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Letter from the Editor-in-Chief

Howard University. It is an institution defined by its boldness. Since 1867, Howard has been audacious. General Oliver Otis Howard and sixteen other founders dared to open a co-educational, nonsectarian university for all. Countless bold moments ensued, from the establishment of a law school for African Americans in 1869 to that same law school's submission of an amicus brief in the *Fisher v. University of Texas* case, and from Charles Hamilton Houston's zealous mission to train a cadre of social engineers to that same cadre's successors speaking out about the Troy Davis and Trayvon Martin tragedies in 2011 and 2012. History has shown that this institution breeds unabashed, unapologetic change-seekers.

It is no surprise that the *Howard Law Journal* possesses a spark of its mother entity's audacious flame. Its 1955 genesis and its subsequent coexistence with Howard University School of Law make the *Journal* unique. Today, the *Journal* serves as a platform for diverse viewpoints on a broad range of topics. Our pages are lenses of hindsight, insight, and foresight on legal issues and principles of morality and justice. Many of our authors echo Houston's social engineering philosophy, while—in the spirit of varied intellectual discourse and creativity—many others speak from a completely different paradigm. So what is the unifying theme? One read through issue one of Volume Fifty-Six makes the answer readily apparent: all who publish here dare to contribute something bold and new to legal scholarship.

Robert Bejesky leads our first issue by providing a profound and haunting look into the psychology and flawed rationales justifying foreign policy decisions about the war in Iraq in his article, *Cognitive Foreign Policy: Linking Al-Qaeda and Iraq*. Our next article is Eric Schepard's *Why Harlan Fiske Stone (Also) Matters*, a poignant piece that gives voice to the oft-forgotten legal giant Harlan Fiske Stone, analyzes his virtues and faults, and ultimately poses what Stone might think about today's legal issues and decisions. Then, our own Visiting Assistant Professor Ajmel Quereshi continues with *The Search for an Environmental* Filartiga*: Trans-Boundary Harm and the Future of International Environmental Litigation*, in which he assesses whether the notion of trans-boundary harm can help practitioners frame Alien Tort Statute claims to effectively combat international environmental issues.

Next, Nicole Grant, Howard University School of Law alumna and former Managing Editor of the *Howard Law Journal*, ushers us into an exploration of cyberbullying with *Mean Girls and Boys: The Intersection of*

Cyberbullying and Privacy Law and Its Socio-Political Implications. Grant explains the disturbing trend's evolution and consequences, providing relevant legal authority that practitioners may examine when attacking the growing problem. Our final article is *A New Regionalist Perspective on Land Use and the Environment*, in which author Brittan J. Bush facilitates an important inquiry into achieving environmental goals within localities. He leads us through an intriguing assessment of the new regionalist approach and argues that new regionalism is the most effective means to achieving successful environmentally-conscious federal land use regulation.

It is with great pleasure that we publish four student-written pieces in this issue. Each of these notes and comments represents a *Howard Law Journal* Editor's fervor in communicating an important message and the concerns that will follow a new generation of legal scholars into practice. Aubrey Cunningham's *Toward a System of Least Restrictive Care:* Brown v. Plata *and the Eighth Amendment Right to Adequate Mental Health Care for the Incarcerated* courageously questions the efficacy of the *Brown v. Plata* decision and seeks legal solutions to the dire conditions faced by mentally ill prisoners. *The Affirmative Duty to Disintegrate Concentrations of Impoverished Communities* by Thurston James Hamlette boldly takes on the issue of gentrification and the role that government housing programs and opportunities can play in easing gentrification's devastating effects on low-income communities in Washington, D.C. and beyond.

Martinis Jackson, in *Timely Death of the Show-Up Procedure: Why the Supreme Court Should Adopt a Per Se Exclusionary Rule*, delves into the law surrounding the use of police "show-up" identification—with an emphasis on the *State v. Henderson* case and its resulting framework—to uncover the best way to promote justice in criminal identification procedures. Finally, Salomon Menyeng, in his comment—*Uncle Sam v. Napoleon: Who Owns the Security Estate Property Under the New African Uniform Law on Securities?*—rounds out our issue by analyzing the influence of American common law and the Napoleonic principle of unitary ownership on the African Uniform Law on Securities.

All of these pieces fit perfectly into our ongoing legacy: they are bold, courageous, and poignant. It is because of these features that we are proud to present the first issue of Volume Fifty-Six of the *Howard Law Journal*.

Angela M. Porter
Editor-in-Chief
2012-2013

Cognitive Foreign Policy: Linking Al-Qaeda and Iraq

ROBERT BEJESKY*

* M.A. Political Science; M.A. Applied Economics; LL.M. International Law. The author has taught international law courses for Cooley Law School and the Department of Political Science at the University of Michigan, American Government and Constitutional Law courses for Alma College, and business law courses at Central Michigan University and the University of Miami. I would like to express my sincere gratitude to the editors of the *Howard Law Journal* who worked on this Article for their exceptional work on source verification and footnote formatting.

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INTRODUCTION

A percentage of U.N. Security Council members, scholars, prominent officials, and foreign populations have maintained that the 2003 Iraq War was illegal under international law.[1] Many factors explain how force was employed amid considerable opposition. Variables such as media performance, citizen advocacy, and political party dy-

1. Robert Bejesky, *Weapon Inspections Lessons Learned: Evidentiary Presumptions and Burdens of Proof*, 38 SYRACUSE J. INT'L L. & COM. 295, 344-50 (2011) [hereinafter Bejesky, *Weapon Inspections*].

namics can influence whether international law is followed;[2] and the composition of other branches of government, whether there are adequate checks on executive power, and positions of academic advocacy and lobby groups can affect whether U.S. constitutional design is followed.[3] However, vital to both domestic politics and international relations, and the interactions between these two levels, is information.[4] This Article examines the information surrounding the invasion of Iraq; juxtaposes polls querying perceptions on security threat allegations; and applies research in linguistics, emotion, cognition, medical science, and marketing to illustrate how asymmetric information bypassed domestic and international level checks.

I. ADVERTISING, PROPAGANDA, AND PSEUDOCOMMUNICATION

A. Persuasion

Vance Packard's book, *The Hidden Persuaders* (1957), riveted public attention on advertiser initiatives to channel consumer purchasing decisions with insights from psychology and the social sciences.[5] Public relations and marketing are now branches of psychology,[6] and the industry of shaping perceptions is entrenched in U.S. society. In their textbook, *Age of Propaganda*, Professors Pratkanis and Aronson wrote, "Every time we turn on the radio or television, every time we open a book, magazine, or newspaper, someone is trying to educate us, to convince us to buy a product, to persuade us to vote for a candidate or to subscribe to some version of what is right, true, or beautiful."[7] Persuasion seems endemic in human interactions, but the

2. Oona A. Hathaway, *Between Power & Principle: An Integrated Theory of International Law*, 72 U. CHI. L. REV. 469, 520 (2005). *See generally* Robert Bejesky, *Press Clause Aspirations and the Iraq War*, 48 WILLIAMETTE L. REV. 343, 343 (2012) [hereinafter Bejesky, *PCA*] (examining media influences).

3. Robert Bejesky, *Politico-International Law*, 57 LOY. L. REV. 29, 30, 38-41, 62-63, 107-08 (2011) [hereinafter Bejesky, *Politico*]; Louis Fisher, *Lost Constitutional Moorings: Recovering the War Power*, 81 IND. L.J. 1199, 1213 (2005).

4. Robert Bejesky, *Public Diplomacy or Propaganda? Targeted Messages and Tardy Corrections to Unverified Reporting*, 40 CAP. U. L. REV. (forthcoming 2012) [hereinafter Bejesky, *PDP*] (manuscript at 1-2, 70-74); Robert D. Putnam, *Diplomacy and Domestic Politics: The Logic of Two-Level Games*, 42 INT'L ORG. 427, 450 (1988).

5. VANCE PACKARD, THE HIDDEN PERSUADERS 3 (1957).

6. DOUGLAS RUSHKOFF, COERCION: WHY WE LISTEN TO WHAT "THEY" SAY 190 (1999).

7. ANTHONY R. PRATKANIS & ELLIOT ARONSON, AGE OF PROPAGANDA: THE EVERYDAY USE AND ABUSE OF PERSUASION 3 (2001). Judge Learned Hand called "the art of publicity . . . a black art" and recognized the media's power in shaping public perceptions. Ralph S. Brown, Jr., *Advertising and the Public Interest: Legal Protection of Trade Symbols*, 108 YALE L.J. 1619, 1620 n.3 (1999).

"problem arises when the style and force of a person's or institution's influence outweighs the merits of whatever it is they're trying to get us to do."[8]

For the private sector, advertising has merits and costs. Corporations congregate focus groups, incorporate psychology studies, and employ experts to develop elaborate scenarios, words, and images to impart approbatory impressions of products in commercials.[9] Businesses spend hundreds of billions of dollars on marketing annually, and the cost of producing and disseminating that information is an expense of doing business included in the product price.[10] The U.S. Supreme Court has incorporated the merits of commercial advertising into constitutional jurisprudence—businesses have a right to advertise, predicated both on the right of consumers to be apprised of products on the market and on the right of business enterprises to dispense messages and compete economically.[11] Law proscribes false advertising, but people disagree over the degree to which businesses should persuade consumer preferences by using emotional ploys, imagery, and cajolery for aggressive selling.[12]

8. RUSHKOFF, *supra* note 6, at 1-2, 18 (providing a broad view of persuasion by considering interactions between employers/employees, parents/children, expert/lay communities, teachers/pupils, salespeople/customers, and government authorities/populace).

9. PACKARD, *supra* note 5, at 4; Sophie Clavier & Laurent El Ghaoui, *Marketing War Policies: The Role of the Media in Constructing Legitimacy*, 19 KAN. J.L. & PUB. POL'Y 212, 213 (2010); Ellen P. Goodman, *Stealth Marketing and Editorial Integrity*, 85 TEX. L. REV. 83, 83 (2006); Tamara R. Piety, *"Merchants of Discontent": An Exploration of the Psychology of Advertising, Addiction, and the Implications for Commercial Speech*, 25 SEATTLE U. L. REV. 377, 381 (2001).

10. GARTH S. JOWETT & VICTORIA O'DONNELL, PROPAGANDA AND PERSUASION 147 (2006) (stating that $249 billion was spent on advertising in 2003); Brown, *supra* note 7, at 1637.

11. Va. State Bd. of Pharm. v. Va. Citizen's Consumer Council, 425 U.S. 748, 765 (1976) ("[T]he free flow of commercial information is indispensible . . . to the formation of intelligent opinions [and a market economy] . . . ."); Brown, *supra* note 7, at 1621; David Cole, *Beyond Unconstitutional Conditions: Charting Spheres of Neutrality in Government-Funded Speech*, 67 N.Y.U. L. REV. 675, 705 (1992); Bruce Ledewitz, *Corporate Advertising Democracy*, 12 B.U. PUB. INT. L.J. 389, 404-05, 408-09 (2003).

12. Glickman v. Wileman Bros. & Elliott, Inc., 521 U.S. 457, 479 (1997) (Souter, J., dissenting) ("[The advertisements at issue] exploit[ed] all the symbolic and emotional techniques of any modern ad campaign . . . ."); DAVID CROTEAU & WILLIAM HOYNES, THE BUSINESS OF MEDIA: CORPORATE MEDIA AND THE PUBLIC INTEREST 156-62 (2001); NEIL POSTMAN, AMUSING OURSELVES TO DEATH: PUBLIC DISCOURSE IN THE AGE OF SHOW BUSINESS 86-87, 127-31 (1985). "National advertising is dominated by appeals to sex, fear, emulation, and patriotism, regardless of the relevance of those drives to the transaction at hand." Brown, *supra* note 7, at 1620, 1623, 1635.

B. Government Persuasion

Governments also have a history of constituting departments and agencies that systematize and proffer news to forge perceptions and garner support for policies.[13] As with corporate advertising, citizens may disagree over the mechanisms that a government employs to promote a message and on the substance of the discourse.[14] Government discourse may be viewed positively and called public diplomacy or public relations,[15] or negatively and labeled intentionally misleading, "spin" and disinformation; or gray, white, or black propaganda.[16] The term "propaganda" has even undergone a metamorphosis to political correctness. Propaganda was historically defined as the "dissemination of biased ideas and opinions, often through the use of lies and deception," but today it is defined less nefariously as "suggestion" or "influence" by "manipulation of symbols and the psychology of the individual."[17] The target, legitimacy, and design of the message may determine the label and the acceptability of the message.[18]

The President has a distinctive institutional capability to craft information and persuade the populace, which may boost political power.[19] Using strategies that depict a problem, risk, or hazard and thereafter provide the solution to the anxieties, the Bush administration tendered the problem of Iraq,[20] and was the protective authority offering a solution to the problem that the administration had marketed.[21] Professor Kuhner remarked, "President Bush used the media

13. JOWETT & O'DONNELL, *supra* note 10, at 7; Clavier & El Ghaoui, *supra* note 9, at 213 ("[T]here is a parallel between advertising strategies and the justification of political decisions . . . .").

14. Bejesky, *PDP*, *supra* note 4, at 1-3, 70-74.

15. Peter van Ham, *Place Branding: The State of the Art*, 616 ANNALS AM. ACAD. POL. & SOC. SCI. 126, 135 (2008); Benno H. Signitzer & Timothy Coombs, *Public Relations and Public Diplomacy: Conceptual Convergences*, 18 PUB. REL. REV. 137 (1992).

16. JOWETT & O'DONNELL, *supra* note 10, at 3, 7, 20, 22 ("Propaganda is the deliberate, systematic attempt to shape perceptions, manipulate cognitions, and direct behavior to achieve a response that furthers the desired intent of the propagandist.").

17. PRATKANIS & ARONSON, *supra* note 7, at 11.

18. Bejesky, *PDP*, *supra* note 4, at 1-3, 54-57, 70-74.

19. RICHARD E. NEUSTADT, PRESIDENTIAL POWER: THE POLITICS OF LEADERSHIP 32 (1960); JOHN R. SEARLE, FREEDOM AND NEUROBIOLOGY: REFLECTIONS ON FREE WILL, LANGUAGE, AND POLITICAL POWER 105 (2007) ("[P]olitical powers are . . . linguistically constituted.").

20. Jide Nzelibe, *A Positive Theory of the War-Powers Constitution*, 91 IOWA L. REV. 993, 1007 (2006).

21. In every milieu of persuasion, the sales tactic is the same— "generate disorientation, induce regression, and then become the target's transferred parent figure." RUSHKOFF, *supra* note 6, at 71; Robert Bejesky, *Intelligence Information and Judicial Evidentiary Standards*, 44 CREIGHTON L. REV. 811, 875-82 (2011) [hereinafter Bejesky, *Intelligence*] (concluding there was

to sell the war just as corporations use the media to sell products and make a profit."[22] Michael Isikoff and David Corn explained, "Bush and his aides were looking for intelligence not to guide their policy on Iraq but to market it. The intelligence would be the basis not for launching a war but for selling it."[23] Professor Clarke contended: "In retrospect, the invasion of Iraq hung on what appears to have been deception . . . and an effort to obscure, all inconveniently contrary evidence."[24] Professor Collins wrote, "The Bush Administration attacked Iraq after a sales job that can reasonably be called propaganda."[25] University of Pennsylvania President Amy Gutman and Harvard Political Science Professor Dennis Thompson maintained, "When a primary reason offered by the government turns . . . out to be false, or worse still deceptive, then not only is the government's justification for the war called into question, so also is its respect for citizens."[26]

The sales job was costly, both in terms of funding operations to shape perceptions and in terms of invading and occupying Iraq. Paradigmatic of propagandists' use of stealth, distortions, and ambiguous sources to achieve persuasion,[27] the Bush administration made hundreds of ultimately false statements about menacing weapons.[28] Then, after the invasion, the Administration accentuated patriotism, deem-

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no realistic threat from Iraq); Bejesky, *Politico*, *supra* note 3, at 39-43, 62-69, 91-95 (stating the Bush administration and neoconservatives marketed Iraq as a security threat).

22. Timothy K. Kuhner, *The Separation of Business and State*, 95 CALIF. L. REV. 2353, 2383 (2007).

23. MICHAEL ISIKOFF & DAVID CORN, HUBRIS: THE INSIDE STORY OF SPIN, SCANDAL AND THE SELLING OF THE IRAQ WAR 16 (2006).

24. Alan W. Clarke, *Rendition to Torture: A Critical Legal History*, 62 RUTGERS L. REV. 1, 36 (2009).

25. SOLOMON HUGHES, WAR ON TERROR, INC.: CORPORATE PROFITEERING FROM THE POLITICS OF FEAR 1 (2007) (indicating market forces and thinking have been injected into the domain of public policy in the war on terror); Richard B. Collins, *Propaganda for War and Transparency*, 87 DENV. U. L. REV. 819, 831 (2010).

26. AMY GUTMAN & DENNIS THOMPSON, WHY DELIBERATIVE DEMOCRACY? 4 (2004) (arguing that the public should prefer information that is truthful and newsworthy); *see* Blake D. Morant, *The Endemic Reality of Media Ethics and Self-Restraint*, 19 NOTRE DAME J.L. ETHICS & PUB. POL'Y 595, 605 (2005) (arguing that people do not irrationally bask in falsities).

27. JOWETT & O'DONNELL, *supra* note 10, at 44 ("The propagandist tries to . . . control[ ] the media as a source of information distribution and . . . present[ ] distorted information from what appears to be a credible source."); *see* RUSHKOFF, *supra* note 6, at 3 ("The better and more sophisticated the manipulation, the less aware of it we are."); Goodman, *supra* note 9, at 84 ("Advertisers use the media to encourage consumption, propagandists to urge belief. When they press products and positions . . . while masking their identities and promotional intent, they market by stealth.").

28. Bejesky, *Weapon Inspections*, *supra* note 1, at 303-10, 315, 318-19, 322-24, 336-44; *see* Charles Lewis & Mark Reading-Smith, *False Pretenses*, CENTER FOR PUB. INTEGRITY (Jan. 23, 2008), http://projects.publicintegrity.org/WarCard/; *Study: Bush, Aides Made 935 False State-*

phasized false prewar allegations about security threats, provided anonymous pro-war discourse via the Pentagon's military analyst program, dominated the media with the embedded journalist program and agenda setting, used anonymous advertising through Video News Releases, employed government sub-agencies to hone diplomatic statements, and provided pro-occupation portrayals inside the Iraqi media.[29] Nobel Laureate Joseph Stiglitz and Professor Linda Bilmes documented startling invasion and occupation expenditure and derivative costs in *The Three Trillion Dollar War: The True Cost of the Iraq Conflict* (2008).[30] Bush departed with the lowest presidential approval rating in history at 22%, due to the Iraq War and poor domestic economic conditions.[31] To understand how the marketing program was successful amid such high cost, the Article employs a systematic methodology of shaping perceptions in public relations.

C. Systematization

Professor Stuart wrote that pseudocommunication, akin to propaganda, is "the deliberate manipulation of language under the guise of legal precision to persuade an audience that a gross error in judgment is perfectly acceptable, where all notions of honesty are stripped from the legal purpose by manipulating the tools of the language."[32] Elements typical of pseudocommunication include:

> (1) The sender maintains control and determines the meaning of the message and limits the effectiveness of feedback.
>
> (2) . . . [T]he sender's stated purposes are often deliberately hidden, unclear, and not empirically verifiable.
>
> (3) The sender's control of the analysis as well as the flow of information encourages collective and non-critical thinking by the receiver.

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ments in Run-up to War, CNN (Jan. 24, 2008), http://edition.cnn.com/2008/POLITICS/01/23/bush.iraq/.

29. *See generally* Bejesky, *PDP*, *supra* note 4.

30. *See generally* JOSEPH E. STIGLITZ & LINDA BILMES, THE THREE TRILLION DOLLAR WAR: THE TRUE COST OF THE IRAQ CONFLICT 7 (2008) (exploring in depth the costs associated with the Iraq War).

31. *Bush's Final Approval Rating: 22 Percent*, CBS NEWS (Jan. 16, 2009), http://www.cbsnews.com/stories/2009/01/16/opinion/polls/main4728399_page2.shtml?tag+contentMain;contentBody.

32. Susan Stuart, *Shibboleths and Ceballos: Eroding Constitutional Rights Through Pseudocommunication*, 2008 BYU L. REV. 1545, 1548 ("[P]seudocommunication is the technique of selling a product no one wants, not through persuasive lawyering but through Madison Avenue shilling.").

> (4) . . . [S]ymbols and signs. . .encourage[ ] ambiguous interpretation by implying, without establishing, close relationships between symbols and their referents.
>
> (5) The sender's appeals make emotional connections between the receiver and the message.
>
> (6) The sender bases his justification for the message on private and unknowable sources, such as outside authorities, inside information, [and] secret knowledge . . . .
>
> (7) The sender believes that the ends justify the means, which are value-free and above criticism.
>
> (8) The sender analyzes the universe with certainty and reduces that analysis to a simple word, phrase, or slogan.[33]

These elements are organized into four parts to assemble the Article's analytical sequence. Part II involves elements one and six and explains information asymmetries inherent in the two authorizations to use force and the President's control over national security information. Part III considers elements two and four and discusses how an overt and broad policy of fighting terrorism was used with linking classified national security data to "stretch" the use of force authority for Iraq. Part IV involves elements seven and eight to explain how positive emotions of national unity and patriotism, and negative emotions of security dangers conjoined to bypass dissent. Part V considers elements three and five to explore utility balancing, and inaccurate perceptions of risk.

II. INSTITUTIONAL PARAMETERS

A. AUMF for 9/11: Definitions and Secrecy

In a security threat or wartime atmosphere, Constitutional War Powers furnish an abundant institutional basis for the President to manage and fashion information to forge populace perceptions. Those opportunities distend after Congress activates Executive War Powers. Congress afforded the Bush administration with two authorizations to use the military. The first was granted on September 18, 2001 when Congress authorized the President to:

> [U]se all necessary and appropriate forces against those nations, organizations, or persons he determines planned, authorized, committed, or aided the terrorist attacks that occurred on September 11, 2001, or harbored such organizations or persons, in order to prevent

33. *Id.* at 1550-51.

> any future acts of international terrorism against the United States by such nations, organizations or persons.[34]

The sentence provides limited authority to retaliate against abettors to acts of terrorism transpiring on 9/11.[35] The "in order to prevent any future acts by such nations, organizations, or persons" involves averting possible plans by actors with a nexus to 9/11. At a congressional hearing, Professor Jane Stromseth explained that Congress did not acquiesce to a "blank check" on War Powers, but precisely stipulated that the use of force was exclusive to actors connected to 9/11.[36] Two days after the AUMF was adopted, Bush was already speaking beyond the confines of the language when he announced: "Our enemy is a radical network of terrorists and every government that supports them. Our war on terror begins with al Qaeda, but it does not end there. It will not end until every terrorist group of global reach has been found, stopped and defeated."[37]

In a memo dated five days after the President's statement, Justice Department Counsel John Yoo rendered a legal interpretation of the AUMF. He contended that neither the War Powers Resolution, nor the AUMF "can place any limits on the President's determinations as to any terrorist threat, the amount of military force to be used in response, or the method, timing, and nature of the response. These decisions, under our Constitution, are for the President alone to make."[38] Contrarily, in *Padilla v. Yoo* (2009), Judge White held that

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34. Authorization for Use of Military Force, Pub. L. No. 107-40, 115 Stat. 224 (2001) [hereinafter AUMF 2001] (approved by Congress on Sept. 14, 2001 and signed by the President on Sept. 18, 2001).

35. Jay Alan Bauer, *Detainees Under Review: Striking the Right Constitutional Balance Between the Executive's War Powers and Judicial Review*, 57 ALA. L. REV. 1081 (2006) (discussing some favored limited interpretations of the AUMF's target); *see* Curtis A. Bradley & Jack L. Goldsmith, *Congressional Authorization and the War on Terrorism*, 118 HARV. L. REV. 2047, 2108 (2005) ("If an individual was involved in the September 11 attacks, or harbored someone who was, he is covered as a 'person' under the AUMF. If an individual had no connection to the September 11 attacks, then he is not covered as a 'person' under the AUMF . . . ."); Katherine Flanagan-Hyde, *The Public's Right of Access to the Military Tribunals and Trials of Enemy Combatants*, 48 ARIZ. L. REV. 585 (2006).

36. 148 CONG. REC. 133 (2002) (statement of Jane E. Stromseth, Professor, Georgetown University Law Center); *see* Jordan J. Paust, *Above the Law: Unlawful Executive Authorizations Regarding Detainee Treatment, Secret Renditions, Domestic Spying, and Claims to Unchecked Executive Power*, 2007 UTAH L. REV. 345, 400-01 (2007) (Congress's authorization was narrow, only applied to the past tense act of 9/11, not an act in the future, and only applied to those with a facilitative connection to 9/11 and not to those who were supposedly "affiliated," "associated" or have "links" with al-Qaeda). *Id.*

37. President George Bush, Address to Joint Session of Congress (Sept. 20, 2001), *available at* http://archives.cnn.com/2001/US/09/20/gen.bush.transcript/.

38. Memorandum from John Yoo, Deputy Assistant Att'y Gen. (Sep. 25, 2001), http://www.justice.gov/olc/warpowers925.htm [hereinafter "Yoo Memo"]; *see* Hamdan v. Rumsfeld,

Congress granted the President authority to "formulate the response to terrorism against the United States," but not an expansive sanction exempt from judicial review.[39] The AUMF language, notably that which mandated a connection to 9/11, and the context, which ostensibly elicited a transient and limited emergency, were supplanted by an unidentified in time, place, and manner "state of war."[40] Despite that it is Congress's prerogative to define the time, scope, and authority of U.S. military conflict,[41] Yoo opined that "the Joint Resolution is somewhat narrower than the President's constitutional authority."[42]

In fact, the inquiry into whether countering terrorism constitutes a *real* war has invariably been mired in controversy. If there is no real "war," then it seems imprudent to expansively construe the Commander-in-Chief authority. Characteristic of the mien in which scholars have been prefacing "war on terrorism" with the qualifier "so-called," Professor Bassiouni pointed out that "the so-called 'War on Terrorism'. . . is a term developed and given content by the Administration."[43] Professor Henkin asked whether the "War on Terror" is just a metaphor.[44] The Red Cross suggested that it might be called a "fight against terrorism" because terrorism is a "phenomenon" and

126 S. Ct. 2749, 2822 (2006) (Scalia, J., dissenting) (curbing expansive interpretations of executive war power, but three Justices believed the President should have discretion to manage military tribunals without judicial intervention because of the AUMF and the alleged state of war after 9/11); *see also id.* at 2825 (Thomas, J., dissenting) (explaining that the President's determination during a time of war should be granted a "heavy measure of deference"); Jennifer Van Bergen & Douglas Valentine, *The Dangerous World of Indefinite Detentions: Vietnam to Abu Ghraib*, 37 CASE W. RES. J. INT'L L. 449, 461 (2006) ("Through his Military Order, Bush granted himself extraordinary powers to identify al Qaeda members and those who harbor them . . . .").

39. Padilla v. Yoo, 633 F. Supp. 2d 1005, 1026 (N.D. Cal. 2009); *see* Hamdi v. Rumsfeld, 542 U.S. 507, 535 (2004) (recognizing restrictions on presidential power).

40. Bruce Ackerman, *This Is Not a War*, 113 YALE L.J. 1871, 1873 (2004).

41. Fisher, *supra* note 3, at 1200; Jules Lobel, *Conflicts Between the Commander in Chief and Congress: Concurrent Power Over the Conduct of War*, 69 OHIO ST. L.J. 391, 425, 438, 445 (2008); Saikrishna Bangalore Prakash, *The Separation and Overlap of War and Military Powers*, 87 TEX. L. REV. 299, 303 (2008).

42. Yoo Memo, *supra* note 38.

43. M. Cherif Bassiouni, *The Institutionalization of Torture Under the Bush Administration*, 37 CASE W. RES. J. INT'L L. 389, 406 (2006); *e.g.*, Laura A. Dickinson, *Torture and Contract*, 37 CASE W. RES. J. INT'L L. 267 (2006); Miles P. Fischer, *Essay: Applicability of the Geneva Conventions to "Armed Conflict" in the War on Terror*, 30 FORDHAM INT'L L.J. 509 (2007); Jennifer Moore, *Practicing What We Preach: Humane Treatment for Detainees in the War on Terror*, 34 DENV. J. INT'L L. & POL'Y 33 (2006); Jordan J. Paust, Boumediene *and Fundamental Principles of Constitutional Power*, 21 REGENT U. L. REV. 351 (2009); Leila Nadya Sadat, *The Unlawful Enemy Combatant and the U.S. War on Terror*, 37 DENV. J. INT'L L. & POL'Y 539 (2009).

44. Louis Henkin, *War and Terrorism: Law or Metaphor*, 45 SANTA CLARA L. REV. 817 (2005); Mary Ellen O'Connell, *The Legal Case Against the Global War on Terror*, 36 CASE W. RES. J. INT'L L. 349 (2004); Richard D. Rosen, *America's Professional Military Ethic and the Treatment of Captured Enemy Combatants in the Global War on Terror*, 5 GEO. J.L. & PUB. POL'Y 113 (2007); Tung Yin, *Ending the War on Terrorism One Terrorist at a Time: A Noncrimi-*

not official state conflict.[45] United Nations definitions have historically treated terrorism as a criminal act and not an act of war.[46] Senator Gary Hart analogously questioned whether terrorism should be classified as a breed of organized crime.[47] Professor Graham wrote that "this widely proclaimed 'war' is nothing more than hyperbolic fiction. It makes for great political theatre, a superb sound bite for the media, but it simply does not exist."[48] In July 2008, during the first meeting between the new British Prime Minister Gordon Brown and President Bush, Brown referred to terrorism as a "crime."[49] Shortly after inauguration, President Obama scrapped the phrase "global war on terrorism" and designated the conflict "overseas contingency operations."[50] Secretary of State Hillary Clinton remarked that "the administration has stopped using the phrase ["war on terror"] and I think that speaks for itself."[51]

The Bush White House expansively interpreted the AUMF and Commander-in-Chief authority to detain individuals. For example, the AUMF states that the President could use necessary force on

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nal Detention Model for Holding and Releasing Guantanamo Bay Detainees, 29 HARV. J.L. & PUB. POL'Y 149, 210 (2005) ("The perhaps inaptly named war on terrorism . . . .").

45. Int'l Comm. of the Red Cross, *International Humanitarian Law and Terrorism: Questions and Answers*, ICRC.ORG (Jan. 1, 2011), http://www.icrc.org/eng/resources/documents/faq/terrorism-faq-050504.htm; *see* INT'L COMM. OF THE RED CROSS, INTERNATIONAL HUMANITARIAN LAW AND THE CHALLENGES OF CONTEMPORARY ARMED CONFLICTS 20-22 (Oct. 2007), http://www.icrc.org/eng/assets/files/other/ihl-challenges-30th-international-conference-eng.pdf.

46. Upendra D. Acharya, *The War on Terror and Its Implications for International Law & Policy: War on Terror or Terror Wars: The Problem in Defining Terrorism*, 37 DENV. J. INT'L L. & POL'Y 653, 666-68 (2009); *e.g.*, Stephen P. Marks, *Is There a "New Paradigm" of International Law?*, 14 MICH. ST. J. INT'L L. 71, 85 (2006) ("[T]he traditional paradigm is to treat acts of terrorism as international criminal behavior rather than acts of war."); Randall Peerenboom, *Human Rights and Rule of Law: What's the Relationship?*, 36 GEO. J. INT'L L. 809, 926 (2005) ("While terrorism had previously been treated as a crime, after 9/11 President Bush escalated the rhetoric by declaring a war on terrorism."); Yin, *supra* note 44, at 152 ("[T]errorism, even on the scale of the 9-11 attacks, can either be treated as a criminal matter . . . or an armed attack warranting response under the law of armed conflict.").

47. Sherman J. Bellwood Lecture, *National Security and the Constitution: A Dialogue with Senators Gary Hart and Alan Simpson*, 43 IDAHO L. REV. 7, 15 (2006); *see* Nathaniel Berman, *Privileging Combat? Contemporary Conflict and the Legal Construction of War*, 43 COLUM. J. TRANSNAT'L L. 1, 13 (2004) ("[S]hould the prisoners be viewed as alleged violators of criminal law or . . . as participants in an armed conflict?"); Mark A. Drumbl, *Judging the 11 September Terrorist Attack*, 24 HUM. RTS. Q. 323 (2002) (stating 9/11 was a criminal attack).

48. David E. Graham, *The Treatment and Interrogation of Prisoners of War and Detainees*, 37 GEO. J. INT'L L. 61, 84 (2005).

49. Philippe Sands, *Poodles and Bulldogs: The United States, Britain, and the International Rule of Law*, 84 IND. L.J. 1357 (2009).

50. Scott Wilson & Al Kamen, '*Global War on Terror' Is Given New Name*, WASH. POST (Mar. 25, 2009), http://www.washingtonpost.com/wp-dyn/content/article/2009/03/24/AR2009032402818.html.

51. Sue Pleming, *Obama Team Drops "War on Terror" Rhetoric*, REUTERS, Mar. 31, 2009, http://www.reuters.com/article/idUSTRE52T7MH20090331.

those who he "determines" were complicit in 9/11, while Yoo's memo substituted "suspects" were involved in "terrorist attacks on the United States."[52] The President made this assessment with national security data, which is secret, frequently indeterminate and unverifiable, and subject to the Executive's unreviewable control.[53] Congress and courts are expected to defer to the President's secrecy prerogatives.[54] The President's Military Order, *Detention, Treatment, and Trial of Certain Non-Citizens in the War Against Terrorism*, authorized detention of any individual who he determines:

> [T]here is reason to believe . . . is or was a member of the organization known as al Qaida; [or] has engaged in, aided or abetted, or conspired to commit, acts of terrorism, or acts in preparation thereof, that have caused, threaten to cause, or have as their aim to cause, injury to or adverse effect on the United States, its citizens, national security, foreign policy, or economy.[55]

Hence, the White House approved detaining individuals when there was "reason to believe" the person was associated with *any* speculative act of terrorism against the U.S. The AUMF was also interpreted as the authorization for detaining individuals captured in a foreign combat zone. In *Hamdi v. Rumsfeld* (2004), Justice O'Connor, writing for a plurality, held that the AUMF sanctioned confining "enemy combatants" in Afghanistan to impede them from "taking up arms once again."[56] O'Connor further opined: "There can be no doubt that individuals who fought against the United States in Afghanistan as part of the Taliban, an organization known to have supported the al-Qaeda terrorist network responsible for those at-

52. Bradley & Goldsmith, *supra* note 35, at 2082-83 ("One could argue that the effect of the 'he determines' provision is to give the President broad, and possibly unreviewable discretion to apply the nexus requirement to identify the covered enemy . . . .").

53. The deliberative process is cut short due to reliance on secrecy. GUTMAN & THOMPSON, *supra* note 26, at 2; Robert Bejesky, *National Security Information Flow: From Source to Reporter's Privilege*, 24(3) ST. THOMAS L. REV. (forthcoming 2012) [hereinafter Bejesky, *Flow*] (manuscript at 4-16); *see also* Michael J. Kelly, *Responses to the Ten Questions*, 35 WM. MITCHELL L. REV. 5059, 5060 (2009) ("The Classified Information Procedures Act (CIPA) allows a president carte blanche in this area."). The government can restrict the free flow of ideas by marketing information on which it does not possess requisite competence to make determinations. *See* Dale Carpenter, *The Antipaternalism Principle in the First Amendment*, 37 CREIGHTON L. REV. 579, 647-48 (2004).

54. Deborah N. Perlstein, *Form and Function in the National Security Constitution*, 41 CONN. L. REV. 1549, 1551-52, 1562 (2009); *see also* Kelly, *supra* note 53, at 5061.

55. Military Order of November 13, 2001, Detention, Treatment, and Trial of Certain Non-Citizens in the War Against Terrorism, 3 C.F.R. 919 (2001).

56. Hamdi v. Rumsfeld, 542 U.S. 507, 518-19 (2004) (O'Connor, J., concurring) ("[D]etention . . . is so fundamental and accepted an incident to war as to be an exercise of the 'necessary and appropriate force' Congress has authorized the President to use.").

tacks, are individuals Congress sought to target in passing the AUMF."[57] The AUMF language precisely required a connection deriving from 9/11, but instead was interpreted to warrant detaining individuals because they could engage in terrorism, and to imprisoning insurgents inside a foreign country. Likewise, the AUMF for Iraq also did not provide any approval for confining individuals without criminal charge, but that did not prevent approximately 100,000 Iraqis from being detained between 2003 and 2011.[58]

The AUMF did not identify a terrorist group culpable for 9/11, but Bush announced to Congress that al-Qaeda, led by Osama bin Laden in Afghanistan, was the perpetrator.[59] However, the AUMF refers to "organizations" responsible for 9/11, which spawned expansive interpretations of targeted groups. Professors Bradley and Goldsmith note that "while the nexus requirement is an important limitation on the scope of the AUMF, the AUMF nonetheless encompasses terrorist organizations other than those responsible for the September 11 attacks if they have a sufficiently close connection with the responsible organizations."[60] Going further, Yoo's memo stated that "[t]he President may deploy military force preemptively against terrorist organizations or the States that harbor or support them, whether or not they can be linked to the specific incidents of September 11."[61]

There have also been capricious connotations of al-Qaeda as an organization. Al-Qaeda was sometimes presented as an "army," having officials with titles, such as "lieutenant," "military commander," "intelligence official," and "treasury secretary" in a military hierarchy with "high ranking," "top officials," "senior members," and "soldiers,"[62] who often "swear allegiance" to Osama bin Laden or otherwise support the group.[63] Suspected terrorists have also been viewed as migratory fighters who comingle with civilian communi-

57. *Id.* at 517-18.

58. Robert M. Chesney, *Iraq and the Military Detention Debate: Firsthand Perspectives from the Other War, 2003-2010*, 51 VA. J. INT'L L. 549, 553, 558 (2011).

59. President George Bush, *supra* note 37 (demanding Taliban turn over al-Qaeda members).

60. Bradley & Goldsmith, *supra* note 35, at 2055, 2080, 2110-11. "The AUMF is arguably broader than authorizations in declared wars in its description of the enemy against which force can be used." *Id.* at 2082.

61. Yoo Memo, *supra* note 38.

62. David Johnston, *At a Secret Interrogation, Dispute Flared Over Tactics*, N.Y. TIMES, Sept. 10, 2006, § 1, at 1.

63. U.S. Dep't of State, International Information Programs: Guantanamo Detainees (Mar. 16, 2004); *see* Yin, *supra* note 44, at 174-75.

ties.[64] On other occasions, al-Qaeda was a secretive network of cells,[65] which is more analogous to the pre-9/11 perception. Authorities prosecuted terrorism suspects in federal court, including Osama bin Laden in absentia, pursuant to criminal racketeering laws designed to prosecute the mafia.[66] Another interpretation was that al-Qaeda need not be viewed in any of these ways. Professor Rosenau explained:

> It doesn't have any self-evident answer it seems to me . . . Al-Qaeda means a lot of things to a lot of different people . . . It's sort of a shorthand for Islamic terrorism . . . It's sort of a rarified, kind of nebulous, general, terrorist threat . . . I think this sort of vague view of al-Qaeda is shared in the U.S. policy community. I don't think there's any real agreement as to what al-Qaeda is.[67]

The linkage to a 9/11 conspirator was also finessed by the presumption that the AUMF appertained to suspected involvement in terrorism generally.[68] For example, the Bush Administration's *National Security Strategy* (2002) enumerated that "the enemy is not a single political regime or person or religion or ideology. The enemy is terrorism—premeditated, politically motivated violence perpetrated against innocents."[69] The target herein is not an identified group or individuals within a group. The reference is to general terminology, which inevitably obfuscates. The word "terrorism" perfunctorily stig-

64. Adam Klein, *The End of Al Qaeda? Rethinking the Legal End of the War on Terror*, 110 COLUM. L. REV. 1865, 1896 (2010) ("[I]nternational jihadi . . . may move from conflict to conflict as the theater of battle and the belligerent parties shift . . ."); *see* Jefferson D. Reynolds, *Collateral Damage on the 21st Century Battlefield: Enemy Exploitation of the Law of Armed Conflict, and the Struggle for a Moral High Ground*, 56 A.F. L. REV. 1, 40-41 (2005) (stating that Taliban and al-Qaeda members integrated into the Afghan civilian community).

65. Bradley & Goldsmith, *supra* note 35, at 2109 (referencing distinction between "relatively hierarchical and centralized" groups and "small, autonomous clusters of al Qaeda operatives that may be either dormant or active").

66. Jules Lobel, *Preventive Detention and Preventive Warfare: U.S. National Security Policies Obama Should Abandon*, 3 J. NAT'L SECURITY L. & POL'Y 341, 354 (2009) ("[T]he court system is generally well equipped to handle most terrorism cases."); *see also* Jordan J. Paust, *Post-9/11 Overreaction and Fallacies Regarding War and Defense, Guantanamo, the Status of Persons, Treatment, Judicial Review of Detention, and Due Process in Military Commissions*, 79 NOTRE DAME L. REV. 1335, 1337 (2004) ("[Osama] bin Laden and fourteen of his followers had been indicted (some in absentia) for their participation in terrorist attacks . . . .").

67. Bill Rosenau, *RAND Presentation on the History of al-Qaeda*, C-SPAN, Feb. 13 2007.

68. BOB WOODWARD, BUSH AT WAR 43 (2003) (describing debate surrounding commingling "terrorism" and "al-Qaeda").

69. NATIONAL SECURITY STRATEGY OF THE UNITED STATES OF AMERICA 5 (2002), http://www.globalsecurity.org/military/library/policy/national/nss-020920.pdf.

matizes,[70] but has proven cumbersome to define[71] and "has become so widely used in many contexts as to become almost meaningless."[72]

A U.N. Secretary General Panel defined terrorism as any action "intended to cause death or serious bodily harm to civilians or non-combatants, when the purpose of such act, by its nature or context, is to intimidate a population, or to compel a government or an international organization to do or abstain from doing an act."[73] Even with an impartial and delimiting definition, whether a non-state entity is justified in using force may be open to normative interpretation.[74] The famous statement "one country's terrorist can be another country's freedom-fighter"[75] lingers. The U.S. State Department once placed Nelson Mandela, former Nobel Peace Prize recipient and former President of South Africa, on the terrorist watch list.[76]

B. State Linkages and Expanding onto Iraq

Unless they are drifting about in vessels on the high seas, alleged terror groups must necessarily be present in a sovereign jurisdiction, which implicates linkages to foreign governments and the AUMF's

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70. Karima Bennoune, *Terror/Torture*, 26 BERKELEY J. INT'L L. 1, 21 (2008).

71. Rosalyn Higgins, *The General International Law of Terrorism*, *in* INTERNATIONAL LAW AND TERRORISM 13 (Rosalyn Higgins & Maurice Flory eds., 1997) ("Terrorism is a term without any legal significance. It is merely a convenient way of alluding to activities, whether of State or of individuals, widely disapproved of and in which either the methods used are unlawful, or the targets protected, or both."); W. Michael Reisman, *International Legal Responses to Terrorism*, 22 HOUS. J. INT'L L. 3, 9 (1999) ("Definitions of terrorism are particularly outcome sensitive precisely because they tend to delimit the range of lawful responses to them.").

72. Mark D. Kielsgard, *A Human Rights Approach to Counter-Terrorism*, 36 CAL. W. INT'L L.J. 249, 250 (2006) ("[T]wenty-first century policy-makers have sought unsuccessfully to delimit and identity the meaning of terrorism . . . ."); Alex Schmid, *Terrorism—The Definition Problem*, 36 CASE W. RES. J. INT'L L. 375, 378, 380 (2004) ("[M]ost people have a vague idea or impression of what terrorism is, but lack a more precise, concrete and truly explanatory definition.").

73. SECRETARY-GENERAL'S HIGH-LEVEL PANEL ON THREATS, CHALLENGES & CHANGE, A MORE SECURE WORLD: OUR SHARED RESPONSIBILITY 164 (2004).

74. Scott Aldworth, *Terror Firma: The Unyielding Terrorism Bar in the Immigration and Nationality Act*, 14 LEWIS & CLARK L. REV. 1159, 1160-61 (2010) (explaining how Saman Kareem Ahmad, an Iraqi Kurd, fought in rebellions against Hussein's regime and worked for the U.S. military for several years, but the U.S. Citizenship and Immigration Service still designated him as engaged in terrorist activity); Ryan M. Scoville, *Toward an Accountability-Based Definition of "Mercenar"*, 37 GEO. J. INT'L L. 541, 573 (2006) (listing non-state belligerents opposing states in an effort to attain independence, including citizens in India revolting against the British in 1947, Moroccans opposing France in 1956, and Lithuanians opposing the Soviet Union in 1990); AMNESTY INTERNATIONAL, *Without Distinction: Attacks on Civilians by Palestinian Armed Groups*, AI Index: MED 02/003/2002, July 2002, at 7 ("'Terrorism' . . . does not have an internationally agreed definition and in practice is used to describe quite different forms of conduct. States and commentators describe acts or political motivations that they oppose as 'terrorist,' while rejecting the use of the term when it relates to activities or causes they support.").

75. Cheema v. Ashcroft, 383 F.3d 848, 858 (9th Cir. 2004).

76. Peerenboom, *supra* note 46, at 924.

"harboring" provision.[77] Since many government officials presumed that an al-Qaeda network spanned the world,[78] debate stirred over the extent to which military actions could affirmatively bypass sovereign jurisdiction in search of terror suspects[79] or to thwart terrorism generally. Again, the AUMF language literally required a tie to 9/11, but with the aforementioned interpretations, and presidential prerogatives that were difficult to review, haziness necessarily beleaguered customarily-accepted notions of sovereignty. However, for Iraq, the September 2001 AUMF was only indirectly involved. There was a specific authority.

The Authorization to Use Military Force Against Iraq was adopted on October 10, 2002. Section 3 of the Authorization to Use Military Force against Iraq states:

> (a) AUTHORIZATION—The President is authorized to use the Armed Forces of the United States as he determines to be necessary and appropriate in order to—
>
> (1) defend the national security of the United States against the continuing threat posed by Iraq; and
>
> (2) enforce all relevant United Nations Security Council resolutions regarding Iraq.

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77. Yoo Memo, *supra* note 38, at 1 ("The President has constitutional power not only to retaliate against any person, organization, or State suspected of involvement in terrorist attacks on the United States, but also against foreign States suspected of harboring or supporting such organizations."); *see* NATIONAL SECURITY STRATEGY, *supra* note 69, at 13-14. "Rogue States" were defined in the NSS as states that have brutal leaders, disregard international law, sponsor terrorism, attempt to acquire offensive-use WMDs, and "hate the United States and everything for which it stands." *Id.*

78. WOODWARD, *supra* note 68, at 33 (citing CIA contention).

79. Jennifer S. Martin, *Adapting U.C.C. § 2-615 Excuse for Civilian-Military Contractors in Wartime*, 61 FLA. L. REV. 99, 101 (2009). The September AUMF granted the President "'[T]he authori[ty] to use all necessary appropriate force' to combat terrorism in the Middle East") *Id.*; *see* David Luban, *On the Commander in Chief Power*, 81 S. CAL. L. REV. 477, 481 (2008) ("[T]he Global War on Terror ('GWOT') is unlike other wars. We fight it wherever the terrorists are, and the terrorists might be anywhere. They pick the battlefield, so the battlefield potentially encompasses the entire Earth."); Gary Minda, *Congressional Authorization and Deauthorization of War: Lessons From the Vietnam War*, 53 WAYNE L. REV. 943, 947, 951 (2007); Margaret L. Satterthwaite, *Rendered Meaningless: Extraordinary Rendition and the Rule of Law*, 75 GEO. WASH. L. REV. 1333, 1405 (2007) ("It is generally agreed that there are no territorial boundaries to the 'war on terror'—it occurs anywhere an al Qaeda operative can be found."); Mary Ellen O'Connell, *What is War?*, JURIST, (Mar. 17, 2004), http://www.jurist.law.pitt.edu/forum/oconnell1.php. In November 2002, after a Predator drone killed six men in Yemen, Condoleezza Rice remarked: "We're in a new kind of war. And we've made very clear that it is important that this new kind of war be fought on different battlefields." *Id.* The Pentagon's Deputy General Counsel for International Affairs Charles Allen remarked that the U.S. could attack "al-Qaeda and other international terrorists around the world, and those who support such terrorists." *Id.*

> (b) PRESIDENTIAL DETERMINATION- In connection with the exercise of the authority granted in subsection (a) to use force the President shall, prior to such exercise or as soon thereafter as may be feasible, but no later than 48 hours after exercising such authority, make available to the Speaker of the House of Representatives and the President pro tempore of the Senate his determination that—
>
> (1) reliance by the United States on further diplomatic or other peaceful means alone either (A) will not adequately protect the national security of the United States against the continuing threat posed by Iraq or (B) is not likely to lead to enforcement of all relevant United Nations Security Council resolutions regarding Iraq; and
>
> (2) acting pursuant to this joint resolution is consistent with the United States and other countries continuing to take the necessary actions against international terrorist and terrorist organizations, including those nations, organizations, or persons who planned, authorized, committed or aided the terrorist attacks that occurred on September 11, 2001.[80]

When the Authorization was adopted, Congress expressed that it was intended to leverage resolute diplomacy through the United Nations and was not per se endorsing war.[81] Professors Ackerman and Hathaway affirm that this was a limited authorization to use force conditioned on there being an actual imminent threat.[82] The President understood that the terms were conditions because he reiterated them verbatim in a letter to Congress two days before the attack to comply with the 48-hour requirement in § 2(b).[83] Thus, when the White House began offering additional rationalizations, particularly of

80. Authorization for Use of Military Force Against Iraq Resolution of 2002, H.R.J. Res. 114, 107th Cong. § 3 (2002).

81. JOHN DEAN, WORSE THAN WATERGATE 155 (2004); Bruce Ackerman & Oona Hathaway, *Limited War and the Constitution: Iraq and the Crisis of Presidential Legality*, 109 MICH. L. REV. 447, 462 (2011) ("Many in Congress had pushed for an even narrower resolution, authorizing the use of force only with the explicit approval of the United Nations."); Fisher, *supra* note 3, at 1212; *see also* H.R. REP. No. 107-721, at 4, 5 (2002) (stating the House Committee on International Relations' impression that the *Authorization* was intended as a means of avoiding the use of military force by persuading Iraq to meet its international obligations); 148 CONG. REC. S-10290 (statement of Sen. Clinton) ("[N]ot a vote to rush to war . . . [a]nd we say to him: [u]se these powers wisely and as a last resort . . . ."); *id.* (statement of Sen. Biden) ("[A] strong vote in Congress . . . increases the prospect for a tough, new U.N. resolution . . . [and] decreases the prospects of war.").

82. Ackerman & Hathaway, *supra* note 81, at 461-62.

83. Letter from George W. Bush, President of the U.S., to Speaker of the H.R. (Mar. 19, 2003), *available at* http://www.cbsnews.com/stories/2003/03/19/iraq/main544604.shtml.

humanitarian intervention, "such talk was blatantly inconsistent with the plain language of the 2002 resolution."[84]

The justification for the invasion technically never existed.[85] Iraq ultimately did not possess any weapons or programs to meet the condition in § 3(a)(1), to "defend the national security of the United States against the continuing threat posed by Iraq." Likewise, in the immediate pre-war period, U.N. weapons inspections did not verify that Iraq was in breach of Security Council resolutions by either possessing prohibited weapons or active programs in violation of § 3(a)(2).[86] Regular updates to the Security Council confirmed that Iraq cooperated with inspections and that evidence of breach was lacking.[87] Section 3(b)(2) could also be interpreted to mean another condition for using force was that other countries had to agree that Iraq posed a terrorist threat and/or had some connection to 9/11.

C. Rhetoric, Later Factual Determinations, and Authorizations to Use Force

The remainder of the Article explores how public perceptions on threat allegations were contorted in conjunction with the flexibly-interpreted conditions to use military force. Allegations were abundant and systematically repeated as veritable without equivocation.[88] Journalism organizations compiled a database of 935 specific false statements by President Bush, Secretary of State Powell, Secretary of Defense Rumsfeld, Vice President Cheney, National Security Advisor ("NSA") Rice, Undersecretary of Defense Wolfowitz, and Press Secretaries Fleischer and McClellan regarding Iraq's alleged weapons of mass destruction and associations with al-Qaeda.[89] Statements were made on 532 separate occasions, including in speeches, interviews, briefings, testimony and other venues in the two-year period following 9/11.[90] The study notes, "In addition to their [935] patently false pronouncements, Bush and these seven top officials also made hundreds

84. Ackerman & Hathaway, *supra* note 81, at 464.

85. *Id.*; Bejesky, *Weapon Inspections*, *supra* note 1, at 350-69; Bejesky, *Intelligence*, *supra* note 21, at 817-19.

86. Bejesky, *Weapon Inspections*, *supra* note 1, at 317-34.

87. *Id.*

88. Leslie Gielow Jacobs, *Bush, Obama and Beyond: Observations on the Prospect of Fact Checking Executive Department Threat Claims Before the Use of Force*, 26 CONST. COMMENTARY 433, 436-37, 440-41 (2010).

89. Lewis & Reading-Smith, *supra* note 28.

90. *Study*, *"False Pretenses" Led U.S. to War*, CBS NEWS, (Jan. 23, 2008); *Study: Bush*, *supra* note 28; Lewis & Reading-Smith, *supra* note 28.

of other statements in the two years after 9/11 in which they implied that Iraq had weapons of mass destruction or links to Al Qaeda."[91] Research confirms that increased exposure, including exposure to false information, increases the likelihood that the information will be accepted as true.[92]

Americans held opinions consistent with the false allegations. During the six months prior to attack, several polls revealed that a majority of Americans thought that Iraq was involved in 9/11, and approximately 80% believed Iraq was associated with al-Qaeda and possessed weapons of mass destruction ("WMDs").[93] False perceptions prolonged into occupation. In a May 2003 poll, the Program on International Policy Attitudes ("PIPA") at the University of Maryland found that 34% of Americans thought WMDs had been discovered after the invasion and 22% believed Iraqi forces had used them on U.S. troops.[94] During the 2004 Presidential Election cycle, a poll asked whether "Iraq had weapons of mass destruction when the U.S. invaded," and 58% of Bush supporters agreed, and 16% of Senator John Kerry voters agreed.[95] In mid-2004, shortly before the 9/11 Commission determined that there was "no 'collaborative relation-

91. Lewis & Reading-Smith, *supra* note 28.

92. JOWETT & O'DONNELL, *supra* note 10, at 174; Peter C. Gordon & Keith J. Holyoak, *Implicit Learning and Generalization of the "Mere Exposure" Effect*, 45(3) J. PERSONALITY & SOC. PSYCHOL. 492, 492 (1983); J. M. Spectar, *Beyond the Rubicon: Presidential Leadership, International Law & The Use of Force in the Long Hard Slog*, 22 CONN. J. INT'L L. 47, 90 (2006) ("[The] administration exploited, furthered, manipulated or thrived on the public's confusion."); Eric K. Yamamoto, *Why the Public Must Compel the Courts to Hold the President Accountable for National Security Abuses*, 68 LAW & CONTEMP. PROBS. 285, 286-87 (2005) (citing a list of books) ("Many have documented this administration's penchant for deliberate misrepresentations on national security in blunt terms, for lying to the American people about threats at home and abroad."); *News World*: *The World According to Bush* (CBC news television broadcast Oct. 17, 2004), http://www.cbc.ca/passionateeyesunday/feature_171004.html (quoting Harvard Professor Stanley Hoffman) ("If you repeat a lie often enough, people swallow it.").

93. Bejesky, *PCA*, *supra* note 2, at 352-56; Kane Pryor, *A National State of Confusion*, SALON, Feb. 3, 2003, http://www.salon.com/2003/02/06/iraq_poll_2/ (stating that 65% believed that al-Qaeda and Iraq were "two closely collaborating allies").

94. PROGRAM ON INTERNATIONAL POLICY ATTITUDES, *PIPA Knowledge Networks Poll: Americans on Iraq War and Finding WMD*, at 1, 4, May 14-18, 2003, http://www.pipa.org/OnlineReports/Iraq/IraqFindWMD_May03/IraqFindWMD%20May03%20quaire.pdf [hereinafter PIPA] (providing that 57% of respondents believed Iraq had WMDs *before* the war); HARRIS INTERACTIVE, *The Harris Poll #79: Iraq, 9/11, Al Qaeda, and Weapons of Mass Destruction, What the Public Believes Now*, Oct. 21, 2004 (on file with author) ("38 percent believe that Iraq had weapons of mass destruction when the U.S. invaded.").

95. HARRIS INTERACTIVE, *supra* note 94; *see also* Douglas M. McLeod, *Derelict of Duty: The American News Media, Terrorism, and the War in Iraq*, 93 MARQ. L. REV. 113, 135-36 (2009) (explaining that 49% believed that Iraq possessed WMDs in October 2004, and 41% believed Iraq possessed WMDs in March 2006).

ship' between Iraq and al Qaeda," 49% of Americans believed "clear evidence that Iraq was supporting al Qaeda has been found."[96]

Part III categorizes three allegations of Iraq being connected to al-Qaeda. First, if Iraq was involved in 9/11, the September 2001 AUMF authorized a use of force. Second, if Iraq had ties to al-Qaeda members who would attack the U.S., the AUMF's "prevent any future attacks" language might be applicable. Third, if 9/11 perpetrators resided in Iraq, then the "harboring" provision could be a basis to use force. Research on memory, emotion, and familiarity of message elucidates why the political speech on these three allegations was so persuasive and sired false public perceptions.

III. HIGHLY-EMOTIVE EVENTS: TERRORISM

A. Framework

Brains are composed of billions of neurons, which transmit electrical signals through the synapses that connect them.[97] Memory is a network of associations with core understandings branching out through synapses to related ideas.[98] New information links to what is already known, and connections among cells are crucial for learning, and for forming[99] and recalling memories.[100] Long-term memory holds a vast repository of knowledge in "dormant" form waiting to be accessed.[101] Thinking about and remembering information activates the neurons, cells, nodes, and bonds that store the information.[102]

Emotion and systematic repetition can impact the intensity of memory. The expectation that information will be needed in the future elevates self-interest to affirmatively retain new information.[103] For example, students are apt to be more attentive to testable material in class because the more that one intensely contemplates an event or issue, the stronger the memory will be.[104] Students study lessons to

96. Walter Pincus & Dana Milbank, *Al Qaeda-Hussein Link Is Dismissed*, WASH. POST, June 17, 2004, at A01.

97. KATHLEEN TAYLOR, BRAINWASHING: THE SCIENCE OF THOUGHT CONTROL 107-11 (2004).

98. DANIEL REISBERG, COGNITION: EXPLORING THE SCIENCE OF THE MIND 239, 242 (2d ed. 2001).

99. *Id.*; TAYLOR, *supra* note 97, at 111, 140.

100. REISBERG, *supra* note 98, at 154; TAYLOR, *supra* note 97, at 111-13 (stating that strength and connections of synapses can modify brain function and memory).

101. REISBERG, *supra* note 98, at 14.

102. *Id.* at 263-66.

103. DANIEL T. WILLINGHAM, COGNITION: THE THINKING ANIMAL 189 (2d ed. 2004).

104. *Id.* at 185.

improve recall for a test since memory naturally fades over time, but can be recollected more easily by repetition and association to information already stored in long-term memory.[105] Also, emotions such as stress, fear, anger, or happiness place the brain's neurons on alert, and release different chemicals in the brain to strengthen connections among neurons.[106] Emotional events may invoke clearer memories and more rapid recall.[107] Similarly, peoples' emotional reactions and adjustments to events depend on memory.[108]

Marketing, public relations specialists, and even political pundits recognize that frequent repetition produces familiar messages that are accepted as true with increased credibility.[109] Advertisers echo the same slogans, jingles, and repetitive selling points,[110] and consultants advise politicians to repetitively iterate the same phrase so that consistency and familiarity with the message appears in the media.[111] The Bush administration engaged the same approach of "framing" persua-

105. Sensory and short-term data are temporarily stored in the brain's neural connections and become available for cognitive processes by repetition and association to more permanent information. REISBERG, *supra* note 98, at 7, 14, 68; *see also* WILLINGHAM, *supra* note 103, at 138, 163-64, 190-92, 226-28; Molly J. Walker Wilson, *Behavioral Decision Theory and Implications for the Supreme Court's Campaign Finance Jurisprudence*, 31 CARDOZO L. REV. 679, 688 (2010). Some people have better memories, and each person's memory changes with age, environmental conditions, stresses, and diseases (e.g. Alzheimer's), but the biological process of remembering, decay of memory, and forgetting is the same. *Id.*

106. *See* TAYLOR, *supra* note 97, at 153, 164; *see also* WILLINGHAM, *supra* note 103, at 281 (stating "emotional memories" result from "emotional conditioning"). Anxiety can influence personality, emotions, and cognition. *See generally* MICHAEL EYSENCK, ANXIETY AND COGNITION (1997); STANLEY D. RACHMAN, ANXIETY (2004).

107. REISBERG, *supra* note 98, at 180-84, 221-22; *see also* A. Burke, F. Heuer & D. Reisberg, *Remembering Emotional Events*, 20 MEMORY & COGNITION 277-90 (1992), *available at* http://www.ncbi.nlm.nih.gov/pubmed/1508053; L. Cahill, J.L. McGaugh, *Mechanisms of Emotional Arousal and Lasting Declarative Memory*, 21 TRENDS IN NEUROSCIENCE 294-99 (1998), *available at* http://www.ncbi.nlm.nih.gov/pubmed/9683321.

108. REISBERG, *supra* note 98, at 7.

109. *See* PRATKANIS & ARONSON, *supra* note 7, at 183 (citing R.B. Zajonc, *The Attitudinal Effects of More Exposure*, 9 J. PERSONALITY & SOC. PSYCHOL. 1-27 (1968)) ("[T]he more a person is exposed to an item, the more attractive it is."). Increased exposure and repetition can implant false beliefs. *Contra* Davis v. FCC, 554 U.S. 724, 752 (2008) (Stevens, J., dissenting) ("[F]looding the airwaves with slogans and sound bites may well do more to obscure the issues than to enlighten listeners."); REISBERG, *supra* note 98, at 179, 210.

110. *See* PACKARD, *supra* note 5; PRATKANIS & ARONSON, *supra* note 7, at 24-25, 179 (explaining that advertising books apply behavioral psychology principles) ("[R]epetition, intensity (use bright and loud ads), association (link content to the recipient's experiences), and ingenuity (make the ad distinctive) . . . to improve the effectiveness of the message."); *see also* Brown, *supra* note 7, at 1641 ("[T]he symbol comes to be more than a conduit through which the persuasive power of the advertising is transmitted, and acquires a potency, a 'commercial magnetism,' of its own."); Walter D. Scott, *The Psychology of Advertising*, ATLANTIC, Jan. 1904.

111. THOMAS PATTERSON, OUT OF ORDER 147-49 (1994); *see also* PRATKANIS & ARONSON, *supra* note 7, at 179.

sive speech with repetition.[112] Accusations that Iraq was involved in 9/11, harbored al-Qaeda, and would give WMDs to terrorists, likely built emotionally-laden memories and perceptions even though allegations were ultimately false.[113] Politicians methodically evoke emotions,[114] but the Bush/Cheney era was one of "rampant nationalism that weds patriotism with a culture of fear."[115]

B. Highest Emotion: Directly to 9/11

1. Flashbulb Memories and Direct References to 9/11

During and after 9/11, an influential foundational memory was erected. Scientists refer to extraordinarily-emotive episodes that bear lasting, vivid retention as *flashbulb memories*.[116] Typical characteristics of *flashbulb memories* are the ability to recall considerable detail about the event and what one was doing as the event occurred.[117] Examples include the President Kennedy assassination, the *Challenger* disaster, the O.J. Simpson verdict, intensely-emotional personal affairs, and the 9/11 attacks.[118] The foundational memory can ostensibly accord a resilient cognitive anchor and foundation for new information to attach.[119]

In polls preceding the invasion, the percentage of Americans who believed Iraq was involved in 9/11 went from 52% (August 2002),[120] to

112. *See* Michael T. Wawrzycki, *Language, Morals, and Conceptual Frameworks in Dispute Resolution: Establishing, Employing, and Managing the Logos*, 8 CARDOZO J. CONFLICT RESOL. 210, 227-29 (2006).

113. *See* Bejesky, *PCA*, *supra* note 2, at 352-56 (stating majorities consistently held false beliefs); *see also* Bejesky, *Intelligence*, *supra* note 21, at 875-82 (stating repetition can shift populace perceptions); Clavier & El Ghaoui, *supra* note 9, at 229.

114. *See generally* TED BRADER, CAMPAIGNING FOR HEARTS AND MINDS: HOW EMOTIONAL APPEALS IN POLITICAL ADS WORK (2006).

115. Stuart, *supra* note 32, at 1555; *see also* David L. Altheide, *The Mass Media, Crime and Terrorism*, 4 INT'L CRIM. JUST. 982 (2006); Bejesky, *supra* note 3, at 91-95.

116. REISBERG, *supra* note 98, at 222.

117. *Id.*

118. *Id.* at 222, 224; *see also* Larry Cahill et al., *Adrenergic Activation and Memory for Emotional Events*, 371 NATURE 702, 702-04 (1994); Burke, Heuer & Reisberg, *supra* note 107; Paust, *supra* note 66, at 1336 ("[T]he media's repetition of the horrific destruction of symbolic skyscrapers in New York City may have been a primary contributing factor to the nation's sense of insecurity . . . [or] even to an intense anxiety or a sense of terror.").

119. *See supra* Parts IV.A; *see infra* Part IV.C.

120. Romesh Ratnesar, *Iraq and al-Qaeda: Is There a Link?*, CNN, Aug. 26, 2002, http://archives.cnn.com/2002/ALLPOLITICS/08/26/time.iraq/; *see also* Joel Roberts, *No Rush to War*, CBS, Sept. 24, 2002, http://www.cbsnews.com/stories/2002/09/24/opinion/polls/main523130.shtml (coinciding with Bush's addresses to the U.N. General Assembly and U.S. Congress, 70% believed that al-Qaeda was in Iraq and 51% believed Saddam was "personally involved" in 9/11).

66% (October 2002), and to 57% (February 2003).[121] A commentator interpreted the polls:

> It suggests that whatever support there is for a war against Iraq, it owes much to the erroneous belief of at least half of the American people that it was Saddam Hussein's operatives who flew the planes into the World Trade Center and Pentagon. If it is disturbing to conclude that many Americans may be supporting a war on the basis of a falsehood . . . .[122]

After the invasion, a September 2003 *Washington Post* poll discovered that 69% believed Hussein was involved in the 9/11 attacks even though the "Bush administration and congressional investigators say they have no evidence of [an Iraqi connection to 9/11]."[123] The Senate Select Committee on Intelligence (SSCI) concluded that there was no evidence of Iraq involvement in 9/11.[124] In an April 2007 *60 Minutes* interview, former Central Intelligence Agency ("CIA") Director Tenet was asked about Vice President Cheney's allegations that recurrently linked al-Qaeda and Iraq and gainsaid the CIA was sourcing the accusation.[125] Tenet stated: "We could never verify that there was any Iraqi authority, direction, control, complicity with 9/11 or any other operational act against America, period."[126] False perceptions tarried. In 2006, 62% of Americans who supported the war did so because they still thought Iraq was connected to 9/11.[127]

Suggestive of how immoderately delusive public perceptions formed, Professor Nzelibe recounted "President Bush informed the

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121. THE PEW RESEARCH CTR. FOR THE PEOPLE & PRESS, *U.S. Needs More International Backing*, Feb. 20, 2003, http://www.people-press.org/2003/02/20/us-needs-more-international-backing/; *see also* Note, *War, Schemas, and Legitimation: Analyzing the National Discourage About War*, 119 HARV. L. REV. 2099, 2108-09 (2006); Pryor, *supra* note 93 (claiming that 65% believed al-Qaeda and Iraq were "two closely collaborating allies"); Dana Milbank & Claudia Deane, *Hussein Link Lingers in Many Minds*, WASH. POST, Sept. 6, 2003, at A01 (explaining that 69% believing Hussein was involved in 9/11).

