiently self-aware or critical.'"[210]

While structuralism flattens out and reduces authors and their novels within solitary forms of suspicious theorization—teaching us to ignore the full picture of its creation and surface meaning—cancel culture is even more invidious because it freezes the actions of real, contingent, opaque, and complex persons in time and, like the enchanter figures, rigidly insists upon its own incomplete picture of the situation and of the entire cancelled person. In this sense, both structuralism and cancel culture can be viewed as forms of fantasy, which Murdoch believed merely console us with simple obtuse facts and further remove us from goodness and morality, as opposed to imagination, which she heralded as the correct process to achieve a proper sense of reality and enable moral growth.

Conclusion: Countering Cancel Culture with Murdochian Love and Acceptance as a Form of Justice

Although Murdoch was not a Christian and she did not often discuss politics in either her philosophy or her fiction, her writings are nonetheless peppered with her concerns regarding the effects of structuralism on both religion and government. In Metaphysics as a Guide to Morals, she warns us to beware of those "gleeful prophets" of structuralism "who lack energy to defend or re-examine the old idea of the self, the truth-seeking individual person, as a moral and spiritual centre":

> Structuralism and Marxist-structuralism . . . see here the end of the old (Greek, Cartesian, bourgeois, etc.) metaphysical era as also the end of the God era. The Christian God supports, by his attention, the reality of the solidary individual, of whom Christ is the guarantor, ideal image or alter ego. Modern totalitarian tyrants, rightly from their point of view, have wanted to destroy religion entirely.[211]

While Murdoch understood the desire of humanists to move past and even cast aside the sheer acts of evil witnessed in the twentieth century and, in the aftermath

[210] *Fine, What a Fuss, supra* note 126, at 118-19.
[211] Murdoch, Metaphysics, *supra* note 57, at 161.

of the war, to focus optimistically on modern man "as a brave naked will surrounded by an easily comprehended empirical world,"[212] she was gravely concerned about the modern (and dry) propensity to forget that, regardless of whether we are religious, we are all invariably tinged with original sin.

The loss of the transcendent, in other words, has diminished our capacity to acknowledge the imperfect state of our humanity and because it replaced God with man as the ultimate judge, today we value cold facts, harsh judgment, and our own rightness over attention and love towards others. For example, with respect to Murdoch's morally flawed characters as analyzed in this article, it is objectively true that: (1) Rosa actually engaged in the turbid sexual acts depicted in Calvin's photo; (2) Simon had a promiscuous youth and told lies to his husband; and (3) Dora's, Rupert's, and Morgan's egoistic acts led them to deceive their spouses and others and engage in dangerously selfish fantasies.

From the ubiquitous lens of the hermeneutics of suspicion in the literary academy, it is also a fact that several of the authors who have written the most prolific and sublime works that have made up our canon of great literature have nonetheless engaged in immoral and inhumane behaviors, as have those whose lives, opacities, and backgrounds have been reduced and ignored by the phenomenon of cancel culture by both the cancellers and cancelled. These contemporary realities reflect Murdoch's picture of modern evil that has persisted and grown since she observed it and warned us against the risks of not attending to it in *Against Dryness*.

In *A Catholic Modernity?* Catholic philosopher Charles Taylor similarly asserts that "the denial of transcendence can put the most valuable gains of modernity in danger."[213] Like Murdoch, he warns against maintaining an overly optimistic picture of the modern world that safely locates "all evil outside of us" because it leads to motivations of justice over those of benevolence.[214] Taylor observes that modern secular humanism "is tempted to congratulate itself" for elevating humanity by "replacing the low and demeaning picture of human beings as depraved, inveterate sinners [and] in articulating the potential of human beings for goodness and greatness."[215] However, Taylor notes the "tragic irony" that persists within this model: "the higher the sense of potential, the more grievously real people fall short, and the more severe the turn-around will be which is inspired by the disappointment."[216]

Also like Murdoch, who was concerned about our overly optimistic sense of freedom gained by having jettisoned our pre-modern adherence to the spiritual and the transcendent, Taylor understands that

> A lofty humanism posits high standards of self-worth, and a magnificent goal to strive towards. It inspires enterprises of great moment. But by this very token it encourages force, despotism, tutelage, ultimately contempt, and a certain ruthlessness is shaping refractory human material . . . Wherever action for high ideals is not tempered, controlled, ultimately

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212 Murdoch, *Against Dryness, supra* note 17, at 290.

213 Charles Taylor, *A Catholic Modernity?* 10 Marianist Award Lectures 28 (1996) http://ecommons.udayton.edu/uscc_marianist_ard/10.

214 *Id.* at 33.

215 *Id.* at 31.

216 *Id.* at 32.

> engulfed in an unconditional love of the beneficiaries, this ugly dialectic risks repeating itself.[217]

Within this modern pattern in which we view ourselves good and "evil proves its exteriority to us," our indignation and superiority blind us to "the havoc we wreak around us" and we are thus doomed to administer justice rather than benevolence.[218]

Instead of blithely casting the stone at the actions of the evil other and viewing ourselves as saints, Jordan B. Peterson when speaking of the atrocities committed in the twentieth century often and soberly reminds us that it was through the fault of people just like us that the Nazi and Soviet systems arose.[219] He opines that the best pathway forward is for each person to be willing to take responsibility for the malevolence in their own heart that ultimately manifests within totalitarian and communist movements.[220] Indeed, if there is anything that post-war authors such as Murdoch and Arendt have contributed to our modern understanding of good versus evil, it is that they cannot be neatly and comfortably separable, nor can one exist to the absolute exclusion of the other, at any given point in time or within any single person.

In his work that exposed the world to the horrors of the Soviet Union under Joseph Stalin's communistic regime, The Gulag Archipelago, Russian philosopher and novelist Aleksandr Solzhenitsyn comments on the attempt to dichotomize good and evil as he describes the horrific acts of his captors in the Gulag concentration camp where was sentenced to eight years of hard labor for his private criticisms of Stalin and communism:

> If only it were all so simple! If only there were evil people somewhere insidiously committing evil deeds, and it were necessary only to separate them from the rest of us and destroy them. But the line dividing good and evil cuts through the heart of every human being. And who is willing to destroy a piece of his own heart? During the life of any heart this line keeps changing place; sometimes it is squeezed one way by exuberant evil and sometimes it shifts to allow enough space for good to flourish. One and the same human being is, at various stages, under various circumstances, a totally different human being. At times he is close to being a devil, at times to sainthood. But his name doesn't change, and to that name we ascribe the whole lot, good and evil.[221]

As Taylor also ironically notes, while we fight against the injustices of our time, in this battle toward goodness we are moved by a flaming indignation against wicked acts which, in itself, "comes to be fueled by hatred for those who support and convive with these injustices; and this in turn is fed by our sense of superiority

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217 *Id.*

218 *Id.* at 33.

219 Jordan Peterson, *Deep Knowledge of Evil Will Straighten You Out*, YouTube, uploaded by Bite-sized Philosophy, 21 Nov. 2017, https://www.youtube.com/watch?v=I_VSJQeLjwI.

220 *Id.*

221 Aleksandr Solzhenitsyn, The Gulag Archipelago 1918-56: An Experiment in Literary Investigation 75 (Vintage Classics, 2018).

that we are not like these instruments and accomplices of evil."[222] While Taylor recognizes that within this modern pattern of morality, we may start "with the most exquisite sense of wrong, the greatest passion for justice and equality and peace," he astutely observes that we "become centers of hatred, generators of new modes of injustice on a greater scale."[223]

By confidently and arrogantly categorizing 'good versus evil' as 'us versus them,' the hermeneutics of suspicion and cancel culture are only two of these new modes of injustice that threaten to overtake our sense of goodness and love. It is within the confines of our modern conundrum of secular humanism that anti-humanist structuralist precepts are bred, and if left unchecked, they inevitably grow into dangerously solipsistic, resentment-based, and ideological movements like the hermeneutics of suspicion and cancel culture.

It is also from these convictions that Murdoch's writings delicately discern the differences between love and forgiveness on the one hand versus justice and rightness on the other. At the end of Defeat, Julius is the only character who is nonplussed by the tragedy of Rupert's death and the effect it has on the other characters, even proudly congratulating himself for the diabolical godgames that he played upon the other characters. In an attempt to justify the didactically inspired acts that he obtusely fails to perceive as immoral, Julius asks Tallis, "You concede that I am an instrument of justice?" to which Tallis responds only with a smile.[224] Conradi interprets Tallis's response to mean that he "concurs in part with Julius's diagnosis of human ills, but not with the pleasure Julius derives from showing that it is so."[225] In this parting scene in Defeat pitting the evil enchanter against the saint, Murdoch quietly proclaims that she wants us to be instruments of love, not instruments of justice.

In conclusion, I assert that if we continue insisting on literary dryness (and its progeny, cancel culture) in law, literature, and in life, we risk at our peril the ability to attend to the whole person, resulting in our loss of the "deepening of concepts [in which] moral progress takes place."[226] Contrarily, by willingly observing the realities of individual human beings and their unique situations within a loving and attention-oriented framework that defies a dichotomous choice between consolation and condemnation, we can strive towards Murdoch's goal of achieving "a renewed sense of the difficulty and complexity of the moral life and the opacity of persons."[227] It is by applying Murdoch's historically practical and educative lessons for combating evil and achieving a moral sense of goodness that her metaphysical philosophy and fiction can help inform our own approach to today's cancel culture-laden society.

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222 Taylor, *supra* note 213, at 33.
223 *Id.*
224 Murdoch, Defeat, *supra* note 81, at 397.
225 Conradi, *supra* note 59, at 231.
226 Murdoch, *Against Dryness, supra* note 17, at 293.
227 *Id.*

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The Prosecutor's Evolution

Scott Ingram*

ABSTRACT

It is axiomatic that American prosecutors possess significant discretion. What varies among prosecutors is how they use their discretion. How they use their discretion derives from how prosecutors perceive their role. Different prosecutors perceive their role differently. Some see themselves as representing the victim and others see themselves as ensuring just outcomes. These differences emerge from the American prosecutor's distinct evolution. Over 200 years, the American prosecutor has transformed through various stages. The private prosecutor, an attorney the victim hired, originated from the British system. With the expansion of democratic institutions, the prosecutor became political, representing a particular political party's interests. Abuses led to prosecutors becoming more professional, representing the state. This disconnected prosecutors from their community. Proactive prosecutors emerged to reconnect prosecutors to their community. Then, in 2016, a new wave of prosecutors emerged. These prosecutors saw themselves protecting defendants from a punitive criminal justice process.

This article explores these different perspectives, looking for commonalities that can define the American prosecutor's identity. Three emerge. First, prosecutors are public servants. Though they may serve different publics and do so in different ways, all seek to serve public interests. Second, they represent the community. Prosecutorial policies and case selection derive from community values and priorities. Finally, prosecutors are opportunistic. When given the opportunity to expand their discretion

KEYWORDS

Prosecutors, Discretion, Criminal Justice, History, Identity

CONTENTS

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On January 2, 2020, the first court day of newly elected Fairfax County, Virginia prosecutor Steve Descano's term, his chief trial assistant appeared in court to implement one of Descano's campaign promises: the refusal to prosecute "simple possession of marijuana" cases.[1] When the chief trial assistant moved to dismiss the first case he explained the policy's rationale.[2] The judge denied the request, citing the preference, in his court anyway, for individual decision-making rather than blanket no-prosecution policies.[3] The prosecutor's request exemplifies the new wave of prosecutors who are changing the way prosecutors run their offices and evaluate their cases.[4] Yet, as the judge's resistance demonstrates, some object to this because prosecutors do not traditionally do these things.[5] That is the point according to these new prosecutors.[6] They want to change how prosecutors do business.[7]

This change resurrects a question about what prosecutors *should* do. Do they simply prosecute the cases brought to them or do they perform additional functions?[8] Are they criminal justice policymakers?[9] Do they advise and oversee the police?[10] Do they represent the victim's interests?[11] Do they investigate cases?[12] Are they responsible for alleviating mass incarceration?[13]

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1 Justin Jouvenal & Racel Weiner, *Prosecutors Won't Pursue Marijuana Possession Charges in 2 Northern Va. Counties* The Wash. Post, Jan 2, 2020 For Descano's campaign platform, *see* Steve Descano, *Progressive Justice: The Case for Criminal Justice Reform in Fairfax County*, available at: https://static1.squarespace.com/static/5b08d8fd85ede1b5cc3e7d9c/t/5d8b5b91def8834a61161e22/1569414039552/ProgressiveJustice-SteveDescano.pdf.

2 Jouvenal & Weiner, *supra* note 1.

3 *Id.* Later in the day, the judge relented and granted the dismissal. *Id.*

4 *See generally,* Emily Bazelon, Charged: The New Movement to Transform American Prosecution and End Mass Incarceration Random House (2019); *see infra* Section V.

5 Jeffrey Bellin, *Defending Progressive Prosecution,* 39 Yale L. & Pol,y Rev. 218 (2020) (identifying and answering objections to progressive prosecution). *See also* Laurie Levenson, *Progressive Prosecutors: Winning the Hearts and Minds of Line Prosecutors,* 60 Am. Crim. L. Rev. 1495 (2023).

6 Bazelon, *supra* note 4, at xxvii-xxviii.

7 *Id.* and Levenson, *supra* note 5, at 1496-98.

8 *See generally* Joan Jacoby, The American Prosecutor: A Search for Identity (1980) Leonard R. Mellon et al., *The Prosecutor Constrained by His Environment: A New Look at Discretionary Justice in the United States,* 72 J. Crim. L. & Criminology 52 (1981); Laurie L. Levenson, *Working Outside the Rules: The Undefined Responsibilities of Federal Prosecutors,* 26 Fordham Urb. L.J. 553 (1999); and Kay L. Levine, *The New Prosecution,* 40 Wake Forest L. Rev. 1125 (2005).

9 Alissa Pollitz Worden, *Policymaking by Prosecutors: The Uses of Discretion in Regulating Plea Bargaining*, 73 Judicature 335(1989-1990) and Mellon, Jacoby & Brewer *supra* note 8, at 53-54.

10 George F. Cole, *The Decision to Prosecute,* 4 Law & Soc. Rev. 331, 334-337 (1970). *See generally* Allen F. Anderson, *The Police, the Prosecution, and Plea Negotiation Rates: An Exploratory Look,* 12 Crim. Just. Rev. 35 (1987).

11 Irene Oritseweyinmi Joe, *The Prosecutor's Client Problem,* 98 Bost. Univ. L. Rev. 885 (2018).

12 W. Allan Williams, *The Case for Proactive Prosecution,* 13 Crim Just. J. 389 (1991-1992).

13 Angela J. Davis, *The Prosecutor's Ethical Duty to End Mass Incarceration,* 44 Hofstra L. Rev. 1063 (2016).

The varied demands imposed on prosecutors have led to criticism. Some argue that prosecutors have too much power.[14] It is too easy for them to obtain wrongful convictions, prosecute political opponents, and overwhelm beleaguered defense attorneys.[15] Others assert prosecutors have too much discretion because no one in the court system can effectively hold them accountable.[16] Some critics perceive prosecutors as more punitive than rehabilitative.[17] Another group argues prosecutors engage in misconduct through closing arguments, suppression of evidence, and statements to the public.[18]

Professor David Sklansky identifies these problems plus an additional problem that he says is less frequently discussed.[19] He recognizes the prosecutor's ambiguous role in the criminal court process.[20] This ambiguity appears most clearly when we think of prosecutors as ministers of justice and as advocates. On one hand, prosecutors represent one side in a story-telling competition.[21] In this competition both sides must zealously compete for the adversarial system to work.[22] After all, if one were to engage in a competition where only one side plays to win, there would not be much of a competition. Yet prosecutors are called upon to do much more than this. They must objectively evaluate cases.[23] They must ensure all discoverable

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14 Angela J. Davis, *The American Prosecutor: Independence, Power, and the Threat of Tyranny,* 86 Iowa L. Rev. 393 (2001).

15 Ellen Yaroshefsky, *Wrongful Convictions: It Is Time to take Prosecution Discipline* Seriously, 8 Univ D.C. L. Rev. 275 (2004), Fred C. Zacharias & Bruce Green, *The Duty to Avoid Wrongful Convictions,* 89 Boston Univ. L. Rev. 1 (2009); Laurie Levenson, *The Politicization of Prosecutors: A Tribute to the Work of Bennett Gershman,* 16 Ohio St. Univ. L. Rev. 325 (2018); Irene Oritseweyinmi Joe, *Regulating Mass Prosecution,* 53 U.C. Davis L. Rev. 1175 (2020); Peter A. Joy & Kevin C. McMunigal, *Overloaded Prosecutors,* 33 Crim. Just. 31 (2018).

16 Kenneth Culp Davis, Discretionary Justice: A preliminary Inquiry, (1969); Donald G. Gifford, *Meaningful Reform of Plea Bargaining: The Control of Prosecutorial Discretion*, 1983 Univ. Ill. L. Rev. 37 (1983); Robert L. Misner, *Recasting Prosecutorial Discretion,* 86 J. Crim. Law & Criminology 717 (1995); David Sklansky, *The Nature and Function of Prosecutorial Power*, 106 J. Crim. L. & Criminology 473 (2016); Bruce A. Green & Ellen Yaroshefsky, *Prosecutorial Accountability 2.0*, 92 Notre Dame L. Rev. 51 (2016); David Keenan et al.,*The Myth of Prosecutorial Accountability After* Connick v. Thompson*: Why Existing Professional Responsibility Measures Cannot Protect Against Prosecutorial Misconduct,* 121 Yale L. J. Online 203 (2011); Stephanos Bibas, *Prosecutorial Regulation Versus Prosecutorial Accountability,* 157 Univ. of Penn. L. Rev. 959 (2009); Daniel C. Richman, Old Chief v. United States*: Stipulating Away Prosecutorial Accountability*, 83 Va. L. Rev. 939 (1997).

17 David Sklansky, *Problems with Prosecutors*, Ann. Rev. Crim. 2.8-2.9 (2018).

18 Michael D. Cicchini, *Combating Prosecutorial Misconduct in Closing Arguments,* 70 Okla. L. Rev. 887 (2018); Cynthia E. Jones, *A Reason to Doubt: The Suppression of Evidence and the Inference of Innocence,* 100 J. Crim. L. & Criminology 415 (2010); John G. Browning, *Prosecutorial Misconduct in the Digital Age,* 77 Alb. L. Rev. 881 (2014).

19 Sklansky, *supra* note 17, at 1:2.1-2.19.

20 *Id.*

21 Gary Goodpaster, *On the Theory of American Adversary Criminal Trial,* 78 J. Crim. L. & Criminology 118 (1987).

22 *Id.*

23 Kenneth J. Melilli, *Prosecutorial Discretion in an Adversary System,* 1992 N.Y.U. L. Rev. 669 (1992); Bennett L. Gershmann, *The Prosecutor's Duty to Truth,* 14 Geo. J. of

information reaches the defense attorney.[24] They must protect the defendant's rights.[25] In short, they must remain neutral.[26] Prosecutors must choose a path or somehow follow two paths at once. This creates an identity crisis for prosecutors.

Professor Sklansky is not the first to recognize this. Over forty years ago, Joan Jacoby published an often-cited work entitled The American Prosecutor: A Search for Identity.[27] In this book, she devotes a chapter to the prosecutor's historical development.[28] She identifies the prosecutor's origins as an appointed but minor official.[29] Then the prosecutor becomes elected.[30] Over time, the prosecutor's discretion increases.[31] She ends arguing that prosecutors need to embrace their policy-making ability and use it to confront crime problems.[32] Even forty years later, this is still the most comprehensive treatment of the prosecutor's developmental arc.

While Jacoby's work remains the most complete, others have examined segments in closer detail. The American prosecutor's story begins with its European roots.[33] As people settled in the colonies they brought their legal traditions with them and adapted them to their new surroundings.[34] Other scholars explored the increasingly formal legal systems that emerged in the Revolutionary years.[35] From there, different scholars examined the transition from victim-centered prosecution to state-driven prosecution.[36] Another group studied the transition to

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Legal Ethics 309 (2000); Alafair S. Burke, *Talking About Prosecutors,* 31 Cardozo L. Rev. 2119 (2010).

24 Sara Gurwitch, *When Self-Policing Does Not Work: A Proposal for Policing Prosecutors in Their Obligation to Provide Exculpatory Evidence to the Defense,* 50 Santa Clara L. Rev. 303 (2010) and Ellen Yaroshefsky, *Ethics and Plea Bargaining – What's Discovery Got to Do With It,* 23 Crim. Just. 28 (2008).

25 Bruce A. Green, *Gideon's Amici: Why do Prosecutors so Rarely Defend the Rights of the Accused,* 122 Yale L.J. 2336 (2013) and Eric S. Fish, *Prosecutorial Constitutionalism,* 90 So. Cal. L.R. 237 (2017).

26 H. Richard Uviller, *The Neutral Prosecutor: The Obligation of Dispassion in a Passionate Pursuit,* 68 Fordham L. Rev. 1695 (2000).

27 Jacoby, *supra* note 8.

28 *See generally, id.*, chapter one.

29 *Id.* at 19-28.

30 *Id.*

31 *Id.*

32 *Id.*

33 Frank Miller, Prosecution: The Decision to Charge a Suspect with a Crime (1970) and W. Scott van Alstyne, *The District Attorney – A Historical Puzzle,* 1952 Wis. L. Rev. 125 (1952) and John Langbein, The Origins of Adversary Criminal Trial (2003).

34 *Id.*

35 *See e.g.* William E. Nelson, Americanization of the Common Law: The Impact of Legal Change on Massachusetts Society, 1760-1830 (1994)(Other scholars explored the increasingly formal legal systems that emerged in the Revolutionary years).

36 Allen Steinberg, *From Private Prosecution to Plea Bargaining: Criminal Prosecution, the District Attorney, and American Legal History,* 30 Crime & Delinq. 568 (1984); Thomas Meehan, *Courts, Cases, and Counselors in Revolutionary and Post-Revolutionary Pennsylvania,* 91 The Penn. Mag. of Hist. and Bio. 3 (1967); Kathryn Preyer *Crime, the Criminal Law and Reform in Post-Revolutionary Virginia,* 1 L. & Hist. Rev. 53 (1983).

professionalism.[37] At the same time, legal scholars and sociologists began studying the prosecution function.[38] Their reports supplement the historical record.[39] Today, scholarship on prosecutors abounds.[40] These works, taken together and added to modern prosecutorial activities, provide a view of the prosecutor's more recent transitions. This article connects this disparate scholarship into a unifying narrative that illuminates the prosecutor's developmental arc.

Explaining the prosecutor's developmental arc serves three purposes. First, it fills a prominent scholarship gap. We cannot fully understand today's prosecutors if we do not know their evolutionary development. This article accomplishes this by updating Jacoby's work. Second, scholars, almost universally, recognize that prosecutors play the central role in the criminal court process.[41] Professor Sklansky observed that "above all else, prosecutors are mediating figures, straddling the frontiers between adversarial and inquisitorial justice, between the police and the courts, and between law and discretion."[42] While there is little dispute that today's prosecutors fill the role, the question remains how this occurred. By understanding this evolution, we can better address the ongoing problem of prosecutorial misconduct.[43] Finally, by exploring the prosecutor's evolution, we can begin resolving the prosecutor's identity crisis. Tracing the prosecutor's development helps rectify the prosecutor's client problem.[44] It also helps us understand why some prosecutors function differently from others and why painting the prosecutorial function with a broad brush leads to a distorted picture.[45]

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37 *Id. See also* Carolyn B. Ramsey, *The Discretionary Power of "Public" Prosecutors in Historical Perspective,* 39 Am. Crim. L. Rev. 1309 (2002).

38 Roscoe Pound, Criminal Justice in America (1930) and Raymond Moley, Politics and Criminal Prosecution (1929).

39 *Id.*

40 A search of Google Scholar for articles referencing "United States prosecutor" returned over 17,000 articles. These include: Jeffrey Bellin, *The Changing Role of the American Prosecutor,* 18 Ohio St. J. Crim. L. 329 (2020); Brandon Hasbrouck, *The Just Prosecutor,* 99 Wash. UL Rev. 627 (2021); Thomas P. Hogan, *De-prosecution and death: A synthetic control analysis of the impact of de-prosecution on homicides*, 21 Criminology & Pub. Pol'y 489 (2022); Ronald F Wright, *Prosecutors and their state and local polities,* 110 The J. Crim. L. and Criminology 823 (2020); Shima B. Baughman and Megan S. Wright, *Prosecutors and Mass Incarceration,* 94 S. Cal. L. Rev. 1123 (2020); Alexandra L. Cox, & Camila Gripp, *The Legitimation Strategies of "Progressive" Prosecutors,* 31 Social & Legal Stud. 657 (2022); Tyler Yeargain, *Prosecutorial Disassociation,* 47 Am. J. Crim. L. 85 (2020).

41 Davis, *supra* note 14, at 408-414, Jonathan A. Rapping, *Who's Guarding the Hen House? How the American Prosecutor Came to Devour Those He is Sworn to Protect,* 51 Washburn L.J. 513 (2011); Jason Kreag, *Prosecutorial Analytics,* 94 Wash. Univ. L. Rev. 771 (2016) *but see* Jeffrey Bellin, *The Power of Prosecutors,* 94 N.Y.U. L.vRev. 171 (2019).

42 David A. Sklansky, *The Nature and Function of Prosecutorial Power,* 106 J. Crim. L. & Criminology 473 (2016).

43 On the need to restrain prosecutorial misconduct, *see* Jennifer Lee, *'Justice for All': The Necessity of New Prosecutorial Accountability Measures,* (Feb. 7, 2020). Available at SSRN: https://ssrn.com/abstract=3534139 or http://dx.doi.org/10.2139/ssrn.3534139.

44 *See generally* Joe, *supra* note 11.

45 At this point it is important to note that this is a broad picture. Future work is required to make each of these phases more granular in their analysis. When that happens, it is likely that more subtle changes occurred within each of these phases.

The prosecutor's developmental arc, or evolution, reveals the incremental expansion of prosecutorial authority from representing a specific client to solving broad societal problems. This evolution occurred in five distinct phases. The first is the "private" phase.[46] Prosecutors served private interests. In fact, prosecutors were not the lawyers but those who initiated the criminal complaint, usually the victim. This yielded to the "political" phase where prosecutors served the state's interest as embodied by their respective political party interests.[47] While independent of specific clients, the local political party greatly influenced the criminal prosecution machinery. This phase transitioned to the "professional" phase where prosecutors, though still representing the state, separated themselves from substantial party control.[48] In this role, the "minister of justice" model emerged. Recently, this phase began fading as prosecutors established closer connections to their community. First, there is the "proactive" phase where prosecutors expand upon their traditional role to address community crime problems.[49] Most recently, as noted at the outset, the "progressive" phase has arrived.[50] These prosecutors use their power to address wider social problems caused, at least in part, by the previous prosecutor phases.

Prior to embarking on this historical journey, it is important to note that there are not clear, delineated boundaries between the phases. Different places evolved at different times. Additionally, remnants of one phase may remain even as prosecutors move onto another phase. As the journey unfolds, aspects of earlier phases will sound similar to today's prosecutors. These echoes of earlier phases provide clues to the prosecutor's identity. They remain relatively constant despite variation in perception. Similarly, this is an evolution not a revolution. Even today's "progressive" phase has not fundamentally changed the day-to-day work that prosecutors perform. The prosecutorial function continues to evolve.

I. Private Prosecutors

The American prosecutor's origin story remains clouded. One reason for this is the lack of uniformity between the colonies. Different colonies were settled at different times and by different groups. Consequently, their legal systems developed differently. The American prosecutor appeared within the English common law tradition and assimilated French and Dutch influences. These influences, plus the uniqueness of the colonial environment, gave birth to the American prosecutor.

