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VOLUME 60 • ISSUE 2 • WINTER 2017

HOWARD LAW JOURNAL

TABLE OF CONTENTS

LETTER FROM THE EDITOR-IN-CHIEF

If Volume 60, Issue 1 of the *Howard Law Journal* represented the United States in its current form, Issue 2 represents its transcendence over time. With the *Journal* being in its sixtieth year, our hope is that this Volume as a whole leads to meaningful discussion and reflection about the state of our country. In the past sixty years, what exactly have we seen? Sixty years of excellence. Sixty years of fighting for equality. Sixty years of change, hope. The evolution of law and policy from the *Howard Law Journal's* inception is undoubtedly a terrific one, but such evolution did not come with ease. Thus, the purpose of Issue 2 is to highlight this progression, this struggle, and to also show that over time, diverging struggles have evolved that have spawned acts of resistance similar to those exhibited by our predecessors.

Professor Katheryn Russell-Brown opens this Issue with a discussion on the concept of black protectionism and its transcendence through time. In her Article, "Critical Black Protectionism, Black Lives Matter, and Social Media: Building a Bridge to Social Justice," Professor Russell-Brown describes the Black community's support for targeted members of the community. She then argues that, in recent years, Black protectionism has been applied more critically, cautiously, and directly with the goal of improving social conditions for Blacks than in the past.

The next Article provides a historical narrative. Professor Matthew Steilen discusses the well-known case of Josiah Philips in his Article, "The Josiah Philips Attainder and the Institutional Structure of the American Revolution." Philips led a gang of militant loyalists and escaped slaves in southeastern Virginia during the American Revolution. He was accused of treason, tried for robbery, and was subsequently convicted and executed.

Professor Steven Nelson discusses the racialized history of special education programs in his Article, "Special Education Reform Policies and the Permanence of Oppression: A Critical Race Case Study of Special Education Reform in Shelby County, Tennessee." Using Critical-Race Theory, Professor Nelson argues that Tennessee's Diploma Project has not closed the graduation gap between students who identify as disabled—a population that is disproportionately Black—and those who are not.

"We the People." The first three words of the Preamble of the United States Constitution are also the subject of this Article, "Generation Gaps and Ties That Bind: Constitutional Commitments and the Framers' Bequest of Unamendable Provisions." Professor George Mader discusses the potential stifling of our present generation because of unamendable constitutional provisions and poses the question: even if these provisions were amendable,

what would be the precautions set in place to limit the power of those creating such provisions?

In "A Quantitative Analysis of Racial Composition on Juries in New York State," Professor Wendy Hind focuses on the need to evaluate the current demographics of juries in ten of the largest counties in New York. By comparing United States Census data for 2013 with New York Courts' publications on juror demographics, Professor Hind study helps to better inform policy on jury selection with regard to possible discrimination and trends of misrepresentation on juries.

The following Notes and Comments were written by students of the Volume 60 *Howard Law Journal*. In her Comment, "Drop the Phone and Step Away From the Weapon: The First Amendment, the Camera Phone, and the Movement for Black Lives Matter," student author Valecia J. Battle explores, from the perspective of marginalized individuals, the rights that we as a people have in filming police activities in light of the increased attention to police brutality and the current pressure of the Black Lives Matter Movement.

The next Comment is entitled, "White Milk, Black Market: A Call for the Regulation of Human Breast Milk Over the Internet." In it, student author Crystal Oparaeke notes that today, a new market for human breast milk has recently emerged over the Internet. The issue is that human breast milk obtained over the Internet may contain toxins, bacteria, or may even be adulterated with water or cow's milk. Therefore, Oparaeke argues that the federal government should regulate human breast milk sold over the Internet.

In "Saying No to 'Cutting Corners': The Military Courts' Correctness in Rejecting the Use of Evidence of Sexual Assault Against a Minor to Search for Child Pornography," student author Desirae Krislie C. Tongco notes that much of the discussion about the approach to child pornography relates to the idea that child molestation and child pornography are closely linked. She argues, however, that they are not. Tongco, through her research, has instead found that social science cannot conclusively link sexual assault against a minor and child pornography possession. Thus, because the two crimes have a tenuous relationship, the inevitable doctrine fails.

On behalf of the *Howard Law Journal*, I would like to thank you for your readership. It is my goal that as you read each Article, you learn more about the past struggles of our nation, the struggles that have begun to take shape, and solutions that you can help to implement.

Monique Peterkin
Editor-in-Chief
Volume 60

Critical Black Protectionism, Black Lives Matter, and Social Media: Building a Bridge to Social Justice

KATHERYN RUSSELL-BROWN*

* Chesterfield Smith Professor of Law & Director, Center for the Study of Race and Race Relations, University of Florida, Levin College of Law, Gainesville, Florida. The Author thanks Audrey McFarlane, Cynthia Lee, Ruth Peterson, and Diedre Houchen for their insightful commentary. A special thanks also to University of Florida law student Robert Portman for his exemplary research assistance.

INTRODUCTION

The O.J. Simpson murder trial exposed America's deep racial divide. In 1994, Simpson, a popular and beloved retired football player, was charged with killing his former wife, Nicole Brown Simpson and her friend Ronald Goldman.[1] The murders were grisly. People across the nation were fascinated by the case. The trial was shown on television and the legal twists and turns were reported on the morning and nightly news. The lawyers, witnesses, and family members of the victims and the defendant became household names. Polls indicated that the country was deeply split along racial lines, with two-thirds of all Whites believing that Simpson was guilty and two-thirds of all African Americans believing that Simpson was not guilty.[2] Following a four-hour deliberation, the jury returned a verdict of not guilty.[3] The aftermath of the acquittal was telling. While most Whites were stunned and angry, most African Americans cheered and celebrated the outcome.[4] Many Blacks viewed the not-guilty verdict as a kind of racial vindication for decades of cases wherein Whites were not held criminally responsible for violent crimes committed against Blacks.[5] The long list of cases includes the 1955 murder of Emmett Till,[6] the 1964

1. People v. Simpson, No. BA 097211 (Cal. Super. Ct. L.A. Cnty. 1995).

2. In racial terms, the *Simpson* case was discussed largely as Black versus White. Few articles or surveys about the case examined attitudes held by Latinos, Asian Americans, or other racial groups. *See* KATHERYN RUSSELL-BROWN, THE COLOR OF CRIME 94 (2009) [hereinafter RUSSELL-BROWN, COLOR OF CRIME]. This is particularly surprising given that the case took place in Los Angeles, a racially-diverse city, and that the judges in both the criminal and civil cases, Lance Ito and Hiroshi Fujisaki, were Japanese-American. Gale Holland, *Judge Fujisaki Was Able to Keep Trial in Control*, USA TODAY (Feb. 5, 1997), http://usatoday30.usatoday.com/news/index/nns200.htm.

3. *See, e.g.*, Timothy Egan, *NOT GUILTY: THE JURY; One Juror Smiled; Then They Knew*, N.Y. TIMES (Oct. 4, 1995), http://www.nytimes.com/1995/10/04/us/not-guilty-the-jury-one-juror-smiled-then-they-knew.html (discussing the statement by one juror who explains why the verdict was reached in less than four hours).

4. *Id.*

5. *See, e.g.*, Martin Gottlieb, *NOT GUILTY: THE RACIAL PRISM; Racial Split at the End, as at the Start*, N.Y. TIMES (Oct. 4, 1995), http://www.nytimes.com/1995/10/04/us/not-guilty-the-racial-prism-racial-split-at-the-end-as-at-the-start.html (describing the racial split following the end of the O.J. Simpson trial).

6. In 1955, Emmett Till, a fourteen-year-old Chicago youth, visited his relatives in Money, Mississippi. Following a stop at a local grocery story, Till is said to have whistled at the clerk, a White woman (according to other accounts, Till had a stutter that may have been mistaken for whistling). The clerk told her husband and outraged, he and a friend kidnapped Till from his uncle's home, killed him, and threw his body into the Tallahatchie River. The two men, Roy Bryant and J. W. Milam, were charged with murder. The all-White, all-male jury, acquitted the two men. A few months later, in an interview with a magazine, Bryant and Milam admitted to killing Emmett Till. *See, e.g.*, *The Shocking Story of Approved Killing in Mississippi*, AM. EXPERIENCE, http://www.pbs.org/wgbh/amex/till/sfeature/sf_look_confession.html (last visited Oct. 27, 2016).

murders of three civil rights workers, Michael Schwerner, Andrew Goodman, and James Chaney,[7] and the 1991 beating of Rodney King.[8]

The Simpson case offers a textbook example of how Black protectionism works. Black protectionism describes the Black community's support for and group embrace of targeted members of the community.[9] This communal protection is triggered when well-known African Americans are placed in the cross hairs of the criminal justice system. Specifically, the Black community pushes back *en masse*, when one of its elite members has been accused of criminal or ethical wrongdoing. The phenomenon of Black protectionism developed as a group survival strategy. It operates to protect the most successful members of the community and thereby buffer and protect the larger Black community.[10] Black protectionism exemplifies what sociologist Michael Dawson labels "linked fate."[11] That is, although African

7. *See, e.g.*, *Murder in Mississippi*, AM. EXPERIENCE, http://www.pbs.org/wgbh/americanexperience/features/general-article/freedomsummer-murder/ (last visited Aug. 16, 2016) (describing the disappearance and murder of Schwerner, Chaney, and Goodman at the hands of the Klu Klux Klan).

8. O.J.: MADE IN AMERICA (ESPN Films 2016). In an interview with a juror in the O.J. Simpson criminal case, she said that the verdict was partially "payback" for the acquittals of the officers in the Rodney King case.

9. For detailed discussions of Black protectionism, see RUSSELL-BROWN, COLOR OF CRIME, *supra* note 2 at 85–93; KATHERYN K. RUSSELL, THE COLOR OF CRIME: RACIAL HOAXES, WHITE FEAR, BLACK PROTECTIONISM, POLICE HARASSMENT AND OTHER MACROAGGRESSIONS 56–65 (1998) [hereinafter RUSSELL-BROWN, RACIAL HOAXES]; KATHERYN RUSSELL-BROWN, PROTECTING OUR OWN: RACE, CRIME AND AFRICAN AMERICANS 39–65 (2006) [hereinafter RUSSELL-BROWN, PROTECTING OUR OWN]; Katheryn Russell-Brown, *Black Protectionism as a Civil Rights Strategy*, 53 BUFF. L. REV. 1, 7 (2005) [hereinafter Russell-Brown, *Black Protectionism*].

10. Black protectionism works to shield the most successful members of the Black community who face charges or allegations of wrongdoing. The protection of elite members has been viewed as paramount to group survival. Thus, protectionism is the community's nod to the difficulty African Americans face in surmounting the racial odds and achieving success. *See generally* Audrey G. McFarlane, *The Significance of Race and Class Through the Paradox of Black Middle-Classness*, 72 LAW & CONTEMPORARY PROBLEMS 163 (2009).

Polls indicated that Donald Trump's candidacy for president tapped into White fears and a desire by some Whites to maintain majority racial status. *See, e.g.*, Nicholas Confessore, *For Whites Sensing Decline, Donald Trump Unleashes Words of Resistance*, N.Y. TIMES (July 13, 2016), http://www.nytimes.com/2016/07/14/us/politics/donald-trump-White-identity.html?_r=0. This Article, however, makes the argument that African Americans practice a particular type of protectionism, with its own structural components and process.

11. MICHAEL C. DAWSON, BEHIND THE MULE: RACE AND CLASS IN AFRICAN AMERICAN POLITICS 77 (1994). The concept of linked fate can be expressed in alternate terms. Geoff Ward uses "microclimates of racial meaning" to describe how racism and racial violence are ensconced (and flourish) within historically identifiable geographical locations. Microclimates identify the locations and spatial variations of anti-Black racial violence. They also allow for an examination of how race impacts the evolution of these spaces over time. Specifically, how an area with a deep history of anti-Black violence may foretell that community's race-based environmental devastation years later (e.g., air pollution, toxic waste, or contaminated water). In some sense,

Americans are a diverse group, they remain connected in their political attitudes and perceptions of society at large. This is because even with the advancement and success of some members of the group, Blacks still face myriad forms of subordination (e.g., economic, social, educational, and political). The concept of linked fate highlights the connection between self-interest and group interest—as individual African Americans go, so go African Americans as a group.

As noted, in Simpson's case, African Americans were supportive and protective of him. Many believed that there were a number of reasons that he might have been targeted by the justice system, including his race, the fact that his wife was White, or that he was a successful African American. According to these rationales, the charges against Simpson represented an attempt to bring "another Black man down." Black protectionism was used to pushback against a justice system viewed by many African Americans as racially biased. In this way, O.J. Simpson's acquittal was a "win" for the African American community in that the verdict shed light on systematic racial injustices.

The practice of Black protectionism is a noteworthy sociological phenomenon. It reflects the low levels of trust and faith that African Americans as a group have in the U.S. justice system. Studies consistently indicate that African Americans are the racial group that has the least trust in law enforcement.[12] An analysis of Black protectionism—how it works and its evolution—offers a window into how African Americans perceive and interact with the criminal justice system. It is an effort by African Americans to intervene against what is widely perceived to be a racially-biased justice system. In this way, Black protectionism has been used as a kind of civil rights strategy[13]—an attempt to interrupt and reject the representation of Black as criminal by the police, by the courts, and by the correctional system. Thus, an understanding of how Black protectionism works, its history and its

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the Black community operates as a *macro*racial climate of racial violence. Black protectionism is a response by the Black community to society's wide net of racial oppression, past and present—a net comprised of numerous microclimates.
See Geoff Ward, *Microclimates of Racial Meaning: Historical Racial Violence and Environmental Impacts*, 2016 WIS. L. REV. 575 (2016).

12. *See, e.g.*, *Law Enforcement and Violence: The Divide Between Black and White Americans*, ASSOCIATED PRESS-NORC CTR. FOR PUB. AFF. RES., http://www.apnorc.org/projects/Pages/HTML%20Reports/law-enforcement-and-violence-the-divide-between-black-and-White-americans0803-9759.aspx (last visited Aug. 16, 2016). A 2015 poll found that 50% of Blacks surveyed said they had personally been treated unfairly by the police, compared with 3% of Whites surveyed.

13. *See, e.g.*, RUSSELL-BROWN, PROTECTING OUR OWN, *supra* note 9, at 45–65 (describing instances of Black protectionism associated with different Black community members).

evolution, provides an incisive barometer of how the African American community views its overall progress and its status within the U.S. justice system. Americans continue to debate whether race relations are improving or growing more divided.[14] Further, an evaluation of the workings of Black protectionism may shed light on what steps are necessary to reduce or temper its use for maximum community effectiveness. At the same time, this discussion considers the likely socioracial impact if these steps are not heeded.

Black protectionism has consistently been available in instances where well-known Blacks have been accused of wrongdoing.[15] However, it appears that something new is afoot. In recent years, there have been several cases indicating that Black protectionism is operating under new rules. It is this "something new" that serves as the focal point for this Article. This analysis of how Black protectionism currently works is framed within a discussion of how Black protectionism has operated in the past. As the discussion makes clear, Black protectionism is now applied more critically, cautiously, and more directly with the goal of improving social conditions for African Americans. This new Black protectionism both gives protection to a larger group of Blacks who need the community's protective cloak *and* denies it to those who have little to offer the community.

This Article provides a detailed, contemporary examination and critique of the practice of Black protectionism. The discussion focuses on how Black protectionism has evolved over the decades, and whether the changes make it a more useful tool for community empowerment than its applications in previous eras. Its latest iteration, herein labeled Critical Black Protectionism, is assessed and evaluated in light of the increasing use of social media. The analysis is concerned with how the application of Black protectionism has been shaped by the widespread use of social media. In particular, it considers how Critical Black Protectionism determines who counts as Black crime victims in need of the community's voice. This Article is di-

14. Following several incidents in 2016 involving the police killings of unarmed Black men and the killings of police officers, national polls indicated that race relations in the U.S. were at their nadir. For instance, a July 2016 New York Times poll found that 69% of the respondents said that race relations were "generally bad." Giovanni *Russonello*, *Race Relations Are at Lowest Point in Obama Presidency, Poll Finds*, N.Y. TIMES (July 13, 2016), http://www.nytimes.com/2016/07/14/us/most-americans-hold-grim-view-of-race-relations-poll-finds.html. In marked contrast, at a memorial service held for five slain Dallas officers, President Obama stated that racial groups in the U.S. are "not as divided as we seem." *Id.*

15. *See generally* RUSSELL-BROWN, PROTECTING OUR OWN, *supra* note 9 (providing examples of Black protectionism when well-known Blacks have been accused of wrongdoing).

vided into five parts. Part I provides an overview of Black protectionism, its roots and evolution. As well, this Part examines how African Americans have used protectionism. This discussion offers a base for analyzing contemporary iterations of Black protectionism. Part II sets out the step-by-step process of Black protectionism. It details who is eligible for protectionism and the "trigger questions" used to determine whether it is merited in a particular case. Part III assesses and critiques how Black protectionism has been applied in contemporary cases where African Americans have been accused of criminal or ethical wrongdoing. This section begins with a look at the sexual assault allegations against Bill Cosby and the criminal cases involving Ray Rice, Adrian Peterson, Jameis Winston, Chris Brown, and Michael Vick. Following an overview of these contemporary cases, there is an assessment of whether and how Black protectionism was used in these cases, compared with its availability in previous cases. Part IV discusses the Black Lives Matter movement and its push and impact in reshaping and reimagining Black crime victims. It also considers how this reimagining has encouraged a revamping of Black protectionism. This Part also examines the emergence of social media and the role it has played in the refining of Black protectionism. This Part concludes by identifying the shift to a new, updated form of protectionism: Critical Black Protectionism. The discussion addresses how Critical Black Protectionism refines and expands previous applications of Black protectionism. Part V addresses outstanding questions about Critical Black Protectionism, including its future iterations and its ability to impact and alter how the justice system works for African Americans.

I. THE DEVELOPMENT AND EVOLUTION OF BLACK PROTECTIONISM: AN OVERVIEW

Over the past four centuries, anti-Black discrimination has appeared in various forms, legal and extralegal. These include the slave codes, Black laws, Black codes, Jim Crow legislation, lynchings, sundown towns, redlining, "separate but equal" schooling, racial covenants, and racial profiling. Notably, most of these refer to legislation passed by congressional bodies, not racial discrimination carried out behind closed doors. African Americans pushed back against all of these practices, in ways small and large. The grass roots responses included the abolitionist and Civil Rights movements and the myriad attendant legal strategies used to challenge racially discriminatory laws, such as sit-ins, bus boycotts, and voter registration drives.

Blacks as a group responded in various ways to the unrelenting racial assaults. One strategy was the development of race-centered cultural practices and movements.[16] Another, related response has been the adoption of a pro-Black cultural narrative employed by the African American community.[17] This narrative states that Blacks stand on equal footing with Whites, morally, socially, spiritually, and physically—and that the law and society should reflect this reality.[18] These narratives are what could be termed practices of resilience.[19] This term describes the Black community's various approaches to ending racial oppression and pushing back against racial discrimination in various forms—e.g., exile, protests, marches, days of absence. Black protectionism is one type of push back in that the Black community rejects the narrative of Black dysfunction.

Black protectionism is a practice of resilience. It works to utilize Black success as a symbol of group self-worth and racial uplift. Black protectionism does this by questioning the mainstream narrative that Blacks are inferior to Whites. It provides a racial cloak of protection for those Blacks who have managed to achieve notoriety and financial success. Examples of how Black protectionism has been used to help Black athletes illuminates the practice of resilience. It highlights one way that the Black community itself can determine which members are positive representations of the race.

Black athletes have been the primary benefactors of protectionism. The Black community has been especially proud and protective of its athletes. This is in part because Black athletic success gives lie to the myth of White supremacy.[20] In this way, for African Americans, sports have provided both a means of relaxation *and* a space for racial

16. Marcus Garvey's "Back to Africa" movement is one example. When Garvey came to the U.S. from Jamaica, in 1915, he was shocked to discover how poorly Blacks fared in the country. He instituted branches of his United Negro Improvement Association ("UNIA") in the U.S. The movement attracted millions of followers around the world. *See generally* COLIN GRANT, NEGRO WITH A HAT: THE RISE AND FALL OF MARCUS GARVEY (2008) (explaining Garvey's efforts to improve poor Blacks' lives); C.L.R. JAMES, A HISTORY OF PAN-AFRICAN REVOLT (2012) (providing a more general review and analysis of the Pan Africanist Movement).

17. *Id.*

18. *Id.*

19. Jury nullification is another example of a practice of resilience. *See generally* Paul Butler, *Racially Based Jury Nullification: Black Power in the Criminal Justice System*, 105 YALE L.J. 677 (1995).

20. *See generally* STEPHEN JAY GOULD, THE MISMEASURE OF MAN (1981) (discussing and critiquing research done in the 1800s and 1900s that seeks to establish Whites superiority); Dorothy Roberts, *The Politics of Race and Science: Conservative Colorblindness and the Limits of Liberal Critique*, 12 DU BOIS REV. 199 (2015) (providing a contemporary critique of race and science scholarship).

resistance. Historically, athletic dominance was one of the few avenues open to Blacks that allowed them to achieve upper-class success and status.

The case of boxer Jack Johnson provides one of the earliest examples of Black protectionism being used to protect a Black athlete. In 1910, Johnson was slated to fight White boxer Jim Jeffries. Jeffries, who was billed as the "Great White Hope," was handpicked to beat Johnson.[21] However, Jack Johnson won after a bruising fifteen-round match.[22] The victory made Johnson the first ever Black heavyweight boxing champion.[23] After he won, Whites in communities across the country erupted in violence.[24] Throughout his career, the Black community stood behind him—siding with Johnson in his fight against Jeffries and supporting him after he served time in prison for violating the Mann Act.[25] Many Blacks believed that the government was looking for a way to punish Johnson for his boxing success and his romantic involvements with White women.[26]

Almost sixty years later, boxing champion Muhammad Ali received an even heartier embrace from the Black community. In 1964, Ali announced that he had become a Muslim and had changed his name from Cassius Clay to Muhammad Ali.[27] In 1966, he was informed by the Selective Service that he was eligible to serve in the military.[28] Ali, who stated that he was a pacifist and that his religion opposed war, applied for conscientious objector status.[29] His New York boxing license was immediately suspended[30] and other states fol-

21. *See, e.g.*, UNFORGIVEABLE BLACKNESS: THE RISE AND FALL OF JACK JOHNSON (PBS 2004).

22. *Id.*

23. *See, e.g.*, EDWIN B. HENDERSON, THE NEGRO IN SPORTS 26–30 (1939).

24. *See, e.g.*, ARTHUR ASHE, A HARD ROAD TO GLORY: A HISTORY OF THE AFRICAN AMERICAN ATHLETE, VOL. 1 1619–1918 (1988); *Jack Johnson on Trial: Great Interest*, CHICAGO DEFENDER, May 10, 1913, at 1.

25. *See generally* THE MANN ACT OF 1910, 18 U.S.C.A. § 2421 (2015). At the time, the Mann Act made it unlawful to transport a woman across state lines for the purpose of prostitution or other unlawful sexual conduct.

26. *See, e.g.*, Billy Lewis, *The Jack Johnson Case*, FREEMAN, Nov. 30, 1912, at 7.

27. *See generally* MUHAMMAD ALI, THE GREATEST: MY OWN STORY (1975) (chronicling the battles that the heavyweight champion faced in and out of the ring).

28. *Id.*

29. *See, e.g.*, Sean Gregory, *Why Muhammad Ali Matters to Everyone*, TIME (June 4, 2016), http://time.com/3646214/muhammad-ali-dead-obituary/. Muhammad Ali famously stated, "Man, I ain't got no quarrel with them Vietcong."

30. *See, e.g.*, Marty Lederman, *Muhammad Ali, Conscientious Objection, and the Supreme Court's Struggle to Understand 'Jihad' and 'Holy War': The Story of* Cassius Clay v. United States, SCOTUSBLOG (June 8, 2016), http://www.scotusblog.com/2016/06/muhammad-ali-conscientious-objection-and-the-supreme-courts-struggle-to-understand-jihad-and-holy-war-the-story-

lowed suit. Ali was roundly castigated by the mainstream press as a "coward" and as "un-American" and some refused to call him by his new name.[31] In 1967, Ali was convicted of draft evasion and sentenced to five years and fined $10,000.[32] Following his unsuccessful appeals, Ali held firm and the Black community's support remained steadfast.[33] Four years later, the U.S. Supreme Court reversed Ali's conviction for draft evasion.[34] In addition to the above cases, other well-known cases involving Black athletes include Mike Tyson and Kobe Bryant.[35]

Black protectionism has extended beyond Black athletes to include other well-known and well-heeled African Americans. It has been used to cloak Black actors, entertainers, politicians, and business people. There have been many high-profile cases involving African Americans who received Black protectionism. The list includes former mayor of Washington, D.C., Marion Barry, Supreme Court Justice Clarence Thomas, singer R. Kelly, and Michael Jackson.[36] As discussed in more detail in later sections, the evolution of Black protectionism has shifted the group of African Americans who are eligible to receive its protective shield. Given this change, it is not likely

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of-cassius-clay-v-united-states/ ("While Ali's criminal appeal was pending, he decided to sue the New York State Athletic Commission, alleging that it had unconstitutionally suspended his boxing license.").

31. Gregory, *supra* note 29.

32. Martin Waldron, *Clay Guilty in Draft Case; Gets Five Years in Prison*, N.Y. TIMES (June 20, 1967), http://www.nytimes.com/learning/general/onthisday/big/0620.html#article.

33. In his eulogy of Muhammad Ali, Pastor Kevin Cosby made this point by analogy: "You have to bet for the horse while it's still in the mud. There are a lot of people who bet on Muhammad Ali when he was in the winners' circle. But the masses bet on him while he was still in the mud . . . I'm not saying that Muhammad Ali is the property of Black people. He is the property of all people. But while he is the property of all people. Let us never forget that he is the product of Black people in their struggle to be free." Muhammad Ali's Memorial Service — The New York Times, YOUTUBE (June 10, 2016), https://www.youtube.com/watch?v=1bYFb97j7Ro.

34. Clay v. United States, 403 U.S. 698, 710 (1971).

35. For a detailed discussion of these cases, see RUSSELL-BROWN, PROTECTING OUR OWN, *supra* note 9, at 39–65.

36. *Id.* at 45–47, 56–62. Marion Barry, former mayor of Washington, D.C., was caught on videotape smoking a crack cocaine pipe. He faced a 13-count indictment, which included a perjury charge. He was acquitted on one count of drug possession, convicted of misdemeanor drug possession, and sentenced to six months in prison. Following his nomination to the Supreme Court in 1991, it was reported that then federal District Court judge, Clarence Thomas, had been accused of sexual harassment against law professor Anita Hill. Following the widespread circulation of a video that appeared to show R. Kelly engaged in sexual acts with a minor, he was indicted on child pornography charges; he was acquitted in 2008. In 2005, Michael Jackson faced charges of child molestation and intoxicating a minor. Jackson was acquitted. In each of these cases, surveys indicated that the Black community stood solidly behind Barry, Thomas, Kelly, and Jackson.

that African Americans who received it in the past would receive the same degree of protectionism today.

With the above discussion of Black protectionism in mind, Part II provides a detailed review of its mechanisms. It also identifies the circumstances that trigger African Americans to engage in a protectionist response and examines how this compares with how Whites respond to the same allegations.

II. HOW BLACK PROTECTIONISM OPERATES

Black protectionism works as a two-tier process. The first level determines whether a particular person is eligible to receive protectionism. Eligibility has three requirements:

[1] There is an allegation of wrongdoing (criminal or ethical);
[2] The allegation is made by a mainstream agent (a representative of the state or a political spokesperson); and
[3] The allegation is against someone Black who has a national reputation or credibility as a racial spokesperson.

Once these elements are established, Black Protectionism is available. However, it is the responses to a set of trigger questions that determine the degree and strength of the Black protectionism applied in a particular case. At the second there are two sets of trigger questions, one for Blacks and another for Whites.[37] These are the questions raised and considered by members of these two racial groups.[38]

37. It is noted that the trigger questions are male-centric. One of the undeniable truths about Black protectionism is that it has been almost exclusively available to Black men. *See* RUSSELL-BROWN, PROTECTING OUR OWN, *supra* note 9, at 99–101 (providing a more detailed discussion of the gender dynamic and Black protectionism).

38. While the discussion here is based on the Black versus White dynamic, other racial groups have some version of race-based protectionism. *Id.*; *see* Table 1.

Table 1
Trigger Questions

Blacks	Whites
1. Did he commit the offense?	1. Did he commit the offense?
2. Even if he did, was he set up?	
3. Would he risk everything he has (e.g., wealth, fame, material possessions) to commit an offense?	
4. Is he the only person who has committed this offense?	
5. Do Whites accused of the same offense receive the same scrutiny and treatment?	
6. Is this accusation part of a government conspiracy to destroy the Black race?	

These trigger questions highlight the analysis Blacks engage in when evaluating accusations of wrongdoing leveled against high-profile group members. This varies greatly from the single-question analysis used by Whites when someone White is accused of wrongdoing. Whites are much less likely to explicitly consider race as the cause of an allegation.[39] White skin privilege may operate in a way that encourages Whites to overlook the ways in which race may be a salient factor in evaluating the credibility of criminal charges against African Americans. The marked contrast in the trigger questions is tied to the drastically different experiences—direct and indirect—that Blacks and Whites have with the criminal justice system.[40] Blacks are much more likely to have had negative experiences with the police, courts, and prisons (or know someone who has),[41] and thus are more likely to question the justice system's legitimacy.[42]

39. *See generally* TOM TYLER, SOCIAL JUSTICE IN A DIVERSE SOCIETY (1997) (describing White people's perception of race and the criminal justice system).

40. Studies and surveys show a persistent racial gap in perceptions of the criminal justice system. For instance, Whites are two and one-half more times likely to state that the justice system operates fairly, compared with Blacks. *Id.*

41. *See generally* MICHELLE ALEXANDER, THE NEW JIM CROW: MASS INCARCERATION IN AN AGE OF COLORBLINDNESS (2010) (for a trenchant analysis of the how wide-scale incarceration is used to manage and establish the racial narrative on crime).

42. In an empirical study of how interactions with the justice system alters perceptions of government, Vesla Weaver and Amy Lerman conclude that contact with the criminal justice system "weakens attachment to the political process and heightens negative perceptions of gov-

In addition to the structural workings of the justice system when evaluating an individual case, Blacks also consider how Whites as a group are likely to view the same case. In particular, the calculus for the appropriateness of Black protectionism includes a comparison of the Black community's perceptions of the case with the White community's perceptions of the case. Further, there is some consideration of how these perceptions may vary based on the race of the alleged offender (or victim).[43] Thus, Blacks as a group are using racially-variegated lenses to evaluate the fairness of a particular allegation or charge. This type of racial analysis exemplifies the double-consciousness illuminated by sociologist W.E.B. Du Bois over a century ago.[44]

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ernment." Vesla Weaver & Amy Lerman, *Political Consequences of the Carceral State*," 104 AMER. POLIT. SCI. REV. 817, 820 (2010). In other research, they found that African Americans who have been "stopped, arrested, convicted, or incarcerated" are more likely to believe there is racial discrimination against Blacks and are much more pessimistic about racial equality in the United States. Amy Lerman & Vesla Weaver, A Different Lifeworld? The Impact of Criminal Justice Encounters on Racial Perceptions and Identity (2010) (unpublished paper presented at American Political Science Association Meeting). Given these findings, it is not a stretch to consider that seeing police violence against members of your community would also result in negative perceptions of the justice system and a decline in civic participation.

In *How the Criminal Justice System Educates Citizens*, Ben Justice and Tracey Meares argue that various aspects of the justice system have a curriculum (overt and tacit) that "teach" us how the justice system works. For groups that have disproportionately high rates of contact with police (e.g., African Americans) the justice system may work as a "site of negative 'civic education.'" Ben Justice & Tracey Meares, *How the Criminal Justice System Educates Citizens*, 651 ANNALS AM. ACAD. POL. & SOC. SCI. 159, 161 (2014).

43. When African Americans review allegations against and treatment of a high-profile Black, they also consider how the White community perceives the case and whether Whites would respond differently if the alleged offender was White. Thus, this review involves a four-part analysis:

> (1) An assessment of the Black community's response to an allegation against a high profile Black person;
>
> (2) An assessment of the White community's response to an allegation against a high-profile Black person;
>
> (3) An assessment of the White community's response to an allegation against a high-profile White person; and
>
> (4) An assessment of the Black community's response to an allegation against a high-profile White person.

It is noted that not all of these considerations are explicit. Rather, they are part of the Black protectionism analysis that African Americans engage in when high-profile members face criminal or ethical charges.

44. In *The Souls of Black Folk*, published in 1903, W.E.B. Du Bois states:

> [T]he Negro is a sort of seventh son, born with a veil, and gifted with second-sight in this American world,—a world which yields him no true self-consciousness, but only lets him see himself through the revelation of the other world. It is a peculiar sensation, this double-consciousness, this sense of always looking at one's self through the eyes of others, of measuring one's soul by the tape of a world that looks on in amused contempt and pity. One ever feels his two-ness,—an American, a Negro; two souls, two thoughts, two unreconciled strivings; two warring ideals in one dark body, whose dogged strength alone keeps it from being torn asunder.

W.E.B. DU BOIS, THE SOULS OF BLACK FOLK 3 (1965).

As well, the Black protectionism processing matrix underscores a reality of our criminal justice system—race matters.[45]

The Black community's protectionism takes different forms, but the bottom line is that it manifests itself as a sizable number of Blacks questioning the credibility of the allegation or charge against the high-profile group member. For instance, throughout the O.J. Simpson criminal trial, national surveys revealed that Blacks believed that Simpson was not guilty of the murders.[46] Black protectionism operates as a bulwark against allegations of criminality and deviance against African Americans.

Another important feature of Black protectionism is that it operates without regard to the consent of the recipient. That is, it may be unsolicited, even unwanted. Black protectionism, while triggered in response to an individual African American's circumstance, works as a protective measure for the Black community. It goes into effect regardless of whether the high-profile Black person desires it, whether the person identifies as Black, whether the person feels connected to the Black community, or whether the person sees himself as a representative of the African American community.[47]

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45. Data on the justice system clearly shows that race matters at each stage of the justice system, from arrest to post-sentencing. *See, e.g.*, NAZGOL GHANDNOOSH, BLACK LIVES MATTER: ELIMINATING RACIAL INEQUITY IN THE CRIMINAL JUSTICE SYSTEM (2015); *see also* McCleskey v. Kemp, 481 U.S. 279 (1987) (illustrating the impact of race on capital sentencing). The case utilized empirical research, which shows that the race of the victim impacts sentencing. The defendant challenged application of the Georgia death penalty as a violation of the Equal Protection Clause (that the death penalty operated in a racially biased manner). The defense offered the results of empirical research, known as the "Baldus Study," to establish that the race of the victim was the most significant variable determining whether an offender would be sentenced to death. The Supreme Court did not dispute the findings, but decided that a capital offender alleging race discrimination has to establish that his particular jury was racially biased against him. *See generally* U.S. DEP'T OF JUSTICE, INVESTIGATION OF THE BALTIMORE CITY POLICE DEPARTMENT (2016), https://www.justice.gov/opa/file/883366/download; U.S. DEP'T OF JUSTICE; THE FERGUSON REPORT (2015), https://www.justice.gov/sites/default/files/opa/press-releases/attachments/2015/03/04/ferguson_police_department_report.pdf. Both reports provide a look at the impact of race on the administration of justice in a particular community and jurisdiction.

46. *See, e.g.*, Janet Elder, *Trial Leaves Public Split on Racial Lines*, N.Y. TIMES (Oct. 2, 1995), http://www.nytimes.com/1995/10/02/us/trial-leaves-public-split-on-racial-lines.html (discussing polarization of public opinion along racial lines following the O. J. Simpson trial).

47. *See, e.g.*, Denise C. Morgan, *Jack Johnson: Reluctant Hero of the Black Community*, 32 AKRON L. REV. 529, 530 (1999) (arguing that there are two different types of Black heroes: those who "have simultaneously exposed the fallacy of the American racial hierarchy of White over Black and who have embraced their connection to other Black Americans[,]" such as Martin Luther King and Muhammad Ali, and those who "have difficulty reconciling their sense of individuality with membership in a subordinated community[,]" like Jack Johnson).

Notably, in the Simpson case, it is not clear whether Simpson himself desired or appreciated the Black community's embrace. He is on record as stating that he did not want to be seen as Black:

An analysis of dozens of cases involving race-based protectionism shows that there is a low bar for its application.[48] Once a charge is leveled against a well-known African American, a consideration of whether Black protectionism is available begins.[49] As posited in earlier research, Black protectionism may be considered a kind of civil rights strategy.[50] It is a way to support and shield African Americans who have, against the racial odds, attained mainstream success. This group includes athletes,[51] along with other Black professionals (teachers, preachers, funeral directors, doctors, and business owners), who were in the first tier of Blacks to "make it."

All told, Blacks as a group have a race-based skepticism towards the combined workings of the criminal justice system, the mainstream media, and the political structure. Based on their lived experiences, African Americans, as a group, are less trusting of the police and less likely to believe that the justice system operates in a racially-fair manner.[52] This distrust of the criminal justice system co-exists with African American concerns that Blacks are portrayed negatively in the mainstream media. Many African Americans believe that African Americans are unfairly and overwhelmingly portrayed as criminals in the media—encapsulated by the term *criminal blackman*.[53] In addition to views about the criminal justice system and the media, African Americans also share a concern that the political establishment operates to keep them marginalized.[54]

> I was at a wedding, my [first] wife and a few friends were the only Negroes there and I overheard a lady at the next table say "Look there's O.J. Simpson and some niggers." Isn't that weird? That sort of thing hurts me, even though it's what I strive for, to be a man first.

RUSSELL-BROWN, COLOR OF CRIME, *supra* note 2, at 86.

48. *See generally* RUSSELL-BROWN, PROTECTING OUR OWN, *supra* note 9 (analyzing a series of cases involving potential recipients of Black protectionism in Chapter Three).

49. In some instances, the high-profile African American suggests that the allegations against him are racially motivated—thus, explicitly requesting Black protectionism. *Id.* at 49. For instance, in 2016, when African American congresswoman Corrine Brown was indicted on fraud charges, she stated "I'm not the first black elected official to be persecuted and, sad to say, I won't be the last." Matt Dixon, *Brown Says She's Not the First Black Lawmaker to be 'Persecuted,'* POLITICO (July 11, 2016, 1:26 PM), http://www.politico.com/states/florida/story/2016/07/brown-says-not-first-black-lawmaker-persecuted-103686#ixzz4E7p08HVC.

50. *See generally* Russell-Brown, *Black Protectionism*, *supra* note 9 (discussing how Black protectionism can be used as a strategy in obtaining equal treatment for African Americans).

51. *Id.* at 10.

52. *See generally* TYLER, *supra* note 39 (describing African Americans' general distrust of police).

53. RUSSELL-BROWN, COLOR OF CRIME, *supra* note 2, at 14.

54. Maurice Mangum, *Explaining African American Political Trust: Examining Psychological Involvement, Policy Satisfaction, and Reference Groups*, 82 INT'L SOC. SCI. REV. 3 (2012) (analyzing research explaining why African Americas have little trust in the government). *But*

For example, African Americans have been particularly sensitive to the numerous instances of disrespect shown towards Barack Obama, the first African American President of the United States. During his eight-year tenure, the nation's first Black president faced a barrage of allegations and insults, criminal and otherwise. These included allegations that President Obama was one or more of the following: a Muslim,[55] a Marxist[56], atheist,[57] a traitor,[58] an ISIS sympathizer,[59] or a Kenyan-born foreigner,[60] all of which, to those making the claims, made him unworthy of and ineligible to be the President of the United States. As well, President Obama experienced several encounters—verbal[61] and physical[62]—that indicated disrespect for his leadership.[63] There were also strategic political attempts to diminish his leadership. Most notably, his 2016 nominee to

see Beyond Distrust: How Americans View their Government, PEW RES. CTR. (Nov. 23, 2015), http://www.people-press.org/2015/11/23/1-trust-in-government-1958-2015/ (finding that African Americans have slightly higher levels of trust of the federal government than Whites). *See generally* SHAYLA NUNNALLY, TRUST IN BLACK AMERICA: RACE, DISCRIMINATION, AND POLITICS (2012) (arguing that the uncertainty, risk, and unfairness of institutionalized racial discrimination has led African Americans to distrust American democracy).

55. *See, e.g.*, Kevin Shipp, *The Real Barack Obama and the Transformation of America*, TEA PARTY TRIB. (Nov. 9, 2014), http://www.teapartytribune.com/2014/11/09/real-barack-obama-transformation-america/; Asawin Suebsaeng & Dave Gilson, *Chart: Almost Every Obama Conspiracy Theory Ever*, MOTHER JONES (Nov. 2, 2012), http://www.motherjones.com/politics/2012/10/chart-obama-conspiracy-theories.

56. Shipp, *supra* note 55.

57. *Id.*

58. *Id.* Following the June 2016 massacre in Orlando Florida in which a gunman killed forty-nine people, Donald Trump, then the Republican presumptive presidential nominee, stated, "Look, we're led by a man that is either not tough, not smart, *or he's got something else in mind.*" Jenna Johnson, *Donald Trump Seems to Connect President Obama to Orlando Shooting*, WASH. POST (June 13, 2016) https://www.washingtonpost.com/news/post-politics/wp/2016/06/13/donald-trump-suggests-president-obama-was-involved-with-orlando-shooting/ (emphasis added).

59. *See id.*

60. Suebsaeng & Gibson, *supra* note 55. Prior to his election, and well into his first term, some questioned whether President Obama had been born in the United States. *See generally* Michael Shear, *Obama Releases Long-Form Birth Certificate*, CAUCUS (Apr. 27, 2011, 9:28 AM), http://thecaucus.blogs.nytimes.com/2011/04/27/obamas-long-form-birth-certificate-released/?_r=0 (discussing Obama's release of his birth certificate and the controversy surrounding his national origin that was led by Donald Trump, who is now U.S. President).

61. On September 9, 2009, during a health care address that President Obama gave to Congress, House Representative (R-South Carolina) Joe Wilson shouted, "You lie!" *Rep. Wilson Shouts, 'You Lie' to Obama During Speech*, CNN (Sept. 10, 2009, 8:27 AM), http://www.cnn.com/2009/POLITICS/09/09/joe.wilson/index.html.

62. In 2013, after arriving in Arizona, President Obama greeted the governor, Jan Brewer. The video of the encounter shows her angrily pointing her finger at Obama and challenging him. Carrie Budoff Brown, *Tiff on the Tarmac: Obama Fights Back*, POLITICO (Jan. 12, 2012, 8:35 PM), http://www.politico.com/story/2012/01/tiff-on-the-tarmac-obama-fights-back-072100.

63. Examples include the various editorial cartoons likening Obama to a simian. *See, e.g.*, Oliver Burkeman, *New York Post in Racism Row Over Chimpanzee Cartoon*, GUARDIAN (Feb. 18, 2009, 1:58 PM), https://www.theguardian.com/world/2009/feb/18/new-york-post-cartoon-race.

the U.S. Supreme Court, Judge Merrick Garland, was denied a Senate hearing.[64] The message of these various actions was clear: President Obama did not deserve the nation's respect. African Americans, however, pushed back on this portrayal. More than any other racial group, the Black community steadfastly supported President Obama throughout his presidency.[65] Surveys indicated that Obama had an approval rating over eighty percent among African Americans—the highest of any racial group.[66] In some ways, President Obama was the recipient of Black protectionism. Though he was not charged with a crime, the numerous claims made against him operated as a kind of criminal allegation. In this way, the Black community's response was to "protect its own" and defend President Obama. It is likely that the strong challenges to President Obama's legitimacy increased the support and protection he received from African Americans.[67]

The treatment of African Americans within the criminal justice system is another factor that influences how African Americans individually and as group members perceive their overall experience and social status. Statistics consistently show that African Americans are disproportionately represented at each stage of the justice system—e.g., arrests, charge decisions, pre-trial detention, and conviction. For instance, Black motorists are more likely to be pulled over by the police than White drivers.[68] Also, in comparable circumstances, a Black

64. *See, e.g.*, Michael Ramsey, *Why the Senate Doesn't Have to Act on Merrick Garland's Nomination*, ATLANTIC (May 15, 2016), http://www.theatlantic.com/politics/archive/2016/05/senate-obama-merrick-garland-supreme-court-nominee/482733/.

65. John Blake, *What Black America Won't Miss About Obama*, CNN (July 1, 2016, 12:31 AM), http://www.cnn.com/2016/06/30/politics/why-black-america-may-be-relieved-to-see-obama-go/.

66. *See, e.g.*, *Obama Weekly Job Approval by Demographic Groups*, GALLUP (updated through July 2016), http://www.gallup.com/poll/121199/obama-weekly-job-approval-demographic-groups.aspx (showing White support for Obama at thirty-eight percent and Hispanic support at seventy percent).

67. While Blacks have given Obama widespread support, there has also been widespread criticism. *See* Julie Hirschfeld Davis, *Obama Confronts Growing Expectations*, N.Y. TIMES, (July 21, 2016), http://www.nytimes.com/2016/07/22/us/politics/obama-police-race.html. *See generally* MICHAEL ERIC DYSON, THE BLACK PRESIDENCY: BARACK OBAMA AND THE POLITICS OF RACE IN AMERICA (2016) (critiquing Obama's reluctance to discuss, engage, and encourage a detailed discussion of race—with the goal of improving race relations).

68. LYNN LANGTON & MATTHEW DUROSE, U.S. DEP'T OF JUSTICE, POLICE BEHAVIOR DURING TRAFFIC AND STREET STOPS, 2011, at 1 (2013), https://www.bjs.gov/content/pub/pdf/pbtss11.pdf. While racial disparity may raise a question about racial discrimination, the two are not the same. However, research studies done on driver behavior have not consistently found that Black drivers are more likely to be law violators than White drivers. *See, e.g.*, Wilkins v. Maryland State Police, Civil No. MJG-93-468 (D. Md. 1996) (laying out the terms of the settlement agreement where Maryland agrees to no longer consider race in its drug enforcement practices); Richard Lundman & Robert Kaufman, *Driving While Black: Effects of Race, Ethnicity,*

person is more likely to be arrested than a White person,[69] more likely to face more serious criminal charges,[70] more likely to be convicted, and more likely to receive a harsher criminal sentence.[71] The Justice Department estimates that more than twenty-five percent of all Black men will spend some portion of their lives behind bars.[72] The data on Blacks and lethal police force paint a stark picture of racial disparity.[73] Independent data gathered by news organizations show that in 2015 Blacks comprised twenty-seven percent of those killed by police.[74] Notably, Black men, who are approximately *six* percent of the U.S. population, made up twenty-five percent of police shootings.[75] This racial disproportionality sends a clear signal that race matters in the operation of the justice system, specifically that Blacks experience tougher treatment by the police, courts, and the correctional system overall. For African Americans, this climate of racial disparity serves to underscore the need for Black protectionism.

Beyond the criminal justice realm, a host of other racial disparities exist. These include the areas of education, employment, housing, healthcare, and wealth. Black men with a college degree are less likely to receive a job offer than White men with a felony record.[76] A

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and Gender on Citizen Self-Reports of Traffic Stops and Police Actions, 41 CRIMINOLOGY 195 (2003) (discussing whether African American, Hispanic, and White men are more or less likely to report police interactions after being pulled over for a traffic violation); *see also* David Kocieniewski, *Study Suggests Racial Gap in Speeding in New Jersey*, N.Y. TIMES (Mar. 21, 2002), http://www.nytimes.com/2002/03/21/nyregion/study-suggests-racial-gap-in-speeding-in-new-jersey.html?pagewanted=all.

69. *See* THE SENTENCING PROJECT, REPORT OF THE SENTENCING PROJECT TO THE UNITED NATIONS HUMAN RIGHTS COMMITTEE REGARDING RACIAL DISPARITIES IN THE UNITED STATES CRIMINAL JUSTICE SYSTEM (2013), http://sentencingproject.org/wp-content/uploads/2015/12/Race-and-Justice-Shadow-Report-ICCPR.pdf.

70. *Id.*

71. *Id.*

72. There is debate about whether this figure is closer to 1:3 or 1:4. In 1997, the Justice Department published a study that found that 28.5% of Black men will spend time behind bars during their life time. THOMAS BONCZAR & ALLEN BECK, BUREAU OF JUSTICE STATISTICS, LIFETIME LIKELIHOOD OF GOING TO STATE OR FEDERAL PRISON 3 (1997), http://bjs.gov/content/pub/pdf/Llgsfp.pdf. However, in the decade since that report, incarceration rates for Black men have declined. Marc Mauer, director of the Sentencing Project, estimates that the figure may be closer to one in four. Glenn Kessler, *The Stale Statistic that One in Three Black Males 'Born Today' Will End up in Jail*, WASH. POST (June 16, 2015), https://www.washingtonpost.com/news/fact-checker/wp/2015/06/16/the-stale-statistic-that-one-in-three-black-males-has-a-chance-of-ending-up-in-jail/.

73. *See 991 People Shot Dead by Police in 2015*, WASH. POST (Dec. 2015), https://www.washingtonpost.com/graphics/national/police-shootings/.

74. *See id.*

75. *See id.* (showing that in 2015 there were 991 people killed by law enforcement officers and of this number, 248 were Black men).

76. DEVAH PAGER, MARKED: RACE, CRIME AND FINDING WORK IN AN ERA OF MASS INCARCERATION 90–91 (2007).

person with a "Black-sounding" name is fifty percent less likely to receive a job interview than someone with a "White-sounding" name.[77] To the degree that these political and criminal justice realities affect perceptions of fairness and equality, they support the Black community's decision to protect and defend high-profile members who face legal trouble. These socio-political justice system factors combine to create a baseline of suspicion when a high-profile African American is accused of wrongdoing. Thus, for decades, Black protectionism has been a predictable reaction when well-known African Americans have been accused of wrongdoing. Black protectionism has its critics.

Critics of the practice have questioned its rationale, arguing that as a knee-jerk reaction, protectionism does not benefit the Black community.[78] Others have made the case that a more circumspect and limited application of protectionism would yield greater long-term benefits to the Black community.[79] Despite these criticisms, until recently, the Black community has continued to make protectionism available to select group members. In recent years, however, something has changed. There has been an observable shift in the availability and application of Black protectionism. The rules have been altered, in ways that both broaden and reduce the eligibility pool for protectionism. Part III examines how protectionism has evolved through a look at how it has worked in contemporary cases involving well-known Blacks accused of wrongdoing.

III. CONTEMPORARY CASES[80]

While a handful of earlier scholarship identifies, details, and critiques Black protectionism, over the last decade, there has been no

77. Marianne Bertrand & Sendhil Mullainathan, National Bureau of Economic Research, *Are Emily and Greg More Employable Than Lakisha and Jamal? A Field Experiment on Labor Market Discrimination* 11–19 (Nat'l Bureau of Econ. Research, Working Paper No. 9873, 2003), http://www.nber.org/papers/w9873.pdf (showing the results from a survey conducted to see if African American names were discriminated against).

78. In a comedy routine, Chris Rock questioned whether Simpson's acquittal in any way benefited the Black community. Rock said he still has not received his "O.J. prize" in the mail. CHRIS ROCK: BRING THE PAIN (HBO 1996).

79. *See generally* RUSSELL-BROWN, PROTECTING OUR OWN, *supra* note 9 (discussing the critiques of Black protectionism in Chapter 6).

80. There are two other cases involving allegations of criminal or ethical harm engaged in by high-profile African Americans that deserve note. For different reasons, neither is included in the list of six cases discussed in this section of the Article. The first involves golfer Tiger Woods and the second involves actor Nate Parker.

comprehensive scholarly assessment of its contemporary workings.[81] In fact, Black protectionism as a phenomenon has attracted scant research interest. This is particularly surprising given that it is a relatively widespread phenomenon and one that sheds light on how African Americans as a group interpret, perceive, and react to the U.S. criminal justice system in particular and the legitimacy of the law

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In 2009, golfer Tiger Woods and his wife, Elin Nordegren, were involved in an altercation. The incident occurred after his wife learned that Woods had been intimately involved with several other women. It was a huge national story. This incident is intentionally not discussed in this section. First, the Woods's incident did not involve a criminal allegation (although it did raises issues of morality). Second, it appears there is some debate about how Woods, who is biracial (mother from Thailand and father who is African American), is viewed by African Americans today. Interestingly, this case did not have explicit racial overtones, as the others discussed in this section. In fact, the tepid racial response to this incident may be additional support for the argument that the rules of Black protectionism have changed, it is no longer a knee-jerk gift offered to any and all Black celebrities.

In 2016, prior to the release of Nate Parker's much anticipated movie, "The Birth of a Nation," it was widely reported that he had been accused of rape while in college. In 1999, Parker was charged and acquitted of sexually assaulting a fellow student while attending Penn State University. Parker is African American and the woman was White. The woman said that she was drunk and unconscious during the sexual contact and could not give consent. The evidence indicates that she was forced to have sex with another man, Jean McGianni Celestin, who was present and also Parker's roommate (Celestin was convicted of rape at trial). The woman committed suicide in 2012. Brooks Barnes & Cara Buckley, *Criminal Case Trails Director and His Film*, N.Y. TIMES (Aug. 18, 2016), http://www.nytimes.com/2016/08/18/movies/the-birth-of-a-nation-nate-parkers-heralded-film-is-now-cloaked-in-controversy.html. This case presents an interesting twist on the typical case of Black protectionism. In this instance, the criminal charges have *already been* heard and *tried* in a court of law. Parker received mixed-support from African Americans. Early signs indicated that Parker would receive condemnation, not support from African Americans. *Id.*; *see also* Maiysha Kai, *An Open Letter to Nate Parker*, ROOT.COM (Aug. 17, 2016), http://www.theroot.com/articles/culture/2016/08/an-open-letter-to-nate-parker/; Gillian White, *Nate Parker and the Court of Public Opinion*, ATLANTIC (Aug. 18, 2016), http://www.theatlantic.com/entertainment/archive/2016/08/nate-parker-faces-the-court-of-public-opinion/496439/. *But see* Jamal Watson, *Al Sharpton on Nate Parker: Hollywood Trying to 'Smear the Messenger,'* ROOT.COM (Aug. 20, 2016), http://www.theroot.com/articles/culture/2016/08/rev-al-sharpton-on-nate-parker-hollywood-trying-to-smear-the-messenger/ (arguing that a double standard is being used since Parker was acquitted of rape).

The highly anticipated movie did not do well at the box office. It did not receive any Golden Globe nominations. However, in January 2017, the Directors' Guild of America nominated Parker for the debut director's award.

Some made comparisons between the sexual harassment allegations against Casey Affleck with Nate Parker's case. Affleck, who is White, starred in the critically reviewed movie, "Manchester by the Sea." Affleck was accused of sexual harassment by two former staffers. *See, e.g.,* Brooks Barnes, *The Glare Varies for Two Actors on Hollywood's Awards Trail*, N.Y. TIMES (Jan. 4, 2017), https://www.nytimes.com/2017/01/04/movies/casey-affleck-nate-parker-awards-season.html?_r=0; Amy Zimmerman, *Casey Affleck's Dark Secret: The Disturbing Allegations Against the Oscar Hopeful*, DAILY BEAST (Nov. 23, 2016, 12:00 AM), http://www.thedailybeast.com/articles/2016/11/22/casey-affleck-s-dark-secret-the-disturbing-allegations-against-the-oscar-hopeful.html.

81. *See generally* RUSSELL-BROWN, COLOR OF CRIME, *supra* note 2; RUSSELL-BROWN, PROTECTING OUR OWN, *supra* note 9. The most recent review of the Black protectionism cases was published in 2009.

in general. The material in the next section seeks to bridge this research gap, beginning with an overview of the sexual assault allegations against Bill Cosby.[82]

A. "Hey, Hey, Hey:"[83] The Cosby Cases

Next to the O.J. Simpson case, the Bill Cosby sexual assault cases are the most well-known recent incidents of an African American celebrity being accused of a crime. However, in stark contrast to the Black community's outspoken and unabashed protective response to O.J. Simpson, the reaction to Cosby has been mixed at best. Responses have run the gamut, including mockery, scorn, silence, calls for "balance," victim blaming, and, in some instances, praise.

One remarkable aspect of the Cosby case is that there have been several high profile African Americans who have publicly criticized him.[84] In fact, the case entered the public consciousness as the result of a comedy routine by another Black comedian. A stand-up routine by Hannibal Buress[85] opened the door for a new wave of criminal allegations and intense public debate and criticism of Bill Cosby. In his routine, Buress referred to a talk Cosby gave in 2004. Cosby spoke at an NAACP event celebrating the fiftieth anniversary of *Brown v. Board of Education*.[86] In his comments, Cosby admonished and ridiculed poor Blacks. He stated:

> The lower economic people are not holding up their end of this deal . . . These people are not parenting. They are buying things for

82. There have been other cases that raise the issue of Black protectionism. These include Herman Cain (businessman/politician, sexual assault allegations), Michael Jace (actor, convicted of murder), Wendell Pierce (actor, arrested for battery); and Isaiah Washington (actor, fired for using homophobic slurs).

83. This expression is taken from the lead character of the 1970s cartoon, "Fat Albert" (voiced by Bill Cosby). James Hamblin, *The Origin of Fat Albert: How Bill Cosby did Obesity Right*, ATLANTIC (Sept. 27, 2012), http://www.theatlantic.com/health/archive/2012/09/the-origin-of-fat-albert-how-bill-cosby-did-obesity-right/262817/.

84. On his Comedy Central show, "The Nightly Show," comedian-host, Larry Wilmore regularly and fiercely criticized Cosby. As well, at least one Black publication raised the issue directly. EBONY Magazine's November 2015 issue featured a controversial cover where the Cosby family was shown with shattered glass centered cracked around Bill Cosby's face. *See also* Goldie Taylor, *Cliff-Hanger: Can 'The Cosby Show' Survive? Should It?*, EBONY (Oct. 15, 2015), http://www.ebony.com/entertainment-culture/ebony-bill-cosby-cover-story-november-2015-999#axzz4Df3ozipX.

85. Hannibal Buress, *Hannibal Buress Called Bill Cosby a Rapist During a Stand Up*, YOUTUBE (Oct. 29, 2014), https://www.youtube.com/watch?v=dzB8dTVALQI.

86. 347 U.S. 483 (1954).

> their kids—$500 sneakers for what? And won't spend $200 for Hooked on Phonics.[87]

Buress's 2014 response to Cosby:

> He gets on TV, 'Pull your pants up black people, I was on TV in the '80s! I can talk down to you because I had a successful sitcom!' Yeah, but you raped women, Bill Cosby. So turn the crazy down a couple notches. 'I don't curse onstage!' But you're a rapist.[88]

When some members of the audience expressed disbelief at Buress's claims about the revered comedian, he tells them to "Google 'Bill Cosby and rape.'"[89] After one of his shows was posted on YouTube, Buress's routine led to intense media interest. More than one journalist noted the irony that it was a male comedian, not the women who accused Cosby of sexual assault, who led to the explosive media attention. There were numerous women willing to testify in court that they had been drugged and assaulted by Cosby. There were not enough, however, to cause public interest or outcry.

In 2005, Andrea Constand filed suit against Cosby for sexual assault.[90] Constand, a woman's basketball coach at Temple University (Cosby's alma mater), accused him of drugging her with Quaaludes and then sexually assaulting her.[91] In his deposition, Cosby admitted to having drugged women so he could have sex with them.[92] After Constand filed suit, thirteen other women came forward with similar allegations. Each woman was willing to serve as a witness in the case.

87. Felicia R. Lee, *Cosby Defends His Remarks About Poor Blacks' Values*, N.Y. TIMES (May 22, 2004), http://www.nytimes.com/2004/05/22/arts/cosby-defends-his-remarks-about-poor-blacks-values.html?_r=0.

88. Buress, *supra* note 85. One consequence of being critical of a high-profile African American is that some Blacks will perceive the person as a race traitor; for instance, following Buress's comments, Faizon Love, another Black comedian, referred to Buress as a "house nigga." *Faizon Love Supports Bill Cosby, Calls Hannibal Buress a House N***a*, THEGRIO (Nov. 22, 2014, 6:07 PM) [hereinafter *Faizon Love Supports Bill Cosby*], http://thegrio.com/2014/11/22/faizon-love-bill-cosby/.

89. Buress, *supra* note 85.

90. Complaint, Andrea Constand v. William H. Cosby, No. 2:05-cv-01099-ER (E.D. Penn. Nov. 21, 2005); Associated Press, *Bill Cosby Drops Lawsuit Against Andrea Constand, Accuser in Criminal Case*, NBC NEWS (July 29, 2016, 12:19 AM), http://www.nbcnews.com/storyline/bill-cosby-scandal/bill-cosby-drops-lawsuit-against-andrea-constand-accuser-criminal-case-n619316.

91. Holly Yan et al., *Bill Cosby Admitted He Got Quaaludes to Give to Women*, CNN (July 7, 2015, 11:42 PM), http://www.cnn.com/2015/07/07/us/bill-cosby-quaaludes-sexual-assault-allegations/.

92. *Id.*

However, in 2006, Constand's case was settled and the case files were sealed.[93]

Following the massive publicity Burress' routine received, women began to go public with stories of alleged sexual assault by Cosby. More than fifty women stated publicly that Cosby either raped or attempted to rape them.[94] When the first wave of women began to tell their stories, there was a mixed public response. Many people viewed the women with suspicion. Some questioned why so many of the women waited decades to come forward,[95] others did not find the stories of alleged assault credible,[96] still others concluded that some of the women benefited from a relationship with Cosby, and perhaps now they had an axe to grind because their careers were not successful.[97] Several of the women addressed these criticisms.[98]

In prior times, it is at this point in Cosby's unfolding story that Black protectionism would have worked to quell and minimize any further discussion of his alleged wrongdoing. As it has in many earlier cases involving sexual assault, Black protectionism would have pushed the media spotlight away from Cosby to focus on the women—e.g., their past sexual histories, prior missteps, careers, economic status, and former relationships. This shift in focus would have effectively worked to shut down any African American dissent and worked to present a united racial front in support of Cosby. This would have been done through the existing media channels, such as Black radio,

93. The case was settled for an undisclosed amount; the settlement also included a provision that prevented Constand from speaking publicly about the case. *See* Associated Press, *supra* note 90.

94. Amanda Holpuch et al., *The Bill Cosby Sexual Abuse Claims—57 Women and the Dates They Went Public*, GUARDIAN (Dec. 31, 2015, 1:03 PM), www.theguardian.com/world/2015/dec/31/bill-cosby-sexual-abuse-claims-57-women-dates-public-accusations.

95. *See, e.g.*, Christine M. Flowers, *Rape Allegations Against Cosby No Excuse to Suspend Rights of the Accused*, PHILLY.COM (Nov. 20, 2014, 3:01 AM), http://www.philly.com/philly/columnists/christine_flowers/20141120_Rape_allegations_against_Cosby_no_excuse_to_suspend_rights_of_the_accused.html.

96. *Id.*

97. *See generally Why Is the Media Ignoring the Shady Background of Some of the Cosby Accusers?*, MELANOID NATION (Oct. 17, 2015), http://melanoidnation.org/why-is-the-media-ignoring-the-shady-backgrounds-of-some-of-the-cosby-accusers/ (arguing Bill Cosby's accusers are not credible and do not have prominent careers).

98. Barbara Bowman, *Bill Cosby Raped Me. Why Did it Take 30 Years for People to Believe My Story?*, WASH. POST (Nov. 13, 2014), https://www.washingtonpost.com/posteverything/wp/2014/11/13/bill-cosby-raped-me-why-did-it-take-30-years-for-people-to-believe-my-story/; *see, e.g.*, Noreen Malone, *'I'm No Longer Afraid': 35 Women Tell Their Stories About Being Assaulted by Bill Cosby, and the Culture That Wouldn't Listen*, N.Y. MAG. (July 26, 2015), http://nymag.com/thecut/2015/07/bill-cosbys-accusers-speak-out.html (noting the interviews women who accused Bill Cosby of sexual assault and who deny that their allegations are false or driven by bitterness about their careers).

Black spokespersons, BET, barbershops, and beauty salons. It is likely that many other well-known Blacks, including racial spokespersons, would have stepped forward to offer unequivocal support for Cosby.[99]

The traditional narrative would have highlighted Cosby's stellar decades-long career, the iconic breakthrough status of "The Cosby Show," as well as the notable philanthropic work of Cosby and his wife Camille, including their donations of millions of dollars to historically Black colleges and universities.[100] The fact that the criminal justice system has been racially biased against Black men would also have been part of the clarion call for Black protectionism for Cosby.

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99. A handful of celebrities did come to Cosby's defense or at least sought to contextualize his actions within the larger group of sexual assault cases. For instance, Malcolm-Jamal Warner, who played Theo Huxtable on "The Cosby Show," suggested that the reactions to the Cosby allegations were disproportionate, especially when compared with other entertainers in comparable circumstances. Warner stated, "There is no one that has been calling for Woody [Allen]'s movies to be pulled off the air," Warner said. "Roman Polanski is still celebrated. Stephen Collins' show still comes on. So it's just interesting how it's very unbalanced." *Malcolm-Jamal Warner: 'Cosby' is Villainized, Woody Allen Gets a Pass Because He's White*, THEGRIO (Feb. 3, 2016), http://thegrio.com/2016/03/04/malcolm-jamal-warner-cosby-gets-yanked-off-the-air-woody-allen-gets-pass-because-hes-white/. Warner is referencing the fact that in 1992 filmmaker Woody Allen became involved with his then-girlfriend Mia Farrow's adopted daughter, Soon-Yi Previn. Farrow discovered that Allen had nude photos of 21-year-old Previn in his home. On The Red Carpet Staff, *Woody Allen on Marriage to Soon Yi: 'What Was the Scandal?'*, ABC 7, http://abc7.com/archive/8209443/ (last visited Oct. 25, 2016). In 1977, filmmaker Roman Polanski pled guilty to unlawful sex with a minor (a 13-year-old girl). After serving 42 days behind bars he was released. Upon learning that he faced a longer sentence, Polanski fled the U.S. for Poland, where he remains. Rebecca Keegan, *Samantha Geimer Tells Her Side of the Story*, L.A. TIMES (Sept. 16, 2013), http://articles.latimes.com/2013/sep/16/entertainment/la-et-jc-geimer-book-20130916.

Overall, the responses to the Cosby allegations were tepid compared with how previous incidents have triggered widespread Black protectionism. Some celebrities avoided a direct response. In response to a question about the allegations, Phylicia Rashad, who played Clair Huxtable on "The Cosby Show," responded, "This is in litigation now, right? Then I'm not commenting on anything. Let it play out." John Justice, *Here's What Happens When Phylicia Rashad Is Grilled About Bill Cosby's Rape Allegations*, BET (Apr. 11, 2016), http://www.bet.com/news/celebrities/2016/04/11/phylicia-rashad-bill-cosby-rape-allegations-comments.html. Keisha Knight-Pulliam, who played Rudy Huxtable on "The Cosby Show," said "Everyone's entitled to their opinion, but we still live in a country where you're innocent until proven guilty. . . I understand everything that's happened, and me being a feminist . . . 'No means no' and I get that. But just so you know, I did work with him for a really long time, I love him dearly still. That isn't the man I know." John Justice, *Don't Come for Mr. Cosby: Keisha Knight Pulliam Claps Back at Amber Rose*, BET (Apr. 1, 2016), http://www.bet.com/news/celebrities/2016/04/01/keisha-knight-amber-rose-cosby.html. Some public groups sought to defend Cosby. Project 21, a public policy group of Black conservatives said that Cosby was being treated unfairly and referred to the Cosby accusers as "opportunistic." They argued that the legal process was unfair to Cosby. Tim Devaney, *Black Group Defends Bill Cosby From 'Opportunistic' Women*, THE HILL (July 9, 2015, 3:17 PM), http://thehill.com/blogs/in-the-know/in-the-know/247399-black-group-defends-bill-cosby-from-opportunistic-women.

100. Lee A. Daniels, *A Black College Gets Cosby Gift of $20 million*, N.Y. TIMES (Nov. 8, 1988), http://www.nytimes.com/1988/11/08/us/a-black-college-gets-cosby-gift-of-20-million.html.

Black protectionism—what has also been called "Rally-Round-the-Brother"[101]—would have been in full effect. Burress would likely have been dismissed as not having paid his dues, as not a true representative of the Black community, or worse, demonized as a race traitor, seeking to bring down a famous Black man.[102]

However, the actual reactions to the Cosby allegations reflect a sea of change in the Black community's assessment of wrongdoing by a high-profile group member. As news of the allegations surfaced, polls showed that African Americans were not uniform in their reaction to the charges.[103] Bill Cosby was unable to channel the traditionally available lines of racial support. This was partly because his support among African Americans had greatly eroded. As referenced earlier, many Blacks were troubled, offended, and perplexed by his 2004 NAACP comments.[104] Further, the volume of the allegations and the fact that Cosby had been out of public view for years did not bolster his support. A review of the Black community's response to a series of other cases involving high-profile African Americans accused of criminal wrongdoing, indicates a waning use of traditional Black protectionism. These cases offer some early support for the finding that Black protectionism was beginning to be more judiciously applied.

B. Ray Rice

In 2014, National Football League ("NFL") player Ray Rice was accused of domestic violence.[105] Rice, who played with the Baltimore Ravens, was seen on a hotel elevator video punching, kicking, and

101. Clarence Page, *Clarence Thomas Feeds Blacks' Conspiracy Fears*, WASH. POST (Oct. 16, 1991), http://articles.chicagotribune.com/1991-10-16/news/9104030357_1_lynching-for-uppity-blacks-black-males-clarence-thomas.

102. *See Faizon Love Supports Bill Cosby*, *supra* note 88.

103. For instance, a July 2015 YouGov poll shows that thirty-two percent of Blacks had a "favorable" view of Bill Cosby, compared with twenty-one percent for Whites and forty percent for Hispanics. Poll data showed that thirty-seven percent of Blacks had an "unfavorable" view of Cosby, compared with sixty-six percent for Whites and forty-one percent for Hispanics. One-third of Blacks polled stated they "don't know" whether they had a favorable or unfavorable opinion of Cosby. *Bill Cosby Poll July 8-9, 2015*, YouGov, https://today.yougov.com/publicopinion/archive/?page=9&sort=-publication_date&month=7 (last visited Oct. 25, 2016).

104. *See generally* MICHAEL ERIC DYSON, IS BILL COSBY RIGHT: OR HAS THE BLACK MIDDLE CLASS LOST ITS MIND? (2005) (discussing the class and generational divide in Black America by using Bill Cosby's speech on poor Black people when he received an NAACP award in the spring of 2004).

105. Louis Bien, *Ray Rice Indicted for Aggravated Assault in Domestic Violence Incident With Fiancée*, SB NATION (Mar. 27, 2014, 4:50 PM), http://www.sbnation.com/nfl/2014/3/27/5555054/ray-rice-arrest-assault-domestic-violence-fiancee.

spitting on his fiancée, Janay Palmer.[106] Following the assault, Rice dragged Palmer, who had been knocked unconscious, from the elevator.[107] Rice was charged with aggravated assault.[108] As a result of the incident and prior to the public release of the video, the NFL suspended Rice for two games.[109] Following the release of the video, the Baltimore Ravens ended Rice's contract and the League suspended him indefinitely.[110] Rice's case led the NFL to create stricter policies for players involved in domestic violence incidents.[111]

There was widespread public discussion about whether the NFL and the media were too quick to make Rice the public face of domestic assault.[112] Some suggested that Rice, who pled no contest to the assault charge and began a diversion program, was subjected to a double standard. Specifically, some argued that the punishment he received, including an indefinite suspension and being cut from the Baltimore Ravens, was too harsh.[113] Further, some speculated that if Rice had been White, he would not have lost his job.[114] Many others, however, were critical of Rice's actions (and statements made follow-

106. Hank Gola et al., *Ray Rice Cut by Ravens, Suspended by NFL After Video of Him Punching Then Fiancée in Casino Elevator Emerges*, NY DAILY NEWS (Sept. 9, 2014, 9:02 AM), http://www.nydailynews.com/sports/football/video-ray-rice-punching-then-fiancee-casino-elevator-emerges-article-1.1931889.

107. *Id.*

108. *Id.*

109. *Id.*

110. *Id.*

111. The NFL revised its Personal Conduct Policy, applicable to all NFL employees. According to the policy, a first offense for domestic violence will result in a six-game suspension without pay and a second offense will result in a lifetime ban. *Id.*

112. Trent Baker, *Stephen A. Smith on Kurt Busch: Double Standard for White, Black Athletes on Domestic Violence*, BREITBART (Feb. 25, 2015), http://www.breitbart.com/video/2015/02/23/stephen-a-smith-on-kurt-busch-double-standard-for-white-black-athletes-on-domestic-violence/.

113. *See, e.g.*, NFL POLL SEPTEMBER 9-10, 2014, YOUGOV (2015), http://cdn.yougov.com/cumulus_uploads/document/dpfpqecdhs/tabs_HP_Ray_Rice_20140910.pdf (showing the statistics of a general survey where participants were asked what was the appropriate punishment for Ray Rice punching his fiancée). Fifty percent of Blacks surveyed "approved" of Rice being cut from the Baltimore Ravens (compared with thirty-three percent who said they did not approve). This compares with sixty-nine percent of Whites who approved of the ban. Forty-six percent of Blacks polled approved of the NFL's indefinite ban (compared with thirty-seven percent who did not approve). This compares with sixty-one percent of Whites who approved of the ban.

114. Kevin B. Blackistone, *White Domestic Abusers Get a Second Chance. Ray Rice Is Black, So He Won't*, GUARDIAN (Dec. 2, 2012), https://www.theguardian.com/commentisfree/2014/dec/02/domestic-abusers-ray-rice-nfl-employment (quoting PAGER, *supra* note 76 and showing that Black men who have criminal records are more than two times less likely as their White counterparts to get a second chance at re-employment). *See generally* Monica Moorehead, *Ray Rice, Racism and Women's Oppression*, WORKERS (Sept. 16, 2014), http://www.workers.org/2014/09/16/ray-rice-racism-womens-oppression/#.V3LWPk3rvcs (listing multiple White athletes who have hurt women that were not demonized by the media).

ing the release of the videotape), his wife's decision to stay with him, and argued that he should have been more severely penalized by the NFL.

C. Adrian Peterson

In 2014, Minnesota Vikings football player Adrian Peterson was accused of brutally beating his four-year-old son with a tree switch.[115] The injuries were severe.[116] Peterson initially attempted to justify his actions by stating that his discipline had not gone overboard.[117] However, he later pled no contest to misdemeanor reckless assault.[118] Peterson was sentenced to probation, community service, and a fine.[119] The NFL initially suspended Peterson for nine weeks.[120] However, the suspension was later extended to the remainder of the season without pay. The Peterson case, which came on the heels of the Rice incident, sparked discussions of racial bias. However, there did not appear to be a race-based consensus about the case, or anything approaching a Black protectionist response toward Peterson. In fact, some African Americans used the case to discuss and criticize the disproportionate use of corporal punishment in the African American community.[121]

D. Jameis Winston

In 2012, Jameis Winston, a star football player at Florida State University ("FSU"), was accused of rape by Erica Kinsman, another

115. Eric Prisbell & Brent Schrotenboer, *Adrian Peterson Avoids Jail Time in Child Abuse Case*, USA TODAY (Nov. 4, 2014, 8:46 PM), http://www.usatoday.com/story/sports/nfl/vikings/2014/11/04/adrian-peterson-minnesota-vikings-child-abuse-plea-deal-misdemeanor/18466197/.

116. *Id.*

117. Sam Galanis, *Report: Adrian Peterson Told Cops He Beat 4-Year-Old Son With Tree Branch*, NESN (Sept. 12, 2014), http://nesn.com/2014/09/adrian-peterson-beat-visibly-injured-4-year-old-son-with-tree-branch/.

118. Lynn Zinser, *Adrian Peterson Agrees to Plea Deal in Child-Abuse Case*, N.Y. TIMES (Nov. 4, 2014), http://www.nytimes.com/2014/11/05/sports/football/vikings-adrian-peterson-reaches-plea-deal-in-child-abuse-case.html?mtrref=www.google.com&gwh=B9216E3CB978FDE1EE94AB86D99B83C8&gwt=pay&assetType=nyt_now.

119. *Id.*

120. Peter King, *Peterson's Punishment*, SPORTS ILLUSTRATED (Nov. 18, 2014), http://mmqb.si.com/2014/11/18/adrian-peterson-suspension-appeal-roger-goodell.

121. *See, e.g.*, Mychel Denzel Smith, *Sparing the Rod Won't Spoil the Racism*, THE NATION (Sept. 19, 2014), https://www.thenation.com/article/sparing-rod-wont-spoil-racism/; Khadijah Costley White, *Adrian Peterson Is Not a Racial Sy*mbol, ATLANTIC (Sept. 15, 2014), http://www.theatlantic.com/entertainment/archive/2014/09/adrian-peterson-is-not-a-symbol/380199/.

FSU student.[122] Winston denied the charges.[123] Some months later, following an investigation by the *New York Times*, it was revealed that another female student had previously accused Winston of rape and the University had put forth little effort to examine her claims.[124] Kinsman's lawsuit against FSU was settled for $950,000.[125] Winston, however, was never formally charged with sexual assault.[126] In fact, he was cleared of sexual misconduct or endangerment in a FSU code of conduct hearing.[127] Winston went on to win the Heisman trophy in 2013 and was the first pick in the 2014 NFL draft.[128] There did not appear to be a marked racial divide in public support or scorn for Winston.[129] A 2014 poll found that Blacks had a more favorable opinion of Winston than Whites. However, the same percentage of Blacks and Whites—nineteen percent—said they had an unfavorable opinion of Winston.[130] The majority said they were "not sure."[131] It is possible that Winston might have received a Black protectionist response if he had been formally charged with a crime. It is also possible that some of Winston's public actions, following the rape allegations, eroded what little support he had. One of these actions involves Winston walking out of a grocery store without paying for thirty-two dollars worth of crab legs.[132] Some months later, a video surfaced

122. Rachel Axon, *Florida State Agrees to Pay Winston Accuser $950,000 to Settle Suit*, USA TODAY (Jan. 25, 2016, 6:29 PM), http://www.usatoday.com/story/sports/ncaaf/2016/01/25/florida-state-settles-title-ix-lawsuit-erica-kinsman-jameis-winston/79299304/.

123. *Id.*

124. Walt Bogdanich, *A Star Player Accused, and a Flawed Rape Investigation*, N.Y. TIMES (Apr. 16, 2014), http://www.nytimes.com/interactive/2014/04/16/sports/errors-in-inquiry-on-rape-allegations-against-fsu-jameis-winston.html?_r=0.