122. Pryor, *supra* note 93.

123. Milbank & Deane, *supra* note 121; *see also* Dana Milbank, *Bush Disavows Hussein-September 11th Link*, WASH. POST, Sept. 18, 2003, at A18.

124. S. SELECT COMM. ON INTELLIGENCE, 109TH CONG., POSTWAR FINDINGS ABOUT IRAQ'S WMD PROGRAMS AND LINKS TO TERRORISM AND HOW THEY COMPARE WITH PREWAR ASSESSMENTS 105-13 (2006), *available at* http:// intelligence.senate.gov/phaseiiaccuracy.pdf [hereinafter SSCI/2006/FINDINGS].

125. *60 Minutes*, *George Tenet: At the Center of the Storm* (CBS television broadcast Apr. 29, 2007), *available at* http://www.cbsnews.com/2100-18560_162-2728375.html.

126. *Id.* There was no attack on U.S. interests and the substantial reference to a possible attack was that Iraq had supposedly been "casing" Radio Free Europe for five years. Bejesky, *Intelligence*, *supra* note 21, at 857-58.

127. McLeod, *supra* note 95, at 136 (describing how 15 % of those who believed there was no Iraqi connection to 9/11 supported the war).

American public in 2002 that Saddam Hussein was linked to the terrorists who conducted the September 11 attacks."[128] In 2008, SSCI Chair Senator John Rockefeller asserted that the Bush administration was so transfixed on Iraq after 9/11 that it "used the 9/11 attacks by al-Qaeda as justification for overthrowing Saddam Hussein."[129] Congressman Dennis Kucinich went further by tendering Articles of Impeachment of President George W. Bush. Article II was called "Falsely, Systematically, and with Criminal Intent Conflating the Attacks of September 11, 2001, With Misrepresentation of Iraq as a Security Threat as Part of a Fraudulent Justification for a War of Aggression."[130]

Unconfirmed CIA reports[131] and news chronicles initiated speculation. One week after 9/11, the Associated Press wrote: "A U.S. official, speaking on condition of anonymity, said the United States has received information from a foreign intelligence service that Mohamed Atta, a hijacker aboard one of the planes that slammed into the World Trade Center, met earlier this year in Europe with an Iraqi intelligence agent."[132] On October 27, the *New York Times* printed: "The Czech interior minister said today that an Iraqi intelligence officer met with Mohammed Atta . . . just five months before [9/11]."[133] Days later, another report added that Czech Prime Minister Milos Zeman alleged that Atta and the Iraqi agent discussed plans to blow

128. Jide Nzelibe, *Are Congressionally Authorized Wars Perverse?*, 59 STAN. L. REV. 907, 927 (2007).

129. Gilbert Cruz, *The Skimmer: Senate Report on Prewar Intelligence*, TIME, June 6, 2008, *available at* http://www.time.com/time/printout/0,8816,1812507,00.html; Ackerman & Hathaway, *supra* note 81, at 471 (describing that the Bush administration was fixated on Iraq and used the 9/11 attacks by al-Qaeda as justification for overthrowing Saddam Hussein).

130. Congressman Dennis J. Kucinich, *Articles of Impeachment of President George W. Bush*, art. II, June 10, 2008, *available at* http://kucinich.house.gov/news/DocumentSingle.aspx?DocumentID=93581.

131. SSCI/2006/FINDINGS, *supra* note 124, at 94 (citing a January 2003 CIA report in which the CIA stated that it had no credible information that Bagdhad was complicit in the 9/11 attacks or any other al-Qaeda stike, but that two leads—that the alleged Atta meeting with an Iraqi intelligence officer in Prague and the facilitation of the arrival at Kuala Lumpur airport of September 11 hijacker Khalid al-Mihdhar by Ahmad Hikmat Shakir al-Azzawi, a part-time facilitator of Arab visitors who obtained his job through an Iraqi Embassy employee—raised the possibility); *id.* at 99 (dismissing later allegation outright).

132. Karen Gullo, *First Criminal Charges Filed in Investigation, Against Detroit Men Who Had Airport Diagrams in Apartment*, ASSOC. PRESS, Sept. 18, 2003, http://www.leadingtowar.com/PDFsources_claims_iraqnotinvolved/2001_09_18_AP.pdf; Spectar, *supra* note 92, at 91.

133. Patrick E. Tyler & John Tagliabue, *Czechs Confirm Iraqi Agent Met with Terror Ringleader*, N.Y. TIMES, Oct. 27, 2001, *available at* http://www.nytimes.com/2001/10/27/international/middleeast/27IRAQ.html?pagewanted=all.

up the Radio Free Europe building in Prague.[134] One year later, the *New York Times* explained: "The Czech president, Vaclav Havel, has quietly told the White House he has concluded that there is no evidence to confirm earlier reports that Mohamed Atta . . . met with an Iraqi intelligence officer."[135] Evidently the error was known for many months but went uncorrected because Czech officials did not want to "publicly embarrass other prominent officials in his government."[136] Czech intelligence officials were purportedly "furious that Mr. Zeman had taken the information straight to the top of the American government, before they had a chance to investigate further."[137]

The SSCI ascertained that CIA reporting on the speculative meeting progressed from affirming the story, based exclusively on the Czech report, to relating that it was uncertain whether the meeting had transpired.[138] The FBI also investigated and denied the charge.[139] Nonetheless, many Bush administration officials and pundits advanced the story as accurate without verification.[140] In December

134. *Czech PM: Atta Considered Prague Attack*, CNN, Nov. 9, 2001, http://archives.cnn.com/2001/WORLD/europe/11/09/inv.czech.atta/index.html.

135. James Risen, *Threats and Responses: The View from Prague; Prague Discounts an Iraqi Meeting*, N.Y. TIMES, Oct. 21, 2002, *available at* http://www.nytimes.com/2002/10/21/world/threats-and-responses-the-view-from-prague-prague-discounts-an-iraqi-meeting.html?pagewanted=all.

136. *Id.* (describing how the claim came from "a single informant in the local Arab community").

137. *Id.*

138. S. SELECT COMM. ON INTELLIGENCE, 110TH CONG., REPORT ON WHETHER PUBLIC STATEMENTS REGARDING IRAQ BY U.S. GOVERNMENT OFFICIALS WERE SUBSTANTIATED BY INTELLIGENCE INFORMATION 70 (2008), *available at* http://intelligence.senate.gov/080605/phase2a.pdf [hereinafter SSCI/2008] (citing CIA, SEIB, IRAQ: INDICATIONS OF POSSIBLE IRAQI LINKS TO ATTACKS (2001); CIA, SPWR, TERRORISM: MUHAMMED ATTA'S TRAVELS TO PRAGUE (2001); CIA, SPWR, TERRORISM: REPORTING ON MUHAMMAD ATTA IN (2002)); SSCI/2006/FINDINGS, *supra* note 124, at 95 (citing a 2002 CIA paper that stated that reporting was contradictory on Atta's alleged trip to Prague and that the CIA had not verified his travels); *id.* (citing a January 2003 CIA report in which the CIA stated that it was increasingly skeptical that Atta traveled to Prague in 2001 or met with the ISS Iraqi Intelligence Service officer al-Ani); Senator Carl Levin, *New CIA Response Raises Questions Again: Where Does the Vice President Get His Information?*, SENATE (July 8, 2004), http://levin.senate.gov/newsroom/supporting/2004/070804cheney.pdf (lacking any credible information that a meeting took place).

139. SSCI/2006/FINDINGS, *supra* note 124, at 101.

140. SHELTON RAMPTON & JOHN STAUBER, WEAPONS OF MASS DECEPTION: THE USES OF PROPAGANDA IN BUSH'S WAR ON IRAQ 91-95 (2003); Bob Drogin, Paul Richter & Doyle McManus, *White House Says Sept. 11 Skyjacker Had Met Iraqi Agent*, SUN SENTINEL, Aug. 2, 2002, *available at* http://articles.sun-sentinel.com/2002-08-02/news/0208020082_1_czech-republic-prague-iraqi-embassy. The neoconservative movement's "mouthpiece" printed a story about a classified memo written by Undersecretary of Defense Douglas Feith, another neoconservative; and Vice President Cheney called the barrage of allegations the best source of information for detailing a relationship between Hussein and al-Qaeda based on leaked classified information. Bejesky, *Flow*, *supra* note 53, at 20-22; Stephen F. Hayes, *Case Closed*, 9(11) WEEKLY STANDARD (Nov. 24, 2003), http://www.weeklystandard.com/Content/Public/Articles/000/000/003/378f

2001, Vice President Cheney stated that "it's been pretty well confirmed that [Atta] did go to Prague and he did meet with a senior official of the Iraqi intelligence service last April, several months before the attack."[141] On September 8, 2002, Cheney rehashed: "Mohamed Atta . . . did apparently travel to Prague on a number of occasions. . . [W]e have reporting that places him in Prague with a senior Iraqi intelligence official a few months before the attack . . . [I]t's unconfirmed at this point."[142] In March 2003, National Security Advisor Rice contended that there were "a lot of tantalizing meetings" between Iraq officials and "people who were involved in 9/11."[143] In September 2003, Cheney still maintained that Iraqi support for al-Qaeda was "clearly official policy," even though "we've never been able to develop anymore of that [Czech story] yet either in terms of confirming or discrediting it. We just don't know."[144] In June 2004, Cheney stated: "We have never been able to confirm that [the Atta meeting], nor have we been able to knock it down, we just don't know . . . I can't refute the Czech claim . . . I can't prove the Czech claim, I just don't know."[145] The Czech claim has "never been proven; it's never been refuted."[146] By this point, the Czechs, FBI, CIA, and 9/11 Commission had all denied the claim.[147] In March 2006, Cheney finally abandoned the allegation, while conferring the impression that it was isolated and inconsequential:

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mxyz.asp?nopager=1. The memo was dismissed both by the SSCI and by a Pentagon inspector general investigation. Bejesky, *Flow*, *supra* note 53, at 20-22.

141. S. SELECT COMM. ON INTELLIGENCE, 108TH CONG., REPORT ON THE U.S. INTELLIGENCE COMMUNITY'S PREWAR ASSESSMENTS ON IRAQ 453 (July 7, 2004) [hereinafter SSCI/2004] (citing Vice President Cheney, *Meet the Press* (Dec. 9, 2001)).

142. SSCI/2008, *supra* note 138, at 70 (citing Vice President Cheney, *Meet the Press* (Sept. 8, 2002)).

143. SSCI/2004, *supra* note 141, at 460 (citing *Face the Nation* (Mar. 9, 2003)).

144. David E. Sanger & Robin Toner, *Bush Insists on Iraq-al Qaeda Link*, N.Y. TIMES (June 19, 2004), http://articles.sfgate.com/2004-06-18/news/17430893_1_iraq-and-al-qaeda-terrorist-network-cnbc-s-capital-report/2 (denoting Cheney's statement that he was simply repeating Czech intelligence); *see also Cheney Reasserts Already Debunked Atta-Iraq Connection*, DEMOCRACY NOW! (Sept. 16, 2003), http://www.democracynow.org/2003/9/16/cheney_reasserts_already_debunked_atta_iraq; Dana Priest & Glenn Kessler, *Iraq, 9/11 Still Linked by Cheney*, WASH. POST, Sept. 29, 2003; Meet the Press, *Transcript for Sept. 10*, MSNBC (Sept. 10, 2006), http://www.msnbc.msn.com/id/14720480/ns/meet_the_press/t/transcript-sept/ (noting that past claims were based on the CIA's re-reporting from the Czech intelligence service report and on a report derived from a photographer); *Transcript for Sept. 14*, MSNBC NEWS, Sept. 14, 2003.

145. Molly Ivins, *Bush's Un-lies*, CNN (Aug. 22, 2006), http://edition.cnn.com/2006/POLITICS/08/22/ivins.iraq/index.html.

146. David E. Sanger & Robin Toner, *Bush and Cheney Talk Strongly of Qaeda Links with Hussein*, N.Y. TIMES (June 17, 2004), http://nytimes.com/2004/06/17/international/middleeast/17CND-BUSH.html; Levin, *supra* note 138.

147. *See supra* notes 96, 135, 139.

> [W]e had one report early on from another intelligence service that suggested that the lead hijacker, Mohamed Atta, had met with Iraqi intelligence officials in Prague . . . And that reporting waxed and waned where the degree of confidence in it, and so forth, has been pretty well knocked down at this stage. That evidence has never been forthcoming."[148]

2. Insinuating Connections to 9/11

The Bush administration also insinuated connections between Iraq and 9/11. On October 8, 2002, two days before the congressional vote to permit use of force against Iraq, Bush provided a comprehensive account of peril. He referenced that citizens were wondering, "[a]fter 11 years of living with this problem, why do we need to confront it [Iraq] now?"[149] He answered his own question by stating, "We have experienced the horror of September 11th. We have seen that those who hate America are willing to crash airplanes into buildings. . ."[150] Bush then expounded that "the designs and deceptions of the Iraqi regime" were known, Iraq "still has chemical and biological weapons and is increasing" capabilities, that Iraq could "give weapons to terrorists," and that "[w]e refuse to live in fear."[151] In his January 28, 2003 State of the Union address, Bush remarked:

> Saddam Hussein aides and protects terrorists, including members of al Qaeda. Secretly, and without fingerprints, he could provide one of his hidden weapons to terrorists or help them develop their own. Before September the 11th, many in the world believed that Saddam Hussein could be contained. But chemical agents, lethal viruses, and shadowy terrorist networks are not easily contained. Imagine those 19 hijackers with other weapons and other planes – this time armed by Saddam Hussein.[152]

Days later, Bush reported: "We know that our enemies have been working to acquire weapons of mass destruction. That is a fact. If their ambitions were ever realized, they would set out to inflict catastrophic harm on the United States with many times the casualties of

148. *Interview of the Vice President by Tony Snow*, WHITE HOUSE (Mar. 29, 2006), http://georgewbush-whitehouse.archives.gov/news/releases/2006/03/20060329-2.html.

149. *'Saddam Hussein Is a Threat to Peace,'* WASH. POST, Oct. 8, 2002, at A20, *available at* http://www.washingtonpost.com/ac2/wp-dyn/A56050-2002Oct7?language=printer.

150. *Id.*

151. *Id.*

152. George Bush Administration, *Address Before a Joint Session of the Congress on the State of the Union*, GPO (Jan. 28, 2003), http://frwebgate.access.gpo.gov/cgi-bin/getdoc.cgi?dbname=2003_presidential_documents&docid=pd03fe03_txt-6.pdf.

September 11th."[153] In March 2003, shortly before the attack, Bush stated: "If the world fails to confront the threat posed by the Iraqi regime, refusing to use force, even as a last resort, free nations would assume immense and unacceptable risks. The attacks of September the 11th, 2001, showed what the enemies of America did with four airplanes. We will not wait to see what terrorists or terrorist states could do with weapons of mass destruction."[154]

On May 1, 2003, in the high-profile address announcing the end of the Iraq War, Bush pronounced:

> The battle of Iraq is one victory in a war on terror that began on September the 11, 2001—and still goes on. That terrible morning, 19 evil men . . . gave America and the civilized world a glimpse of their ambitions . . . The liberation of Iraq is a crucial advance in the campaign against terror. We've removed an ally of al-Qaeda and cut off a source of terrorist funding.[155]

In September 2003, Cheney insisted that "democratizing Iraq" would inflict a material blow at "the geographic base of the terrorists who have had us under assault for many years, but most especially on 9/11."[156]

If imputations in speeches had been factual, both authorizations to use military force might have been applicable. The September 2001 AUMF sanctioned the use of force against abettors to 9/11, and § 3 of the October 2002 AUMF-Iraq (and the President's letter to Congress) stated that military force against Iraq must be consistent with the response of other countries to 9/11.[157] When confronted with purported misrepresentations, Bush insisted that he never linked Iraq to 9/11. He stated, "First, if I might correct a misperception. I don't think we ever said—at least I know I didn't say—that there was a direct connection between September the 11th and Saddam Hussein. . .I was very careful never to say that Saddam Hussein ordered the attacks on America."[158] Historian Joseph Trento commented, "The President has basically let the people believe a lie, which is that Iraq played a

153. McLeod, *supra* note 95, at 125.

154. Milbank & Deane, *supra* note 121.

155. *See* Press Release, Office of the Press Secretary, President Bush Announces Combat Operations in Iraq Have Ended (May 1, 2003); Milbank & Deane, *supra* note 121.

156. *Rumsfeld Sees No Link Between Saddam Hussein, 9/11*, USA TODAY (Sept. 16, 2003), http://www.usatoday.com/news/world/iraq/2003-09-16-rumsfeld-iraq-911_x.htm.

157. *See* discussion *supra* notes 34, 80.

158. *Bush Discusses War on Terror* (CNN television broadcast Mar. 20, 2006), *available at* http://transcripts.cnn.com/TRANSCRIPTS/0603/20/se.01.html.

role in 9/11, which is nonsense . . . Believe me, the people who perpetuated this lie knew . . . the affect it would have on the public."[159]

After the invasion, commentators impugned prewar allegations, and officials frequently responded by diverting attention from Iraqi involvement in 9/11, to generic associations with al-Qaeda. This prospect implicates the September 2001 AUMF's "prevent any future attacks" provision.[160] Bush stated: "We've had no evidence that Saddam Hussein was involved with September the 11th . . . [but] there's no question that Saddam Hussein has al-Qaeda ties."[161] Rice expressed that "no one has said that there is evidence that Saddam Hussein directed or controlled 9/11, but let's be very clear, he had ties to al-Qaeda, he had al-Qaeda operatives who had operated out of Baghdad."[162] Bush declared that we didn't say "the 9/11 attacks were orchestrated [by Saddam Hussein and al-Qaeda]. . . We did say there were numerous contacts between Saddam Hussein and al-Qaeda."[163] Cheney emphasized that 9/11 is "a separate proposition from the question of whether or not there was some kind of a relationship between the Iraqi government, Iraqi intelligence service, and the al-Qaeda organization."[164]

C. Allegation of Ties Between Al-Qaeda and Iraq

1. Framing Speech

Linguistics research indicates that framing speech with selective word choice can exploit the recipient's decision-making process, behaviors, and attitudes.[165] The Bush administration "framed" the issue

159. *News World*, *supra* note 92 (interview with Joseph Trento); *see also* Oren Gross, *Chaos and Rules: Should Responses to Violent Crises Always Be Constitutional?*, 112 YALE L.J. 1011, 1039 (2003) ("[I]ndividuals tend to link the probability of a particular event taking place with their ability to imagine similar events taking place."); Amos Tversky & Daniel Kahneman, *Judgment Under Uncertainty: Heuristics and Biases*, 185 SCIENCE 1124, 1127 (1974) (stating that graphic, vivid, and emotional events may create an "availability bias" to skew interpretation of information).

160. *See* Authorization for the Use of Military Force, Pub. L. No. 107-40, 115 Stat. 224 (2001).

161. Wayne Washington, *Bush Puts Distance on a Hussein Link to 9/11*, BOS. GLOBE, (Sept. 18, 2003), http://www.boston.com/news/world/articles/2003/09/18/bush_puts_distance_on_a_hussein_link_to_911/.

162. *Meet the Press* (MSNBC television broadcast Sept. 28, 2003), *available at* http://www.msnbc.msn.com/id/3088197/ns/meet_the_press/t/transcript-sept/.

163. *Bush Insists Iraq, al-Qaeda Had 'Relationship'*, CNN (June 17, 2004), http://articles.cnn.com/2004-06-17/politics/Bush.alqaeda_1_iraq-and-al-qaeda-sudan-between-iraqi-intelligence-terror-network?_s=PM:ALLPOLITICS.

164. *Interview*, *supra* note 148.

165. *See* Wilson, *supra* note 105, at 682.

of Iraq as a part of the War on Terror to attain Congressional and populace support.[166] Consequently, 78% believed Iraq assisted al-Qaeda.[167] In a September 2006 interview, Bush candidly acknowledged, "you know, one of the hardest parts of my job is to connect Iraq to the war on terror."[168] Professors Kinder and Herzog expressed concern that the "nefarious possibilities of framing is just that they can become freewheeling exercises in pure manipulation."[169] Psychology studies in word association, chunking, memory cues, stereotyping, and schema are pertinent to explaining the effectiveness of framing associations between Iraq and al-Qaeda.

2. Cognitive Similarity of Threat, Word Association, and Memory Anchors

People maturate memories by making connections to known information,[170] and frequently remember with stimuli from memory cues,[171] including words, phrases, and mental perceptions. The power of word and phrase associations to stimulate emotions has been intensely studied and was a basis for the accuracy of lie detector tests when they were first introduced by Carl Jung.[172] Words have an embedded meaning and conjure certain images, feelings, and understandings. Psychologist Perry London explained:

> A large body of scientific literature shows plainly that conditioning methods can be used to control several types of voluntary and involuntary activity affecting thinking, language, imagination, emotion, motivations, habits and skills. People can be conditioned to . . . react emotionally to meaningless words or phrases; . . . to

166. *See* BRUCE ACKERMAN, BEFORE THE NEXT ATTACK 16-17 (2006); Wawrzycki, *supra* note 112, at 238 (stating that pollsters advised politicians to link al-Qaeda and Iraq in speeches).

167. Milbank & Deane, *supra* note 121.

168. Caitlin A. Johnson, *Couric's Interview with President Bush*, CBS NEWS (Sept. 6, 2006), http://www.cbsnews.com/2102-500923_162-1980074.html?tag=contentMain;contentBody.

169. DONALD R. KINDER & DON HERZOG, *Democratic Discussion*, *in* RECONSIDERING THE DEMOCRATIC PUBLIC 363 (George E. Marcus & Russel L. Hanson eds., 1993).

170. The mind accesses the word, and cues images and ideas linked to the word. David O. Sears, *Symbolic Politics: A Socio-Psychological Theory*, *in* EXPLORATIONS IN POLITICAL PSYCHOLOGY 118-20 (Shanto Iyengar & William J. McGuire eds., 1993) (discussing symbolic processing).

171. *See* WILLINGHAM, *supra* note 103, at 208-09.

172. *See* DAVID MATSUMOTO ET AL., FBI LAW ENFORCEMENT BULLETIN, EVALUATING TRUTHFULNESS AND DETECTING DECEPTION (2011), *available at* http://www.fbi.gov/stats-services/publications/law-enforcement-bulletin/june_2011/school_violence; *About Carl Gustav Jung*, C.G. JUNG INSTITUTE OF LOS ANGELES, http://www.junginla.org/institute/cgjung (last visited Seot. 25, 2012).

> hallucinate to signals; [and] to feel fear, revulsion, embarrassment or arousal upon demand.[173]

The Bush administration frequently referenced highly-emotive words, contexts, and foundational memories, and comingled terms in speeches.[174] Examples of emotional memory cues include direct and indirect contextual associations among words such as "9/11," "Osama bin-Laden," "terrorism," "al-Qaeda," "fear," "dangers," "chemical weapons," "biological weapons," "nuclear weapons," "mushroom clouds," "death and destruction," "threat to our way of life," "Saddam Hussein," "axis-of-evil," and "evil dictator."[175] The catch-all phrase "weapons of mass destruction" and the acronym "WMD" likely became a fear-based heuristic and cognitive anchor for people lacking detailed knowledge of chemical, biological, and nuclear weapons. While those weapons were not discovered, WMDs were presumed to exist by another heuristic memory cue – Iraqi "denial and deception," or its acronym "D&D."[176]

3. Chunking, Exemplars, Schema, and Stereotyping

The imputation that Iraq was associated with al-Qaeda was presumably persuasive because of emotive words, memory anchors, and associations among labels and ideas. Psychology research on chunking, exemplars, schema, and stereotyping substantiates that the mental organization of words and ideas can induce cognitive biases.[177] *Chunking* refers to how knowledge is combined, organized, accepted, or rejected, and utilized to form a coherent understanding of an issue or event.[178] A *schema* is a cognitive structure used to process new

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173. DENISE WINN, THE MANIPULATED MIND: BRAINWASHING, CONDITIONING AND INDOCTRINATION 79 (2000) (citing PERRY LONDON, EMOTIONAL CONTROL (1969)); *see also* MARC SIEGEL, FALSE ALARM: THE TRUTH ABOUT THE EPIDEMIC OF FEAR 25-26 (2005) ("Sometimes fears incubate, become indelible, and even increase in potency. They are often brought back to life by stressful events.").

174. The Bush administration used word choice and association strategies to market the "war on terror." *See* JOWETT & O'DONNELL, *supra* note 10, at 10; GILLES KEPEL, THE WAR FOR MUSLIM MINDS 121 (2004). *See generally supra* Parts IV.B.1-2.

175. Certain synonyms such as "terrorist," "guerillas," "insurgents," "belligerents," and "militants" may be used. William J. Drummond, *Neutral or Negative, Accuracy or Appeasement: Nouns of Choice in the Iraqi Conflict*, 19 N.D. J.L. ETHICS & PUB. POL'Y 509, 510-12 (2005). Similarly, for El Salvador, the Reagan administration also distributed State Department documents to the media entitled "Communist Interference in El Salvador," which involved propaganda that was later discovered to be false. Fisher, *supra* note 3, at 1226-27.

176. SSCI/2008, *supra* note 138, at 40; *see also* Bejesky, *Weapon Inspections*, *supra* note 1, at 323-24.

177. Clavier & El Ghaoui, *supra* note 9, at 213 ("[S]ystematic statistical account of the usage of words and their association with other words can have a useful predictive quality . . . .").

178. *See* WILLINGHAM, *supra* note 103, at 201.

information with existing knowledge, such that previous experience resides in "packets" that are accessible to discern a new situation.[179] Schemas can reinforce biases, because schema-consistent information is more easily recalled than learning not associated with schemas.[180]

Exemplars, *stereotypes*, and *prototypes* refer to how the brain generalizes,[181] associates, and systematizes information.[182] These are essential and natural cognitive processes for the learning process because they provide a reference point and building block to rapidly retrieve memories,[183] and generalize new information as either typical or atypical of an existing category.[184] Stereotypes can be media- and culturally-driven,[185] and propel people to make judgments based on perceived typical representations of the class in which new information plausibly jibes.[186] However, there is the danger of oversimplification. "Symbolic predispositions" have caused discrimination, persecution, racism and prejudice;[187] such as with illegal stereotyping of black Americans and Latinos in criminal law,[188] and generalizations about Muslims and terrorism both before and after 9/11.[189]

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179. *See, e.g.*, Notes, *supra* note 121, at 2103; PATTERSON, *supra* note 111, at 56; TAYLOR, *supra* note 97, at 122; WILLINGHAM, *supra* note 103, at 202.

180. *See* Ronald Chen & Jon Hanson, *Categorically Biased: The Influence of Knowledge Structures on Law and Legal Theory*, 77 S. CAL. L. REV. 1103, 1168-73, 1193-1210 (2004).

181. *See* Cynthia R. Farina, *False Comfort and Impossible Promises: Uncertainty, Information Overload, and the Unitary Executive*, 12 U. PA. J. CONST. L. 357, 364-66 (2010); *see also* C. Neil Macrae et al., *The Dissection of Selection in Person Perception: Inhibitory Processes in Social Stereotyping*, 69 J. PERSONALITY & SOC. PSY. 397, 403 (1995). *See generally* Robert B. Zajonc, *Feeling and Thinking: Preferences Need No Inferences*, 35 AM. PSYCHOLOGIST 151 (1980); Robert B. Zajonc, *On the Primacy of Affect*, 39 AM. PSYCHOLOGIST 117 (1984).

182. WILLINGHAM, *supra* note 103, at 242.

183. Russel H. Fazio et al., *On the Automatic Activation of Attitudes,* 50 J. PERSONALITY & SOC. PSYCHOL. 229 (1986). *See generally* John A. Bargh et al., *The Automatic Evaluation Effect: Unconditional Automatic Attitude Activation with a Pronunciation Task*, 32 J. EXPERIMENTAL SOC. PSYCHOL. 104 (1996).

184. WILLINGHAM, *supra* note 103, at 246.

185. *See generally* JACK SHAHEEN, REEL BAD ARABS: HOW HOLLYWOOD VILIFIES A PEOPLE (2001) (describing the ongoing vilification of Arab Muslims in Hollywood films).

186. WILLINGHAM, *supra* note 103, at 243-44; WINN, *supra* note 173, at 50.

187. Sears, *supra* note 170, at 118-20. *See generally* Leonard M. Baynes, *Racial Profiling, September 11th and the Media: A Critical Race Theory Analysis*, 2 VA. SPORTS & ENT. L.J. 1 (2002) (discussing the impact that the media has had on racial profiling post-9/11).

188. *See* DAVID HARRIS, PROFILES IN INJUSTICE, WHY RACIAL PROFILING CANNOT WORK (2002); David Rudovsky, *Law Enforcement by Stereotypes and Serendipity: Racial Profiling and Stops and Searches Without Cause*, 3 U. PA. J. CONST. L. 296 (2001); Andrew Taslitz, *Stories of Fourth Amendment Disrespect: From Elian to the Internment*, 70 FORDHAM L. REV. 2257 (2002); Tom R. Tyler & Cheryl J. Wakslak, *Profiling and Police Legitimacy: Procedural Justice, Attributions of Motive, and Acceptance of Police Authority*, 42 CRIMINOLOGY 253 (2004).

189. DAVID COLE, ENEMY ALIENS: DOUBLE STANDARDS AND CONSTITUTIONAL FREEDOMS IN THE WAR ON TERROR 5-6, 84-88 (2003); *see also* Nagwa Ibrahim, *The Origins of Muslim Racialization in U.S. Law*, 7 UCLA J. ISLAMIC & NEAR E.L. 121, 135-37, 144 (2008/2009) (explaining that from 1984 to 1998, only two out of eighty-seven acts of terrorism in the U.S. were

The Bush administration frequently repeated certain words, cues, and phrases that could dehumanize foes[190] and invoke emotionally-laden memories and sentiments.[191] Broadly speaking "evil-doers" described enemies,[192] and "America," "freedom" and "liberty" justified actions at the enemy. From their textual analysis of Bush's June 2002 West Point Military Academy commencement address, Woods and Donovan demonstrated how the praised, positive American image was invoked as the antithesis of the enemy in juxtaposed phrases.[193] Emotionally-laden contrasting terms included power/weak, soldiers/terrorists, good/evil, hope/deluded, moral purpose/blackmail, innocent/guilty, liberty/joyless conformity, freedom/dictators, peace/violence, homeland/caves, civilized/brutal, right/wrong, justice/cruelty, and honorable/ruthless.[194] Bush's January 2006 State of the Union Address used nearly the same language of threats as in previous years, including by stating derivatives of the word "terrorism" twenty-three times and "freedom" nineteen times.[195] In March 2006, Bush delivered a speech involving Iraq and included the word "terror" fifty-four times.[196] Stanford Psychology Professor Philip Zimbardo explains

committed by Muslim groups); Tom R. Tyler, Stephen Schulhofer & Aziz Z. Huq, *Legitimacy and Deterrence Effects in Counterterrorism Policing: A Study of Muslim Americans*, 44 L. & Soc'y Rev. 365, 387 (2010).

190. Drummond, *supra* note 175, at 509.

191. Sears, *supra* note 170, at 133; *see* Taylor, *supra* note 97, at 133; Gia B. Lee, *Persuasion, Transparency, and Government Speech*, 56 Hastings L.J. 983, 998-999 (2005).

192. Alan Clarke, *Creating a Torture Culture*, 32 Suffolk Transnat'l L. Rev. 1, 18 n.82 (2008).

193. Jeanne M. Woods & James M. Donovan, *"Anticipatory Self-defense" and Other Stories*, 14 Kan. J.L. Pub. Pol'y 487, 499 (2005).

194. *Id.*; *see also* Clavier & El Ghaoui, *supra* note 9, at 222-24, 227 (noting other speeches in which Bush dichotomized good and evil and the cognitive power of this association). Similarly, government documents later revealed that Reagan's Office of Public Diplomacy actually used polling to identify "key words, phrases, or images" that would demonize the Nicaraguan government in the eyes of Americans. Greg Grandin, Empire's Workshop: Latin America, The United States, and the Rise of the New Imperialism 125 (2006) (citing Office of Public Diplomacy for Latin American and the Caribbean, Update of Time-Line for Sixty-Day Public Diplomacy Plan (1986)). The office marketed the Sandinistas as "'evil,' Soviet 'puppets,' 'racist and repress human rights,' 'involved in U.S. drug problems.' The Contras were 'freedom fighters,' 'good guys,' 'underdogs,' 'religious,' and 'poor.'" *Id.*

195. President George W. Bush, State of the Union Address (Jan. 31, 2006), *available at* http://www.pbs.org/newshour/indepth_coverage/white_house/sotu2006/bush_01-31-06.html. "[T]he word terror . . . it seems, is solely responsible for Bush's [long] popularity . . . . Without the word 'terror,' Bush would have no war, no foreign policy, no justification for decimating the Constitution, and nothing to talk about in his speeches." Mike Adams, *The Terror of President Bush*, Counter Think (Feb. 8, 2006), http://www.informationclearinghouse.info/article11836.htm.

196. Sidney Blumenthal, *Apocalyptic President*, The Guardian, Mar. 22, 2006.

how stereotyped images of *good* and *evil* stimulate emotion as propaganda:

> The process begins with creating stereotyped conceptions of the other, dehumanized perceptions of the other . . . the other as a fundamental threat to our cherished values and beliefs. With public fear notched up and the enemy threat imminent, reasonable people act irrationally, independent people act in mindless conformity, and peaceful people act as warriors. Dramatic visual images of the enemy on posters, television, magazine covers, movies, and the Internet imprint on the recesses of the limbic system, the primitive brain, with the powerful emotions of fear and hate.[197]

4. Statements by the Bush Administration

In addition to repeating rumors of direct alliance, such as references to the Atta meeting with Iraqi intelligence in Prague,[198] the Bush administration frequently indirectly linked and comingled al-Qaeda, Iraq, and 9/11, and juxtaposed different perils in speeches. Perhaps word associations, stereotypes and generally-applicable emotive imagery insinuated that Hussein's regime contained the same kind of people, were apt to do the same things, posed the same risks, and represented the same type of foe.[199] SSCI member Ronald Wyden remarked that Bush administration officials were "associating Saddam Hussein and Iraq with al-Qaeda and thereby with the attacks against the World Trade Center and the Pentagon. Repeated associations helped build the case for war against Iraq."[200] Wyden believed the approach was akin to stratagems adopted by advertisers who "know the power of association when trying to convince customers to purchase a product."[201] Journalism Professor Robert Jensen contended that stereotyping was used in marketing the invasion of Iraq. Jensen stated,

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197. PHILIP ZIMBARDO, THE LUCIFER EFFECT: UNDERSTANDING HOW GOOD PEOPLE TURN EVIL 11 (2007).

198. *See supra* Part IV.B.1.

199. It was hypothesized that "Americans instinctively lump both foes together as Middle Eastern enemies." Milbank & Deane, *supra* note 121 ("The intellectual argument is there is a war in Iraq and a war on terrorism and you have to separate them, but the public doesn't do that . . . . They see Middle Eastern terrorism, bad people in the Middle East, all as one big problem."). However, this would be abetted by Bush administration officials using word association and announcing rumors hidden inside the U.S. intelligence apparatus. Bejesky, *supra* note 21, at 875-82.

200. SSCI/2004, *supra* note 141, at 495.

201. *Id.*

> The problem for the Bush administration is that plans that had already existed for regime change in Iraq had to be justified. They couldn't just go in without public support. The public support was created by connecting Saddam Hussein to those fears of terrorism – the fear generated by 9/11, the fear of terrorist networks has to transferred to Iraq – that is, people have to learn to be as afraid of Saddam Hussein as they are of Osama bin Laden.[202]

In an August 7, 2003 speech, former Vice President Al Gore remarked that this linking artifice was a "systematic effort to manipulate facts" to implant a "false impression."[203] After combing the texts of Bush administration speeches and commentary, democratic Staff Director Anthony Blinken concluded,

> Read the speeches by Mr. Bush, Mr. Cheney, and Mr. Rumsfeld throughout the period prior to the war on Iraq after September 11th. It's very subtle. They begin by referring to Saddam Hussein, then to September 11th, and finally to bin Laden . . . [I]f someone listens with only half-an-ear, such notions mingle and blend, sewing the seeds of the idea in the American people's minds that there's a link between these three figures and events.[204]

For example, on September 12, 2002, just hours after a day filled with 9/11 memorials, Bush addressed the U.N. General Assembly and stated: "In the attacks on America a year ago, we saw the destructive intentions of our enemies. This threat hides within many nations . . . In cells and camps, terrorists are plotting further destruction, and building new bases for their war against civilization."[205] Bush then intersected the alleged danger to Iraq: "In one place – in one regime – we find all these dangers."[206] After enumerating allegations about Iraq's speculative WMD programs, he closed the speech by returning to terrorism: "And if an emboldened regime were to supply these

202. MEDIA EDUCATION FOUNDATION, HIJACKING CATASTROPHE: 9/11, FEAR & SELLING AMERICAN EMPIRE (2006); *see also* Altheide, *supra* note 115, at 4 (discussing politics of fear). Political Science Professor John Mueller remarked: "[y]ou get a general fuzz going around: People know they don't like al Qaeda, they are horrified by September 11th, they know this guy is a bad guy, and it's not hard to put those things together." Milbank & Deane, *supra* note 121.

203. Milbank & Deane, *supra* note 121.

204. *News World*, *supra* note 92 (interview with Blinken). "The notion was reinforced by these hints, the discussions that they had about possible links with al Qaeda terrorists." Milbank & Deane, *supra* note 121 (providing an explanation by Andrew Kohut, a pollster at Pew Research Center).

205. Press Release, White House, President's Remarks at the United Nations General Assembly (Sept. 12, 2002), *available at* http://georgewbush-whitehouse.archives.gov/news/releases/2002/09/20020912-1.html.

206. *Id.*

weapons to terrorist allies, then the attacks of September the 11th would be a prelude to far greater horrors."[207]

On September 25, 2002, Bush remarked: "The danger is, is that al-Qaeda becomes an extension of Saddam's madness and his hatred and his capacity to extend weapons of mass destruction around the world . . . I can't distinguish between the two, because they're both equally as bad, and equally as evil . . . ."[208] He further opined that in "the war on terror, you can't distinguish between al Qaeda and Saddam when you talk about the war on terror."[209] On different occasions, Bush conjectured that this is "a man . . . who hates America; a man who loves to link up with Al Qaeda; a man who is a true threat to America . . . ."[210] "He's a threat because he is dealing with al Qaeda;"[211] and "He [Hussein] hates the fact, like al Qaeda does, that we love freedom."[212] On October 7, three days before the Congressional vote on the AUMF-Iraq, Bush remarked that "confronting the threat posed by Iraq is crucial to winning the war on terror."[213] Four days after the AUMF-Iraq was adopted, Bush contended: "This is a man who, in my judgment, would like to use al Qa'ida as a forward army."[214] Cheney remarked,

> Iraq is not a distraction from the war on terror; it is absolutely critical to winning the war on terror. As the president has said, Iraq could decide on any given day to provide biological or chemical weapons to a terrorist group or individual terrorist.[215]

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207. *Id.*

208. Press Release, White House, The Rest of the Story: Iraq's Links to Al Qaeda (Sept. 15, 2006), *available at* http://georgewbush-whitehouse.archives.gov/news/releases/2006/09/20060915-4.html.

209. *Id.*; *see also* SSCI/2004, *supra* note 141, at 454 (citing Bush, Sept. 25, 2002).

210. Press Release, White House, President Bush Pushes for Homeland Security Bill (Sept. 28, 2002), *available at* https://www.dhs.gov/xnews/speeches/speech_0024.shtm.

211. *Hardball with Chris Matthews* (MSNBC television broadcast Nov. 11, 2005), *available at* http://www.msnbc.msn.com/id/10036925/ns/msnbc_tv-hardball_with_chris_matthews/t/hardball-chris-matthews-nov-th/.

212. *George W. Bush on Homeland Security*, ON THE ISSUES, http://www.ontheissues.org/Celeb/George_W__Bush_Homeland_Security.htm (citing Oct. 31, 2002 speech).

213. David E. Sanger, *Threats and Responses: The President's Speech; Bush Sees 'Urgent Duty' to Pre-empt Attack by Iraq*, N.Y. TIMES, Oct. 8, 2002, at A1; *Threats and Responses; Transcript: Confronting Iraq Threat 'Is Crucial to Winning War on Terror,'* N.Y. TIMES, Oct. 8, 2002, at A12.

214. *See* SSCI/2008, *supra* note 138, at 81 (citing Bush's statements on Oct. 14, 2002).

215. Linda D. Kozaryn, *Confronting Iraq Crucial to Winning War on Terror, Cheney Says*, AM. FORCES PRESS SERVICES (Jan. 10, 2003), http://www.defense.gov/news/newsarticle.aspx?id=29585. Cheney remarked that Hussein "had long-established ties with al Qaeda," a claim that was again affirmed by Bush at the same time. *Judy Woodruff's Inside Politics* (CNN television broadcast June 16, 2004), *available at* http://transcripts.cnn.com/TRANSCRIPTS/0406/

Commenting on Bush's surprise that the public held false perceptions about links between Iraq and al-Qaeda, former Pentagon DIA officer Karen Kwaitkowski stated that these are "[t]he very things that a year later President Bush himself denies, and feigns his surprise, 'I don't know why everybody thinks that.'"[216] After she resigned, Kwaitkowski spoke publicly about her experience in the Pentagon's Office of Special Plans ("OSP"), and noted that appointed officials in the OSP specifically advocated this "story-line" between al-Qaeda and Iraq and "selling it to everyone who would listen" even though the accusation had no basis in the intelligence.[217] Indeed, it was the Bush administration that maintained there was a definitive alliance between Iraq and al-Qaeda, whereas the Intelligence Community was more reserved and offered a range of postulations based on uncertain data.[218] Similarly, on September 14, 2003, Cheney was asked on *Meet the Press* if he thought it was surprising that two-thirds of Americans believed that Iraq was involved in 9/11 and he stated,

> No, I think it's not surprising that people make that connection. You and I talked about this two years ago. . . At the time I said no, we didn't have any evidence of that. We learned a couple of things. We learned more and more that there was a relationship between Iraq and al-Qaeda that stretched back through most of the decade of the '90s, that it involved training, for example, on BW and CW [biological weapons and chemical weapons], that al-Qaeda sent personnel to Baghdad to get trained on the systems that are involved.[219]

It seems that anytime certain top officials in the Bush administration "learned" something new—i.e. were briefed on a new classified rumor—they broadcasted it to Americans. After completing its five-year investigation, the SSCI's determined: "Iraq and al-Qaida did not have a cooperative relationship . . . . Most of the contacts cited between Iraq and al-Qaida before the war by the intelligence community and policymakers have determined not to have occurred . . . ."[220] SSCI Chair Rockefeller remarked that the Bush administration was so transfixed on Iraq after 9/11 that "top Administration officials made

16/ip.00.html. *But see* McLeod, *supra* note 95, at 117 (pointing out the falsity of Cheney's claim that there is "'overwhelming' evidence of 'long-established' links" between Iraq and al-Qaeda).

216. HIJACKING CATASTROPHE, *supra* note 202.

217. *Conspiracies: Iraq* (Sky television broadcast 2006).

218. Bejesky, *Intelligence*, *supra* note 21, at 855-76.

219. *Fox News Spins 9/11 Commission Report*, FAIR (June 22, 2004), http://www.fair.org/index.php?page=1577.

220. SSCI/2008, *supra* note 138, at 72.

repeated statements that falsely linked Iraq and al-Qaeda as a single threat."[221] A 2008 Pentagon study, which examined 600,000 Iraqi documents seized during the occupation and thousands of hours of interrogations, also found no link between Saddam and al-Qaeda.[222] *ABC News* announced that "the government report is the first official acknowledgment from the U.S. military that there is no evidence Saddam had ties to al-Qaeda."[223]

D. Al-Qaeda or Affiliated Groups in Iraq

Being queried about the deliberate and "constant linkage between Iraq and al-Qaeda" and how the idea was employed as a rationale for war with Iraq, in September 2006, Vice President Cheney remarked on *Meet the Press*,

> [T]here are two totally different propositions here, and people have consistently tried to confuse them . . . So you've got Iraq and 9/11, no evidence that there's a connection. You've got Iraq and al-Qaeda, testimony from the director of CIA that there was indeed a relationship, Zarqawi in Baghdad, etc . . . [W]e know that Zarqawi, running a terrorist camp in Afghanistan prior to 9/11 . . . then fled and went to Baghdad and set up operations in Baghdad in the spring of '02 and was there from then, basically, until basically the time we launched into Iraq . . . Zarqawi was in Baghdad after we took Afghanistan and before we went into Iraq. You had the facility up at Kermal, poisons facility, ran by Ansar Islam, an affiliate of al-Qaeda.[224]

Prewar intelligence maintained that alleged al-Qaeda operative Ayman al-Zarqawi and two dozen compatriot-insurgents fled Afghan-

221. Cruz, *supra* note 129; *see also* Mark Fenster, *The Opacity of Transparency*, 91 IOWA L. REV. 885, 929 (2006) (stating that the Bush Administration insisted that there was a link between Saddam Hussein, al Qaeda and the 9/11 attacks). The SSCI does not acknowledge links among public diplomacy, propaganda, and marketing strategies. *See generally* SSCI/2008, *supra* note 138.

222. Mike Mount, *Hussein's Iraq and al Qaeda Not Linked, Pentagon Says*, CNN (Mar. 13, 2008), http://articles.cnn.com/2008-03-13/us/alqaeda.saddam_1_qaeda-targets-of-iraqi-state-iraqi-state-terror-operations?_s=PM:US; Warren P. Strobel, *Exhaustive Review Finds No Link Between Saddam and al Qaeda*, MCCLATCHY NEWS (Mar. 10, 2008), http://www.mcclatchydc.com/2008/03/10/29959/exhaustive-review-finds-no-link.html.

223. *See* William Kristol, *Gunsmoke: Why Is the Bush Administration Silent on the New Pentagon Report?*, WKLY. STANDARD, Mar. 24, 2008, *available at* http://www.weeklystandard.com/Content/Public/Articles/000/000/014/881yegar.asp (acknowledging the ABC quote and other headlines in mainstream news sources that referenced the "no link" finding and citing alleged al-Qaeda associations with other groups or shared-ideology and apparent Iraqi support for terrorism generally).

224. *Meet the Press* (MSNBC television broadcast Sept. 10, 2006), *available at* http://www.msnbc.msn.com/id/14720480/ns/meet_the_press/t/transcript-sept/.

istan and migrated five hundred miles to Iraq; that an Iraqi hospital amputated Zarqawi's leg; and that Zarqawi had assembled a terrorist network across the country, developed a chemical weapons facility in Kurdish-controlled northern Iraq, was supplying a terror cell with weapons in London, and planned terror attacks for London and Europe.[225] These claims intensified after Secretary of State Powell's February 5, 2003 address to the United Nations.[226] Ironically, there were no chemical weapons in Iraq, no attacks from weapons produced in Zarqawi's purported chemical facility, and no terror group in London.[227]

Nonetheless, Zarqawi became the quintessential link between al-Qaeda and Iraq.[228] During the first two years of the occupation, Zarqawi's media persona morphed and bombings were typically blamed on him.[229] Maj. Gen. Rick Lynch asserted that 90% of suicide bombers in Iraq were recruited and trained by Zarqawi.[230] Bush cited: "Zarqawi's the best evidence of connection to al-Qaeda affiliates and al-Qaida. He's the person who's still killing. He's the person, remember the e-mail exchange between al-Qaeda leadership and

225. Bejesky, *Intelligence*, *supra* note 21, at 868-70.

226. *See How the Spooks Took Over the News*, INDEPENDENT (Feb. 11, 2008), http://www.independent.co.uk/news/media/how-the-spooks-took-over-the-news-780672.html ("Zarqawi was a footnote, not a headline, but the flow of stories about him . . . flooded the global media on 5 February 2003 . . . .").

227. Bejesky, *Intelligence*, *supra* note 21, at 871-72.

228. *Id.* at 870; *see also Full Transcript of the Debate Between the Vice Presidential Candidates in Cleveland*, N.Y. TIMES, Oct. 5, 2004, http://www.nytimes.com/2004/10/05/politics/campaign/06dtext-full.html?_r=1&pagewanted=all&position= ("We know [Zarqawi] was running a terrorist camp, training terrorists in Afghanistan prior to 9/11. . . . migrated to Baghdad. . . . oversaw the poisons facility up at Khurmal . . . . is responsible for most of the major car bombings that have killed or maimed thousands of people.").

229. Rumsfeld called Zarqawi the "leading terrorist in Iraq and one of three senior al-Qaeda leaders worldwide." Karen DeYoung & Walter Pincus, *Zarqawi Helped U.S. Argument That al-Qaeda Network was in Iraq*, WASH. POST, June 10, 2006, http://www.washingtonpost.com/wp-dyn/content/article/2006/06/09/AR2006060901578.pf.html; *see also* U.S. DEP'T OF DEF., DoD NEWS BRIEFING (2005), *available at* http://www.defenselink.mil/transcripts/transcript.aspx?transcriptid=3209 (contending that Zarqawi threatened the occupation); Peter Grier, *Iraq's bin Laden? Zarqawi's Rise*, CHRISTIAN SCI. MONITOR (May 14, 2004), http://csmonitor.com/2004/0514/p03s01-usfp.html (noting that Zarqawi has claimed responsibility for various bombings). "U.S. intelligence officials believe that Ayman al-Zarqawi, a Jordanian militant with links to Osama bin Laden's al-Qaida network, has orchestrated the vast majority of terror attacks [including over thirty bombings]." *Terror Strikes Blamed on al-Zarqawi in Iraq*, MSNBC (May 4, 2005), http://www.msnbc.msn.com/id/5437742/ns/world_news-hunt_for_al_qaida/t/terror-strikes-blamed-al-zarqawi-iraq/; *see also 'Zarqawi' Beheaded US Man in Iraq*, BBC (May 13, 2004), http://news.bbc.co.uk/2/hi/middle_east/3712421.stm (blaming Zarqawi for kidnappings and beheadings).

230. DeYoung & Pincus, *supra* note 229.

he himself about how to disrupt the progress toward freedom."[231] On another occasion Bush stated: "The violence you see in Iraq is being carried out by ruthless killers who are converging on Iraq to fight the advance of peace and freedom . . . from Saudi Arabia and Syria, Iran, Egypt, Sudan, Yemen, Libya and other [countries]."[232]

In April 2006, the *Washington Post* attained internal military documents, including those prepared for Army General George W. Casey, the top U.S. commander in Iraq.

> The U.S. military is conducting a propaganda campaign to magnify the role of the leader of al-Qaeda in Iraq, according to internal military documents and officers familiar with the program . . . .
>
> The documents state that the U.S. campaign aims to turn Iraqis against Abu Musab al-Zarqawi, a Jordanian, by playing on their perceived dislike of foreigners . . . .
>
> For the past two years, U.S. military leaders have been using Iraqi media and other outlets in Baghdad to publicize Zarqawi's role in the insurgency . . . .
>
> . . . [Col. Derek] Harvey said: "Our own focus on Zarqawi has enlarged his caricature, if you will—made him more important than he really is, in some ways."
>
> "The long-term threat is not Zarqawi or religious extremists, but these former regime types and their friends . . . ."[233]

Thus, Zarqawi was an element of a propaganda campaign intended to garner public support for the "war on terrorism," and provided a favorable impression of American occupation to the Iraqi people, but narratives of this key al-Qaeda "link" in Iraq curiously infiltrated the U.S. media in English. Consequently, news narratives of Zarqawi ostensibly provided a rationale for continuing occupation concomitant with Americans realizing that all of the allegations about WMDs and links to al-Qaeda were false.[234] Brig. Gen. Mark Kimmit, who was the military's chief spokesman when the Zarqawi PSYOP program began, stated that "there was no attempt to manipulate the

231. Warren P. Strobel, Jonathan S. Landay & John Walcott, *Fresh CIA Analysis: No Evidence Saddam Colluded with al-Qaida*, SEATTLE TIMES, Oct. 5, 2004, http://seattletimes.nwsource.com/html/nationworld/2002054248_intell05.html.

232. President George W. Bush, Remarks at Fort Bragg, N.C., 41 WEEKLY COMP. PRES. DOC. 1079, 1080 (July 4, 2005).

233. Thomas E. Ricks, *Military Plays Up Role of Zarqawi*, WASH. POST, Apr. 10, 2006, http://www.washingtonpost.com/wp-dyn/content/article/2006/04/09/AR2006040900890_pf.html.

234. For three years "Zarqawi's presence in Iraq was cited as proof the uprising was fomented by al-Qaeda backed 'foreign fighters.' . . . Zarqawi was always a useful source of propaganda for the administration." DeYoung & Pincus, *supra* note 229.

press."[235] However, Pentagon documents listed the American "'U.S. Home Audience' as one of the targets of a broader propaganda campaign."[236] Just two months after this propaganda program was exposed, Zarqawi was apparently killed in an airstrike.[237] The *Washington Post* headline read: "June 8 – Abu Musab al-Zarqawi, the mastermind behind hundreds of bombings, kidnappings and beheadings in Iraq, was killed . . . ."[238]

There were also reportedly about a dozen groups affiliated with al-Qaeda in Iraq.[239] Bush responded to reporters: "The reason I keep insisting that there was a relationship between Iraq and Saddam and al-Qaeda [is] because there was a relationship between Iraq and al-Qaeda."[240] On another occasion, when the president addressed prewar claims about al-Qaeda and Iraq, he maintained that it was "Ansar al-Islam, which is an al-Qaeda affiliate—I would call [that] al-Qaeda—was active in Iraq before the war—hence, a terrorist tie with Iraq . . . ."[241] In July 2007, and responding contemporaneous to congressional demands for U.S. troops to be brought home, Bush remarked: "The same folks that are bombing innocent people in Iraq were the ones who attacked us in American on September 11th, and

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235. Ricks, *supra* note 233.

236. *Id.*

> Abu Musab al-Zarqawi . . . is 'more myth than man,' according to American military intelligence agents in Iraq.
>
> Several sources said the importance of Zarqawi, blamed for many of the most spectacular acts of violence in Iraq, has been exaggerated by flawed intelligence and the Bush administration's desire to find "a villain" for the post-invasion mayhem.
>
> . . .
>
> "[Intelligence officials] were basically paying up to $10,000 a time to opportunists, criminals and chancers who passed off fiction and supposition about Zarqawi as cast-iron fact, making him out as the linchpin of just about every attack in Iraq," the agent said. . .
>
> "Back home this stuff was gratefully received and formed the basis of policy decisions."

Adam Blomfield, *How US Fuelled Myth of Zarqawi the Mastermind*, TELEGRAPH (Oct. 4, 2004), http://www.telegraph.co.uk/news/worldnews/middleeast/iraq/1473309/How-US-fuelled-myth-of-Zarqawi-the-mastermind.html.

237. Ellen Knickmeyer & Jonathan Finer, *Insurgent Leader Al-Zarqawi Killed in Iraq*, WASH. POST, June 8, 2006, http://www.washingtonpost.com/wp-dyn/content/article/2006/06/08/AR2006060800114_pf.html.

238. *Id.*

239. Arsalan M. Suleman, *Strategic Planning for Combating Terrorism: A Critical Examination*, 5 CARDOZO PUB. L. POL'Y & ETHICS 567, 591 (2007).

240. *Bush Insists Iraq, al Qaeda Had 'Relationship,' supra* note 163.

241. *Primetime*, *President Bush Interview* (ABC News television broadcast Dec. 16, 2003), *available at* http://abcnews.go.com/Primetime/story?id=131912&page=6; *see also Fox News Sunday*, *Condoleezza Rice* (Fox News television broadcast Sept. 7, 2003), *available at* http://www.foxnews.com/story/0,2933,96651,00.html#ixzz20vviZGTc ("I think that the evidentiary basis here is not so strong. But we are getting pieces of evidence, certainly, that al-Qaeda is interested in Iraq . . . .").

that's why what happens in Iraq matters to the security here at home."[242]

The degree to which al-Qaeda was present in Iraq seems interpretable. Again, all of the official postwar investigations affirmed the same conclusion—there was no association between Hussein's regime and al-Qaeda.[243] Instead, during the occupation, combatants might have been detained, subjected to harsh interrogations, and divulged that current insurgents cooperated with al-Qaeda or the former regime; or there might have been other evidence, such as an email or a captured note that served as the basis of a compact.[244] Or insinuations may have evolved as Arsalan Suleman suggests. Suleman noted that while "there is no evidence that Iraq was involved with al Qaeda in any way before the U.S. invasion, terrorists have rallied to the cause of fighting Americans in Iraq, thereby making Iraq a front in the war on terrorism."[245] While the attack lacked a justification, military conflict supposedly drew al-Qaeda members to Iraq.

IV. AMBIGUOUS LEGISLATIVE AUTHORITY AND PATRIOTISM

A. Framing the Context of Patriotism: Emotion and Poll Approvals

To assess how the Bush administration could make unsubstantiated allegations, and have the claims disproven but skirt by without consequence, it helps to recall how an event can impact approval ratings. For the first eight months in office, Bush spent much of his time on vacation and 55% of Americans thought he was taking too much

242. Michael R. Gordon & Jim Rutenberg, *Bush Distorts Qaeda Links, Critics Assert*, N.Y. TIMES, July 13, 2007, http://www.nytimes.com/2007/07/13/world/middleeast/13qaeda.html.

243. *See Conspiracies: Iraq*, *supra* note 217; SSCI/2008, *supra* note 138, at 72; Ackerman & Hathaway, *supra* note 81, at 471; Cruz, *supra* note 129; Fenster, *supra* note 221, at 929; Kristol, *supra* note 223; Kucinich, *supra* note 130; Lewis & Reading-Smith, *supra* note 28; Mount, *supra* note 222; Strobel, *supra* note 222.

244. *See* Bejesky, *PDP*, *supra* note 4, at 66-68 ("[V]erdicts demonstrate . . . [that] the government ultimately may be unable to prove little more than the tie [to Al Qaeda]."); *see also* Benjamin J. Priester, *Terrorist Detention: Directions for Reform*, 43 U. RICH. L. REV. 1021, 1037-40 (2009).

245. Suleman, *supra* note 239, at 595; *see also* Robert Burns, *Top US Officer: Al-Qaeda in Iraq 'Devasted,'* ASSOCIATED PRESS, June 6, 2010 ("A string of setbacks for al-Qaeda's affiliate in Iraq has left the insurgent group 'devastated.'"); James Forman, Jr., *Exporting Harshness: How the War on Crime Helped Make the War on Terror Possible*, 33 N.Y.U. REV. L. & SOC. CHANGE 331, 335 (2009) ("By the time it became clear [that Iraq] had no weapons of mass destruction, the Bush administration began warning of the risks of losing to terrorists in Iraq . . . .").

time off.[246] During those eight months, approval ratings hovered between 50 and 60%,[247] but immediately following the 9/11 attacks, ratings soared to above 90%.[248] While Bush portrayed himself during the election as an ordinary country boy, who lacked national experience and was proudly not an insider to Washington, after 9/11, he apparently needed to task career officials in the FBI, CIA, Pentagon, and other security related agencies with direction. Senator Robert Byrd noted that Bush came to office after a virtual tie election, but with 9/11 there was "shock, trauma, and fear among the American people; the surge of patriotism; and the sense of common danger: all of these quickly catapulted this rather inarticulate, directionless man . . . to [an august] level of power."[249]

Historical polls reveal that leaders reap short-term populace support by responding to perceived foreign crises and may use force to boost domestic support.[250] History and recent experience illustrates that conflict abroad virtually always increases executive power at home.[251] There is a "rally around the flag" phenomenon.[252] Emphasizing security threats and using force may avail Republicans by usurping attention from issues most pressing to Democrats, such as health care, minimum wage proposals, and other social issues.[253]

246. *See* David W. Moore, *Public Critical of Bush's Vacation Plans*, GALLUP (Aug. 7, 2001), http://www.gallup.com/poll/4774/Public-Critical-Bushs-Vacation-Plans.aspx.

247. *Id.*

248. *Historical Bush Approval Ratings*, U. MINN., http://www.hist.umn.edu/~ruggles/Approval.htm (last updated June 20, 2008).

249. ROBERT C. BYRD, LOSING AMERICA 20 (2004). Irene Zubaida Khan, *The 2007-2008 Mitchell Lecture: The Rule of Law and the Politics of Fear: Human Rights in the Twenty-First Century*, 14 BUFF. HUM. RTS. L. REV. 1, 3 (2008) ("Playing on people's fears allows the political leaders to consolidate their power, to create false certainties and to escape accountability.").

250. *See* PAUL BRACE & BARBARA HINCKLEY, FOLLOW THE LEADER 107 (1992); Karl R. DeRouen, Jr., *The Indirect Link: Politics, the Economy, and the Use of Force*, 39 J. CONF. RES. 671, 672 (1995).

251. Curtis A. Bradley & Martin S. Flaherty, *Executive Power Essentialism and Foreign Affairs*, 102 MICH. L. REV. 545, 546 (2004) (citing PLATO, THE REPUBLIC 291 (Desmond Lee trans., 1995); ARISTOTLE, THE POLITICS 346 (T.A. Sinclair trans., 1988)); *see also* William Michael Treanor, *Fame, the Founding, and the Power to Declare War*, 82 CORNELL L. REV. 695, 747-48 (1997).

252. JOHN E. MUELLER, WAR, PRESIDENTS AND PUBLIC OPINION 267 (1973); *see also* John E. Mueller, *Presidential Popularity from Truman to Johnson*, 64 AM. POL. SCI. REV. 18, 21 (1970); Barbara Norrander & Clyde Wilcox, *Rallying Around the Flag and Partisan Change: The Case of the Persian Gulf War*, 46 POL. RES. Q. 759, 759 (1993).

253. *See* Michael Doran, *The Closed Rule*, 59 EMORY L.J. 1363, 1391-93 (2010). An October 2003, Pew Research Center polls discovered that nearly 70% of Republicans believed that the best way to ensure peace is by military strength and 85% of Republicans believed going to war in Iraq was the correct decision, while only 39% of Democrats believed it was the correct decision. *See* William A. Galston, *Political Polarization and the U.S. Judiciary*, 77 UMKC L. REV. 307, 311 (2008); *see also* Alan Abramowitz & Kyle Saunders, *Why Can't We All Just Get Along? The*

President Reagan advertised ominous peril to drastically increase military spending,[254] and the Republican Party attained populace support from Bush Sr.'s 1991 Gulf War.[255] Similarly, two days after the 2003 invasion of Iraq, Bush Jr.'s approval rating rose to 70% while the percentage of Americans who believed that the U.S. would be the victim of another major terrorist attack sharply increased.[256] In March 2006, 70% of Republicans believed U.S. military progress in Iraq was progressing favorably, while only 30% of Democrats agreed.[257] Due to the so-called "war on terrorism," foreign policy actions were relatively unchecked even as Bush's approval ratings dropped to 50% (September 2005), to 30 to 35% (May 2007),[258] and to 28% (April 2008).[259] When Bush held 32% approval ratings, Stephen Colbert explained that there is a "well-known liberal bias" in such statistics.[260] Bush departed with the lowest presidential approval rating in history at 22%, due to Iraq and poor economic conditions.[261]

B. Shifting to the "State" as the Actor to Defuse Criticism

In addition to relying on the emotive event of 9/11 to persuasively justify actions, appearing unaware of controversies,[262] and watching as

Reality of a Polarized America, 3 FORUM 1, 8 (2005) (explaining that 70% of Democrats but only 11% of Republicans prefer diplomacy over the use of military force).

254. *See* Thomas Hartley & Bruce Russett, *Public Opinion and the Common Defense: Who Governs Military Spending in the United States?*, 86 AM. POL. SCI. REV. 905, 910-11 (1992); Robert Higgs & Anthony Kilduff, *Public Opinion: A Powerful Predictor of U.S. Defense Spending*, 4 DEF. ECON. 227, 234-35 (1993); Charles W. Ostrom & Robin F. Marra, *U.S. Defense Spending and the Soviet Estimate*, 80 AM. POL. SCI. REV. 819, 819-20 (1986).

255. *See* Norrander & Wilcox, *supra* note 252, at 759; Wilson, *supra* note 105, at 707.

256. *See Historical Bush Approval Ratings*, *supra* note 248; *see also* HUMPHREY TAYLOR, SUCCESSFUL WAR LIFTS MANY (REPUBLICAN) BOATS AND THEIR RATINGS SURGE 1-3 (2003), *available at* http://www.gallup.com/poll/4909/Terrorism-United-States.aspx.

257. *See* Galston, *supra* note 253, at 311.

258. *Historical Bush Approval Ratings*, *supra* note 248; *see, e.g.*, Joel Roberts, *Bush Approval Rating At New Low*, CBS NEWS, Jan. 22, 2007, http://www.cbsnews.com/2100-500160_162-2384943.html; *Bush Approval Rating Hits New Low*, USA TODAY, May 8, 2006, http://www.usatoday.com/news/washington/2006-05-08-bush-approval_x.htm.

259. Frank Newport, *Bush Job Approval at 28%, Lowest of His Administration*, GALLUP, Apr. 11, 2008, http://www.gallup.com/poll/106426/bush-job-approval-28-lowest-adminstration.aspx.

260. *See* Adam Benforado & Jon Hanson, *Naïve Cynicism: Maintaining False Perceptions in Policy Debates*, 57 EMORY L.J. 499, 501 (2008).

261. *See Bush's Final Approval Rating*, *supra* note 31.

262. Deborah Waire Post, *Academic Freedom as Private Ordering: Politics and Professionalism in the 21st Century*, 53 LOY. L. REV. 177, 192 (2007) (citing reports) ("[S]tudents reported that faculty members called Bush a 'moron' and a 'bastard.'"). Senator Simpson spoke of a "pure hatred" for George Bush and Dick Cheney in some societal segments. Sherman J. Bellwood Lecture, *supra* note 47, at 13. While Bush possessed Ivy League academic credentials, he frequently appeared naïve when responsibility for negative consequences was required. *News World*, *supra* note 92 (quoting CIA officer Robert Steele) ("The people around Bush are not

the media altered attention and fallout to less scandalous issues,[263] the White House persistently referenced the symbol of the "State" as the actor, which defuses repercussions from dereliction. Symbolism can constitute power,[264] undermine rational thought,[265] and mechanically evoke attitudinal "hot buttons."[266] Social symbols and patriotism can engender a sense of unity and belonging in societies[267] and political coherence amid dissent. Professor White wrote that the theory of symbolic politics suggests that symbolism can "drive political decision making for the mass public" and invoke an "automatic link in memory between a broad array of political concepts and positive or negative affect."[268] This cornerstone and *heuristics*, which are generalizations that simplify decision-making and opinion-setting to avoid complex variable assessments,[269] may countenance foreign policy[270] instead of facts.