The predominant feature of the early American prosecutor was the co-existence of public and private aspects.[51] At different times, colonies created public attorneys who represented the British Crown's interests or the local public's interests.[52] Initially, this public attorney was a minor figure who performed a mix of administrative and legal duties.[53] Instead, private individuals carried the bulk of the

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46 *See* Section 1, *infra*.
47 *See* Section 2, *infra*.
48 *See* Section 3, *infra.*
49 *See* Section 4, *infra.*
50 *See* Section 5, *infra.*
51 Jacoby, *supra* note 8, at 19-28.
52 *See e.g.* Lawrence H.Gipson, American Loyalist: Jared Ingersoll (1971).
53 Jacoby, *supra* note 8, at 19-28.

law enforcement burden.[54] When people referred to prosecutors at this early time, they meant the person who initiated the case, the private individual. The public figure was not the prosecutor. These private prosecutors, if the case was sufficiently serious, would hire private attorneys to represent them throughout the process.[55] If they could not afford a private attorney, the public attorney oversaw the case.[56]

A. A Decentralized Process Emphasizing Private Interests

To understand how "prosecutors" functioned during the private prosecution phase, we must understand early American court procedures and court roles. Although each colony differed in its terminology, procedures and structures, there were some basic similarities owing to the eventual dominance of the British legal system.[57] While the British system operated on a "pure" private model, no American colony fully adopted it; instead, the colonies blended the private model with a public aspect.[58] To prevent against excessive authority, however, they utilized decentralized processes, giving individual victims the most control.[59] How much process also varied between colonies. In Massachusetts, for example, an organized, formal system existed.[60] This contrasted with New York's less formal and less respected court system.[61]

Each colony operated a similarly structured court system.[62] A single person, with authority to resolve minor matters and send more serious matters to the next higher court, entailed the first level.[63] This individual went by different names in different places.[64] Small towns might have one person serve the entire town while larger population centers utilized multiple individuals to hear and resolve matters.[65] In this court, the people and the law interacted intimately and informally, something

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54 Allen Steinberg, The Transformation of Criminal Justice, Philadelphia 1800-1880, 430-44 (1989).

55 *Id.*

56 *Id.*

57 Lawrence M. Friedman, A History of American Law, 50-53, 66 (3d ed. Oxford Univ. Press 2005) and Douglas Greenberg, *Crime, Law Enforcement and Social Control in Colonial America,* 26 Am. J. Leg. Hist. 293, 295 (1982).

58 Friedman, *supra* note 57, at 32-37 and Yue Ma, *Exploring the Origins of Public Prosecution* 18 Int. Crim. Just. Rev. 190 (2008).

59 J. Willard Hurst, The Growth of American Law: The Lawmakers (1950) 174-5; and Friedman, *supra* note 57, at 17-19.

60 David H. Flaherty, *Crime and Social Control in Provincial Massachusetts,* 24 Hist. J. 339 (1981).

61 Douglas Greenberg, *The Effectiveness of Law Enforcement in 18th Century New York,* 19 Am. J. Leg. Hist. 173 (1975).

62 Erwin C. Surrency, *Courts in the American Colonies* 11 Am. J. Leg. Hist. 347 (1967) and Hurst, *supra* note 59, at 98-9 *but see* Friedman, *supra* note 57, at 4-7, 37.

63 Steinberg, *supra* note 54, at 6, 39-41.

64 In Philadelphia, the "prosecutor" went to the alderman. Steinberg, *supra* note 36, at 571. In the New England colonies it was the magistrate. Flaherty, *supra* note 60, at 341. In the southern colonies, it was the justice of the peace. Nathaniel J. Berry, *Justice of the Peace Manuals in Virginia Before 1800,* 26 J.S. Legal Hist. 315 (2018). For consistency sake, this article uses "justice of the peace."

65 Allen Steinberg, *The Spirit of Litigation: Private Prosecution and Criminal Justice in Nineteenth Century Philadelphia,* 29 J. Soc. Hist. 231 (1986) (multiple judges in Philadelphia).

Professor Lawrence Friedman termed "low law."[66] Most cases began and ended at this stage.[67] More serious matters such as high misdemeanors and felonies were sent to a grand jury associated with the county court.[68] This was the formal colonial—and later state—court.[69] Its procedures were more formal and only met certain times throughout the year.[70] Usually, those sitting at this court had formal legal training.[71] Appeals from these courts and the most serious cases went to the highest court level.[72] During colonial times, when there was no separation of powers, the highest court level consisted of the governor and his council.[73] As a result, when this court met, it was at the colonial capital.[74] This meant litigants and witnesses came from across the colony to this court for trial.[75] One must remember that there was also no appeal as we presently think of them.[76] As a case progressed through these three levels, each new level meant a new trial.[77]

When examining the role different people played in this court structure, it is important to delineate two important crime categories. The first is that of crimes against property and people. These ranged from murder to assault to burglary.[78] In each instance there is an identifiable victim, someone with an interest in pursuing the case.[79] These cases moved through the system based on victim desire and legal sufficiency.[80] Generally, private attorneys represented the two sides.[81] For resolution, they had to rise to the middle level of courts.[82] The second category includes moral offenses ranging from adultery to disorderly conduct or public drunkenness.[83] Generally, these offenses were only prosecuted when they created social problems.[84] Most colonial jurisdictions lacked the resources to prosecute such offenses because it required a public figure, paid by the colony.[85] Prosecuting such offenses also required high functioning legal systems, meaning they had the resources to process

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66 Lawrence M. Friedman, *High Law and Low Law*, 10 Fl. Univ. L. Rev. 53 (2014). Low law is the unwritten law that people use to resolve perceived legal barriers to accomplish their objectives. In a sense, it is similar to Roscoe Pound's dichotomy between the law in action and law on the books. Roscoe Pound, *Law in Books and Law in Action*, 44 Am. L. Rev. 12 (1910).

67 Hurst, *supra* note 59, at 147.

68 Surrency, *supra* note 62, at 269-270.

69 George Fisher, *Plea Bargaining's Triumph*, 109 Yale L. J. 857 (2000).

70 *Id.*

71 *Id.*

72 Surrency, *supra* note 62, at 268-269.

73 *Id.*

74 *Id.*

75 *Id.*

76 *Id.*

77 *Id.*

78 Steinberg, *supra* note 54, at 48-51.

79 *Id.*

80 *Id.*

81 *Id.*

82 *Id. See also* Fisher, *supra* note 69, at 861-862.

83 Steinberg, *supra* note 65, at 233; *See also* David H. Flaherty, *Law and the Enforcement of Morals in Early America,* in 1 Crime and Justice in American History, 127, 129-130 (Erik Monkonnen ed., 1991) and Greenberg, *supra* note 57, at 303.

84 Flaherty, *supra* note 83, at 140.

85 *Id.*

cases.[86] High functioning systems were necessary because most morals offenses were nonindictable, meaning that the lowest level court had jurisdiction to resolve the matter.[87] Whether the offense was indictable or not determined which court actors performed which function.

In cases involving a victim, the victim initiated the process and was the "prosecutor."[88] They initiated cases by appearing before the "judge" of the lowest level court.[89] Once before the "judge," the "prosecutor" would present his claim.[90] If the "judge" found the claim meritorious, and the "prosecutor" paid the requisite fee, the "judge" would order the defendant to appear.[91] Once the defendant appeared, the "judge" would hear the defendant's version.[92] Minor cases would be resolved immediately, or ignored completely, but more serious offenses would be bound over for the mid-level court.[93] If the "judge" found the claim lacking, the "prosecutor" could locate another "judge" who might hold a different opinion.[94] With this system, the victim's main discretionary concern seems to be whether the possible sanction was worth the fee payment. Ultimately, the "prosecutor's" discretion was unlimited. Even if the "judge" bound over the "prosecutor's" case, the "prosecutor" could terminate the action by simply not appearing at the next court date.[95] "Prosecutors" would often terminate the case due to the costs incurred with each step in the process and because the "prosecutor" and defendant often knew each other.[96] This familiarity led to informal resolution, outside the court process.[97] It also meant that someone could be "prosecutor" one day and defendant another day.[98] In this sense, the courts preserved order but did not resolve conflict.

The Justice of the Peace played the most critical role when resolving "prosecutor" complaints. Justices of the Peace originated in the British system and eventually crossed the Atlantic to the colonies.[99] The British Crown required dispute resolution mechanisms but did not want to pay for them.[100] The monarchy devised a model whereby private complainants went to a local official for dispute

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86 Greenberg, *supra* note 57, at 325-6.

87 Steinberg, *supra* note 65, at 233.

88 Allen Steinberg, *The 'Lawman' in New York: William Travers Jerome and the Origins of the Modern District Attorney in Turn-of-the-Century New York* 34 Univ. Tol. L. Rev. 753 (2003); *See e.g.* Commonwealth v. Hutcheson, 4 Ky. 355 (Ct. App. Ky., 1809) (reasoning that: "Snapp, who was summoned to give evidence, cannot be considered as the prosecutor required by law. No man can be made a prosecutor against his will, but every man is bound to obey the process of the law. If Snapp was the prosecutor or willing to become so, it was easy to have named him.")

89 This was not a judge as modern litigants would experience. See *infra* notes 99-118 and accompanying text.

90 Steinberg, *supra* note 54, at 39-44.

91 *Id.*

92 *Id.*

93 *Id.*; Flaherty, *supra* note 60, at 358-59.

94 Steinberg, *supra* note 54, at 39-44.

95 *Id.*

96 *Id.*; Nicholas R. Parrillo, Against the Profit Motive: The Salary Revolution in American Government, 1780-1940. (2013).

97 Parrillo, *supra* note 96, at 256.

98 Steinberg, *supra* note 54, at 39-44.

99 Langbein, *supra* note 33, at 40-47.

100 *Id.*

resolution.[101] Had the Crown desired, it could have created a more centralized and professional prosecutorial corps.[102] Instead, it opted for a local solution with resolutions based on community knowledge and practices.[103] These Justices of the Peace conducted cursory investigations and adjudicated disputes.[104] Rather than monetary payment, the British Crown rewarded Justices of the Peace with honor and authority.[105]

Justices of the Peace performed both investigative and adjudicative functions.[106] Their investigative work was not modern investigative work but involved hearing from witnesses produced by the "prosecutor" and memorializing the statements.[107] Often this entailed asking those involved in disputes relevant questions to determine responsibility.[108] Once they gathered the information, they decided what to do with the case. They could find the case lacked sufficient evidence. If the offense was sufficiently serious, they could send it to the grand jury.[109] If there was sufficient evidence of only a minor offense, the Justice of the Peace could impose a sanction.[110]

Justices of the Peace heard a wide range of cases. Professor Steinberg recounts a typical day for a Philadelphia Justice of the Peace, known as an alderman. "On a typical day in 1848, one alderman heard six assault and battery cases, three larceny cases, three breach of ordinance cases, one firecracker case, one fast driving case and one case of throwing "torpedoes" on the stage of the Arch Street Theatre; committed three boys to the House of Refuge, issued two landlord's warrants of eviction, two private notices and eight summonses; had one man examined for life insurance and one operated on for opthalmia; and conducted one marriage ceremony."[111] This variety and quantity brought crowds to the office daily and established close relationships between the community and the Justice of the Peace.[112]

Despite performing investigative and adjudicative functions, the Justices of the Peace usually lacked formal legal training. Instead, these men obtained their positions due to their community standing.[113] They were men of "substance and power" in their communities.[114] Their social standing derived from reputation rather than education. Most Justices of the Peace could not read or write.[115] In some places, Justices of the Peace were local politicians. For example, in Philadelphia, the Mayor was selected from the Justices of the Peace.[116] Legal training for Justices

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101 *Id.*
102 *Id.*
103 *Id.*
104 *Id.*
105 *Id.*
106 Flaherty, *supra* note 83, at 146-7.
107 Scott Ingram, Constitutional inquisitors: The Origins and Practice of Early Federal Prosecutors (2023) 23-26.
108 Mike McConville and Chester Mirsky, *The Rise of Guilty Pleas: New York, 1800-1865* 22 J. L. & Soc. 443 (1995).
109 Ingram, *supra* note 107, at 26.
110 *Id.*
111 Steinberg, *supra* note 65, at 236.
112 *Id.*
113 Flaherty, *supra* note 60, at 347-350.
114 Flaherty, *supra* note 83, at 146-147.
115 Greenberg, *supra* note 57, at 304.
116 Steinberg, *supra* note 54, at 38-9.

of the Peace was not required because people generally did not trust lawyers.[117] The citizenry feared lawyers' ability to use law as an oppressive tool and thus preferred the informal dispute resolution process provided by Justices of the Peace.[118]

If the offense was sufficiently serious and the Justice of the Peace believed the evidence was sufficient, the Grand Jury would hear the case. These grand juries primarily served a screening function. They filtered out cases that were not worth pursuing or for which the "prosecutor" did not appear.[119] When the grand jury found the evidence sufficient and the case worthwhile, it would issue an indictment and those with legal training would handle the case.[120] Most cases that came before the grand jury were dismissed because the "prosecutor" failed to appear.[121] These "prosecutors" either received the resolution they sought prior to the grand jury hearing the case or did not understand that their case had to progress from the justice of the peace to the grand jury.[122] As time passed, those with legal training criticized the grand jury for allowing too many unworthwhile cases through the screening process.[123]

Grand Juries also served an important community function. Comprised of leading citizens, the grand jury served the community by identifying problems.[124] Grand juries played a critical role as the United States transitioned from colony to nation.[125] Grand juries oversaw local government functioning and held local officials accountable for their actions.[126] They did this through "presentments" whereby the grand jury recommended criminal charges based upon the grand jury's own investigation.[127] Like the Justices of the Peace, the investigations grand juries performed entailed merely questioning witnesses that appeared before the grand jury.[128] Like indictments, any presentment alleging criminal activity went to a legally trained attorney.[129]

The legally-trained attorney was responsible for drafting the formal legal document that charged the defendant.[130] These attorneys ranged in ability. Some, such as those in New York, were prominent attorneys who listed the state among their clients.[131] Others lacked significant legal ability and could not find work elsewhere.[132] Once they drafted the indictment, the attorney handled administrative

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117 Hurst, *supra* note 59, at 147-148; Steinberg, *supra* note 54, at 6.
118 Steinberg, *supra* note 54, at 6.
119 Ingram, *supra* note 107, at 26-29.
120 *Id.*
121 *Id.*
122 *Id.*
123 *Id.*
124 Richard D. Younger, The People's Panel: The Grand Jury in the United States, 1634-1941 (1964).
125 *Id.*
126 *Id.*
127 Jacoby, *supra* note 8, at 18.
128 Younger, *supra* note 124, at 11.
129 Jacoby, *supra* note 8, at 18-19.
130 David J. Bodenhamer, Fair Trial: Rights of the Accused in American History (1992).
131 McConville and Mirsky, *supra* note 108, at 453.
132 Rita W. Cooley, *Predecessors of the Federal Attorney General: The Attorney General in England and the American Colonies*, 2 Am. J. Leg. Hist. 304, 310-311 (1958).

duties, including scheduling the case, receiving the case file, and determining which cases received priority.[133] This was the extent of their discretion, however. They had no interest in the outcome of the case.[134] In fact, intervening in the case was perceived as the state sanctioning the "prosecutor's" case.[135] This was only warranted in cases of "great public interest."[136] Yet these attorneys did perform some legal work. They presented cases to the grand jury and, if no private attorney represented the "prosecutor," then the publicly appointed attorney would represent the "prosecutor."[137] If no private attorney appeared for the defense either, the publicly appointed attorney would represent both sides in the case.[138] Assuming private counsel appeared for the "prosecutor," the publicly appointed attorney would prepare a case summary for the private attorney's use during trial.[139]

Like the Justices of the Peace, these publicly appointed attorneys received income based on fees.[140] In some places, the public attorney received fees based on the number of cases proceeding through the courts.[141] This type of arrangement incentivized minimal case screening and allowed litigants their day in court.[142] Other places only allowed fees if a conviction resulted.[143] These places prioritized close case scrutiny and promoted victimless crimes where the proof did not rely as much upon witness attendance.[144] If the public attorney did not believe the case would result in a conviction, the public attorney did not pursue the case.[145]

Jared Ingersoll, whose son would sign the United States Constitution, provides an example of how these public attorneys functioned.[146] Ingersoll initially served as the King's Attorney for New Haven County in Connecticut.[147] The office had been created in the early 1700s when there was concern about Connecticut's loyalty to the Crown.[148] To demonstrate their loyalty, the Connecticut legislature adopted a statute appointing an attorney in each county to represent the Crown's interests with particular emphasis on "prosecut[ing] and implead[ing] in the lawe all criminal offenders, and [doing] all other things necessary and convenient to suppress vice and immoralitie."[149] When Ingersoll took office, he immediately increased the number of morals prosecutions.[150] This was the only aspect of the

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133 Bodenhamer, *supra* note 130, at 63; McConville and Mirsky, *supra* note 108, at 453-454; Andrew M. Siegel, *When Prosecutors Control Criminal Court Dockets: Dispatches on History and Policy from a Land Time Forgot,* 32 Am. J. Crim. L. 325 (2005).

134 Steinberg, *supra* note 36, at 575-576.

135 *Id.*

136 *Id.*

137 McConville and Mirsky, *supra* note 108, at 453-454; Steinberg, *supra* note 36, at 577-78.

138 Steinberg, *supra* note 36, at 577-578.

139 McConville and Mirsky, *supra* note 108, at 453-454.

140 Parrillo, *supra* note 96, at 255-256.

141 *Id.*

142 *Id.*

143 *Id.*

144 *Id.*

145 *Id.*

146 *See generally,* Gipson, *supra* note 52.

147 *Id.* at 46-48.

148 *Id.*

149 *Id.*

150 *Id.*

work that Ingersoll could control. Victims initiated other criminal cases.[151] While his emphasis on morals prosecutions did not garner him public support, it enhanced his reputation with Connecticut's ruling bodies. [152] In May 1765 he was selected by the General Assembly as one of 34 Justices of the Peace and as a collector of the Stamp Act tax.[153]

While the public attorneys participated in every case, most cases were litigated by attorneys hired by the "prosecutor" and the defendant. Attorneys and judges rode circuits together, appearing in each town multiple times throughout the year.[154] When the attorneys arrived in town, they would take cases from anyone who could afford their services.[155] This meant that in one case the private attorney might represent the defendant and, in the next, represent the "prosecutor." Much like the English barrister, these private attorneys did not identify themselves with one side or the other and simply presented the cases to the best of their ability.[156] William Rawle, a prominent Philadelphia attorney who would later become the United States Attorney for Pennsylvania, exemplifies this.[157] During parts of the 1780s, he maintained a journal about his law practice in which he recorded his daily activities.[158] Rawle described a case where he served as defense counsel. Rawle's client had assaulted and battered "a poor Ratcatcher."[159] Despite representing the defendant, Rawle seemed to sympathize with the victim, writing that his client "not very needfully assaulted and battered the poor Ratcatcher."[160] In his first case that day, Rawle represented Rogers, whom he referred to as a "vile fellow."[161]

One final actor occasionally appeared in the process: the state Attorney General. Prior to Independence, each colony had its own Attorney General.[162] The Attorney General represented the English Attorney General in that particular colony and handled any matter necessary to protect the Crown's interests.[163] This included treason and revenue cases.[164] They also oversaw the work performed by other public officials and provided legal advice to the royal Governor.[165] Following the Revolution, however, the Attorney General lost prestige because of the position's close relationship to the Crown.[166] Local officials assumed responsibility for all

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151 *See supra* notes 86-98 and accompanying text.

152 Gipson, *supra* note 52, at 52-57.

153 *Id.*

154 Friedman, *supra* note 57, at 92.

155 *Id.*

156 On the English Barrister, *see* William T. Pizzi, Trials Without Truth: Why Our System of Criminal Trials has become an Expensive Failure and What We Need to Rebuild It (1999).

157 Scott Ingram, *George Washington's Attorneys: The Political Selection of United States Attorneys at the Founding,* 39 Pace L. Rev. 163 (2018).

158 Rawle Family Papers, Pennsylvania Historical Society, Philadelphia, PA.

159 William Rawle Journal, March 25, 1786, Rawle Family Papers, Pennsylvania Historical Society, Philadelphia, PA [photo 6170078]

160 *Id.*

161 *Id.*

162 Cooley, *supra* note 132, at 309.

163 *Id.*

164 *Id.*

165 *Id.*

166 Jacoby, *supra* note 8, at 18-19 (discussing the change to more local control over prosecution).

criminal prosecutions and the Attorney General only had the ability to supervise and advise.[167]

B. Rationale for and Critique of the Private Prosecution System

Nothing required the colonial and early American criminal court system to function this way. The fact that it did so resulted from a confluence of factors. From an economic perspective, the private prosecution model proved cost efficient.[168] Litigants bore the financial burden and paid for the system.[169] Those employed by the system served only part-time and were compensated by the fees.[170] From a political perspective, the private prosecution model kept the state at arm's length, assuaging the citizenry's fears of governmental tyranny. As Steinberg noted, the prevailing ethos was that the government should not intervene in typical cases.[171] Private litigants had the power to initiate and conclude cases at their discretion, meaning justice was in the community's hands, rather than the government's. From a social perspective, this was how the colonists wanted it. Prosecution was a local matter based on local values.[172] They did not want outsiders dictating local priorities. As Ingersoll's example demonstrates, even in morals cases, vigorous enforcement did not lead to popular support.[173] Ingersoll served as a Crown representative.[174] To the people, this was too strong an intervention. Grand Juries also demonstrate this phenomenon when, during the Revolutionary Era, they refused to indict colonists protesting British policies.[175] Ultimately, the American system supplied informal, pragmatic dispute resolution. Combatting crime, as it is thought of today, was not a priority.

Even though this system emerged from the early American experience, the system had its critics. Complaints emerged about the public attorney, the Justice of the Peace, and the Grand Jury. People recognized the lack of legal talent in the public attorney's office.[176] They felt it gave paid defense counsel an unfair advantage in court.[177] Judges in the higher courts also complained about the Justices of the Peace and the Grand Jury.[178] The lack of formal legal training for these roles impaired the screening function by allowing too many unworthy cases to reach the formal court stages.[179]

Social changes also necessitated systemic changes. Violence erupted in larger communities, overwhelming the private prosecution model.[180] This caused

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167 *Id.*
168 Langbein, *supra* note 33, at 11-12.
169 *Id.*
170 Parrillo, *supra* note 96, at 256.
171 Steinberg, *supra* note 36 at 575-576 (government interest in the outcome).
172 Steinberg, *supra* note 65, at 234-38.
173 Gipson, *supra* note 52, at 52-57.
174 *Id.*
175 Younger, *supra* note 124, at 27-28.
176 Robert Ireland, *Privately Funded Prosecution of Crime in Nineteenth Century United States* 39 Am. J. of Leg. Hist. 43, 43-46 (1995).
177 *Id.* and Ramsey, *supra* note 37, at 1328-31.
178 Steinberg, *supra* note 54, at 57.
179 *Id.*
180 *Id.*

people to seek greater governmental involvement in law enforcement.[181] Rather than the informal, part-time law enforcement of the colonial and early American eras, professional police forces developed in the mid-nineteenth century.[182] The new police forces resulted in a sharp increase in arrests.[183] The minor public attorney function could not handle the significant caseload increase.[184] The victim became less relevant as a new phenomenon of public prosecution emerged.[185] They were paid by the government, rather than by fees and obtained their jobs through election rather than appointment.[186] This change led to political, rather than private, prosecution.

II. Political Prosecutors

As the nineteenth century progressed two significant changes forced the "public attorney" to transform into a political prosecutor. First, citizens demanded a greater voice in who served in judicial and law enforcement roles.[187] Rather than appoint judges and sheriffs, people argued that those functions should be elected.[188] Due to their association with the courts, the "public attorney" rode along on the wave of democratic accountability.[189] Second, in response to increasing public disorder, urban areas created full-time, professional police forces who were authorized to arrest those violating the law.[190] This created both increased caseloads and a desire for more state involvement in crime control.[191] These two changes made the "public attorney" elected, brought the position more discretion, and necessitated more staff. As a result, by the mid-nineteenth century, political parties controlled the prosecution function, making prosecutors subject to party control.

A. Societal Change in the Nineteenth Century

As the nation expanded west during the nineteenth century, the "public attorney" function traveled with it. States statutorily authorized the role and devised different appointment methods.[192] A few retained appointment by local judges.[193] Other states permitted the governor, the legislature or the state supreme court to appoint the prosecutor.[194] In these latter states, many perceived it as a governmental attempt to exert political influence over local concerns.[195] They argued for local prosecutorial elections to insulate prosecutors from state-level partisan political battles.[196]

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181 *Id.*
182 *Id.*
183 *Id.*
184 *Id.*
185 *Id.*
186 Jacoby, *supra* note 8, at 21-2.
187 *Id.*
188 *Id.*
189 Michael J. Ellis, *The Origins of the Elected Prosecutor* 121 Yale L.J. 1528 (2012).
190 Steinberg, *supra* note 54, at 29.
191 *Id.*
192 Ellis, *supra* note 189, at 1537-38.
193 *Id.*
194 *Id.*
195 *Id.*
196 *Id.*

At the same time, the nation moved towards greater democracy.[197] Few public officials were actually elected. To make public officials more accountable to the people, the public demanded that local officials such as judges and county sheriffs be elected.[198]

Significant social upheaval corresponded with the move toward more democratic accountability for public officials, especially in urban areas.[199] Places relying on privately initiated prosecution discovered that the private prosecution model failed to adequately address the problem.[200] As a result, people resorted to increased state control over the law enforcement function by creating professional police forces.[201] Professor Steinberg identifies two important consequences of this decision.[202] First, it created two distinct groups of people: those under suspicion of public disorder and those who were not.[203] Naturally, the police focused on the former.[204] Second, these new police forces possessed the power to arrest.[205] This meant that the state, not a private citizen, became the initiating force behind criminal cases.[206]

To deal with the large influx of cases, the "public attorney" role had to expand to become the prosecutor. This appears in court decisions from the transitional time period. In an 1809 Kentucky assault case, the grand jury's indictment failed to include the prosecutor's name as required by statute.[207] In granting the defendant's motion to identify the prosecutor or, in the alternative, dismiss the case, the court wrote:

> To prevent vexatious prosecutions…by those who would willingly convert the process of the commonwealth into an engine of malice and private resentment, provided they could stand behind the curtain secure from costs, it has been enacted…that "the name and sirname of the prosecutor, and the town and county in which he shall reside, with his title and profession, shall be written at the foot of every bill of indictment…"[208]

By 1847, in Mississippi, a defendant indicted for forgery raised the same objection.[209] The court noted that the public prosecutor has the statutory duty to identify the prosecutor's identity on each indictment.[210] The court defined an indictment as "a criminal prosecution, based on the written accusation of either a private or a public prosecutor, and preferred to the grand jury, and by them indorsed on the back "a

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197 *Id.*
198 *Id.*
199 Steinberg, *supra* note 65, at 242.
200 *Id.*
201 *Id.*
202 *Id.*
203 *Id.*
204 *Id.*
205 *Id.*
206 *Id.*
207 Commonwealth v. Hutcheson, 4 Ky. 355 (Ky. App. Ct., 1809).
208 *Id.* at 355.
209 Morris v. State of Mississippi, 16 Miss. 762 (Miss. 1847).
210 *Id.*

true bill," and returned into court."[211] Recognizing that the District Attorney is the prosecutor, the court wrote:

> the record does not show that there was any prosecutor other than the district-attorney, whose name is attached to the indictment. …[I]f there were no private prosecutor the district-attorney would not be authorized to mark one on the indictment. …It is not essential to the validity of an indictment, or presentment, that the same should be signed by the district-attorney…. The statutes of this state do not require the district-attorney to sign his own name to any presentment or indictment. They are simply required to "appear and prosecute for the state, in their respective districts, in all criminal prosecutions," [citation omitted] "and to attend the deliberations of the grand jury, &c. and give them the necessary information touching the law and the facts of each case," [citation omitted]. If, therefore, the district-attorney signs his own name to an indictment it is a voluntary act, and an assumption of the responsibility of the prosecution.[212]

As these two cases demonstrate, by the mid-nineteenth century, courts recognized that public prosecutors acquired more authority, supplanting private prosecutors, even in cases where the private prosecutor may not have desired to proceed.