125. Axon, *supra* note 122.

126. Tom Spousta, *Jameis Winston Is Cleared in Hearing Over Student's Rape Accusation*, N.Y. TIMES (Dec. 21, 2014), http://www.nytimes.com/2014/12/22/sports/ncaafootball/jameis-winston-is-cleared-in-florida-state-hearing.html?_r=0.

127. *Id.*

128. Dan Hanzus, *Jameis Winston Selected by Buccaneers at No. 1*, NFL.COM (May 1, 2015, 3:11 AM), http://www.nfl.com/news/story/0ap3000000489140/article/jameis-winston-selected-by-buccaneers-at-no-1.

129. *See, e.g.*, J.P. Scott, *Why I'll Root for Florida State and Jameis Winston*, FANSIDED, http://fansided.com/2014/12/31/ill-root-florida-state-jameis-winston/ (last visited Oct. 26, 2016); *Florida State's Jameis Winston Has Lost The Support of His Alabama Hometown*, POSTGAME (Sept. 30, 2014), http://www.thepostgame.com/blog/dish/201409/jameis-winston-has-disgraced-his-hometown.

130. PUBLIC POLICY POLLING, BUSH LEADS REPUBLICANS, NECK AND NECK WITH CLINTON, (2014), http://www.publicpolicypolling.com/pdf/2014/PPP_Release_FL_611.pdf.

131. *Id.*

132. This incident took place in 2014. Winston stated that when he went to pick up the crab legs from the supermarket, the employee told him he could have them for free. Winston said the employee told him whenever he came into the grocery store, he would not have to pay. He received a civil citation for shoplifting. Will Hobson, *Jameis Winston Has New Explanation for*

showing Winston dancing atop a table singing loudly, using curse words and crude, sexually vulgar language.[133]

E. Chris Brown (& Rihanna)

In 2009, the singer Chris Brown was accused of beating up his then-girlfriend, Rihanna, a pop singer.[134] The incident might have languished in the "She said/He said" pile, had there not been a photo of Rihanna after the assault. In fact, prior to the release of police photographs, there was widespread speculation that Rihanna initiated the fight with Brown and was somehow at least partially responsible for the incident.[135] When the allegations of assault initially surfaced, Brown drew widespread support from African Americans. Some noted that Brown was raised in a household with domestic abuse.[136] However, early support for Brown largely declined once the photos were widely circulated. In the pictures, Rihanna had bruised, swollen lips and bruises and cuts on her cheeks, forehead, chin, and nose. Following the release of the photos, the prevailing public sentiment was that domestic violence is a serious crime and that Brown should receive a prison sentence for his actions.[137] Some expressed the view that Brown should be held accountable, but that his sentence should take account of his age and family circumstances. After pleading guilty to felony assault, Brown was sentenced to five years of proba-

Crab Legs Theft That Could Cause Problems for Florida State, WASH. POST (Apr. 22, 2015), https://www.washingtonpost.com/news/sports/wp/2015/04/22/jameis-winston-has-new-explanation-for-crab-legs-theft-that-could-cause-problems-for-florida-state/.

133. *See, e.g.*, Bill Hanstock, *Jameis Winston Stood on a Table at FSU and Yelled 'F—k Her Right in the P—-y'*, SB NATION (Sept. 16, 2014, 4:47 PM), http://www.sbnation.com/lookit/2014/9/16/6252613/jameis-winston-stood-on-a-table-at-fsu-and-yelled-f-k-her-right-in.

134. George Rush & Nancy Dillon, *Rihanna & Chris Brown Fight Started Over Text Message From Other Woman*, N.Y. DAILY NEWS (Feb. 11, 2009, 8:55 AM), http://www.nydailynews.com/entertainment/gossip/rihanna-chris-brown-fight-started-text-message-woman-article-1.369542.

135. *Id*.

136. *See* Gil Kaufman, *Chris Brown Haunted by Family's History of Domestic Violence*, MTV (Oct. 10, 2009), http://www.mtv.com/news/1604730/chris-brown-haunted-by-familys-history-of-domestic-violence/.

137. *But see* Daniel Nasaw, *Survey: Half of Boston Teens Blame Rihanna for Chris Brown Beating*, THE GUARDIAN (Mar. 16, 2009), https://www.theguardian.com/world/deadlineusa/2009/mar/16/rihanna-usa. (noting the Boston Health Commission surveyed two hundred teenagers in 2009 following allegations of assault against Brown. Survey found that forty-six percent said Rihanna was responsible for the incident (compared with fifty-one percent who said Chris Brown was responsible). Fifty-two percent said that both Brown and Rihanna were responsible. A significant number of males and females surveyed said that Rihanna was destroying Brown's career).

tion and 1,400 hours of community service.[138] It is noted that Chris Brown's case was an atypical one given that both the alleged offender and victim were high-profile members of the Black community. The case exposed a gender-based fissure in the application of Black protectionism—who gets it when the offender and victim are Black?[139]

F. Michael Vick

In 2007, NFL quarterback Michael Vick was indicted on federal charges related to dog fighting.[140] Vick's illegal dog fighting business, "Bad Newz Kennels," led to the abuse, starvation, and death of many dogs.[141] Vick pled guilty to the felony of sponsoring a dogfighting ring.[142] He was sentenced to twenty-three months in federal prison and fined almost one million dollars in restitution.[143] Following his guilty plea, Vick received a two-year suspension from the League.[144] He was widely criticized and scorned as a heinous animal abuser. There were also those who argued that Vick was being used as a racial scapegoat.[145] Polls taken at the time showed that there was a significant racial gap in public opinion, with Blacks much more likely to support Vick than Whites, fifty-one percent compared with twelve percent.[146] The fact that Vick's case took place in an earlier period

138. Deneen L. Brown & Ashley Surdin, *Chris Brown Pleads Guilty to Assault*, WASH. POST (June 23, 2009), http://www.washingtonpost.com/wp-dyn/content/article/2009/06/22/AR2009062200452.html.

139. *See* RUSSELL-BROWN, PROTECTING OUR OWN, *supra* note 9, at 99–01, 125–27.

140. Indictment at 1–2, United States v. Peace, Crim. No. 3:07CR (E.D. Va. July 17, 2007), http://aldf.org/downloads/vick_federal_indictment.pdf (noting the charges under 18 U.S.C. § 371, included conspiracy to travel in interstate commerce in aid of unlawful activities and to sponsor a dog in an animal fighting venture).

141. Meleva Steiert, *Does Michael Vick Deserve Forgiveness? Where Do NFL Fans Draw the Line?,* DOGTIME.COM, http://dogtime.com/trending/28239-michael-vick-deserve-forgiveness-nfl-fans-draw-line (last visited Oct. 26, 2016).

142. *Id.*

143. *Id.*

144. *Id.*

145. *See, e.g.*, Melissa Harris-Perry, *Michael Vick, Racial History and Animal Rights,* THE NATION (Dec. 30, 2010), https://www.thenation.com/article/michael-vick-racial-history-and-animal-rights/; Kathy Rudy, *Michael Vick, Dog Fighting and Race,* DUKE TODAY (Aug. 29, 2007), https://today.duke.edu/2007/08/vick_oped.html (discussing the role that race played in the public prosecution of Michael Vick and the dog fighting scandal); Toure, *What if Michael Vick Were White?*, ESPN MAGAZINE (Aug. 25, 2011), http://espn.go.com/espn/commentary/story/_/id/6894586/imagining-michael-vick-white-quarterback-nfl-espn-magazine.

146. A Pew Research Center Poll taken on Aug. 28, 2007, found that 51% of Blacks thought the coverage of Vick's case was "unfair" compared with 12% of Whites. *Michael Vick Case Draws Large Audience*, PEW RES. CTR (Aug. 28, 2007), http://www.people-press.org/2007/08/28/michael-vick-case-draws-large-audience/; *see also* Majorie Connelly, *Celebrity Seen as Factor Regarding Vick, Poll Finds*, N.Y. TIMES (Aug. 14, 2007), http://www.nytimes.com/2007/08/14/sports/

(prior to the explosion in social media) may partly explain the majority support he received from African Americans.

The next section analyzes these six contemporary cases as a group. This focus allows for a consideration of whether and how Black protectionism has evolved. As important, the discussion evaluates what these changes signal regarding who is eligible for Black protectionism and who is not.

G. Analysis and Application of Black Protectionism in Contemporary Cases

The above discussion highlights six of the more recent cases involving a high-profile African American accused of wrongdoing. Each of these cases was ripe for an application of Black protectionism based on how it had been used in prior incidents. Black protectionism, however, was not centrally tied to any of these cases in the same way that it has been in earlier cases. This leads to two key observations about these recent cases.

The first is that in each case, the focus of discussion centered on the fifth trigger question.[147] This question asks, "Do Whites accused of the same offense receive the same scrutiny and treatment?" In each instance, the question was asked whether the same scrutiny and public desire for punishment would have been on display had the person been White. In the contemporary cases, this question seems to have replaced or been used as a stand in for the full embrace of Black protectionism. For instance, the sentiment in the Vick case appeared to be, yes Vick's actions were wrong, but the amount of public criticism and punishment he received is out of balance with similarly situated Whites.[148]

The argument that these cases generated excessive media attention appears well-founded. In each of these incidents, the famous Black person morphed into public enemy number one for their offense. For instance, Bill Cosby has arguably come to symbolize the worst sexual predator in U.S. history. Likewise, the media intensity and reportage in Vick's case could lead one to conclude that he was

football/14vick.html?_r=0; Lindsay Goldwert, *Michael Vick in Black and White*, CBS NEWS (Aug. 30, 2007), http://www.cbsnews.com/news/michael-vick-in-black-and-white/.

147. *See supra* Part III.

148. Note that this approach is in stark contrast to an approach that says that if the answers to the trigger questions are yes, then Black protectionism is in effect. For further discussion, see *infra* Part III.H.

the country's most notorious animal abuser. Additionally, while there have been other incidents involving celebrities and domestic violence, Ray Rice and Chris Brown arguably become the notorious national representatives of celebrities and domestic assault.[149] In fact, it is difficult, if not impossible, to come up with the name of White, well-known celebrities who received the same level of intense scrutiny and public demands that they be held criminally responsible for sexual assault offenses.

The case of actor Johnny Depp allows for a race-based comparison. In 2016, there were allegations that Depp had committed numerous assaults against his wife, Amber Heard. The story received national press.[150] However, public interest and media attention did not rise to the same level as the Rice incident. Perhaps this was because Depp was not starring in a movie or TV show at the time of the accusations. However, this is odd considering that Depp is an internationally-known film star, while Rice, prior to the incident, was relatively unknown outside of football. Further, in both incidents, there was documented evidence of abuse.[151] At core, this concern (fifth trigger question) is about the existence of a racial double standard in the media, public reaction,[152] and the punishment meted out in the justice system.

The sexual assault charges against Roger Ailes, the founder and former chairman and CEO of Fox News, offer another example. Ailes who is White, was forced to resign in 2016 after former news anchor Gretchen Carlson filed a complaint alleging sexual assault charges against him.[153] Within weeks, twenty-five other women reported that Ailes had also sexually harassed them.[154] This story was widely re-

149. *See, e.g.*, Gerrick D. Kennedy, *When Will We Stop Punishing Chris Brown for His Past?*, L.A. TIMES, (Dec. 3, 2015), http://www.latimes.com/entertainment/music/posts/la-et-ms-daily-show-chris-brown-australia-20151202-story.html.

150. *See, e.g.*, Samantha Miller, *Johnny Depp & Amber Heard, Inside Their Toxic Marriage*, PEOPLE (June 1, 2016, 6:30 AM), http://www.people.com/article/amber-heard-new-photos-alleged-abuse-johnny-depp. Other celebrities as well have been in domestic violence incidents, including Tommy Lee and Ozzy Osbourne.

151. *Id.*

152. One measure of the impact of media coverage is the "Q" rating. This rating determines how popular public figures are viewed by the American public. As well, Forbes lists the "most disliked athletes." In 2010, Michael Vick was included on this list (which included five other Black athletes in the top 10). *See, e.g.*, OUT OF BOUNDS: RACISM AND THE BLACK ATHLETE (LORI LATRICE MARTIN 2014).

153. Complaint, Carlson v. Ailes, No. L-005016-16, (N.J. Super. Ct. Law Div. July, 6 2016).

154. *See, e.g.*, Paul Farhi, Scott Higham, Mauel Roig-Franzia, & Krissah Thompson, *The Fall of Roger Ailes: He Made Fox News His 'Locker Room'—And Now Women Are Telling Their Stories*, WASH. POST (July 22, 2016), https://www.washingtonpost.com/lifestyle/style/the-fall-of-

ported. However, the story did not pique the public's interest to the same degree as the stories involving Bill Cosby, Ray Rice, and Chris Brown. This is particularly concerning given that Ailes faced over two dozen allegations, including one woman who claimed that Ailes subjected her to twenty years of psychological abuse and blackmail.[155] Also, under his leadership, Fox News positioned itself as staunchly promoting family values and reporting the news in a balanced and fair manner. The reactions to the Depp and Ailes cases lend credence to the concern that cases involving allegations against African Americans may face greater public interest and thus greater public scrutiny than cases involving allegations against Whites.

The second observation about these contemporary cases is linked to the first one. That is, the Black community's relatively muted reaction to the six contemporary cases suggests a shift in the use of Black protectionism. None of these six cases resulted in the typical groundswell of Black protectionism. They did not receive a response from the Black community that is comparable to the racialized reactions of previous incidents involving African Americans accused of wrongdoing (e.g., O.J. Simpson, Mike Tyson, or Marion Barry). Based on these recent cases, it appears that the African American community is engaging in a more thoughtful and nuanced analysis than it did in previous cases involving high-profile community members.

The actions of Bill Cosby, Ray Rice, Adrian Peterson, Jameis Winston, Chris Brown, and Michael Vick landed them in the cross hairs of the law and the media. However, their cases were treated differently by the African American community than previous comparable cases. In this group, two of the cases were closest to reflecting a standard use of Black protectionism—Michael Vick and Chris Brown. Notably, these were the two earliest cases. That said, none of the six men was treated as a grand symbol or larger-than-life representation of the Black community. The Black community's response in these cases begs the question: Is there a new paradigm for Black protectionism?

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roger-ailes-he-made-fox-his-locker-room—and-now-women-are-telling-their-stories/2016/07/22/5eff9024-5014-11e6-aa14-e0c1087f7583_story.html.

155. Gabriel Sherman, *Former Fox News Booker Says She Was Sexually Harassed and 'Psychologically Tortured' by Roger Ailes for More Than 20 Years*, N.Y. MAG. (July 29, 2016), http://nymag.com/thecut/2016/07/fmr-fox-booker-harassed-by-ailes-for-20-years.html.

H. Critical Black Protectionism as the New Paradigm for Black Protectionism

Critical Black Protectionism is the name given to the new and different approach to utilizing and applying black protectionism. It shares some features and has goals in common with critical race theory.[156] Specifically, Critical Black Protectionism is designed to spotlight racial injustice perpetuated through the court system and to empower the African American community in the fight for racial justice. Critical Black Protectionism both expands and constricts the application of Black protectionism. It makes protectionism available to a larger group of people (alleged offenders *and* victims) and it rejects a blanket protection of all high-profile African Americans. Critical Black Protectionism alters both the operational process for Black protectionism and the trigger questions. Table 2 and Table 3 detail these shifts by comparing standard Black protectionism with Critical Black Protectionism.

Table 2
Eligibility: Comparing Standard Black Protectionism and Critical Black Protectionism

Standard Black Protectionism[157]	Critical Black Protectionism
1. An allegation of wrongdoing	1. An allegation of wrongdoing or victimization
2. By a mainstream agent (state representative or political spokesperson)	2. By or against someone Black
3. Against someone Black who has a national reputation or credibility as a racial spokesperson	3. By a mainstream agent

Table 2 shows that the application of Critical Black Protectionism has a broader reach than standard Black protectionism. Critical Black Protectionism expands the eligibility for protectionism in two ways. One, it allows protectionism to be applied to people who are not high-profile African Americans, such as local community leaders (criteria 2: "by or against someone Black"). Two, it allows African Americans

156. *See generally* CRITICAL RACE THEORY: THE KEY WRITINGS THAT FORMED THE MOVEMENT (Kimberle Crenshaw, Neil Gotanda, Gary Peller, Kendall Thomas eds., 1996) (explaining critical race theory and its place in modern society).

157. *See supra* Part II.

who have been victimized by the justice system to receive Black protectionism (criteria 1: "allegation of wrongdoing or victimization"). Examples include Rodney King and Trayvon Martin who are widely perceived to be victims of excessive force (by police or others). This shift in focus also results in a change to the trigger questions, as indicated by Table 3 below:

Table 3[158]
Trigger Questions for Critical Black Protectionism

Did he commit the offense?
Even if he did, was he set up?
Would he risk everything he has (wealth, fame, material possessions) to commit an offense?
Is he the only person who has committed this offense?
Do Whites accused of the same offense receive the same scrutiny and treatment?
Is this[159] accusation part of a government conspiracy to destroy the Black race?
If the person is well known, has he done anything for the Black community (e.g., philanthropy, community service, been outspoken on community issues, expressed pride in being Black)?
Is it in the Black community's best interest to support this person?

As the additional questions indicate, Critical Black Protectionism requires a more thoughtful and involved analysis than standard Black protectionism. Under this new formulation, community members have to critique the use of protectionism. Notably, in this new scheme, all Blacks can use protectionism and all Blacks may in some instances be eligible for it. They have to assess not only what the allegations signal in terms of the historical tension between Blacks and the justice system, but also to consider the individual person under the public microscope and his/her history with the Black community. The final trigger question asks group members to make a broad assessment of the impact of applying Black protectionism in the particular case. Specifically, they are asked to decide whether applying protectionism in a single case will signal progress or regression for the Black

158. Questions 6 & 7 are additions to the list of Trigger Questions. *See supra* Table 1.

159. Note that Trigger Questions 1-6 are the same as those listed in Table 1. *See supra* Table 1. These six comprise the Trigger questions for "standard" Black protectionism.

community. This question is the most important one, because it acts as a mandate—requiring that the application of Black protectionism provide an overall community benefit.

Critical Black Protectionism reflects a seismic shift in the operation of Black protectionism. A look at the Black community's response to several recent cases involving an allegation against a high-profile African American suggests that a different review process is in place. As detailed above, other factors appear to be included in the evaluation process, including whether the community as a whole will benefit from the exercise of protectionism. More specifically, the new calculation involves determining whether it will be a good use of the community's racial capital to apply Black protectionism in a particular case. Further, the new protectionism expands eligibility to Blacks who have been victims of state violence. The next Part examines this reworking of Black protectionism. It considers the reasons for the changes and how the rise in the Black Lives Matter movement and social media impact the paradigm shift.

IV. THE IMPACT OF THE BLACK LIVES MATTER MOVEMENT AND SOCIAL MEDIA ON BLACK PROTECTIONISM

The Black Lives Matter movement formed in response to the 2012 death of Trayvon Martin in Sanford, Florida.[160] However, the group gained national attention following the 2014 death of Michael Brown in Ferguson, Missouri.[161] In the weeks-long protests that followed Brown's killing by a Ferguson police officer, the group of young Black activists emerged as leaders in the call for police accountability.[162] Members of the group appeared across media outlets, including television, cable news interviews, and online videos. They were unabashed in their calls for racial justice.[163] In its "Who We Are" state-

160. *About the Black Lives Matter Network*, BLACK LIVES MATTER, http://blacklivesmatter.com/about/ (last visited Oct. 24, 2016).

161. Herbert Ruffin, *Black Lives Matter: The Growth of a New Social Justice Movement*, BLACKPAST.ORG, http://www.blackpast.org/perspectives/black-lives-matter-growth-new-social-justice-movement (last visited Aug. 23, 2016).

162. The founders are Patrisse Cullors, Opal Tometi, and Alicia Garza. *All #BlackLivesMatter: Learn More About Who We Are, Our Founders, and Our Guiding Principles*, BLACK LIVES MATTER, http://blacklivesmatter.com/who-we-are/ (last visited Oct. 24, 2016).

163. Some, however, trace the seeds of the group's development to an event that occurred nearly a decade earlier, Hurricane Katrina. Many were stirred to political action in the wake of the inadequate, negligent, and criminal responses to the hurricane, which resulted in thousands of deaths and placed thousands of others—mostly African Americans—in life-threatening cir-

ment, Black Lives Matter states that its focus is on addressing concerns of marginalized communities, particularly communities of color.[164] The group has chapters across the U.S. and countries around the world.[165]

Black Lives Matter focuses on the systemic ways that racism and privilege work to both encourage and erase state violence against members of marginalized groups, particularly African Americans.[166] Their efforts show how the application of ostensibly race-neutral laws and policies can serve to both obscure and enforce racially-discriminatory practices by the police. They do this by spotlighting the many cases involving police killings of African Americans. Beyond the Brown case, others that received national attention include Eric Garner, Tamir Rice, Samuel DuBose, Corey Jones, Bettie Jones, Laquan McDonald, Alton Sterling, and Philando Castile.

The actions of the Black Lives Matter movement have altered the traditional cycle of events that take place following an incident of po-

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cumstances. *See, e.g.*, Jamelle Bouie, *Black Lives Matter Began When New Orleans' Levees Failed*, MOTHER JONES (Aug. 28, 2015), http://www.motherjones.com/environment/2015/08/black-lives-matter-katrina; Katheryn Russell-Brown, *While Visions of Deviance Danced in Their Heads*, *in* BLACK INTELLECTUALS EXPLORE THE MEANING OF HURRICANE KATRINA (D. Troutt, ed., 2006).

164. The website states:

> #Black Lives Matter is a unique contribution that goes beyond the extrajudicial killings of Black people by police and vigilantes. It goes beyond the narrow nationalism that can be prevalent within Black communities, which merely call on Black people to love Black, live Black and buy Black, keeping straight cis Black men in the front of the movement while our sisters, queer and trans and disabled folk take up roles in the background or not at all. Black Lives Matter affirms the lives of Black queer and trans folks, disabled folks, black-undocumented folks, folks with records, women and all Black lives along the gender spectrum. It centers those that have been marginalized within Black liberation movements.

About the Black Lives Matter Network, *supra* note 161.

165. *See, e.g.*, Sewell Chan, *Black Lives Matter Activists Protest Across Britain*, N.Y. TIMES (Aug. 5, 2016), http://www.nytimes.com/2016/08/06/world/europe/black-lives-matter-demonstrations-britain.html?_r=0.

166. *See, e.g.*, ANGELA J. DAVIS, ARBITRARY JUSTICE: THE POWER OF THE AMERICAN PROSECUTOR (2007) (giving a detailed, incisive discussion of the role of prosecutor); U.S. DEP'T OF JUSTICE, THE FERGUSON REPORT (2015), https://www.justice.gov/sites/default/files/opa/press-releases/attachments/2015/03/04/ferguson_police_department_report.pdf. In its discussion of the relationship between police, courts and the municipality, the Report concludes:

> Ferguson's law enforcement practices are shaped by the City's focus on revenue rather than by public safety needs. This emphasis on revenue has compromised in the institutional character of Ferguson's police department, contributing to a pattern of unconstitutional policing, and has also shaped its municipal court, leading to procedures that raise due process concerns and inflict unnecessary harm on members of the Ferguson community.

Id. at 2. *See generally* NICOLE GONZALEZ VAN CLEVE, CROOK COUNTY: RACISM AND INJUSTICE IN AMERICA'S LARGEST CRIMINAL COURT (2016) (uncovering, through a ten-year study, an acute systemic racialized justice process and outcomes in the Cook County court system).

lice violence.[167] Their calls for protest marches and rallies across the country, combined with video posts, tweets, public statements, and media interviews, have elevated the public status of Black victims of police abuse.[168] Black Lives Matter challenges and refutes attempts to criminalize Black crime victims. For instance, they reject focusing on a victim's background to explain (or justify) a police assault. Following these incidents, the media typically presents a portrait of the victim and assesses whether the person is a "good victim" or a "bad victim."[169] Black Lives Matter seeks to re-center the public's focus on the actions of the police and the government—keeping the emphasis on state action, and not on whether the person was a model victim (e.g. whether the person had a clean record or graduated from college). With this background in mind, the next part considers the evolving paradigm of Black protectionism and the impact of Black Lives Matter and social media.

A. The Shift from Standard Black Protectionism to Critical Black Protectionism

Four key factors have converged to result in a new operating model for Black protectionism. The first is the rise of the Black Lives Matter movement. This movement has been seminal to reframing Black protectionism. It uses a historically-based group narrative to situate and discuss the contemporary conditions of Blacks (and others) in U.S. society. The movement and its narrative are squarely focused on people of color who have been victims of state violence. As well, it has clear, identifiable goals, including the end of state violence against marginalized groups, particularly African Americans.

167. *See, e.g.*, KATHERYN RUSSELL-BROWN, UNDERGROUND CODES: RACE, CRIME AND RELATED MATTERS (2004) (referring to this as the "Roundabout" or the "Police Brutality Dance." The six steps include (1) an incident of police violence; (2) expressions of outrage by minority community members; (3) state officials label incident as an aberration; (4) Attempts are made to portray the victims as bad or flawed; (5) community protests; and (6) no criminal charges are issued or if charges, no conviction) [hereinafter RUSSELL-BROWN, UNDERGROUND CODES].

168. *See* Devon Carbado, *Blue-on Black Violence: A Provisional Model of Some of the Causes*, 104 GEO. L.J. 1479, 1482 (2016). Carbado uses the term "blue-on black violence" not only to describe police assaults on Blacks, but also to place these assaults on the same level of importance as discussions of "Black-on-Black crime." In giving this practice a label, Carbado discusses it as a structural phenomenon not dismissible as the work of "rogue police officers who harbor racial animus against Black people." See also Janine Young Kim, *Racial Emotions and the Feeling of Equality*, 87 U. COLO. L. REV. 437, 482 (2016), for discussion of emotional meaning behind "Black Lives Matter." (noting Black Lives Matter is a "contemporary example of racial grief . . . which can be viewed as a protest not only against police violence but also emotional rules that hold that black lives are "fundamentally ungrievable.") (citation omitted).

169. RUSSELL-BROWN, UNDERGROUND CODES, *supra* note 167, at 60–62.

This is a goal that African Americans as a group can rally around and one that addresses all group members, not just an elite few. African Americans have expressed strong support for the Black Lives Matter movement. A 2016 survey reported that 41% of Blacks expressed strong support for the group, compared with 14% of Whites and 15% of Hispanics.[170]

Second, at the national level there has been a renewed and revised focus on the victims of violence. This shift is most pointedly demonstrated in the responses to the allegations against Bill Cosby. Across race, the criminal claims against Cosby prompted serious consideration and reflection. As explicated in Table 2 and Table 3 above, Blacks now weigh a different set of factors to determine whether to support a fallen high-profile member of the race. In a prior era, Cosby would have been guaranteed Black protectionism.[171] The result is that today African Americans are more willing to criticize well-known members and are less likely to offer a knee-jerk defense to an African American in trouble with the law simply because the person is African American. Given this shift, it is very likely that, were O.J. Simpson charged with double murder today, he would not receive much support from the African American community. In fact, it is likely that there would be loud voices within (and outside) the Black community that would be harshly critical of Simpson. This would be the case given the previous allegations of domestic abuse and Simpson's strained relationship with the Black community.

The third factor has been the rapid rise and broad impact of social media. In prior decades, spokespersons for the African American community were almost always Black men involved in civil rights activism. The list includes Jesse Jackson, Al Sharpton, Ben Chavis, John Lewis, Julian Bond, Malcolm X, and Martin Luther King, Jr. The rise of social media has made it easier for those who are not recognized spokespersons and those with non-mainstream views, to weigh in and be heard on race-related matters. The presence of social media may

170. Juliana M. Horowitz & Gretchen Livingston, *How Americans View the Black Lives Matter Movement*, PEW RES. CTR. (July 8, 2016), http://www.pewresearch.org/fact-tank/2016/07/08/how-americans-view-the-black-lives-matter-movement/.

171. Cosby was the recipient of Black protectionism when, in 1997, he faced charges that he was the father of a child born outside his marriage. The case involved Autumn Jackson, who along with her boyfriend, attempted to extort money from Cosby to keep the secret. Cosby, who was widely-revered as the epitome of an upstanding family man, admitted that he had been unfaithful to his wife. *See, e.g., Cosby and Wife Resolved His Affair Long Ago, She Says*, CHI. TRIB. (Jan. 28, 1997), http://articles.chicagotribune.com/1997-01-28/news/9701290339_1_ennis-cosby-jose-medina-camille-cosby.

partly explain the increasingly critical approach of Black protectionism. With social media, the voices and varied viewpoints of Black women[172] and young activists in particular, have become more audible.

Today, Facebook, Twitter, Instagram, and other technological applications, make it possible for anyone to write and share an opinion—popular or marginal. Anyone can be a citizen journalist. This also means that anyone can be a target of scorn (or adulation) by the online masses. This new reality has an upside in terms of our ability to "hear" and confront other community voices. Thus, voices that would have been silenced or quelled prior to the rise of social media may now receive an audience comparable to the audience received by mainstream voices. In this way, social media has helped to create a more democratized space for critiquing issues of the day.

For instance, when boxer Mike Tyson was accused of rape in 1992,[173] the voices for the standard application of Black protectionism (*see* Table 2) were loud enough to drown out voices that were critical of Tyson. Some commentators attributed this to a historical mix of racism and sexism.[174] As discussed earlier, the responses Tyson received contrast greatly with the public's response to the sexual assault allegations against Bill Cosby. Social media has allowed dissenting voices—ones that disagree with the standard applications of Black protectionism—to be heard. In particular, social media has enabled victims of crime to speak directly to the public. This has led to a notable shift in public interest in, and understanding of, victims' experiences. In turn, the shift in focus to victims has made it harder for

172. *Invisible Man, Got the Whole World Watching* (CSPAN television broadcast June 21, 2016), https://www.c-span.org/video/?411497-1/mychal-smith-discusses-invisible-man-got-whole-world-watching. In the discussion and in his book, Smith acknowledges the presence and impact of Black women's voices in social media, including Black Twitter.

173. *In Short: Boxing, Tyson Accused of Rape*, N.Y. TIMES (July 27, 1991), http://www.nytimes.com/1991/07/27/sports/in-short-boxing-tyson-accused-of-rape.html.

174. *See, e.g.*, Darci Burell, *Myth, Stereotype, and the Rape of Black Women*, 4 UCLA WOMEN's L.J. 87–88 (1993) ("Rape is a difficult and complex issue in the African American community. The history of African Americans has inescapably linked racism and sexual assault for both women and men"); Allan Johnson, *Tyson Rape Case Strikes a Nerve Among Blacks*, CHI. TRIB. (Mar. 29, 1992), http://articles.chicagotribune.com/1992-03-29/news/9201280903_1_mike-tyson-rape-trial-miss-black-america-contest-relationship-between-black-men. The piece notes "Tyson had the support of thousands around the country, even after a jury convicted him of raping Desiree Washington." Referring to the divide between Black men and women in the Tyson rape case, sociologist, Bertice Berry notes: "A lot of what you're hearing is sexism. We live in a sexist society. In our attempt to be three times ahead of 'the Man,' we learn all the things we think are acceptable and necessary to assimilate and make it in this society." Further, Black women protecting Black men dates back to slavery, "in order to feed our children, in order to advance our race, in order to take care of our own, in order to make sure our husband is not put to death because of something we do. This is tradition." *Id.*

African Americans to stand stoically by their man.[175] Commenting on the impact of social media on perceptions of crime, Tamara Green, one of the women who alleged she was sexually assaulted by Bill Cosby stated, "In 2015 we have social media. We can't be disappeared. It's online and can never go away."[176]

Another important facet of social media is the nature of its content. It is sometimes graphic. For instance, people are able to use cell phones to take and post photographs and stream videos online that would not have previously made their way into newspapers or the mainstream media.[177] The aftermath of the shooting death of motorist Philando Castile, which was streamed live on Facebook, is a notable example.[178] Social media has brought arresting images of police violence to our televisions, cellphones, and laptops. After watching videos showing Eric Garner being choked to death by a New York police officer while saying "I can't breathe," Laquan McDonald being shot in the back by Chicago police officers,[179] or Walter Scott being shot in the back by a South Carolina police officer, Bill Cosby, Ray Rice, Mike Tyson, O.J. Simpson, and others may appear to be less worthy of and less in need of Black protectionism.

Fourth, there has been little tangible benefit to practicing Black protectionism as it has been used in earlier periods. There is no clear gain for the Black community in standing behind a high-profile community member accused of wrongdoing. This is particularly true given the low threshold for traditional Black protectionism, which allowed

175. An online discussion by Black sports commentators about Black protectionism offers some interesting and nuanced insights on how it works. The Marshall Faulk Show, *Black Protectionism Part 1*, DAILYMOTION (Dec. 13, 2011), http://www.dailymotion.com/video/xmxyr8_black-protectionism-part-1_sport (referring to Black protectionism, Faulk comments that it may lead to a "sacrificing of our value system to blindly support a person or thing based on our own kindred or race." Another comments, "sometimes it's not conscious, it's reflexive.").

176. Malone, *supra* note 98.

177. The impact of social media on the Arab Spring is well documented. *See, e.g.*, PHILIP HOWARD & MUZAMMIL HUSSAIN, DEMOCRACY'S FOURTH WAVE?: DIGITAL MEDIA AND THE ARAB SPRING (2013) (discussing the impact of social media on the Arab Spring). *See generally* Katheryn Russell-Brown, *Body Cameras, Police Violence and Racial Credibility*, 67 FLA. L. REV. FORUM 207 (2016) (discussing the rising use of cell phone cameras to document and capture police violence).

178. Seven Starks, *Philando Castile Full Video*, YOUTUBE (JULY 7, 2016), https://www.youtube.com/watch?v[gDs4n2Vco (providing the livestream video taken by Diamond Reynolds, fiancé of Philando Castile).

179. *See, e.g.*, Ben Austen, *Chicago After Laquan McDonald*, N.Y. TIMES (Apr. 20, 2016), http://www.nytimes.com/2016/04/24/magazine/chicago-after-laquan-mcdonald.html. In 2017, the Justice Department released a detailed and scathing report on the Chicago Police Department. U.S. DEP'T OF JUST., INVESTIGATION OF CHICAGO POLICE DEPARTMENT (2017), https://www.justice.gov/opa/file/925846/download.

well-known African Americans, regardless of whether they viewed themselves as Black (e.g., O.J. Simpson), to receive protectionism. However, Black protectionism in a time of Black Lives Matter requires that the community rally around those people who need the community's help and whose help will benefit the entire community. This requirement indirectly imposes a credibility check on the use of Black protectionism.

The issue of the Black community's credibility is an important factor in the reshaping of Black protectionism. The fact that Critical Black Protectionism offers a sparing and discerning use of Black protectionism may imbue it with an additional layer of credibility. In this way, it makes the application of protectionism internally consistent. That is, *within the African American community* it makes sense to protect other community members who need help and deny or refuse to lend the community's name to help members who have done little to support the community or whose actions should not be defended. Further, the Black community's assertions of harm may be easier to acknowledge (and harder to deny) given that the cases in the spotlight typically involve a violent physical assault and in numerous instances are accompanied by video evidence. In order for protectionism to be instrumental in pushing for changes in the criminal justice system, community members have to buy into the practice. The more the practice of protectionism benefits the entire community and not only select members—e.g., a single gender or celebrities only—the more community members will be willing to participate in the protectionism. The more community members participate, the louder the community's voice. By expanding the group eligible for protectionism, Critical Black Protectionism expands the community base of support who are willing to give protectionism.

The Black Lives Matter movement and the rise in social media have led to changes in how Black victims are perceived. It has sought to make Black victims more visible, to establish that they deserve empathy, and that they should receive the Black community's embrace to ensure justice. By focusing on incidents involving serious, often fatal police violence, Black Lives Matter has pushed African Americans and the public at large to question whether everyone deserves justice, or only a select few. Protecting the humanity of all members of society means that the community embrace should be available for the least of them—in particular, for those who are neither well-known nor elite. In this way, Critical Black Protectionism is a broadly embrace-

able form of social protest—a kind of civil rights action that all Blacks can engage in. This revised version of protectionism offers what Patricia Williams describes as a "political mechanism that can confront the *denial* of need."[180] At its best, Critical Black Protectionism acts as both a call to action and as a national history lesson of race and criminal justice. The next Part identifies two questions that are important to consider as Black protectionism shifts to Critical Black Protectionism.

V. OUTSTANDING QUESTIONS ABOUT CRITICAL BLACK PROTECTIONISM

A look at the contemporary cases of Black protectionism makes it clear that there has been a shift in how protectionism works today. As detailed above, the new iteration of Black protectionism—Critical Black Protectionism—has many positive features. This includes broadening the group of people who get protection. It also includes, making Black protectionism a more thoughtful exercise, not a knee-jerk reaction. These changes have been motivated by new social media platforms. However, there are some remaining questions about the practice of Critical Black Protectionism. Let us consider two issues.

The first question addresses the future of Critical Black Protectionism. Specifically, what is its likely trajectory? Will protectionism ever "end?" Based on how it has worked in the past and how it has evolved most recently, it is likely that Black protectionism will persist in some form. Until the political and social circumstances improve for African Americans as a group, protectionism will be a cultural mainstay. Black protectionism is a voice of dissent and protest against the status quo. A status quo that says that Blackness is something negative, something to be feared and something to be contained. The longevity of protectionism is also tied to another question.

The second and perhaps most important question focuses on the effectiveness of protectionism. That is, now that we have identified the shift in the group eligible for protectionism, what is the *impact* of this new approach to Black protectionism? With the use of standard Black protectionism, the apparent objective was to push back on the

180. PATRICIA WILLIAMS, THE ALCHEMY OF RACE AND RIGHTS: DIARY OF A LAW PROFESSOR 151–53 (1991). Williams analyzes how the discussion on "needs" versus "rights" has been racialized. *Id.*

claim that a well-known member of the Black community was engaged in wrongdoing (or that a specific Black person was being held to a higher standard than a similarly situated White person). Relatedly, Critical Black Protectionism asks for a critique of how Blacks in the criminal justice system are viewed—particularly Black victims.[181] The focus on police violence, led by Black Lives Matter, has expanded the public understanding and concern for Black crime victims. This is an important step forward.

The next step, however, is whether this change in focus will help lead to different criminal justice system outcomes. For instance, in the dozens of cases involving police killings,[182] murder charges are rare,[183] and there have been no cases in which an officer has been convicted of murder.[184] As well, homicide charges are rare. Even more striking is the fact that in most cases involving police shooting deaths, officers are neither charged with homicide,[185] nor when charged are they con-

181. Russell-Brown, *Black Protectionism, supra* note 9, at 58.

182. Two news outlets, the Washington Post and the Guardian, gather data on police shootings. *See generally* THE SENTENCING PROJECT, *supra* note 69 (reporting of a sentencing project to the United Nations Human Rights Committee regarding racial disparities in the criminal justice system). *See also The Counted: People Killed in the US, Recorded by The Guardian – with Your Help*, THE GUARDIAN, https://www.theguardian.com/us-news/series/counted-us-police-killings. In 2016, the U.S. Justice Department announced that it would begin collecting official data on police shootings and killings, beginning in 2017. As part of this effort, the Justice Department will implement a National Use of Force Data Collection program (and work with state, local and tribal law enforcement agencies. *Justice Department Outlines Plan to Enable Nationwide Collection of Use of Force Data*, U.S. DEP'T OF JUST. (Oct. 13, 2016), https://www.justice.gov/opa/pr/justice-department-outlines-plan-enable-nationwide-collection-use-force-data.

183. Walter Scott's case, however, was different. In this case, Scott was killed by police officer Michael Slager following a routine traffic stop for a broken tail light. The shooting, which took place in Charleston, South Carolina, was captured on video. Slager was charged with first degree murder and was also indicted on federal civil rights charges. Michael S. Schmidt & Matt Apuzzo, *South Carolina Officer Is Charged With Murder of Walter Scott*, N.Y. TIMES (Apr. 7, 2015), https://www.nytimes.com/2015/04/08/us/south-carolina-officer-is-charged-with-murder-in-black-mans-death.html.

184. It is rare for an officer to be convicted of a homicide offense. One of these cases involved New York police officer, Peter Liang. In 2016 he was convicted of criminally negligent homicide in the 2014 shooting death of Akai Gurley, an unarmed Black man. Liang received five years of probation for the crime. Alan Feuer, *Ex-New York Officer Gets 5 Years of Probation in Fatal Brooklyn Shooting*, N.Y. TIMES (Apr. 19, 2016), http://www.nytimes.com/2016/04/20/nyregion/peter-liang-ex-new-york-police-officer-sentenced-akai-gurley-shooting-death-brooklyn.html. In some of these cases, the victim's families have won civil suits, including the family of Amadou Diallo ($3 million wrongful death), the family of Eric Garner ($5.9 million), and the family of Walter Scott ($6.5 million). *See generally* Cynthia Lee, *'But I Thought He Had a Gun'-Race and Police Use of Deadly Force*, 2 HASTINGS RACE & POVERTY L.J. 1 (2004), (discussing how use of deadly force by police is perceived and considered justifiable within the justice system).

185. Recent examples include the cases of Michael Brown, Tamir Rice, and Eric Garner.

victed.[186] Thus, one obvious and important measure of whether Critical Black Protectionism is effective is whether police are held accountable for taking Black lives. And, as important, whether there is a reduction in the number of Black lives lost to police violence. As discussed above, Black protectionism developed as a communal necessity—it was the Black community's protective response to attacks against its most successful members. If Black community members, ones who had "made it" by society's standards, could be taken down, then the remainder of the community was at great risk for harm, too.

Whether Critical Black Protectionism will be a catalyst for greater accountability[187] and criminal responsibility for police officers (e.g., prison time) remains to be seen. In this way, Critical Black Protectionism is potentially a strategy for effective change in justice outcomes. It is a statement that Black lives matter. The effect of positive changes in how justice is meted out within and across the Black community is potentially profound. A change in how the justice system treats Black victims of police violence may lead the Black community to alter its attitude and perceptions of the criminal justice system, from its views on policing and more broadly, its faith in the law.

CONCLUSION

Over the last decade, the practice of Black protectionism has changed. Today, the Black community is less likely to make it available to well-known African Americans facing legal trouble. Instead, it

186. Examples include the four New York police officers who were charged with murder in the 1999 shooting death of Amadou Diallo, a Guinean immigrant. The officers were acquitted. In 2015, Freddie Gray died after being arrested and transported to the police station by Baltimore, Maryland, officers. As a result of the video and the type of injuries sustained by Gray, six officers were charged with felonies ranging from assault to murder. One of the officers, Caesar Goodson, was charged with second-degree murder. Three others were charged with involuntary manslaughter. None of the four officers was found criminally liable for any crimes in Gray's death. After three bench trials that resulted in acquittals for three of the officers, the prosecutor dropped the remaining three cases. *Freddie Gray Case Ends with No Convictions of Any Police Officers*, N.Y. TIMES (July 27, 2016), http://www.nytimes.com/interactive/2015/04/30/us/what-happened-freddie-gray-arrested-by-baltimore-police-department-map-timeline.html?_r=0.

187. Numerous police agencies have adopted programs to address concerns regarding implicit bias. In 2016, the U.S. Department of Justice announced that federal agents and prosecutors will participate in training to address unconscious bias. Julia Edwards, *Justice Dept. Mandates 'Implicit Bias' Training for Agents, Lawyers*, REUTERS (June 27, 2016), http://www.reuters.com/article/us-usa-justice-bias-exclusive-idUSKCN0ZD251; For an interesting argument regarding strategies to address racial bias by law enforcement (explicit and implicit), see Cynthia Lee (2016), *Race, Policing, and Lethal Force: Remedying Shooter Bias With Martial Arts Training*, 79 L. & CONT. PROB. 145 (arguing that police departments should require martial arts training for officers); see also Katheryn Russell-Brown, *Making Implicit Bias Explicit, in* POLICING THE BLACK MAN (Angela J. Davis, ed.) (forthcoming 2017).

is readily available for Black victims of crime,[188] particularly in cases involving police assaults. Black protectionism is no longer viewed as an automatic response by the Black community—a racial allegiance required by African Americans to "protect their own." The rise in social media has enabled alternative and dissenting voices to be heard. These new voices have upended the way that Black protectionism works. Specifically, that using and focusing Black protectionism on high-profile Blacks is ineffective because it ignores the majority of Black crime victims and it does not provide the community with a return benefit.

This new protectionism that has emerged is Critical Black Protectionism. It is a departure from the Black protectionism of old. The value of this new and measured form of Black protectionism is that it hews closest to raising awareness about the failings of the criminal justice system, including racial profiling, selective prosecution, and other race-related issues (e.g., victim blaming). Prior to these recent developments, Black protectionism was stuck in an interminable feedback loop, because the Black community appeared to speak with one voice. That voice protected and defended well-known Black men accused of crime, regardless of the circumstances. However, Critical Black Protections requires that the community engage in a more discerning two-part assessment. This includes an assessment of the circumstances of the allegation or charge. Also, if the person is well-known, this assessment includes a look at their connection with the Black community. It also requires an assessment of how and whether a community cloak of protection will benefit African Americans as a whole. This shift in thinking about how Black protectionism is distributed indicates that there has been a near 180-degree shift in who matters for purposes of Black protectionism.

The ascendance of Black Lives Matter combined with the growth and development of social media, has prompted the changes in Black protectionism. In effect, the Black Lives Matter movement may have helped to remove—or at least call into question the prior requirement that the person receiving it was a well-known member of the Black community (*see* Table 2 above) who had been accused of a crime. The new scheme encourages Black protectionism for both alleged offenders and victims of crime. It also alters the trigger questions (*see* Table

188. For instance, both Trayvon Martin and Jordan Davis were killed by private citizens, not police officers. In both instances, the victims (and their families) received Black protectionism.

3) by adding questions that provoke a consideration of whether an exercise of protectionism will embolden the Black community. In summary, the Black Lives Matter movement has focused the community's protective gaze on Black victims of state violence and away from elite individuals. Under this revised structure, Black protectionism is available for all African Americans, not just high-status Blacks.

Overall, the practice of Black protectionism has been used to subvert the dominant narrative. It rejects the long-standing link between Blackness and criminality. It also rejects mainstream society's questioning of African American humanity. As noted throughout this Article, the Black community's use of protectionism is a community resource, one that will work best when used in ways that benefit the community. In this way, Black protectionism can be used to gauge how African Americans perceive their place in society and in particular within the criminal justice system–to determine whether the law is friend or foe. Critical Black Protectionism requires that the community benefit from its racial embrace: "We have to know the difference between Trayvon Martin and Bill Cosby."[189] Indeed, the recent evolution from standard Black protectionism to Critical Black Protectionism is a hopeful sign of movement in the right direction.

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189. Mark Lamont Hill, *The Bill Cosby Scandal & 'Problematic' Black Protectionism*, HUFFINGTON POST (2015), http://www.ovguide.com/video/the-bill-cosby-scandal-problematic-black-protectionism-4750aca4fe1411e4a71f22000b09867e (quoting Ebony editor Jamilah Lemieux about the Black community's response to the rape allegations against Bill Cosby).

The Josiah Philips Attainder and the Institutional Structure of the American Revolution

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* Associate Professor, School of Law, University at Buffalo. Many people have helped to improve this study during its long period of gestation. For their comments at various stages, I want to thank Stuart Banner, Mary Sarah Bilder, Guyora Binder, Matthew Birkhold, Michael Boucai, Luis Chiesa, John Dehn, Ofer Dynes, Sam Erman, Jean Galbraith, Bob Gordon, Gwendolyn Gordon, Sally Gordon, Ariela Gross, Nicole Hallett, Dan Hulsebosch, Fred Konefsky, Celeste Langan, Jonathan Manes, John Mikhail, Sarah Nicolazzo, Tony O'Rourke, Nathan Perl-Rosenthal, Gabriel Rosenberg, Hilary Schor, Jack Schlegel, Justin Simard, Norm Spaulding, Clyde Spillenger, Rob Steinfeld, Rick Su, Martha Umphrey, Hannah Wells, Natasha Wheatley, and John Fabian Witt. I also want to thank the conveners of the 2016 Law and Humanities Junior Scholar Workshop for the opportunity to present the manuscript there.

ABSTRACT

This Article is a historical study of the Case of Josiah Philips. Philips led a gang of militant loyalists and escaped slaves in the Great Dismal Swamp of southeastern Virginia during the American Revolution. He was attainted of treason in 1778 by an act of the Virginia General Assembly, tried for robbery before a jury, convicted and executed. For many years, the Philips case was thought to be an early example of judicial review, based on a claim by St. George Tucker that judges had refused to enforce the act of attainder. Modern research has cast serious doubt on Tucker's claim. This Article draws on period sources to establish what we know about Philips' activities and to argue for the case's continuing importance. In particular, the Philips case is a rich illustration of wartime justice and the development of a doctrine of separation of powers. Edmund Randolph, Attorney General and then Governor of Virginia (and the first Attorney General of the United States), regarded Philips' fate as evidence of the danger of a legislative power to summarily convict for treason. Another Virginia Governor, Patrick Henry, thought such a power essential in a legislature and argued that Philips had received his due as a bandit under principles of international law. It was this suggestion that may have led St. George Tucker to describe Virginia judges as refusing to enforce the act, since there were difficult legal questions about Philips's status under international law. The Article explores these questions in some detail, and concludes by connecting them to broader changes in American understandings of legislative power and its relation to law.

INTRODUCTION

Josiah Philips was a bandit—a terrorist, we would say—who led a gang of militant loyalists and escaped slaves in the Great Dismal Swamp of Virginia during the American Revolution. In the summer of 1778, the Virginia General Assembly passed a bill attainting him of treason, drafted by none other than Thomas Jefferson.[1] Traditionally, a "bill of attainder" condemned someone to death for a widely-known

1. An act to attaint Josiah Philips and others, unless they render themselves to justice within a certain time, c.12, 9 THE STATUTES AT LARGE; BEING A COLLECTION OF ALL THE LAWS OF VIRGINIA, FROM THE FIRST SESSION OF THE LEGISLATURE IN THE YEAR 1619, at 463–64 (William Waller Hening ed., 1821) [hereinafter VA STATUTES AT LARGE]; *Bill to Attaint Josiah Philips and Others, in* 2 THE PAPERS OF THOMAS JEFFERSON 189–90 (Julian P. Boyd ed., 1950) [hereinafter *Bill to Attaint*].

treason in conditions where courts of law were incapable of reaching the offender.[2] Jefferson's bill contained a grace period, and Philips was captured before it ended, sparing him an immediate death sentence. Instead, he was indicted for robbery, tried before a jury, convicted and executed as a felon.[3]

In the years that followed, the case took on an air of mystery. The men involved (and some uninvolved) made a series of baffling and contradictory claims about just what had happened to Philips. In the opening days of the 1788 Virginia ratifying convention, where delegates debated a proposed federal Constitution, Edmund Randolph suggested that Philips had been executed pursuant to the act of attainder, despite the fact that Randolph *himself* had prosecuted Philips for robbery as the state's attorney general.[4] Patrick Henry conceded the claim, though he had been intimately involved in the Philips affair and must have known what had happened, and though his concession bolstered the case for ratifying a Constitution he bitterly opposed.[5] Some years after that, the eminent Virginia jurist, St. George Tucker, stated in his annotated edition of Blackstone's *Commentaries* that judges had refused to enforce the act of attainder, making the case one of the earliest instances of what we now call "judicial review."[6] But when, decades after *that*, Thomas Jefferson learned of the claims of Tucker, Randolph, and Henry, he angrily denied them all, asserting that Philips had been captured after the grace period, and that then-Attorney General Randolph had decided not to seek execution under the act.[7] Judge Tucker, he wrote misreported the case in an effort to compose a "diatribe" against bills of attainder.[8]

A dread of wandering into this morass, and a sense that someone has irretrievably contaminated the record by, well, *lying*, has led the

2. Matthew J. Steilen, *Bills of Attainder*, 53 HOUS. L. REV. 767, 890–94 (2016). Widely known crimes were said to be "notorious," and their prosecution could proceed on the basis of what commentators call "manifest proofs." JOHN M. COLLINS, MARTIAL LAW AND ENGLISH LAWS, C. 1500 – C. 1700, at 19, 21 (2016).

3. Jesse Turner, *A Phantom Precedent*, 48 AM. L. REV. 321, 322–23 (1914).

4. *See infra* Part II.A. On Attorney General Randolph's prosecution of Philips, see Trent, *infra* note 74, at 450–51.

5. *See infra* note 74.

6. 1 ST. GEORGE TUCKER, BLACKSTONE'S COMMENTARIES: WITH NOTES OF REFERENCE, TO THE CONSTITUTION AND LAWS, OF THE FEDERAL GOVERNMENT OF THE UNITED STATES, AND OF THE COMMONWEALTH OF VIRGINIA 293 (1803) [hereinafter TUCKER, BLACKSTONE'S COMMENTARIES].

7. *See infra* Part II.C.

8. *Letter from Thomas Jefferson to Louis H. Girardin (Mar. 12, 1815)*, *in* 8 THE PAPERS OF THOMAS JEFFERSON: RETIREMENT SERIES 337 (J. Jefferson Looney ed., 2011) [hereinafter *Girardin Letter*].

Case of Josiah Philips to lie dormant for some time.[9] This is a mistake. It is a rich and important case. It has much to tell us about the allocation of governmental authority during periods of armed conflict, or what we might call the "institutional structure" of conflict. Today the President and political leadership of the United States Armed Forces largely control the timing and terms of conflict, but this is usually thought to be an institutional structure that has emerged over time.[10] Indeed, the Philips case reveals a very different structure at work, and the controversy that followed the case reveals a range of opinions, on the eve of ratification and in the first decades afterwards, about just how to separate governmental powers during war.

Take these points one at a time. First, the Philips attainder illustrates how state legislatures and their committees exercised significant legal powers during the war, ordering arrests, mass removals, confiscations and even executions pursuant to summary proceedings they conducted. The bill of attainder was one such summary proceeding.[11] Its use reflects the view of some in the founding generation that the as-

9. Most of the important historical work on the case is now over 100 years old. *See* H. J. ECKENRODE, THE REVOLUTION IN VIRGINIA 66, 191–92 (1916); W. P. Trent, *The Case of Josiah Philips*, 1 AM. HIST. REV. 444 (1896); Turner, *supra* note 3, at 323. Hamilton Eckenrode was an archivist with the Virginia State Library and claimed to base his account on an examination of state records. I utilize Eckenrode's history below. Jesse Turner was a progressive historian, and his interest in the case grew from Judge Tucker's suggestion that it had involved judicial review. Another treatment of the case by a progressive constitutional historian is CHARLES GROVE HAINES, THE AMERICAN DOCTRINE OF JUDICIAL SUPREMACY 77–80 (1959), but Haines's work is essentially derivative. The only recent studies of the Philips attainder are LEONARD W. LEVY, ORIGINS OF THE BILL OF RIGHTS 72–77 (1999); 2 WILLIAM WINSLOW CROSSKEY, POLITICS AND THE CONSTITUTION IN THE HISTORY OF THE UNITED STATES 944, 945 (1953). Both Crosskey and Levy have axes to grind, however, and this limits the usefulness of their work. Crosskey is consumed with winnowing the list of early state-court 'precedents' for judicial review, and rather liberal with his accusations of mendacity; Levy's views are colored by a very palpable dislike of Jefferson. The Bill of Attainder Clauses and the Philips case are also discussed in Jay Wexler's light-hearted book, THE ODD CLAUSES: UNDERSTANDING THE CONSTITUTION THROUGH TEN OF ITS MOST CURIOUS PROVISIONS 157–76 (2011), an account influenced by Levy (minus the bile).

10. For recent work in this line, see BRUCE ACKERMAN, THE DECLINE AND FALL OF THE AMERICAN REPUBLIC 43–64 (2010); STEPHEN M. GRIFFIN, LONG WARS AND THE CONSTITUTION 17–18 (2013); SAIKRISHNA BANGALORE PRAKASH, IMPERIAL FROM THE BEGINNING: THE CONSTITUTION OF THE ORIGINAL EXECUTIVE 142–70 (2015); David J. Barron & Martin S. Lederman, *The Commander in Chief at Lowest Ebb—A Constitutional History*, 121 HARV. L. REV. 941, 946–49, 951–80 (2008) [hereinafter Barron & Lederman, *Commander in Chief*]; David J. Barron & Martin S. Lederman, *The Commander in Chief at Lowest Ebb—Framing the Problem, Doctrine, and Original Understanding*, 121 HARV. L. REV. 689, 712, 772–99 (2008); Mark E. Brandon, *War and the Constitutional Order*, *in* THE CONSTITUTION IN WARTIME: BEYOND ALARMISM AND COMPLACENCY 21–24 (Mark Tushnet ed., 2005); John C. Dehn, *The Commander-in-Chief and the Necessities of War: A Conceptual Framework*, 83 TEMP. L. REV. 599, 608–25 (2011).

11. Steilen, *supra* note 2, at 889–96.

sembly was the central repository of sovereignty in a republic and thus had critical legal functions in wartime. Bills of attainder are now banned by the Constitution, but Congress retains a power to constitute commissions and similar summary proceedings where armed conflict has frustrated the course of civil justice.[12] Modern accounts of legislative power tend to obscure the legal character of much that traditionally occurred in legislative bodies, as well as persistent disagreements about what the limits of 'legislative' power should be.[13] These disputes have continued well into the present age. Just last term, for example, the Supreme Court reaffirmed Congress' power to pass a bill that prescribed a rule "for a single, pending case" thought to implicate national security interests.[14] Philips's attainder reflects a set of background conventions against which such 'legislative' powers are intelligible.[15]

12. For the ban on bills of attainder, see U.S. CONST., art. I, § 9, cl. 3; United States v. Brown, 381 U.S. 437, 441 (1965). On Congress's authority to establish military commissions where civil courts are closed, and to define the law such bodies apply, see Art. I, § 8, cl. 10–11, 14–16, 18; Hamdan v. Rumsfeld, 548 U.S. 557, 591–92 (2006); Duncan v. Kahanamoku, 327 U.S. 304, 314 (1946); see generally 2 WILLIAM WINTHROP, MILITARY LAW AND PRECEDENTS 1295–1321 (2d ed. 1896) (describing historical uses of military commissions).

13. The legal activities of wartime state legislatures look a lot like those of early eighteenth-century colonial assemblies, complicating a standard historical narrative about their institutional development. *See, e.g.*, MARY PATTERSON CLARKE, PARLIAMENTARY PRIVILEGE IN THE AMERICAN COLONIES 58 (1943) (judicial powers of assemblies "were exercised now and then up to the Revolution . . . [but] activity of this sort tended to be less common as the colonies advanced"); MICHAEL KAMMEN, DEPUTYES AND LIBERTYES: THE ORIGINS OF REPRESENTATIVE GOVERNMENT IN COLONIAL AMERICA 57 (1969) (lower houses "largely shed their early exercise of broad judicial powers" at the end of the seventeenth century); Alison Olson, *Eighteenth-Century Colonial Legislatures and their Constituents*, 79 J. AM. HIST. 543, 556 (1992) (describing a shift away from judicial proceedings towards "legislative action" after mid-eighteenth century). For accounts that feature adjudication in eighteenth-century colonial assemblies, see MARY SARAH BILDER, THE TRANSATLANTIC CONSTITUTION: COLONIAL LEGAL CULTURE AND THE EMPIRE 77–83 (2004) (equity); Christine A. Desan, *The Constitutional Commitment to Legislative Adjudication in the Early American Tradition*, 111 HARV. L. REV. 1381, 1404, 1407 (1998) (treasury).

14. Bank Markazi v. Peterson, No. 14-770, slip. op. at 19 (S. Ct. Apr. 20, 2016). Except for impeachment, most of Congress's quasi-legal powers are skipped over in a standard Constitutional Law class. Thus, for example, Congress exercises powers to issue compulsory process summoning witnesses and requesting the production documents (backed by contempt), and to conduct investigations as part of its oversight of government. For an introduction, see MICHAEL STOKES PAULSEN, STEVEN G. CALABRESI ET AL., THE CONSTITUTION OF THE UNITED STATES 247–57, 283–96 (2d ed. 2013). Early Congresses received a significant number of petitions and passed private bills in response. *See*, *e.g.*, James E. Pfander & Jonathan L. Hunt, *Public Wrongs and Private Bills: Indemnification and Government Accountability in the Early Republic*, 85 N.Y.U. L. REV. 1862, 1888–92 (2010).

15. These conventions are historical and institutional, rather than functional. *See* William B. Gwyn, *The Indeterminacy of the Separation of Powers in the Age of the Framers*, 30 WM. & MARY L. REV. 263, 265–66 (1989) ("[T]he terms 'legislative' and 'executive' power . . . refer, not to single governmental functions, but to a variety of functions exercised by the two houses of Parliament on the one hand and those exercised by the monarch, his officials, and his advisors, on the other.").

Second, the subsequent dispute about the Philips case illustrates the complexity of judicial efforts to check the prosecution of loyalists by enforcing the state law of treason and international, customary laws of war. One of the central questions raised in the case was whether Philips was a prisoner of war and entitled to protection under the laws of war. Virginia judges may have blocked his prosecution for treason on this basis (we can't know for certain), but boundaries between treason and other crimes were permeable, and a felony prosecution under domestic law was allowed to go forward.[16] The result points to a willingness of early state courts to question the legal status of individuals in war, but also to the intrinsic difficulty of these issues.[17] Political membership and legal status were central to Virginians' efforts to govern and protect themselves, and the importance of these issues explains why the Philips affair came up, ten years after his execution, at the 1788 Virginia ratifying convention. The delegates' dispute thereby gives the Case of Josiah Philips a significance not unlike the extradition of Thomas Nash in 1799 or even the Neutrality Controversy of 1793.[18]

16. It thus overstates matters to say, as have two distinguished commentators, that "[i]n 1789, war was a fundamental concept in public international law–sharply distinguishable from peace–to which particular legal consequences attached. During war, elaborate rules of belligerency governed relations between warring states." Curtis A. Bradley & Jack L. Goldsmith, *Congressional Authorization and the War on Terror*, 118 HARV. L. REV. 2047, 2059 (2005) (internal quotation marks and citation omitted).

17. These concerns have led some modern judges to disarow an authority to inquire into a prisoner's status altogether. *See* Hamdi v. Rumsfeld, 542 U.S. 507, 585–86 (2004) ("[T]he question whether Hamdi is actually an enemy combatant is of a kind for which the Judiciary has neither aptitude, facilities nor responsibility and which has long been held to belong in the domain of political power not subject to judicial intrusion or inquiry." (internal quotation marks and citation omitted) (Thomas, J., dissenting). Although Justice Thomas's opinion is a dissent, the 'fate' of *Hamdi* as administered by the D.C. Circuit has arguably produced a result not like the one Thomas thought appropriate. *See* PAUL BREST & SANDFORD LEVINSON, PROCESSES OF CONSTITUTIONAL DECISIONMAKING 1071–72 (6th ed. 2014).

18. The Nash affair may not be known to all constitutional lawyers. Nash was allegedly a British seaman. The British charged him with mutiny aboard a British ship. He was taken into custody by the Americans and the British requested his extradition. President Adams asked the federal judge with jurisdiction over Nash to deliver him, and the judge held a *habeas* hearing, at which Nash claimed to be an American by the name of Jonathan Robbins—a claim that may have been true. The judge transferred him anyway and Nash (or Robbins) was executed soon after, causing an uproar. *See* David E. Engdahl, *John Marshall's "Jeffersonian" Concept of Judicial Review*, 42 DUKE L.J. 279, 304–14 (1992); Walter Dellinger & H. Jefferson Powell, *Marshall's Questions*, 2 GREEN BAG 2D 367 (1999); Ruth Wedgwood, *The Revolutionary Martyrdom of Jonathan Robbins*, 100 YALE L.J. 229, 304 (1990). The Neutrality Controversy is a central episode in today's separation of powers canon, and there is an immense literature on the event. For recent commentary, see HAROLD H. BRUFF, UNTRODDEN GROUND: HOW PRESIDENTS INTERPRET THE CONSTITUTION 42–47 (2015); GRIFFIN, *supra* note 10, at 18–23; WILLIAM R. CASTO, FOREIGN AFFAIRS AND THE CONSTITUTION IN THE AGE OF FIGHTING SAIL 19–35, 59–102 (2006).

I propose, then, to revisit the case, and my study will have four parts. In Part I, I draw on legislative records, executive records, newspapers, letters and early histories to determine what we know about Josiah Philips and his attainder. Unlike prior commentators, I situate Jefferson's bill of attainder within the English legal tradition from which it originated. The bill's clear place in this tradition, its proper uses as described in the parliamentary treatises and other law books on which Jefferson typically drew, and evidence that others in the General Assembly accepted these uses, suggests that most of those involved thought it lawful for the assembly to attaint Philips. The question then becomes why some Virginians were uncomfortable with it.

In Part II, I examine the statements of Randolph, Henry, Jefferson and Tucker that have been the source of much of the mystery surrounding the case. Setting each statement in the shifting constitutional surround, I argue that the mystery is largely a result of re-telling the story over time, adjusting emphasis and filling gaps in accordance with purposes and assumptions then dominant. Thus, as I read the Randolph-Henry exchange at the 1788 Virginia ratifying convention, the two men shared a belief that republican assemblies *should* possess legal powers, but disagreed as to the *form* and *scope* of those powers.[19] Neither man seems to have thought this allocation inconsistent with the vaunted separation of powers provision in the 1776 state constitution.[20] Randolph's discomfort grew, rather, from a sense that emergency proceedings in the assembly corrupted the ordinary course of law. Yet, that the state's assembly should be denied residual powers to do justice and to protect Virginia citizens was a difficult proposition to sustain. These were textbook examples of royal prerogative power, and in a republic, the popular assembly was arguably their nat-

19. Randolph supported a council of revision, which he conceived as a kind of legislative mechanism for judicial review. *See infra* Part II.D, note 131, and accompanying text.

20. *Declaration of Rights, § 5*, *in* 2 BEN: PERLEY POORE, THE FEDERAL AND STATE CONSTITUTIONS, COLONIAL CHARTERS, AND OTHER ORGANIC LAWS OF THE UNITED STATES 1909 (1877) ("Sect. 5. That the legislative and executive powers of the State should be separate and distinct from the judiciary . . . ."). For representative readings of this section, see WILLI PAUL ADAMS, THE FIRST AMERICAN CONSTITUTIONS: REPUBLICAN IDEOLOGY AND THE MAKING OF THE STATE CONSTITUTIONS IN THE REVOLUTIONARY ERA 267 (2001 ed.) ("Virginia's constitution of June 1776 was the first constitutional document since the *Instrument of Government* . . . to include the principle of separation of powers in express terms. It did so with a clarity that no previous statement of either theory or practice had achieved."); SCOTT DOUGLAS GERBER, A DISTINCT JUDICIAL POWER: THE ORIGINS OF AN INDEPENDENT JUDICIARY, 1606 –1787, at 61 (2011) (similar).

ural home.[21] Indeed, state assemblies continued to exercise residual legal powers and to interfere in the proceedings of courts well into the nineteenth century, despite judicial efforts to check the practice using due process principles.[22]

With this context, I turn in Part III to St. George Tucker's claim that Virginia judges refused to enforce the act of attainder. The claim has long been regarded as erroneous, due to Philips's capture before the end of the grace period in the act.[23] I argue that Tucker may have been correct. Were Philips to be timely taken into custody, the act of attainder required that he be tried for treason, and trying a loyalist for treason in a civil conflict like the Revolution raised serious legal difficulties. Treason required *allegiance*; did Philips owe Virginia allegiance? He claimed to hold a British military commission, which would have made him a belligerent, not a traitor. The laws of war required that Virginia hold belligerents as prisoners of war.[24] Was Philips a member of the Virginia political community, then, or was he a foreign subject? Or was he outside *both* communities, an outlaw, or like one of the escaped slaves in his gang? Courts in states with significant loyalist populations struggled with these questions during the

21. On the prerogative source of the obligations to do justice and to protect subjects, see 2 TUCKER, BLACKSTONE'S COMMENTARIES, *supra* note 6, at 262, 266–68 (1803). On the place of royal prerogative in American state and national governments in this period, see KATHLEEN BARTOLONI-TUAZON, FOR FEAR OF AN ELECTIVE KING: GEORGE WASHINGTON AND THE PRESIDENTIAL TITLE CONTROVERSY OF 1789, at 57–64 (2014); BILDER, *supra* note 13, at 73–83; MARKUS DUBBER, THE POLICE POWER: PATRIARCHY AND THE FOUNDATIONS OF AMERICAN GOVERNMENT 83–85 (2005); JERRILYN GREENE MARSTON, KING AND CONGRESS: THE TRANSFER OF POLITICAL LEGITIMACY, 1774–1776, at 20–31, 34 (1987); BRENDAN MCCONVILLE, THE KING'S THREE FACES: THE RISE AND FALL OF ROYAL AMERICA, 1688–1776, at 303 (2006); ERIC NELSON, THE ROYALIST REVOLUTION: MONARCHY AND THE AMERICAN FOUNDING 149 (2014); JOHN PHILLIP REID, CONSTITUTIONAL HISTORY OF THE AMERICAN REVOLUTION 85–99 (abr. ed. 1995); Matthew Crow, *Thomas Jefferson and the Uses of Equity*, 33 LAW & HIST. REV. 153, 168–69 (2015); Jack N. Rakove, *Taking the Prerogative out of the Presidency: An Originalist Perspective*, 37 PRES. STUDS. Q. 85, 89–90 (2007).

22. *See generally* JOHN V. ORTH, DUE PROCESS OF LAW: A BRIEF HISTORY 45–46 (2003); JOHN PHILLIP REID, LEGISLATING THE COURTS: JUDICIAL DEPENDENCE IN EARLY NATIONAL NEW HAMPSHIRE 3–17 (2009); Nathan S. Chapman & Michael W. McConnell, *Due Process as Separation of Powers*, 121 YALE L.J. 1672, 1703–26 (2012); Wallace Mendelson, *A Missing Link in the Evolution of Due Process*, 10 VAND. L. REV. 125, 126–28 (1956). Other early constitutional 'hooks' for this effort were the Ex Post Facto Clauses. *See* Evan C. Zoldan, *The Civil Ex Post Facto Clause*, 2015 WISC. L. REV. 727, 753–67, and the Contract Clause, *see also* 3–4 G. EDWARD WHITE, HISTORY OF THE SUPREME COURT OF THE UNITED STATES: THE MARSHALL COURT AND CULTURAL CHANGE, 1815–1835, at 595–673 (1988).

23. *See, e.g.*, CROSSKEY, *supra* note 9, at 944; Turner, *supra* note 3.

24. *E.g.*, EMER DE VATTEL, THE LAW OF NATIONS, bk.III, ch.VIII, ss.140, 149, at 347–48, 354–55 (tr. 1797) (1896); 1 JAMES KENT, COMMENTARIES ON AMERICAN LAW, Lec. V, at 88–89 (1826); *see* STEPHEN C. NEFF, JUSTICE AMONG NATIONS: A HISTORY OF INTERNATIONAL LAW 147–51, 163–65, 194–98 (2014); JOHN FABIAN WITT, LINCOLN'S CODE: THE LAWS OF WAR IN AMERICAN HISTORY 16–23 (2012).

Revolution.[25] Some lawyers like St. George Tucker among them, urged state courts to enforce the protections in state constitutions and the law of nations, investing those bodies with a "national security" function like that of the early federal courts.[26] Yet lawyers also made opportunistic use of domestic criminal law, and state courts permitted prosecutions for ordinary felonies, at least on occasion, rather than require proceedings under military jurisdiction on charges of war crime.

Finally, in Part IV, I step away from the case, and argue that changes in the understanding of the bill of attainder tracked changes in the understanding of the popular assembly itself. The idea that a bill of attainder was a summary *legal* procedure suited to times of civil disorder was not uncommon in the 1760s and 1770s, at least among well-read lawyers. But by the mid-1780s, bills of attainder were often described as arbitrary exercises of *legislative* power. This framing would better justify courts of law in enforcing bans on bills of attainder, since, as Hamilton put it, "specific exceptions to the legislative authority . . . can be preserved in practice no other way than through the medium of the courts."[27] On these grounds courts of law would claim not only a power void acts of attainder passed by the legislature, but more generally to superintend legislative decisions about when summary procedures could be used in place of the common law.

I. JOSIAH PHILIPS CIRCA 1778

The Josiah Philips gang was not unique in the Revolutionary War period, although its methods were not widely representative either. More often, resistance in loyalist strongholds probably looked like Queens, New York, where the disaffected ignored the orders of the ad

25. *See* BRADLEY CHAPIN, THE AMERICAN LAW OF TREASON 46–80 (1964); CLAUDE HALSTEAD VAN TYNE, THE LOYALISTS IN THE AMERICAN REVOLUTION 268–85 (1902). Leading examples are New York and Pennsylvania. On New York in particular, see DANIEL HULSEBOSCH, CONSTITUTING EMPIRE: NEW YORK AND THE TRANSFORMATION OF CONSTITUTIONALISM IN THE ATLANTIC WORLD, 1664-1830, at 111–69 (2005); On Pennsylvania, see Henry J. Young, *Treason and Its Punishment in Revolutionary Pennsylvania*, PA. MAG. HIST. & BIO. 287, 298 (1966); Steilen, *supra* note 2, at 857–89.

26. WILLIAM R. CASTO, THE SUPREME COURT IN THE EARLY REPUBLIC 71, 130–41 (1995) [hereinafter Casto, SUPREME COURT]; *see also* Barron & Lederman, *Commander in Chief*, *supra* note 10, at 952–55, 963, 967–70; Dehn, *supra* note 10, at 616–25. Another framing of this role for courts is that they functioned to promote *vigorous* or *good government*, 'protecting' government from anarchy by enforcing respect for acts. *See, e.g.*, 1 JULIUS GOEBEL, JR., HISTORY OF THE SUPREME COURT OF THE UNITED STATES: ANTECEDENTS AND BEGINNINGS TO 1801, at 634 (1971).

27. *See infra* note 187.

hoc 'Whig' assemblies attempting to govern, and the militant welcomed or even joined the invading British army.[28] Elsewhere loyalism mixed with a kind of organized crime. In Maryland, for example, on the eastern shore of Chesapeake Bay, Hamilton Callilo and Thomas Moore led a gang engaged in "piracy and robbery mixed with loyalism," for which Callilo was made an outlaw.[29] In Pennsylvania, the Doan family robbed tax collectors and destroyed state property into the 1780s, for which several members were also outlawed.[30] The Nugent and Shockey gang made a name for itself in robbery and counterfeiting, offenses to which a number of loyalist syndicates became dedicated.[31] From the perspective of the new state governments formed in 1776 and 1777, these militant, criminal loyalists posed a serious challenge. States like New York, Pennsylvania and Virginia struggled to administer civil justice and protect citizens across their expansive territories, and in some cases militants were able to operate in essentially ungoverned areas. As we will see in Philips's case, it was militants' presence in those spaces—where civil process did not run and magistrates could not police—that required the use of institutions like outlawry and attainder.[32]

Philips was a laborer from Lynhaven Parish, in the very southeast portion of Virginia.[33] He became disaffected with the movement towards independence. In August 1775, he was seen "command[ing] an ignorant disorderly mob, in direct opposition to the measures of this country."[34] Some two years later, in June 1777, Colonel John Wilson, head of the Norfolk County militia, complained of "sundry evil disposed persons, to the number of ten, or twelve," who were "lurking in secret places threatening and doing actual mischief to the peaceable

28. Alexander Clarence Flick, Loyalism in New York During the American Revolution 37–57 (1901); Alan Taylor, American Revolutions: A Continental History, 1750–1804, at 213–16 (2016); Van Tyne, *supra* note 25, at 87–89.

29. Chapin, *supra* note 25, at 59. Outlaws surrendered their protection under the law for failing to appear before a court to answer charges against them. *See* 1 Frederick Pollock & Frederic William Maitland, The History of English Law Before the Time of Edward I 539, 554 (2d ed. 1898); 2 Frederick Pollock & Frederic William Maitland, The History of English Law Before the Time of Edward I 580–81 (2d. ed. 1898).

30. Respublica v. Doan, 1 U.S. 86, 92–93 (Pa. 1784); Anne M. Ousterhout, A State Divided: Opposition in Pennsylvania to the American Revolution 213–14 (1987).

31. Henry J. Young, *Treason and Its Punishment in Revolutionary Pennsylvania*, 90.3 Pa. Mag. Hist. & Bio. 287, 298 (1966).

32. *See infra* Part I.

33. Trent, *supra* note 9, at 444–45.

34. Third Virginia Convention, Proceedings of the Convention of Delegates for the Counties and Corporations in the Colony of Virginia (1775).

and well affected Inhabitants" of the area.[35] At their head was Josiah Philips.[36] Counted among the party, as well, were a number of "runaway slaves," drawn perhaps by Lord Dunmore's promise in November 1775 to free slaves who fought for the King.[37] Indeed, "irregular armed gangs" of runaways would raid Virginia farms and plantations for the British throughout the Revolution.[38] In response to Colonel Wilson's letter, the state's Privy Council, an executive council selected by the legislature, recommended that Governor Patrick Henry "issue a proclamation offering a reward" to anyone who apprehended Philips and brought him before a magistrate "to be dealt with according to Law."[39] Philips was captured that winter, only to escape sometime in early 1778.[40] He proved difficult to recapture, in part because of the geography of the Dismal Swamp, where Philips had his hideout, and in part because of "the disaffection which prevailed in that quarter."[41] The gang had supporters—or at least few were willing to cross them. By May 1778, they numbered around fifty; a muster of three militia companies to go after Philips raised only ten men, and the expedition failed.[42] Several days later, the commanding officer was killed in an ambush near his home, being "fired on by four men concealed in [his neighbor's] house."[43] Colonel Wilson wrote to Governor Henry on May 20, informing him of the attack and complaining of "disaffection" in area residents, who sympathized with "Philips and

35. JOURNALS OF THE COUNCIL OF THE STATE OF VA.: JULY 12, 1776-OCTOBER 2, 1777 at 435 (H.R. McIlwaine ed., 1931) [hereinafter JCS VA: 1776-1777].

36. *Id.* (spelling Philips's name "Phillips").

37. ECKENRODE, *supra* note 9, at 66, 191–92 (1916). Slave loyalism was widespread in the Revolution, despite the fact that Dunmore's promise was not an "official government policy." MARSTON, *supra* note 21, at 55. There is evidence that slaves in some communities felt a significant attachment to King George, whom they viewed as a benevolent monarch who intended to free his enslaved peoples from the lordship of "local pharaohs." MCCONVILLE, *supra* note 21, at 175–76, 181–82. Among the local pharaohs, of course, were members of the Virginia planter class now leading an American Revolution.