For example, the "state" was a source of evidence. On December 4, 2002, Rumsfeld remarked: "The *United States knows* Iraq has weapons of mass destruction . . . . *[A]ny country* on the face of the earth

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stupid. They are very smart. They are very calculating and manipulative. They're not deaf or dumb in any sense of the word.").

263. Presidents may also distract attention during political fallout. George Bush claimed the response to Hurricane Katrina caused the political fallout, while his father contended he lost his second term because he made a campaign promise of no new taxes. President Nixon was besieged in large-scale scandal, but attention focused on the comparatively-minor wrong of not providing information relevant to the Watergate break-in. *See* Bejesky, *Flow*, *supra* note 53, at 28-30.

264. DAVID I. KERTZER, POLITICS, & POWER 24-32 (1988).

265. *See* C. GEERTZ, THE INTERPRETATION OF CULTURES 100 (1973) (explaining symbols limit human analytic capabilities, powers of endurance, and moral insight); Max Lerner, *Constitution and Court as Symbols*, 46 YALE L.J. 1290, 1293 (1937) ("Men possess thoughts, but symbols possess men.").

266. *See* Mishawaka Rubber & Woolen Mfg. Co. v. S.S. Kresge Co., 316 U.S. 203, 205 (1942) (Frankfurter, J.) (recognizing the human propensity to accept the "psychological function of symbols" and the "drawing power of a congenial symbol"); Dacher Keltner et al., *Culture, Emotion, and the Good Life in the Study of Affect and Judgment*, 13 PSYCHOL. INQUIRY 65, 65-66 (2002); Brent T. White, *Ritual, Emotion, and Political Belief: The Search for the Constitutional Limit to Patriotic Education in Public Schools*, 43 GA. L. REV. 447, 497 (2009).

267. *See* Marie A. Failinger, *Against Idols: The Court as a Symbol-Making or Rhetorical Institution*, 8 U. PA. J. CONST. L. 367, 381 (2006).

268. White, *supra* note 266, at 503-04 (quoting Milton Lodge et al., *First Steps Toward a Dual-Process Accessibility Model of Political Beliefs, Attitude, and Behavior*, *in* FEELING POLITICS: EMOTION IN POLITICAL INFORMATION PROCESSING 25 (David P. Redlawsk ed., 2006)).

269. *See* PRATKANIS & ARONSON, *supra* note 7, at 165; REISBERG, *supra* note 98, at 295; WILLINGHAM, *supra* note 103, at 374.

270. *See* Paul R. Brewer et al., *International Trust and Public Opinion about World Affairs*, 48 AM. J. POL. SCI. 93, 93 (2004); Paul Goren, *Political Sophistication and Policy Reasoning: A Reconsideration*, 48 AM. POL. SCI. 462, 462 (2004); Philip E. Tetlock, *Theory-Driven Reasoning About Plausible Pasts and Probable Futures in World Politics: Are We Prisoners of Our Preconceptions?*, 43 AM. J. POL. SCI. 335, 335 (1999).

that has an active intelligence program knows that Iraq has weapons of mass destruction."[271] Iraq did not possess WMDs, which means that no country knew that Iraq had WMDs. Without weapons, the rationale for war shifted from patriotism to safeguard security to patriotism to "liberate."[272] Sentiments of national unity and humanitarianism were inherent in the labels "Operation Enduring Freedom" in Afghanistan and "Operation Iraqi Freedom" in Iraq.[273] Likewise, the Bush administration invented the parlance "war on terrorism" to claim encompassing commander-in-chief authority and war powers, but for purposes of complying with the Geneva Convention the "war on terrorism" was not an authentic war.[274] If macro-level legal dispositions on international law are not sufficiently compelling, micro-level semantics can subdue opprobrium. Professor Resnick explained that in defining detainment conditions, "[t]he labels 'enhanced interrogation,' 'harsh' techniques, and 'coercion' have been offered up in lieu of the words torture, and the cruel, inhuman, and degrading treatment" standard.[275]

One week before the 2006 congressional election that led Democrats to recapture both Houses of Congress for the first time in twelve years, and with many Democrats advocating withdrawal from Iraq,[276] Bush stated,

> The events of the past month have been a serious concern to *me* and a serious concern to the *American people* . . .
>
> The enemy *we* face in Iraq has evolved over the past three years. After the fall of Saddam Hussein, a sophisticated and violent insurgency took root . . .

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271. *U.S. to Weigh Iraqi Weapons Lists with Own Intelligence*, FOX NEWS, Dec. 4, 2002, http://www.foxnews.com/story/0,2933,72053,00.html (emphasis added); *see also* PRATKANIS & ARONSON, *supra* note 7, at 51 (providing a well-known marketing strategy of asserting what everyone knows or takes for granted).

272. *See* Bejesky, *Weapon Inspections*, *supra* note 1, at 360-62; Todd E. Pettys, *Our Anticompetitive Patriotism*, 39 U.C. DAVIS L. REV. 1353, 1409 (2006).

273. *See* PRATKANIS & ARONSON, *supra* note 7, at 46. In making the decision to go to war, political propagandists avoid negative sentiments about killing and going to war by instilling patriotism and beliefs that the country is "decent, fair, and reasonable." *Id.*

274. Sadat, *supra* note 43, at 539. Similarly, war operations and use of force may be called "policies," and condemnable attacks by U.S. forces or private contractors are frequently referred to as "incidents."

275. Clarke, *supra* note 24, at 72 ("[The Bush administration was] hiding behind euphemisms like 'harsh interrogations,' [and] empty diplomatic assurances . . . ."); Judith Resnick, *Detention, The War on Terror, and the Federal Courts: An Essay in Honor of Henry Monaghan*, 110 COLUM. L. REV. 579, 614 (2010).

276. Bejesky, *PDP*, *supra* note 4, at 14-15.

> *We* learned some key lessons from that early phase in the war. *We* saw how quickly Al Qaeda and other extremist groups would come to Iraq to fight and try to *drive us out*. *We* overestimated the capability of the civil service in Iraq to continue to provide essential services to the Iraqi people. *We* did not expect the Iraqi Army, including the Republican Guard, to melt away in the way that it did in the face of advancing *Coalition forces*.[277]

This excerpt is politically irreconcilable with Democrats largely opposing occupation and the populace agreeing by electing those candidates, but this dissonance may be immaterial when patriotism and national pride of the state as actor are implicated. While scholars also speak of "States" as unitary actors for simplification, and because this approach is consistent with treatment under international law,[278] overreliance on metaphorical analysis frequently begets philosophical rather than practical solutions for real problems. As Professor Reisman pointed out, "Though we often say 'The United States believes this' . . . states don't have minds. Elites who manipulate the symbols of states do, but they are rarely accessible and even more rarely cooperative."[279] The ostensible problem is that the state is the actor under international law, whereas individuals administrating actions are customarily overlooked. Meanwhile, at the domestic level, controversial foreign policies may be averted because actions are mired in debates over legitimacy of actions under international law.

At the domestic level, government discourse that unifies with a nationalistic passion, invokes "us" against "them" inclinations, and efficacious exploits of positive and negative emotive sentiments[280] may appear utilitarian to the populace.[281] The approach was particularly

277. President Bush, Press Conference (Oct. 25, 2006) *in Opening Remarks, President Urges Steadfastness in a Difficult Fight*, N.Y. TIMES, Oct. 26, 2006, at A12 (emphasis added); *see* Mark Shields, *The NewsHour with Jim Lehrer*, PBS (Nov. 3, 2006), http://www.pbs.org/newshour/bb/politics/july-dec06/sb11-03.html (criticizing Bush's "false braggadocio and his swaggering macho" and statement of "Bring 'em on" as response to opposing the U.S. military presence).

278. Jack L. Goldsmith & Eric A. Posner, *A Theory of Customary International Law*, 3 (Chi. John M. Olin Law & Econ., Working Paper No. 63), *available at* http://papers.ssrn.com/paper.taf?abstract_id=145972 ("States independently pursue their self-interest without generating gains from interaction.").

279. Eric A. Posner & Alan O. Sykes, *Optimal War and Jus Ad Bellum*, 93 GEO. L.J. 993, 999 (2005) ("States themselves obviously cannot be put in jail . . . . [T]he leaders . . . [committing acts of] aggression can be and sometimes are incarcerated."); W. Michael Reisman, *International Lawmaking: A Process of Communication*, 75 AM. SOC'Y INT'L L. PROC. 101-02 (1981).

280. COLE, *supra* note 189, at 5.

281. Adeno Addis, *The "War on Terror" as an Autoimmunity Crisis*, 87 BROOK. L. REV. 323, 337 (2007); Michael P. Allen, *George W. Bush and the Nature of Executive Authority: The Role of Courts in a Time of Constitutional Change*, 72 BROOKLYN L. REV. 871, 875 (2007). "Perpetuation of the fuzzy concept of evil has been a necessary ingredient of American foreign policy . . . .

lucid in Bush administration neoconservative thought[282] and Reagan administration rhetoric.[283] By casting an enemy label as antithetical to American pride or security, political competition may struggle more against the persuasiveness of labels than issues.[284] Perceived adversaries are typically viewed with heightened negativity when zeal is involved,[285] and there is a ritualistic and emotive collective nature of patriotism that heightens attention, and increases sociability and mood.[286] However, the "us" against "them" strain of patriotism may slight transnational laws and principles,[287] and permit government officials to act first and thereafter veil themselves behind the patriotic "state" with impunity as the actor. However, this outcome lacks any basis in democratic theory.[288] Government receives authority and le-

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Once the personification of evil is complete, the framework of liberating the populace from the clutches of those evil leaders and evil dictators becomes more efficient." Saby Ghoshray, *False Consciousness and Presidential War Power: Examining the Shadowy Bends of Constitutional Curvature*, 49 SANTA CLARA L. REV. 165, 185-86 (2009).

282. "[Neoconservative thought is premised on advancing a] strong moral position on good and evil [and] viewing enemies as embodiments of evil who must be destroyed." Fisher, *supra* note 3, at 1230-32. Reagan used "evil empire" and Bush Jr. used "axis of evil" as simple labels, which urged action by "deception, and manipulation to advance a predetermined political cause." *Id.* at 1232.

283. The Reagan-Bush Sr. administration instituted the White House's Office of Public Diplomacy ("OPD") to disseminate information about the Central America guerilla wars during the 1980s. GRANDIN, *supra* note 194, at 123-24; National Security Decision Directive, NSDD 77, *Management of Public Diplomacy Relative to National Security*, DIGITAL NAT'L SECURITY ARCHIVE (2012), http://nsarchive.chadwyck.com; Antonella Aloma Castro, Comment, *Truth in Broadcasting Act: Can It Move the Media Away from Indoctrinating and Back to Informing*?, 27 LOY. L.A. ENT. L. REV. 127, 130-31 (2007). "[Operation Truth was] a huge psychological operation of the kind the military conducts to influence a population in a denied or enemy territory." NOAM CHOMSKY, HEGEMONY OR SURVIVAL: AMERICA'S QUEST FOR GLOBAL DOMINANCE 8 (2003). The Reagan administration used propaganda programs. Bejesky, *Flow*, *supra* note 53, at 9, 17, 19.

284. Ghoshray, *supra* note 281, at 189, 196-97; Allen W. Palmer & Edward L. Carter, *The Smith-Mundt Act's Ban on Domestic Propaganda: An Analysis of the Cold War Statute Limiting Access to Public Diplomacy*, 11 COMM. L. & POL'Y 1, 3 (2006) (discussing U.S. propaganda efforts during the Cold War to cover civil rights abuses and to destabilize Eastern Europe).

285. Emily Pronin, Carolyn Puccio & Lee Ross, *Understanding Misunderstanding: Social Psychological Perspectives*, *in* HEURISTICS AND BIASES: THE PSYCHOLOGY OF INTUITIVE JUDGMENT 636, 647-48 (Thomas Gilovich, Dale Griffin & Daniel Kahneman eds., 2002).

286. *See* White, *supra* note 266, at 450.

287. BETTY JEAN CRAIGE, AMERICAN PATRIOTISM IN A GLOBAL SOCIETY 2-3, 124-26 (1996); *see* Monroe E. Price, *The Market for Loyalties: Electronic Media and the Global Competition for Allegiances*, 104 YALE L.J. 667, 668-70 (1994) (persuading individuals with identity forms a "market for loyalties"); White, *supra* note 266, at 465 ("[P]atriotism connotes mindless support for an out-of-control government; it means disregard for the lives, the rights, and the dignity of non-Americans . . . .").

288. *See* SISSELA BOK, LYING: MORAL CHOICE IN PUBLIC AND PRIVATE LIFE 7 (1978). People who possess unrelenting self-assurance of being correct "may perpetuate so-called pious frauds" and "see nothing wrong in telling untruths for what they regard as a much 'higher' truth." *Id.*; *see also* MICHAEL IGNATIEFF, THE LESSER EVIL 119 (2004) ("[D]emocratic values . . . may actually blind democratic agents to the moral reality of their actions.").

gitimacy from the consent of the governed,[289] which includes informed approval to use force.[290] If an administration repeatedly issues false statements and propagandizes, consent is lacking,[291] and there is a breach of the fiduciary relationship between government and the people. The U.S. as a sterile actor under international law neither made 935 false statements about Iraq, nor did it hold National Security Council meeting in January 2001 with a view of overthrowing the Iraqi government.[292] The Bush Administration expended billions in U.S. taxpayer dollars to bankroll organizations and operations to create a patriotic environment to make Americans feel that they were part of the foreign policy.[293]

Here is the pickle. Assume the polity is divided into those who believe falsities cannot justify a foreign policy action; staunch supporters of the Administration, who may be devoutly loyal to party ideology; and the rationally uninformed.[294] The latter two groups in conjunction with dominant norms of patriotism may cancel out the dissent of the first faction. It is not clear that some percentage of the populace can acquiesce to an administration's false statements on a critical political issue. Nonetheless, long-held attitudes and party loyalty may prevail over current opinion,[295] which can be prominently observed when citizens vote along party lines,[296] and are guided by

289. THE DECLARATION OF INDEPENDENCE ¶ 2 (U.S. 1776); *see also* Bejesky, *Politico*, *supra* note 3, at 30-31 ("[P]residential authority [comes] from the 'people.'"); Owen M. Fiss, *Free Speech and Social Structure*, 71 IOWA L. REV. 1405, 1407 (1986) ("Democracy promises collective self-determination — a freedom to the people to decide their own fate . . . .").

290. Jacobs, *supra* note 88, at 436.

291. *See* Bejesky, *Politico*, *supra* note 3, at 31-35; Bejesky, *Intelligence*, *supra* note 21, at 811-12. *See generally* Bejesky, *PDP*, *supra* note 4 (critiquing public diplomacy theory and espousing that tardy corrections and information diffusion to unstated audiences might be viewed as breeds of propaganda).

292. *See* Bejesky, *Politico, supra* note 3, at 33-34, 62-67; Lewis & Reading-Smith, *supra* note 28.

293. *See generally* Bejesky, *PDP*, *supra* note 4. Propaganda invokes emotions and seeks to persuade the recipient to voluntarily accept the message "as if it were his or her own." PRATKANIS & ARONSON, *supra* note 7, at 11.

294. *See* Benforado & Hanson, *supra* note 260, at 504-07 (explaining that "Dispositionism" and "naïve cynicism" are schemas that dismiss dissent that might otherwise be availing).

295. *See* WINN, *supra* note 173, at 29 ("Opinions are but briefly held and likely to reflect current public feeling . . . . They are readily changed and may be susceptible either to propaganda or to reasoned argument. Attitudes, on the other hand, are likely to be long lived . . . .") (internal quotation marks omitted).

296. *See* Farina, *supra* note 181, at 364-65; Gary D. Allison, *Protecting Our Nation's Political Duopoly: The Supremes Spoil the Libertarians' Party*, 41 TULSA L. REV. 291, 307-08 (2005); Richard R. Lau & David P. Redlawsk, *Advantages and Disadvantages of Cognitive Heuristics in Political Decision Making*, 45 AM. J. POL. SCI. 951, 952-53 (2001). For example, devoted Republicans are apt to hold conservative and supportive attitudes toward Republican policies even if they lack specific knowledge about initiatives. Democrats are apt to hold liberal predispositions

heuristics, rather than rational choice.[297] Polls indicated that Republicans were considerably more likely to accept the Bush administration message about dangers from Iraq than Democrats.[298] This would be expected as citizens will accord varying levels of credibility to the message, depending on predispositions.[299] There was a partisan split in voting to authorize the invasion in Congress,[300] the SSCI members' interpretation of the results of their investigation,[301] and Republican voters being four times more likely than Democrats to think WMDs existed when the U.S. invaded.[302]

C. Patriotism for Country or Leader?

1. Hypothesis

Politicians expectantly exploit entrenched attitudes and patriotic symbols to garner public support.[303] In polls conducted over the last two decades, ninety percent of Americans have consistently identified themselves as "very patriotic," while other countries have had percentages as low as forty percent.[304] Yet, patriotism is open to connotative interpretation. Citizens may adduce patriotism to mean identifying with the nation and its symbols; possessing a sense of national pride; feeling "love of country;" believing in the need to make sacrifices for the country's best interest;[305] respecting the military; distaining competing economic and political systems; or approbating dominant loyalties, including "trust in the president."[306] Of these

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and vote for Democrats for the same reason. Party names serve as shortcuts to decision-making, voting, and political expression. Supporting a particular political party can be a *heuristic* form of decision-making. Scrutinizing and weighing costs and benefits of all political positions are complex and time-consuming processes.

297. *See* Wilson, *supra* note 105, at 681, 688.

298. *See generally* Robert Bejesky, *Political Penumbras of Taxes and War Powers*, 14 LOY. J. PUB. INT. L. (*forthcoming* 2012).

299. PRATKANIS & ARONSON, *supra* note 7, at 124.

300. Lynn Sweet, *Congress Gives Bush Power to Attack Iraq*, CHICAGO SUN-TIMES, Oct. 11, 2002, *available at* http://schakowsky.house.gov/index.php?option=com_content&task=view&id=2381&Itemid=17 ("In the House, yes votes were provided by 215 Republicans and 81 Democrats.").

301. Press Release, S. Comm. on Intelligence, Senate Intelligence Committee Unveils Final Phase II Reports on Prewar Iraq Intelligence (June 5, 2008), *available at* http://intelligence.senate.gov/ press/record.cfm?id=298775 (stating that Democrats adopted the bipartisan report 10-5 that chastised the Bush administrations and many Republican members did not).

302. HARRIS INTERACTIVE, *supra* note 94.

303. *See* White, *supra* note 266, at 523.

304. *See id.* at 522.

305. *See* MERLE CURTI, THE ROOTS OF AMERICAN LOYALTY viii (1946); DUSAN KECMANOVIC, THE MASS PSYCHOLOGY OF ETHNONATIONALISM 12 (1996).

306. *See* White, *supra* note 266, at 481.

seven representations, the last poses the most chagrin. If patriotism is soaring and loyalty to the president is equated to obligatory nationalism, which seemed to be the case after 9/11,[307] controversial government actions may go unquestioned due to patriotism. To others, patriotism may mean acclaiming freedom of speech rights and ensuring that government officials operate within the confines of acceptable behavior. In fact, welcoming this form of patriotism may best define policies undergirding other forms of national loyalty, but this interpretation is pitted against dominant culturally-driven notions of allegiance. The role of the education system provides an example of and insight into this predicament.[308]

2. Educational System: Forming Core Political Values

Instrumental to establishing a citizen's foundational beliefs are the educational system, socialization, family, peers, and the media.[309] A person's childhood years are important to forming political attitudes in adulthood,[310] and scholars have contended that the role of the education system pervades beyond instructing to indoctrinating.[311]

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307. "[T]he Nebraska State Board of Education passed a 'Patriotism Bill' . . . . [T]his statute proposes that one of the 'first duties of [the] educational system' is to produce 'men' who love America by conducting 'its activities, choos[ing] its textbooks, and arrang[ing] its curriculum in such a way that the love of liberty, justice, democracy, and America will be instilled in the hearts and minds of the youth of the state.'" *Id.* at 458. Other states adopted and funded measures to encourage patriotism. *See id.* at 458-62.

308. "[S]chools are directly infringing on rights of conscience . . . with the deliberate intention of also shaping that child's future exercise of his or her political conscience." *Id.* at 510-11. "The central first amendment value . . . is . . . the ability of the people to criticize government and its leaders, thus providing a potent check on incompetence and abuse of power . . . . [The] results of this 'editing' [of textbooks] are not neutral. Students receive inaccurate and dangerously misleading accounts of American history, which encourage complacency and discourage political participation and, particularly, dissent." Stephen E. Gottlieb, *In the Name of Patriotism: The Constitutionality of 'Bending' History in Public Secondary Schools*, 62 N.Y.U. L. REV. 497, 502-03 (1987); *see also* Thomas L. Emerson & David Haber, *The Scopes Case in Modern Dress*, 27 U. CHI. L. REV. 522, 526-28 (1960) (arguing that content must be ideologically balanced).

309. *See* ELLIOT ARONSON, THE SOCIAL ANIMAL 60 (1980); JOWETT & O'DONNELL, *supra* note 10, at 31. People frequently "cling to" first impressions and established beliefs, which is called the *primacy effect*. *See* TAYLOR, *supra* note 97, at 49 (arguing that many allege there is ideological coercion in advertising, the media, and education); WINN, *supra* note 173, at 43; Stanley Ingber, *Socialization, Indoctrination, or the 'Pall of Orthodoxy': Value Training in the Public Schools*, 1987 U. ILL. L. REV. 15, 19-22 (1987) (explaining that public schools indoctrinate values).

310. *See* ROBERT E. CLEARY, POLITICAL EDUCATION IN THE AMERICAN DEMOCRACY 49-53 (1971).

311. White, *supra* note 266, at 449, 454.

> The prevailing view among scholars critical of the use of public schools to inculcate patriotism is that it undermines both individual rights of conscience and the democratic process itself.
> . . .

First Amendment disagreements often emerged because children are required to attend school and there may be no reasonable substitute for government-funded public education.[312] Students could become a captive audience,[313] susceptible to emotional conditioning.[314] Professor White relates this possibility to the formation of patriotic beliefs:

> [T]he bulk of patriotic education takes place in early elementary school, before children have reached a level of maturity where predominantly cognitive approaches to patriotic education might be possible.
>
> . . . A growing body of literature in the neurological and cognitive sciences suggests . . . that when political attitudes are emotionally conditioned during childhood, they are not easily jettisoned-and, indeed, are rarely even questioned by most individuals.[315]

In early American history, commentators candidly encouraged patriotism to be taught in school,[316] and the Supreme Court characterized patriotic instruction as "plainly essential to good citizenship."[317] That view came under attack. Courts have since protected free expression, condemned some cases of indoctrination,[318] and permitted certain forms of value education in public schools as legitimate.[319]

> [It] contributes to the manipulation of the public by political power . . . [and] legitimizes anti-democratic aspects of the American political system . . . .

Id. "Public schools are, in many ways, an indoctrinator's dream . . . . [P]ublic schools can package their message as highly valued 'education' rather than less trustworthy propaganda." Ingber, *supra* note 309, at 2; *see also* Martin H. Redish & Kevin Finnerty, *What Did You Learn in School Today? Free Speech, Values Inculcation, and the Democratic-Education Paradox*, 88 CORNELL L. REV. 62, 64 (2002); Rebecca Tanglen, Comment, *Local Decisions, National Impact: Why the Public School Textbook Selection Process Should Be Viewpoint Neutral*, 78 U. COLO. L. REV. 1017, 1017 (2007); Note, *Developments in the Law: Academic Freedom*, 81 HARV. L. REV. 1045, 1053 (1968) ("The assumptions of the 'free marketplace of ideas' on which freedom of speech rest do not apply to school-aged children, especially in the classroom . . . . [O]ne function of elementary and even secondary education is indoctrinative . . . .").

312. *See* Gottlieb, *supra* note 308, at 550-51.

313. *See* Cole, *supra* note 11, at 725; Gottlieb, *supra* note 308, at 501.

314. White, *supra* note 266, at 451.

315. *Id.* at 451-52.

316. *See id.* at 455 (citing GEORGE T. BALCH, METHODS OF TEACHING PATRIOTISM IN THE PUBLIC SCHOOLS, at vii (1890)) (explaining that public schools would be a powerful means of inculcating patriotism).

317. Pierce v. Soc'y of Sisters, 268 U.S. 510, 534 (1925) ("[N]othing [should] be taught which is manifestly inimical to the public welfare."); *cf.* Bd. of Educ. v. Barnette, 319 U.S. 624, 662 (1943) (Frankfurter, J., dissenting) ("It is not for this Court to make psychological judgments as to the effectiveness of a particular symbol that represents our heritage and our hopes.").

318. *Barnette*, 319 U.S. at 624.

319. *See* Forum for Academic & Inst. Rights, Inc. v. Rumsfeld, 291 F. Supp. 2d. 269, 301 (D.N.J. 2003) ("[P]laintiffs argue that if academic freedom means anything, it means that the decision as to what to teach is the law schools' to make without government interference."); Gottlieb, *supra* note 308, at 511-15; White, *supra* note 266, at 449, 471-72 ("It is pure fiction . . . to pretend that a right to opt out [of ritualized expressions] means much of anything to elementary school children.").

Opinions have generally been divided between the Court's liberal members, who favored heightened diversity in expression; and conservative court members, who have not been significantly opposed to value formation in schools.[320]

To many, being exposed to values in childhood that eventuate a patriotic American probably would not be controversial, but ponder how daily education functions in practice and springs a conundrum. Textbooks are politically correct. The American Textbook Publishers Institute advised publishers "to avoid statements that might prove offensive to economic, religious, racial or social groups or any civil, fraternal, patriotic or philanthropic societies in the whole United States."[321] Consequently, to support Leftist and civil rights movements, textbooks promoted equality for racial, gender, religious, and other civil rights causes, and this caused friction during the 1960s through 1980s.[322] However, what remained were textbook representations that downplayed less than meritorious actions by many U.S. government administrations.[323] Omitting those accounts from required reading may not only garner a faulty perception of those events,[324] but also implicitly legitimize questionable actions of current officials when policies are viewed from the backdrop of a pristine history.

The values that schools and educational materials should stimulate are democratic participation, independent thought, and critical inquiry,[325] all of which necessitate ideologically-balanced materials[326]

320. *See* White, *supra* note 266, at 468-69.

321. Bejesky, *Politico*, *supra* note 3, at 56-57 (citations omitted). *See generally* Tanglen, *supra* note 311 (discussing that textbooks selected for school use should have a neutral view).

322. Post, *supra* note 262, at 189-90 ("[The] alleged mobilization of students who claim to be oppressed because liberal faculty punish them for their conservative views . . . is a simulated civil rights movement.").

323. *See* Gottlieb, *supra* note 308, at 504 ("American policy is sanitized [and] books rarely report questionable government action."); Stanley Ingber, *Socialization, Indoctrination, or the "Pall of Orthodoxy": Value Training in the Public Schools*, 1987 U. ILL. L. REV. 15, 46 (1987) ("[R]espond[ing] to mounting pressure from multiple sources [e.g., textbook publishers] by steadily reducing the substantive content of their books to make them as inoffensive as possible."). "Distortion violates fundamental policies the first amendment was drafted to enforce." Gottlieb, *supra*, at 551.

324. *See* PRATKANIS & ARONSON, *supra* note 7, at 262.

325. LINDA J. SAX ET AL., AMERICAN FRESHMAN: AMERICAN NORMS FOR FALL 1997, at 2-4 (1997); *see* Charles N. Quigley, Symposium, *Civic Education: Recent History, Current Status, and the Future*, 62 ALB. L. REV. 1425, 1433-35 (1999).

326. Content must be ideologically-balanced. *See* Emerson & Haber, *supra* note 308, at 526-28.

that foster the prerogative to remonstrate government conduct.[327] Assuredly, professors and teachers are entitled to academic freedom,[328] subject to limitations inherent in faculty and institutional relations, contractual responsibilities, and reasonable job performance.[329] However, if a professor or teacher injects alternative portrayals, the educator may be battling against simplified, effete, and deficient textbook representations. Public schools often seem to promote a unified conception of American citizenship and not diversity of ideas.[330] This disconnect may be a prime basis on which patriotic beliefs rely, establish dominant societal norms, and occasion conformity to political leader action.

3. Consistency Theory

Public relations experts, marketers, and advertisers rely on existing beliefs and relevant prior knowledge to *shape perceptions* and thereby impart favorable impressions of promotions.[331] The brain makes logical links to associate new material to past knowledge to support foundational memories and comprehend new information.[332] Memories are particularly strong for information that is well-organized and related to strong values, ideologies, and foundational knowledge.[333]

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327. Cole, *supra* note 11, at 680 ("[A] public university directed to teach only ideas supportive of government policies would raise first amendment concerns . . . .").

328. *See* Keyishian v. Bd. of Regents, 385 U.S. 589, 603 (1967) ("Our nation is deeply committed to safeguarding academic freedom . . . [T]he First Amendment . . . does not tolerate laws that cast a pall of orthodoxy over the classroom."); Cary v. Bd. of Educ., 427 F. Supp. 945, 952 (D. Colo. 1977) ("[T]he propagation of predominant views . . . the essence of tyranny . . . ."); William A. Wines & Terence J. Lau, *Can You Hear Me Now?—Corporate Censorship and Its Troubling Implication for the First Amendment*, 55 DEPAUL L. REV. 119, 141-42 (2005).

329. *See* Gottlieb, *supra* note 308, at 519-22, 532; Sally Falk Moore, *Law and Social Change: The Semi-Autonomous Social Field as an Appropriate Subject of Study*, 7 LAW & SOC'Y REV. 719, 722 (1973) (discussing how higher education can establish rules that are coercive); Post, *supra* note 262, at 177.

330. *See* STEPHEN L. CARTER, THE DISSENT OF THE GOVERNED: A MEDIATION OF LAW, RELIGION, AND LOYALTY 21-45 (1998); Tyll van Geer, *The Search for Constitutional Limits on Governmental Authority to Inculcate Youth*, 62 TEX. L. REV. 197, 249-51 (1983) (stating that it is inconsistent with the First Amendment to permit government to inculcate beliefs).

331. *See* JOWETT & O'DONNELL, *supra* note 10, at 9; WILLINGHAM, *supra* note 103, at 179, 220. To sell products, advertisements are replete with strategies that use the latest sports star, music, and catchy phrases to develop favorable emotional attitudes and associate impressions to core memories about other favorable beliefs. *See* PRATKANIS & ARONSON, *supra* note 7, at 128-31; *supra* Parts II.A, IV.A, IV.C.1-3.

332. WILLINGHAM, *supra* note 103, at 180, 221; *see* REISBERG, *supra* note 98, at 154-56, 199 (explaining that billions of neurons and synapses organize themselves and make memory connections to easily retrieve information).

333. REISBERG, *supra* note 98, at 158.

Yale University conducted extensive studies on the relationship between core memories and new data and coined the term *consistency theory*, which affirms that people have a "desire or drive for consistency as a central motivator in attitude formation and behavior."[334] There is "comfort in familiarity."[335] People actively seek out information, including by accepting biased and irrelevant material,[336] to confirm and validate entrenched values and preexisting beliefs.[337] New information can cumulate and reinforce previously established beliefs and memories, making them more ingrained and entrenched.[338]

Alternatively, information inconsistent with prior knowledge and entrenched beliefs is apt to lead to cognitive dissonance and be rejected.[339] Stronger foundational memories and long-established beliefs are harder to change.[340] People tend to prefer their own choices, values, and opinions more than those of others;[341] but thoughts, ideol-

334. JOWETT & O'DONNELL, *supra* note 10, at 172.

335. *Id.* at 174. *See generally* Zajonc, *supra* note 181 (suggesting that viewers who were exposed to stimuli more frequently also liked them better). New information consistent with prior knowledge is more apt to be accepted, but information inconsistent with prior knowledge is less apt to influence long-term memory.

336. White, *supra* note 266, at 505; Wilson, *supra* note 105, at 688.

337. *See* Ellen P. Goodman, *Media Policy Out of the Box: Content Abundance, Attention Scarcity, and the Failures of Digital Markets*, 19 BERKELEY TECH L.J. 1389, 1408 (2004); Wawrzycki, *supra* note 112, at 231 (discussing how worldviews are a "powerful tool" in developing persuasive arguments).

338. REISBERG, *supra* note 98, at 267. Prior beliefs form expectations and predictions about the future. TAYLOR, *supra* note 97, at 137; WILLINGHAM, *supra* note 103, at 203; WINN, *supra* note 173, at 50; *see* PRATKANIS & ARONSON, *supra* note 7, at 77; Emily Pronin, Thomas Gilovich & Lee Ross, *Objectivity in the Eye of the Beholder: Divergent Perceptions of Bias in Self Versus Others*, 111 PSYCH. REV. 781, 795-97 (2004); White, *supra* note 266, at 498. Expectations create placebo effects and self-fulfilling prophesies. WINN, *supra.*

339. *See* JOWETT & O'DONNELL, *supra* note 10, at 172; WINN, *supra* note 173, at 45. "Cognitive dissonance" refers to the mind rejecting inconsistent beliefs because "consistency is a highly desirable commodity." TAYLOR, *supra* note 97, at 128; *see* PRATKANIS & ARONSON, *supra* note 7, at 42-45. This is true for peoples' opinions, values, decisions, and reactions to new information. In *Theory of Cognitive Dissonance*, Professor Leon Festinger wrote that once a person is committed to a decision, "the person is susceptible to cognitive dissonance or psychological discomfort" when alternatives are presented. JOWETT & O'DONNELL, *supra* note 10, at 172. Cognitive dissonance has been applied to explain legal behavior. *See* Chen & Hanson, *supra* note 180, at 1196; David Luban, Symposium, *Integrity: Its Causes and Cures*, 72 FORDHAM L. REV. 279 (2003); Kenneth A. Sprang, *After-Acquired Evidence: Tonic for an Employer's Cognitive Dissonance*, 60 MO. L. REV. 89 (1995).

340. TAYLOR, *supra* note 97, at 134-35, 144. Strong values and ideological foundations are called *anchors. See, e.g.*, JOWETT & O'DONNELL, *supra* note 10, at 33; SEARS, *supra* note 170, at 122-23; Tversky & Kahneman, *supra* note 159, at 1128. In decision-making, thinking, and forming judgments, "people place too much faith in the easily available evidence, even when they know the evidence is biased" and their anchors are arbitrary. REISBERG, *supra* note 98, at 387.

341. David Greene et al., *The False Consensus Effect: An Egocentric Bias in Social Perception and Attribution Processes*, 13 J. EXPERIMENTAL SOC. PSYCHOL. 279, 279 (1977); Emily Pronin, *Perception and Misperception of Bias in Human Judgment*, 11 TRENDS COGNITIVE SCI. 37, 38-40 (2006), *available at* http://web.missouri.edu/~segerti/capstone/Biasinjudgement.pdf.

ogy, and values can have varying degrees of malleability and can reluctantly adjust given the proper environment and influence.[342]

Patriotism appended to propaganda can muster conformity to political agendas.[343] Professor Edelman remarked: "Virtually any belief, valid or invalid, supported by cogent reasoning or by prejudice, can be inculcated and be widely accepted as realistic through deliberate manipulation or through unintended exploitation of prevailing institutions."[344] Kathleen Taylor, a research scientist at Oxford University, explained that persuasion and coercion involve different levels of pressure, but are "framed within, and transmit, a set of [ideological] beliefs about the world" including by defining "the social roles of individuals as State subjects, teaching them their proper place in the *status quo*."[345] People undergo "operant conditioning" in which they observe and adhere to prevailing societal norms and assimilate collective understanding and cultural socialization through interpersonal relations.[346] Conformity, as a social force, can alter people's perceptions about the world[347] and abate willingness to support nonconforming opinions, particularly with continued exposure to public opinion.[348]

342. DANIEL J. LEVITIN, THIS IS YOUR BRAIN ON MUSIC 86 (2006) (explaining that the mind has great capability to change); TAYLOR, *supra* note 97, at 107-08.

343. Propaganda can implant false impressions that can guide later thoughts and actions. PRATKANIS & ARONSON, *supra* note 7, at 87. False beliefs and memories are more apt to take hold with speculative scenarios and imagination. REISBERG, *supra* note 98, at 210; WINN, *supra* note 173, at 37-39 (citing HANS TOCH, THE SOCIAL PSYCHOLOGY OF SOCIAL MOVEMENTS) (describing how beliefs instilled through indoctrination and socialization processes masquerade as fact or knowledge).

344. TAYLOR, *supra* note 97, at 224. "[If] a whole group of people or nation act on certain assumptions, those assumptions will probably gain the status of facts. As everyone believes them and acts on them, it is rare that they get called into question at all." WINN, *supra* note 173, at 45.

345. TAYLOR, *supra* note 97, at 49.

346. Coercion and peer pressure are "social force[s] that make[ ] people . . . do strange things . . . to be accepted" because of the fear of rejection. ZIMBARDO, *supra* note 197, at 259; *see* GEERTZ, *supra* note 265, at 52 ("[W]e become individual under the guidance of cultural patterns . . . [that] . . . give form, order, point, and direction to our lives."). *See generally* JOAN E. GRUSEC & PAUL D. HASTINGS, HANDBOOK OF SOCIALIZATION: THEORY AND RESEARCH (2006).

347. ZIMBARDO, *supra* note 197, at 263.

348. *See generally* Serge Moscovici, *Social Influence and Conformity*, *in* 2 HANDBOOK OF SOCIAL PSYCHOLOGY 347, 377 (Gardner Linzey & Elliot Aronson eds., 3d ed. 1985) (describing the effects of unanimity in conforming to a majority position); Charles A. Kiesler, Mark Zanna & James De Salvo, *Deviation and Conformity: Opinion Change as a Function of Commitment, Attraction and Presence of a Deviate*, 3 J. PERSONALITY & SOC. PSYCHOL. 458, 463-66 (1966) (explaining the science behind commitment to opinions as defined by groups).

4. Bush Administration Examples

Some examples and commentary from scholars sketch how patriotism enfeebled dissent. Administration officials echoed pre-invasion WMD assertions about Iraq frequently and unequivocally, and the media and Americans accepted the claims as fact.[349] Skeptics who questioned the allegations were sometimes ridiculed.[350] PBS produced a documentary that examined how the war was marketed and explained that "it was proving difficult to distinguish the opinion of the pundits from the policies of the administration."[351] Pundits diffused dissent by appealing to patriotism as a national obligation.[352] Professor Rourke wrote,

> Sometimes the urge to achieve unity is so strong that any degree of dissent comes under suspicion. . . . [E]very war spawns patriotic zealots who accuse war dissenters of sympathizing with, or even aiding and abetting, the enemy. The press is also restrained, and the public willingly accepts the argument that information will assist the enemy.[353]

Harvard Law Dean Martha Minow concluded that "the Bush Administration treat[ed] questions about its policies as unpatriotic support for the terrorists."[354] Referring to a Senate probe into the "war

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349. Writing about the Vietnam War, Journalist Frances FitzGerald wrote: "Whether or not the American officials actually believed their own propositions, they repeated them year after year with dogged persistence and a perfect disregard for all contradictory evidence." *See* Lewis & Reading-Smith, *supra* note 28; Note, *supra* note 121, at 2104.

350. Bejesky, *Flow*, *supra* note 53, at 15; *see also infra* notes 353-58.

351. *Bill Moyers Journal: Buying the War* (PBS television broadcast Apr. 25, 2007), *available at* http://www.pbs.org/moyers/journal/btw/transcript1.html.

352. William Kristol, *Limited Government and Spreading Democracy: Two Fronts*, 102 Nw. U. L. Rev. 449, 450 (2008) ("President Reagan and Bush are certainly the two presidents . . . who have done the most at home for the sake of restoring constitutionalist government.") (claiming that others considered Reagan and Bush as the two Presidents who most undermined constitutionalist government and democracy); Keith Olbermann, *What Motivated Man Accused of Sending Threats?*, MSNBC (Nov. 19, 2006), http://www.msnbc.msn.com/id/15721895/ns/msnbc_tv-countdown_with_keith_olbermann/t/what-motivated-man-accused-sending-threats/# (noting Ann Coulter's call for the execution of "people like John Walker" as means to intimidate liberals); *see* Tim Robbins, *Our Voices Are Lost in the Tide of Intolerance Sweeping America*, Guardian (Apr. 19, 2003), *available at* http://www.guardian.co.uk/politics/2003/apr/20/usa.iraq. (explaining the harassment that he and Susan Sarandon faced for being an antiwar advocates, including by being "listed as traitors"); Eugene Volokh, *Deterring Speech: When Is It "McCarthyism"? When Is It Proper?*, 93 Cal. L. Rev. 1413, 1423-24 (2005) (noting opposition from those in Hollywood and the harassment of individuals who have spoken against the falsities of Iraq).

353. John T. Rourke, Presidential Wars and American Democracy: Rally 'Round the Chief 8 (1993).

354. Tom W. Bell, *Treason, Technology, and Freedom of Expression*, 37 Ariz. St. L.J. 999, 999 (2005) ("Critics of the War on Terrorism [have been treated as disloyal] . . . ."); Martha Minow, Book Review, *What Is the Greatest Evil?: The Lesser Evil: Political Ethics in an Age of Terror*, 118 Harv. L. Rev. 2134, 2144 (2005).

on terror," Attorney General Ashcroft complained that inquiries were "eroding national unity" and "aiding terrorists."[355] In addressing criticism of the war in Iraq, Senator John McCain remarked that "the time for debate is over" after invasion.[356] The anti-war group MoveOn challenged General Petraeus's honesty, and McCain asserted that MoveOn "ought to be thrown out of this country."[357]

Challenges to the evidentiary basis for invasion were thoroughly pertinent. United Nations operations began in Iraq shortly after the 1991 Gulf War, and inspection teams assumed in 1998 that Iraq was clean of WMD programs.[358] Four years passed, ambiguities on those exculpatory conclusions may have lingered,[359] but Bush administration officials, neoconservatives, and Iraqi defectors diminished those conclusions by renewing perceptions of danger in 2002.[360] Ultimately, the threat and weapons did not exist, and White House discourse shifted to supporting the troops amid a mission of "liberating" Iraq.[361] Hence, the critics during the prewar period were correct, but the original and congressionally-authorized justification for war no longer mattered. As long as soldiers occupied Iraq, Americans were required to support the new ambiguous mission.[362]

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355. JAMES CARROLL, CRUSADE: CHRONICLES OF AN UNJUST WAR 48 (2004).

356. White, *supra* note 266, at 463; *see* CHALMERS JOHNSON, THE SORROWS OF EMPIRE 292 (2004) (explaining that White House officials made similar claims). *See generally* Winslow T. Wheeler, *The Week of Shame: Congress Wilts as the President Demands an Unclogged Road to War*, CENTER FOR DEF. INFO. (Jan. 2003), http://pogoarchives.org/labyrinth/04/01.pdf (describing the different opinions in Congress pertaining to war efforts).

357. White, *supra* note 266, at 463; *see* ANNIE MACHON, SPIES, LIES & WHISTLEBLOWERS: MI5, MI6 AND THE SHAYLER AFFAIR 34-48, 244-46 (2005) (noting that the British have also had a history of engaging in crackdowns on protesting groups, such as labor unions as a "threat to the security of the state").

358. *See* Bejesky, *Weapon Inspection*, *supra* note 1, at 301-02.

359. REISBERG, *supra* note 98, at 204, 210 (accepting that factual ambiguities can be more predominant for distant events).

360. Fisher, *supra* note 3, at 1230 ("[The] push for an aggressive foreign policy came from the neocons, while key members of the Federalist Society helped crystallize the legal and constitutional doctrines that justified placing offensive powers in the presidency . . . ."); *see* Bejesky, *Politico*, *supra* note 3, at 62-64; Lewis & Reading-Smith, *supra* note 28. *See generally* Robert Bejesky, *Congressional Oversight of the Marketplace of Ideas: Dissidents as War Rhetoric Sources*, 63 SYRACUSE L. REV. (*forthcoming* 2012) (itemizing some public allegations from defectors).

361. McLeod, *supra* note 95, at 131 ("Video clips of President Bush and Colin Powell were often used to lead stories and panel discussions, and were frequently integrated into the middle of such programming."); *see* Bejesky, *PDP*, *supra* note 4, at 5-7 (noting that patriotic images dominated the media); Bejesky, *Weapon Inspections*, *supra* note 1, at 360-62; Clay Calvert, *The Privacy of Death: An Emergent Jurisprudence and Legal Rebuke to Media Exploitation and a Voyeuristic Culture*, 26 LOY. L.A. ENT. L. REV. 133, 133-35, 148-49, 160 (2005/2006) (stating negative images that can undermine political support for war are avoided).

362. Bejesky, *PDP*, *supra* note 4, at 5 (providing that Professor Chomsky portrayed this as a typical method of supplanting issues by employing patriotism).

For example, amid advocacy to withdraw from Iraq, the Bush administration consistently dodged criticism over the reasons for invasion and exacted patriotism. On Veterans Day 2005, Bush explained that "it's completely legitimate to criticize my decision" to go to war, but "it's deeply irresponsible to rewrite the history of how that war began. Some Democrats and anti-war critics are now claiming we manipulated the intelligence and misled the American people about why we went to war."[363] Then he promptly changed the subject by stating that the stakes in the war on terrorism "are too high"[364] and the "national interest is too important, for politicians to throw out false charges. These baseless attacks send the wrong signal to our troops and to an enemy that is questioning America's will."[365] Similarly, Cheney bemoaned that troop morale could suffer with accusations that "they were sent into battle for a lie."[366] Senator Ted Stevens retorted critics: "Now the attempt is to undermine the [troops] standing abroad by repeatedly calling [Bush] a liar."[367] Indeed 85% of U.S. troops believed they were in Iraq "mainly to retaliate for Saddam's role in the 9/11 attacks," and 77% said they believed the "main or a major reason for the war was to stop Saddam from protecting al Qaeda in Iraq."[368] If these polls are accurate and all of the official post-invasion investigations confirming that Iraq did not have connections to al-Qaeda or 9/11 are accurate, the soldiers were indeed under false impressions.[369]

Members of Congress sought to withdraw troops, and Bush retorted: "I expect there to be criticism . . . . But when Democrats say that I deliberately misled the Congress and the people, that's irresponsible. They looked at the same intelligence I did, and they voted –

363. Fisher, *supra* note 3, at 1252 (2005) (citing President George W. Bush, Speech at Tobyhanna Army Depot Commemorating Veterans Day (Nov. 11, 2005)).

364. *Id.*

365. *Id*.

366. Michael A. Fletcher, *Bush, Cheney Denounce Democratic Senators Critical of Iraq War*, WASH. POST, Nov. 17, 2005, at A8.

367. Charles Babington, *Hawkish Democrats Join Calls for Pullouts*, WASH. POST, Nov. 18, 2005, http://www.washingtonpost.com/wp-dyn/content/article/2005/11/17/AR2005111700794.html. Similarly, in April 2006, Rice remarked about the decision to invade Iraq: "I know we've made tactical errors, thousands of them . . . [but] I believe strongly that [invading] was the right strategic decision . . . [because Iraq] had been a threat to the international community [for] long enough . . . ." John Daniszewski, *Rice Gets a Cold Reception in England*, L.A. TIMES, Apr. 1, 2006, http://articles.latimes.com/2006/apr/01/world/fg-rice1.

368. *U.S. Troops in Iraq: 72% Say End War in 2006*, IBOPE INTELIGENCIA (Feb. 28, 2006), http://www.ibopezogby.com/news/2006/02/28/us-troops-in-iraq-72-say-end-war-in-2006/.

369. *See supra* notes 89-91, 96, 124-30, 220-23.

many of them voted – to support the decision I made."[370] Amid congressional criticism that alleged the Bush administration manipulated the intelligence, Cheney maintained that the Senators were making "one of the most dishonest and reprehensible charges ever aired in this city."[371] Congress did not have access to the intelligence information—"Americans were led to war based on a targeted marketing campaign that revealed only information that supported the need for war and none that contradicted it."[372] The SSCI Chair explained that the president "exploited this [intelligence information] declassification authority in the lead up to the war" with impunity by discussing sensitive reports that favored war and threatened prosecution on officials who might provide opposing intelligence detail.[373] Even worse is that all of the information that the administration selectively declassified was false, and underlying data were predominantly unverified rumors.[374]

V. ELEVATING RISK WITH WMD ALLEGATIONS

A. WMD Claims

1. Introduction

Congress's AUMF-Iraq permitted the President to use the military if necessary and appropriate to defend U.S. national security and enforce Security Council resolutions and if force; is consistent with the responses of other countries to 9/11.[375] While official investigations revealed that none of these conditions existed, in October 2004, and eighteen months after invasion, 49% of Americans still thought Iraq had possessed WMDs at the time of invasion, and 41% believed this in March 2006.[376] This Part considers this lingering disassociation between confirmed fact and erroneous perception. Section A organizes statements by Bush administration officials about WMDs, and section

370. Babington, *supra* note 367; *see also* Elisabeth Bumiller, *Cheney Sees 'Shameless' Revisionism on War*, N.Y. TIMES, Nov. 22, 2005, at A1 ("Vice President Dick Cheney stepped up the White House attacks on critics of the Iraq war on Monday, declaring that politicians who say Americans were sent into battle based on a lie are engaging in 'revisionism of the most corrupt and shameless variety.'").

371. Eric Schmitt, *Fast Withdrawal of G.I.'s Is Urged by Key Democrat*, N.Y. TIMES, Nov. 18, 2005, http://www.nytimes.com/2005/11/18/politics/18military.html.

372. Eric Lane et al., *Too Big a Canon in the President's Arsenal: Another Look at* United States v. Nixon, 17 GEO. MASON L. REV. 737, 769 (2010).

373. S. REP. NO. 110-345, at 92 (2008).

374. *See* Bejesky, *Intelligence*, *supra* note 21, at 875-78.

375. *See* AUMF 2001, *supra* note 34.

376. McLeod, *supra* note 95, at 136.

B considers the probable cognitive reactions elicited from those imputations and the intermediary role of the media.

2. Statements About WMDs

During pivotal periods of diplomacy and domestic legislative action, top officials repeatedly made statements that turned out to be false. However, the allegations commenced significantly before the American Intelligence Community produced the National Intelligence Estimate on October 1, 2002.[377] On March 22, 2002, one year before the attack, President Bush remarked that Iraq "possesses the world's most dangerous weapons."[378] On August 26, Vice President Cheney espoused imminent danger: "Simply stated, there is no doubt that Saddam Hussein now has weapons of mass destruction. There is no doubt he is amassing them to use against our friends, against our allies, and against us."[379] Cheney further contended, "The Iraqi regime has been very busy enhancing its capabilities in the field of chemical and biological agents. . . .[Hussein wants] more time to husband his resources [and] invest in his ongoing . . . biological weapons programs."[380]

Statements about Iraq's alleged WMDs intensified with the first anniversary of 9/11. On September 8, Secretary of State Powell remarked, "There's no doubt he has chemical weapon stocks . . . and he has the capacity to produce more chemical weapons."[381] On September 8, National Security Advisor Rice stated, "We know that he has stored the biological weapons . . . And we know that he has looked for ways to weaponize those and deliver them."[382] In his September 12 address to the United Nations General Assembly, Bush specified: "Right now, Iraq is expanding and improving facilities that were used for the production of biological weapons."[383] He contended:

377. SSCI/2006/FINDINGS, *supra* note 124, at 10-12; *see also* Bejesky, *Political Penumbras of Taxes and War Powers*, *supra* note 298 (explaining that congresspersons were hesitant to accept White House allegations, and requested the American IC to produce an NIE; that the NIE produced a shoddy product in a record-setting three week period; and that congresspersons were not even given access to the classified NIE, but were provided with a more affirmative CIA document).

378. SSCI/2004, *supra* note 141, at 453.

379. S. REP. NO. 110-345, at 39 (2008) (citing Cheney speech, Aug. 26, 2002).

380. *Id.* at 17, 19 (citing Cheney speech, Aug. 26, 2002).

381. *Id.* at 36 (citing Powell, Sept. 8, 2002).

382. *Id.* (citing Rice, Sept. 8, 2002).

383. *Id.* at 17 (citing Bush speech to U.N., Sept. 12, 2002).

> We know that Saddam Hussein pursued weapons of mass murder even when inspectors were in his country. Are we to assume that he stopped when they left? The history, the logic, and the facts lead to one conclusion: Saddam Hussein's regime is a grave and gathering danger. To suggest otherwise is to hope against the evidence. To assume this regime's good faith is to bet the lives of millions and the peace of the world in a reckless gamble. And this is a risk we must not take.[384]

After addressing the U.N., Bush administration officials urged congressional action. Key phrases follow from what were nearly-diurnal public statements. Secretary of Defense Rumsfeld testified before Congress: "His regime has amassed large clandestine stockpiles of chemical weapons, including VX and sarin and mustard gas."[385] On September 19, Rumsfeld remarked, "We do know that the Iraqi regime has chemical and biological weapons of mass destruction."[386] On September 19, Bush articulated, "This is a man who has weapons of mass destruction and says he doesn't. He poses a serious threat to the American people . . . . And the battlefield has now shifted to America."[387]

On September 20, White House Spokesman Ari Fleischer stated, "No nation represents the threat to peace on earth the way Iraq does because of its attempt to get weapons of mass destruction . . . ."[388] On September 26, Rumsfeld contested, "We know they have weapons of mass destruction. We know they have active programs. There isn't any debate about it."[389] On September 26, Bush warned, "The danger to our country is grave. The danger to our country is growing. The Iraqi regime possesses biological and chemical weapons."[390]

On September 27, Bush overtly instructed Americans to be afraid: "The man who said he would get rid of weapons of mass destruction still has them. And we need to fear the fact that he has

384. SSCI/2004, *supra* note 141, at 503-04 (citing Bush speech to U.N., Sept. 12, 2002).

385. S. REP. NO. 110-345, at 37 (2008) (citing Rumsfeld's testimony before Senate Armed Services Committee, Sept. 18, 2002); *Id.* at 27 (citing Rumsfeld's statement, Sept. 27, 2002) ("[T]hey have had an enormous appetite for weapons, biological weapons and chemical weapons . . . [t]hey *are looking* not only at a variety of biological capabilities, but a variety of ways of dispensing or weaponizing them . . . .") (emphasis added).

386. *Id.* at 44.

387. *Id.* (citing Bush's speech, Sept. 19, 2002).

388. SSCI/2004, *supra* note 141, at 505.

389. S. REP. NO. 110-345, at 45 (2008) (citing Rumsfeld's speech, Sept. 26, 2002); SSCI/2004, *supra* note 141, at 454.

390. S. REP. NO. 110-345, at 45 (citing Bush's statement, Sept. 26, 2002).

weapons of mass destruction."[391] On September 27, and in later speeches, Rumsfeld reiterated the same claims and enumerated that Iraq possessed stockpiles of biological weapons, "including anthrax and possibly smallpox."[392] On October 5, Bush pronounced, "The danger to America [from] the Iraqi regime is grave and growing . . . Delay, indecision and inaction are not options for America, because they could lead to massive and sudden horror."[393] On October 7, Bush remarked, "[Iraq] possesses and produces chemical and biological weapons."[394] Bush conjectured, "And surveillance photos show that the regime is rebuilding facilities that it had used to produce chemical and biological weapons. Every chemical and biological weapon that Iraq makes is a direct violation of the truce that ended the Gulf War in 1991."[395] Congress voted and passed the *Authorization to Use Military Force Against Iraq* three days later.[396]

Diplomacy progressed, and U.N. inspectors were unsuccessful in discovering WMD programs.[397] The principal diplomacy came on February 5, 2003 when Powell addressed the Security Council. Powell spoke, "[W]e know from sources that a missile launcher and warheads containing biological warfare agent to various locations, distributing them to various locations in western Iraq . . . . Most of the launchers and warheads had been hidden in large groves of palm trees and were

391. *Id.* (citing Bush's statement, Sept. 27, 2002).

392. *Id.* at 37 (citing Rumsfeld's speech at Atlanta Chamber of Commerce, Sept. 27, 2002 and Rumsfeld's speech, Jan. 20, 2003).

393. SSCI/2004, *supra* note 141, at 459-60 (citing President Bush, Radio Address, Oct. 5, 2002).

394. S. REP. NO. 110-345, at 17 (2008) (citing Bush speech, Oct. 7, 2002).

395. *Saddam Hussein*, *supra* note 149 ("Yet, Saddam Hussein has chosen to build and keep these weapons . . . . After [eleven] years during which we have tried containment, sanctions, inspections, even selected military action, the end result is that Saddam Hussein *still has chemical and biological weapons*, and is increasing his capabilities to make more.") (emphasis added).

396. H.R.J. Res. 114, 107th Cong. (2002).

397. Bejesky, *Weapon Inspections*, *supra* note 1, at 321-34. *But see* S. REP. NO. 110-345, at 46 (2008) (quoting George W. Bush, President of the United States, Report on Matters Relevant to the Authorization for Use of Military Force Against Iraq Resolution of 2002 (Jan. 20, 2003)) ("So far, there are no signs that the regime has taken the decision to make a strategic shift in its approach to give up its WMD."); *Id.* (quoting George W. Bush, President of the United States, Remarks with Economists (Jan. 21, 2003)) ("[Iraq] has weapons of mass destruction, the world's deadliest weapons, which poses a direct threat to the United States, our citizens and friends and allies."); *Id.*(quoting Colin Powell, Secretary of State (Jan. 26, 2003)) ("What happened to nearly 30,000 munitions capable of carrying chemical agents?"); *Id.* at 28 (quoting George W. Bush, President of the United States, State of the Union Address (Jan. 28, 2003)) ("Our intelligence officials estimate that Saddam Hussein had the materials to produce as much as 500 tons of sarin, mustard and VX nerve agent. In such quantities, these chemical agents could kill untold thousands. He's not accounted for these materials. He has given no evidence that he has destroyed them.").

moved every one to four weeks to escape detection."[398] Powell also affirmed, "We know that Iraq has embedded key portions of its illicit chemical weapons infrastructure within its legitimate civilian industry."[399] He remarked, "Iraq's behavior shows that Saddam Hussein and his regime are concealing their efforts to produce more weapons of mass destruction."[400]

Powell pronounced, "Our conservative estimate is that Iraq today has a stockpile of between 100 and 500 tons of chemical weapons agent. That is enough agent to fill 16,000 battlefield rockets."[401] With regard to mobile facilities, Powell maintained, "One of the most worrisome things that emerges from the thick intelligence file we have on Iraq's biological weapons is the existence of mobile production facilities used to make biological agents. . . . Let me take you inside that intelligence file and share with you what we know from eyewitness accounts. We have first-hand descriptions of biological weapons factories on wheels and rails."[402] Inspections were conducted for four months and had not discovered weapons, but the Bush administration continued to maintain that they existed in public statements prior to invasion.[403]

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398. *Id.* at 17 (quoting Colin Powell, Secretary of State, Address to the United Nations Security Council (Feb. 5, 2003)).

399. *Id.* at 30 (quoting Colin Powell, Secretary of State, Address to the United Nations Security Council (Feb. 5, 2003)). Powell also noted that "under the guise of dual-use infrastructure, Iraq has undertaken an effort to . . . develop and produce chemical weapons," and enumerated a list of items typically used in industrial chemical applications or academic laboratory facilities. *Id.*

400. *Id.* at 39 (quoting Colin Powell, Secretary of State, Address to the United Nations Security Council (Feb. 5, 2003)); *see id.* ("Iraq has trained al Qaeda members in bomb-making and poisons and deadly gases.").

401. *Id.* at 30 (quoting Colin Powell, Secretary of State, Address to the United Nations Security Council (Feb. 5, 2003)). Powell remarked: "Even the low end of 100 tons of agent would enable Saddam Hussein to cause mass casualties across more than 100 square miles of territory, an area nearly five times the size of Manhattan . . . . And we have sources who tell us that he recently has authorized his field commanders to use them." *Id.*

402. *Id.* at 18 (quoting Colin Powell, Secretary of State, Address to the United Nations Security Council (Feb. 5, 2003)). Powell stated:

> The trucks and train cars are easily moved and are designed to evade detection by inspectors . . . . The source was an eyewitness, an Iraqi chemical engineer who supervised one of these facilities. He was actually present during biological agent production runs. He was also at the site when an accident occurred in 1998. [Twelve] technicians died from exposure to biological agents. We know that Iraq has at least seven of these mobile, biological weapons factories . . . . [T]hey can produce enough dry, biological agent in a single month to kills thousands upon thousands of people . . . . There can be no doubt that Saddam Hussein has biological weapons and the capability to produce more, many more. And he has the ability to dispense these lethal poisons and diseases in ways that can cause massive death and destruction.

Id.

403. *See id.* at 47 (quoting interview by Tim Russert with Dick Cheney, Vice President of the United States, on *Meet the Press* (Mar. 16, 2003)) ("[We] also have to address the question of

3. Giving WMDs to Terrorists

The Bush administration also synthesized WMD threats with terrorism in public statements during essential periods of diplomacy and congressional action. In his address to the U.N. on September 12, 2002, Bush specified, "And our greatest fear is that terrorists will find a shortcut to their mad ambitions when an outlaw regime supplies them with the technologies to kill on a massive scale. In one place—in one regime—we find all these dangers, in their most lethal and aggressive forms."[404] Goading congressional action in late September, Bush remarked that "Al Qa'ida hides, Saddam doesn't, but the danger is, is that they work in concert" and "al Qa'ida becomes an extension of Saddam's madness."[405]

Secretary of Defense Rumsfeld testified to a Congressional committee: "Iraq has these weapons. They're simpler to deliver and even more readily transferred to terrorist networks, who could allow Iraq to deliver them without Iraq's fingerprints."[406] On September 28,

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where might these terrorists acquire weapons of mass destruction, chemical weapons, biological weapons, nuclear weapons? And Saddam Hussein becomes the prime suspect . . . . We know he's out trying once again to produce nuclear weapons and we know that he has a long-standing relationship with various terrorist groups, including the al-Qaeda organization."); *id.* (quoting George W. Bush, President of the United States, Address to the Nation (Mar. 17, 2003)) ("Intelligence gathered by this and other governments leaves no doubt that the Iraq regime continues to possess and conceal some of the most lethal weapons ever devised."); *cf.* Bejesky, *Weapon Inspections*, *supra* note 1, at 317-34.

404. S. REP. NO. 110-345, at 39 (2008) (quoting George W. Bush, President of the United States, Address to the United Nations General Assembly, Sept. 12, 2002); *see also id.* at 73 (quoting Dick Cheney, Vice President of the United States, Speech at the Nashville Convention of the Veterans of Foreign Wars (Aug. 26, 2002)) ("And containment is not possible when dictators obtain weapons of mass destruction, and are prepared to share them with terrorists who intend to inflict catastrophic casualties on the United States."); *id.* at 81 (citing Dick Cheney, Vice President of the United States, Remarks at the Air National Guard Conference (Dec. 2, 2002)) ("Iraq could decide on any given day to provide biological or chemical weapons to a terrorist group or to individual terrorists.").

405. *Id.* at 80; *see also id.* (quoting George W. Bush, President of the United States, Remarks with Columbian President Uribe (Sept. 25, 2002) ("[Y]ou can't distinguish between al Qa'ida and Saddam when you talk about the war on terror."); *id.* (citing George W. Bush, President of the United States, Remarks in the Rose Garden with Congressional Leaders (Sept. 26, 2002)) ("Each passing day could be the one on which the Iraqi regime gives anthrax or VX—nerve gas—or someday a nuclear weapon to a terrorist ally."); *id.* at 80-81 (quoting George W. Bush, President of the United States, Radio Address in the Cabinet Room of the White House (Sept. 28, 2002)) ("[W]hen [his WMD programs] have fully materialized, it may be too late to protect ourselves and our allies. By then, the Iraqi dictator will have had the means to terrorize and dominate the region, and each passing day could be the one on which the Iraqi regime gives anthrax or VX nerve gas or someday a nuclear weapon to a terrorist group.").

406. *Id.* at 79 (quoting Donald Rumsfeld, Secretary of Defense, Testimony before the House Armed Services Committee (Sept. 18, 2002)); *see id.* at 80 (quoting Donald Rumsfeld, Secretary of Defense, Testimony before the House Armed Services Committee (Sept. 18, 2002)) ("Every month that goes by, his weapons of mass destruction programs are progressing and he moves closer to his goal of possessing the capability to strike our population, and our allies, and hold

Bush warned, "The dangers we face only worsen from month to month and year to year . . . and each passing day could be the one on which the Iraqi regime gives anthrax or VX nerve gas or someday a nuclear weapon to a terrorist group."[407] Powell testified to a congressional committee: "We now see that a proven menace like Saddam Hussein, in possession of weapons of mass destruction, could empower a few terrorists to threaten millions of innocent people."[408] In his October 5 radio address, Bush pronounced, "Iraq has stockpiled biological and chemical weapons. . . . Iraq has longstanding ties to terrorist groups which are capable of, and willing to, deliver weapons of mass death."[409] On October 7, Bush contended, "Saddam is harboring terrorists and the instruments of terror, the instruments of death and destruction. . . . Facing clear evidence of peril, we cannot wait for the final proof—the smoking gun—that could come in the form of a mushroom cloud."[410]

In his January 2003 State of the Union Address, Bush explained, "With nuclear arms or a full arsenal of chemical and biological weapons, Saddam Hussein could resume his ambitions of conquest in the Middle East and create deadly havoc in that region . . . . Evidence from intelligence sources, secret communications, and statements by people now in custody reveal that Saddam Hussein aids and protects terrorists, including members of al-Qaida. Secretly, and without fingerprints, he could provide one of his hidden weapons, or help them

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them hostage to blackmail."); S. REP. NO. 108-301, at 454 (2004) (quoting Donald Rumsfeld, Secretary of Defense, Remarks in Department of Defense News Briefing (Sept. 26, 2002)) ("We have what we consider credible evidence that al Qaeda leaders have sought contacts in Iraq who could help them acquire . . . weapons of mass destruction capabilities.").

407. S. REP. NO. 108-301, at 454 (2004) (quoting George W. Bush, President of the United States, Radio Address in the Cabinet Room of the White House (Sept. 28, 2002)).

408. S. REP. NO. 110-345, at 80 (2008) (quoting Colin Powell, Secretary of State, Testimony before the House Committee on International Relations (Sept. 19, 2002)); *see id.* at 74 (quoting Colin Powell, Secretary of State, Address to the United Nations Security Council (Feb. 5, 2003)) ("[A]l-Qaida could turn to Iraq for help in acquiring expertise on weapons of mass destruction."); *id.* at 81 (quoting Colin Powell, Secretary of State, Remarks at the World Economic Forum (Jan. 26, 2003)) ("The more we wait, the more chance there is for this dictator with clear ties to terrorist groups, including Al-Qaida, more time for him to pass a weapon, share a technology, or use these weapons again.").

409. *Id.* (quoting George W. Bush, President of the United States, Radio Address at the Seaport Hotel (Oct. 5, 2002)).