The switch to popular election made public prosecutors an instrument of social control, a tool of the state.[213] During this time, working on behalf of the state meant working on behalf of political parties. No one worked for the government who did not also work for the controlling political party. By aligning themselves with a wider political organization, prosecutors had to consider more than the case's merits or the victim's interests. Political considerations became a significant factor in discretionary decision-making. Not only did the citizenry embrace this change but demanded vigorous prosecution.[214]

During this time, prosecutors gained discretionary decision-making authority in charging and in plea bargaining. Prosecutors became the grand jury's gatekeeper.[215] Whenever the grand jury heard cases, the prosecutor examined witnesses and explained the law to the grand jurors.[216] This permitted them to influence how the grand jury perceived the case. If the grand jury decided in a manner contrary to the prosecutor's wishes, the prosecutor could decide not to pursue the indictment.[217] Once a case reached court, prosecutors offered defendants leniency in exchange for a guilty plea.[218] Showing leniency insulated defendants from the harshness of the state-dominated prosecutorial apparatus.[219] With these powers, prosecutors effectively assumed both the grand jury and justice of the peace functions.

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211 *Id.*
212 *Id.*
213 Mary E. Vogel, *The Social Origins of Plea Bargaining: Conflict and Law in the Process of State Formation, 1830-1860* 33 L. & Soc. Rev. 161 (1999).
214 Ramsey, *supra* note 37, at 1336-42.
215 McConville & Mirsky, *supra* note 108, at 464-67.
216 *Id.*
217 *Id.* and Steinberg, *supra* note 88, at 755.
218 Vogel, *supra* note 213, at 166-68, 218-19.
219 *Id.* Of course, this was more of an illusion as prosecutors were the instruments of social control by the State.

Different prosecutors used their discretionary authority differently. Though this discussion focuses on state-level prosecutors, a federal prosecution during this time period illustrates how changing prosecutors could change outcomes. In St. Louis, during the early 1870s, a group of whiskey distillers and United States government revenue collectors conspired to defraud the United States government of millions of dollars of revenue.[220] Much like state and local government, federal government employment relied upon political affiliation.[221] This meant that the United States Attorney for the Eastern District of Missouri, who was responsible for prosecuting the frauds, showed little interest in prosecuting his political associates.[222] His reluctance to do so led to his removal and resulted in an outsider's appointment.[223] The outsider aggressively pursued the frauds until he unearthed evidence against the President's personal secretary.[224] Simply changing who filled the role, changed the case's trajectory.

Cases like this helped political party leaders discover that utilizing prosecutorial political authority could advance the party's political interests.[225] Prosecutors had the ability to disperse favors and enforce party discipline.[226] They could indict political rivals, threaten indictments against those who considered opposing the party, and ignore indictments returned against party loyalists.[227] Professor Steinberg recounts how, after a newly elected District Attorney took office, his staff found hundreds of indictments that never made it to court.[228] Instead, the indictments remained, awaiting use should the indicted defendant defy party wishes.[229] They could also appeal to key segments of the electorate through their decisions.[230] By showing leniency, they could gain popular support when necessary.[231] Obtaining guilty pleas also had the ancillary benefit of increasing the office's conviction rate.[232]

Of course, the political party could only use this power so long as the voters recognized the prosecutor's successes. This brought prosecutors squarely into the public sphere.[233] News media reported how prosecutors handled criminal cases in court and whether or not they obtained guilty verdicts.[234] Conviction equaled success.[235] This meant that, to boost conviction rates, prosecutors targeted those

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220 Ron Chernow, Grant, (2017) 796-808.

221 *See generally* Ari Hogenboom, Outlawing the Spoils: A History of the Civil Service Reform Movement, 1865-1883 (1968).

222 Scott Ingram, *Politics of Justice: Presidents Trump and Grant and the Problem of Investigating the Executive Branch,* (November 1, 2018). Available at SSRN: https://ssrn.com/abstract=3363358or http://dx.doi.org/10.2139/ssrn.3363358

223 *Id.*

224 *Id.*; *See also* Chernow, *supra* note 220, at 796-808.

225 Vogel, *supra* note 213, at 230-232 and Ramsey, *supra* note 37, at 1338-1341.

226 Moley, *supra* note 38, at 74.

227 Mark H. Haller, *Plea Bargaining: The Nineteenth Century Context,* 13 L & Soc. Rev. 273 (1979); Steinberg, *supra* note 88, at 755; Ramsey, *supra* note 37 at 1338-1341.

228 Steinberg, *supra* note 88, at 755.

229 *Id.*

230 Vogel, *supra* note 213, at 233-35.

231 *Id.*

232 McConville and Mirsky, *supra* note 108, at 460, 465-66; Pound, *supra* note 38, at 183-84.

233 McConville and Mirsky, *supra* note 108, at 465-66; Haller, *supra* note 227, at 277-78.

234 Haller, *supra* note 227, at 277-278; Ramsey, *supra* note 37, at 1340-42.

235 McConville and Mirsky, *supra* note 108, at 465-66.

without financial resources or the social power to defend themselves.[236] Actual guilt or innocence was secondary.[237] This was particularly important in high profile cases where a conviction could launch the prosecutor to higher office.[238]

In her article on the historical development of public prosecutors, Carolyn Ramsey describes the political duel that occurred between two assistant prosecutors who sought election when the incumbent decided not to run.[239] The two assistants jointly pursued a prosecution against several alderman who allegedly accepted bribes during the construction of a Broadway street car line.[240] One assistant prepared the cases and the other delivered many of the closing arguments.[241] When they opposed each other in the election, "respectable" newspapers such as the *New York Times* endorsed the assistant who prepared the cases and labeled the other as associated with the political machines.[242] The latter ultimately prevailed and proved the *New York Times* correct when he dismissed the remaining aldermanic bribery cases.[243] The machine-backed prosecutor also refused to act on indictments, making decisions based on personal benefit and leniency.[244] When the prosecutor asserted that he intended to save scarce prosecutorial resources for the most significant cases, the media was not convinced.[245] At the next election, the assistant who prepared the bribery cases again ran, again associating his former colleague with the political machines.[246] At the same time, the challenger asserted his independence from the political machines.[247] These two electoral contests further reveal the political prosecutor at work. The winner of the first contest "represented" the less respectable portion of society, those Professor Steinberg identified as the "suspect" group.[248] Conversely, the challenger "represented" the respectable portion of society.[249]

Beyond their discretionary power, prosecutor offices offered political parties a "dumping ground" for political loyalists.[250] Increased caseloads required assistant prosecutors. Like those elected, those who worked in the office possessed political ambitions. Starting as an assistant could lead to advancement as the elected prosecutor.[251] To ensure the assistants remained loyal, those hired had to have proper political connections.[252] These assistants shared certain qualities. They entered the office early in their career and remained a short time before advancing to better

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236 Steinberg, *supra* note 88, at 755.
237 *Id.*
238 Moley, *supra* note 38, at 75-80; Vogel, *supra* note 213, at 235.
239 Ramsey, *supra* note 37, at 1347-51.
240 *Id.*
241 *Id.*
242 *Id.*
243 *Id.*
244 *Id.*
245 *Id.*
246 *Id.*
247 *Id.*
248 *Id.*; Steinberg, *supra* note 65, at 242.
249 Ramsey, *supra* note 37, at 1347-51.
250 Steinberg, *supra* note 88, at 755.
251 Vogel, *supra* note 213, at 218.
252 Steinberg, *supra* note 88, at 755.

positions.[253] One reason for this was that the assistants received little pay.[254] Instead of pay, they received political rewards when they influenced the outcomes of cases or protected their party's political interests.[255] Ultimately, the low pay and low prestige created an office of people who knew more about politics than law.[256]

B. Critiques and Reform

Not surprisingly, the major critique of the political prosecutor was the connection to the political system. As demonstrated through hiring practices and decision-making considerations, partisan, electoral politics played a considerable role. Those supporting the favored party received benefits while those opposed faced persecution. Interestingly, however, there appears to be a tenuous balance between the competing partisans that resulted in both the "respectable" and the "suspect" classes gaining power, albeit at different times.

Recognition that partisan allegiance could have a harmful effect on justice administration appeared quickly. For example, in Ohio, newspapers reported how one prosecutor, in the months before an election, refused to prosecute political allies.[257] Aware of such instances, one Ohio legislator questioned whether selecting prosecutors was better left to someone other than the electorate.[258] While nothing resulted from the legislator's inquiry, Ohio newspapers regularly reported that prosecutors acted on behalf of political allies rather that in the interests of the people as a whole.[259]

People also quickly recognized that hiring people based on political affiliation rather than legal ability resulted in ineffective and incompetent representation. This meant that in the most serious cases the victim or victim's family would hire their own representation to prosecute the case. This private prosecutor worked with the public prosecutor, but the private prosecutor took charge.[260] In a sense, the private prosecutor model merged with the political prosecutor model. Savvy defense attorneys took note of this, however, and argued that the private prosecutor's interest was vengeance rather than truth or justice.[261] Once defense attorneys began making these arguments, many state legislatures noticed and responded by prohibiting victims from hiring private prosecutors.[262]

Newspapers and legislators were not the only people who observed the flaws presented by political prosecution; defendants did as well. Burdened with cases from both police and political overseers, prosecutors confronted significant caseload pressure. As Professor Steinberg notes in his study of the transition away from political prosecution, a newly elected prosecutor found unacted upon indictments

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253 Moley, *supra* note 38, at 87.
254 *Id.*
255 Haller, *supra* note 227, at 277-78.
256 Moley, *supra* note 38, at 74-87.
257 Ellis, *supra* note 189, at 1547.
258 *Id.*
259 *Id.*
260 Ramsey, *supra* note 37, at 1329-31.
261 *Id.*
262 Andrew Sidman, *The Outmoded Concept of Private Prosecution,* 25 Am. U. L.R. 754, 768-73 (1976).

simply laying around the office.[263] To reduce the caseload pressure, prosecutors made deals with defendants. Defendants learned that the system was not about presenting a defense or administering justice but about manipulating the system to get the best deal possible.[264]

Despite these critiques, the prosecutor's political connection provided some measure of representation to all societal groups. The political machines recognized the prosecutor's discretionary power and sought to use it to the machine's advantage. This made prosecutorial elections highly contested. The "respectable" class had their candidate and the "suspect" class had their candidate. Whichever candidate prevailed represented their political patron's interests. As Professor Ramsey noted in her study of New York City prosecutors, when the "suspect" class's candidate won, the prosecutor did not pursue as many criminal cases.[265] While the "respectable" class decried this as laziness and inattention, the "suspect" class argued that they wished to preserve resources for the most serious cases.[266]

By the end of the nineteenth century, the Progressive movement began, and its sweeping social agenda affected criminal prosecution as well.[267] Demand for an independent prosecutor who would use discretion for the public good increased.[268] This transformed the prosecutor into a crime fighter who protected the public and provided law and order.[269] The transformation emerged from private organizations who committed themselves to rooting out corruption and immorality.[270] They investigated cases and brought them to the prosecutors.[271] They also created public pressure, making it difficult for prosecutors to refuse the cases.[272] These groups received assistance from inside the prosecutor's office too. Professor Steinberg recounts how William Travers Jerome utilized his family name and its connection to Tammany Hall to get a job in the District Attorney's office after graduating from law school.[273] He did not perform as expected when he pursued an assault case against a Tammany district boss.[274] While forced to resign, he would later return as an independent prosecutor, having learned from his experience.[275]

III. Professional Prosecutors

As the twentieth century dawned, people such as New York District Attorney William Travers Jerome, ushered in a new perspective on criminal prosecution.

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263 Steinberg, *supra* note 88, at 755.
264 Haller, *supra* note 227, at 277.
265 Ramsey, *supra* note 37, at 1347-51.
266 *Id.*
267 Steinberg, *supra* note 88, at 755. *See also* Bruce A. Green and Rebecca Roiphe, *A Fiduciary Theory of Prosecution*, 69 Am. U.L. Rev. 805 (2020).
268 Steinberg, *supra* note 88, at 755.
269 *Id.*
270 *Id.*
271 *Id.*
272 *Id.*
273 *Id.* On Tammany Hall, *see generally* Terry Golway Machine made: Tammany Hall and the Creation of Modern American Politics (2014).
274 Steinberg, *supra* note 88, at 755.
275 *Id.*

They established some degree of independence from the political machines.[276] Rather than party demands, prosecutors acted based on their conception of justice, becoming "ministers of justice."[277] As the century progressed, the United States Supreme Court required criminal prosecutions adhere to certain procedural protections.[278] To obtain convictions, prosecutors had to ensure courts provided defendants these rights. Finally, the progression to procedural rights correlated with career prosecutors. Career prosecutors became specialists and devoted their efforts to making criminal prosecution more efficient. This meant screening out cases with insufficient evidence and learning to improve evidence collection and case presentation. By the end of the twentieth century, people argued that prosecutors had become too powerful and too disconnected from the communities they serve.

A. Twentieth-Century Independence

Throughout the twentieth century, prosecutors, for the most part, disconnected themselves from the political connections that dominated their 19th-century decision-making. They established their independence by taking more control over their charging authority. Over time, prosecutors developed strategies to utilize their discretion efficiently.

Public demands for increased morals prosecutions forced prosecutors to adapt.[279] Private agencies investigated and presented cases with strong evidence to prosecutors.[280] It did not take long for prosecutors to realize they had more success with "good" cases than prosecuting every case the police brought to them.[281] This added layers of complexity to the prosecution function. Roscoe Pound and Raymond Moley both observed this in the twentieth century's early decades. Pound perceived the American prosecutor as combining investigative, charging, preparing, and advocating functions.[282] He noted that previously the victim, attorney general, solicitor and advocate from the English system performed these diverse functions.[283] Similarly, Moley noted prosecutors must possess both the investigator's skills and the lawyer's skills.[284] To accomplish these tasks, prosecutors needed to organize

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276 This was not total independence from political machines. Even as prosecutors became more professional, they still had to stand for election. JACOBY, *supra* note 8, at xxi.

277 On ministers of justice, *see generally* Bennett L. Gershman, *Hard Strikes and Foul Blows*: Berger v. United States *75 Years After,* 42 LOY. U. CHI. L.J. 177 (2010). Bruce A. Green, *Why Should Prosecutors Seek Justice?,* 26 FORDHAM URB. L. J. 607 (1999).

278 A. Kenneth Pye, *The Warren Court and Criminal Procedure,* 67 MICH. L. REV. 249 (1968), Jerold H. Israel, *Criminal Procedure, the Burger Court, and the Legacy of the Warren Court,* 75 MICH. L. REV. 1319 (1977), Donald A. Dripps, *Beyond the Warren Court and Its Conservative Critics: Toward a Unified Theory of Constitutional Criminal Procedure,* 23 UNIV. MICH. J. L. REFORM 591 (1989); and Yale Kamisar, *The Warren Court and Criminal Justice: A Quarter-Century Retrospective,* 31 TULSA L. J. 1 (1995).

279 Steinberg, *supra* note 88, at 755, 768-71.

280 *Id.*

281 Orvill C. Snyder, *District Attorney's Hardest Task,* 30 J. CRIM. L. & CRIMINOLOGY 167 (1939) (prosecuting every case is not efficient or desirable).

282 POUND, *supra* note 38, at 182.

283 *Id.*

284 MOLEY, *supra* note 38, at 48-52.

their office, acquire permanent personnel, and divide labor.[285] These requirements opened the door for professional prosecutors as most attorneys entering office did not enter office with such things.

Courts also quickly noticed prosecutors possessed significant charging discretion and how prosecutors used this discretion impacted the reliability of trials.[286] While other courts referenced this concern first, the United States Supreme Court most famously commented about the potential problem in *Berger v. United States*.[287] The United State government charged Berger and others with counterfeiting bank notes.[288] According to the Supreme Court, the government did not have a strong case.[289] During the trial, the assistant United States Attorney presenting the case engaged in several foul blows.[290] Most focused on a particular witness whom the prosecutor believed would connect Berger with the conspiracy.[291] During the testimony, the prosecutor misstated facts, put words into the witness's mouth, stated facts in questions without evidentiary support, and then cross examined based on these unsubstantiated statements.[292] The prosecutor highlighted the cross examination during his closing argument.[293] According to the Court, "The prosecuting attorney's argument to the jury was undignified and intemperate, containing improper insinuations and assertions calculated to mislead the jury."[294] Following this conclusion, the Court turned to the prosecutor's role.[295] Justice Sutherland wrote:

> The United States Attorney is the representative not of an ordinary party to a controversy, but of a sovereignty whose obligation to govern impartially is as compelling as its obligation to govern at all, and whose interest, therefore, in a criminal prosecution is not that it shall win a case, but that justice shall be done.[296]

Sutherland continued,

> He may prosecute with earnestness and vigor -- indeed, he should do so. But, while he may strike hard blows, he is not at liberty to strike foul ones. It is as much his duty to refrain from improper methods calculated to produce a wrongful conviction as it is to use every legitimate means to bring about a just one.[297]

While this would eventually be read as encompassing a general duty, Justice Sutherland, in the next sentence, turned to the prosecutor's role in court, stating:

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285 POUND, *supra* note 38, at 183-184.
286 Gershman, *supra* note 277.
287 Berger v United States, 295 U.S. 78 (1935).
288 *Id.* at 79-80.
289 *Id.*
290 *Id.* at 84-89.
291 *Id.*
292 *Id.*
293 *Id.*
294 *Id.*
295 *Id.*
296 *Id.*
297 *Id.*

> It is fair to say that the average jury, in a greater or less degree, has confidence that these obligations, which so plainly rest upon the prosecuting attorney, will be faithfully observed. Consequently, improper suggestions, insinuations, and, especially, assertions of personal knowledge are apt to carry much weight against the accused, when they should properly carry none.[298]

Consequently, the Court's concern was with a prosecutor's trial conduct and not anything outside of that context.

Following *Berger*, prosecutors became "ministers of justice" but what that meant for how prosecutors should perform their role proved ambiguous. Justice Sutherland recognized the concomitant duties of aggressive prosecution and protecting innocence.[299] Legal scholars attempted to discern the balance. Some presented clear duties: ascertain the facts, convict the guilty and protect the innocent from conviction.[300] Others saw more ambiguity and imposed greater burdens, including ensuring that the basic element of an adversarial process appear in each trial.[301] Still others prescribed a more nebulous formulation, placing prosecutors somewhere in the middle of a neutral judge, an advocate, and a defense attorney.[302]

If legal scholarship created confusion, then prosecutorial practice did little to bring clarity. Social scientists observed prosecutorial behavior and recognized that different prosecutors perceived their role differently, striking inconsistent balances between their advocacy role and their minister of justice role. Jacoby, in her study of multiple prosecutor offices, observed that some offices adopted a conservative, or legalistic, approach to their office.[303] They rarely employed discretion and prosecuted nearly every case presented to the office.[304] This prosecutor is a remnant of the political prosecutor. A second category exemplified the professional prosecutor, who managed to switch roles as the criminal process progressed.[305] At the outset they played a judicial role, determining whether a given case was worthwhile prosecuting.[306] Then, once the case entered the court system, switched to an advocate.[307] Even within this category, however, prosecutors struck the balance differently. Some saw themselves in a more adversarial posture, promoting "law and order" and "public safety."[308] In San Diego, California, during the 1970s, individual prosecutors could exercise little discretion when resolving cases.[309] All plea negotiations had to be

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298 *Id.*

299 *Id.*

300 Karen E. Holt, *Hard Blows and Foul Ones: The Limited Bounds on Prosecutorial Summation in Tennessee*, 58 Tenn. L. Rev. 117 (1990)

301 Fred C. Zacharias, *Structuring the Ethics of Prosecutorial Trial Practice: Can Prosecutors Do Justice?,* 44 Vand. L. Rev. 45 (1991).

302 Carrie Leonetti, *When the Emperor Has No Clothes III: Personnel Policies and Conflicts of Interest in Prosecutors' Offices,* 22 Cornell J. L. & Pub. Pol'y 53 (2012).

303 Jacoby, *supra* note 8, at xxii.

304 *Id.*

305 *Id.*

306 *Id.*

307 *Id.*

308 Pamela Utz, *Two Models of Prosecutorial Professionalism,* in The Prosecutor 99-124 (McDonald, ed. 1979).

309 *Id.*

approved by high-level assistants.[310] Only rarely did such negotiations occur.[311] By contrast, in Alameda County, California, during the same time period, prosecutors adopted a "magisterial" approach.[312] Prosecutors embraced their ability to reconsider cases as the system progressed.[313] They negotiated cases in moderated and objective fashion.[314] A third model, which foresaw how prosecutors would expand upon their discretionary authority, cast prosecutors as policymakers who used their position for social, economic, legal or political change.[315]

As prosecutors sought to balance these dual roles, the United States Supreme Court redefined criminal procedure. Its decisions provided criminal defendants protections and vacated convictions when protections were not provided. These included the right to counsel, followed by the requirement that counsel be effective.[316] It included the requirement that prosecutors provide the defense with exculpatory information.[317] The Court also created a whole body of search and seizure law and confession law.[318]

These procedural protections further complicated the prosecutorial decision-making calculations. New decisions regarding search and seizure and confessions required prosecutors to further oversee investigative activity.[319] They became counselors to law enforcement, advising them on which practices were constitutional and which were not.[320] Not all law enforcement agencies heeded this advice, however, and some agencies became more trusted than others.[321] Which agency conducted the investigation could affect the charging decision.

The changing rules also proved challenging for prosecutors. Complaints about misconduct emerged, especially in the disclosure of exculpatory evidence. Prosecutors who adopted a win-at-all-costs mentality suppressed exculpatory evidence, hoping to gain trial advantage.[322] Other prosecutors struggled to apply the discovery rules to individual cases.[323] This proved especially challenging because,

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310 *Id.*
311 *Id.*
312 *Id.*
313 *Id.*
314 *Id.*
315 Mellon et al., *supra* note 8, at 53, 80.
316 Gideon v. Wainwright, 372 U.S. 335 (1963) and Strickland v. Washington, 466 U.S. 668 (1984).
317 Brady v. Maryland, 373 U.S. 83 (1963).
318 *See* e.g. Katz v. United States, 389 U.S. 347 (1967), Miranda v. Arizona, 384 U.S. 436 (1966).
319 Allen F. Anderson, *The Police, The Prosecution, and Plea Negotiation Rates: An Exploratory Look,* 12 Crim. Just. Rev. 35 (1987), Daniel Richman, *Prosecutors and Their Agents, Agents and Their Prosecutors,* 103 Colum. L. R. 749 (2003).
320 *Id.*
321 Carl P. Stover, *Prosecution in Middle County: An Application of Organization Theory to Criminal Justice,* 6 Crim. Just. Rev. 26 (1981).
322 *See e.g*. Athelia Knight, *1983 Murder Conviction Overturned: Missouri Woman Freed as Judge Rules Prosecution was 'Fundamentally Unfair',* Wash. Post Aug. 4, 1999, p.A2. *See generally* Heather Schoenfeld, *Violated Trust: Conceptualizing Prosecutorial Misconduct,* 21 J. of Contemp. Crim. Just. 250 (2005).
323 Steven Koppell, *An Argument Against Increasing Prosecutors' Disclosure Requirements Beyond* Brady*,* 27 Geo. J. of Legal Ethics 643 (2014) and Brian P. Fox, *An Argument Against Open-File Discovery in Criminal Cases,* 89 Notre Dame L. Rev. 425 (2013).

over time, the scope and complexity of criminal investigations exponentially increased the amount of information that was potentially discoverable.[324] For example, in the 1993 World Trade Center Bombing case, once the trial had concluded, Assistant United States Attorney Patrick Fitzgerald learned about recorded statements made by one of the government's incarcerated witnesses to Bureau of Prisons officers.[325] Erring on the side of caution, Fitzgerald disclosed the problem.[326] To guard against this type of problem, some prosecutors adopted "open file" policies where defense attorneys could simply view the entire case file.[327] With different prosecutors adopting different perspectives, people began defining the prosecutor's duty to do justice as consisting of doing nothing that would undermine any component of the American criminal justice system.[328]

Complex laws, complex cases, and complex decisions required people devote more time to criminal prosecution. Rather than merely try cases as private prosecutors did or remain until the next election as political prosecutors did, attorneys began making prosecution their career.[329] This attracted more talented attorneys with better educations and no interest in political advancement.[330] Incumbent elected prosecutors devoted more attention to hiring, preferring merit to political connections.[331] For example, in New York City, since 1942, there have been only four elected District Attorneys.[332] Similarly, since 1962, Orleans Parrish, in Louisiana, has had only five district attorneys.[333] Jurisdictions like these

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[324] *See generally* Jenia I. Turner, *Managing Digital Discovery in Criminal Cases,* 109 J. Crim. L. & Criminology 237 (2019).

[325] Patrick J. Fitzgerald, *Thoughts on the Ethical Culture of a Prosecutor's Office,* 84 Wash. L. Rev. 11 (2009).

[326] *Id.*

[327] Burke, *supra* note 23, at 2126-2127; Fox, *supra* note 323, at 429-430, 433; Steve Williams, *Implementing* Brady v. Maryland*: An Argument for a Pre-Trial Open File Policy* 43 U. Cin. L.Rev. 889 (1974).

[328] Rapping, *supra* note 41, at 518-19, 527-28.

[329] J.J. Fishman, *Social and Occupational Mobility of Prosecutors in New York City*, in The Prosecutor (William McDonald ed.,1979).

[330] Steinberg, *supra* note 88, at 772; and Fishman, *supra* note 329, at 245-50.

[331] Fitzgerald, *supra* note 325, at 18; Seema Gajwani & Max G. Lesser, *The Hard Truths of Progressive Prosecution and a Path to Realizing the Movement's Promise*, 64 N.Y.L. Sch. L. Rev. 69 (2019).

[332] Frank Hogan served from 1942-1974. Robert Morgenthau served from 1975-2009. Cyrus Vance served from 2010 to 2021. Alvin Bragg succeeded Vance after the 2021 election. Prior to Hogan, the longest anyone had served as New York District Attorney was eight years, Hugh Maxwell from 1821-1829. New York District Attorney's Office, *History of the Office*, https://www.manhattanda.org/about-the-office/history-of-the-office/ (last visited Nov. 1, 2023).