38. ALAN TAYLOR, THE INTERNAL ENEMY: SLAVERY AND WAR IN VIRGINIA, 1772-1832, at 27, 41 (2013) [hereinafter TAYLOR, INTERNAL ENEMY]. After the revolution, as well—and especially following the bloody revolt in Saint-Domingue (modern-day Haiti)—white Virginians lived in fear of slave revolts, many imagined but some very real. *See id.* at 86–87, 89–97.

39. JCS VA.: 1776-1777 *supra* note 35, at 435–36.

40. 2 JOURNALS OF THE COUNCIL OF THE STATE OF VA.: OCTOBER 6, 1777-NOVEMBER 30, 1781 58 (H.R. McIlwaine ed., 1932) [hereinafter JCS VA: 1777-1781]; *Bill to Attaint*, *supra* note 1, at 192; ECKENRODE, *supra* note 9, at 191.

41. WILLIAM WIRT, *Letter from County Lieutenant John Wilson to Patrick Henry (May 20, 1778)*, in SKETCHES OF THE LIFE OF PATRICK HENRY 217 (1817). The Dismal Swamp was the location of "the largest and longest-lived runaway community" of slaves. TAYLOR, INTERNAL ENEMY, *supra* note 38, at 76.

42. JCS VA.: 1777-1781, *supra* note 40, at 127; WIRT, *supra* note 41, at 235–36.

43. WIRT, *supra* note 41, at 218.

his notorious gang."[44] The fate suffered by the commanding officer would surely visit others, he predicted, unless "the relations and friends of those villains" were removed from the area.[45]

Henry received Wilson's letter several days later and shared it immediately with Jefferson, who was then a leading member of the House of Delegates.[46] According to Jefferson, "we both thought the best proceeding would be by bill of attainder."[47] Around the same time, Henry showed the letter to the Privy Council, which advised the governor to forward the letter to the legislature and to order a company of regulars to the area "to cooperate with the Militia in crushing these Desperadoes."[48] James Madison was among the councilors.[49] On May 27, Henry sent the correspondence to Benjamin Harrison, then Speaker of the lower house.[50] The governor's cover letter described an "insurrection in Princess Anne and Norfolk," which he had sought, unsuccessfully, to "quell" using the county militias. Colonel Wilson had requested that the governor "remov[e] such families as are in league with the insurgents," but, Henry continued, "thinking that the executive power is not competent to such a purpose, I must beg leave to submit the whole matter to the assembly, who are the only judges how far the methods of proceeding directed by law are to be dispensed with on occasion."[51] Asking the assembly to authorize the removal contrasted with Henry's conduct nine months earlier, when on the advice of his council he had promptly removed disaffected and "suspected" persons, and been indemnified by the assembly later.[52]

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44. *Id.*

45. *Id.*

46. *Letter from Thomas Jefferson to William Wirt (Aug. 14, 1814)*, *in* 7 THE PAPERS OF THOMAS JEFFERSON: RETIREMENT SERIES 548–49 (J. Jefferson Looney ed., Princeton Univ. Press 2010) (1743–1836) [hereinafter *Wirt Letter, 1814*]

47. *Id.*

48. JCS VA.: 1777-1781, *supra* note 40, at 140; Trent, *supra* note 9, at 446.

49. Turner, *supra* note 3, at 329–30. Other members of the council included Dudley Digges, John Blair, Nathaniel Harrison, David Jameson and John Page. RALPH LOUIS KETCHAM, JAMES MADISON: A BIOGRAPHY 79 (1st ed. 1990). Ketcham lists Blair among the councilors "present when Madison took his seat" on January 14, 1778, although Blair was appointed to a judgeship on the General Court shortly thereafter, on January 23, 1778. *See infra* note 99 and accompanying text.

50. WILLIAM WIRT, *Letter from Patrick Henry to Benjamin Harrison (May 27, 1778)*, *in* THE LIFE OF PATRICK HENRY 219–21 (1817).

51. *Id.*

52. In April 1776, prior to independence, a colonial Committee of Safety had ordered the removal of disaffected persons from Norfolk and Princess Anne, but then retracted its resolution in May. Robert Leroy Hilldrup, The Virginia Convention of 1776: A Study in Revolutionary Politics 119 (1935) (unpublished Ph.D. dissertation, University of Virginia) (on file with author). After the appearance of the British navy in the Chesapeake next year, Governor Henry and his council decided to remove disaffected persons from the area; then, in October 1777, the assem-

Speaker Harrison immediately referred Henry's letter to a committee of the whole house "on the state of the commonwealth." That committee deliberated the next morning, May 28, and then reported a resolution the same day.[53] What Henry had called an "insurrection," the committee labeled treason. "Information being received," they wrote, "that a certain Philips, with divers others, . . . have levied war against this commonwealth . . . committing murders, burning houses, wasting farms, and doing other acts of enormity, in defiance of the officers of justice," it was resolved that Philips and "his associates, and confederates" should "render themselves to some officer" within June, or "such of them as fail so to do ought to be attainted of high treason."[54] The assertion that the Philips gang had committed treason by murder and arson incorporated a significant legal claim, namely, that the latter offenses constituted "levying war," one of the ancient varieties of treason.[55] In the interim, it would be "lawful for any person . . . to pursue and slay, or otherwise to take and deliver to justice . . . Philips, his associates and confederates."[56] Upon receipt of the resolution, the House appointed Jefferson, along with lawyer John Tyler (later Governor), to a committee to draft a bill. A bill was docketed the same day, May 28, by the clerk of the House, a young Edmund Randolph.[57]

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bly indemnified the governor and council for the decision (as they described it) "to remove and restrain, during the imminence of the danger, at a distance from the post and encampments from the [Virginia] militia, and from other places near the ports and harbours of this commonwealth, certain persons whose affections to the American cause were suspected, and more especially such as had refused to give assurance of fidelity and allegiance to the commonwealth." An Act for indemnifying the Governor and Council, and others, for removing and confining Suspected Persons during the late public danger. 1617 Va. Acts 373–74. Jefferson apparently drafted this bill (as he did the Philips attainder). *Bill Indemnifying the Executive for Removing and Confining Suspected Persons (Dec. 16 – 26, 1777)*, *in* 2 THE PAPERS OF THOMAS JEFFERSON 119 (Julian P. Boyd ed., 1950). On the whole, then, Virginia acted both prospectively *and* retroactively to authorize the governor to address security threats posed by loyalists. *See* MARGARET BURNHAM MACMILLAN, THE WAR GOVERNORS IN THE AMERICAN REVOLUTION 83 (1943). Both approaches show an active role for the General Assembly in directing the use of state force. *See* Barron & Lederman, *Commander in Chief*, *supra* note 10, at 782, 789.

53. *See* WIRT, *supra* note 41, at 220.

54. *Id.* at 221.

55. What constitutes "levying war" is the subject of the doctrine of "constructive treason." By Chapin's analysis, an *insurrection* (as Henry had called it) would clearly be a form of constructive treason, but murder, arson and robbery might not. CHAPIN, *supra* note 25, at 7; Thomas P. Slaughter, *"The King of Crimes": Early American Treason Law, 1787-1860*, *in* LAUNCHING THE "EXTENDED REPUBLIC" THE FEDERALIST ERA 58–78 (Ronald Hoffman & Peter J. Albert eds., 1996). Chapin observes that Virginia accepted the doctrine of constructive treason later in the war, at least in principle. CHAPIN, *supra* note 25, at 174.

56. WIRT, *supra* note 41, at 221.

57. JOURNAL OF THE HOUSE OF DELEGATES OF VA. 34 (May 5, 1777–June 1, 1778); 9 THE DOCUMENTARY HISTORY OF THE RATIFICATION OF THE CONSTITUTION 1004 n.5 (John P. Ka-

The draft bill, which was preserved and published as part of Jefferson's papers, is relatively unremarkable as an example of attainder. Indeed, its language and function would have been instantly recognizable to a student of parliamentary history—as Jefferson himself was—and it is likely that Jefferson emulated bills he had encountered in his reading.[58] Over most of its history, the bill of attainder had served as a device for the king and his allies to punish treasonous conduct by great men who were too powerful for the common law courts at Westminster or who could not be reached by their process.[59] Bill proceeding in Parliament operated as a kind of *summary legal procedure*, in the sense that it enabled the government to convict an individual whose serious criminal conduct was widely known, without the presence of the accused or any presentation of testimonial evidence.[60] Those involved largely spoke and wrote about bills of attainder as legal proceedings, a view that contrasts markedly with our own, which (if it acknowledges the bill of attainder at all) treats it as an exercise of legislative power. Proponents connected the bill of attainder to a body of continental legal commentary on summary proceedings by describing the widely-known treasons it targeted as "notorious"—an expression that one encounters, remarkably, in sources as various as

minski & Gaspare J. Saladino et al. eds., 1990) [hereinafter "9 DHRC"] (noting that Randolph docketed the bill as clerk).

58. Jefferson would have read of bills of attainder in his study of Hatsell's *Precedents* and Rushworth's *Collections*, among other sources. H. TREVOR COLBOURN, THE LAMP OF EXPERIENCE: WHIG HISTORY AND THE INTELLECTUAL ORIGINS OF THE AMERICAN REVOLUTION 159–60 (1965) (describing Jefferson's study of Rushworth); H.R. DOC. NO. 111–157, at 127 (2011) (quoting Jefferson, "I could not doubt the necessity of quoting the sources of my information, among which Mr. Hatsel's most valuable book is preeminent"); Morris L. Cohen, *Thomas Jefferson Recommends a Course of Law Study*, 119 U. PA. L. REV. 823, 842 (1971) (recommending the study of "Hatsell's Precedents of the House of Commons" and "Select Parliam'y debates of England and Ireland"); 2 CATALOGUE OF THE LIBRARY OF THOMAS JEFFERSON 233 (E. Millicent Sowerby ed., 1953) [hereinafter Sowerby] (including volume 1 of the 1706 edition of the Statutes at Large, which indexed the attainders of Jack Cade and Elizabeth Barton); Sowerby, *supra*, at 300 (volume 1 of Pemberton's *History of Tryals*, which described the attainder of Thomas Cromwell, among others). Jefferson could also have studied acts of attainder in Coke's Third *Institute*, in the section on Parliament, but the accounts given there were distorted to some degree by Coke's efforts to elevate the place of the common law above the 'law and course of Parliament.'

59. Steilen, *supra* note 2, at 775; *see also* J.G. BELLAMY, THE LAW OF TREASON IN ENGLAND IN THE LATER MIDDLE AGES 102–03, 177–205 (1970); ZECHARIAH CHAFEE, JR., THREE HUMAN RIGHTS IN THE CONSTITUTION 90–161 (1956); COLIN G. C. TITE, IMPEACHMENT AND PARLIAMENTARY JUDICATURE IN EARLY STUART ENGLAND 16, 83–148 (1974); J.R. Lander, *Attainder and Forfeiture, 1453–1509*, *in* 2 HISTORICAL STUDIES OF THE ENGLISH PARLIAMENT, 1399–1603, at 92–124 (E.B. Fryde & Edward Miller eds., 1970); William Richard Stacy, The Bill of Attainder in English History (unpublished Ph.D. dissertation, University of Wisconsin-Madison, 1986) (on file with author).

60. Steilen, *supra* note 2, at 793–96, 802–04, 824–26.

medieval bills of attainder (*notoriement* in Anglo-Norman) and bills passed in eighteenth-century America.[61] Across their long history, bills of attainder generally took two different forms. Some bills of attainder ordered an individual to submit himself to ordinary proceedings at common law, functioning like a kind of parliamentary outlawry.[62] Modern commentators describe this first form as the "conditional" or "suspensive" attainder. It was suspensive in the sense that the attainted individual's surrender would suspend his conviction, which might then be reinstated after a common-law proceeding. Anyone who failed to timely surrender would be attainted by force of the act alone, after expiration of a grace period. Other bills of attainder, such as those that applied to the dead, simply pronounced their targets guilty of a notorious offense. Commentators sometimes call this second form the "absolute" attainder.[63] Many bills, of course, combined these forms to reach different individuals with different effect.

Jefferson's bill was a suspensive attainder. It shared much in common with suspensive attainders employed elsewhere during the Revolution, such as Pennsylvania.[64] Following the committee resolution, the bill alleged that Philips had committed treason. "[C]ontrary to their fidelity," wrote Jefferson, the gang had "levied war against this Commonwealth," committing murder, arson and robbery, "and still continue to exercise the same enormities."[65] Outlawing Philips, which would require his summons at successive sessions of court over a period of months, was far too slow a process in these circumstances. To "outlaw the said offenders according to the usual forms and procedures of the courts of law would leave the said good people for a long time exposed to murder and devastation."[66] Instead, the bill set out a suspensive attainder, giving Philips and his gang until an unspecified day in June to surrender. If Philips failed to surrender by the end of

61. *See* COLLINS, *supra* note 2, at 19, 21 (2016) (discussing notoriety and "notorious"); *see also* T.F.T. Plucknett, *The Origins of Impeachment*, 24 TRANSACTIONS ROYAL HIST. SOC'Y 47, 59–61, 63–67, (1941); Steilen, *supra* note 2, at 889–90 (discussing American bills of attainder and related summer procedures that used the word, specifically, identifying New York and Pennsylvania measures); Kenneth Pennington, *Two Essays on Court Procedure: The Jurisprudence of Procedure* 185, 205–06 (unpublished manuscript) (on file with author).

62. *See* 1 FREDERICK, *supra* note 29, at 279–80 (discussing outlawry).

63. *See, e.g.*, BELLAMY, *supra* note 59, at 184–88.

64. Steilen, *supra* note 2, at 885–86; *see also* CHAPIN, *supra* note 25, at 55, 78–80; LEVY, *supra* note 9, at 71–72; VAN TYNE, *supra* note 25, at 190–242, 268–85; James Westfall Thompson, *Anti-Loyalist Legislation During the American Revolution*, 3 ILL. L. REV. 147, 157–59 (1909).

65. *Bill to Attaint*, *supra* note 1, at 189–90.

66. *Id.* at 190.

the grace period, he could be killed on sight, effectively deputizing the state's citizens and thereby extending its executive force.[67] If, on the other hand, Philips surrendered before the grace period expired, he could claim a common-law trial. Crucially, since the act charged Philips with having "levied war," a kind of treason, that trial would presumably be on charges of treason. Philips was not the only target. Like other such attainders, Jefferson's bill was general in scope, attainting Philips by name but including, as well, his unnamed "associates and confederates."[68] Alleged gang members would be permitted to contest their affiliation and obtain a trial on this issue "according to the forms of law."[69]

The bill passed swiftly through the assembly. After an initial reading in the House of Delegates on May 28, it was read a second time on May 29 and a third time on May 30; Jefferson was immediately ordered to carry the bill into the Senate, which reported its concurrence later that day.[70] Representatives made only minor changes to Jefferson's draft, and gave Philips until the last day in June to surrender.[71] "An act to attaint Josiah Philips and others" was reported the following week in the *Virginia Gazette*.[72]

The research of Jesse Turner in 1914 revealed that Philips was in fact captured before the end of the grace period on the last day of June.[73] Excerpts from court records show that Philips was indicted by

67. The other central function of the bill of attainder—obtaining a right to the attainted person's property—was likely of little importance in Philips's case. *Cf.* Steilen, *supra* note 2, at 775 (describing six functions served by English bills of attainder).

68. *Bill to Attaint*, *supra* note 1, at 190*; see also* An Act for preventing tumultuous and riotous Assemblies in the Places therein mentioned, and for the more speedy and effectual punishing the Rioters, 5 THE COLONIAL LAWS OF NEW YORK FROM THE YEAR 1664 TO THE REVOLUTION 647 (James B. Lyon ed., 1894) (providing another example of a general act of attainder).

69. *Bill to Attaint*, *supra* note 1, at 190.

70. JOURNAL OF THE HOUSE OF DELEGATES OF VA., *supra* note 57, at 28, 32, 35 (1778); Trent, *supra* note 9, at 446–47, 447 n.2 (correcting Wirt on the basis of the House Journal).

71. An act to attaint Josiah Philips and others, unless they render themselves to justice within a certain time, VA STATUTES AT LARGE, *supra* note 1. *Contra* Bill to Attaint, *supra* note 1, at 193 nn.1–10.

72. THE VIRGINIA GAZETTE (Purdie) (June 5, 1778), p. 2, col. 2. Like other acts, acts of attainder were regularly published in colonial and state newspapers. This entry does not describe the content of the act attainting Philips, including the thirty-day grace period.

73. Turner, *supra* note 3, at 338–39. The document Turner discovered describes an examination of Philips by a judge on charges that he had committed a robbery, after which Philips is committed to jail. The date of the proceeding is June 11, 1778. *Id.* at 339; *see also* VIRGINIA GAZETTE (Purdie) (June 19, 1778), p. 2, col. 2 ("Last Tuesday the noted Josiah Philips and James Hodges were safely lodged in the publick jail by the sheriff of Princess Anne. They were taken the 4th instant, at night, in Norfolk County."). Prior to Turner, the view had been that Philips was captured in the late summer or autumn of 1778, after the grace period had

a grand jury on October 20, 1778—not for treason, however, but for robbery "of twenty-eight men's felt hats . . . and five pounds of twine."[74] Edmund Randolph, who had been clerk of the House of Delegates when Philips was attainted, was then the state's Attorney General, and apparently initiated this prosecution. Tried by jury and found guilty, Philips was sentenced to death and executed in December 1778.[75]

II. JOSIAH PHILIPS *REDUX*

One of the great challenges of the Philips attainder is; that the record freely admixes history and memory. Much of what we know about the case derives from later accounts given by Randolph, Henry, Tucker, and Jefferson, which rest, ostensibly, on personal recollection. Together, these statements raise a number of difficult questions; Edmund Randolph's account, in particular, seems at odds with the institutional records that have been preserved. There is no easy way to deal with these difficulties. My approach below is to excerpt the relevant statements and then consider what they might mean in context. Proceeding in this fashion gives us three groups: (A) statements by Randolph and Patrick Henry in the Virginia ratification convention of 1788; (B) an account given by St. George Tucker in annotations to his edition of Blackstone's *Commentaries*, published in 1803 but likely written in the early 1790s; and (C) a series of letters written by Thomas Jefferson between 1814 and 1816.

It is admittedly a bit tedious to try and sort all this out, but reexamining what Randolph, Henry, Tucker and Jefferson said about the Philips case does prove to have several benefits. First, it shows that Randolph's account, while erroneous in several minor respects, can be

expired. This view was based on statements made by Jefferson and entries in the Privy Council journal authorizing rewards for the capture. *Girardin Letter*, *supra* note 8, at 337; Trent, *supra* note 9, at 448; *see generally* WIRT, *supra* note 41, at 216–25.

74. *An Endictment Against Josiah Philips For Robbery (Oct. 20, 1778)*, *in* WIRT, *supra* note 41, at xi (noting that "true bill" was written on the indictment in Edmund Randolph's handwriting); *see also* VIRGINIA GAZETTE (Purdie) (Oct. 30, 1778), p. 3, col. 2 (reporting a "trial [of Josiah Philips and others] . . . for robbing the publick waggons"). The original court records were reportedly destroyed during the Civil War. Trent, *supra* note 9, at 448. Wirt told Jefferson sometime in 1815 or 1816 that he had discovered the records. *Letter from Thomas Jefferson to William Wirt (Oct. 8, 1816)*, *in* 10 THE PAPERS OF THOMAS JEFFERSON: RETIREMENT SERIES 438 (J. Jefferson Looney ed., 2013) [hereinafter *Writ Letter, 1816*].

75. WIRT, *supra* note 41, at xi–xii (reproducing Philips's verdict, judgment, sentence, and a report of his execution); *see also* VIRGINIA GAZETTE (Dixon & Hunter) (Dec. 4, 1778), p. 2., col. 2 ("This day were executed at the gallows near this city, pursuant to their sentence, the following criminals, viz. Josiah Philips . . . .").

interpreted in a way that renders it largely accurate. There are errors in Randolph's retelling, to be sure, but they are best described as errors of emphasis, as the colorization one adds to a story to enhance its rhetorical effect. There is a second benefit as well. A close reading of the record suggests that we have missed the *point* of Randolph's argument almost entirely. The perception that Randolph's account was grossly erroneous arises, I think, from a failure to think about the institution of the wartime representative assembly as did Randolph and his principal interlocutor, Henry. For them the assembly was the central repository of sovereignty in a republic and had critical legal functions in wartime, including the use of summary legal procedures like the bill of attainder. In exercising these functions the assembly was not limited to passing general, forward-looking laws—a constraint that would be ill-fitted to the nature of the task. If we try to imagine as they would have the different institutional forms sovereignty could assume in the prosecution of a civil war and the protection of a state's citizens, we can better understand what was at stake in arguments where the Philips case was adduced: the scope of summary proceedings and the integrity of ordinary forms of justice.

A. Randolph and Henry in the Virginia Ratifying Convention

Philips' case made its first reappearance ten years after his execution, in the convention of Virginia delegates elected to ratify the proposed federal Constitution.[76] On June 6, 1788, the fourth day of the convention, Governor Edmund Randolph—who had previously been clerk of the House of Delegates when Philips was attainted, and then Attorney General when Philips was indicted and convicted of robbery—adduced the attainder as an example of the insecurity of individual rights.[77] The Virginia Constitution of 1776 did not prohibit attainders, but section 8 of its Declaration of Rights did guarantee that defendants could confront their accusers, compel the production of favorable evidence, and have a jury trial. Randolph then described what had occurred for the benefit of the convention:

> A man who was a citizen was deprived of his life, thus—from a mere reliance on general reports, a Gentleman in the House of Delegates informed the House, that a certain man (Josiah Philips) had committed several crimes, and was running at large perpetrating other crimes, he therefore moved for leave to attaint him; he ob-

76. *See generally* VIRGINIA GAZETTE (Dixon & Hunter) (Dec. 4, 1778), p. 2., col. 2.
77. *Id.*

> tained that leave instantly; no sooner did he obtain it, than he drew from his pocket a bill ready written for that effect; it was read three times in one day, and carried to the Senate: I will not say that it passed the same day through the Senate: But he was attainted very speedily and precipitately, without any proof better than vague reports! Without being confronted with his accuser and witness; without the privilege of calling for evidence in his behalf, he was sentenced to death, and was afterwards actually executed.[78]

The account looks startlingly inaccurate. As we know, Philips' attainder did not pass through the House of Delegates in one day. Nor was Philips deprived of his confrontation or jury trial rights; he was indicted for robbery, tried by a jury and convicted. The errors are hard to understand, given Randolph's positions as clerk of the House and Attorney General; surely, no one was in a better position than Randolph to know what *had* happened.

Yet perhaps even more surprising was the response Randolph's description drew from Patrick Henry one day later. Rather than challenge Randolph, Henry largely conceded the account. Philips, he argued,

> was not executed by a tyrannical stroke of power <nor was he a Socrates>. He was a fugitive murderer and an out-law. . . . Those who declare war against the human race, may be struck out of existence as soon as they are apprehended. He was not executed according to those beautiful legal ceremonies which are pointed out by the laws, in criminal cases. The enormity of his crimes did not entitle him to it. I am truly a friend to legal forms and methods; but, Sir, the occasion warranted the measure. A pirate, an out-law, or a

78. 9 DHRC, *supra* note 57, at 972. Randolph's speech, as well as the speech of Henry on the following day, are taken from DEBATES AND OTHER PROCEEDINGS OF THE CONVENTION OF VIRGINIA 77–78 (1788) [hereinafter DEBATES OF THE CONVENTION OF VIRGINIA], the first of three volumes compiled from shorthand notes taken by lawyer David Robertson and published in October 1788, several months after the convention concluded. 9 DHRC, *supra* note 57, at 902. Robertson sat in the galley, *id.*, a seat he described as "remote from the speakers, where he was frequently interrupted by the noise made by those who were constantly going out and coming in." *Id.* at 905. Robertson could understand certain speakers better than others. Asked years later to describe the accuracy of Robertson's record, John Marshall commented that "Gov: Randolph whose elocution was good was pretty well reported," but that "Mr. Henry was reported worst of all,—no reporter could Correctly reporte him." *Id.* at 905. George Mason was less sanguine, but for a different reason, accusing Robertson on multiple occasions of bias as a "federal Partizan." *Id.* at 904. On Robertson's reporting, see PAULINE MAIER, RATIFICATION: THE PEOPLE DEBATE THE CONSTITUTION, 1787–1788, at 258–59 (2010) (suggesting that hearing, rather than bias, was Robertson's principal problem); MARY SARAH BILDER, MADISON'S HAND: REVISING THE CONSTITUTIONAL CONVENTION 167 (2015) ("The printed speeches [of the Virginia Convention] differed from members' recollections. . . . [They] remained a product of partial memory and generous extrapolation.").

> common enemy to all mankind, may be put to death at any time. It is justified by the laws of nature and nations.[79]

But Philips had not been "struck out of existence" upon being apprehended! He had been given a trial. Henry's offhand remark that Philips was not "a Socrates" became a Federalist talking point in the first half of the convention. Randolph brought it up on June 9, John Marshall mentioned it on June 10, George Nicholas discussed it that day and then again on June 14 and 16, and Edmund Pendleton, president of the convention, discussed the matter on June 12.[80] Only Benjamin Harrison came to Henry's defense, cautioning that Philips "was a man, who, by the law of nations, was entitled to no privilege of trial."[81]

Jefferson made no comment, as he was then in France.

B. St. George Tucker in Blackstone's Commentaries

The Philips attainder slept again. Fifteen years later, in 1803, leading Virginia judge St. George Tucker published an annotated version of Blackstone's *Commentaries on the Law of England*, which included a clause-by-clause commentary on the federal Constitution. Tucker had likely written the notes in the early 1790s for a course on law he gave at William and Mary.[82] When Tucker came to the prohibition of bills of attainder in article I, sections 9 and 10, he described them in no uncertain terms. "Bills of attainder," Tucker wrote, were "state-engines of oppression in the last resort, . . . supply[ing] the want of legal forms, legal evidence, and of every other barrier which the laws provide against tyranny and injustice in ordinary cases."[83] They were evident "in almost every page of English history for a considerable period." Tucker then turned to the Philips case:

> In May, 1778, an act passed in Virginia, to attaint one Josiah Philips, unless he should render himself to justice, within a limited time: he was taken, after the time had expired, and was brought before the

79. 9 DHRC, *supra* note 57, at 1038. DHRC incorporates corrections made by reporter Robertson in an 1805 edition of the Debates, which are set off by angle brackets. The 1788 edition of the Debates omits mention of Socrates from Henry's speech, but includes a footnote in Randolph's speech of June 9, which reads, "Mr. Henry had said that Philips was not a Socrates." DEBATES OF THE CONVENTION OF VIRGINIA, *supra* note 78, at 192.

80. 9 DHRC, *supra* note 57, at 1086, 1116, 1127, 1333; 10 THE DOCUMENTARY HISTORY OF THE RATIFICATION OF THE CONSTITUTION 1197 (John P. Kaminski & Gaspare J. Saladino et al. eds., 1993).

81. 9 DHRC, *supra* note 57, at 1127.

82. TUCKER, BLACKSTONE'S COMMENTARIES, *supra* note 6, at viii.

83. *Id.* at 292–93.

> general court to receive sentence of execution pursuant to the directions of the act. But the court refused to pass the sentence, and he was put upon his trial, according to the ordinary course of law . . . . This is a decisive proof of the importance of the separation of powers of government, and of the independence of the judiciary . . . .[84]

But how could it be? Philips had, in fact, come in before the end of the grace period. He therefore could not have been executed under the act of attainder. Tucker knew several of the judges involved and may have discussed the matter with them.[85] From where, then, could Tucker have gotten the impression that the General Court refused to enforce the act?

C. The Jefferson-Wirt and Jefferson-Girardin Exchanges

Ten years later, in 1814, Jefferson finally learned of the afterlife of the attainder of Josiah Philips. In July, William Wirt wrote Jefferson seeking information for a biography of Patrick Henry. Wirt noted that Henry had been "much censured by Mr Ed. Randolph" at the 1788 convention "on account of the attainder of a man by the name of Phillips."[86] Could Jefferson provide any information? Jefferson responded the next month. Randolph's censure of Henry was, he wrote, "without foundation."[87] As Jefferson recalled it, Henry had informed him of Philips's doings, and both men thought it best to proceed by bill of attainder. When Philips was captured, it was *Randolph* who decided not to have him executed according to the Act. Randolph believed Philips "would plead that he was a British subject, taken in arms, in support of his lawful sovereign, and as a prisoner of war entitled to the protection of the law of nations."[88] It was "safest" simply to indict him for robbery.

The next spring, in March 1815, Jefferson wrote a much fuller account of the affair to Louis Girardin, who was then at work continuing a classic history of Virginia.[89] Girardin's manuscript referred to

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84. *Id.* at 293.

85. Trent, *supra* note 9, at 452 ("The learned judge has long been known . . . as a painstaking writer. Would he have permitted himself to make so important a statement without having investigated the subject carefully?").

86. *Letter from William Wirt to Thomas Jefferson (July 27, 1814)*, *in* 7 THE PAPERS OF THOMAS JEFFERSON: RETIREMENT SERIES 495 (J. Jefferson Looney ed., Princeton Univ. Press 2010); *see also* Trent, *supra* note 9, at 451.

87. *Writ Letter, 1814*, *supra* note 46, at 548.

88. *Id.* at 549.

89. JOHN BURK, 4 SKELTON JONES & LOUIS HUE GIRARDIN, THE HISTORY OF VIRGINIA: FROM IT'S FIRST SETTLEMENT TO ITS PRESENT DAY 305–06 (1816).

St. George Tucker's account of the Philips attainder in his now-influential edition of the *Commentaries*. Jefferson was critical. "[I]nstead of a definition of the functions of bills of attainder," wrote Jefferson, Judge Tucker had "given a diatribe against their abuse." But bills of attainder had "a proper office," which was to reach fugitives from justice. "[W]hen a person, charged with a crime, withdraws from justice, or resists it by force, either in his own or a foreign country, . . . a special act is passed by the legislature, adapted to the particular case."[90] Properly formed, such an act should provide the defendant a chance to appear, but "declare[ ] that his refusal to appear shall be taken as a confession of guilt, . . . and pronounce[ ] the sentence which would have been rendered on his confession or conviction in a court of law." The attainder of Philips had taken just this form. He had been "too powerful to be arrested by the sheriff and his posse comitatus." Proofs of his wrongdoing "were ample, his outrages as notorious as those of the public enemy, and well known to the members of both houses from those counties." Philips' alleged service in the English cause did not make it unlawful for Virginia to proceed by bill of attainder, since "an enemy in lawful war putting to death, in cold blood, the prisoner he has taken, authorizes retaliation, which would be inflicted with peculiar justice on the individual guilty of the deed." Randolph had proceeded against him "as a murder & robber" anyway, against which Philips "pleaded that he was a British subject, authorized to bear arms by a Commission from L^{d} Dunmore, that he was a mere prisoner of war," but the plea had been rejected and Philips executed "according to the forms and rules of the Common law." Judge Tucker was wrong that the judges had refused to enforce the Act. Its enforcement was in fact "never proposed to them."[91]

D. Making Sense of Randolph's Account

The record raises two central questions. *First*, why did Randolph misrepresent the proceedings against Josiah Philips?[92] Or did he,

90. *See Girardin Letter*, *supra* note 8, at 334.

91. *Id.* at 334, 336–37. An examination of the records in the case, suggested Jefferson, would be appropriate, as he was "not so certain in my recollection of the details." *Id*. at 337; *see also Letter from Thomas Jefferson to William Wirt (Aug. 5, 1815)*, *in* 8 THE PAPERS OF THOMAS JEFFERSON: RETIREMENT SERIES 643–44 (J. Jefferson Looney ed., 2011).

92. Although Crosskey and Eckenrode thought Randolph lied, CROSSKEY, *supra* note 9, at 946; ECKENRODE, *supra* note 9, at 193, Jefferson did not. *Writ Letter,* 1816, *supra* note 74, at 438 ("[N]ot that I consider mr Randolph as misstating intentionally, or desiring to boulster an argument at the expence of an absent person . . . and as little do I impute to mr Henry any willingness to leave on my shoulders a charge which he could so easily have disproved."). On another occa-

somehow, forget? But what, then, of Henry's response—did Henry forget too? *Second*, why did Tucker claim that the judges of the Virginia General Court had refused to enforce the act of attainder? Whether one took Randolph's view—that Philips had been "afterwards actually executed"—or Jefferson's view (and the view of modern researchers)—that Philips had been tried by a jury and executed for robbery—there was no basis for thinking the case had involved judicial review.

Return, first, to Edmund Randolph's account of the Philips attainder at the Virginia ratifying convention. A clue to what Randolph intended can be found in his *History of Virginia*, composed between 1809 and 1813 and for many years available only in manuscript.[93] Randolph's *History* refers briefly to the Philips affair, reiterating much of what he had alleged at the convention, but with an important addition. Here is what Randolph says:

> It was generally believed that a banditti in the neighborhood of Norfolk had availed themselves of the cover and aid which a British squadron and British forces had lately afforded them for plunder and revenge by various atrocities on many citizens. One Josiah Philips . . . had eluded every attempt to capture him. . . . [T]he General Assembly, without other evidence than general rumor of his guilt, or the insufficiency of legal process in taking him into custody, on the motion of a member attainted him of high treason, unless he should surrender by a given day. In a very august Assembly of Virginia, it was contended that, as he deserved to die, it was unimportant whether he fell according to the technicality of legal proceeding or not. Probably he deserved death, although if a judgment can be formed of this by subsequent facts, *the prosecution against him being as against a robber, not a traitor, he was an offender less heinous than he was conceived to be*. His apology, too, was not perhaps admissible, although it was that he had never for a moment acquiesced in the Revolution . . . and that his loyalty was not for a moment concealed, but he received on the first opportunity, and acted under, a military commission from the crown. He did not surrender within

sion, Jefferson described Randolph as "the poorest cameleon I ever saw, having no colour of his own, and reflecting that nearest to him." EDMUND RANDOLPH, HISTORY OF VIRGINIA, at xv (Arthur H. Shaffer ed., 1970) (1809–1813) [hereinafter RANDOLPH, HISTORY] (quoting Dice Robins Anderson, *Edmund Randolph*, in 2 THE AMERICAN SECRETARIES OF STATE AND THEIR DIPLOMACY 100 (1927)).

93. RANDOLPH, HISTORY, *supra* note 92, at xxxvii–xliv. The Shaffer edition is the only printed version of the *History* of which I am aware, although parts of it were reproduced in various places by individuals who had seen the manuscript. *E.g.*, 1 WILLIAM WIRT HENRY, PATRICK HENRY: LIFE, CORRESPONDENCE AND SPEECHES 435 (1891).

> the time prescribed and was exposed, on being arrested, to the single question whether he was the person attainted and upon the establishment of the affirmative to be led to execution. He waived his apology because he would not exasperate his jury in his defense against robbery.[94]

Randolph's account in the *History* clearly demonstrates that he was aware Philips was prosecuted for robbery. Randolph regards this fact as consistent with his criticism of the attainder—in fact, Philips's prosecution for *robbery* is part of what bothers Randolph most about the affair. This suggests a different interpretation of Randolph's words at the Virginia ratifying convention in 1788. On that occasion, Randolph noted that the House of Delegates had relied on only "vague reports" or "general reports," and that these reports had alleged Philips merely to have committed "several crimes."[95] Randolph also emphasized the speed with which the bill passed through House, which had deprived Philips of an opportunity to appear and defend himself before the bill passed.[96] These points suggest that Randolph's concern was with *the circumstances under which the bill passed*, rather than the act's subsequent execution. Indeed, Jefferson himself suggests just this interpretation of Randolph's words in his letter to Louis Girardin. If, wrote Jefferson, "mr Randolph meant only that Philips had not these advantages [i.e., confrontation of his accusers and the introduction of evidence] *on the passage of the bill of Attainder*, how idle to charge the legislature with omitting to confront the culprit with his witnesses, when . . . their sentence was to take effect only on his own refusal to come in and be confronted."[97] Moreover, Randolph did not, in fact, deny that Philips had been tried. He stated only that the bill had sentenced Philips to death (as it had, *conditionally*), and that Philips was "afterwards actually executed."[98] Both propositions were true, so far as we know.

Nor did Randolph falsely *imply* that Philips had been executed pursuant to the act of attainder. It would have been reckless to attempt such a thing given the convention's membership. Present there were a number of judges and former judges who had served during the Philips affair, including John Blair, Paul Carrington, and the doyens of Virginia legal society, George Wythe and Edmund Pendleton,

94. RANDOLPH, HISTORY, *supra* note 92, at 268–69 (emphasis added).
95. 9 DHRC, *supra* note 57, at 972.
96. *Id.*
97. *Girardin Letter*, *supra* note 8, at 335 (emphasis added).
98. 9 DHRC, *supra* note 57, at 972.

any one of whom might have known of Philips' fate.[99] Their politics and purposes were diverse. Another judge, Joseph Jones, had served on the General Court in 1778 and would now vote against the proposed federal Constitution, in opposition to Randolph. James Madison knew of the Philips case from his seat on the governor's Privy Council in 1778 and supported the Constitution, but opposed Randolph's desire to *amend* it.[100] Patrick Henry and Benjamin Harrison opposed the Constitution *unless* amended (Henry, likely, even if amended), and both had been personally involved in Philips's attainder. Whether moved by politics or office, any one of these men might have undermined Randolph by pointing out a misleading implication. His credibility already in question for having switched positions on the Constitution (he had refused to sign it at the Philadelphia Convention), it would have been utterly senseless for Randolph to risk his reputation—and ratification—to mischaracterize the case.[101]

Assuming they were accurately reported, Henry's remarks did evince a mistaken belief that Philips had been executed pursuant to the act of attainder. Were this the point in dispute, all those present with knowledge of Philips's case would have expected Randolph to correct the error, and Randolph would have been aware of such an expectation. But it was not the point in dispute. Randolph's purpose in referring to the Philips case was, as he put it, to demonstrate the insecurity of "public justice" in Virginia, and for that purpose the bill's passage was the crucial point.[102] Randolph dwelled on the circumstances under which the bill passed. He emphasized speed, collusion, and that Philips had not been afforded an opportunity to appear and defend himself.[103] The last point was attractive because it was a clas-

99. *Compare* 10 DOCUMENTARY HISTORY OF RATIFICATION, *supra* note 80, at 1540–41 (listing Virginia ratification 'aye' and 'no' votes), *with* 2 WILLIAM BROCKENBROUGH, VIRGINIA CASES, OR DECISIONS OF THE GENERAL COURT OF VIRGINIA, at x, xiii (1826) (listing members of General Court and High Court of Chancery).

100. Prior to the convention, Madison suspected that Randolph approved of the Constitution, if amended before ratification; at the convention, however, Randolph urged that amendment should follow ratification. MAIER, *supra* note 78, at 232, 241, 261.

101. *See id.* at 261 (noting that "members of the opposition were not so happy about Randolph's stand [in favor of ratification prior to amendment], and periodically in the course of the convention they would make comments about Randolph's inconsistency that provoked brief, emotional flare-ups"); *see also* RANDOLPH, HISTORY, *supra* note 92, at xiii (similar).

102. *See* 9 DHRC, *supra* note 57, at 971 ("Governor *Randolph*.— . . . The security of public justice, Sir, is what I most fervently wish—as I consider that object to be the primary step to the attainment of public happiness. . . . We are told that the report of dangers is false. The cry of peace, Sir, is false: Say peace when there is peace: It is but a sudden calm. The tempest growls over you—look round—wheresoever you look, you see danger.").

103. *Id.*

sic objection against bills of attainder, which others were likely to know.[104] The objection was not usually employed against *suspensive* attainders, however, and Jefferson's response, quoted above, shows why: surely one cannot fault the assembly for proceeding against Philips *in absentia* when the man refused to come in. Yet Randolph had a rejoinder to Jefferson, which he described in the *History*: Should a citizen have to bear the risk that he be conditionally sentenced to death by the legislature without notice? "What was [Philips's] peril, while he was roving abroad, devoted by a legislature to death unless he should surrender himself"?[105] And what could Philips have expected had he come in, given that the "denunciation of a government is almost the sure harbinger of condemnation"?[106] A jury would be biased against a defendant already publicly condemned in the legislature by the leading men of the state. The rejoinder was especially powerful because Philips had been alleged merely to have committed "several crimes"—murder, arson and robbery—rather than conduct that was *unequivocally* treason. Indeed, report of Philips's trial in the *Virginia Gazette* stated a charge of "robbing the publick waggons"—but then added, parenthetically, that his gang "were accused of murder, treason, and sundry other outrages."[107] If serious but ordinary crimes were to be summarily prosecuted in the assembly any time judicial process failed, it risked "confounding" legislative and judicial powers and thereby corrupting ordinary forms of justice. *That* danger was not alleviated because Philips had in fact received a trial.[108]

This construction of Randolph's comments provides a key for making sense of much of what was said about Philips at the conven-

104. *See, e.g.*, Steilen, *supra* note 2, at 800–02 (noting the criticism of Elizabeth Barton attainder); *id.* at 822–23 (discussing the attainder in Coke's *Institutes* and "On the Judicature of Parliaments").

105. RANDOLPH, HISTORY, *supra* note 92, at 269.

106. *Id.* Levy makes this point in his discussion of the case, without attributing it to Randolph. LEVY, *supra* note 9, at 76.

107. VIRGINIA GAZETTE (Purdie) (Oct. 30, 1778), p. 3, col. 2 ("On Friday the 16th commenced, and continued to the 21st, the trial of sundry prisoners from the publick jail, when Josiah Philips [and others] from Princess Anne for robbing the publick wagons (and who were accused of murder, treason and sundry other outrages) were capitally convicted . . . .").

108. According to Madison's notes and the official journal of the Philadelphia convention, on August 20, 1787, Randolph had moved to broaden the definition of treason in the draft Constitution to include giving aid and comfort to the enemies of the United States, because they "had a more extensive meaning." 2 THE RECORDS OF THE FEDERAL CONVENTION OF 1787, at 339, 345–46, 351 (Max Farrand ed., 1937); *see also* 3 DOCUMENTARY HISTORY OF THE CONSTITUTION OF THE UNITED STATES OF AMERICA, 1786–1870, at 569 (1900). The act of attainder, however, charged Philips and his gang with having levied war, and thus depended on a theory that the use of armed force to resist the execution of law or effect change was treasonous. *See supra* note 55.

tion. For if Randolph aimed his attack at the scope of legislative attainder, then Henry would focus his defense there as well. Henry had defended bills of attainder before, as Randolph knew. During deliberations in the 1776 convention that enacted Virginia's *state* constitution, Henry had argued forcefully against language in a draft declaration of rights prohibiting bills of attainder, citing cases not unlike Philips'. According to Randolph's *History*, "An article prohibiting bills of attainder was defeated by Henry, who with a terrifying picture of some towering public offender against whom ordinary laws would be impotent, saved that dread power from being expressly proscribed."[109] The guarantee of jury trials and confrontation in (what became) section 8 of the Declaration of Rights was objected to on a similar basis.[110] Henry's ally, the radical Thomas Ludwell Lee, also attempted to qualify a ban on ex post facto laws for this reason, proffering that such rules "were not natural laws, but might be changed by posterity as the law of necessity—the exigencies of life—might dictate," such as "when the safety of the State absolutely requires" that it act ex post facto.[111]

At the federal convention, twelve years later, Henry found it much harder to stake out this position on bills of attainder. Although George Mason had attacked the proposed Constitution for its ban on ex post facto laws despite the need for such laws to protect "public safety," Henry said nothing about the neighboring provision banning bills of attainder.[112] And although slavery played an important role in Henry's arguments during the convention, he made no effort to connect the Philips attainder to the presence of escaped slaves in the gang

109. RANDOLPH, HISTORY, *supra* note 92, at 255; *see also* Hilldrup, *supra* note 52, at 202–03.

110. Hilldrup, *supra* note 52, at 193 (reporting that Thomas Ludwell Lee or an ally "tried to attach to this section . . . an amendment . . . 'that no man, except in times of actual invasion or insurrection, can be imprisoned upon suspicion of crimes against the States, unsupported by legal evidence,'" which Hilldrup views as giving "martial law a constitutional sanction").

111. *Id.* at 183. In committee, Henry and Lee had lost to the moderate "Tuckahoes," who insisted on such a ban to protect themselves from anti-Tory laws. *Id.* at 184. The ban, however, was rejected by the full convention.

112. *George Mason's Objections to the Constitution of Government formed by the Convention*, *in* 8 THE DOCUMENTARY HISTORY OF THE RATIFICATION OF THE CONSTITUTION 45 (John P. Kaminski & Gaspare J. Saladino et al. eds., 1988) ("Both the general Legislature & the State Legislatures are expressly prohibited making ex post facto Laws; tho' there never was or can be a Legislature but must & will make such Laws, when Necessity & the public safety require them . . . ."). Henry joined Mason in his criticism of the bans on federal and state ex post facto laws in Article I, sections 9 and 10, but on the basis that they would require federal and state governments to honor deflated paper currencies and debts. *See* 10 DOCUMENTARY HISTORY OF RATIFICATION, *supra* note 80, at 1346–47, 1354, 1356–58.

and the dangers of slave insurrection.[113] Instead, Henry opened the convention by arguing that the proposed federal Constitution would deprive Virginians of the liberties they now enjoyed.[114] The tactic made the Philips case awkward, since Philips had at least been threatened with a denial of the right to a jury trial. Henry's strategy was to argue that Philips was never entitled to the procedure; the legislature could proceed as it did, Henry argued, because Philips was a "fugitive" and an "out-law," a "common enemy to all mankind." As the speech unwound, however, Henry lost his grip on the argument, as listeners misunderstood the observation about Socrates, whom Henry adduced not as an example of a virtuous man, but as someone *unjustly* condemned and executed (ironically, by a jury). Philips, in contrast, had been given a fugitive's due. Delegates missed the point, and when Henry concluded that Philips' treatment was justified by the "laws of nature and nations," they heard confirmation of a view that the *unvirtuous* might be deprived of trial by jury.[115] Federalists sensed a misstep and seized upon it.

So, why, then, did Randolph misrepresent what had happened to Philips? The answer is that he did not—at least, not where it counted. Randolph *was* guilty of exaggerating the speed with which the bill passed through the house. He was also mistaken that Philips had been captured *after* the grace period in the act expired. And he was less than fully forthright in failing to correct Henry's assertion that Philips had not enjoyed a jury trial, although he probably remained well within the conventions and mutual expectations that characterized

113. *See* Robin L. Einhorn, *Patrick Henry's Case Against the Constitution: The Structural Problem with Slavery*, 22 J. EARLY REPUB. 549, 549–55 (2002) (discussing Henry's speech of June 24). Randolph broached the issue of slave insurrections early in the convention. MAIER, *supra* note 78, at 274.

114. *See* 9 DHRC, *supra* note 57, at 930 ("[Patrick Henry:] I expected to have heard the reasons of an event [*i.e.*, the proposal of the Constitution] so unexpected to my mind, and many others. Was our civil polity, or public justice, endangered or sapped? . . . This proposal of altering our Federal Government is of a most alarming nature . . . you ought to be extremely cautious, watchful, jealous of your liberty; for instead of securing your rights, you may lose them forever."). When Randolph and Pendleton responded that Virginia was suffering from economic depression, Henry chided them, "You are not to inquire how your trade may be increased, nor how you are to become a great and powerful people, but *how your liberties can be secured*." *Id.* at 951–52 (emphasis added). For Randolph and Pendleton's comments, see *id.* at 934, 944. According to Pauline Maier, Henry's argument that "[t]he people were secure before the Constitutional Convention met" "effectively redefined the questions for debate," and "forced [the convention] to confront big questions that were not on its formal agenda." MAIER, *supra* note 78, at 260, 257.

115. *See* 9 DHRC, *supra* note 57, at 1038.

convention discourse.[116] For Philips' trial was not Randolph's concern. Randolph's concern was that a bill of attainder had passed merely on the basis of reports that Philips led a gang engaged in murder, arson and robbery, without offering Philips an opportunity to appear and defend himself. *This* was true, and it supported Randolph's contention that civil justice was insecure in Virginia. If the assembly could interfere in judicial forms of process merely because it was wartime, then section 8 of the state's admirable Declaration of Rights would not be enough to protect Virginians' liberties. And it was at this proposition, naturally, that Patrick Henry aimed his response. The Philips case did not evidence a failure of justice, Henry argued, since everyone had known that Philips was not entitled to the protections of the common law. Swept up by his own argument, perhaps, Henry mishandled the point—a result that apparently was not uncommon for the great orator.[117]

If I am right about this, it follows that Henry, Jefferson and even Randolph regarded the General Assembly as possessing significant legal powers. Their dispute was about the scope of these powers. This reinforces a reading of section 5 of the Virginia Declaration of Rights, which famously provided for a separation of powers, as intended merely to secure some autonomy for Virginia courts, rather than confine the assembly to a legislative 'function'—passing general, forward-looking laws.[118] Indeed, from one perspective, it was essential that a republican assembly have the authority to cure failures in justice caused by a breakdown in judicial process. In appropriate cases, where the security of the whole people was at risk, the assembly might

116. *Cf.* Jack Rakove, *A Biography of Madison's Notes of Debates*, 31 CONST. COMMENT. (forthcoming) (reviewing BILDER, *supra* note 78) (identifying, among "the rhetorical conventions that operated during the ratification conventions," the conversion of "'the complicated political process into the thoughts of a single mind'").

117. *Girardin Letter*, *supra* note 8, at 335 ("[Henry] must have known that Philips was tried and executed under the Common Law, and yet, according to this report, he rests his defence on a justification of attainder only. [B]ut all who knew mr Henry know that when at ease in argument, he was sometimes careless, not giving himself the trouble of ransacking either his memory or imagination for all the topics of his subject, or his audience that of hearing them."). We should not conclude, I think, that Randolph knowingly took advantage of Henry in this regard, given the membership of the convention and the risk of having a misleading statement be openly corrected.

118. *Declaration of Rights*, *supra* note 20, at 1920 ("Sect. 5. That the legislative and executive powers of the State should be separate and distinct from the judiciary"); *see also* ADAMS, *supra* note 20, at 265 ("Virginia's constitution of June 1776 was the first constitutional document since the *Instrument of Government* . . . to include the principle of separation of powers in express terms. It did so with a clarity that no previous statement of either theory or practice had achieved.") (providing representative readings of this section); GERBER, *supra* note 20, at 61.

suspend the law in favor of summary or military proceedings, guided by the expertise of elite lawyers sitting there.[119] This was one way in which the representative assembly, and not the governor, inherited the king's obligations to protect his subjects and provide justice.[120] In Jefferson's mind, at least, such an allocation was preferable to vesting the authority in common-law courts, since judicial innovation was inconsistent with republican government, even where judges improvised on a long-established judicial writ like outlawry.[121]

III. ST. GEORGE TUCKER AND THE ROLE OF COURTS IN WARTIME GOVERNANCE

Jefferson saw an expansive role for the General Assembly in Virginia's republican government, but even he would later admit that it did not prove equal to the task. It was prone to the same corruption that had compromised Virginia's colonial government.[122] The state's constitution was of no avail in this regard; as Jefferson complained in *Notes on the State of Virginia*, it was "no alleviation" to the threat of despotism that powers had been placed "in a plurality of hands," as guaranteed by section 5 of the Declaration of Rights, since the Assembly had absorbed "[a]ll the powers of government, legislative, executive and judiciary," inserting itself even into the ordinary course of justice.[123] Over the course of the 1780s, then, some Virginians began to envision a shift in the institutional forms of magistracy. The General Assembly would have to be bound by "well-designed legal mechanisms."[124] One such mechanism was a stronger *national* authority;

119. Section 7 of the *Declaration of Rights* requires the consent of the "representatives of the people" to suspend laws. *Declaration of Rights*, *supra* note 20, at 1920. Jefferson clearly thought the assembly should have a power to attaint. In addition to his Bill to Attaint Josiah Philips, see Jefferson's proposed "Bill for Proportioning Crimes and Punishments in Cases Heretofore Capital," probably written in late 1778, which provides that "No attainder shall work corruption of blood in any case." *Bill to Attaint*, *supra* note 1, at 503, 506–07 n.21.

120. Matthew Crow, *Thomas Jefferson and the Uses of Equity*, 33 Law & Hist. Rev. 153, 168–69 (2015).

121. A.G. Roeber, Faithful Magistrates and Republican Lawyers: Creators of Virginia Legal Culture, 1680–1810, at 163–67 (1981); David Thomas Konig, *Legal Fictions and the Rule(s) of Law: The Jeffersonian Critique of Common-Law Adjudication*, *in* The Many Legalities of Early America 114–17 (Christopher L. Tomlins & Bruce H. Mann eds., 2001).

122. Colbourn, *supra* note 58, at 172–73.

123. Thomas Jefferson, Notes on the State of Virginia 123–24 (1785). That the assembly interfered with the ordinary course of justice is how I understand the famous complaint that the Assembly had "in many instances, decided rights which should have been left to judiciary controversy." *Id*. at 124.

124. Gerald Leonard, *Jefferson's Constitutions*, *in* Constitutions and the Classics: Patterns of Constitutional Thought from Fortescue to Bentham 378 (Denis J. Galligan ed., 2014). Compare Leonard's account with Mary Sarah Bilder's account of Jefferson's thinking

but another was the court of law, now inoculated against executive interference by a doctrine of 'judicial independence,' and improved by statutory reform and by the spread of common-law procedures.[125]

This is the context in which we must take up St. George Tucker's suggestion, in his edition of Blackstone's *Commentaries*, that Virginia's judges refused to enforce the act of attainder against Josiah Philips. Tucker was a member of the great planter class by marriage, but had found commercial success and reputation largely as a lawyer practicing before Virginia's central courts in the 1780s.[126] He became an early and vigorous proponent of employing the state's courts as a 'legal mechanism' for checking the General Assembly. Tucker had taken this position as early as 1782 (around the same time Jefferson was writing *Notes*), in his argument as an amicus in another treason prosecution, known to us as Commonwealth v. Caton.[127] In *Caton*, the question was whether a provision governing pardons in Virginia's Treason Act was consistent with the pardon clause in the state's 1776 Constitution; and, if the former was "repugnant" to the latter, whether the Court of Appeals could declare the act void.[128] Tucker took the second question first and argued straightaway that the court must have such an authority, concomitant to its power "to explain the Laws of the Land as they apply to particular Cases."[129] Moreover, this power was the courts' alone. For if the General Assembly, too, could "explain the Laws judicially, that is to decide in *particular Cases*," then

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in the late 1780s: "Jefferson returned [to the United States in 1789 from France] with views framed by the aspirations and anxieties of the French Revolution instead of firsthand experience with American political changes . . . . For Jefferson, danger lay with would-be monarchists rather than state governments. Salvation lay with republican government rather than national or federal government." BILDER, *supra* note 78, at 203. As I read Jefferson, the danger, and thus salvation, lay with both. *See Letter from Thomas Jefferson to James Madison (Sept. 6, 1789)*, *in* 15 THE PAPERS OF THOMAS JEFFERSON 396 (Julian P. Boyd ed., 1958) ("It might be indeed if every form of government were so perfectly contrived that the will of the majority could always be obtained fairly and without impediment. But this is true of no form. The people cannot assemble themselves. Their representation is unequal and vicious. . . . Factions get possession of the public councils. Bribery corrupts them. Personal interests lead them astray from the general interests of their constituents . . . ."), *cited in* BILDER, *supra* note 78, at 320 n.2.

125. ROEBER, *supra* note 121, at 161, 197; F. THORNTON MILLER, JURIES AND JUDGES VERSUS THE LAW: VIRGINIA'S PROVINCIAL LEGAL PERSPECTIVE, 1783–1828, at 12–33 (1994).

126. TAYLOR, INTERNAL ENEMY, *supra* note 38, at 32.

127. *Argument in the Case of the Prisoners* (Oct. 31, 1782), *in* 3 ST. GEORGE TUCKER'S LAW REPORTS AND SELECTED PAPERS, 1782–1825, at 1741–48 (Charles F. Hobson ed., 2013); William Michael Treanor, *The Case of the Prisoners and the Origins of Judicial Review*, 143 U. PA. L. REV. 491, 520–29 (1994).

128. Pendleton's Account of "The Case of the Prisoners" (Caton v. Commonwealth), *in* 2 THE LETTERS AND PAPERS OF EDMUND PENDLETON, 1734–1803, at 416–17 (David John Mays ed., 1967); Commonwealth v. Caton, 4 Call 5 (1782).

129. *Argument in the Case of the Prisoners*, *supra* note 127, at 1742.

"the Judiciary, who are by the Constitution appointed as a counterpoise to it [i.e., the assembly], is entirely annulled."[130] Here Tucker seems to have been responding to Edmund Randolph, also appearing in the case as the state's Attorney General. Randolph had agreed that a law repugnant to the constitution was void, but *not* that a court of law could declare it void. In other words, he had *opposed judicial review*. In correspondence to friends, Randolph suggested that the people themselves might resolve the validity of the Treason Act, and that a different institution—a council of revision—could enforce the constitution in the future.[131]

From an early date, then, Tucker saw a constitutional role for courts of law as a check on the republican assembly, and in this regard he was distinguished from Randolph. But how might the General Court have checked the General Assembly in the Philips case? It is perfectly possible, as Dumas Malone suggested years ago, that Edmund Randolph—who, recall, was also Attorney General when Philips was captured—decided to prosecute Philips for robbery *after*

130. *Id.*

131. Edmund Randolph, *Notes on Virginia Laws. Includes Pardons for Traitors.*, LIBRARY OF CONG., https://www.loc.gov/item/mjm021836 (last visited Jan. 17, 2017) ("That, howsoever adverse the law, which vests this power in the general assembly may be, to the constitution, no court of judicature can pronounce its nullity."). My interpretation of Randolph's argument differs markedly from William Treanor's. I am indebted here in more than the usual degree to Rob Steinfeld, who pointed out to me that Treanor conflates two questions Randolph clearly separates in his notes: "1. [whether] the treason law [should] be declared void, so far as it is repugnant to the constitution," and "2. If it can be declared void, can any court of judicature pronounce its nullity?" Treanor, *supra* note 127, at 511. Treanor treats the first question as equivalent to judicial review, but I don't think the reading can be sustained. Randolph describes his answer to the first question as "the decision of my own mind" as to when "the right of resistance commences." *Id.* at 512. The reference here seems to be to popular resistance to unconstitutional laws, that is, enforcement 'out of doors,' rather than in a court of law. Moreover, the reporter Daniel Call records Randolph as arguing against judicial review. Commonwealth v. Caton, 4 Call 5, 7 (1782) ("The attorney general, in reply, insisted . . . that the court were not authorized to declare it [the Treason Act] void."). Treanor suggests that Call is in error and that the portion of Randolph's notes stating an opposition to judicial review describe the state's 'official' position, to which Randolph was personally opposed. Treanor, *supra* note 127, at 511. Yet there is little reason for such gymnastics other than Treanor's identification of Randolph's first and second questions, and for that identification I can find little justification in the text itself. Randolph did support judicial review five years later at the Philadelphia Convention, but as a supplement to a council of revision. 1 THE RECORDS OF THE FEDERAL CONVENTION OF 1787, at 21, 28 (Max Farrand ed., 1937) (Madison and Paterson notes of Randolph's 'Virginia' Plan); DOCUMENTARY HISTORY, *supra* note 108, at 19 (Madison). In the weeks before the argument in *Caton*, Randolph had written to James Madison that there was talk of creating a "council of revision," comprising in part members of the assembly, in order to "to keep the legislature in future cases within its just limits." Letter from Edmund Randolph to James Madison (Oct. 26, 1782), Manuscript/Mixed Material, Library of Congress, https://www.loc.gov/item/mjm012317.

consulting with the judges of the General Court.[132] Jefferson later denied that the judges had refused to enforce the act, but a consultation would have been ambiguous, and we should not be surprised if Jefferson, writing to Wirt in 1815, was prone to emphasize the executive discretion it implied, while Tucker in the early 1790s saw the stricter logic of judicial duty. Perhaps, then, the judges expressed an objection to the act of attainder in some way, leading Randolph to prosecute Philips for robbery. But why would the judges have objected? How was the act of attainder relevant? If Philips was captured before the expiration of the grace period in the attainder, why should Randolph have sought out their views on it?

The answer to this question has to do with the boundaries between the law of war and the law of treason. Jefferson's bill of attainder charged Philips with having "levied war against this Commonwealth" by committing murder, arson and robbery. It conditionally attainted him of "high treason," of course—*but it also functioned as an indictment*, ordering Philips and his gang to surrender for "their trials for the treasons, murders and other felonies" they had committed.[133] High treason, however, could only be committed by an individual who owed allegiance to the sovereign.[134] At its core, wrote Blackstone in 1769, high treason was a crime that amounts "either to a total renunciation of that allegiance, or at the least to a criminal neglect of that duty, which is due from every subject to his sovereign."[135] American courts of law could enforce this principle consistent with their place in a republican form of government, ensuring that assem-

132. DUMAS MALONE, JEFFERSON AND HIS TIME: JEFFERSON THE VIRGINIAN 292 (1948); *cf.* Trent, *supra* note 9, at 453 (similar suggestion, but under the assumption that Philips was captured after the grace period had expired). Much later, when Randolph served as United States Attorney General, he described for French Ambassador Edmond Genet his decision not to prosecute Chief Justice John Jay, as Genet had requested: "I do not hold myself bound, nor do I conceive that I ought, to proceed against any man in opposition to my decided judgment." *Letter from Edmund Randolph to Edmond Genet, (Dec. 18, 1793)*, *quoted in* CASTO, SUPREME COURT, *supra* note 210, 137–38.

133. *Bill to Attaint*, *supra* note 1, at 190; c.3, 9 STATUTES AT LARGE, *supra* note 1, at 464. The editor of Jefferson's papers, Julian Boyd, identified a grammatical error in Jefferson's draft bill, which orders Philips and his associates to turn themselves in "in order to their trials for the treasons, murders and other felonies." Boyd suggests that Jefferson omitted the word "stand." *Bill to Attaint*, *supra* note 1, at 193 n.6. Yet the same usage appears in the act of attainder, and as Michael Boucai has pointed out to me, the Oxford English Dictionary defines "in order to" as "with a view to the bringing about of (something), for the purpose of (some desired end)." OED ONLINE ("order") (Aug. 2016).

134. EDWARD COKE, THE THIRD PART OF THE INSTITUTES OF THE LAWS OF ENGLAND 4–5, 10–11 (1817) (1644); Calvin's Case (K.B. 1608), *in* 1 THE SELECTED WRITINGS OF SIR EDWARD COKE: THE REPORTS 166, 174–227 (Steve Sheppard ed., 2003).

135. 4 TUCKER, BLACKSTONE'S COMMENTARIES, *supra* note 6, at 74.

blies respected the law of nations while playing an active role in protecting the operations of government and preserving domestic peace.[136]

A. The Problem of Allegiance

The leaders of American assemblies understood the legal connections between treason and allegiance. When assemblies sought to establish independent state governments in 1776 and 1777, one of the first acts or ordinances they passed was one defining treason and describing who owed the state allegiance.[137] Virginia addressed treason and allegiance in two separate acts of assembly. The Treason Act (the one litigated in *Caton*) was passed in October 1776, but it was not until May 1777 that the General Assembly addressed the matter of allegiance, obligating "all free born male inhabitants of this state, above the age of sixteen years" to swear an oath of allegiance before a justice of the peace.[138] The latter act began by reciting that "allegiance and protection are reciprocal,"[139] which was a standard view, but which concealed a difficult problem in this case, explaining why allegiance was joined to a compulsory oath. The problem was this: if allegiance followed from protection, then someone whom the state had never protected could not owe the state allegiance. This might be thought to describe Josiah Philips; after all, he had been attainted *by act* because he resided *in an ungoverned area* (the "Dismal Swamp"), where the state was unable to execute the law and judicial process did not run. This meant that a court of law trying Philips for treason would have to determine whether he was even capable of the crime. Three years later, in 1781, this very issue came before the Supreme Court of Pennsylvania in Respublica v. Chapman.[140] There the defendant challenged his attainder for treason by the state's Supreme Executive Council on grounds that he had not owed the state allegiance at the time he joined the enemy in December 1776. On that date the state had not yet enacted a constitution or formed a regular govern-

136. *See* CASTO, *supra* note 26, at 45–46, 126–41, 146, 159–60; GOEBEL, *supra* note 26, at 623–33.

137. One can find the relevant citations in CHAPIN, *supra* note 25, at 36–41.

138. 9 STATUTES AT LARGE, *supra* note 1, at 168 ("An act declaring what shall be Treason."); *id*. at 281 ("An act to oblige the free male inhabitants of this state above a certain age to give assurance of Allegiance to the same, and for other purposes.").

139. *Id.*

140. Respublica v. Chapman, 1 U.S. 53 (Pa. 1781); REPORTS OF CASES RULED AND ADJUDGED IN THE COURTS OF PENNSYLVANIA, BEFORE AND SINCE THE REVOLUTION 53 (1790).

ment. Still, wrote Chief Justice Thomas McKean, "there did antecedently exist a power competent to redress grievances, to afford protection, and, generally, to execute the laws," administered by council and convention, to which allegiance was due.[141] The same issue stood at the center of the Philips case, and in this respect his capture before the end of the grace period in the act of attainder was irrelevant.

But the problem was not limited to cases like Chapman's and Philips's. The difficulties posed by allegiance were, in fact, widespread. Prosecution for lesser state crimes, such as the myriad "treasonous misdemeanors" concocted by state legislatures, also raised the question of allegiance.[142] In Virginia, for example, shortly after enacting its treason law, the General Assembly passed "An Act for the punishment of certain offences," defining a variety of offenses short of treason, including seditious libel, exciting the people to resist government, discouraging enlistment, and other offenses.[143] These crimes, which Blackstone had called "contempts . . . against the king's person and government," could also be regulated on a preventive basis, under a regime of "preventive justice."[144] And, indeed, preventive regulation of sedition and treasonous misdemeanor was common during the Revolution, forming perhaps the mainstay of what Willard Hurst has described as the "[s]ummary executive action" so typical of the time.[145]

The absence of allegiance was thus a natural defensive plea against charges of treason and related offenses. Aware of this, Attor-

141. *Id*. at 57. McKean nevertheless went on to instruct the jury that the state's treason law implied a period of election in which individuals were free to join either side, and Chapman was discharged. Recognizing a period of free election was, says Chapin, an "act of grace," but states generally recognized such a period, concluding in the passage of a treason law. CHAPIN, *supra* note 25, at 71–72.

142. Young, *supra* note 25, at 296; *see also* VAN TYNE, *supra* note 25 (providing the best study of these offenses in the context of the Revolution).

143. An act for the punishment of certain offenses, c.5, 9 STATUTES AT LARGE, *supra* note 1, at 170–71. The act was repealed and replaced by a similar statute in May 1780. An act affixing penalties to certain crimes injurious to the independence of America, but less than treason, and repealing the act for the punishment of certain offenses, c.14, 10 THE STATUTES AT LARGE; BEING A COLLECTION OF ALL THE LAWS OF VIRGINIA, FROM THE FIRST SESSION OF THE LEGISLATURE IN THE YEAR 1619, at 268–70 (William Waller Hening ed., 1822).

144. 3 TUCKER, BLACKSTONE'S COMMENTARIES, *supra* note 6, at 251. On the ideology of police offenses and preventive justice, see MARKUS DUBBER, THE POLICE POWER: PATRIARCHY AND THE FOUNDATIONS OF AMERICAN GOVERNMENT 83–85 (2005).

145. JAMES WILLARD HURST, THE LAW OF TREASON IN THE UNITED STATES 83 (1945). To be sure, publicists described a similar principle under the law of war. Thus, according to Vattel, a nation at war could demand good behavior of unarmed *enemies*, disarming or even imprisoning those whom were not trusted. VATTEL, *supra* note 24, bk.III, c.VIII, §§ 147, at 353.

ney General Randolph would have had good reason to seek out the views of the General Court on the issue of Philips's allegiance. The judges, for their own part, might reasonably have expected that issue to come before them. Not only was it raised by the language of the act of attainder, which directed Philips's trial for treason, but such questions had come before English courts in a variety of postures for over 100 years, as evidenced by a variety of authorities they knew, including Calvin's Case.[146] If Randolph did inquire into the view of the judges of the General Court and discovered they harbored serious objections, he may have concluded that it was best not to proceed under the act of attainder at all, but bring a new indictment for a felony like robbery, which still carried a death sentence. This would account for both Jefferson's recollection that Randolph had declined to prosecute under the act, and Tucker's statement that the judges had refused to do so. As historian Henry Young has shown, it was the same path followed by state attorneys in Pennsylvania, tasked with prosecuting loyalists who had "operated as uninstructed guerrillas, rendering themselves liable to prosecution for nearly every felony."[147]

B. The Problem of Belligerent Status

Philips had grounds for a second defensive plea as well, namely, that he was an enemy belligerent and entitled to protection under the customary law of war. Indeed, references to Philips's status under the law of war and the law of nations litter the record. When Patrick Henry first addressed the attainder at the Virginia ratifying convention in 1788, he suggested that Philips's treatment was justified by the law of nations.[148] Randolph picked up on the point in his response to Henry two days later, pointing out that Philips "had a commission in his pocket" when he was arrested, making him "therefore only a prisoner of war."[149] Marshall and Nicholas missed the issue in their comments, but Benjamin Harrison—who had been speaker of the House of Delegates when the bill of attainder passed—did address it, asserting that Philips "by the law of nations, was entitled to no privilege of trial."[150] Everyone with personal knowledge of the matter brought up

146. Paul Halliday, Habeas Corpus: From England to Empire 32, 162–73, 205–06 (2010).
147. Young, *supra* note 25, at 296–98.
148. 9 DHRC, *supra* note 57, at 1038.
149. *Id*. at 1087.
150. *Id*. at 1127.

Philips's status under the law of war. It figured centrally as well in Jefferson's subsequent recollections of the case. In his first account, given to Wirt in August 1814, Jefferson noted that Philips had been "covering himself, without authority, under the name of a British subject," and that Randolph believed Philips would enter such a plea against the attainder, arguing that he was "a prisoner of war entitled the protection of the law of nations."[151] He used similar language in a letter to Girardin the next year.[152] And Randolph's *History*, written around the same time, asserted that Philips' "apology" to the charges against him was that "he had never for a moment acquiesced in the Revolution . . . but he received on the first opportunity, and acted under, a military commission from the crown."[153]

If Philips had accepted a military commission from the crown "on the first opportunity," as Randolph stated, and had done so before he owed allegiance to Virginia, then it likely made him an enemy.[154] An enemy could not commit treason.[155] Moreover, a central commitment of the publicist tradition was that a captured enemy should be held as a prisoner of war, and could not be put to death or otherwise punished.[156] At the Virginia ratifying convention, Henry had raised this cluster of issues by describing Philips as "[a] pirate, an out-law, or a common enemy to all mankind."[157] Henry's language followed the *Commentaries,* where Blackstone had described a "crime of piracy" against the law of nations. The pirate, wrote Blackstone, "has renounced all the benefits of society and government, and has reduced

151. *Wirt Letter, 1814*, *supra* note 46, at 548–49.

152. *Girardin Letter*, *supra* note 8, at 337 ("[Philips] pleaded that he was a British subject, authorized to bear arms by a Commission from Ld Dunmore, that he was therefore a mere prisoner of war, and under the protection of the law of nations.") ("I recommend an examination of the records . . . I am not sure of . . . whether his plea of alien enemy was formally put in and overruled.").

153. RANDOLPH, HISTORY, *supra* note 92, at 268–69.

154. This was the conclusion reached by Chief Justice Thomas McKean in an advisory opinion for President Reed of Pennsylvania's Supreme Executive Council. *Letter or Opinion of C. J. McKean to Pres. Reed, 1779*, 7 PENN. ARCH., 1ST SER. 644–46 (1853).

155. *See* COKE, *supra* note 134, at 10–11; 4 TUCKER, BLACKSTONE'S COMMENTARIES, *supra* note 6, at 74–75.

156. *See* VATTEL, *supra* note 24, bk.III, c.vIII, ss.140, 149, at 358– 59; *see also* HUGO GROTIUS, DE IURE BELLI AC PACIS, Liber III, Caput XIV 522 (1646) (stating that prisoners of war who surrender on condition of their safety are not to be put to death) ("Easdem ob causas vitam salvam paciscentium, sive in praelio, sive in obsidione non repudianda dedito."). On the publicist tradition and the treatment of prisoners, see generally KENT, *supra* note 24, Lec.V, at 88–89 (focusing on the publicist tradition and the treatment of prisoners); NEFF, *supra* note 24, at 147–51, 163–65, 194–98 (highlighting the theory of 'regular war' more generally); WITT, *supra* note 24, at 16–19.

157. 9 DHRC, *supra* note 78, at 1038.

himself afresh to the savage state of nature, by declaring war against all mankind."[158] Society could, in self-defense, kill the pirate or outlaw, and states had created summary procedures for dealing with such cases. It was this label, then—*pirate*—that Randolph sought to rebut by raising the issue of the military commission. If Philips had possessed a military commission, as was rumored, then he was likely not a pirate, but a belligerent following British orders.[159]

Jefferson was not present at the convention to hear this exchange between Henry and Randolph, but he seems to have perceived the issue, arguing in his letter to Girardin that the existence of a military commission was beside the point. Even if Philips had been commissioned, wrote Jefferson, "an enemy in lawful war *putting to death, in cold blood, the prisoner he has taken*, *authorizes retaliation*, which would be inflicted with peculiar justice on the individual guilty of the deed, were it to happen that he should be taken."[160] Jefferson may have been referring to Vattel's *The Law of Nations*, a work he had closely studied, which described "a kind of retaliation sometimes practiced in war, under the name of reprisals." Reprisals were a dangerous business; according to the practice, the sovereign might respond to an enemy's killing of innocent prisoners by "hang[ing] an equal number of his [i.e., the enemy's] people . . . [and] notifying him that we will continue thus to retaliate, for the purpose of obliging him to observe the laws of war."[161] Yet Jefferson, apparently, found the idea compelling, or at least its logic difficult to resist, as he followed something like this course as Governor of Virginia in combating British-led "Indian warfare" in the western territories.[162] Jefferson connected the

158. 4 TUCKER, BLACKSTONE'S COMMENTARIES *supra* note 6, at 71.

159. *See* VATTEL, *supra* note 24, bk.III, c.XV, at 403–05 ("The generals, officers, soldiers, privateersmen, and partisans, being all commissioned by the sovereign, make war by virtue of a particular order. . . . [I]t is an infamous proceeding . . . to take out commissions from a prince, in order to commit piratical depredations on a nation which is perfectly innocent with respect to them. The thirst of gold is their only inducement; nor can the commission they have received efface the infamy of their conduct, *though it screens them from punishment*.") (emphasis added). I understand Vattel to be acknowledging that a commission might be used as 'cover' for piratical activity, not as authority for it; *see also* KENT, *supra* note 24, Lec.V, at 91 (according to Kent, citing Vattel, even an uncommissioned pirate could not be punished).

160. *Girardin Letter*, *supra* note 8, at 337.

161. VATTEL, *supra* note 24, bk.III, c.VIII, at 359.

162. *See* WITT, *supra* note 24, at 28–29, 33–37; *see also* 9 DHRC, *supra* note 78, at 1038 (stating that Jefferson was not the only of our figures to invoke such limitations. Patrick Henry, too, argued that, under the law of nations, Philips's conduct exempted him from protection as a prisoner of war, due to "the enormity of his crimes."); *id.* at 1127 (acknowledging that Benjamin Harrison also shared their views. Harrison had commented that Philips was "a man, who, by the law of nations, was entitled to no privilege of trial."); VATTEL, *supra* note 24, bk.III, c.VIII, § 141, at 358 ("There is, however, one case, in which we may refuse to spare the life of an enemy

conduct of these "merciless Indian savages" on the western frontier to escaped slaves in the eastern Tidewater—slaves like those who had joined the Philips gang—and the analogy resounded deeply in Virginia.[163]

The legal issues here are clearly quite complex, but (fortunately) we have no immediate need to referee them. Whether or not one accepts Jefferson's argument, it is easy to see that Philips's status engendered serious difficulties for a treason prosecution, since a prisoner of war could not normally be tried for treason.[164] If Randolph consulted the judges of Virginia's General Court on this point, they may have expressed their view that the law of nations forbade a trial of Philips for treason, as ordered by the act of attainder—a use of the law of nations not unlike the one James Duane would make in the later case of Rutgers v. Waddington.[165] The issue was one the General Court was certainly competent to consider; King's Bench in England had long determined prisoner of war status on petitions for writ of habeas corpus, and had even discharged enemy aliens charged with treason.[166] Randolph may have discovered that the judges would be amenable to hearing charges of robbery. Against robbery, a defensive

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who surrenders . . . . It is when that enemy has been guilty of some enormous breach of the law of nations, and particularly when he has violated the laws of war").

163. *See* DECLARATION OF INDEPENDENCE (1776) ("He has excited *domestic insurrections* amongst us, and has endeavoured to bring on the inhabitants of our frontiers, the *merciless Indian Savages*, whose known rule of warfare, is an undistinguished destruction of all ages, sexes and conditions.") (emphases added); PAULINE MAIER, AMERICAN SCRIPTURE: MAKING THE DECLARATION OF INDEPENDENCE 79, 121 (1997); *see also* TAYLOR, INTERNAL ENEMY *supra* note 38, at 10 (discussing the parallel between Indian warfare and slave revolt in Virginia) ("In newspapers and pamphlets, American writers demonized the British as race traitors who allied with savage Indians on the frontier and fomented bloody slave uprisings in the South. By aiming and encouraging the supposedly barbaric red and black peoples, the British betrayed the white Americans, who claimed a unique capacity to enjoy freedom and sustain a republic."); MARSTON, *supra* note 21, at 55. On Americans' use of Vattel and the theory of regular war to normalize violent conflict in the project of state building, see Ian Hunter, *'A Jus gentium for America': The Rules of War and the Rule of Law in the Revolutionary United States*, 14 J. HIST. INT'L L. 173, 178–91 (2012).

164. HALLIDAY, *supra* note 146, at 172–73 (describing describes one exception to the bar on trying prisoners of war for treason. In captivity, a prisoner of war became a 'local subject' of the sovereign, and could be tried for treason or felony for conduct after assuming that status).

165. Rutgers v. Waddington (N.Y. City Mayor's Ct. N.Y. 1784), *in* 1 THE LAW PRACTICE OF ALEXANDER HAMILTON 414–18 (Julius Goebel, Jr. ed., 1964) (discussing that the court gave force to the law of nations as part of the common law of the New York, effectively vindicating national treaty commitments); *cf.* Respublica v. De Longchamps, 1 U.S. 111 (1784) (McKean, C.J.) (describing the law of nations as part of the "municipal law" of Pennsylvania) (highlighting a similar case decided around the same time, but involving principles of substantive law). On the De Longchamps affair and the subsequent prosecution, see CASTO, SUPREME COURT, *supra* note 26, at 7–8, 132–33.