410. *Id.* at 39, 73 (quoting George W. Bush, President of the United States, Remarks at the Cincinnati Museum Center (Oct. 7, 2002)). Bush also remarked:

> Iraq could decide on any given day to provide a biological or chemical weapon to a terrorist group or individual terrorists . . . . We could wait and hope that Saddam does not give weapons to terrorists, or develop a nuclear weapon to blackmail the world. But I'm convinced that is hope against all evidence.

Id. at 73.

develop their own."[411] The next day, Bush reminded, "And *as I have said repeatedly*, Saddam Hussein would like nothing more than to use a terrorist network to attack and kill and leave no fingerprints behind" [emphasis added].[412] On March 17, two days before the attack, Bush remarked, "The danger is clear: using chemical, biological or, one day, nuclear weapons obtained with the help of Iraq, the terrorists could fulfill their stated ambitions and kill thousands or hundreds of thousands of innocent people in our country or any other."[413]

There were allegations that Iraq was training al-Qaeda members for chemical weapon attacks. On September 25, 2002, Rice stated, "We know too that several of the detainees, in particular some high ranking detainees, have said that Iraq provided some training to al-Qa'ida in chemical weapons development."[414] On September 26, Rumsfeld noted, "[W]e do have solid evidence of the presence in Iraq of al Qaeda members," and very reliable reporting of senior level contacts going back a decade, and of possible chemical biological agent training."[415] On October 7, Bush recited, "We've learned that Iraq has trained al-Qa'ida members in bomb making and poisons and deadly gases."[416] On February 5, 2003, Powell contended, "The support that this detainee describes included Iraq offering chemical or biological weapons training for two al-Qa'ida associates beginning in December 2000."[417] On February 6, Bush added, "Iraq has also provided al-Qa'ida with chemical and biological weapons training."[418] On March 9, Rice recounted "a very strong link to training al-Qa'ida

411. *Id.* (quoting George W. Bush, President of the United States, State of the Union Address (Jan. 28, 2003)); *see also id.* at 81-82 (quoting Dick Cheney, Vice President of the United States, Remarks to the Conservative PAC (Jan. 30, 2003)) ("His regime aids and protects terrorists, including members of al Qa'ida. He could decide secretly to provide weapons of mass destruction to terrorists for use against us. And as the President said on Tuesday night, it would take just one vial, one canister, one crate to bring a day of horror to our nation unlike any we have ever known.").

412. *Id.* at 79 (quoting George W. Bush, President of the United States, Remarks with British Prime Minister Tony Blair (Jan. 31, 2003)).

413. *Id.* at 82 (quoting George W. Bush, President of the United States, Address to the Nation (Mar. 17, 2003)).

414. S. SELECT COMM. ON INTELLIGENCE, THE USE BY THE INTELLIGENCE COMMUNITY OF INFORMATION PROVIDED BY THE IRAQI NATIONAL CONGRESS, S. REP. NO. 109-330, at 176 (2006) (including an Interview by Margaret Warner with Condoleezza Rice, National Security Advisor, on PBS *News Hour* (Sept. 25, 2002)).

415. *Id.*; S. REP. NO. 110-345, at 69 (2008) (quoting Donald Rumsfeld, Secretary of Defense, Remarks in Press Briefing (Sept. 26, 2002)).

416. S. REP. NO. 109-331, at 176 (2006) (quoting George W. Bush, President of the United States, Remarks at the Cincinnati Museum Center (Oct. 7, 2002)).

417. *Id.*

418. *Id.*

in chemical and biological weapons, we know from a detainee – the head of training for al-Qaida, that they sought help in developing chemical and biological weapons because they weren't doing very well on their own. They sought it in Iraq. They received the help."[419]

Later investigations confirmed that there was no validated affiliation between Iraq and al-Qaeda, and no WMDs, or WMD programs in Iraq; but Americans held beliefs that were generally consistent with the prewar allegations.[420] Unsurprisingly the SSCI concluded, "No postwar information has been found that indicates Iraq provided chemical and biological weapons training to al-Qaida."[421] Annexing terrorism to WMD threats may have emotionally intensified perceptions of exigency and risk. Former CIA Director Tenet wrote, "For many in the Bush administration, Iraq was unfinished business. They seized on the emotional impact of 9/11 and created a psychological connection between the failure to act decisively against al-Qa'ida and the danger posed by Iraq's WMD programs."[422] Variables that may have leveraged faulty populace perceptions regarding WMDs include the repetition of imminent, inevitable, and catastrophic peril; a media that perfunctorily accepted threat claims; and the classified data that purportedly authenticated threat accusations were not publicly accessible.

B. Elevating Fear and Danger

1. Psychological Reactions to Fear

The impact of fear on human biology and physiology can prompt people to undertake irrational actions. In his book devoted to what he witnessed in the media and how broadcasts influenced his patients, NYU Professor of Medicine Dr. Marc Siegel explained that for three years after 9/11, the news recurrently presented jeopardy from terrorism and Americans "grew afraid more easily than before, misinformed by our leaders and provoked by the news media."[423]

419. *Id.*; *see also* Walsh, *supra* note 156 ("[A]l-Qaeda sent personnel to Baghdad to get trained on the systems, and involved the Iraqis providing bomb-making expertise and advice to the al-Qaeda organization.") (quoting Dick Cheney, Vice President of the United States, Remarks at Pentagon News Conference (Sept. 16, 2003)).

420. *See* Bejesky, *Intelligence*, *supra* note 21, at 818-19; *supra* Parts III.C, IV.B.1.

421. S. REP. NO. 110-345, at 72 (2008).

422. GEORGE J. TENET, AT THE CENTER OF THE STORM: MY YEARS AT THE CIA 305 (2007); *see also* SIEGEL, *supra* note 173, at 54 (explaining that security threat allegations may invoke fear).

423. SIEGEL, *supra* note 173, at vii, 57, 195 (stating that Siegel's media interviews were being "blown out of proportion" to the actual threats posed, and patients began "calling and worrying"

A tiny pecan-shaped organ named the amygdala "serves as the central station for processing fear"—it is the "hub of the brain's wheel of fear," and can induce "difficult to deprogram" cycles of emotion in the brain's biology and memory.[424] Fear can cause cognitive changes in attention, personality, memory, and perception;[425] stimulate neurochemical exchanges between nerves; and activate mental processes that propagate physical manifestations, such as heart-thumping, mood disorders, faltering memories, aberrant thought, depression, tightened muscles, immune system overload, increased blood pressure, inability to sleep, and other physiological effects.[426] The detrimental health effects from prolonged stress and angst can be more harmful than the supposed danger instilling the fear.[427]

Politicians commonly overstate risks to prod legislative agendas, including for economic policies, taxing and spending measures, crime prevention bills, and foreign policy. If a government distorts and inflates risks, society's ability to conceive rational choices and appropriately weigh costs and benefits on important issues may be reduced.[428] Fear-laden messages may coerce citizens to depend on or accede to preventative prescriptions from political leaders[429] to alleviate the intrinsic fear.[430] People may support unreasonable political positions to mollify anxiety.[431] The Bush/Cheney era has been designated one of "rampant nationalism that weds patriotism with a culture of fear" that relied on "the increased use of Orwellian doublespeak as official gov-

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for isolated and uncontrollable situations that they believed were life-threatening but were really only overreactions).

424. *Id.* at 5, 28, 195. "[Higher centers of the brain that help people] to unlearn fear are weak compared to the hard-wiring of the central amygdala." *Id.*

425. Leda Cosmides & John Tooby, *Evolutionary Psychology and the Emotions*, *in* HANDBOOK OF EMOTIONS 94-96 (Michael Lewis & Jeannette M. Haviland-Jones eds., 2d ed. 2000).

426. SIEGEL, *supra* note 173, at 14, 24-25, 49, 203; TAYLOR, *supra* note 97, at 153.

427. SIEGEL, *supra* note 173, at 2, 49 (stating that if people are overly fearful from perceived life threatening situations, they become more susceptible to stress, sickness, and disease, which then increases fear).

428. *Id.* at 4; WILLINGHAM, *supra* note 103, at 366-70.

429. Altheide, *supra* note 115. People can be goaded to "do 'dirty work,' believe lies and support unlawful actions that kill thousands of people" because of "the politics of fear, or decision-makers' promotion and use of audience beliefs and assumptions about danger, risk and fear in order to achieve certain goals." *Id.*; *see also* CARROLL, *supra* note 355, at 96, 139 (stating that the "state of emergency" gave the Bush administration its "extensive exercise of power"); SIEGEL, *supra* note 173, at 6, 14, 24-25, 49, 203; TAYLOR, *supra* note 97, at 153; Harold Hongju Koh, *Rights to Remember*, THE ECONOMIST, Nov. 1, 2003, at 7; Yamamoto, *supra* note 92, at 301.

430. G.C. Chu, *Fear Arousal, Efficacy and Imminency*, 4 J. PERSONALITY & SOC. PSY. 517, 517-24 (1966), *available at* http://psycnet.apa.org/journals/psp/4/5/517/; PRATKANIS & ARONSON, *supra* note 7, at 211, 214.

431. MURRAY EDELMAN, POLITICS AS SYMBOLIC ACTION: MASS AROUSAL AND ACQUIESCENCE 52-57 (1971).

ernment language."[432] Similarly, the Reagan administration aggrandized trepidation, based upon classified data; impelled citizens to experience negative psychological reactions from the presentation of security threats; and proclaimed a role of "protector."[433] Similarities are unsurprising given that neoconservative affinities united the two administrations.[434]

Ascribing to *realist* assumptions of uncertain threats and surmising malicious intentions from other states can have a cogent impact on societal perceptions,[435] and influence the interpretation of circumstantial risk under the law. The use of force against Iraq under the United Nations Charter and international law would have been legal if the U.S. had either been attacked or if it was clear that self-defense was required to meet an *unavoidable* and *imminent* Iraqi attack.[436] While the American Intelligence Community never said there was an immediate peril,[437] the Bush administration employed language that epito-

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432. Seth Kreimer, *Too Close to the Rack and the Screw: Constitutional Constraints on Torture in the War on Terror*, 6 U. PA. J. CONST. L. 278, 306 (2003) ("[A] sufficiently large fear of catastrophe could conceivably authorize almost any plausible efficacious government action."); Stuart, *supra* note 32, at 1555, 1588-89.

433. The use of euphemism, metaphor, "word engineering," fear, abstraction, doublespeak, and lies may appeal to American perceptions. Richard Delgado, *The Language of the Arms Race: Should the People Limit Government Speech?*, 64 B.U. L. REV. 961, 967-73 (1984). The Reagan administration portrayed enemies as dire, terrifying threats, and sought to provoke "unconscious response mechanisms." *Id.* at 967-70. An American Psychiatric Association Task Force concluded that from the Reagan administration's nuclear threat portrayals many adults and children "responded to the threat of nuclear annihilation by distancing, numbness, or 'psychic shutdown.'" *Id.* at 975. Americans feared nuclear weapons and risks associated from nuclear fallout as dreaded, catastrophic, and uncontrollable. Lesley Wexler, *Limiting the Precautionary Principle: Weapons Regulation in the Face of Scientific Uncertainty*, 39 U.C. DAVIS L. REV. 459, 506 (2006). The response breeds a "desire for a strong leader" to alleviate the stress. Delgado, *supra*, at 976. "[S]ecrecy implies that the truth would be gruesome and terrifying; the audience is almost grateful for being spared the frightening information." *Id.* at 982. Melvin Goodman, former Head of Office of Soviet Affairs at the CIA (1976-87), describes that "the Soviet Union . . . collapsed . . . because it was a 'house of cards'. . . [but Reagan and CIA Director Casey] dismissed [alternative CIA opinions] because they believed their own myths and their own fanciful notions. They had become victims of their own lies." *The Power of Nightmares, Part II: The Phantom Victory*, (BBC 2 television broadcast Oct. 27, 2004).

434. Bejesky, *Politico*, *supra* note 3, at 38-43, 62, 99-100.

435. *Id.* at 30-33, 38-50, 107-08.

436. In 1837, Secretary of State Daniel Webster stated that Britain's act in the Caroline case could by justified in self-defense "if the necessity of that self-defense is instant, overwhelming, and leaving no choice of means, and no moment for deliberation." Amos Guiora, *The Military Commissions Act of 2009: Pre-Empting Terror Bombings—A Comparative Approach to Anticipatory Self-Defense*, 41 U. TOL. L. REV. 801, 816 (2010) (quoting Daniel Webster); *see also* Mark M. Baker, *Terrorism and the Inherent Right of Self-Defense*, 10 HOUST. J. INT'L L. 25, 45 (1987); Michael J. Glennon, *The Fog of Law: Self-Defense, Inherent, and Incoherent in Article 51 of the United Nations Charter*, 25 HARV. J.L. PUB. POL. 539, 540 (2002).

437. SSCI/2004, *supra* note 141, at 496. CIA Director Tenet stated that the IC "never said there was an 'imminent' threat." *Id.* Senator Durbin was not convinced that the NIE presented an "imminent" threat, but his proposal to impose language in the October 2002 Authorization of

mized "imminent threat" and catastrophic harm to confer the appearance of unavoidable danger.[438]

Rumsfeld was asked on *Face the Nation:* "If they did not have these weapons of mass destruction, though, granted all of that is true, why then did they pose an immediate threat to us, to this country?"[439] Rumsfeld responded: "You and a few other critics are the only people I've heard use the phrase 'immediate threat.' I didn't. The president didn't. And it's become kind of like folklore that that's—that's what happened."[440] The interviewer retorted Rumsfeld's assertion with some of his own quotes.[441] One can parse words, but when one examines pre-war statements and speeches, "imminent" and synonymous words and phrases were loaded directly or impliedly within the context of virtually all allegations.[442] Bush administration officials employed language such as "it simply makes no sense to wait any longer;" "mushroom clouds" could detonate in American cities without warning; "delay, indecision and inaction could lead to a massive and sudden horror;" "take action before it's too late;" "we will not wait;" "time is not on our side;" "if someone is waiting for a so called 'smoking gun' it is certain that we will have waited too long;" "we

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only using force against Iraq if there was an "imminent threat" was rejected by the Senate by a vote of 70-30. *Id.* at 506. On September 28, 2002, Bush quoted a British government paper which claimed that Iraq "could launch a biological or chemical attack in as little as 45 minutes after the order is given." *Id.* at 505 (citing Bush radio address, Sept. 28, 2002). Any missile can be fired within 45 minutes, but the unsubstantiated danger inherent in the allegation presumed that Iraq had menacing weapons and a viable delivery system, even though Iraq was prohibited from possessing missiles with a range beyond 150 km.

438. Wawrzycki, *supra* note 112, at 240 (arguing that using metaphors is akin to "framing" persuasive speech, such that people may be more moved by the metaphor than by facts).

439. *Face the Nation*, CBS NEWS, Mar. 14, 2004, http://www.cbsnews.com/htdocs/pdf/face_031404.pdf.

440. *Id.*

441. "Some have argued . . . that the nuclear threat from Iraq is not imminent, that Saddam is at least five to seven years away from having a nuclear weapon. I would not be so certain . . . . No terrorist state poses a greater or more immediate threat to the security of our people and the stability of the world [than] the regime of Saddam Hussein . . . ." *Id.* Likewise, when no WMDs had been discovered in Iraq, Rumsfeld was asked at a Pentagon press conference about the way he had "painted a picture of extensive stocks" of WMDs, and contended that he never said "extensive." Eric Rosenberg, *Rumsfeld Retreats, Disclaims Earlier Rhetoric*, HEARST NEWSPAPERS, Nov. 9, 2003, http://www.ocala.com/apps/pbcs.dll/article?p=all&tc=PGall&AID=%2F20031109%2FNEWS%2F211090375%2F1003. In September 2002, Rumsfeld testified to Congress stating that Iraq "has at this moment stockpiles of chemical and biological weapons" and he made the claim thereafter. *Id.* In September 2002, Rumsfeld remarked that there was "bulletproof" evidence of links between Hussein and al-Qaeda, but in October 2004, Rumsfeld stated: "[t]o my knowledge, I have not seen any strong, hard evidence that links the two." Jamie McIntyre, *Rumsfeld: Al Qaeda Comments 'Misunderstood,'* CNN, Oct. 5, 2004, http://edition.cnn.com/2004/WORLD/meast/10/04/rumsfeld.iraq/.

442. *See supra* notes 151-54, 174-76, 207, 215; Part VI.A.2-3.

don't want the 'smoking gun' to be a mushroom cloud;" and "we cannot wait for the 'smoking gun.'"[443]

Fear can be instilled by rhetoric. Irene Zubaida Khan, Secretary General of Amnesty International, explains: "History is replete with examples of how easily political leaders have fomented fear to short-circuit debate on critical issues that they want to push through, or to divert attention from other pressing issues that they want to ignore."[444] Dr. Saby Ghoshray asserted:

> Within a framework of false consciousness, people identify imminent danger, which shapes the political process whereby the President utilizes the constitutional power vested in him, Congress remains inert, and the country slogs on tolerating the unabridged and unbridled usurpation of executive excess.
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> . . . .
>
> [I]mposing false beliefs in a methodical and scientific manner, the political process injects dread and fear in the minds of citizens.[445]

2. The Media and Fear-Dominant Stories

Today's media enterprises have evolved somewhat from a public service that accurately and thoroughly enlightens of pertinent events, to a capitalist product that scintillates appeal so it can be sold. The news media succinctly broadcasts core information on political events,[446] while favoring emotive sound bites, sensationalism,[447] bi-

443. Ackerman & Hathaway, *supra* note 81, at 460-61 (citing Bush statements espousing "unique urgency" and a danger that is "grave and growing"); *see also* Bejesky, *Weapon Inspections*, *supra* note 1, at 365 n.349; Forman Jr., *supra* note 245, at 335 ("[T]he Bush administration consistently and 'successfully invoked the threat of 'mushroom clouds' to win support.'"); Jacobs, *supra* note 88, at 438 ("[E]xecutive department advocates strategically planned their rhetoric and presentations to make use of 'gripping images,' such as the 'smoking gun' that might be a 'mushroom cloud,' [and] the little lump of material 'a little larger than a single softball' that could become a nuclear weapon.").

444. Khan, *supra* note 249, at 3.

445. Dr. Saby Ghoshray, *Illuminating the Shadows of Constitutional Space While Tracing the Contours of Presidential War Power*, 39 LOY. U. CHI. L.J. 295, 326 (2008).

446. *See* BILL KOVACH & TOM ROSENSTEIL, THE ELEMENTS OF JOURNALISM 140-43 (2001); J.M. Balkin, *Some Realism About Pluralism: Legal Realist Approaches to the First Amendment*, 1990 DUKE L.J. 375, 408 ("[C]ommunication is scarce also in the sense that there is only so much available audience time to go around.").

447. Maurice Murad, *Shouting at the Crocodile*, *in* INTO THE BUZZSAW 82 (Kristina Borjesson, ed. 2002) ("[I]f it bleeds it leads."); *see also* SIEGEL, *supra* note 173, at 2-3; Jonathan Graubart, *What's News: A Progressive Framework for Evaluating the International Debate Over the News*, 77 CALIF. L. REV. 629, 660 (1989) (discussing lack of substantive content about government policies in news); Peter Marguilies, *The Detainees' Dilemma: The Virtues and Vices of Advocacy Strategies in the War on Terror*, 57 BUFF. L. REV. 347, 383 (2009) (reporting "attracts eyeballs and advertising"); Blake D. Morant, *The Inescapable Intersection of Credibility, Audience and Profit in Broadcast Media's Coverage of Elections*, 24 ST. JOHN'S J.L. COMM. 479, 482,

zarre lifestyles, sex scandals, and violence to increase ratings and market share.[448] Consequently, the breadth between fact and inaccurate opinion may grow. For example, from 1990 to 1998, the murder rate dropped by 20%, but studies discovered that because broadcasts of murder stories over this same period increased by 600%, Americans thought crime rates were drastically rising.[449] After 9/11 national news frequently transfixed on national security issues. The President portrayed threats, and "the twenty-four-hour media corroborate[d] [threats] and propagate[d] the presidential will, again bypassing constitutional safeguards,"[450] and contouring an environment of coercion.[451]

Dr. Siegel wrote a book contending that post-9/11 terror threat broadcasts not only invoked fear, but also became "a free-floating anxiety that lack[ed] a specific target."[452] Chemical and biological

487 (2009); Ralph Nader, *Corporate Law Firms and the Perversion of Justice: What Public Interest Lawyers Can Do About It*, 1 WASH. U. J.L. & POL'Y 53, 60 (1999) ("[M]ass media is increasingly screening out any subject matter that does not center around violence, sex, addiction, or celebrity status."); Hannibal Travis, *Postmodern Censorship of Pacifist Content on Television and the Internet*, 25 N.D. J.L. ETHICS & PUB POL'Y 47, 62 (2011) ("[R]eporters strip context from stories, depriving the public of understanding, creating stereotypes and caricatures of politicians and subjects and blurring the perceptions of cause and effect."); From the Editors, *The Times and Wen Ho Lee*, N.Y. TIMES, Sept. 26, 2000, at A2 (apologizing for its "alarmist" tone in Wen Ho Lee's reporting); Michael Moore, BOWLING FOR COLUMBINE (2002), http://www.script-o-rama.com/movie_scripts/b/bowling-for-columbine-script-transcript.html (providing examples of the media embellishing and misreporting risks out of proportion to the danger, including Y2K scares, killer bees, politicians using fear, and other daily events).

448. John King Gamble & Nicole Lee Dirling, *Mass Media Coverage of International Law: (Benign) Neglect?, Distortion?*, 18 FLA. J. INT'L L. 211, 215 (2006); Morant, *supra* note 26, at 630.

449. SIEGEL, *supra* note 173, at 56-57 (citing Professor Barry Glassner).

450. Ghoshray, *supra* note 445, at 327; Eytan Gilboa, *Searching for a Theory of Public Diplomacy*, 616 ANNALS 55, 63 (2008) (alleging alternative directional influence with the "CNN effect" and contends that television coverage forces policy makers to take actions they otherwise would not have taken).

451. Altheide, *supra* note 115, at 4; *see also* M. Cherif Bassiouni, *Terrorism, Law Enforcement, and the Mass Media: Perspectives, Problems, Proposals*, 72 J. CRIM. LAW & CRIMINOLOGY 1, 18-19 (1981); Michelle Ward Ghetti, *The Terrorist Is A Star!: Regulating Media Coverage of Publicity-Seeking Crimes*, 60 FED. COMM. L.J. 481, 481, 488, 500 (2008) (stating that psychology of terrorism could not exist without the media's willingness to cover shocking, dramatic, and conflict-laden events. Further stating that media defends the practice of covering publicity-seeking crimes as part of public's "right to know" and provide advantage knowledge).

452. SIEGEL, *supra* note 173, at 50. Siegel focuses on health risk as a form of free-floating anxiety that coexisted with terror threats, but another possible example is the national coverage with alerts of child kidnapping that also emerged shortly after 9/11. Liu Fu, Beth Moellers, Leigh Moscowitz, Spring-Serenity Duvall & Yue Tan, *Every Parent's Worst Nightmare: Myths of Child Abductions in the News*, Paper Presented at the Annual Meeting of the International Communication Association, http://citation.allacademic.com/meta/p_mla_apa_research_citation/0/1/4/9/6/pages14968/p14968-1.php. Hostage taking and kidnapping is a highly-publicized form of terrorism. *Taking Prisoners*, THE ECONOMIST (July 4, 2008), http://www.economist.com/nocle/11692844. Terror warnings and 9/11 updates were juxtaposed with national kidnapping alerts, and the Amber Alert system bore similarities to the national terror alert system. Act to Prevent

weapon hazards converged with overblown media portrayals of health risks from long-existing illnesses. Siegel imparts a chronology of news reporting on West Nile virus, smallpox, SARS, mad cow disease, flu epidemic, and bird flu,[453] and reminds us that stories slid from the media radar without explanation.[454] Ironically, the chronology began one month prior to the invasion of Iraq.

West Nile virus had existed since 1937, but in mid-April 2003, the Center for Disease and Control classified the West Nile virus "an emerging infectious disease epidemic," but the crisis was dropped and forgotten several months later.[455] In mid-March 2003, SARS became the very first panic "to involve the world-wide health community and petrify Asia and Canada along with the United States."[456] The media impelled audiences into frenzy, people with a cough or flu-like symptoms queued at doctor's offices, and Americans feared eating in Chinese restaurants or nearing Asians.[457] In May 2003, after one case of mad cow disease was discovered in Canada, the Bush administration banned Canadian beef imports.[458] Shortly thereafter, the media explained there was a new flu bug that was a killer of children and it was spreading to all fifty states, even though influenza generally spreads to all fifty states and children are more susceptible to the illness because of weaker immune systems.[459] Saddam Hussein was captured in Iraq

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Child Abduction and the Sexual Exploitation of Children, and for Other Purposes, Pub. L. No. 108-21, 117 Stat. 650 (2003; Homeland Security Presidential Directive-3, Mar. 11, 2002, http://www.dhs.gov/xabout/laws/gc_1214508631313.shtm#1. Some media sources alleged links between al-Qaeda terrorists and child kidnappings. David Sapsted, *Terrorist 'Helped Kidnap Children,'* TELEGRAPH, Apr. 22, 2005, http://www.telegraph.co.uk/news/uknews/1488412/Terrorist-helped-kidnap-children.html.

453. "After 9/11 we felt vulnerable to attack, and after anthrax we felt vulnerable to infectious agents. West Nile virus was the first bug du jour after anthrax, and the American public quickly transferred its unrealistic fear of the mail to a fear of mosquitoes." SIEGEL, *supra* note 173, at 55-56 ("At a time when people are living longer and healthier, people are worried about iffy illnesses.").

454. *Id.* at 168.

455. *Id.* at 126-30 (stating that cases emerged in the U.S. in 1999, but stories did not become a high-profile until after 9/11); *see also Fighting Fear and West Nile*, CHI. TRIB., Apr. 13, 2002.

456. SIEGEL, *supra* note 173, at 6.

457. *Id.* at 18, 148-50. SARS killed seven hundred people globally, but no one in the U.S. died. *Id.* at 6, 16, 18, 143. *See generally* Cass R. Sunstein, *Risk and the Law: Precautions Against What? The Availability Heuristic and Cross-Cultural Risk Perception*, 57 ALA. L. REV. 75, 90-91 (2005) (unrealistically weighed risks from SARS). SARS also shared characteristics of other common illnesses.

458. SIEGEL, *supra* note 173, at 162, 164 (stating that the risk of humans contracting Mad Cow Disease from eating beef, particularly when properly cooked, is very low, but through 2005, 140 people in the world had become infected and 120 died).

459. *Id.* at 153, 155. The Director of the CDC tried to assuage worries by saying "most of us will get through this [disease] fine," but did not admit that the "flu epidemic" or "disease" was being hyped in the media. *Id.*

on December 14, 2003, the "flu epidemic/disease" was displaced in the news, and the influenza season of 2003-04 was milder than other seasons.[460] In mid-January 2004, the avian bird flu emerged and the *New York Times* described that it "deepened fears of a global epidemic if the virus combines with another that can transmitted person to person."[461]

The threat atmosphere was so heavy at the time that the Bush administration initiated proposals to vaccinate the entire American population against chemical and biological weapon attacks.[462] Certain types of chemical and biological weapons, as well as immunization programs, do have cognitive associations with naturally-occurring illnesses.[463] The $3.2 billion mass immunization program had been approved, but the program was quietly aborted in October 2003.[464] New responses, drills, and procedures for the federal, state, and local level were developed to respond to the worst variety of catastrophic attacks;[465] the American Council of Science and Health produced an official step-by-step training manual for response procedures in the event of a domestic terrorist attack by "lewisite, mustard, arsine, cynide, prosgene, sarin, tabin, VX, and many more" chemical and biological agents.[466] These domestic proposals converged with the chemical and biological weapons that the Bush administration claimed Iraq possessed.[467] Perhaps the more localized, espoused crisis made

460. *Id.* at 20, 168.

461. *Id.* at 168; *The Spread of Avian Influenza*, N.Y. TIMES, Jan. 30, 2004, http://www.nytimes.com/2004/01/30/opinion/the-spread-of-avian-influenza.html ("[S]ooner or later a mutant strain of bird flu may set off a human pandemic.").

462. *See* SSCI/2004, *supra* note 141, at 167. The Deputy National Intelligence Officer for Science and Technology remarked: "[I]t's important to remember that people . . . were reading this at the time when we were having a national debate on whether people should be immunized and what the threat was from al-Qa'ida on smallpox . . . ."). *Id.*; *see also NBC News' Meet the Press* (NBC television broadcast Sept. 8, 2002) (airing Vice President Cheney speaking about this proposal a year after 9/11).

463. Americans were besieged with information about bioterrorism, possible terrorist attacks, including crop dusters and dirty bomb delivery mechanisms on American cities. SSCI/2004, *supra* note 141, at 145 (citing *The BW Threat to the Global and US Agricultural Sectors* (ICB 2001-09), March 2001; *Smallpox: How Extensive a Threat?* (ICB 2001-34HC), Dec. 2001.); *see* SIEGEL, *supra* note 173, at 140.

464. *See id.* at 19, 111-16, 133-34 (explaining how 65% of the population supported immediate mass vaccinations by late 2002); *see also* Anita Manning, *Smallpox Vaccination Plan Ceased*, USA TODAY, Oct. 15, 2003.

465. Manning, *supra* note 464.

466. SIEGEL, *supra* note 173, at 140.

467. SSCI/2004, *supra* note 141, at 166-67 ("The [October 2002] NIE stated that we assess that Iraq has some BW agent and maintains the capability to produce B. anthracis, botulinim toxin, aflatoxin, Clostridium perfringerns (gas gangrene)[, smallpox,] and ricin toxin."). Bush administration statements stressed that Iraq had VX, sarin, and mustard gas. State of the Union

the foreign policy more acceptable even though Iraq ultimately did not have any of these weapons or a viable delivery system that could make the danger credible.[468]

3. Deductive and Inductive Reasoning and the National Security Apparatus

Irrational Action

The Supreme Court generally assumes that there is a rational audience that is capable of assessing the credibility and quality of core speech, and "expression on public issues."[469] The problem with this assumption is that citizens may be rationally ignorant of political issues, due to the time required to absorb sufficient detail and generate an informed opinion.[470] Likewise, complex issues may be arduous to assimilate,[471] making related propaganda[472] and heuristic biases particularly persuasive.[473] Moreover, discourse on security hazards is inherently emotional and apt to negatively impact prudent decision-making. Emotion can drive cognitive processes[474] and breed irra-

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Address, *supra* note 152; *see also* Colin Powell, Secretary of State, Address to the U.N. Security Council (Feb. 5, 2003).

468. SIEGEL, *supra* note 173, at 137-38 (noting that it would be unimaginable for clouds of dangerous gases to be delivered successfully without being destroyed by the environment); *see also* Bejesky, *Intelligence*, *supra* note 21, at 851-54 (discussing how Iraq's missiles with 150-km ranges and UAVs were not a viable threat).

469. *See* NAACP v. Claiborne Hardware Co., 458 U.S. 886, 913 (1982); *see also* Org. for a Better Austin v. Keefe, 402 U.S. 415, 418 (1971).

470. Farina, *supra* note 181, at 365-66; Fenster, *supra* note 221, at 928 (2006); *see also* Stanley Ingber, *The Marketplace of Ideas: A Legitimizing Myth*, 1984 DUKE L.J. 1, 5 (1984) (challenging the rational information consumer assumption).

471. Christine Jolls, Cass R. Sunstein & Richard Thaler, *A Behavioral Approach to Law and Economics*, 50 STAN. L. REV. 1471, 1475-76 (1998).

472. *See* Delgado, *supra* note 433, at 973 ("By means of such devices as euphemism, abstraction, and doublespeak, the government fosters a world view in which its assumptions and aims are unlikely to be seriously questioned. Because of the way government defines reality, certain thoughts do not come to mind."); *see also* C. Edwin Baker, *Scope of the First Amendment Freedom of Speech*, 25 UCLA L. REV. 964, 965-66 (1978) ("[T]echniques of behavior manipulation, irrational response to propaganda, [and lack of] objective truth, [undermines] the marketplace of ideas . . . .").

473. Wilson, *supra* note 105, at 680.

474. *See* Arie W. Kruglanski et al., *To "Do the Right Thing" or to "Just Do It": Locomotion and Assessment as Distinct Self-Regulatory Imperatives*, 79 J. PERSONALITY & SOC. PSY. 793 (2000), http://www.columbia.edu/cu/psychology/higgins/papers/kruglanski+%202000%20reg%20mode.pdf; Hana Shepherd, *The Cultural Context of Cognition: What the Implicit Association Test Tells Us About How Culture Works*, 26 SOC. FORUM. 121, 125 (2011), http://onlinelibrary.wiley.com/doi/10.1111/j.1573-7861.2010.01227.x/full; Cosmides & Steven A. Soloman, *The Empirical Case for Two Systems of Reasoning*, 119 PSYCHOL. BULL. 3 (1996), http://academic.research.microsoft.com/Paper/2054736; Tooby, *supra* note 425, at 90-98.

tional responses,[475] rather than deliberate, informed and well conceived choices.[476] Professors Pratkanis and Aronson explain: "When a propagandist unscrupulously plays on our feelings of insecurity, or exploits our darkest fears . . . exploration and inquiry stop. We become snared in the rationalization trap . . . . Our emotions overwhelm our critical abilities."[477]

These cognitive processes culminate into decisional results for which scientists have measured and coined theories. *Loss Aversion Theory* confirms that people are very sensitive to losses and dread worst possible outcomes even when risk of loss is really very low.[478] Amos Tverskys's *prospect theory* specifies that the risk of loss will impact decision-making more than the possibility of an equivalent gain,[479] and that people are prone to overweigh events with low probability and underestimate events with high probability.[480] Professor Sunstein wrote of the availability heuristic— "when intense emotions are engaged, people tend to focus on the adverse outcome, not on its likelihood."[481] The availability heuristic is apt to be most cognitively available to sway decision-making when there are vivid and emotionally-charged events with frequent reminders.[482]

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475. *See* Khan, *supra* note 249, at 3 ("[F]ear severely restricts the ability to reason and to critically challenge those who lead us."); Baker, *supra* note 472, at 976; Jolls, Sunstein & Thaler, *supra* note 471, at 1471; Harry H. Wellington, *On Freedom of Expression*, 88 YALE L.J. 1105, 1130 (1979).

476. Emotions and feelings direct decision-making often more than rational thought. ANTONIO R. DAMASIO, THE FEELING OF WHAT HAPPENS (1999); ANTONIO R. DAMASIO, DESCARTES' ERROR: EMOTION, REASON, AND THE HUMAN BRAIN, xi (1994). Behavioral economists explain why people do not always act rationally with market choices. *See* Edward P. Lazear, *Economic Imperialism*, 115 Q.J. ECON. 99 (2000); Shira B. Lewin, *Economics and Psychology: Lessons for Our Own Day from the Early Twentieth Century*, 24 J. ECON. LITERATURE 1293 (1996).

477. PRATKANIS & ARONSON, *supra* note 7, at 66.

478. REISBERG, *supra* note 98, at 436-38; *see* David E. Adelman, *Scientific Activism and Restraint: The Interplay of Statistics, Judgment, and Procedure in Environmental Law*, 79 NOTRE DAME L. REV. 497, 543 (2004) (noting that people are apt to make decisions following a position of being "better [off] safe than sorry"); Amos Tversky & Daniel Kahneman, *The Framing of Decisions and the Psychology of Choice*, 211 SCIENCE 453, 453 (1981), http://psych.hanover.edu/classes/Cognition/Papers/tversky81.pdf.

479. Wawrzycki, *supra* note 112, at 213-14 (2006). In gambling scenarios, people generally fear losses more than they value the chance to win. *See* Daniel Kahneman et al., *Anomalies: The Endowment Effect, Loss Aversion, and Status Quo Bias*, 5 J. ECON. PERSPECTIVES 193, 195-204 (1991).

480. Wilson, *supra* note 105, at 691.

481. Cass Sunstein, *Probability Neglect: Emotions, Worst Cases, and Law*, 112 YALE L.J. 61, 62 (2002).

482. Lyrissa Barnett Lidsky, *Nobody's Fools: The Rational Audience as First Amendment Ideal*, 2010 U. ILL. L. REV. 799, 831 (2010).

Consequently, people are inclined to support preemptive measures to prevent security risks from manifesting, even without tangible proof to corroborate the particular risk of harm ("Precautionary Principle").[483] The societal perception may be so dominant that the burden of rejecting the uncertain danger is assigned to those who are indifferent to or would willingly accept the risk.[484] The precautionary principle originated in environmental protection for which open scientific studies of global warming and pollution exist, but its new application to national security implicates hidden data that are particularly prone to politicization.[485] The Bush administration took the intelligence community's estimates about WMDs, and ostensibly made the unsubstantiated insinuations more credible with emotionally-laden rhetoric in public speeches and interviews.[486]

For example, allegations included that Iraq possessed hundreds of tons of biological and chemical weapon agents ready for an immediate strike, a nuclear weapon program, large-scale WMD facilities, small-scale BW-producing trailers, and missiles with ranges beyond the UN's proscribed 150-km range; and was abetting and harboring al-Qaeda.[487] Each independent claim was false, and based on spurious, classified data rather than verified facts.[488] However, consider how cognitive processes can prompt false beliefs. If security threat claims appear realistic because they are repetitively communicated and assembled by mental processes such as *schema,* heuristics, and fear, the populace may be more apt to support an invasion to alleviate fear from the conjectured danger[489] even if enhanced knowledge of the underlying data that would substantiate the peril is lacking. Emotive insecurity and deductive reasoning would seem to wreak havoc on rational public choice. Likewise, invoking positive emotion such as pa-

483. Tim O'Riordan et al., *The Evolution of the Precautionary Principle*, *in* REINTERPRETING THE PRECAUTIONARY PRINCIPLES 19 (Tim O'Riordan et al. eds., 2001).

484. *Id.* at 20.

485. *See* Bejesky, *Intelligence*, *supra* note 21, at 813-14, 875-82.

486. *See id.* at 875-82; Bejesky, *PCA*, *supra* note 2, at 348-66, 388-92.

487. Bejesky, *Intelligence*, *supra* note 21, at 816, 875-77.

488. The SSCI found that the intelligence reports did not support intelligence estimates. Bejesky, *Politico*, *supra* note 3, at 69-70; Bejesky, *Intelligence*, *supra* note 21, at 875-82. For example, after four months of allegations devoid of evidentiary detail, Powell consolidated the information for his Security Council address on February 5, 2003, and referred to the content as "evidence." Bejesky, *Weapon Inspections*, *supra* note 1, at 336-42. Allegations may be more persuasive when conclusions are frequently repeated, even when underlying data is all wrong.

489. YUENG FOONG KHONG, ANALOGIES OF WAR: KOREA, MUNICH, DIEN BIEN PHU, AND THE VIETNAM DECISIONS OF 1965 37-38 (1992) (referring to schema being "primed" and influencing "interpretation of subsequent environmental events"); TAYLOR, *supra* note 97, at 124.

triotism and symbolism can diminish the effectiveness of people's analytic and critical reasoning processes and compel them to accept simplistic decision-making, perceptions, and beliefs.[490]

Complex Claims Based on Asymmetric Information

The WMD security urgency and risk were difficult for citizens to objectively discern,[491] particularly when information to establish conclusions remained hidden inside the national security apparatus. Methods of inference explain this idea. In contemplative decision-making and scientific inquiry, people draw conclusions from a combination of facts, evidence, and underlying beliefs,[492] but they also deemphasize contradictory or ambiguous data[493] and generally employ two different forms of reasoning. *Inductive* reasoning commences with evidence or observations to make a decision, or draw a conclusion or theory from premises;[494] while *deductive* reasoning commences with a conclusion or a theory and searches for evidence to support conclusions.[495] For example, law enforcement officials investigate by searching for evidence (inductive), and pursue evidentiary leads based on motive and pre-existing theories of a crime (deductive). Judges are required to be neutral and objective when administering a case, establishing the factual record, and presenting facts to the jury (inductive), but may be required to make relevancy determinations and assess broader case questions (deductive).

People naturally and ordinarily utilize deductive reasoning in rendering decisions and opinions because they tend to prefer reconciling

490. John McManus, *Ritual and Human Social Condition*, *in* THE SPECTRUM OF RITUAL: A BIOGENETIC STRUCTURAL ANALYSIS 215, 230-35 (Eugene G. d'A'Aquili et al. eds., 1979).

491. Jacobs, *supra* note 88, at 479 ("When executive branch officials exaggerate threat claims, they depend upon the lack of ability or incentive of others to engage in effective fact checking before the decision to use force is made."); Joseph S. Nye, *Public Diplomacy and Soft Power*, 616 ANNALS 94, 99 (2008) (explaining that having too much complex and confusing information can cause "inattention," which has been called the "paradox of plenty"); Richard E. Petty & John T. Cacioppo, *The Effect of Involvement on Responses to Argument Quantity and Quality: Central and Peripheral Routes to Persuasion*, 46 J. PERSONALITY & SOC. PSYCHOL. 69, 71 (1984) (stating that people may not scrutinize and analyze information to make informed decisions because they lack the time and cognitive ability to understand and scrutinize the message).

492. REISBERG, *supra* note 98, at 377.

493. Donald A. Redelmeier et al., *Understanding Patients' Decisions: Cognitive and Emotional Perspectives*, 270 JAMA 72, 73 (1993).

494. REISBERG, *supra* note 98, at 377-78; WILLINGHAM, *supra* note 103, at 388; Research Methods Knowledge Base, *Deductive and Inductive Thinking*, http://www.socialresearchmethods.net/kb/dedind.php.

495. REISBERG, *supra* note 98, at 411; WILLINGHAM, *supra* note 103, at 387; Research Methods Knowledge Base, *supra* note 494.

new information with foundational knowledge and values[496] and generating simplified ultimate conclusions, often with heuristics.[497] Daniel Gilbert wrote that the "human brain knows many tricks that allow it to consider evidence, weigh facts and still reach precisely the conclusion it favors."[498] Anytime people "are less receptive to certain data due to preconceived notions, any inductive reasoning process will necessarily display a bias,"[499] even when they honestly believe they are being objective.[500] Professor Stuart explained that an audience that relies on pseudo-communication messages has "difficulty remembering evidence, making correct inferences in critical reasoning, and recognizing false inferences," but instead are "suckers for slogans and sayings" and portrayals of exaggerated problems.[501]

Preconceived, exaggerated portrayals of threats are found in the intelligence claims about Iraq, but also in actions and documents that preceded the October 2002 National Security Estimates. For example, documents authored by top Bush administration appointees (e.g., PNAC's *Rebuilding America's Defenses* (2000), White House National Security Council meetings starting in February 2001, and news releases announcing war plans in mid-2002, all indicated that Iraq was the national security focus.[502] If a conclusion and predetermined pref-

496. REISBERG, *supra* note 98, at 413.

497. Belief bias occurs when someone believes a conclusion to be true and perceives premises in a manner to substantiate that conclusion. *Id.* at 416. People are guided by what they already believe. *Id.* at 20. Deductive reasoning conjures the prosaism, "I've already made up my mind; don't distract me with the facts." *Id.* at 392. When disconfirming evidence contradicts foundational beliefs, people often fail to readjust beliefs, or forget disconfirming cases and exhibit a memory bias toward cases consistent with their beliefs. *Id.* at 413. *See generally* HEURISTICS AND BIASES, *supra* note 285 (discussing misunderstanding and human inference); Derek E. Bambauer, *Shopping Badly: Cognitive Biases, Communications, and the Fallacy of the Marketplace of Ideas*, 77 U. COLO. L. REV. 649, 651 (2006); Baruch Fischhoff, *Hindsight Foresight: The Effect of Outcome Knowledge on Judgment Under Uncertainty*, 1 J. EXPERIMENTAL PSYCHOL. 288 (1975) (stating that "hindsight bias" confirms *post facto* deductive reasoning—people tend to "integrate an outcome and events that preceded it into a coherent story"); Lee, *supra* note 191, at 997, 999 ("[I]ndividuals often pay little attention to the substance of arguments, and focus instead on ultimate conclusions."); Sunstein, *supra* note 457, at 87 ("It is well-established that in thinking about risks, people rely on certain heuristics, or rules of thumb as cognitive shortcuts to decision-making and belief-formation to simplify their inquiry."). After the invasion, a substantial percentage of Americans continued to believe that Iraq had WMDs and that they were actually found when they were not. Bejesky, *PDP*, *supra* note 4, at 53-54.

498. Daniel Gilbert, Op. Ed., *I'm O.K., You're Biased*, N.Y. TIMES, Apr. 16 2006, at 12.

499. Randolph I. Gordon & Brook Assefa, *A Tale of Two Initiatives: Where Propaganda Meets Fact in the Debate Over America's Health Care*, 4 SEATTLE J. SOC. JUST. 693, 705 (2006).

500. Lee Ross & Andrew Ward, *Naïve Realism in Everyday Life: Implications for Social Conflict and Misunderstanding*, *in* Values and Knowledge (Edward S. Reed, Elliot Turiel & Terrance Brown eds., 1996).

501. Stuart, *supra* note 32, at 1554.

502. Bejesky, *Politico*, *supra* note 3, at 40-42, 62-70.

erence exists, perhaps discovering data is rather effortless. Robert Steele, a former CIA covert operations officer, remarked: "These people came to their conclusions [about Iraq] and then looked for intelligence to support it. And when they couldn't find intelligence to support it, they created lies to the American public, to the American Congress, to the United Nations, and to the rest of the world."[503] Other intelligence officials and experts believed that the decision to go to war was made, and intelligence conclusions and data were interpreted to support that decision.[504] If true, public rhetoric drove the interpretation of the intelligence data.[505]

The Bush administration stated hundreds of times that Iraq possessed WMDs and endangered Americans. Rhetoric may form a conclusion, abetted by the negative emotion of fear and the positive emotion of patriotism, which may even urge that action be taken to alleviate the negative emotion. Even if the data to form those assessments are lacking, the heuristically-generated conclusion—that Iraq was a menace to U.S. security—may be credible. Premises of WMD dangers, or even that weapons could be delivered on American cities, could seem realistic, tangible, and factual.[506] People may cognitively

503. *News World*, *supra* note 92 (Interview with Robert Steele).

504. Press Release, S. Comm. on Intelligence, *supra* note 301; SSCI/2004, *supra* note 141, at 272, 484. An intelligence analyst stated that "the going-in assumption was we were going to war, so this NIE was to be written with that in mind. We were going to war, which meant American men and women had to be properly given the benefit of the doubt of what they would face . . . . That was what was said to us . . . . Remember, the conops [concept of operations] had already been published . . . . The conop order had been given months before, months. Deployments had already begun." SSCI/2004, *supra* note 141, at 505; *see also* JAMES BAMFORD, A PRETEXT FOR WAR 333-37 (2004); JAMES RISEN, STATE OF WAR 79-80 (2006); Walter Pincus, *Records Could Shed Light on Iraq Group*, WASH. POST, June 9, 2008, at A15; Julian Borger, *The Spies Who Pushed for War*, GUARDIAN, July 17, 2003, http://www.guardian.co.uk/ world/2003/jul/17/ iraq.usa; Chalmers Johnson, *Porter Goss' WIA—Worthless Intelligence Agency,* TOMDISPATCH.COM, Nov. 27, 2004, http://www.alternet.org/story/20600/; Carl Levin, *Remarks of Senator Carl Levin at the Paul Warnke Lecture on International Security at the Council on Foreign Relations*, Sept. 13, 2004, http://levin.senate.gov/newsroom/release.cfm?id=226066; Paul R. Pillar, *Intelligence, Policy, and the War in Iraq*, FOR. AFFAIRS, Mar. 2006, http://www.foreignaffairs.com/ articles/61503/paul-r-pillar/intelligence-policyand-the-war-in-iraq.

505. Bejesky, *Politico*, *supra* note 3, at 62-70 (claims were made in the media, there was war planning long before the NIE was produced, and intelligence reports did not support estimates); Bejesky, *Intelligence*, *supra* note 21, at 875-82 (analyzing the data and allegations made by the Bush administration); Bejesky, *PDP*, *supra* note 4, at 9-20 (the Pentagon's "independent military analysts" were a systematic and unabashed propaganda campaign to persuade the public); Jacobs, *supra* note 88, at 444-46, 449-50 ("[In mid-2002] the Administration had made its decision, lined up England as an ally, and planned and begun implementing a comprehensive strategic marketing campaign to persuade Congress members and the public to consent to the use of force.").

506. Lewis & Reading-Smith, *supra* note 28; *see supra* note 92; *see supra* Part III.C., Part IV.B.1, Part VI.A.1.

overemphasize risks and jeopardy and not adequately weigh lack of evidence.[507] Meanwhile, for the public *en mass* to reject a dominant perception, it must surmount under-mobilization and collective action problems.[508] Critics who did demand evidence were even labeled politically-biased and "anti-American."[509]

CONCLUSION

Approximately six months prior to the 2003 invasion of Iraq, top Bush administration officials began to inundate the media with unequivocal claims that Iraq illegally possessed chemical, biological, and nuclear weapon programs in violation of United Nations prohibitions and that the Iraqi government had ties to terrorist groups that would attack the United States.[510] Advocacy prompted renewed Security Council diplomacy on September 12, 2002, and a congressional authorization to use force on October 10, which was an authorization dependent on Iraq being a security threat to the U.S. and not being in compliance with all Security Council resolutions, and consistent with the response of other countries to 9/11.[511] U.N. weapon inspectors periodically updated the U.N. Security Council and the media for four months, and indicated that they had not uncovered WMD programs and that Iraq was complying with the inspection process; while the Bush administration countered updates with accusations that intelligence information indicated that Iraq was involved in deception.[512] When anonymous sources sometimes casted doubt on claims, Bush administration officials repeated the rhetoric and prevented disclosure of national security information.[513] The war followed without Security Council approval, and the Bush administration supplanted the justification for invasion by contending that the war was to "liberate the Iraqi people."[514] Investigations revealed that intelligence data was

507. The restoration effect says that if something is accepted, then the mind may view other information consistently. REISBERG, *supra* note 98, at 85; *see supra* note 303.

508. Daniel A. Farber, *Probabilities Behaving Badly: Complexity Theory and Environmental Uncertainty*, 37 U.C. DAVIS L. REV. 146, 170-71 (2003).

509. Kuhner, *supra* note 22, at 2384; Robert Bejesky, *From Marginalizing Economic Discourse with Security Threats to Approbating Corporate Lobbies and Campaign Contributions*, 12 CONN. PUB. INT. L.J. (*forthcoming* 2012).

510. Bejesky, *Weapon Inspections*, *supra* note 1, at 303-10.

511. *Id.* at 311-15; *see supra* Part III.B.

512. *See generally* Bejesky, *Weapon Inspections*, *supra* note 1 (discussing the Bush Administration's claims of Iraqi deception with regard to WMDs).

513. Bejesky, *Flow*, *supra* note 53, at 4-8, 22-28, 33-34, 48; *Bill Moyers Journal*, PBS, June 6, 2008, http://www.pbs.org/moyers/journal/06062008/transcript2.html.

514. Ackerman & Hathaway, *supra* note 81, at 464; Bejesky, *Politico*, *supra* note 3, at 102-06.

unconfirmed.[515] Misinformation and new scandals, such as torture and oil interests in Iraq, displaced this chronology from public attention.[516]

This Article used marketing and psychology principles and research to demonstrate why periodic polls conducted prior to and after the invasion revealed that an overwhelmingly high majority of Americans believed allegations involving WMDs and ties to al-Qaeda, even though successions of investigations proved claims were unsubstantiated.[517] First, 9/11 was a highly emotive event that led to a fear-based atmosphere, high presidential approval ratings, and patriotic support for national security proposals. Frequently-repeated allegations may create perceptions of palpability, particularly when associated with generalized and stereotyped dangers. The Bush administration dispensed public allegations that associated Iraq with 9/11, and maintained Iraq supported and harbored al-Qaeda members. The September 2001 AUMF was related to these allegations, but those allegations about Iraq were not confirmed. The populace was more apt to support military action due to the perception of said associations.

Second, for WMD allegations, top officials incessantly and unequivocally repeated that Iraq had chemical and biological weapons and a nuclear weapons program. Demeaning peril and vivid imagery were often invoked without a means to verify allegations. With a penchant to garner ratings by portraying emotive stories, the media complacently accepted allegations at face value. Americans perceived that the allegations were true. WMD allegations were not true, but if the population believes conclusions to be true, deductive reasoning processes and heuristics may goad perceptions to accept danger even without being presented with the data that would verify those conclusions. In this case, it is unsurprising that military action would be supported a as "Precautionary Principle" measure to confront a perceived but irrational risk.

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515. Bejesky, *Intelligence*, *supra* note 21, at 875-82.

516. Bejesky, *Flow*, *supra* note 53, at 22-28, 33-34; Bejesky, *PCA*, *supra* note 2, at 352-56; *see also* Bejesky, *PDP*, *supra* note 4; Robert Bejesky, *Geopolitics, Oil Law Reform, and Commodity Market Expectations*, 63 OKLA. L. REV. 193, 238-39, 216-18, 249-50 (2011); Robert Bejesky, *Currency Cooperation and Sovereign Financial Obligations*, 24 FLA. J. INT'L L., at 91, 99-104 (2012) (explaining that liberating Iraqis may have displaced attention from the dearth of economic gratuity during occupation.).

517. Bejesky, *PCA*, *supra* note 2, at 352-56; Bejesky, *Intelligence*, *supra* note 21, at 875-78; Bejesky, *PDP*, *supra* note 4, at 51-54.

Why Harlan Fiske Stone (Also) Matters

What One Republican Justice Nominated by a Staunchly Conservative President Would Likely Say About the FBI's Collection of Domestic Intelligence, the Constitutionality of the Affordable Care Act, the Partisan Judiciary, and the Rights of Religious Minorities Suspected of Disloyalty

ERIC SCHEPARD*

ABSTRACT

Harlan Fiske Stone has been largely overlooked in the recent legal literature even though his legacy should influence how we resolve contemporary legal problems. This article examines Stone's archived correspondence, his speeches and opinions, and numerous secondary sources to demonstrate why he is more important now than at any time since his death in 1946.

As Attorney General from 1924-25, Stone's decision to prohibit the Bureau of Investigation (BI, today's FBI) from spying on domestic radicals established a framework that should guide the troublesome relationship between domestic intelligence and law enforcement that reemerged after September 11, 2001. As an Associate Justice of the Supreme Court from 1925-41, Stone's visionary critiques of formalistic, extra-textual interpretations of Congress's power refute the Court's recent holding that the Commerce and Necessary and Proper Clauses do not authorize the Affordable Care Act's individual mandate. Even more importantly, Stone's devotion to judicial restraint when assessing the constitutionality of laws that he, his party, and the President who appointed him opposed, contrasts sharply with the troublingly partisan divisions of the current

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Court. Finally, Stone's dissent in *Minersville v. Gobitis*, though largely overlooked in the contemporary legal literature, bravely defended the rights of a religious minority suspected of disloyalty during a surge of national paranoia that mimics the public's current apprehension toward Muslim Americans.

This Article also analyzes less attractive aspects of Stone's legacy, including his appointment of J. Edgar Hoover to head the BI and his opinion upholding the military's mistreatment of aliens and citizens of Japanese descent during World War II. For largely good but for ill too, it will introduce Stone to twenty-first century audiences.

INTRODUCTION

Harlan Fiske Stone, Attorney General from 1924 to 1925, Associate Justice of the Supreme Court from 1925 to 1941, and Chief Justice from 1941 to 1946, was one of the most celebrated jurists of his time.[1] However, he has been largely overlooked in our own, even though his legacy should influence how we resolve contemporary legal problems.

As Attorney General, Stone's decision to prohibit the Bureau of Investigation (BI, today's FBI) from spying on domestic radicals established a framework that should guide the troublesome relationship between domestic intelligence and law enforcement that reemerged after September 11, 2001. As a Justice, Stone's visionary critiques of formalistic, extra-textual interpretations of Congress's power in *United States v. Butler*[2] and other cases refute the Court's recent holding[3] that the Commerce and Necessary and Proper Clauses do not authorize the Affordable Care Act's[4] individual mandate.[5] Perhaps more importantly, Stone's commitment to judicial restraint, even when assessing the constitutionality of laws inimical to his party, the President who appointed him, and his personal beliefs, imbued his decisions with a legitimacy lacking from those of our firmly partisan Court. Finally, Stone's dissent in *Minersville v. Gobitis*,[6] though largely overlooked in the contemporary legal literature, bravely defended the rights of a religious minority suspected of disloyalty during a surge of national paranoia that mimics the public's current apprehension toward Muslim Americans.

Despite Stone's significant contributions, recent scholarship has focused primarily on his contemporaries on the Court. Since 1994, at least one book has been devoted in whole or part to all of the major Justices with whom Stone served, including Oliver Wendell Holmes,[7]

1. *See infra* notes 49-52 and accompanying text.
2. 297 U.S. 1, 78 (1936).
3. Nat'l Fed'n of Indep. Bus. v. Sebelius, 132 Sup. Ct. 2566, 2593 (2012).
4. Patient Protection and Affordable Care Act, Pub. L. No. 111-148, 124 Stat. 119 (2010).
5. The provision is titled the "Requirement to Maintain Minimum Essential Coverage." 26 U.S.C.A. § 5000A (2010).
6. 310 U.S. 586, 601 (1940).
7. *See generally* G. Edward White, Oliver Wendell Holmes, Jr. (2006).

Louis Brandeis,[8] George Sutherland,[9] Benjamin Cardozo,[10] and Charles Evans Hughes,[11] as well as Felix Frankfurter, Hugo Black, William Douglas, and Robert Jackson.[12] Meanwhile legal journals regularly publish works devoted to Brandeis[13] and Holmes[14] and have recently published pieces devoted to Justices Willis Van Devanter and Pierce Butler, two of Stone's less distinguished contemporaries.[15] Articles by public intellectuals have also renewed interest in the New Deal Era Justices; for example, *The New Republic* published *Why Brandeis Matters*, by Jeffery Rosen, a lengthy article that argued persuasively that Brandeis's views still influenced contemporary debates about economics, privacy, and Zionism.[16] Stone, however, has faded from the limelight, an afterthought for almost two decades in the legal literature and the primary subject of no book since the 1950s.

Though this Article attempts to correct this imbalance, it is not a tribute. It will analyze some of Stone's less attractive decisions, including his appointment of J. Edgar Hoover to head the BI and his opinion upholding the military's mistreatment of aliens and citizens of Japanese descent during World War II. For largely good but for ill too, it will introduce Stone to twenty-first century audiences and show

8. *See generally* MELVIN UROFSKY, LOUIS D. BRANDEIS: A LIFE. (2009).

9. *See generally* HADLEY ARKES, THE RETURN OF GEORGE SUTHERLAND: RESTORING A JURISPRUDENCE OF NATURAL RIGHTS (1994).

10. *See generally* ANDREW L. KAUFMAN, CARDOZO (1998); RICHARD POLENBERG, THE WORLD OF BENJAMIN CARDOZO: PERSONAL VALUE AND THE JUDICIAL PROCESS (1997).

11. *See generally* JAMES F. SIMON, FDR AND CHIEF JUSTICE HUGHES: THE PRESIDENT, THE SUPREME COURT, AND THE EPIC BATTLE OVER THE NEW DEAL (2012).

12. *See generally* NOAH FELDMAN, SCORPIONS: THE BATTLES AND TRIUMPHS OF FDR'S GREAT SUPREME COURT JUSTICES (2010). A book on the Stone and Vinson Courts was published in 1997, but it focused on Felix Frankfurter, Hugo Black, and William O. Douglas, the purported leaders of the Court during Stone's Chief Justiceship. MELVIN I. UROFSKY, DIVISION AND DISCORD: THE SUPREME COURT UNDER STONE AND VINSON 1941-1953, at 8 (1997).

13. *See, e.g.*, Connie Davis Powell, "*You Already Have Zero Privacy. Get Over It!" Would Warren and Brandeis Argue for Privacy for Social Networking?*, 31 PACE L. REV. 146, 146-47 (2011); Neil M. Richards, *The Puzzle of Brandeis, Privacy, and Speech*, 63 VAND. L. REV. 1295, 1298 (2010).

14. *See, e.g.*, Irene M. Ten Cate, *Speech, Truth, and Freedom, An Examination of John Stuart Mill's and Oliver Wendell Holmes's Free Speech Defenses*, 22 YALE J. L. & HUMAN. 35, 39-41 (2010); Steven J. Heyman, *The Dark Side of the Force: The Legacy of Justice Holmes for First Amendment Jurisprudence*, 19 WM. & MARY BILL RTS. J. 661, 664-65 (2011); *see also* G. Edward White, *The Canonization of Holmes and Brandeis: Epistemology and Judicial Reputations*, 70 N.Y.U. L. REV. 576, 576 (1995) ("Holmes and Brandeis remain[ ] objects of academic fascination . . . .").

15. *See generally* Wallace Johnson, *Willis Van Devanter—A "Re-examination*," 1 WYO L. REV. 403 (2001); David R. Strass, *Pierce Butler: A Supreme Technician*, 62 VAN. L. REV. 695 (2009).

16. *See generally* Jeffrey Rosen, *Why Brandeis Matters: The Constitution and the Crash*, THE NEW REPUBLIC, July 22, 2010, at 19 (reviewing MELVIN UROFSKY, LOUIS D. BRANDEIS: A LIFE (2009)).

why he should be more influential now than at any time since his death in 1946.

This Article provides a fresh perspective on Stone's legacy based on correspondence at the Library of Congress's archives, his opinions and speeches, and secondary sources of information about him—many decades old. It gleans new insights about Stone and demonstrates the significance of his values to some of the legal problems of our time. It also catalogues the major publicly available sources of information about Stone to help initiate an overdue comprehensive reexamination of his life and career in light of recent scholarship on the era in which he lived.[17]

Part I briefly summarizes the key aspects of Stone's life and career as well as the flood of major scholarship devoted to him during his life and in the decade after his death. It then speculates on the causes of the noticeable decline in his judicial reputation and the lack of any major recent scholarship devoted to him.

Part II describes Attorney General Stone's termination of the BI's domestic spying following the Red Scare and his justification for selecting J. Edgar Hoover to run the BI. It then shows how the FBI's post 9/11 resumption of clandestine investigations of mosques, without evidence of criminal wrongdoing, erodes the wall Stone erected between law enforcement and domestic-intelligence collection to protect the people's rights and their safety.

Part III briefly situates Stone's commitment to judicial restraint within the Court's pre-1937 attacks on Congressional power. It then examines his *Butler* dissent in depth to show how and why its arguments and language should have and did influence Chief Justice Roberts's opinion in *National Federation of Independent Business v. Sebelius*, which upheld the individual mandate but rejected Congress's power to enact it under the Commerce and Necessary and Proper Clauses.[18]

Part IV documents the authenticity and singularity of Stone's devotion to judicial restraint by explaining how he upheld laws that conflicted with his personal political and economic beliefs and that directly violated those of his nominating President, Calvin Coolidge. It then argues that today's partisan Court may need a new Justice

17. Other highly pertinent topics that this article does not explore in depth include, among other things, Stone's leadership style as Chief Justice and his transformation of the law of personal jurisdiction in *Int'l Shoe Co. v. Washington*, 326 U.S. 310, 320-21 (1945).

18. Nat'l Fed'n of Indep. Bus. v. Sebelius, 132 S. Ct. 2566, 2587, 2592-94, 2608 (2012).

Stone—an appointee of a conservative Republican who nonetheless sustains legislation with which he disagrees—to bolster its legitimacy.

Finally, Part V examines the dark side of Stone's philosophy of restraint as expressed in his opinion upholding a curfew imposed on Japanese Americans during World War II. It contrasts Stone's decisions in the Japanese internment cases with his famous footnote four in *United States v. Carolene Products*[19] and his courageous but less famous dissent in *Gobitis*.[20] In that opinion, Stone defended the rights of the Jehovah's Witnesses, who were widely regarded at the time as a fascist sleeper cell, and reminded the nation that a democracy earns—and does not compel—the loyalty of its citizens.

I. A BRIEF OVERVIEW OF STONE'S LIFE AND AFTERLIFE IN THE LEGAL LITERATURE

Harlan Fiske Stone was born in 1872 to farmers who lived in Chesterfield, New Hampshire.[21] After graduating from Amherst College in 1894, a year ahead of his acquaintance, Calvin Coolidge, Stone taught high school science, but his extracurricular observations of a local court piqued his interest in practicing law.[22] In 1899, Stone graduated from Columbia Law School, where he later became a beloved professor and then Dean from 1910 until 1923.[23]

During World War I, Stone served—with great humanity, according to his biographer, Alpheus Thomas Mason—on a board investigating the sincerity of conscientious objectors to the draft.[24] Afterward, he risked his job and reputation by publicly condemning Attorney General A. Mitchell Palmer's infamous raids against suspected radicals.[25] Nevertheless, he appeared to agree generally with the philosophy of the pro-business wing of the Republican Party; in early writings or speeches, he castigated agrarian and labor radicals, doubted the

19. 304 U.S. 144, 152 n.4 (1937).

20. Minersville v. Gobitis, 310 U.S. 586, 601 (1940).

21. John W. Johnson, *Harlan Fiske Stone*, *in* THE SUPREME COURT JUSTICES: A BIOGRAPHICAL DICTIONARY 425 (Melvin Urofsky ed., 1994).

22. ALPHEUS THOMAS MASON, HARLAN FISKE STONE: PILLAR OF THE LAW 65-67 (1956).

23. Johnson, *supra* note 21, at 425; *see also* MASON, *supra* note 22, at 91-93 (discussing Stone's popularity as a teacher).

24. Alpheus Thomas Mason, *Harlan Fiske Stone: In Defense of Individual Freedom*, 51 COLUM. L. REV. 147, 147-50 (1951).

25. KENNETH ACKERMAN, YOUNG J. EDGAR, 6, 356-60 (2007); MASON, *supra* note 22, at 113-14. Ackerman mentions that "[o]f all the witnesses, Stone alone had no dog in this fight, no record of representing leftists, no question of credentials. He was the unbiased referee, and he had blown the whistle on the raids, ruling them clearly out of bounds." ACKERMAN, *supra*, at 360.

efficacy of activist government, and accepted the legitimacy of the judiciary's power to protect property rights and overturn economic regulations.[26] In 1923, he resigned as dean to become a partner at the Wall Street firm of Sullivan & Cromwell.[27]

He did not remain there long. In 1924, Coolidge plucked Stone from his lucrative practice to replace a holdover Attorney General from the Harding administration who had been implicated in its scandals.[28] As Attorney General, Stone prohibited the Department of Justice's (DOJ) BI from spying on radical groups, abolished its General Intelligence Division, and banned wiretapping.[29] Ironically, however, he is perhaps best known for selecting J. Edgar Hoover, then twenty-nine years old, as the BI's chief.[30] In January 1925, less than a year into Stone's term as Attorney General, Coolidge nominated Stone to the Supreme Court—even though Stone recommended Benjamin Cardozo[31]—and he was confirmed overwhelmingly the following month.[32]

Most observers, including the conservative Chief Justice Taft, who pressed Coolidge to appoint Stone, George Norris, a progressive senator who condemned Coolidge's nomination of a "Morgan Bank Lawyer," and Felix Frankfurter, then a Professor at Harvard, assumed that Stone would join the Court's pro-business wing.[33] They severely

26. *See* G. EDWARD WHITE, THE AMERICAN JUDICIAL TRADITION: PROFILES OF LEADING AMERICAN JUDGES 170 (3d ed. 2007) ("Stone exhibited, in the years before his appointment to the Court, a singularly negative attitude toward [social experimentation]"); Merle Fainsod, *Public Control of Business: Selected Opinions by Harlan Fiske Stone*, 54 HARV. L. REV. 160, 162 (1940) ("Harlan F. Stone was known as a Morgan lawyer. He combined a lucrative corporate law practice with service, first as Professor and later as Dean of the Columbia Law School Faculty. His early conservative predilections were not concealed."); Miriam Galston, *Activism and Restraint: The Evolution of Harlan Fiske Stone's Judicial Philosophy*, 70 TUL. L. REV. 137, 144 n.20 (1995) ("Several commentators note that, when his appointment to the Supreme Court was announced, Stone was generally perceived as a friend of big business, a political conservative, and likely to align himself with the conservative majority of the Court."); MASON, *supra* note 22, at 55, 62-63, 115-17, 208.