[333] Jim Garrison served from 1962-1973. Harry Connick, Sr. served from 1974-2003. Eddie Jordan served from 2003-2007. Leon Cannizarro served between 2008-2021. In 2021, Jason Williams was elected to succeed Cannizarro. *Harry Connick, Sr,* Wikipedia, https://en.wikipedia.org/wiki/Harry_Connick_Sr. (viewed Jan 7, 2024); *Eddie Jordan (attorney)*, Wikipedia, (viewed Jan 7, 2024); Mike Pearlstein, *New Orleans DA Leon Cannizzaro retires with a complicated legacy after 2 terms* 4WWL News, July 24, 2020 (https://www.wwltv.com/article/news/crime/new-orleans-da-leon-cannizzaro-retires-with-a-complicated-legacy-after-2-terms/289-d4fdcccf-3c28-4ff5-96c6-20b3f1bacd20); District Attorney Williams, Orleans Parish District Attorney, https://orleansda.com/district-attorney-williams/ (viewed Jan 7, 2024). Both New York and Orleans Parish

demonstrate not only the careerist nature of prosecution that emerged but how prosecutors disconnected themselves from partisan political battles and rendered prosecutor elections relatively meaningless.[334]

As these independent, professional prosecutors took office, they professionalized their offices. Offices moved from part-time assistants to full-time assistants.[335] They also created internal office structures to channel and oversee prosecutorial decision-making, particularly in case screening.[336] Some offices separated charging units from trial units. This separated the dual roles of magistrate and advocate.[337] Yet, by focusing their attention on the charging decision, questions arose about how prosecutors reached this decision. Some questioned whether a prosecutor's personal opinion on guilt should matter.[338] Other prosecutors differed about which cases were "worth" pursuing.[339] Other offices avoided these questions by establishing vertical prosecution units that specialized in certain crime types.[340] Some units focused on crimes such as sex crimes or homicide.[341] Prosecutors who worked in these areas became subject-matter experts in their case types.[342] These divisions occurred more in urban jurisdictions, rather than rural, because urban offices had more cases and more assistants.[343]

Ultimately, while political prosecutors were associated with their political activity, professional prosecutors were identified as law enforcers.[344]

B. Critiques and Reform

Critics focused on the prosecutor's law enforcement mentality in three ways. First, they asserted that prosecutors possessed too much power and needed to be

pale when compared to Paul Ebert who served as Commonwealth Attorney for Prince William County, Virginia, from 1968 to 2019 without interruption. *See* Transcript of Oral History Interview with Paul Ebert, Prince William County Office of Historic Preservation, https://www.pwcva.gov/assets/2023-12/Transcript%20of%20Oral%20History%20Interview%20with%20Paul%20Ebert_0.pdf (2023).

334 Ronald F. Wright, *How Prosecutor Elections Fail Us,* 6 Ohio St. J. Crim. L. 581 (2008).

335 William F. Wessel, *From Cracker Barrell to Supermarket: Taking the Country Out of Prosecution Management* in The Prosecutor, (William McDonald, ed.,1979).

336 *Id.*

337 Uviller, *supra* note 26, at 1716, 1718. See e.g. Wessel, *supra* note 335, at 141-42.

338 Alafair S. Burke, *Prosecutorial Agnosticism* 8 Ohio, St. J. Crim. Law 79 (2010), Melilli, *supra* note 23, at 685.

339 Alafair S. Burke, *Prosecutorial Passion, Cognitive Bias, and Plea Bargaining* 91 Marq. L. Rev. 183 (2007)

340 Dawn Beichner & Cassia Spohn, *Prosecutorial Charging Decisions in Sexual Assault cases: Examining the Impact of a Specialized Prosecution Unit*, 16 Crim. Just. Pol. Rev. 461 (2005).

341 *Id. See also* Cook County State's Attorney's Office, Criminal Prosecution Bureau Divisions, https://www.cookcountystatesattorney.org/criminal-prosecutions-bureau and District Attorney's Office, NC Prosecutorial District 26, Office Structure, https://charmeckda.com/our-office/office-structure/.

342 Beichner & Spohn, *supra* note 340, at 462; David C. Pyrooz et al., *Gang-related Homicide Charging Decisions: The Implementation of a Specialized Prosecution Unit in Los Angeles,* 22 Crim. Just. Pol'y Rev. 3 (2011).

343 Jacoby, *supra* note 8, at 62-71.

344 Melilli, *supra* note 23, at 688, 698.

restrained.[345] Second, while the "minister of justice" model was to guide professional prosecutorial decision-making, it proved to be too ambiguous to be much use. Finally, by taking a professional approach, not considering the political implications of their decisions, prosecutors became too disconnected from the community and ultimately defined justice as securing conviction at all costs. Concern about the lack of community connection led prosecutors to focus on specific crime problems communities identified.

As prosecutors considered their role and comprehended their authority, professional prosecutors learned to leverage the system to their benefit. As this occurred, prosecutors tipped the balance between themselves and defense attorneys in the prosecutor's favor.[346] During the political stage, defense attorneys possessed greater ability and achieved greater success.[347] As prosecutors became more professional, however, they became more skilled and began dominating the criminal court system.[348] By tipping the balance in their favor, prosecutors established a system based on the presumption of guilt, rather than the presumption of innocence.[349]

Prosecutors employed various means to tip the courthouse balance of power in their favor. First, they gained prominence over police departments.[350] Police departments became dependent upon prosecutors to file criminal charges in cases where the police made arrests. With prosecutors demanding quality cases, the police were forced to improve their evidence collection techniques and to work collaboratively with prosecutors to develop strong cases.[351] Prosecutors also used their charging discretion to acquire power. Taking advantage of new broadly-worded criminal laws passed by legislatures, prosecutors filed more cases.[352] The caseload increase severely impacted the quality of representation defense attorneys could provide.[353] The large number of high-quality cases led defense attorneys to develop a plea bargain mentality.[354] For prosecutors, a score-keeping mentality developed.[355]

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345 *See e.g.* Davis, *supra* note 14, at 457-64.

346 Bennett L. Gershman, *The New Prosecutors,* 53 Univ. Pitt. L. Rev. 393 (1991).

347 *Id.* and *supra*, section 2.A.

348 *Id.*

349 JaneAnne Murray, *A Perfect Prosecution: The State of New York v. Dominique Strauss-Khan,* 8 Crim. L. & Phil. 371 (2014).

350 Steinberg, *supra* note 88, at 755.

351 Richman, *supra* note 319, at 778-786. Allen F. Anderson, *The Police, the Prosecution, and Plea bargain Rates: An Exploratory Look,* 12 Crim. Just. Rev. 35 (1987).

352 Rapping, *supra* note 41, at 537.

353 William Lawrence, *The Public Defender Crisis in America:* Gideon*, the War on Drugs, and the Fight for Equality,* 5 Univ. Mia. Race & Soc. Just. L. Rev. 167 (2015) and Peter A. Joy, *Ensuring the Ethical Representation of Clients in the Face of Excessive Caseloads,* 75 Mo. L. Rev. 771 (2010).

354 Abraham Blumberg, *The Practice of Law as a Confidence Game: Organizational Co-optation of a Profession,* 1 Law & Soc. Rev. 15 (1966); Gilbert Geis, *Revisiting Blumberg's 'The Practice of Law as a Confidence Game',* 31 Crim. Just. Ethics 31 (2012); Albert W. Alschuler, *The Defense Attorney's Role in Plea Bargaining,* 84 Yale L.J. 1179 (1975).

355 Kenneth Bresler, *I Never Lost a Trial: When Prosecutors Keep Score of Criminal Convictions,* 9 Geo. J. Legal Ethics 537 (1995); Catherine Ferguson-Gilbert, *It is Not Whether You Win or Lose, It Is How You Play the Game: Is the Win-Loss Scorekeeping Mentality Doing Justice for Prosecutors,* 38 Cal. W. L. Rev. 283 (2001).

Like the political prosecutors, professional prosecutors won re-election based on soaring conviction rates.[356] Good prosecutors only filed good cases and secured convictions in those cases.[357] The pressure to win pushed prosecutors to develop case processing strategies to induce guilty pleas.[358] First, prosecutors overcharged cases by charging the most serious offense for which they had probable cause while knowing there was not proof beyond a reasonable doubt.[359] These prosecutors then offered a "reduced" charge in exchange for a guilty plea.[360] Risk-averse defendants entered guilty pleas.[361] Second, prosecutors imposed what some termed a "trial tax."[362] By pleading guilty, defendants received a lesser sentence than if they elected to exercise their constitutional right to a trial. At times, the discount encouraged even factually innocent defendants to plead guilty.[363]

While prosecutors saw their advantageous use of the court process as justice, others perceived such practices as unjust. These divergent views highlighted the ambiguous nature of justice and that holding prosecutors to a "justice" standard provided little guidance for prosecutorial decision-making.[364] Some saw convicting everyone as justice while others saw protecting the defendant's rights as justice.[365] Others critiqued the justice notion as failing to distinguish prosecutors from any other legal actor.[366] At various times people referred to judges, police and all lawyers as ministers of justice.[367] Ultimately, the notion of prosecutors as ministers of justice provided some broad aspirational goals but gave no criteria for how prosecutors should decide what is just in any particular case.[368]

Overall the move to professionalization disconnected prosecutors from the communities they purportedly served. Disparate notions of justice permitted prosecutors to explain any decision as "just." Securing high conviction rates generally satisfied the public and assured re-election as often as the incumbent desired.[369] The high volume of cases also meant that, for nearly every criminal

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356 Ronald F. Wright, *supra* note 334, at 603-04; Ronald F. Wright, *Beyond Prosecutor Elections*, 67 SMU L. Rev. 593 (2014); David A. Sklansky, *The Changing Political Landscape for Elected Prosecutors*, 14 Ohio St. J. of Crim. Law 647 (2016).

357 Catherine M. Coles, *Evolving strategies in 20th-century American prosecution,* in The changing role of the American prosecutor 177 (2008).

358 Oren Bar-Gill & Omri Ben-Shahar, *Credible Coercion*, 83 Tex. L. Rev. 717, 763-69 (2005)

359 Kyle Graham, *Overcharging*, 11 Ohio St. J. Crim. L. 701 (2014).

360 *Id.*

361 Albert W. Alschuler, *Implementing the Criminal Defendant's Right to Trial: Alternatives to the Plea Bargaining System,* 50 U. Chi. L. Rev. 931 (1983); Stephanos Bibas, *Plea Bargaining Outside the Shadow of Trial,* 117 Harv. L. Rev. 2463 (2004).

362 Brian D. Johnson, *Trials and Tribulations: The Trial Tax and the Process of Punishment,* 48 Crime & Just. 313 (2019).

363 *Id.*

364 Fred C. Zacharias, *Structuring the Ethics of Prosecutorial Trial Practice: Can Prosecutors Do Justice?,* 44 Vand. L. Rev. 45 (1991).

365 *Id.*

366 Bresler, *supra* note 355, at 538-40.

367 *Id.*

368 R. Michael Cassidy, *Character and Context: What Virtue Theory Can Teach Us About a Prosecutor's Ethical Duty to Seek Justice,* 82 Notre Dame L. Rev. 635 (2006).

369 Wright, *supra* note 334, at 604-07.

case, few in the public even remotely knew what prosecutors did.[370] During the political stage, prosecutors were accountable to the people through party affiliation. Voters knew electing a person as district attorney meant party loyalists would fill the assistant ranks.[371] Once party affiliation was removed, prosecutorial political activity dropped and the connection to community disappeared.[372] Ultimately, this means prosecutors had nothing holding them accountable for their decisions.[373]

What remained of the community connection led prosecutors to focus on particular crime problems. At different times, in different places, different prosecutors identified crime problems that they could address through prosecution. In New York, in the 1930s, Thomas Dewey, as district attorney, prioritized breaking up criminal rackets.[374] In South Carolina, during the early 1990s, prosecutors targeted prenatal drug use by prosecuting mothers whose newborns tested positive for cocaine in their blood.[375] This culminated in a move away from conviction rates and case filing numbers as measures of prosecutorial success.[376] Prosecutors eventually placed more emphasis on their quasi-judicial role.[377] This opened the door for proactive prosecutors who sought to re-establish their community connection without compromising their professional prosecutorial integrity.

IV. Proactive Prosecutors

By the end of the twentieth century, prosecutors recognized the need to better connect with the community and realized that prosecution alone could not resolve community crime problems.[378] Instead, prosecutors had to be more proactive. They had to learn from the community and take measures, outside traditional prosecution functions, to prevent criminal activity.[379] This evolutionary phase channeled prosecutorial discretion into public policy.[380] Criminal prosecution itself became part of broader crime prevention policies. This led to prosecutors working proactively in different areas. They testified before legislatures. They worked with multi-agency task forces to address specific crime problems. To aid this work, they created specialized units beyond focusing on specific crime types. They also worked with specific constituencies, neighborhoods, and problems. Finally, they initiated new "courts" designed to meet the needs of the defendants prosecuted.

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370 Stuart A. Scheingold and Lynne A. Gresset *Policy, Politics and the Criminal Courts,* 12 Am. Bar Found. Res. J. 461 (1987).

371 *Supra* notes 250-56 and accompanying text.

372 Fishman, *supra* note 329, at 245-50.

373 Davis, *supra* note 14, at 439-43.

374 Mary M. Stolberg Fighting Organized Crime: Politics, Justice and the Legacy of Thomas E. Dewey (1995).

375 Karen J. Maschke, *Prosecutors as Crime Creators: The Case of Prenatal Drug Use,* 20 Crim. Just. Rev. 21 (1995).

376 Stephanos Bibas, *Rewarding Prosecutors for Performance,* 6 Ohio St. J. Crim. L. 441 (2008).

377 Stanley Z. Fisher, *In Search of the Virtuous Prosecutor,* 15 Am. J. Crim. L. 197 (1987).

378 Anthony C. Thompson, *It Takes a Community to Prosecute,* 77 Notre Dame L. Rev. 321 (2002).

379 *Id.*

380 Mellon, Jacoby and Brewer, *supra* note 8, at 80-81.

A. Prosecutors in Their Communities

Prosecutors built upon their title as a jurisdiction's "chief law enforcement officer" to advise legislative bodies about criminal law and criminal justice policies that might better assist local communities. Prosecutors provided this advice directly and indirectly. Some legislators or government agencies approached directly. For example, in Oklahoma, the State Department of Human Services solicited prosecutorial input prior to proposing changes to the legislature.[381] Prosecutors also promoted their agenda through the media, influencing legislation indirectly. In the Bronx, prosecutors advocated for legislation that would give them authority to handle certain eviction cases in civil court.[382] They argued this would aid their mission to root out neighborhood crime problems.[383] Prosecutors also provided testimony at legislative hearings. In one instance, the district attorney for Houston, Texas testified before a United States Senate committee seeking funding for DNA testing.[384] In another, the National District Attorney's Association (NDAA) sent a representative to testify regarding the waiver of juveniles to criminal court.[385] Prosecutors also testified before state legislatures. In Washington, the state Attorney General testified about the state's gang problem.[386] In California, prosecutors testified about topics ranging from mortgage fraud to cock-fighting.[387] Prosecutors also provided legislation. In Missouri, prosecutors proposed legislation relating to identity theft and compensation for wrongfully convicted defendants.[388] A prosecutor drafted these proposals and gave them to a state legislator who then introduced them to the legislature and requested the prosecutor testify before the legislature regarding the proposals. Similarly, in Massachusetts, legislators provided the state legislature with proposed legislation that mandated minimum sentences for certain sex offenders.[389]

To address specific community concerns about crime problems, prosecutors leveraged their law enforcement relationships to target specific crime problems. Due to overlap between state and federal criminal law and the need to efficiently use resources, state and federal prosecutors worked together to more effectively

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381 Barbara Hoberock, *Prosecutors' Input Sought in Reworking DHS*, Tulsa World, Jan. 20, 2012, at A12.

382 Daniel Beekman, *Getting help with evictions Klein, DA Johnson propose 'Bawdy House Bill' to boot no-good tenants*, N.Y. Daily News, May 11, 2012, at 46.

383 *Id.*

384 Brian Rogers, *DA Seeking DNA Funding: Lykos Makes Her Case to US Senate panel,* The Houston Chronicle, Nov. 13, 2009, at B2.

385 James Fox, Testimony on behalf H.R. 2289, the "Juvenile Justice Accountability and Improvement Act of 2009", House Judiciary Subcommittee on Crime, Terrorism and Homeland Security. June 9, 2009.

386 States News Service, *Anti-Gang Legislation Discussed in Olympia*, States News Service, Jan. 19, 2011.

387 Mike Cruz, *San Bernadino County DA to Testify on Proposed Cockfighting Law*, San Bernadino County Sun, April 4, 2012; States News Service, *Pavley Bill Targeting Mortgage Fraud Passes Public Safety Committee; Fraud Victims, Prosecutors Testify in Favor*, April 28, 2009.

388 This is drawn from the author's personal experience.

389 John J. Monahan, *Stronger Child Rape Penalties Outlined*, Telegram & Gazette, May 21, 2008, at A1

prosecute criminal violations.[390] The first of these efforts was the Organized Crime Drug Enforcement Task Forces (OCDETF).[391] These were created to pool resources and focus attention on drug distribution organizations.[392] This idea expanded to encompass other crimes. Another nationwide task force was Project Safe Neighborhoods.[393] It removed violent offenders from communities as state and local law enforcement and prosecutors target particular individuals for prosecution.[394] Every federal judicial district had a Joint Terrorism Task Force associated with it to deter and disrupt terrorist acts.[395] Other task forces included violent offenders and export control.[396]

With task forces in place, prosecutors created more specialized units to handle the cases. To address the growing and complex problem of property flipping, several offices created mortgage fraud units.[397] In Illinois, the Attorney General's Office received a grant to provide training on domestic violence cases to prosecutors throughout the state.[398] Others focused on driving under the influence, child abuse and gangs. The effectiveness of these units remains an open question.[399]

Other offices created specialized units to ensure compliance with prosecutorial obligations. In San Jose, California, the prosecutor's office created an office to review all cases to ensure accurate convictions.[400] Other jurisdictions created discovery compliance units to ensure all required discovery material actually is disclosed.[401]

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390 For a more detailed look at this phenomenon *see* Lisa L. Miller & James Eisenstein, *The Federal/State Criminal Prosecution Nexus: A Case Study in Cooperation and Discretion* 30 Law & SoC. Inq. 239 (2005).

391 United States Drug Enforcement Administration, OCDETF Program, https://www.dea.gov/organized-crime-drug-enforcement-task-force-ocdetf, (visited Aug 28, 2023), and United States Department of Justice, About OCDETF, , https://www.justice.gov/ocdetf/about-ocdetf (visited Aug 28, 2023).

392 *Id.*

393 United States Department of Justice, *Project Safe Neighborhoods*, https://www.justice.gov/psn (visited Oct. 12, 2023).

394 *Id.*

395 United States Attorney's Office, Western District of Missouri, *Joint Terrorism Task Force*, https://www.justice.gov/usao-wdmo/joint-terrorism-task-force (visited Oct. 13, 2023) and Federal Bureau of Investigation, *Joint Terrorism Task Forces*, , https://www.fbi.gov/investigate/terrorism/joint-terrorism-task-forces (visited October 13, 2023).

396 United States Department of Justice, Office of Juvenile Justice and Delinquency Prevention, *Violent Crime Task Force – Charlotte, NC,* visited October 13, 2023 and Department of Justice, *Justice Department and Partner Agencies Launch National Counter-Proliferation Initiative*, https://www.justice.gov/archive/opa/pr/2007/October/07_nsd_806.html (visited October 13, 2023).

397 Montgomery County (MD) State's Attorney's Office, *Special Prosecutions Division*, https://www.montgomerycountymd.gov/SAO/units/specialprosecution.html (visited October 13, 2023) and Solano County (CA) District Attorney's Office, *Prosecution Divisions*, https://www.solanocounty.com/depts/da/prosecution_units.asp (visited October 13, 2023) .

398 Jason Nevel, *Grant Oges to Hire More Attorneys: Federal Money Targets Domestic Violence, Rape Cases; Tazewell to Train Lawyers*, The Pantagraph, May 1, 2009, at A5.

399 Pyrooz et al., *supra* note 342; Ed Timms and Kevin Krause, DA's Public Integrity Unit Rarely Investigates Officials, The Dallas Morning News, Dec. 12, 2010

400 Tracey Kaplan, *New Santa Clara County District Attorney Has Tough Job Ahead,* San Jose Mercury News, Jan. 3, 2011.

401 Montgomery County (MD) State's Attorney's Office, *Discovery Process* https://www.montgomerycountymd.gov/sao/discovery.html,(visited Oct. 13, 2023), and King County

To further embrace their policy-making ability, prosecutors increased their community interaction, creating something that became known as community prosecution, and developed innovative prosecutorial practices.[402] Many programs assigned prosecutors to particular areas within the jurisdiction. In Philadelphia, the District Attorney reorganized the office so that prosecutors were assigned to neighborhoods that corresponded with the police department's organization to promote clear communication between the prosecutor, the police and the community.[403] Similarly, Prince George's County, Maryland, placed prosecutors inside the police departments.[404] The State's Attorney hoped the move would generate innovative solutions to county crime problems.[405] In Fulton County, Georgia, the prosecutor opened an office in the suburb of Alpharetta because the town needed prosecutors to concentrate on that area of the county, rather than become involved in the large number of cases Atlanta generated.[406]

Such changes often resulted from initiatives newly elected prosecutors developed upon entering office. In 2004, a newly elected prosecutor entered office in Pueblo, Colorado bringing what he termed "smart justice."[407] The program focused on prevention and protection combined with prosecution.[408] He believed prosecutors should implement criminal justice policies, particularly in juvenile and mental health issues.[409] While still prosecuting criminals who deserved punishment, he created outreach and diversion programs for youth and offenders with mental illnesses.[410] Finally, he created specialized units to handle difficult criminal cases, allowing the assistants to develop a level of expertise in their area.[411] When making charging decisions, the prosecutor adopted a policy whereby the assistants must be certain of conviction prior to filing charges.[412] Newly elected prosecutors would become the driving force behind progressive prosecution as well.

(WA) Prosecuting Attorney's Office, *King County Prosecuting Attorney's Office Brady Committee Protocol,* https://fairandjustprosecution.org/wp-content/uploads/2017/09/King-County-Brady-Policy-revised-11-06-15.pdf.

402 *See* Gerard Rainville & M. Elaine Nugent, *Community Prosecution Tenets and Practices: The Relative Mix of "Community" and "Prosecution"*, 26 Am. J. Crim. Just. 149 (2002). For this discussion it is considered community prosecution if the office employing the policy labels it as such.

403 Mensah M. Dean, *D.A. Sees Chance for Cut in Crime with New 'Bureau' Court Setup*, Phila. Daily News, Oct. 28, 2010, at 18.

404 Ruben Castaneda, *Prosecutor Intends to Adjust Focus*, Wash. Post, Jan. 2, 2011, at C1.

405 *Id.*

406 Andria Simmons, *Prosecutor Adds North Office; Alpharetta Office Joins 5 Others in Fulton Effort to Build Ties With Localities,* Atlanta Journal-Constitution, Aug. 15, 2009, at 1A.

407 Jeff Tucker, *Thiebaut Cleaves to 'Smart Justice' Style of Prosecution*., Pueblo Chieftan, June 24, 2012.

408 *Id.*

409 *Id.*

410 *Id.*

411 *Id.*

412 *Id.*

B. Critiques

As proactive prosecution bloomed at the start of the 21st century, critiques followed almost immediately. Some saw the new community roles as advancing prosecutorial power.[413] Moving professional prosecutors with a "law and order" philosophy into the community brought an inherent bias into proposed solutions to community problems.[414] Not all professional prosecutors supported embracing the community and this created internal resistance to community prosecution programs.[415] When prosecutors entered the community, questions arose about how to determine the "community's" voice.[416] Finally, the diverse array of community prosecution programs made some question whether proactive prosecution was more symbolic than functional.

Prior to proactive prosecution, prosecutors had tipped the balance of power in their favor.[417] By expanding their domain into community relations, prosecutors further expanded their influence.[418] Previously seen as magistrates and advocates, prosecutors became social engineers.[419] They attempted to address a wide range of problems identified as causing crime with the goal of reducing it.[420] Rooting themselves in the community could bias potential jurors who might establish personal relationships with prosecutors and result in prosecutors targeting individuals for reasons other than their criminal activity.

Professors Green and Burke examined a Delaware County, Pennsylvania, community prosecution program and questioned whether the choices made to address community problems raised ethical questions due to a law enforcement bias.[421] They argued that some programs "may be inconsistent with ordinary principles regarding how prosecutors should employ their discretion."[422] They found a diversion program available to the wider county was not available to the county seat, which had a higher drug use rate.[423] This denied first-time offenders in the county seat an opportunity to obtain treatment, thus violating a principle of equality.[424] Rather than make prosecutorial decisions based on offense conduct, the decision was made based on location.[425]

Not all prosecutors embraced this change. Having spent their careers prosecuting cases in a particular way, some professional prosecutors resisted community involvement.[426] When newly elected prosecutors attempted to implement

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413 *See infra* notes 412-20 and accompanying text.
414 *Id.*
415 Green & Alafair S. Burke, *The Community Prosecutor: Questions of Professional Discretion,* 47 WAKE FOREST L. REV. 285 (2012).
416 Devin J. Doolan, Jr. *Community Prosecution: A Revolution in Crime-Fighting,* 51 CATH. U. L. REV. 547 (2002).
417 *Supra* notes 350-63 and accompanying text.
418 Levine, *supra* note 8, at 1128-29.
419 *Id.*
420 *Id.*
421 Green & Burke, *supra* note 415, at 296-302.
422 *Id.*
423 *Id.*
424 *Id.*
425 *Id.*
426 *Id.* at 292-293.

new programs, prosecutors more familiar with professional prosecutorial methods saw these new programs in tension with their visions of prosecutorial behavior.[427] To them, trying to solve community problems was the job of social workers.[428] The office culture also dictated that "community prosecution" assignments were seen as less prestigious than the "professional" prosecution assignments.[429]

Once prosecutors entered the "community" they struggled to find the "true" community voice. To make initial inroads, prosecutors sought well-defined and well-organized groups.[430] Prosecutors also utilized existing connections, such as victim rights organizations.[431] Some communities proved difficult to integrate into prosecution programs. These groups, based on their life experiences, viewed law enforcement programs suspiciously.[432] There might be built-in biases when creating these programs as well. For example, parents of juvenile offenders might be overlooked when planning community programs.[433]

Ultimately the novelty and variety of proactive prosecution may render it more symbolic than functional. The novelty of the approach permits any office to label almost anything community or proactive prosecution.[434] Some prosecutors who attend neighborhood meetings call their attendance community prosecution.[435] Other offices have gone further and installed prosecutors in neighborhood offices or have created community criminal justice councils.[436] The most ambitious offices have created collaborative organizations that pair prosecutors with community members to identify crime problems and craft prevention initiatives.[437] This led to the critique that proactive prosecution was not a new phenomenon but merely a public relations tactic that ultimately interfered with change.[438]

V. Progressive Prosecutor

The 2016 election cycle saw the rise of progressive prosecution.[439] Prosecutorial candidates promised not just symbolic change but revolutionary change in how they would approach the prosecution function.[440] Not all proffered the same ideas.[441] Still, certain similarities emerged. Their main goals were reducing mass incarceration and the racial disparities associated with it and promoting

427 Burke, *supra* note 339, at 186-87; David A. Sklansky, *The Progressive Prosecutor's Handbook,* 50 U.C. Davis Online 25 (2017).
428 Levine, *supra* note 8, at 1169-76 and Sklansky, *supra* note 427, at 27.
429 Thompson, *supra* note 378, at 357.
430 *Id.*
431 *Id.*
432 *Id.*
433 *Id.*
434 *Id.*
435 *Id.*
436 *Id.*
437 *Id.*
438 Sklansky, *supra* note 427, at 27.
439 Bruce A. Green & Rebecca Roiphe, *When Prosecutors Politick: Progressive Law Enforcers Then and Now,* 110 J. Crim. L. & Criminology 719, 720 (2020).
440 *Id.*
441 Benjamin Levin, *Imagining the Progressive Prosecutor,* 105 Minn. L. Rev. 1415 (2020).

transparency in prosecutorial decision-making. To reduce mass incarceration, many progressive prosecutors advocated non-prosecution of various low-level crimes and seeking no-cash bail for non-violent offenses. To promote transparency, many progressive prosecutors, as candidates, announced which crimes they would not prosecute and, once in office, made office data available to the public.[442] Like the proactive prosecutor, critiques of progressive prosecution quickly emerged to argue it expands prosecutorial domain even further, raising separation of power concerns, and re-connects prosecutors to the political process.