166. HALLIDAY, *supra* note 146, at 170.

plea that Philips was an enemy belligerent was unlikely to succeed, since belligerents were supposed to preserve the lives and property of unarmed civilians.[167]

We should be able to see now why Randolph was so critical of the passage of the bill of attainder against Philips, despite the fact that it was suspensive in form. The case clearly involved complex factual and legal questions, several of which were contested. Was Philips a British subject? Did he have a military commission? Did that commission predate his obligation of allegiance to Virginia? Did Philips forfeit his right to protection as a prisoner of war by his treatment of civilians? The General Assembly had offered Philips no opportunity to appear and contest these issues before the bill passed. And after it passed, he could have far less hope to press a jury to his side. We should be able to see, as well, the rationale for courts refusing to enforce such acts, as envisioned by St. George Tucker.[168] In the case of a suspensive attainder for treason, the rationale did not turn on when Philips had been captured, and this explains why *everyone* involved failed to recollect the point—it did not matter.

IV. THE INSTITUTIONAL FORMS OF LAW IN CIVIL CONFLICT

The terms of dispute about Philips's attainder capture an evolution in the role of the assembly in the last decades of the eighteenth century; and the confusion this change could trigger when assembly procedures or powers were contested. Writing in July of 1776, Massachusetts lawyer and Yale graduate Joseph Hawley had described attainder in traditional terms, suggesting that "high treason ought to be

167. VATTEL, *supra* note 24, at 362; *see also* KENT, *supra* note 24, at 87 (discussing additional defenses of this position, with some citations to publicist literature); WINTHROP, *supra* note 12, at 1212, 1215 ("[I]t is forbidden by the usage of civilized nations, and is a crime against the modern law of war, to take the lives of, or commit violence against, non-combatants and private individuals not in arms . . . . As to [private property], the strict war right of seizure has been very materially qualified by modern usage. Private property . . . is now in general regarded as properly exempt from seizure except where suitable for military use or of a hostile character."). As I understand it, the General Court would not have heard prosecution for this offense under the law of war; the point is, rather, that such an offense would have made it unlikely that a jury would accept a plea of enemy status as a defense to the civil crime of robbery.

168. TAYLOR, INTERNAL ENEMY, *supra* note 38, at 87–89, 105–10. The presence of escaped slaves in the gang only strengthened the case for involving the courts, as Tucker knew first-hand the intransigence of the assembly on issues related to slavery. In 1796 he had proposed an elaborate plan to gradually eliminate slavery, but the plan was flatly rejected by the House of Delegates. As Alan Taylor describes it, Tucker retreated into a pro-slavery position, and as Judge of the Court of Appeals narrowed a crucial anti-slavery decision, Wrights v. Hudgins, issued by Chancellor George Wythe.

the same in all the United States;—*saving to the legislature of each colony or state the right of attainting individuals by an act or bill of attainder*."[169] The behavior of "[o]ur stories," thought Hawley, made this power necessary "for the general safety."[170] The distinction implied that the state legislatures would be *subject to* a law of treason, applying that law to cases in the manner of courts, rather than punishing individuals arbitrarily. This view was still relatively common at the time, and shortly after Hawley's letter we find it expressed in the influential treatise Hatsell's *Precedents*. Hatsell described the bill of attainder as "an extraordinary power," a "deviation from the more ordinary forms of proceeding by indictment or impeachment" appropriate "where, from the magnitude of the crime, or the imminent danger to the state, it would be a greater public mischief to suffer the offense to pass unpunished, than even to over-step the common boundaries of the law."[171] Such was the case with the "most powerful offenders." Jefferson, likely under Hatsell's influence, described this same use for bills of attainder, observing, in a letter to Girardin, that Philips had been "too powerful to be arrested by the sheriff and his posse comitatus. . . ."[172] Patrick Henry, too, had sounded this note in defending bills of attainder in the state constitutional convention of 1776, expressing concern for "some towering public offender against whom ordinary laws would be impotent."[173]

This perspective on the bill of attainder fit quite naturally with at least one of the republican conceptions of the constitutional place of the assembly. Matters of war and peace were, by the 1760s, firmly in the hands of metropolitan institutions, but threats to civil government or the domestic police of individual colonies were regularly handled by governor, council and assembly.[174] Maintaining security and government were royal obligations, and naturally discharged in individual colonies by assemblies, usually royally chartered bodies. When, sev-

169. *Letter from Joseph Hawley to Elbridge Gerry (July 17, 1776)*, *in* 4 THE FOUNDERS' CONSTITUTION 430 (Philip P. Kurland & Ralph Lerner eds., 1987) (emphasis added).

170. *Id.*

171. 4 JOHN HATSELL, PRECEDENTS OF PROCEEDINGS IN THE HOUSE OF COMMONS 89–90 (3d ed. 1796) (1781).

172. *Girardin Letter*, *supra* note 8, at 336.

173. RANDOLPH, HISTORY, *supra* note 92, at 255.

174. *See* JACK P. GREENE, THE CONSTITUTIONAL ORIGINS OF THE AMERICAN REVOLUTION 50–51 (2011); ANDREW C. MCLAUGHLIN, FOUNDATIONS OF AMERICAN CONSTITUTIONALISM 133–38 (1961); *see also* HULSEBOSCH, *supra* note 25, at 103–04, 347 n.146 (discussing Ethan Allen's attainder and the role that provincial governments might play within the empire in ensuring domestic security); Steilen, *supra* note 2, at 832–35.

eral decades later, colonies began to reconstitute themselves as republican states, their assemblies continued to take on matters of police and justice, and Jefferson, for one, thought the assembly to be their proper home.[175] As one commentator recently put it, Jefferson "went about the project of constituting a republican polity by relocating and transforming the power of sovereign judgment and its jurisdiction within constitutional structure to varied assemblies of the people."[176] Of course, not all the institutions of the imperial constitution could be jettisoned. The new republican states, Jefferson thought, required a national body (that is, an imperial body) to support the union and adjudicate disputes.[177] Federal institutions were thus internal to Jefferson's republicanism. Also internal were constraints imposed by law, given effect in a variety of institutional forms. The constraint of law was especially important when it came to matters of treason. Writing to George Wythe in 1778, Jefferson recommended model language for a state treason statute that prohibited both the assembly and the courts of law from declaring constructive treasons.[178] Treason law had to be given (in the words of a modern commentator) "firm definition," even if state assemblies were to retain the power to attaint by bill, in order to ensure domestic security and cure failures in civil process.[179] This was, more or less, the same view Joseph Hawley had endorsed: a uniform substantive law of treason, supplemented by a power in each assembly to attaint.

It would take only a few decades for this view of the bill of attainder to weaken considerably, while at the same time a transformation in the constitutional role of the assembly was occurring. Writing in the years around 1810, Edmund Randolph observed in his *History* that the assembly's power to attaint derived "from some connection

175. *See generally* 1 THE PAPERS OF THOMAS JEFFERSON 342 (Julian P. Boyd ed., 1950). (discussing Jefferson's first draft of a constitution for Virginia, which provides that an administrator "shall possess the powers formerly held by king," but excludes the prerogative powers of "Declaring war or peace," "issuing letters of marque or reprisal," and "erecting courts," among others, which are "to be exercised by the legislature alone.").

176. Crow, *supra* note 120, at 168; *see also* BILDER, *supra* note 25, at 73–83 (expressing concerns with equity as Crow describes, equity's intolerance of hardship and obstruction of justice grew out of the royal obligations to address these sufferings, and drew on royal authority to address obstructions of justice, adjust procedural requirements and ignore technical failures in pleading. These were leading themes in equity jurisprudence, and Jefferson made note of them in his study of that body of law); Edward Dumbauld, *Thomas Jefferson's Equity Commonplace Book*, 48 WASH. & LEE L. REV. 1257, 1273–80 (1991).

177. *See* Leonard, *supra* note 124, at 372–73; PETER S. ONUF, THE MIND OF THOMAS JEFFERSON 74–75 (2007).

178. *Bill to Attaint*, *supra* note 1, at 493–94.

179. *See* HURST, *supra* note 145, at 87–89.

with the character of grand inquest of the Commonwealth."[180] This was a rather traditional, legal view of the bill of attainder. The English House of Commons had begun to describe itself as a grand inquest in the 1620s to justify its role in impeachment, a process universally regarded as a form of judicature.[181] And it was judicature in the General Assembly that most worried Randolph, since it posed a risk of "confounding . . . judicial with legislative authority." And yet, in the nearly the same breath, Randolph also suggested that the General Assembly's power to attaint "may probably exist in the sphere of Virginian legislative power, *as an attribute to legislation itself*. . . ."[182] Side-by-side the two views of attainder made little sense. If attainder was an attribute to legislation, then how did it pose a danger of confounding judicial and legislative powers?

The view that a bill of attainder was a kind of legislation, as opposed to a summary legal procedure, gathered considerable strength in the last decades of the eighteenth century. It proved attractive to lawyers engaged in marking out a new role for courts of law in American constitutional systems. We have seen already how St. George Tucker supported this role from a relatively early period. It is unsurprising, then, that in his annotations to the *Commentaries* he described the bill of attainder as "a legislative declaration of guilt."[183] They were arbitrary, dispensing entirely with "legal forms, legal evidence, and . . . every other barrier which the laws provide against tyranny and injustice in ordinary cases," and thus are put to "nefarious purposes" in every age.[184] Jefferson would later call Tucker's account a "diatribe," but others took the same view. James Wilson's *Lectures on Law*, written around the same time as Tucker's annotated *Commentaries*, described bills of attainder as "legislative verdicts."[185] Bills of attainder were not an expression of general will, or the reasonable public opinion—the proper objects of laws enacted by a popular legislature—but private, factional will.[186] Attainder in the assembly thus

180. RANDOLPH, HISTORY, *supra* note 92, at 269.

181. *See* Plucknett, *supra* note 61, at 47.

182. RANDOLPH, HISTORY, *supra* note 92, at 269 (emphasis added).

183. 4 TUCKER, BLACKSTONE'S COMMENTARIES, *supra* note 6, at 293.

184. *Id*. at 293–94.

185. James Wilson, *Lectures on Law*, Part II, Lecture VI, *in* 2 THE WORKS OF JAMES WILSON 548 (Robert Green McCloskey ed., 1967) (1790).

186. *See* Philip Pettit, *Two Republican Traditions*, *in* REPUBLICAN DEMOCRACY: LIBERTY, LAW AND POLITICS 169, 186–88, 199 (Andreas Niederberger & Philipp Schink eds., 2013) (discussing the depository of popular sovereignty in an assembly whose acts express the general will is characteristic of what Philip Pettit has called the "Franco-German tradition of republicanism,"

became a leading example of the legislative excesses of the 1780s, against which the leading Federalists complained and for which they prescribed judicial review as a necessary brake. In Federalist 78, Alexander Hamilton included the bill of attainder among the "specific exceptions to the legislative authority" which "can be preserved in practice no other way than through the medium of the courts."[187] On this understanding, then, bills of attainder implicated the separation of powers not because they confounded judicial and legislative functions—they were purely legislative—but because they tested the independence of the judiciary, upon which the efficacy of a constitutional ban would depend.

In this way, Federalists were now claiming for the courts of law an interest in the royal authority that had been deposited in popular assemblies after independence. The assembly of the 1770s had assumed what were, under the imperial constitution, curial or conciliar tasks: managing the allocation of authority throughout the dominions and the forms that 'the law of the land' would take in various institutional settings.[188] But the conduct of the assembly, especially in matters of domestic police and the civil administration of justice, showed the inadequacy of the arrangement. For this there were a number of remedies, but principal among them was the common-law court, or, more precisely, the form that law took in the common-law court. Courts called on to play this constitutional role employed natural law with particularly great effect; although principles of natural law had long been relevant, even in English courts, they now became central to an emerging judicial doctrine of implied limitations on legislative power.[189] To secure this package of institutional and doctrinal reforms, proponents argued that *law* was the proper repository of *courts*, and that the forms and processes employed by the popular assembly were not, in fact, *properly regarded as law at all*, but instead arbitrary expressions of factional will. Lost was any sense that a sovereign people met in assembly was possessed of a sui generis body of

associated in particular with Rousseau). On "public opinion" and the French Enlightenment, see COLLEEN A. SHEEHAN, JAMES MADISON AND THE SPIRIT OF REPUBLICAN SELF-GOVERNMENT 63–66, 79–83 (2009).

187. THE FEDERALIST No. 78 (Alexander Hamilton), *in* ALEXANDER HAMILTON, JAMES MADISON, &JOHN JAY THE FEDERALIST, at 429 (Benjamin Fletcher Wright ed., 1961).

188. *See generally* HALLIDAY, *supra* note 146, at 137–76 (stating that after the Glorious Revolution, some of the conciliar functions related to the suspension of ordinary forms of law were delegated by Parliament to the King's councils).

189. R. H. HELMHOLZ, NATURAL LAW IN COURT 142–70 (2015).

law suited to times of crisis and disorder. The rule of the common law became, in effect, the rule of law *simpliciter*.[190]

Jefferson, always hard to pin down, moved in a somewhat different direction, and in this respect he presaged another major institutional development to come. Jefferson had never believed in a human faculty of reflective reason, supposedly promoted by the form of proceedings in a court of law; for him, the reason of a people was organically connected to a particular time and place, and to a shared body of experiences.[191] The assertion of federal jurisdiction over the law of nations in the 1790s evidenced, in Jefferson's mind, how judicial proceedings could be used to partisan ends.[192] The natural repository of the reason of a people was thus not the judiciary, but the legislature. If the legislature should need to be checked by another institution, the preferable alternative was a fully coordinate *executive*, whose connection to all the people would be renewed at times of crisis by their mobilization through political parties.[193]

CONCLUSION

The Case of Josiah Philips is a wartime case, but it is also a record of our efforts to construct a fundamental law of wartime. It involves inaccuracy, but it is not, at its heart, a case about lying. The subsequent history of the case well illustrates the mode of historical understanding that characterized the construction of fundamental law in eighteenth-century America. Americans sought to understand the imperial civil war into which they had been plunged by situating the ex-

190. *Cf.* Alan Cromartie, *The Rule of Law*, *in* REVOLUTION AND RESTORATION: ENGLAND IN THE 1650s, at 55, 57–61 (John Morrill ed., 1992) (comparing this to the posture assumed by common lawyers in the disputes leading up the English Civil War, who elevated the common law to constitutional status despite the desire for law reform and public hatred of common lawyers).

191. *See* SHANNON C. STIMSON, THE AMERICAN REVOLUTION IN THE LAW: ANGLO-AMERICAN JURISPRUDENCE BEFORE JOHN MARSHALL 90–100 (1990).

192. *See also* CASTO, SUPREME COURT, *supra* note 26, at 130–41, 147–52; Ralph Lerner, *The Supreme Court as Republican Schoolmaster*, 1967 SUP. CT. REV. 127, 131, 152–55; Kathryn Preyer, *Jurisdiction to Punish: Federal Authority, Federalism and the Common Law of Crimes in the Early Republic*, 4 LAW & HIST. REV. 223, 263 (1986) (noting definitions of what the 'national interest' or 'public order' were most frequently involved heated political controversy."); GOEBEL, *supra* note 26, at 624 (ironically, it was Jefferson himself who apparently suggested that federal judges enforce the law of nations in federal criminal proceedings).

193. Leonard, *supra* note 124, at 383–87 (adding that like Governor Henry, President Jefferson sought ratification for his emergency actions in the legislature, and in Jefferson's case, this was premised on his view of the action as extraconstitutional and ultra vires); *see, e.g.*, Henry P. Monaghan, *The Protective Power of the Presidency*, 93 COLUM. L. REV. 1, 24–27 (1993).

perience within a familiar historical framework.[194] That framework was largely defined by a common law triumphant over arbitrary government.[195] The bill of attainder rested on a long tradition, but it never held a firm position in this framework.[196] This did not make it any easier to describe a satisfactory alternative regime. Americans knew meanings for "legislative" and "executive," but disagreed about their content, and struggled to connect these ideas to familiar English institutions in a way that accomplished the concrete tasks of government at war. They carried on their deliberations about how best to design institutions in a period that only recently had seen the rise of legislative reporting, which remained unreliable and even fictive in its methods.[197] And their arguments evolved rapidly, as changing conditions altered the terms of constitutional persuasion. If we cannot square the corners of the Case of Josiah Philips, then, we should not be surprised; but that does not mean it has nothing to tell us.

194. *See* COLBOURN, *supra* note 58, at 21–56; MCCONVILLE, *supra* note 21, at 266–74; John Phillip Reid, *The Jurisprudence of Liberty: The Ancient Constitution in the Legal Historiography of the Seventeenth and Eighteenth Centuries*, *in* THE ROOTS OF LIBERTY 147, 149, 156–58, 181–87 (Ellis Sandoz ed., 1993).

195. MCCONVILLE, *supra* note 21, at 274.

196. Steilen, *supra* note 2, at 772–73.

197. BILDER, *supra* note 78, at 19–34.

Special Education Reform Policies and the Permanence of Oppression: A Critical Race Case Study of Special Education Reform in Shelby County, Tennessee

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ABSTRACT

The state of Tennessee, as part of its application for President Obama's competitive Race to the Top grant, passed its First to the Top legislation. First to the Top created major education reforms in Tennessee in its successful effort to gain more than $500 million dollars in federal grants to support education reform-based efforts aimed at increasing academic outcomes for public school students. Special education reform was specifically targeted in Tennessee's efforts. By way of the Tennessee Diploma Project, the state sought to provide all public school students in the state access to an academically rigorous curriculum. In particular, the Tennessee Diploma Project–by policy–required all special education students be placed in a course of study that would lead to a regular education diploma. The state conceived this plan in an effort to afford students who were identified as disabled more and better post-secondary options and to close the regular diploma graduation rate for students who are identified as disabled. This Article discusses the racialized history of special education programs before assessing whether the Tennessee Diploma Project has closed the graduation rate between students who are and are not identified as having a disability. Using a proportional analysis this Article argues that the Tennessee Diploma Project has not closed the graduation gap between students who are and are not identified as disabled. Finally, this Article uses Critical Race Theory to frame the inefficacy of equity-based policy to produce equitable outcomes for students who are identified as disabled, a population that is disproportionately Black.

INTRODUCTION

The Disability Rights Movement was born out of *Brown v. Board of Education of Topeka, Kansas*[1] and the Civil Rights Movement.[2] Immediately after *Brown*, Black students were frequently and disproportionately referred to special education programs, recreating segregation in public schools and establishing an end run to the Supreme

1. *See generally* Brown v. Board of Education of Topeka, 347 U.S. 483 (1954).

2. Thomas Rentschler, *No Child Left Behind: Admirable Goals, Disastrous Outcomes*, 12 WIDENER L. REV. 637, 653 (2005); Russell J. Skiba, Ada B. Simmons, Shana Ritter, Ashley C. Gibb, M. Karega Rausch, Jason Cuadrado & Choong-Guen Chung, *Achieving Equity in Special Education: History, Status, and Current Challenges*, 74 EXCEPTIONAL CHILDREN 264, 264 (2008) [hereinafter Skiba et al., *Achieving Equity*]; Margaret M. Wakelin, Note, *Challenging Disparities in Special Education: Moving Parents from Disempowered Team Members to Ardent Advocates*, 3 NW. J.L. & SOC. POL'Y 263, 265 (2008).

Court's holding in *Brown*, which barred the segregation of students based on race.[3] Thus, the overrepresentation of Black students and other students of color in special education programs is symbolic of the various manifestations of White supremacy and racism in education policy.[4] Congress passed the Education for All Handicapped Children Act ("EAHCA") in 1975 in an effort to remedy the disproportionate representation, seclusion of Black students in special education programs, and exclusion of Black students from the general education setting.[5] In fact, prior to EAHCA's passage in 1975, students who were identified as disabled were routinely denied even the least amount of education if their school district declared its inability to provide education for students who were identified as disabled.[6] Even with the passage of EAHCA, students identified as disabled, a disproportionately Black group, were often not included in the general education classroom.[7] EACHA, which was the first iteration of the legislation that later became the Individuals with Disabilities Education Act ("IDEA"), ultimately established a narrative that reinforced a deficit perspective of student differences; this deficit narrative has served to exclude alternate explanations for student outcomes.[8] Specifically, the deficit ideology of EAHCA excluded assessments of societal and historical factors that contribute to students' academic performance and behaviors.[9] Furthermore, the passage and implementation of EAHCA resulted in Black students who had not been previously identified receiving disability classifications, which resulted in the removal of those students to more isolated educational settings under the guise of disability as opposed to race.[10]

Some scholars dismiss the role of race as a factor in the misidentification and mal-identification of Black students for special educa-

3. Beth A. Ferri & David J. Connor, *In the Shadow of Brown: Special Education and Overrepresentation of Students of Color*, 26 REMEDIAL & SPECIAL EDUC. 93, 94–95 (2005) [hereinafter Ferri & Connor, *In the Shadow of Brown*] (sharing examples of how special education enrollment increased for Black students after *Brown v. Board of Education*).

4. *Id.* at 94.

5. Robert A. Garda, Jr., *The New IDEA: Shifting Educational Paradigms to Achieve Racial Equality in Special Education*, 56 ALA. L. REV. 1071, 1075–76 (2005); Wakelin, *supra* note 2, at 263; Beth A. Ferri & David J. Connor, *Tools of Exclusion: Race, Disability, and (Re)segregated Education*, 107 TCHR. C. REC., 453, 454 (2005) [hereinafter Ferri & Connor, *Tools of Exclusion*].

6. Ferri & Connor, *Tools of Exclusion*, *supra* note 5, at 457.

7. *Id.*

8. Kathy-Anne Jordan, *Discourses of Difference and the Overrepresentation of Black Students in Special Education*, 90 J. AFR. AM. HIST. 128, 144 (2005).

9. *Id.*

10. Ferri & Connor, *Tools of Exclusion*, *supra* note 5, at 457.

tion services,[11] yet the rate of special education referrals decreases dramatically when there are a higher proportion of Black students in a school.[12] This suggests that race is, in fact, a factor in a student's matriculation into and through special education programs since a lower proportion of Black students in a school would more effectively enable segregative practices.[13] Similarly, at the state level, Black students' prevalence in the general population is correlated to Black students' identification as students with disabilities.[14] Essentially, the greater the proportion of Black people in a city's population, the more likely overrepresentation of Black students in special education programs occurs; on the other hand, the greater the proportion of Black students in a particular school district, it becomes less likely that Black students will be overrepresented in special education programs.

Rich Milner, an urban education scholar, relying on Ladson-Billing's concept of educational debt, argues that there is an opportunity gap rather than an achievement gap for students of color when compared to White students.[15] Whether there is an achievement gap or an opportunity gap, evaluating the ways in which special education programs and other educational policies contribute to oppression is a worthwhile endeavor. Special education programs are inherently linked to general education curriculum as Congress has statutorily required that general education teachers pursue and implement individualized supports prior to referring a student for special education services.[16] This Article considers whether special education reform legislation and policies serve as a mechanism for pursuing educational equity through increased graduation rates for students identified as disabled. Because Black students are often overrepresented in special

11. Dara Shifrer, Chandra Muller & Rebecca Callahan, *Disproportionality and Learning Disabilities: Parsing Apart Race, Socioeconomic Status and Language,* 44 J. LEARNING DISABILITIES 246, 254 (2011).

12. Tamela McNulty Eitle, *Special Education or Racial Segregation: Understanding Variation in the Representation of Black Students in Educable Mentally Handicapped Programs*, 43 SOC. Q. 575, 590–92 (2002).

13. For instance, a school that is 75% Black is unlikely to be able to segregate enough Black students–through special education referral–to effectively make White students a super majority of students in the regular education classroom. A school that is 40% Black, however, may find that referring Black students to special education could make the regular education classroom into an almost exclusively White setting.

14. Donald P. Oswald, Martha J. Coutinho, Al M. Best & Nirbhay N. Singh, *Ethnic Representation in Special Education: The Influence of School-Related Economic and Demographic Variables*, 32 J. SPECIAL EDUC. 194, 204 (1999).

15. H. Richard Milner, IV, *Beyond a Test Score: Explaining Opportunity Gaps in Educational Practice*, 43 J. BLACK STUD. 693, 695–98 (2012).

16. Garda, *supra* note 5, at 1073.

education program, increasing the graduation rates of students enrolled in special education programs has the potential to impact the graduation rate of Black students.

I. THE OVERREPRESENTATION OF BLACK STUDENTS IN SPECIAL EDUCATION PROGRAMS

The overrepresentation of Black students has been a consistent and persistent impediment to movements towards educational equity.[17] Given the pervasive and ubiquitous barriers to academic achievement that are associated with enrollment in special education programs, students—specifically Black students—are at risk of oppression and marginalization since the roots of the over-matriculation of Black students in special education are saturated with practices aimed at racism, seclusion, and exclusion.[18] For instance, soon after *Brown*, scholars became concerned about the disproportionate identification of Black students for enrollment in special education programs.[19] In the early 1980s, the federal government acknowledged the outcry of scholars and commenced its own investigation into the disproportionate identification of Black students for special education services.[20] In the 1997 reauthorization of IDEA, the federal government required states and local school districts to more closely monitor the overrepresentation of Black students in special education programs as well as develop plans to address issues of the disproportionate identification of Black students for special education services.[21] In 2004, the reauthorization of IDEA accentuated federal efforts to confront and disrupt disproportionality.[22]

IDEA's 1997 and 2004 reauthorizations would ultimately threaten sanctions for states and local school districts that ran afoul of mandates to address the overrepresentation of Black students in spe-

17. *See generally* Alfredo J. Artiles & Stanley C. Trent, *Overrepresentation of Minority Students in Special Education: A Continuing Debate*, 27 J. SPECIAL EDUC. 410 (1994).

18. *Id.*

19. Skiba et al., *Achieving Equity*, *supra* note 2, at 266; Torin D. Togut, *The Gestalt of the School-to-Prison Pipeline: The Duality of Overrepresentation of Minorities in Special Education and Racial Disparity in School Discipline on Minorities*, 20 AM. U. J. GENDER SOC. POL'Y & L. 163, 164 (2011).

20. Skiba et al., *Achieving Equity*, *supra* note 2, at 266.

21. *Id.*; Ferri & Connor, *Tools of Exclusion*, *supra* note 5, at 460.

22. Skiba et al., *Achieving Equity*, *supra* note 2, at 266.

cial education programs.[23] Notwithstanding the incorporation of more severe sanctions for overidentification of Black students for special education services, the success of IDEA has been attenuated because the primary mechanism for assuring compliance with federal statutes—financial penalties—have not been frequently used.[24] Thus, the overrepresentation of Black students in special education programs remains a problem in primary and secondary education.[25] In some disability categories, Black students, in particular, represent more than half of all students identified for special education services.[26] Most poignantly, Black students are most likely to be overrepresented in the most stigmatized disability categories.[27] At the same time, Black students remain underenrolled in gifted and talented programs.[28] Rob Garda, Jr., an education law expert, argues, borrowing from Critical Race Theory's argument, that racial discrimination is both endemic and pervasive and that special education reform policies will be unable to improve the outcomes of students who are identified as disabled.[29]

Scholars have debated the role of racial oppression in disparate racial outcomes for students.[30] The disproportionate matriculation of Black students in special education programs is reasonably connected to racial oppression when considering the history of White American's acts of educational oppression against Black people. White power structures have sought to impede and/or minimize the education of Black communities.[31] For instance, it was illegal to teach slaves to read.[32] Similarly, during Jim Crow, school buildings in Black communities were often destroyed during riots that targeted Black economic wealth.[33] Similarly, oppressive curricular designs and curricular deci-

23. Margaret E. Shippen, Rebecca Curtis & Alan Miller, *A Qualitative Analysis of Teachers' and Counselors' Perceptions of the Overrepresentation of African Americans in Special Education*, 32 TCHR. EDUC. & SPECIAL EDUC. 226, 226 (2009).

24. Wakelin, *supra* note 2, at 263–64.

25. *See generally* Donna Y. Ford, *Culturally Different Students in Special Education: Looking Backward to Move Forward*, 78 EXCEPTIONAL CHILDREN 391 (2012). *See generally* Dalun Zhang et al., *Minority Representation in Special Education: 5-year Trends*, 23 J. CHILD & FAM. STUD. 118 (2014).

26. Zhang et al., *supra* note 25, at 119.

27. *See generally* Zhang et al., *supra* note 25.

28. Oswald, *supra* note 14, at 196.

29. Garda, *supra* note 5, at 1074, 1094.

30. *See generally* Roslyn Arlin Mickelson, *When Are Racial Disparities in Education the Result of Racial Discrimination? A Social Science Perspective*, 105 TCHR. C. REC. 1052 (2003).

31. Skiba et al., *Achieving Equity*, *supra* note 2, at 265.

32. *Id.*

33. *Id.*

sions often served only to prepare Black students for subordinate and subservient roles in society.[34] The natural consequence of the overrepresentation of Black students in special education programs is to continue the legacy of Jim Crow, reestablishing school settings that are both separate and unequal.[35] Support for this argument is evidenced by the fact that states in the South are more likely than other states to disproportionately identify Black students for special education services; this suggests that there might be hidden ties to the legacy of racial discrimination in schools when considering the overrepresentation of students of color in special education programs.[36] Essentially, special education legislation and programs could be appropriately seen as alternate and covert metamorphoses of racial oppressions.[37]

II. OVERREPRESENTATION OF BLACK STUDENTS IN SPECIAL EDUCATION AS RACIAL OPPRESSION

Special education policies have resulted in the neglect, disenfranchisement, and marginalization of those the policies purport to protect.[38] Special education programs are linked to increased racial segregation in public schools.[39] Segregation that is the result of special education programs is especially pronounced at the classroom level.[40] Additionally, segregative and exclusionary practices that result from special education programs typically go unchecked because segregation in schools that is based on disability status is often framed as being in the interest of the public good.[41]

The odds of identification for special education services increase dramatically for students who are Black and attending schools in

34. Jordan, *supra* note 8, at 132.

35. Ferri & Connor, *Tools of Exclusion*, *supra* note 5, at 454; Garda, *supra* note 5, at 1072; J. John Harris III, Elinore L. Brown, Donna Y. Ford & Jeanita W. Richardson, *African-Americans and Multicultural Education: A Proposed Remedy for Disproportionate Special Education Placement and Underinclusion in Gifted Education*, 36 EDUC. & URB. SOC'Y 304, 315 (2004); Rebecca Vallas, Note, *The Disproportionality Problem: The Overrepresentation of Black Students in Special Education and Recommendations for Reform*, 17 VA. J. SOC. POL'Y & L. 181, 188 (2010).

36. Ferri & Connor, *In the Shadow of Brown*, *supra* note 3, at 95–97.

37. Ferri & Connor, *Tools of Exclusion, supra* note 5, at 468–71.

38. *Id.* at 460–61.

39. Wanda J. Blanchett et al., *Urban School Failure and Disproportionality in a Post-Brown Era: Benign Neglect of the Constitutional Rights of Students of Color*, 26 REMEDIAL & SPECIAL EDUC. 70, 73 (2005).

40. Ferri & Connor, *Tools of Exclusion*, *supra* note 5, at 454.

41. Anne Smith & Elizabeth B. Kozleski, *Witnessing Brown: Pursuit of an Equity Agenda in American Education*, 26 REMEDIAL & SPECIAL EDUC. 270, 277 (2005).

large, urban school districts.[42] These same students are more likely to receive the most restrictive placements.[43] Unfortunately, the systemic issues that plague urban schools compound the barriers and obstacles for Black students who are matriculated in special education programs. For instance, poor educational opportunities in urban areas and underfunded student support services recreate the ills of pre-*Brown* segregation.[44] Students are at risk of marginalization, disenfranchisement, and oppression through the misidentification or maldentification for special education programs if schools do not afford them the opportunities to achieve academically.[45]

Some scholars argue that the identification of Black students for special education services is objective and offers irrefutable explanations for disparate outcomes for students of color.[46] This notion is particularly pervasive for educators.[47] In particular, school counselors and general education teachers have indicated that they did not believe in and/or understand overrepresentation.[48] Biased teacher assumptions that apply racialized, negative perceptions to Black students have abetted the overrepresentation and neglect of Black students in special education programs.[49] Given that there is no support that Black students' behaviors—in terms of frequency or intensity—warrant or justify disproportionality in school disciplinary procedures[50] and Black students are more likely to be referred to special education programs for behavioral issues,[51] it appears that teachers may be specifically looking for reasons to address the behaviors of Black students while ignoring similar behaviors that other students exhibit.

A myriad of stakeholders in education stand to benefit from the continued compounded segregation and neglect of urban students'

42. Ferri & Connor, *In the Shadow of Brown*, *supra* note 3, at 95.
43. *Id.*
44. Blanchett et al., *supra* note 39, at 74.
45. Skiba et al., *Achieving Equity*, *supra* note 2, at 281–82.
46. Jordan, *supra* note 8, at 130.
47. Shippen et al., *supra* note 23, at 230.
48. *Id.*
49. Jordan, *supra* note 8, at 130.
50. Russell J. Skiba, Robert H. Homer, Choong-Geun Chung, M. Karega Rausch, Seth May & Tary Tobin, *Race Is Not Neutral: A National Investigation of African American and Latino Disproportionality in School Discipline*, 40 SCH. PSYCHOL. REV. 85, 86–87 (2011) [hereinafter Skiba et al., *Race is Not Neutral*].
51. Smith & Kozleski, *supra* note 41, at 275 (stating that Black students make up roughly 16% of all public education students in the United States, but Black students make up almost a quarter of all students classified as having a severe emotional disorder).

matriculation into special education programs.[52] As currently constructed, the educational system operates to supply laborers in the United States' capitalistic society.[53] In a capitalistic society, some students must underachieve so that they might have fewer and lesser employment opportunities, forcing those students to enter the workforce in lesser-regarded fields and lower paid.[54] The students who are offered lesser and fewer opportunities for academic, social, and occupational success are typically students from low-income, high minority communities. Schools in these communities are less capable of overcoming challenges to the successful implementation of special education policies.[55] Hence, IDEA has been less effective in low-income, high minority areas, and students in these areas are frequently denied a free and appropriate education.[56]

While some scholars theorize the culture gap as a lens through which disproportionate outcomes for Black students may be evaluated,[57] other scholars assess the disproportionate outcomes for Black students through the lens of cultural responsiveness.[58] Cultural responsiveness is a more appropriate lens through which to consider the disproportionate placement of Black students into special education programs than is the assumption that Black students are inherently disobedient or unintelligent. Black students are most frequently overidentified in the subjectively identified disabilities, which are also the most stigmatized disabilities.[59] Upon placement in special education programs, Black students are also more likely than their White peers to be placed in the most restrictive academic settings.[60] Moreover, whereas special education programs seek to empower and support the academic growth of White students, Black students who are identified do not enjoy these or similar supports.[61] Put another way, special ed-

52. Blanchett et al., *supra* note 39, at 75.

53. *Id.*

54. *Id.*

55. Wakelin, *supra* note 2, at 268.

56. Garda, *supra* note 5, at 1073.

57. Carla R. Monroe, *Understanding the Discipline Gap through a Cultural Lens: Implications for the Education of African-American Students*, 16 INTERCULTURAL EDUC. 317, 318 (2005).

58. Vallas, *supra* note 35, at 188–89.

59. Ferri & Connor, *In the Shadow of Brown*, *supra* note 3, at 94; Garda, *supra* note 5, at 1080; Skiba et al., *Achieving Equity*, *supra* note 2, at 269.

60. Jordan, *supra* note 8, at 128; Wakelin, *supra* note 2, at 270–71. *See generally* Lance Fussarelli, *Gubernatorial Reactions to No Child Left Behind: Politics, Pressures and Education* Reform, 80 PEABODY J. EDUC. 120 (2005).

61. Harris et al., *supra* note 35, at 315.

ucation classification more often guarantees White students more and better educational access while simultaneously circumscribing the educational opportunities for Black students.[62] Enrollment in special education classes does little to assist Black students in reaching their goals and is problematic because Black students who begin special education services are less likely to exit special education programs.[63]

The misidentification and mal-identification of Black students also contributes to lower academic achievement for Black students.[64] Lower academic achievement leads to lower graduation rates, which also leads to fewer and lesser educational, social, and occupational options for students who are identified as disabled.[65] The over-identification of Black students in primary and secondary schools negatively impacts the collegiate matriculation of students who are identified as disabled.[66] Furthermore, students who are identified as disabled are less likely to complete high school, and without a high school diploma, students who are identified as disabled have a greater likelihood of entering the juvenile justice system.[67] Students who are identified as disabled are then at risk of further oppression in the educational system since juvenile corrections facilities inadequately serve populations with special needs.[68] Although parents of students who are identified have some pathways to remedy inadequacies in special education programs, the chances of prevailing on challenges to a school or school district's practices under IDEA are relatively slim, especially for poor, minority families.[69]

62. Ferri & Connor, *Tools of Exclusion*, *supra* note 5, at 458–59.

63. Deidre Glenn Paul, *The Train Has Left: The No Child Left Behind Act Leaves Black and Latino Literacy Learners Waiting at the Station*, 47 J. ADOLESCENT & ADULT LITERACY 649, 651 (2004); Wakelin, *supra* note 2, at 264.

64. Ferri & Connor, *In the Shadow of Brown*, *supra* note 3, at 95; Garda, *supra* note 5, at 1081–85; Wakelin, *supra* note 2, at 269; Zhang et al., *Minority Representations*, *supra* note 25, at 119.

65. Ferri & Connor, *In the Shadow of Brown, supra* note 3, at 95; Garda, *supra* note 5, at 1081–85; Zhang et al., *Minority Representations*, *supra* note 25, at 118–19.

66. D. Kim Reid & Michelle G. Knight, *Disability Justifies Exclusion of Minority Students: A Critical History Grounded in Disability Studies*, 35 EDUC. RES. 18, 20 (2006).

67. Vallas, *supra* note 35, at 192.

68. Peter E. Leone & Candace A. Cutting, *Appropriate Education, Juvenile Corrections, and No Child Left Behind*, 29 BEHAV. DISORDERS 260 (2004).

69. Wakelin, *supra* note 2, at 265–68.

III. SPECIAL EDUCATION POLICY AND EDUCATION REFORM POLICIES: A NOSTRUM FOR SCHOOL FAILURE?

In recent memory, education reform policies have enjoyed bipartisan support in Congress,[70] although the bipartisan base in favor of education reform is slowly fracturing.[71] Education reform advocates have explicitly sought to increase the academic outcomes for students who are identified as disabled.[72] Special education reform policies, chiefly IDEA, and other education reform policies have created a firestorm that requires students who are identified as disabled to overcome inadequate educational opportunities and satisfactorily passed non-individualized high-stakes testing.[73] The 1997 reauthorization of IDEA targeted the academic opportunity gap between students who are identified as disabled and student who are not identified as disabled through the incorporation of testing and accountability measures.[74] Somewhat ironically, standardized testing and accountability often function to provide the data necessary to disproportionately identify Black students for special education programs.[75] The 1997 reauthorization of IDEA was a harbinger of things to come, as Congress would pass the No Child Left Behind Act ("NCLB") roughly three years after it reauthorized IDEA in 1997. NCLB's strict requirements for testing ultimately served to encourage the segregation and exclusion of populations that have been historically and are contemporaneously marginalized and disenfranchised, often targeting poor, high minority districts for censuring.[76] Although there were provisions for excusing some students who were identified as disabled,

70. *See* Liz Hollingsworth, *Unintended Educational and Social Consequences of the No Child Left Behind Act*, 12 J. GENDER, RACE & JUST. 311, 311–18 (2009) (discussing the bipartisan support for NCLB); *see also* Lee W. Anderson, *The No Child Left Behind Act and the Legacy of Federal Aid to Education*, 13 EDUC. POL'Y ANALYSIS ARCHIVES 1, 10–11 (discussing the bipartisan support of IDEA's reauthorization).

71. Fussarelli, *supra* note 60, at 120–22.

72. Beth R. Handler, *Two Acts, One Goal: Meeting the Shared Vision of No Child Left Behind and Individuals with Disabilities Education Improvement Act of 2004*, 80 CLEARING HOUSE 5 (2006).

73. Rentschler, *supra* note 2, at 639.

74. *Id.* at 656.

75. Paul, *supra* note 63, at 651; Milner,IV, *supra* note 15, at 694; Togut, *supra* note 19, at 164.

76. James E. Ryan, *The Perverse Incentives of the No Child Left Behind Act*, 79 N.Y.U. L. REV. 932, 961–66 (2004).

the provisions for excusal ignored the reality that many schools have large concentrations of students who are identified as disabled.[77]

States and local school districts game standardized test scores.[78] Some states have gone so far as to reducing the raw scores necessary to achieve a marking of proficiency in an effort to quell fears of citizens who worry about the state of public schools.[79] For instance, the now-defunct NCLB begot pervasive and negative incentives to penalize students who are identified as disabled as well as castigate schools that enroll large numbers of students who are identified as disabled.[80] High stakes accountability effectuates dropouts as well as other negative academic indicators.[81]

The United States' obsession with standardized testing and education reform, in general, arose from the nation's fear of falling behind other industrialized nations in student achievement.[82] Arguments that concentrate on the failure of the United States' educational system set aside clear evidence that the top students in the United States continue to outpace their international counterparts.[83] The implementation of test-heavy education reform strategies is aimed at improving the performance of groups that have been historically and contemporaneously marginalized and disenfranchised. Unfortunately, policies that pursue educational equity are often colorblind attempts at addressing inequities that are the result of race.[84] NCLB provides a concrete example of this problem: the law places the burden of pursuing educational equity squarely on the shoulders of Black people and Black communities since the law did not take into account the contextual and historical factors contributing to poor academic outcomes.[85] Moreover, standardized tests, including those that were mandated by NCLB, sustain racially biased attitudes

77. Theoni Soublis Smyth, *Who Is No Child Left Behind Leaving Behind?*, 81 CLEARING HOUSE 133, 135 (2008).

78. David Hursh, *Exacerbating Inequality: The Failed Promise of the No Child Left Behind Act*, 10 RACE, ETHNICITY & EDUC. 295, 299 (2007).

79. *Id.*

80. Linda Darling-Hammond, *Race, Inequality and Educational Accountability: The Irony of 'No Child Left Behind'*, 10 RACE, ETHNICITY & EDUC. 245, 250–52 (2007).

81. Ryan, *supra* note 76, at 961–66.

82. Steven L. Nelson & Jennifer E. Grace, *The Right to Remain Silent in New Orleans: The Role of Self-Selected Charter School Boards on the School-to-Prison Pipeline*, 40 NOVA L. REV. 447, 461 (2016).

83. Donald C. Orlich, *No Child Left Behind: An Illogical Accountability Model*, 78 CLEARING HOUSE 6, 6 (2004).

84. Hollingsworth, *supra* note 70, at 319.

85. *Id.* at 312.

that influence educational policy[86] and restrict the assessment of student proficiency to what can be tested in standard formation, making a presumption that such knowledge is objective, reliable, and valid.[87] To this end, high stakes testing and accountability has created an environment in which schools are encouraged to push students out in an effort to avoid lowered test scores.[88] It, then, comes as no surprise that Black students are overrepresented in school disciplinary proceedings.[89] Similarly, the results of standardized testing have supported claims that Black students should be marginalized, disenfranchised, and otherwise neglected.[90] NCLB's focus on testing and accountability placed urban schools and urban school districts at risk of punishment because urban schools and urban school districts are more likely to enroll students from marginalized and disenfranchised communities.[91] Thus, even the naming of successful and unsuccessful schools is deeply racialized.[92] Furthermore, urban schools and school districts are forced to reduce curricular opportunities and limit opportunities for educators to make meaningful connections to students' lived experiences in an effort to prepare students for standardized testing.[93]

IV. THE TENNESSEE DIPLOMA PROJECT

The Tennessee Diploma Project is an offshoot of Tennessee's efforts to win funding under President Obama's Race to the Top grants.[94] Tennessee's reaction to Race to the Top mimicked the reaction of other states; there was a groundswell of proposed and implemented education reform-based legislation and policies.[95] Some of the most notable provisions of Tennessee's legislation and regulations

86. Smyth, *supra* note 77, at 135.
87. Hursh, *supra* note 78, at 298.
88. *Id.* at 301.
89. Russell J. Skiba et al., *The Color of Discipline: Sources of Racial and Gender Disproportionality in School Punishment*, 34 URB. REV. 317–19 (2002).
90. Jordan, *supra* note 8, at 133.
91. Hursh, *supra* note 78, at 298.
92. Heather E. Price, *Does No Child Left Behind Really Capture School Quality? Evidence From an Urban School District*, 24 EDUC. POL'Y 779, 795 (2010).
93. *See* Hursh, *supra* note 78, at 295.
94. *First to the Top*, TENN. DEP'T OF EDUC. https://www.tn.gov/education/topic/first-to-the-top (last visited Jan. 18, 2017); ULRICH BOSER, CTR. FOR AM. PROGRESS, RACE TO THE TOP: WHAT HAVE WE LEARNED FROM THE STATES SO FAR? 65 (2012), https://www.americanprogress.org/wp-content/uploads/issues/2012/03/pdf/rtt_states.pdf.
95. Patrick McGuinn, *Stimulating Reform: Race to the Top, Competitive Grants and the Obama Education Agenda*, 26 EDUC. POL'Y 136, 140–44 (2012).

aimed at securing funding under Race to the Top included new procedures for teacher evaluation, new academic standards and accountability measures, the provision of incentives to attract and retain in special education classes teachers certified to teach special education, and the expansion of school choice and policies aimed at addressing disproportionately low graduation rates for populations that have traditionally been marginalized, disenfranchised, and neglected.[96] Tennessee won $500 million in the first round of the competitive grant because of the state's proposed and previously implemented education reform policies.[97] Tennessee won five times more funding than Delaware, the only other state to be awarded funds under Race to the Top in the first round of competition.[98]

The Tennessee State Board of Education is legislatively charged with promulgating policies related to public education.[99] Of particular relevance to this Article, the Tennessee State Board of Education is tasked with the duty to establish graduation requirements for high school students in the state.[100] The board fulfilled its duty to establish and update graduation requirements by enacting the Tennessee Diploma Project.[101] The Tennessee Diploma Project, among other things, raised graduation requirements for all students,[102] and by way of policy, specifically required that all high school students who are identified as having a disability be enrolled in a rigorous, state-approved program of courses that would lead to a regular education diploma (as opposed to a special education diploma).[103] After passage of the Tennessee Diploma Project, high schools in Tennessee are required by state policy to enroll all special education students in programs of study that expand the post-secondary options for students

96. *See generally id.*; U.S. DEP'T OF EDUC., RACE TO THE TOP APPLICATION FOR INITIAL FUNDING 15–16, 20, 78, 97 (2010), https://www2.ed.gov/programs/racetothetop/phase1-applications/tennessee.pdf (proposing reform for Tennessee's education system that would comply with the Race to the Top legislation and reward Tennessee with funding for the proposed initiatives).

97. *See* McGuinn, *supra* note 95, at 139.

98. *Id.*

99. *See* TENN. CODE ANN. § 49-1-302 (2016) (discussing the general duties of the Tennessee State Board of Education).

100. *Id.* at (a)(6) (declaring that the Tennessee State Board of Education is responsible for establishing graduation requirements for high school students).

101. *See generally* Tennessee State Board of Education, High School Policy § 2.103(1) (2016) (explaining the requirements for graduation in the State of Tennessee).

102. *Graduation Requirements*, TENN. DEP'T OF EDUC., https://www.tn.gov/education/topic/graduation-requirements (last visited Jan. 19, 2017).

103. Tennessee Department of Education, High School Policy § 2.103(1)(c) [hereinafter TN High School Policy].

identified as disabled.[104] A student may still qualify for an alternative diploma (e.g., special education diploma) if the student first fails to meet the requirements for a regular education diploma.[105] Through the implementation of the Tennessee Diploma Project, the Tennessee State Board of Education appears to have statutorily raised academic expectations and removed institutionally oppressive barriers to the educational, social, and occupational success of students identified as having a disability.

The "First to the Top" legislation in Tennessee has produced some academic gains.[106] Tennessee now outpaces all other states in academic growth as determined by student scores on state assessments.[107] Similarly, Tennessee's students have achieved academic gains on national assessments.[108] Finally, the state's graduation rate has grown significantly, now surpassing the national graduation rate for both students not identified as disabled and students identified as disabled.[109] Still, the Tennessee Diploma Project sought to "minimize tracking of students by ability" and to "eliminate central classes taught below the college preparation level," indicating that the purpose of the Tennessee Diploma Project aimed to close the opportunity gap between students not identified as disabled and students identified as disabled.[110] Because students who do not graduate have fewer educational, social, and occupational opportunities, it is important to determine whether the Tennessee Diploma Project has, in fact, closed the opportunity gap by way of closing the graduation gap.

VI. METHODS

Data for this Article was obtained from the Tennessee Department of Education's database on school and school district performance. The data for all statistical analyses are available from the Tennessee Department of Education's website. In particular, graduation rates for both students not identified as disabled and students identified as disabled for all schools in Shelby County, Tennessee

104. *See id.* at (1)(c)–(d).
105. *Id.* at (1)(c).
106. *First to the Top, supra* note 94.
107. *Id.*
108. *Tennessee Students the Fastest Improving in the Nation in Science*, TENN. ST. GOV'T (Oct. 27, 2016, 8:22 AM), https://www.tn.gov/governor/news/tennessee-students-the-fastest-improving-in-the-nation-in-science.
109. *Governing Data: High School Graduation Rates by State*, GOVERNING, http://www.governing.com/gov-data/high-school-graduation-rates-by-state.html (last visited Jan 19, 2017).
110. TN High School Policy, *supra* note 103, at § 2.103(1)(b).

(Memphis City and its intra-county suburbs), were extracted from the 2012, 2013, and 2015 publically available data. The difference in the graduation rate between students not identified as disabled and students identified as disabled was calculated for each individual school (not including schools that did not report graduation rates). Similarly, the statewide difference between graduation rates was calculated for students who were not identified as disabled and students identified as disabled were calculated.

For each respective year, the number of schools in Shelby County whose graduation rate was above and below the statewide average was counted. The proportion of schools that had graduation rates below the state average was compared for the years of 2012 and 2013 and 2012 compared to 2015. The school year ending in 2012 served as the baseline for this analysis because the school year ending in 2012 was the last year in which students in Tennessee could graduate under the former graduation policy. Thus, a comparison between 2012 and 2013 reveals the immediate change in graduation rate differences while a comparison between 2012 and 2015 reveals the change in graduation rate differences seven years after the implementation of the policy.[111] Given the small sample sizes, proportional comparisons were made using the Fisher Exact Test of Independence—a statistical test specifically designed to give exact p-values for statistical comparisons even for small sample sizes. The Fisher Exact Test, while less robust than other statistical tests, has recently been used by the United States Department of Education Office of Civil Rights to prove that segregation in public schools was not likely the result of random chance.[112] The Fisher Exact Test is an appropriate statistical methodology given that the Department of Education has used the test in litigation.

VII. SPECIAL EDUCATION REFORM POLICIES FAILED TO CLOSE THE GRADUATION GAP

The Fisher Exact Test of Independence for schools above and below the statewide graduation gap reveals that the change in education policy, namely the Tennessee Diploma Project, increased the propor-

111. SHELBY CTY. SCHS., DESTINATION 2025: 2015 SHELBY CTY. SCHS. ANNUAL REPORT 7 (2015), http://www.scsk12.org/2025/files/2016/Destination%202025%20Report_2015.pdf.

112. *See* Letter from Timothy Blanchard, Dir., Dep't of Educ., to Patricia Elliott-Patton, Complainant (July 1, 2014), https://www2.ed.gov/about/offices/list/ocr/docs/investigations/more/02141077-a.pdf.

tion of schools that exceeded the average state disparity in graduation rates for students who are identified as disabled and students who are not identified as disabled. In the school year ending in 2012, 21 of 45 (approximately 47%) schools in Shelby County had graduation gaps that exceeded Tennessee's overall difference in graduation rates.[113] In the school year ending in 2013, 20 of 37 (approximately 54%) schools in Shelby County had graduation gaps that exceeded Tennessee's overall gap in graduation rates. Thus, the Tennessee Diploma Project, in its first graduating class, proved to be more harmful to efforts to assure educational equity for students who were identified as disabled. In fact, the proportion of schools that exceeded the state average for graduation gap between students identified as disabled and students not identified as disabled increased, although the increase was not statistically significant.[114] Table 1 displays the results of the Fisher Exact Test of Independence that compares the school year ending in 2012 and the school year ending in 2013.

Table 1: Fisher Exact Test of Independence Comparing the Proportion of Schools in Shelby County Above and Below the State Average Graduation Gap (2012 v. 2013)

	2012	**2013**
Schools Above Average	21 (47%)	20 (54%)
Schools Below Average	24	17
p-value: 0.658		

The Fisher Exact Test of Independence for schools above and below the statewide graduation gap reveals that the change in educational policy, namely the Tennessee Diploma Project, did very little to change the graduation gap between students who had not been identified as disabled and students who were identified as disabled. In the school year ending in 2012, 21 of 45 (approximately 47%) schools in Shelby County had graduation gaps that exceeded Tennessee's overall gap in graduation rates. In the school year ending in 2015, 21 of 46 (approximately 46%) schools in Shelby County had graduation gaps that exceeded Tennessee's overall gap in graduation rates.[115] Thus, the Tennessee Diploma Project, in its third graduating class, returned

113. Data on file with author.
114. Data on file with author.
115. Data on file with author.

the schools in Shelby County to the position that first prompted the need for the policy. The data does not support an argument that the Tennessee Diploma Project was effective at closing the graduation gap between students who had not been identified as disabled and students who were identified as disabled. Table 2 displays the results of the Fisher Exact Test of Independence that compares the school year ending in 2012 and the school year ending in 2015.

Table 2: Fisher Exact Test of Independence Comparing the Proportion of Schools in Shelby County Above and Below the State Average Graduation Gap (2012 v. 2015)

	2012	**2015**
Schools Above Average	21 (47%)	21 (46%)
Schools Below Average	24	25
p-value: 0.999		

VIII. CRITICAL RACE REFLECTIONS ON SPECIAL EDUCATION REFORM POLICIES IN SHELBY COUNTY

The overrepresentation of Black students in special education programs is problematic because students in special education programs are less likely to graduate from high school than are their peers who are in general education programs. Additionally, in the context of Shelby County, Tennessee, special education reform policies have proven to be ineffective at resolving the intractable problem that is the graduation rate gap between students in general education programs and special education programs. As indicated in tables 1 and 2, special education reform, in the embodiment of the Tennessee Diploma Project, created more inequity in the first graduating cohort of the policy's implementation. The graduation rate gap returned to its value immediately preceding the implementation of the Tennessee Diploma Project in the policy's third graduating cohort. The recalcitrant nature of the graduation gap between students identified as disabled and students not identified as disabled invites a critical race analysis.

A critical race analysis of the indomitable graduation gap between students identified as disabled and students not identified as disabled is salient because Black students are overrepresented in special education programs. In effect, the academic, social, and occupational trajectories as well as the graduation rate of Black students are

greatly impacted when the graduation rate of students enrolled in special education programs lag behind other groups. Given the disproportionate enrollment of Black students in special education programs and the fact that Black student enrollment in special education programs boomed after *Brown*, it is unsurprising that—despite policy initiatives purporting to pursue educational equity—the graduation gap has proven unwavering.

Critical Race theorists would not find the fact that racial oppression through the separate but unequal treatment of Black students, who are disproportionately enrolled in special education programs, surprising. In fact, Critical Race theorists have long argued that racism is permanent[116] and that racism is too flexible and ever-changing for the rigid tools that the judicial system may use to thwart racism.[117] From a critical race perspective, any policy seeking to address racial inequity via proxy, such as class or disability status, is doomed to failure. It is not reasonable to resolve a problem caused by race-conscious policies by using a colorblind remedy. Because the roots of oppression in the United States are steeped in race, race is the oppression that ties all other oppressions together. Race has, historically and contemporarily, been used in the United States to *other* Black people. Of course, to be Black in the United States is to be *other*: not just some other race, but something other than human.[118] Policies, especially education policies, have been used to maintain the second-class status of Black people in the United States, serving to advantage White people through the allotment of more and greater opportunities to develop knowledge, skills, and tangible advantages that lead to White people being seen as allegedly better than Black people. In previous articles, I have discussed how education reform policies have led to the further marginalization of Black communities. This has proven true in the state takeover of public schools in Black communi-

116. Derrick A. Bell, Jr., *Racism Is Here to Stay: Now What?*, 35 How. L.J. 79 (1991); *see also* Derrick A. Bell, Jr., *The Racism is Permanent Thesis: Courageous Revelation or Unconscious Denial of Racial Genocide*, 22 Cap. U. L. Rev. 571, 587 (1993).

117. *See* Derrick A. Bell, Jr., *Serving Two Masters: Integration Ideals and Client Interests in School Desegregation Litigation*, 85 Yale L.J., 470, 471–72 (1976); *see also* Steven L. Nelson, *Different Script, Same Caste in the Use of Passive and Active Racism: A Critical Race Theory Analysis of the (Ab)use of "House Rules" in Race-Related Education Cases*, 22 Wash. & Lee J. Civil Rts. & Soc. Just. 297, 300 (2016) [hereinafter Nelson, *Different Script*].

118. Michael J. Dumas, *Against the Dark: Antiblackness in Education Policy and Discourse*, 55 Theory into Practice 11, 13 (2016) [hereinafter Dumas, *Against the Dark*].

ties,[119] the charter school movement's disproportionate impact in Black communities,[120] and the implementation of affirmative action policies[121] that act to limit access and opportunity for Black communities. Likewise, Wendy Parker, a law school professor and researcher, has discussed these issues in the context of teacher segregation and school reform after *Brown*.[122] In a slightly different circumstance, Monica Ridgeway and Randy Yerrick, science education researchers, have found that even White allies can have negative impacts on Black peoples' movements towards equity.[123] Thus, I assert that racism is not likely to be overcome through the establishment of alliances, even if those alliances result in new (or new manifestations of) policies aimed at securing racial equity in education.

Given that racism is amorphous, shifting between manifestations, and that civil rights legislation is more concerned with procedural than substantive results,[124] attacking racism has proven to be futile. This is especially the case because race-neutral policies often result in policies that purport to serve the interest of Black people benefiting White people. In fact, the Tennessee State Board Education, in its policy promulgating the Tennessee Diploma Project, states explicitly that every student will have "access to a rigorous education."[125] Notably, the policy never promises that every student will take part in a rigor-

119. *See generally* Steven L. Nelson, *Racial Subjugation By Another Name: Assessing the Impact of State Takeover Districts on the School-to-Prison Pipeline*, 9 GEO. J. L. & MODERN CRITICAL RACE PERSP. 1 (2017) [hereinafter Nelson, *Racial Subjugation*].

120. *See generally* Steven L. Nelson, *Killing Two Achievements with One Stone: The Intersectional Impact of Shelby County on the Rights to Vote and Access High Performing Schools*, 13 HASTINGS RACE & POVERTY L.J. 225 (2016). *See also* Steven L. Nelson & Heather N. Bennett, *Are Black Parents Locked Out of Challenging Disproportionately Low Charter School Board Representation? Assessing the Role of the Federal Courts in Building A House of Cards*, 12 DUKE J. CON. L. & PUB. POL'Y. 153 (2016).

121. *See generally* Steven L. Nelson, *Different Script, supra* note 117.

122. *See generally* Wendy Parker, *Desegregating Teachers*, 86 WASH. U. L.R. 1 (2008) (discussing how the desegregation of public school students overshadowed the problems associated with racial segregation among public school teachers). *See also* Wendy Parker, *From the Failure of Desegregation to the Failure of Choice*, 40 WASH. U. J.L. & POL'Y 117 (2012) (arguing that school choice is returning the United States to a period of legalized racial segregation in public schools). Although I'm not convinced that desegregation would produce more equitable educational opportunities and/or outcomes for Black students, I agree with Professor Parker that charter schools produce a substantial risk of the problems of separate but equal schooling.

123. Monica L. Ridgeway & Randy Yerrick, *Whose Banner Are We Waving: Exploring STEM Partnerships for Marginalized Urban Youth*, CULTURAL STUD. SCI. EDUC. 1 (2016) (examining how well-intentioned programs supporting marginalized groups are often hijacked and explaining how said hijacking could be prevented).

124. *See* Alan D. Freeman, *Legitimizing Racial Discrimination Through Antidiscrimination Law: A Critical Review of Supreme Court Doctrine*, 62 MINN. L. REV. 1049, 1049–50 (1978).

125. TN High School Policy, *supra* note 103, at § 2.103(1) (2016).

ous curriculum; instead, the policy simply states that the option for a rigorous course load will be available to all students.[126] Most importantly, the policy does not explain how schools and school districts are obligated to assist students in meeting the increased demands of the reform-oriented graduation policy.[127] Given education policy's focus on objectivity, there is no discussion in the Tennessee State Board of Education's policy of how schools and school districts will be objectively held accountable for assuring that all students have access to a curriculum that expands post-secondary opportunities.[128] Thus, it is not specifically stated that each student identified as disabled will benefit from the increased access to a more challenging curriculum. Therefore, even as Black students are overrepresented in special education programs, there is no assurance that Black students in special education programs will benefit from increased access to a more challenging curriculum.

Moreover, in the context of Critical Race Theory, isolating Black students in special education programs with low graduation rates reinforces and reassures White privilege and supremacy. In particular, half of all Black men who do not receive a high school diploma are incarcerated before the age of thirty.[129] Thus, the disproportionate enrollment of Black students in special education programs contributes to the school-to-prison pipeline by restricting the educational opportunities of Black students, which in turn limits the social and occupational trajectories of Black students enrolled in special education programs given the decreased likelihood of Black students graduating once enrolled in special education courses. Even going beyond White privilege and White supremacy, education reform policies, including special education reform policies, are clear examples of antiblackness in education policy.[130] Antiblackness acknowledges that education policy and the politics of education are deeply racialized;

126. *See id.*

127. *See id.* at § 2.103.

128. *See id.*

129. *See* Courtney Connley, *Study: Black Male High-School Dropouts Have High Prison Risk*, BLACK ENTERPRISE (May 10, 2014), http://www.blackenterprise.com/education/black-men-who-drop-out-of-high-school-prison; *see also* George Gao, *Chart of the Week: The Black-White Gap in Incarceration Rates*, PEW RESEARCH CENTER (July 18, 2014), http://www.pewresearch.org/fact-tank/2014/07/18/chart-of-the-week-the-Black-White-gap-in-incarceration-rates.

130. Steven L. Nelson, *Racial Subjugation*, *supra* note 119; Steven L. Nelson & Heather N. Bennett, *Are Black Parents Locked Out of Challenging Disproportionately Low Charter School Board Representation? Assessing the Role of the Federal Courts in Building A House of Cards*, 12 DUKE J. CON. L. & PUB. POL'Y. 153 (2016); Nelson & Grace, *supra* note 82, at 449–50.

however, antiblackness asserts that education policy is not simply racialized but is also influenced by a "cultural disregard for and disgust with blackness."[131] That disgust materializes in the form of continuous efforts to subjugate Black people, and the seclusion of Black students, efforts to undereducated Black students, and the school-to-prison pipeline are but examples of the continued assailments on Black people in the United States.[132] In the context of public education, it has long been the case that policy has been used to subjugate Black people;[133] thus, the fact that education policy—as implemented by the Tennessee State Board of Education—has failed to advance educational equity for marginalized students is the only predictable and reasonable consequence of any policy developed to protect marginalized, disenfranchised, and neglected communities.

CONCLUSION

The overinclusion of Black students in special education programs has been an incessant problem in primary and secondary education in the United States. Education policy has proven to be inept at the task of mitigating the misidentification and malidentification of Black students for special education services. More importantly, education policy has proven incapable of making significant steps to close the graduation gap between students in special education programs and students in general education programs. At the federal level, both IDEA and NCLB attempted to resolve issues of disproportionality in special education referrals, services, and achievement. Neither

131. Dumas, *Against the Dark*, *supra* note 118.

132. *See* Mark P. Fancher, *Born in Jail: America's Racial History and the Inevitable Emergence of the School-to-Prison Pipeline*, 13 J.L. SOC'Y 267, 267–68 (2011); *see also* Lia Epperson, *Brown's Dream Deferred: Lessons on Democracy and Identity from Cooper v. Aaron to the "School-to-Prison Pipeline"*, 49 WAKE FOREST L. REV. 687, 688, 697–98 (2014); Tracie R. Porter, *The School-to-Prison Pipeline: The Business Side of Incarcerating, Not Educating, Students in Public Schools*, 68 ARK. L. REV. 55, 63–64 (2015).

133. Michael J. Dumas, *"Losing an Arm": Schooling as Site of Black Suffering*, 17 RACE, ETHNICITY & EDUC. 1 (2014) (detailing how desegregation policies created suffering for Black people); Nelson & Bennett, *supra* note 130 (evaluating how education reform policies have interacted with other social policies to negate Black political power while reinforcing the school-to-prison pipeline); *see also* Nelson *supra* note 117, at 302 (theorizing how race-related education cases have, in fact, aided White stakeholders while assuring that Black stakeholders never have the opportunity to obtain equity); Steven L. Nelson, *Still Serving Two Masters? Evaluating the Conflict Between School Choice and Desegregation Policies Under the Lens of Critical Race Theory*, BOSTON U. PUB. INT. L. J. (forthcoming Spring 2017) (evaluating how rhetorical promises of civil rights laws and policies have counteracted each other to provide no benefit for Black stakeholders); Ridgeway & Yerrick, *supra* note 123 (examining how well-intentioned programs supporting marginalized groups are often hijacked and explaining how said hijacking could be prevented).

of these policies were successful at stemming the importunate and predictable issue of disproportionality in special education programs. At the state level, programs like the Tennessee Diploma Project have also proven inefficacious in terms of regulating the graduation gap between students identified as disabled and students not identified as disabled.

Given the overrepresentation of Black students in special education programs, and the graduation gap between students in special education programs and students in general education programs is bound to impact the educational, social, and occupational opportunities available for Black students. A Critical Race analysis of the impact of the Tennessee Diploma Project reveals that the policy has produced very little, if any, benefit for students in special education programs and therefore, did little to provide educational equity for the groups that disproportionately comprise the student population of special education programs. Critical Race Theory would assert that the minimal impact of the Tennessee Diploma Project is another example of how law and policy seldom, if ever, operate for the benefit of Black Americans. This argument is specifically relevant to the development and implementation of special education programs. For instance, special education programs arose in response to school desegregation, offering White Americans another mechanism by which to segregate public schools. Furthermore, federal and state policies have failed to adequately address issues of disproportionality. That education policy has failed to adequately address issues of disproportionality in special education programs is baffling since federal policies, such as Race to the Top and No Child Left Behind, have been extraordinarily impressive at shaping the behaviors of schools and school districts.

Generation Gaps and Ties That Bind: Constitutional Commitments and the Framers' Bequest of Unamendable Provisions

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We the People of the United States, in Order to form a more perfect Union, establish Justice, insure domestic Tranquility, provide for the common defence, promote the general Welfare, and secure the Blessings of Liberty to ourselves and our Posterity, do ordain and establish this Constitution for the United States of America.[1]

ABSTRACT

"We the People." That phrase conjures a vision of present-day U.S. citizens taking part of a continuous enterprise of constitutional development, each succeeding generation stepping into the shoes of those who framed and ratified the Constitution and, as the new performer in the role of "We the People," reinterpreting a centuries-old role. Like those who created the role, we have power to modify the Constitution. But is each succeeding generation really allowed the same creative and expressive power to alter the role, to amend the Constitution?

The subject of this Article, in general, is the relationship between "We the People," who "ordain[ed] and establish[ed]" the Constitution, and we the "Posterity" to whom the "Blessings of Liberty" were to be secured. The rules for amending the Constitution, and any limitation on amendment emplaced by those rules, are central to relationships between generations of the American citizenry. The more particular topic of this Article is the special case of unamendable provisions as ties that bind and the gaps that separate generations of We the People. Such permanent, unalterable provisions are the ties that bind generations inflexibly to one another; yet such provisions create the widest of gaps between the sovereignties of those same generations.[2]

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1. U.S. CONST. pmbl.

2. As to intergenerational relationships among the citizenry, and the possibility of unamendable provisions, Akhil Reed Amar has written:

> [O]ne might plausibly infer from the Preamble's text about the rights of "our Posterity" and from the very act of ordainment that what We, the People originally established, We could later amend. Ongoing popular sovereignty formed the Constitution's bedrock principle, which could not be abrogated without undermining the very foundation of the document. On this view, if some putative amendment purported to eliminate the right of a later generation to adopt still further amendments, such an attempted abrogation of a genuinely *inalienable* right would not be a permissible amendment of the Constitution's general project. Rather, it would represent an impermissible repudiation of the basic legitimating concept.

AKHIL REED AMAR, AMERICA'S CONSTITUTION 292 (2005).

Amar assumes an inalienable power of popular sovereignty prevents the United States citizenry from ever truly binding itself. In this way, Amar sees in the Preamble an assumed oneness of the American people over time. The "We" that "ordain[ed] and establish[ed]" the Constitu-

INTRODUCTION

The current citizenry of the United States lives with the Constitution given to us by past generations. The supermajority requirements for constitutional amendment[3] effectively grant the decisions of past generations a deference,[4] a presumption that must be overcome if the Constitution is to be changed. Future generations, likewise, will need to coalesce into an amendatory supermajority to alter the Constitution we leave to them.

A similar situation exists in most national constitutions.[5] The deference conferred upon the past by supermajority amendment requirements can raise concerns about the self-determination of present democratic majorities.[6] And some constitutions have set aside certain provisions as subject to amendment only when even more stringent requirements are met.[7]

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tion and the "We" that amend it are the same, or at least the framing and following generations have the same power to create constitutional provisions. As this Article makes clear, I take a different lesson from the Preamble. It contains "We the People" and "[their] Posterity." When we look at the framing generation, they are the People. We are the posterity. Significant results flow from that distinction.

3. *See* U.S. CONST. art. V (requiring, for amendments to be valid, that they be proposed by two-thirds of both houses of Congress, or by a constitutional convention, then ratified by legislatures or ratifying conventions of three-fourths of the states).

4. Michael J. Klarman, *Antifidelity*, 70 S. CAL. L. REV. 381, 387 (1997) [hereinafter Klarman, *Antifidelity*] ("Supermajority requirements [for constitutional amendment] necessarily privilege the status quo; they are antimajoritarian and difficult to reconcile with democratic premises.").

5. Amendment rules for contemporary constitutions across the world predominantly require multiple levels of approval, usually by supermajorities of the legislature and/or the people and/or "a complex extra-majoritarian decision rule." Lael K. Weis, *Constitutional Amendment Rules and Interpretive Fidelity to Democracy*, 38 MELB. U. L. REV. 240, 265 (2014).

6. *See* Michael C. Dorf, *The Aspirational Constitution*, 77 GEO. WASH. L. REV. 1631, 1632 (2009) (asking "[w]hat entitles one generation of Americans to entrench against simple majoritarian change those values and practices it deems fundamental, but that a later generation may find unnecessary or affirmatively retrograde?")

Likewise:

> What gave men in the late eighteenth century, who lived in a world vastly different from our own, the right to impose their preferences on all future generations of Americans, unless those later generations could meet the supermajority requirements that the founding generation prescribed for constitutional amendments in Article V? For those generations that do manage to amend the Constitution, what gives them the right to bind future majorities until a supermajority can again be assembled?

Todd E. Pettys, *Popular Constitutionalism and Relaxing the Dead Hand: Can the People Be Trusted?*, 86 WASH. U. L. REV. 313, 320 (2008).

7. Weis, *supra* note 5, at 263 (noting it is common for countries to have different amendment procedures, more and less onerous, depending on the subject matter of the amendment); *see also* Richard Albert, *Amending Constitutional Amendment Rules*, 13 INT'L. J. CONST. L. 655, 677, 681 (2015) [hereinafter Albert, *Amendment Rules*] (dubbing such scaling of amendatory difficulty "relativity").

So, the point of this Article: what of the intergenerational difficulties created when some constitutional provisions cannot be amended[8]—when, under the terms of the constitution, no supermajority is sufficient to overcome the status quo?[9]

In another place, I have argued that the U.S. Constitution contained in its original form, and to this day, a permanently unamendable provision.[10] I also argued that there exists today the power of an amendatory supermajority to create additional unamendable provisions. I admit I find this second result disquieting and, given my uncertainty as to that part of my result,[11] I have returned to the question with a view to understanding why that result is such a troubling idea, and does an exploration of it reduce or increase that unease?

Such unamendable provisions have been decried as undermining the rights of later citizens "to adequate and equal opportunities for participating in public debate, voting equality, informed citizenship . . . deliberative procedures, [and] effective representation."[12] And surely

8. There is always the option of extra-constitutional change; revolution, if you like, or the potentially less violent event of tearing up a constitution and writing a new one. In either situation, such a "re-constitution" is a question of power and will rather than constitutional law. My concerns in this Article are bounded by what is legally allowable *under* a constitution, not extraconstitutional change. *See* Richard Albert, *The Unamendable Core of the United States Constitution*, *in* COMPARATIVE PERSPECTIVES ON THE FUNDAMENTAL FREEDOM OF EXPRESSION 13, 30 (András Koltay ed., Wolters Kluwer 2015) [hereinafter Albert, *Unamendable*] (recognizing that "[u]namendability, whether formal or informal, is defenceless against any effort to create a new constitutional regime[,] [b]ut unamendability can be enforced within an existing, legally continuous regime where political actors operate by the textual rules of legal change").

9. Such unamendable provisions existed in 82 of 192 national constitutions in 2011. Yaniv Roznai, *Unconstitutional Constitutional Amendments—The Migration and Success of a Constitutional Idea*, 61 AM. J. COMP. L. 657, 667 (2013). "[T]he global trend, especially after World War II, is towards acceptance of explicit and implicit limitations on the constitutional amendment power." Gábor Halmai, *Judicial Review of Constitutional Amendments and New Constitutions in Comparative Perspective*, 50 WAKE FOREST L. REV. 951, 982–83 (2015)*; see* Richard Albert, *Constitutional Disuse or Desuetude: The Case of Article V*, 94 B.U. L. REV. 1029, 1038 nn.53–57, 1040 nn.67–68 (2014) [hereinafter Albert, *Constitutional Disuse*] (listing briefly and categorizing over 20 national constitutions containing unamendable provisions); Richard Albert, *Counterconstitutionalism*, 31 DALHOUSIE L.J. 1, 39–44 (2008) [hereinafter Albert, *Counterconstitutionalism*] (describing unamendable provisions in the constitutions of Germany, Italy, Turkey, Namibia, Republic of Congo, Cameroon, Gabon, Mauritania, Mali, and Niger).

10. That argument appears in George Mader, *Binding Authority: Unamendability in the United States Constitution—A Textual and Historical Analysis*, 99 MARQ. L. REV. 841 (2016). A brief summary of the core of the argument appears *infra* notes 25–41 and accompanying text. The unamendable constitutional provision is: "no religious Test shall ever be required as a Qualification to any Office or public Trust under the United States." U.S. CONST. art. VI, cl. 3.

11. I hold to my argument that the original U.S. Constitution contained unamendable provisions, one of which is permanent and is still in force. As to the issue of whether we may create unamendable provisions, I still prefer over any opposing view my argument that we have that power; but I am open to being persuaded otherwise.

12. Albert*, Unamendable*, *supra* note 8, at 23*; see also* Douglas Linder, *What in the Constitution Cannot Be Amended?*, 23 ARIZ. L. REV. 717, 728–32 (1981) (arguing unamendable amend-

there are dangers in unamendable provisions. A constitutional supermajority may make a tragically unwise choice, perhaps an overhasty action undertaken during short-term passion or a decision made during the benightedness of a present compared to a possibly more enlightened future.[13] Thus, one argument against a constitution containing or allowing unamendable provisions is an assumed progress by succeeding generations, a belief in not only the right of succeeding generations of citizens to amend a constitution however they please, but also a trust in the likelihood that they will correct our errors or oversights.

And yet, do we not have the power to unalterably bind ourselves to live by an ideal, to hold ourselves to a standard? "Do we not believe that we can agree today to bind ourselves tomorrow, and, further, that we can agree today that we shall not have the right tomorrow to change our minds?"[14]

In this Article, I explore the concerns raised by the possibility of unamendable constitutional provisions and address three topics: (1) If the framers created unamendable provisions but no later generation can create them, what does it say about our constitutional heritage; what does it say about "We the People"? (2) If we *can* create unamendable provisions, should we amend the Constitution so such provisions are no longer possible, neither for us nor future generations? (3) If we can create unamendable provisions, with what mindset and under what precautions should we exercise that power?

The answers I reach are:

(1) If our generation has no power to create unamendable provisions, then we must confront this truth: the generation that framed and ratified the original Constitution is the one and only true "We the People." That was a generation apart, the last with the power to say the Constitution stands permanently for any substantive proposition. All following generations are in a subordinate position. In

ments are invalid because they are inconsistent with democratic theory and morality and they allow one generation to prevent succeeding generations from making fundamental political and moral choices).

13. Miriam Galston, *Theocracy in America: Should Core First Amendment Values Be Permanent?*, 37 HASTINGS CONST. L.Q. 65, 116 ("The central policy argument against entrenching parts of the Constitution is that doing so would subject the country to the risk of unamendable provisions in circumstances when they should be altered to accommodate social, economic, political, or cultural changes.").

14. David R. Dow, *The Plain Meaning of Article V*, *in* RESPONDING TO IMPERFECTION 117, 122 (Sanford Levinson ed., Princeton Univ. Press 1995). Dow argues that the essence of the United States Constitution is the paradox that the citizenry believes in both majority will and that "certain ideals transcend the vicissitudes of majority will." *Id.* at 143–44.

> addition, the Constitution is merely an adaptable framework[15] for achieving whatever stream of preferences moves an amendatory supermajority of the people of the United States at a given time.[16]
>
> (2) If, in the alternative, we can create unamendable provisions, we may remove that power, but we should not. Banning such provisions forever by constitutional amendment would unfairly restrict future generations as surely as any other unamendable provision. We would not be declaring a particular substantive provision unamendable, but would be prohibiting an entire class of provisions. We and the future both may need at some point an ability to disable ourselves in a believable way from certain alterations to the Constitution. There is a danger that the power to create unamendable provisions may be misused, but perhaps we should trust the future a little.
>
> (3) If we consider creating unamendable provisions of our own, we must develop processes that filter out provisions that indulge the self-interest of the present to the detriment of future generations' sovereignty over their own times. Such processes might include requiring multiple ratifications over time to ensure intergenerational acquiescence. In addition, certain long-standing, long-approved constitutional provisions declaring protective rights might safely be made unamendable.