27. Johnson, *supra* note 21, at 425; *see also* MASON, *supra* note 22, at 143.

28. MASON, *supra* note 22, at 141-44.

29. *Id.* at 149-53; *see* ACKERMAN, *supra* note 25, at 2-7; CHARLES A. BEARD, *Prefatory Note to* SAMUEL J. KONEFSKY, CHIEF JUSTICE STONE AND THE SUPREME COURT, at xviii (1945).

30. Johnson, *supra* note 21, at 425.

31. Milton Handler, *Stone's Appointment by Coolidge*, XVI SUPREME CT. HIST. SOC'Y Q. 3, 1995 at 4.

32. Johnson, *supra* note 21, at 425; MASON, *supra* note 22, at 198-99; *see* MASON, *supra* note 22, at 182-85 (discussing whether Coolidge "kicked" Stone upstairs). Stone was also the first nominee to the Court to appear before a Senate committee for questioning. UROFSKY, *supra* note 12, at 10.

33. H.N. HIRSCH, THE ENIGMA OF FELIX FRANKFURTER 72, 79 (1981); Richard D. Friedman, *Tribal Myths: Ideology and the Confirmation of Supreme Court Nominations*, 95 YALE L.J.

misjudged him. Despite initially siding with the conservatives,[34] throughout the 1920s and 1930s Stone joined frequently with liberal Justices Brandeis, Holmes, and Holmes's replacement, Cardozo, to oppose the Court's attempts to limit Congressional and state power to regulate the economy.[35] Indeed, in the 1930s, when the conservative "Four Horsemen"[36] forged a majority with one or both of the more moderate Justices[37] to strike down New Deal legislation and other government regulations of the economy, Stone's blistering dissents propelled him to the leadership of the Court's liberal wing, inspired the New Dealers, and buttressed their suspicion that the Court's conservative Justices, and not the Constitution itself, had caused their problems.[38]

President Roosevelt's 1937 attempt to pack the Court with like-minded Justices failed, but natural attrition soon allowed him to appoint men who broadly approved of the New Deal and government regulation of the economy.[39] The Court's focus then largely shifted to its responsibility (or lack thereof) to protect civil liberties, criminal defendants, and minorities.[40] Stone heralded this transformation in his landmark footnote four in *United States v. Carolene Products*,[41]

1283, 1294 (1986); MASON, *supra* note 22, at 198-99; Johnson, *supra* note 21, at 426; Mason, *supra* note 24, at 147.

34. Johnson, *supra* note 21, at 426; UROFSKY, *supra* note 8, at 577-78.

35. MASON, *supra* note 22, at 253; UROFSKY, *supra* note 8, at 577; *see* DAVID P. CURRIE, THE CONSTITUTION IN THE SUPREME COURT: THE SECOND CENTURY 1888-1986, at 205-06 (1990).

36. The term the "Four Horsemen" refers to Justices James McReynolds, Sutherland, Van Devanter, and Butler.

37. The more moderate Justices refer to Justice Owen Roberts and Chief Justice Charles Evans Hughes.

38. JOHNSON, *supra* note 21, at 426; JEFF SHESOL, SUPREME POWER: FRANKLIN ROOSEVELT VS. THE SUPREME COURT 2, 188-89, 232 (2010); UROFSKY, *supra* note 12, at 10 ("With the retirement of Holmes and the aging of Brandeis, Stone took a more vocal position in the 1930s, and by the time Hughes retired, Stone had emerged as the chief opponent of judicial conservatism."); *see* WILLIAM E. LEUCHTENBURG, THE SUPREME COURT REBORN 215 (1995); WILLIAM G. ROSS, THE CHIEF JUSTICESHIP OF CHARLES EVANS HUGHES, 246 (2007); John P. Frank, *Harlan Fiske Stone, An Estimate*, 9 STAN. L. REV. 621, 625-26 (1957) (reviewing ALPHEUS THOMAS MASON, HARLAN FISKE STONE: PILLAR OF THE LAW 65-67 (1956)).

39. JOHNSON, *supra* note 21, at 429; *see* ALLISON DUNHAM, *Mr. Chief Justice Stone*, *in* MR. JUSTICE: BIOGRAPHICAL STUDIES OF TWELVE SUPREME COURT JUSTICES 229 (Allison Dunham and Philip B. Kurland eds., 1964); *see also* CURRIE, *supra* note 35, at 244-334.

40. CURRIE, *supra* note 35, at 244-334.

41. United States v. Carolene Prods. Co., 304 U.S. 145, 152-53 n.4 (1938); s*ee* CURRIE, *supra* note 35, at 244 ("Appropriately, it was Justice Stone—perhaps the principal architect of the whole revolution—who summed it all up in the most clairvoyant and best-known footnote in Supreme Court history . . . . Stone established the Court's agenda for the next fifty years."); UROFSKY, *supra* note 12, at 11 ("Stone's footnote [four in Carolene Products] [ ] has been cited in hundreds of cases . . . .").

which declared that the lenient scrutiny to which the Court would henceforth subject economic legislation may not extend to legislation affecting the Bill of Rights, the political process, and discreet and/or insular minorities. In *Gobitis*, one of the first tests of the Court's new jurisprudential regime, eight Justices agreed that school children did not have a constitutional right to refuse to salute the flag.[42] Justice Stone dissented alone. In a dramatic about-face, three years later, the Court overturned *Gobitis*.[43] But this case was just one of many; scholars writing in the middle of the twentieth century repeatedly observed that Stone's dissenting opinions and positions became law more than those of any other Justice.[44]

In 1941, as the Senate unanimously confirmed Roosevelt's nomination of Stone to replace Charles Evans Hughes as Chief Justice, Senator Norris publicly admitted that he had misjudged him.[45] Until Stone's death of a massive cerebral hemorrhage in 1946, his oft-divided Court dealt most prominently with cases that emerged from World War II.[46] In *Hirabayashi v. United States*,[47] Stone, writing for a Court united in the result, upheld the military's imposition of a curfew on citizens and aliens of Japanese descent; in *Korematsu v. United States*,[48] he joined a six-justice majority to uphold their exclusion from the west coast.

During Stone's life and immediately after his death, scholars published numerous articles,[49] and Samuel Konefsky a full-length book,[50] that recognized and examined Stone's vast contributions to multiple

42. *See generally* Minersville Sch. Dist. v. Gobitis, 310 U.S. 586 (1940).

43. Bd. of Educ. v. Barnette, 319 U.S. 624, 642 (1943); Johnson, *supra* note 21, at 431-32.

44. *E.g.*, DUNHAM, *supra* note 39, at 229; Noel T. Dowling, *The Methods of Mr. Justice Stone in Constitutional Cases*, 41 COLUM. L. REV. 1160, 1162 n.3 (1941); Warner W. Gardner, *Mr. Chief Justice Stone*, 59 HARV. L. REV. 1203, 1208 (1946); *see also* Richard A. Givens, *Chief Justice Stone and the Developing Functions of Judicial Review*, 47 VA. L. REV. 1321, 1324 (1961) ("An impressive number of [Stone's] dissents have later become law, whereas surprisingly few of his opinions for the Court have been severely shaken by subsequent decisions.").

45. MASON, *supra* note 22, at 372-73.

46. UROFSKY, *supra* note 12, at 42, 47-84, 137; Frank, *supra* note 38, at 626-27; Johnson, *supra* note 21, at 434.

47. 320 U.S. 81, 83-105 (1943).

48. 323 U.S. 213, 215-224 (1944).

49. *See* Dowling, *supra* note 44; Fainsod, *supra* note 26; Gardner, *supra* note 44. *See generally* Elliot E. Cheatum, *Stone on Conflict of Laws*, 46 COLUM. L. REV. 719 (1946); Noel T. Dowling, Elliot E. Cheatham & Robert L. Hale, *Mr. Justice Stone and the Constitution,* 36 COLUM. L. REV. 351, (1936); Walter Gelhorn, *Stone on Administrative Law*, 46 COLUM. L. REV. 734, (1946); Learned Hand, *Chief Justice Stone's Conception of the Judicial Function*, 46 COLUM. L. REV. 696, (1946); Roswell Magill, *Stone on Taxation*, 46 COLUM. L. REV. 747, (1946); Herbert Wechsler, *Stone and the Constitution*, 46 COLUM. L. REV. 764, (1946).

50. KONEFSKY, *supra* note 29.

fields of law. Herbert Wechsler, Stone's former law clerk,[51] credited him as the major figure responsible for transforming into doctrine the theories of judicial restraint and robust protections of civil liberties first developed by Justices Brandeis and Holmes.[52] Warner W. Gardner, another former clerk,[53] recognized him as "among the great Justices in the history of the Supreme Court."[54]

However, following the publication in 1956 of Mason's oft praised,[55] although arguably too partial,[56] biography of Stone,[57] in which he declared Stone the equal of Holmes and Brandeis,[58] the pace of Stone's scholarly examination declined, as did his reputation, at least to an extent. A consensus emerged that as Chief Justice, Stone too freely tolerated dissents and concurrences among his feuding, egotistical brethren, allowed conference discussions to persist too long, administered a slow docket, drifted rightward, and was ultimately eclipsed in importance by Roosevelt appointees Justices Black, Douglas, Frankfurter, and Jackson.[59] One scholar, in a 1990 book,

51. Alpheus Thomas Mason, *Harlan Fiske Stone, in* THE JUSTICES OF THE SUPREME COURT 1789-1969: THEIR LIVES AND MAJOR OPINIONS 2227 (Leon Friedman & Fred L. Israel eds. 1969).

52. Wechsler, *supra* note 49, at 770-71 ("The decades in question transformed the country: there was a change hardly less than revolutionary in the dominant legal thought. If Justice Stone was a spectator of the social and economic development, his was very close to the major role in the authoritative definition of its impact upon the fundamental law. . . . The lines had been drawn by Holmes and reinforced by Brandeis . . . By 1937, in the shadow of the Court plan, the dissenters had become a majority of the Court. When the changes in personnel had been effected, their protest had become the major premises of the Court. If Justice Stone was a junior in the pioneering effort, it fell to him to carry through the victory and then to consolidate the gain.").

53. SHESOL, *supra* note 38, at 339.

54. Gardner, *supra* note 44, at 1203.

55. *See, e.g.*, SHAWN FRANCIS PETERS, JUDGING JEHOVAH'S WITNESSES 67 (2000) (describing it as "splendid"); UROFSKY, *supra* note 12, at 10 n.3 (describing it as "a model of judicial biography"); Galston, *supra* note 26, at 142 (describing it as "masterful" and "comprehensive"); Johnson, *supra* note 21, at 434 (describing it as "masterful").

56. *See* Kurland, *supra* note 49, at 1325 (noting Mason's "strong bias" on behalf of his subject).

57. MASON, *supra* note 22.

58. *Id.* at 774 ("Among the great figures in American constitutional law, only Holmes, Brandeis, and Stone clearly emerged as a team and as a trio of equals.").

59. *See, e.g.*, HENRY J. ABRAHAM, JUSTICES, PRESIDENTS, AND SENATORS: A HISTORY OF U.S. SUPREME COURT APPOINTMENTS FROM WASHINGTON TO CLINTON 148 (1999) ("[Stone] lacked the executive capacity, the tactical decisiveness, and marshalling ability of a Taft or Hughes for the center chair. Allowing himself to be drawn into too many endless conference squabbles, he could hardly be regarded as an effective chief."); C. HERMAN PRITCHETT, THE ROOSEVELT COURT: A STUDY IN JUDICIAL POLITICS AND VALUES 1937-1947 261 (1948) ("The late Justice Stone ended his judicial career well to the right of the Court on which he had once been noted for dissents from the left."); JOHN PAUL STEVENS, FIVE CHIEFS 36 (2011) ("Though a thorough and brilliant scholar, [Stone] was an exceptionally poor presiding officer during the Court's deliberations in conference, which sometimes consumed more than two days."); UROF-

praised Stone as the Justice most responsible for ushering in modern constitutional interpretation in a variety of fields.[60] But by the 1990s, most scholars likely agreed generally with one assessment of Stone, which regarded him as a competent Justice who failed to achieve legal immortality in part because of his decisions in the Japanese internment cases.[61]

The indifference toward Stone manifested in various ways. He was not included among the "also rans" in one 1995 ranking of the great justices, let alone the top ten,[62] and had slipped from among the top ranked justices in others polls as well.[63] Meanwhile, articles examining footnote four of *Carolene Products*, and Stone's role authoring it, appeared until the mid 1990s.[64] But the last major piece devoted to Stone's legal reasoning—on the evolution of his preference for judicial restraint in economic matters—was published in 1995.[65]

Stone has been examined in a recent spate of scholarly examination of the period in which he served on the Court. In the last few years, noted scholar Noah Feldman wrote a book about Justices

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SKY, *supra* note 12, at 8 (observing that Justices Frankfurter, Black, and Douglas emerged as the leaders on the Stone Court); Frank, *supra* note 38, at 621 ("As a chief justice, [Stone] was strikingly unsuccessful."); *id.* at 629 (noting that Stone failed to unify his Court, excessively tolerated dissenting and concurring opinions, and did not expediently manage the Court's docket).

60. CURRIE, *supra* note 35, at 334 ("In his twenty years on the Bench, Harlan F. Stone had done more perhaps than any other Justice to bring law into the twentieth century. We are indebted to him for one of the most effective protests against the old order and for the authoritative program of the new. He almost singlehandedly wrote the modern law of intergovernmental immunity, commerce clause preemption, full faith and credit, extraterritorial taxation, and personal jurisdiction. Next to Marshall and Holmes, Stone may well have been the most influential Justice yet to have sat in the Court.").

61. *See* Frank, *supra* note 38, at 624 ("[Stone] was a substantial, but not ground-breaking adherent of the rights of man."); Johnson, *supra* note 21, at 434 ("Judged against the justices with whom he served, Stone should receive high but not top marks . . . . As a legal writer, he rose to brilliance on occasion, as in his *Darby* majority opinion or his *Gobitis* dissent, but his prose did not consistently sparkle as did that of Holmes and Cardozo. And as sensitive as Stone was to civil liberties, he failed to weigh in against the egregious 'internment' of Japanese Americans during World War II."); *see also* GEOFFREY STONE, FREE SPEECH IN WARTIME 298 (2004) (noting Stone's failure to protest internment despite his previous support for civil liberties).

62. *See generally* Bernard Schwartz, *Supreme Court Superstars: The Ten Greatest Justices*, 31 TULSA L. REV. 93 (1995-96).

63. William G. Ross, *The Ratings Game: Factors that Influence Judicial Reputation*, 79 MARQ. L. REV. 401, 421 (1996) ("Similarly, it is interesting that Hughes, who ranked sixth in the 1970 Blaustein-Mersky survey, and Stone, who ranked eighth, fell to ninth and twelfth place, respectively, in the 1993 update and do not appear among the top ten justices in any of the three 1992 Pederson-Provizer surveys.").

64. *See generally* Peter Linzer, *The Carolene Products Footnote and the Preferred Position of Individual Rights: Louis Lusky and John Hart Ely v. Harlan Fiske Stone*, 12 CONST. COMMENT. 277(1995); Mathew Perry, *Justice Stone and Footnote 4*, 6 GEO. MASON U. C.R. L.J. 35 (1996); Lewis F. Powell Jr., *Carolene Products Revisited*, 82 COLUM. L. REV. 1087(1982).

65. Galston, *supra* note 26.

Frankfurter, Jackson, Douglas, and Black that largely reaffirmed the consensus that they led Stone's fractured Court.[66] Meanwhile, Jeff Shesol's masterful *Supreme Power* discussed Stone's prominent role in the Court-packing controversy.[67] Stone was portrayed largely as J. Edgar Hoover's dupe in a recent biography of Hoover,[68] and in a small part in Clint Eastwood's 2011 movie about Hoover.[69] Nonetheless, Edward White has rightly observed that the legal academy has lavished more attention and praise on Brandeis and Holmes than on Stone.[70] And recently, it seems, almost all but Stone have received significant scholarly attention.[71]

One can only speculate on the causes of Stone's neglect. Perhaps scholars believed that Konefsky's evaluation and Mason's comprehensive biography said all there is to say.[72] Perhaps scholars had lost interest by the time Stone's papers became available to the public in 1975, almost thirty years after his death.[73] Perhaps Stone's apparent leftward shift during the New Deal or his apparent rightward shift as Chief Justice alienated those searching for an ideological hero. Perhaps scholars simply thought that other Justices wrote more entertaining opinions.[74] Perhaps Columbia does not promote its alumni on the Supreme Court as well as Harvard.[75] In any event, while Stone has not faded into obscurity, as one 1996 article suggested, he has faded

66. FELDMAN, *supra* note 12, at 204-205. Feldman does uniquely observe that Stone's seemingly endless conference-discussions helped develop the other Justices' coherent jurisprudential theories. *Id.*

67. SHESOL, *supra* note 38, *passim*.

68. ACKERMAN, *supra* note 25, at 1-7, 355-63, 371-81.

69. J. EDGAR (Warner Brothers 2011).

70. White, *supra* note 14, at 620.

71. *See supra* notes 7-15 and accompanying text.

72. William Ross speculates that the lack of a recent biography on Stone accounts for his fade from the limelight. Ross, *supra* note 63, at 427.

73. Elliot A. Brown, Harlan Fiske Stone and His Law Clerks 8 (1965) (unpublished manuscript) (on file with Columbia University Law Library).

74. Ross, *supra* note 63, at 441 (Robert C. Post contends that Holmes and Brandeis are more highly regarded than Stone, even though Post believes that Stone was the "most modernist" justice of the 1920s, because 'Holmes and Brandeis simply write better and smarter opinions than their contemporaries. Their work glows with competence and mastery and style. It leaps off the page, in part because it points so directly to what modern eyes view as essential.'"); Warner W. Gardner, a fervent admirer of Stone, nonetheless considered his prose "rather labored." Gardner, *supra* note 44, at 1205.

75. *Id.* at 425 n.61 ("Professor Hoffer contends that [t]here's no question that Frankfurter was a relentless promoter, but you have to go beyond Frankfurter. This is a Harvard Law School program, a form of Harvard Law School's absolutely magnificent self-adoration project . . . . Frankfurter taught them how to do it. That's why Holmes is canonized, not [Harlan Fiske] Stone; because Columbia doesn't do it that well.").

from the limelight.[76] The next four sections will attempt to return him to center stage.

II. "A MENACE TO FREE INSTITUTIONS": ATTORNEY GENERAL STONE AND DOMESTIC INTELLIGENCE IN THE AFTERMATH OF THE RED SCARE AND 9/11

To understand the most enduring legal precedent Stone established before joining the Court, it is necessary to examine briefly the condition of the DOJ, and its BI, when Stone became Attorney General in 1924. In the spring of 1919, as paranoia engulfed the nation following the Russian Revolution and a rash of intense labor violence, bombs exploded simultaneously in eight cities, including outside the house of President Woodrow Wilson's Attorney General A. Mitchell Palmer.[77] The massive federal investigation that followed failed to apprehend the perpetrators,[78] but under Palmer's direction, the BI detained and brutalized thousands of suspected agitators for extended periods, often without charge or even evidence of their sympathy for radicalism, let alone participation in a crime.[79] To facilitate the investigation, Palmer established the BI's Intelligence Division, headed by twenty-four year-old J. Edgar Hoover. Even after the Red Scare subsided, Hoover's agents infiltrated and wiretapped suspected radical groups, lawful organizations allegedly influenced by suspected radicals (many of whom were black), and political opponents of the BI.[80] Fittingly, the BI employed a wide variety of corrupt, partisan, and unqualified agents to execute its unsavory tasks.[81]

Upon his appointment as Attorney General, Stone abolished the Intelligence Division and prohibited the BI from investigating anything other than violations of the law, which did not and does not

76. *Id.* at 427.

77. ACKERMAN, *supra* note 25, at 20-26; STONE, *supra* note 61, at 220-22.

78. ACKERMAN, *supra* note 25, at 394.

79. FINAL REPORT OF THE SENATE SELECT COMM. TO STUDY GOVERNMENT OPERATIONS WITH RESPECT TO INTELLIGENCE ACTIVITIES, S. REP. NO. 94-755 BOOK III, 383-84 (1976) [hereinafter CHURCH COMMITTEE REPORT]; ACKERMAN, *supra* note 25, at 1-8; STONE, *supra* note 61, at 223-24.

80. CURT GENTRY, J. EDGAR HOOVER: THE MAN AND HIS SECRETS 62, 79 (1991); *see also* CHURCH COMMITTEE REPORT, *supra* note 79, at 382-83; RHODRI JEFFREYS-JONES, THE FBI: A HISTORY 73-74, 84 (2007); RICHARD E. MORGAN, DOMESTIC INTELLIGENCE: MONITORING DISSENT IN AMERICA 27-29 (1980); STONE, *supra* note 61, at 222-23.

81. ACKERMAN, *supra* note 25, at 2; MASON, *supra* note 22, at 149.

include adhering to radical political beliefs.[82] He justified his reforms in a succinct statement to the press:

> There is always the possibility that a secret police system may become a menace to free government and free institutions because it carries with it the possibility of abuses of power which are not always quickly apprehended or understood. The Bureau of Investigation is not concerned with political or other opinions of individuals. It is concerned only with their conduct and then only with such conduct as is forbidden by the laws of the United States. When a police system passes beyond these limits, it is dangerous to the proper administration of justice and to human liberty, which it should be our first concern to cherish.[83]

Privately, Stone expressed even greater outrage at the BI's violations of the rights of innocent civilians. Although Stone did not categorically reject the use of a "secret police," he wrote to Felix Frankfurter near the end of his tenure as Attorney General: "I could conceive of nothing more despicable nor demoralizing than to have public funds . . . used . . . to shadow[ ] people who are engaged in legitimate practices in accordance with the constitution of this country and the law of this country."[84] Stone also believed his reforms protected more than civil liberties by promoting improved relations between the public and law enforcement:

> I am firmly of the opinion that officials of the Department of Justice can more effectively perform their duties by acting the part of gentlemen than by resorting to tactics of a different character . . . . The Agents of the Bureau of Investigation are being impressed with the fact *that the real problem of law enforcement is in trying to obtain the cooperation and sympathy of the public* and that they cannot hope

82. CHURCH COMMITTEE REPORT, *supra* note 79, at 388-89; MAX LOWENTHAL, THE FEDERAL BUREAU OF INVESTIGATION 297-98 (1950); MASON, *supra* note 22, at 149; MORGAN, *supra* note 80, at 30; Samuel J. Rascoff, *Domesticating Intelligence,* 83 S. CAL. L. REV. 575, 600 (2010) ("In response to alleged intelligence abuses by the FBI during the "Red Scare," then-Attorney General Harlan Fiske Stone . . . mandat[ed] that the FBI not be concerned with the opinions of individuals, political or otherwise . . . .").

83. A couple of sources attribute this quote to a May 10, 1924, article in the *New York Times*. LOWENTHAL, *supra* note 82, at 298, 515; MASON, *supra* note 22, at 153, 826. However, the author, with the assistance of research staff at American University's Pence Law Library, could not find it in any issue of the *New York Times*. The author found the most contemporaneous source of the quote in a February 1940 letter that Senator George Norris read into the Congressional record. 86 CONG. REC. 5642 (May 7, 1940). Because the quote has been cited numerous times, the author will assume that Stone made it publicly.

84. Letter from Harlan Fiske Stone, Att'y Gen., United States to Felix Frankfurter, Professor, Harvard Law School (February 9, 1925) (on file with Library of Congress).

> to get such cooperation until they . . . merit the respect of the public.[85]

Thus, Stone placed the BI squarely on the "law-enforcement" side of a wall he erected between law enforcement and domestic-intelligence collection to protect the people's rights *and* to protect their safety.

Nonetheless, Stone chose J. Edgar Hoover as the BI's temporary head in April 1924 and then permanent head that December.[86] During his near fifty-year reign over the BI/FBI, Hoover almost compulsively directed agents to investigate political and religious groups without evidence of their participation in criminal activity.[87] In retrospect Stone's selection of Hoover seems particularly egregious because Stone knew of Hoover's participation in the Palmer raids.[88] Indeed, one of Hoover's biographers portrays Stone as Hoover's dupe.[89] An article trumpeting Stone's example as a defender of civil liberties for the twenty-first century must evaluate his responsibility for appointing Hoover, one of the great "civil-liberties disaster(s)" of the twentieth century.[90]

Context tempers the severity of history's judgment of Stone's appointment of Hoover. Stone chose Hoover because of his reputation as an honest and effective administrator and his promise to professionalize the BI's corrupt, incompetent, and partisan agents.[91] Hoover's excuse for his participation in the Palmer Raids—that he merely followed the orders of his superiors—seemed plausible considering that at the time of the Raids, the DOJ had only recently hired Hoover, a then recent law graduate in his mid-twenties.[92] Furthermore, Secretary of Commerce Herbert Hoover (no relation) and Mabel Willebrandt, the nation's chief prohibition officer and first female assistant Attorney General, vouched for Hoover.[93] Indeed, Hoover also convinced Roger Baldwin, the head of the ACLU, of his sincere opposi-

85. *Id.* (emphasis added).

86. GENTRY, *supra* note 80, at 127, 142.

87. ACKERMAN, *supra* note 25, at 1-8; Tom Lininger, *Sects, Lies, and Videotape: The Surveillance and Infiltration of Religious Groups*, 89 IOWA L. REV. 1201, 1231 (2004).

88. ACKERMAN, *supra* note 25, at 6-7, 380; CHURCH COMMITTEE REPORT, *supra* note 79, at 389.

89. ACKERMAN, *supra* note 25, at 1-8, 372-81.

90. Floyd Abrams, Partner, Cahill Gordon & Reindell, Address at the University of Pennsylvania Journal of Constitutional Law Symposium: The First Amendment and the War Against Terrorism (October 2002), *in* 5 U PA. J. CONST. L. 1, 6 (2002).

91. ACKERMAN, *supra* note 25, at 2-3, 377; MASON, *supra* note 22, at 150-51.

92. ACKERMAN, *supra* note 25, at 7, 377.

93. *Id.* at 375-78; MASON, *supra* note 22, at 150; *see* GENTRY, *supra* note 80, at 126.

tion to surveillance of radicals.[94] A former professor, Stone thought of Hoover as a talented, if ill-tutored pupil, who could thrive under the right guidance.[95] As he explained in a letter to Felix Frankfurter:

> As Assistant Director [Hoover] has given a fine exhibition of capacity and straightforwardness. He has been zealous in the reform of the Bureau and has done his work with a thoroughness and intelligence which has been most gratifying . . . . Of course, it is inevitable that the character of his administration will be affected by the attitude of the Attorney General. If Hoover is given a chance, he will make good in a way which would be gratifying to all those . . . who believe that there is a better way of conducting investigations that the old-fashioned detective methods.[96]

Frankfurter's response reminded Stone of Hoover's participation in the Palmer Raids,[97] but Stone replied that Hoover's superiors would determine whether Hoover used his talents for good or ill:

> I note too, [your concerns] about Hoover. I suppose, in his case . . . one must take the fat with the lean. I can only say that I have no question but under my guidance he would carry forward the bureau to better things. Neither he nor any one else in that position would be likely to accomplish that result under an Attorney General who was not sympathetic with the liberal view of what the bureau should do.[98]

Stone wrote these letters after his nomination to the Supreme Court on January 5, 1925.[99] Perhaps, then, Stone naively believed—or hoped—that he or similarly conscientious, liberal-minded mentors would guide or at least control Hoover in the future. A more thor-

94. CHURCH COMMITTEE REPORT, *supra* note 79, at 389; ACKERMAN, *supra* note 25, at 379; GENTRY, *supra* note 80, at 138-40; DONALD OSCAR JOHNSON, THE CHALLENGE TO AMERICAN FREEDOMS: WORLD WAR I AND THE RISE OF THE AMERICAN CIVIL LIBERTIES UNION 174-75 (1963); ATHAN G. THEOHARIS & JOHN STUART COX, THE BOSS: J. EDGAR HOOVER AND THE GREAT AMERICAN INQUISITION 87 (1988); TIM WEINER, ENEMIES: A HISTORY OF THE FBI 61 (2012). Notably, only Felix Frankfurter, on whom Hoover kept a file, remained suspicious. ACKERMAN, *supra*, at 380.

95. Indeed, Stone's and Hoover's mentor-mentee relationship continued after Stone's confirmation to the Supreme Court. MASON, *supra* note 22, at 152; THEOHARIS & COX, *supra* note 94, at 89.

96. Letter from Harlan Fiske Stone, Att'y Gen., United States to Felix Frankfurter, Professor, Harvard Law School (Jan. 19, 1925) (on file with Library of Congress).

97. Letter from Felix Frankfurter, Professor, Harvard Law School to Harlan Fiske Stone, Att'y Gen., United States (Jan. 22, 1925) (on file with Library of Congress).

98. Letter from Harlan Fiske Stone, Att'y Gen., United States, to Felix Frankfurter, Professor, Harvard Law School (Jan. 24, 1925) (on file with Library of Congress).

99. MASON, *supra* note 22, at 181.

ough investigation of Hoover and his files may have convinced him that Hoover posed a threat regardless of his supervisor.[100]

But Hoover proved Stone correct that under the right circumstances, he would provide much more "fat" than "lean." In the decade beginning with Stone's tenure as Attorney General, Hoover accomplished Stone's goals spectacularly, transforming the BI into a professional, scientific, non-partisan, crime-fighting force that promoted agents based primarily on merit.[101] In addition, Hoover largely curtailed the BI's intelligence gathering operations, even if its acceptance and maintenance of information on radicals provided by outside sources complied only with the letter, and not the spirit, of Stone's prohibition.[102] Hoover resumed widespread spying in the mid–1930s only after his ultimate superior, President Roosevelt, requested more information on domestic Fascists and Communists.[103] But when Stone wrote Dean Young B. Smith in 1932 that Hoover fought crime using "enlightened methods,"[104] his assessment was largely accurate.

In any event, the full irony of Stone's selection of Hoover would not emerge until after both men had died. In 1976, in the wake of the Church Committee's Congressional investigation of intelligence

100. *See* ACKERMAN, *supra* note 25, at 7.

101. *See, e.g.*, ACKERMAN, *supra* note 25, at 4-5, 379, 403-04 ("Once installed in the new post, Edgar drew almost universal praise for his reorganization of the Bureau of Investigation under Harlan Stone in the mid-1920s. Even Felix Frankfurter complimented it."); GENTRY, *supra* note 80, at 129-33; MASON, *supra* note 22, at 151-52; RALPH DE TOLEDANO, J. EDGAR HOOVER: THE MAN AND HIS TIME 91 (1973) ("The Bureau had become what Harlan Fiske Stone had envisioned—efficient and enforcing laws without fear or favor . . ."); WEINER, *supra* note 94, at 63.

102. *See* ACKERMAN, *supra* note 25, at 405 ("Edgar mostly stayed away from tracking radicals and communists during the late 1920s and early 1930s."); GENTRY, *supra* note 80, at 141 ("Contrary to Hoover's pledge to both Baldwin and Stone, the Bureau never stopped collecting and filing away information on alleged radicals."); MORGAN, *supra* note 80, at 30 ("For the next decade [after Stone appointed Hoover], it seemed the bureau indeed was out of the domestic intelligence business."); THEOHARRIS & COX, *supra* note 94, at 92-93; Michael R. Belknap, *Blaming it on the Liberals,* 68 TEX. L. REV. 1315, 1332-33 (1990) (reviewing WILLIAM W. KELLER, THE LIBERALS AND J. EDGAR HOOVER (1989)) ("[Hoover's Agency] largely abandoned the collection of domestic political intelligence for more than a decade" after Stone became Attorney General.); WEINER, *supra* note 94, at 63 ("[Harlan Fiske Stone] watched over Hoover, and the new director knew it. To that end, Hoover hewed to Stone's edicts."); *id.* ("[F]or the next decade, [Hoover] kept his spying operations small and tightly focused . . . . Throughout the rest of the 1920s, Hoover and the Bureau tracked the work of American Communists with the help of paid informers, Party defectors, police detectives, and State Department officials."); *see also* Robert Post, *Federalism, Positive Law, and the Emergence of the American Administrative State: Prohibition in the Taft Court Era*, 48 WM. & MARY L. REV. 1, 140 n.467 (2006) (documenting Hoover's description of his crackdown against agents' use of illegal investigative methods).

103. ACKERMAN, *supra* note 25, at 405; STONE, *supra* note 61, at 248.

104. Letter from Harlan Fiske Stone, Justice, Supreme Court of the United States to Young B. Smith, Dean, Columbia Law School (Apr. 18, 1932) (on file with Library of Congress).

abuses during the Hoover era, Attorney General Edward Levi promulgated guidelines that prevented the FBI from investigating a political or religious group without first producing substantial evidence of its criminal activity.[105] The Levi Guidelines "embodied values similar to those affirmed by Attorney General Harlan Fiske Stone in 1924 when he ordered the FBI to terminate its surveillance of political activities after the abuses of the 1919-20 Red Scare."[106] As Attorney General, Stone inadvertently created a monster as well as the framework for controlling it.

Stone's wall between domestic intelligence and law enforcement remains vitally relevant. The aftermath of the 9/11 attacks and an apparent uptick in attempted domestic terrorism has forced the FBI and other law enforcement agencies to again assess the extent to which they should collect domestic intelligence. Since then, agencies have expanded their use of electronic surveillance, watch lists, and human intelligence as part of their counterterrorism strategy.[107]

Perhaps most ominously, the Attorney General has twice issued guidelines that have restructured and partly eroded Stone's wall between law enforcement and domestic intelligence. First, in an obvious attempt to facilitate the FBI's surveillance of mosques, Attorney General Ashcroft revised the Levi Guidelines in 2002 to allow agents or informers to infiltrate religious meetings and services without evidence of the group's participation in criminal activity.[108] In 2008, Attorney General Mukasey reaffirmed the Ashcroft revisions and formally announced that the FBI would once again collect general intelligence, even if unrelated to a criminal investigation.[109] Little evidence exists confirming that these methods have prevented terrorism

105. Lininger, *supra* note 87, at 1214-15.

106. Stone, *supra* note 61, at 553; *see also* Weiner, supra note 94, at 338 ("Like his predecessor, Harlan Fiske Stone, who had made Hoover the director a half century before, [Levi] revered the rule of law more than the power of politicians. He believed that a secret police was a menace to a free society.").

107. Rascoff, *supra* note 82, at 579-80.

108. The Attorney General's Guidelines on General Crimes, Racketeering Enterprise and Terrorism Enterprise Investigations § VI(a)-(b) (2002); Stone, *supra* note 61, at 555-56; Lininger, *supra* note 87, at 1229-30.

109. *See* Attorney General's Guidelines for Domestic FBI Operations 8 (2008); *see also* David A. Harris, *Law Enforcement and Intelligence Gathering in Muslim and Immigrant Communities After 9/11*, 34 N.Y.U. Rev. L. & Soc. Change 123, 157-58 (2010) ("From May of 2002 forward, therefore, the FBI no longer needed a basis in fact in order to place informants in a mosque or a church. Rather, these investigations could be undertaken without any prior reason to suspect any illegal conduct by congregants. In 2008, Attorney General Michael Mukasey reaffirmed the Ashcroft position with the new Attorney General's Guidelines for Domestic FBI Operations."); Rascoff, *supra* note 82, at 599.

or major crime.[110] But scholars have argued that the Agency's tactics may violate the Constitution,[111] chill participation in protected activity,[112] and undermine the trust between law enforcement and the Muslim community that, as Stone likely would have recognized, most effectively prevents domestic terrorism by Islamic radicals.[113] This perhaps explains in part why on November 7, 2011, the FBI released to the public new guidelines for intelligence operations that specifically limited intelligence searches and reaffirmed that "rigorous obedience to constitutional principles and guarantees is more important than the outcome of any single interview, search for evidence, or investigation."[114]

There are no simple solutions to the problems of domestic intelligence, particularly since the attacks on 9/11 proved that modern technology and tactics enable today's terrorists to inflict far more damage than their predecessors from 1919. But it is important to remember that the perpetrators of the Palmer Raids believed their methods necessary to defend Americans against mass violence and revolution that threatened American freedoms.[115] Nonetheless, Stone erected his wall because he understood that police infiltration of lawful groups without evidence of criminality often reflects a prejudice that facilitates brutality, discrimination, and repression. Just as importantly, he recognized that a law enforcement agency that shadows people engaged in legitimate practices compromises both the liberties *and* the security of a public that it is supposed to protect. What Stone wrote to

110. *See* Lininger, *supra* note 87, at 1254.

111. *Id.* at 1231-52.

112. *See* STONE, *supra* note 61, at 556 ("[FBI] surveillance, whether open or surreptitious, can have a significant chilling effect on First Amendment freedoms."); Harris, *supra* note 109, at 168 ("People at mosques have become cautious and wary in expressing themselves to each other. Trust in fellow congregants has subtly but noticeably worn away and been re-placed by suspicion. In short, Muslims have begun to fear that merely being present at their houses of worship, or conspicuously expressing their faith and traditions, could bring the full weight of a government investigation down on them.").

113. Aziz Z. Huq, *Private Religious Discrimination, National Security, and the First Amendment*, 5 HARV. L. & POL'Y REV. 347, 358 (2011) (listing examples of cooperation between the Muslim community and law enforcement that helped prevent terrorism); *see* Harris, *supra* note 109, at 127-28; Lininger, *supra* note 87, at 1255.

114. *Domestic Investigations and Operations Guide*, Federal Bureau of Investigation, Oct. 15, 2001, at 49, *availabe at* http://vault.fbi.gov (declassified in part and published online on Nov. 7, 2011); WEINER, *supra* note 94, at 447-48.

115. *See, e.g.*, RICHARD POLLENBERG, FIGHTING FAITHS: THE ABRAMS CASE, THE SUPREME COURT, AND FREE SPEECH 165 (1999) ("[This book mentions that J. Edgar Hoover remarked that radicals] threaten the happiness of the community, the safety of every individual, and the continuance of every home and fireside. They would destroy the peace of the country and thrust it into a condition of anarchy and lawlessness and immorality that pass imagination.").

Felix Frankfurter remains vitally true over eighty-five years later: *nothing* is more troubling to public confidence in law enforcement than using government funds to track people engaged in constitutionally protected activities.

III. "THE ONLY CHECK UPON OUR EXERCISE OF POWER IS OUR OWN SENSE OF SELF-RESTRAINT": HOW JUSTICE STONE'S NEW DEAL OPINIONS SHOULD HAVE AND DID AFFECT CHIEF JUSTICE ROBERTS'S OPINION UPHOLDING THE AFFORDABLE CARE ACT

A. *United States v. Butler*: the Climax of the Court's pre-1937 Battle Over the Limits of Congressional Power

Stone's opinions regarding the limits of congressional authority, particularly his dissent in *Butler*,[116] greatly affected the context of the Supreme Court's decision addressing the constitutionality of the individual mandate in *National Federation of Independent Business v. Sebelius*.[117] To understand why, it is first necessary to explain briefly the jurisprudence that those opinions rejected.

Before 1937, the Court repeatedly invented extra-textual formal limitations on Congress's enumerated powers to strike down legislation that regulated areas the Court believed should be reserved to the states.[118] Justice Day's 1918 opinion in *Hammer v. Dagenhart*[119] exemplified this artificial formalism.[120] *Hammer* struck down Congress's prohibition on the shipment in interstate commerce of goods produced in factories employing the labor of children under the age of sixteen.[121] The Court held that Congress's power to regulate commerce among the states[122] did not encompass the power to regulate goods that caused no harm.[123] The Court created the category of "goods that caused no harm" to ensure that Congress did not usurp

116. United States v. Butler, 297 U.S. 1, 78 (1936) (Stone, J., dissenting).
117. 132 S. Ct. 2566, 2584-93 (2012).
118. *See, e.g.*, United States v. E.C. Knight Co., 156 U.S. 1, 4 (1895) (determining that Congress did not have power under the Commerce and Necessary and Proper Clauses to regulate matters than affected interstate commerce only "indirectly"); Ian Millhiser, *Worse Than Lochner*, 29 YALE L. & POL'Y REV. INTER ALIA 50, 50-51 (2011). *See generally* Barry Cushman, *Formalism and Realism in Commerce Clause Jurisprudence*, 67 U. CHI. L. REV. 1089 (2000) (examining the jurisprudential methods of the era).
119. Hammer v. Dagenhart, 247 U.S. 251, 268-77 (1918).
120. *See* Millhiser, *supra* note 118, at 550-51.
121. *Hammer*, 247 U.S. at 251.
122. U.S. CONST. art. 1, § 8, cl. 3.
123. *Hammer*, 247 U.S. at 271-72.

the states' purportedly exclusive power to regulate manufacturing,[124] even though, as Justice Holmes explained in his classic dissent, the Constitution itself does not prevent Congress from using its power over interstate commerce to regulate indirectly local activity.[125]

The conflict over this jurisprudential methodology escalated dramatically as the Court, usually over impassioned dissents, repeatedly struck down the New Deal Congress's attempts to address the nationwide economic crisis.[126] As one scholar described it, the Court "revived doctrines that had languished for decades or employed rubrics that had never before been used to invalidate . . . act[s] of Congress."[127] Thus, the Court struck down Congressional attempts to regulate wages and working conditions in the coal mining industry[128] and institute a pension system for railroad workers[129] as exceeding Congress's power to enact all laws necessary and proper to regulate commerce among the states.[130] According to the Court, the extent to which child labor, or working conditions in coal mines, or retirement benefits for railroad workers actually affected interstate commerce did not matter; Congress could not regulate any activity within judicially-invented categories of activities that only the states could control.

The battle climaxed early in 1936 in *United States v. Butler.*[131] Justice Roberts's opinion declared unconstitutional the New Deal's vitally important and controversial Agricultural Adjustment Act (AAA).[132] As he had done before when the conservative majority struck down economic regulations,[133] Justice Stone passionately dissented.

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124. *Id.* at 272-76.

125. *Id.* at 277-81 (Holmes, J., dissenting).

126. *See, e.g.*, Carter v. Carter Coal Co., 298 U.S. 238, 297-310 (1936); R.R. Ret. Bd. v. Alton, 295 U.S. 330 (1935). *But see* A.L.A. Schechter Poultry Corp. v. United States 295 U.S. 495 (1935) (striking down the National Industrial Recovery Act without dissent).

127. LEUCHTENBURG, *supra* note 38, at 215.

128. *Carter*, 298 U.S. at 297-310.

129. *Alton*, 295 U.S. at 362-71.

130. U.S. CONST. art. 1, § 8, cls. 3, 18.

131. 297 U.S. 1 (1936). Herbert Wechsler remarked that Stone's dissent in *Butler* "marks in many ways the high moment of the constitutional conflict" between the liberal and conservative justices during the New Deal. Wechsler, *supra* note 49, at 776-77.

132. *Butler*, 297 U.S. 1; *see* ROSS, *supra* note 38, at 246 n.13 (noting that "a clear majority" of persons surveyed in a Gallup poll disapproved of the AAA); SHESOL, *supra* note 38, at 174-75 (referring to the AAA as a "pillar" of the recovery program and one of the Hundred Days' "proudest achievements"); *see also* SHESOL, *supra* note 38, at 175 (noting that the *New York Times* called the AAA "the most popular measure of the New Deal.").

133. *See, e.g.*, Colgate v. Harvey, 296 U.S. 404, 436-50 (Stone, J., dissenting).

The AAA was designed to prop up devastatingly depressed prices for agricultural goods by taxing agricultural processors to fund a subsidy for farmers who limited their output.[134] The Court first declined to judge separately the constitutionality of the taxing and spending components of the AAA because the Act inextricably fused them as part of a scheme to regulate agriculture.[135] The Court then settled a long running debate regarding the extent of the Constitution's grant to Congress of the power "to lay and collect taxes, duties, imposts, and excises, to pay the debts and provide for the common defense and general welfare of the United States . . . ."[136] The Court ruled that Congress could tax and spend to regulate matters affecting the nation's general welfare, and not solely matters within the enumerated fields of Article 1, Section 8.[137]

Nevertheless, the Court struck the AAA down because it was designed to regulate agriculture, which, the Court maintained, the Constitution granted the states the exclusive power to govern.[138] Only a bright-line rule, the Court insisted, could preserve the power of the states; otherwise Congress could use its taxing and spending power to enact a parade of horrible regulations over all activities under local control.[139] The Court explained, for example, that Congress might use its virtually unlimited power to tax and spend to impose conditions that would restrict the nationwide production of shoes or force garment manufacturers to relocate to smaller cities.[140] But, ultimately, the Court implied that it invalidated the AAA not to limit Congress's power over the states, but to limit its power to *redistribute wealth* from one business to another:

> [i]f the act before us is a proper exercise of the federal taxing power, evidently the regulation of all industry throughout the United States may be accomplished by similar exercises of the same power. *It would be possible to exact money from one branch of an industry and pay it to another branch in every field of activity* which lies within the province of the states.[141]

134. *Butler*, 297 U.S. at 53-57; *see* SHESOL, *supra* note 38, at 174 (describing the reasons Congress passed the AAA).
135. *Butler*, 297 U.S. at 58-61.
136. U.S. CONST. art. 1 § 8, cl. 1.
137. *Butler*, 297 U.S. at 64-66; *see also* CURRIE, *supra* note 35, at 227-31.
138. *Butler*, 297 U.S. at 68.
139. *Id.* at 74-77.
140. *Id.* at 75-77.
141. *Id.* at 75 (emphasis added). Ironically, considering the contortions undertaken to support its holding, the opinion is best known for implying that the Court can effectively mechanize constitutional interpretation: "[t]he judicial branch of the government has only one duty; to lay

Stone's dissent emphasized that the majority accepted that Congress may levy a tax on agricultural processors; it disapproved only of Congress providing funds to those farmers who agreed to limit output.[142] Stone challenged the Court's conclusion that a farmer's acceptance of Congress's funds for a specific purpose constituted a coercive "regulation" of agriculture.[143] But ultimately, he deemed the issue of coercion irrelevant because "[i]t is a contradiction in terms to say that there is power to spend for the national welfare, while rejecting any power to impose conditions reasonably adapted to the attainment of the end which alone would justify the expenditure."[144] Indeed, Stone argued that the Court's reasoning—that Congress could spend for the general welfare without imposing purportedly regulatory conditions upon the way the money was spent—could and would unleash a more horrible parade than the one the majority feared:[145]

> [t]he limitation now sanctioned must lead to absurd consequences. The government may give seeds to farmers, but may not condition the gift upon their being planted in places where they are most needed or even planted at all. The government may give money to the unemployed, but may not ask that those who get it shall give labor in return, or even use it to support their families. It may give money to sufferers from earthquake, fire, tornado, pestilence, or flood, but may not impose conditions, health precautions, designed to prevent the spread of disease, or induce the movement of population to safer or more sanitary areas.[146]

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the article of the Constitution which is invoked beside the statue which is challenged and to decide whether the latter squares with the former." *Id.* at 62. *See* ARKES, *supra* note 9, at 86-93 (providing an eloquent and counterintuitive defense of Roberts's *Butler* opinion). Professor Arkes appears to argue that the Court correctly decided *Butler* precisely *because* it recognized that the AAA was designed to redistribute wealth from one business to another. *Id.*

142. *Butler*, 297 U.S. at 79.

143. *Id.* at 81-83. Stone appeared to agree with the majority that Congress's power to tax and spend did not include a power to coerce farmers directly to limit their agricultural output: "The power to tax and spend is not without constitutional restraints. . . . [I]t may not be used to coerce action left to state control." *Id.* at 87. But after the opinion was issued, he suggested that the distinction between coercion and persuasion was irrelevant. He wrote: "[p]ersuasion, coercion, if you please, is inseparable from the granted power and an incident of it, and that incident is included in the grant. Does not all this mean that whatever the effect, if the payment is persuasive or coercive, 'the tail goes with the hide' and is within the constitutionally granted power[?] Of course I would admit that the thing could be more specifically stated, but could it have been made any plainer?" Letter from Harlan Fiske Stone, Justice, Supreme Court of the United States, to Robert L. Hale, Professor (June 1, 1939) (on file with Library of Congress); MASON, *supra* note 22, at 409 n.*.

144. *Butler*, 297 U.S. at 85.

145. *Id.* at 85-87.

146. *Id.* at 85.

Finally, Stone addressed the heart of the dispute. In doing so, he fashioned perhaps the most compelling plea for restraint ever written when the Court judges the constitutionality of acts passed by Congress. Instead of dwelling on the unjust or absurd legislation that a Congress "lost to all sense of public responsibility"[147] could theoretically enact to determine the limits of Congress's power to tax and spend, Stone urged the Court to examine the text of the Constitution itself. Stone remarked that the Framers expressly limited Congress's power to tax and spend to purposes that affect the nation's general welfare.[148] Here, however, the Court imposed upon Congress "[l]imitations which do not find their origin in any express provision of the Constitution and to which other expressly delegated powers are not subject."[149] To the Court's argument that its unwritten limitations protected the states, Stone replied that the Constitution's language confirmed that the framers meant to grant Congress extensive national powers.[150] The people's representatives, and not the Court, he maintained, decided the ways and the extent to which it would exercise those powers.[151]

Once Congress's power to act had been established, Stone argued, the Court's duty was done.[152] Stone observed that the people themselves could normally change a dumb law while only its own "sense of self restraint"[153] prevented the Court from abusing its own power.[154] Thus, "[f]or the removal of unwise laws from the statute book appeal lies, not to the courts but to the ballot and the processes of democratic government."[155]

Indeed, Stone's masterful closing emphasized that an overly vigilant judiciary ultimately threatened the power of the states, and the liberties of the people, *more* than an unwise Congress:

> [a] tortured construction of the Constitution is not to be justified by recourse to extreme examples of reckless congressional

147. *Id.* at 87.
148. *Id.*
149. *Id.* at 83.
150. *Id.* at 86-87.
151. *Id.* at 87 ("It must be remembered that legislatures are the ultimate guardians of the liberties and welfare of the people in quite as great a degree as the courts.") (internal quotation marks and citations omitted).
152. *Id.* at 79 ("[C]ourts are concerned only with the power to enact statutes, not their wisdom.").
153. *Id.*
154. *Id.* at 87.
155. *Id.*

> spending which might occur if courts could not prevent expenditures which, even if they be thought to effect any national purpose, would be possible only by action of a legislature lost to all sense of public responsibility . . . . [A Court that assumes] it alone must preserv[e] our institutions . . . is far more likely in the long run to obliterate the constituent members of an indestructible union of indestructible states than the frank recognition that language, even of a constitution, may mean what it says: that the power to tax and spend includes the power to relieve a nationwide economic maladjustment by conditional gifts of money.[156]

Stone's *Butler* dissent was the most celebrated of the era.[157] Together with his dissent later that year in *Morehead v. Tipaldo*,[158]—in which he famously argued that the Court's own "economic predilections"[159] influenced its decision to strike down a minimum wage law—Stone fermented the New Dealer's suspicion that only "Court packing" could correct its dishonest and dangerous interpretations of the Constitution.[160] Moreover, the pre-1937 dissents of Justices Stone, Brandeis, and Cardozo doctrinally framed the Court's post-1937 decisions recognizing Congress's power under the Commerce Clause and other constitutional provisions to regulate local affairs and even individual decisions that nonetheless substantially affected national economic problems.[161]

B. The *Butler* Dissent and the Individual Mandate Under the Commerce Clause

That power seemed established until recently.[162] In June 2012, the Supreme Court held five to four in *Sebelius* that the Commerce and Necessary and Proper Clauses do not authorize Congress to enact the individual mandate.[163] The mandate, which penalizes Americans

156. *Id.* at 87-88 (internal punctuation omitted). Indeed, as others have pointed out, federalism is supposed to safeguard the people's rights. *See*, *e.g.*, Peter J. Smith, *Federalism, Lochner, and the Individual Mandate*, 91 B.U. L. Rev. 1723, 1725, n.13 (2011).

157. Johnson, *supra* note 21, at 428.

158. 298 U.S. 587, 631-36 (1936).

159. *Id.* at 633. President Roosevelt used "economic predilections" and other phrases from Stone's dissents in a fireside chat supporting the court-packing plan. Mason, *supra* note 22, at 444.

160. *See supra* note 38 and accompanying text.

161. *See* Ross, *supra* note 38, at 246.

162. *See, e.g.,* Gonzales v. Raich, 545 U.S. 1, 17 (2005) ("Our case law firmly establishes Congress' power to regulate purely local activities that are part of an economic class of activities that have a substantial effect on interstate commerce.") (internal quotation marks omitted).

163. *Sebelius*, 132 S. Ct. 2566, 2593 (2012). Justices Scalia, Kennedy, Thomas, and Alito joined Chief Justice Roberts's opinion holding that the Commerce and Necessary and Proper

who do not purchase minimum health-insurance coverage, is essential to the Act's larger purpose of expanding access to health insurance for over forty-five million Americans without it.[164] But the Court held that the mandate, though "necessary" to effectuate regulations of the interstate market in health insurance, was not "proper" because it regulates economic "inactivity," while before, Congress regulated only economic "activity."[165] Without distinguishing between economic "activity" and "inactivity," the Court concluded, Congress could use its commerce power to force citizens to do virtually anything, including, they insist, to buy vegetables in order to improve their health.[166]

Though Stone's *Butler* dissent addressed the Tax and Spend Clause, and not the Commerce and Necessary and Proper Clauses, its philosophy applies to all judicial attempts to restrict artificially the expansive national powers that the Constitution grants Congress.[167] As

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Clauses do not authorize the mandate, but dissented against the Chief Justice's opinion authorizing the mandate under Congress's power to tax and spend. *Id.* at 2647. One appeals court and two district courts had previously ruled the mandate unconstitutional. *See generally* Florida v. United States Dep't of Health and Human Servs., 648 F.3d 1235, (11th Cir. 2011), *cert. granted*, 2011 WL 5515165 (U.S. Nov. 14, 2011); Florida *ex rel.* Bondi v. United States Dep't of Health & Human Servs., 780 F. Supp. 2d 1256(N.D. Fl. 2011) [hereinafter Bondi]; Virginia *ex rel.* Cucinelli v. Sebelius, 728 F. Supp. 2d 768 (E.D. Va. 2010) [hereinafter Cucinelli]. At least two Circuit courts had ruled the mandate constitutional. *See*, *e.g.*, Seven-Sky v. Holder, 661 F.3d 1 (D.C. Cir. 2011); Thomas More Law Ctr. v. Obama, 651 F.3d 529, (6th Cir. 2011).

164. Ryan C. Patterson, Note, *"Are You Serious?": Examining the Constitutionality of an Individual Mandate for Health Insurance*, 85 NOTRE DAME L. REV. 2003, 2006 (noting that 45.7 million Americans were uninsured in 2007). Indeed, one of the district courts that ruled the mandate unconstitutional acknowledged that it was essential to the Act's larger program. *Bondi*, 780 F. Supp. 2d at 1298. Chief Justice Roberts's opinion seemed to reach the same conclusion *Sebelius*, 132 S. Ct. at 2592; *see also* Smith, *supra* note 156, at 1727 (explaining how the minimum coverage requirement is essential to expanding access to health insurance).

165. *Sebelius*, 132 S. Ct. at 2587; *see also* Andrew Koppelman, *Bad News for Mail Robbers: The Obvious Constitutionality of Health Care Reform,* 121 YALE L. J. ONLINE 1, 6 (2011) ("The principal complaint about the mandate is that Congress should only be able to regulate economic activity, and the mandate is not a regulation of any activity."); Smith, *supra* note 156, at 1728 ("The core of the constitutional attacks on the individual mandate has been the claim that Congress lacks authority under Article 1 to compel individuals, simply by virtue of their status as lawful United States residents . . . to acquire and maintain insurance . . . . First, opponents of the mandate have made a doctrinal claim that Congress lacks power under the Commerce and Necessary and Proper clauses to regulate "inactivity.").

166. *Sebelius*, 132 S. Ct. at 2588-89; *see also* Koppelman, *supra* note 165, at 18 (noting that opponents of the individual mandate argue that "[i]f the limitations they demand are not accepted . . . Congress will have the power to do absolutely anything it likes" including the power to "require that people buy and consume broccoli at regular intervals.") (internal quotations omitted); Smith, *supra* note 156, at 1729 ("Second, the plaintiffs have pressed a slippery slope argument, contending that if Congress has authority to compel individuals to purchase health insurance, then Congress can compel individuals to do anything.").

167. *See* Eric Schepard, *Conservative Justices May Hate Obamacare, But They Should Not Overrule Congress*, CHRISTIAN SCI. MONITOR (Mar. 30, 2012), http://www.csmonitor.com/Commentary/Opinion/2012/0330/Conservative-justices-may-hate-Obamacare-but-they-should-not-overrule-Congress.

one scholar observed, the *Butler* opinion emerged from "the same concern that had underlain efforts to limit the commerce power,"[168] and another that the *Butler* opinion "placed the taxing and spending provisions in a special category, doing for Congress's power to tax and spend what Justice Day had done in 1918 [in *Hammer*] for Congress's power to regulate interstate commerce."[169] Indeed, change a few terms and phrases, and Justice Ginsburg's opinion defending Congress's power to enact the individual mandate under the Commerce and Necessary and Proper Clauses[170] could have simply cloned passages of Stone's *Butler* dissent.

Once again, a conservative Court invalidated a rationale for constitutionality of controversial legislation that a liberal Congress passed to address a pressing national economic problem.[171] Once again, the Court imposed on Congress "limitations, which do not find their origin in any express provision of the Constitution"—this time between commercial "activity" and "inactivity" instead of "agriculture" and other activities that promote "the general welfare"—to restrain purportedly unbridled Congressional power.[172] Once again, the Court subjected one of Congress's enumerated powers to limitations—this time the commerce power instead of the power to tax and spend— "to which other expressly delegated powers are not subject."[173] Once

168. CURRIE, *supra* note 35, at 230.

169. MASON, *supra* note 22, at 408.

170. *Sebelius*, 132 S. Ct. at 2609 (Ginsburg, J., concurring in part) ("This is not meant to take away from Justice Ginsburg's masterful opinion, one passage of which particularly evokes of Stone's reasoning] When contemplated in its extreme, almost any power looks dangerous. The commerce power, hypothetically, would enable Congress to prohibit the purchase and home production of all meat, fish, and dairy goods, effectively compelling Americans to eat only vegetables. Yet no one would offer the hypothetical and unreal possibility of a vegetarian state as a credible reason to deny Congress the authority ever to ban the possession and sale of goods. The Chief Justice accepts just such specious logic when he cites the broccoli horrible as a reason to deny Congress the power to pass the individual mandate.").

171. The December 2011 Kaiser Health Care Tracking Poll showed public opinion of the Affordable Care Act virtually divided. *Kaiser Health Tracking Poll*, THE HENRY J. KAISER FOUNDATION (Dec. 2011), http://www.kff.org/kaiserpolls/upload/8265-F.pdf. One scholar referred to the health care law as "the most important progressive legislation in decades." Koppelman, *supra* note 165, at 2.

172. Ilya Shapiro, *A Long Strange Trip: My First Year Challenging the Constitutionality of Obamacare*, 6 FLA. INT'L L. REV. 29, 52 (2010) (arguing that a formal distinction between "activity" and "inactivity," though imperfect, is essential to preserving Article I's scheme of limited and enumerated powers); *see, e.g.*, Millhiser, *supra* note 118, at 55-56 ("The many legal challenges to the ACA rely on an interpretative method that is indistinguishable from that used in *Hammer* and similar cases . . . . [T]hey also spin complex webs of exemptions and caveats to their extra-constitutional limits on federal power.").

173. As others have pointed out, no one doubts Congress's power to mandate citizens to register for the draft, report for jury duty, or respond to the census under other enumerated powers. *See, e.g.*, Millhiser, *supra* note 118, at 56; Smith, *supra* note 156, at 1730-31, 1736-37.

again, the Court believed the limitation necessary to prevent a parade of hypothetical abuses that "would be possible only by action of a legislature lost to all sense of public responsibility" while ignoring the much more terrible consequences that could potentially emanate from a precedent limiting Congress's power to act.[174] Once again, the Court asserted that these limitations are necessary despite two powerful constraints that already limit the possibility of Congressional abuses of power: 1) the text of the Constitution, which allows Congress to tax and spend for only national purposes, and which allows it to regulate only the economic sphere under its commerce and necessary and proper powers,[175] and 2) the pure self-interest of legislators running for reelection. Most importantly, once again, the Court appealed to federalism to advance political/ideological "predilections" in favor of economic liberty that the Constitution nowhere requires.[176]

A few months after the *Butler* decision was released, Stone explained to Felix Frankfurter that the Court's pre-1937 decisions had inflicted an egregious injustice on the Country: "[w]hen our Court sets at naught a plain command of Congress, without the invocation of any identifiable prohibition of the Constitution, and supports it only by platitudinous irrelevancies, it is a matter of transcendent impor-

Indeed, the Court's opinion in *Sebelius* acknowledged that the activity/inactivity distinction applied only to the Commerce Clause. *Sebelius*, 132 S. Ct. at 2586 n.3.

174. As Professor Koppelman observed "[i]n both child labor and health care contexts, opponents of reform flee from illusory dangers into the jaws of real ones." Koppelman, *supra* note 165, at 21. Koppelman and others have documented how a doctrine preventing Congress from regulating inactivity may devastate its ability to address a number of collective action problems that the states cannot address on their own. *See* Koppelman, *supra* note 165, at 21; Smith, *supra* note 156, at 1739-40.

175. *See* United States v. Morrison 529 U.S. 578, 611 (2000) (allowing Congress to regulate under its power to enact all laws necessary and proper to regulate interstate commerce only "economic endeavors."); United States v. Lopez, 514 U.S. 549, 573-74 (1995) (Kennedy, J., concurring) (stating that Congress may "regulate in the commercial sphere on the assumption that we have a single market and a unified purpose to build a stable national economy"); Millhiser, *supra* note 117, at 59 (arguing that the Constitution's text reasonably justifies the formalistic distinction in *Morrison* and not the activity/inactivity distinction proposed by opponents of the individual mandate).

176. Indeed, the joint dissent by Justices Scalia, Kennedy, Thomas, and Alito argued almost explicitly that the Constitution's federalist structure was designed, in part, to protect an individual's economic liberty. *Sebelius*, 132 S. Ct. at 2676-7. Chief Justice Robert's majority opinion more opaquely expressed similar views. *See id.* at 2578. And many have persuasively argued that the unconvincing distinction between "activity and inactivity" proposed by opponents of the individual mandate, while legally framed as necessary to protect the power of the states in a federal system, thinly masks their desire to revive a Lochneresque libertarian political/economic agenda that would restrict the power of the states as well. *See, e.g.*, Arthur J.R. Baker, Note, *Fundamental Mismatch: The Improper Integration of Individual Liberty Rights into Commerce Clause Analysis of the Patient Protection and Affordable Care Act*, 66 U. MIAMI L. REV. 259, 261 (2011); Koppelman, *supra* note 165, at 22-23; Smith, *supra* note 156, at 1725.

tance."[177] It remains so today. Perhaps before the Court invoked the "broccoli" argument to justify a strained distinction between economic "activity" and "inactivity" in the name of protecting the power of the states, it should have first heeded Stone's concluding warning from *Butler* as he likely would have rewritten it for the health care litigation:

> [a] tortured construction of the constitution is not to be justified by recourse to extreme examples of *reckless congressional regulation* which might occur if courts could not prevent legislation which, even if they be thought *to effect commerce*, would be possible only by action of a legislature lost to all sense of public responsibility . . . . [A Court that assumes] it alone must preserv[e] our institutions . . . is far more likely in the long run, to obliterate the constituent members of an indestructible union of indestructible states, *and the liberties of their people*, than the frank recognition that language, even of a constitution, may mean what it says: That the power to *enact all laws necessary and proper to regulate commerce among the states* includes the power *to enact an individual mandate as an essential and reasonable component of legislation that expands access to the vast and often indispensable interstate market in health insurance*.[178]

C. The *Butler* Dissent and Chief Justice Roberts's Decision in *Sebelius*

Over the long term, Chief Justice Roberts's resurrection of the artificial formalism of the *Butler* Court may devastate Congress's national powers.[179] But his decision to join with the Court's four liberals to uphold the mandate under Congress's power to tax and spend mooted the immediate impact of his interpretation of the Commerce and Necessary and Proper Clauses. Somewhat ironically, Stone's *Butler* dissent most relevantly addresses Congress's power to enact the individual mandate under the Commerce Clause, even though *Butler* itself examined only Congress's power to tax and spend. After all, *Sebelius* and *Butler* dealt with related if slightly different disputes

177. Letter from Harlan Fiske Stone, Justice, Supreme Court of the United States, to Felix Frankfurter, Professor, Harvard Law School (Apr. 9, 1936) (on file with Library of Congress); SHESOL, *supra* note 38, at 212.

178. United States v. Butler, 287 U.S. 1, 87-88 (1936) (emphasis added).

179. Indeed, Randy Barnett, the intellectual godfather of the litigation challenging the individual mandate, argues that he *won* the argument in *Sebelius*, which he believes created a precedent that will restrict the powers of future Congresses. Randy Barnett, *We Lost. The Constitution Didn't*, WASH. POST, July 1, 2012 at B01.

about the Tax and Spend Clause; *Sebelius* decided that the tax and spend power authorizes a provision to raise revenue that Congress *labels* a penalty, whereas *Butler* decided that Congress may not enact a provision to raise revenue that it labels as a tax yet *acts* like a regulation of agriculture.[180] In any event, *Sebelius* seems to comport generally with Stone's view that Congress may invoke the power to tax and spend to incentivize individual behavior that in the aggregate will address national problems.[181]

More importantly, Chief Justice Roberts's opinion on the taxing power deserves praise for honestly applying the principle that Stone's New Deal jurisprudence embodied. As Chief Justice Roberts wrote "[policy judgments] are entrusted to our Nation's elected leaders, who can be thrown out of office if the people disagree with them. It is not our job to protect the people from the consequences of their political choices."[182] Chief Justice Roberts's sentiment mimicked Professor Jack Balkin's reminder to David Rivkin Jr. and Lee Casey, two prominent opponents of the mandate's constitutionality, during a debate that occurred as the health-care litigation began: "What was said during the constitutional struggle over the New Deal is still true today: for objectionable social and economic legislation, however ill-considered, 'appeal lies not to the courts but to the ballot and to the processes of democratic government.'"[183] Fittingly, Professor Balkin quoted Stone's dissent in *Butler*[184] to make his point. Time will tell whether Chief Justice Roberts continues to abide by Stone's principle.