A. More Equitable Prosecutions

Kim Foxx in Cook County, Illinois, and Larry Krasner in Philadelphia, Pennsylvania, serve as two well-known examples of progressive prosecutors who swept into office between 2016 and 2020. In 2016, Foxx became the first African-American woman to lead her office.[443] She ran promising a more forward-thinking agency.[444] This included regaining public trust and promoting transparency.[445] Since taking office, Foxx implemented her campaign agenda.[446] She highlighted the office's conviction integrity unit, created in 2012, noting that it overturned convictions in more than 80 cases.[447] She instructed prosecutors to consent to non-monetary bonds.[448] She also diverted resources from low-level crimes to more violent offenses.[449] To promote transparency, she made her office's data available to anyone interested in reviewing it.[450] Prior to her election, she worked as an Assistant State's Attorney and served as Chief of Staff to the Cook County Board President where she led the county's criminal justice reform agenda.[451]

Where Foxx brought prosecutorial experience to the office, Larry Krasner spent the bulk of his career handling criminal defense work.[452] His campaign emphasized changing the Philadelphia District Attorney's office's culture.[453] He pledged to end mass incarceration by not prosecuting "insufficient and insignificant" cases, reviewing past convictions, and stopping cash bail.[454] Once in office, he successfully

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442 Paulina Villegas, *New Manhattan DA Wants to Stop Prosecuting Some Offenses, Make Prison a 'Last Resort',* Wash. Post. Jan 5, 2022. *See e.g*. Philadelphia District Attorney Public Data Dashboard for transparency: https://data.philadao.com/.

443 Cook County State's Attorney, *Kimberly M. Foxx*, https://www.cookcountystatesattorney.org/about/kimberly-foxx (visited Oct. 23, 2023). *See also* Miriam A. Krinsky ,Change from Within: Reimagining the 21st, Century Prosecutor 77-97 (2022).

444 Cook County State's Attorney, *supra* note 443.

445 *Id.*

446 *Id.*

447 *Id.*

448 *Id.*

449 *Id.*

450 *Id.*

451 *Id.*

452 Philadelphia (PA) District Attorney's Office, *Leadership: District Attorney Larry Krasner*, https://phillyda.org/about/leadership/ (visited Oct. 23, 2023).

453 Larry Krasner for District Attorney, *On the Issues: See What a Real Progressive can Bring to Philadelphia's DA Office*, https://krasnerforda.com/platform, (visited Oct. 23, 2023).

454 *Id.*

diverted nonviolent offenders and greatly reduced cash bail requirements.[455] He also unilaterally decriminalized marijuana possession and prostitution.[456] To accomplish this required sweeping personnel changes.[457]

These two examples demonstrate the fundamental principles of progressive prosecution. The first is that progressive prosecutors focus upon the mass incarceration problem in the United States.[458] As many have noted, the United States incarcerates people at a staggering rate and this disproportionately affects minority groups.[459] Progressive prosecutors identified several approaches to reversing this phenomenon. First, they tasked conviction integrity units with reviewing past cases for errors, focusing on police misconduct. Second, they used their discretionary authority to decriminalize—or nullify-- what they perceived as minor offenses. Third, they stopped mandating cash bail for non-violent offenses.

Progressive prosecutors built upon the foundation laid for them by their predecessors when it came to conviction integrity units. These units began in Dallas and San Diego between 2007-2009.[460] These offices were established in the wake of Innocence Project DNA exonerations.[461] They reviewed cases where DNA might indicate the courts convicted the wrong person.[462] Progressive prosecutors established new units where they previously did not exist and expanded their mission, reviewing convictions for procedural errors or those that resulted from questionable police testimony.[463] These units also developed policies to prevent future wrongful convictions such as creating lists of officers with suspect credibility.[464]

During their campaigns, progressive prosecutor candidates announced they would not prosecute entire categories of criminal offenses or create standards for prosecution above what the statutory law required. They focused on perceived low-level misdemeanor offenses including marijuana and retail theft.[465] This expanded the prosecutor's discretionary authority.[466] Previous prosecutor phases employed

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455 Steve Volk, *Larry Krasner vs. Everybody: Inside the Philly DA's Crusade to Revolutionize Criminal Justice*, Philadelphia (Nov. 23, 2019), https://www.phillymag.com/news/2019/11/23/larry-krasner-criminal-justice-reform/,(visited Oct. 23, 2023).

456 *Id.*

457 *Id.*

458 Davis, *supra* note 13, at 1077-79 and Bazelon, *supra* note 4, at 316-25.

459 Ronnie B. Tucker, Sr. *The Color of Mass Incarceration,* 37 Ethnic Study Reviews 135 (2016), Michael C. Campbell & Matt Vogel, *The Demographic Divide: Population Dynamics, Race, and the Rise of Mass Incarceration in the United States,* 21 Punishment & Society 47 (2019); James Forman, Jr. *Racial Critiques of Mass Incarceration: Beyond the New Jim Crow,* 87 N.Y.U. L. Rev. 101 (2012). On the roots of mass incarceration and race, *see generally* Heather Schoenfeld, Building the Prison State: Race and the Politics of Mass Incarceration (2018).

460 Inger H. Chandler, *Conviction Integrity Units: Owning the Past, Changing the Future,* 31 Crim. Just. 14, 14 (2016-2017).

461 *Id.* at 15.

462 *Id.*

463 Bazelon, *supra* note 4, at 156-57 and 327-28.

464 Bazelon, *supra* note 4, at 156 and 282-86.

465 Bazelon, *supra* note 4, at 156.

466 Jeffrey Bellin, *Expanding the Reach of Progressive Prosecution,* 110 J. Crim. L. & Criminology 707 (2020).

discretionary authority on a case-by-case basis.[467] Progressive prosecutors applied their authority without regard to case facts, instead effectively nullifying entire sections of the criminal code.[468] They could do this with only minor opposition because their election bestowed a popular mandate.[469]

Finally, progressive prosecutors championed removing cash bail for minor offenses.[470] While only judges set bail, prosecutors may make recommendations.[471] Often, judges follow the prosecutor's recommendation.[472] Bail, itself, discriminated against low-income defendants who lack the funds to post bail.[473] This means they remain incarcerated thus creating an incentive to plead guilty, even if factually innocent.[474] Prosecutors found they could reduce incarceration and avoid potentially wrongful convictions by not recommending cash bail to the court.[475]

To demonstrate their policies' effectiveness and develop new policies, progressive prosecutors promoted data transparency.[476] Both Krasner's and Foxx's offices made their case data publicly available. Interested citizens could see the decisions prosecutors made and the effects those decisions had on the community. For these prosecutors, evidence-based decisions were easily defended.[477] They could justify their programs as cost-saving and efficient.[478] Instead of being judged on conviction rates, data transparency created new metrics upon which people could judge the prosecutor's success.

B. Critiques

The progressive prosecution program raises critiques beyond those associated with disliking change. Like proactive prosecution, progressive prosecution suffers from a definitional problem. Many have labeled themselves progressive prosecutors, but the policies implemented differed. Regardless of the label, some progressive prosecutorial policies have raised questions. First, using evidence-based prosecution resembles pretextual prosecutions, prosecuting someone for conduct beyond the formal criminal charges. Second, while condemning prosecutorial power to incarcerate people *en masse*, progressive prosecution expands prosecutorial power to nullify duly enacted legislation. A final critique appears in progressive prosecution's embrace of politics, though not necessarily partisanship.

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467 *See* Sections I-IV.

468 Roger A. Fairfax, *Prosecutorial Nullification,* 52 B.C. L. Rev. 1243 (2011); Erik Luna, *Prosecutorial Decriminalization,* 120 J. Crim. L. & Criminology 785 (2012); W. Kerrell Murray, *Populist Prosecutorial Nullification,* 96 N.Y.U. L. Rev. 173 (2021).

469 Bazelon, *supra* note 4, at 272. Murray, *supra* note 468, at 209-14.

470 Bazelon, *supra* note 4, at 41-44. *See also* Wendy R. Calaway & Jennifer M. Kinsley, *Rethinking Bail Reform,* 52 U. Rich. L. Rev 795 (2018)

471 Bazelon, *supra* note 4, at 41-44.

472 *Id.*

473 *Id.*

474 *Id.*

475 *Id.*

476 Bazelon, *supra* note 4, at 282-283

477 Sklansky, *supra* note 17, at 2.10-2.11.

478 Lissa Griffin & Ellen Yaroshefsky, *Ministers of Justice and Mass Incarceration,* 30 Georgetown J. Leg. Ethics 310 (2017)

Between 2016 and 2020, numerous prosecutors ran under the progressive prosecution banner but advocated different degrees of reform.[479] One type adopts the name without with action.[480] This person has progressive political ideas but does nothing to implement them.[481] A second type applies progressive ideas to procedural protections.[482] To an extent, this is the professional prosecutor leaning to the minister of justice side of the scale.[483] It prioritizes procedural protections over convictions but, in the process, makes conviction and sentence more certain.[484] A third type adopts the wider liberal, or progressive, political agenda and implements it in the context of criminal prosecution.[485] This type might target police misconduct or specific types of crimes such as wage theft.[486] A fourth prioritizes the single agenda item of eliminating mass incarceration.[487] This type crafts policies to achieve this end without regard to the traditional prosecutorial function.[488] Before even assessing progressive prosecution, the true meaning must be defined.

Beyond labeling, progressive prosecutorial policies have generated some concern. Many progressive prosecutors have adopted evidence-based practices.[489] For instance, they will argue that bail reform has not meant fewer people appear for court. Yet evidence-based practices may lead to prosecutorial decisions based upon statistical trends rather than individual case assessments. Professor Sklansky sees this akin to pretextual prosecutions where prosecutors pursue minor or technical law violations in order to prosecute someone who has engaged in more broad but unprovable criminal conduct.[490] For example, the High Point, North Carolina, community implemented a call-in initiative whereby non-violent drug dealers were brought into a community meeting that included social workers, counselors, and law enforcement.[491] The dealers were given a choice to either avail themselves of the community support of face the possibility of long prison sentences.[492] Those choosing the latter were charged with a crime for which the police had evidence.[493] The most significant dealers were identified through evidence-based practices and then sometimes prosecuted for the first identifiable offense, even if unrelated to drug dealing.[494]

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479 *See generally*, Levin, *supra* note 441.
480 *Id.* at 1428-32.
481 *Id.*
482 *Id.* at 1432-38.
483 *Id.*
484 *Id.*
485 *Id.* at 1438-44.
486 *Id.*
487 *Id.* at 1444-46.
488 *Id.*
489 *See, e.g.,* Jeffrey Toobin, *The Milwaukee Experiment: What Can One Prosecutor Do About the Mass Incarceration of African-Americans,* New Yorker, May 4, 2015.
490 Sklansky, *supra* note 17, at 2.4-2.5, 2.15 and Daniel C. Richman & William J. Stuntz, *Al Capone's Revenge: An Essay on the Political Economy of Pretextual Prosecution,* 105 Colum. . Rev. 583 (2005).
491 David Kennedy, *Drugs, Race and Common Ground: Reflections on the High Point Intervention,* NIJ J., 2008 http://hpcav.com/wp-content/uploads/2009/12/HP-model-article-1.pdf
492 *Id.*
493 *Id.*
494 This is based on the author's discussions with the High Point Police Department and attending the Department's Citizen's Police Academy.

Progressive prosecutorial policies also raise separation of powers concerns.[495] Today, prosecutors serve as executive officials charged with enforcing legislatively enacted laws.[496] Prosecutors are not lawmaking offices, even if they do draft legislation and advise legislators.[497] In the lawmaking process, the executive branch may veto unacceptable legislation.[498] However, once duly enacted, the executive has a duty to enforce it, within the bounds of prosecutorial discretion.[499] This discretion has traditionally occurred on a case-by-case basis. Progressive prosecutors have expanded prosecutorial discretion to encompass entire crime categories. These policies essentially give prosecutors a more extensive and unreviewable executive veto power. While only used presently for offenses deemed minor, the possibility exists that other prosecutors will use this "veto" power for laws that progressive prosecutors may think are important, such as prohibitions on gun ownership.

The differing perceptions of important crimes and minor crimes highlight the last criticism of progressive prosecution, namely that it brings political preferences back into prosecutorial decision-making. Commentators on the prosecution function have decried politicized prosecutions, arguing that politics must be separated from prosecutorial decision-making.[500] Yet, progressive prosecutors rely on the political process—sometimes in a partisan manner—to establish a mandate for their reform agenda.[501] Progressive prosecutors respond to concerns raised by their constituents, especially those who observe court regularly.[502] As a result, the potential exists for progressive prosecutors to bring charges in particular cases more for their political public relations benefit than based, solely, on the case's merits.

VI. The Prosecutor's Identity

As prosecutors have evolved from minor judicial figures in a larger system to a force for not only criminal justice, but social reform, certain themes emerge that illuminate the prosecutor's identity. First, it appears that prosecutors have a gravitational pull, centralizing authority around themselves. This is not to say their authority is unlimited or even unchecked, but prosecutors have significantly expanded their influence as they have evolved. Second, prosecutors have a community connection. While the connection strength varies throughout the prosecutor's evolutionary arc, the connection remains. Finally, prosecutors have an interest in case outcomes and this interest exists inversely to their community connection. As prosecutors distance themselves from the community, they perceive winning individual cases as more important. As they connect more closely with the community, other priorities

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495 Jeffrey Bellin, *Expanding the Reach of Progressive Prosecution*, 110 J. Crim. L. & Criminology 707 (2020).

496 *See e.g.* RSMo 56.060 (Prosecutor's duties, generally); NCGS 7A-71; NY Consolidated Laws 18-700.

497 *See supra* notes 381-89 and accompanying text.

498 *See e.g.* N.Y. Const. art IV, § 7; FL. Const. art I, §8; and Or. Const. art. V, § 15b.

499 See e.g. Or. Const. art V, § 10; Tx Const. art IV, § 10; Ohio Const. Art III, § 6.

500 *See generally* Levenson, *supra* note 15; Bennett L. Gershman, *The Most Dangerous Power of the Prosecutor,* 29 Pace L. Rev. 1 (2008).

501 Bazelon, *supra* note 4, at 76-101.

502 *Id.*

take precedence. Their interest in the outcome also directly relates to their case screening function. Ultimately, this tells us that prosecutors assume an identity that society expects.

A. The Prosecutor's Gravitational Pull

The first key theme that emerges from exploring the prosecutor's historical evolution is that prosecutors transitioned from a small role in a decentralized process to a place where they can create widespread social change. In doing so, they pulled other aspects of the criminal courts and the wider criminal justice system into their domain.[503] Sometimes this involved assuming roles held by others. At other times this meant devising strategies to leverage the system in their favor. This shows that prosecutors have a gravitational pull that permits them to centralize authority around themselves.

From their origins as someone who organized files, prosecutors have become agents for social change. Public prosecutors originated because the courts needed someone to translate private criminal complaints into the proper legal form. In more organized colonial legal systems, the courts also needed someone to initiate morals prosecutions. Following independence, these public prosecutors rode the wave ushered in by more elected government positions. With independent electoral authority, prosecutors assumed discretionary authority. Taking over from Justices of the Peace and Grand Juries, prosecutors decided which cases entered the court system and which did not. Acquiring this authority gave prosecutors the tool necessary to exert leverage over other aspects of the criminal courts and criminal justice process.

Over time, prosecutors used their discretionary authority to advance their professional goals. Initially, that meant leveraging their charging authority to gain political advantage. Prosecutors who identified with political machines used their leverage to protect those similarly politically connected by not filing criminal charges, even if warranted. Those who identified with the "other" party faced the threat of potential prosecution, even if unwarranted. Eventually prosecutors only prosecuted cases with strong evidence. This led to a police-prosecutor relationship whereby the two organizations cooperated in criminal investigations, forming an exchange relationship.[504] This in turn led to prosecutors identifying particular crime problems and addressing them, first, through prosecution and, later, through legislation. When working in this later sphere, prosecutors could propose new crime control measures and advise legislatures on crime control matters. In the courthouse, prosecutors used their discretionary authority to leverage guilty pleas. By offering lesser sentences before trial, as opposed to after trial, prosecutors imposed a measure of risk for defendants who wished to exercise their constitutional right to trial. Then, by overcharging cases, prosecutors could negotiate lower sentences without giving up anything. More recently, prosecutors have used their discretionary authority to not prosecute cases. This could be the result of proactive diversion programs or the belief that, as a policy matter, the offense does not warrant prosecution.

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503 On the concept of domain, *see* William F. McDonald, *The Prosecutor's Domain*, in The Prosecutor (William F. McDonald, ed., 1979).

504 On exchange relationships, *see* George F. Cole, *The Decision to Prosecute,* 4 L. & Soc'y Rev. 331 (1970).

If we divide the criminal justice system into six stages, we see how prosecutors have expanded their domain throughout the process. First, the legislature must identify conduct as criminal. Prosecutors now propose new laws and advocate for their passage. Second, someone must investigate alleged criminal behavior. Prosecutors work closely with law enforcement to determine priorities and to gather evidence. Third, someone must initiate criminal charges. This is where prosecutors possess near absolute authority. In addition, their work on the investigation leads to a presumption of guilt, making them more advocates than ministers of justice. Fourth, outcomes must be negotiated. Prosecutors, through their charging authority, can heavily influence the boundaries of the negotiation. Fifth, someone must adjudicate the case, especially if an outcome cannot be negotiated. Once again, through their charging authority, prosecutors induce guilty pleas at extraordinary rates. Finally, someone must decide what happens to the person once the person reaches the other side of the process. Prosecutors utilize their charging authority to divert some people from the entire process and mandate certain behavior as a consequence. While prosecutors may not have "power" over the other court actors, they have significant influence over every stage in the process and have centralized authority through their charging discretion.

B. The Prosecutor's Community Connection

As prosecutors expanded their domain, their community connection waxed and waned. Community connection is important because the electoral process is one of the few methods available to hold prosecutors accountable for discretionary decisions. If people do not vote or are not connected to elected prosecutors, then prosecutors can use their charging discretion for nefarious purposes. Throughout the arc of prosecutorial evolution, that connection has varied.

Beginning as minor figures, the only connection prosecutors had to the community was when a case emerged from the grand jury. The prosecutor had a duty to prepare the case for court and, if no private attorney appeared, present the case.[505] Once the public prosecutor became an elected official, a public connection became essential. At first, prosecutors were part of a larger political organization that reflected people with certain political perspectives. New York City's experience best reflects this. One candidate represented the "respectable" classes and the other candidate represented the "suspect" classes. Depending on which could garner the most support, that group's interests prevailed. In this way, as part of a larger political process, prosecutors were just one representative of the collective community voice. As prosecutors disconnected themselves from the partisan political influences—but not necessarily political parties—they became less connected to the communities they served. Instead, they exercised their own professional judgement rather than being beholden to a particular political interest or agenda. If a community connection had significance during this time, it was to identify crime problems that professional prosecutors should investigate and pursue. This disconnect appears in the infrequent electoral change in prosecutor offices. Eventually, however, as prosecutors sought innovative ways to prevent

[505] It should not be forgotten that the public prosecutor only performed this function in the most serious cases. In minor matters, the justices of the peace resolved the matter without a public prosecutor ever seeing the case. *See supra,* section 2.

criminal activity, they recognized the need to return to the community. They formed community partnerships to proactively address criminal conduct, before it reached the courts.

Today, we see even more community connection as progressive prosecutors assume more control. In this, we hear echoes of political prosecutors who responded to constituent desires. Progressive prosecutors affiliate more with the Democratic party and their political interests align with groups that traditionally vote Democratic.[506] Their different perspective also forced progressive prosecutors to replace long-time prosecutors with newly hired prosecutors who share the progressive prosecution vision.[507] Similar hiring practices occurred with political prosecutors. Just as importantly, progressive prosecutors seek to mitigate the harshness of the criminal justice process just like those during the political prosecution phase. Finally, progressive prosecutors adopt the grand jury's role during the Revolutionary Era when they refuse criminal charges they perceive as unjustly affecting certain societal groups.

C. The Prosecutor's Interest in the Outcome

Like the prosecutor's community connection, the prosecutor's interest in the case outcome waxes and wanes throughout the prosecutor's evolution. The change occurs, however, in an inverse relationship with the community connection. The closer the community connection the less interest, or emphasis, is placed on obtaining a guilty verdict. Not surprisingly, as prosecutors focus more on winning, they also focus more on case screening, weeding out cases with insufficient evidence.

Initially, the public prosecutor lacked any interest in the case outcome.[508] With private prosecutors handling most cases, public prosecutors did not even present cases. Instead, they prepared case summaries that both sides utilized. When public prosecutors did handle cases, they merely presented the facts. In some instances, they presented the case for both sides. During this time, the state itself also had no interest in the outcome of criminal cases.[509] Showing an interest constituted an unacceptable endorsement of the victim's case.

The move to elected prosecutors changed this approach slightly. As party loyalists, prosecutors had an interest in obtaining a conviction if it benefitted their political constituents. Convictions were important for prosecutors who represented the "respectable" classes to show that the prosecutors were protecting the community. Conversely, for prosecutors who represented the "suspect" classes,

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506 Alicia Victoria Lozano & Lauren Mayk, *U.S. Attorney McSwain, Philadelphia District Attorney Krasner Clash Despite Shared Vision for Safer City,* NBC Phila. June 20, 2019.

507 *See e.g.* Samantha Melamed et al., *More than 70 Lawyers Hired by DA Larry Krasner Have Left. Some Say the Office Is in Disarray,* Phila. Inquirer Dec. 22, 2021 *See also* Cynthia Godsoe & Maybell Romero, *Prosecutorial Mutiny,* 60 Am. Crim. L. Rev. 1403 (2023).

508 A few places tied fees to success but most courts paid fees based on the number of cases processed. Nicholas Parillo, Against the Profit Motive: The Salary Revolution in American Government, 1780-1940 (2013).

509 But for matters of great public concern such as treason, s*ee* Steinberg, *supra* note 36, at 575 and Carlton F.W. Larson, Trials of Allegiance: Treason, Juries and the American Revolution (2019).

they were less concerned about the quantity of convictions. Instead, they argued that preserving resources for more important cases was paramount.

Professional prosecutors focused exclusively on winning cases. Conviction rates were essential to demonstrate not only their effectiveness, but their worthiness for the position. Some developed a win-at-all-costs mentality that caused them to circumvent constitutional protections. Others strategized means to enhance the likelihood of conviction. The desire to win prompted, at least in part, cooperation with the police and plea negotiation strategies such as overcharging and trial taxes. Over time, the quantity of wins also mattered. By obtaining guilty pleas, prosecutors could trumpet thousands of convictions annually. All of this helped their re-election efforts.

Overwhelming caseloads and community demands for reform, however, shifted the winning orientation of some prosecutors. Instead, they saw preventing criminal activity and avoiding prosecution as meritorious. The number of community partnerships became more important than the number of convictions. Today's progressive prosecutors spend more time lauding their exonerations than their convictions. By hiring new attorneys, who share this vision, measures other than conviction rates demonstrate successful outcomes.

VII. Conclusion

In his memoir about his time as United States Attorney for the Southern District of New York and the lessons learned from it, Preet Bharara stated that "prosecutors are sometimes empty vessels in whom the public will pour their hopes or hatreds."[510] Tracing the prosecutor's evolutionary arc provides shape to this vessel. There is no doubt that the public shapes the prosecutor's role. It evolves due to societal demands. Prosecutors respond to community desires. What remains is to define their identity, to describe the vessel.

First and foremost, prosecutors are public servants. This remains one constant throughout the prosecutor's evolutionary journey. Whether they merely created a legal file or attempted to end mass incarceration, prosecutors have served the public in some manner. At times, their efforts may be misguided or have negative consequences. At times, their efforts might be politically motivated. However, they seek to serve the public's interest as they perceive it at that particular time and place.

As public servants, prosecutors represent the community, for better or worse. The public poses the most significant checks on prosecutorial charging decisions through the ballot box and the jury box. When they speak, prosecutors listen. The rise of progressive prosecutors demonstrates this. However, when the community remains silent, prosecutors employ their own judgement. Likewise, we must recognize that not all communities want the same thing. As a result, two prosecutors could look at the same case and justifiably believe their constituency wants different outcomes.

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[510] Preet Bharara, Doing Justice: A Prosecutor's Thoughts on Crime, Punishment and the Rule of Law, Knopf (2019) 213.

Finally, prosecutors are opportunistic. When given the opportunity, they use their discretion for whatever ends they feel are most appropriate in the moment. Those ends could be political benefit, conviction rates, dropping crime rates, or lower incarceration rates. They may choose to zealously enforce a law in one moment and nullify it in another. For better or worse, as public servants who represent the community, they are subject to community whims and needs. As prosecutors continue to evolve, this identity will undergird their work.

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The Vietnam War, Imperial Presidents, and Limited Democracy

Will Sarvis*

ABSTRACT

During the Vietnam conflict presidents Lyndon Johnson and Richard Nixon wielded war powers without congressional declarations of war. The legislature and judiciary more or less deferred to these "Imperial Presidents" rather than check or balance their war policies. This deferment seriously compromised and, in some cases, even nullified representative democracy. Populist democracy, in the form of the Antiwar Movement, fared little better. Millions of citizens repeatedly expressed their opposition to the war in mass demonstrations, especially after 1967. And yet active American combat in Vietnam continued until 1973. The ineffectiveness of the Antiwar Movement is consistent with the Elite Theory of democracy wherein a small minority of powerful people in corporations (including media corporations) and government offset and counteract populism. Ironically, in this case, the Imperial Presidency also overwhelmed legislative and judicial elites. Thus, in the most dramatic subset of a greater post-World War II phenomenon, the Vietnam War featured a monarch-like executive using war powers that circumvented both direct (populist) and indirect (representative) aspects of democracy.

KEYWORDS

Vietnam war, antiwar movement, imperial presidency, war powers, elite theory (democracy)

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* Will Sarvis is an independent writer. The author kindly thanks Anne Richardson Oakes for her extraordinary help in bringing this essay to fruition.

I. Introduction

Since World War II, changes in the executive exercise of war powers have made the American presidency resemble a monarchy far more than the Founding Fathers ever intended. The Founders deliberately created an executive office with far less power than the English monarchy they had recently rebelled against. In the United States Constitution the Framers explicitly vested Congress with war powers,[1] not the president. And yet, after World War II presidents of both major parties have engaged the United States in a number of foreign wars in Korea, Vietnam, and the Persian Gulf (among other places) without seeking or receiving congressional declarations of war. This *de facto* executive power became part of what Arthur Schlesinger referred to as the Imperial Presidency. Schlesinger was especially referring to the Vietnam War and how both presidents Lyndon Johnson and Richard Nixon conducted this conflict in great secrecy from the American citizenry and their representatives in Congress.[2]

Equally disturbing, both Congress and the judiciary were at least partially complicit in enabling the Imperial Presidency, whether consciously or inadvertently. This explains one reason why active combat in the Vietnam War continued for six years after 1967, when a significant portion of the American public began to doubt the probability of victory in the conflict, question its strategic necessity, and question the morality of American involvement in what was basically another nation's civil war. Without legislative and judicial help, massive populist opposition to the war proved ultimately ineffective. The mass demonstrations—unprecedented and since unparalleled in American history—certainly contributed to a mood of national unrest, but it is impossible to prove that they fundamentally changed war policies. In fact, presidents Johnson and Nixon continued the war in explicit defiance of the Antiwar Movement.

Schlesinger was right; these were imperial presidents, and such executives wield authority more like monarchs than as holders of an office that the Founders intended to be co-equal with the legislature and judiciary through checks and balances. Given this, it is completely unsurprising that imperial presidents also tended to dismiss popular sentiment against their policies, regardless of the anti-Vietnam War's large, widespread, and dramatic public demonstrations.