Part I of this Article is a necessary evil—it examines in dry, logical terms the possible basic constitutional postures a constitution may adopt toward unamendability, then offers instinctive reactions to the intergenerational fairness of each type. Part I also briefly recapitulates my argument that the United States Constitution contains an unamendable provision and allows, through the Article V amendment process, the creation of other unamendable provsions. Part II explores the literature on constitutional precommitment and the manners in which preommitment by one generation binds later generations. I then take lessons learned from that literature (which usually addresses the case in which constitutional amendment is diffi-

15. I do not mean to imply an adaptable framework that provides governmental stability is less than an ingenious creation. My use of "merely" is to drive home the point that although many Americans see the Constitution as containing permanent truths and ideals, if the Constitution is infinitely amendable, the only permanent truth or ideal it can stand for is its own flexibility.

16. Any preference, that is, except a desire to add a provision permanently to the Constitution. To be sure, one might reply, perhaps devastatingly, that what I just so blithely referred to as "achieving whatever stream of preferences moves . . . the people" might neatly be summed up in a single word: "liberty" (the blessings of which are secured to the framers' posterity). But it is a particular brand of liberty that does not allow Constitution-enforced self-binding.

cult, not impossible) and apply them to the case of unamendable constitutional provisions. Part III includes a reflection on whether each generation is allowed to have a "voice" in the Constitution, and also discusses what sorts of constitutional provisions might best be made unamendable, including the case in which an unamendable provision prohibits all future unamendable provisions.

I. CONSTITUTIONAL UNAMENDABILITY

A constitution, when it first takes effect, can adopt one of two stances on each of two questions about unamendability. Every constitution either contains an unamendable provision[17] or does not contain an unamendable provision. Also, every constitution either permanently prohibits the later creation of unamendable provisions, or it does not permanently prohibit the later creation of unamendable provisions. Thus, there are four categories of constitutions, corresponding to the boxes in Table 1, below.

Conditions of Unamendability When Constitution First Takes Effect		Permanently Prohibits Creation of Unamendable Provisions?	
		Yes	**No**
Contains at Least One Unamendable Provision?	**Yes**	**1** Has at least one unamendable provision but permanently prohibits creation of any more	**3** Has at least one unamendable provision and does not permanently prohibit creation of more
	No	**2** Has no unamendable provision and permanently prohibits creation of any more	**4** Has no unamendable provisions and does not permanently prohibit creation of more

Table 1: Conditions of Unamendability When Constitution First Takes Effect

17. To allow for the idea that there can be, outside the text of a constitution, implicit constitutional content, I use the term "provision" to cover both written and unwritten aspects of a given constitution.

A. Two Observations About Unamendability

With the preceding as introduction, and with the table as a helpful organizing scheme, we can observe two truths about constitutions and unamendable provisions. These observations are useful background for the rest of the article.

Observation No. 1 Every constitution, when it first takes effect, either allows the eventual creation of unamendable provisions or already includes unamendable provisions, or both. An equivalent statement is that Box 2, which purports to be the case in which the original constitution neither contains any unamendable provisions nor allows their later creation, is empty.

Proof: If a constitution can never have any unamendable provisions, there must be a provision of the constitution prohibiting unamendable provisions.[18] *That* provision is *itself* either unamendable or not. If it *is* unamendable, then Observation No. 1 is true. So, assume to the contrary that the provision prohibiting unamendable provisions is open to amendment. Then it can be removed from the constitution, the constitution will then allow unamendable provisions, and the observation above is true.

As seen within the proof, the only way for a constitution to prohibit forever the creation of unamendable provisions is for it to already have (or add) an unamendable provision barring unamendable provisions.[19] So it must be the case that every constitution has, or

18. I am allowing the instance in which the provision barring the creation of unamendable provisions is an implicit understanding about the constitution.

19. Richard Albert has said something similar, though more particular: "the exception to the general rule against unamendability in the United States presents itself: the First Amendment's democratic rights must themselves be unamendable in order to preserve the free amendability of the United States Constitution." Albert, *Unamendable*, *supra* note 8, at 31. Albert sees the United States Constitution as possessing no unamendable textual provisions, clearly a point on which he and I disagree. *Id.* at 24; *see also* AMAR, *supra* note 2, at 291 (wondering whether "some things [are] unamendable by dint of the Constitution's very essence[.] For example, [does] the bedrock idea of republican self-government mean that strong protection for core political expression [is] an irrepealable feature of the entire constitutional project?"). I consider

eventually can have, one or more unamendable provisions. The question is not *whether* the constitution has/allows unamendability, but rather what kind of unamendability it has and/or allows: will it have an unamendable provision that forever bars all other permanent provisions or will it be open to the creation of unamendable provisions?[20]

Observation No. 2 A constitution that permanently prohibits the creation of unamendable provisions cannot regain the power to create unamendable provisions, but a constitution that allows the creation of unamendable provisions can be altered to give up that power.[21]

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the First Amendment to be neither implicitly nor explicitly unamendable. *See* Mader, *supra* note 10, at 879–81.

20. Note that, whether there is a provision barring future unamendable provisions or not, there may be (other) unamendable provisions already present in the constitution.

21. A metaphor often mentioned in discussing the issues surrounding unamendability is the paradox of the omnipotent being and the boulder: can an omnipotent being create a boulder an omnipotent being cannot lift? *See, e.g.*, AMAR, *supra* note 2, at 292; JON ELSTER, ULYSSES UNBOUND: STUDIES IN RATIONALITY, PRECOMMITMENT, AND CONSTRAINTS 147–48 (2000) [hereinafter ELSTER, ULYSSES UNBOUND]; PETER SUBER, THE PARADOX OF SELF-AMENDMENT: A STUDY OF LOGIC, LAW, OMNIPOTENCE, AND CHANGE, at xiii–xiv (1990). No matter the answer, the posited omnipotent being fails at a task and is therefore not omnipotent. Either the being can lift every boulder it can create, and therefore lack "creative omnipotence" or it can create a boulder it cannot lift, and therefore lack "lifting omnipotence." The comparison is then made the amending power: either it can create an unamendable provision (and will thereafter lack "alteration omnipotence" in that it is unable to alter every aspect of the constitution) or it is able to amend every aspect of the constitution (and therefore lack "binding omnipotence" in that it cannot create a binding provision incapable of amendment). Thus, an "omnipotent" amending power is labeled a paradox.

There is, however, a problem with the analogy between the boulder-creating omnipotent being and a provision-creating amending power: In the boulder-creation and boulder-lifting paradox, the omnipotent being is not itself changed; the boulder is not a part of the being. But when an amending power creates an unamendable provision, that act affects the amending power, which is lessened by the fact that there is not something it cannot amend.

The better analogy is this: Recognize that one aspect of an omnipotent being is the ability to change any aspect of itself. So we request the omnipotent being alter itself by giving up its omnipotence. The being either will be able to give up its omnipotence (at which point it is no longer omnipotent), or it will be unable to give up its omnipotence. It might seem we again have a paradox—the being fails in either case, as it either no longer is omnipotent or it has failed at a task (and is therefore not omnipotent). But it only seems a paradox if we assume omnipotence is eternal. When the omnipotent being is asked to change itself to lose its omnipotence, the being has succeeded (displays omnipotence) at that moment *only if it loses omnipotence*. If the being does not lose omnipotence, the being was not omnipotent in the first place. That the being is no longer omnipotent at time t_2 is not a concern as to the being's omnipotence at time t_1.

Observation No. 2 above encapsulates this result. Non-omnipotent amending powers cannot create unamendable provisions. Omnipotent amending powers can create unamendable provisions, thereby forever losing their omnipotence.

Proof: The first part of the observation is simply an acknowledgment of what it means for a provision to be unamendable.

As to the second part of the observation: If a constitution allows the creation of unamendable provisions, then one unamendable provision that can be created is:

Article Z: This Article is unamendable. No amendment to the constitution made after the ratification of this Article shall result in an unamendable constitutional provision.

Such an amendment would bar any future unamendable provisions.

Put into the terms of Table 1, Observation No. 2 means it is possible for a constitution to move from Box 3 or Box 4 (the Boxes in which unamendable provisions may be eventually created) to Box 1 by creating an unamendable provision that bans any future unamendable provisions. The reverse movement, Box 1 to Box 3 or Box 4, is not possible.

Before moving on to an elucidation of unamendability in the United States Constitution, it is worthwhile to gauge, in a simple, intuitive way, the manner in which constitutions falling into each Box treat the constitutional aspirations of later generations.

In Box 1 of Table 1, the constitutional framers have created one or more provisions that cannot be amended and, further, have prohibited the creation of any future permanent provisions. Box 1 can be further subdivided into two cases.

Box 1 Criterion	**Case A**	**Case B**
Constitution has at least one unamendable provision but permanently prohibits creation of any more	The sole unamendable provision is one prohibiting all future unamendable provisions (the constitution can never have any other unamendable provision)	There are multiple unamendable provisions, including one that prohibits the addition of any *other, future* unamendable provisions
	Relationship between constitutional framers and future: Framers bind future only in that there will be no unamendable provisions, a condition under which the framers also place themselves	Relationship between constitutional framers and future: Framers place unamendable restrictions on future citizens but do not allow future citizens to create additional unamendable provisions

Table 2: The two cases of Box 1 Constitutions.

In Case A, the sole unamendable provision at the time the constitution goes into effect is a provision banning any future unamendable provisions. The constitution's framers have determined every aspect of the constitution shall be open to amendment forever. This power of the framing generation to decide for all future generations the issue of whether unamendable provisions shall be possible is inherent in the one-way direction of time. The framing generation was required to foreclose or allow unamendability; what they did affected their future, our present.[22] But apart from the framers deciding to ban unamendable provisions, the framers and all future generations are treated the same.[23]

22. *See* John O. McGinnis & Michael B. Rappaport, *Symmetric Entrenchment: A Constitutional and Normative Theory*, 89 VA. L. REV. 385, 427–28 (2003) [hereinafter McGinnis & Rappaport, *Symmetric*] (acknowledging that a framing generation has more power than succeeding generations in that they could decide the strictness of the entrenchment rules that would apply to both the framers and to succeeding generations of citizens). Such a "first-mover" advantage is unavoidable, though, and is mitigated as much as possible if the framing generation subjects itself to the same rules it imposes on future generations. *Id.*; *see also* JON ELSTER, ULYSSES AND THE SIRENS: STUDIES IN RATIONALITY AND IRRATIONALITY 94 (1979) [hereinafter ELSTER, SIRENS] ("The constituent assembly has a unique and privileged character, not by right but by historical accident. In exceptional and unpredictable historical situations, representivity of persons and the legitimacy of voting methods are decided on the spot; the drastic breach with the past leaves the assembly free to bind the future."); *infra* note 100 and accompanying text.

23. It is not true that a permanently unamendable provision was the only way for the framers to prohibit themselves from creating unamendable provisions. They could have made the bar to unamendability temporary, thereby restraining only themselves and the citizenry who followed shortly.

Also note that, although it is true that unamendability has been prohibited forever, there is nothing preventing the citizenry from creating onerous amendment procedures that make future amendments extremely difficult.

In Case B, there are multiple unamendable provisions, including a final one that prevents any future creation of permanent provisions. In this case, the constitution's framers have created permanent provisions, then prohibited the practice to later generations. The framers have had the final say on some topics, then prohibited all future generations not only from changing the framers' decisions on those topics, but from having their own final say on any other topics. All future generations are treated the same as one another, but here the framers have treated themselves differently in a manner beyond the unavoidable first-mover advantage.

In Box 3 of Table 1, the constitution's framers have made decisions that cannot be undone or altered, but the framers also have allowed following generations to do as the framers did—to create unamendable provisions. There is still a certain unfair asymmetry in that the framers act first, putting some amendments beyond the power of future generations, whereas the future generations of course put no powers out of reach of the framers. Each successive generation can add unamendable provisions, so the framing generation has created a situation in which there could be a hierarchy of generations, later generations receiving less power to amend than earlier generations. As noted earlier, the creation of a particular kind of amendment, one barring all future unamendable provisions, would move a constitution from Box 3 to Box 1.

In Box 4 of Table 1, the framers have deferred to future generations the entire question of unamendability. The framers have imposed no constraints on future generations, who may or may not create unamendable provisions, and may or may not (one time, by one generation) prohibit all future unamendable provisions. The creation of an unamendable provision (allowed in this Box) would, of course, move the constitution from Box 4 to Box 3,[24] or, if the unamendable provision barred all future unamendable provisions, to Box 1.

B. Unamendability in the U.S. Constitution

Below is a greatly condensed version of my argument, made elsewhere,[25] that the original U.S. Constitution in 1789 contained two unamendable provisions, one of which was temporary, and one of

24. The opposite move, from Box 3 to Box 4, is not possible.

25. The text contains only the barest outline of my argument. For the full, (and I think far more convincing) argument, please see Mader, *supra* note 10.

which still exists. I further argued that constitutional text and historical evidence from the framing period indicate that the Constitution allows the creation of other unamendable provisions, thus placing it in Box 3 of Table 1.

We can begin by noting the U.S. Constitution contains no explicit statements about allowing or not allowing amendments containing unamendable provisions.[26]

My argument starts with the language of Article V:

> [Amendments proposed by two-thirds of both houses of Congress, or by a constitutional convention] shall be valid to all Intents and purposes, as Part of this Constitution, when ratified by [legislatures or ratifying conventions] of three fourths of the several States, . . . ; Provided that no Amendment which may be made prior to [1808] shall in any Manner affect [Article I, Section 9, clauses 1 and 4]; and that no State, without its Consent, shall be deprived of its equal Suffrage in the Senate.[27]

The first portion of Article V's concluding proviso, a so-called sunset provision, made certain aspects of the Constitution[28] unamendable until 1808. It also was itself unamendable until 1808. One might attempt to argue the provision is ineffective by saying Article V could have been amended prior to 1808 to remove the prohibition on amendment, and then another amendment could have been enacted that "affect[ed]" the provisions previously protected. But an amendment of Article V removing the protective sunset provision would itself "in any Manner affect" the clauses protected from amendment.[29] Various contemporaneous understandings of the word "affect" as used in Article V support that conclusion.[30] Thus, the sunset entrenchment provision in Article V was unamendable until 1808, as were the specifically cited clauses from Article I, Section 9, and all

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26. *See* McGinnis & Rappaport, *Symmetric*, *supra* note 22, at 411, 429–30 (stating the authors' understanding that Article V of the United States Constitution permits the creation of unamendable amendments, but deeming that situation a "definite flaw").

27. U.S. CONST. art. V.

28. The specific clauses referenced in the sunset provision are:

> The Migration or Importation of such Persons as any of the states now existing shall think proper to admit, shall not be prohibited by the Congress prior to [1808], but a Tax or duty may be imposed on each such Importation, not exceeding ten dollars for each Person.

Id. art. I, § 9, cl. 1.

> No Capitation, or other direct, Tax shall be laid, unless in Proportion to the Census or Enumeration herein before directed to be taken.

Id. art. I, § 9, cl. 4.

29. *See* Mader, *supra* note 10, at 855–64.

30. *Id.* at 860–64.

provisions whose alteration would have "affect[ed]" those clauses. This prohibition on amendment included, for example, the Three-Fifths Clause, as it "affect[ed]" Article I, Section 9, clause 4.[3132]

Article VI of the Constitution contains a provision that is unamendable.[33] Article VI includes: "no religious Test shall ever be required as a Qualification to any Office or public Trust under the United States."[34] This is the only instance of the word "ever" (or any word of such temporal illimitability) appearing in the Constitution. The best understanding of the phrase "no religious Test . . . ever" is that it prohibits not only religious tests, but also prohibits the removal of the prohibition on religious tests. The provision would bar religious tests even without the word "ever." It simply is not plausible that the only use in the Constitution of a word of permanence is a surplusage. To prevent "ever" from being extraneous, it must be that the word connotes permanence of the provision; the provision states not merely "no religious test," but "no religious test *ever*." There is also historical evidence that (1) this provision prohibiting religious tests was understood at the time to be unamendable, and (2) the Framers wanted the provision to be unamendable.[35]

Given the precedent of multiple unamendable provisions in the original Constitution, one of which is permanent, and given Article V's provision that any amendments properly proposed and ratified are "valid to all Intents and Purposes as Part of this Constitution," new amendments to the Constitution can create unamendable provisions.

31. The Three-Fifths Clause states in relevant part: "Representatives and direct Taxes shall be apportioned among the several States which may be included within this Union, according to their respective Numbers, which shall be determined by adding to the whole Number of free Persons, including those bound to Service for a Term of Years, and excluding Indians not taxed, three fifths of all other Persons." U.S. CONST. art. I, § 2, cl. 3.

32. For completeness's sake, allow me to address the other entrenchment provision in Article V of the Constitution. The provision that "no State, without its Consent, shall be deprived of its equal Suffrage in the Senate" is ingeniously constructed to prevent changes to the states' equal vote in the Senate, but is not unamendable. The *consent requirement* could be removed first by ordinary amendment (with no particular state's consent being necessary, as removing the provision would not deprive any state of its equal Senate vote). Then, with the consent requirement removed, a state could be deprived of its equal vote. The provision is unamendable as a practical matter, however, until such time as all states desire a different rule of suffrage in the Senate. This is because if the provision is removed, *every* state is susceptible to an amendment aimed at reducing that state's Senate representation. The provision is a pin in a grenade, and to pull it puts every state's own interest in danger. U.S. CONST. art. V.

33. Mader, *supra* note 10, at 870–78.

34. U.S. CONST. art. VI, cl. 3.

35. Despite the presence of religious tests in almost all the states, there was little discussion of the provision at the Constitutional Convention; much of the historical evidence referred to in the text is aimed at explaining that lack of discussion. Mader, *supra* note 10, at 873–78.

We also have historical evidence that post-framing statesmen believed they had the power to create unamendable provisions. Constitutional amendments that would create unamendable provisions have, in fact, been proposed. Most significantly, as the Civil War approached in the winter of 1860–61, several amendment proposals aimed at resolving that crisis contained purportedly unamendable provisions.[36] One of those proposals unquestionably intended to be unamendable, the Corwin Amendment Proposal of 1861,[37] was passed by two-thirds of each house of Congress and sent to the states for ratification (one of only six amendment proposals to clear both houses of Congress and fail to be ratified[38]). President Lincoln acknowledged in his first inaugural address that such an irrevocable provision was acceptable.[39] The proposal was ratified by two states before events overtook its war-averting goal.

So my argument as to the constitutionality of creating unamendable provisions by amendment is, in sum, that the framers appreciated the logical and textual nuances of unamendability, and chose to place

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36. Perhaps chief among the many proposals were a set of six proposals by Senator Crittenden of Kentucky, the so-called Crittenden Proposals, which contained unamendable provisions. CONG. GLOBE, 36th Cong., 2d Sess. 114 (1861); *see also* Mader, *supra* note 10, 885–87 (discussing the Crittenden Proposals).

37. The proposed amendment read:

> No amendment shall be made to the Constitution which will authorize or give to Congress the power to abolish or interfere, within any State, with the domestic institutions thereof, including that of persons held to labor or service by the laws of said state.

Corwin Amendment, proposed for U.S. CONST. art. XIII (proposed Mar. 2, 1861); *see also* CONG. GLOBE, 36th Cong., 2d Sess. 1236 (1861).

The drafting of this provision was flawed, resulting in a provision that was intended to be unamendable but would have been amendable. *See* Mader, *supra* note 10, at 886–89.

38. The five other amendment proposals sent to the states for ratification but were not ratified are: (1) from the original list of amendment proposals that became the Bill of Rights, a proposal prescribing the size and representation standards for the House of Representatives (those standards are currently met); (2) a proposal from the early republic to require congressional permission for any U.S. citizen to accept a noble title or other boon from a foreign power; (3) one that would allow Congress to regulate the working conditions of minors, a power now considered to reside in the Commerce Clause; (4) the Equal Rights Amendment; and (5) an amendment granting congressional representation to Washington D.C. For a brief history of these unratified amendment proposals and their texts, see STAFF OF S. COMM. ON THE JUDICIARY, 99TH CONG., AMEND. TO THE CONST.: A BRIEF LEGIS. HIST. 96–98 (Comm. Print 1985); *see also* JOHN R. VILE, CONSTITUTIONAL CHANGE IN THE UNITED STATES: A COMPARATIVE STUDY OF THE ROLE OF CONSTITUTIONAL AMENDMENTS, JUDICIAL INTERPRETATIONS, AND LEGISLATIVE AND EXECUTIVE ACTIONS 24–25 (1994).

39. "I understand a proposed amendment to the Constitution . . . has passed [Congress,] to the effect that the federal government shall never interfere with the domestic institutions of the States, including that of persons held to service. . . . [H]olding such a provision to now be implied [by] Constitutional law, I have no objection to its being made express and irrevocable." President Abraham Lincoln, Inaugural Address (Mar. 4, 1861), *in* HAROLD HOLZER, LINCOLN PRESIDENT-ELECT 473 (2008).

two unamendable provisions into the Constitution. The framers also provided for amendments to the Constitution, but did not include a textual bar to additional unamendable provisions. Historical events show that when faced with the Civil War crisis, Congress and the President both assumed unamendable provisions could be proposed and ratified into the Constitution. So, given the Framers' creation of unamendable provisions and Article V's assurance amendments are "Part of this Constitution," I infer that later generations have the power to create unamendable constitutional provisions.

One certainly can take issue with that inference, but such an argument would need to posit that amendments are limited to refinements to the original Constitution, that they must conform to some degree with the Constitution as a whole.[40] In my earlier work, I addressed such arguments but did not fully resolve them.[41]

The result, then, is that the U.S. Constitution is in Box 3 of Table 1, or, perhaps, Box 1B of Table 2 (if one believes an unwritten constitutional provision bars us from creating unamendable provisions). Box 1B indicates the framing generation had more constitutional power than any succeeding generation—the Framers included

40. *See* Philip A. Hamburger, *The Constitution's Accommodation of Social Change*, 88 MICH. L. REV. 239, 300–01 (1989) (arguing the Framers intended a permanent constitution and considered amendments to be the means of perfecting the document, if necessary, by eliminating defects rather than considering amendments to be adaptations to changed circumstances); Roznai, *supra* note 9, at 670 (reprising the argument made in the first Congress that amendments were based on a different authority (the states) from that on which the Constitution is based (the people)); Justin DuPratt White, *Is There an Eighteenth Amendment?*, 5 CORNELL L.Q. 113, 116 (1920) (declaring as a limit: "whether or not the subject of [the proposed amendment] is of a class that, followed to the end by subsequent amendments, would result in the destruction of the United States or of the states"); R. George Wright, *Could a Constitutional Amendment be Unconstitutional?*, 22 LOY. U. CHI. L.J. 741, 764 (1991) (finding, "for reasons of logic," amendments to be unconstitutional if they are incompatible with the assumed remainder of the Constitution); *see also* THE FEDERALIST NO. 85, at 182–83 (Alexander Hamilton) (Isaak Kramnick ed., 1987) (forming the basis for an argument that amendments are founded on a different, and perhaps lesser, authority because they are not of a whole with the rest of the Constitution):

> We may of course expect to see, in any body of men charged with its original formation, very different combinations of the parts upon different points. Many of those who form a majority on one question, may become the minority on a second, and an association dissimilar to either may constitute the majority on a third. Hence the necessity of moulding and arranging all the particulars which are to compose the whole, in such a manner as to satisfy all the parties to the compact; and hence, also, an immense multiplication of difficulties and casualties in obtaining the collective assent to a final act. . . . But every amendment to the Constitution, if once established, would be a single proposition . . . . There would be no necessity for management or compromise, in relation to any other point—no giving nor taking.

41. Mader, *supra* note 10, at 882–84. As I noted in the Introduction to this Article, this incomplete resolution, as well as my unease with the result that unamendable provisions may be added to the Constitution, led me to write this Article.

unamendable provisions, but no later generation has that option. If the U.S. Constitution is located in Box 3, the Framers created provisions we cannot undo *and* we have additional questions to consider: What are the dangers and benefits of unamendable provisions; should we create any of them; and how do we go about creating such provisions in a manner likely to maximize benefits while minimizing dangers? The following section addresses those concerns.

II. THE TIES THAT BIND: INTERGENERATIONAL CONSTITUTIONAL COMMITMENTS

A key concern of constitutional theorists is the tension between democratic principles of majority rule and a constitution containing provisions entrenched against alteration by a mere majority.[42] The scholarship in this area mostly addresses supermajority requirements that make constitutional amendment difficult rather than addressing unamendability, but the two situations are to a degree analogous, and many of the concepts that arise transfer usefully from the first situation to the second.

42. *See, e.g.*, ELSTER, SIRENS, *supra* note 22, at 93 ("The paradox of democracy can thus be expressed: each generation wants to be free to bind its successors, while not being bound by its predecessors."); ELSTER, ULYSSES UNBOUND, *supra* note 21, at 88–94; STEPHEN HOLMES, PASSIONS AND CONSTRAINTS: ON THE THEORY OF LIBERAL DEMOCRACY 134–77 (1995) [hereinafter HOLMES, PASSION AND CONSTRAINTS]; Samuel Issacharoff, *The Enabling Role of Democratic Constitutionalism: Fixed Rules and Some Implications for Contested Presidential Elections*, 81 TEX. L. REV. 1985, 1992 (2003) ("[I]f the effect of constitutions is to impose constraints not so much on the founding generation, . . . but on subsequent generations, may that be reconciled with any robust majoritarian sense of democracy?"); *id.* at 1994 ("Why must the generation of today be bound in its majoritarian desires simply because the society of yesterday insistently demanded that certain political avenues be closed?"); Klarman, *Antifidelity*, *supra* note 4, at 383–86; Jed Rubenfeld, *The Moment and the Millennium*, 66 GEO. WASH. L. REV. 1085, 1088–89 (1998).

Specifically addressing the United States Constitution, *see* Dow, *supra* note 14, at 119 (footnotes omitted):

> In the United States, we believe in, and our political institutions reflect, majority rule. At the same time, we also believe that not everything ought to be subject to it. Following the majority *because it is the majority* is sometimes obligatory; resisting the majority *even though it is the majority* is sometimes required. [These] [t]wo competing principles constitute the essence of our political being.

See also id. at 136 ("The people may agree today that a mere majority tomorrow will lack the lawful power to alter the Constitution. When the people do this, they have alienated a portion of their sovereignty.").

A. Constitutional Precommitment and the Dead Hand Objection

An incisive expression of the so-called "dead hand" objection to supermajority entrenchment of a constitutional provision[43] is:

> [I]f a present majority is bound by the constitutional handiwork of a past majority until it can assemble the supermajority necessary to secure constitutional change, [that situation] is inconsistent with the democratic principle that present majorities rule themselves. . . . After the enacting generation has departed the scene, . . . any constitutional provision is illegitimately entrenching.[44]

How much more so, then, for unamendable provisions?[45]

The dead hand objection was expressed during and even before the founding of the United States and the framing of its Constitution. Thomas Jefferson famously argued that the earth belongs to the living; a constitution should expire after half of those who were adults at the time of its introduction had died.[46] His contemporaries Noah Webster and Thomas Paine voiced similar ideas.[47]

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43. The dead hand concern is expressed not only in terms of the supermajority requirement for constitutional amendment. It also oftentimes is expressed as a critique of originalism as a theory of interpreting the constitution, the idea being that originalism seeks to understand the intent or meaning of those (almost always long dead) who wrote or ratified a constitutional provision. *See* John O. McGinnis & Michael B. Rappaport, *Originalism and the Good Constitution*, 98 GEO. L. J. 1693, 1752 (2010) [hereinafter McGinnis & Rappaport, *Originalism*].

44. Michael J. Klarman, *Majoritarian Judicial Review: The Entrenchment Problem*, 85 GEO. L.J. 491, 508–09 (1997) [hereinafter Klarman, *Majoritarian Judicial Review*]; *see also* Issacharoff, *supra* note 42, at 1987 ("[A] constitution . . . is a precommitment that thwarts or limits deliberative choices in the future."); McGinnis & Rappaport, *Originalism*, *supra* note 43, at 1752 ("The dead hand problem refers to the question why, under the Constitution, the present day majority is prevented from taking action that displaces the decisions of people long dead.").

45. "The strongest 'precommitment' device is a subject-matter restriction on formal amendment." Richard Albert, *The Expressive Function of Constitutional Amendment Rules*, 59 MCGILL L.J. 225, 233 (2013) [hereinafter Albert, *The Expressive Function*]. And therefore: "the dead hand problem is most acute with regard to so-called unamendable constitutional provisions." Klarman, *Majoritarian Judicial Review, supra* note 44, at 508*; see also* Richard Albert, *Constitutional Handcuffs*, 42 ARIZ. ST. L.J. 663, 667 (2010) [hereinafter Albert, *Constitutional Handcuffs*] (noting unamendable constitutional provisions are "deeply troubling for democratic theory, and doubly troubling for democratic practice"); *id.* at 675 (calling the denial of popular choice brought about by unamendable provisions "another matter altogether" from the restrictions imposed by supermajority requirements for constitutional amendments).

46. Jefferson stated these views several times but perhaps related them most clearly in an exchange of letters with James Madison. *See* DAVID N. MAYER, THE CONSTITUTIONAL THOUGHT OF THOMAS JEFFERSON 302–05 (1999). Using actuarial tables from the time, Jefferson determined that half of all then-existing adults would be dead in nineteen years and so suggested that period of time as the natural lifespan for constitutional provisions. HOLMES, PASSION AND CONSTRAINTS, *supra* note 42, at 142.

47. For short summaries of the views of Jefferson, Paine, and Webster, along with a rejoinder to Jefferson from Madison, see HOLMES, PASSION AND CONSTRAINTS, *supra* note 42, at 139–42, 152–58; Louis W. Hensler III, *The Recurring Constitutional Convention: Therapy for a Democratic Constitutional Republic Paralyzed by Hypocrisy*, 7 TEX. REV. L. & POL. 263, 291–94 (2003); Pettys, *supra* note 6, at 326.

Yet the grip of the dead hand and the resultant intergenerational binding are, to some degree, unavoidable.[48] The citizenry of a nation is not a static "transtemporal national self,"[49] and any act by the current citizenry to bind itself will, as time passes, bind others who are not yet part of the participating citizenry.[50] Even if we remove from consideration the ongoing naturalization of citizens, on any given day people are born into a citizenry, age into full political status, and die out of the citizenry; generations do not change all at once. Today's citizens are not identical to tomorrow's citizens, so a citizenry binding itself begins immediately to bind a future, different citizenry.[51]

But to restrict the present citizenry from binding *itself* also seems unfair. By what right would future generations limit the present anymore than vice versa? Must the citizenry of the present tiptoe through the world in an effort not to do anything that will bind future generations?[52]

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48. "Unless a democratic system can solve the problem of representing the future, changing interests of the unborn, it violates a rather fundamental underlying premise of democracy—that those who bear the costs of a decision should have their interests adequately reflected in the choice. . . . Aggregative democracy based on subjective political equality among current citizens appears to be only a crude approximation to political equality." JAMES. G. MARCH & JOHAN P. OLSEN, REDISCOVERING INSTITUTIONS 146–47 (1989).

49. Pettys, *supra* note 6, at 335 (using the term "transtemporal national self" and describing the concept but considering the concept a failed rationale for originalist constitutional interpretation). Under a theory of the citizenry as a "transtemporal national self," traceable at least as far back as Richard Hooker and Edmund Burke, "governmental arrangements were an inheritance that each new generation received from its predecessors" and the "[m]embers of a generation-spanning society are joined together as one body politic . . . so [that] one generation . . . binds it successors." *Id*. at 335–36. Some contemporary scholars have argued similarly in support of originalism as a theory of constitutional interpretation. *Id.* at 336 (collecting examples).

50. Stephen Holmes, in the process of recounting and summarizing how James Madison and David Hume reacted to Thomas Jefferson's assertions that every generation should start afresh with a new constitution, puts the point perfectly:

> Precisely because generations overlap, because individuals enter into and depart from the world one by one, the living have no right to repeal, at set intervals, the legacy of the past. Closing the doors on our predecessors' commitments is impractical, because the members of every new generation must coexist promiscuously with survivors of the old. . . . [The] methods of registering public consent [must] be compatible with the unsynchronized itineraries of human lives.

HOLMES, PASSION AND CONSTRAINTS, *supra* note 42, at 158.

51. Seamless generations may be a reason to trust a commitment to constitutionalism: at any given time, several generations have representatives in the citizenry (some who have been adult citizens for 60 years and some who will still be citizens 60 years from now). *See* Pettys, *supra* note 6, at 349–51.

52. "If this generation should not limit the capacity of future generations to make basic political choices, by what authority can future generations restrict our choices about such matters? If our bodies must respect their ghosts, why do not their ghosts have the same obligation to respect our bodies?" Walter F. Murphy, *Merlin's Memory: The Past and Future Imperfect of the Once and Future Polity*, *in* RESPONDING TO IMPERFECTION 164, 179 n.52 (Sanford Levinson ed., 1995). Murphy concedes that, of course, "the specious present *can* inflict much more grievous harm on the future than the future can inflict on the past." *Id.*

The answer, then, is to bind the future as lightly as will simultaneously allow for full self-government of the present.[53] There is "a distinction between majorities seeking to control *themselves* through precommitment and seeking to control [the future] through entrenchment."[54]

B. Lending a Helping (Dead) Hand

Once it is recognized that different generations affect one another—and, of course, the temporal relationship between generations cannot be changed—it is not surprising that different generations may have different advantages and disadvantages. While the Framers may have had more input into the Constitution, later generations have other advantages. We inherit the benefits of their system—a Constitution that is stable, desirable, and strongly supported by the nation.[55]

Precommitment by one generation to constitutional provisions that are difficult to amend can bring to future generations not only the sovereignty-restraining dead hand but also benefits, precisely *because* of the difficulty of amendment. "On this view, a constitutionally-bound government acquires capacity it would not otherwise have by effectively restraining itself . . . . A government which is effectively bound to pay back its loans and honor its contracts is thereby made better able to borrow money and enter into contracts."[56]

The key in the above quote is that the government is bound "*effectively*." That effectiveness comes from the difficulty in amending the constitutional provisions requiring the repayment of loans and the honoring of contracts.

The benefits flowing from the stability of the provisions entrenched in a constitution include the prevention of unwise

53. A majoritarian precommitment involves today's majority seeking to bind itself against future temptations; cross-temporal entrenchment involves today's majority seeking to control future majorities. . . . [C]onstitutionalism understood as intragenerational precommitment may be justifiable on majoritarian grounds, . . . [b]ut constitutionalism understood as the effort of current majorities (or even supermajorities) to embed fundamental values against possible efforts by future generations to repudiate them resists majoritarian justification.

Klarman, *Majoritarian Judicial Review, supra* note 44, at 507–08.

54. *Id.* at 507.

55. McGinnis & Rappaport, *Originalism*, *supra* note 43, at 1753.

56. John Ferejohn & Lawrence Sager, *Commitment and Constitutionalism*, 81 TEX. L. REV. 1929, 1929 (2003).

majoritarian impulse; such impulse might otherwise violate minority rights[57] or sacrifice important principles to short-term gain.[58]

Related to, but distinct from, the just-noted restraining features of a difficult-to-change constitution, the stability of such an instrument also encourages citizens to take the long view of their own accord and to bypass short-term gains for ultimately more valuable benefits long term.[59] Knowing the rules are unlikely to change, repeat players have an incentive to sacrifice the short term for the benefits of reciprocity, reputation, and coordination.[60] This long-view mentality can extend even to the act of amendment, encouraging the generality of provisions.[61]

The dead hand is usually discussed in terms of the restraint it exerts on majorities, but such intergenerational constitutional commitments also may enable that majoritarian power.[62] A constitutional

57. Albert, *Constitutional Handcuffs*, *supra* note 45, at 674 (noting the danger of "vicious manifestations of majoritarianism" like German Nazism, South African apartheid, and the Jim Crow laws in the United States).

58. "Constitutional designers may . . . create formal amendment rules to limit [the] future choices" of distrusted political actors. Albert, *The Expressive Function*, *supra* note 45, at 233*; see also* ELSTER, ULYSSES UNBOUND, *supra* note 21, at 24–45 (analyzing the role of precommitment in overcoming the change, or "time-inconsistency," of desires).

59. As to the benefits of the citizenry taking a long view, *see* Daryl J. Levinson, *Parchment and Politics: The Positive Puzzle of Constitutional Commitment*, 124 HARV. L. REV. 657, 711 (2011).

A constitution difficult to amend (and therefore one with provisions that endure for a long time) "encourages a generality of perspective," leading to the formation of "reasonable ground rules" and the creation of "liberty-bearing provisions . . . in ignorance of many of the details of social life to which they will come to be applied in the future." Lawrence G. Sager, *The Birth Logic of a Democratic Constitution*, *in* CONSTITUTIONAL CULTURE AND DEMOCRATIC RULE 110, 123 (John Ferejohn, Jack N. Rakove & Jonathan Riley eds., 2001).

60. As to reciprocity and reputation, *see* Levinson, *supra* note 59, at 711*; see also* Frank H. Easterbrook, *Textualism and the Dead Hand*, 66 GEO. WASH. L. REV. 1119, 1122 (1998) (noting that today's majority accepts limits on its power "for greater surety that its own rights will be respected when . . . power has shifted"). As to coordination, *see* HOLMES, PASSIONS AND CONSTRAINTS, *supra* note 42, at 172–74.

61. *See* Sager, *supra* note 59, at 124 (noting that when a constitution is "obdurate to change," constitutional provisions may be "constrained to broad issues of structure and general propositions of political justice").

> Those who draft or are asked to ratify the content of an obdurate constitution are likely to adopt a generosity or generality of perspective, born simply of the fact that they know what they put in place is likely to remain in place. The narrow interests of an individual or a group at the time of drafting or amendment is in competition with their imaginable interests over time, and, for that matter, the interest of their children and their children's children. Self-interest, projected over circumstances unknown and generations unborn, is likely to shed the worst of its parochial limitations.

Ferejohn & Sager, *supra* note 56, at 1958.

62. "[I]t is possible to view precommitments not so much as substantive limitations on the choices of policy available to a majority at any particular point, but rather as the process values that insure the rights of participation that are indispensable for any democratic order to survive." Issacharoff, *supra* note 42, at 1994*; see also* HOLMES, PASSIONS AND CONSTRAINT, *supra* note 42, at 152–54.

framework can *facilitate* expression of majority will.[63] A constitution requiring a supermajority for amendment may settle, beyond repeated majority oscillation, some basic issues which promote majoritarian self-rule. For instance, durable constitutional provisions may (1) facilitate democracy through the settling of basic questions (e.g., parliamentarian versus presidential form, federalist versus unitary, terms of office, etc.), and (2) entrench some constitutional rights that enhance democracy (e.g., free speech; one person, one vote; etc.).[64]

Finally, Stephen Holmes has noted an additional, somewhat indirect benefit of one generations' restraint on future generations:

> Precommitment is justified because, rather than merely foreclosing options, it holds open possibilities that would otherwise lie beyond reach. . . . By means of a constitution, generation *a* can help generation *c* protect itself from being sold into slavery by generation *b*. To safeguard the choices available to distant successors, constitution makers restrict the choices available to proximate successors.[65]

C. Intergenerational Binding—Fair Terms

The previous sections in this Part tell us that for one generation to bind other generations to constitutional provisions while mitigating detriments (and maximizing benefits) to those later generations, it is key that the self-interest of the present must be subordinated to a view that all citizens, present and future, are worthy of equal concern. Then the benefits of precommitment to well-chosen constitutional entrenchments can accrue: protected rights, enabled democracy, stability-enhancing long view, and protection of far-future citizens from the tyranny of intermediate generations.

One way to limit self-interest and provide intergenerational protection is for the earlier generation to (self-)impose a veil of ignorance. The term, "veil of ignorance" comes of course from John

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"If the people cannot bind themselves, there can be neither a large-scale, peaceful, ordered society nor any constitution that is authoritative beyond declaring that the will of the people is the supreme law of the land." Murphy, *supra* note 52, at 187.

63. HOLMES, PASSIONS AND CONSTRAINT, *supra* note 42, at 167.

64. Michael C. Dorf, *The Aspirational Constitution*, 77 GEO. WASH. L. REV. 1631, 1637–38, 1640; *see also* HOLMES, PASSIONS AND CONSTRAINT, *supra* note 42, at 169–72; Albert, *Unamendable*, *supra* note 8, at 29–31; McGinnis & Rappaport, *Originalism*, *supra* note 43, at 1752 ("[A] supermajoritarian-enacted constitution likely generates desirable restrictions like the separation of powers, federalism, checks and balances, and the protection of individual rights. . . . Under these conditions the hand of the past is one that reaches out to steady the living.").

65. HOLMES, PASSION AND CONSTRAINTS, *supra* note 42, at 162.

Rawls.[66] Adrian Vermeule has adapted Rawls's conception of the veil of ignorance from one in which decision makers know the consequences of their decisions but not what positions they will occupy, to the more usual situation in which decision makers know the positions they occupy, but are uncertain as to how benefits and burdens of their decisions will be distributed.[67] Vermeule defines: "[a] veil of ignorance rule . . . is a rule that suppresses self-interested behavior on the part of decisionmakers . . . by subjecting [them] to uncertainty about the distribution of benefits and burdens that will result from a decision."[68]

Vermeule offers four veiling tactics.[69] The first is *prospectivity*, which requires provisions be enacted in advance of the acts they govern; for instance, those creating a criminal provision do not know who will violate the provision.[70]

The next two of Vermeule's tactics frequently work together. *Generality* requires that provisions apply broadly, depriving those creating a provision of a strong predictive sense upon whom benefits and burdens will disproportionately settle.[71] *Durability* is roughly a temporal version of the generality principle; it requires provisions be likely to exist for a long time, so although those creating a provision may have some idea of the short-term results it will have, the long-term future introduces uncertainty as to the total effect of the provision.[72] To be sure of creating an effective veiling, generality and dura-

66. JOHN RAWLS, A THEORY OF JUSTICE 118 (1971).

67. Adrian Vermeule, *Veil of Ignorance Rules in Constitutional Law*, 111 YALE L.J. 399 (2001).

68. *Id.* at 399.

69. *Id.* at 407–08. Vermeule does add a fifth veil tactic, *randomization*, which he considers "[a] straightforward means of producing a veil effect." He offers a short survey of scholarly literature and historical practice, but notes randomization has rarely if ever been used in constitutional governance. *Id.* at 424–25. This is not surprising, I suppose, given that we might prefer government to act in a manner dictated by reason rather than chance. However, where a thing must be done, and fairness dictates a given boon or burden be randomly assigned, it may pop up. I offer two examples Vermeule did not mention in his piece, though that may be because he did not consider them to be "constitutional governance." First, of course, is the example of a military draft lottery. Second, and more likely to be considered both constitutional and governance, is the division of the Senate into three classes, each to be elected every six years in cycling two-year intervals. *See* U.S. CONST. art. I, sec. 3, cl. 2. The original division of the first twenty senators was made by lot on May 15, 1789. S. JOURNAL, 1st Cong., 1st Sess., May 15, 1789. As later states were added, the Senate used lots again to determine which of each state's two new senators was in which class. *See e.g.*, S. JOURNAL, 31st Cong., 1st Sess., 617 (1850) (noting the manner in which California's two new senators, John C. Frémont and William M. Gwin, were assigned to senatorial classes).

70. *Id.* at 408–11.

71. *Id.* at 412.

72. *Id.* at 415.

bility may need to be tied together (and would ideally be so tied) so that, should those creating a provision burden a general group to which the creators do not belong, they still cannot be sure they will not enter that group in the future.[73]

Vermeule's fourth veil tactic is *delayed effectiveness*, which uncouples the decision from short-term interests by lengthening the time between the decision to enact the provision and the provision taking effect.[74] This eliminates situations in which a short-term gain is so big it would swamp the self-interest-defeating properties of durable provisions.[75] Delayed (or "sunrise") provisions also present a moral difficulty, however: the reduced interest of the present-day designers of the constitutional provisions comes about precisely because it will not affect those in the present as much as those in the future; so the present is constitutionalizing more for the future than for itself, which exacerbates the problem of the dead hand.

Combining generality, durability and delayed effectiveness (which by its nature includes prospectivity) produces a veil of sufficient thickness to limit significantly the self-interest of those imposing a constitutional provision. Generality suggests the substance that a constitutional provision should have if it is to be resistant to self-interest of its framers; durability and delayed effectiveness suggest the manner of implementation that will best limit self-interest in the framers.

There are two more criteria, neither of them veil tactics and both of them procedural, to be added to our list of best practices for engaging in intergenerational binding. *Symmetric entrenchment* describes the concept that "[e]ach generation should be subject to the same

73. Vermeule, *supra* note 67, at 417.

74. *Id.* at 419. Jon Elster has expressed similar ideas as to the value of delay in reducing self-interest in those creating constitutional provisions. ELSTER, ULYSSES UNBOUND, *supra* note 21, at 143–46. Elster suggested a delay of ten or twenty years. *Id.* at 144. Elster also recognized that delays could be used to get decision makers to commit to a plan when the long-term benefits are known to be better than the short-term return, and then follow through later despite any instances when the short-term gain of backing out may temporarily be greater than the short-term gain of sticking it out. *Id.* at 141, 143.

For more on delayed implementation of laws and constitutional provisions, see generally Daniel E. Herz-Roiphe & David Singh Grewal, *Make Me Democratic, But Not Yet: Sunrise Lawmaking and Democratic Constitutionalism*, 90 N.Y.U. L. REV. 1975 (2015) (exploring the use of sunrise lawmaking in the United States); Jacob E. Gersen & Eric A. Posner, *Timing Rules and Legal Institutions*, 121 HARV. L. REV. 543 (2007) (discussing various rules for forcing delay in legislative lawmaking).

75. Vermeule, *supra* note 67, at 419.

rules for adding constitutional provisions as the other generations."[76] Basic fairness between those framing a provision and those who will later live with the provision dictates there should be a "strong presumption" that "[t]he voting rule that governs the enactment of an entrenched provision should be the same as the voting rule governing its repeal."[77] At the original framing of an entire constitution, it may be necessary to entrench some basic compromises more deeply than the rest of the constitutional provisions, but "[o]nce a constitution is up and running, it is much harder to overcome the presumption of symmetry."[78]

Richard Albert suggests *intertemporality* as a requirement for entrenchment of especially important provisions.[79] Intertemporality "respect[s] the considered judgment of the community as expressed over a period of years, and not only at one fixed point in time" and can be executed by "sequential approval—multiple votes over multiple years."[80]

Intertemporality reflects the view that

> [s]upermajorities are not created equal: their strength is directly proportional to their stability over time. A sustainable supermajority thus has a greater claim to representativeness than a temporary one. What underpins this view is a theory of transcendent sovereignty that assigns to some combination of previous, present, and future political actors—rather than only to the present

76. McGinnis & Rappaport, *Originalism*, *supra* note 43, at 1719; *see also* McGinnis & Rappaport, *Symmetric, supra* note 22, at 385.

77. McGinnis & Rappaport, *Symmetric*, *supra* note 22, at 426. "[S]ymmetric entrenchment treats all generations fairly, because they give each generation an equal opportunity to enact and repeal entrenched provisions." *Id.* This means any change in the procedural rules, including the size of the supermajority needed to adopt an amendment, can never be changed, as any such change (e.g., ratifying by three-fourths of the states an amendment proposal to change the requirement to nine-tenths of the states) would be asymmetric.

78. *Id.* at 430*; see also* Albert, *The Expressive Function*, *supra* note 45, at 245 ("[T]he choice to make one constitutional provision subject to a higher formal amendment threshold could represent a political bargain entered into by the constitutional designers for the sake of ratifying an otherwise 'unratifiable' constitution."). *Cf.* Sager, *supra* note 59, at 113 (arguing "[w]e need to set aside the clearly false idea that there is a necessary symmetry between conditions under which a regime of government is born and those under which it can be changed or replaced.").

79. Albert, *Amendment Rules*, *supra* note 7, at 22. Albert offers intertemporality as a strategy for the entrenchment of a constitution's amending provisions, but the concept is a perfect fit for thinking about intergenerational binding. Albert also suggests *relativity*, the scaling of provisions by how difficult they are to amend. *Id.* I do not discuss relativity because, in the end, I will be asking what processes are best used for unamendable provisions, a situation in which the scale is already at its upper end: impossibility of amendment.

80. *Id.*

> generation—the shared responsibility for ratifying transformative change.[81]

As Albert notes,[82] this is an expression of Jed Rubenfeld's theory of "how a constitution *binds*—of how, in other words, constitutional law exerts legitimate authority over time."[83] Rubenfeld argues that people "live through temporally extended courses of action. . . . Self-government therefore requires that the self simultaneously be governing and governed. This is attainable only by one who lives out self-given commitments."[84] The appropriate "self" for democratic self-government is "a people"[85]; so "the very idea of a nation, of a national people as a subject of self-government, contemplates an entity that extends across generations."[86] In Rubenfeld's view, then, "[w]ritten self-government . . . demands the creation of new constitutional commitments only when a people is prepared to make a significant *temporal* commitment to them."[87]

Thus, Albert's intertemporality scheme binds temporally proximate generations together in constitution-making; the later generation has veto power over whether the earlier generation's suggestion becomes a binding constitutional provision. This has the effect of allowing, at least for roughly adjacent generations, an almost magical reversal of time's arrow. It also requires the proposing generation to believe the provision is a good idea even if it will not have an immediate effect on that generation.[88]

D. Application to Unamendability

One might consider unamendability, the placing of a position beyond any supermajority's ability to alter, to be a facially illegitimate imposition of one generation's will upon future generations[89]—it is

81. *Id.* at 23.

82. *Id.* at 24 (citing JED RUBENFELD, FREEDOM AND TIME: A THEORY OF CONSTITUTIONAL SELF-GOVERNMENT (2001)).

83. JED RUBENFELD, FREEDOM AND TIME: A THEORY OF CONSTITUTIONAL SELF-GOVERNMENT 163 (2001).

84. *Id.* at 143.

85. *Id.* at 145.

86. *Id.* at 152.

87. *Id*. at 175.

88. Depending on the length of the delay, the effect on the propsing generation could be extremely attenuated.

89. *See* Akhil Reed Amar, *Popular Sovereignty and Amendment*, *in* RESPONDING TO IMPERFECTION 91 (Sanford Levinson ed., 1995) ("Could a legitimate amendment generally purport to make itself (or any other random provision of the Constitution) immune from further amendments? If so, wouldn't that clearly violate the legal right of future generations to alter their

the dead hand with a vengeance. Unamendability certainly violates the directive that the present should tread lightly on the sovereignty of the future.[90]

> Under Jed Rubenfeld's theory of constitutionalism noted earlier,
>
> [t]he very principle that gives the Constitution legitimate authority—the principle of self-government over time—requires that a nation be able to reject any part of a constitution whose commitments are no longer the people's own. Thus written constitutionalism requires a process not only of popular constitution-writing, but also of popular constitution-rewriting.[91]

Others have cautioned that unamendable provisions forestall the possibly valuable act of continually choosing, regardless of the choice being for good or ill.[92] Unamendable provisions could "chill constitutional discourse and prevent reconsideration of the constitutional text,"[93] and can, because there is no safety valve of amendment, lead to extra-constitutional change or revolution.[94]

Other problems exist as well. Unamendability introduces a special separation of powers problem in that court interpretations of the text of unamendable provisions cannot be undone by amendment.[95] And, of course, symmetry, of the sort in which the enacted provision is repealable by the same supermajority, is impossible where the provision is unamendable.

Finally, when we consider the United States Constitution's history with unamendability, we are hardly encouraged. Unamendablity has been used once to protect the right of a member of any religion to serve in the United States government and multiple times to entrench or attempt to entrench slavery.[96]

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government?"); Murphy, *supra* note 52, at 178–79 (considering the argument that "a people could not legitimately use democratic processes to destroy the essence of democracy—the right of others, either of a current majority or minority or of a minority of future generations, to meaningful participation in self-government.") (footnotes omitted).

90. Albert, *Unamendable*, *supra* note 8, at 23 (noting his understanding that "democratic constitutionalism . . . require[s] the continuing right of political actors and citizens to redefine themselves through their constitution"); Issacharoff, *supra* note 42, at 199; (noting that one can debate the relation of increased costs to concomitant benefits attending a hard-to-amend constitution; but unamendability is, in those terms, an infinite cost).

91. RUBENFELD, *supra* note 82, at 174.

92. Albert, *Unamendable*, *supra* note 8, at 28.

93. Albert, *Counterconstitutionalism*, *supra* note 9, at 47 (2008)*; see also* Albert, *Unamendable*, *supra* note 8, at 24.

94. Albert, *Counterconstitutionalism*, *supra* note 9, at 51.

95. Albert, *Unamendable*, *supra* note 8, at 24.

96. *See supra* notes 28–31, 36–37 and accompanying text.

What can be said to justify unamendable provisions against all of those detriments?

First, we should note that several of the objections just listed have to do with the risk of choosing unwisely what to make unamendable. That is of course a valid and significant concern; but it also is a concern that can be dealt with separately from the argument that unamendability, of itself, is somehow harmful to a citizenry.[97]

Second, recalling the benefits noted in Part II.B., we can see unamendability has a number of things to recommend it in the face of concerns about its inherent nature to irrevocably bind future generations. Unamendable provisions provide maximum stability and permanent settling of basic questions, enabling all of the benefits associated with reliance. They also provide maximum restraint on any impulsive, destructive passions of majorities and even supermajorities. And if carefully written, unamendable provisions may be the most effective means of preventing future generations from harming even later generations.

III. THE FRAMERS' BEQUEST(S) AND OUR FUTURE(S) AS HEIR

If we assume I am right that the original Constitution had (and has) an unamendable provision, but we leave undecided the question of whether unamendable provisions can be added by amendment, there are four possible situations:

> (1) The framing generation created unamendable provisions but we do not have the power to do the same.
> (2) The framing generation created unamendable provisions; we have the power to create unamendable provisions; and we create exactly one: a provision that unamendably abjures the power of the citizenry ever to create another unamendable provision.
> (3) The framing generation created unamendable provisions; we have the power to create unamendable provisions; and we do so, but not of the type noted in (2). The Constitution retains the power to create more unamendable provisions in the future (including, possibly, eventually, an amendment that bars all future unamendable provisions).
> (4) The framing generation created unamendable provisions; we have the power to create unamendable provisions; and we neither

97. Below, I offer strategies to improve the likelihood that unamendable provisions will be chosen well. *See infra* notes 105–14 and accompanying text.

> create them nor prohibit them. This has been the situation since the original Constitution was ratified.

Note that in every instance the framing generation has set itself apart as unique. The framing generation decided to include unamendable provisions, and by doing so spoke in a way that prevents any future generation from speaking on the topic of religious tests (and, temporarily, on various other aspects of the Constitution).[98]

A. They the People

Unlike other futures I listed above and discuss below, this one is not the result of a choice we make. Rather, this future assumes, contrary to my argument above,[99] the framing generation has prohibited all future unamendable provisions.[100] We cannot undo that choice. Thus, we are not "We the People" of the Constitution's Preamble, rather, the Framers are "They the People" and we are "Their Posterity."

The prohibition on unamendable provisions may be a good thing, normatively. The Framers' decision prevents irrepealable mistakes and prevents any generation's infliction of irrevocable binding on a later generation. Still, it feels a bit like being set loose in the Garden of Eden and being told to avoid the Tree of Knowledge Unamendability. There is something patronizing about being told by the Framers that certain compromises were necessary to the formation of the Constitution but the similar ability to bind a bargain so long as the Constitution exists is not available to us.

B. Forever and Ever Amen[d]

If we can create unamendable provisions, one possible choice is to prohibit forever any future unamendable provisions.[101] The No Religious Test Clause will remain unamendable but that will be the

98. The framing generation was unique, too, in that it set the rules for amendment—what processes must be followed and the sizes of the supermajorities necessary to propose and ratify a constitutional amendment. But that aspect of the framers' uniqueness was unavoidable. The framers needed to decide how, at least originally, the amending process was to function. The decision to set a few things outside that process, though, is different because while later generations could change the amending process, later generations cannot undo an unamendable provision.

99. *See infra* notes 36–41 and accompanying text. *See also* Mader, *supra* note 10 at 878–89.

100. Referring to Tables 1 & 2, this places the Constitution in Box 1B, from which no movement is possible.

101. Referring to Tables 1 & 2, this is a movement from Box 3 to Box 1B.

only unamendable provision for as long as the Constitution exists. In this future, "we *un*-lock the door and throw away the key[.]"[102]

On the one hand, this might seem an attractive option. We avoid making mistakes we (and future generations) cannot reverse. There also is a certain fairness in that the limit we impose applies to ourselves as surely as to future generations.

Still, we engage in a certain egotism: if we do abjure forever the power to create unamendable provisions, it is a choice we *make for* the future as well as ourselves. A citizenry should bind future generations as little as possible, and in this scenario we would be removing from future generations the power to unalterably bind themselves.

The power to bind oneself is no small thing to be without. Should a future situation require a compromise that all sides needed to be sure was binding beyond possibility of amendment, there would be no such device available. Just as with any other unamendable provision (see Section C, below), taking the irrevocable action of prohibiting all future unamendable provisions should be done with a mindfulness, and perhaps also the consent, of future citizens.

Additionally, what would it mean for us to send the nation irreversibly into a future in which everything (save the No Religious Test Provision) is officially impermanent, where the Constitution's chief feature is its own changeability?[103]

One reasonable approach, should we choose to go down this road, would be to temporarily give up the right to create unamendable provisions. We could amend the Constitution to include a provision prohibiting for say, ten years, the enactment of unamendable provi-

102. Mader, *supra* note 10, at 889.

103. *See* David Fontana, *A Case for the Twenty-First Century Constitutional Canon*: *Schneiderman v. United States*, 35 CONN. L. REV. 35, 35, 42–47 (2002) (discussing a case in which the court adjudicated whether a naturalized citizen, in order to prove he was "attached to the principles of the Constitution," as required to obtain citizenship, must consider some aspects of the Constitution to be unamendable); *see also* SANFORD LEVINSON, CONSTITUTIONAL FAITH 126–28, 135–38, 142–47 (1988) (discussing "constitutional attachment" in general and *Schneiderman* specifically).

In a story repeated in several sources, the famous mathematician and logician Kurt Gödel, when he applied for U.S. citizenship, is reported to have stated he knew how the United States, without violation of its constitution, could become a dictatorial state; his reasoning is unknown, but some commentators have concluded his conclusion was based on his understanding that there were no limits on amendment in the Constitution. *See* SUBER, *supra* note 21, at 212; F. E. Guerra-Pujol, *Gödel's Loophole*, 41 CAPITAL U. L. REV. 637 (2013); Sanford Levinson & Jack M. Balkin, *Constitutional Crises*, 157 U. PA. L. REV. 707, 750-52 (2009).

sions.[104] Such a temporary restraint would both spur discussion of the question and also allow time for the near future to make a considered judgment on the matter. Such a temporary moratorium, whether it results in a permanent disavowal of unamendable provisions or in one of the other scenarios below, may be a good place to start.

C. Finding Our Voice and Having Our Say

Another choice we can make is to add one or more unamendable provisions to the Constitution. We have as much right as any generation, including the Framers, to speak an unamendable truth.[105] The dead hand objection expresses a concern that a given generation not needlessly inhibit majoritarian democracy in future generations,[106] but in trying to preserve every possible voice of constitutional amendment in the future, might we unduly silence ourselves? If we are to speak, what should we say, and how best do we to temper that speech before we make it permanent?

As to substance, in an effort to cabin the conversation and to better choose from tested ideas, I will focus on which current United States Constitutional provisions are good choices for an upgrade to status as unamendable provisions.[107] Certainly it seems that the prohibition on slavery,[108] and the prohibitions on denying a right to vote based on race[109] or sex,[110] are the sorts of provisions that might be made unamendable without significant fear of later regret.

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104. If we wanted to guarantee the ten years, then similarly to the U.S. Constitution's Sunset Entrenchment Provision mentioned *supra* in II.B., this amendment itself would need to be unamendable for the same period of time.

105. The framing generation had no special merit that of itself renders their work special status beyond their coming first. *See* Pettys, *supra* note 6, at 327–29 (illustrating that, as a response to the dead-hand objection to originalism as a method of interpreting the Constitution, there are significant problems with the argument that the framers were wiser and less self-interested than later generations); Weis, *supra* note 5, at 256–57 (disputing the often-made argument that "A constitution's founding is often thought to uniquely locate popular sovereignty as the source of constitutionalism . . . 'founding moments' represent episodes of intense public deliberation and engagement that are not found in everyday politics").

106. An additional normative problem with this scenario is if we follow up our *creation* of unamendable provisions by moving to scenario (2) and *prohibiting* all future unamendable provisions. In that case, we have become for future generations what, in scenario (1), the framing generation is to us.

107. We certainly could look at examples from other countries, though the reasons for those provisions being unamendable vary as widely as the geography, peoples, and political histories of those nations. *See, e.g.*, Albert, *Constitutional Disuse*, *supra* note 9, at 1039–40, 1038 nn.53–57, 1040 nn.67–68. Among his copious work on unamendability, Professor Albert has categorized unamendable provisions by their purpose. *See* Albert, *Constitutional Handcuffs*, *supra* note 45, at 678–98 (listing preservative, transformational, and reconciliatory unamendable provisions).

108. U.S. CONST. amend. XIII, § 1.

109. *Id.* amend. XV, § 1.

If we examine these three gold-standard provisions and see what attributes they have in common, we can generalize to the sorts of provisions especially likely to make good choices for unamendability. (1) They are tried and true in the extreme, all having been present in our constitutional system for about 100 to 150 years; (2) all of them are general in application—they apply to everyone; (3) all are aimed at stopping harm to individuals without imposing a similar harm on anyone else; and (4) they express ideas that can be reasonably captured in language, especially in that they contain straightforward prohibitions.[111] These attributes are what we might look for in fashioning other candidates for unamendability.

Commentators addressing unamendability have put forward the democratic speech rights of the First Amendment as candidates for permanent entrenchment in the Constitution,[112] but I think the ideas expressed in the First Amendment are simply too cognitively thick to be made unamendable at this time. Court interpretation of unamendable provisions will be impervious to alteration by constitutional amendment, so such provisions must be straightforward. First Amendment provisions must somehow be narrowed and specified before they are made unamendable.

Applying special processes and/or limitations might be one way to work toward making unamendable some of the First Amendment protections. We might try making a provision temporarily unamendable. This would "relax[ ] the dead hand['s grip]" on future generations when the provision expires.[113] Combining temporary

110. *Id.* amend. XIX.

111. Clear and focused language is necessary to avoid the problem of a Supreme Court opinion permanently inserting a problematic interpretation into the Constitution. *See* Albert, *Unamendable*, *supra* note 8, at 24. Yes, there may be reasonable debate as to all the possible meanings of sex, or race, or slavery, or voting, or even denial, but the idea is fairly concrete when compared to terms like "due process," "privilege," "speech," or "commerce."

112. *See* BRUCE ACKERMAN, WE THE PEOPLE: FOUNDATIONS 16 (1991) (stating "I myself think it would be a good idea to entrench the Bill of Rights against subsequent revision by some future American majority caught up in some awful neo-Nazi paroxysm."); *id.* at 320–21, (discussing the German constitution's unamendable provisions guaranteeing basic human dignity, and positing the possible value of entrenching rights unamendably into the United States Constitution)*; see also* Albert, *Unamendable*, *supra* note 8, at 31 (expressing a belief that "the First Amendment's democratic rights must themselves be unamendable in order to preserve the free amendability of the United Sates Constitution"); Galston, *supra* note 13, at 114–15 (arguing that unamendably entrenching First Amendment values, for instance, might bring out the "enabling" benefits discussed earlier, as those values could "reinforce[ ] popular sovereignty [by preserving] the fundamental values that prevent the popular will from actions that could undermine popular government").

113. Ozan O. Varol, *Temporary Constitutions*, 102 CAL. L. REV. 409, 448–52 (2014). Varol is not addressing unamendable provisions, but Varol's thorough discussion of the virtues and flaws

unamendability with Albert's prescription of sequential approvals in accordance with the principle of intertemporality,[114] we would have a situation in which we expand the base of those consulted and impose the unalterability of the provision on only those citizens most proximate to the action. Perhaps, by episodic trials and tweaks, something even so rich in meaning as the First Amendment might be rendered into provisions as surely perpetually desirable as the three provisions mentioned earlier.

Sunset unamendability combined with intertemporality may be wise in almost any instance of unamendability. Such provisions allow us to restrain ourselves, with spillover effect into only the near future. Where a provision proves desirable over time, it may be re-entrenched over and over, if the then-present citizens desire it, allowing some provisions to be ever on a continually receding horizon.

Where we are considering pronouncing perpetual truths meant to bind future generations to the lessons we have learned, we should avail ourselves of a design and assessment protocol that includes sequential approval over time and perhaps an incubation period during which we have temporary provisions before committing to perpetuity.

D. Holding Our Tongue

We also can leave to our later selves and to future generations the decision of whether to create unamendable provisions or ban them forever. No generation of citizens since the framing has created an unamendable provision, and no one has seriously tried since 1861. We can simply refrain as well. This stance preserves options. From here, we or future citizens can adopt either of the futures mapped out in B and C above.

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I am convinced that any unamendable provisions, even one barring other unamendable provisions, should be the result of a process that forces a careful consideration of the magnitude and propriety of such an act. I therefore distill four principles from the foregoing discussion.

(1) Due concern for the sovereignty of future generations over their own times, no unamendable provision should be truly perma-

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of temporary constitutional provisions offers several ideas that are helpful when thinking about the difficulty of safely creating unamendable provisions.

114. *See* Albert, *Amendment Rules*, *supra* note 7, at 678–81.

nent; any unamendable provision should sunset by its own terms after a period of time.

(2) To merely state a special case of (1), even those provisions that designate the disallowance of unamendable provisions should be temporary. A constitutional provision declaring that unamendable provisions are banned must have a beginning and ending date.

(3) Where an unamendable provision is substantive (that is, it addresses anything other than solely the turning on or off of the power to create unamendable provisions—the sorts of provisions just noted in (2)), it should have a delayed onset. This delayed onset should also require a second ratification of the provision after a significant period of time, the better to allow: (a) a span of time during which any mistaken supermajoritarian fervor for the provision can die down, allowing sober, careful thought about the wisdom of both the provision and its unamendability; and (b) acknowledgment of the intertemporal binding of generations. Combined with (1), this means any substantive unamendable provision must have a delayed, doubly approved sunrise AND a sunset.

(4) As a first step, I recommend an amendment that would place a temporary moratorium on unamendable provisions. Such an amendment proposal itself would begin a discussion about unamendable provisions, and its ratification would allow time for such a discussion to play out in an atmosphere free from any impending permanent provision.

CONCLUSION

In the late 1780s, "We the People" wrote and ratified the United States Constitution. The original Constitution included an unamendable provision but offered no explicit guidance as to whether future unamendable provisions might be created. The answer to the question of whether we can now create unamendable provisions has profound ramifications for the relationships among generations of U.S. citizens. This Article explores the possible answers.

The results are discomfiting. If we don't have the power, then we must admit there is a profound discontinuity in the power exerted by those ratifying the Constitution and those, like us, who come after. Assuming we do have the power to create unamendable provisions, we have three options: create them, stop them forever, or leave the possibility open, but refrain from doing anything at the moment. Bar-

ring forever the creation of new unamendable provisions is appealing as a safety measure against unwise amendments, but denies us the power to bind ourselves to tenets we may wish to adopt. Creating an unamendable provision, even leaving that option open for ourselves or another generation may seem risky, but we can discern guidelines for creating unamendable provisions that offer a degree of security. Those guidelines include: requiring multiple ratifications spread over time; making the unamendability temporary; and writing the amendment with clear, simple terms.

Essay

"Is It Really a Jury of Your Peers?": A Quantitative Analysis of Racial Composition on Juries in New York State

Wendy Hind*

ABSTRACT

Based on tests developed by the Supreme Court to analyze the concept of a "jury of one's peers," a three-part analysis was performed on ten of the most populated counties of the State of New York. Significant results indicated a potential Sixth Amendment violation because of the underrepresentation of African Americans on juries in several counties in New York.

INTRODUCTION

Juries in the United States play a vital role in the functioning of the criminal justice system. The right to a trial by jury has been guaranteed by both Article III of the Constitution and the Sixth Amendment. However, aside from the jury being drawn from the same area where the trial is to be held, little is explicitly laid out in the Constitution about what actually constitutes a "jury." Despite the commonly held belief that the Constitution guarantees a right to trial by a "jury of one's peers," no mention of that guarantee is stated anywhere in the U.S. Constitution. Rather, the concept of a "jury of one's peers" comes largely from the British Magna Carta, but has been adopted as

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a vital piece of American law.[1] Justice Harlan in *Thompson v. Utah* (1898) explained, "[i]t must consequently be taken that the word 'jury' and the words 'trial by jury' were placed in the Constitution of the United States with reference to the meaning affixed to them in the law as it was in this country and in England at the time of the adoption of that instrument," and, "[w]hen Magna Carta declared that no freeman should be deprived of life, etc., 'but by the judgment of his peers or by the law of the land,' it referred to a trial by twelve jurors. Those who emigrated to this country from England brought with them this great privilege."[2] From these English origins the concept of a jury made of one's peers has become entrenched in the American legal system.

In 1942, building on the foundational opinion of Justice Harlan, Justice Murphy reinforced the Magna Carta version of a jury being representative of the relevant community in *Glasser v. United States* (1942). Justice Murphy emphasized that any processes which alter the representativeness of juries can "lead to the irretrievable impairment of substantial liberties," and that, "[t]endencies, no matter how slight, toward the selection of jurors by any method other than a process which will insure a trial by a representative group are undermining processes weakening the institution of jury trial, and should be sturdily resisted."[3] Furthermore, the Supreme Court in *Duren v. Missouri* (1979) instituted a test to identify instances of juries that are unconstitutionally unrepresentative. The test states:

> (1) that the group alleged to be excluded is a distinctive group in the community; (2) that the representation of this group in venires from which juries are selected is not fair and reasonable in relation to the number of such persons in the community; and (3) that this underrepresentation is due to systematic exclusion of the group in the jury-selection process.[4]

In addition to *Glasser* and *Duren*, legislation has been passed to detail the expectations for a representative jury. An example of such legislation would be the Jury Selection and Service Act, passed in 1968, which plainly states, "[i]t is the policy of the United States that all litigants in Federal courts entitled to trial by jury shall have the

1. Geoffrey Robertson, *Magna Carta and Jury Trial 2016*, British Lib., http://www.bl.uk/magna-carta/articles/magna-carta-and-jury-trial (last visited Mar. 22, 2017).

2. Thompson v. Utah, 170 U.S. 343, 349–50 (1898).

3. Glasser v. United States, 315 U.S. 60, 86 (1942).

4. Duren v. Missouri, 439 U.S. 357, 364 (1979).

right to grand and petit juries selected at random from a fair cross section of the community."[5]

Despite the clear emphasis the Supreme Court has placed on the need for juries to be representative of the community, in addition to the passage of the Jury Selection and Service Act by Congress, rarely has any research been done to investigate the true representativeness of American jury pools. Calls have been made by a few,[6] but those calls have not translated into action. Only the examination of a single county in Texas,[7] multiple counties in Maryland,[8] and the collection of juror demographic data (without comparison to census data) in two counties in Florida[9] appear to have been completed on jury representativeness. There is too little existing literature on whether the composition of American jury pools match their respective communities; this Study works to begin filling that gap. It focuses on the need to evaluate the current demographics of juries in an effort to confirm or deny the existence of a jury of one's peers in ten of the largest counties in New York. By comparing United States Census data for 2013 with New York Courts' publications on juror demographics, such a study will help better inform policy on jury selection with regards to possible discrimination and trends of misrepresentation on juries.

I. METHODS

Due to the severely limited availability of jury demographics data, New York State was chosen because it appears to be one of the only states with readily available, applicable data on jury pool demographics. The data was gathered by the New York State Unified Court System and published in the Third Annual Report pursuant to Section 528 of the Judiciary Law.[10] The report gathered the data us-

5. Jury Selection and Service Act of 1968, Pub. L. Mp. 90-27 82 Stat. 53 (1968).

6. Mark D. Bradbury & Marian R. Williams, *Diversity and Citizen Participation: The Effect of Race on Juror Decision Making*, 45 ADMIN. & SOC'Y 563 (2013).

7. *See generally* J. Ray Hays & Stacy Cambron, *Courtroom Observation of Ethnic Representation Among Jurors in Harris County, Texas*, 85 PSYCHOL. REP. 1218 (1999) (examining the ethnic diversity of jury pools in a Texas county by surveying 266 jurors).

8. *See generally* Richard Seltzer et al., *Fair Cross-Section Challenges in Maryland: An Analysis and Proposal*, 25 U. BALT. L. REV. 127 (1996) (examining the historical background of the jury selection system in Maryland).

9. *See generally* Shamena Anwar et al., *The Impact of Jury Race in Criminal Trials*, Q.J. ECON. 1017 (2012) (examining the impact of jury racial composition on trial outcomes using data from felony trials in Florida between 2000 and 2010).

10. *See generally* A. GAIL PRUDENTI, ANNUAL REPORT PURSUANT TO SECTION 528 OF THE JUDICIARY LAW (2013), http://www.nycourts.gov/publications/pdfs/528Report2013.pdf.

ing surveys distributed to individuals who reported for jury service.[11] The surveys collected information on race, gender, age, county of service, national origin, date of service, and jurors summoned for a grand jury or trial jury.[12] The strength of this data is the self-reporting nature of the surveys, allowing for greater accuracy of the data in comparison to the visually gathered data used in previous studies.[13]

When selecting which New York State counties to use, the ten counties with the most surveys returned were selected, but, despite being in the top ten, Bronx County had 38% of its racial identification data missing so it was not used; Albany County, the county with the eleventh highest number of returned surveys, was used in place of Bronx County. Of the counties used in the comparison, all had at least a 76% survey completion rate for the racial identification data. The demographic information for the general population of the counties for 2013 was found on the United States Census Bureau website.[14]

The data from the selected counties was analyzed using three statistical tests: **absolute disparity**, **comparative disparity**, and **standard deviation with a test for statistical significance**. These are the same three statistical tests used by Seltzer, Copecino, and Donahoe[15] and were also supported in *Berghuis v. Smith*.[16] All three tests are necessary because the Supreme Court in *Berghuis* stated that it had not made any ruling which "specifies the method or test courts must use to measure the representation of distinctive groups in jury pools," and that the absolute disparity, comparative disparity, and standard deviation tests have been previously used to indicate disparities.[17] By continuing to use these three tests, the current study can easily be compared to the results found by Seltzer, Copecino, and Donahoe in Maryland and will be in accordance with *Berghuis*.

11. *Id.*
12. *Id.*
13. *See generally* Hays & Cambron, *supra* note 7.
14. *Annual Estimates of the Resident Population by Sex, Race, and Hispanic Origin for the United States, States, and Counties: April 1, 2010 to July 1, 2013*, U.S. CENSUS BUREAU (June, 2014) [hereinafter *Resident Population*], http://factfinder.census.gov/faces/tableservices/jsf/pages/productview.xhtml?pid=PEP_2013_PEPSR6H&prodType=table.
15. Seltzer et al., *supra* note 8, at 128–29.
16. *See generally* Berghuis v. Smith, 559 U.S. 314 (2010) (applying the absolute disparity, comparative disparity, and standard deviation with a test of statistical significance in determining whether there was an impartial jury decision).
17. *Id.* at 316.

A. Absolute Disparity

The first test, the test of absolute disparity, consists of comparing the African American percentage of the population, as indicated by the Census data, with the African American percentage of the jury pool, as indicated by the New York Court surveys.[18] This calculation resulted in a straightforward result of either African Americans being over or underrepresented by simply subtracting the African American percentage of the population from the percentage of the jury pool represented by African Americans.[19] The absolute disparity test found one of the selected New York counties reached a 10% disparity level, which would have warranted a Sixth Amendment violation;[20] the only county to surpass the 10% threshold was Kings County at 10.4%, where the percentage of African Americans in the population was 35.4% and the percentage of African Americans in the jury pool was 25%.

B. Comparative Disparity

The second test, the test of comparative disparity, takes the absolute disparity value—the difference between the percentage of African Americans in the population and in the jury pool—and divides it by the Census percentage of African Americans in the general population of the county. The comparative disparity test is used to calculate if a person of a specific group (in this study, African Americans) is as likely to be selected for jury service as any other member of the population.[21] A comparative disparity value of 0% means the jury pool is a fair representation of the community;[22] a comparative disparity value of -50% would mean individuals of the group are half as likely to be selected as should be expected based on the composition of the community.[23] When using the comparative disparity test, a resulting disparity of 20% or greater is indicative of a significant concern.[24] By this standard all ten counties tested have a significantly lessened chance of an African American being selected for a jury.

18. Seltzer et al., *supra* note 8, at 134.
19. *Id.*
20. *Id.*
21. *Id.* at 136.
22. *Id.*
23. *Id*. at 137.
24. *Id.* at 138.

The county with the most glaring problem, according to the comparative disparity test, was Erie County at 56.8%.[25]

Comparative Disparity Formula:[26]

$$\frac{\text{Proportion in Jury Pool} - \text{Proportion in Population}}{\text{Proportion in Population}} \text{X } 100$$

C. Statistical Significance

The third test is a standard deviation analysis. It is used to determine the likelihood of an apparent disparity arising simply by chance, but the test does not indicate the severity of a disparity.[27] This test takes into account the expected percentage of the jury population, the actual percentage of the jury population, and the sample size.[28] According to *Castaneda v. Partida* (1977), "if the difference between the expected value and the observed number is greater than two or three standard deviation, then the hypothesis that the jury drawing was random would be suspect to a social scientist."[29] Finally, when determining statistical significance, "[i]f the p-value is lower than .05, one would conclude that the results were not caused by a chance occurrence."[30] To make our calculation we followed the detailed outline put forward by Seltzer, Copacino, and Donahoe, which is depicted below.[31] The standard deviation analysis, when using the standard set by *Castaneda v. Partida*, finds all counties having statistically significant differences; the smallest number of standard deviations was Albany County with 13.65 and the largest number of standard deviations was New York County with 66.65.[32] Lastly, every county registered a statistically significant p-value of less than .05.

25. *See id.* at 136 (providing the formula for the comparative disparity test); *see also* PRUDENTI, *supra* note 10, at 6 (listing proportion of jurors by race at the county level); *Resident Population*, *supra* note 14 (totaling the number of people from each race at the county level).

26. Seltzer et al., *supra* note 8, at 136.

27. *Id.* at 139–41.

28. *Id.* at 139, 139 n.72.

29. CORNELL UNIVERSITY DEP'T OF MATHEMATICS, CASTANEDA V. PARTIDA: FREQUENTIST TREATMENT 1 http://www.math.cornell.edu/~web2710/handouts/Eg.5.10.1_castaneda-frequentist.pdf (last visited Jan. 31, 2017) (quoting Castaneda v. Partida, 430 U.S. 482 (1977)).