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180. *Butler*, 297 U.S. at 55-56 (citing the AAA, 7 U.S.C. § 609(b), which refers to the revenue raising provisions of the AAA as a "tax"). Chief Justice Roberts's opinion in *Sebelius* seemed to recognize the difficulty of distinguishing substantively between a "tax" and a "penalty." *See Sebelius*, 132 S. Ct. at 2599-60.

181. Indeed, Chief Justice Roberts cited *Butler*—which has never been overturned—to show that the Court has aggressively policed exactions to ensure they did not regulate behavior regarded at the time as beyond federal authority, but continued that more often and more recently the Court has declined to examine Congress's motive for raising revenue. *Sebelius*, 132 S. Ct. at 2599; *see also* United States v. Sanchez, 340 U.S. 42, 44 (1950) ("It is beyond serious question that a tax does not cease to be valid merely because it regulates, discourages, or even definitely deters the activities taxed."); *Id.* ("Nor does a tax statute necessarily fail because it touches on activities which Congress might not otherwise regulate."); Sonzinsky v. United States, 300 U.S. 506, 514 (1937) (upholding unemployment compensation schemes under Congress's power to tax and spend); Ruth Mason, *Federalism and the Taxing Power*, 99 CAL. L. REV. 975, 1003 (2011) ("The Court's broad interpretations of the taxing power in cases . . . call into question the continued relevance of the Court's *Lochner*-era jurisprudence that construed the power to be constrained by Congress's other enumerated powers.").

182. *Sebelius*, 132 S. Ct. at 2579.

183. David B. Rivkin, et al., *A Healthy Debate: The Constitutionality of an Individual Mandate*, 158 U. PA. L. REV. PENNUMBRA 93, 108 (2009).

184. *Butler*, 297 U.S. at 79.

IV. DENYING HIS OWN "PREDILECTIONS": WHY STONE'S RESTRAINT SHOULD GUIDE THE PARTISAN JUDICIARY

Stone was not the only great dissenter of his era. Holmes, his replacement Cardozo, as well as Brandeis also wrote landmark pre-1937 dissents that passionately advocated for judicial restraint toward economic regulations.[185] But Stone's restraint—defined here as writing or joining opinions upholding legislation with which he or his party disagreed[186]—resonates so powerfully because of its almost unimpeachable authenticity; neither he nor the conservative Republican who appointed him supported the New Deal. Holmes, an appointee of Theodore Roosevelt, an unabashedly progressive Republican,[187] was essentially agnostic about government regulation of the economy.[188] Brandeis, though perhaps not enthusiastic about the New Deal itself, was appointed by a Democrat and deeply believed in robust government regulation to protect the vulnerable.[189] And among the Justices, Cardozo—whom the relatively moderate Republican, Herbert Hoover, nominated in large part to avoid a confirmation controversy with a Democratic Senate—sympathized most with the New Deal.[190]

In contrast, Stone's nominating president, Calvin Coolidge, whom Stone vigorously served as Attorney General and supported in the 1924 presidential campaign,[191] was perhaps the most economically conservative President of the twentieth century. Multiple biographers have documented President Coolidge's staunch belief in small government, low taxes, and the unconstitutionality of the very policies—

185. *See, e.g.*, Carter v. Carter Coal Co., 298 U.S. 238, 324 (1936) (Cardozo, J., dissenting); New State Ice Co. v. Liebman, 285 U.S. 262, 280 (1932) (Brandeis, J., dissenting); Hammer v. Dagenhart, 247 U.S. 251, 277 (1918) (Holmes, J., dissenting).

186. "Judicial restraint is a notoriously imprecise term." Jeffrey Rosen, *Forward*, 97 MICH. L. REV. 1323, 1327 (1999) (internal punctuation omitted).

187. ABRAHAM, *supra* note 59, at 118 (noting that Theodore Roosevelt, who was determined to appoint justices who shared his views, apparently believed Holmes was *too conservative*).

188. Mason succinctly distinguished between Holmes's and Stone's approach to government regulation in his biography of Stone: "Holmes said: '[t]hey can't do it, but let them try.' Stone said, '[t]hey should not do it, but judges are not the ones to oppose.'" MASON, *supra* note 22, at 332; *see, e.g.*, David Luban, *Justice Holmes and the Metaphysics of Judicial Restraint*, 44 DUKE L.J. 449, 475 (1994) ("Holmes qualifies as a moral nihilist; indeed, he advanced the moral nihilist's typical reduction of value judgments to tastes and naked preferences . . . .").

189. ABRAHAM, *supra* note 59, at 135-36; MASON, *supra* note 22, at 349 ("While Holmes would uphold legislation as not unconstitutional, Brandeis upheld it as constitutional and desirable."); UROFSKY, *supra* note 8, at 691.

190. POLENBERG, *supra* note 10, at 168, 195 ("Cardozo, Louis D. Brandeis, and Harlan Fiske Stone were the most liberal members of the Court, and of the three Cardozo was most sympathetic to what Roosevelt was trying to accomplish.").

191. MASON, *supra* note 22, at 174-79.

price, wage, and other business regulations—that Stone voted to uphold as a Justice.[192] Indeed, Coolidge's 1924 campaign manager, William Butler, initiated the litigation that killed the AAA.[193] Furthermore, Stone informally advised Republican President Hoover as part of his Medicine Ball Cabinet[194] and informally assisted him and the Republican's 1936 presidential nominee in their campaigns against Roosevelt.[195]

Stone has not been the only Justice to frustrate the wishes or expectations of his or her nominating President once confirmed to the politically unaccountable Court. But relatively moderate Presidents Eisenhower, Nixon, Ford, or George H. W. Bush appointed the most famous judicial apostates—Justices Warren, Brennan, Blackmun, Stevens, and Souter.[196] Meanwhile, President Reagan's non-conformist appointees—Justices O'Connor and Kennedy—became relative moderates themselves.[197] Except perhaps for the arch-conservative Justice McReynolds, an Attorney General for his appointing president, Democrat Woodrow Wilson,[198] no justice of the twentieth century *championed* a jurisprudence diametrically opposed to the political philosophy of the President who appointed him, let alone in whose administration he served.[199] It is almost impossible to envision

192. DAVID GREENBERG, CALVIN COOLIDGE 12 (2006) ("In important ways Coolidge's economic philosophy did resemble the old laissez-faire doctrine: he favored regulating business lightly, cutting taxes, [and] containing federal expenditures . . . ."); DONALD R. MCCOY, CALVIN COOLIDGE: THE QUIET PRESIDENT 315 (1967) ("For the federal government to fix farm prices, regulate workers' hours and wages, and tell businessmen how to run their businesses was clearly unconstitutional to Coolidge . . . .").

193. SIMON, *supra* note 11, at 274.

194. SHESOL, *supra* note 38, at 36.

195. MASON, *supra* note 22, at 286 (advise to Hoover); SHESOL, *supra* note 38, at 226 (advise to Landon).

196. See ABRAHAM, *supra* note 59, at 189-91 (describing the moderation of President Eisenhower, who nominated Justices Warren and Brennan). Blackmun approaches more closely full-fledged judicial apostasy, although neither he nor Nixon, his appointing President, can accurately be described as ideological devotees. *See id.* at 251-53, 260-61. George H. W. Bush, though perhaps disappointed for political reasons when Justice Souter turned out more liberal than expected, was himself a moderate as well. *See id.* at 303-09 (describing Bush I's moderation and his nomination of Souter).

197. *Id.* at 281-89 (describing Reagan's nomination of O'Connor and her moderation on the Court). *Id.* at 303 ("With the possible exception of some of Justice O'Connor's votes in crucial gender-related cases, and some First Amendment freedom-of-expression stances by Justices Scalia and Kennedy, the Reagan appointed quartet . . . has broadly lived up to the former president's expectations . . . .").

198. *Id.* at 133.

199. Indeed Blackmun never *met* Nixon before nominating him, nor had Ford met Stevens. *Id.* at 260, 276. Blackmun's indifference toward Nixon—Blackmun declared Nixon "didn't know me from Adam's off ox"—contrasts starkly with Stone's loyalty to Coolidge and Hoover. *See id.* at 260.

a comparable scenario occurring today. The extent of Stone's apostasy is comparable to a hypothetical in which President Barack Obama appoints a justice with views akin to Justice Scalia, or President George W. Bush selects a Justice with views akin to Justice Ginsburg.

Yet Stone's jurisprudence defied more than his nominating President. The Great Depression spurred Stone to modify his thinking on government intervention in the economy,[200] but his general suspicion of activist government and the New Deal in particular persisted. He penned his *Butler* dissent to approve the constitutionality of a policy, the AAA, which he considered "foolish, if not vicious."[201] In addition, though Stone acknowledged the reasonableness of a minimum wage, he shared the same "predilections" against it as the majority justices against whom he dissented in *Tipaldo*.[202] In a September 1935 letter to Herbert Hoover, Stone remarked that "the country would be startled if it could know, in some detail, the truth about the bureaucracy which is being built up and the way in which it is operating."[203] To the end, he remained a loyal Republican.[204] Indeed, he noted that

200. *See infra* note 204 and accompanying text.

201. Gardner, *supra* note 44, at 1204. A number of sources demonstrate Stone's opposition to the AAA. *See, e.g.*, Letter from Harlan Fiske Stone, Justice, Supreme Court of the United States, to the Honorable Franklin W. Fort (Jan. 11, 1936) (on file with Library of Congress) ("If you could arrange it so that the Constitution would provide that the Supreme Court could condemn laws they thinks unwise, I believe I could write a powerful opinion against the AAA."); Letter from Harlan Fiske Stone, Justice, Supreme Court of the United States to Helen Stone (Jan. 16, 1936) (on file with Library of Congress) ("Personally, I have no use for the A.A.A. law, by that didn't mean that it was unconstitutional."); Letter from Harlan Fiske Stone, Justice, Supreme Court of the United States to John Bassett Moore, Judge (Feb. 8, 1936) (on file with Library of Congress) ("The people . . . do not yet realize what [the AAA] did to our markets . . . to say nothing of its effect on the morale of the farmer."); MASON, *supra* note 22, at 416-18; SHESOL, *supra* note 38, at 191 (citing sources noting that Stone deplored the AAA).

202. Letter from Harlan Fiske Stone, Justice, Supreme Court of the United States to Irving Brant (June 13, 1936) ("I have a good deal of skepticism about the satisfactory operation of price fixing schemes, but in my mind that is something with which courts have nothing to do . . . . Judicial labors would be intolerable . . . if they placed on me the responsibility of choice of economic theories about which reasonable men may differ."); ROSS, *supra* note 38, at 91-92 (noting Stone's opposition to the minimum wage); MASON, *supra* note 22, at 305 ("Stone's republican convictions were strong. His social and economic views were in general accord with those of his right-wing colleagues."); *id.* at 544 (noting Stone's disapproval of the New Deal); *id.* at 555 (noting Stone's personal distaste for the minimum wage); SHESOL, *supra* note 38, at 192 (describing Stone's disapproval of the New Deal).

203. Letter from Harlan Fiske Stone, Justice, Supreme Court to Herbert Hoover (Nov. 19, 1935) (on file with Library of Congress).

204. Stone's son speculated that Stone wouldn't retire from the Court until a Republican could appoint his successor. MASON, *supra* note 22, at 800.

the Court's invalidation of the AAA robbed the Republicans of an effective weapon in the 1936 Presidential campaign.[205]

Stone's personal opposition to economic regulations should not be overstated. He emerged as the New Deal's most passionate judicial champion in part because the devastation wrought by the Great Depression may have changed his views on limiting economic liberty in a modern, industrial, and interdependent economy.[206] Indeed, he gave a (quite resonant) address in 1934 at the University of Michigan Law School warning that "[i]n a changing economy, mere material gain to the individual may not in itself be the social good it was once conceived to be."[207] Stone's speech emphasized particularly that corporate lawyers must become more than the "obsequious servant of business . . . tainted . . . with the morals and manners of the market place in its most anti-social manifestations."[208] He asked why "a Bar which has done so much to develop and refine the technique of business organization, to provide skillfully devised methods for financing industry . . . has done relatively so little to remedy the evils of the investment market . . . ."[209] Later, he remarked in a letter to Irving Brant, a leading constitutional commentator,[210] that "the dead hand of economic theories of a century ago" may not suit changing economic conditions.[211] The Great Depression of Stone's era, like our current economic troubles, cast doubt on a faith in unregulated capitalism.

But Stone cared most about maintaining the Court's legitimacy and the proper function of a judge in a democracy. Though Stone, like every other Justice, opposed President Roosevelt's Court-packing plan,[212] privately he acknowledged that the Court had brought the trouble on itself.[213] He recognized that when the Court, in fealty to a

205. SHESOL, *supra* note 38, at 188; Letter from Harlan Fiske Stone, Justice, Supreme Court of the United States, to the Honorable Franklin W. Fort (Jan. 11, 1936) (on file with Library of Congress).

206. *See* MASON, *supra* note 22, at 369-75.

207. Harlan Fiske Stone, *The Public Influence of the Bar*, 48 HARV. L REV. 1, 1, 4 (1934).

208. *Id.* at 7.

209. *Id.*

210. SHESOL, *supra* note 38, at 225.

211. Letter from Harlan Fiske Stone to Irving Brant, (June 13, 1936) (on file with Library of Congress); ROSS, *supra* note 38, at 91-92.

212. Letter from Harlan Fiske Stone, Justice, Supreme Court of the United States to Irving Brant (Apr. 20, 1937) (on file with Library of Congress) ("It would be a disaster to increase the number of the Court over its present number, and I very much hope that it will not occur.").

213. Warner W. Gardner, *Harlan Fiske Stone: The View From Below*, XXII SUPREME CT. HIST. SOC'Y Q., vol. XXII 2, 2001, at 10 ("I remember, however, a fairly long conversation on the Court plan of 1936. He . . . thoroughly opposed . . . such an improvised reform of the Court.

particular ideology, twists the language of the Constitution to overturn Congressional legislation, the political branches will treat it as one.

Justice Stone's warning regarding the Court's institutional legitimacy reverberates powerfully in our highly partisan times. As Jeffrey Rosen recently explained:

> Ever since *Bush v. Gore*, we've come to expect that federal courts will divide along predictable ideological lines: Judges appointed by Democrats are supposed to vote for Democratic priorities, while judges appointed by Republicans are supposed to prefer Republican priorities. In short, many people now assume judicial institutions will behave like legislative ones.[214]

And some statistics largely corroborate him. As Justice Breyer has mentioned, polls showed a growing suspicion that the Court decides cases on political and not legal grounds[215] even before the four most recent appointees cemented the Court's current partisan division. Now, as the *New York Times* has reported, for the first time, the Court's majority of Republican appointees and minority of Democratic appointees usually vote along partisan lines in controversial cases.[216] And this conservative majority, like the one in the 1930s, has repeatedly overturned precedent and ruled unconstitutional acts passed by Congress.[217] Indeed, concerns about accusations of naked partisanship failed to deter four of the five Republican appointed Justices from voting to strike down the *entire* health care law.[218]

But one Republican-appointed Justice averted a potentially imminent crisis by joining the four Democratic appointed Justices to uphold the individual mandate. Chief Justice Roberts likely recognized that striking down another major act of Congress along partisan lines would severely threaten his Court's legitimacy. Unlike his fellow conservatives—both now and in the 1930s—Chief Justice Roberts, at least temporarily, heeded the wisdom of his predecessor, Harlan Fiske

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But his opposition was tempered by a human thought that this was precisely what he had been warning his colleagues against . . . ."); SHESOL, *supra* note 38, at 338-39.

214. Jeffrey Rosen, *No Objection*, THE NEW REPUBLIC, Dec. 15, 2011, at 5.

215. STEPHEN BREYER, MAKING OUR DEMOCRACY WORK: A JUDGE'S VIEW 218 (2010).

216. *See* Adam Liptak, *Do the Judicial Math*, N.Y. TIMES, Feb. 6, 2011, at WK 3; Adam Liptak, *Court Under Roberts Most Conservative in Decades*, N.Y. TIMES, July 25, 2010, at A1, A18-19.

217. *See* Miriam Galston, *When Statutory Regimes Collide: Will Citizens United and Wisconsin Right to Life Make Federal Tax Regulation of Campaign Activity Unconstitutional*, 13 U. PA. J. CONST. L. 867, 868 n.1 (2011) (noting the Roberts's Court alleged judicial activism).

218. Nat'l Fed'n of Indep. Bus. v. Sebelius, 132 Sup. Ct. 2566, 2677 (2012) (observing the joint dissent of Justices Scalia, Kennedy, Thomas, and Alito).

Stone, who recognized that a Justice's ideological and partisan predilections *require* liberal application of judicial restraint.[219]

Given that Chief Justice Roberts has now voted only once with the liberal/Democratic block in a five-to-four decision,[220] *Sebelius* may have only detoured, and not deviated, from his partisan/activist path. And once the din of the health care ruling dies down, the Chief Justice may conclude that accusations of partisanship need not concern him. After all, while Justice Breyer[221] and numerous scholars have repeatedly echoed Stone's predictions about the dangers of the Court's perceived partisanship,[222] new research suggests that the public generally accepts that the Court will govern similarly to the political branches.[223]

In any event, the Country's purportedly implacable partisan divisions—including, most prominently, the conservative movement's apprehension about "another Souter" joining the Court—has prompted scrutiny of judicial nominations that would likely prevent a Republican President from nominating a modern-day Stone.[224] All in all,

219. *See* SHESOL, *supra* note 38, at 395.

220. Before *Sebelius*, Chief Justice Roberts had voted less frequently with the liberal block in 5-4 cases than Justices Kennedy, Scalia, or Thomas. Amanda Cox & Matthew Ericson, *Siding With the Liberal Wing*, N.Y. TIMES, June 28, 2012, at A15.

221. *See* BREYER, *supra* note 216, at 218.

222. *See, e.g.*, David S. Law, *A Theory of Judicial Power and Judicial Review,* 97 GEO. L.J. 723, 778-79 (2009) ("[I]t is often suggested that the Supreme Court enjoys a finite store of some intangible resource known as legitimacy, which can be cultivated over time but also depleted in a variety of ways. Legitimacy may be depleted, for example, by decisions that . . . smack of blatant partisanship or unprincipled vacillation, or otherwise blur the distinction between legal decision making and ordinary political decision making upon which courts stake their claim to obedience."); *see also* David Cole, *The Liberal Legacy of Bush v. Gore,* 94 GEO. L.J. 1427, 1430-31 (2006) ("As an unelected body in a democratic polity, without the means to enforce its own judgments, the judiciary more than any other branch of government must rely on the authority of its legitimacy. And its legitimacy, in turn, rests on the perception that it is not simply a political institution, but that it is guided by constitutional principle and law that rises above—and constrains—everyday partisan political decision making. The Court is at its most vulnerable where it is seen as deciding cases without a basis in constitutional principle because then there appears to be little to differentiate it from the political branches.").

223. Recent empirical analysis "suggest[s] that how Americans think about the Supreme Court is perhaps not so different from how they think about the rest of the federal government." David Fontana & Donald Braman, *Supreme Anxiety: Do Controversial Court Decisions Really Inspire the Backlash Liberals Fear?,* THE NEW REPUBLIC, Feb. 2, 2012, at 9.

224. *See* JEFFREY TOOBIN, THE NINE 340 (2007) ("For the movement conservatives, the problem with [Bush nominee Harriet] Miers was not her lack of qualifications but their own lack of certainty that she would follow their agenda on the Court"); Henry S. Cohn, Book Review, 53 FED. LAW. 54, 55 (Sept. 2006) ("During the Harriet Myers [sic] debate, commentators on the right feared that she might become 'another Souter' and urged the second President Bush to switch to a nominee with known conservative views."). Indeed, "[i]n Souter's office hangs a portrait of a justice who held similar views—New Hampshire's Harlan Fiske Stone." *Id.*

Stone's devotion to transcending partisanship on the Court may become his most anachronistic judicial quality.

V. *HIRABAYASHI* AND *GOBITIS*: NEGLECTING AND PROTECTING MINORITIES SUSPECTED OF DISLOYALTY

A. *Hirabayashi*: The Dark Side of Restraint

Unfortunately Stone's commitment to judicial restraint, so widely applauded in economic areas, helped justify some of the Court's most widely reviled opinions on civil liberties in wartime. Stone's opinion in *Hirabayashi* upheld, without a dissent, a wartime curfew imposed on aliens and citizens of Japanese descent,[225] and he joined Justice Black's opinion for six justices in *Korematsu* upholding the military's exclusion of all persons of Japanese ancestry from the west coast.[226]

In *Hirabayashi*, Stone reasoned that the Fourteenth Amendment's Equal Protection Clause applies only to state governments.[227] The Court thus had to uphold as legitimate any rational exercise of the Executive's constitutionally granted power to wage war.[228] Stone then accepted as rational the military's belief that the targeted curfew would hinder disloyal citizens plotting to assist a potential invasion of the West Coast.[229] As he noted in one particularly obtuse passage: "There is support for the view that social, economic and political conditions which have prevailed since the close of the last century . . . have intensified [the Japanese's] solidarity and have in large measure prevented their assimilation as an integral part of the white population."[230] In Stone's opinion, discrimination against the Japanese that prevented their assimilation justified further discrimination against them.[231]

As both Mason and Konefsky have explained, the *Hirabayashi* decision emerged from the same philosophy of judicial restraint that inspired Stone's decisions about economic matters.[232] The revulsion

225. Hirabayashi v. United States, 320 U.S. 81, 83-105 (1943).
226. Korematsu v. United States, 323 U.S. 214, 215-224 (1944).
227. *Hirabayashi*, 320 U.S. at 100.
228. *Id.* at 93, 101-02.
229. *Id.* at 101-02.
230. *Id.* at 96.
231. *See* Jerry Kang, *Denying Prejudice: Internment, Redress, and Denial*, 51 UCLA L. REV. 933, 947-48 (2004).
232. KONEFSKY, *supra* note 29, at 253 ("[I]t may be said that the *Hirabayashi* case was decided more on the basis of criteria which Chief Justice Stone has espoused in the commercial field than on the basis of principles for which he has called in the civil rights cases."); MASON, *supra* note 22, at 683 ("The core of Stone's wartime jurisprudence was still the same as that

Stone expressed in private conference toward the military's abuse of the Japanese did not overcome his unsubstantiated suspicion that Japanese-Americans had assisted the attack on Pearl Harbor, nor his inclination to defer to the other branches' preferences for responding to national crises—this time a feared invasion, instead of a depression.[233] A wrongly perceived military necessity provoked Stone to rescind the protection the Court offered to discreet and insular minorities in his footnote four of *Carolene Products.*[234]

Ironically, Stone's *Hirabayashi* opinion included one of the Court's most forceful denunciations of racial discrimination in an era in which *Plessy v. Ferguson*[235] remained good law: "[d]istinctions between citizens solely because of their ancestry are by their very nature odious to a free people whose institutions are founded upon the doctrine of equality."[236] Unfortunately this passage, which could have introduced a great dissent announcing a principal of racial equality, wound up buried in an opinion that did the opposite. Yet even so, it may have laid the groundwork for the Court's future attack against racial discrimination. As Noah Feldman has observed, "[Stone's] principal of equality remained on the books alongside his situational justification for discriminatory treatment; eventually it paved the way to judicial rejection of segregation."[237]

Stone died soon after the Japanese internment cases, which may have prevented reconsideration upon more sober reflection.[238] And it is easy to forget that the era shapes the Justice; as Chief Justice, Stone hesitated to hinder potentially the war effort,[239] and legal luminaries like Holmes[240] and Brandeis[241] tolerated or endorsed invidious discrimination under much less precarious circumstances. Indeed, two of

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which had prompted him eight years earlier to uphold the assertion of national authority over the economic life of the nation.").

233. *See* PETER IRONS, THE COURAGE OF THEIR CONVICTIONS: SIXTEEN AMERICANS WHO FOUGHT THEIR WAY TO THE SUPREME COURT, 45 (1990); STONE, *supra* note 61, at 298. *See generally* Eric L. Muller, *Hirabayashi and the Invasion Evasion*, 88 N.C. L. REV. 1333 (2010) (arguing that the government's lawyers in *Hirabayashi* knowingly and deliberately overstated the threat of a Japanese invasion of the west coast).

234. United States v. Carolene Prods. Co., 304 U.S. 144, 152 n.4 (1938).

235. 163 U.S. 548-551 (1896) (upholding separate but equal).

236. *Hirabayashi*, 320 U.S. at 100.

237. FELDMAN, *supra* note 12, at 241.

238. Indeed Stone would later disagree with views he expressed in speeches he gave before joining the Court. MASON, *supra* note 22, at 124.

239. *Id.* at 681.

240. *See, e.g.*, Buck v. Bell, 274 U.S. 200, 207 (1927) (Holmes, J.) (upholding mandatory sterilization in part because "[t]hree generations of imbeciles are enough."). It must be noted that both Justices Stone and Brandeis joined with Holmes's opinion.

the Court's other champions of civil liberties, Justices Black and Douglas, similarly voted to uphold the curfew and internment.[242] Perhaps Justice Stanley Reed's letter to Stone best defends Stone's *Hirabayashi* opinion: "It seems to me that you have stated a very difficult situation in a way that will preserve rights in different cases and at the same time enable the military forces to function. It is a thankless job but you have done it well."[243]

Nonetheless, Stone's legacy will be forever tarnished by his failure to confront the unfortunate misconception that the necessities of war can justify the violation of cherished values.[244] Indeed, Stone lapsed even further when he cited *Hirabayashi* in judicial conference to justify *Korematsu*.[245] And as Justice Stevens observed in his recent book, Stone "may have bent the rule of law in response to perceived military necessity"[246] in *Ex parte Quirin*,[247] and *In re Yamashita*,[248] his two other significant World War II related opinions.

B. *Gobitis*: Protecting Liberties "Which Tend to Inspire Patriotism and Love of Country"

Stone's 1943 *Hirabayashi* opinion perplexes even more because three years prior, as wartime hysteria percolated, Stone abandoned his restraint to author perhaps the Court's most heroic defense of the rights of a purportedly disloyal minority. In *Gobitis*, the Court decided that the First Amendment as incorporated against the states by the Fourteenth Amendment, did not protect school children of the Jehovah's Witness faith from expulsion for refusing, on religious

241. *See* Christopher A. Bracey, *Louis Brandeis and the Race Question*, 52 ALA. L. REV. 859, 861 (2001) (arguing that Brandeis was "complicit[ ] in rendering judicial decisions that reinforced core principles of the segregation regime").

242. *See, e.g.*, FELDMAN, *supra* note 12, at 243-54; STONE, *supra* note 61, at 304.

243. MASON, *supra* note 22, at 676; Letter from Stanley Reed, Justice, Supreme Court of the United States to Harlan Fiske Stone, Justice, Supreme Court of the United States (June 3, 1943) (on file with Library of Congress).

244. *See* BREYER, *supra* note 213, at 193 ("*Korematsu*'s impact as precedent likely consists of what it failed to do: make clear that there are at least some actions that the Constitution forbids presidents and their military delegates to take, even in wartime.").

245. *See* IRONS, *supra* note 233, at 322.

246. STEVENS, *supra* note 59, at 36.

247. *See generally* 317 U.S. 1 (1942) (rejecting challenges to death sentences imposed on putative German saboteurs). Indeed *Quirin* "remained the last word on the subject of military tribunals" until after 9/11. WEINER, *supra* note 94, at 113. However, the military significantly complicated Stone's task by executing the alleged saboteurs *before* Stone wrote his decision. *See id.* at 113-14.

248. *See generally* 327 U.S 1 (1946) (upholding death sentence imposed by a military tribunal on a Japanese general who commanded soldiers that committed atrocities).

grounds, to participate in their public school's mandatory flag salute.[249] Stone dissented alone.

Justice Frankfurter's opinion maintained that religious minorities must comply with generally applicable rules not aimed at promoting or restricting religious belief or dissemination of those beliefs.[250] Thus, he continued, the Court must weigh the individual's interest in freedom of conscience with the majority's equally, if not more important, interest in promoting loyalty by requiring the flag salute.[251] In an ironic homage to John Marshall's famous line from *Marbury v. Madison*,[252] Frankfurter argued: "It is not our province to choose among competing considerations in the subtle process of securing effective loyalty to the traditional ideals of democracy . . . [s]o to hold would in effect make us the school board for the country."[253]

Frankfurter concluded by reminding the Gobitis family of another forum in which they could pursue their interests:

> But to the legislature no less than to the courts is committed the guardianship of deeply cherished liberties . . . . To fight out the wise use of legislative authority in the forum of public opinion and before legislative assemblies rather than to transfer such a contest to the judicial arena, serves to vindicate the self-confidence of a free people.[254]

Frankfurter's encomiums to judicial restraint and the democratic process, of course, purposely evoked Stone's opinion in *Butler*. Indeed, Frankfurter, who expressed to Stone personal opposition to the school board's actions, hoped that his Stone impersonation would sway him to join a unanimous opinion rallying the public around the flag shortly after Germany's abrupt conquest of France shocked and demoralized the country.[255] Stone himself was well aware of the national panic; as he wrote his brother shortly before the publication of *Gobitis*, "[p]erhaps we are experiencing now some of the emotions which afflicted those who saw the barbarians break down the Roman

249. Minersville Sch. Dist. v. Gobitis, 310 U.S. 586, 586, 592-93, 600 (1940).

250. *Id.* at 593-95.

251. *Id.* at 595-98.

252. "It is emphatically the province and duty of the judicial department to say what the law is." Marbury v. Madison, 5 U.S. 137, 177 (1803) (overturning an act of Congress for the first time).

253. *Gobitis*, 310 U.S. at 598.

254. *Id.* at 600.

255. MASON, *supra* note 22, at 526-27; *see* Letter from Felix Frankfurter, Justice, Supreme Court of the United States, to Harlan Fiske Stone, Justice, Supreme Court of the United States (May 27, 1940) (on file with Library of Congress).

Empire."[256] But Frankfurter again misjudged Stone, who responded to those fears with a sense of patriotism far different from the one Frankfurter favored.

Stone maintained that the very existence of the First Amendment demanded exceptions to the government's normal power to compel citizens to violate their religious conscience.[257] Thus, the government regulation must yield, he wrote, if it can use means less restrictive to free speech or religion to accomplish its legitimate ends of inculcating loyalty.[258] And here, Stone believed coercion unnecessary because more tolerant, and effective, methods to achieve that end were available:

> Without recourse to such compulsion the state is free to compel attendance at school and require teaching by instruction and study of all in our history and in the structure . . . of our government, including the guarantees of civil liberty which tend to inspire patriotism and love of country.[259]

Stone's reasoning, of course, blatantly substituted his judgment for that of the school officials. He felt compelled to intervene because directing the Gobitis family to seek redress from the legislature surrendered "the constitutional protection of the liberty of small minorities to the popular will."[260] It was "helpless minorities" like the Witnesses, who entertain in good faith an unusual religious belief, that the Constitution empowered the Court to protect from "legislative efforts to secure conformity of belief."[261] For ultimately, Stone affirmed:

> The Constitution expresses more than the conviction of the people that democratic processes must be preserved at all costs. It is also an expression of faith and a command that freedom of mind and spirit must be preserved, which government must obey, if it is to adhere to the justice and moderation without which no free government can exist.[262]

Stone, who had argued so vigorously that the Constitution does not mandate a particular economic ideology, recognized nonetheless that

256. Letter from Harlan Fiske Stone, Justice, Supreme Court of the United States, to Lauson Stone (May 21, 1940) (on file with Library of Congress).

257. *Gobitis*, 310 U.S. at 602-03.

258. *Id.* at 603-04.

259. *Id.* at 604.

260. *Id.* at 606.

261. *Id*.

262. *Id.* at 606-07.

it did explicitly protect some personal liberties of the minority from the will of the majority.[263]

It is hard now to appreciate the importance of Stone's *Gobitis* dissent. Doctrinally, it cited and clarified Stone's landmark footnote four in *Carolene Products*,[264] which formally recognized the Court's duty to protect the rights of politically helpless minorities. In addition, it synthesized existing caselaw into the now familiarly strict standard by which the Court assesses the constitutionality of laws that may compromise the First Amendment.[265]

But perhaps most importantly, Stone's *Gobitis* dissent is one of the Court's most powerful defenses of a minority group under general suspicion of disloyalty in the proximity of wartime.[266] The Witnesses' insularity and uncommon religious practices, including, most prominently, their refusal to salute the flag, sparked rumors that they were a Fifth Column, or, in today's parlance, a "terrorist sleeper cell,"[267] allied with the fascists or communists who had recently conquered much of Europe.[268] A wave of vigilantism against the Witnesses, which began shortly before the opinion's publication, peaked in response to it,[269] designating *Gobitis* as one of the few Supreme Court decisions directly responsible for inciting mob violence.[270] Indeed, the Witnesses were so unpopular that the DOJ's Civil Rights Division aban-

263. *See* MASON, *supra* note 22, at 530.

264. *Gobitis*, 310 U.S. at 606 (citing United States v. Carolene Prods. Co., 304 U.S. at 152 n.4); VINCENT BLASI & SEANA V. SHIFFRIN, *West Virginia State Board of Education v. Barnette*, *in* CONSTITUTIONAL LAW STORIES 442 (Michael C. Dorf ed., 2004) ("Stone's dissenting opinion is best considered an extension of his effort . . . in the *Carolene Products* case to mark out a sphere of constitutional controversy in which an independent judiciary has a major role to play."); FELDMAN, *supra* note 12, at 184 ("In 1940, the idea that the Court should protect minorities from the majority was not the commonplace it would later become. Stone had first introduced it in 1937, burying it in a footnote."); KONFESKY, *supra* note 29, at 218 ("What was dictum and buried in a footnote in his opinion in the *Carolene Products Co.* case concerning the judiciary's role in civil rights cases is made central in his dissent in the *Gobitis* case.").

265. *Gobitis*, 310 U.S. at 603 ("In the cases just mentioned the Court was of opinion that there were ways enough to secure the legitimate state end without infringing the asserted immunity . . . ."); ROSS, *supra* note 38, at 189 (Stone's *Gobitis* dissent was "an early example of the search for 'less restrictive alternatives' to oppressive legislation that has characterized modern civil liberties law . . . .").

266. Shortly after World War I, Justice Holmes, joined by Justice Brandeis, wrote the Century's first great opinion defending dissent in the proximity of wartime in *Abrams v. United States*. 250 U.S. 616, 624-31 (1919) (Holmes, J., dissenting) (arguing for the free speech rights of an anti-draft pamphleteer).

267. BREYER, *supra* note 215, at 75-76.

268. PETERS, *supra* note 55, at 8-9, 72-73.

269. The first major mob violence occurred before the Court announced *Gobitis* on June 4, 1940. *Id.*

270. FELDMAN, *supra* note 12, at 185 ("To some horrified observers, it appeared that the Supreme Court, by denying the children the constitutional right to be exempt from saluting, had

doned hopes of convicting the vigilante perpetrators in trials by local juries.[271]

As Noah Feldman put it, "the Coolidge appointee . . . out-liberaled" the recent Roosevelt appointees Justices Black, Douglas, and Murphy,[272] who, influenced by widespread editorial praise for Stone's dissent,[273] publicly admitted their *Gobitis* mistake in a 1942 opinion.[274] In 1943, after the violence against the Witnesses had ebbed[275] and Justices Jackson and Rutledge replaced two members of the *Gobitis* majority,[276] Chief Justice Stone mentored Justice Jackson[277] as he wrote *West Virginia v. Barnette*, which overturned *Gobitis*.[278] Jackson's landmark opinion[279] established one of the most enduring principles in Supreme Court history: "If there is any fixed star in our constitutional constellation, it is that no official, high or petty, can prescribe what shall be orthodox in politics, nationalism, religion, or other matters of opinion or force citizens to confess by word or act their faith therein."[280] But its arguments and even some of its language "echoed . . . Stone's *Gobitis* dissent."[281]

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declared open season on the Witnesses."); IRONS, *supra* note 231, at 22-23; PETERS, *supra* note 55, at 9 ("*Gobitis* . . . helped ignite some of the worst anti-Witness violence of the period.").

271. PETERS, *supra* note 55, at 11.

272. FELDMAN, *supra* note 12, at 186.

273. MASON, *supra* note 22, at 531-32; *see also* PETERS, *supra* note 55, at 67 (discussing the flood of "congratulatory mail" to Justice Stone's chambers). Indeed, many years later, Justice Black stated that he and Justices Douglas and Murphy "knew we were wrong" about *Gobitis* shortly after reading Stone's dissent but did not have time to change their votes. NEWMAN, *supra* note 59, at 284. Scholars, however, have not found convincing Justice Black's *post-hoc* explanation . *Id.* at 284-85; *see* Robert L. Tsai, *Reconsidering* Gobitis*: An Exercise in Presidential Leadership*, 86 WASH U. L. REV. 363, 370-71 (2008).

274. Jones v. City of Opelika, 316 U.S. 584, 623-34 (1942) (Murphy, J., dissenting).

275. IRONS, *supra* note 233, at 23; MASON, *supra* note 22, at 533; PETERS, *supra* note 55, at 9.

276. Johnson, *supra* note 21, at 432.

277. John Q. Barrett, *Recollections of West Virginia State Board of Education v. Barnette*, 81 ST. JOHNS L. REV. 755, 795 (2007) [hereinafter *Recollections*].

278. *Bd. of Educ. v. Barnette*, 319 U.S. 624, 642; Johnson, *supra* note 21, at 432.

279. *See, e.g.*, William P. Marshall, *Progressive Constitutionalism, Originalism, and the Significance of Landmark Decisions in Evaluating Constitutional Theory*, 72 OHIO ST. L.J. 1251, 1259 (2011) ("[*Barnette*] is rightly celebrated as one of the greatest First Amendment decisions in American history.").

280. *Barnette*, 319 U.S. at 642. Professor John Q. Barrett believes Jackson's words "form a central part of our civic constitution. They remind us of our freedom, in our earliest years in school and throughout life, to believe devoutly and practice sincerely the ideas and faiths that call to us." *Recollections*, *supra* note 277, at 796.

281. Johnson, *supra* note 21, at 432. In particular, Jackson reiterated Stone's argument that permitting dissent *promoted* patriotism. "To believe that patriotism will not flourish if patriotic ceremonies are voluntary and spontaneous instead of compulsory routine is to make an unflattering estimate of the appeal of our institutions to free minds." *Barnette*, 319 U.S. at 641.

Recent reexaminations of the *Gobitis* story[282] temper a 2003 article's assessment that the case has been "largely forgotten."[283] Yet despite Stone's brave contradiction of every other Justice,[284] the eloquence of his opinion, and the unprecedented speed at which his dissenting position became law, the legal academy has recently overlooked his *Gobitis* dissent, particularly compared to the great dissents of Justice Harlan[285] or Justice Holmes, or Justice Jackson's opinion in *Barnette*.[286]

Stone's *Gobitis* dissent richly deserves greater recognition. Stone contributed in other cases to "the rights of man" during his tenure on the Court,[287] but the *Gobitis* opinion resonates particularly clearly at another time of war as much of the public suspects another religious minority—Muslim Americans—of disloyalty to America and its values.[288] Stone's opinion recognized that a democracy earns loyalty via persuasion, and instruction in the values, including freedom of the mind, that distinguish our form of government from that of the forces that marched through Europe in Stone's time, or that have terrorized this country in ours.[289]

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282. *See, e.g.*, BLASI & SHIFFRIN, supra *note* 264, at 439-446; FELDMAN, *supra* note 12, at 179-86; PETERS, *supra* note 55, *passim*; Tsai, *supra* note 273 *passim.*

283. William A. Galston, *Expressive Liberty and Constitutional Democracy: The Case of Freedom of Conscience*, 48 AM. J. JURIS. 149, 151 (2003).

284. As Akhil Reed Amar recently put it: "*Think about the audacity of someone to be alone against every other Justice.* He says to the rest of them, in effect, 'You are all wrong, and I'm right, I'm as right as right can be. History will prove that.'" Akhil Reed Amar, *Plessy v. Ferguson and the Anti-Canon*, 39 PEPP. L. REV. 75, 82 (2011) (emphasis added).

285. *See, e.g.*, Goodwin Liu, Remark to the California Law Review, The First Justice Harlan, 96 CAL. L. REV. 1383, 1385 (2008) ("Harlan, it may be said, inaugurated the tradition of the Great Dissent"). *See generally* Eric Schepard, *The Great Dissenter's Greatest Dissents, the First Justice Harlan, the "Color Blind" Constitution, and the Meaning of His Dissents in the Insular Cases for the War on Terror*, 48 AM. J. LEGAL HIST. 119 (2006) (discussing Harlan's dissenting opinions).

286. Anita Krishnakumar, *On the Evolution of the Canonical Dissent*, 52 RUTGERS L. REV. 781, 811 & n.152 (2000) ("[I]t would be a mistake to consider the [*Gobitis*] dissent canonical given that it is rarely cited or quoted by later Courts."); *see also id.* at 781-82, 808 (explaining that the *Gobitis* dissent has not been canonized).

287. *See, e.g.*, Robert M. Cover, *The Origins of Judicial Activism in the Protection of Minorities*, 91 YALE L.J. 1287, 1307 (1982) ("Stone's decision . . . in *United States v. Classic*, [313 U.S. 299 1941]—though not a race case—was immediately understood to be a breakthrough for minority rights . . . .").

288. *See, e.g.*, Warren D. Camp, *Child Custody Disputes in Families of Muslim Tradition*, 49 FAM. CT. REV. 582, 582 (2011) (noting that a 2009 poll showed that 44% of non-Muslims believe that Muslims' religious beliefs are too extreme and less than half believe that U.S. Muslims are loyal to the United States); Huq, *supra* note 113, at 350 ("National polling data from the past five years suggests that a majority of Americans have categorically negative views of Islam and their Muslim cocitizens.").

289. *See* MASON, *supra* note 22, at 529 ("Loyalty is a beautiful idea, [Stone] said in effect, but you cannot create it by compulsion and force.").

VI. STONE'S LEGACY

Melvin Urofsky, author of a recent Brandeis biography, defined a great Justice as "the author of important opinions that continue to shape American jurisprudence."[290] According to that standard, Harlan Fiske Stone, now more than ever, deserves recognition as a great jurist. His decision to prohibit the BI from spying on radicals and his dissents in *Butler* and other pre-1937 cases established the framework for resolving crucial policy and legal debates. His devotion to restraint and non-partisanship should continue to guide the conscience of the judiciary. His mistakes in *Hirabayashi* remind us how easily wartime paranoia and prejudice can compromise cherished values, like the tolerance Stone championed so eloquently in *Gobitis*. As Stone's law clerk, Bennett Boskey,[291] correctly predicted in 1946, "time, I think will prove the[ ] durability" of Stone's opinions.[292]

Though Felix Frankfurter often misjudged Stone, he got one thing about him right. When Stone fatigued of dissenting, Frankfurter reminded him

> [Y]ou are an educator, even more so on the Supreme Court than you were off it. And you are the last person who needs to be told that education, particularly when the whole nation is your class, involves saying the same old thing in a new and fresh and powerful form.[293]

Stone believed his influence peaked as a teacher.[294] The nation remains his classroom, hopefully receptive, even today, to his insights in a new and fresh and powerful form.

290. UROFSKY, supra note 8, at xii.
291. Bennett Boskey, *Mr. Chief Justice Stone*, 59 HARV. L. REV. 1200, 1200 (1946).
292. *Id.* at 1203.
293. Letter from Felix Frankfurter, Professor, Harvard Law School to Harlan Fiske Stone, Justice, Supreme Court of the United States (Mar. 28, 1932) (on file with Library of Congress); MASON, *supra* note 22, at 310.
294. MASON, *supra* note 22, at 90.

The Search for an Environmental *Filartiga*: Trans-Boundary Harm and the Future of International Environmental Litigation

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INTRODUCTION

In wake of the Second Circuit's decision in *Filartiga v. Pena Irala*,[1] critics and supporters alike anticipated the coming of a new era of international litigation. In *Filartiga*, the Second Circuit granted non-citizen plaintiffs tortured abroad a ten million-dollar judgment, and simultaneously revived the Alien Tort Statute (ATS)—a then obscure statute that allows foreigners to sue in United States federal courts for violations of the "law of nations."[2] Since *Filartiga*, American Courts have recognized, among others, cruel, inhuman, or degrading treatment; genocide; war crimes; crimes against humanity; summary execution; prolonged arbitrary detention; and forced disappearance as actionable torts under the statute.[3]

1. Filartiga v. Pena-Irala, 630 F.2d 876 (2d Cir. 1980).
2. Sosa v. Alvarez-Machain, 542 U.S. 692, 712 (2004).
3. Pamela J. Stephens, *Spinning Sosa: Federal Common Law, the Alien Tort Statute, and Judicial Restraint*, 25 B.U. INT'L L.J. 1, 5 (2007).

Inspired by the efforts of their human rights brethren, environmental legal scholars speculated whether the same statute could be used to obtain redress for violations of international environmental law. Unfortunately, thirty years later, the dreams of environmental enthusiasts have failed to come to fruition. Courts have routinely dismissed environmental ATS cases, raising a variety of substantive and procedural objections.[4] Procedural objections—particularly whether such cases involve political questions that courts lack the jurisdiction to adjudicate—will always be a significant barrier to ATS claims. However, the hesitancy of American courts to recognize a viable environmental claim under the ATS results in part from the failure of international litigators to file and sufficiently support a claim alleging a violation of the most viable international environmental norm—the prohibition on trans-boundary harm. The norm, as generally understood and explained in international arbitral decisions, adjudications, treaties and multilateral liability and compensatory agreements, decisions of United States federal courts, the works of legal scholars and jurists, and various states' domestic practices provides that a nation should not use its territory in a way that causes significant or serious harm within another country's borders.

The Article will open with a brief survey of ATS jurisprudence, specifically focusing on the text of the statute and early interpretations of it, modern court decisions prior to *Sosa v. Alvarez-Machain*, and the Supreme Court's decision in *Sosa* which altered and universalized requirements for the recognition of torts under the law of nations. The second part of the Article will trace the parallel emergence of the prohibition on trans-boundary harm as a principle of customary international law. The third part of the Article will explore the principal criticisms of courts which have considered environmental ATS claims, namely that the tort alleged was not sufficiently universal, specific, or binding upon among the international community. Finally, the fourth section of the Article will explain why the prohibition on trans-boundary harm may satisfy many of these criticisms. Included in the fourth section will be an assessment of the norm's most significant substantive limitation—that unlike a number of norms in the human rights context, the prohibition against trans-boundary harm is generally understood as creating a duty between states, not individuals—and po-

4. *See infra* Part III.

tential theories and strategies that might be used to overcome this barrier.

I. UNIVERSAL, SPECIFIC, AND BINDING: THE FRAMEWORK FOR RECOGNITION UNDER THE ALIEN TORT STATUTE

The history of the Alien Tort Statute can be concisely classified into three periods: (1) the colonial era, during which the statute was enacted; (2) the modern era, in the wake of *Filartiga*, during which victims, for the first time, regularly challenged government and corporate practices that violated the law of nations; and (3) the contemporary period, during which courts have analyzed asserted torts under the reformulated framework the Supreme Court articulated in *Sosa*.

A. The Origins of the Alien Tort Statute

The Alien Tort Statute, enacted in 1789, provides: "The District Court shall have original jurisdiction of any civil action by an alien for a tort only, committed in violation of the law of nations or a treaty of the United States."[5] The statute was originally placed in the Judiciary Act of 1789;[6] however, as at the time, legislative history was not maintained, there is little concrete knowledge about the statute's original purpose.[7] In 1781, the Continental Congress, foreshadowing the statute's enactment, passed an expansive resolution encouraging states to provide relief to foreign nationals alleging violations of international norms recognized as part of the law of nations.[8]

The resolution urged states to "authorize suits . . . for damages by the party injured, and for compensation to the United States for damage sustained by them from an injury done to a foreign power by a citizen."[9] Echoing Blackstone, the Congressional resolution called upon state legislatures to "provide expeditious, exemplary, and adequate punishment for the violation of safe conducts or passports . . . of

5. 28 U.S.C. § 1350 (2006).

6. Anne-Marie Burley, *The Alien Tort Statute and the Judiciary Act of 1789: A Badge of Honor*, 83 AM. J. INT'L 461, 461 (1989) (providing an extensive overview of the creation of the ATS).

7. Tel-Oren v. Libyan Arab Republic, 726 F.2d 774, 812 (D.C. Cir. 1984) (Bork, J., concurring) ("Historical research has not as yet disclosed what section 1350 was intended to accomplish."); *id.* at 813-815 (providing an extensive overview of the creation of the ATS).

8. Burley, *supra* note 6, at 476.

9. Sosa v. Alvarez-Machain, 542 U.S. 692, 716 (2004) (quoting 21 J. CONTINENTAL CONGRESS 1137 (G. Hunt ed. 1912)).

hostility against such as are in amity . . . with the United States . . . infractions of the immunities of ambassadors and other public ministers . . . [and] infractions of treaties and conventions to which the United States are a party."[10] Significantly, the resolution urged states to not only recognize these "most obvious" offenses, but also "additional offenses not contained in the foregoing enumeration."[11]

From the beginning, jurists, interpreting the statute, focused on the concept of "ripening"—whether the norm asserted by the aggrieved party had achieved sufficient status to be part of the "law of nations." Prevalent among the controversies was the debate between Justices Joseph Story and John Marshall as to whether the prohibition on international trade in slaves was sufficiently ripe to be actionable under the statute.[12] In *United States v. La Jeune Eugenie*,[13] Justice Story, relying primarily on natural law traditions and recent state practices,[14] concluded that such a prohibition existed and, therefore, its violation was actionable.[15] However, Justice Marshall, relying primarily upon the revolutionary world's employment of slavery throughout the seventeenth and eighteenth centuries, concluded that the prohibition lacked universal assent and, thus, was not part of the law of nations.[16]

Nearly seventy-five years passed before a Supreme Court justice again considered the statute's meaning. However, in *The Paquete Habana*,[17] the Court accepted Justice Story's standard. The Court acknowledged that while countries of the world on occasion had accepted the capture of fishing vessels as prizes of war in the past, the practice had come to be rejected far more often than not.[18] Accord-

10. 21 J. CONTINENTAL CONGRESS 1136-37 (G. Hunt ed. 1912).

11. *Id.*

12. *Compare infra* notes 14-16 and accompanying text (citing Justice Story's understanding of the "law of nations"), *with infra* note 17 (discussing Justice Marshall's opinions on the "law of nations").

13. 26. F. Cas. 832 (C.C.D. Mass. 1822) (No. 15,551).

14. *See id.* at 846 (concluding that the law of nations could be deduced from the general principles of right and justice, customary state practice, and conventions governing international affairs).

15. *See id.* ("[I]t does not follow . . . that because a principle cannot be found settled by the consent or practice of nations at one time, it is to be concluded, that at no subsequent period the principle can be considered as incorporated into the public code of nations.").

16. *Id.*

17. 175 U.S. 677 (1900).

18. *See id.* at 686 ("It is therefore worth the while to trace the history of the rule, from the earliest accessible sources, through the increasing recognition of it, with occasional setbacks, to what we may now justly consider as its final establishment in our own country and generally throughout the civilized world.").

ingly, what in the past had been merely "an ancient usage" had "gradually ripe[ned] into a rule of international law."[19]

B. The Reemergence of the Alien Tort Statute

For the next eighty years, the statute went unutilized. It was not until the Second Circuit's decision in *Filartiga v. Pena* that the statute again garnered significant attention. In *Filartiga*, an expatriate Paraguayan family living in the United States, relying on the statute, filed a claim against a former Paraguayan military officer who kidnapped and tortured their son.[20] Upon examination of "the sources [from] which customary international law is derived—the usage of nations, judicial opinions, and the work of jurists"—the court concluded "that official torture" had ripened to the point that it was "now prohibited by the law of nations."[21]

In the wake of *Filartiga*, courts set out a three-part test to determine whether an international norm was actionable under the statute. A cognizable norm, under the law of nations, must have been sufficiently: (1) specific; (2) universal; and (3) obligatory.[22] Relying upon these criteria, courts recognized eight torts as violations of the law of nations: summary execution,[23] genocide,[24] war crimes,[25] disappearance,[26] arbitrary detention,[27] slave trading,[28] and cruel, inhuman, or degrading punishment.[29]

However, alleging a viable tort was only the first hurdle for most plaintiffs. Under the Foreign Services Immunities Act (FSIA), foreign states, with few exceptions, have complete immunity from liability within United States' courts.[30] Unless one of FSIA's enumerated exceptions applies, federal courts lack subject matter jurisdiction to con-

19. *Id.*
20. Filartiga v. Pena-Irala, 630 F.2d 876, 880 (2d Cir. 1980).
21. *Id.* at 887.
22. *See, e.g.*, Forti v. Suarez-Mason, 672 F. Supp. 1531, 1542-43 (N.D. Cal. 1987) ("Before this court may adjudicate a tort claim under 1350, it must be satisfied that the legal standard it is to apply is one with universal and definition; on no other basis may the court exercise jurisdiction over a claimed violation of the law of nations.").
23. *In re* Estate of Ferdinand Marcos Human Rights Litigation, 25 F.3d 1467, 1475 (9th Cir. 1994).
24. Kadic v. Karadzic, 70 F.3d 232, 241 (2d. Cir. 1995).
25. *Id.* at 241-43.
26. Forti v. Suarez-Mason, 694 F.Supp. 707, 711 (N.D. Cal. 1998).
27. *Kadic*, 70 F.3d at 242-43.
28. Xuncax v. Gramajo, 886 F.Supp. 162, 184-85 (D. Mass. 1995).
29. Doe I v. Unocal Corp., 963 F.Supp. 880, 886 (C.D. Cal. 1997).
30. 28 U.S.C. § 1604 (2006).

sider claims against foreign sovereigns.[31] Notable exceptions include the waiver exception,[32] the commercial activity exception,[33] the international takings exception,[34] and the non-commercial torts exception.[35]

Even if a claim is not barred by the FSIA, courts may refuse to consider it on account of the Act of State Doctrine, a judicially created rule intended to limit American courts from judging actions foreign sovereigns take within their own country.[36] The doctrine, however, is merely discretionary, as opposed to jurisdictional.[37] Accordingly, courts must independently examine the character of the act at issue in determining whether to apply the doctrine.[38] Courts should consider, among other things, whether the act at issue was committed in the national interest, whether significant consensus has emerged internationally regarding the act's illegality, whether the plaintiff seeks damages or injunctive relief, and the effect of judicial intervention on the foreign policy goals of the Executive and Legisla-

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31. *Id.*

32. *Id.* § 1605(a)(1) ("[I]n which the foreign state has waived its immunity either explicitly or by implication, notwithstanding any withdrawal of the waiver which the foreign state may purport to effect except in accordance with the terms of the waiver.").

33. *Id.* § 1605(a)(2).

> [I]n which the action is based upon a commercial activity carried on in the United States by the foreign state; or upon an act performed in the United States in connection with a commercial activity of the foreign state elsewhere; or upon an act outside the territory of the United States in connection with a commercial activity of the foreign state elsewhere and that act causes a direct effect in the United States . . . .

Id.

34. *Id.* § 1605(a)(3).

> [I]n which rights in property taken in violation of international law are in issue and that property or any property exchanged for such property is present in the United States in connection with a commercial activity carried on in the United States by the foreign state; or that property or any property exchanged for such property is owned or operated by an agency or instrumentality of the foreign state and that agency or instrumentality is engaged in a commercial activity in the United States . . . .

Id.

35. *Id.* § 1605(a)(5).

> [N]ot otherwise encompassed in paragraph (2) above, in which money damages aresought against a foreign state for personal injury or death, or damage to or loss of property, occurring in the United States and caused by the tortious act or omission of that foreign state or of any official or employee of that foreign state while acting within the scope of his office or employment; except this paragraph shall not apply to—(A) any claim based upon the exercise or performance or the failure to exercise or perform a discretionary function regardless of whether the discretion be abused, or (B) any claim arising out of malicious prosecution, abuse of process, libel, slander . . . .

Id.

36. W.S. Kirkpatrick & Co. v. Envtl. Tectonics Corp., 493 U.S. 400, 404 (1990).

37. Siderman de Blake v. Republic of Argentina, 965 F.2d 699, 707 (9th Cir. 1992).

38. *See* Republic of the Philippines v. Marcos, 862 F.2d 1355, 1361 (9th Cir. 1988) (en banc) (explaining that the doctrine did not apply in a suit against the deposed dictator of the Philippines by the present government because "the doctrine is meant to facilitate the foreign relations of the United States, not to furnish the equivalent of sovereign immunity to a deposed leader").

tive Branches.[39] If the act was not taken in the national interest or significant consensus has emerged regarding the act's illegality, the application of the doctrine may be inappropriate. Applying these principles, the doctrine's application often coincided with whether the asserted norm was sufficiently universal, specific, and obligatory.[40]

As a result of these difficulties, plaintiffs often attempted to hold individuals and corporations responsible for international human rights and environmental violations.[41] This approach, however, conflicted with the traditional understanding of the law of nations as applying to states;[42] establishing "substantive principles for determining whether one country has wronged another,"[43] rather than creating rights of action against private actors.[44] Nonetheless, in the wake of *Filartiga*, courts acknowledged that the law of nations does not always "confine its reach to state action."[45] Because certain norms create duties for individuals as well as for states, individual persons and entities could be held liable for genocide, war crimes, piracy, and slavery, regardless of whether the defendant acted under the color of state law.[46] Courts, however, continued to interpret all other violations as requiring state action.[47]

Where a plaintiff alleged a violation other than the specified few for whom individuals could owe duties, courts required plaintiffs to prove that the defendants acted under the "color of law" in accordance with 42 U.S.C. § 1983.[48] Under § 1983, a private individual acts under the color of law "when he acts together with state officials or

39. Liu v. Republic of China, 892 F.2d 1419, 1432-33 (9th Cir. 1989).

40. *See, e.g.*, Nat'l Coal. Gov't of Burma v. Unocal Corp., 176 F.R.D. 329, 353-57 (C.D. Cal. 1997) (discussing that the Act of State Doctrine bars claims under ATS for expropriation of property, trespass, and conversion where no controlling international law, but claims of torture and forced labor not barred).

41. Xuncax v. Gramajo, 886 F.Supp. 162, 187-89 (D. Mass. 1995).

42. *See* Kadic v. Karadzic, 70 F.3d 232, 239-241 (2d. Cir 1995) (providing a brief survey of war crimes, torture, and genocide as committed primarily by states); Filartiga v. Pena-Irala, 630 F.2d 876, 883-85 (2d. Cir. 1980) (reviewing the development of state practice relating to torture).

43. Banco Nacional de Cuba v. Sabbatino, 376 U.S. 398, 422 (1964).

44. *See* 1 L. Oppenheim, INTERNATONAL LAW: A TREATISE 19 (H. Lauterpacht ed., 7th ed. 1948).

45. *Kadic*, 70 F.3d at 239.

46. *Id.* at 239-44.

47. Beanal v. Freeport-McMoRan, Inc., 969 F. Supp. 362, 373-80 (E.D. La. 1997) (requiring state action of plaintiff's asserted claims for murder, causing disappearance, torture, cruel and inhuman treatment or punishment, prolonged arbitrary detention and systematic race discrimination); John Doe I v. Unocal Corp., 963 F. Supp. 880, 890-92 (C.D. Cal. 1997) (requiring state action before defendant could be held liable for forced labor).

48. *See, e.g.*, *Beanal*, 969 F. Supp. at 380 ("Beanal must allege state action in order to state a claim . . . under § 1350 for non-genocide related human rights violations abuses.").

with significant state aid."[49] The Supreme Court, when assessing the legitimacy of "color of law" claims in the context of domestic civil rights actions, has formulated four separate tests for state action: "public function,"[50] "symbiotic relationship,"[51] "nexus,"[52] and "joint action."[53] Of these, the joint action test was the only test under which courts sustained ATS jurisdiction over corporate defendants.[54] The joint action test provides that private actors may be held liable as state actors if they willfully participate in joint action with a state to affect a particular deprivation of rights.[55]

Divergent views regarding the scope of liability for corporations that acted "under the color of law" became readily apparent.[56] Additionally, significant disagreements emerged regarding: (1) the strength of evidence required to provide that a norm classifies as part of the law of nations;[57] (2) which torts qualified for inclusion in the law of nations;[58] and (3) whether an asserted international norm must also be independently actionable in domestic courts.[59]

C. *Sosa v. Alvarez-Machain* and Contemporary Jurisprudence

In 2003, the Supreme Court, in *Sosa*, took significant steps towards answering these questions. While the court declined to adopt specific criteria for recognition, it stated that a norm could not be actionable unless it, at a minimum, met certain requirements.[60] In *Sosa*,

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49. *Kadic*, 70 F.3d at 245 (citing Lugar v. Edmondson Oil Co., 457 U.S. 922, 937 (1982)).

50. Jackson v. Metro. Edison Co., 419 U.S. 345, 349-52 (1974). Under this test, a private actor may be held liable when it performs a function with the exclusive province of the state. *Id.* at 352.

51. *See* Burton v. Wilmington Parking Auth., 365 U.S. 715 (1961) ("The state has so far insinuated itself into a position of interdependence with [the private actor] that it must be recognized as a joint participant in the challenged activity.").

52. *Jackson*, 419 U.S. at 350-51. To hold a private actor liable under the nexus test, a plaintiff must show that the nexus between the state and the private actor is so close that one's actions may be considered the other's. *Id.*

53. Dennis v. Sparks, 449 U.S. 24, 27 (1980).

54. *See* John Doe I v. Unocal Corp., 963 F. Supp. 880, 890-91 (C.D. Cal. 1997) (utilizing the joint action test to find subject matter jurisdiction over Unocal under ATS), *aff'd in part*, 395 F.3d 932 (9th Cir. 2002).

55. *Dennis*, 449 U.S. at 27.

56. *See, e.g.*, Presbyterian Church of Sudan v. Talisman Energy, Inc., 244 F. Supp. 2d 289 (S.D.N.Y. 2003); Beanal v. Freeport-McMoRan, Inc., 969 F. Supp. 362 (E.D. La. 1997).

57. *Compare supra* note 20 and accompanying text (discussing the strength of the norm asserted in Filartiga), *with* Doe v. Unocal Corp., 110 F. Supp. 2d 1294, 1304 (C.D. Cal. 2000) (concluding that the human rights norm in question must rise to the level of a *jus cogens* norm).

58. *See* DAVID WEISSBRODT ET AL., INTERNATIONAL HUMAN RIGHTS: LAW POLICY, AND PROCESS 771 (3d ed., 1999) (discussing Judge Bork's views on the Alien Tort Statute).

59. *Id.*

60. Sosa v. Alvarez-Machain, 542 U.S. 692, 732 (2004).

plaintiff Humberto Alvarez-Machain alleged that the "Drug Enforcement Administration['s] us[e] [of] petitioner [Jose Francisco] Sosa and other Mexican nationals to abduct . . . Alvarez-Machain" violated the prohibition on arbitrary detention, allegedly recognized as part of the law of nations.[61]

The Court began its analysis by explaining that ATS is jurisdictional; that is, while it does not create a private right of action, it creates subject matter jurisdiction for other claims recognized as part of the "law of nations."[62] Second, the court held that crimes actionable as part of the law of nations would not be restricted to merely the three contemplated by "Judge Blackstone and the Framers" in 1789: (1) violation of safe conducts; (2) infringement of the rights of ambassadors; and (3) "murder or robbery, or other capital crimes, punishable as piracy if committed on the high seas."[63]

Third, the Court laid down a set of guidelines lower courts could use in determining whether a tort is part of the law of nations. The Court cautioned that to bring a cognizable ATS claim, an aggrieved party must establish that the asserted norm does not have "less definite content and acceptance among civilized nations than the historical paradigms familiar when § 1350 was enacted."[64] The Court did not explicitly state that the norm asserted be obligatory—that is, be from a binding treaty or part of customary international law. However, in assessing the strength of the material *Alvarez-Machain* provided in support of the norm's "definitive nature" and "acceptance among civilized nations," it found that non-binding materials, if presented alone, would be insufficient.[65] While mere declarations, non-binding, and non-self-executing treaties will not be adequate proof of a norm's definite nature, courts would not be precluded from considering them as supporting material in addition to the works of, for example, well-qualified jurists and commentators.[66] Furthermore, the Court left open the possibility that they may be used to prove the

61. *Id.* at 718.

62. *Id.* at 714.

63. *Id.* at 748.

64. *Id.* at 731-32.

65. *See id.* at 734-35 (assessing the value of the U.N. Charter and the Universal Declaration on Human Rights as to proving universal consensus against arbitrary detention).

66. *See id.* at 735 ("Accordingly, Alvarez cannot say that the Declaration and Covenant themselves establish the relevant and applicable rule of international law."); *id.* at 734 (quoting prior decisions of the Court as to what sources courts may consider for ATS claims).

existence of "binding customary international law."[67] The plaintiff's claims in Sosa were dismissed as he was unable to prove universal acceptance of the norm asserted—a prohibition against any and all arbitrary detention, regardless of length.[68] The Court failed to address the specificity of the norm asserted, beyond commenting that "it may be harder to say which policies cross that line with the certainty afforded by Blackstone's three common law offenses."[69]

Finally, the Court issued a series of considerations that courts must account for before recognizing a new claim, thereby ensuring that judicial discretion in the field is properly exercised. First, courts must recognize that the jurisprudential status of the common law has changed drastically since 1789.[70] Whereas it was then understood among legal scholars as the result of careful decision making, in contemporary times it is generally considered a judicial act of creation.[71] Second, judges must be cognizant of the fact that while courts have "assumed competence to make judicial rules of decision of particular importance to foreign relations, such as the act of state doctrine . . . the general practice [among modern courts] has been to look for legislative guidance before exercising innovative authority over substantive law."[72] Third, courts must recognize that the decision to create a private right of action is one better left to legislative judgment in the great majority of cases.[73] Fourth, courts have a responsibility to limit their decisions such that they do not impinge upon the discretion of the legislative and executive branches.[74] Finally, deciding courts must consider recent jurisprudence indicating that contemporary courts have not been inclined toward judicial creativity.[75] While these

67. *See id.* at 735 ("Alvarez cannot say that the Declaration and Covenant themselves establish the relevant and applicable rule of international law. He instead attempts to show that prohibition of arbitrary arrest has attained the status of binding customary international law."). Whereas the Court dismissed the Universal Declaration on Human Rights and the United Nations Covenant on Civil and Political Rights when asserted by themselves, it cited and quoted the Restatement (Third) of International Law which previous courts had dismissed because of its non-binding and purely advisory nature. *Id.* at 737.

68. *See id.* at 736 ("Alvarez thus invokes a general prohibition of 'arbitrary' detention defined as officially sanctioned action exceeding positive authorization to detain under the domestic law of some government, regardless of the circumstances. Whether or not this is an accurate reading of the Covenant, Alvarez cites little authority that a rule so broad has the status of a binding customary norm today.").

69. *Id.* at 737.

70. *Id.* at 725.

71. *Id.*

72. *Id.* at 726.

73. *Id.* at 727.