In this essay, first we will examine the two presidents (Johnson and Nixon) whose tenure encompassed most of the Vietnam War and certainly its most significant years of combat. Consistent with the Imperial Presidency, both Johnson and Nixon conducted the Vietnam War with their own prerogatives paramount. The executive branch largely created the war, escalated it, and modified policy when it saw fit, if sometimes making somewhat token acknowledgements of the war's growing unpopularity with the public and Congress. Nixon and National Security Advisor Henry Kissinger (later secretary of state) ended the war largely and belatedly on their own terms and specifically not those long advocated by antiwar protestors or congressional doves. We may readily conclude that Johnson, Nixon, and Kissinger did not yield to the Antiwar Movement, as reflected in their actions, words, and policies at the time, confirmed later in retrospective comments.

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1 Article I, Section 8, Clause 11.

2 See, Arthur Schlesinger, Jr., The Imperial Presidency (1973).

As disturbing as their presidential secrecy may have been, we should remember to see such executive behavior within the Cold War historical context when leaders all over the world feared the prospect of a third world war, or at least a nuclear war between the United States and the Soviet Union. One could also argue that the secrecy aspect was simply part of the modern administrative state (not to be confused with the conspiracy theory of the Deep State[3]) which inherently features a significant degree of classified information within and far beyond the executive branch.[4] Sadly, government officials in general have regularly violated the 1966 Freedom of Information Act,[5] but this conduct is merely a regular feature of the modern and contemporary bureaucratic state.[6] Having said that, where do necessary secret policies end and illegal war conduct begin? The war actions of imperial presidents would suggest that such a question was and is immaterial to them. Yet such a question would be central for any philosophy of democracy, both in its representative and direct forms.

Next we will analyze the two other branches of government – legislative and judicial – ideally designed to check and balance each other and the executive branch. Whether inadvertent or deliberate, legislators' and judges' actions and inactions allowed the Imperial Presidency comparatively free reign. There was never a majority in either the House or Senate that voted to end funding for the war. Only toward the war's final years did various senators begin introducing substantial bills designed to curtail the conflict, but they all ended in failed votes or were passed in diluted form. Congress notably failed to use their constitutional "power of the

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3 David Rohde addresses this conspiracy theory in In deep: the FBI, the CIA, and the Truth about America's "Deep State" (2020).

4 The era of "modern government secrecy" is actually centuries old, beginning during the Italian Renaissance among various city-states negotiating peace and power-sharing among themselves and with foreign powers. Historians usually trace the birth of this diplomacy to the 1454 Treaty of Lodi. *See* Garrett Mattingly, Renaissance Diplomacy (1959). Subsequent Machiavellian politics (mainly from Machiavelli's early 1500s treatise, The Prince) included a realpolitik embrace of diplomatic secrecy. For example, see the maneuverings of Castruccio Castracani in Niccolò Machiavelli, *The Life of Castruccio Castracani of Lucca*, The Prince (1532). Today's proponents of realistic politics would likely find WikiLeaks' recent exposures of governmental secrets as naïve, at best. For an overview of WikiLeaks' founder Julian Paul Assange and his collaborators, *see* Alex Gibney, dir., We Steal Secrets: The Story of WikiLeaks (2013).

5 PL 89-487, 80 Stat. 250.

6 Sam Archibald, a former director for the Special Subcommittee on Government Information, wrote "the sharpness of the tool depends substantially upon the will of the government-the will of the executive branch to honor the open-records provisions of the law, the will of the judicial branch to enforce the access-to-information provisions of the law and the will of the legislative branch to stand up for the people's right to know if the other two branches emasculate the freedom of expression necessary to make participatory democracy work in the Information Age." *See* Sam Archibald, *The Early Years of the Freedom of Information Act. 1955 to 1974*, PS: Political Science and Politics 26:4 (Dec. 1993) at 731. *Also see* Ted Bridus and Jack Gillum, *US Gov't Sets Record for Failures to Find Files When Asked*, Associated Press (March 18, 2016), and John Chenault, *The Myth of Freedom of Information*, Kentucky Libraries 78:2 (Spring 2014), available at https://ir.library.louisville.edu/faculty/13/.

purse"[7] to cease funding the war, or to take any other significant legislative action to modify the war policies of the Imperial Presidency. The judiciary also balked in the face of the conflict, untenably arguing for executive prerogatives in the face of a missing congressional declaration of war, even to the point of obfuscating the fact that the Constitution specifically vests war powers in Congress, not the executive.

Some of those in the legislative and judicial branches who deferred to the executive war politics in Vietnam probably felt that the Imperial Presidency was a Cold War necessity. Detractors would undoubtedly feel concerned that such precedents served as an erosive effect on the democratic constitutional system itself. But when considering how these major branches of the national government failed to mitigate or end the war, it becomes all the less tenable to claim (as many have) that the populist Antiwar Movement had any more success.[8]

This brings us to our last section of the essay where we shall assess the much-noted Antiwar Movement. This was basically a populist movement with direct democracy aspirations. First, despite all the sensational media coverage of antiwar protests, at any given time demonstrators represented a small minority of Americans. As early as 1967, a much larger demographic began doubting and opposing the war, even while many of them objected to the public demonstrations and particularly their radical elements. We have such vivid images of the Antiwar Movement because of unprecedented media coverage, but overall this coverage was ambiguous. Massive demonstrations waged year after year had no substantial effect in ending or even shortening the war. This point is crucial because many Americans (and protesters in particular) nurture unrealistic notions of direct democracy that a representative system in a large nation simply cannot accommodate. Despite direct democracy elements (such as the famous trio of legislative referendum, ballot initiative, and candidate recall), the United States overwhelming operates its democracy through local, state, and national representative institutions.

Then-contemporary media (as well as subsequent historians) probably noticed and described the Antiwar Movement as much or even more than the war itself, including the reportage of numerous polls that consistently reflected significant unease with or outright opposition to the Vietnam War. And yet the war dragged on year after year, despite poll results and massive public unrest all over the nation. In the final assessment, the Antiwar Movement had a marginal, ambiguous, and sometimes even an outright backlash effect on the conduct of the war. Thus,

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7 Article I, Section 8, Clause 1 of the U.S. Constitution reads: "The Congress shall have Power To lay and collect Taxes, Duties, Imposts and Excises, to pay the Debts and provide for the common Defence [sic] and general Welfare of the United States; but all Duties, Imposts and Excises shall be uniform throughout the United States." Article I, Section 9, Clause 7 of the U.S. Constitution reads: "No Money shall be drawn from the Treasury, but in Consequence of Appropriations made by Law; and a regular Statement and Account of the Receipts and Expenditures of all public Money shall be published from time to time."

8 Examples include Joe Allen, Vietnam: The (Last) War the U.S. Lost (2008) at 174, 175, 176; Terry H. Anderson, The Movement and the Sixties (1995) at 418; Tom Wells, The War Within: America's Battle Over Vietnam (2016) at 579. More generally, *see* Melvin Small, Johnson, Nixon, and the Doves (1988). For a gathering of former antiwar activists who still apparently believe they were instrumental in ending the war, *see* Stephan Talbot, dir., The Movement and the 'Madman', *American Experience*, season 35, episode 4, (PBS, March 28, 2023).

the Antiwar Movement's failures themselves defied notions direct democracy. By contrast, the Elite Theory of democracy[9] holds that various corporate and governmental elites (not the people) actually wield the bulk of real power within American democracy anyway; certainly they would likely dismiss the Antiwar Movement's efficacy altogether.

II. The Executive

Johnson and the Antiwar Movement

President Johnson was far more concerned about hawks than doves when it came to Vietnam War policy. At one point Johnson apparently told undersecretary of state George Ball, "don't pay any attention to what those little shits on the campuses do. The great beast is the reactionary elements."[10] Hawks wanted an expanded war, including a land invasion of North Vietnam and possibly even the use of nuclear weapons. Johnson clung to his limited war, much to the frustration of some of the military commanders on the ground, including General William Westmoreland.[11] But he had no respect nor agreement with doves opposing the war altogether.[12]

Johnson's popularity ratings were plunging, but his reasons for not seeking reelection were multifaceted, complicated, and often interrelated. Physical and mental exhaustion plagued Johnson at the end of his first term. His adherence to a limited war in Vietnam satisfied practically no one except Cold Warriors who appreciated that an expanded conflict risked the possibility of global expansion and even World War III. Antiwar candidate Robert Kennedy's entry into the Democratic primary race of 1968 was another crucial final factor in Johnson's decision to resign, and antiwar candidate Eugene McCarthy's strong second place showing in the New Hampshire primary was also ominous for Johnson's future prospects. Primary challengers followed other factors that had harmed Johnson's popularity, such as the numerous and widespread urban riots of 1967 and an economy succumbing to inflation (partly because of Johnson's hidden Vietnam War expenditures) going from 1% in 1964 up to 4.7% in 1968.[13] As for the Vietnam War itself, it was the Tet Offensive – not antiwar protests on the home front – that became the most influential factor in deciding Johnson's retirement from politics.[14] Undoubtedly

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9 Generally *see* Thomas R. Dye and Harmon Zeigler, The Irony of Democracy: An Uncommon Introduction to American Politics, 13th ed. (2006).

10 As quoted by Secretary of Defense Clark Clifford. *See* Clark Clifford and Richard Holbrooke, Counsel to the President: A Memoir (1991) at 417. Also see Robert S. McNamara and Brian VanDeMark, In Retrospect: The Tragedy and Lessons of Vietnam (1995) at 283-84.

11 George C. Herring, America's Longest War: the United States and Vietnam, 1950-1975 3rd ed. (1996) at 223.

12 As historian George Herring wrote, "Mistakenly believing that the peace movement was turning the public against the war, he [Johnson] set out to destroy it," even illegally employing the CIA to discredit Antiwar Movement leaders. See *id* at 198.

13 Figures from Investopedia, https://www.investopedia.com/inflation-rate-by-year-7253832.

14 Doris Kearns Goodwin, Lyndon Johnson and the American Dream, 2nd ed. (1976; 1991) at 335, 343.

Johnson was aware that his Vietnam War policy was faltering with the American electorate and that the Antiwar Movement (including dissent in the news media) was probably a contributing factor. But claiming the Antiwar Movement ended the Johnson presidency stretches credibility.

According to biographer Doris Kearns Goodwin, Johnson actually sympathized with the protesters but dismissed their claims and concerns as naïve, inexperienced, and uninformed, a product of youthful ignorance. Johnson actually blamed the professors for campus unrest, thinking they were old enough to know better, and that they were mired in their "egghead" world of theory rather than contending with profoundly consequential *realpolitik* decisions. During his decreasing popularity, Johnson actually began deceiving himself into believing that the American public liked him, approved of his policies (including his execution of the Vietnam War), and blamed widely disseminated contrary information on faulty pollsters and the media.[15] Goodwin wrote that Johnson began descending into "rationalization, wishful thinking, denial, repression"[16] instead of accepting the bleak realities of the Vietnam conflict and the public response.[17] Dismissing young demonstrators as mere "exhibitionists" indicated how Johnson was not getting their message.[18]

The idea that Johnson more or less discounted the antiwar demonstrations becomes all the more clear when we consider that, increasingly, he began to ignore his own policy advisors who had any doubts about the premise of Vietnam as a crucial stance against the threat of worldwide communist revolution. When Secretary of Defense Robert McNamara himself began doubting the wisdom of the war, his days in the cabinet were numbered. He left in 1968 to head the World Bank. McNamara was but the highest profile cabinet member who began doubting Johnson's Vietnam policy, yet Johnson had begun to ignore them all. Instead, fatefully, Johnson began listening only to those cabinet members who agreed with his approach, especially National Security Advisor Walt Rostow.[19]

Johnson himself never conceded to having been influenced by the Antiwar Movement. In fact, in 1971 he stood firm in asserting that he had well-served American foreign policy interests and the greater regional stability of Southeast Asia.[20] In fact, a pronounced stubborn streak characterized Johnson's entire approach to the Vietnam War. Even after the Tet Offensive he refused to back down and actually escalated the air war in the following months.[21] After leaving the presidency, Johnson looked back and blamed the media for a "chorus of defeatism" following the Tet Offensive.[22] He felt those in the Antiwar Movement needed to examine their consciences for having been wrong about the war and America's

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15 *Id* at 312, 315; Herring, *supra* note 11, at 240.

16 Goodwin, *supra* note 14, at 311. Also, generally see pages 310-15, 318-20, 324-28.

17 Johnson began making fateful mistakes, like focusing on supportive letters from GIs, saying they "didn't get the attention the TV people gave the exhibitionists." *See* Goodwin, *supra* note 14, at 315.

18 As Goodwin observed, "Long before the end of his Presidency, Johnson lost all ability to communicate with the peace movement." *See* Goodwin, *supra* note 14, at 327.

19 *Id* at 320.

20 Lyndon Baines Johnson, The Vantage Point: Perspectives of the Presidency, 1963-1969 (1971) at 355, 422, 531.

21 Herring, *supra* note 11, at 197, 201, 210, 227, 232.

22 Johnson, *supra* note 20, at 384.

foreign policy in Vietnam.[23] He blamed the Antiwar Movement for causing a "self-inflicted wound of critical proportions" to the United States.[24] An increasingly stalemated war had to be central in Johnson's decision not to run for reelection, but one could argue that miscalculating the place of the North Vietnamese within Cold War international politics – and especially underestimating North Vietnamese resolve – was more important in this regard than the American Antiwar Movement. Certainly Johnson's stated reaction to the Antiwar Movement's influence was only negative or even retaliatory.

Whether or not we find Johnson's retrospective views credible, his actions during his time in office certainly reflected the same policy he later defended. In other words, if the demonstrations had been so effective, why did Johnson refuse to end the war during the last eight months of 1968 after he had announced his retirement and had no reelection considerations at stake? Senator Thomas Eagleton offered what was probably the most likely reason: Johnson was simply not going to admit he had been mistaken about Vietnam, for it would be equivalent to admitting that the billions spent and the thousands of American lives lost had all been in vain. Unlike former Secretary of Defense Robert McNamara (who eventually admitted that the war was a mistake), Johnson remained resolute about his Vietnam War policy.[25] The Antiwar Movement may have contributed to Johnson's unpopularity, his physical and mental exhaustion – and thus his decision not to seek reelection – but Johnson's own actions made no concessions and followed no course demanded by the Antiwar Movement.

1968: the Meltdown Year

Arguably, 1968 was the most intense year of anti-Vietnam War protests. That was also the year when American deaths peaked in Vietnam, following the Tet Offensive that both surprised American military commanders and revealed to the American public how Johnson had been lying about or at least vastly exaggerating North Vietnamese weaknesses and lack of resolve. 1968 was also when the nation witnessed the meltdown at the Democratic National Convention in Chicago, mainly between status quo Democrats (Hubert Humphrey supporters) and anti-war Democrats severely disheartened after Robert Kennedy's assassination in June, but still hoping Gene McCarthy could carry the anti-war torch.

Nixon actually capitalized upon this public sentiment during the 1968 GOP convention, giving one of his many speeches about law and order. He described a supportive demographic: "the non-shouters, the non-demonstrators, that are not

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23 *Id* at 530, 531.

24 In 1971 Johnson wrote, "There is not the slightest doubt in my mind that this dissension prolonged the war, prevented a peaceful settlement on reasonable terms, encouraged our enemies, disheartened our friends, and weakened us as a nation." See *id* at 530.

25 Senator Eagleton said, "Johnson was never going to do a 180° *mea culpa*. That's not Lyndon Johnson. That's not most politicians. John Kennedy said the Bay of Pigs was a failure and his popularity went up. But most politicians don't like to say, 'I failed.' It's tough to say." *See* Thomas F. Eagleton interview (Nov. 3, 1998), *Politics in Missouri Oral History Project*, Collection #3929, Western Historical Manuscript Collection (Columbia, Missouri).

racist or sick, that are not guilty of the crime that plagues this land."[26] And remember, the antiwar protests were but an aspect of the greater youth rebellion that included long male hair, abandonment of sexual mores, no end of narcotics, wild rock'n'roll music, et cetera—so, undoubtedly, Nixon was appealing to various conservative people who found *all of this* objectionable. The irony that male college students were exempt from the draft rankled the parents of working class young men who disproportionately served and died in the war.[27]

How and why some candidates win and lose is always very complex, but it would be reasonable to conclude that the 1968 protests in particular played into Nixon's "law and order" campaign appeal. Granted, the 1968 antiwar protests were preceded by a great deal of inner city rioting over racism, poverty, and police brutality throughout the 1960s. Following the widespread 1967 urban riots, James Earl Ray murdered Martin Luther King, Jr., in April 1968 and an entire new slew of urban riots broke out in over a hundred cities resulting in the deaths of over 35 people. Many Americans found the violent versions of the Antiwar Movement to be but a repulsive subset of all this. Thus, the "law and order" advocacy had a broad application in the campaigns of any number of political candidates that year, including Alabama's governor George Wallace. 1968 not only witnessed Nixon's victory in the presidential race but the defeat of the only two senators (Alaska's Ernest Henry Gruening and Oregon's Wayne Lyman Morse) who had opposed the 1964 Gulf of Tonkin Resolution, Johnson's "police action license" for escalating the Vietnam War. None of this indicated much effectiveness for the Antiwar Movement's efforts.

Nixon-Kissinger and the Antiwar Movement

If the Antiwar Movement could not reverse or even mitigate Lyndon Johnson's course in Vietnam, Richard Nixon and his powerful National Security Advisor Henry Kissinger were even less receptive to populist antiwar appeals. Nixon was especially dismissive of demonstrators, saying that allowing antiwar demonstrators to make foreign policy was equivalent to anarchy.[28] Nixon vowed that "under no circumstances" would he allow the antiwar protests to affect or influence him.[29] In his much-noted "Silent Majority" speech of November 3, 1969, Nixon offered the polite version of this objection when he stated, "I would be untrue to my oath of office if I allowed the policy of this Nation to be dictated by the minority who hold that [antiwar] point of view and who try to impose it on the Nation by mounting

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[26] David Emory Shi & George Brown Tindall, America: The Essential Learning Edition (2015) at 1040. *Also see* Allen J. Matusow, The Unraveling of America: A History of the Liberalism in the 1960s (1984) at 401; Michael Schumacher, The Contest: The 1968 Election and the War for America's Soul (2018), especially at 232, 237, 305, 331.

[27] As eminent historian Eric Foner wrote, Nixon "campaigned as the champion of the 'silent majority'—ordinary Americans who believed that change had gone too far—and called for a renewed commitment to 'law and order.'" *See* Eric Foner, Give Me Liberty! An American History, 4th ed., vol. 2 (2014) at 1017.

[28] Stanley Karnow, Vietnam: A History (1983) at 599. Also see page 633.

[29] Quoted in Thomas J. Knock, "*Come Home, America": The Story of George McGovern*, in Vietnam and the American Political Tradition: the Politics of Dissent, Randall B. Woods, ed. (Cambridge University Pr., 2003) at 112.

demonstrations in the street."[30] In his 1978 memoir, Nixon reiterated some of Johnson's objections to the Antiwar Movement when he claimed it had prolonged the war, hindered efforts to negotiate with the North Vietnamese, and harmed American military morale.[31] Violent antiwar protesters especially angered him; he called them the "super hypocrites of our time."[32]

Despite polite public speech, historian Robert Dallek concluded that behind the scenes Nixon (similar to Johnson) was actually determined to retaliate against antiwar activists.[33] In sunnier moments Nixon even believed the Antiwar Movement would actually backfire and result in greater overall public support for him and his Vietnam War policies.[34] Follysome as this may have been, Nixon was not even close to allowing the Antiwar Movement to influence his course in Vietnam policy. If anything, he settled more stubbornly into his own prerogatives.[35] This sort of defiance in the face of public unrest perhaps epitomizes the Imperial Presidency. In May 1972, Nixon actually escalated the war more than any time since 1965 during the so-called "Linebacker" offensive (in retaliation for North Vietnam's Easter Offensive) and then enjoyed a subsequent rise in approval ratings.[36] This probably made Nixon feel vindicated in his defiance of the Antiwar Movement.

In his memoirs, Kissinger presented himself as a non-angry counterpart to Nixon's open hatred of the demonstrators, as if he and the war opponents were merely expressing differences of opinion among gentle folk.[37] But Kissinger echoed Nixon when he wrote, "My theme was constant, that the war had to be ended as an act of policy, not in response to demonstrations."[38] Like Johnson and Nixon, Kissinger also retrospectively blamed the Antiwar Movement for prolonging the war, not ending or shortening its duration.[39] Again, there is no evidence to support the idea that the Antiwar Movement influenced Kissinger any more than it influenced Johnson or Nixon.

The Antiwar Movement and 1969 Operation Duck Hook

Contrary to all the foregoing evidence, media like Stephan Talbot's 2023 documentary film, *The Movement and the* '*Madman*', represent another example of aging former activists who insist they influenced the ending of the Vietnam War.[40]

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30 Richard Nixon, "Silent Majority Speech," (Nov. 3, 1969), transcript available at Watergate Info: https://watergate.info/1969/11/03/nixons-silent-majority-speech.html.

31 Richard M. Nixon, The Memoirs of Richard Nixon (NY: Grosset & Dunlap, 1978) at 350-51. Also see Herring, *supra* note 11, at 263, 356, 401.

32 *Id*, at 493.

33 Robert Dallek, Nixon and Kissinger: Partners in Power (2007) at 200, 208. Robert Brigham also mentions this in Robert K. Brigham, Reckless: Henry Kissinger and the Tragedy of Vietnam (2018) at 117. Also see Herring, *supra* note 11, at 264.

34 Dallek, *Id* at 133, 159.

35 As historian George Herring wrote, "Rather than fearing the domestic backlash he was sure would come, he seems to have welcomed it." *See* Herring, *supra* note 11, at 260.

36 *Id* at 273-275.

37 Henry Kissinger, White House Years (1979) at 300.

38 *Id*, at 302. Kissinger concluded, "There can be no serious national policy when an attempt is made to coerce decisions by an outpouring of emotion and when those in high office are forced to take measures they do not really believe in simply to calm protests in the streets." See *id* at 516.

39 *Id*, at 510.

40 Talbot, *supra* note 8.

The premise of the film is that massive protests on October 15, 1969[41] convinced Nixon and Kissinger against executing Operation Duck Hook, a scheme of possibly dropping nuclear bombs on North Vietnam. This is a doubly disingenuous premise. First, we only learned of the highly secret nuclear warfare brinksmanship many years later, when the government declassified documents during the 1990s.[42] The demonstrators of the National Moratorium in October 1969 had no clue about Operation Duck Hook's existence. Thus, in an example of eisegesis, the commentators in The *Movement and the 'Madman'* are reading later knowledge into the past.[43]

Second, what the 1969 demonstrators did not know—but what Talbot and his commentators should have known—was that Nixon and Kissinger had already abandoned Operation Duck Hook before the National Moratorium of 1969 began.[44] Accounts vary as to why Nixon and Kissinger abandoned the ploy, and likely there was a combination of factors. Global opposition to Vietnam War escalation supposedly influenced Nixon himself,[45] though that seems debatable considering Nixon and Kissinger secretly continued to expand the war into Cambodia. National Security Council staff member Roger Morris remembered the cancelation as based in doubts over military effectiveness, not because of the Antiwar Movement.[46] Other National Security Council members (especially Lawrence Lynn) also predicted against Operation Duck Hook's military effectiveness.[47]

It is also important to recognize Operation Duck Hook as a subset of Nixon and Kissinger's "Joint Chiefs of Staff Readiness Test," a global show of American military force, more specifically nuclear warfare saber rattling.[48] Operation Duck Hook and the Joint Chiefs of Staff Readiness Test themselves turned out to be nuclear warfare bluffs, and in a sense, the Soviets and China merely called that bluff. As for the North Vietnamese, they showed no change in their resolve to continue fighting for their homeland.

Talbot's film is long on the reminiscences of former antiwar activists (such as Tom Wells, Melvin Small, and Daniel Ellsberg) as well as former Vietnam War veterans who turned against the war—but it reflects wishful thinking more than cause-and-effect. For example, Melvin Small erroneously claimed "Nixon folded," as if public disapproval alone caused him to abandon Operation Duck Hook.

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41 BBC News, On This Day: 15 October 1969: *Millions March in US Vietnam Moratorium*, http://news.bbc.co.uk/onthisday/hi/dates/stories/october/15/newsid_2533000/2533131.stm).

42 William Burr & Jeffrey Kimball, *Nixon's Secret Nuclear Alert: Vietnam War Diplomacy and the Joint Chiefs of Staff Readiness Test, October 1969*, 3 Cold War History 114 (2003); William Burr & Jeffrey Kimball, *Nixon's Nuclear Ploy*, Bulletin of the Atomic Scientists 30 (2003); Nina Tannenwald, *Nuclear Weapons and the Vietnam War*, 29 Journal of Strategic Studies 677 (2006); Scott D. Sagan & Jeremi Suri, *The Madman Nuclear Alert: Secrecy, Signaling, and Safety in October 1969*, 27 International Security 156-57 (2003).

43 Also, in this case, called the "presentism fallacy" of historical thought. *See* David Hackett Fischer, Historians' Fallacies: Toward a Logic of Historical Thought (1970) at 135-40.

44 Burr & Kimball, *Nixon's Secret Nuclear Alert*, *supra* note 42, at 115.

45 Tannenwald, *supra* note 42, at 714-15.

46 *Id*, at 715.

47 *Id*. *See also* Sagan & Suri, *supra* note 42, at 159-62.

48 Sagan & Suri, *supra* note 42, at 113-14. *See also* Herring, *supra* note 11, at 249.

Majority public opinion had been at least uneasy about the war since 1967, but that did not preclude Nixon and Kissinger from threatening nuclear warfare in an effort to leverage a Vietnam peace agreement on terms they considered favorable to the United States. This was part of the Nixon-Kissinger's global anti-communist strategy.[49] In other words, Nixon and Kissinger were focusing more on the large and complex picture of foreign affairs within the Cold War context, and far less on antiwar demonstrations.

To Talbot's credit, he includes an observation from Stephen B. Bull, who was Special Assistant to the President and Appointments Secretary, 1969-73. Bull represents a solitary voice of reason in Talbot's film, overshadowed numerically by former activists who ignore even the possibility of bluffing, which Bull emphasizes. Bluffing is the standard interpretation now, contradicting the thesis of Talbot's film.[50] And, after all, bluffing and saber rattling was par for the course during the entire Cold War. Some political scientists at the time called it "brinksmanship," as in going up to the brink of nuclear war.

In an interview about the film, director Talbot said, "We didn't stop the war anywhere near soon enough, but the protest movement ended the draft and Nixon began to step up the withdrawal of troops."[51] But Nixon had promised to end the draft during the 1968 presidential campaign and executed a phased withdrawal of American soldiers which garnered overwhelming public support.[52] Numbers of American soldiers in Vietnam went from 536,100 in 1968 to 475,200 in 1969, Nixon's first year in office. Thereafter the numbers went down to 334,600 in 1970, then 156,800 the following year.[53] The draft did not actually end until 1973, but the reduction of ground soldiers (and substituting, to some degree, an air war) undoubtedly appeased a large sector of the non-demonstrating antiwar public. Nixon's "Vietnamization" policy of slowly shifting war burdens from American soldiers to South Vietnamese military forces became a face-saving exit, along with the oft-repeated idea of finding "peace with honor."

In 1969, a Gallup poll asked, "Do you approve or disapprove of the way President Nixon is handling the situation in Vietnam?"[54] 64% of American adults approved, 25% disapproved. Despite some popular images of college campuses as bastions of majority antiwar activism, half of the college students surveyed approved of Nixon's handling of the war and only 44% disapproved, with significant regional differences (more approval in the South, the least approval in the northeast).[55]

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49 As William Burr and Jeffrey Kimball argue, "In contrast to skeptical anti-war critics, Nixon, Kissinger, and other policy-makers believed that achieving their goals in Indochina would have a critical bearing on the global influence of the United States." *See* Burr & Kimball, *Nixon's Secret Nuclear Alert*, *supra* note 42, at 30.