30. Seltzer et al., *supra* note 8, at 142.

31. *Id.* at 139 n.72.

32. *See id.* (providing the standard deviation formula); *see also* PRUDENTI, *supra* note 10, at 6 (providing the county-level data).

For populations of 50 or greater, the standard deviation (Z-Score) is:[33]

$$\frac{\text{Percentage in Population- Percentage in Jury Pool}}{\sqrt{\text{[Percentage in Population (100-Percentage in Population)]/ Total Sample Size}}}$$

II. ANALYSIS OF DATA

In order to more fully grasp the implications of the findings, the results should be analyzed through the framework laid out in *Duren*. In *Duren*, the Court first stated that the segment of the population being analyzed must be "a distinctive group in the community."[34] African American populations were found to meet this first requirement in *Strauder v. West Virginia* (1880).[35] The second step laid out in *Duren* was to show that the jury representation of the distinct group was "not fair and reasonable in relation to the number of such persons in the community."[36] To prove this end, the three tests explained above were used. All three tests are used to determine if representation is to be considered "fair and reasonable" because each of the three tests have unique deficiencies and, as a result, create a much more convincing argument when used together.

The test of absolute disparity suggests one of the tested counties reached a level of disparity considered to be discriminatory. A 10% disparity was needed, and one county, Kings County, exceeded this benchmark. However, one deficiency of the absolute disparity test is how it automatically excludes any group which does not constitute 10% of the population from being in violation of the Sixth Amendment, because when a group doesn't make up 10% of the population to begin with, it cannot possibly observe a disparity of 10% or greater. Simply because the absolute disparity test doesn't take into account the initial proportion of the population made up by the group, it places small groups under a significantly larger burden than is placed on larger groups to prove an unfair disparity.[37] Consequentially, the 10% threshold should only be used when the group "approaches 50%

33. Seltzer et al., *supra* note 8, at 139 n.72.
34. Duren v. Missouri, 439 U.S. 357, 364 (1979).
35. Strauder v. West Virginia, 100 U.S. 303, 309 (1880).
36. *Duren*, 439 U.S. at 364.
37. *See* Seltzer et al., *supra* note 8, at 136–37.

of the population."[38] This larger burden should be considered when examining the results of the absolute disparity test on the counties investigated in this study, because only one county—Kings County—had an African American population that made up 21% or more of the general population.[39] In terms of proportions, this means that for any county other than Kings County, at least half the African Americans would have to be absent to reach the 10% disparity threshold.

The test of comparative disparity is also not without its drawbacks. The comparative disparity test appears to be the opposing counterpart to the absolute disparity test because it has the potential to give small populations an easier path to expose a disparity warranting a Sixth Amendment violation. This could be a contributing factor in explaining why every county had a comparative disparity level significantly higher than the 20% threshold, and as noted above, most counties had relatively small African American populations.

Lastly, the limitations of the standard deviation test should be considered. This third test does not indicate the level of disparity seen between the general population and the jury pool but rather "the test merely shows whether a certain disparity could have occurred by chance," and, "with very large samples, virtually any disparity will be considered significant."[40] Since the test does not measure levels of disparity, it is clear it should not be used alone when evaluating a potential disparity, but rather, it should be used in combination with the absolute disparity and comparative disparity tests to give perspective about whether or not a disparity could be the result of pure chance. All three tests together appear to be necessary in order to get the best indication of whether or not a significant disparity exists in any of the counties.[41] The need to look at all three tests was reinforced by the Supreme Court in *Berghuis*, where the Court reiterated that "each test is imperfect," and "neither *Duren* nor any other decision of this Court specifies the method or test courts must use to measure the representation of distinctive groups in jury pools."[42]

Since no decisive precedent to determine underrepresentation has been set, the figures presented in this analysis should not be interpreted as a clear example of a Sixth Amendment violation, but rather

38. *Id.* at 142–43.
39. *See* PRUDENTI, *supra* note 10, at 6.
40. *See* Seltzer et al., *supra* note 8, at 141.
41. *Id.*
42. Berghuis v. Smith, 559 U.S. 314, 329 (2010).

should be seen as identifying areas for further investigation, as the counties investigated have exhibited a potential for Sixth Amendment claims. The findings of this study do not suggest that every jury seated in 2013 in the ten counties here examined was in violation of the Sixth Amendment, but rather that it appears possible—based on the representativeness of the overall jury pools—that a potential existed for Sixth Amendment violations to have occurred on some of the juries which were actually seated.

III. LIMITATIONS OF STUDY

The New York data was an incomplete sample due to missing data from unreturned surveys and nonresponses on returned surveys. The incompleteness of the sample is because the publication did not use the total number of people who responded to their survey as the total number of people to calculate racial percentages. Instead, the publication used the total number of surveys sent out as constituting 100% and calculated racial composition percentages as a percentage of the total number of surveys distributed for the county.[43] This creates a situation where those individuals who did not respond to the survey, or chose not to disclose racial information, are still included in the results, but without their ethnicity being recorded. The result was racial identity percentages, which do not add up to a full 100% for each county. The incomplete data could result in biased data should the unreturned surveys be largely from a distinctive segment of the population. Additionally, this study's generalizability is very limited as jury selection procedures vary by state. Even within the state of New York, it is difficult to discern any distinct pattern to project onto the counties not examined in this study.

One way to overcome these limitations is to greatly increase the amount of data available for studies through the collection of juror demographics at the county, state, and federal level. Without additional data regarding the actual representativeness of juries and jury selection pools in the U.S., it will be near impossible to ensure that systematic discrimination is not occurring in the judicial process. Given the power juries hold to determine the fate of those on trial, it is important that defendants are afforded every constitutional guaran-

43. *See generally* PRUDENTI, *supra* note 10 (noting that percentages do not add up to 100% due to non-responses of some jurors).

tee afforded to them—any deviation can have significant effects on individuals' lives.

With a larger and more accurate pool of data available, future studies will be able to analyze the representativeness of juries in various states and at the federal level. This will allow for comparison and evaluation of the various selection procedures used by the states and the federal government, allowing in turn for the construction of selection procedures to more fully create a jury of one's peers.

CONCLUSION

This analysis has examined ten of the most populated counties in New York State for symptoms of jury misrepresentation, which may be in violation of the Sixth Amendment. The data used was drawn from the United States Census Bureau and from a publication of the New York Courts.[44] The figures were analyzed in the framework used by Seltzer, Copacino, and Donahoe,[45] supported in *Berghuis*, which stated that claims of underrepresentation should be grounded in a test of absolute disparity, a test of comparative disparity, and a standard deviation analysis. After utilizing these three tests, this analysis found that in the Seltzer, Copacino, and Donahoe framework, every examined county registered potentially concerning levels of African American underrepresentation in jury pools.[46] The results of the three tests were then viewed in the context of the three-part *Duren* test, which has been used to classify jury compositions as violating the Sixth Amendment. The overall findings of this study do not conclusively suggest that any Sixth Amendment violations have occurred, but there appears to be potential for a Sixth Amendment violation to have occurred based on the racial misrepresentation that appeared in the jury pools of the ten counties.

44. *See* PRUDENTI, *supra* note 10; *see also Resident Population*, *supra* note 14.
45. *See* Seltzer et al., *supra* note 8, at 132–43.
46. *Id.* at 133–43 (describing the three tests).

APPENDIX:

County	Total Population of County	Total Percentage of Black Population	Total Number of Jury Surveys Returned	Black Percentage of Jury Pool	Absolute Disparity	Comparative Disparity	Standard Deviation Z-Score	P-Value
Albany	306,945	13.5%	5,147	7%	-6.5%	-48.15%	-13.65	0.00001
Erie	919,866	13.9%	11,471	6%	-7.90%	-56.83%	-24.45	0.00001
Kings	2,592,149	35.4%	83,367	25%	-10.40%	-29.38%	-62.80	0.00001
Monroe	749,606	16%	13,930	8%	-8%	-50%	-25.76	0.00001
Nassau	1,352,146	12.4%	22,562	8%	-4.40%	-35.48%	-20.05	0.00001
New York	1,626,159	18.4%	75,163	9%	-9.40%	-51.09%	-66.52	0.00001
Queens	2,296,175	20.9%	53,167	14%	-6.90%	-33.01%	-39.14	0.00001
Richmond	472,621	11.8%	6,951	6%	-5.80%	-49.15%	-14.99	0.00001
Suffolk	1,499,738	8.2%	21,052	4%	-4.20%	-51.22%	-22.21	0.00001
Westchester	968,802	15.9%	11,271	10%	-5.90%	-37.11%	-17.13	0.00001

Absolute Disparity	Warrants a Sixth Amendment violation if exceeds 10% (Seltzer, Copacino, & Donahoe, 1996, pg. 134-135)
Comparative Disparity	A disparity of 20% or greater is indicative of a significant concern (Seltzer, Copacino, & Donahoe, 1996, pg. 138)
Statistical Significance	A p-value of less than .05 indicates, "the results were not caused by a chance occurrence (Seltzer, Copacino, & Donahoe, 1996, pg.142)."

COMMENT

Drop the Phone and Step Away From the Weapon: The First Amendment, the Camera Phone, and the Movement for Black Lives

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INTRODUCTION

With the rapid increase in technology, wiretapping laws became necessary to protect the average citizen from privacy infringement. Simultaneously, technological development brought about an increase in the average citizen's access to technological advancements. Among those advancements is the cell phone, a device that gives its holder the ability to record at any given moment. But what happens when those recorded are public officials? What happens when those captured moments show public officials brutalizing private citizens? Whose rights do we protect? Who has rights to protect?

For decades, members of Black, Brown, and poor communities tried to make the larger American public see, believe, and understand their interactions with police. For decades we did not listen. These communities that directly experienced police brutality tried to explain it to us, but we could not believe them. We could not believe that these pillars of righteousness, whose only role is to protect and serve, were doing the exact opposite. Police protect us from the criminal. If these experts in criminality thought certain tactics were necessary, who were we to challenge them? Police tactics could bother only the criminal, and we did not want to be bothered with criminals. For decades, our refusal to believe allowed us to sit silently in suburbia and let the police handle the "criminals." Now, that has all changed. Now, we see the truth we tried to ignore. Now, we must actively choose not to believe our own eyes in order to believe our comfortable lies. Now we are challenged because "across-the-tracks" activities are being broadcasted in our living rooms. Our children see and do not understand. The lies do not work for them. Maybe the criminal was not criminal after all.

Filming the police has been an active tool in the human rights movement since its advent. In the 1950s and 1960s, placing Jim Crow in the living rooms of white America motivated some to travel to the South and join the movement.[1] They could no longer pretend as if the problem did not exist and would not persist. The act of filming the oppressor and broadcasting that oppression has always been a way to use speech to combat that oppression and contribute to the marketplace of ideas of how our America should be. The difference now is

1. *See, e.g.*, *Civil Rights Martyrs*, S. POVERTY L. CTR., https://www.splcenter.org/what-we-do/civil-rights-memorial/civil-rights-martyrs (last visited Jan. 20, 2017) (highlighting individuals like Viola Gregg Liuzzo, a white woman who traveled to from Detroit to Selma, Alabama, after seeing televised reports of the attack at the Edmund Pettus Bridge).

that we do not have to wait for the television cameras to get to the scene and choose a narrative. Now, the camera rests at the fingertips of the people and information dissemination is but a click away. Now, even if you find it hard to believe the "criminal" over the cop, you get to decide for yourself. You get to see the interaction. You get to determine if this is the America in which you choose to live.

Capturing police brutality on video will not destroy the barbaric brutalization of communities of color in one fell swoop. However, it allows those of us who have passively accepted and supported narratives to see exactly what we support. Bringing the actions to our attention forces us to make a decision.

It is speech. It is speech that contributes to the marketplace of ideas that make the United States "a more perfect union." It is speech that, if seen through the context of history and the perception of the marginalized, will assist in fighting racial and class oppression. If we allow officers to discretionarily halt this speech, we destroy it. We damage our freedom. We tear at the fabric of America.

This Comment explores, from the perspective of marginalized individuals, the rights that individuals have in filming officials publicly engaged in police activities in light of the increased attention to police brutality and the current pressure from the Black Lives Matter Movement. Part I contextualizes the problem by giving a brief historical synopsis of the Black experience. Part II discusses wiretapping and eavesdropping statutes that are currently enacted in various states. Part III illustrates, through case law, how officers use these laws to infringe upon an individual's First Amendment rights and challenges the qualified immunity defense and the argument that citizens of the United States have no well-established right to film police while engaged in duty. Part IV explores the First Amendment as citizens of the United States see it and as members of marginalized communities actually experience it, noting the many attacks on mankind and Black Lives Matter's response to that brutality. Part V reiterates the importance of the freedom of speech and addresses the chilling effect that the misuse of discretion has on First Amendment rights. Finally, Part VI explores potential solutions to ensuring the right to record police officers engaged in official duty.

I. THE CRIMINALIZATION OF BLACKNESS[2]

In order to understand the peculiar position of people of color—especially Black people—in the United States of America, one must understand the effect that socially constructed stereotypes have played in the definition of their various cultures[3] ever since they were brought to this country in chains.[4] In America, there have been three distinctive waves of radical racial rhetoric that constructed, reaffirmed, and strengthened stereotypes to create and instill the idea of Black inferiority and white superiority. Those waves came with the American enslavement of African people, the backlash of the Reconstruction period, and the New Jim Crow.[5]

A. The American Enslavement of African People: Caste Creation

> "The economic classes of America have always been divided by race—one's defective ancestry, one's uncivilized land, one's savageness, one's curse for not being white. Segregation, Jim Crow, and slavery owed their existence to this logic, and made Blacks the American underclass by definition."[6]
>
> ~Dr. Tommy Curry

2. Although I understand that more than Black people have been unjustifiably killed at the hands of law enforcement, I focus on Black people because I believe the historical context of how they came to be in this country places them in a peculiar position that allows for a better measure to understand police interactions with people who are not deemed worthy of protection and service.

3. Collin Palmer, *Defining and Studying the Modern African Diaspora*, AM. HIST. ASS'N (Sept. 1998), https://www.historians.org/publications-and-directories/perspectives-on-history/september-1998/defining-and-studying-the-modern-african-diaspora.

4. *See generally* KHALIL GIBRAN MUHAMMAD, THE CONDEMNATION OF BLACKNESS: RACE, CRIME, & THE MAKING OF MODERN AMERICA 1–14 (2010) (providing a historical overview of how Black Americans have been stereotyped as criminals).

5. *See generally* MICHELLE ALEXANDER, THE NEW JIM CROW: MASS INCARCERATION IN THE AGE OF COLORBLINDNESS (2012) (giving a complete understanding of the experience of Black people and the effect and purpose of mass incarceration); ANGELA Y. DAVIS, ARE PRISONS OBSOLETE? (2003) (providing a detailed timeline of the actions that occurred after the passage of the Thirteenth Amendment that turned Black people from generally slaves to generally criminal).

6. Tommy Curry, *Capital Noir: [w]hite Supremacy, Prisons, and the Road to Perdition in The Wire*, *in* THE WIRE AND PHILOSOPHY: THIS AMERICA, MAN (David Bzdak et al., 2013), http://www.academia.edu/2918567/_Draft_Capital_Noir_w_hite_Supremacy_Prisons_and_the_Road_to_Perdition_in_The_Wire.

Curse of Ham.[7] As illustrated by the ominous dark tone of their skin, Black people were cursed by God.[8] Not kissed by the sun, but damned for all eternity.[9] The symbol of their eternal damnation? Darkness.[10] This logic, if it can be called that, was used by white Christians to justify slavery.[11] Savage Africans. Because they were uncivilized,[12] white people, politicians, and institutions claimed that the enslavement of Africans[13] actually assisted in the civilization of African people stolen from the continent.[14] Black men were simultaneously too strong and too weak.[15] They had to be controlled to prevent uprisings, but they were portrayed as being happy with their servitude.[16]

7. See generally *Genesis* 9:25 (King James); Benjamin Braude, *The Sons of Noah and the Construction of Ethnic and Geographical Identities in the Medieval and Early Modern Periods*, 54 WILLIAM & MARY Q. 103–42 (Jan. 1997); Tony Evans, *Are Black People Cursed? The Curse of Ham*, ETERNAL PERSP. MINISTRIES (Jan. 18, 2010), http://www.epm.org/resources/2010/Jan/18/are-black-people-cursed-curse-ham/; Felicia R. Lee, *From Noah's Curse to Slavery's Rationale*, N.Y. TIMES (Nov. 1, 2003), http://www.nytimes.com/2003/11/01/arts/from-noah-s-curse-to-slavery-s-rationale.html, for perspectives on and a discussion about the Curse of Ham.

8. *See generally* UNESCO, *Struggles Against Slavery* (2004), http://unesdoc.unesco.org/images/0013/001337/133738e.pdf (discussing the history of the slave trade and slavery).

9. Braude, *supra* note 7, at 136–38.

10. *Id.* at 103.

11. Evans, *supra* note 7. Like many other individuals and institutions, Catholic churches and colleges profited from the American slave trade. *Id.*; *see also* Rachel L. Swarns, *272 Slaves Were Sold to Save Georgetown. What Does It Owe Their Descendants?*, N.Y. TIMES (Apr. 16, 2016), https://www.nytimes.com/2016/04/17/us/georgetown-university-search-for-slave-descendants.html.

12. *See* WALDO E. MARTIN, THE MIND OF FREDERICK DOUGLASS 208–11(1984).

13. I understand that these people are usually called slaves, but I, and many others, prefer to refer to this peculiarly placed group of individuals as enslaved Africans because Africa is where they came from, and enslavement was the process that attempted to make them subhuman. They were not slaves. They were people with families, and routines, and lives, and loves. To diminish them to slave, when God made them human is another privileged, degrading action—an action, in which I refuse to take part.

14. MARTIN, *supra* note 12.

15. *See* JAMES W. SILVER, RUNNING SCARED 171 (1984).

16. This logic is problematic because it ignores the many uprisings that enslaved Africans led in the Americas. It also disregards the role the art of survival played in American enslavement. *See also* Henry Louis Gates, Jr., *Did African-American Slaves Rebel?*, PBS, http://www.pbs.org/wnet/african-americans-many-rivers-to-cross/history/did-african-american-slaves-rebel/ (last visited Jan. 20, 2017) (refuting the myth that slaves were content being slaves and summarizing famous slave rebellions); *Nat Turner's Rebellion*, PBS, http://www.pbs.org/wgbh/aia/part3/3p1518.html (last visited Jan. 20, 2017) (describing the events that led Nat Turner to organize and lead a slave rebellion). *See generally* DANIEL RASMUSSEN, AMERICAN UPRISING: THE UNTOLD STORY OF AMERICA'S LARGEST SLAVE REVOLT (2011) (telling the story of the slave revolt that nearly destroyed New Orleans and changed the trajectory of America while also explaining some of the characteristics of slavery).

Black women were considered hypersexual beings, whose existence alone forced their captors inside of them.[17] Mammy.[18] Black women were not attractive or sexual at all.[19] Sapphire.[20] Black women were full of attitude and sass. They emasculated their men and controlled the household.[21]

It is astounding that white supremacy had the ability to survive. The stereotypes created to justify slavery were so contradictory, it is hard to fathom that they worked/are working. But these stereotypes persist today. They are the reason for the slow response time in Black neighborhoods.[22] They are the reason a twelve-year-old child can, to some, look like a frightening adult man.[23] They are the reason a school-aged girl can be strung up by her neck, choke-slammed and dragged out of a classroom.[24] They are the reasons.

The American enslavement of African people created a caste system.[25] This system could be likened to that of India and Black people were the Dravidians.[26] They were the Untouchables.[27] The economic and colonial system of the Americas created a need for mass labor. Labor the rich colonialists were not willing to do. Thus, indentured servants performed this labor in exchange for an opportunity to come

17. Dr. Carolyn West, *Mammy, Jezebel, Sapphire and Their Homegirls: Developing an "Oppositional Gaze" Toward the Images of Black Women*, *in* LECTURES ON THE PSYCHOLOGY OF WOMEN 286, 288, 294 (J. Chrisler et al. eds., 4th ed. 2008), http://www.drcarolynwest.com/media/sites/162/files/article_mammy-jezebel-sapphire-homegirls.pdf.

18. *Id.* at 289.

19. *Id.*

20. *Id.* at 295; *see also* Marilyn Yarbrough & Crystal Bennett, *Cassandra and the "Sistahs": the Peculiar Treatment of African American Women in the Myth of Women as Liars*, 3 J. GENDER, RACE & JUST. 625, 635–40 (2000).

21. Yarbrough & Bennett, *supra* note 20, at 638.

22. *See* Jeremy Gorner & Kristen Mack, *ACLU Suit Alleges Police Slower to Respond in Minority Areas*, CHI. TRIB. (Oct. 28, 2011), http://articles.chicagotribune.com/2011-10-28/news/ct-met-aclu-police-lawsuit-20111028_1_aclu-suit-mayor-rahm-emanuel-officers; *Newly Released Data Shows City Continues to Deny Equitable Police Services to South and West Side Neighborhoods*, ACLU (Mar. 31, 2014, 10:59 AM), http://www.aclu-il.org/newly-released-data-shows-city-continues-to-deny-equitable-police-services-to-south-and-west-side-neighborhoods/.

23. *See, e.g.*, Nsikan Akpan, *How Cops Used Virtual Reality to Recreate Tamir Rice, San Bernardino Shootings*, PBS (Jan. 13, 2016, 5:00 PM), http://www.pbs.org/newshour/updates/virtual-reality-tamir-rice-3d-laser-scans-shootings-san-bernardino/.

24. Jaeah Lee, *Disturbing Video Shows School Cop Body Slam and Drag a Black Female Student*, MOTHER JONES (Oct. 26, 2015, 4:58 PM), http://www.motherjones.com/mojo/2015/10/video-school-cop-body-slams-and-drags-black-female-student; *see also* Ashley Fantz et al., *Texas Pool Party Chaos: 'Out of Control' Police Officer Resigns*, CNN (June 9, 2015, 10:33 PM), http://www.cnn.com/2015/06/09/us/mckinney-texas-pool-party-video/.

25. ALEXANDER, *supra* note 5, at 20–22.

26. THE UNTOUCHABLES (Exandas Documentaries 2007). The Dravidians of India occupied the lowest level of that caste system. They too were of a darker complexion than their fellow Indians.

27. *Id*.

to America.[28] However, these white servants had a limited time of service and they also were not as capable as the economy needed.[29] The leap from volunteer servitude to the kidnapping of millions of people to force them to work in the new colonies would seem preposterous if it did not actually happen. Although it conducted what may be described as the most brutal form of enslavement, America came a little late to the party. Portugal was the first empire to invade the western coast of Africa in order to kidnap African people and force them into perpetual servitude.[30] This is not surprising given Portugal's tradition of enslaving their darker brethren.[31]

The black skin of the new forced labor made them different from the indentured servants.[32] This difference made it easier to denigrate and dehumanize them. This difference made it easier to justify that denigration. Where indentured servants had freedom of movement, control over their beings, and the solace of knowing their toiling was not eternal, the African victims of the American enslavement system only possessed their hopes and dreams. They were at the bottom of this new system, with poor white people above them and wealthy white people at the very top.

B. Reconstruction and Jim Crow

> "[T]he slave went free; stood a brief moment in the sun; then moved back again toward slavery."[33]
>
> ~W.E.B. DuBois

The fall of the American enslavement system did not dismantle the caste system that it created. Reconstruction briefly gave Black people a breath. Newly freed men took positions in Congress and other government positions.[34] They also established communities and economies that were not only based on the independence of the com-

28. ALEXANDER, *supra* note 5, at 22–23.
29. *Id.* at 23–24.
30. Emilia Viotta da Costa, *The Portuguese-African Slave Trade: A Lesson in Colonialism*, 12 LATIN AM. PERSP. 41, 57 (1985).
31. In the 1100s and 1200s, Portugal enslaved Muslims during their wars with Christians. Given this history, it is not unbelievable that they were the first to invade and exploit Africa, stealing her children and future. *Id.* at 46.
32. I recognize that Native Americans were also used as slaves, and the failure to elaborate on their struggle within the system should not be taken as a slight to the experience of Native people in this country.
33. W.E.B. DU BOIS, BLACK RECONSTRUCTION IN AMERICA 30 (1935).
34. ALEXANDER, *supra* note 5, at 29.

munities as a whole, but the interdependence of those who lived, worked, and worshipped there.[35]

However, post-Reconstruction, the backlash lasted longer and had a stronger impact. The newly freed Black men threatened the fabric of America. Individuals, who were once enslaved, were now Senators.[36] They impacted American politics, playing a role in lived realities of Black and white Americans alike. They helped secure land grants to further the plight of public education.[37] They organized individuals who were once considered nothing more than their work-product into communities. They attempted to create a new, better America for the whole. This was a threat to those who liked things the way they were, who benefited from things the way they were.

They were uppity.[38] But alongside the uppity one, still stood the Mandingo.[39] He and all his anger, all of his rage was now free, no longer under supervision and control. The possibilities of what he could do with this new freedom were almost as frightening as the Reconstruction Senators. He would wreak havoc on those who had killed his father, raped his wife, and stolen his children.[40]

This era ushered in the narrative of there being a need to protect whiteness from this newly freed Blackness.[41] It perpetuated the idea of the need to make sure the races knew their respective places. Sys-

35. *Id.* at 30–35. In 1921, white rioters descended upon what was known as Black Tulsa in Tulsa, Oklahoma, in order to seek a vigilante-type revenge against individual Black men. The Greenwood District was a thriving Black business district and residential neighborhood. What began as a minor disagreement in an elevator quickly escalated into the complete destruction of a thriving Black town. *See 1921 Tulsa Race Riot*, TULSA HIST. SOC'Y & MUSEUM, http://tulsahistory.org/learn/online-exhibits/the-tulsa-race-riot/ (last visited Feb. 21, 2017). The descendants of those affected by the destruction later attempted to hold the city accountable for the lack of action during these riots. *See generally* Alexander v. Oklahoma, Civ. No. 4:03cv00133, 2004 U.S. Dist. LEXIS 5131 (N.D. Okla. Mar. 19, 2004).

36. *See Black Leaders During Reconstruction,* HIST., http://www.history.com/topics/american-civil-war/black-leaders-during-reconstruction (last visited Jan. 19, 2017); *Gaines, Matthew*, TEX. ST. HIST. ASS'N, https://tshaonline.org/handbook/online/articles/fga05 (last visited Feb. 25, 2017).

37. *Gaines, Matthew supra* note 36.

38. The word "uppity" is usually used against Black people who do not fit neatly into the stereotypes created for Blackness. Even First Lady Michele Obama was subject to this slur. *See* DailyRushbo, *Limbaugh: Media Can't Decide If Moochelle Obama Was Booed At NASCAR Race*, YOUTUBE (Nov. 21, 2011), https://www.youtube.com/watch?v=3AT-UzmXnzY; *see also* Hunter, *Michelle Obama Mentions Racism, Fox News Elevates Angry Black Person Threat Level to Super-Uppity*, DAILY KOS (May 12, 2015, 1:00 PM), http://www.dailykos.com/story/2015/5/12/1384243/-Michele-Obama-mentions-racism-Fox-News-elevates-angry-black-person-threat-level-to-Super-Uppity.

39. 13TH (Kandoo Films 2016).

40. FREDERICK DOUGLASS, NARRATIVE OF THE LIFE OF FREDERICK DOUGLASS, AN AMERICAN SLAVE 10 (6th ed. 1845).

41. BIRTH OF A NATION (David W. Griffith Corp. 1915).

tems of policing were already in place during the American enslavement period when "police" were tasked with returning "stolen property" to their rightful owners.[42] That "stolen property" was human beings who made the conscious decision to run away from the chains of slavery.[43]

During this time laws were created to criminalize the mere existence of the newly freed people.[44] One of the most egregious was the use of vagrancy laws.[45] These laws were a part of the southern Black Codes, passed after Black people were emancipated, and they basically placed Black people back on the plantations, using the criminal justice system.[46] Newly freed Black people, who were never allowed to own anything, were now cast out on the street if they did not choose to stay and work as sharecroppers. Those who betrayed the system and left the plantation were met with laws that said if they were caught "wandering" or unemployed, they could be arrested and imprisoned at a hard labor camp.[47] Yes, if an officer caught a person, who had just worked for free for their entire lifetime, not working, they could force them to work for free once more.

What is even more disturbing is the police practice of "hiring out" the new "convicts" to work again on the very plantations where they had just escaped.[48] Police used their discretion to disparately enforce punishment for these crimes against Black people, very similarly to how it is done today. Because of the existence of convict leasing programs, these actions often led to the newly freed people being returned to old Master's plantation and still forced to work as punishment for their "crime." Black men were, again, sold to the highest bidder.[49] As seen today, the police systems have always profited from criminalizing and incarcerating Black people.[50] Blackness

42. DAVIS, *supra* note 5, at 27–28.
43. *Id.* at 28–29.
44. ALEXANDER, *supra* note 5, at 31.
45. *The Southern "Black Codes" of 1865-66*, CONST. RTS. FOUND., http://www.crf-usa.org/brown-v-board-50th-anniversary/southern-black-codes.html (last visited Jan. 18, 2017).
46. *Id*.
47. *Id*.
48. *Id*.
49. U.S. DEP'T OF JUST., INVESTIGATION OF THE FERGUSON POLICE DEPARTMENT 2 (2015) [hereinafter FERGUSON REPORT], https://www.justice.gov/sites/default/files/opa/press-releases/attachments/2015/03/04/ferguson_police_department_report.pdf (finding that the municipality used law enforcement to generate revenue, and Black people were disproportionately the targets of their tactics); *see also* Campbell Robertson, *Missouri City to Pay $4.7 Million to Settle Suit Over Jailing Practices*, N.Y. TIMES (July 15, 2016), https://www.nytimes.com/2016/07/16/us/missouri-city-to-pay-4-7-million-to-settle-suit-over-jailing-practices.html?_r=1.
50. *See, e.g.*, FERGUSON REPORT, *supra* note 49; Robertson, *supra* note 49.

was legally criminalized. Though they shed the technical title as "slave," "convict" was no different.[51]

With the fall came new justifications for the treatment of Black people—scientific justifications.[52] Scientists lent their legitimacy to racism. It was not simply that the racist, backwards, slave-holding Southerners said that Black people were inferior beings. Science said so. The 1890 census marked the first time prison statistics pervaded the discussion of the innate criminality of the Black population.[53] Social scientists used the statistics that identified Black people as 12% of the American population but disproportionately represented in the prison population as fodder for the conclusion that Black people were inherently criminal.[54] They did not take a step back to contextualize the recent history of slavery and vagrancy laws. They did not even think to question the impact of enslaving and then releasing a group of people after depriving them of education would have on those individuals and the greater nation. They looked at statistics, and instead of questioning how they came to be, they used them as a basis for the justification of criminalizing Blackness.[55] In fact, this science was used to justify depriving Black people of education because education further criminalized them.[56]

These practices continued overtly until the Civil Rights Movement. Similar to the Reconstruction period, with less obstacles blocking their path, Black people began to flourish, gaining entrance into previously segregated institutions.[57] Also similar to the time after Reconstruction, those who felt as if they benefited from the system of white supremacy carried out a backlash.[58] However, one consequence

51. *See* Ruffin v. Commonwealth, 62 Va. 790, 796 (1871).

52. In *The Condemnation of Blackness*, Khalil Gibran Muhammad provides a historical analysis of the science that accompanied overt racism. American racism has never simply been a trait of southern aggression. It has always been legitimatized by less radical segments of society. In the late 19th Century, immediately after slavery and Reconstruction, scientists like Harvard educated Nathaniel Southgate Shaler, began speaking on the "Negro Problem." These individuals used science to blame Black people for their post-slavery position as well as that of the United States. *See generally* MUHAMMAD, *supra* note 4 (discussing the scientific justifications for racism).

53. *See id.* at 33–34.

54. *Id*. at 15–34.

55. *See id*.

56. *See* John Roach Straton, *Will Education Solve the Race Problem?*, 170 N. AM. REV., 785, 786 (1900).

57. *See generally Civil Rights Movement,* HIST., http://www.history.com/topics/black-history/civil-rights-movement (last visited Feb. 5, 2017) (providing background on the Civil Rights Movement from the 1950s throughout the 1960s).

58. *Id.* There is a value in whiteness, even if that value is mostly psychological. That value, however, diminishes when white people must share spaces with those who do not share white-

of the Civil Rights Movement was that there were actually legal punishments for blatant acts of discrimination.[59] Thus, supporters of the old system had to figure out how to continue acting as they desired, within the confines created by the new system. The names changed, but the players remained the same. The old caste system could still work. One simply had to understand how to navigate the new rules of American decency and democracy. One could not simply steal the labor of decent American citizens, but criminals . . . criminals were different.

C. Law & Order, The New Jim Crow, and the Prison Industrial Complex

> Arguably the most important parallel between mass incarceration and Jim Crow is that both have served to define the meaning and significance of race in America. Indeed, a primary function of any racial caste system is to define the meaning of race in its time. Slavery defined what it meant to be black (a slave), and Jim Crow defined what it meant to be black (a second-class citizen). Today mass incarceration defines the meaning of blackness in America: black people, especially black men, are criminals. That is what it means to be black.[60]
>
> ~Michelle Alexander

The politics of policing mandated that Black people were never able to be a part of the policing system.[61] They existed always as the policed. They were the property that the original police returned to their "rightful owners."[62] Thus, when trying to fix any aspect of the

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ness, especially when the perceived value is mostly psychological. White supremacy is frail. The separation of segregation not only made white people feel superior, it allowed for them to exclusively receive local and federal subsidies that gave them another ill-gotten gain and advantage over Black people. *Cf.* Amy Traub et al., *The Asset Value of Whiteness: Understanding the Racial Wealth Gap*, DEMOS (Feb. 6, 2017), http://www.demos.org/publication/asset-value-whiteness-understanding-racial-wealth-gap (using statistics to show that individual behavior had little to do with racial wealth disparities in the United States); Patricia J. Williams, *The Value of Whiteness*, THE NATION (Nov. 12, 2014), https://www.thenation.com/article/value-whiteness/ (providing a poignant evaluation on the value of whiteness through the context of a white woman suing a sperm bank for inseminating her with Black sperm).

59. *Id.*

60. ALEXANDER, *supra* note 5, at 197.

61. *See generally* ALEXANDER, *supra* note 5 (carefully detailing the political role police and policing have played in the development and maintenance of an American caste system).

62. *See generally* DAVIS, *supra* note 5 (providing a detailed timeline of the actions that occurred after the passage of the Thirteenth Amendment that turned Black people from generally slaves to generally criminal).

problems with police culture, one must understand the very foundation upon which this system has been built.[63]

Policing is somewhat of a racially exclusive luxury. Police protect the property and serve the needs of white people.[64] They are entrenched and enshrined in the excessiveness of white culture. To Black people, police have always represented the colonizer, the overseer, the capturer: never here to protect and serve them.[65] Black culture, as defined by the dominant culture, necessitates that Black people are whom the system must protect against.[66]

The practice and policy of using "law and order" as a farce did not abruptly begin after the Civil Rights Movement experienced success.[67] It was used by law enforcement against advocates for the Civil Rights Movement. Sheriffs and governors did not strip individuals of their basic human dignity and rights. They provided law and order. The leading argument against Dr. Martin Luther King, Jr., and his tactics of civil disobedience was that it disturbed law and order.[68] This criminalized the politics surrounding Blackness at the same time that the Federal Bureau of Investigation reported an increase in the national crime rate.[69] Richard Nixon blamed the increase on people deciding "which laws to obey and when to disobey them."[70] It was simple for those not involved in the movement to see the data as a representation of correlation if not causation.

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63. *Id.*

64. *Id.*

65. *See generally* Linda Greenhouse, *Justices Rule Police Do Not Have a Constitutional Duty to Protect Someone*, N.Y. TIMES (June 28, 2005), http://www.nytimes.com/2005/06/28/politics/justices-rule-police-do-not-have-a-constitutional-duty-to-protect.html (providing an overview of the Supreme Court case, *Castle Rock v. Gonzales*); *The Decolonizer Does the Police*, DECOLONIZER (Oct. 29, 2016) https://www.thedecolonizer.com/articles/2016/10/19/the-decolonizer-does-the-police; *Do Black Americans Feel That the Police 'Serve and Protect' Them?*, QUORA, https://www.quora.com/Do-Black-Americans-feel-that-the-police-serve-and-protect-them (last visited Feb. 6, 2017); Richard W. Stevens, *Just Dial 911? The Myth of Police Protection*, FOUND. FOR ECON. EDUC. (Apr. 1, 2000), https://fee.org/articles/just-dial-911-the-myth-of-police-protection/.

66. I am not in any way insinuating that criminality does not exist in the Black neighborhood. That would be absurd. Criminality exists in all communities. I also understand that factors like extreme poverty, a lack of educational opportunity, and economic deficiencies are leading causes in a person deciding to pursue a life of crime. However, the purpose of this piece is not to define and dissect human criminality. It is to allow the reader to understand the context under which the stereotype of Black as automatically criminal came to pervade the minds of American citizen and how that perversion affects civilians and police officers alike in their interaction with Black people.

67. ALEXANDER, *supra* note 5, at 40; *see* 13TH, *supra*, note 39.

68. ALEXANDER, *supra* note 5, at 40–41.

69. 13TH, *supra* note 39.

70. ALEXANDER, *supra* note 5, at 41.

Barry Goldwater first used this language to stoke these fears and declared that he would crack down on crime in his 1964 presidential campaign.[71] The rhetoric had been successfully sanitized of overt racism although the dog whistle still blew sharply.[72] Citizens who truly believed in (1) the stereotypes that already existed and (2) that the fight for equal rights was a disturbance to law and order quickly turned to support politicians who were fighting the criminals. Politicians appealed to the fear and anxiety of working-class white people: those individuals who had throughout history been the buffer between Black people and the wealthy white class and harbored the most collective animosity.[73]

These stereotypes pervaded most minds during this time. Then video footage allowed individuals to determine for themselves exactly what was at stake. Despite the rhetoric of politicians, those who joined the movement did so because they saw with their own eyes the attacks on innocent citizens.[74] They no longer chose to passively accept rhetoric. The footage provided them with information that allowed them to decide what role they would play in shaping the American narrative. If they could, the politicians, officers, and other oppressors of the day would have likely enjoyed the option to cease the filming, but they could not. We protected the right to gather and disseminate information then. We should do so now, especially during a time of such civil unrest. We should not allow anyone to use mechanisms that were put in place to protect citizens to oppress the freedom of speech.

II. WIRETAPPING & EAVESDROPPING LAWS

Contrary to officers' current use, wiretapping and eavesdropping laws were not established to use against citizens.[75] These provisions

71. *Id*. at 42.

72. *Id*. at 43.

73. Tim Wise, *How Racism Explains America's Class Divide and Culture of Economic Cruelty*, *in* UNDER THE INFLUENCE: SHAMING THE POOR PRAISING THE RICH AND JEOPARDIZING THE FUTURE OF AMERICA (2015), http://www.timwise.org/2015/04/how-racism-explains-americas-class-divide-and-culture-of-economic-cruelty-an-excerpt-from-under-the-affluence/.

74. *See, e.g.*, *Civil Rights Martyrs*, S. POVERTY L. CTR., https://www.splcenter.org/what-we-do/civil-rights-memorial/civil-rights-martyrs (last visited Jan. 20, 2017).

75. *See* S. REP. NO. 90-1097 (1968), *reprinted in* 1968 U.S.C.C.A.N. 2112, 2153, 2157; *see also* Rania Khalek, *15 Years in Prison for Taping the Cops? How Eavesdropping Laws Are Taking Away Our Best Defense Against Police Brutality*, ALTERNET (July 27, 2011), http://www.alternet.org/story/151806/15_years_in_prison_for_taping_the_cops_how_eavesdropping_laws_are_taking_away_our_best_defense_against_police_brutality.

were placed into our system of laws as a direct result of the increasing pace of technological advancement and the desire to protect the individual from unwanted and unwarranted privacy invasion.[76] The importance of protecting individuals is so widespread that every state has enacted some wiretapping or eavesdropping law with the exception of Vermont.[77]

The other states' laws require one or all involved parties to consent. Florida,[78] New Hampshire,[79] and Pennsylvania[80] are all-party states that protect face-to-face conversation. Although their laws protect individuals from having face-to-face conversations secretly taped, states like Alabama,[81] Arkansas,[82] Kentucky,[83] Tennessee,[84] Connecticut,[85] and Nevada[86] do not define protected conversations. Massachusetts,[87] whose law was recently under fire, prohibits secretly taping any conversation.[88] Maryland,[89] Michigan,[90] Montana,[91] Oregon,[92] and Washington[93] prohibit taping a conversation without the consent of all involved. California prohibits taping confidential conversations.[94]

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76. *Id*.

77. Carol M. Bast, *Tipping the Scales in Favor of Civilian Taping of Encounters with Police Officers*, 5 U. DENV. CRIM. L. REV. 61, 64–65 (2015). Although one was enacted, Illinois's far-reaching law was recently declared unconstitutional because the statute was overbroad and burdened more speech than was necessary to serve its interests. *See* People v. Clark, 6 N.E.3d 154, 162 (Ill. 2014); *see also* People v. Melongo, 6 N.E.3d 120, 127 (Ill. 2014). As further stated below, this law reached the farthest beyond protection of individual privacy, actually increasing the penalty for filming a police officer. 720 ILL. COMP. STAT. ANN. 5/14-4(b) (LexisNexis 2014).

78. FLA. STAT. ANN. § 934.02(2) (West 2014).

79. N.H. REV. STAT. ANN. § 570-A:11 (2012).

80. 18 PA. CONS. STAT. ANN. § 5702 (West 2012).

81. ALA. CODE § 13A-11-30(1) (2006).

82. ARK. CODE ANN. § 5-60-120(a) (West 2003).

83. KY. REV. STAT. ANN. § 526.020(1) (West 1975).

84. TENN. CODE ANN. § 39-13-601(a)(1) (West 2011).

85. CONN. GEN. STAT. ANN. § 53a-189 (West 1971).

86. NEV. REV. STAT. ANN. § 200.650 (West 2013).

87. MASS. ANN. LAWS. ch. 272, § 99 C.1 (LexisNexis 1998).

88. *Id*.

89. MD. CODE ANN., CTS. & JUD. PROC. §§ (3), 10-402(a)(1)–(c)(3) 10-401(13)(i), (West 2009 & 2015).

90. MICH. COMP. LAWS ANN. § 750.539a(2) (West 1967).

91. MONT. CODE ANN. § 45-8-213(1) (West 2007) (invalidated on other grounds by State v. Dugan, 303 P.3d 755 (Mont. 2013)).

92. OR. REV. STAT. ANN. § 165.540(1) (West 2016).

93. WASH. REV. CODE ANN. § 9.73.030(1) (West 1986).

94. CAL. PENAL CODE § 632(a) (West 2017); *see* Ashley Hoffman, *Did Kanye West and Kim Kardashian Break the Law by Recording Taylor Swift?*, (July 18, 2016), TIME, http://time.com/4410467/taylor-swift-kim-kardashian-kanye-west-recording/.

The remaining states are one-party consent states, and they either closely follow the federal eavesdropping statutes or varied slightly.[95] The states in the former category are Delaware,[96] Hawaii,[97] Iowa,[98] Louisiana,[99] Minnesota,[100] Nebraska,[101] New Jersey,[102] Ohio,[103] Oklahoma,[104] Rhode Island,[105] Utah,[106] West Virginia,[107] and Wisconsin.[108] The latter are Arizona,[109] Colorado,[110] Idaho,[111] Missouri,[112] North Carolina,[113] North Dakota,[114] South Carolina,[115] South Dakota,[116] Texas,[117] Virginia,[118] and Wyoming.[119] Alaska[120] and New York[121] protect communication where the speaker has a reasonable expectation of privacy. Georgia,[122] Kansas,[123] and Maine[124] protect private conversation that occurs in a location that is reasonably safe from surveillance. Indiana,[125] Mississippi,[126] and New Mexico[127] have provisions that protect phone conversations, but these laws do not appear to prohibit taping a face-to-face conversation.

95. Bast, *supra* note 77, at 85.
96. Del. Code Ann. tit. 11, § 2402(a), (b) (2016).
97. Haw. Rev. Stat. Ann. § 803-42(a) (LexisNexis 2016).
98. Iowa Code § 727.8 (2016).
99. La. Stat. Ann. § 15:1303.A (2016).
100. Minn. Stat. Ann. §§ 626A.02.1–02.4 (2016).
101. Neb. Rev. Stat. Ann. § 86-290(1) (LexisNexis 2016).
102. N.J. Rev. Ann. § 2A:156A-3 (2016).
103. Ohio Rev. Code Ann. § 2933.52(A) (LexisNexis 2016).
104. Okla. Stat. tit. 13, § 176.3 (LexisNexis 2016).
105. R.I. Gen. Laws § 11-35-21 (2016).
106. Utah Code Ann. § 77-23a-4(1)(b) (LexisNexis 2016).
107. W. Va. Code Ann. § 62-1D-3(a) (LexisNexis 2016).
108. Wis. Stat. § 968.31(1) (2016).
109. Ariz. Rev. Stat. § 13-3005 (LexisNexis 2016).
110. Colo. Rev. Stat. § 18-9-304(1) (2016).
111. Idaho Code § 18-6702(1) (2016).
112. Mo. Rev. Stat. §§ 542.400–.422 (2016).
113. N.C. Gen. Stat. Ann. § 15A-287(a) (2016).
114. N.D. Cent. Code § 12.1-15-02(1) (2016).
115. S.C. Code Ann. § 17-30-20 (2016).
116. S.D. Codified Laws § 23A-35A-20 (2016).
117. Tex Penal Code Ann. § 16.02(b) (LexisNexis 2015).
118. Va. Code Ann. § 19.2-62(A) (2016).
119. Wyo. Stat. Ann. § 7-3-702(a) (2016).
120. The Alaska law defines private communication by using the two-prong test established in *Katz v. United States*, where there had to be an expectation of privacy and that expectation had to be reasonable. Alaska Stat. § 42.20.310(a) (2016).
121. N.Y. Penal Law § 250.05 (Consol. 2016).
122. Ga. Code Ann. § 16-11-62 (2016).
123. Kan. Stat. Ann. § 21-6101(a) (2016).
124. Me. Rev. Stat. Ann. tit. 17-A, § 511.1 (2016).
125. Ind. Code Ann. § 35-33.5-5-5 (LexisNexis 2016).
126. Miss. Code Ann. §§ 41-29-501 to -535 (2016).
127. N.M. Stat. Ann. § 30-12-1 (LexisNexis 2016).

Few states have an express exception for the recording of police activities.[128] The majority of these states require that speakers have a reasonable expectation of privacy.[129] There is, however, disagreement as to whether police officers performing their public duties have a reasonable expectation of privacy.[130]

In an effort to further protect citizens' privacy, most of the laws were enacted after the federal wiretapping laws were passed.[131] The federal wiretapping statutes are provisions that work together to protect citizens' privacy.[132] They were passed as a balancing measure in the country's devotion to protecting the freedoms and protections guaranteed by the United States Constitution and secured by the Foreign Intelligence Surveillance Act ("FISA") of 1978 as it allowed the federal government to surveil foreign terrorist organizations.[133]

During this time, the United States executive branch searched for ways to use intelligence to intercept communications of those it considered terrorists.[134] While this branch grasped for more power, Congress made an attempt to steady that hand and secure the U.S. citizens' right to privacy.[135] In an effort to protect United States citizens against government infringement of their privacy in the name of the war on terror, Congress amended FISA of 1978 as well as the Electronic Communications Privacy Act ("ECPA") of 1986 in July of 2008.[136] In an effort to provide their respective citizens with similar or even more protection, states enacted their own wiretapping laws.[137]

III. QUALIFIED IMMUNITY & THE WELL-ESTABLISHED RIGHT

Police officers use wiretapping and eavesdropping laws to arrest citizens filming them performing their public duties. With blatant disregard for the First Amendment, officers arrest individuals and confis-

128. Bast, *supra* note 77.
129. *Id*.
130. *Id*.
131. *See generally* Khalek, *supra* note 75.
132. *Id*.
133. 18 U.S.C.A. § 2511 (2016).
134. *Id*.
135. *Id*.
136. Electronic Communications Privacy Act of 1986, Pub. L. No. 99-508, 100 Stat. 1848.
137. Bast, *supra* note 77.

cate their recording devices.[138] Too many of these arrests do not lead to charges.[139] But what they result in is exactly what the officers want.[140] Intimidation.[141] In the short-term, the officer stops the individual from filming her actions.[142] In the long-term, the action has a chilling effect on those actively observing who spread the word.[143] Upon seeing someone arrested for simply exercising their First Amendment rights, others believe there must be something unique about filming an officer that makes it illegal.

While surveying the states, their laws, and their officers' use of those laws against civilian filming, I hypothesized that Massachusetts would violate the most. The state does not recognize a police exception and it prohibits all surreptitious recordings without implied or express consent from all involved.[144] The law also does not require a "reasonable expectation of privacy" as many other states do. However, Massachusetts's officers were not the most egregious.[145] While

138. Jason Kotowski, *Can Police Seize Your Cellphone As Evidence? There's No Easy Answer*, HUFFINGTON POST (Aug. 11, 2013, 5:05 PM), http://www.huffingtonpost.com/2013/08/12/police-seize-cellphone-evidence_n_3739770.html.

139. Richard Prince, *Ferguson Cops Are Accused of Using 'Catch and Release' Tactics to Slow Down Journalists*, THE ROOT (Oct. 15 2014, 10:04 AM), http://www.theroot.com/blog/journal-isms/ferguson_cops_are_accused_of_using_the_catch_and_release_tactic_to_slow/.

140. *See* Andrea Papagianis, *Chicago Police Detained Journalists Covering Girl's Murder*, REPORTERS COMMITTEE FOR FREEDOM PRESS (Mar. 20, 2012), http://www.rcfp.org/browse-media-law-resources/news/chicago-police-detained-journalists-covering-girls-murder (indicating the Freedom of Press issues that arise from police intimidation tactics); Richard Prince, *Ferguson Cops Are Accused of Using 'Catch and Release' Tactics to Slow Down Journalists*, THEROOT (Oct. 15 2014, 10:04 AM), http://www.theroot.com/blog/journal-isms/ferguson_cops_are_accused_of_using_the_catch_and_release_tactic_to_slow/ (providing evidence of police intimidation used during the Ferguson uprisings); Catherine Rentz, *Freddie Gray Arrest Witness Accuses Police of Intimidation,* BALT. SUN (Apr. 25, 2015, 9:39 PM), http://www.baltimoresun.com/news/maryland/bs-md-freddie-gray-wanted-witness-20150425-story.html (illustrating the intimidation tactics utilized by Baltimore police during the Freddie Gray arrest); David Walker, *Police Intimidation Watch: Journalists Detained for Being Present at a Chicago News Event*, PDNPULSE (Mar. 21, 2012), http://pdnpulse.pdnonline.com/2012/03/police-intimidation-watch-journalists-detained-for-being-present-at-a-chicago-news-event.html (showing that not even the press are safe from police intimidation tactics in cities like Chicago).

141. In *Gaymon v. Borough of Collingdale*, the officer threatened to arrest and charge under Pennsylvania wiretapping statute in order to make the wife stop filming, but charged her under disorderly conduct for the alleged act of spitting on neighbor. Even the judge did not believe that the officer thought the plaintiffs were violating the wiretapping law because he did not erroneously charge them under it. Gaymon v. Borough of Collingdale, 150 F. Supp. 3d 457, 460 (E.D. Pa. 2015).

142. Rentz, *supra* note 140.

143. *See id.*

144. MASS. GEN. LAWS. ANN. ch. 272, § 99 (West 2014).

145. *See generally* Bast, *supra* note 77 (showing multiple violations in other states but only one violation in Massachusetts).

other states misused their wiretapping laws against citizens once or twice, Pennsylvania violated multiple times.[146]

More than others, in order to stop citizen filming, Pennsylvania officers told individuals they were being arrested for violating the state's eavesdropping laws.[147] Usually, the citizen was arrested on a completely separate charge (e.g., obstruction or disorderly conduct—a seeming go-to for officers with no other basis for a different charge).[148] Too often, all of the charges were dropped.[149]

For example, in *Gaymon v. Borough of Collingdale*, the officers were called after the plaintiff's mother parked her car too close to a neighbor's property.[150] Upon arriving, the officers were aggressive and the situation quickly intensified.[151] Feeling the need to document the events, Mrs. Gaymon began recording the encounter with the officers, her daughter, and husband from inside her home.[152] The officers told her that she was in violation of Pennsylvania eavesdropping laws and if she did not stop filming, he would enter her house and arrest her.[153] After the plaintiff told him that he was wrong and refused to cease recording, he followed through on his threat, but charged her and her daughter with disorderly conduct.[154]

All of the charges were eventually dropped and the citizen sued the officers for violating her First Amendment rights.[155] The judge did not believe the officer's claim that he thought there was no clearly-established First Amendment right to film police, because although he threatened the plaintiff, the officer did not actually charge her with violating the statute.[156] The court used this information as

146. *See* Kelly v. Borough of Carlisle, 622 F.3d 248, 251 (3d Cir. 2010); *Gaymon*, 150 F. Supp. 3d 457, 459; Snyder v. Daugherty, 899 F. Supp. 2d 391, 399 (W.D. Pa. 2012); Ickes v. Borough of Bedford, 807 F. Supp. 2d 306, 312, 313, 315 (W.D. Pa. 2011).

147. *See Kelly*, 622 F.3d 248; *Gaymon*, 150 F. Supp. 3d 457; *Snyder*, 899 F. Supp. 2d 391; *Ickes*, 807 F. Supp. 2d 306.

148. *See Kelly*, 622 F.3d 248; *Gaymon*, 150 F. Supp. 3d 457; *Snyder*, 899 F. Supp. 2d 391; *Ickes*, 807 F. Supp. 2d 306.

149. *See Kelly*, 622 F.3d 248; *Gaymon*, 150 F. Supp. 3d 457; *Snyder*, 899 F. Supp. 2d 391; *Ickes*, 807 F. Supp. 2d 306.

150. *Gaymon*, 150 F. Supp. 3d at 459, 460 ("This is a case where, if the allegations are true, a petty complaint from a neighbor led to a grossly disproportionate response by police, culminating in officers entering a family's home and arresting its owner for doing nothing more than attempting to videotape the officers' over-reaction on her own property.").

151. *Id*. at 460.

152. *Id*.

153. *Id*.

154. *Id*.

155. *Id*. at 459, 461.

156. *Id*. at 466.

evidence that the officer had knowledge of his inability to charge the woman under the statute,[157] finding it "telling that Mrs. Gaymon was never charged with a violation of the Wiretap Act.[158] If the officers mistakenly believed that Mrs. Gaymon's conduct violated the Wiretap Act, it is reasonable to infer that they would have charged Mrs. Gaymon with that offense, and of course they did not."[159] Unfortunately, this is not an isolated incident in Pennsylvania.[160]

Illinois was similarly egregious. This state's provision was so extreme that the Illinois Supreme Court declared it unconstitutional, and now there is no wiretapping or eavesdropping law altogether.[161] The law that existed, however, required all-party consent and where some states excluded the recording of public officials or provided for a "reasonable expectation of privacy" exception, Illinois went a step further into the direction of infringement.[162] Where "eavesdropping" on a civilian was a class four felony, filming a law enforcement officer was a class one felony.[163] One could be subject to imprisonment of four to fifteen years when filming an officer.[164]

The Supreme Court has not weighed in on whether First Amendment rights also include the right to film police in the public performance of their duties. This failure results in state legislatures and police officers nationwide repetitively infringing upon these rights.[165] As jurisprudence now stands, the right to film police performing their duties in a public place is an established right in some circuits, but not in others.[166] However, in those jurisdictions that recognize this right, it is limited beyond general "time, place, and manner."[167] In the other

157. *Id*.

158. *Id*.

159. *Id*.

160. *See* Kelly v. Borough of Carlisle, 622 F.3d 248 (3d Cir. 2010); *see also* Snyder v. Daugherty, 899 F. Supp. 2d 391, 399 (W.D. Pa. 2012); Ickes v. Borough of Bedford, 807 F. Supp. 2d 306, 316 (W.D. Pa. 2011).

161. *See* People v. Clark, 6 N.E.3d 154, 162 (Ill. 2014); People v. Melongo, 6 N.E.3d 120, 127 (Ill. 2014).

162. 720 ILL. COMP. STAT. ANN. 5/14-4(b) (West 2003).

163. *Id.* 5/14-4(a)-(b).

164. *Id.* 5/14-4(b).

165. *See generally Kelly,* 622 F.3d 248 (finding that the officer had qualified immunity from the constitutional claim because he called the attorney general for guidance and was told his arrest would be proper).

166. *See* Gericke v. Begin, 753 F.3d 1 (1st Cir. 2014); ACLU v. Alvarez, 679 F.3d 583 (7th Cir. 2012); Glik v. Cunniffe, 655 F.3d 78 (1st Cir. 2011). *But see Kelly*, 622 F.3d 248; Szymecki v. Houck, 353 F. App'x. 852 (4th Cir. 2010) (per curiam).

167. *Gericke*, 753 F.3d at 7–8.

states, the courts held that police possess qualified immunity from First Amendment claims because that right is not well-established.[168]

The former circuit courts approach the conversation as if the right is a given.[169] The First Circuit held that the "First Amendment protects a 'range of conduct' surrounding the gathering and dissemination of information . . . .; [T]he Constitution protects the right of individuals to videotape police officers performing their duties in public."[170] The Seventh Circuit held similarly in *ACLU v. Alvarez*, finding that the right to gather information was as any other First Amendment right and subject to "valid time, place, or manner" restrictions.[171] The court held that enforcement of the Illinois Eavesdropping statute would be an unconstitutional infringement on the First Amendment.[172] Although this approach is not unanimous, the Eleventh Circuit Court of Appeals agreed with this line of reasoning.[173]

The Third and Fourth Circuits have both held that officers have qualified immunity because the action of filming police in the performance of their duties is not a well-established right.[174] These states require that the individual records openly, and arguably give the police officers a substantial amount of discretion that effectually deprives the individual of the right. Police generally use this discretion to arrest individuals for either violating the state's wiretapping laws, disturbing the peace, obstruction, or disobeying a police order.

In *Kelly v. Borough of Carlisle*, a Third Circuit case from Pennsylvania, the court held that the officer was entitled to qualified immunity because the right to videotape police officers during traffic stops was not clearly established.[175] Here, the plaintiff, Brian Kelly, was riding as a passenger in his friend's truck when they were stopped for alleged traffic violations.[176] Kelly usually carried his video camera

168. *See generally Szymecki*, 353 F. App'x. at 853 (holding Szymecki's right to record police activities on public property under the First Amendment was not established); Kelly v. Borough of Carlisle, 815 F. Supp. 2d 810 (M.D. Pa. 2011).

169. *Gericke*, 753 F.3d at 7.

170. *Id*.

171. *See Alvarez*, 679 F.3d at 591–92.

172. *See id*.; *see also* People v. Clark 6 N.E.3d 154, 162 (Ill. 2014); People v. Melongo, 6 N.E.3d 120, 127 (Ill. 2014).

173. *See* Smith v. City of Cumming, 212 F.3d 1332, 1333 (11th Cir. 2000) (finding that although the plaintiffs had a right to film police activities, they had not proven that those rights were violated).

174. *See* Kelly v. Borough of Carlisle, 622 F.3d 248, 262 (3d Cir. 2010); Szymecki v. Houck, 353 F. App'x. 852, 853 (4th Cir. 2010) (per curium).

175. *Kelly,* 622 F.3d at 262.

176. *Id*. at 251.

with him, which he used to tape various encounters.[177] During the traffic stop, Kelly held the camera in his lap and taped the incident.[178] The facts do not establish whether the camera was in plain view of the officer.[179] According to the officer, it was not until the officer told Kelly and the driver that he was taping the stop that the officer realized that Kelly was also taping. After confiscating Kelly's camera, the officer called Assistant District Attorney Birbeck to inquire whether Kelly's failure to inform the officer that he was taping the traffic stop could serve as grounds for the officer to arrest Kelly for violating the Pennsylvania eavesdropping statute.[180] Birbeck told the officer it was appropriate to do so, and the officer arrested Kelly, but the charge was later dropped.[181]

The court placed great weight on the officer's conversation with Birbeck.[182] Considering Kelly's Fourth Amendment claim in light of the conversation, the court held that a police officer is presumptively entitled to qualified immunity from Fourth Amendment claims premised on a lack of probable cause when she relies on a prosecutor's legal opinion that the arrest is warranted under the law.[183] The appellate court found that the lower court erred in reviewing case law interpreting the Pennsylvania eavesdropping statute.[184] It was clearly established that police officers do not have a reasonable expectation of privacy when recording conversations with suspects, and the Pennsylvania Supreme Court twice held that where the police officer did not have a reasonable expectation of privacy, recording the encounter did not violate the statute.[185] The court remanded the case and ordered that the district court investigate the facts to make findings as to whether the officer knew he was being recorded at the beginning of the traffic stop and whether the officer asked Birbeck for legal advice.[186] Notably, the court characterized traffic stops as "inherently dangerous situations" and noted that Third Circuit courts that had

177. *Id.* Citizens' belief that they need to have their camera ready to record encounters with the government should illustrate something to the Court. People are not only using these devices to speak. They are using them to survive.

178. *Id*.

179. *Id*.

180. *Id*.

181. *Id*. at 252.

182. *See id*. at 255–56.

183. *Id*.

184. *See id*. at 256–59.

185. *Id*. at 257–58.

186. *Id*. at 258–59.

recognized a First Amendment right to tape a police officer had not dealt with the traffic stop environment.[187]

In *Szymecki v. Houck*, the United States Court of Appeals for the Fourth Circuit quickly dismissed the idea that the right to record police activity was clearly established.[188] The court took the narrowest view possible of the right and the action. It did not analogize filming as a modernized method of information gathering.[189] Instead, it said that its responsibility was to look at Supreme Court case law, and examine if the contours of the Constitutional right were sufficiently clear.[190] To this court, the use of technology to gather information on the police while performing their duties was not clearly established, and this entitled the officer to qualified immunity when arresting the information gatherer.[191] In the unpublished decision, which was less than two pages, the appellate court agreed with the lower court's conclusion that "Szymecki's asserted First Amendment right to record police activities on public property was not clearly established in this circuit at the time of the alleged conduct."[192]

The assertion that the right to film police officers is not a well-established right leaves us bemused on what rights United States citizens maintain.[193] The most glaring problem is the circular logic on which the decisions are based and continue to produce. If the right is not well-established, at what point will it be established? At what point are officers expected to understand that, as a public official, their public activities can be filmed? Can the right ever be determined when a circuit split exists and courts like that in *Szymecki* infer that officers are only expected to know the rights as established in their respective jurisdictions? Thus, if a court says that filming a police officer is not a well-established right, the officer then looks to the

187. *Id*. at 262.

188. Szymecki v. Houck, 353 F. App'x. 852, 853 (4th Cir. 2010).

189. *See generally id*.

190. *Id*. at 852–53.

191. *Id*.

192. *Id.* at 853. Although this case was less than two pages, it infers that officers should only be expected to know if a right is established in their jurisdiction.

193. The Northern District of Texas granted the officers' motion to dismiss the plaintiff's claims because no preexisting law prohibited their conduct. The court actually used the lack of guidance from the Supreme Court as a basis to allow the officers to continue to violate citizens' rights. *See* Turner v. Driver, 2016 U.S. Dist. LEXIS 20179, at *7 (N.D. Tex. Feb. 19, 2016) ("The Supreme Court and Fifth Circuit have not addressed whether or not there is a First Amendment right to videotape police activities. Circuit courts that have addressed the issue in different contexts are split as to whether or not there is a clearly established First Amendment right to record the public activities of police.").

right as established by that court. Even though he should likely know that the citizen can film him, he can argue that it is not established and he is entitled to qualified immunity. If the Supreme Court does not address this issue, citizens of the United States will not be equally entitled to the protections of the Constitution. Californians would enjoy freedom of speech, while Pennsylvanians would not.

IV. WHY DO OUR FREEDOMS LOOK DIFFERENT? "AIN'T I A [CITIZEN]?"[194]

It is difficult for a citizen to understand what rights she has when filming an officer without risking arrest. The jurisdictional split causes mass confusion. This, coupled with the amount of discretion given to police, which is often used as a scare tactic to control citizens, has a chilling effect on this right to gather information on public officials and hold them accountable for their actions.[195]

This uncertainty aids police officers' abuse of discretion. A temporary arrest where charges are later dropped or never filed still serves the purpose of an officer being unwantedly filmed.[196] The individual's action has ceased, and as the layperson, she likely does not know that the officer's actions are unconstitutional.[197] Beyond the impact this has on the individual filming, it also has a chilling effect on onlookers, who will remember this encounter and make note that they too can be arrested for filming the police.[198]

"Congress shall make no law . . . abridging the freedom of speech, or of the press; or the right of the people peaceably to assemble, and to petition the Government for a redress of grievances."[199]

194. Sojourner Truth, *Ain't I a Woman* (1852), http://www.sojournertruth.org/Library/Speeches/AintIAWoman.htm.

195. *Cf.* Frederick Schauer, *Fear, Risk and the First Amendment: Unraveling the Chilling Effect*, 58 B.U. L. REV. 685, 694–701 (1978) (arguing that the varying local standards for obscenity affect the outcome of litigation and causes a chilling effect increasing the degree of uncertainty inherent in the legal process).

196. Aiello v. Wilmington, 623 F.2d 845, 857 (3d Cir. 1980) ("An impermissible chill is created when one is deterred from engaging in protected activity by the existence of a governmental regulation or the threat of prosecution thereunder.").

197. *Cf.* Schauer, *supra* note 195, at 693 (noting that the chilling effect can cause individuals to refrain from doing something that which they lawfully could).

198. *Id.* at 689–97.

199. U.S. CONST. amend. I.

Recently, citizen filming has played a very important role in developing the narrative surrounding police brutality.[200] Video taken by individual bystanders who witness police brutality allowed the entire nation to see Eric Garner's encounter with the police and hear his dying words.[201] In New York City, on July 17, 2014, officers in plain clothes approached Mr. Garner and questioned him for selling loose cigarettes.[202] At some point one of the officers attempted to handcuff him from behind.[203] In response, Mr. Garner swatted his arms and demanded not to be touched.[204] Immediately after, Officer Pantaleo placed Mr. Garner in an illegal chokehold, which was against NYPD regulations, and attempted to bring him down to the ground.[205] Other officers surrounded him, and after about twenty seconds passed, Pantaleo released Garner and pressed his face against the pavement.[206] Garner repeated the words "I can't breathe" eleven times.[207] The phrase "I can't breathe" became a rallying cry for those attempting to shed a light on police interactions with those who live in America's "back alleys."[208]

The South Carolina officer, Michael Slager, who shot Walter Scott in the back as he ran away, had no idea that an individual had captured most of the encounter on camera.[209] The officer stopped Mr. Scott for a minor traffic offense because he allegedly had a non-functioning brake light.[210] According to the officer, Mr. Scott fled when

200. *See generally* Jamiles Lartey, *Film-makers Demand Inquiry Into 'Targeting' of People Who Record Police*, THE GUARDIAN (Aug. 11, 2016, 12:55 PM), https://www.theguardian.com/film/2016/aug/10/filmmakers-citizen-journalists-justice-department-investigation.

201. *See* Christopher Mathias, *He Filmed the Death of Eric Garner. Now He's Getting Ready to Spend 4 Years in Prison*, HUFFINGTON POST (Sept. 2, 2016), http://www.huffingtonpost.com/entry/ramsey-orta-eric-garner_us_57a9edbde4b0aae2a5a15142.

202. Al Baker et al., *Beyond the Chokehold: The Path to Eric Garner's Death*, N.Y. TIMES (June 13, 2015), http://www.nytimes.com/2015/06/14/nyregion/eric-garner-police-chokehold-staten-island.html.

203. *Id.*

204. *Id.*

205. *Id.*

206. *Id.*

207. Christopher Mathias, *Eric Garner Said "I Can't Breathe" 11 Times – Now Activists Are Making 11 Demands in His Name*, HUFFINGTON POST (Dec. 11, 2014, 12:45 PM) [hereinafter Mathias, *I Can't Breathe*], http://www.huffingtonpost.com/2014/12/11/eric-garner-protests-demands_n_6308956.html.

208. *See* Michael A. Gonzales, *Blood on the Leaves: Eric Garner and "Strange Fruit"*, EBONY (Dec. 5, 2014), http://www.ebony.com/entertainment-culture/blood-on-the-leaves-eric-garner-and-strange-fruit-999#axzz4JXBbmm88; Mathias, *I Can't Breathe*, *supra* note 207.

209. *See How a Bystander's Video Revealed the Truth About a Police Shooting in South Carolina*, PBS (Apr. 8, 2015, 6:30 PM), http://www.pbs.org/newshour/bb/bystanders-video-revealed-truth-police-shooting-south-carolina/.

210. *Id.*

Slager returned to his vehicle.[211] Slager pursued him, and the two got into a physical altercation where Slager used his Taser on Scott. Mr. Scott again fled, and Slager fired eight rounds, striking Scott five times: three times in the back, once in the buttocks, and once in his ear.[212] After the shooting, Slager, already armed with his narrative, radioed the dispatcher and said he shot Scott because he felt threatened and Scott took his Taser. But the recording shows him grabbing something, thought to be the Taser, in the vicinity of where the initial altercation occurred and moving it closer to Mr. Scott's body.[213] Feidin Santana recorded this encounter, and he initially decided not to come forward with the video for fear of retribution.[214] He even considered deleting it and leaving the community because he believed his life would be in danger.[215] Had he not, the world would have believed Slager's version because, like so many other times, it was the only version available, and it was the word of an officer.

Philando Castile was pulled over by police officers in a suburb of St. Paul, Minnesota, because he was allegedly driving with a broken taillight.[216] After notifying the officer that he was a licensed gunholder and following the officer's request to show identification, Mr. Castile was shot while reaching for that identification.[217] Immediately after he was shot, Diamond Reynolds began not only recording the incident, but also streaming it live on Facebook.[218] When asked why she chose to do so, Ms. Reynolds responded that it was because she did not want the officers to misrepresent the incident.[219] The film shows Philando Castile struggling and suffering from the bullet wound, with Ms. Reynolds' four-year-old daughter in the backseat.[220]

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211. *Id.*

212. *Id*.

213. *Id*.

214. Mikki Kendal, *The Police Can't Police Themselves. And Now the Public Is Too Scared to Cooperate*, WASH. POST. (Apr. 10, 2015), https://www.washingtonpost.com/posteverything/wp/2015/04/10/the-police-cant-police-themselves-and-now-the-public-is-too-scared-to-cooperate-with-them/?utm_term=.8eaacd757ccd.

215. *Id*.

216. Camila Domonoske, *Minnesota Gov. Calls Traffic Stop Shooting "Absolutely Appalling At All Levels",* NPR (July 07, 2016, 7:19 AM), http://www.npr.org/sections/thetwo-way/2016/07/07/485066807/police-stop-ends-in-black-mans-death-aftermath-is-livestreamed-online-video.

217. *Id*.

218. *Id*.

219. *Id*. Ms. Reynolds' words are very important in understanding the psyche of marginalized individuals when involved in these situations. She did not think it was sufficient to record the incident, but believed that, in order to prevent police misrepresentation, she had to live stream it.

220. *Id*.

These recordings refuted the narrative the police attempted to shape.[221] The usual jargon of being fearful for their lives or reacting to an overly aggressive and combatant assailant could no longer be the only story shoved down the throats of the American people.[222] Now there was proof of the encounter; a countervailing narrative, told from a neutral perspective,[223] but bolstering the narrative of the marginalized; a narrative they could not share from the grave. Unfortunately, this is the story Black, Brown and poor people who have experienced police brutality for many generations have attempted to tell, only to be silenced by the majority.[224] Their marginalization made them criminal. Their criminality made them unbelievable; their deaths justifiable.

V. WHAT DOES THIS MEAN TO THE LEGAL COMMUNITY?

The importance of the freedom of speech is entrenched in who we are as a nation. When interpreting the words of our founding fathers, the courts continuously say that the purpose of these freedoms is to encourage the marketplace of ideas, allow for citizens to participate in decision-making, maintain a balance between healthy debate and necessary consensus, and individual self-fulfillment.[225] Although individual self-fulfillment has been the least accepted by the Court, it is the factor the people believe in the most. When we say we have the freedom of speech, we, the people, mean that we have the God-given, nation-assenting right to speak freely. Regular people do not actively use their freedom of speech to shape America. Regular people use their freedom to be America. They are working, eating, sleeping, and doing it all over again to live America: to live free. The majority of us have no purpose in speaking besides being free.

However, there are those of us who have made it a point to use the freedom of speech to contribute to the marketplace of ideas and

221. *See* Nick Wing, *12 Videos that Show the Difference Between What Cops Said and What Actually Happened*, HUFFINGTON POST (July 28, 2015, 6:55 PM), http://www.huffingtonpost.com/entry/police-brutality-reports_us_55b65b79e4b0074ba5a53417.

222. *See id*.

223. Those who are not proponents of bystander filming often say that the video does not tell the entire story. I find this to be a very interesting argument when this same group likely argued before that video evidence provided the entire story against any other criminal.

224. *See generally* David Bayley, *Getting Serious About Police Brutality*, *in* ACCOUNTABILITY FOR CRIMINAL JUSTICE 93 (1995) (exploring principles for achieving more accountable policing).

225. *See* R.A.V. v. City of St. Paul, 505 U.S. 377, 387 (1992); Police Dep't of Chicago v. Mosley, 408 U.S. 92, 96 (1972); Mulligan v. Nichols, 835 F.3d 983, 989 (9th Cir. 2016).

shape the American social landscape. But our sculpting involves a deep knowledge and understanding of the historical context of racial relations in the United States. We believe that using speech to fight systemic racial oppression is as compelling an interest as contributing to the marketplace of ideas.

Although this was the bare basis of every real American reformation from the students of the Civil Rights Movement to Crispus Attucks's actions in the Boston Tea Party, using speech to fight racial oppression seems to be a novel idea. This is only because we choose to view it from a narrow perspective and simplistic paradigm. To see this as a basis of our freedom of speech we must step away from thinking exactly like a founding father and think about the America we are attempting to create today. It is difficult to see freedom of speech as a tool to fight racial oppression if one thinks from the perspective of the oppressor. Filming a public servant brutalizing a civilian, in order to hold him accountable, is as important as contributing to a political action committee.[226] To us, this is life or death.

This has to be important to those of us in the legal field because it is our subsystem that reifies the oppression, stabilizing systemic racism. We have to see what we are a part of, what we are contributing to. We have to recognize it for what it is and change it or don't, but we do not get to keep pretending as if it does not exist because that works better for us; that works better for our system. There are real consequences to the historical and pseudoscientific racism that serves as the foundation of our legal and criminal justice systems.

The disparity in the incarceration rate is simply the result of a complex combination of the aforementioned stereotypes and pseudoscience. However, understanding these complexities allows one to understand how it all works together. It allows one to understand how a jury of our peers can watch a video of police officers barbarically beat Rodney King, but still choose not to believe their eyes and still choose to acquit the officers.[227] It allows us to understand eyewitness identification case studies that clearly illustrate biases when a black person is

226. *See generally* Citizens United v. F.E.C, 558 U.S. 310 (2010) (holding that the provision of the Bipartisan Campaign Reform Act prohibiting unions, corporations, and not-for-profit organizations from broadcasting electioneering communications within 60 days of a general election or 30 days of a primary election violates the clause of the First Amendment).

227. Seth Mydans, *The Police Verdict; Los Angeles Policemen Acquitted in Taped Death*, N.Y. TIMES (Apr. 30, 1992), https://www.nytimes.com/books/98/02/08/home/rodney-verdict.html.

involved.[228] It allows us to understand civilian experiments that show the difference in treatment between a Black person and a white person legally openly carrying on the streets.[229] The ability to film these things from a device that is carried in your pocket does not solve the problem, but it does allow for us to see it. It allows us to understand our system. It allows us to understand that Black people and their allies have not simply made these things up. These are real American experiences. These are real American problems.

The right to film police performing their public duties on its face is simple. As some circuits have established, the police have no expectation of privacy when performing their public duties.[230] As a result, the right to film police—like any other protected speech—is only subject to certain time, place, and manner restrictions.[231] What these circuits have gotten wrong is the "inherently dangerous" exception.[232] Cases like that of Eric Garner, Walter Scott, and Philando Castile show that the "inherently dangerous" situations are the ones that need to be filmed. The process of gathering this speech and the record that exists afterward assists in the fight against racial oppression and contributes to the marketplace of ideas.

Two states have taken steps to protect their citizens from violation. California and Colorado have established retaliation laws in order to disincentive police officers from violating individuals' rights.[233] Other states and localities should consider doing the same. In California, Senate Bill 411 amended the state's penal code to say that simply filming or taking a photograph of an officer performing his duty in a public place does not automatically amount to interference.[234] It was signed into law August 11, 2015.[235] Colorado's House Bill 15-1290 compensates individuals who are wrongfully detained or have their property confiscated by police.[236] If a police officer intimidates or ille-

228. *Cf.* Univ. of Portsmouth, *Eyewitness Identification May be Attributed to Bias*, MED. XPRESS (Sept. 13, 2010), http://phys.org/news/2010-09-eye-witness-identification-attributed-bias.html (discussing the prevalence of bias in eyewitness identifications).

229. The Young Turks, *Open Carry Experiment Exposes Racist Cops*, YOUTUBE (May 20, 2015), https://www.youtube.com/watch?v=StrqQLQr8BA.

230. *See* Gilk v. Cunniffe, 655 F.3d 78, 83 (1st Cir. 2011); Smith v. City of Cumming, 212 F.3d 1332, 1333 (11th Cir. 2000).

231. *Id.*

232. *See Kelly v. Borough of Carlisle*, 622 F.3d 248, 262 (3d Cir. 2010).

233. CAL. PENAL CODE § 69 (West 2015); COLO REV. STAT. ANN. § 13-21-128 (2015).

234. S.B. 411, 2015 Leg., Reg. Sess. (Cal. 2015).

235. *Id*.

236. H.B. 15-1290, 17th Gen. Assemb., Reg. Sess. (Colo. 2015).

gally confiscates a camera or cellphone, the individual will be entitled to $15,000 in civil fees. It was signed into law on May 20, 2015.

More states should consider "retaliation laws," but if not, simply adding a public servant exception to their eavesdropping and wiretapping laws would assist in preventing officers from misusing the laws. However, this would not solve all of the problems involved in protecting this freedom because officers use other charges to inhibit this freedom of speech. Thus, the Supreme Court of the United States has to act on this circuit split. It has to establish that the right to record a public official performing public duties is a well-established right possessed by the people of the United States. It is a right that, although used with new technology, is deeply entrenched in our sense of democracy. It is fundamental to our idea of liberty.