74. *Id.*

75. *Id.* at 728.

measures may seem daunting, the Court, in closing, stated that its decision should not be interpreted as instructing "federal courts [to] avert their gaze entirely from any international norm intended to protect individuals."[76]

Finding the underlying norm insufficient,[77] the Court, only in passing, commented on the potential liability of trans-national corporations, or other private actors, for violations of the law of nations. In footnote twenty, the Court stated that whether corporations could be held liable under ATS would be primarily dependent upon whether the violation alleged extends liability to such defendants.[78] The Court said nothing of the legitimacy of ATS claims brought under section 1983's "color of law" doctrine.[79]

Courts, post-*Sosa*, have continued to recognize a variety of international torts as actionable under the law of nations, including: torture and extrajudicial killing,[80] crimes against humanity,[81] war crimes,[82] genocide,[83] severe cruel, inhuman, and degrading treatment,[84] prolonged arbitrary detention,[85] hijacking of airplanes,[86] human trafficking,[87] and forced labor.[88] Furthermore, at least one circuit has not hesitated to find new torts justiciable, including prohibitions on non-consensual

76. *Id.* at 730.

77. *See supra* note 70 and accompanying text.

78. *Sosa*, 542 U.S. at 732-33.

79. *Id.*

80. Aldana v. Del Monte Fresh Produce, 416 F.3d 1242 (11th Cir. 2005); Mujica v. Occidental Pet. Corp., 381 F. Supp. 2d 1164, 1179 (C.D. Cal. 2005); Doe v. Saravia, 348 F. Supp. 2d 1112, 1153-54 (E.D. Cal. 2004); *see also Sosa*, 542 U.S. at 728 (citing H.R. Rep. No. 102-367, pt. 1, p. 3 (1991)) ("It is true that a clear mandate appears in the Torture Victim Protection Act . . . providing authority that 'establish[es] an unambiguous and modern basis for' federal claims of torture and extrajudicial killing.").

81. *Mujica*, 381 F. Supp. 2d at 1180; *Saravia*, 348 F. Supp. 2d at 1154-57; *see also Sosa*, 542 U.S. at 762 (Breyer, J., concurring).

82. *Sosa*, 542 U.S. at 762 (Breyer, J., concurring); *In re* Xe Servs. Alien Tort Litig., 665 F. Supp. 2d 569, 582 (E.D. Va. 2009).

83. *Sosa*, 542 U.S. at 762 (Breyer, J., concurring).

84. *Mujica*, 381 F. Supp. 2d at 1181; Doe I v. Qi, 349 F. Supp. 2d 1258, 1320-25 (N.D. Cal. 2004). *Contra Aldana*, 416 F.3d at 1247.

85. *See Qi*, 349 F. Supp. 2d at 1325-28 (finding that twenty days detention and torture without charges or allowing to see lawyer or family was actionable; thirty days detention, torture, and sexual abuse without charges or access to a lawyer or family was actionable; forty-nine and fifty-five day detentions with torture and inhuman treatment was actionable under the ATS); Jama v. U.S. I.N.S., 343 F. Supp. 2d 338, 361 (D.N.J. 2004). *Contra Aldana*, 416 F.3d at 1247.

86. *In re* Terrorist Attacks on Sept. 11, 2001, 349 F. Supp. 2d 765, 826 (S.D.N.Y. 2005); Burnett v. Al Baraka Inv. & Dev. Corp., 274 F. Supp. 2d 86, 100 (D.D.C. 2003).

87. Velez v. Sanchez, 754 F. Supp. 2d 488, 496 (E.D.N.Y. 2009); Adhikari v. Daoud & Partners, 697 F. Supp. 2d 674, 687 (S.D. Tex. 2009).

88. *Adhikari*, 697 F. Supp. 2d at 687.

medical experimentation[89] and arbitrary denationalization by a state actor.[90]

In conducting their analyses, courts, post-*Sosa*, have generally disregarded non-self-executing treaties, unless the norm asserted in the treaty is supported by additional authority.[91] Jurists instead have relied on a variety of other international and domestic sources, including the Nuremberg War Crimes Tribunal Charter,[92] the international criminal tribunals for the former Yugoslavia and for Rwanda, the Rome Statute for the International Criminal Court,[93] the Torture Victims Protection Act,[94] the War Crimes Act,[95] and pre-*Sosa* lower court decisions.

Questions regarding the scope of liability for non-state actors under the statute have continued to garner significant discussion. The Supreme Court, in *Samanter v. Yousef* [96] clarified that neither the text nor the history and purposes of the FSIA support an extension of the Act's protections to individuals.[97] However, the question of corporate liability has remained an open question under the statute. While the Second Circuit recently foreclosed all ATS-based claims against corporations,[98] the D.C., Ninth,[99] and Eleventh Circuits have suggested that corporations, under appropriate circumstances, may be held liable for violations of the law of nations.[100] The Supreme Court undertook consideration of the issue during the spring 2012 term in *Kiobel*

89. Abdullahi v. Pfizer, Inc., 562 F.3d 163 (2d Cir. 2009).

90. *In re* S. African Apartheid Litig. v. Daimler AG, 617 F. Supp. 2d 228, 253 (S.D.N.Y. 2009).

91. *Abdullahi*, 562 F.3d at 177.

92. Agreement for the Prosecution and Punishment of the Major War Criminals of the European Axis, Aug. 8, 1945, 59 Stat. 1544, 82 U.N.T.S. 279.

93. Rome Statute of the International Criminal Court, U.N. GAOR, U.N. Doc. A/CONF.183/9 (1998).

94. Torture Victim Protection Act of 1991, Pub. L. 102-256, 106 Stat. 73 (1992).

95. War Crimes Act, 18 U.S.C. § 2441(c) (2006).

96. Samantar v. Yousuf, 130 S. Ct. 2278 (2010). Courts, likewise, have continued to expound upon the circumstances in which a defendant who has acted in violation of the law of nations may nonetheless be immune from suit under the Act of State Doctrine. In *Doe I v. Liu Qi*, the United States District Court for the Northern District of California held that even if the alleged claim was sufficiently specific to be actionable under the ATS, courts could decline to hear the case if the violation involved an act of state. 349 F. Supp. 2d 1258, 1290-91 (N.D. Cal. 2004). The court ultimately rejected application of the doctrine and the plaintiff's request for declaratory relief in light of the State Department's condemnation of the practice at issue. *Id.* at 1306.

97. *Samantar*, 130 S. Ct. at 2289.

98. Kiobel v. Royal Dutch Petroleum Co., 642 F.3d 379 (2d Cir. 2011).

99. Sarei v. Rio Tinto, PLC, 671 F.3d 736, 747-48 (9th Cir. 2011).

100. Doe v. Exxon Mobil Corp., 654 F.3d 11 (D.C. Cir. 2011); Romero v. Drummond Co., 552 F.3d 1303, 1315 (11th Cir. 2008).

v. Royal Dutch Petroleum.[101] However, rather than deciding the matter, the Court returned the case to the parties, asking for further briefing on a broader and more troubling question for plaintiffs: "whether and under what circumstances the ATS allows courts to recognize a cause of action for violations of the law of nations occurring within the territory of a sovereign other than the United States."[102] Though American courts have generally assumed that they have broad jurisdiction over such cases,[103] the Court's decision has the potential to radically reshape ATS jurisprudence, regardless of the tort alleged.

II. FROM *TRAIL SMELTER* TO *RIO TINTO*: THE EMERGENCE OF THE INTERNATIONAL PROHIBITION ON TRANS-BOUNDARY HARM AS CUSTOMARY INTERNATIONAL LAW

While American courts were grappling with the meaning of the ATS, the international prohibition on trans-boundary harm—the principle that a nation should not use its territory in a way that causes serious or significant harm within another country's borders—was emerging as a principle of customary international law. Customary international law is binding on all nations, "not because it was prescribed by any superior power, but because it has been generally accepted as a rule of conduct."[104] The International Court of Justice has observed that "it is axiomatic that the material of customary international law is to be looked for primarily in actual practice and *opinio juris* [or legal obligation] of the states."[105] Norms, accepted as customary international law, are not required to have garnered universal consensus among states or be deeply entrenched in their histories.[106]

101. *Kiobel*, 642 F.3d at 379.

102. Kiobel *et al.* v. Royal Dutch Petrol. *et al.*, 132 S. Ct. 1738 (2012).

103. *See Sarei*, 671 F.3d at 745 ("Likewise, the D.C. Circuit recently concluded that there is no bar to the ATS's applicability to foreign conduct because the Supreme Court in Sosa did not disapprove these seminal decisions and Congress, in enacting the Torture Victim Protection Act, implicitly ratified such law suits."); Doe VIII v. Exxon Mobil Corp., Nos. 09–7125, 09–7127, 09–7134, 09–7135, 2011 WL 2652384, at *25 (D.C. Cir. 2011); Kadic v. Karadzic, 70 F.3d 232 (2d Cir. 1995) (Bosnia-Herzegovina); *In re* Estate of Ferdinand Marcos Human Rights Litigation, 978 F.2d 493 (9th Cir. 1992); Filartiga v. Pena-Irala, 630 F.2d 876 (2d Cir. 1980) (Paraguay); *see also*, Flomo v. Firestone Nat'l Rubber, Co., No. 10–3675, 2011 WL 2675924, at *24 (7th Cir. 2011).

104. The Paquete Habana, 175 U.S. 677, 711 (1900).

105. Continental Shelf (Libyan Arab Jamahiriya v. Malta), 1985 I.C.J. 13, 29-30 (June 3).

106. WEISSBRODT ET AL., *supra* note 58 at 708-09.

On the contrary, "one of the most important principles is that new norms must be applied as they emerge."[107]

A. State Practice

While there is no universal definition of state practice, two elements have generally been required: (1) "evidence of frequent repetition of the specific international practice among the general community of states;"[108] and (2) that the practice "include[ ] those states that are particularly affected by the proposed norm."[109] State practice does not have to be sustained over a prolonged period of time, but when it is, states must "rigorously and consistently conform to the rule at issue."[110] Accordingly, state practice inconsistent with the norm must generally be treated as a breach of the rule.[111] Whether these criteria have been satisfied requires a case-by-case analysis.

The clearest evidence of a general state practice prohibiting significant trans- boundary harm is the multiplication of liability regimes for victims to obtain redress for cross-border environmental damage. As of 2004, twenty-seven multilateral environmental agreements, two draft multilateral environmental agreements, twenty-six regional environmental agreements, and twenty-six national laws address such adjudicatory regimes.[112] Though the agreements each cover different environmental issues, embodied within each is the common principle prohibiting state actions that infringe upon the environment of other states.[113]

Additionally, the increased use of Environmental Impact Assessments (EIA) internationally further supports the existence of a general state practice prohibiting trans- boundary harm. Traditionally, corporate and government developers were free to undertake projects regardless of the potential negative environmental impact.[114] Development was subject to interruption only if actual

107. *Id.* at 709.

108. DAVID HUNTER ET AL., INTERNATIONAL ENVIRONMENTAL LAW AND POLICY 311-12 (2d ed., 1998).

109. *Id.* at 312.

110. *Id.*

111. *Id.*

112. Pauline Abadie, *A New Story of David and Goliath: The Alien Tort Claims Act Gives Victims of Environmental Injustice in the Developing World a Viable Claim Against Multinational Corporations*, 34 GOLDEN GATE U. L. REV. 745, 780 n.212 (2004).

113. *Id.* at 780-81.

114. *Id.* at 778.

adverse impact occurred.[115] However within the last twenty-five years, the use of EIAs has spread rapidly.[116] The United States, under the National Environmental Policy Act of 1969,[117] was the first country to require EIAs.[118] Executive Order 12,114, issued in 1979, expanded this obligation, requiring federal agencies and departments to establish procedures "to facilitate environmental cooperation with foreign nations" when initiating "major" projects with a significant environmental impact beyond the United States' borders.[119] As of 2004, over 100 nations, developed and developing, had adopted similar programs.[120] While the preparation of an EIA is not mandatory worldwide, and in some countries does not require a change in development plans if harm is predicted, it provides subsidiary evidence of an emerging pattern of state practice.[121]

B. *Opinio Juris*

For a customary state practice to be accepted as customary international law, it must be apparent that the practice is the result of legal, as opposed to political or moral, obligation.[122] Like state practice, the question of whether *opinio juris* exists is primarily a factual one.[123] Courts have recognized a wide range of evidence as relevant to this inquiry, including:

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115. *Id.* at 778-79.
116. *Id.*
117. 42 U.S.C. §§ 4321-4370(H) (2006).
118. 42 U.S.C. § 4332(F) (2006).
119. Exec. Order No. 12,114, 44 Fed. Reg. 1,957 (Jan. 4, 1979), *reprinted in* 42 U.S.C. § 4321 (2006).
120. Abadie, *supra* note 112, at 780; *see* BARRY SADLER, ENVIRONMENTAL ASSESSMENT IN A CHANGING WORLD: EVALUTATING PRACTICE TO IMPROVE PERFORMANCE 25 (1996) (estimating that over one hundred countries have environmental impact assessment programs). *See generally* ANNIE DONNELLY ET AL., A DIRECTORY OF IMPACT ASSESSMENT GUIDELINES (2d ed. 1998) (listing environmental impact assessment guidelines from a variety of countries).
121. Abadie, *supra* note 112, at 780. For a contrary view, see John H. Knox, *The Myth and Reality of Transboundary Environmental Impact Assessment*, 96 AM. J. INT'L 291 (2002). Knox argues that the only international norm that can be gleaned from the widespread use of international EIAs is that states must use "due diligence" in planning projects. *Id.* at 293. He places significant emphasis on the fact that in most states once the possibility of international damage is uncovered, developers are not required to adjust the parameters of their project. *See id.* at 295 ("[S]tates' positions sometimes seem to support the idea of responsibility without liability of any kind whatsoever . . . ."). Knox's argument is distinguishable in that his analysis focuses on whether the use of EIAs, in and of itself, is enough to establish "Principle 21" as customary international law. *See id.* at 291-92 (laying out the author's general argument). In this Article, I rely on the use of EIAs only secondarily, in addition to a variety of other materials more persuasively substantiating the existence of a customary international norm.
122. HUNTER, *supra* note 108, at 312.
123. *Id.*

> inter alia diplomatic correspondence, government policy statements and press releases, opinions of official legal advisers, official manuals on legal questions, comments by governments on drafts produced by the International law commission, State legislation, international and national judicial decisions, legal briefs endorsed by the States, a pattern of treaties in the same form, resolutions and declarations by the United States.[124]

Additionally, interstate practice that has been certified by a majority of states acquires *opinio juris* status.[125]

The prohibition on trans-boundary harm can be traced to the ancient common law doctrine *sic utere tuo ut alienum non laedus*, which translates as "one should not do harm to another person's property."[126] The rule was initially applied in the environmental context by a series of international arbitral tribunals. As early as 1927, tribunals recognized limits on a state's right to pollute. The tribunal adjudicating the *Island of Palmas Arbitration*,[127] a territorial dispute over the Island of Palmas between the Netherlands and the United States, cautioned: "[t]erritorial sovereignty involves the exclusive right to display the activities of states. The right has a corollary duty: the obligation to protect within the territory the rights of other states . . . ."[128]

The prohibition was reaffirmed less than fifteen years later in the *Trail Smelter Case*. In 1939, the United States filed a complaint alleging that an iron ore smelter located on Canadian soil had damaged privately owned agricultural and forest lands in the state of Washington.[129] In its decision,[130] the *Trail Smelter* tribunal reiterated: "Under principles of international law . . . no state has the right to use or permit the use of its territory in such a manner as to cause injury by fumes in or to the territory of another . . . when the cause is of serious consequence and the injury is established."[131] The *Trail Smelter* ruling

124. *Id.*

125. Mary Elliott Rolle, Graduate Note, *Unraveling Accountability: Contesting Legal and Procedural Barriers in International Toxic Tort Cases*, 15 GEO. INT'L ENVTL. L. REV. 135, 191-92 (2003).

126. Carolin Spiegel, Note, *International Water Law: The Contributions of Western United States Water Law to the United Nations Convention on the Law of the Non-Navigable Uses of International Watercourses*, 15 DUKE J. COMP. & INT'L L. 333, 336 (2005).

127. Island of Palmas Case (Neth. v. U.S.), 2 R.I.A.A. 829 (1928).

128. *Id.* at 839.

129. *Id.*

130. Trail Smelter Case (U.S. v. Can.), 3 R.I.A.A. 1905 (1941).

131. *Id.*

has no binding precedential authority;[132] however, subsequent international decisions have repeatedly reaffirmed the obligation of states to refrain from causing trans-boundary harm. In the *Corfu Channel* case,[133] the International Court of Justice found Albania responsible for damage to British ships caused by mines in Albanian waters.[134]

The Court explained that "such obligations are based . . . on certain general and well-recognized principles, namely: elementary considerations of humanity . . . and every State's obligation not to allow knowingly its territory to be used for acts contrary to the rights of other states."[135] Similarly, the tribunal in the 1957 *Lac Lanoux Arbitration*,[136] involving the temporary diversion and subsequent restoration of a river running between two countries, recognized that precisely because it was "not alleged that the works in question [had] as their object . . . the creation of a means of injuring, at least contingently, Spanish interest[,]" there was no international harm.[137] The most recent Restatement (Third) of Foreign Relations, recognizing these decisions, characterizes as mandatory the duty to prevent injuries outside of a nation's domestic borders.[138]

Support for the principle, however, is not limited to tribunal decisions, but can also be found in various international agreements. Principle Twenty-One of the Stockholm Declaration[139] states:

> States have, in accordance with the Charter of the United Nations and the principles of international law, the sovereign right to exploit their own resources pursuant to their own environmental policies, and the responsibility to ensure that activities within their jurisdiction or control do not cause damage to the environment of other States or of areas beyond the limits of national jurisdiction.[140]

The Stockholm Conference, at which the document was produced, was recognized at the time as the most successful and well-attended international environmental convention ever held.[141] Despite the fact that the event occurred during the height of the Cold

132. *See* HUNTER, *supra* note 108, at 346 (noting that the decisions of international adjudicatory bodies have no "independent force" beyond their power to persuade).
133. Corfu Channel (U.K. v. Alb.) 1949 I.C.J. 4 (Apr. 9).
134. *Id.* at 22-23.
135. *Id.* at 22.
136. Lake Lanoux Arbitration (Spain v. Fr.), 12 R.I.A.A. 281, 24 I.L.R. 101 (1957).
137. *Id.*
138. RESTATEMENT (THIRD) OF THE FOREIGN RELATIONS LAW OF THE U.S. § 601(1) (1987).
139. United Nations Conference on the Human Environment, Stockholm Declaration, June 16, 1972, U.N. Doc. A/CONF.48/14, 11 I.L.M. 1416 (1972) [hereinafter Stockholm Declaration].
140. *Id.* at Principle 21.
141. HUNTER, *supra* note 108, at 173.

War, over 113 countries approved the Declaration, including the United States, the Soviet Union, and the Soviet Bloc.[142] Though the Declaration was approved only after extensive consultation with the countries present and an affirmative vote of 112 to zero,[143] it is officially non-binding.[144]

Issued twenty years after the Stockholm Conference, the Rio Declaration[145] reiterated the international community's commitment to Principle Twenty-One, including it word-for-word in Article Two of the new Declaration.[146] Like its predecessor, the Rio Declaration was non-binding.[147] However, it similarly came to fruition only after extensive consultation with all parties present.[148] The Rio Declaration, in fact, was subject to a much wider audience than its predecessor:

> At Stockholm, attendance totaled a few thousand. Here there may be close to 10,000 official delegates, perhaps 15,000 NGO representatives, and 6,000 or more journalists trying to cover the activities . . . . Two national political leaders attended the Stockholm Conference: Prime Minister Olaf Palme of Sweden, the host[,] and Indira Ghandi of India. At Rio some 130 heads of state are expected to be present—one of the largest such gatherings on the record.[149]

Furthermore, a number of other treaties, some of them binding, reiterate the prohibition in various limited contexts.[150] For example, the International Convention for the Prevention of Pollution from Ships (MARPOL) limits the discharge of certain pollutants from ships.[151] Annex II, for example, details the discharge criteria and

142. *Id.* at 173-74.

143. Louis B. Sohn, *The Stockholm Declaration on the Human Environment*, 14 HARV. INT'L L.J. 423, 431-33 (1973).

144. *See* Amlon Metals, Inc. v. FMC Corp., 775 F. Supp. 668, 671 (S.D.N.Y. 1991) (rejecting Principle Twenty-One as evidence of customary international law because the Stockholm Declaration is non-binding).

145. United Nations Conference on Environment and Development, Rio de Janiero, Braz., June 3-14, 1992, *Rio Declaration on Environment and Development*, U.N. Doc. A/CONF.151/26/Rev.1 (Vol. 1) (Aug. 12, 1992) [hereinafter Rio Declaration].

146. *Id.* at art. 2.

147. HUNTER, *supra* note 108, at 196.

148. Tommy Koh, *The Earth Summit's Negotiating Process: Some Reflections on the Art and Science of Negotiating*, *in* NICHOLAS A. ROBINSON, AGENDA 21: EARTH'S ACTION PLAN, at vi (1993).

149. LESTER BROWN, TIME IS RUNNING OUT ON THE PLANET, EARTH SUMMIT TIMES 13 (1992). The Lester Brown piece may also be found in HUNTER, *supra* note 108.

150. United Nations Convention on the Law of the Sea, Dec. 10, 1982, 1833 U.N.T.S. 3 [hereinafter UNCLOS]; International Convention for the Prevention of Pollution from Ships, art. 1(b), Feb. 17, 1978, 1340 U.N.T.S. 61.

151. *See* International Convention for the Prevention of Pollution from Ships, *supra* note 150.

measures for the control of pollution by noxious liquid substances carried in bulk.[152] The Annex specifically provides that no country shall discharge residues containing noxious substances within twelve miles of the nearest land.[153] One hundred sixty-nine countries, including the United States, have ratified the Convention, representing over ninety-eight percent of the world's shipping tonnage.[154]

The United Nations Convention on the Law of the Sea,[155] embodies similar principles. Though not ratified by the United States,[156] the UNCLOS recognizes the United States as a provisional member, along with the 135 countries that have ratified the Convention.[157] The United States, in turn, complies with UNCLOS' provisions, regarding them as principles of customary international law.[158] The UNCLOS relies on an elaborate system of zones, requiring parties to ensure the conservation and utilization of living marine resources beyond those waters deemed part of their jurisdiction.[159] Article 194, clause 2 of the UNCLOS, specifically incorporates the prohibition: "states shall take all measures necessary to ensure that activities under their jurisdiction or control are so conducted as not to cause damage by pollution to other states and their environment," and that "pollution arising from incidents or activities under their jurisdiction or control does not spread beyond the areas where they exercise sovereign rights in accordance with this Convention."[160] As the UNCLOS is binding on all members, it includes provisions requiring international dispute resolution in case of a breach.[161]

These decisions and agreements are further buttressed by the writings of various international scholars who have found the prohibition to have achieved the status of customary international law.[162] For

152. *Id.* at Annex II.

153. *Id.*

154. *Status of Conventions Summary*, INT'L MARITIME ORG., http://www.imo.org/About/Conventions/StatusOfConventions/Pages/Default.aspx (last visited Aug. 22, 2011).

155. UNCLOS, *supra* note 150.

156. Sarei v. Rio Tinto PLC, 221 F. Supp. 2d 1116, 1161 (C.D. Cal. 2002).

157. *Id.*; HUNTER, *supra* note 108, at 659.

158. HUNTER, *supra* note 108, at 659.

159. *See* Christopher R. Bryant, *The Archaeological Duty of Care: The Legal, Professional and Cultural Struggle over Salvaging Historic Shipwrecks*, 65 ALB. L. REV. 97, 131 n.207, 134 (2001) (explaining the system of zones the UNCLOS creates).

160. UNCLOS, *supra* note 150, art. 194.

161. Lakshman D. Guruswamy, *Should UNCLOS or GATT/WTO Decide Trade and Environment Disputes?*, 7 MINN. J. GLOBAL TRADE 287, 288-89 (1998) (explaining the powers of the United Nations Convention on the laws of the sea).

162. EDITH BROWN WEISS ET AL., INTERNATIONAL ENVIRONMENTAL LAW AND POLICY 317 (1998); PHILLIPE SANDS, PRINCIPLES OF INTERNATIONAL ENVIRONMENTAL LAW 190 (1995);

example, Professor Phillipe Sands, a renowned professor and scholar of international environmental law, has referred to Principle Twenty-One as the "cornerstone of international environmental law"—one of the only international environmental norms that is "sufficiently substantive" for an international cause of action.[163]

Finally, at least one American judicial decision suggests that a similar principle may exist within federal common law. Though federal common law is clearly distinct from customary international law, in assessing whether a norm has achieved customary international status, United States legal scholars have devoted particular attention to whether a synonymous principle exists within the former.[164] In *Michie v. Great Lakes Steel Div., Nat'l Steel*,[165] the United States Court of Appeals for the Sixth Circuit considered the claims of thirty-seven Canadians alleging that the combined, though non-conspiratorial, pollution caused by the defendants'—United States corporations—air pollution created a nuisance.[166] Though the court dismissed the plaintiffs' claims on procedural grounds,[167] the court acknowledged that "there may be a federal common law of nuisance applicable to injuries by pollution of water or air across state boundaries."[168]

III. A SERIES OF PROBLEMS: PRINCIPAL CRITICISMS OF ENVIRONMENTAL NORMS ASSERTED UNDER THE ALIEN TORT STATUTE

United States federal courts have issued written decisions in seven cases alleging environmental torts under the Alien Tort Stat-

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ALEXANDRE KISS & DINAH SHELTON, INTERNATIONAL ENVIRONMENTAL LAW 130; David Wirth, *The Rio Declaration on Environment and Development: Two Steps Forward and One Back, or Vice Versa?*, 29 GA. L. REV. 599, 620 (1995); Rudiger Wolfrum, *Purposes and Principles of International Environmental Law*, 33 GER. Y.B. INT'L L. 308, 310 (1990).

163. PHILIPPE SANDS, *supra* note 162, at 184.

164. Curtis A. Bradley & Jack L. Goldsmith, *Customary International Law as Federal Common Law: A Critique of the Modern Position*, 110 HARV. L. REV. 815, 816 (1997). *But see* Harold Hongju Koh, *Is International Law Really State Law?*, 111 HARV. L. REV. 1824, 1852 (1998) ("Every court in the United States—including the state courts that Bradley and Goldsmith champion—applies law that was not made by its own polity . . . ."). More important to the Article's larger purpose, though not immediately relevant in this section, courts, pre-*Sosa*, who were hostile to ATS claims, on occasion required that the norm asserted as part of the law of nations be separately actionable in United States federal courts. *See supra* note 59 and accompanying text.

165. Michie v. Great Lakes Steel Div., Nat Steel Corp., 495 F.2d 213 (6th Cir. 1974).

166. *Id.* at 215.

167. *See id.* at 217-18 (affirming the dismissal of the case for lack of diversity subject matter jurisdiction).

168. *Id.* at 218 n.2.

ute.[169] While all but one dismissed the underlying suit on procedural grounds,[170] courts in each case have assessed the sufficiency of the international norm asserted.[171] A review of these cases reveals that courts have consistently criticized asserted environmental norms on three grounds. First, courts frequently have found that the asserted norm lacks universal consensus among the international community. Second, courts have concluded that the asserted norm was so vague or unduly broad that it could not be enforced through litigation. Third, courts have disregarded norms that they found were not obligatory, explaining that a norm based solely on a resolution or non-binding treaty is insufficient. The guidelines the Supreme Court set out in Sosa confirm the fatal nature of each objection.[172]

A. Environmental Norms Asserted Have Not Been Sufficiently Universal

Universality is commonly understood as requiring that the rule or occurrence manifest itself "in every case."[173] However, in the ATS context, modern courts have applied a somewhat less restrictive definition. While the wrong must be of "mutual . . . and not [of] merely several concern," unanimity is not required; rather, plaintiffs must only "show a general recognition among states that a specific practice is prohibited."[174] As stated by the Second Circuit in *Filartiga*, the international norm at issue must have the "general assent of civilized nations."[175]

As noted, courts have routinely rejected environmental norms on the grounds that they lack sufficient universal approval among the international community. For example, in *Beanal v. Freeport-*

169. Flores v. S. Peru Copper Corp., 414 F.3d 233, 233 (2d Cir. 2003); Aguinda v. Texaco, Inc., 241 F.3d 194, 194 (2d Cir. 2001); Beanal v. Freeport-McMoran, Inc., 197 F.3d 161, 161 (5th Cir. 1999); Jota v. Texaco, Inc., 157 F.3d 153, 153 (2d Cir. 1998); Viera v. Eli Lilly & Co., No. 1:09–cv–0495–RLY–DML, 2010 WL 3893791, at *3 (S.D. Ind. Sept. 30, 2010); Sarei v. Rio Tinto PLC, 221 F. Supp. 2d 1116, 1116 (C.D. Cal. 2002); Amlon Metals, Inc. v. FMC Corp., 775 F. Supp. 668, 668 (S.D.N.Y. 1991).

170. *Viera*, 2010 WL 3893791, at *5.

171. *See infra* notes 176-215 and accompanying text.

172. *See supra* notes 64-65 and accompanying text (discussing the Court's requirements for the recognition of norms under ATS).

173. WEBSTER'S DICTIONARY 1563 (4th ed. 2000).

174. Filartiga v. Pena-Irala, 630 F.2d 876, 888 (2d Cir. 1980); Forti v. Suarez-Mason, 694 F. Supp. 707, 709 (N.D. Cal. 1988).

175. *Filartiga*, 630 F.2d at 881 (citing The Paquete Habana, 175 U.S. 677, 694 (1900)).

McMoran,[176] the plaintiffs, residents of Indonesia, generally asserted violations of international environmental law as a result of the defendant's copper mining operations.[177] Despite the court's request that plaintiffs re-file an amended complaint with more specificity,[178] plaintiffs failed to assert specific norms upon re-filing.[179] In searching for international law that would satisfy the plaintiff's claims, the United States District Court for the Eastern District of Louisiana reviewed case law, the Restatement (Third) of Foreign Relations, and one of Phillip Sands' recent environmental treatises.[180] Upon completing its review, the court specifically rejected three norms: (1) the Polluter Pays Principle;[181] (2) the Precautionary Principle;[182] and (3) the Proximity Principle.[183] The court, however, acknowledged the plausibility of environmental claims based on other principles. In particular, the court quoted Sands' characterization of Principle Twenty-One as potentially possessing the necessary qualifications for recognition.[184]

B. Environmental Norms Asserted Have Not Been Sufficiently Specific.

An international norm cognizable under the law of nations is sufficiently specific if "there are sufficient criteria to determine whether a given action amounts to the prohibited act and thus violates the norm."[185] Accordingly, a norm definable only in the "abstract sense" is not justiciable.[186] Some courts have viewed specificity as a vestige of universality—whether it can legitimately be said that there is inter-

176. Beanal v. Freeport-McMoran, Inc., 969 F. Supp. 362 (E.D. La. 1997), *aff'd*, 197 F.3d 161 (5th Cir. 1999).

177. *Id.* at 165-66.

178. *Id.* at 163.

179. *Beanal*, 969 F. Supp. at 382 ("As set forth in the complaint, Plaintiff alleges that Freeport's mining operations and drainage practices have resulted in environmental destruction with human costs to the indigenous people.").

180. *Id.* at 383.

181. *Id.*

182. *Id.*

183. *Id.* The district court's analysis was adopted with little additional comment by the Fifth Circuit upon appeal. *Beanal*, 197 F.3d at 167 n.5.

184. *Beanal*, 969 F. Supp. at 384. The United States District Court for the Southern District of Indiana similarly rejected plaintiffs' claims alleging violations of specific, local health, and safety standards because of the lack of sufficient universal assent. The court, citing *Beanal*, stated, "it goes without saying that recognized health and environmental standards differ within the states of this country, let alone between the countries of the world." Viera v. Eli Lilly & Co., No. 1:09–cv–0495–RLY–DML, 2010 WL 3893791, at *3 (S.D. Ind. Sept. 30, 2010).

185. Xuncax v. Gramajo, 886 F. Supp. 162, 184 (D. Mass. 1995).

186. *Id.* at 186.

national acceptance of the norm's specific elements.[187] However, if the requirement is applied with too much rigor, it may undermine the statute. The ATS allows causes of action based on international law despite the field's general inability to lend itself to specific definitions.[188] Accordingly, the exact contours of the international norm need not be defined, provided it is clear that the law of nations prohibits the challenged conduct.[189] As explained by one court, in the human rights context:

> It is not necessary that every aspect of what might comprise a standard such as "cruel, inhuman or degrading treatment" be fully defined and universally agreed upon before a given action meriting the label is clearly proscribed under international law, any more than it is necessary to define all acts that may constitute "torture" or "arbitrary detention" in order to recognize certain conduct as actionable misconduct under that rubric.[190]

As noted, federal courts have questioned the specificity of international environmental norms asserted. In some cases, courts have complained that the asserted norm did not specify which activities are prohibited. For example, in *Amlon Metals v. FMC*,[191] a British importer of metal wastes for recycling brought an action against its American supplier for its alleged mislabeling and illegal shipment of unusable solid wastes to the plaintiff's plant.[192] The plaintiffs asserted a violation of Principle Twenty-One of the Stockholm Declaration, but presented in support only the Stockholm Declaration and the Restatement (Third) of Foreign Relations Law.[193] In rejecting the plaintiffs' claim that the subsidiary's actions were actionable under Principle Twenty-One, the United States District Court for the Southern District of New York concluded that the principle does not set forth any specific proscriptions, but rather refers only in a general

187. *See id.* at 187 ("[T]he requirement of universality goes not only to recognition of the norm in the abstract sense, but to agreement upon its content as well."); *see also* Forti v. Suarez-Mason, 694 F. Supp. 707, 712 (N.D. Cal. 1988) ("To be actionable under the Alien Tort Statute the proposed tort must be characterized by universal consensus in the international community as to its binding status and its content.").

188. *See* Tel-Oren v. Libyan Arab Republic, 726 F.2d 774, 781 (D.C. Cir. 1984) (Edwards, J., concurring) ("[Courts have the] awesome duty . . . to derive from an amorphous entity—i.e., the 'law of nations'—standards of liability applicable in concrete situations.").

189. *Xuncax*, 886 F. Supp. at 187; *see Forti*, 694 F. Supp. at709 ("[P]laintiffs need not establish unanimity among nations. Rather, they must show a general recognition among states that a specific practice is prohibited.").

190. *Xuncax*, 886 F. Supp. at 187.

191. Amlon Metals, Inc. v. FMC Corp., 775 F. Supp. 668 (S.D.N.Y. 1991).

192. *Id.* at 670.

193. *Id.* at 671.

sense to the responsibility of nations to ensure that activities within their jurisdiction do not cause damage to the environment beyond their borders.[194]

In other cases, courts have complained of the lack of a rule specifying the degree of harm prohibited. For example, in *Flores v. Southern Peru Copper*,[195] Peruvian residents filed an ATS claim alleging that pollution from the defendant's mining and smelting operations violated an international prohibition on "intra-national pollution" and, separately, the right to sustainable development,[196] which requires state actors to limit environmental harm caused by their development activities.[197] In support of their claim, plaintiffs relied on a variety of legal sources, including numerous international human rights treaties,[198] United Nations' General Assembly resolutions,[199] non-United Nations declarations,[200] judgments of international tribunals,[201] and the writings of international legal scholars.[202] Notably, the Rio Declaration and the aforementioned scholarly writings were the only environmental authorities cited.[203] The United States Court of Appeals for the Second Circuit found the plaintiffs' reliance on the International Covenant on Civil and Political Rights; the American Convention on Human Rights; the International Covenant on Economic, Social and Cultural Rights; and the United Nations Convention on the Rights of the Child unpersuasive because, among other things, the treaties failed to clearly delineate the degree of intra-national pollution that would constitute a violation of the norm asserted.[204]

Finally, where the asserted norm is positive, courts have complained of the lack of a limiting principle specifying precisely what the norm guarantees the protected party. In *Sarei v. Rio Tinto*,[205] plaintiffs, residents of Papa New Guinea alleged that Rio Tinto, an interna-

194. *Id.*
195. Flores v. Southern Peru Copper Corp., 414 F.3d 233 (2d Cir. 2003).
196. *Id.* at 238, 255.
197. *See infra* note 235 and accompanying text.
198. *Flores*, 414 F.3d at 257. For further discussion of which treaties plaintiffs relied upon, see *supra* notes 214-15 and accompanying text.
199. *Flores*, 414 F.3d at 256.
200. *Id.* Among other documents, plaintiffs relied upon the American Declaration on the Rights and Duties of Man and the Rio Declaration. *Id.* at 263.
201. *Id.* at 256.
202. *Id.*
203. *Id.* at 257-66.
204. *Id.* at 255.
205. Sarei v. Rio Tinto PLC, 221 F. Supp. 2d 1116 (C.D. Cal. 2002).

tional mining corporation, had destroyed their island's environment, damaged the health of its people and incited a ten-year civil war.[206] Though the United States District Court for the Central District of California eventually dismissed plaintiffs' claims because they involved a "political question,"[207] it weighed the merits of the asserted norms. Plaintiffs alleged generally "a right to a safe environment as a customary norm" and then alleged a number of more specific bases, including the "principle of sustainable development" and the United Nations Convention on the Law of the Sea (UNCLOS).[208] The court concluded that it could not identify the parameters of a right to a safe environment; accordingly, it was too broad to create a justiciable norm.[209]

However, the court cautioned that its decision did not imply that all environmental torts lacked sufficient specificity. As noted, the plaintiffs additionally alleged violations of two articles of the UNCLOS: (1) Article 194, requiring that "states take 'all measures . . . necessary to prevent, reduce and control pollution of the marine environment' that involves 'hazards to human health, living resources and marine life through the introduction of substances into the marine environment;'"[210] and (2) Article 207, directing states to "adopt laws and regulations to prevent, reduce, and control pollution of the marine environment caused by land-based sources."[211] Despite the fact that the United States is not party to the treaty, the court determined that these provisions had acquired a customary character and, therefore, plaintiffs had asserted a recognizable claim.[212]

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206. *See id.* at 1122-27 (discussing the factual background of plaintiff's claims). Specifically, tailings from the mine were dumped into the Kaweriong-Jaba river system, causing the destruction of fish which served as a food source for the local population. *Id.* at 1123.

207. *Id.* at 1195.

208. *Id.* at 1160.

209. *See id.* at 1160-61 ("Indeed, as defendants note, Handl concedes that the principle may be "too broad a concept to be legally meaningful. Because the court cannot identify the parameters of the right created by the principle of sustainable development, it concludes that it cannot form the basis for a claim under the ATCA.").

210. *Id.* at 1161.

211. *Id.* at art. 207.

212. *See* Sarei v. Rio Tinto PLC, 221 F. Supp. 2d 1116, 1161 (C.D. Cal. 2002) ("Although the United States has not ratified UNCLOS, it has signed the treaty. Moreover, the document has been ratified by 166 nations and thus appears to represent the law of nations."). The court justified the customary character of the UNCLOS on four grounds. First, the Convention has been ratified by 166 nations—a large portion of the world's countries. *Id.* Second, although the United States has yet to ratify the Convention, the President has signed it. *Id.* Third, the Supreme Court has acknowledged that while "[t]he U.S. has not ratified UNCLOS . . . it has recognized that its baseline provisions reflect customary international law." *Id.* Finally, American courts had previously recognized that "there is a consensus among commentators that the provi-

C. Asserted Environmental Norms Have Not Been Sufficiently Obligatory

Finally, courts have found asserted environmental norms to be merely aspirational, as opposed to obligatory; that is, the torts alleged merely created non- binding goals, instead of specifically prohibiting particular conduct.[213] For example, in *Flores*, the Second Circuit, in addition to criticizing the norm for its lack of specificity, found insufficient evidence that the alleged prohibition on intra-national pollution was binding on the countries of the world. As noted, the plaintiffs in support of the asserted prohibition against intra-national pollution relied largely on non-binding General Assembly resolutions and other international declarations.[214] The court explained that even if the norm plaintiffs asserted was found in the sources on which plaintiffs relied, the documents were non-binding and thus insufficient, in and of themselves, to support an ATS claim.[215]

IV. THE PATH TO AN ENVIRONMENTAL *FILARTIGA*: THE INTERNATIONAL PROHIBITION, IF PLEADED AND SUPPORTED PROPERLY, SATISFIES CRITICISMS OF PRIOR COURTS

The international proscription on trans-boundary harm—a nation may not use its territory in a manner that creates significant harm within another country's borders—is unique among international environmental principles in that it sufficiently satisfies the concerns of courts that have considered prior environmental ATS claims; it is specific, universal, and obligatory. That said, the prohibition, like other environmental norms, has one serious and specific limitation: it creates responsibilities for and duties towards other states, not individuals. Exceptions within the Act of State Doctrine and the FSIA may open nations to liability. Additionally, individuals, who in violating the norm act under the color of state law, could be held liable for breaching the prohibition. However, even in these cases, plaintiffs would be limited by the fact that the prohibition may not have developed to the point that it can be enforced by individual victims, as required under the ATS.

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sions of UNCLOS III reflect customary international law, and are thus binding on all other nations, signatory and non signatory." *Id.*

213. *See* Xuncax v. Gramajo, 886 F. Supp. 162, 184 (D. Mass. 1995).

214. *See supra* notes 198-202 and accompanying text.

215. Flores v. S. Peru Copper Corp., 414 F.3d 233, 259-63 (2d Cir. 2003).

A. The Prohibition on Trans-Boundary Harm Is Sufficiently Universal

As noted, a plaintiff asserting a violation of the prohibition need not show that every nation adheres to the principle asserted, but only prove a general recognition among states that the specific practice is prohibited.[216] The prohibition's universal acceptance is evidenced by: (1) the decisions of numerous American courts; (2) the writings of eminent legal scholars; (3) various regional and trans-regional agreements creating liability for trans-boundary polluters; (4) binding treaties applying the principle in specific environmental contexts; (5) the widespread approval garnered by the Stockholm and Rio Declarations; (6) the common use of environmental impact assessments; and (7) the decisions of the International Court of Justice and other international arbitral tribunals.

The strongest evidence of the norm's universal status is the jurisprudence of American courts. As noted, in *Beanal*, despite rejecting other norms asserted, the Eastern District of Louisiana, citing the works of Phillipe Sands suggested that the prohibition may be the sole norm cognizable under the ATS.[217] Similarly in *Rio Tinto*, the Central District of California held that the UNCLOS, in which the prohibition is included, has been so broadly adhered to that it qualifies as customary international law.[218] Relatedly, in the nuisance context, the Sixth Circuit suggested that federal common law relating to nuisance may prohibit pollution of water or air across state boundaries.[219]

Furthermore, the multitude of compensatory and liability schemes incorporated into regional and trans-regional agreements for trans-national polluters further evidences the norm's universal status. As noted, twenty-seven multilateral environmental agreements, two draft multilateral environmental agreements, twenty-six regional environmental agreements, and twenty-six national laws, impose liability for transnational pollution.[220] Similarly, a variety of binding treaties set limits on trans-boundary harm in various, specific environmental contexts.[221] Notable among these, for its near universal acceptance,

216. *See supra* note 174 and accompanying text.
217. *See supra* note 184 and accompanying text.
218. *See supra* notes 210-212 and accompanying text.
219. *See supra* note 168 and accompanying text. Though distinct from the law of nations, a minority of judges and legal scholars have suggested that a norm's acceptance as part of the law of nations depends on its recognition as a matter of federal common law. *See supra* note 164.
220. *See supra* note 112 and accompanying text.
221. *See supra* notes 151-61 and accompanying text.

the MARPOL creates an elaborate set of rules governing the transportation of waste across state lines.[222]

Though non-binding,[223] the Stockholm and Rio Declarations further evidence the norm's international approval. As noted, over 130 nations approved the Rio Declaration, including the United States.[224] While by themselves the Declarations are insufficient to support the establishment of a sufficient norm, they may be used to buttress a claim provided binding sources are provided.[225]

In addition, numerous international decisions from arbitral tribunals and the International Court of Justice reaffirm the norm's universal recognition.[226] Though the decisions are not binding on states not parties to them,[227] the repeated use of the principle by adjudicatory bodies and the repeated acceptance of the resulting decisions by various states further reinforce the prohibition's broad acceptance.

Finally, the rapid expansion of EIAs evidences the norm's approval. Within the United States, federal regulations require that federal agencies establish procedures governing cooperation with foreign nations when a project may have a significant international environmental impact.[228] Over 100 nations, both developing and developed, have instituted similar practices.[229] That the practice has been codified in the United States is especially relevant as courts, considering ATS claims, have paid particular attention to whether the tort alleged was proscribed by United States statute.[230]

B. The Prohibition on Trans-Boundary Harm Is Sufficiently Specific

Plaintiffs asserting a valid ATS claim must also show that the norm violated is specific, that is, it can be defined in more than the "abstract sense."[231] However, some ambiguity must be allowed as a necessary consequence of international law's general nature.[232]

222. *See supra* notes 151-54 and accompanying text.
223. *See supra* notes 144, 147 and accompanying text.
224. *See supra* note 149 and accompanying text.
225. *See supra* note 66 and accompanying text.
226. *See supra* notes 128-37 and accompanying text.
227. *See supra* note 132 and accompanying text.
228. *See supra* note 119 and accompanying text.
229. *See supra* note 120 and accompanying text.
230. *See supra* notes 94-95 and accompanying text (listing the sources courts have relied on post-*Sosa*).
231. *See supra* note 185-86 and accompanying text.
232. *See supra* notes 188-90 and accompanying text.

Courts considering ATS claims have critiqued environmental norms asserted on the grounds that the treaties provided in support of the principles failed to provide any meaningful limit on each right's extent.[233] The international prohibition on trans- boundary harm is distinguishable from the norms asserted in that harm under the prohibition must be serious or significant—a notable limiting principle non-existent in the norms courts have rejected.

A comparison of the prohibition and the right to sustainable development demonstrates this point. The plaintiffs in *Rio Tinto* and *Flores* asserted claims under the right to sustainable development, each of which was subsequently rejected by the respective courts.[234] "Sustainable development requires meeting the basic needs of all and extending to all the opportunity to satisfy their aspirations for a better life," while "not endanger[ing] the natural systems that support life on Earth: the atmosphere, the waters, the soils, and the living beings."[235] While the Rio Declaration provides general means by which this goal may be achieved, the singularity of the document limits its merits. It is not enough that the norm be specific, but rather that the norm be universally accepted at the level of specificity asserted.[236] Plaintiffs in *Rio Tinto* were only able to show a level of acceptance among the international community akin to that mentioned in the Brundtland Report.[237]

The prohibition on trans-boundary harm, in contrast, requires significant or serious environmental damage. In the *Lac Lanoux Case*, the arbitral tribunal rejected France's claim because, among other things, the tribunal was unable to conclude that significant damage would occur as a result of the proposed "reasonable" development activities.[238] Likewise, EIAs must only be conducted when initiating "major" projects with "significant" environmental impact beyond the United States' borders.[239] Similarly, the majority of multilateral liabil-

233. *See supra* Part II.B. The Court in *Sosa* limited its analysis to the asserted norm's lack of universality, commenting on the specificity of the norm asserted only in passing. *See supra* notes 68-69 and accompanying text (recounting the Court's discussion of the asserted norm's specificity).

234. *See supra* notes 204, 209, and accompanying text.

235. World Comm'n on Env't & Dev., Our Common Future 16, 42 (1987).

236. *See infra* note 244 and accompanying text.

237. *See supra* note 209 and accompanying text.

238. Affaire du Lac Lanoux (Fr. v. Spain), 12 R.I.A.A. 281, 315-17 (1957) (denying relief where there was no diminution in either the quantity or the quality of the water delivered).

239. *See supra* notes 117-19 and accompanying text.

ity and compensation agreements require a threshold of measureable damages before liability ensues.[240]

Though the court in *Flores* considered a claim similar to that made here, its criticism of the prohibition on intra-national pollution's specificity was based only on the specificity of the treaties presented, primarily human rights treaties in which the prohibition is not mentioned.[241] Had the court had the opportunity to weigh the definite nature of the other sources supporting the existence of the prohibition, it may have arrived at a different conclusion.

Likewise, the Court in *Amlon Metals*, rejected a claim alleging a violation of the prohibition.[242] In *Amlon Metals*, plaintiffs relied primarily on the Stockholm Declaration which does not limit itself to "significant harm."[243] While plaintiffs also cited the Restatement (Third) of Foreign Law, which does include such a limitation, the court rejected the Restatement, given the fact that it was the sole source plaintiffs were able to present enunciating the norm as such.[244] Given the development of the prohibition over the last twenty years and the limited materials before the court, *Amlon Metals* may not necessarily preclude a sufficiently supported claim.

Finally, in the human rights context, courts have recognized norms as part of the law of nations despite a degree of specificity comparable to that of the prohibition on trans-boundary harm. Though the Supreme Court in *Sosa* left open the question as to whether the requirement that arbitrary definition be prolonged provided enough specificity,[245] subsequent lower court decisions have answered affirmatively.[246] Similarly, courts have found the prohibition on disappearances to be sufficiently definite without the provision of any limiting principle, relating to the length of the abduction or imprisonment.[247]

240. *See* Abdaie, *supra* note 112, at 782-83 (noting that, "[a]fter an extensive review of international, regional, and state legislation and practice, a UNEP Working Group of Experts on Liability and Compensation for Environmental Damage defined 'environmental damage' as 'a change that has measurable adverse impact on the quality of a particular environment or any of its components, including its use and non-use values, and its ability to support and sustain an acceptable quality of life and viable ecological balance.'").

241. *See supra* note 203 and accompanying text.

242. *See supra* notes 192-94 and accompanying text.

243. *See supra* notes 140, 193-94 and accompanying text.

244. Amlon Metals, Inc. v. FMC Corp., 775 F. Supp. 668, 671 (S.D.N.Y. 1991).

245. *See supra* note 73 and accompanying text.

246. *See supra* note 89 and accompanying text.

247. *See supra* note 29 and accompanying text.

C. The Prohibition on Trans-Boundary Harm Is Sufficiently Obligatory

The Supreme Court in *Sosa* did not separately state a requirement that the norm asserted be obligatory, but considered whether the material presented in support of the norm's universality and specificity was binding when assessing the amount of weight it should be given.[248] Courts since *Sosa* have generally disregarded claims premised solely on non-binding and non-self-executing treaties, but have attached weight to such materials when supported by other obligatory sources.[249]

The prohibition on trans-boundary harm, accepted as customary international law, sufficiently meets this standard.[250] While the court in *Flores* rejected a similar claim, premised on a prohibition against intra-state pollution, three points suggest that the court's decision may not necessarily be fatal to a claim based on the prohibition on trans-national pollution.

First, as noted, the plaintiffs presented and the court considered only a minority of the relevant sources available. While the court examined a variety of legal sources, including international human rights treaties, United Nations' General Assembly resolutions, non-United Nations declarations, judgments of international tribunals, and the writings of international legal scholars, the Second Circuit focused primarily on human rights materials—none of which specifically incorporate environmental norms.[251] Second, the Second Circuit's decision in *Flores* preceded *Sosa*, in which the Court explained that non-binding material may well be considered, albeit in a supporting role.[252]

Third, the history and scope of jurisprudence concerning the trans-national prohibition on international pollution is far broader than that relating to the prohibition on intra-national harm. As noted above, the existence of binding international treaties embodying the norm,[253] federal rules requiring that precautions be taken to ensure that such harm is not caused before a project is undertaken[254] and

248. *See supra* note 69 and accompanying text.
249. *See supra* note 95 and accompanying text.
250. *See supra* Part II.
251. *See supra* notes 198-200 and accompanying text.
252. *See supra* note 66 and accompanying text.
253. *See supra* notes 151-61 and accompanying text.
254. *See supra* note 119 and accompanying text.

American jurisprudence governing nuisance actions resulting from such pollution all suggest that the norm may be binding.[255]

D. Potential Remaining Barriers: The Limited Responsibilities and Duties Created by the Prohibition Against Trans-Boundary Harm

While the prohibition on trans-boundary harm may sufficiently address each of the criticisms of courts that have considered environmental ATS claims, the prohibition does have limitations which may ultimately limit whether aggrieved aliens are successfully able to utilize it. The prohibition, unlike genocide or war crimes, creates a duty between states. Accordingly, the norm may only be actionable against states, which are protected by the Foreign Sovereign Immunities Act and the Act of State Doctrine, and may only create duties towards other states—who by definition cannot bring suits under the statute. Despite these obvious limitations, the limited case law that exists suggests that claims alleging violations of the prohibition may someday be successful.

1. Problems Created By And Potential Solutions for the Limited Responsibilities Owed Pursuant to the Prohibition

Unlike genocide,[256] the prohibition on trans-boundary harm, like other environmental norms,[257] does not place on every private actor the responsibility to not commit certain acts. On the contrary, the norm only creates an obligation that states not pollute beyond their borders. While private actors are generally available for suit in United States' federal courts, the FSIA and act of state doctrine shield foreign nations, and in some cases individuals acting in conjunction with the state, from liability.[258]

The FSIA, however, has a limited number of exceptions.[259] The commercial exception to FSIA, on occasion, has been utilized by

255. *See supra* note 165 and accompanying text.
256. *See supra* note 46 and accompanying text.
257. Environmental norms, almost universally, impose obligations on states. A brief review of the environmental norms relied upon by plaintiffs prior to *Sosa* proves the point. Having been asserted on multiple occasions, prevalent among these is the right to sustainable development. While the right does create a duty to a nation's citizens—that is, to develop in a manner which considers the nation's environment—the duty is still one owed by a nation-state. *See supra* note 235 and accompanying text (defining sustainable development as requiring that all persons be provided certain basic needs and opportunities).
258. *See supra* notes 30-40 and accompanying text.
259. *See supra* notes 32-35 and accompanying text.

aliens alleging violations under the ATS.[260] The exception provides that the Act shall not apply in cases

> in which the action is based upon a commercial activity carried on in the United States by the foreign state; or upon an act performed in the United States in connection with a commercial activity of the foreign state elsewhere; or upon an act outside the territory of the United States in connection with a commercial activity of the foreign state elsewhere and that act causes a direct effect in the United States.[261]

Admittedly, the applicability of the first two scenarios to a trans-boundary environmental claim may be limited. For a successful claim alleging a violation of the prohibition, each would require that a foreign state have engaged in a commercial activity within the United States that caused pollution-related damages beyond United States' borders. While the third seems somewhat more plausible—that a commercial activity committed abroad, for example, mining, would cause trans-boundary harm—courts have historically interpreted "direct effect" narrowly.[262]

A more successful alternative might be to file suit against the private actor(s) utilizing § 1983's color of law doctrine. As explained, an individual may be held liable for torts only applicable to states if the private actor acted under the color of state law. As the Supreme Court recently explained, the FSIA does not apply to private individuals.[263] Such individuals may nonetheless be shielded from liability by the Act of State Doctrine. Whether the doctrine applies will require a case by case basis examination of the strength of the norm alleged, the interest served by the act at issue, the United States' relationship with the sovereign in coordination with whom the individual acted and the type of relief the plaintiff seeks.[264]

260. *See* Licea v. Curacao Drydock Co., 794 F. Supp. 2d 1299, 1302-03 (S.D. Fla. 2011).
261. *See supra* note 33 and accompanying text.
262. *See supra* note 35 and accompanying text. Furthermore, were the Court in *Kiobel* to find that American courts have limited jurisdiction over ATS claims committed abroad, it would virtually prescribe this category of claims.
263. *See supra* note 97 and accompanying text.
264. *See supra* note 39 and accompanying text.

2. Problems Created by and Potential Solutions for the Limited Duties Owed Pursuant to the Prohibition Against Trans-Boundary Harm

More threatening is that while norms in the human rights context create duties to the individual—for example, a person is owed a duty not to be tortured—the prohibition, as currently phrased, creates no duties to individual persons. Rather the duty is termed as being owed only to other states. As stated by the arbitral panel in the *Trail Smelter* case: "Under principles of international law . . . no state has the right to use or permit the use of its territory in such a manner as to cause injury by fumes in or to the territory of another . . . when the cause is of serious consequence and the injury is established."[265] Similarly, Principle Twenty-One explicitly proclaims that states should "not cause damage to the environment of other States."[266]

Some caselaw indicates that courts may hear the claim despite this limitation. In *Rio Tinto*, the court acknowledged the right of private individuals to advance a claim alleging violation of two UNCLOS provisions which only create a general obligation upon states to refrain from harming the marine environment beyond their jurisdictional control.[267] However, most authorities, international and domestic, have yet to characterize the right as extending to individual residents of the state to whom the obligation is owed.

This is not to stay that such a right may not eventually develop. Human rights, like environmental rights, were initially conceived of as creating duties only between states.[268] Many of the historical roots of international human rights law are treaties establishing obligations between states to treat persons under their jurisdiction according to certain minimum standards. Following World War II, atrocities committed by the Nazis provided a moral and political impetus for states to negotiate the first modern multilateral human rights treaties, beginning with the convention against genocide.[269] The Universal Declaration of Human Rights, adopted shortly after the end of the war, was not legally binding, although many of its provisions may now be recognized as customary international law.[270] In 1976, the Interna-

265. *See supra* note 131 and accompanying text.
266. *See supra* note 140 and accompanying text.
267. *See supra* notes 210-11 and accompanying text.
268. *See supra* note 42 and accompanying text.
269. Louis Henkin, The Age of Rights 16 (1990).
270. Hersh Lauterpacht, International Law and Human Rights 397-408 (1973).

tional Convention on Civil and Political Rights ("ICCPR") and the International Convention on Economic, Social, and Cultural Rights ("ICESCR") came into effect.[271] These treaties have gained near universal recognition and have been followed by a series of conventions, each expanding upon a particular category of rights.[272] "[In] the face of the developments of international human rights law since World War II, the notion that international law exists only as obligations between states would be generally regarded as untenable."[273]

Nor is this to say that the development of the prohibition into a norm enforceable by individuals would require a cataclysmic event on par with World War II, followed by a series of international conventions. Other potentially enforceable human rights norms, originally understood as applying only to states, have emerged since World War II. For example, the prohibition on transnational forcible abduction was traditionally understood as only creating obligations between states.[274] For this reason, extradition treaties were generally understood not to create enforceable rights on behalf of individuals.[275] However, various developments in international extradition law have led scholars to question this conclusion.[276] Accordingly, whether individuals can be said to protected by the prohibition can be fairly characterized as open question.[277]

Furthermore, were such a development to occur, it would fit well with the history of the prohibition. While the norm traditionally has been termed as creating duties between states, it ultimately exists for the benefit of individuals. For example, in the *Trail Smelter* case, though the United States sought damages from Canada, it did so on behalf of Washington State farmers and landowners whose property

271. International Covenant on Civil and Political Rights, Dec. 16, 1966, S. TREATY DOC. NO. 95-20, 6 I.L.M. 368 (1967), 999 U.N.T.S. 171; International Covenant on Economic, Social and Cultural Rights, Dec. 16, 1966, S. TREATY DOC. NO. 95-19, 6 I.L.M. 360 (1967), 993 U.N.T.S. 3.

272. Glen Kelley, *Multilateral Investment Treaties: A Balanced Approach to Multinational Corporations*, 39 COLUM. J. TRANSNAT'L L. 483, 505-06 (2001).

273. John A. Perkins, *The Changing Foundations of International Law: From Consent to State Responsibility*, 15 B.U. INT'L L. J. 433, 484 (1997).

274. George Schwarzenberger, *The Problem of International Criminal Law*, 3 CURRENT LEGAL PROBS. 263, 272 (1950).

275. *Id.*

276. Paul Michell, *English-Speaking Justice: Evolving Responses to Transnational Forcible Abduction After Alvarez-Machain*, 29 CORNELL INT'L L.J. 383, 437 (1996).

277. *See id.* at 437-38 ("Much debate has raged as to whether extradition treaties create rights in individuals as well as in states.").

was damaged by fumes from a Canadian Smelter.[278] International resolutions likewise express this point. While Principle Two of the Rio Declaration mentions only states, other principles make clear the Declaration's ultimate purpose. Principle Fourteen restates the prohibition more specifically, encouraging states to "prevent the relocation and transfer to other States of any . . . substances that cause severe environmental degradation or are found to be harmful to human health."[279] Similarly, Principle 13 of the Declaration explicitly requires that states prepare for violations of the prohibition by "develop[ing] national law[s] regarding liability and compensation for the victims of pollution and other environmental damage."[280] Ultimately, whether the prohibition will develop as such is an open question. However, were it to evolve, the result would not be unfounded.[281]

CONCLUSION

We cannot be certain that an aggrieved party will ever be able to successfully assert an environmental claim under the Alien Tort Statute. However, were a court to recognize the prohibition on trans-boundary harm as actionable, there would be a significant base of information to support the court's conclusion.

Courts considering ATS claims alleging violations of international environmental law have had three distinct criticisms. The norms alleged were (1) not universally accepted; (2) not specific or definable; or (3) not legally binding. The prohibition on trans-boundary harm, when alleged and supported properly, sufficiently meets these criteria. First, the norm has been incorporated into and utilized in a variety of international and domestic legal sources, including the writings of eminent legal scholars; a multitude of regional and trans-regional agree-

278. Yvette Livengood, *Learning From Red Sky at Morning: America and the Crisis of the Global Environment: How "Jazz" and Other Innovations Can Save Our Sick Planet*, 82 DENV. U. L. REV. 135, 170 n.298 (2004).

279. Rio Declaration, *supra* note 145, at Principle 14.

280. *Id.* at Principle 13.

281. Finally, as noted earlier, were the Court in *Kiobel* to limit American court's jurisdiction over torts committed abroad, it would pose a significant barrier to plaintiffs alleging violations of the prohibition on trans-boundary harm. As the Court has not issued its decision, it is not clear whether it will take such a step or how broad its decision may be. Accordingly, I hesitate to devote extensive time to addressing the matter. That said, it is hard to believe that courts would not retain jurisdiction over harm originating within the United States or affecting property within it as each situation would involve a defendant's actions which had significant connection to United States territory.

ments; the Stockholm and Rio Declarations; and the decisions of the International Court of Justice and other international tribunals. Second, the prohibition's requirement that the harm be "significant" or "serious" sufficiently defines the prohibition's scope. Finally, that the prohibition constitutes customary international law demonstrates that the norm is sufficiently obligatory.

The most serious questions relating to the norm concern not whether it is part of the law of nations, but rather whether it is individually enforceable. Limitations as to whom the prohibition creates duties raise serious questions as to whether the prohibition has developed the characteristics necessary to serve as the basis for a successful ATS claim. However, this objection need not always be fatal. The history and purposes of the prohibition support the development of the right into one that is individually enforceable. Ultimately we can only hope that international environmental law will continue to gain depth and acceptance in the next century, much in the same manner that international human rights law did in the last.

Mean Girls and Boys: The Intersection of Cyberbullying and Privacy Law and Its Social-Political Implications

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* J.D., Howard University School of Law, 2012; B.S., Sociology, Emory University, 2008. I would like to thank my advisor, Professor Andrew Taslitz, for his help and insight in writing this Article. Your love for the law inspires me to be a lifelong learner. To my parents who taught me the importance of humility and my younger siblings who push me to work harder and be better; I love you. I would also like to thank my mentors, Professor Patricia Worthy and Professor Ursula Tracy Doyle, for encouraging me to excel and to write about what I love. I dedicate this Article to all of the innocent victims of cyberbullying, like Amanda Todd, Ryan Patrick Halligan, Megan Meier, and Tyler Clementi, those who sometimes feel like they don't have a voice. My only hope is that this Article helps to facilitate the necessary conversations to ensure that, even in some small way, tomorrow is a better day than today.

> "Rather than just some people, say 30 in a cafeteria, hearing them all yell insults at you, it's up there for six billion people to see. Anyone with a computer can see it . . . and you can't get away from it. It doesn't go away when you come home from school. It made me feel even more trapped." – David Knight[1]

INTRODUCTION

Jennifer is a twelve-year-old middle school student.[2] She is on the honor roll, takes ballet and piano lessons, and lives at home with

1. SHAHEEN SHARIFF, CONFRONTING CYBER-BULLYING: WHAT SCHOOLS NEED TO KNOW TO CONTROL MISCONDUCT AND AVOID LEGAL CONSEQUENCES 43 (2009). David Knight is a Canadian high school student that was bullied by his peers who created a website entitled, "Welcome to the page that makes fun of David Knight." *Id.* The website was not taken down until six months after it was created, only after David's parents threatened to sue both the school and the Internet provider. *Id.*

2. Jennifer is a hypothetical student suffering from cyberbullying. Jennifer's story is a typical one. For real life examples, see Christy Matte, *Readers Respond: Personal Cyberbullying Stories*, ABOUT.COM, http://familyinternet.about.com/u/ua/computingsafetyprivacy/Cyberbullyua.htm (last visited July 27, 2012); Stephanie Smith, *Cyber Bully Victims 'Isolated, Dehumanized'*, CNN (Sept. 21, 2010, 8:48 AM), http://thechart.blogs.cnn.com/2010/09/21/cyber-bully-victims-isolated-dehumanized/ (last visited July 21, 2012); *Cyberbullying Continued After Teen's Death*, CBS NEWS (Mar. 29, 2010, 12:31 PM), http://www.cbsnews.com/stories/2010/03/29/earlyshow/main6343077.shtml (last visited July 27, 2012).

her parents, older brother, and two younger sisters. To most people looking in, Jennifer is the stereotypical happy, popular pre-teen. Jennifer had many friends, but because of a "falling out" with another popular girl, Jennifer's life has drastically changed. Now, instead of enjoying school, Jennifer makes excuses not to attend. She constantly snaps at her family members and has issues with discipline. Jennifer became extremely introverted, constantly locked herself in her room, preferred to eat alone and avoided socializing. Jennifer is irritable because she constantly feels attacked and helpless to defend herself. She is always on the computer and her cell phone because she feels she has to keep up with what others are saying about her.

Jennifer spends more time desperately trying to persuade other students at her school to stop posting false things about her than she does studying, causing her grades to drop substantially. She is having a very hard time, and because she is only twelve-years-old, she does not know what to do or who to ask for help. She does not want to tell her parents because she does not want them to go to her school and make things worse. Jennifer's parents are extremely worried because they think that Jennifer is dealing with an eating disorder. What they do not know is that Jennifer is a victim of cyberbullying. In addition, Jennifer does not know the identity of her bully. Sadly, Jennifer's story is very similar to the stories of many other children around the United States.

Bullying is as an age-old societal problem, beginning in the schoolyard and often progressing to the boardroom.[3] A bully is someone who treats others abusively by means of force or coercion.[4] The National Education Association estimates that "every seven minutes

3. *See generally* SHARIFF, *supra* note 1, at 5 (describing both youth and adults as bullies). Bullying is a form of abuse that is based on an imbalance of power; it can be defined as a systematic abuse of power. Bullying may be physical, including behaviors such as hitting, punching and spitting, or it may involve language that is browbeating using verbal assault, teasing, ridicule, sarcasm, and scapegoating. It involves a minimum of two people, a perpetrator and a victim. However, a large number of people may be involved in an indirect manner as an audience. These bystanders may be other students who witness the bullying event but remain uninvolved. They often feel powerless and show a loss of self-respect and self-confidence.

Id. at 23-24; *see also Bullying: What Is It? Types of Bullying, Bullying Tactics, How Targets Are Selected, the Difference Between Bullying and Harassment: An Answer to the Question "Why Me?"*, BULLY ONLINE, http://www.bullyonline.org/workbully/bully.htm (last visited July 27, 2012).