50 For example, Scott D. Sagan and Jeremi Suri wrote, "Nixon hoped that his nuclear bluff would compensate for his domestic and bureaucratic constraints, convincing Moscow to put pressure on the Hanoi government to sue for peace on terms acceptable to the United States." *See* Sagan & Suri, *supra* note 42, at 153.

51 G. Allen Johnson, *San Francisco Filmmaker Goes Back to Roots as Vietnam War Protester in PBS Documentary*, San Francisco Chronicle (March 27, 2023).

52 Brigham, *supra* note 33, at 76-77.

53 Statistics from the University of Houston's "Digital History" website, available at https://www.digitalhistory.uh.edu/disp_textbook.cfm?smtID=11&psid=3844.

54 Lydia Saad, *Gallup Vault: 1969 College Students' Resistance to Vietnam*, news.gallup.com (March 16, 2018).

55 *Id*.

Ironically, neither Johnson's limited war strategy nor Nixon's threats of nuclear escalation had any practical effect in lessening (much less arresting) North Vietnamese resolve to persevere. If we were to claim any single reason for the North Vietnamese victory, it was because fighting for one's homeland turned out to be far more inspiring than fighting for a semi-abstract anti-communist ideology thousands of miles from home. As Ho Chi Minh famously predicted in 1946, "You will kill ten of us, we will kill one of you, but in the end, you will tire of it first."[56] The skewed kill ratio actually turned out to be far more severe (closer to 34::1, if we conservatively count two million dead Vietnamese to 58,000 American deaths).[57] But Ho Chi Minh was quite prophetic in this regard. The North Vietnamese were well aware of the Antiwar Movement in the United States, and undoubtedly they considered this an asset in their focus on the *longue durée*. But fundamentally they were fighting a civil war with a legacy of foreign interference; first the 19th French colonials, then the Japanese during World War II, a post-war attempt by the French to reclaim their colony, followed by American Cold War entanglement.

Cold War and Imperial Presidents

Many Americans object to the idea of an American Empire,[58] but is there a better word to describe hundreds of global military outposts[59] still protecting American interests in the post-Cold War era? The United States emerged as the only world superpower after the collapse of the Soviet Union in 1991, yet its worldwide military outposts remain. It is in this sense that the world now has an American Empire.

One reason the word likely causes discomfort is because "democracy" and "empire" more or less contradict one another, or at least set a double standard of democracy at home and imperialism abroad. And yet this dualism goes back to the birth of western democracy itself with the polis of Athens and its 5th Century

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56 Karnow, *supra* note 28, at 17.

57 R.J. Rummel, *Deaths in Vietnam War (1954–75)*, University of Hawaii study available at https://www.hawaii.edu/powerkills/SOD.TAB6.1B.GIF

58 But not so for scholar, professor, and former CIA consultant Chalmers Johnson, who not only believed there was an American Empire, but warned how it endangered American democracy. As he told interviewer Amy Goodman, "A nation can be one or the other [democracy at home or imperialist abroad] but it can't be both." He felt the Roman Republic had chosen the imperialist path and lost its democracy thereby. See Amy Goodman, *Chalmers Johnson: "Nemesis: The Last Days of the American Republic,"* Democracy Now! (Feb. 27, 2007) available at

https://www.democracynow.org/2007/2/27/chalmers_johnson_nemesis_the_last_days

Also see Johnson's trilogy of books: Blowback: The Costs and Consequences of American Empire; The Sorrows of Empire: Militarism, Secrecy, and the End of the Republic; and Nemesis: The Last Days of the American Republic.

Republican-Libertarian Pat Buchanan has also long decried the American Empire, as reflected in numerous television interviews and appearances, especially in the role as pundit for the weekly public television magazine, the McLoughlin Group. His blog titles are indicative: *A Republic Not an Empire*; *America's Unsustainable Empire*; and *Is the American Empire Worth the Price*? *See*

https://buchanan.org/blog/Topics/imperialism
https://buchanan.org/blog/pjb-a-republic-not-an-empire-312
https://buchanan.org/blog/americas-unsustainable-empire-129168

59 Chalmers Johnson, *Empire of Bases*, New York Times (July 13, 2009).

BCE empire located mainly in the Ionian Sea region. Athens featured an admittedly limited democracy at home for its citizens (yet so too did the United States until the 20th century) but imposed colonial rule, including the extraction of monetary tribute, from its colonies.[60] More troubling for the American Founders was the intermixed decline of democracy and the rise of imperialism during the latter period of the Roman Republic,[61] an era they studied carefully.[62]

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[60] A great many scholars have studied this. For a few examples, *see* Robert J. Bonner, Aspects of Athenian Democracy (1933) at 159, 176; William Scott Ferguson, Greek Imperialism (1913) at 39, 65, 66, 70; D.B. Gregor, *Athenian Imperialism*, Greece & Rome 22:64 (Feb. 1953) at 27-32.

The British Empire would, of course, provide another famous example of democracy at home and colonial domination abroad. The influential British scholar John Atkinson Hobson lived and wrote during the British Empire's apex. His observations included how imperialism fundamentally contradicted democracy and fostered international racism. Hobson also described how imperialism benefitted a domestic plutocratic oligarchy who indulged their own greed and exacerbated socio-economic disparities at home. *See* J.A. Hobson, Imperialism: A Study (1902) at 158, 159, 160-61, 335-36, 365. For examples of positive and negative interpretations of the history and legacy of the British Empire, respectively *see* Niall Ferguson, Empire: The Rise and Demise of the British World Order and the Lessons for Global Power (2003) and Caroline Elkins, Legacy of Violence: A History of the British Empire (2022).

[61] Many scholars have described this. For examples, *see* Stewart Perowne, Death of the Roman Republic : from 146 B.C. to the Birth of the Roman Empire (1968), at 53; Nathan Rosenstein & Robert Morstein-Marx, *The Transformation of the Republic*, in A companion to the Roman Republic 632 (Nathan Rosenstein & Robert Morstein-Marx, eds., 2006); David Colin Arthur Shotter, The Fall of the Roman Republic (1994) at 10, 14. The expanding foreign territory seems to have been the main cause for the Republic's eventual demise, though many corollary or dependent factors included the displacement of farmers, increase in slavery, widening socioeconomic disparities, and political infighting. *See* Edward J. Watts, Mortal Republic : How Rome Fell into Tyranny (2018) at ch.3, *Empire and Inequality*. As for political infighting, the late Roman Republic's senators in particular recognized imperialism's dangers to its legislative body. *See* Tenney Frank, Roman Imperialism (1914) at 274. As Edward Gibbon, famous historian of Rome wrote, "The victory over the senate was easy and inglorious. Every eye and every passion were directed to the supreme magistrate, who possessed the arms and treasure of the state; whilst the senate, neither elected by the people, nor guarded by military force, nor animated by public spirit, rested its declining authority on the frail and crumbling basis of ancient opinion. The fine theory of a republic insensibly vanished, and made way for the more natural and substantial feelings of monarchy." *See* Edward Gibbon, The History of the Decline and Fall of the Roman Empire, v.1 (1836) at ch.V: *Sale of the Empire to Didius Julianus, Part II*; available at Project Gutenberg, https://www.gutenberg.org.

Undoubtedly the undeclared Korean and Vietnam wars and the general post-World War II shifting of war powers to the executive were on the mind of U.S. Senator Robert C. Byrd when he wrote, "The Roman Senate which, for almost five centuries, controlled the power of the purse and had been the supreme organ under the republic, had voluntarily given up these powers, had become dependent, had become fearful, had lost its nerve, and had ceded power, without being forced to do so, to an emperor." *See* Robert C. Byrd, Senate of the Roman Republic: Addresses on the History of Roman Constitutionalism (1995) at 157-58.

[62] Paul Meany, *Rome's Heroes and America's Founding Fathers*, J. Am. Revolution (Oct. 23, 2018); Charles F. Mullett, *Classical Influences on the American Revolution*, Classical Journal 35:2 (Nov. 1939) at 96, 97; Carl J. Richard, Greeks and Romans

In the case of the United States, one could argue that the contradictions of selective democracy were present at birth, and certainly so from the perspectives of indigenous peoples and African slaves, to name but two groups who remained disenfranchised well into the 20th century. The United States is a nation of conquest, so in a sense its first "empire" was its contiguous continental territories and states[63] gathered under the ideology of Manifest Destiny,[64] which spilled over the continental borders to include various 19th century imperial acquisitions abroad.[65] This empire has now finally reached its furthest extent owing to post-World War II superpower status.

During the Cold War, the United States did not pursue imperial conquest and territorial acquisition per se, but the nation contended mightily for an anti-communist world order, and this meant attempting to "contain" communism in the USSR and China. In Asia, containment included many military outposts in places like Okinawa, Taiwan, South Korea, and – temporarily – South Vietnam. For the Vietnamese, the Vietnam War was more of a civil war complicated by post-colonial factions and the various proxy aspirations of the United States, the USSR, and China. The latter had natural proximitous geographical concerns (similar to the ones they had during the Korean War) as would any nation bordering another nation at war with foreign powers.

Historical empathy is necessary if we are to understand the influence of the Cold War during the Vietnam era. All the presidents who oversaw the Vietnam War were firm believers in the two main foreign policy theories that we now call myths: the Monolithic Communist Theory/Myth and the Domino Theory/Myth. The USSR certainly espoused a great deal of rhetoric that helped reinforce the now obviously untenable idea that communist ideology would somehow supersede

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Bearing Gifts : How the ancients Inspired the Founding Fathers (2008) at 97; Eran Shalev, Rome Reborn on Western Shores: Historical Imagination and the Creation of the American Republic (2009). For an interesting interview with scholar Edward J. Watts comparing the decline of the Roman Republic with recent events in American politics, see Clay S. Jenkinson, *America, Rome and the Slow Erosion of Republics*, governing.com (Dec. 14, 2020), available at https://www.governing.com/context/america-rome-and-the-slow-erosion-of-republics.html

Or, as scholar Edward J. Watts wrote, "the Second Punic War (218-201 BCE) fundamentally and permanently changed the economic, political, and military life of [republican] Romans, and, as the second century dawned, Romans came increasingly to understand that a state that reconfigured itself to project power across wide distances during a war would never return to its previous form. (The United States would reach a similar realization after World War II.)" See Watts, *supra* note 61, at 45.

63 Mainly acquired through the following agreements with other European or Euroamerican colonial powers: Louisiana Purchase (France, 1803), the Oregon Treaty (Britain, 1846), the Treaty of Guadalupe Hidalgo (Mexico, 1848), and the Gadsden Purchase (Mexico, 1853).

64 The journalist John L. O'Sullivan coined the term "Manifest Destiny" in 1845. Since then historians have treated it as a standard topic in introductory textbooks. *See generally* Frederick Merk, Manifest Destiny and Mission in American History: A Reinterpretation (1963). For a very helpful and nuanced interpretation of Manifest Destiny, *see* Walter A. McDougall, Promised Land, Crusader State (1997) at ch.4.

65 Including Caribbean and Pacific territories seized from the Spanish during and after the Spanish-American War, but also Pacific Islands such as Guam, Wake Island, part of Samoa, the Northern Mariana Islands, and the Hawaiian Archipelago.

nationalism, thus fostering a "monolith" of global communism. Dominos falling became the metaphor for the creation of this monolith, and adherents premised their notions upon the fatally inaccurate idea that nations "fell" to communism, one after the other. An obvious alternative interpretation for a nation like China would be more along the lines of communism serving the Chinese as a transition from pre-industrial vulnerability to international colonialism to contemporary autonomy and capitalism. But during the Vietnam era, all American presidents embraced the Monolithic and Domino ideas. Moreover, Democratic Party presidents Truman, Kennedy, and Johnson all had to contend with domestic Republican Party pressures of appearing "soft" on communism.[66] This tragically helped foster initial involvement, escalation, and prolongation of the Vietnam War.

Another important aspect of presidents Johnson and Nixon in particular was what the aforementioned historian Arthur Shlesinger, Jr., dubbed the Imperial Presidency.[67] Unlike pre-World War II presidents, Cold War era executives began exercising unprecedented power as well as employing a great deal of secrecy in their exercise of that power.[68] As Imperial Presidents, both Johnson and Nixon deliberately and carefully deceived the American public and Congress regarding their war policies and practices. Johnson clung to a limited war and Nixon repeatedly attempted to intimidate the North Vietnamese and their allies with shows of force and increased air war – both approaches were ultimately ineffective, but so too was the Antiwar Movement in changing these fundamental presidential approaches to the conflict.

Regardless of the Imperial Presidency and its flagrant abuses, we should avoid laying too much of the responsibility for the war on the executive branch. After all, from the founding of the nation, the Constitution has empowered Congress with control over finances,[69] the much-repeated "power of the purse."[70] Tellingly, Congress did not use its funding powers to end the war. The case of action speaking louder than words (including antiwar words) may be crucial here. Congress only began making what amounted to token financial gestures when the war was already in its final phase.

III. The Legislature and the Judiciary

Congress and Marginal Antiwar Amendments

Similar to those claiming that antiwar demonstrations and protests ended the Vietnam War, various scholars claim that Congress was an effective antiwar force

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66 Herring, *supra* note 11, at 82, 155, 195, 198; Karnow, *supra* note 28, at 320.

67 Schlesinger, *supra* note 2. Also see Thomas E. Cronin, *A Resurgent Congress and the Imperial Presidency*, Political Science Quarterly 95:2 (Summer 1980) at 213; Jacob K. Javits, Who Makes War: The President Versus Congress (1973), at 262-66.

68 Schlesinger wrote, "by the 1960s and 1970s, Presidents began to claim the power to send troops at will around the world as a sacred and exclusive presidential right." Schlesinger, *supra* note 2, at 310. Also see ch. 7, "The Presidency Rampant: Vietnam," at 177-207.

69 *See supra* note 7.

70 Historian and biographer Doris Kearns Goodwin observed the obvious when she wrote, "At any time in the course of the war, the Congress could have stopped America's involvement in Vietnam if it had wanted to." *See* Goodwin, *supra* note 14, at 324.

during the conflict.[71] Sadly, this is again far more wishful thinking than a convincing argument.[72] In the case of Vietnam, Congress granted Johnson the Tonkin Gulf Resolution in 1964, basically giving the president permission to escalate the war. As later revealed in the Pentagon Papers,[73] Johnson proceeded to oversee the conflict with a great deal of secrecy, hiding facts from both Congress and the public. Toward the end of the war (during 1970-71) various senators and representatives proposed five congressional amendments (four in the senate, one in the house) that would have limited soldier numbers or curtailed funding – but all failed.[74] In other words, even antiwar senators and representatives during the Vietnam War tended to be long on rhetoric and short on action, and they were ever in the numerical minority regardless of party affiliation.[75]

In 2014, Kelly McHugh published a masterful article that analyzed the congressional role during the Vietnam and Iraq wars, as well as schools of thought regarding these topics. In both conflicts McHugh noted that "although members of Congress were vocal in opposing the war, there were few legislative attempts to curtail the president's ability to conduct the war."[76] There are many reasons for this, from buck-passing to risk aversity among legislators (especially as it pertained to reelection concerns).[77] When it came to war in particular, Congress tended to defer to the executive regardless of funding or defunding powers.[78] So Congress did not really rein in Nixon and Kissinger. The sponsors of the much-noted Cooper-Church amendment of 1971 intended to end funding of the war's expansion into Cambodia. Of it McHugh wrote,

> The Senate passed the [Cooper-Church] amendment quickly, but only after distilling its provisions; specifically, the Senate modified the language of the amendment to make it clear that Congress did

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71 For examples see William G. Howell & Jon C. Pevehouse, *When Congress Stops Wars: Partisan Politics and Presidential Power*, Foreign Affairs 86:5 (Sept./Oct. 2007) at 95-107; Julian E. Zelizer, *How Congress Got Us Out of Vietnam*, Prospect (March 2007) at 30-34.

72 As Louis Fisher and Ryan C. Hendrickson wrote regarding foreign wars, "In most cases, Congress has chosen the politically expedient route of deferring to the president." *See* Louis Fisher & Ryan C. Hendrickson, *Congress at War*, Foreign Affairs 87:3 (May-June 2008) at 167.

73 Among the many volumes on this topic, see Daniel Ellsberg, Secrets: A Memoir of Vietnam and the Pentagon Papers (2002); George C. Herring, ed., The Pentagon Papers, abridged edition (1993); The Pentagon Papers: The Defense Department History of United States Decision-making on Vietnam (1971-72) 5 vols.

74 Kelly McHugh, *Understanding Congress's Role in Terminating Unpopular Wars*, Democracy and Security 10:3 (July-Sept. 2014) at 204.

75 As Stephen R. Weissman wrote, "Holding hearings, imposing reporting requirements, adopting resolutions stating that Congress should authorize any future military action, and sponsoring independent legislation opposing military action amount to no more than putting up a fuss, unless they actually culminate in significant legal constraints on presidential power." *See* Stephen R. Weissman, *Congress at War*, Foreign Affairs 87:3 (May-June 2008) at 169.

76 McHugh, *supra* note 74, at 192.

77 *Id*. at 195-97.

78 *Id*. at 193. McHugh concluded that "Nixon used the leeway provided by a skittish Congress to geographically expand the war, in the hopes of averting a defeat." See *id.* at 218.

> not intend to trammel on the president's constitutional authority to set policy. Moreover, the amendment pledged that Congress would work "in concert" with the administration in disengaging from Cambodia. Despite these modifications, the amendment lingered for months in the House of Representatives; the final bill was not sent to the president until December of 1970, after the administration had already signaled its intention to withdraw US troops from Cambodia. In essence, the amendment had no obvious effect on the operations in Cambodia.[79]

Given such half-measures and failures of legislative limits on the executive, some senators pursued a more fundamental change to reemphasize congressional war powers. Many scholars make strong arguments that the Framers originally intended that Congress (and not the president) should have war-making powers and this remained central to the war-making aspect of the Vietnam conflict.[80] Contrary legal arguments during the Vietnam era itself (claiming the president had war powers coequal with Congress)[81] were largely matters of eisegesis, or more specifically, an employment of the presentist fallacy of history.[82] Article II, section 2 of the Constitution designates the president as Commander in Chief, but by this the Framers meant *ex post facto* presidential war powers, not *declaratory* congressional war powers – at least in most circumstances, outside of things like a sudden, emergency response to foreign aggression toward the United States.[83]

Senators Tom Eagleton and Jacob Javits wrote eloquently[84] about Johnson and Nixon's abuse of the congressional War Powers clause.[85] And yet Javits and Eagleton's efforts backfired in the 1973 War Powers Resolution[86] that actually surrendered war powers to the president for the first 60-90 days of a conflict without the requirement of Congress formally declaring war.[87] In a profound way, the War Powers Resolution merely became a crowning non-achievement in legislative checks on executive war powers. For this reason, Senator Eagleton ironically began as a sponsor of the bill but ended up voting against it because an entirely different dynamic surrounds initial war funding compared to financing an ongoing conflict.[88] Eagleton was making a strong

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79 *Id*, at 205.

80 For examples, see David Gray Adler, *The Constitution and Presidential Warmaking: The Enduring Debate*, Pol. Sci. Q. 103:1 (Spring 1988) at 2, 7, 8, 36; Cronin, *supra* note 67, at 214; Fisher and Hendrickson, *supra* note 72, at 168-69; Charles A. Lofgren, *War-Making under the Constitution: The Original Understanding*, Yale L.J. 81:4 (March 1972), at 699-700; Weissman, *supra* note 75, at 169.

81 Adler, *id* at 2; Cronin, *supra* note 67, at 209-237 at 212.

82 Fischer, *supra* note 43.

83 Adler, *supra* note 80, at 12-14, 29; Lofgren, *supra* note 80, at 700.

84 Thomas F. Eagleton, War and Presidential Power: a Chronicle of Congressional Surrender (1974); Javits, *supra* note 67.

85 U.S. Constitution, Article I, Section 8, Clause 11.

86 Public Law 93-148; 87 Stat. 555.

87 *Id* at § 5(b).

88 As Eagleton told his colleague Senator Javits, "Once the president has 60 or 90 days, and the troops are there, the decision is already made. You can't cut off the money while they're shooting at our troops in the trenches or in the jungles." *See* Eagleton, *supra* note 25. Circuit Judge George E. MacKinnon made a similar commonsensical

point based on then-recent history, for this is exactly what happened in the Senate during 1965-68, when senators only voted (three different times) for continuing appropriations for soldiers already in Vietnam—not against the war policy itself.[89]

The central point to remember is, Congress did not and would not rein in presidential war power during the most contentious and divisive war in American history.[90] The subtitle of Eagleton's 1974 book more or less says it all: *War and Presidential Power: a Chronicle of Congressional Surrender*.[91] Eagleton was hardly alone. For example, noted legal scholar John Hart Ely described the 1973 War Powers Resolution as "a tale of congressional spinelessness."[92]

This is especially daunting considering that the attempt to reassert congressional war powers took place after Congress discovered that Kissinger and Nixon had secretly and illegally expanded the Vietnam War into Cambodia. If Congress could not rein in presidential war power during the highly controversial Vietnam-Cambodia conflict, it seems unlikely they ever will. The Vietnam War ended, but there is no legal reason another president could not engage the nation in another such conflict. In fact, presidents since 1973 have routinely ignored the War Powers Resolution altogether.[93] And if Congress refused to rein in the Imperial Presidency during the Vietnam War, the judicial branch behaved similarly.

The Judiciary and the "Political Question"

Far less visible than the mass demonstrations on college campuses and in city streets were the lawsuits that various soldiers, prospective draftees, and even

observation in 1973: "in voting to appropriate money or to draft men a Congressman is not necessarily approving the continuation of a war no matter how specifically the appropriation or draft act refers to that war. A Congressman wholly opposed to the war's commencement and continuation might vote for the military appropriations and for the draft measures because he was unwilling to abandon without support men already fighting. An honorable, decent, compassionate act of aiding those already in peril is no proof of consent to the actions that placed and continued them in that dangerous posture. We should not construe votes cast in pity and piety as though they were votes freely given to express consent." *See* Mitchell v. Laird, 488 F.2d 619 (1973), 159 U.S. App. D.C. 352.

89 Goodwin, *supra* note 14, at 325, 326.

90 Herring, *supra* note 11, at 186.

91 It is astonishing to find, repeatedly, how various writers and scholars have mistaken the War Powers Resolution as an effective congressional check on executive war powers—when it was just the opposite. For examples, see Charles DeBenedetti & Charles Chatfield, An American Ordeal: The Antiwar Movement of the Vietnam Era (1990) at 405; Foner, *supra* note 27, at 1029; Adam Garfinkle, Telltale Hearts: The Origins and Impact of the Vietnam Antiwar Movement (1997) at 283; Karnow, *supra* note 28, at 684; Kevin M. Kruse & Julian E. Zelizer, *Have We Had Enough of the Imperial Presidency Yet?* New York Times (Jan. 9, 2019). Eagleton himself described how—many times, over the decades—he had to explain and re-explain to various journalists why he made a 180-degree turn against the legislation he helped initiate as a sponsor. *See* Eagleton, *supra* note 25.

92 John Hart Ely, *Suppose Congress Wanted a War Powers Act That Worked*, Columbia L.R. 88:7 (Nov. 1988) at 1419. Also see Cronin, *supra* note 67, at 217; Javits, *supra* note 67, at 239, 261; Schlesinger, *supra* note 2, at 206.

93 Dye and Zeigler, *supra* note 9, at 268.

members of Congress filed against the war during 1968-73. Most often, they filed these cases on the grounds that the Vietnam conflict was unconstitutional due to a missing congressional declaration of war.[94] In response, many judges pointed out that Congress was fully complicit in the Vietnam War despite having made no formal declaration of war. For example, in 1968 U.S. District Judge Charles Edward Wyzanski, Jr., observed that Congress had not only passed the Tonkin Gulf Resolution allowing expansion of U.S. involvement in Vietnam, but repeatedly appropriated money to conscript men into the military.[95] In making such assessments, Wyzanski and other judges dismissed these cases. A couple of judges pointed out that a formal declaration of war would have international consequences that Congress was obviously avoiding with good reason, especially in the interest of precluding escalation of the Vietnam conflict into a broader regional or global war.[96] But repeatedly, judges during this period dismissed plaintiffs' cases due to what they described as a "political question" rather than a judicial one. Judge Wyzanski described this most succinctly when he wrote, "this Court concludes that the distinction between a declaration of war and a cooperative action by the legislative and executive with respect to military activities in foreign countries is the very essence of what is meant by a political question."[97]

Among many others, political scientist Francis D. Wormuth strongly disagreed with the courts' refusal to rule on the constitutionality of the Vietnam War by relegating it to a "political question."[98] In other words – in direction contradiction to what judge after judge ruled – the fact that the Vietnam War lacked an explicit congressional war declaration was a perfectly justiciable topic.[99] Many years later, legal scholar Louis Fisher agreed with this general assessment.[100] Furthermore,

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94 U.S. v. Sisson, 294 F. Supp. 513 (1968), Medeiros v. U.S., 294 F. Supp. 199-200 (1968), Switkes v. Laird, 316 F. Supp. 365 (1970), Berk v. Laird, 317 F. Supp. 717-18 (1970), Mottola v. Nixon, 318 F. Supp. 541 (1970), Orlando v. Laird, 443 F.2d 1041 (1971), Com. of Mass. v. Laird, 451 F.2d 29 (1971), Atlee v. Laird, 339 F. Supp. 1350 (1972), Atlee v. Laird, 347 F. Supp. 692, 705 (1972), Mitchell v. Laird, 488 F.2d 614-15 (1973), 159 U.S. App. D.C. 347-48.

95 U.S. v. Sisson, 294 F. Supp. 515 (1968). For similar reasoning, see Medeiros v. U.S., 294 F. Supp. 200 (1968), Berk v. Laird, 317 F. Supp. 727-29 (1970), Mottola v. Nixon, 318 F. Supp. 549, 544 (1970), Orlando v. Laird, 443 F.2d 1043-44 (1971), Com. of Mass. v. Laird, 451 F.2d 31, 35 (1971), Atlee v. Laird, 347 F. Supp. 712 (1972), Mitchell v. Laird, 488 F.2d 619 (1973), 159 U.S. App. D.C. 352, Mitchell v. Laird, 488 F.2d 617-19 (1973), 159 U.S. App. D.C. 350-52.

96 *U.S. v. Sisson*, 294 F. Supp. 516 (1968), Berk v. Laird, 317 F. Supp. 725-26, 729 (1970).

97 *U.S. v. Sisson*, 294 F. Supp. 516 (1968). Berk v. Laird, 317 F. Supp. 729 (1970), Mottola v. Nixon, 318 F. Supp. 549, 552 (1970), Atlee v. Laird, 347 F. Supp. 692, 693, 701-06 (1972), Campen v. Nixon, 56 F.R.D. 406 (1972), DaCosta v. Laird, 471 F.2d 1153-54, 1158 (1973), Mitchell v. Laird, 488 F.2d 617 (1973), 159 U.S. App. D.C. 350, Holtzman v. Schlesinger, 484 F.2d 1309-10, 1314 (1973).

98 Francis D. Wormuth, *The Nixon Theory of the War Power: A Critique*, Cal. L.R. 60:3 (May 1972) at 678-88.

99 *Id* at 681. In no uncertain terms, Wormuth concluded that the courts should have followed "the explicit textual commitment of the war power to Congress" and should have held "invalid any exercise of the war power that [did] not result from the decision of Congress itself. See *id* at 680.