CONCLUSION

Protecting the freedom of speech and expressive conduct from the proscription of government entities is the cornerstone of our democracy.[237] Our forefathers believed the right to express disagreeable ideas was and is what makes us a great democracy, and our society has continued to hold this freedom as sacred.[238] The sanctity of this right should not and cannot depend on the ethnicity of the speaker. Because these freedoms were put in place to protect the citizens from a tyrannical government, we must be extremely vigilant in safeguarding them. We must strictly scrutinize a government actor's desire to limit speech when it is in opposition to his or her actions. We cannot allow for police officers, at their discretion, to determine what part of their public activities can be subject to the scrutiny of the American people. If they are to protect and serve us, they should be held accountable to us, for all of their actions, even those committed against the least of us. Establishing the right to film police in the public performance of their duties as an inherent part of the freedom of speech will not likely end police brutality, but it will allow the national conversation to continue. It will continue to assist in challenging the idea of Blackness as inherently criminal. It will allow us to continue on the journey of becoming more American.

237. *See* R.A.V. v. City of St. Paul, 505 U.S. 377, 382 (1992).
238. Dennis v. United States, 341 U.S. 494, 580 (1951) (Black, J., dissenting).

COMMENT

White Milk, Black Market: A Call for the Regulation of Human Breast Milk Over the Internet

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* J.D. Candidate, Howard University School of Law, Class of 2017; Senior Articles Editor, *Howard Law Journal*, Vol. 60; B.S., Biology, University of Houston, 2013. I give thanks to God, who has continuously blessed my life and given me strength to endure law school. I thank Professor Aderson Francois, my faculty advisor, for opening my eyes to the quirky world of breast milk. I would also like to thank my family and friends, especially my parents, Nicholas and Ann Oparaeke, for their unwavering support.

INTRODUCTION

"Kudos to this Mama."

"[I]f Jessica and her friend are both okay with this arrangement why does anyone else care?"

"Nursing a friend's child, with their permission is a wonderful thing to do."

"I found this picture disturbing."

"OH GOOD GRIEF. What the HELL is wrong with people?!?!?!"

"If she was breastfeeding her friend's husband, I would understand the uproar."[1]

Late last summer, Jessica Colletti almost broke the Internet when she posted a photograph of herself breastfeeding not only her son, but her friend's son simultaneously.[2] After discovering that Charlie Interrante was unable to breastfeed her son and that her son did not react well to formula, Colletti volunteered to breastfeed Interrante's son.[3] This unconventional arrangement led to Colleti proudly posting the picture in honor of World Breastfeeding Week.[4] The photograph, posted on Facebook and Mama Bean (a parenting blog), depicted Colleti's 16-month-old son suckling Colletti's right breast and Interrante's 18-month-old son suckling Colletti's left breast.[5] The controversial photograph generated both criticism and praise on the Internet.[6]

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1. *Mama Bean – Unconditional Attachment*, FACEBOOK (Aug. 8, 2015), https://facebook.com/1432253050324038/photos/a.1432452276970782.1073741828.1432253050324038/1675897192626288/?type=1&p=10.

2. Bala Cynwyd, *Photo of Mom Breastfeeding Friend's Son Sparks Controversy*, 6 ABC ACTION NEWS (Aug. 12, 2015), http://6abc.com/family/photo-of-mom-breastfeeding-friends-son-sparks-controversy/923944/. Similarly, actress and producer Salma Hayek raised eyebrows when ABC News filmed her breastfeeding a sick infant in Sierra Leone. Sierra Leone has the highest infant mortality rate in the world because of the stigma attached to breastfeeding. There, tradition forbids having sexual relations with a breastfeeding woman. As a result, husbands encourage wives to stop breastfeeding quickly. Hayek decided to take a stance against the stigma by breastfeeding a hungry infant. The clip went viral and appeared in newspapers around the world. Latin Buzz, *Salem Hayek Breastfeeds African Baby*, YOUTUBE (Feb. 11, 2009), https://www.youtube.com/watch?v-2Spm9ocYUU. Breast milk comes with a wide array of folklore. For instance, many cultures believe semen will curdle or poison the breast milk. NAOMI BAUMSLAG & DIA L. MICHELS, MILK, MONEY, AND MADNESS 8 (1995).

3. Cynwyd, *supra* note 2.

4. *Photo of Pennsylvania Mother Breastfeeding Friend's Son Goes Viral*, FOX 25 (Aug. 12, 2015), http://okcfox.com/archive/photo-of-pennsylvania-mother-breastfeeding-friends-son-goes-viral.

5. *Id.*

6. *See, e.g.*, Rachelle Blinder, *Pa. Mom Breastfeeds Friend's Son, Promotes Milk Sharing*, DAILY NEWS (Aug. 12, 2015), http://www.nydailynews.com/life-style/pa-mom-breastfeeds-friend-

Supporters of cross-nursing and human breast milk sharing saw this gesture as compassionate and altruistic, but others perceived it as disturbing. Although infants have been fed from other mothers' breasts for centuries, in the modern United States, human breast milk sharing is taboo. Having the ability to afford a wet nurse once served as an elite social marker in ancient aristocratic societies and is still commonplace in developing countries.[7] Now in the United States, many people cringe at the thought of cross-nursing and breast milk sharing. Because of the prevalence of infant formula and human milk banks, most people do not see the need to exchange bodily fluids with a baby other than one's own. Despite this cultural stigma in the United States, women still seek human breast milk sold over the Internet.

Today, like other commodities, people turn to the Internet to buy human breast milk. A new market for human breast milk has recently emerged over the Internet with 55,000 postings in 2014.[8] Lactating mothers either donate or sell their excess milk on websites such as Eats on Feets, Human Milk 4 Human Babies, and Facebook.[9] Mothers who are unable to produce enough breast milk—or any at all—for their infants and individuals seeking human breast milk for other reasons are connected with these mothers to acquire the "liquid gold."[10]

The safer, more conventional route to obtain human breast milk is a milk bank, but milk banks only sell their high-priced human breast

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son-promotes-milk-sharing-article-1.2321578; Maria Coder, *Mother Who Breastfeeds Her Son and Her Friend's Toddler Tells People That What She's Doing is Completely Natural*, PEOPLE (Aug. 11, 2015), http://people.com/celebrity/jessica-colletti-sparks-online-debate-for-breastfeeding-her-friends-baby/; *New Yorkers Sound Off on Photo of Woman Breastfeeding Child Who Isn't Hers*, CBS NEW YORK (Aug. 12, 2015), http://newyork.cbslocal.com/2015/08/12/breastfeeding-others-children/.

7. Viv Groskop, *Not Your Mother's Milk*, THE GUARDIAN (Jan. 5, 2007), https://www.theguardian.com/society/2007/jan/05/health.medicineandhealth. HIV can be transferred through breast milk. This especially poses a problem in developing countries, such as many parts of Africa, where HIV testing is not prevalent, yet cross-nursing is widely accepted. *Id.*

8. JoNel Aleccia, *Breast Milk Sold Online Might Not Be Safe – or Pure – Study Says*, SEATTLE TIMES (Apr. 5, 2015), http://www.seattletimes.com/seattle-news/health/study-finds-breast-milk-for-sale-online-may-not-be-what-it-seems/; *see also* Nicholas Bakalar, *Breast Milk Donated or Sold Online Is Often Tainted, Study Says*, N.Y. TIMES (Oct. 21, 2013), http://www.nytimes.com/2013/10/21/health/breast-milk-donated-or-sold-online-is-often-tainted-study-says.html (growing from 13,000 Internet postings in 2011).

9. *See* Judy Dutton, *Liquid Gold: The Booming Market for Human Breast Milk*, WIRED (May 17, 2011), http://www.wired.com/2011/05/ff_milk/ (explaining the online market that facilitates the donation and sale of human breast milk).

10. *Id.*

milk to hospitals and children with a doctor's prescription.[11] Thus, buying and selling human breast milk over the Internet has developed into an emerging market. Individuals can obtain human breast milk over the Internet without a prescription at low or no cost at all. The market seems very appealing before one weighs the benefits against the health risks associated with the use of untested human breast milk.

The issue is that human breast milk obtained over the Internet may contain toxins, bacteria, or may be adulterated with water or cow's milk. This is especially troubling when the recipient is more than likely a vulnerable infant. It is impossible to know the composition of the milk without screening the donor and testing the milk. A study from the Center for Biobehavioral Health at the Research Institute found that one-third of the 500 new mothers surveyed do not consider the health of the women supplying the milk.[12] Mothers neglect the fact that medical history and daily habits affect the quality of human breast milk.[13] When buying milk over the Internet, it is impossible to assess the physical characteristics or health of a donor. The federal government generally regulates the donation of other bodily fluids that are comparable to human breast milk;[14] but the federal government does not regulate the sale of human breast milk.[15]

To protect the health of consumers, this Comment argues that the federal government should regulate human breast milk sold over the

11. Linda C. Fentiman, *Marketing Mothers' Milk: The Commodification of Breastfeeding and the New Markets for Breast Milk and Infant Formulas*, 10 NEV. L.J. 29, 67 (2010). Milk banks receive hand–delivered and shipped milk, which is processed then shipped to hospitals and individuals with prescriptions. *Id.* at 66 n.253.

12. Sarah A. Keim et al., *Breastmilk Sharing: Awareness and Participation Among Women in the Moms2Moms Study*, 9 BREASTFEEDING MEDICINE 398 (2014) [hereinafter Keim et al, *Breastmilk Sharing*]; *see also* David Samadi, *The Doctor Is in: Sharing Breast Milk May Be Murky*, DAILY NEWS (Aug. 11, 2015), http://www.nydailynews.com/life-style/health/doctor-sharing-breast-milk-murky-article-1.2321906. The survey asked 500 new mothers what they knew about breast milk sharing and if they have ever donated breast milk or used donated breast milk themselves. Shockingly, one-third of women don't consider the health of the woman providing the milk. Keim et al., *Breastmilk Sharing*, *supra*, at 401.

13. *See* Keim et al., *Breastmilk Sharing*, *supra* note 12. Mothers who feed their infants breast milk obtained from the Internet potentially expose their child to infectious diseases, drugs, and toxins. *Id.* Even an alcoholic drink may affect the quality of breast milk. While an "occasional celebratory single, small alcoholic drink is acceptable," alcohol is concentrated in breast milk and breastfeeding should be avoided for at least 2 hours after the drink. Am. Acad. of Pediatrics, *Breastfeeding and the Use of Human Milk*, 115 PEDIATRICS 496 (2005).

14. Regulation of Biological Products, 42 U.S.C. § 262 (2012). Many bodily fluids, such as semen and blood, tissues, and organs are highly regulated by government authorities. However, breast milk is considered a food; therefore, the buying and selling is legal. Dutton, *supra* note 9.

15. The FDA has not established guidelines or standards for human milk banks. U.S. FOOD & DRUG ADMIN., USE OF DONOR HUMAN MILK, http://www.fda.gov/ScienceResearch/SpecialTopics/PediatricTherapeuticsResearch/ucm235203.htm.

Internet. By adopting the voluntary guidelines developed by the Human Milk Banking Association of North America and approved by the U.S. Food and Drug Administration (FDA), the government would effectively mitigate the current risks associated with these transactions.[16] These guidelines would require mothers who wish to donate or sell their breast milk over the Internet to be screened. Additionally, the human breast milk would be tested according to guidelines and appropriate measures adopted for shipping and storage.

In addition to standardizing requirements for breast milk sold over the Internet and at milk banks, this Comment confronts several social issues contributing to risky purchases of breast milk over the Internet. Because the healthcare community and medical professionals stigmatize mothers who are unable to breastfeed, these mothers are pressured into finding breast milk over the Internet. The health benefits of human breast milk have been overemphasized and have caused mothers to go to extreme measures to obtain human breast milk for their infants. Furthermore, this has a disparate impact on African American[17] and lower socio-economic status mothers. Thus, the healthcare community should rely on credible evidence and supply mothers with reliable information to make an informed decision concerning their infant feeding choices.

Part I of this Comment discusses historical trends in breastfeeding and analyzes breastfeeding in ancient civilizations through 21st century United States as well as physicians' roles in such trends. Part II explains the increase in demand for human breast milk. Part III examines the current human milk market, including milk banks and unregulated online milk sharing communities. Part IV compares the sale and regulation of other regenerative products, such as blood, sperm, and oocytes, which the government does regulate, with the sale of human breast milk. Part V proposes that the federal government regulate human milk sold over the Internet and incentivize safer routes to obtain human breast milk.

16. Fentiman, *supra* note 11; HUMAN MILK BANKING ASSOCIATION OF NORTH AMERICA, www.hmbana.org.

17. When it comes to women's health issues, there is an intersectionality component that is not usually addressed. For a general overview of intersectionality, see Kimberle Crenshaw, *Demarginalizing the Intersection of Race and Sex: A Black Feminist Critique of Antidiscrimination Doctrine, Feminist Theory and Anitracist Politics*, 1989 CHI. L. FORUM 139 (1989).

I. BRIEF HISTORY OF BREASTFEEDING

Breast milk sharing has a long and varied history. Cultural ideas and industrialization have influenced the way mothers feed their infants.[18] Markets in human breast milk originally took the form of human services.[19] For most of history, wet nurses provided human breast milk to infants when a woman could not produce breast milk or died during childbirth.[20] Through a cultural shift, wet nursing went from an act of social cooperation to an occupation for lower-class women.[21] Women of elite classes in ancient Greece and western Europe[22] viewed breastfeeding as a menial job, so they employed wet nurses instead of breastfeeding their own children.[23] Similarly, American slaves frequently played the role of wet nurses for the children of white masters.[24] Lactating slaves were forced to stop nursing their own infants in order to care for and nurse white children.[25] For a period of nearly two years, masters demanded early weaning of slave children to employ slave mothers to breastfeed white children.[26] Female slaves were required to give their masters' children care and attention at the expense of their children.[27] The legacy of slaves as their masters' wet nurses and the institution of "mammies" may have contributed to the discomfort that some African American mothers have with breastfeeding to this day.[28] Wet nursing, which was once com-

18. Fentiman, *supra* note 11, at 53.

19. *Id.* Wet nursing became a well–organized profession until bottle feeding was introduced in the 19th century. The profession was regulated by laws and contracts that detailed the duration of services, supplies, and payment. Emily E. Stevens et al., *A History of Infant Feeding*, 18 J. PERINAT. EDUC. 32 (2009).

20. Fentiman, *supra* note 11.

21. *See* Samuel Curry, *"One of Our Greatest Investments": Breastfeeding in the Early 20th Century United States*, GRINNELL COLLEGE (May 25, 2016), http://lewiscar.sites.grinnell.edu/HistoryofMedicine/uncategorized/one-of-our-greatest-investments-breastfeeding-in-the-early-20th-century-united-states/; Claude Fischer, *Breastfeeding History*, BERKELEYBLOG (Sept. 28. 2011), http://blogs.berkeley.edu/2011/09/28/breastfeeding-history/.

22. Lawmakers in Renaissance France required wet nurses to be registered at an employment bureau and undergo a medical examination. Stevens et al., *supra* note 19.

23. Fentiman, *supra* note 11.

24. *Id.* at 53.

25. A Negro Nurse, *More Slavery at the South*, U.N.C.: DOCUMENTS THE AM. SE., http://docsouth.unc.edu/fpn/negnurse/negnurse.html (last visited Mar. 22, 2017).

26. Emily West & R.J. Knight, *Mothers' Milk: Slavery, Wet-Nursing, and Black and White Women in the Antebellum South*, 83 J. S. HIST. 37, 43 (2017).

27. *Id.*

28. Fentiman, *supra* note 11, at 53. Breastfeeding to African American women is frequently marked by this country's cultural legacy of slavery and race hatred. Historically, the bodies of African American women were not only forced to wet nurse their masters' white children, but also seen as animalistic and primitive. Joan B. Wolf, *Is Breast Really Best? Risk and Total Moth-*

mon in numerous cultures and time periods, has fallen out of common place and become an archaic practice in the United States.[29]

Trends in breastfeeding have changed over the years in the United States, with physicians playing a large role in encouraging and discouraging certain methods of infant feeding. Until the pasteurization of cow's milk in the nineteenth century, almost all infants were breastfed for survival.[30] Infants that were fed unpasteurized and often adulterated cow's milk died at a rate of fifteen times higher than breastfed infants.[31] During this time, physicians urged women to breastfeed, as it was the healthiest choice for their infants.[32] By the early twentieth century, many women did not breastfeed for reasons attributed to personal convenience or economic necessity.[33] Eventually, physicians advised that formula was comparable to human breast milk and promoted it as an alternative.[34] Formula use, in conjunction with the invention of the rubber nipple, began to rise with middle and upper class women most likely to bottle feed.[35] During the middle of the twentieth century, breastfeeding rates sharply declined.[36] The official policy of the American Academy of Pediatrics (AAP) provided that breastfeeding was the preferred method, but physicians often took the opposite position. The difference in opinion is attributed to the influence of infant formula "detail men" who marketed infant formula to physicians during office visits and paid vacations.[37] These manufacturers' representatives praised the advantages of their particular formula brand.[38] Physicians were misinformed and lacked knowl-

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erhood in the National Breastfeeding Awareness Campaign, 32 J. HEALTH POL. POL'Y & L. 595, 621 (2007).

29. Dr. Rhonda Shaw, a researcher on contemporary cross-nursing practices, attributes culture as the explanation for Western objection to cross-nursing. Shaw states:

> The exchange of body fluids between different women and children, and the exposure of intimate bodily parts make some people uncomfortable. The hidden subtext of these debates has to do with perceptions of moral decency. Cultures with breast fetishes tend to conflate the sexual and erotic breast with the functional and lactating breast.

Groskop, *supra* note 7.

30. Fentiman, *supra* note 11, at 36.

31. *Id.* Infants died from dehydration, diarrhea, and other illnesses caused by tainted cow's milk. *Id.* at 36 n.35.

32. *Id.* at 36.

33. *Id.* By this time, breastfeeding became infeasible for many mothers who were expected to work to support their families. *See id.* at 36 n.35.

34. *Id.* at 36–37. Unlike their predecessors, by the 1930s, doctors depreciated human milk as "nothing . . . sacred." Jacqueline H. Wolf, *Low Breastfeeding Rates and Pubic Health in the United States*, 93 AM. J. PUB. HEALTH 2000, 2004 (2003) [hereinafter Wolf, *Breastfeeding Rates*].

35. Fentiman, *supra* note 11, at 37.

36. *Id.*

37. *Id.*

38. *Id.*

edge about breastfeeding because their views were often clouded by the influential detail men.[39]

Breastfeeding rates dropped significantly with the promotion and availability of formula in the middle of the twentieth century.[40] Bottle feeding appealed to "modern" women who wished to return to the workforce.[41] As a result of this drop, "by 1971 only 21% of American infants were breastfed when they were discharged from the hospital, and only 6% were breastfeeding five to six months later."[42] Breastfeeding returned in the 1970s when pediatricians and child-rearing experts introduced the new paradigm of the mother-child relationship that was facilitated by the bonding built from physical closeness.[43] Proponents of child-mother bonding helped resurge breastfeeding in the late 1970s and early 1980s. This resurgence was followed by a sharp decline until the end of the twentieth century.[44] Once again, physicians relied on weak and misinformed science to promote breastfeeding with this new idea of bonding.[45] Breastfeeding rates have now plateaued since 1999.[46] Most mothers take cues as to infant feeding from pediatricians and the government recommendations. Because of this influence, pediatricians have a heightened responsibility to provide reliable information.

II. WHY DEMAND FOR HUMAN BREAST MILK OVER THE INTERNET IS INCREASING

A. The Government's Role in the Demand for Human Breast Milk

To promote breastfeeding among first-time parents, the U.S. Department of Health and Human Services ran a national breastfeeding campaign commercial which showed a pregnant woman being thrown

39. *Id.* The influence of physicians from 1930 to the 1970s encouraged mothers to supplement their breast milk with cow's milk and wean infants earlier. Wolf *Breastfeeding Rates*, *supra* note 34.

40. Fentiman, *supra* note 11, at 37–38.

41. *Id.* at 37.

42. *Id.* at 38.

43. *Id.* Bonding is the connection between mother and infant during the post-birth period. Advocates announced that bonding was necessary to avoid child abuse, and breastfeeding was one way to build the requisite physical closeness between mother and infant. *Id.*

44. *Id.*

45. *Id.*

46. *Id.* "Among infants born in 2013, 4 out of 5 (81.1%) started to breastfeed, over half (51.8%) were breastfeeding at 6 months, and almost one third (30.7%) were breastfeeding at 12 months." BREASTFEEDING REPORT CARD, CTR. FOR DISEASE CONTROL & PREVENTION 2 (2016), https://www.cdc.gov/breastfeeding/pdf/2016breastfeedingreportcard.pdf.

off of a mechanical bull.[47] The commercial declared, "[y]ou wouldn't take risks before your baby's born. Why start after?"[48] This thirty-second television commercial, along with other governmental breastfeeding campaign advertisements, attempted to elicit fear of disaster if a mother chose not to breastfeed.[49] Instead of providing credible information for a mother to make an informed decision on infant feeding, the government has used scare tactics, which prompts mothers to seek human breast milk by any means necessary.

The U.S. Surgeon General,[50] the American Academy of Pediatrics,[51] the Department of Health and Human Services' breastfeeding awareness campaign,[52] Michelle Obama, pediatricians, OBGYNs, and lactation consultants are all telling American mothers that "breast is best."[53] Recommenders of breastfeeding contend that human breast milk provides infants with nutrients that benefit an infant from per-

47. *National Breastfeeding Campaign "Ladies Night" Spot*, OFFICE OF WOMEN'S HEALTH, U.S. DEP'T OF HEALTH & HUM. SERVS., [hereinafter *"Ladies Night"* video]; http://www.wh.palladiantest.com/breastfeeding/government-in-action/CNBA4230-E01NY.mpg (last visited Feb. 2, 2017); *see also* Roni Rabin, *Breast-Feed or Else*, N.Y. TIMES (June 13, 2006), http://www.nytimes.com/2006/06/13/health/13brea.html?pagewanted=1&_r=1. In the early 20th century, the government implemented similar scare tactics to encourage mothers to breastfeed. Posters were hung in urban neighborhoods, with one declaring "[t]o lessen baby deaths let us have more mother-fed babies. You can't improve on God's plan. For your baby's sake—nurse it!" Wolf, *Breastfeeding Rates*, *supra* note 34, 2000 (2003).

48. *"Ladies Night"* video, *supra* note 47.

49. For example, in 2003, the U.S. Department of Health and Human Services initiated an advertising campaign that featured photos of insulin syringes and asthma inhalers topped with rubber nipples. This campaign was aimed to convince mothers that if they did not breastfeed, their babies faced health risks. Marc Kaufman & Christopher Lee, *HHS Toned Down Breast-Feeding Ads*, WASH. POST (Aug. 31, 2007), http://www.washingtonpost.com/wp-dyn/content/article/2007/08/30/AR2007083002198.html?hpid=topnews.

50. The U.S. Department of Health and Human Services issued The Surgeon General's Call to Action to Support Breastfeeding, which urges clinicians, employers, communities, researchers, and government leaders to enable mothers to breastfeed. U.S. DEP'T OF HEALTH & HUM. SERVS., THE SURGEON GENERAL'S CALL TO ACTION TO SUPPORT BREASTFEEDING (2011), https://www.surgeongeneral.gov/library/calls/breastfeeding/calltoactiontosupportbreastfeeding.pdf.

51. The American Academy of Pediatrics published a policy statement in regards to breastfeeding as a public health issue. American Academy of Pediatrics, *Policy Statement: Breastfeeding and the Use of Human Milk*, 129 PEDIATRICS e827 (2012), [hereinafter *Policy Statement*], http://pediatrics.aappublications.org/content/129/3/e827.

52. The U.S. Department of Health and Human Services' *Healthy People 2020* declared breastfeeding a national priority to improve the wellbeing for all Americans. *Maternal, Infant, and Child Health*, HEALTHY PEOPLE 2020, https://www.healthypeople.gov/2020/topics-objectives/topic/maternal-infant-and-child-health (last visited Mar. 22, 2017).

53. Toby Harnden & Liza Meckler, *Michelle Obama Urges Women to Breastfed*, TELEGRAPH (Feb. 15, 2011), http://www.telegraph.co.uk/news/worldnews/michelle-obama/8326566/Michelle-Obama-urges-women-to-breastfeed.html; Amy Joyce, *Breast Milk at Any Cost?*, WASH. POST (Oct. 22, 2013), https://www.washingtonpost.com/lifestyle/on-parenting/breast-milk-at-any-cost/2013/10/22/561c5d04-3a80-11e3-b7ba-503fb5822c3e_story.html; *see also* Cynthia G. Colen & David M. Ramey, *Is Breast Truly Best? Estimating the Effect of Breastfeeding on Long-Term*

inatal to childhood and possibly into adulthood.[54] Studies have shown that the enzymes, hormones, growth factors, and immunologic substances help defend against infectious agents in breastfed infants.[55] But it must also be stated that "breastfed infants are significantly more likely to be white, be born into families with above average incomes, have parents with advanced educational attainment, maintain easier access to health care services, and live in safer neighborhoods with lower levels of environmental toxins."[56] Research that supports the health benefits of breast milk rarely account for the socioeconomic differences between mothers who breastfeed and those who bottle feed. Thus, comparing bottle fed and breastfed infants is problematic and an incomplete picture.

According to the World Health Organization (WHO), a strong advocate of breastfeeding, breast milk is the ideal food for the growth and development of infants.[57] As such, the organization says that "infants should be exclusively breastfed for the first six months of life to achieve optimal growth, development, and health."[58] The organization also boasts that human breast milk cannot be duplicated by any other form of feeding[59] because breastfeeding is the "biological norm."[60] If breastfeeding is not feasible, WHO recommends employing a healthy wet nurse.[61] Additionally, in 2012, AAP, the leader in a push toward increased breastfeeding, issued a policy statement that summarized research in support of breastfeeding.[62] The AAP recommends breast milk as the best nutrition for infants because it helps infants' resist illnesses, it is easier to digest than formula, it may raise a child's intelligence, and breast milk reduces the risk of sudden infant death syndrome.[63]

In 1990, the United States signed the Innocenti Declaration, which committed the federal government to create a national strategy

Child Wellbeing in the United States Using Sibling Comparisons, 109 SOC. SCI. MED. 55 (Jan. 29, 2014).

54. Colen & Ramey, *supra* note 53, at 55.

55. *Id.*

56. *Id.*

57. *The World Health Organization's Infant Feeding Recommendation*, WORLD HEALTH ORG., [hereinafter *Feeding Recommendation*] http://www.who.int/nutrition/topics/infantfeeding_recommendation/en/ (last visited Feb. 3, 2016).

58. *Id.*

59. *Id.*

60. Rabin, *supra* note 47.

61. *Feeding Recommendation*, *supra* note 57.

62. *Policy Statement*, *supra* note 51, at e827.

63. *Id.*; *see also* Colen & Ramey, *supra* note 53, at 55.

to increase breastfeeding.[64] In an effort to improve the health of Americans, HHS, during the Clinton administration, focused on: assuring access to comprehensive, current, and culturally appropriate lactation care and services for all women, children, and families; "ensuring that breastfeeding is recognized as the normal and preferred method of feeding infants and young children; ensuring that all federal, state, and local laws recognize and support the importance and practice of breastfeeding; and increasing protection, promotion and support for breastfeeding mothers in the work force."[65] During the Bush administration, HHS shifted its focus to "ensure that breastfeeding is recognized as the normal and preferred method of feeding."[66]

The government-led public health campaign encourages mothers to breastfeed for the first six months to protect their infants from colds, the flu, ear infection, diarrhea, and obesity.[67] The government's stance is clear: not breastfeeding is risky.[68] Suzanne Haynes, a senior scientific adviser to the Office of Women's Health in the Department of Health and Human Services, remarked that, "[j]ust like it's risky to smoke during pregnancy, it's risky not to breast-feed after" pregnancy.[69] Additionally, Senator Tom Harkin proposed affixing warning labels to cans of infant formula and in advertisements, similar to the ones found on cigarettes.[70] He proposed that the labels would either read "breast-feeding is the ideal method of feeding and nurturing infants" or "breast milk is more beneficial to infants than infant formula."[71] The government's message has increased women's desperate desire to breastfeed or obtain human breast milk for their infants.

The goal of a government health initiative entitled "Healthy People 2010" was to get half of all new mothers to continue breastfeeding

64. INNOCENTI DECLARATION, UNICEF (1990), http://www.who.int/about/agenda/health_development/events/innocenti_declaration_1990.pdf (promoting breastfeeding through governmental initiatives); *see also* Fentiman, *supra* note 11, at 40–41.

65. U.S. DEP'T OF HEALTH & HUM. SERV., BREASTFEEDING IN THE UNITED STATES: A NATIONAL AGENDA 17 (2001) [hereinafter A NATIONAL AGENDA], www.usbreastfeeding.org/d/do/494; *see also* Fentiman, *supra* note 11, at 41 (explaining the government's view of breastfeeding during the Clinton administration).

66. A NATIONAL AGENDA, *supra* note 65, at 11; *see also* Fentiman, *supra* note 11, at 41–42 (explaining the government's view of breastfeeding during the Bush administration).

67. Rabin, *supra* note 47.

68. *Id.*

69. *Id.*

70. *Id.*

71. *Id.*

for six months.[72] By 2011, most of the goals were met or exceeded.[73] The American Academy of Pediatrics (AAP) proclaims that breast milk is "uniquely superior for infant feeding."[74] The International Formula Council also states that breast milk is the preferred method of feeding and "offers specific child and maternal health benefits."[75] Dr. Haynes from the Department of Health and Human Services said, "[o]ur message is that breast milk is the gold standard, and anything less than that is inferior."[76] She added, "[f]ormula is not the gold standard. It's so far from it, it's not even close."[77] Campaigns such as these have taken it way too far. Instead of depending on credible information, mothers are being pressured into feeding their infants human breast milk. Critics of such campaigns say that mothers who cannot breastfeed or choose not to will feel guilty and inadequate.[78] The claim that breast milk offers many health benefits has pushed parents to obtain milk by any means, including over the Internet, even if it will endanger their child.[79]

Societal pressure placed on mothers to breastfeed their infants may in turn harm their children.[80] Women who are unable to breastfeed feel ashamed that they are unable to give their children the "best." Mothers who do not feed their infants breast milk are portrayed as harming their children and not giving their child the best opportunity to thrive. The governmental push portrays mothers who do not breastfeed, mostly poor and African American, as bad parents and irresponsible citizens.[81] For example, the Special Supplemental Nutrition Program for Women, Infants, and Children (WIC) offers women who breastfeed eligibility for twice as long as women who do

72. U.S. Dep't of Health and Human Servs., Ctr. for Disease Control and Prevention & nat'l Ctr. for Health Statistics, Healthy People 2010 Final Review (2012), https://www.cdc.gov/nchs/data/hpdata2010/hp2010_final_review.pdf.

73. *Id.* Objectives included increasing the proportion of mothers who breastfed their infants ever, at six months, at one year, through three months, and through 6 months. *Id.*

74. Am. Acad. of Pediatrics, *supra* note 13, at 496 (2005).

75. Rabin, *supra* note 47.

76. *Id.*

77. *Id.*

78. *Id.* After being unable to produce enough milk for her two infants, Karen Petrone shared the same sentiment many mothers in that predicament feel. She stated, "I felt so guilty . . . I thought I was doing something wrong." *Id.*

79. Joyce, *supra* note 53.

80. *Id.* (stating that "uber-motherhood . . . has helped make breastfeeding a competitive sport").

81. Courtney Jung, *Overselling Breast-Feeding*, N.Y. Times (Oct. 16, 2015), http://www.nytimes.com/2015/10/18/opinion/sunday/overselling-breast-feeding.html.

not breastfeed.[82] Infants that are fed formula are eligible only for infant cereal and fruit and vegetable based infant food, but breastfed babies receive meat-based baby food.[83] This is supposed to encourage poor mothers to breastfeed, but it may be crossing the line from supporting a woman's decision into coercing a woman's decision.[84]

B. Obstacles to Breastfeeding

Breast milk has earned the title of "liquid gold."[85] The market for human breast milk is long existing[86] but recently exploding.[87] The market is not only for mothers seeking the nutrition of breast milk to nourish their infant, but also individuals with alternative purposes.[88]

Women with adopted infants or who cannot breastfeed must turn to alternatives in order to obtain human breast milk. Many mothers opt for human breast milk because of the many health benefits it purports to provide to infants. But many mothers who wish to breastfeed face obstacles to breastfeeding or obtaining human breast milk. These obstacles have served as an impetus to the emergence of the human milk market over the Internet. Mothers faced with these obstacles often look to other alternatives to satisfy their desires for human breast milk. Buying human breast milk over the Internet may seem like a practical option for mothers who want to feed their infants with breast milk, but it may come at the expense of their infant's safety.

Breastfeeding may be less likely or impossible for women with medical concerns. Mothers with diseases, such as HIV and active tuberculosis, are encouraged not to breastfeed in order to prevent transmitting such diseases to the infant.[89] Women undergoing chemotherapy, radiation, or using drugs or alcohol are advised to refrain from breastfeeding because toxic chemicals that the mother has been exposed to is contained in breast milk.[90] Additionally, mothers

82. *Id.* Additionally, WIC serves more than fifty percent of the infants born in the United States each year. *Id.*

83. *Id.*

84. *Id.* The article opines that "withholding food from mothers at nutritional risk, and from their babies, seems more like punishment." *Id.*

85. *See* Dutton, *supra* note 9.

86. Fentiman, *supra* note 11, at 36.

87. Sandee LaMotte, *With Breast Milk Online, It's Buyer Beware*, CNN (Apr. 14, 2015, 9:21 AM), http://www.cnn.com/2015/04/14/health/breast-milk-online-dangers/.

88. *See infra* Part II.C.

89. Am. Acad. of Pediatrics, *supra* note 13, at 497. Although the AAP believes breastfeeding is optimal for infants, there are a few situations in which the academy warns against it. *Id.*

90. *Id.*

who have undergone breast reduction or enhancement surgery find it difficult to produce a sufficient milk supply.[91] Women who have had surgery on their breast are three times more likely to have lactation insufficiency in comparison to women who have not had surgery on their breast, but these women are often not told this information.[92] Tragically, Tabitha Walrond had to learn this on her own. Walrond, who had undergone breast-reduction surgery, was prosecuted for murder after her two-month old child died due to malnutrition and dehydration.[93] Walrond's insufficient milk supply eventually led to her conviction of criminally negligent homicide that carried a sentence of five years' probation.[94]

To breastfeed, many mothers would have to work less hours outside the home, have flexibility within their job, or rely on a partner to make up for the loss of income.[95] This may be especially unattainable for poor or minority women who face difficulty finding steady, full-time employment, have few to no benefits, lower salaries on average, and a greater likelihood to face single parenthood.[96]

Breastfeeding is an unrealistic expectation for many mothers. For instance, mothers who have resumed work may have difficulty breastfeeding.[97] Maternity leaves are typically short and few employers provide breastfeeding support.[98] Though more than sixty percent of mothers with young children work, federal law only requires companies to provide twelve weeks unpaid maternity leave without a lactation leave requirement.[99] In the United States, the average mother takes only ten weeks maternity leave and nearly thirty percent of

91. Fentiman, *supra* note 11, at 50.

92. *Id.* at 50 n.132.

93. *Id.* at 50. Tabitha Walrond's attorney argued that Walrond was unaware that her surgically reduced breast produced an insufficient supply of milk. Additionally, she was misguided by her mother and rejected by the health care system because her son did not have a Medicaid card. Nina Bernstein, *Mother Convicted in Infant's Starvation Death Gets 5 Years' Probation*, N.Y. TIMES (Sept. 9, 1999), http://www.nytimes.com/1999/09/09/nyregion/mother-convicted-in-infant-s-starvation-death-gets-5-years-probation.html.

94. *See* Bernstein, *supra* note 93 (noting that the judge and prosecutors received over 900 letters from around the world in support of Walrond. Many mothers said they almost let their infant starve to death with the best of intention); Fentiman, *supra* note 11, at 50.

95. *See generally* Fentiman, *supra* note 11, at 56–57.

96. *See id*. at 57.

97. *Id*. at 56.

98. *See id.* at 56–57; *see also* Joan Ortiz et al., *Duration of Breast Milk Expression Among Working Mothers Enrolled in an Employer-Sponsored Lactation Program*, 30 PEDIATRICS NURSING 111 (2004) (citing reviews of 462 women employed by five corporations revealed that the mean postnatal maternity leave was 2.8 months).

99. Rabin, *supra* note 47 (noting The Family and Medical Leave Act of 1993 permits employees up to 12 weeks for the birth of a child or to care for a child).

mothers do not take maternity leave at all.[100] In order to maintain a milk supply at work, a woman must have the ability to pump at work.[101] There is currently no federal statute that requires employers to accommodate women who wish to pump after returning to work.[102] Only one-third of all large companies provide a private area where women can pump breast milk during the workday and only seven percent offer on-site or near-site child care.[103]

Mothers at higher paying jobs are more likely to have the flexibility and privacy to pump while at work.[104] For instance, Starbucks' corporate headquarters has a "Lactation Room" with company-supplied pumps, recliners, and magazines to provide new mothers the opportunity to continue breastfeeding after resuming work.[105] Conversely, mothers at lower paying jobs are less likely to have the space or time to pump while at work.[106] The impossibility of pumping at work leads many women to decline to breastfeed or quit breastfeeding shortly after returning to work.[107] Women who work salaried jobs are more likely to continue to breastfeed, but more than sixty percent of American women receive hourly wages or are employed in minimum wage jobs.[108] Mothers that desire to feed their infants human breast milk, but who are unable to pump at work, may seek human milk on the Internet.

Another reason mothers may choose to purchase human breast milk over the Internet is the stigma attached to breastfeeding in public. Many question the appropriateness of breastfeeding in public, and women who chose to nurse in public places often find themselves being harassed and even arrested.[109] In an extraordinary example, a woman was arrested for breastfeeding her infant at Wal-Mart.[110] Mary Lambert briefly breastfed her newborn infant in the back of Wal-Mart

100. Jung, *supra* note 81.

101. Fentiman, *supra* note 11, at 57.

102. *Id.* at 58.

103. Rabin, *supra* note 47.

104. Fentiman, *supra* note 11, at 57.

105. Jodi Kantor, *On the Job, Nursing Mothers Find a 2-Class System*, N.Y. TIMES (Sept. 1, 2006), http://www.nytimes.com/2006/09/01/health/01nurse.html?_r=0.

106. *Id.* (stating that a former cashier, Jennifer Munoz, often pumped her breast milk into the toilet in order to maintain a milk supply after returning to work).

107. *Id.*

108. Fentiman, *supra* note 11, at 57.

109. *Id*. at 56.

110. *See* A. Michael Smith, *Woman Arrested for Breastfeeding at Wal-Mart*, EMPIRE NEWS (Aug. 7, 2014), http://empirenews.net/woman-arrested-for-breastfeeding-at-wal-mart/.

before finishing her purchases and leaving.[111] Even though no customers witnessed Lambert's actions, a Wal-Mart employee, monitoring the activities from the store's security room, believed it was necessary to inform the police of what he labeled "lewd behavior."[112] The police tracked Lambert to her home through her credit card receipt and took her and her infant into custody for the night.[113] Lambert faced public humiliation, and she now has a misdemeanor charge on her record for public indecency.[114] Lambert's situation is an extreme case, but many other women have faced public humiliation and legal action as a result of breastfeeding on public transportation and other public venues.[115]

Breastfeeding has been characterized as both good and disgusting. Americans' split personality about breastfeeding was recently exemplified in a Newsweek article, which observed that two out of three Americans believe breast milk is the best way to feed an infant, but one in four people expressed a feeling of discomfort when seeing a woman engaged in breastfeeding.[116] Not surprisingly, 48% of women are uncomfortable nursing their own baby in a park, store, or mall.[117] Breasts are scandalous and their sexual aspects underlie the objection to breastfeeding in public.[118] American culture champions breast milk as the best food for infants, yet cultural norms discourage women from breastfeeding.

Insufficient education on breastfeeding presents another obstacle to breastfeeding, and this generally and disparately impacts African American women. African American women are less likely to utilize traditional healthcare services, and as such, they are unlikely to get a formal breastfeeding education.[119] Additionally, hospitals that serve black communities are failing to support breastfeeding.[120] The U.S.

111. *Id.*
112. *Id*.
113. *Id*.
114. *Id.*
115. For example, in 2006, a mother was ejected from an airplane for breastfeeding her baby. *See* Geoff Elliot, *Mums Begin 'Lactivism' After Airline Bans Breastfeeding*, AUSTRALIAN (Nov. 23, 2006), http://www.theaustralian.com.au/news/world/mums-begin-lactivism-after-airline-bans-breastfeeding/story-e6frg6so-1111112569722.
116. Karen Springen, *Indecent Exposure?*, NEWSWEEK (June 11, 2007), at 1.
117. *Id.*
118. Fentiman, *supra* note 11, at 56.
119. Magazine Monitor, *Who, What, Why: Why Do African American Women Breastfeed Less?*, BBC (June 10, 2014), http://www.bbc.com/news/blogs-magazine-monitor–27744391. Because African American women are less likely to breastfeed, African American women are less likely to have a sister, friend, or mother who can offer their experience and advice. *Id.*
120. *Id.*

Center for Disease Control and Prevention found that hospitals in area codes with more than 12.2% of black residences were less likely than hospitals in area codes with fewer black residences to meet factors attributed to supporting breastfeeding.[121]

Despite the numerous obstacles to breastfeeding, mothers who cannot breastfeed for a number of valid reasons are often stigmatized. These obstacles help to explain the growing demand for human breast milk. These obstacles are often interlinked and play a significant role in a mother's decision to seek human breast milk over the Internet.

C. Alternative Uses and Demands for Breast Milk

Alternatively, individuals aside from mothers may wish to buy human breast milk. Human breast milk is the favorite new supplement for bodybuilders who claim that drinking breast milk promotes health and serves as a muscle-building supplement.[122] Additionally, individuals seek out breast milk for breast milk fetishes. A couple featured on TLC's "Strange Sex" series explained the husband's sexual desire for his wife's breast milk.[123] The husband gets sexually aroused by drinking his wife's breast milk and adds his wife's breast milk to his coffee and breakfast cereal.[124]

A simple Google search will reveal the many uses of breast milk. For those that are not fortunate to have a supply on demand, they may turn to the Internet. The antibodies found in human breast milk have been said to work as an ear and eye treatment; consumption of human breast milk or gargling with breast milk can soothe a sore throat; breast milk has healing components that soothe burning, itching, and stinging; breast milk is an acne and skin disorder treatment;

121. *Id.* Policies and practices that support breastfeeding include: staff competency assessments; prenatal breastfeeding education; early initiation to breastfeeding; teaching breastfeeding techniques; limited use of supplements; rooming-in; teaching feeding cues to limit the use of pacifiers; and post-discharge support. *Hospital Support for Breastfeeding*, CTR. FOR DISEASE CONTROL & PREVENTION, https://www.cdc.gov/vitalsigns/breastfeeding/ (last visited Feb. 28, 2016).

122. Michael Easter, *Bodybuilders Are Drinking Human Breast Milk. Are They Insane, or Super Insane?*, MEN'S HEALTH (Feb. 19, 2015), http://www.menshealth.com/fitness/human-breast-milk-and-bodybuilding.

123. Susan Donaldson James, *Man Who Sucks Wife's Breast Milk Claims ED Benefits*, ABC NEWS (July 11, 2010), http://abcnews.go.com/Health/breast-feeding-man-fetish-suckles-baby-milk-wife/story?id=16753422.

124. *Id.*

and breast milk can be used as a substitute for cow's milk in cooking.[125] Thus, the uses for breast milk are vast.

The high prevalence of human breast milk consumption by both adults and infants obtained over the Internet is a cause for concern. Human breast milk bought over the Internet is being used to nourish infants, cook, and treat minor ailments. The use of human breast milk will continue to grow and the market will expand. If the human breast milk being bought and sold over the Internet is adulterated, many are at risk of harm, including infants who are the most vulnerable.

It is easy to see why the buying and selling of human breast milk over the Internet is becoming more prevalent. Human milk bought over the Internet is less financially burdensome and easily accessible. Infants without prescriptions and individuals who choose to use breast milk for other means have access to breast milk on the Internet as opposed to milk banks that only service hospitals and critically ill infants with a prescription.

D. Breast May Not Be Best

The benefits of breastfeeding have been overstated because studies are generally based on biased evidence. For example, a study conducted in the 1980s compared children who were breastfed for less than three months and more than six months.[126] The study showed that children who nursed for longer than six months scored 7 points higher on an IQ test.[127] But the incomplete story did not show that women who breastfed longer were richer, more educated, and had higher IQ scores.[128] Once these variables were adjusted for, the effects of nursing were much smaller.[129] A more recent study found no significant difference between children who breastfed and those given formula.[130] The study measured factors previously attributed to breastfeeding: body mass index, obesity, asthma, hyperactivity, parental attachment, behavioral compliance, reading comprehension, vocabulary recognition, math ability, memory based intelligence, and

125. Lizette Borreli, *6 Surprising Natural Uses for Breast Milk*, MED. DAILY (July 8, 2013), http://www.medicaldaily.com/6-surprising-natural-uses-breast-milk-247460.

126. N K Angelsen et al., *Breast Feeding and Cognitive Development at Age 1 and 5 Years*, 85 ARCHIVES OF DISEASE IN CHILDHOOD 183, 183 (2001).

127. *Id.* at 183; Emily Oster, *Everybody Calm Down About Breastfeeding*, FIVETHIRTY EIGHT (May 20, 2015), http://fivethirtyeight.com/features/everybody-calm-down-about-breast feeding/.

128. Angelsen et al., *supra* note 126, at 183; Oster, *supra* note 127.

129. Angelsen et al., *supra* note 126, at 183; Oster, *supra* note 127.

130. Colen & Ramey, *supra* note 53, at 56.

scholastic competence.[131] When the researchers looked at the data across all families, breastfed children had better outcomes in BMI, hyperactivity, math skills, reading recognition, vocabulary word identification, digit recollection, scholastic competence, and obesity.[132] When the researchers looked at siblings who were fed differently, a different picture emerged.[133] The benefits were not significantly different.[134]

Studies have shown that the average breastfed babies are healthier than formula-fed babies, but correlation is not the same as causation.[135] Mothers with higher levels of education, higher income, and more flexible daily schedules are more likely to breastfeed.[136] Ninety-one percent of the women in the top income quintile and eighty-one percent of white women breastfed.[137] Breastfeeding is a lifestyle choice that is most common in white middle and upper class mothers.[138] Better health of breastfed babies has more to do with the mother than the breast milk itself.[139] Thus, it is more important to look within families, as opposed to across families. Factors, such as child care, maternity leave, school quality, housing, and employment affect a child's long term outlook.[140]

A randomized study from Belarus studied the difference in the development of children based on breastfeeding.[141] The study was conducted among 17,000 mother-infant pairs for eighteen months.[142] The evidence showed that breastfeeding may slightly decrease an infant's chance of diarrhea and eczema, but it did not change the rates of colds, ear infections, or death.[143] The study found no significant

131. *Id.*
132. *Id.*
133. *Id.*
134. *Id.*
135. Joan Wolf, *Is Breast Really Best? Are the Benefits of Breastfeeding Exaggerated?*, BABBLE, http://www.babble.com/baby/benefits-of-breastfeeding-baby-formula-feeding/ (last visited Feb. 10, 2017).
136. Alexandra Sifferlin, *Breast-Feeding Benefits Overstated?*, CNN (Feb. 28, 2014), http://www.cnn.com/2014/02/28/health/time–breastfeeding/. "[M]others who completed some high school, were high school graduates, or attended some college were 64%, 60% and 39%, respectively, less likely to initiate breastfeeding than mothers who graduated from college." Colen & Ramey, *supra* note 53, at 55.
137. Jung, *supra* note 81.
138. *Id.*
139. Wolf, *supra* note 135.
140. Sifferlin, *supra* note 136.
141. Michael S. Kramer et al., *Promotion of Breastfeeding Intervention Trial (PROBIT)*, 285 JAMA 413, 413 (2001); Oster, *supra* note 127.
142. Jung, *supra* note 81; Kramer et al., *supra* note 141, at 413.
143. Kramer et al., *supra* note 141, at 413; Oster, *supra* note 127.

reduction in allergies and asthma, cavities, height, blood pressure, weight, and various measures of obesity.[144] There was also no evidence to support the impact on behavioral issues, emotional problems, peer issues, hyperactivity, or maternal-child connection.[145] These results were also present in sibling studies.

The most fundamental flaw is the causality. The decision to breastfeed may reflect a combination of factors that lead to better health outcomes rather than the breast milk itself. Also, the data fails to explain whether it is breast milk or the act of breastfeeding that provides the benefits that are claimed. Some benefits may be closely related to the close physical proximity of breastfeeding. Close bodily contact and attention can be provided by feeding an infant with formula. The fact of the matter is that the evidence used to support the HHS campaign, the Academy, and the press is much weaker than acknowledged. There are many flaws in the studies that support the belief that breast milk reduces childhood illnesses and death. There is no biological mechanism to explain how this results.

Many pediatricians insist that breast milk is superior to formula for premature and low weight infants. This assertion increases the pressure on the market to provide more human breast milk. The WIC program was launched to provide assistance to poor nursing mothers and children.[146] Now, it enrolls almost half of the infants in America and pays for more than half of all formula sold in the United States.[147] Women who participate in WIC are far less likely to breastfeed than non-WIC women.[148] The gap reflects that poor women participate in WIC and are less likely to breastfeed.[149]

Studies have suggested that in comparison to bottle fed infants, breastfed infants are less likely to be obese, develop asthma, and be diagnosed with autoimmune diseases, including Type I diabetes and cancer. But evaluations of these findings appear to be less conclusive. Although the government and health community proclaim an exhaustive list of health benefits from human breast milk, an Ohio State Uni-

144. Jung, *supra* note 81, at 413; Oster, *supra* note 127.

145. Oster, *supra* note 127. *See generally* Kramer et al., *supra* note 141 (detailing the impact that breastfeeding had on medical conditions).

146. Fentiman, *supra* note 11, at 72. The WIC program serves pregnant, postpartum, and breastfeeding women. *Women, Infants and Children (WIC)*, U.S. DEP'T OF AGRIC., https://www.fns.usda.gov/wic/wic-eligibility-requirements (last published Aug. 3, 2016).

147. Fentiman, *supra* note 11, at 72.

148. *Id.*

149. *See id.*

versity study found that the long-term benefits of breastfeeding may be an effect of the general good health of women who opt to breastfeed.[150] In order to minimize the effect that race, socioeconomic, educational, and other differences have on the results, the study compared breastfed and bottle fed sibling pairs.[151] The researchers found no difference between the sibling pairs on body mass index, obesity, asthma, hyperactivity, reading comprehension, math ability, and memory based intelligence.[152] Thus, because of the overstated benefits of breast milk, mothers who are unable to breastfeed feel guilty and as a result resort to seeking human breast milk from the Internet as a safe alternative.

III. HUMAN BREAST MILK SHARING AS AN EMERGING MARKET

A. Healthy Excess Breast Milk Can Help Supply the Market

Women who produce surplus milk have options.[153] Women may dispose of the extra breast milk, give it to family and friends to feed their children, or donate their milk to a milk bank.[154] Alternatively, women may choose to sell their extra breast milk to strangers over the Internet for profit.[155] Today, more than 55,000 individuals are sharing, selling, and buying breast milk online.[156] A variety of websites offer their services to facilitate such transactions.[157] Even though informal breast milk sharing is not recommended by the FDA and has a risk of transmitting infectious diseases, many women participate in this exchange.[158] While some women offer milk for money or pleasure, other women receive or pay for milk to feed their infants.[159]

150. Colen & Ramey, *supra* note 53, at 55. *See generally* Ohio State University, *Breast-Feeding Benefits Appear to Be Overstated, According to Study of Siblings*, RES. NEWS (Feb. 25, 2014), http://researchnews.osu.edu/archive/sibbreast.htm (concluding that the mothers in the Ohio University study who were fortunate to have well-paying jobs had good health care).

151. Ohio State University, *supra* note 150.

152. *Id.*

153. Sheela R. Geraghty et al., *Got Milk? Sharing Human Milk Via the Internet*, 126 PUB. HEALTH REP. 161, 162 (2011).

154. *Id.*

155. Fentiman, *supra* note 11, at 66.

156. Joyce, *supra* note 53.

157. Fentiman, *supra* note 11, at 66.

158. U.S. FOOD & DRUG ADMIN., *supra* note 15 ("FDA recommends against feeding your baby breast milk acquired directly from individuals or through the Internet.").

159. Fentiman, *supra* note 11, at 66.

On one side of the transaction are mothers looking to supplement their income by selling excess breast milk.[160] And others may wish to donate their milk for altruistic purposes. Ashley Luader provides an example:

> Hi my name is Ashley. This past Saturday my fiancé and I lost our sweet girl Harlow. She was a stillborn at 7 months. Our hearts are broken and I'm searching for any sense of purpose or light to hold onto. I've made the decision to donate my breast milk in hope of spreading the gift of Harlow. She was a beautiful soul and, since I cannot share my milk with her, I want to pay it forward in hopes of helping other families.[161]

With no baby to feed with her milk, Ashley donated the milk to babies whose mothers are unable to breastfeed.[162] Ten percent of breast milk donors are mothers whose babies have died.[163] In addition to the emotional benefits, pumping after the death of a baby shrinks the uterus, prevents clogged milk ducts, and releases hormones that are linked to relaxation and joy.[164]

Regulating breast milk sold over the Internet will affect both mothers who are looking to donate and those who are looking to purchase human breast milk. Regulations will create obstacles for mothers who wish to donate or sell their milk. Mothers looking to supplement their income may be unable to continue selling their breast milk over the Internet if they are required to abide by FDA regulations. Regulations may cause excess milk to go unused, but they may indirectly benefit consumers by excluding unhealthy milk from market. In sum, regulations will ensure that all human breast milk sold over the Internet is healthy.

Additionally, FDA regulations do not foreclose the ability of mothers to earn extra income from the comfort of their home. The Internet has opened a market that facilitates transactions between the buyer and seller. There is a demand and lactating mothers have begun to satisfy it and are profiting from the need for human breast milk.

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160. LaMotte, *supra* note 87. Over a year, a lactating mother could make $23,000 by selling 25 ounces of breast milk every day at a rate of $2.50 per ounce. *Id.*

161. Blythe Bernhard, *Harlow's Gift: Breast Milk Donations Aid Givers and Receivers,* ST. LOUIS POST-DISPATCHER (Nov. 25, 2015), http://www.stltoday.com/lifestyles/health-med-fit/harlow-s-gift-breast-milk-donations-aid-givers-and-receivers/article_9f6bb67c-79f9-58e7-b22a-4eebd2b5522e.html.

162. *Id.*

163. *Id.*

164. *Id*.

While mothers who wish to sell their human breast milk over the Internet have an interest in government regulation of breast milk, their concerns may not outweigh the negative effects of breast milk being sold over the Internet. Women who wish to continue selling milk have safer alternatives available. Lactating mothers may donate their breast milk to milk banks, which are located across the United States.[165] It is fulfilling to be able to provide an infant with nutrients, and it should be even more rewarding to provide an infant with tested and safe breast milk without risk of infection or transmission of disease.

B. Human Milk Banks

The safest route for donated breast milk is a human milk bank. There are currently twenty-one milk banks in North America and several developing banks in the United States.[166] Milk banks thoroughly screen and test donors' blood then pasteurize the milk to meet the voluntary CDC and FDA standards.[167] These banks supply milk to hospitals and critically ill infants.[168] Only around twenty-seven percent of the pasteurized human breast milk is provided to an outpatient infant.[169] Since milk banks must offset the cost of donor screenings and pasteurization, their prices are substantial, charging $4.50/ounce on average.[170] For the purchaser, this would cost between $1,800 and $3,000 a month and would grow as the infant ages.[171] Unfortunately this is not an affordable option for most women.

165. *Donate Milk,* HUMAN MILK BANKING ASSOC. OF NORTH AM., https://www.hmbana.org/donate-milk (last visited Feb. 10, 2017).

166. *Locations*, HUMAN MILK BANKING ASSOC. OF NORTH AM., https://www.hmbana.org/locations (last visited Feb. 10, 2017).

167. Fentiman, *supra* note 11, at 66 n.253. HMBANA establishes voluntary guidelines for the screening of donors, collecting, processing, handing, testing, and storage of human breast milk. U.S. FOOD & DRUG ADMIN., *supra* note 15. Each HMBANA milk bank screens donors through a verbal screening, questionnaire, and blood test. Donors are also disqualified for drug use, chronic diseases, travel restrictions, presence of transmittable disease in household, herbal use, positive blood tests, and positive bacterial counts after pasteurization. PAULINE SAKAMOTO, U.S. FOOD & DRUG ADMIN., HUMAN MILK BANKING ASSOCIATION OF NORTH AMERICA, http://www.fda.gov/downloads/AdvisoryCommittees/CommitteesMeetingMaterials/PediatricAdvisoryCommittee/UCM235619.pdf (last visited Feb. 10, 2017).

168. Fentiman, *supra* note 11, at 66.

169. *See* LaMotte, *supra* note 87.

170. Fentiman, *supra* note 11, at 66.

171. Roxanne Nelson, *Breast Milk Sharing Is Making a Comeback, but Should It?*, 112 AM. J. NURSING 19, 20 (2012). Milk banks charge around $3 to $5 an ounce, and an average eight-pound baby drinks 20 ounces per day. This could cost about $60 to $100, which translates to between $1,800 and $3,000 per month. *Id.*

In contrast, unregulated human breast milk on the Internet costs little to nothing. Private sellers may donate or sell their milk for $0.50 to $2 an ounce.[172] Thus, milk sharing over the Internet may be the only affordable way to obtain donated breast milk for most women.

Milk banks are a safe option for donor milk, but the price of processed and pasteurized human milk is expensive and the supply is limited. Conversely, because human milk purchased online is not being tested before it is consumed, the milk may be adulterated, carry diseases, or contain bacteria.[173]

C. Human Breast Milk Sharing Over the Internet

The FDA warns that "when human milk is obtained directly from individuals or through the Internet, the donor is unlikely to have been adequately screened for infectious diseases or contamination risk."[174] Moreover, it is unlikely that the "human milk has been collected, processed, tested or stored in a way that reduces possible safety risks to the baby."[175] There is a growing number of milk sharing communities on the Internet, including Eats on Feets, Human Milk 4 Human Babies, and Facebook. Milk sharing websites introduce a party who is looking to sell breast milk to a party who is looking to purchase breast milk.[176] These websites connect lactating women to mothers who are unable to feed their infants, bodybuilders seeking to gain muscle, individuals looking for clearer skin, and individuals with a sexual fetish. Generally, the donor is required to self-report health history.[177] Sellers can add a profile about themselves and include details such as

172. *See, e.g.*, *Abundantly Producing Breast Milk $2.00 Per Bag*, ONLY THE BREAST [hereinafter *Abundantly Producing*], http://www.onlythebreast.com/breast-milk-classifieds/show-ad/67885/abundantly-producing-breast-milk-2-00-per-bag/norfolk/virginia/selling-locally/ (selling breast milk for $0.50 an ounce) (last visited Feb. 10, 2017); *Healthy, Organic, Exclusively Pumping Mama Overproducing Creamy, Thick Milk and Hoping to Benefit Your Little One With It!*, ONLY THE BREAST [hereinafter *Healthy Organic*], http://www.onlythebreast.com/breast-milk-classifieds/show-ad/86141/healthy-organic-exclusively-pumping-mama-overproducing-creamy-thick-milk-and-hoping-to-benefit-your-little-one-with-it/fat-babies/ (last visited Feb. 10, 2017) (selling breast milk for $2 an ounce).

173. *See infra* Part IV.

174. *Use of Donor Human Milk*, U.S. FOOD & DRUG ADMIN., http://www.fda.gov/ScienceResearch/SpecialTopics/PediatricTherapeuticsResearch/ucm235203.htm (last updated Aug. 2015).

175. *Id.*

176. Geraghty et al., *supra* note 153, at 162.

177. *Id.*

their diet, lifestyle habits, and if they smoke, take drugs, or drink alcohol or coffee.[178] Unfortunately, self-reporting is unreliable.

Mothers post on milk sharing communities about whether they have a surplus or deficiency of breast milk before meeting up to receive breast milk.[179] Eats on Feets has more than 120 chapters serving different geographic locations.[180] The sites instruct on the proper pumping, freezing, and shipping of the milk.[181] But, the milk the buyer receives is unregulated and untested.[182] Because the milk is priced by volume, a seller may add a substance, for example, cow's milk, to the breast milk in order to increase the volume and their monetary gain.[183] This may be accounted for because a woman exchanging her breast milk for money has different motivations than a woman who donates her breast milk to a milk bank or who shares it with a family or friend without receiving payment.[184] A study found more bacteria in breast milk purchased over the Internet than samples donated to milk banks.[185] Milk donors have no motive to lie because they have nothing to gain.

In addition, breast milk can carry infectious diseases and harm the recipient.[186] Also, environmental chemicals may be found in milk stored in plastic containers for a long period of time.[187] Women who obtain milk from multiple women may be exposing their infants to numerous harmful exposures.[188] There is no way to guarantee the quality or safety of the milk being exchanged.

As previously mentioned, there are numerous adult consumers of human breast milk, but the most common purchasers online are par-

178. Sarah A. Keim, *Microbial Contamination of Human Milk Purchased Via the Internet*, 132 PEDIATRICS 1227, 1229 (2013) [hereinafter Keim, *Microbial Contamination*] (noting 74% of the Internet samples would have failed HMBANA criteria).

179. Rachel Saslow, *Mothers Share Breast Milk Via Internet Groups Despite FDA's Concern*, WASH. POST (Apr. 11, 2011), https://www.washingtonpost.com/national/health/mothers-share-breast-milk-via-internet-groups-despite-fdas-concerns/2011/02/21/AFcxCZMD_story.html.

180. *Id.*

181. *See* Geraghty et al., *supra* note 153, at 162.

182. *Id.* at 163.

183. *Id.*

184. Cari Nierenberg, *Breast Milk Sold Online May Not Be 100% Human Milk*, LIVE SCI. (Apr. 6, 2015), http://www.livescience.com/50385-breast-milk-online-not-pure.html.

185. Keim, *Microbial Contamination*, *supra* note 178, at 1229–30 (finding that internet breast milk samples contained more bacteria in comparison to unpasteurized milk bank samples).

186. Geraghty et al., *supra* note 153, at 162.

187. *Id.* Additionally, cyclical refrigeration-freezing-thawing may impair the integrity of the milk. *Id.*

188. *Id.*

ents seeking breast milk to feed their infants.[189] There is a risk of contamination when breast milk is purchased online and room temperature breast milk is the perfect breeding ground for bacteria.[190] Conversely, milk banks screen for bacteria before the milk is released.[191]

The first study to examine the safety of breast milk shared over the Internet revealed that three-fourths of the breast milk samples contained illness-causing bacteria and showed signs of improper collection, storage, and shipping methods.[192] Harmful bacteria may have resulted from unclean containers of breast milk pumps,[193] donors' skin, or improper shipping methods.[194] The principal investigator was surprised to find the level of bacterial counts and fecal contamination.[195] In addition, milk that had longer shipping times was more likely to be contaminated.[196] The sampling revealed that human breast milk purchased over the Internet had high levels of overall bacterial growth and contamination with pathogenic bacteria.[197] The study also revealed that the information that sellers advertised about their health was a poor indicator of the quality of milk.[198]

Although the websites provide sanitary guidelines as to how to collect, store, and ship the milk, many sellers do not put those practices into use, sellers did not include dry ice or other cooling methods, which left the milk outside of the recommended storage range.[199] Another study showed that ten percent of the breast milk contained cow's milk.[200] This will cause problems for infants with allergies or lactose intolerance.

189. Charlie Cooper, *Babies at Risk From Breast Milk Bought Over Internet*, INDEP. (Mar. 24, 2015), http://www.independent.co.uk/life-style/health-and-families/health-news/babies-at-risk-from-breast-milk-bought-over-internet-10131311.html.

190. *Id.*

191. *Id.*

192. Keim, *Microbial Contamination*, *supra* note 178, at 1230. 74% of the Internet samples would have failed HMBANA criteria.

193. *Id.*

194. *Id.*

195. *Purchased Breast Milk Putting Babies at Risk*, FOOD INNOVATION CTR., http://fic.osu.edu/members/spotlight/purchased-breast-milk-putting-babies-at-risk.html (last visited Apr. 10, 2016).

196. Keim, *Microbial Contamination*, *supra* note 178, at 1232.

197. *Id.* at 1230.

198. *Id.* Generally, sellers advertised their diet, exercise habits, or limited drug use. Rarely did sellers mention their hygienic practices or absence of infectious disease. *Id.*

199. Keim, *Microbial Contamination*, *supra* note 178, at 1230; *Purchased Breast Milk Putting Babies at Risk*, *supra* note 195.

200. Keim, *Microbial Contamination*, *supra* note 178, at 1157.

IV. THE GOVERNMENT'S REGULATION OF REGENERATIVE PRODUCTS

In the United States, payment is legal for the donor's efforts in donating hair, blood, sperm, and eggs. Similar to human milk donors, many sperm and egg donors choose to donate for monetary compensation or altruistic reasons.[201] The federal government regulates all blood and sperm banks by requiring compliance with FDA mandates.[202] The FDA requires a physical examination and a donor medical history interview for anyone looking to donate.[203]

The FDA has an established system to safeguard the blood supply for recipient safety.[204] Potential donors are asked specific questions related to their lifestyle, health, travel, and medical history.[205] Generally, blood donors must be in good health, feeling well on donation day, at least seventeen years old, and weigh at least 110 pounds.[206] Donors whose blood may pose a health hazard are asked to exclude themselves from donating.[207] The initial screen eliminates approximately ninety-percent of unsuitable donors. After donation, the blood is tested for blood-borne agents, including HIV, hepatitis, and syphilis. Donor blood that tests positive for such diseases or risk of malaria, and acute illnesses are excluded, and blood establishments must keep a current list of individuals who are unsuitable to donate blood.[208] The FDA established comprehensive regulations to assure safe donation and reduce the risks of transfusion transmission of dis-

201. *Id.* The majority of sperm banks and egg donor agencies are for-profit entities that buy and sell sperm and eggs over the internet. KARA W. SWANSON, BANKING ON THE BODY: THE MARKET BLOOD, MILK, AND SPERM IN MODERN AMERICA (1992).

202. *What You Should Know–Reproductive Tissue Donation*, U.S. FOOD & DRUG. ADMIN. (Nov. 5, 2010), http://www.fda.gov/BiologicsBloodVaccines/SafetyAvailability/TissueSafety/ucm232876.htm.

203. *Id.*

204. *What You Should Know–Reproductive Tissue Donation*, U.S. FOOD & DRUG. ADMIN. (Nov. 5, 2010), http://www.fda.gov/BiologicsBloodVaccines/SafetyAvailability/TissueSafety/ucm232876.htm.

205. Some restrictions, such as banning men who have had sex with other men in the past 12 months, has proven controversial. *Revised Recommendations for Reducing the Risk of Human Immunodeficiency Virus Transmission by Blood and Blood Products–Questions and Answers*, U.S. FOOD & DRUG ADMIN. [hereinafter *Revised Recommendations*], http://www.fda.gov/BiologicsBloodVaccines/BloodBloodProducts/QuestionsaboutBlood/ucm108186.htm (last visited Feb. 6, 2017).

206. *Blood Donor Screening and Testing*, AM. ASS'N OF BLOOD BANKS, http://www.aabb.org/advocacy/regulatorygovernment/donoreligibility/Pages/default.aspx (last visited Feb. 6, 2017).

207. *What I Need to Know*, AM. RED CROSS, http://www.redcrossblood.org/students/donating-101/what-do-i-need-know (last visited Feb. 6, 2017).

208. Kathryn C. Zoon, *Safety Implications of Fractionated Blood Products*, U.S. FOOD & DRUG ADMIN. (July 31, 1997), http://www.fda.gov/NewsEvents/Testimony/ucm114908.htm.

ease to the recipient.[209] Milk donations are analogous to blood donations and should be subject to the same stringent requirements.

Donation of reproductive tissue, such as eggs or sperm, are similarly regulated by the FDA. The FDA requires a screening for each donor. Potential donors are put through a physical examination and medical history interview.[210] Specimens from donors are tested for infectious diseases, including HIV, hepatitis, and syphilis.[211]

Sperm donations are also regulated by the FDA, individual states, sperm banks, and professional organizations.[212] Compliance with FDA regulations is mandatory for sperm banks and clinics. The regulations "focus[ ] on 'donor screening, quality processing, and record keeping [with the] . . . goal [of] keeping infectious tissue out of circulation.'"[213] Sperm banks and clinics must first register with the FDA.[214] Registration includes providing the FDA with basic information, its functions, and the types of tissues it maintains.[215] Banks and clinics are required to screen each donor.[216] Screening is comprised of a physical examination and a donor medical history interview.[217] The FDA has a list of twenty-nine factors that banks should consider when screening donors.[218] Individual states license sperm banks,[219] sperm banks may also choose to place limits on themselves.

Sperm donation over the Internet is analogous to online breast milk sharing. For the past five years, Trent Arsenault has been donating his sperm to women he meets on the Internet.[220] The FDA

209. *Id.*

210. *See generally* U.S. DEP'T. OF HEALTH & HUMAN SERV., GUIDANCE FOR INDUSTRY: ELIGIBILITY FOR DONORS OF HUMAN CELLS, TISSUES, AND CELLULAR AND TISSUE BASED PRODUCTS (HCT/Ps) (2007) [hereinafter GUIDANCE FOR INDUSTRY], http://www.fda.gov/downloads/BiologicsBloodVaccines/GuidanceComplianceRegulatoryInformation/Guidances/Tissue/ucm091345.pdf (providing guidelines for the industry).

211. *What You Should Know—Reproductive Tissue Donation*, *supra* note 202.

212. *Id.*

213. Vanessa L. Pi, Note, *Regulating Sperm Donation: Why Requiring Exposed Donation Is Not the Answer*, 16 DUKE J. GENDER L. & POL'Y 379, 382 (2009).

214. *Id.*

215. 21 C.F.R. § 1271.1 (2016).

216. 21 C.F.R. § 1271.25; *see also Biologics Establishment Registration*, U.S. FOOD & DRUG ADMIN., http://www.fda.gov/BiologicsBloodVaccines/GuidanceComplianceRegulatoryInformation/EstablishmentRegistration/default.htm (last updated May 24, 2011).

217. 21 C.F.R. § 1271.45.

218. *Donor Eligibility Final Rule and Guidance Questions and Answers*, U.S. FOOD & DRUG ADMIN., http://www.fda.gov/BiologicsBloodVaccines/TissueTissueProducts/QuestionsaboutTissues/ucm102842.htm (last updated Apr. 20, 2009).

219. GUIDANCE FOR INDUSTRY, *supra* note 210, at 14–20.

220. *California Cryobank Registration, Accreditation, and Licenses*, CAL. CRYOBANK, http://www.spermbank.com/about/sperm-bank-registration (last visited Feb. 9, 2017).

warned Arsenault "to stop donating his sperm over the Internet or he would face a $100,000 fine or up to one year in prison on the grounds that he's ignoring federal regulations that require blood tests every time a person donates any kind of body tissue or fluid."[221] Federal regulation says that sperm donors must be tested for numerous communicable diseases–including HIV, hepatitis B and C, and syphilis–within seven days before a sperm donation.[222] The FDA is not concerned with Arsenault's sperm, but with the fact that he is not testing it as often as he should.[223] Arsenault's website also boasts that his sperm is "top quality" and he claims to have a low-calorie, all-organic diet.[224] The FDA believes there is good reason for blood-testing sperm but has not adopted the same rationale for human breast milk.

Regulation of human breast milk is not novel. French milk banks are subject to a host of legislative and administrative regulations and peer-to-peer sharing is illegal.[225] In France, all lactariums operate under the French analogue of the FDA's Center for Biological Evaluation and Research and the Center for Drug Evaluation and Research.[226] These lactariums have the sole right to process and distribute human breast milk, and they do not pay donors for their milk.[227] Additionally, human breast milk is treated as a health product. A category that encompasses drugs, organs, and tissues.[228] This differs significantly from United States federal government, which remains silent on the issue.[229]

The human milk market is marginally regulated by the FDA. The FDA regulates human milk fortifiers and it also approved the voluntary guidelines that were created by the Human Milk Banking Association of North America.[230] A few states–California, New York, and

221. Erin Allday, *Sperm Donor in Fremont Feeling Heat From Feds*, SFGATE (Dec. 19, 2011, 4:00 AM), http://www.sfgate.com/health/article/Sperm-donor-in-Fremont-feeling-heat-from-feds-2411681.php#photo-1948951.

222. *Id.*

223. 21 C.F.R. § 1271.80 (2016); Allday, *supra* note 221.

224. Allday, *supra* note 221. His excuse: too expensive. It would be expensive to get a blood test before every sperm donation, especially since he is not charging. *Id.*

225. *Id.* His advertising is similar to the profiles posted on breast milk sharing websites, which were proven to have no correlation to the actual quality of the product. *Id.*

226. Mathilde Cohen, Regulating Milk: Women and Cows in France and the United States 1, 20, 22 (2017).

227. *Id.* at 23.

228. *Id.*

229. *Id.*

230. *Id.* at 24.

Texas–have asserted the states' authority to regulate milk as a tissue but fail to do it.[231] Currently, there is no regulation of wet nurses. Conversely, the infant formula market is extensively regulated by the federal government.[232]

V. PROPOSAL

The government should regulate the sale of human breast milk sold over the Internet. While sperm, plasma, hair, and eggs may be for profit, the emerging online human breast milk market raises ethical and legal issues. Human breast milk is more akin to sperm, eggs, and blood, which are all regulated by the federal government. Sperm and eggs make up the building blocks of DNA and blood flows through the body delivering oxygen and nutrients, unlike hair, which is unregulated, is not internalized into the body.

When a regulation is proposed, opposition often cites the increase in cost, bureaucracy, and a restriction in freedom. Some may question the need for regulation if infants are not being harmed when exposed to human milk bought over the Internet. However, it may be medically difficult to prove that an infant's sickness was a result of human milk bought over the Internet. Additionally, mothers may feel ashamed and unwilling to admit that their child became sick from human breast milk bought over the Internet. While greater costs and bureaucracy may be an effect, regulation also provides trust. Trust is essential when products are being consumed, especially by infants.

First and foremost, buying and purchasing human breast milk over the Internet should not be forbidden, but rather must be appropriately regulated by either the state or federal governments. Traditional human milk banks as well as private Internet donors should be subjected to the same governmental regulations. Human breast milk suppliers who do not conform to such regulations should be forced to comply with regulations or cease the sale of human breast milk.

Regulation will protect individuals and infants—who are particularly vulnerable—from human breast milk infected with hepatitis, HIV, tuberculosis, and any other communicable diseases. Prescription drugs, alcohol, and illicit drugs also can be transmitted through human breast milk. In a regulated market, human milk donors would

231. Fentiman, *supra* note 11, at 32.

232. CAL. HEALTH & SAFETY CODE § 1647 (2000); N.Y. PUB. HEALTH LAW § 2502 (2015); TEX. HEALTH & SAFETY CODE ANN. § 161.071 (2001).

be screened in a similar way as blood and sperm donors. To begin, donors would be asked about their lifestyle, health, and medical history. Donors who pass the initial screen will be able to donate human milk. After donation, the human milk is tested for communicable diseases, alcohol, drugs, and medication that may have been transmitted through human breast milk. Milk that tests positive for diseases will be excluded. Suitable human breast milk will be packaged and stored appropriately. Bacteria breeds in human milk and studies have shown that most of the human milk purchased over the Internet contains such bacteria. Improper handling and storage is the cause of such bacterial infestations. The FDA will set guidelines as the appropriate handling and storage of the milk. The Human Milk Banking Association of America already abides by a set of self-regulating rules. The FDA should implement these rules and apply it to all donations and sales of human breast milk.

Additionally, medical and health authorities must be required to use convincing research that proves breastfeeding and human milk leads to better health outcomes. Recommendations should be based on sound research and communicated in a way that presents a complete picture instead of the use of scare tactics.

CONCLUSION

Many individuals seeking human breast milk are now utilizing social networks to find private donors and foregoing the use of traditional human milk banks because private donation is less financially burdensome and more easily accessible. Mothers who are unable to obtain a breast milk prescription, men, and individuals seeking breast milk for any of its other claimed benefits use private donation over the Internet because they lack access to human breast milk from human breast milk banks. Further, media has increased the visibility of human milk donation over the Internet. Several media outlets have published and ran studies on the increasingly prevalent trend of donating breast milk over the Internet. Finally, medical and public health authorities have overemphasized the health benefits of human breast milk. Many women feel obligated to provide their infant with human breast milk and risk putting their infant in danger by obtaining such milk. Medical and public health authorities often use fear-based appeals to convince women that breast is best.

Because of the increasing prevalence of human breast milk being sold over the Internet, the FDA should crack down on private donors. Private donation of human breast milk should be regulated like institutionalized sperm, blood, and egg donation. In response to the many problems associated with the unregulated sell of human breast milk over the Internet, there is a call for government regulation. Governmental regulation would prevent the spread of communicable diseases, contamination, and adulterated breast milk consumed by individuals. It would be reasonable to create and enforce a regulatory program. Private suppliers must either comply with FDA standards, or alternatively, donate their milk to a human breast milk bank.

NOTE

Saying No to "Cutting Corners": The Military Courts' Correctness in Rejecting the Use of Evidence of Sexual Assault Against a Minor to Search for Child Pornography

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INTRODUCTION

In February 2012, law enforcement arrested George Fout for child pornography possession.[1] Following his arrest, Fout admitted to sexually molesting several young boys and conceded that he watched child pornography as "a way to control his urges."[2] Fout was then given two life sentences.[3] Fout's arrest represents a story that has been retold many times in the last decade.[4] Arrests and prosecutions

1. Emily Weissler, *Head Versus Heart: Applying Empirical Evidence About the Connection Between Child Pornography and Child Molestation to Probable Cause Analyses*, 82 FORDHAM L. REV. 1487, 1489 (2013).
2. *Id.* at 1489.
3. *See* Vishal Persaud, *Former Scout Volunteer Found Guilty of Molesting 8-Year-Old Boy*, OCALA STAR BANNER (Nov. 1, 2012, 2:11 PM), http://www.ocala.com/article/20121101/articles/121109974.
4. Weissler, *supra* note 1, at 1489.

for child pornography-related offenses have increased for more than a decade.[5] In fact, in 2007, the United States Department of Justice ("DOJ") announced that combatting child pornography represented one of its priority goals.[6] But aggressive prosecutions and harsh sentencing have not met universal approval.[7] Some scholars argue that law enforcement often go on "witch hunts" against people who possess child pornography and impose "draconian" sentences on those possessors.[8] Much of the discussion about the approach to child pornography relates to the idea that child molestation and child pornography are closely linked.[9] Some courts, when presiding over cases that involve child molestation and child pornography, hold that a suspicion of the former crime constitutes sufficient probable cause to search for the latter crime.[10]

This issue is also relevant in a military context. In *United States v. Hoffmann*,[11] the United States Navy-Marine Corps Court of Criminal Appeals ("CCA") became the first military court to answer this question.[12] Though the CCA struggled with answering this issue, it ultimately held that suspicion of sexual assault against a minor provides sufficient probable cause to search for child pornography.[13] The United States Court of Appeals for the Armed Forces ("CAAF") reversed the CCA and rejected a blind reliance on a suspicion of sexual assault to establish probable cause to search for child pornography. The CAAF, however, does not make such outright rejection. Rather, it limits its holding to *Hoffmann*'s facts. This Note argues that the

5. *Id.*

6. *Id.* at 1498. The next year, Congress tasked the DOJ with formulating and implementing a plan to combat child exploitation across the nation. In 2010, Congress released its initial strategy document that describes a coordinated plan to involve as many federal agencies and law enforcement in its efforts against child exploitation. *Id.* at 1498–99.

7. *Id.* at 1499; *see also* Melissa Hamilton, *The Child Pornography Crusade and Its Net-Widening Effect*, 33 CARDOZO L. REV. 1679, 1689 (2012).

8. *See* Weissler, *supra* note 1, at 1499; *see also* VIRGINIA KENDALL & T. MARCUS FINK, CHILD EXPLOITATION AND TRAFFICKING 3 (2012).

9. Weissler, *supra* note 1, at 1501 (discussing that the debate surrounding the correct approach in solving child pornography possession is related to the debate about whether child molestation and child pornography possession are related).

10. *See, e.g.*, Virgin Islands v. John, 654 F.3d 412, 420 (3d Cir. 2011) (acknowledging that a correlation exists between sexual assault against a minor and child pornography); United States v. Colbert, 605 F.3d 573, 578 (8th Cir. 2010) (describing the intuitive relationship between child molestation and possession of child pornography); United States v. Byrd, 31 F.3d 1329, 1339 (5th Cir. 1995) (noting that common sense would indicate that a person who is sexually interested in children would have child pornography).

11. United States v. Hoffmann, 74 M.J. 542 (N-M.Ct. Crim. App. 2014).

12. *Id.* at 549 (stating that this case presents an issue of first impression for the military).

13. *See id.* at 551–52.

CAAF was correct in its decision for the following three reasons. First, social science cannot conclusively link sexual assault against a minor and child pornography possession. Second, because the two crimes have a tenuous relationship, the inevitable doctrine fails, and searching for evidence of sexual assault does not necessarily yield evidence of child pornography. Third, *Hoffmann* resembles *Dougherty v. City of Covina*,[14] which also rejected the notion that a suspicion of sexual assault against a minor constituted probable cause to search for child pornography. Finally, the CAAF's decision prevents the military from running afoul of the Supreme Court case *Riley v. California*[15] by continuing to use evidence of sexual assault against a minor to search for child pornography possession. For these reasons, the CAAF[16] should hold that, as a matter of law, a suspicion of sexual assault against children does not constitute sufficient probable cause to search for child pornography.

This Note will define "minor" as any person under the age of eighteen.[17] Additionally, this Note will adopt the United States Code's definition of "sexual assault" as:

> [A]cts upon another person by 1) threatening or placing another person in fear, 2) causing bodily harm to that other person, 3) making a fraudulent representation that the sexual act serves a professional purpose, or 4) inducing a belief by any artifice, pretense, or concealment that the person is another person.[18]

Finally, this Note will match the United States Code's definition of child pornography, which provides:

> Child pornography means any visual depiction . . . of sexually explicit conduct, where 1) the production of such visual depiction involves the use of a minor engaging in sexual conduct; 2) such visual depiction is a digital image, a computer image, or computer-generated image that is, or is indistinguishable from, that of a minor engaging in sexually explicit conduct; or 3) such visual depiction has been created, adapted, or modified to appear that an identifiable minor is engaging in sexually explicit conduct.[19]

14. 654 F.3d 892 (9th Cir. 2011).

15. 134 S. Ct. 2473 (2014).

16. This court was previously the United States Court of Military Appeals (C.M.A.). Some cases in this Comment will come from the C.M.A., and the author urges the reader to remember that the C.A.A.F. and the C.M.A. are the same court.

17. 18 U.S.C. § 2256(1) (2012).

18. 10 U.S.C. § 920(b)(1)(A)–(D) (2012).

19. 18 U.S.C. § 2256(8)(A)–(C) (2012).

Part I will discuss the split between the federal courts of appeals over this issue. Part II will provide an in-depth explanation of *Hoffmann*. Part III will explore the military's rules for search and seizure and probable cause. Part IV will explain the CCA's and CAAF's differing *Hoffmann* decisions. Finally, Part V will argue and provide the reasons for why the CAAF correctly decided *Hoffmann*.

I. THE CIRCUIT SPLIT OVER THE CONNECTION BETWEEN SUSPICION OF SEXUAL ASSAULT AGAINST A MINOR AND HAVING CHILD PORNOGRAPHY

The federal courts of appeals are split over whether the suspicion of sexual assault against a minor constitutes "probable cause" sufficient to search for child pornography. Though the Supreme Court has guided the circuit courts in defining probable cause,[20] what exactly constitutes sufficient probable cause for this particular issue remains a controversy.[21]

A. Opinions Holding that a Suspicion of Sexual Assault Against a Minor Does Constitute Sufficient Probable Cause to Search for Child Pornography

The Fifth Circuit has held that suspicion of sexual assault against a minor constitutes sufficient probable cause to search for child pornography.[22] In *United States v. Byrd*, Agent William Shearer targeted defendant Gary Byrd in an undercover child pornography "sting" operation after receiving a tip from a state police officer that Byrd was suspected of sexually abusing a child.[23] On July 29, 1987, undercover officers entered Byrd's home and searched the premises for child pornography while interviewing Byrd.[24] Byrd was convicted of receiving child pornography in the mail.[25] He was sentenced to ten years in

20. Ornelas v. United States, 517 U.S. 690, 696 (1996) ("[This court has] described . . . probable cause to search as existing where the known facts and circumstances are sufficient to warrant a man of reasonable prudence in the belief that contraband or evidence of a crime will be found.").

21. *Compare* United States v. Byrd, 31 F.3d 1329 (5th Cir. 1994), *with* Dougherty v. City of Covina, 654 F.3d 892 (9th Cir. 2011).

22. *Byrd*, 31 F.3d at 1339 ("We also note that common sense would indicate that a person who is sexually interested in children is likely to also be inclined, i.e., predisposed, to order and receive child pornography.").

23. *Id.* at 1331.

24. *Id.* at 1333.

25. *Id.* at 1331.

prison and fined $65,000.[26] In Byrd's appeal, the Fifth Circuit held that "common sense" indicates that a person who is sexually interested in minors will also be interested in obtaining child pornography.[27] Additionally, it held that probable cause supporting the search warrant existed.[28] To support its conclusion, the court examined the following totality of circumstances that existed during Agent Shearer's search: (1) Byrd had stated that he had an interest in homosexual, heterosexual, and sadomasochism activity; and (2) he knew that he ordered videotapes that depicted male children and teenagers engaging in sexual activity with an adult.[29] Instead of considering the possibility that one crime may occur without the other, the court then married the existence of the accusation of Byrd sexually molesting a child to his purchase of videos with children engaging in sexual activity.[30]

Similarly, the Eighth Circuit has held that suspicion of sexual assault against a minor constitutes sufficient probable cause to search one's computer.[31] In *Colbert*, detectives investigated a complaint of suspicious activity relating to defendant and a young girl.[32] When detectives found the defendant, detectives searched defendant's vehicle and found police gear.[33] During the search, defendant stated that he had told the young girl about the videos at his apartment.[34] The detectives subsequently took defendant to the police station for questioning and the district judge issued a search warrant for defendant's apartment.[35] During the subsequent search, investigators found movies, compact discs, and a computer with child pornography.[36] Relying on the Fifth Circuit's holding in *Byrd*, the Eighth Circuit opined that

26. *Id.*

27. *Id.* at 1339 ("To an expert investigator, these facts indicated that Byrd's residence likely contained other child pornography materials or evidence of pedophilic activity.").

28. *Id.* at 1340.

29. *Id.* The court also examined the following factors: (1) Byrd had been accused of abusing ethical trust given to a psychiatrist by sedating and sexually molesting a child; (2) Byrd had access to children on a regular basis, both at work and at home (he was attempting to adopt a son).

30. *Id.* at 1340.

31. United States v. Colbert, 605 F.3d 573, 578 (8th Cir. 2010) (stating Colbert's statements to young girl about the movies in his apartment that she would like to watch, was a "direct link to Colbert's apartment and raised a fair question as to the nature of the materials to which he had referred").

32. *Id.* at 575.

33. *Id.* ("Inside Colbert's car, the detectives found a police scanner, handcuffs, and a hat bearing the phrase 'New York PD.'").

34. *Id.*

35. *Id.* at 575–76.

36. *Id.* at 576.

there exists an "intuitive relationship between acts such as child molestation or enticement and possession of child pornography."[37] In fact, the possession of child pornography is a "logical precursor to physical interaction with a child."[38] Accordingly, the court held that defendant's attempt to entice the young girl was a factor that a judicial officer could consider to determine whether he had child pornography.[39] The very fact that defendant told the young girl that he had movies that she liked to watch heightened the suspicion that defendant had child pornography.[40] It did not matter that the search report did not list the names of children's movies that may have been present in defendant's apartment because it does not make sense to believe that defendant was inviting the young girl to watch a harmless movie or engage in other wholesome activities.[41] The Eighth Circuit's reasoning and conclusions demonstrate that it, like the Fifth Circuit, believed that a suspicion of sexually assaulting a minor constitutes sufficient probable cause to search for child pornography.

Complicating the holdings of the Fifth and Eighth Circuits, the Third Circuit held that a detective's professional experience could establish a correlation between sexual assault against a minor and child pornography.[42] In *Virgin Islands*, sixth grade students told the Domestic Violence Sexual Assault Council that a teacher, defendant Tydel John, had touched them inappropriately.[43] The school gave this information to Detective Joseph, who then sought a warrant to search defendant's home. Detective Joseph's affidavit merely stated that she would find evidence that defendant had sexually assaulted several children from the school.[44] It also alleged that people who commit

37. *Id.* at 578 (stating that there is an intuitive relationship between child molestation and possession of child pornography and that pornography is an electronic record of child molestation).

38. *Id.*

39. *See id.* ("[W]e conclude that Colbert's attempt to entice a child is a factor that a judicial officer reasonably could have considered in determining whether Colbert likely possessed child pornography, . . . all the more so in light of the evidence that Colbert heightened the allure . . . by telling the child that he had movies that she like to watch.").

40. *Id.* at 578–79.

41. *Id.* at 578. ("Although the . . . warrant does not list the titles of children's movies found in his apartment, it would strain credulity to believe that Colbert was attempting to lure the child there to watch, say "Mary Poppins" or "The Sound of Music," or to engage in basket weaving or a game of pickup sticks.").

42. *See* Virgin Islands v. John, 654 F.3d 412, 420 (3d Cir. 2011) ("We acknowledge the possibility that studies might show that a correlation exists between [sexual assault against a minor] and [child pornography possession]; or perhaps extensive investigatory experience might reveal a pattern substantial enough to support a reasonable belief on the part of the police detective.").

43. *Id.* at 414.

44. *Id.* at 414–15.

sexual offenses against a minor hide evidence of such offenses in their home, either in notebooks, photographs, or computer files.[45] Accordingly, the warrant authorized investigators to collect pornographic magazines in defendant's home. Although investigators did not find child pornography, they found evidence "germane" to aggravated rape, unlawful sexual contact, child abuse, and child neglect.[46] The Third Circuit held that though the "intuitive relationship" between sexual assault against a minor and possession of child pornography seemed suspect, Detective Joseph solidified that relationship with specific facts connecting the two crimes.[47] The court noted that the correlation between the two crimes was not an abstract legal issue.[48] Either the facts support a correlation between sexual assault against a minor and having child pornography or they do not.[49] Though the court ultimately held that the warrant did not contain sufficient facts to establish a correlation between the two crimes, the court made clear that such hurdle could be easily jumped with facts and extensive investigatory experience. In holding so, the Third Circuit does not foreclose the opportunity for law enforcement to rely on a suspicion of sexual assault to serve as probable cause for child pornography possession.

B. Opinions Holding that a Suspicion of Sexual Assault Does Not Constitute Sufficient Probable Cause to Search for Child Pornography

The Fourth Circuit held that the connection between the two crimes is not as natural as the Fifth, Eighth, and Third Circuits make it seem.[50] In *Doyle*, Captain Scott, armed with a search warrant, found child pornography on defendant's computer.[51] A magistrate court later found that Captain Scott had little to do with drafting the search warrant and investigating defendant; all he did was sign the search warrant and the supporting affidavits.[52] In fact, his subordinate, Lieutenant Rouse, drafted the document based on his hearing that defen-

45. *Id.* at 414.
46. *Id.*
47. *Id.* at 419, 422 ("It should be clear that the existence of an assault-pornography correlation is a question of fact that Joseph was required to allege . . . if she desired to rely on it as the basis for a probable cause determination.").
48. *Id.* at 419.
49. *Id.*
50. *See* United States v. Doyle, 650 F.3d 460, 472 (4th Cir. 2011) (stating that evidence of child molestation alone does not support probable cause to search for child pornography).
51. *Id.* at 463.
52. *Id.* at 464.

dant had sexually sodomized children.[53] The Fourth Circuit, like the Third Circuit in the *Virgin Islands* case, ruled that the affidavit upon which Rouse relied upon did not support the conclusion that defendant had child pornography since it only contained sexual assault allegations.[54] In fact, the only reference to child pornography in the affidavit stated that the young girl's uncle accused defendant of showing pictures of children to the girl.[55] Nothing in the affidavit showed that the pictures shown depicted nude children.[56] And, even if it did, the court could not conclude that those pictures were child pornography. The nude children may have been standing, which would not have made the pictures constitute child pornography.[57] The court also addressed the alleged correlation between sexual assault against a minor and having pornography, ultimately holding that evidence of sexual molestation alone does not support probable cause to search for child pornography.[58]

Going even further, the Second Circuit held that sexual assault against a minor does not even have a strong correlation with child pornography possession.[59] In *Falso*, the Federal Bureau of Investigations ("FBI") sought a search warrant to search for child pornography in David Falso's home.[60] In his affidavit, Agent Lyons stated that individuals who exploit children commonly use the computer to communicate with "like-minded individuals, store their child pornography collection, and locate, view, download, collect and organize images of child pornography found on the [I]nternet."[61] The affidavit also contained a statement from the FBI's Behavioral Unit, describing that "[t]he majority of individuals who collect child pornography are persons who have a sexual attraction to children."[62] Finally, the affidavit

53. *Id.* at 464–65.

54. *Id.* at 472 (explaining that there was "remarkably scant evidence" in the affidavit to support a belief that defendant possessed child pornography). The court noted that most of the information contained in the affidavit supports a suspicion of sexual assault against a minor. *See id.*

55. *Id.*

56. *Id.* at 473.

57. In order for pictures to constitute child pornography, the children would have to be depicted in a "lewd" fashion. *See id.*

58. *Id.* at 472 ("But evidence of child molestation alone does not support probable cause to search for child pornography."). In making its conclusion, the Fourth Circuit relies on decisions from the Sixth and Second Circuits, which both held that warrants were defective since affidavits supporting the warrants only presented facts about sexual assault against a minor.

59. United States v. Falso, 544 F.3d 110, 122 (2d Cir. 2008).

60. *Id.* at 113.

61. *Id.*

62. *Id.*

revealed that Falso was arrested for sexually abusing a seven-year-old girl eighteen years earlier and pled guilty to acting "injuriously" to a minor.[63] Based on these facts, Agent Lyons concluded in the affidavit that there was probable cause to believe that Falso collected child pornography.[64] The Second Circuit held that the warrant was defective.[65] It reasoned that it is an "inferential fallacy of ancient standing to conclude that because members of Group A (those who collect child pornography) are likely to be members of Group B (those attracted to children), then Group B is entirely, or largely composed of, members of Group A."[66] Thus, the suggested correlation between sexual assault against a minor and possession of child pornography does not stand. The court acknowledged, however, that the two crimes shared child exploitation as a common root.[67] The court even recognized the *mere possibility* that people who are attracted to children have child pornography.[68] Yet, the court deemed this connection between the two crimes as insufficient for the conclusion that the occurrence of one crime, standing alone, lends to the occurrence of the other crime. Accordingly, since the affidavit only presented facts that established one crime (sexual assault against a minor), that, standing alone, did not sufficiently establish probable cause warranting the search for child pornography.[69]

Echoing the Second and Fourth Circuits, the Sixth Circuit held that evidence of one crime, without more, does not authorize a search for the other crime.[70] In *Hodson*, Detective Passano conversed with Michael Hodson via instant online messenger, where Hodson revealed that he was a forty-one-year-old man who had sex with his seven-year-

63. *Id.* at 114.

64. *Id.*

65. *See id.* at 122 (explaining that the District Court's reliance on a prior conviction for endangering the welfare of a child to support its probable cause determination "falls victim to logic").

66. *Id.*

67. *Id.*

68. *Id.* (emphasis added) ("Perhaps it is true that all or more people who are attracted to minors collect child pornography.").

69. *Id.* ("While the district court undoubtedly had the safety of the public in mind, an individual's Fourth Amendment rights cannot be vitiated by fallacious inferences drawn from facts not supported by the affidavit.").

70. *See* United States v. Hodson, 543 F.3d 286, 292 (6th Cir. 2008) ("It is beyond dispute that the warrant was defective for lack of probable cause—Detective Pickrell established probable cause for one crime (child molestation) but designed and requested a search for evidence of an entirely different crime (child pornography). Consequently . . . the evidence obtained from that search must be excluded from trial.").

old nephew.[71] Passano described his conversation with Hodson in an affidavit for a search warrant, and specifically requested the ability to search "any and all computers . . . and all books or manuals that may contain sexually explicit reproductions of a child's image, voice, or handwriting . . ."[72] The affidavit also included another detective's explanation of the circumstances that he believed constituted probable cause.[73] The Sixth Circuit held that this detective's explanation did not clearly establish the connection sexual assault against a minor and possessing child pornography.[74] Rather, the explanation only established probable cause for sexual assault against a minor.[75] Because the detective established probable cause for one crime but requested a search for another crime's evidence, the court held that the search warrant was defective and it was unreasonable for Passano to believe that probable cause existed to search Hodson's home for child pornography based on a suspicion.[76] The court made its disapproval of using sexual assault as probable cause to search for child pornography clear when it stated that "[s]tanding alone, a high incidence of child molestation by persons convicted of child pornography crimes may not demonstrate that a child molester is likely to possess child pornography."[77]

Deviating slightly, the Ninth Circuit, though rejecting a natural correlation between sexual assault against a minor and child pornography possession, instituted a case-by-case approach.[78] Officer Bobkiewicz submitted an affidavit for a search warrant, stating that he was investigating Bruce Dougherty's inappropriate touching of his sixth-grade students. Bobkiewicz also stated that he had fourteen

71. *Id.* at 287.

72. *Id.* at 287–88.

73. *Id.* at 289.

74. *Id.*

75. *Id.*

76. *Id.* at 292–93. The court explained that a "reasonably trained officer," upon looking at the defective warrant, would have realized that the search described (for child pornography evidence) did not match the probable cause described (for child molestation evidence). In fact, the court highlighted that it was unreasonable for both the magistrate judge and the police officer to infer a nexus between the two crimes. *See id.*

77. *Id.* at 293.

78. Dougherty v. City of Covina, 654 F.3d 892, 898 (9th Cir. 2011). The court, in stating that no facts in the affidavit tied Dougherty's acts as a possible molester to his child pornography possession, noted that the affidavit only had Officer Bobkiewicz's statements about the two crimes' connection based on his experience. *See id.* The affidavit had no evidence that demonstrated that Dougherty was a "pedophile" and interested in viewing images of naked children. *See id.* However, the court noted that, in some instances, they might find probable cause to search for child pornography. See *id.* at 899.

years of experience in the police force with over one hundred hours of training involving sex crimes.[79] His experience taught him that people "involved in this type of criminal behavior" also have child pornography.[80] Accordingly, he requested the ability to seize Dougherty's computer to search for child pornography, and the magistrate granted the search warrant.[81] When Bobkiewicz arrived in Dougherty's home, Dougherty consented to the search.[82] But when Dougherty asked to see Bobkiewicz's warrant, Bobkiewicz replied that he left it at the police station.[83] He then seized Dougherty's computer and "related items."[84] The Ninth Circuit held that Officer Bobkiewicz's statement about the correlation between sexual assault against a minor and child pornography possession did not establish sufficient probable cause to search for child pornography.[85] In fashioning its conclusion, the court discussed its previous case, *United States v. Weber*, 923 F.3d 1338 (9th Cir. 1990).[86] In *Weber*, the court found some direct evidence of child pornography through the defendant's old purchases.[87] Despite such direct evidence, the court did not find probable cause to search for child pornography possession.[88] The court reasoned that if it could not find probable cause in *Weber*, it could not find it here because the search warrant relied on an old child molestation allegation and on Babkiewicz's experience; no facts tied Dougherty's acts as a possible child molester to his possession of child pornography.[89] As such, Babkiewicz's statement tying child molestation and child pornography, though grounded in expertise, did not sufficiently establish probable cause to search Dougherty's computer.[90]

These cases demonstrate that the federal courts are split on whether there is a relationship between sexual assault against a minor and child pornography possession. Grappling with this issue as well, the military courts have tried to answer it in light of these federal cir-

79. *Id.* at 896.
80. *Id.*
81. *Id.*
82. *Id.*
83. *Id.*
84. *Id.*
85. *Id.* at 898.
86. *Id.*
87. *Id.* (citing United States v. Weber, 923 F.3d 1338, 1343 (9th Cir. 1990)).
88. *Id.* (explaining that the affidavit did not present facts that would support the conclusion that defendant was a child molester while only relying on an old possible purchase of child pornography) (citing United States v. Weber, 923 F.3d 1338, 1343 (9th Cir. 1990)).
89. *Id.*
90. *Id.* at 899.

cuit court decisions. In order to understand the CCA's and CAAF's *Hoffmann* holdings, it is important to comprehend the military rules of evidence and to what extent they are similar and/or different from the federal rules of evidence.

II. MILITARY RULES (AND PRACTICES) OF EVIDENCE

> The Fourth Amendment of the United States Constitution states: The right of the people to be secure in their persons, houses, papers, and effects, against unreasonable searches and seizures, shall be not be violated, and no [w]arrants shall issue, but upon probable cause, support by [o]ath or affirmation, and particularly describing the place to be searched, and the person or things to be seized.[91]

The Fourth Amendment requires warrants supported by probable cause before law enforcement can conduct a search.[92] In *Illinois v. Gates*, the Supreme Court held that courts must use probabilities rather than certainties in determining whether probable cause exists.[93] Judges must thus make a practical, common-sense decision of whether, given the totality of the circumstances presented in an affidavit requesting for a search warrant, there is a "fair probability that contraband or evidence of a crime will be found in a particular place."[94] The Supreme Court and other courts have further refined the test when it held that probable cause to search does not require evidence sufficient to arrest a person.[95] Also, it does not require any showing that a belief is more likely to be true than false, or a probability of beyond fifty percent.[96]

Historically, the Supreme Court did not apply the Fourth Amendment to military members.[97] But in the 1920's, policies started applying Fourth Amendment principles to the military, and the Manual for Courts-Martial later included search and seizure in 1949.[98] De-

91. U.S. CONST. amend. IV.

92. *See* Johnson v. United States, 333 U.S. 10, 14 (1948). *But see* United States v. Rabinowitz, 339 U.S. 56, 66 (1950).

93. *See* Jacob D. Bashore, *Probable Cause in Child Pornography Cases: Does It Mean the Same Thing?*, 209 MIL. L. REV. 1, 11 (2011); *see also* Illinois v. Gates, 462 U.S. 213, 231 (1983).

94. This probable cause standard has also been called "substantial basis" or "reasonable belief." Bashore, *supra* note 93, at 12; *see also Gates*, 462 U.S. at 238.

95. *See* Bashore, *supra* note 93, at 12; *see also* Zurcher v. Stanford Daily, 436 U.S. 547, 558 (1978).

96. Bashore, *supra* note 93, at 12; *see also* Texas v. Brown, 460 U.S. 730, 742 (1983); United States v. Garcia, 179 F.3d 265, 269 (5th Cir. 1999).

97. Bashore, *supra* note 93, at 13.

98. *Id.*; *see also* United States v. Stuckey, 10 M.J. 347, 352–60 (C.M.A. 1981) (providing the history of military search and seizures from the 1920's until the 1960's).

spite the Supreme Court's refusal to apply the Fourth Amendment to military members, the military courts have applied it to such members since 1959.[99] The Court of Military Appeals ("CMA"), now the CAAF, opined that the Fourth Amendment protections and "the entire Bill of Rights are applicable to the men and women serving in the military service of the United States unless expressly or by necessary implication they are made inapplicable."[100]

Despite the CAAF's Fourth Amendment application to military members, commanding officers still have broad power in authorizing searches[101]—and unlike civilian searches, military searches do not require written search warrants.[102] Instead, they merely require search authorizations, which are "express permissions, written or oral, issued by competent military authority to search a person or area . . ."[103] Unlike a civilian judge who must only rely on information presented before him or her, military judges may rely on oral statements, previously presented information, and hearsay, given that the information is "believable and has a factual basis."[104] Additionally, unlike civilian search warrants, search authorizations may be merely oral and need not be under oath.[105]

Military Rules of Evidence ("MRE") 311–17 now codify Fourth Amendment principles and limitations.[106] Under MRE 315, evidence

99. Bashore, *supra* note 93, at 13; *see also* United States v. Brown, 28 C.M.R. 48, 55 (C.M.A. 1959).

100. Bashore, *supra* note 93, at 13; *see also* United States v. Ezell, 6 M.J. 307, 313 (C.M.A. 1979).

101. Commanding officers' power to authorize searches rests on reasonableness, a lower standard than that of the Fourth Amendment's warrant requirement. Bashore, *supra* note 93, at 13; *see also Stuckey*, 10 M.J. at 361–62. Note, too, that commanding officers are not the only official who may authorize a search. Military judges or magistrates may also authorize a search. MIL. R. EVID. 315(d)(1)–(2).

102. Bashore, *supra* note 93, at 13; *see also Stuckey*, 10 M.J. at 359–61.

103. MIL. R. EVID. 315(b)(1). The full definition of "search authorization" is as follows: an "express permission, written or oral, issued by competent military authority to search a person or area for specified property or evidence, or for a specific person and to seize such property, evidence, or person." *Id.*

104. Bashore, *supra* note 93, at 14.

105. Murl Larkin, *The Military "Search Warrant"*, 16 AM. U. L. REV. 18, 30 (1966). Commanding officers may authorize a search of a person or place under his command when there is probable cause to believe that items relating to a crime are located in the place or on the person to be searched. They may not delegate that authority to authorize searches to any individual who is junior to their rank. Such delegation may occur to the next senior person if a commanding officer is absent or cannot be reached. Commanding officers are not, though, the only individuals who can authorize a search. If there is military judge present on base, he/she may authorize a search. *See Conducting Searches and Seizures*, GLOBALSECURITY.ORG, http://www.globalsecurity.org/military/library/policy/army/fm/19-10/Ch9.htm (last visited Mar. 9, 2016).

106. Bashore, *supra* note 93, at 13.

acquired from reasonable searches conducted pursuant to a search warrant or authorization is admissible at trial unless it is inadmissible under the United States Constitution.[107] MRE 311(a) provides:

> [E]vidence obtained as a result of an unlawful search and seizure made by a person acting in a governmental capacity is inadmissible at trial if: the (1) accused files a motion to suppress or an objection to the evidence; and (2) the accused had a reasonable expectation of privacy in the property searched, the accused had a legitimate interest in the evidence seized, or the accused would have other grounds to object to the search and seizure under the United States Constitution.[108]

MRE 311(b)(1)–(3) defines "unlawful" as a search that was

> conducted, instigated, or participated in" by: (1) military officials in violation of the Constitution or a federal statute that govern court martials and requires exclusion of evidence, (2) other officials . . . of the United States [or its states, commonwealths, and territories] in violation of legal principles that apply in searches and seizures in criminal cases, or (3) [foreign officials whose evidence] was obtained as a result of a . . . search or seizure that subjected the accused to "gross and brutal maltreatment.[109]

MRE 315(f)(2) states that probable cause "exists when there is a reasonable belief that the person, property, or evidence sought is located in the place or on the person to be searched."[110] To determine if probable cause exists for a search, the authorizing official may rely on the following:

> (a) written statements communicated to the authorizing official; (b) oral statements communicated to the authorizing official in person, via telephone, or by other appropriate means of communication; (c) such information as may be known to the authorizing official that

107. MIL. R. EVID. 315(a). Some military searches do not require search authorizations or probable cause. The evidence found in from such searches would still be admissible in trial. If evidence to be sought is in plain view or is found during an inspection or inventory, or if circumstances are pressing, search authorizations are not needed. Some searches do not even require probable cause. A number of searches do not require probable cause. These searches include the following: border searches; searches upon exit or entry on United States installations, aircraft, and vessels abroad; government property searches; consent searches; searches incident to a lawful stop or apprehension; searches within jails or confinement facilities; searches to save lives; searches of open fields and woodland; and any other search that does not require probable cause and is permissible under the United States Constitution. MIL. R. EVID. 314.

108. MIL. R. EVID. 311(a).

109. MIL. R. EVID. 311(b)(1)–(3).

110. MIL. R. EVID. 315(f)(2).

> would not preclude the officer from acting in an impartial fashion.[111]

The authorizing official will then evaluate whether the information furnished reasonably warrants a search authorization based on that information by looking at reasonableness' two elements: (1) the source's basis of knowledge (also known as the knowledge test); and (2) credibility of the person providing the knowledge (also known as the reliability test).[112] The source's basis of knowledge may be established by personal observation, the statement of person or accomplice to be searched, self-verifying detail, and corroboration.[113] An informant's reliability may be established by the informant's demeanor, a statement of past reliability, corroboration, a victim's or eyewitness's statement, a declaration against interest, and information from other law enforcement officials or non-commissioned officers.[114]

After a military judge makes a probable cause determination, the CAAF will rely on four factors to determine whether the probable cause decision was an abuse of discretion, i.e., "clearly erroneous or unsupported by the record." First, the court will give substantial deference to decisions made by a "neutral and detached" magistrate, given that the magistrate did not make his or her determinations on a gut feeling or a "bare bones" affidavit.[115] The neutral and detached standard, however, is a low threshold. For example, the CAAF has found that a magistrate taking only an hour to review and inquire about an affidavit satisfied the "neutral and detached" standard.[116]

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111. MIL. R. EVID. 315(f)(2)(A)–(C). The rules provide that the Secretary of Defense or Secretary concerned may impose additional requirements. *See id.*

112. *See Conducting Searches and Seizures*, *supra* note 105.

113. *Id.* Personal observation can either come from the commanding officer or a third party witnessing the criminal activity. If the third party were the witness, corroboration would need to support that person's statements. If an accomplice provides information, the commanding officer would be more confident in that source's knowledge. Detailed information would pass the knowledge test because such information suggests persona observation. Finally, corroboration may effectively support one's knowledge of a criminal activity. *Id.*

114. *Id.* Demeanor is particularly important when questioning first-time informants. Reliability can be bolstered if the informant has provided reliable information in the past. Like demeanor, corroboration helps when questioning first-time informants with little record of reliability. The informant can also bolster his reliability by stating that he is aware that he is admitting an offense and that he was promised no benefit for providing the information. Finally, obtaining information from other law enforcement or military officials gives a presumption of reliability. The original source would still have to demonstrate his or her basis of knowledge, but that evaluation would take place at a later time. *Id.*

115. A "bare bones" affidavit is one that fails to identify sources, and fails to acknowledge gaps or conflicts in the evidence. United States v. Leedy, 65 M.J. 208, 212 (C.A.A.F. 2007).

116. Bashore, *supra* note 93, at 16 n.105 (describing that in United States v. Clayton, 68 M.J. 419 (C.A.A.F. 2010), the military judge accepted the magistrate judge's spending forty minutes

Additionally, the magistrate is not disqualified from such standard even if he or she is present at the search's scene or issues a prior authorization that is similar to one that a federal district judge might issue.[117] The CAAF seems to hinge its "neutral and detached" analysis on whether the magistrate has a personal bias or "ill will" against the accused.[118] Second, the court will resolve "close call" determinations in favor of sustaining the magistrate's decision.[119] Third, the court will analyze the affidavit in a commonsense, rather than a "hypertechnical," manner.[120] Lastly, the evidence will be examined "in the light most favorable to the prevailing party."[121] This last factor tends to favor the government vis-à-vis the military against a service member.[122]

One exception to the search warrant requirement is the *inevitable discovery* exception. The inevitable discovery rule states that evidence obtained from an unlawful search is admissible when done with proper procedure, the investigation would have inevitably led to the discovery of the evidence.[123] The exception needs more than mere speculation and conjecture to apply.[124] And, when determining whether the inevitable discovery exception applies, the military courts will consider the totality of the circumstances.[125] In *United States v. Weston*, Staff Sergeant (SSgt) ME, a female Marine court reporter, noticed a mysterious electric razor in the bathroom that she shared with appellant, the senior court reporter who had experience with

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discussing the case with the investigator and twenty minutes making a probable cause determination).

117. MIL. R. EVID. 315(d)(2).

118. *See, e.g.*, United States v. Maxwell, 45 M.J. 406, 423 (C.A.A.F. 1996) ("Colonel McHenry was neutral and detached in that he had no ill motive and 'was not motivated solely by revenge or vindictiveness.").

119. *See, e.g.*, United States v. Monroe, 52 M.J. 326, 331 (C.A.A.F. 2000) (stating that resolution of "close call" cases should be largely determined by the preference for warrants and that such cases will be resolved in favor of the magistrate's decision); *see also* Bashore, *supra* note 93, at 16 n.107.

120. Bashore, *supra* note 93, at 16 n.108. This standard conforms with the probable cause review of the "factual and practical considerations of everyday life on which reasonable and prudent men, not legal technicians act." Brinegar v. United States, 338 U.S. 160, 175 (1949).

121. Bashore, *supra* note 93, at 17; *see also* United States v. Reister, 44 M.J. 409, 413 (C.A.A.F. 1996) ("In ruling on a motion to suppress, we consider evidence 'in the light most favorable to the prevailing party.'").

122. Bashore, *supra* note 93, at 17.

123. United States v. Kozak, 12 M.J. 389, 392–93 (C.M.A. 1982); *see also* United States v. Owens, 51 M.J. 204, 210–11 (CA.A.F. 1999) (stating that when law enforcement's routine procedures would inevitably find the evidence in question, the inevitable discover rule applies).

124. *See, e.g.*, United States v. Maxwell, 45 M.J. 406, 422 (C.A.A.F. 1996).

125. *See, e.g.*, United States v. Weston, 67 M.J. 390, 395 (C.A.A.F. 2009).

computers and surveillance.[126] Feeling like she was being watched, SSgt ME took the razor and examined it later that day, only to find that there was a camera hidden in the razor.[127] Ssgt ME reported the camera to the Provost Marshal's Office ("PMO") and appellant's wife, Mrs. Weston.[128] When appellant and his wife returned home, military police met them and led them to the PMO, where they were placed in separate rooms.[129] When asked for consent to search the house, appellant objected.[130] Unbeknownst to appellant, his wife granted consent.[131] The agents searched appellant's home and after appellant's wife subsequently withdrew her consent, seized his computer, which had nonconsensual pictures of SSgt ME changing in the bathroom.[132] Though the CAAF ultimately held that the search was reasonable, and thus the inevitable discovery rule did not apply, Chief Judge Effron stated that, assuming arguendo that the search was unreasonable, discovery of SSgt ME's pictures was inevitable.[133] Through his examination of different circumstances that demonstrated the discovery of the pictures was inevitable,[134] Chief Judge Effron provided an example of the kind of totality of circumstances analysis in which military courts will engage to determine inevitability.

As demonstrated above, military rules regarding evidence do not entirely mirror Fourth Amendment protections in the evidence context. However, to the extent that the CCA and CAAF mention the Fourth Amendment and the inevitable discovery exception in *Hoffmann*, military and federal doctrines match. The doctrines' similarities played a heavy role in influencing the CCA's and CAAF's *Hoffmann* decisions.

126. *Id.* at 391.
127. *Id.*
128. *Id.*
129. *Id.*
130. *Id.* When appellant objected, investigators left him alone. Appellant then called Mr. Fricke, a former military judge and Marine Corps judge advocate.
131. *Id.* Prior to her consent, she did not ask whether the agents had asked her husband to consent, and the investigators did not tell her that her husband refused to do so. When agents returned, they ended the call and confiscated appellant's phone.
132. *Id.* Mrs. Weston withdrew her consent when her husband told her that Mr. Fricke said that she should do so.
133. *Id.* at 394 (Effron, C.J., concurring) ("Assuming that the search of Appellant's home was unlawful . . . the present case falls within the narrow confines of the inevitable discovery exception.").
134. See *id.* at 395.

III. *UNITED STATES V. HOFFMANN* – THE MILITARY'S STANCES ON THE ISSUE

The CCA, being the first military court to address this issue, held that a mere suspicion of sexual assault against a minor constituted sufficient probable cause to search for child pornography.[135] In *Hoffmann*, on September 7, 2011, while walking around Camp LeJeune, a thirteen-year-old boy saw a man drive by in a sport utility vehicle ("SUV") twice while making a fellatio-like gesture.[136] On November 1, 2011, the boy saw the same vehicle and called for his mother to pick him up.[137] The boy and his mother followed the SUV and wrote down its license plate number.[138] Later, the boy's father located the SUV and notified security. Soon thereafter, security identified the SUV as belonging to Private Matthew Hoffmann.[139] After security took Hoffmann into custody, Agent Rivera notified Hoffmann that he was investigating the crime of "indecent liberty."[140] Special Agent Shutt assumed investigative jurisdiction of the case and discovered that a similar crime occurred on base in April 2011 by an individual who matched Hoffmann's description.[141] In April 2011, a man drove by another thirteen-year-old boy several times before persistently asking the boy if he wanted a "quickie."[142] Special Agent Shutt also discovered that a man who also matched Hoffmann's description made indecent gestures towards a ten-year-old boy in September 2011.[143] On March 9, 2012, Hoffmann's Commanding Officer ("CO") authorized a search of Hoffmann's electronic storage devices and computers for child pornography.[144] Hoffmann consented to a search in his barracks but later revoked the consent after Agent Rivera started to unplug his laptop.[145] Agent Rivera ceased the search but seized Hoffmann's

135. United States v. Hoffmann, 74 M.J. 542, 551 (N-M.Ct. Crim. App. 2014) (stating that an individual accused of enticing boys into sexual activity is likely to possess child pornography, either to gratify sexual desires or to aid in sexual assault against boys).

136. *Id.* at 545.

137. *Id.*

138. *Id.*

139. *Id.* Appellant was reduced to pay grade E-1 after a general court martial convicted him of attempted sodomy on a child, indecent liberties with a child, child enticement, and possession of child pornography. *Id.*

140. *Id.* at 546.

141. *Id.* at 545.

142. *Id.*

143. *Id.* at 546.

144. *Id.*

145. *Id.* Hoffmann consented to a search of his room and seizure of "all items used for storage that are locked and unlocked." The CCA's record reveals that Hoffman "withdrew his permission–the authorization to search." Readers should not confuse Hoffman's use of the phrase

electronic storage devices and computers.[146] Investigators found eighteen images and two videos containing child pornography.[147] At the motions hearing, Agent Rivera testified in his forty months of handling sex crimes, seventy to eighty percent of those cases involved "electronic evidence."[148] Additionally, based on prior experience and training, Agent Rivera stated that people who solicit children tend to "research or inquire about it with media equipment."[149] Similarly, Special Agent Shutt testified that there was an "intuitive relationship between acts such as enticement or child molestation and the possession of child pornography."[150] The military judge then found Rivera's seizure to be lawful and admitted the images and videos into evidence.[151] On appeal, the CCA acknowledged that Hoffmann's case was a case of first impression and considered the federal circuit court split on whether there existed a causal connection between sexual assault against children and possession of child pornography.[152] It then held that an individual accused of attempting to entice boys into sexual activity is likely to have child pornography.[153] The court reasoned that the two crimes had a rational connection and determined that there was a substantial basis to conclude probable cause existed to search for child pornography in Hoffmann's barracks.[154]

The CAAF granted review of this case on April 28, 2015.[155] On February 18, 2016, it reversed the CCA.[156] It reviewed the CCA's reliance on the Eight Circuit's decision in *Colbert* that held individuals who entice children into sexual activity "[are] likely to possess child

"authorization to search" with an actual search authorization. Since commanding officers issue search authorizations, it seems unlikely that Hoffmann could have revoked a search authorization. *See Conducting Searches and Seizures*, *supra* note 105.

146. *Hoffmann*, 74 M.J. at 546. The next day, Hoffmann sent Agent Rivera a written notice of his revocation of consent and a demand for the immediate return of the seized property. *Id.*

147. *Id.*

148. *Id.* at 547. The agent also stated that "[y]ou don't go directly to soliciting children . . . without doing some kind of research or inquiring about it with media equipment." *Id.*

149. *Id.*

150. *Id.* at 549. To the court, child pornography represents an electronic record of child molestation.

151. *Id.* at 546.

152. *Id.* at 549.

153. *Id.* at 551 ("[O]ur common sense tells us that . . . an individual accused of deliberately seeking out boys walking home alone and then engaging in brazen attempts to entice these boys into sexual activity is likely to possess child pornography . . . .").

154. *Id.* at 552.

155. UNITED STATES COURT OF APPEALS FOR THE ARMED FORCES DAILY JOURNAL, http://www.armfor.uscourts.gov/newcaaf/journal/2015Jrnl/2015Apr.htm (last updated Feb. 2, 2017).

156. United States v. Hoffmann, 75 M.J. 120, 128 (N-M. Ct. Crim. App. 2016).

pornography."[157] Ultimately, the CAAF disagreed with the CCA's reliance on *Colbert* because both *Hoffmann*'s and *Colbert*'s facts did not match.[158] The CAAF reasoned that in *Colbert*, the affidavit supporting the search warrant established a direct link between enticement and possession of child pornography.[159] However, that link was not present in Hoffmann's case and thus, no probable cause to search for child pornography existed.[160] Because no probable cause existed, the inevitable discovery doctrine failed.[161] To support its reasoning, the CAAF cited to two federal circuit court decisions, emphasizing, in a parenthetical, those cases' holdings that evidence of sexual assault against a minor did not establish probable cause to search for child pornography.[162] What is eerily missing from the CAAF's decision is an outright rejection of using evidence of sexual assault against a minor as probable cause to search for child pornography. Rather, the CAAF limited its conclusion to *Hoffmann*'s facts, which suggests that it may have adopted the Ninth Circuit's case-by-case approach in *Dougherty*. This case-by-case approach, however, still signals that CAAF's outright rejection of relying on sexual assault against a minor to search for child pornography.

IV. THE CAAF CORRECTLY REVERSED THE CCA WHEN IT REJECTED AN OUTRIGHT RELIANCE ON EVIDENCE OF SEXUAL ASSAULT AGAINST A MINOR AS PROBABLE CAUSE TO SEARCH FOR CHILD PORNOGRAPHY.

Because the CAAF is silent on whether a suspicion of sexual assault against a minor constitutes sufficient probable cause to search for child pornography, this author will argue that the CAAF was correct in its decision for the following three reasons. First, social science cannot conclusively link sexual assault against a minor and child pornography possession. Second, because the two crimes have a tenuous relationship, the inevitable doctrine fails, and searching for evidence of sexual assault does not necessarily yield evidence of child pornography. Third, *Hoffmann* resembles *Dougherty v. City of Covina*,[163]

157. *Id.* at 127.
158. *Id.*
159. *Id.*
160. *Id.*
161. *Id.*
162. *Id.* (citing Dougherty v. City of Covina, 654 F.3d 892, 898–99 (9th Cir. 2011); United States v. Falso, 544 F.3d 110, 122 (2d Cir. 2008)).
163. Dougherty v. City of Covina, 654 F.3d 892 (9th Cir. 2011).

which also rejected the notion that a suspicion of sexual assault against a minor constituted probable cause to search for child pornography. Finally, the CAAF's decision prevents the military from running afoul of the Supreme Court case *Riley v. California*[164] by continuing to use evidence of sexual assault against a minor to search for child pornography possession. For these reasons, the CAAF[165] should hold that, as a matter of law, a suspicion of sexual assault against children does not constitute sufficient probable cause to search for child pornography.

A. Using a Suspicion of Sexual Assault Against a Minor Cannot Constitute Sufficient Probable Cause because There is a Tenuous Relationship Between the Two Crimes.

Many scholars are split on the nature of the relationship between sexual assault against a minor and possession of child pornography.[166] Thus, it can be said that there is no conclusive consensus among social science about the relationship between the two crimes.[167] The major studies that the scholars rely upon are explained below.[168]

164. Riley v. California, 134 S. Ct. 2473 (2014) (holding that the police generally may not, without a warrant, search digital information from a seized electronic device from an individual who has been arrested).

165. This court was previously the United States Court of Military Appeals (CMA). Some cases in this Note will come from the CMA, and the author urges the reader to remember that the CAAF and the CMA are the same court.

166. *Compare* Megan Westenberg, *Establishing the Nexus: The Definitive Relationship Between Child Molestation and Possession of Child Pornography as the Sole Basis for Probable Cause*, 81 U. CIN. L. REV. 337, 347 (2012) (claiming that there is nexus between child molestation and possession of child pornography), *with* Mary Leary, *Death to Child Erotica: How Mislabeling the Evidence Can Risk Inaccuracy in the Courtroom*, 16 CARDOZO J. L. & GENDER 1, 7 (2009) (explaining that research supports the connection between child erotica and sexual assault against a minor), *and* Carissa B. Hessick, *Disentangling Child Pornography from Child Sex Abuse*, 88 WASH. U. L. REV. 853, 873 (2011) (describing the empirical research's failure to definitively establish a causal connection between child pornography and sexual assault against a minor).

167. *Compare* Angela Eke et al., *Examining the Criminal History and Future Offending of Child Pornography Offenders: An Extended Prospective Follow-up Study*, 35 L. HUM. BEHAV., 466, 476 (2011) (arguing that not all child pornography offenders have a high risk of committing offenses involving child sexual molestation), *with* Michael Seto et al., *Contact Sex Offending By Men With Online Sexual Offenses*, 23 SEXUAL ABUSE 124, 136 (2011) ("Our second meta-analysis found that online offenders rarely go on to commit detected contact sexual offenses."), *and* Kathryn A. Rigler, *Child Pornography and Child Molestation: One and the Same or Separate Crimes?*, 9 SETON HALL CIR. REV. 193, 216 (2013) ("[T]here is overwhelming evidence that these two types of crimes are strongly correlated.").

168. The following studies are not the only studies that exist on the issue. However, as I mentioned above, these studies have appeared consistently in other scholars' work. Therefore, they warrant explanation. *See, e.g.*, M. Jackson Jones, *A Confusing Interaction Between the Warrants Clause, Child Pornography, and Child Molestation: Determining Whether Evidence of Child Molestation Creates Probable Cause to Search for Child Pornography*, 40 NEW ENG. J. ON CRIM.

1. Studies Linking Sexual Assault Against a Minor and Child Pornography Possession

Butner Studies

In 2000, Dr. Andres Hernandez published the Butner I study, which researched "the incidence of sexual offending involving contact crimes (e.g. child sexual abuse and rape) or program participants, including those inmates convicted of non-contact sexual offenses (e.g. possession of child pornography)."[169] Dr. Hernandez studied ninety prisoners who voluntarily participated in the Butner Correctional Facility's Sex Offense Treatment Program ("SOTP").[170] Those prisoners included seventy-nine percent (79%) Caucasians, nineteen percent (19%) Native Americans, and two percent (2%) African Americans.[171] While conducting his research, Dr. Hernandez studied the prisoners' Presentence Investigation Report ("PSIR") and discharge reports to determine the number of sexual offenses each individual committed prior to enrolling in the SOTP program.[172] As Dr. Hernandez studied the reports, he grouped the prisoners into the following three groups: (1) Child Pornographer/Traveler; (2) Contact Sex Offenders; and (3) Other.[173] Prisoners grouped in the "Child Pornographer/Traveler" category engaged in crimes that involved both child pornography and enticing a child to cross state lines to sexually abuse a child.[174] Prisoners in the "Contact Sex Offenders" group

& CIV. CONFINEMENT 75, 107–27 (2014) (describing the studies that both show and do not show a link between child molestation and child pornography possession); Nicholas Pisegna, *Probable Cause to Protect Children: The Connection Between Child Molestation and Child Pornography*, 36 B.C. J.L. & SOC. JUST. 287, 303–07 (2016) (explaining scientific studies that vary in their conclusion as to whether child molestation and possession of child pornography have a connection).

169. ANDRES E. HERNANDEZ, SELF-REPORTED CONTACT SEXUAL OFFENSES BY PARTICIPANTS IN THE FEDERAL BUREAU OF PRISONS' SEX OFFENDER TREATMENT PROGRAM: IMPLICATIONS FOR INTERNET SEX OFFENDERS 1–2 (2000) [hereinafter BUTNER I], http://www.ovsom.texas.gov/docs/Self-Reported-Contact-Sexual-Offenses-Hernandez-et-al-2000.pdf. I have chosen to name this study "Butner I" because the study is commonly referred to as "Butner I."

170. *Id.* at 3. These ninety prisoners were all males, ranging from twenty-two to sixty-six years of age. *Id.*

171. *Id.*

172. *Id.* at 2. The PSI reports revealed the number of contact sexual crimes that a participant was known to have prior to entering treatment. The discharge reports revealed the number of self-reported contact sexual crimes divulged during SOTP treatment.

173. *Id.* at 3.

174. *Id.*

either sexually molested or abused a child or adult.[175] Finally, prisoners in the "Other" group committed non-sexual crimes.[176]

Dr. Hernandez found that 76% of participants in the "Child Pornographer/Traveler" group had engaged in child molestation.[177] These offenders seem to have committed contact sexual offenses at higher rates (e.g. 30.5 victims per offender) than sex offenders convicted of contact sexual crimes (e.g. 9.5 victims per offender).[178] Through this study, Dr. Hernandez concluded that child pornographers and child molesters had similar behavioral characteristics.[179] In fact, he went so far as to conclude that child pornographers could be "equally predatory and dangerous as extra-familial child molesters."[180] Despite such conclusions, Dr. Hernandez's study had three limitations.[181] First, the data consisted of information obtained from the prisoners' reports.[182] Second, Dr. Hernandez did not speak with the participants. Third, his study only focused on the Butner Correctional Facility, which may not have been representative of the general child pornographer population.[183]

In 2008, Dr. Hernandez and Michael Bourke conducted the Butner Study Redux in a manner nearly identical to the Butner I study.[184] Still focusing on the Butner Correctional Facility,[185] Dr. Hernandez and Mr. Bourke examined 155 offenders' PSIRs, Psychosexual History Questionnaire ("PHQ"), and a polygraph exam-

175. *Id.*

176. *Id.* Dr. Hernandez listed examples of these non-sexual crimes. They are the following: bank robbery, mail fraud, and drug trafficking. He also noted that all subjects but one did not have a history of sexual crimes for which they were previously adjudicated in state jurisdictions.

177. *Id.* at 6; Jones, *supra* note 168, at 109.

178. BUTNER I, *supra* note 169, at 6. Dr. Hernandez noted that 25% of the Internet sex offenders had reports that did not reveal any contact sexual offenses. *Id.*

179. *Id.* at 6; Jones, *supra* note 168, at 109.

180. BUTNER I, *supra* note 169, at 6.

181. Jones, *supra* note 168, at 109. Dr. Hernandez himself notes that it is unclear why some Internet sex offenders have not committed contact sexual crimes while others have. He hypothesizes that some offenders may be denying their past criminal behavior or may not have had access to victims because of poor grooming or predatory skills. BUTNER I, *supra* note 169, at 6 (noting that future research should examine why some Internet offenders have not committed contact sexual crimes while others have).

182. Jones, *supra* note 168, at 109–10.

183. *Id.* at 110.

184. *Id.* at 115; *see also* Michael Bourke & Andres Hernandez, *The 'Butner Study' Redux: A Report on the Incidence of Hands-on Child Victimization by Child Pornography Offenders*, 24 J. FAM. VIOLENCE 183, 185 (2009) [hereinafter *Butner Study Redux*] (explaining that his first analysis was "basically a replication" of the Butner I study. The study, however, utilizes a larger sample and a more rigorous methodology).

185. Pisegna, *supra* note 168, at 304.

ination report.[186] From this study, Dr. Hernandez concluded that a "significant number of Internet sex offenders in [their] sample acknowledged committing acts of hands-on abuse."[187] Two limitations that Dr. Hernandez noted in the second study included the following: (1) all subjects had volunteered for the study and (2) over-reporting.[188]

National Juvenile Online Victimization Study

In 2005, Janis Wolak, David Finkelhor, and Kimberly Mitchell published a study that examined "Internet-related sex crimes committed against minors and describe the characteristics of the offenders, the crimes they committed, and their victims."[189] Wolak conducted the study in two phases.[190] During Phase I, Wolak "surveyed 2,574 local, county, and state law-enforcement agencies by mail asking if they had made arrests in Internet-related, child-pornography, or sexual-exploitation cases" for almost a year.[191] During Phase II, Wolak interviewed law enforcement about the cases that they mentioned in their mail survey.[192]

In her study, Wolak coined the term "dual offenders" as offenders who "sexually victimized children and possessed child pornography, with both crimes discovered in the court of the same investigation."[193] Through her study, Wolak found that 40% of the child pornography possession cases involved dual offenses of posses-

186. Jones, *supra* note 168, at 116. The PSIRs contain criminal and social information used by the federal courts to determine appropriate sentences. It includes prior criminal history. The PHQs are an unreported self-report measure on which offenders record their developmental, psychosocial, criminal, and sexual histories. It also includes a comprehensive assessment of their sexual offending behavior. The polygraph examination report explains the polygraph examinations in which offenders participate after fourteen months of treatment at the SOTP. *Butner Study Redux*, *supra* note 184, at 186.

187. *Butner Study Redux*, *supra* note 184, at 187; *see also* Pisegna, *supra* note 168, at 305 (stating that the study reported that a "vast majority of the participants admitted that they had committed child molestation before getting involved with child pornography").

188. *Butner Study Redux*, *supra* note 184, at 189; Pisegna, *supra* note 168, at 304–06.

189. JANIS WOLAK ET AL., CHILD-PORNOGRAPHY POSSESSORS ARRESTED IN INTERNET-RELATED CRIMES: FINDINGS FROM THE ONLINE VICTIMIZATION STUDY, at vii (2005) [hereinafter N-JOV]. Any individual references to Wolak in this Note is a reference to all of this study's participants. This study is also referred to as the N-JOV study. Pisegna, *supra* note 168, at 306. Thus, I have shorthanded this study as "N-JOV."

190. N-JOV, *supra* note 189, at xi.

191. *Id.* The research period was between July 1, 2000 and June 30, 2001.

192. *Id.* Wolak interviewed the law enforcement officials over the telephone.

193. *Id.* at 16.

sion and child sexual victimization.[194] Additionally, 15% of cases involved child pornography possessors who also attempted to sexually molest children.[195] Ultimately, Wolak concluded that 55% of child pornography possessors were also dual offenders.[196] Her study, however, possessed similar limitations.[197] First, Wolak restricted her data from interviews with law enforcement officials, which left ample opportunity for error and biases.[198] Second, she did not believe that her study could be representative of all child pornography offenders.[199] Third, Wolak conceded that her study neither explained nor determined whether possession of child pornography was related to child victimization.[200] Thus, her research results did not determine "how possessing child pornography is related to child sexual victimization or whether it causes or encourages such victimization."[201]

Other Lesser-Known Studies

Congressional testimony has also highlighted lesser-known studies that link sexual assault against a minor and possession of child pornography.[202] On May 1, 2002, Michael Heimbach, who was Unit Chief for the Federal Bureau of Investigation's Crimes Against Children Unit, cited to Operation Candyman, an investigation that discovered that thirteen out of ninety people arrested for child pornography possession admitted to molesting a total of forty-eight children.[203] Heimbach also cited a United States Postal Inspection Service that

194. *Id.* An additional 15% of child pornography possessors had attempted to sexually victimize children by soliciting undercover investigators posing online as minors. Taking the two statistics together, Wolak found that 55% of child pornography possessors were dual offenders.

195. *Id.*; Pisegna, *supra* note 168, at 307.

196. Pisegna, *supra* note 168, at 307.

197. Jones, *supra* note 168, at 112.

198. N-JOV, *supra* note 189, at 31.

199. *Id.* Wolak stated that the findings of the study apply only to child pornography possessors who were arrested for Internet-related sex crimes against minors. She notes that she is not sure if the study applies to all Internet-related child pornography possessors.

200. Jones, *supra* note 168, at 112.

201. N-JOV, *supra* note 189, at 31.

202. *See, e.g.*, *Stopping Child Pornography: Protecting our Children and the Constitution: Hearing Before the Subcomm. on the Judiciary*, 107th Cong. (2002) [hereinafter *Stopping Child Pornography*] (statement of Ernest A. Allen, President & Chief Executive Office, National Center of Missing and Exploited Children); *Threats Against the Protection of Children: Hearing Before the Subcomm. on Crime, Terrorism, & Homeland Sec. of the H. Comm. on the Judiciary*, 107th Cong. (2002) [hereinafter *Threats Against Children*] (testimony of Michael J. Heimbach, Unit Chief, Crimes Against Children Unit, Federal Bureau of Investigations), https://www.judiciary.senate.gov/imo/media/doc/allen_testimony_10_02_02.pdf.

203. *Threats Against Children*, *supra* note 202, at 3 ("Of the 90 people arrested thus far for their participating in child pornography, 13 of them who chose to make inculpatory statements admitted to molesting a combined total of 48 children.").

determined that nearly 40% of child pornographers were also child molesters.[204] Several months later, Ernie Allen, President and Chief Executive Officer of the National Center for Missing and Exploited Children, testifying before the United States Senate Committee on the Judiciary, noted a 1988 study that discovered that 53% of child molesters reported intentionally viewing hard-core sexual materials to prepare for molestation.[205] Allen also cited to another United States Postal Service study that found that 80% of child pornographers were also sexually abusing children.[206]

2. Studies Not Linking Sexual Assault Against a Minor and Child Pornography Possession

Operation Genesis

In 2001, the Swiss Federal Police began Operation Genesis to investigate Swiss inhabitants who visited an American website that allowed people to view child pornography.[207] Following the completion of Operation Genesis, Andreas Frei, Nuray Erenay, Volker Dittmann, and Marc Graf published a study to determine if child pornographers and child molesters shared similar characteristics.[208] Frei analyzed thirty-three individuals' police files and focused the following variables in an effort to determine if the individuals had any psychiatric disorders: (1) age; (2) employment; (3) marital status; (4) criminological variables; and (5) psychosexual variables.[209]

Frei found that in his sample of offenders, the amount of Internet pornography consumed exceeded the prevalence of child sexual

204. *Id.* ("According to the statistics compiled from [the United States Postal Service's] investigations, a frighteningly high percentage of the child pornography offenders investigated were also in the sexual molestation of children.").

205. *Stopping Child Pornography*, *supra* note 202, at 5 ("A 1988 study found not only that 67% of child molesters reported intentionally viewing hard-core sexual material, but more importantly that 53% of child molesters reported intentionally viewing hard-core sexual materials in preparation for molestation.").

206. *Id.* ("Further, U.S. Postal Service statistics reveal that at least 80% of purchasers of child pornography are active abusers.").

207. Andreas Frei et al., *Paedophilia on the Internet—A Study of 33 Convicted Offenders in the Canton of Lucerne*, 135 SWISS MED. WKLY. 488, 489 (2005), http://citeseerx.ist.psu.edu/viewdoc/download?doi=10.1.1.462.6331&rep=rep1&type=pdf (explaining that the Swiss Federal Police launched the "Genesis" campaign to investigate Swiss inhabitants that used Landslide Production, Inc.).

208. *Id.* at 490 ("The aim of [the] study is to examine whether consumers of illegal child-pornography in the Internet share common features with convicted perpetrators of 'contact offenses' . . . .").

209. *Id.*

abuse.[210] Thus, child pornography was not necessarily connected to contact sexual offenses.[211] The study's limitations include the fact that Frei did not have any direct contact with the individuals that he studied.[212] Additionally, his research was limited to individuals living in a Swiss region. Thus, his chosen population may not be representative of all child pornographers.[213]

Consumption of Internet Child Pornography and Violent Sex Offending Study[214]

In 2008, Jerome Endrass, Frank Urbaniok, Lea Hammermeister, Christian Benz, Thomas Elbert, Arja Laubacher, and Astrid Rossegger published a study that "analyze[d] the characteristics of a sample of child pornography users and the population of those who subsequently re-offended with hands-on and hands-off sex offenses."[215] Endrass analyzed 231 individuals charged with child pornography consumption for using an American website that provides access to child pornography.[216] When he limited his "recidivism" definition to "new convictions," Endrass found that only 3% of his subjects re-offended.[217] When he expanded his definition to criminal investigations and criminal charges, he found that only 0.8% of his subjects were "being investigated, charged, or convicted" of child sexual abuse.[218] Endrass ultimately concluded that a majority of child pornographers did not have a history of committing sex offenses.[219] He also noted only one limitation in his study.[220] Particularly, he recognized that the only individuals who could gain access to the American website had to

210. *Id.* at 493; *see also* Jones, *supra* note 168, at 123.

211. Frei et al., *supra* note 207, at 493 (stating that it may not always be the case that child-pornography and pedophilia are inextricably linked); Jones, *supra* note 168, at 123.

212. Jones, *supra* note 168, at 123.

213. *Id.*

214. This is not the official name of this study. However, scholarly articles refer to this study by this name. *See, e.g.*, Jones, *supra* note 168, at 123.

215. Jerome Endrass et al., *The Consumption of Internet Child Pornography and Violent and Sex Offending* 3, BMC PSYCHIATRY (July 14, 2009), http://bmcpsychiatry.biomedcentral.com/articles/10.1186/1471-244X-9-43.

216. *Id.* From Operation Genesis' arrest of over 400 people for Internet pornography consumption through the American website, Landslide, Inc., only twenty-two were suspected of Internet child pornography consumption.

217. *Id.* at 3–4.

218. *Id.* at 4.

219. *Id.* at 5 (stating that they were able to replicate the finding that a majority of child pornography consumers do not have a criminal record for a violent or sex offense).

220. *Id.* at 6.

know English and possess a credit card.[221] Moreover, his subjects all lived in Switzerland.[222] Thus, his subject pool was limited.[223]

These studies demonstrate that there exists a lack of consensus about whether sexual assault against a minor has a strong connection with child pornography possession.[224] Because no consensus exists to link the two crimes, it does not make sense to use a mere suspicion of sexual assault against a minor as sufficient probable cause to search for child pornography. In fact, some scholars argue that research on the connection between the two crimes is still in its infancy.[225] After conducting the Butner Study Redux, Dr. Hernandez himself stated that the research still needs more developing and criticized law enforcement's reliance on a "biased interpretation of his study."[226] If judges relied on this suspicion to deny excluding evidence of child pornography, the resulting searches would seem eerily similar to the generalized searches that federal courts forbid.[227] A dangerous consequence would then result. Investigators would merely walk into a service member's living quarters under the guise of searching for evidence involving a minor's sexual assault and they would gather up evidence for other crimes to charge the accused. Such search runs contrary to the Fourth Amendment's spirit, and thus, should not occur. These searches should especially not occur in the military, where the service members have less search protection than civilians.

B. Because of the Tenuous Relationship Between the Two Crimes, It Is Unlikely That Such Pornography Would Inevitably Be Discovered

Even if someone argued that child pornography would inevitably be discovered as an investigator searches for evidence involving sexual assault against a minor, it is unlikely such pornography would be found. As mentioned above, a tenuous relationship between the two

221. *Id.* (noting that the prerequisite for consumers to know English could explain the elevated levels of well-educated subjects).

222. *Id.*

223. Jones, *supra* note 168, at 126.

224. *See also id.* at 128 (demonstrating that different prominent researchers produce varying percentages that purport to illuminate the connection between sexual assault against a minor and child pornography possession).

225. *Id.* at 126.

226. *Id*. at 126–27, 131.

227. *See* Ricardo Bascuas, *Fourth Amendment Lessons: From the Highway and the Subway: A Principled Approach to Suspicionless Searches*, 38 RUTGERS L.J. 719, 725 (2007) (stating that the Framers were concerned about generalized searches when they drafted the Fourth Amendment).

crimes exists.[228] Conduct does not necessarily mean possession. It follows then that child pornography may not be inevitably discovered when law enforcement searches for evidence of sexual assault against a minor. Even if a police officer claims that he or she has extensive experience with sex crimes and claims that most sexual assaults have child pornography, it is not enough to support an argument that searching for evidence of sexual assault against a minor will yield child pornography.

Even the federal courts have highlighted the tenuous relationship between the two crimes. Particularly, as mentioned above, the Second Circuit in *Falso* held that an affidavit supporting a search warrant for child pornography was defective because the affidavit only presented facts that established probable cause to search for evidence of sexual assault against a minor.[229] Thus, the investigative agent could not have used the search warrant to search for child pornography. Interestingly, the court refused to recognize a connection between the two crimes even though the defendant had a previous conviction for sexually assaulting a minor.[230] Such refusal foreshadowed the court's hostility against using a suspicion of sexual assault to search for child pornography. The court reasoned that, though sexual assault against a minor and possession of child pornography are both rooted in child exploitation, the fact that the two crimes have the same root does not mean that one implies the other's existence.[231] In fact, the court states that there is only a "mere possibility" that those who are suspected of sexual assault will have child pornography, further demonstrating that even the federal courts, albeit some, recognize the tenuous relationship between the two crimes.[232]

The Fourth Amendment balances an individual's privacy and the police power.[233] If magistrates find that a police officer's "extensive

228. *See* Part IV.A (illustrating the lack of consensus in the research about whether there is a strong connection between sexual assault against a minor and child pornography possession).

229. *See* United States v. Falso, 544 F.3d 110, 122 (2d Cir. 2008); *see also* Part I.B (discussing the federal courts of appeal cases where the courts rejected relying upon a suspicion or conviction of sexual assault as probable cause to search for a minor).

230. *Falso*, 544 F.3d at 114, 122 (holding so even though Falso had a prior conviction of acting "injuriously" toward a child).

231. *Id.* at 122.

232. *See id.*; *see also* Part I.B (discussing the federal courts of appeal cases where the courts rejected relying upon a suspicion or conviction of sexual assault as probable cause to search for a minor).

233. *See* Susan A. Bandes, *The Roberts Court and the Future of the Exclusionary Rule*, AM. CONST. SOC'Y FOR L. & POL'Y 1, 1 (Apr. 2009), https://www.acslaw.org/files/Bandes%20Issue%20Brief.pdf.

experience" is sufficient to allow a suspicion of sexual assault against a minor to serve as probable cause to search for child pornography, they subordinate an individual's privacy in places as sacred as one's home.[234] Probable cause would depend on "what police think" rather than objective facts. People would be subject to generalizations that are just that – generalizations about a population. Generalizations, by definition, cannot adequately explain everyone and their behavior.

Because conduct does not necessarily mean possession, allowing police to use suspicion of one crime to search for another breeds an opportunity to make a generalized search for crimes, which contradicts the very core of the Fourth Amendment.[235] Thus, the federal courts of appeals that imply that mere police assertion of the relationship between sexual assault against a minor and possession of child pornography is enough to issue a search warrant for child pornography seem to implicitly sanction a constitutionally prohibited practice. As demonstrated by *Hoffmann*, the military courts sometimes look to the federal circuits for guidance. So if the federal courts loosen the Constitution's boundaries, the military courts may do the same. For service members who already have less Fourth Amendment protections, there would be no limit to searches.

C. *Hoffmann* Is Factually Similar to *Dougherty*, so the CAAF Was Correct in Holding Similarly to How the Ninth Circuit Held in *Dougherty*

The CAAF's methodology in overruling the lower court involved distinguishing the facts from the facts in *Colbert*, the case upon which the lower court relied. Using such methodology also demonstrates that the CAAF was correct in its decision. From the federal circuit court cases, *Hoffmann* was factually like *Dougherty*. In *Dougherty*, the agent seeking the search warrant used his training with sex crimes as a justification for searching for child pornography, even though he only had facts that would allow him to search for sexual assault against a minor.[236] Additionally, the defendant initially consented to the agent's search but later withdrew it.[237] Despite his withdrawal, the

234. While it is true that a service member's barracks belongs to the federal government, it can be argued that the barracks also symbolizes the service member's home. Accordingly, it makes sense that to some extent, the barracks possesses a sacred space that is similar to a civilian's home.

235. *See* Bascuas, *supra* note 227, at 725.

236. Dougherty v. City of Covina, 654 F.3d 892, 896 (9th Cir. 2011).

237. *Id.*

agent seized his computer and "related items."[238] Unconvinced by the agent's experience, the Ninth Circuit found that the search warrant was defective. No facts tied Dougherty's acts as a possible child molester to his possession to child pornography.[239] Thus, the agent's statement, though grounded in supposed expertise, could not establish probable cause to search for child pornography.[240] Such holding illustrates the Ninth Circuit's belief that a suspicion of sexual assault does not constitute sufficient probable cause to search for child pornography.[241]

Here, like in *Dougherty*, agents relied on their "expertise" to support their search for child pornography based on facts involving sexual assault against a minor. Additionally, like the defendant in *Dougherty*, Hoffmann consented to a search but later withdrew it. Despite his withdrawal, agents seized his computer. Factually, *Hoffmann* is very similar to *Dougherty*. Therefore, the CAAF's conclusion was correct under its own methodology. That is, the CAAF was correct when it held, like the Ninth Circuit held in Dougherty, that because there was no direct link between the suspicion of sexual assault against Hoffmann and his possession of child pornography, the agents should not have searched Hoffmann's barracks.

D. Searching for Child Pornography on One's Computer Implicates *Riley v. California*, Which Prohibits Warrantless Searches of One's Cellphone

The CAAF was correct in its *Hoffmann* conclusion because a warrantless search for child pornography on one's computer implicates *Riley v. California*, which prohibits warrantless cellphone searches that are incident to arrests.[242] In *Riley*, police officers stopped defendant, David Riley, for driving with expired registration tags.[243] During the stop, the officers learned that Riley's license was

238. *Id.*
239. *Id.* at 898.
240. *Id.* at 899.
241. *See* Jones, *supra* note 168, at 76 (explaining that the Ninth Circuit has taken a case-by-case approach when examining whether a suspicion of sexual assault creates probable cause to search for child pornography).
242. Riley v. California, 134 S. Ct. 2473, 2495 (2014) ("Our answer to the question of what police must do before searching a cell phone seized incident to an arrest is accordingly simple–get a warrant.").
243. *Id.* at 2480. Note, too, that *Riley* is a consolidated case of two cases. One case involves David Riley, and the other involves Brima Wurie. *Id.* at 2481. This Note will briefly discuss both of those cases below.

suspended.[244] One officer conducted an inventory search of Riley's car and both officers later arrested Riley for possession of concealed and loaded firearms.[245] As an incident to the arrest, one officer searched Riley, found items associated with the Bloods gang, and seized Riley's cellphone.[246] At the police station, a detective specializing in gangs examined Riley's phone contents, "looking for evidence, because . . . gang members will often video themselves with guns or take pictures of themselves with guns."[247] The detective found photographs of Riley standing in front of a car that he suspected had been involved in a shooting a few weeks earlier.[248] In connection with that earlier shooting, Riley was charged with firing at an occupied vehicle, assault with a semiautomatic weapon, and attempted murder.[249] He was convicted on all three counts and received an enhanced sentence of fifteen years to life in prison.[250] The California Court of Appeals affirmed and the California Supreme Court denied review. The United States Supreme Court granted certiorari.[251]

In its second case, police arrested Brima Wurie after observing him make a drug sale.[252] At the police station, police seized Wurie's two cellphones.[253] The phone at issue was a flip phone that constantly rang while Wurie was at the police station.[254]

The phone identified the caller as "my house," with a picture of a woman holding a baby. Police ran a search of "my house's" phone number and traced the number to an apartment building.[255] When they arrived at the apartment building, they noticed a mailbox with Wurie's name on it and observed a woman who resembled the woman pictured on the phone. They obtained a search warrant and seized

244. *Id.* at 2480.

245. *Id.* Riley was charged with possession of concealed and loaded firearms when the police's inventory search led to two firearms' discovery under the car hood.

246. *Id.*

247. *Id*. at 2480–81.

248. The detective also found a video of young men sparring while someone encouraged the fighting under the moniker "Blood." *Id.* at 2481.

249. *Id.*

250. *Id.* With respect to the enhanced sentence, the State alleged that Riley had committed the crimes charged for the benefit of a criminal street crime gang, an aggravating factor that carries an enhanced sentence.

251. *Id.*

252. *Id.*

253. *Id.*

254. *Id.* Wurie's phone began ringing about five to ten minutes after Wurie arrived at the police station.

255. *Id.*

crack cocaine, marijuana, drug paraphernalia, a firearm, and cash.[256] Wurie was subsequently charged with distributing crack cocaine, possession of crack cocaine with intent to distribute, and being a felon in possession of a firearm and ammunition.[257] He was convicted of all three counts and sentenced to 262 months in prison. A divided First Circuit vacated the conviction for possession with intent to distribute and possession of a firearm as a felon. The Supreme Court granted certiorari.[258]

The Supreme Court analyzed the consolidated case under the *Chimel* search incident to arrest doctrine and emphasized the importance of maintaining a person's privacy with his/her phone.[259] Particularly, the Court noted that the rationales for the warrantless searches appropriate under *Chimel* do not apply in a cellphone context.[260] Those rationales are the following: (1) harm to officers and (2) destruction of evidence.[261] Unconvinced that either one of the rationales applied during cellphone searches, the Court declined to extend the warrantless search exception to cellphone searches.[262] In addition to failure of the *Chimel* rationales to apply, the Court considered the importance of cellphones to boost its conclusion.[263] Particularly, the Court reasoned that cellphones held the "privacies of life" since even a standard sixteen-gigabyte phone could hold millions of pages of texts and thousands of pictures and videos. Just the mere storage capacity of a cellphone implicates privacy.[264] Cellphones now carry prescriptions, bank statements, and Internet browsing history.[265] From a cellphone alone, one could reconstruct a person's life, such as where the person has been and what symptoms of disease a person may have

256. *Id.* (explaining that law enforcement seized, particularly, 215 grams of crack cocaine, marijuana, drug paraphernalia, a firearm, ammunition, and cash).

257. *Id.* at 2482.

258. *Id.*

259. *Id.* at 2494–95 (articulating that the Court was going to analyze the case under the search incident to arrest doctrine and declining to extend the doctrine to searches of cellphone data).

260. *Id.*

261. *Id.*

262. *Id.* ("The two risks identified in Chimel–harm to officers and destruction of evidence–are present in all custodial arrests. There are no comparable risks when the search is of digital data."). The Court held that digital data on cellphones could not by itself be used as a weapon or to effectuate an arrestee's escape. *Id.* at 2485 (examining and rejecting the United States and California's arguments as to why cellphone searches can ensure police safety. Additionally, the Court rejected the United States' and California' arguments about remote wiping and data encryption leading to evidence destruction. *Id.* at 2486.

263. *See id.* at 2489.

264. *Id.* at 2489, 2495.

265. *Id.* at 2489.

researched on WebMD.[266] The Court went even further to state that a cellphone could even have more private information than a home has, unless the cellphone was in the home.[267] Thus, given the trampled privacy due to a warrantless search, the Court rejected warrantless searches of cellphones after an arrest.[268] Though *Riley*'s core involved cellphones, the Court's privacy reasoning applies to searches on computers.[269] Computers, like cellphones, hold the "privacies of life."[270] While searching a computer may yield evidence of a crime, it may also yield information that is extremely private to one's life. It can hold calendars, text messages, photographs, phone contacts, and Internet-browsing history, all features that drove the Court to hold that cellphones are too private to be searched without a warrant. Because computers hold such private information, the government cannot merely use a suspicion of another crime to search for information on a computer such as child pornography. Without a warrant specifically for child pornography that is based on more than a suspicion of sexual assault against a minor, the military investigators would be trampling on the service members' privacy. A mere suspicion of one cannot be used to do an invasive search of one's computer to find evidence of another crime. Thus, the CAAF was correct in rejecting a flat-out reliance on a suspicion of sexual assault against a minor to search for child pornography. Had the CAAF decided *Hoffmann* the other way, it would have allowed search authorization officials to permit searches that run afoul of the Supreme Court's interpretation of the Constitution.

CONCLUSION

A suspicion of sexual assault against a minor cannot constitute sufficient probable cause to search for child pornography. The relationship between the two crimes is attenuated at best. Thus, the CAAF correctly reversed the CCA in *Hoffmann*. In light of the con-

266. *Id.* at 2490.

267. *Id.* at 2491 ("A phone not only contains in digital form many sensitive records previously found in the home; it also contains a broad array of private information never found in a home in any form–unless the phone is.").

268. *Id.* at 2492–95 (also rejecting an extension of the search incident to arrest doctrine as it applies to an automobile, allowance of searching call logs without a warrant, and access to cellphone data if the data could be obtained in a pre-digital counterpart).

269. *See generally id*. at 2489 (describing cell phones as "minicomputers that also happen to have the capacity to be used as a telephone").

270. *See generally id*. at 2489–91 (explaining that cellphones, with their large storage capacity, have the capability to store highly sensitive and personal documentation).

flicting research, *Hoffmann*'s factual similarity to *Dougherty*, and the Supreme Court's recent decision regarding cellphones, the CAAF should hold that, as a matter of law, evidence of sexual assault against a minor does not constitute sufficient probable cause to search for child pornography. If it does, it will land on the proper side of civil rights and the Constitution. If it does not, the CAAF would sanction a search that the Constitution prohibits.