100 Fisher wrote, "The record from 1789 to the Steel Seizure Case of 1952 is replete with court cases that scrutinized presidential claims for emergency power and frequently

Fisher identified the oft-mentioned "political question" explanation as a misconception, noting that presidential war-making power was well within judicial purview.[101] Toward the end of the Vietnam conflict, a couple of dissenting judges themselves began to see it this way.

In a rare minority opinion in 1972, Chief District Judge Joseph S. Lord, III (Eastern District of Pennsylvania) wrote in *Atlee v. Laird* that the case involved what we would now call the central question of executive versus legislative war powers.[102] A month later, District Judge William Thomas Sweigert (Northern District of California) went further when he elaborated upon the central importance of *congressional* war powers for preserving the American democratic and constitutional system.[103] The following year, Appellate Judge James Lowell Oakes (Second Circuit Court of Appeals) wrote that the constitutionality of the war was indeed justiciable, partly because Nixon and Kissinger had covertly expanded the war into Cambodia.[104] Alas, such belated dissenting opinions proved utterly ineffective in shortening or ending the war, or in reining in the Imperial Presidency.

IV. Populism and Elitism

Public Division Over the War

Commentators often write that the United States was more divided during the Vietnam War era than at any previous time in American history since the Civil War.[105] This idea is generally true, but many scholars studying public opinion polls

found them wanting. It was only with the Vietnam War that courts began to systematically avoid war power questions." *See* Louis Fisher, *Judicial Review of the War Power*, Presidential Studies Quarterly 35:3 (Sept. 2005) at 467.

101 *Id* at 469.

102 Judge Lord wrote that the case involved "a determination of whether the executive branch has exceeded the scope of its constitutional [war-making] power." *See* Atlee v. Laird, 347 F. Supp. 692, 693, 713 (1972).

103 Judge Sweigert wrote, "If the state of the law remains as it now stands the American people will never be able to determine with any degree of certainty from equivocal Congressional actions and votes whether this Vietnam War, or any future presidentially conducted war, is being conducted with the kind of Congressional declaration and approval required by the Constitution; they will never be able to determine with any degree of certainty whether Congress is meeting or shirking its Constitutional responsibility and, if shirking its responsibility, then which members thereof are to blame for permitting a President to usurp the warmaking power." *See* Campen v. Nixon, 56 F.R.D. 408 (1972).

104 Holtzman v. Schlesinger, 484 F.2d 1316-18 (1973). He noted, "The Defense Department is continuing to bomb in Cambodia despite the cease-fire in Vietnam and despite the return of our prisoners of war from North Vietnam. The justiciable question then is whether there is any Constitutional authorization for the employment of United States armed forces over Cambodia, now that the war in Vietnam has come to an end." *See id.* at 1317.

105 For examples see Kenneth T. Walsh, *A Deeply Divided Nation*, U.S. News and World Report (Aug. 24, 2018); *The Anti-War Movement and the effects of the War on the USA*, RGS History: The Newcastle RGS History blog (https://rgshistory.com/the-anti-war-movement-and-the-effects-of-the-war-on-the-usa/); *The American Antiwar*

about the war have reached ambiguous or complex conclusions.[106] For example, in 1970, Philip Converse and Howard Schuman especially objected to the simplistic idea of pro- and anti-war factions among the public.[107] In stark contrast to the media's focus on sensational campus demonstrations, Converse and Schuman also found pro-war sentiments among students at smaller colleges actually *exceeding* that of the general population.[108] Some of these pro-war students reflected a more general conservative backlash against radical antiwar protesters.[109] Those romanticizing the Antiwar Movement, then and now, tend to ignore the backlash

Movement, Encyclopedia.com (https://www.encyclopedia.com/history/encyclopedias-almanacs-transcripts-and-maps/american-antiwar-movement); Ray Tyler, *Peace Is at Hand*, Teaching American History (Nov. 1, 2022), https://teachingamericanhistory.org/blog/peace-is-at-hand/.

106 For one example of ambiguity and complexity, pollsters found differing results when asking if American involvement in Vietnam was a "mistake" versus asking people if they supported "withdrawing" the American military from Vietnam. In 1970, Hazel Erskine studied fourteen Gallup polls (taken between 1966-69) asking, "Is the Vietnam War a mistake?" In all fourteen, a higher percentage of older people (50 and older) opposed the war compared to younger people (between 21-29). The middle age cohort (ages 30-49) also reflected more war opposition than the younger group in nine out of the fourteen polls (three polls were tied). See Hazel Erskine, *The Polls: Is War a Mistake?* Pub. Opinion Q. (Spring 1970) at 134-50. Strikingly, Tim Rosentiel reaffirmed this pattern of age demographics after studying decades of poll results spanning the Vietnam War era up to 2006. See Tom Rosentiel, *Youth and War: From Vietnam to Iraq, Generations Disagree About the Use of Military Force*, Pew Research Center (Feb. 21, 2006). William Lunch and Peter Sperlich also asked the public about withdrawing from Vietnam rather than finding American involvement a "mistake." They found that, between 1964-1968, at most only a fifth of the American public supported withdrawing from Vietnam. *See* William L. Lunch and Peter W. Sperlich, *American Public Opinion and the War in Vietnam*, Western Pol. Q. (March 1979) at 25-26.

107 Philip E. Converse & Howard Schuman, *Silent Majorities and the Vietnam War*, Scientific American 23 (June 1970) at 19-20. Converse and Schuman wrote, "For the war in Vietnam the controversial aspects are almost innumerable. Each aspect requires a somewhat different question, which has its own unique meaning. Moreover, since polling agencies prefer to word their own questions, it is possible to obtain different results even when two agencies are examining essentially the same aspect of an issue." See *id* at 17.

108 Converse and Schuman called these pro-war students at smaller colleges "the backbone of popular support for the war." See *Id* at 23.

109 Converse and Schuman believed that "the net effect of vigorous protest in the streets has been to shift mass opinion toward renewed support of the President." See *id.* at 24. More generally, Dye and Zeigler observed that mass opinion tends to *dis*favor demonstrators, sometimes vehemently so. *See* Dye and Zeigler, *supra* note 9, at 174. Matthew Feinberg, et al, also support backlash effect as a general phenomenon when radical protesters inspire counter-reactions. *See* Matthew Feinberg, et al, *The Activist's Dilemma: Extreme Protest Actions Reduce Popular Support for Social Movements*, Journal of Personality and Social Psychology 119:5 (Jan. 2020) at 1086–1111. Even during the Civil Rights Movement, black leaders disagreed about the efficacy of public protesting, and some of them wisely appreciated that such demonstrations could actually backfire and antagonize whites. *See* Paul Burstein, *Public Opinion, Demonstrations, and the Passage of Antidiscrimination Legislation*, Pub. Opinion Q. 43:2 (Summer 1979) at 168.

effect.[110] The Antiwar Movement's ultimate effectiveness is probably doomed to eternal ambiguity, and thus scholars will likely debate it without end.

Cause and Effect of the Antiwar Movement

Philosophers and the better scientists are wary about declaring matters of cause and effect.[111] Regarding the anti-Vietnam War Movement, Andrew Priest wrote, "it is almost impossible to disaggregate it [public opinion for or against the war] from other influences acting upon policymakers, such as the progress of the war itself or other domestic and international events."[112] Before Andrew Priest, Adam Garfinkle had become one of the most provocative scholars to deny Antiwar Movement effectiveness. Yet, early in his 1997 book, *Telltale Hearts*, Garfinkle admitted that "speculation" might be the most honest term rather than any claim to cause-and-effect or lack thereof.[113] It is logical to conclude that some Americans were against the war *despite* the protesters, and others *irrespective* of the protesters—but it is impossible to conclude that the protesters *caused* the end of the war.[114]

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[110] In 1969, a Harris poll asked, "do you sympathize with the goals of the people who are demonstrating, marching, and protesting against the war in Vietnam, or do you disagree with their goals?" Only 28% of those 50 and older expressed sympathy, while 52% of those 35 and younger sympathized (36% of those between 35-49 sympathized). *See* Converse & Schuman, *supra* note 107, at 23. Extraordinary antiwar activist Todd Gitlin and others noted that, as the antiwar movement itself grew frustrated, radicalism became the only alternative for some of the antiwar protesters, but this fantasy of revolution *further* backfired with the general public, pro- and anti-war alike. *See* Todd Gitlin, The Sixties: Years of Hope, Days of Rage (1987) at 285, 286, 380, 381, 384, 408, 411. As Michael Schaller, et al, concluded, "Pictures of bloodied student demonstrators involved some sympathy, but many Americans were frightened by the protests." *See* Michael Schaller, et al, American Horizons: U.S. History in a Global Context, 2d ed., vol. 2 (2016) at 991-92. Also see DeBenedetti & Chatfield, *supra* note 91, at 393-95, 398. As political scientist W. Lance Bennett put it, the public sometimes finds offense in "negatively perceived events like demonstrations, sit-ins, and other protest activities." *See* W. Lance Bennett, News: The Politics of Illusion, 5th ed. (2003) at 126-27.

[111] For example, climate scientist Frances Drake observes how confusion or conflation of causation and correlation regularly obscures debates over global warming. *See* France Drake, Global Warming: The Science of Climate Change (2000) at 123, 124, 148, 154-55, 171. Geoffrey Kabat demonstrates similar difficulties in distinguishing causation from correlation regarding environmental pollution and human health problems. *See* Geoffrey C. Kabat, Hyping Health Risks: Environmental Hazards in Daily Life and the Science of Epidemiology (2008) at 35-36.

[112] Andrew Priest, *Power to the People? American Public Opinion and the Vietnam War*, § 1, chap. 4, in The U.S. Public and American Foreign Policy 42 (Andrew Johnstone and Helen Laville, eds., 2010). Priest concluded that "the idea that a combination of peaceniks, hippies, Marxists and journalists undermined the American effort and, for the first time in US history, forced the government to rethink its policies and eventually withdraw from a foreign war is outlandish." *See id.* at 42.

[113] Garfinkle, *supra* note 83, at xii. Garfinkle himself proceeded to speculate a great deal. See *id* at 1, 2, 3, 8, 13, 19, 26-31, 266, 267, 269.

[114] Notably, in 1979, Lunch and Sperlich concluded that "Antiwar demonstrations had not convinced most citizens that the United States was morally wrong in being in Vietnam and may have even slowed the development of withdrawal sentiment by acting as a negative reference point." *See* Lunch & Sperlich, *supra* note 98, at 31.

This indicates a paradox of sorts, captured by Charles DeBenedetti and Charles Chatfield, who observed that many came to agree with the Antiwar Movement's goals while disagreeing with its methods.[115]

William Berkowitz studied fifteen major anti-Vietnam War protests between 1965 and 1971, then examined subsequent Gallup polls in an attempt to discern the effect of the demonstrations.[116] Berkowitz concluded that "the data in general do not reveal any consistent, dramatic, or lasting effects of the demonstrations one way or another."[117] He also concluded that maybe his study revealed no demonstrable effects from the protests simply because there *were* no effects.[118] This troubled Berkowitz, who alluded to himself as an antiwar activist who was left feeling powerless in light of his findings.[119] He ended his article with an open question wondering what could possibly influence controversial policy when both gentle and "bitingly critical persuasion," civil disobedience, and prolonged massive demonstrations, had all failed.[120]

A few romantics might argue that the Antiwar Movement did indeed end the war. The better question might be, was the multifaceted Antiwar Movement *influential*? If so, how? We can never really measure it. Allen Matusow concluded that the Antiwar Movement ultimately helped de-escalate the war,[121] despite periodic expansions and escalations during both the Johnson and Nixon administrations. Aside from that, it might seem like a reasonable supposition even if it remains impossible to prove in any precise sense. But even if Matusow's assertion is true on its face, we would still have to consider other contributing factors, such as the continuing costs of the war, mounting death toll, and the unwillingness of either Johnson or Nixon to invade North Vietnam. The "limited war" approach was partly to avoid provoking hot war from China (as occurred in the Korean War, after the U.S. and its allies got too close to the Chinese border), but even hawks began seeing this as a no-win strategy that would only perpetuate stalemate.

Perhaps the best assessments of the Antiwar Movement's influence are couched in cautious terms.[122] It profoundly contributed to national divisions but

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115 DeBenedetti and Chatfield wrote, "Public opinion surveys indicated that the American people consistently resented the Antiwar Movement but increasingly agreed with its arguments and conclusions." *See* DeBenedetti & Chatfield, *supra* note 91, at 398.

116 William Berkowitz, *The Impact of Anti-Vietnam Demonstrations Upon National Public Opinion and Military Indicators*, Social Science Research 1-14 (March 1973).

117 *Id.* at 10. Berkowitz concluded that "The protests were thus "neither particularly productive nor counterproductive." *Id*.

118 Berkowitz wrote, "It is possible that anti-Vietnam, demonstrations, and perhaps many social protests in general, may simply have little or no impact whatsoever." *See id* at 12.

119 *Id*. at 13, 14.

120 *Id*. at 13.

121 Matusow, *supra* note 26, at 344.

122 For example, George C. Herring notes that antiwar demonstrations "did not turn the American people against the war," but adds that "Perhaps most important, the disturbances and divisions set off by the Antiwar Movement caused fatigue and anxiety among policymakers and the public, and thus eventually encouraged efforts to find a way out of the war." *See* Herring, *supra* note 11, at 190. Or, as Mitchell K. Hall concluded, even though the Antiwar Movement failed "to end the war directly, the movement was strong enough to alarm the government, creating social conditions that limited policy options and made stopping the war possible." *See* Mitchell K. Hall, *The Vietnam Era Antiwar Movement*, OAH Magazine of History 18:5 (Oct. 2004) at 16. Finally, as

it also reflected and amplified divisions already present. Media coverage likely contributed to this amplification. Media amplification remains important in and of itself, but it also reflected a meeting place among populist protestors and corporate elites. Sensational news is big business.

Populists and Media Elites Meet in Ambiguity

Following the Elite Theory of Democracy, the news media constitutes one component of select power brokers that also includes corporate moguls, high level bureaucrats, and elected office holders. Having said that, it remains difficult to make generalizations about the media coverage of the Vietnam War and the Antiwar Movement. Sometimes the protesters may have benefitted from publicity; other times, some of them expressed frustration and anger over how the media covered them.[123] Continuing a long and deep tradition of sensationalism, the American news media almost definitely focused unduly on the radical elements of the Antiwar Movement.[124]

Early media coverage of the war was generally in sync with the White House, predicting that victory would arrive soon in a limited land war. But especially during 1968, media coverage became far more complex—sometimes angering the hawks or the military itself, sometimes sensationalizing the antiwar demonstrations, sometimes questioning political authority. At this point "truth" was not necessarily the "first casualty of war," as the old saying went;[125] rather, media coverage (and omissions) more resembled a chaotic free-for-all of information overload and all sorts of "truths" and "falsehoods." Media coverage of the war and Antiwar Movement was undeniably influential, but the details of influence are almost hopelessly muddled.

As often repeated, the Vietnam conflict was the first to be broadcast in people's living rooms, and it used the notorious "body count" in lieu of tangible progress in the vein of World War II.[126] Political scientist Guenter Lewy concluded that television coverage came to be clearly biased against the war, focusing on atrocities committed by America's South Vietnamese ally, but omitting how North Vietnam prevented press access altogether.[127] The media delivered numerous horrific images, such as that of the South Vietnamese police commander Nguyen Ngoc Loan

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DeBenedetti and Chatfield wrote, "Antiwar activists contributed to the growth of public disaffection with the war and helped to give it focus, but they were unable to harness it." *See* DeBenedetti & Chatfield, *supra* note 91, at 393.

123 For examples, see Gitlin, *supra* note 102, at 261, 265, 308, 411; also, N.L. Zaroulis & Gerald Sullivan, Who Spoke Up? (1984) at xiii.

124 *See* Garfinkle, *supra* note 83, at 4, 101, 285.

125 For a good analysis of this saying's history, see "Truth Is the First Casualty in War," Quote Investigator (April 11, 2020) https://quoteinvestigator.com/2020/04/11/casualty/

126 As the political scientist Guenter Lewy wrote, "The nightly portrayal of violence and gore and of American soldiers seemingly on the brink of disaster contributed significantly to disillusionment with the war." *See* Guenter Lewy, America in Vietnam (1980) at 433-34.

127 "War has always been beastly," Lewy wrote, "but the Vietnam war was the first war exposed to television cameras and seen in practically every home, often in living color. Not surprisingly this close-up view of devastation and suffering, repeated daily, strengthened the growing desire for peace." *Id*.

executing a Viet Cong prisoner on the street with a snub-nosed handgun in 1968. Eddie Adams (Associated Press) took a photograph of this that won the Pulitzer Prize and made it into newspapers around the world. Four years later, Nick Ut took another Pulitzer-winning photograph for the Associated Press of a nine-year-old naked girl—the severe burns on her back hidden from the camera—running from an American napalm attack. Then there was the footage of Buddhist monks sitting in the lotus position, burning themselves to death to protest mistreatment by the South Vietnamese government. After soaking themselves in gasoline, they lit themselves afire, immediately attracting Vietnamese people who ran toward them bowing and kneeling and making salutary prayers before the monks slowly succumbed to death and fell over.

One of the most-noted media moments arrived when anchorman Walter Cronkite offered his first-ever editorial comment on CBS News. Cronkite had just returned from Vietnam, following the Tet Offensive. On February 27, 1968, he famously said, "To say that we are mired in stalemate seems the only realistic, if unsatisfactory conclusion," and that it was "increasingly clear to this reporter that the only rational way out then will be to negotiate, not as victors, but as an honorable people who lived up to their pledge to defend democracy, and did the best they could."[128]

Cronkite's famous commentary raises the question whether journalists merely represent actuality or rather assist in the creation or enhancement of the experience they seek to report. The claim that LBJ responded to Cronkite's commentary with, "If I've lost Cronkite, I've lost Middle America," remains apocryphal. After all, by this time—and consistent with Elite Theory of democracy[129]—business leaders, legal professionals, and other "conventional" leaders like Secretary of Defense Clark Clifford began opposing the war less on ideological grounds than because they simply saw it as a hopeless quagmire with no chance of military victory for the United States.[130] In other words, these were "Establishment" figures who shared little or nothing in common with demonstrators objecting to the war on moral grounds. And yet, because of their very conventionality, these white-collar professionals likely had more clout when it came to congressional and presidential considerations regarding the hopelessness of the war. In 1969, Clark Clifford wrote, "We should reduce American casualties by reducing American combat forces. We should do so in accordance with a definite schedule and with a specified end point.

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[128] The transcript of this editorial is available at "Final Words: Cronkite's Vietnam Commentary," NPR's *All Things Considered* (July 18, 2009). Veteran journalist David Halberstam, who extensively covered Vietnam, claimed that "Cronkite's reporting did change the balance; it was the first time in American history a war had been declared over by an anchorman." *See* David Halberstam, The Powers That Be (1975; 2000) at 514. Journalist Joel Achenbach more cautiously wrote , that "Cronkite mainstreamed antiwar sentiment," but remarked that "Journalists look for direct causality, while historians see complexity." *See* Joel Achenbach, *Did the News Media, Led by Walter Cronkite, Lose the War in Vietnam?* Wash. Post (May 25, 2018).

[129] In Elite Theory, scholars see a select few in the top tiers of elective office, bureaucracies, corporations, and media as exercising genuine power, in stark opposition to populism. See Dye & Zeigler, *supra* note 9, at 1-4, 10, 17-19, 128-29, 137-43, 195, 291, 323-24, 331, 412.

[130] Herring, *supra* note 11, at 222, 224; Harry McPherson, A Political Education (1972) at 433-34.

Let us start to bring our men home-and let us start now."[131] W. Lance Bennett has pointed out the impact that this kind of opposition from Washington D.C. elites like Clifford had on changing the general media conversation about the war.[132] As for the antiwar protests themselves, it is difficult to imagine the support, emulation, opposition, and backlash they evoked had there *not* been media coverage.[133]

In the final analysis, television coverage of the Vietnam War and antiwar demonstrations probably only contributed to existing divisions, confusions, and ambiguities at home.[134] The impact of media coverage was profound, but sometimes that profundity was merely reflective of a reality (in a *reporting* sense) rather than evoking a reality, as in *making* news and creating or enhancing reactions where none previously existed. As Daniel Hallin concluded, the media was only part of a larger scenario that doomed the Vietnam war to failure. By the time Cronkite made his monumental editorial assessment of the war, Hallin noted that the Vietnam conflict was already failing due to the "limited war" aspect,[135] since Johnson (wisely or not) was unwilling to invade North Vietnam and risk regional or global escalation. Thus, in a reporting sense, to a major degree the media merely came to reflect public and political divisions that already existed.[136]

The Antiwar Movement and Elite Theory

The limited effectiveness of the populist aspect of the Antiwar Movement is largely consistent with the Elite Theory of democracy,[137] a political science philosophy that views the masses as marginally effective in influencing policy. This would apply to domestic policy, but even more to foreign policy and perhaps especially to policy involving the making, conducting, and the ending of war.

Elite Theory scholars have argued that real power in the United States rests with and is wielded not by the people at large but rather by political, bureaucratic, corporate, and media elites.[138] Political and policy outcomes are skewed by financial contributions from political elites that can be, and often are, enormous. Low voter turnout, widespread voter apathy, and an electorate that remains largely ill-informed about policy issues result in elections that are largely symbolic. Even individual political activists tend to be better educated and wealthier than the population at large.[139] This kind of analysis recognizes the limitations of a system of representative democracy which encourages politicians to pursue policies of short-term advantage.[140]

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131 Clark M. Clifford, *A Viet Nam Reappraisal*, Foreign Affairs 622 (July 1969).

132 Bennett, *supra* note 110, at 163.

133 DeBenedetti & Chatfield, *supra* note 91, at 390.

134 Herring, *supra* note 11, at 221.

135 *See* Daniel C. Hallin, The Uncensored War: The Media and the Vietnam (1986) at 213.

136 *Id*.

137 *See generally*, Dye & Zeigler, *supra* note 9.

138 *Id.* at 1-4, 10, 17-19, 128-29, 137-43, 195, 291, 323-24, 331, 412, and especially chapters 8 and 9. *See also*, Bennett, *supra* note 110, at 126.

139 *Id*.

140 As Paul Burstein has noted, "members of Congress find it difficult to gauge public opinion on complex issues. Because electoral politics is fraught with uncertainty, many members of Congress adopt conservative voting strategies, changing their stands on

A major reason for the failure of the Antiwar Movement was its lack of a cohesive democratic form. As Jan-Werner Müller has observed, "Street protests . . . have genuinely democratic meaning, but they lack proper democratic form, and they cannot yield a kind of democratic trump card against representative institutions."[141] Demonstrations, marches, sit-ins, and the like work best when interwoven with existing political, legal, and policymaking systems. And yet, these existing systems also largely failed during the Vietnam War.

The Cold War context remains the crucial backdrop. Fear of communism and a prospective nuclear World War III heavily influenced a generation or two of leaders following the Second World War; perhaps they found it easier or even wiser to defer to a strong executive in these circumstances foreboding possible emergencies that could not accommodate the luxury of judicial and legislative deliberation. So, if the legislative-judicial system and mass protests did not end the war, what did? More than anything, probably the persistence of the North Vietnamese in fighting for their homeland—within a context of America's self-chosen limited war—explains their eventual triumph. In light of this, the United States gradually acknowledged that they were entangled in a hopeless quagmire, short of dangerously escalating the conflict with a land invasion of North Vietnam, employing nuclear weapons, antagonizing China and the Soviet Union and possible sparking a third world war.

V. Conclusion

In this broadest of contexts, the Vietnam War was but one example of the U.S. Constitution compromised during the ongoing aftermath of World War II. Other examples included the Korean and Persian Gulf wars, but also a great many lesser military activities[142] and a huge host of covert CIA operations (some with congressional knowledge, others not).[143] Then there is the entire issue of

issues only when it is very clear where their advantage lies." Burstein was speaking of Civil Rights legislation, but his observation applies equally to the failures of the Antiwar Movement. *See* Burstein, *supra* note 109, at 158.

141 Jan-Werner Müller, What is Populism? (2016) at 68. As Dye and Zeigler have observed, the most direct influence over governmental action and policy will come from organized stakeholders rather than 'the people.' *See* Dye & Zeigler, *supra* note 9, at 233.

142 Aside, beyond, or in addition to outright wars, exercise of American military power globally has been and continues to be part of the Cold War and post-Cold War reality. For collections of essays, *see* Short of War: Major USAF Contingency Operations, 1947-1997 (A. Timothy Warnock, ed., 2000). *See also*, Short of general war: perspectives on the use of military power in the 21st century: anthology of student research papers from the U.S. Army War College class of 2008 (Harry R. Yarger, ed., 2010); Thomas C. Linn, *Military Power Short of War*, Proceedings, U.S. Naval Institute, v.112 (Nov. 1986).

143 The CIA has a long history of operating in secrecy and public dishonesty, often without congressional oversight or authorization. CIA covert activity has reflected enhanced executive power, its own self-preservation and power as a government agency, and both of these dynamics. *See* Tim Weiner, Legacy of Ashes : The History of the CIA (2007) at 105-07, 240, 243, 348, 351, 406-10, 414-15, 500-01, 511-12. *Especially see* the "Fuck the Congress" [sic] attitude and behavior described at 381-84.

"extraordinary rendition," military prisons abroad, and the torture of prisoners[144] – all of which would be unconstitutional in the United States itself. In this light, it seems unreasonable to expect the Founders' conception of congressional war powers in a democratic republic to survive such massive conquest and expansion. The development of *de facto* presidential war powers constitutes but one aspect of an evolving reality, even if it still violates the Constitution per se.

In 1977, despite having left office in disgrace, then-former president Richard Nixon notoriously reaffirmed his belief in the imperial presidency when British journalist David Frost asked him about the Huston Plan, a Vietnam War era scheme of illegally spying on antiwar protesters. Nixon said, "when the president does it . . . that means that it is not illegal."[145] Nixon went on to rationalize such executive behavior with questionable claims that national security and/or domestic peace required such authoritarian actions. But any leader can *claim* to be addressing emergencies when they are actually violating democratic and constitutional process.

On July 1, 2024, in *Trump v. United States*, the Supreme Court of the United States ruled that presidents enjoy immunity from criminal prosecution for at least some official acts.[146] The details and ramifications of this ruling will take decades to work their way through various legal and legislative systems. But *Trump v. United States* certainly did not come out of a vacuum. In fact, one could argue persuasively that it is but one logical result from what is now a deeply ensconced tradition of increased executive power.

During all post-World War II decades – but especially during the Vietnam War – if judges and members of Congress did not, could not, or were unwilling to rein in Imperial Presidents, could we possibly expect something *more* effective from the public demonstrators? Short of genuine populist revolution, perhaps little or nothing. The Vietnam War and those who opposed it constitute a very important chapter in American history, and yet this story is also merely a subset example of the broader phenomenon we now call the Imperial Presidency. Among many others, the great legal scholar Lawrence M. Friedman starkly described the *de facto* war powers of the Imperial Presidency: "Congress has sole power to declare war, according to the Constitution. But these are now empty words."[147] We now have a nearly eighty-year-old tradition of unprecedented presidential war power. Who knows where it may lead.

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144 For an overview going back to the Spanish American War up until contemporary times, *see* William L., D'Ambruoso, American Torture from the Philippines to Iraq : A Recurring Nightmare (2022).

145 Transcript of David Frost's Interview with Richard Nixon (1977), edited and introduced by Jeremy D. Bailey, available at https://teachingamericanhistory.org/document/transcript-of-david-frosts-interview-with-richard-nixon/

146 *Trump v. United States* 603 U.S. _ (2024).

147 Friedman observed how Congress "rather meekly" went along with respective presidents in all the major post-World War II conflicts in Korea, Vietnam, and the Persian Gulf. *See* Lawrence M. Friedman, Law in America: A Short History (2004) at 175.

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