4. *Bullying*, MERRIAM-WEBSTER.COM, http://www.merriam-webster.com/dictionary/bullying (last visited July 29, 2012). Oddly enough, bullying was not historically seen as a social issue but was "accepted as a fundamental and normal part of childhood." SHARIFF, *supra* note 1, at 23. Today, however, both schoolyard and cyberbulling are seen as serious issues that warrant immediate attention. *Id.*

of every school day, a child is a victim of bullying, and eighty-five percent of the time there is no intervention by other students or adults."[5] When students feel helpless and alone, many turn to their own way of dealing.

The word "bully" has been in existence since 1693, although the act of bullying predates the term.[6] Some three hundred years after the term "bullying" was coined, the act has grown to include behaviors and a level of maliciousness that no one could have anticipated.[7] It used to be that bullying meant having your lunch money taken, a bloody nose after school, or ridicule for wearing certain brands of clothing or speaking in a certain way.[8] Today, however, bullying has a new form.[9]

In today's technological society, it is becoming increasingly more difficult for schools, parents, and communities to control what children send over the Internet.[10] These advances in technology have lead to a new kind of bullying—cyberbullying.[11] Students are no longer settling for stealing lunch money or calling their classmates names, instead they are resorting to using anonymous MySpace and

5. Jill Grim, *Peer Harassment in Our Schools: Should Teachers and Administrators Join the Fight?*, 10 BARRY L. REV. 155, 155-56 (2008) (citing *The Social Consequences of Being the Victim of a Bully*, BY PARENTS FOR PARENTS, http://www.byparents-forparents.com/bullyingvictims.html (last visited Aug. 1, 2012)).

6. Mark Peters, *Bully: A Vicious, Cowardly Word with a Long History*, GOOD (Oct. 29, 2010, 8:00 AM), http://www.good.is/post/the-history-of-the-word-bully/. "'Bully' is one of the scariest words I've ever written about, because it can mean so many things: excluding, teasing, rumor-spreading, harassing, abusing, coercing, online-terrorizing, torturing, and even driving to suicide—or 'bullyicide,' as it has been called. That's a frightening range." *Bullying*, *supra* note 4.

7. Marilyn A. Campbell, *Cyberbullying: An Old Problem in a New Guise?*, 15 AUSTRALIA J. GUIDANCE & COUNSELING 68, 69 (2005). "Bullies have gotten more complex and malicious as Internet access becomes more accessible with the rise of cheap, Internet-enabled mobile devices and as social networking becomes more intertwined with students' everyday lives." Jason Koebler, *Cyber Bullying Growing More Malicious, Experts Say*, U.S. NEWS & WORLD REP. (June 3, 2011), 2011 WLNR 11266925. In their November 2010 report, the National Center for Education Statistics and Bureau of Justice Statistics estimated that in 2007, four percent of students between the ages of twelve and eighteen were victims of malicious cyberbullying. INDICATORS OF SCHOOL CRIME AND SAFETY: 2010 42, *available at* http://nces.ed.gov/pubs2011/2011002.pdf.

8. Miriam D. Martin, *Suicide and the Cyberbully*, EZINE ARTICLES (May 21, 2010), http://ezinearticles.com/?Suicide-and-the-Cyberbully&id=4328660.

9. *Id.* ("It used to be that bullying meant having your lunch taken or a bloody nose after school. Today, however, bullying has gone high tech.").

10. Kevin Turbert, Note, *Faceless Bullies: Legislative and Judicial Responses to Cyberbullying*, 33 SETON HALL LEGIS. J. 651, 652-53 (2009) (discussing New Jersey's legislation and educational policies and the model that they show of how school districts can effectively fight cyberbullying).

11. SAMEER HINDUJA & JUSTIN W. PATCHIN, BULLYING BEYOND THE SCHOOLYARD: PREVENTING AND RESPONDING TO CYBERBULLYING 5 (2009).

Twitter posts, threatening text messages, Facebook groups, and malicious instant messages to terrorize their classmates.[12] The choice weapon for a bully in today's classroom is electronic—allowing the bully to reach other students whether they are in the halls of their schools, halls of the malls, or the halls of their own homes.[13]

In general, "cyberbullying" is defined as "willful and repeated harm inflicted through the use of computers, cell phones, and other electronic devices . . . ."[14] Cyberbullying behavior must be deliberate.[15] In addition, cyberbullying behavior must be repetitive, where the bullying reflects a pattern of behavior, and not just one isolated incident.[16] Cyberbullying behavior causes harm where the target perceives that harm was inflicted.[17] Lastly, what differentiates cyberbullying from traditional bullying is that this bullying must come through an electronic medium—a computer, cell phone, or other electronic device.[18]

With their identities hidden behind computer screens, cyberbullies are harder to catch and sometimes even more daring than their playground predecessors.[19] Websites such as MySpace, Facebook,

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12. Turbert, *supra* note 10, at 652-53; *see also* Clay Calvert, *Off Campus Speech, On Campus Punishment: Censorship of the Emerging Internet Underground*, 7 B.U. J. SCI. & TECH. L. 243, 248 (2001) (describing the role that school administrators and school rules should play in censoring student speech before resorting to constitutional First Amendment restrictions).

13. Turbert, *supra* note 10, at 652-53.

14. HINDUJA & PATCHIN, *supra* note 11, at 5; *see also What is Cyber Bullying?*, VIOLENCE PREVENTION WORKS, http://www.violencepreventionworks.org/public/cyber_bullying.page (last visited Aug. 6, 2012) [hereinafter VIOLENCE PREVENTION WORKS].

15. *See* Sameer Hinduja & Justin W. Patchin, *Cyberbullying Fact Sheet: What You Need to Know About Online Aggression*, http://www.cyberbullying.us/cyberbullying_fact_sheet.pdf (last visited July 30, 2012).

16. *See id.*

17. *See id.*

18. *See* VIOLENCE PREVENTION WORKS, *supra* note 14. Cyberbullying has some rather unique characteristics that are different from traditional bullying. One important characteristic is anonymity.

> As bad as the "bully" on the playground may be, he or she can be readily identified and potentially avoided. On the other hand, the child who cyber bullies is often anonymous. The victim is left wondering who the cyber "bully" is, which can cause a great deal of stress. . . . The anonymity afforded by the Internet can lead children to engage in behaviors that they might not do face-to-face. Ironically, it is their very anonymity that allows some individuals to bully at all.

Id.

19. Martin, *supra* note 8. *See generally* Michael Snider & Kathryn Borel, *Stalked by a Cyberbully—Cellphones and the Net Are Kids' Social Lifelines—They Can Also Be Their Social Death*, (May 24, 2004) http://www.cyberbullying.ca/macleans_May_19_2004.html.

> [S]ome bullies post slurs on Web sites where kids congregate, or on personal on-line journals, called Weblogs. In a macabre twist on the American Idol craze, sites have emerged where students vote on their school's biggest geek or sluttiest girl. "Who here hates teressa as much as I do," asks a student with the screen name silentgothichell on a site called Schoolscandals2.com. "She is such a f***ing poser who thinks she is so kewl

Twitter, and YouTube that allow children to create anonymous profiles and anonymous postings have not eased this difficulty, instead create a new hurdle for regulating cyber activity.[20] Youth now have increased opportunities to anonymously bully their fellow classmates on the Internet—opportunities that are neither monitored nor controlled.[21]

Cyberbullying and the regulation of Internet postings by schools and the government have First Amendment implications. The First Amendment states in part that, "Congress shall make no law . . . prohibiting the free exercise thereof; or abridging the freedom of speech . . . ."[22] The protections afforded by the First Amendment, however, are not absolute, and courts have long recognized that the government may regulate certain categories of expression consistent with the Constitution.[23] The First Amendment permits "restrictions upon the content of speech in a few limited areas, which are 'of such slight social value as a step to truth that any benefit that may be derived from them is clearly outweighed by the social interest in order and morality.'"[24] However, it is reasonable that as speech moves

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and awesome and pretty and she is DEFFINATLY NOT!" "Yeah," responds Do_a_crazydance. "She's freaken ugly."

Id.

20. Turbert, *supra* note 10, at 652-53. "Say goodbye to stealing lunch money and getting pushed into lockers, and say hello to anonymous MySpace posts, threatening cell phone texts, and malicious instant messages. Playground bullies have exchanged their brute-force tactics for electronic weapons." *Id.* at 652.

21. *Id.*

22. U.S. Const. amend. I. The First Amendment also prohibits any law that advances the establishment of religion, impedes on the free exercise of religion, infringes on the freedom of the press, prohibits citizens from petitioning the government for redress of grievances, and interferes with the right to peaceably assemble. *Id.*

23. D.C. v. R.R., 182 Cal. App. 4th 1190, 1211 (2010); *see also* Morse v. Frederick, 551 U.S. 393, 408 (2007) (holding that school officials can prohibit students from displaying messages that promote illegal drug use); Bethel Sch. Dist. No. 403 v. Fraser, 478 U.S. 675, 676 (1986) (holding it was appropriate for the school to prohibit the use of vulgar and offensive language); Tinker v. Des Moines Indep. Cmty. Sch. Dist., 393 U.S. 503, 511 (1969) (holding that the First Amendment applied to public schools and that administrators must demonstrate constitutionally valid reasons for any specific regulation of speech in the classroom). See *infra* Part III for a more thorough discussion of these cases.

24. Virginia v. Black, 538 U.S. 343, 358-59 (2003) (quoting R.A.V. v. City of St. Paul, 505 U.S. 377, 382 (1992)). In *Black*, defendants Barry Black, Richard Elliott, and Jonathan O'Mara were convicted of violation of Virginia's cross-burning statute; section 18.2-423 which made it a felony for "any person . . . with the intent of intimidating any person or group . . . , to burn . . . a cross on the property of another, a highway or other public place." *Id.* at 348. The statute made "any such burning . . . prima facie evidence of an intent to intimidate a person or group." *Id.* Defendant Black led a Klu Klux Klan rally, at the conclusion of which a cross was burned. The Court noted that when "cross burning is used to intimidate, few if any messages are more powerful." *Id.* at 357. However, the Court held that because the "prima facie evidence provision in [the] case ignore[d] all of the contextual factors that [were] necessary to decide whether a partic-

away from the simple conversations that the First Amendment was designed to protect and towards threats and other potentially harmful forms of speech, the government has more autonomy to enact statutes that control speech. Schools, nevertheless, have to weigh the constitutional rights of students with the duty to protect students from ridicule and harassment by other students.[25]

First Amendment scholars offer varying perspectives on the best method to address issues of cyberbullying and student speech.[26] The threshold question in determining the free expression rights of public school students is whether the speech is characterized as on-campus or off-campus speech.[27] Some commentators argue that school officials cannot punish any off-campus student expression.[28] These scholars

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ular cross burning is intended to intimidate" and the burden of proof as to the purpose of the cross burning was left on the defendant, the statute was unconstitutional. *Id.* at 367.

25. *See* New Jersey v. T.L.O., 469 U.S. 325, 333 (1985) (holding that to be reasonable, a search must be justified at its inception and reasonable in scope). In *T.L.O.*, a student was taken into the principal's office and searched on the suspicion that she violated a school rule by smoking in the lavatory. When asked if she had been smoking, she denied the violation, but her companion admitted to violating the rule. The principal searched the student's purse for contraband. Because the principal had reason to believe that the search could provide proof of the violation and the search was not a search of the student's person but merely a search of her purse, the Court held that the search was justified at its inception and reasonable in scope. *Id.* at 346-47.

26. Turbert, *supra* note 10, at 681; *see, e.g.*, Louis John Seminski, Jr., *Tinkering with Student Free Speech: Internet and the Need for a New Standard*, 33 RUTGERS L.J. 165, 181 (2001) ("Some legal scholars have proposed constitutional frameworks for addressing these Internet-related school discipline problems."); Alexander G. Tuneski, *Online, Not on Grounds: Protecting Student Internet Speech*, 89 VA. L. REV. 139, 139 (2003).

> As a result of the lack of guidance on the issue, three contrasting approaches have emerged to address student internet speech cases. One approach treats internet speech viewed at school as having taken place on-campus and, therefore, being subject to the Tinker substantial disruption test. A second approach concludes that internet speech is protected because it occurs off-campus. A third approach applies the substantial disruption test under all circumstances, even if the internet speech is deemed to have taken place off-campus.

Tuneski, *supra*, at 153; *see also* Tresa Baldas, *As 'Cyber-Bullying' Grows, So Do Lawsuits*, NAT'L L.J. (Dec. 10, 2007), *available at* http://www.law.com/jsp/article.jsp?id=1197281074941 ("Too often, schools are quick to punish a student for online behavior, rather than call the parents first and let them discipline the child, which could avoid a lawsuit.").

27. Rita J. Verga, *Policing Their Space: The First Amendment Parameters of School Discipline of Student Cyberspeech*, 23 Santa Clara Computer & High Tech. L.J. 727, 730 (2007).

28. Julie Hilden, *Can Public Schools Constitutionally Punish Students' Off-Campus Speech? The U.S. Court of Appeals for the Third Circuit Will Decide*, FINDLAW (June 9, 2010), http://writ.news.findlaw.com/hilden/20100609.html ("There is a bright-line test available in this context, and schools should adopt it: Off-campus speech shouldn't be the basis for suspension unless it violates civil law (as genuine defamation does), or criminal law (as true threats do)."); David L. Hudson Jr., *Underground Papers and Off Campus Speech*, FIRST AMENDMENT CENTER (Apr. 9, 2002), http://www.firstamendmentcenter.org/speech/studentexpression/topic.aspx?topic=underground_newspapers ("School officials have even less authority to regulate off-campus speech—particularly if that expression is never distributed at the school. But that doesn't mean school officials haven't tried.").

take the position that such speech is a matter of parental discipline, civil, or criminal charges, but not school discipline.[29] Others feel as though schools should take an active role in disciplining students and maintaining school safety.[30] Most scholars, however, agree that there is a need for a Supreme Court decision in this unchartered territory.[31] Nonetheless, before this can happen, school districts need a clear, comprehensive plan that attacks this growing problem in an effective and constitutionally sound way.[32] This plan must also address the additional anonymity issue.

The First Amendment protects anonymous speech as well as the right to speak freely.[33] The Supreme Court has ruled on cases involving many different aspects and forms of anonymous action and upheld the right.[34] This protection should also cover Internet speech; however, it may not apply where there is an "allegation of wrongdoing."[35] "Because the technology of the Internet not only allows but favors anonymity or pseudonymity, and because the Internet can carry so much information to so many, anonymous Internet speech that is alleged to cause harm raises specific legal issues about when the right to

29. *See* Hilden, *supra* note 28; Verga, *supra* note 27, at 730.

30. *See* Turbert, *supra* note 10, at 657.

> If schools are serious about disciplining off-campus behavior, they must make it clear in the code of student conduct so that it puts the students on notice. Implementing such policies would curtail the appearance of cyberbullying on-campus and send a message to students that the school is serious in dictating the educational environment and their safety.

Id. at 687 (citations omitted) (internal quotation marks omitted).

31. *See id.* at 681.

32. *See id.*; *see also* Holly Epstein Ojalvo, *Resources on Bullying and Cyberbullying*, N.Y. TIMES (June 28, 2010, 1:36 PM), http://learning.blogs.nytimes.com/2010/06/28/resources-on-bullying-and-cyberbullying/ (discussing ways to alleviate the problems that cyberbullying causes with examples of lesson plans and student opinion on the issue).

33. John B. Morris, Jr. et al., *Other Significant First Amendment Issues on the Internet—The Right to Speak Anonymously*, 2 INTERNET L. & PRAC. § 24:29 (2010) [hereinafter Morris,*The Right to Speak Anonymously*].

34. *Id.* (citing Watchtower Bible & Tract Soc'y of New York, Inc. v. Vill. of Stratton, 536 U.S. 150, 165-69 (2002) (holding that a municipal ordinance that required individuals to obtain a permits with their name on them before engaging in door-to-door political advocacy and produce them when asked violates First Amendment anonymous speech rights); Buckley v. Am. Constitutional Law Found., Inc., 525 U.S. 182, 200 (1999) (holding that a state statute that required individuals who circulated initiative petitioners to wear identification badges violated the First Amendment); McIntyre v. Ohio Elections Comm'n, 514 U.S. 334, 357 (1995) (holding a state statute that prohibited the distribution of political literature without the distributor's name and address violated the First Amendment); Talley v. California, 362 U.S. 60, 65-66 (1960) (striking down a state statute that prohibited the distribution of handbills without the preparer's name and address as unconstitutional)).

35. Morris, *The Right to Speak Anonymously*, *supra* note 33.

speak anonymously can be abridged."[36] The question for courts, students, communities, and school officials is always where to draw the line. Just how protected should anonymity be when a child is ridiculed and bullied through the Internet?

This Article discusses the phenomenon of cyberbullying, specifically focusing on the additional implications and ramifications that privacy law issues create. Part I of this Article discusses the emergence of the Internet and the subsequent creation and growth of "social networking" websites. Part II defines cyberbullying, describing who can be cyberbullied and how the phenomenon has grown in recent years. Additionally, Part II uses real cases of cyberbullying to discuss the socio-political ramifications of cyberbullying, centering on the effects to the individual student, their families and communities, and the nation at large. Part III defines the term privacy law. It also includes a discussion on the history of privacy and the intersection of law and anonymity as well as the protections that are currently in place to regulate Internet activity. Part IV discusses the historical importance of anonymity, specifically focusing on the costs and benefits of breach and the effect that breach can have on all involved. Lastly, Part V discusses current governmental responses to cyberbullying. Part V also proposes resolutions that include programs to encourage parents to be more involved, schools to take action when students report cyberbullying issues, and legislation to control anonymous juvenile Internet postings in a more streamlined manner.

I. THE HISTORY OF THE INTERNET AND POPULAR SOCIAL NETWORKING WEBSITES

> "Instantaneous photographs and newspaper enterprise have invaded the sacred precincts of private and domestic life; and numerous mechanical devices threaten to make good the prediction that 'what is whispered in the closet shall be proclaimed from the housetop.'" - Samuel D. Warren & Louise D. Brandeis, *The Right to Privacy*, *Harvard Law Review*, 1890.[37]

36. SAMUEL C. MCQUADE III, CYBERBULLYING—PROTECTING KIDS AND ADULTS FROM ONLINE BULLIES 5 (2009).

37. Anupam Chander, *Youthful Indiscretion in an Internet Age*, *in* THE OFFENSIVE INTERNET: PRIVACY, SPEECH, AND REPUTATION 124, 124 (Saul Levmore & Martha C. Nussbaum eds., 2010).

A. The Emergence of the Internet as a Method of Communication

With the invention of the Internet, people now have an opportunity to interact with others in a new and unique way. The first website was created in 1991,[38] and by 1998, the first weblogs began to appear.[39] Since then, many research groups have surveyed and polled student Internet use. One of these groups, the PEW Internet and American Life Project, reports that 87% of teens between the ages of twelve and seventeen use the Internet.[40] This means that there are approximately twenty-one-million youth who use the Internet,[41] more than half of whom access the Internet on a daily basis.[42] Similarly, about 42% of students polled claim to have been a victim of cyberbullying.[43] Increasingly, youth are using cell phones and other portable devices to also access the Internet and interact with each other, causing additional issues.[44]

1. Social Networking Websites

In recent years, the Internet has been a major source for networking and reconnecting with other people. This trend has not only affected adults. Research shows that 55% of teenagers between the ages of twelve and seventeen who are online have a profile on a social networking site, with 42% of social networkers also indicating that they blog on various websites.[45] In fact, many young people consider having a personal webpage on MySpace, Facebook, YouTube,

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38. MCQUADE III, *supra* note 36, at 7.

39. *Id.* at 9.

40. JESULON S.R. GIBBS, STUDENT SPEECH ON THE INTERNET: THE ROLE OF FIRST AMENDMENT PROTECTIONS 7 (2010).

41. *Id.*; *see also* Kathleen Conn, *Cyberbullying and Other Student Technology Misuses in K-12 American Schools: The Legal Landmines*, 16 WIDENER L. REV. 89, 89 (2010).

> America's children today have never known a world without computers and the World Wide Web. By 2000, virtually all American public schools had computers with Internet access. Use of computers in [the] U.S. schools begins early, with "67 percent of children in nursery school" using computers and eighty percent of kindergarten students using them, with almost half of these young users accessing the Internet.

Id.

42. MCQUADE III, *supra* note 36, at 11.

43. GIBBS, *supra* note 40, at 7.

44. MCQUADE III, *supra* note 36, at 11.

> Nearly half of all American preteens have cell phones, and schools have been stymied in their efforts to curtail students' cell phone possession and use in schools. Significant numbers of teenagers have personal cell phones with picture, music, and mobile computing capability. Text messaging between and among students is rampant, occurring even during classroom instruction.

Conn, *supra* note 41, at 89-90.

45. MCQUADE III, *supra* note 36, at 12.

Twitter, or other similar forums as not only cool, but necessary to be accepted by their online and/or in-person friends.[46]

Online social communications tools for preteens and teenagers such as MySpace began to surface in the early 2000s, where cyberbullying was somewhat confined to peer-to-peer interactions.[47] With the advent of Facebook, Twitter, and YouTube, the world of social networking entered into entirely new realms.[48] Because today's youth are interacting earlier in their lives, more often, and for more purposes via cyberspace where social standards of behaviors and sanctions are not clearly defined, what constitutes misbehaving in online forums is muddled.

Social networking service websites allow users to interact with an online community of their friends, family, and even those that they have not yet met.[49] These sites allow users to: "(1) construct a public or semi-public profile within a bounded system; (2) articulate a list of other users with whom they share a connection; and (3) view and traverse their list of connections and those made by others within the system."[50] Ultimately, these websites have changed the game of communication.

Facebook

One of the most prominent social networking websites adding to this trend is Facebook. Shortly after its inception in 2004, Facebook quickly became the second largest social network on the web, only behind MySpace in terms of traffic.[51] However, as of 2010, Facebook

46. *Id.* at 48.

47. SHARIFF, *supra* note 1, at 45 ("Online social communication tools for preteens and teenagers such as MySpace began to surface near the beginning of the 2000s and caught on like wildfire.").

48. *Id.*; *see also Cyber-bullying Gathers Pace in US*, BBC NEWS (June 28, 2007, 8:32 GMT), http://news.bbc.co.uk/2/hi/technology/6245798.stm ("Bullying has entered the digital age. The impulses behind it are the same, but the effect is magnified. In the past, the materials of bullying would have been whispered, shouted or passed around. Now, with a few clicks, a photo, video or a conversation can be shared with hundreds via e-mail or millions through a website, online profile or blog posting.").

49. *See* Danah M. Boyd & Nicole B. Ellison, *Social Network Sites: Definition, History, and Scholarship*, 13 J. COMPUTER-MEDIATED COMM. 210, 211 (2007), *available at* http://jcmc.indiana.edu/vol13/issue1/boyd.ellison.html (providing a comprehensive definition of social networking sites).

50. *Id.*

51. Sid Yadav, *Facebook—The Complete Biography*, MASHABLE (Aug. 25, 2006), http://mashable.com/2006/08/25/facebook-profile/.

was the "king" of internet social networking websites.[52] At the end of June 2012, there were 955 million monthly active users and 552 million daily active users on average.[53] In the United States alone, there are over 155 million users making up over 50% of the U.S. population.[54] Although all of the users are not children, 31% or about 48 million accounts are registered to individuals under the age of twenty-four, accounting for a little less than a third of all United States accounts.[55] According to the Nielsen Company, the average active social network user logs in over nineteen times a month, spending an average of between five and seven hours on the site.[56]

Primarily focused on high school to college students, Facebook has a large base of users.[57] Since Facebook's launch in February 2004, it has expanded worldwide to extend to over 200 countries.[58] At its origination, Facebook generally involved having a valid e-mail ID with the associated institution or business.[59] Today, however, Facebook membership is open to anyone over the age of thirteen with an email address.[60]

Twitter

Twitter was founded in March 2006.[61] Since its creation six years ago, Twitter has quickly gained popularity worldwide, and today, it is

52. Katie Kindelan, *Twitter Surpasses MySpace, Facebook Still King*, SOCIALTIMES (Sept. 30, 2010, 10:45 AM), http://socialtimes.com/twitter-myspace-facebook-stats_b24351 (crowning Facebook as the social media king and stating that it grew in membership by fifty-four percent to 598 million unique visitors in August 2010 alone).

53. *Key Facts*, FACEBOOK, http://newsroom.fb.com/content/default.aspx?NewsAreaId=22.

54. *Id.*; *see United States Facebook Statistics*, SOCIALBAKERS, http://www.socialbakers.com/facebook-statistics/united-states (last visited Sept. 11, 2012).

55. *Id.* For more information, visit the SocialBakers website for pie charts that break-down the percentages of Facebook users by age as well as sex and gender.

56. *Id.*; *Facebook Users Average 7 Hrs a Month in January as Digital Universe Expands*, NIELSON WIRE (Feb. 16, 2010), http://blog.nielsen.com/nielsenwire/online_mobile/facebook-users-average-7-hrs-a-month-in-january-as-digital-universe-expands/.

57. SHARIFF, *supra* note 1, at 46.

58. *See Facebook Statistics by Country*, SOCIALBAKERS, http://www.socialbakers.com/facebook-statistics/ (last visited Sept. 11, 2012).

59. Carolyn Abram, *Welcome to Facebook, Everyone*, THE FACEBOOK BLOG (Sept. 26, 2006, 4:47 AM), https://blog.facebook.com/blog.php?post=2210227130.

60. *Statement of Rights and Responsibilities*, FACEBOOK, https://www.facebook.com/legal/terms (last updated June 8, 2012) ("Facebook users provide their real names and information, and we need your help to keep it that way. Here are some commitments you make to us relating to registering and maintaining the security of your account: . . . [5]You will not use Facebook if you are under 13.").

61. *Twitter*, CRUNCHBASE, http://www.crunchbase.com/company/twitter.

> Twitter, founded by Jack Dorsey, Biz Stone, and Evan Williams in March 2006 (launched publicly in July 2006), is a social networking and micro-blogging service that

estimated to have over 500 million users.[62] The website generates over 400 million tweets a day.[63] Today, Twitter is ranked as the second highest visited social networking website in the United States.[64]

Twitter is different and unique from many other social networking websites because it only provides users the opportunity to publish short (under 140 character) comments, known as "tweets," to a group of people who request to follow the user.[65] A tweet is very similar to a cellular phone text message or a Facebook status update.[66] These messages allow users to keep their friends, family, and sometimes their unknown bullies updated on their whereabouts or the changes in their lives.[67] In turn, it gives anonymous users or those users working under a pseudonym access into the lives of easily influenced children.

YouTube

Like both Facebook and Twitter, YouTube has been used as an outlet for youth to express their ideas and meet new people. YouTube, Inc. was founded in February 2005.[68] By May 2006, the website reached two billion views per day and by mid-August, over seven bil-

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allows users to post updates 140 characters long. Twitter is a real-time information network that connects [users] to the latest stories, ideas, opinions, and news.

The service can be accessed through a variety of methods, including Twitter's website; text messaging; instant messaging; and third-party desktop, mobile, and web applications. Twitter is currently available in over 30 languages.

Id.

62. *See* Lauren Dugan, *Twitter to Surpass 500 Million Registered Users On Wednesday*, ALLTWITTER (Feb. 21, 2012, 12:30 PM), http://www.mediabistro.com/alltwitter/500-million-registered-users_b18842.

63. Shea Bennett, *Twitter Now Seeing 400 Million Tweets Per Day, Increased Mobile Ad Revenue, Says CEO*, ALLTWITTER (June 7, 2012 8:00 AM), http://www.mediabistro.com/alltwitter/twitter-400-million-tweets_b23744.

64. Kindelan, *supra* note 52.

65. *Get to Know Twitter: New User FAQ*, TWITTER, https://support.twitter.com/articles/13920-frequently-asked-questions (last visited Aug. 7, 2012) ("[Twitter allows] people [to] write short updates, often called 'Tweets' of 140 characters or fewer. These messages are posted to your profile, sent to your followers, and are searchable on Twitter search.") [hereinafter *Get to Know Twitter*].

66. Shari Weiss, *Twitter Is Like a Text Message to the World, Free Social Media Monitoring Tools & Other SM Marketing Insights [Briefly Stated]*, SHARISAX IS OUT THERE BLOG (Dec. 23, 2010), http://sharisax.com/2010/12/23/twitter-is-like-a-text-message-to-the-world-other-social-media-marketing-insights-briefly-stated/ ("Twitter is like a Text Message with a BCC – TO THE WORLD: Businesses use Twitter to converse with prospects, provide customer service, and drive website traffic.").

67. *Get to Know Twitter*, *supra* note 65 (describing how Twitter is a service that allows friends, family, and co–workers to communicate with one another and remain connected). Because twitter allows such open communication, it can also serve as an available and prime platform for a cyberbully.

68. *Frequently Asked Questions: About YouTube*, YOUTUBE, http://www.artlaco.articlealley.com/history-of-youtube-1482289.html (last visited Aug. 26, 2012).

lion, becoming the tenth most visited website in the United States.[69] Today, YouTube reports that 500 years of YouTube video are watched on Facebook each day and over 700 YouTube videos are shared on Twitter each minute.[70] There are more than 800 million user visits to YouTube each month, over 3 billion hours of video watched and about seventy-two hours of video uploaded to YouTube every minute.[71] In 2011 alone, YouTube had more than 1 trillion views or around 140 views for every person on Earth.[72] This means that YouTube, much like Facebook and Twitter has a huge level of control over our social interactions. YouTube is extremely user friendly, allowing anyone with a computer and an Internet connection to upload a video from any video recording device.[73] YouTube also allows users to comment on posted videos.[74]

YouTube has many positive purposes. Free access to post and view posted material can expose people to new cultures and ideas and even allow families to share and retain happy memories.[75] With its openness, however, children are also able to post videos that can hurt others. This problem gained visibility when five girls from Lakeland, Florida, facing charges over allegedly beating up a classmate, videotaped the beating and planned to post it on YouTube.[76] Posting videos exacerbates the bullied experience because videos are posted for any and everyone to view. Nancy Willard, author of *Cyber-Safe Kids, Cyber-Savvy Teens and Cyberbullying and Cyberthreats*, said it best: "You [are] bullied twice. You [are] bullied in the real world with a

69. Art Laco, *History of YouTube*, http://www.articlealley.com/article_1482289_81.html (last visited June 13, 2012).

70. *Statistics: Social*, YouTube, http://www.youtube.com/t/press_statistics (last visited July 22, 2012) [hereinafter *Statistics: Social*].

71. *Id.*

72. *YouTube Community Guidelines*, YouTube, http://www.youtube.com/t/community_guidelines (last visited Aug. 2, 2012).

73. Christina Scelsi, *YouTube:Tthe World of Viral Video*, 24 Ent. & Sports L. 10, 10 (2006).

> The site provides users with the ability to not only post clips, but also create groups based on interest, as well as integrate the clips into Web sites and other sites on the Internet, all at no cost. Clips available on the site range from home video to music videos to clips of vintage sitcoms, as well as current shows such as "The Office," "The Daily Show," and "The Colbert Report."

Id.

74. *Statistics: Social*, *supra* note 70.

75. *Id.*

76. Janet Kornblum, *Cyberbullying Grows Bigger and Meaner with Photos*, USA Today, July 15, 2008, at 1D.

physical attack, and then you [are] bullied online with humiliation. It [is] very hurtful. Very, very hurtful."[77]

II. NEW-AGE BULLYING

A. What Is Cyberbullying, and Who Is Typically Cyberbullied?

There are common trends as to how cyberbullying is used and whom it typically affects. While not all cyberbullying situations end in severe results such as complete social isolation or suicide, they share many common threads.[78] Victims are usually perceived as being relatively weak or vulnerable.[79] Cyberbullies also tend to target the sexuality and perceived relationships of their victims.[80]

It is not clear whether the term "cyberbullying" was first coined by Canadian Bill Belsey in 2005 or by American lawyer Nancy Willard in 2003.[81] As previously stated, cyberbullying is willful and repeated harm inflicted through computers, cell phones, and other electronic devices.[82] Cyberbullying presents itself in many forms including e-mail, instant messaging, chat room conversations, text-messaging, and website postings.[83] Society's rapid advancements in cellular phone

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77. *Id.*

78. McQUADE III, *supra* note 36, at 7.

79. *Id.*; *see also* Karen L. Bune, *Vulnerable Victims Fall Prey To Cyber Bullies*, OFFICER (Feb. 4, 2008), http://www.officer.com/article/10249134/vulnerable-victims-fall-prey-to-cyber-bullies.

80. McQUADE III, *supra* note 36, at 7.

81. SHARIFF, *supra* note 1, at 5; *see also* Ted Feinberg & Nicole Robey, *Cyberbullying: Whether It Happens at School or Off-Campus, Cyberbullying Disrupts and Affects All Aspects of Students' Lives*, PRINCIPAL LEADERSHIP (Sept. 2008), *available at* http://www.nasponline.org/resources/principals/Cyberbulling%20NASSP%209-08.pdf.

> Approximately half of cyberbullying victims are also targets of traditional bullying. Victims generally are more unpopular, isolated, depressed, anxious, and fearful than their peers. Those at risk are more likely to be searching for acceptance and attention online, more vulnerable to manipulation, less attentive to Internet safety messages, less resilient in getting out of a difficult situation, less able or willing to rely on their parents for help, and less likely to report a dangerous online situation to an adult.

Id.(internal citations omitted).

82. HINDUJA & PATCHIN, *supra* note 11, at 5.

83. *Cyberbullying Facts*, http://www.cyberbullying.org/, (last visited Sept. 29, 2010); *see also Technology and Youth: Protecting Your Child From Electronic Aggression*, http://www.cdc.gov/violenceprevention/pdf/EA-TipSheet-a.pdf (last updated July 1, 2010). The Centers for Disease Control and Prevention report that children use these websites to release what they've coined "Electronic Aggression." Some examples of electronic aggression are:

> [1] Disclosing someone else's personal information in a public area (e.g., website) in order to cause embarrassment.
>
> [2] Posting rumors or lies about someone in a public area (e.g., discussion board).
>
> [3] Distributing embarrassing pictures of someone by posting them in a public area (e.g., website) or sending them via e-mail.
>
> [4] Assuming another person's electronic identity to post or send messages about others with the intent of causing the other person harm.

and Internet technologies have opened new and infinite spaces for communication for today's young people to explore, spaces that are difficult to monitor or supervise.[84]

School officials are extremely fearful of the affect that the Internet, and those who use it maliciously, can have on the immaturity of teens. Cyberbullying easily draws on the immaturity of teenagers because of their inability to fully appreciate the consequences their actions can have on themselves and others. According to a representative from Isafe:

> 58% of kids admit someone has said mean or hurtful things to them online. More than four out of ten saw it happen more than once. Additionally, 53% of kids admit to having said something mean or hurtful to another person online. More than one in three has done it more than once.[85]

Some believe that cyberbullying is not truly harmful because the bullying involves verbal and not physical confrontation.[86] However, research has shown that "[n]on-physical forms of aggression are just as harmful [as physical violence] to a student's ability to learn, grow, and succeed."[87] The subsequent mental anguish from the societal exclusion caused by physical and psychological bullying is sufficient to destroy the confidence of any adult, let alone a child as it can have lifelong effects.[88] Some victims of peer harassment turn around and become bullies themselves.[89] It is also important to point out that bul-

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> [5] Sending mean, embarrassing, or threatening text messages, instant messages, or e-mails.

Id.

84. SHARIFF, *supra* note 1, at 5.

85. GIBBS, *supra* note 40, at 17 ("Isafe is a foundation working to make young people more responsible on the Internet.").

86. Kornblum, *supra* note 76.

87. Grim, *supra* note 5, at 159.

> There are many different effects of peer harassment today, varying based on the type of bullying encountered. Those subjected to physical abuse will suffer minor to severe physical injuries, depending on the nature of the attack. Psychological injuries can also be very serious. The old adage "sticks and stones can break my bones but words can never hurt me" is not always true.

Id.

88. SHARIFF, *supra* note 1, at 37.

89. Grim, *supra* note 5, at 160.

> As former victims, they sometimes feel justified in taking revenge and may even become much more violent than their previous aggressors. It is now known that the Columbine High School shooters were frequently bullied by other students before they decided to take their revenge, as was the student killer in the 2007 Virginia Tech rampage.

Id.; *see also* Seema Metra, *Meaner Bullying Is Leading Schools to Find New Tactics*, L.A. TIMES, Mar. 7, 2008, at 1; Alex Johnson et. al, *High School Classmates Say Gunman Was Bullied*, MSNBC, http://www.msnbc.msn.com/id/18169776/ (last updated Apr. 19, 2007, 6:10 PM).

lies have been shown to be aggressive towards their peers, as well as adults such as parents and teachers.[90] Cyberbullying causes a vicious, but breakable, cycle. Cyberbullying has real life implications for many families. A false or defamatory statement, made by one person about another, may "become a constituent part of that person's Internet identity."[91]

1. Ryan Patrick Halligan

On October 7, 2003, the effects of cyberbullying became real for one Essex Junction, Vermont family. The Associated Press reported that thirteen-year-old Ryan Patrick Halligan was repeatedly "sent instant messages from middle school classmates accusing him of being gay, and 'threatened, taunted and insulted incessantly.'"[92] Ryan was bullied for months, both physically and over the computer.[93] According to his father, Ryan:

> coped with developmental and learning challenges, was targeted for years by a school bully and humiliated by a popular girl at his school who pretended to like him on-line and then shared their private instant messages with others to publicly humiliate him.[94]

After much involvement by Ryan's father in ensuring that community leaders and students alike understood the dire effects of cyberbullying, the governor of Vermont, only seven months after Ryan's death, signed House Bill H. 629, entitled "*An Act Relating to Bullying Prevention Policies*."[95]

2. Megan Meier

On October 17, 2006, the Missouri family of Megan Meier dealt with a similar tragedy.[96] Her situation was distinguishable only in that

90. McQuade III, *supra* note 6, at 24.

91. The Offensive Internet: Privacy, Speech, and Reputation 1, 9 (Saul Levmore & Martha C. Nussbaum eds., 2010).

92. *States Pushing for Laws to Curb Cyberbullying*, FoxNews, http://www.foxnews.com/story/0,2933,253259,00.html (last visited Mar. 11, 2012) ("Classmates sent the 13-year-old Essex Junction, Vt., boy instant messages calling him gay. He was threatened, taunted and insulted incessantly by so-called cyberbullies.").

93. *Id*.

94. *Teen Suicide: Greater IBMer John Halligan Says There Is Something We Can Do*, IBM, http://www.ibm.com/ibm/greateribm/connections/connections_article30.shtml (last visited Sept. 11, 2012) [hereinafter "*Teen Suicide*"].

95. Vt. Stat. Ann. tit. 16, §11(a)(32) (2012).

96. Megan Meier Foundation, http://meganmeierfoundation.cwsit.org/megans Story.php (last visited Aug 3, 2012) [hereinafter Megan Meier Foundation] (providing a biography for Megan Meier, resources on cyberbullying and how to deal with the issue, and news and updates on the social phenomenon).

she was taunted through a MySpace page created by an adult. Soon after opening an account on MySpace, Meier received a message from a sixteen-year-old boy, Josh Evans.[97] Though her mother was not excited about the idea, Meier became online friends with Josh, talking to him almost every day and confiding in him, although they never met in person.[98] Megan, who suffered from depression and attention deficit disorder, corresponded with Josh for more than a month.[99]

On October 15, 2006, Megan received a message from Josh that said: "I don't know if I want to be friends with you anymore because I've heard that you are not very nice to your friends."[100] After that message, she received similar messages, some of which were not kept just between her and Josh.[101] The following day, Megan took her life. In the following weeks, her family learned that Josh never actually existed; but was created by members of a neighborhood family that included a former friend of Megan's all because of alleged rumors spread by Megan.[102]

On May 15, 2008, Lori Drew, the woman who created the MySpace account and sent Megan messages was indicted for her alleged role in the MySpace hoax.[103] At trial, the jury found Drew guilty of a misdemeanor violation of the Computer Fraud and Abuse Act of

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97. *Id.*

> His name was Josh Evans. He was 16 years old. And he was hot. "Mom! Mom! Mom! Look at him!" Tina Meier recalls her daughter saying. Josh had contacted Megan Meier through her MySpace page and wanted to be added as a friend. Yes, he's cute, Tina Meier told her daughter. "Do you know who he is?" "No, but look at him! He's hot! Please, please, can I add him?" Mom said yes. And for six weeks Megan and Josh—under Tina's watchful eye—became acquainted in the virtual world of MySpace."

Id.

98. *Id.*; *see also Key Events in the Megan Meier Case*, USA TODAY (May 15, 2008, 6:18 PM), http://www.usatoday.com/tech/products/2008-05-15-1838288037_x.htm [hereinafter *Key Events in the Megan Meier Case*] ("September 2006: 13-year-old Megan Meier of Dardenne Prairie, Mo., begins communicating online on the MySpace social network with 'Josh Evans,' who she thinks is a good-looking boy living in her area.").

99. MEGAN MEIER FOUNDATION, *supra* note 96.

100. *Id.*; *Key Events in the Megan Meier Case*, *supra* note 98.

101. MEGAN MEIER FOUNDATION, *supra* note 96.

102. *Id.*; *see also Key Events in the Megan Meier Case*, *supra* note 98.

> Fall 2006: Megan's parents learn from a neighbor that Josh was the creation of another neighbor, Lori Drew, her teenage employee Ashley Grills, and Drew's teenage daughter, a former friend of Megan. They are told the MySpace profile was created to see what Megan was saying about Drew's daughter online. Drew, through her attorney, later disputes she helped create the site or knew of mean messages prior to Megan's death.

Id.

103. Scott Glover, *Cyber-Bully Verdict Is Mixed*; *Woman in MySpace Case Is Found Guilty on Three Misdemeanors*, L.A. TIMES, Nov. 27, 2008, at 1; *Key Events in the Megan Meier Case*, *supra* note 98.

1986.[104] On November 23, 2008, Drew filed a motion for acquittal, which the court granted on August 28, 2009.[105] In response to Drew's acquittal, on May 22, 2008, Congresswoman Linda T. Sanchez introduced H.R. 6123 as the "Megan Meier Cyberbullying Prevention Act" to "amend title 18, United States Code, with respect to cyberbullying."[106]

3. Tyler Clementi

Most recently, on September 22, 2010, Tyler Clementi, an eighteen year old freshman at

Rutgers University in New Jersey, jumped from the George Washington Bridge.[107] Tyler's suicide was in response to the streaming of a video of a sexual encounter he had in his dorm room, a streaming video created without his knowledge by his roommate Dharun Ravi and Molly Wei another student at the school.[108] The government charged Ravi and Wei with invasion of privacy.[109]

In April of 2011, a grand jury indicted Ravi on fifteen counts and, for the first time, labeled his actions as a hate crime.[110] Ravi faced up to ten years in prison.[111] On May 6, 2011, Wei entered a plea agreement that allowed her to avoid prosecution in exchange for her testify-

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104. Glover, *supra* note 103; Christopher Maag, *A Hoax Turned Fatal Draws Anger but No Charges*, N.Y. TIMES, Nov. 28, 2007, at A23.

105. United States v. Drew, 259 F.R.D. 449, 468 (C.D. Cal. 2009) (providing the final decision where Lori Drew was charged with violating the Computer Fraud and Abuse Act over the alleged "cyberbullying" of Megan Meier).

106. H.R. 6123, 110th Cong. (2008).

107. Winnie Hu, *Legal Debate Swirls Over Charges in a Student's Suicide*, N.Y. TIMES, Oct. 1, 2010, at A15.

> On Sept. 19, Mr. Ravi messaged his Twitter followers that he had gone to Ms. Wei's dormitory room and activated a webcam in his own room, showing Mr. Clementi as he was "making out with a dude." Prosecutors said the images were streamed live on the Internet. On Sept. 21, the authorities said, Mr. Ravi tried to stream more video and invited friends to watch. But Mr. Clementi apparently discovered the camera and complained to school officials. The next day, he jumped from the George Washington Bridge.

Id.

108. *Id.*; Kelly Heyboer, *2 Rutgers Students Accused of Showing Classmate's Intimate Encounter*, STAR-LEDGER, Sept. 29, 2010, at 13.

109. *Id.*

110. Kelly Heyboer, *Indictment in Clementi Case Alleges a Cover-Up Prosecutors Say Roommate Tampered with Evidence*, STAR-LEDGER, Apr. 21, 2011, at 1. ("The indictment handed up by a Middlesex County grand jury in New Brunswick included two counts of invasion of privacy and two counts of attempted invasion of privacy Ravi was charged with shortly after Clementi's suicide. [T]he indictment also included several new charges related to Ravi's alleged attempts to dupe investigators by deleting text messages and replacing one of his Twitter posts with a new statement designed to mislead police.").

111. *Id.*

ing against Ravi, community service, and other counseling classes.[112] Dharun Ravi's case went to trial and on March 16, 2012, Ravi was found guilty on all fifteen counts, including two counts of bias intimidation.[113] Though Ravi was found guilty, he was sentenced to only thirty days in jail and served only twenty.[114] Both Ravi and the Prosecutors have appealed the decision.[115]

These real-life cases all show that the evolution of technology, coupled with heightened concerns about cyber bullying, present new legal issues for educators that may not align with earlier legal precedence or older educational policies.[116] It is becoming increasingly more difficult to monitor the transfer of information over the Internet and secure the privacy and safety of all parties. But, is the privacy of the bully more important than the protection of the bullied? All of these stories show just how far a bullying incident can go. With so many children taking their lives because of bullying experiences, it is clear that action must be taken. To determine the level of restriction that can be placed on student speech in general and cyber speech/bullying specifically, privacy law and the possible constitutional ramifications of restrictions must be explored.

III. IS PRIVACY IMPORTANT?

A. What Is Privacy Law?

There are two main types of privacy right, one focusing on the "protection of personhood" and the other on "freedom of normalization."[117] The "protection of personhood" ensures that individuals are free to define themselves.[118] Important here is "freedom of normalization," which "focuses on the extent to which the government action

112. Aman Ali, *Student Implicated in U.S. College Suicide Pleads Not Guilty*, REUTERS NEWS (May 23, 2011), http://in.reuters.com/article/2011/05/23/idINIndia-57216620110523.

113. Jonathan Allen & Aman Ali, *UPDATE 1-Dharun Ravi Found Guilty of Hate Crimes for Spying on Gay Rutgers Roommate*, REUTERS NEWS, Mar. 16, 2012. The judge told the jury that to find Ravi guilty of bias intimidation, "they needed to decide if Ravi singled out Clementi because he was gay." *Id.* Ravi was not, however, charged with Clementi's death. *Id.*

114. Tom Haydon, *He May Serve Just 20 Days, Short-Term Inmates Rarely Serve Entire County Sentence: Before Ravi Even Sets Foot In Jail, State Rules Automatically Cut His Term By A Third, Warden Says*, STAR-LEDGER, MAY 23, 2012, at 1; Kate Zernike, *Jail Term Ends After 20 Days For a Former Rutgers Student*, N.Y. TIMES, June 20, 2012, at A26.

115. Sue Epstein, *Ravi's Attorney Calls Statute Unconstitutional in Appeal*, STAR-LEDGER, June 12, 2012, at 3.

116. *See* Kornblum, *supra* note 76.

117. CHRISTOPHER SLOBOGIN, PRIVACY AT RISK: THE NEW GOVERNMENT SURVEILLANCE AND THE FOURTH AMENDMENT 104 (2007).

118. *Id.*

standardizes lifestyles."[119] Freedom of speech is an essential privacy right in a democratic society.[120] Freedom of speech works to give all people the right to express themselves, "even if their speech is trivial, despicable, crass, and repulsive."[121] "For three hundred years in America, the advent of each successive new medium of mass communication has causes re-examination of the availability and applicability of speech protections."[122] "Given its historical belief that 'each medium of expression presents special First Amendment problems[,]' the United States Supreme Court has adopted discrete speech doctrines for print media, motion pictures, broadcast media, and cable."[123] Free speech jurisprudence covers many different aspect of modern day law.[124] As society advances both socially and technologically, the murkiness as to the appropriate function of free speech arises.[125] Technology, specifically the Internet, continues to change the constitutional analysis.[126]

Some believe, that privacy is not closely related to the government's interest in prosecuting Internet criminal libels.[127] United States law currently takes a "piecemeal approach to privacy; statutory and constitutional provisions protect various aspects of privacy," but the courts have never held that there is an over-arching "right to privacy."[128] The Bill of Rights, however, does protect certain aspects of

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119. *Id.*

120. DANIEL J. SOLOVE, THE FUTURE OF REPUTATION—GOSSIP, RUMOR, AND PRIVACY ON THE INTERNET 125 (2007).

121. *Id.*

122. Edward L. Carter, *Outlaw Speech on the Internet: Examining the Link Between Unique Characteristics of Online Media and Criminal Libel Prosecutions*, 21 SANTA CLARA COMPUTER & HIGH TECH. L.J. 289, 312 (2005).

123. *Id.* at 315.

124. GIBBS, *supra* note 40, at 11.

125. *Id.*

126. *Id.*; *see also* Alison Virginia King, *Constitutionality of Cyberbullying Laws: Keeping the Online Playground Safe for Both Teens and Free Speech*, 21 SANTA CLARA COMPUTER & HIGH TECH. L.J. 289 (2005) (examining the role that the Internet has played in recent criminal libel cases, while examining the effect that an increase in Internet communication has had on constitutional analyses).

127. Carter, *supra* note 122, at 316.

> Anonymity is not closely related to the government's interest in prosecuting Internet criminal libels. Anonymity has long been a tradition of our nation's system of free expression. Mark Twain and O. Henry are both pseudonyms for writers who preferred not to use their real names, and anonymous written communication has long been an integral part of self-governing societies. Fear of retaliation or ostracism, in Lake's case, was a plausible reason not to attach his name to his comments. In the United States, at least, "the interest in having anonymous works enter the marketplace of ideas unquestionably outweighs any public interest in requiring disclosure as a condition of entry."

Id.

128. SUSAN W. BRENNER, SHOULD CRIMINAL LIABILITY BE USED TO SECURE DATE PRIVACY—SECURING PRIVACY IN THE INTERNET AGE 271 (2008).

privacy: "the First Amendment creates a right to speak anonymously and to preserve the confidentiality of one's associations, and, under modern Supreme Court interpretations, the Fifth Amendment protects the privacy of one's thoughts by barring the state from compelling incriminating testimony."[129] The United States government has put into place laws to protect the many aspects of privacy, showing the importance it places on the concept.[130] Consequently, a law such as the Privacy Act of 1974[131] is in place to protect the privacy rights of United States citizens.

B. How Has the Court Dealt with Free Speech and Privacy in the Past?

There have been quite a few cases dealing with free speech issues in various settings.

However, as one judge noted:

> A reasonable school official facing this question of [off-campus] speech brought on-campus by a third party] for the first time would find no pre-existing body of law from which he could draw clear guidance and certain conclusions. Rather, a reasonable school official would encounter a body of case law sending inconsistent signals as to how far school authority to regulate speech reaches beyond the confines of the campus. [This is due to] the unsettled nature of First Amendment law as applied to off-campus student speech.[132]

1. *Tinker v. Des Moines Independent Community School District*

The intersection of First Amendment rights of youth and school related speech has been litigated in courtrooms for years. The most prominent First Amendment student speech case was the 1969 case, *Tinker v. Des Moines Independent Community School District*.[133] There, the Court held that in order for school officials to justify censoring speech, they "must be able to show that [their] action was caused by something more than a mere desire to avoid the discomfort

129. *Id*. at 272.

130. Donald C. Dowling, Jr. & Jeremy Mittman, *Corporate Law And Practice Course Handbook*, 1828 PRACTISING L. INST. 381, 405 (2010).

131. Privacy Act of 1974, Pub. L. No. 93-579, 88 Stat. 1896. According to the Federal Trade Commission, the Privacy Act of 1974 "protects certain federal government records pertaining to individuals." *Privacy Act of 1974, as Amended*, FED. TRADE COMMISSION, http://www.ftc.gov/foia/privacy_act.shtm (last visited Aug. 8, 2012). Specifically, the Act serves to control the records that an agency can keep and retrieve using an individual's name or social security. *Id.*

132. GIBBS, *supra* note 40, at 15.

133. *See* Tinker v. Des Moines Indep. Cmty. Sch. Dist., 393 U.S. 503 (1969).

and unpleasantness that always accompany an unpopular viewpoint, allowing schools to forbid conduct that would 'materially and substantially interfere with the requirements of appropriate discipline in the operation of the school.'"[134]

In *Tinker*, John Tinker, his younger sister Mary Beth Tinker, and friend Christopher Echardt, decided to wear black armbands to school to protest the Vietnam War.[135] The principals of the schools banned all students from wearing armbands fearing unruly responses and repercussions.[136] The Tinker siblings and Christopher wore their armbands to school and were subsequently suspended.[137] When *Tinker* reached the Supreme Court, the Court had to decide whether the school's prohibition against wearing armbands as a symbolic protest in a public school violated the students' First Amendment right to free speech.[138]

The Court held, among other things, that the armbands are "closely akin to 'pure speech'" and thus protected by the First Amendment.[139] The Court also discussed the additional element, the school environment, and how school itself creates limitations on free expression.[140] However, because the principals could not show that the armbands would interfere with their abilities to maintain safety or substantially interfere with the appropriate level of discipline, the Court found a First Amendment violation, even though the speech was symbolic action.[141]

It is important to note that in Justice Black's dissenting opinion he wrote:

> While I have always believed that under the First and Fourteenth Amendments neither the State nor the Federal Government has

134. *Id.* at 506-09.
135. *Id.* at 504.
136. *Id.*
137. *Id.*
138. *Id.* at 505.
139. *See id.* at 505-06 ("[T]he wearing of armbands in the circumstances of this case was entirely divorced from actually or potentially disruptive conduct by those participating in it. It was closely akin to 'pure speech' which is entitled to comprehensive protection under the First Amendment . . . .").
140. *Id.* at 506-09.

> [T]he Court has repeatedly emphasized the need for affirming the comprehensive authority of the States and of school officials, consistent with fundamental constitutional safeguards, to prescribe and control conduct in the schools. Our problem lies in the area where students in the exercise of First Amendment rights collide with the rules of the school authorities.

Id. at 507 (internal citations omitted).
141. *Id.* at 509-10.

> any authority to regulate or censor the content of speech, I have never believed that any person has a right to give speeches or engage in demonstrations where he pleases and when he pleases.[142]

Black argued that the Tinkers' behavior was disruptive and for that reason, the school was justified.[143] This case is extremely important because *Tinker* provides the test that courts still utilize to determine if a school's disciplinary actions are in violation of a student's First Amendment rights.

2. *Bethel School District No. 403 v. Fraser*

In 1986, the Supreme Court decided *Bethel School District No. 403 v. Fraser*.[144] The Court held that the "petitioner School District acted entirely within its permissible authority in imposing sanctions upon Fraser in response to his offensively lewd and indecent speech."[145] In *Fraser*, a high school student, Matthew Fraser, gave a speech in which he nominated Jeff Kuhlman, a fellow high school student, for the Associated Student Body Vice President position.[146] However, the speech contained sexual innuendos.[147] A Bethel High School disciplinary rule prohibiting the use of obscene language in the school provided that "[c]onduct which materially and substantially interfere[d] with the educational process [was] prohibited, including the use of obscene, profane language or gestures."[148] Before Fraser gave his speech, two of his teachers advised him that the speech was "inappropriate and that he probably should not deliver it," and also if he did decide to give the speech, he may suffer "severe consequences."[149]

After the speech, Fraser was suspended for three days.[150] He appealed the grievance procedures of his school, but was still found to be in violation of a school policy against disruptive behavior.[151] Fraser filed suit against the school claiming that they were in violation of his

142. *Id.* at 516 (Black, J., dissenting).
143. *Id.* at 517-18.
144. Bethel Sch. Dist. No. 403 v. Fraser, 478 U.S. 675 (1986).
145. *Id.* at 685.
146. *Id.* at 677, 687.
147. *Id.* at 678.
148. *Id.*
149. *Id.*
150. *Id.* at 679.
151. *Id.* at 678-79.

First Amendment right to free speech.[152] The lower court and United States Ninth Circuit Court of Appeals ruled in Fraser's favor.[153]

The Supreme Court reversed the Court of Appeals decision, holding that the school was not in violation of Fraser's First Amendment rights when they suspended him.[154] The Court distinguished the sanctions from those in *Tinker*, stating that the "penalties imposed . . . were unrelated to any political viewpoint."[155] It further reasoned that the First Amendment "does not prevent the school officials from determining that to permit a vulgar and lewd speech such as [the] respondent's would undermine the school's basic educational mission."[156]

3. *Hazelwood School District v. Kuhlmeier*

In 1988, in *Hazelwood School District v. Kuhlmeier*, the Court expanded the control that public school officials have to impose limitations on what they allow students to post in school publications.[157] In *Kuhlmeier*, petitioners contended that school officials "violated their First Amendment rights by deleting two pages of articles from the May 13, 1983, issue of Spectrum," a school newspaper written and edited by the school Journalism class.[158] These articles discussed pregnancy and divorce, and made references to sexual activity and birth control.[159] The Court held that: (1) the First Amendment rights of

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152. *Id.*

> Fraser sought review of this disciplinary action through the School District's grievance procedures. The hearing officer determined that the speech given by respondent was "indecent, lewd, and offensive to the modesty and decency of many of the students and faculty in attendance at the assembly." The examiner determined that the speech fell within the ordinary meaning of "obscene," as used in the disruptive-conduct rule, and affirmed the discipline in its entirety. Fraser served two days of his suspension, and was allowed to return to school on the third day.

Id.

153. *Id.* at 679-80.

154. *Id.* at 686.

> Respondent contends that the circumstances of his suspension violated due process because he had no way of knowing that the delivery of the speech in question would subject him to disciplinary sanctions. This argument is wholly without merit. We have recognized that "maintaining security and order in the schools requires a certain degree of flexibility in school disciplinary procedures, and we have respected the value of preserving the informality of the student-teacher relationship." Given the school's need to be able to impose disciplinary sanctions for a wide range of unanticipated conduct disruptive of the educational process, the school disciplinary rules need not be as detailed as a criminal code which imposes criminal sanctions.

Id.(internal citations omitted).

155. *Id.*

156. *Id.*

157. *See* Hazelwood School Dist. v. Kuhlmeier, 484 U.S. 260, 273-76 (1988).

158. *Id.* at 262.

159. *Id.* at 263.

students in public schools are not automatically the same as the rights adults hold in other settings, and must be applied in light of the special characteristics of the school environment; (2) the school newspaper was not a forum for public expression, and thus school officials were entitled to regulate the paper's contents in any reasonable manner; (3) the standard for determining when a school may punish student expression on school premises is not the same standard for determining when a school may refuse put its name on disseminated student expression; and (4) the school principal acted reasonably in requiring the deletion of the articles.[160]

4. *Morse v. Frederick*

Most recently, in 2007, the Court decided *Morse v. Frederick*.[161] In *Morse*, student Joseph Frederick was suspended for ten days for holding up a banner that stated "Bong Hits 4 Jesus."[162] Bong is a common slang term for smoking marijuana.[163] The principal justified suspending Frederick by citing the school's policy that prohibited displays of materials that promote using illegal drugs.[164] Frederick filed suit against the school under federal statute 42 U.S.C. § 1983, claiming that the school violated his First Amendment rights to free speech.[165]

In the initial action, the District Court did not find a First Amendment violation.[166] The Ninth Circuit Court of Appeals reversed the lower court's decision holding that a violation existed because Frederick was being punished for what he said and not the act.[167] The Supreme Court, in a 5-4 vote, reversed the Ninth Circuit

160. *Id.* at 260-61, 266-67, 270, 272-74.
161. Morse v. Frederick, 551 U.S. 393, 396 (2007).
162. *Id.* at 397-98.
163. *Id.* at 398.
164. *Id.* at 398-99.
165. 42 U.S.C. § 1983 (2006) ("Every person who . . . causes to be subjected, any citizen of the United States or other person within the jurisdiction thereof to the deprivation of any rights, privileges, or immunities secured by the Constitution and laws, shall be liable to the party injured in an action at law, suit in equity, or other proper proceeding for redress . . . ."); *see also Frederick*, 551 U.S. at 399.
166. *See Frederick*, 551 U.S. at 399.

> The District Court granted summary judgment for the school board and Morse, ruling that they were entitled to qualified immunity and that they had not infringed Frederick's First Amendment rights. The court found that Morse reasonably interpreted the banner as promoting illegal drug use—a message that "directly contravened the Board's policies relating to drug abuse prevention." Under the circumstances, the court held that "Morse had the authority, if not the obligation, to stop such messages at a school-sanctioned activity."

Id.(intenal citations omitted).
167. *Id.*

decision holding that although students do have some level of free speech, promoting illegal drug use does not fall within the purview.[168] The majority held that Frederick's message "was reasonably interpreted as promoting marijuana use—equivalent to [take] bong hits or bong hits [are a good thing]."[169]

Following *Tinker*,[170] school officials that want to regulate anonymous postings either on school property and certainly off-school property, must prove that the conduct materially and substantially interferes with the requirements of appropriate discipline to properly operate the school. This should not be extremely difficult seeing that discipline, or a lack thereof, is at the forefront of any cyberbullying situation. It will be much harder, however, to satisfy the *Fraser*[171] standard because although it may be within the authority of the school to prevent anonymous cyberbullying at the school, much of the bullying takes place off of school grounds. *Kuhlmeier*[172] adds an interesting dynamic to the situation because of its "form of public expression"[173] element. There will undoubtedly be a gray area when it comes to determining whether, for instance, a text message sent from a personal cellular device is sufficient to be a "form of public expression." The most recent case, *Morse v. Frederick*,[174] deals strictly with promoting illegal activity. This would also require a case-by-case analysis because some anonymous cyberbullying can focus on illegal actions while others can strictly ridicule and demean. All of these issues must be taken into consideration when proposing legislation and programs to alleviate the issue. A larger concern is how anonymity fits within this model.

IV. ANONYMITY—WHEN IS IT IMPORTANT? WHY?

A. What Is Anonymity? Why Is It Important?

Anonymity has long been a tradition of the United States' system of free expression.[175] Every day, people assume a certain level of ano-

168. *Id.* at 405.
169. *Id.* at 393.
170. Tinker v. Des Moines Indep. Cmty. Sch. Dist., 393 U.S. 503, 509 (1969); *see also* Geoffrey A. Starks, *Tinker's Tenure in the School Setting: The Case for Applying O'Brien to Content-Neutral Regulations*, 120 YALE L.J. ONLINE 65, 68 (2010).
171. Bethel Sch. Dist. No. 403 v. Fraser, 478 U.S. 675, 675 (1986).
172. Hazelwood Sch. Dist. v. Kuhlmeier, 484 U.S. 260, 267 (1988).
173. *Id.*
174. *Frederick*, 551 U.S. at 393.
175. Carter, *supra* note 122, at 316.

nymity regarding their use of the Internet.[176] They often never think that their activities may leave behind a trail of information or data that may uncover who they really are.[177] American society has relished the opportunity for anonymity and the social, cultural, and political advancements that take place due to its existence.[178] Anonymity, however, can pose a problem for the traditional "marketplace of ideas" because it prevents the recipient from knowing where the information comes from and makes it difficult to discern the true significance of writing.

The Supreme Court has also dealt with anonymity issues. In 1995, in *McIntyre v. Ohio Elections Commission*, the Court held that the government could not constitutionally prohibit the distribution of campaign literature simply because it failed to list the name and address of the person issuing it, or in other words, was anonymous.[179] There, Plaintiff Margaret McIntyre created and distributed a handbill that spoke out against a request for a tax levy by her local school board.[180] Although some of the handbills listed Ms. McIntyre's credentials, some were signed "Concerned Parents And Tax Payers."[181] Because her handbills did not state her name, Ms. McIntyre was fined $100 by the Ohio Election Commission.[182]

The Supreme Court applied strict scrutiny, reasoning that anonymous speech regarding important public issues was "core political speech" and could only be regulated by the State if the regulation was "narrowly tailored to achieve a legitimate state interest."[183] Because

176. *See* Ashley I. Kissinger & Katharine Larsen, *Protections for Anonymous Online Speech*, *Communications Law in the Digital Age*, 8 PRACTISING L. INST. 815, 822 (2011), *available at* http://lskslaw.com/attorneys/katharine_larsen.shtml (follow "Publications" hyperlink; then follow "Protections for Anonymous Online Speech" hyperlink) (purchase On-Demand Web Programathttp://www.pli.edu/Content/OnDemand/Communications_Lawin_the_Digital_Age_2011/_/N-4nZ1z135au?fromsearch=false&ID=99995).

177. *Id.*

178. *Id.* at 823.

> For centuries, anonymous commentators have identified solutions for political, social, and cultural challenges, promoted unconventional ideas, and catalyzed community development and transformation. The works of Mark Twain, Voltaire, Charles Dickens, Benjamin Franklin and other great thinkers were published under assumed names, and numerous anonymous texts, including the *Federalist Papers*, are believed to have decisively influenced "the progress of mankind.

Id.

179. *See* McIntyre v. Ohio Elections Comm'n, 514 U.S. 334, 357 (1995).

180. *Id.* at 337.

181. *Id.* at 338.

182. *Id.* at 380.

183. *McIntyre*, 514 U.S. at 347.

> The Court's unprecedented protection for anonymous speech does not even have the virtue of establishing a clear (albeit erroneous) rule of law. For after having an-

the information in the handbills was neither fraudulent nor libelous, the Court did not find a strong enough state interest.[184] The Court has also dealt with anonymity and First Amendment rights issues in previous Supreme Court decisions where it found that an author may remain anonymous under the First Amendment,[185] and restrictions on political speech must pass the strict scrutiny analysis.[186]

As discussed, the need for searches and privacy protections have been extended to various situations and now cover modern forms of communication, though it is not yet clear how invasive interference should be.[187] The content of this protected speech may include oral speech, written speech, music, or conduct (expression).[188] Due to these privacy protections, parties have attempted to use many other methods to find the identity of their anonymous online adversaries, some even contacting the owners of the websites.[189] The Federal Communications Decency Act § 230 has, however, created a general exemption from liability for website owners unless there is evidence for a copyright or trademark claim.[190]

Why is this anonymity so important? As stated above, privacy rights help individuals maintain autonomy and pursue their own individuality. Anonymity only furthers individuality by allowing people

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> nounced that this statute, because it "burdens core political speech," requires " 'exacting scrutiny' " and must be "narrowly tailored to serve an overriding state interest," (ordinarily the kiss of death), the opinion goes on to proclaim soothingly (and unhelpfully) that "a State's enforcement interest might justify a more limited identification requirement" . . . .

Id.(internal citations omitted).

184. *Id.* at 349-51, 357.

185. *See, e.g.*, Talley v. California, 362 U.S. 60, 65 (1960) (voiding a Los Angeles ordinance that restricted the distribution of handbills to those that contained the name and address of the person for whom it was prepared, distributed, or sponsored).

186. *See, e.g.*, First Nat'l Bank of Boston v. Bellotti, 435 U.S. 765, 795 (1978) (holding that corporations have a First Amendment right to make contributions in order to attempt to influence political processes).

187. *See* Kissinger & Larsen, *supra* note 173, at 823; *see also* Orin S. Kerr, *Applying the Fourth Amendment to the Internet: A General Approach*, 62 STAN. L. REV. 1005 (2010).

> [T]he extent to which the Fourth Amendment provides protection for the contents of electronic communications in the Internet age is an open question. The recently minted standard of electronic communication via e-mails, text messages, and other means opens a new frontier in Fourth Amendment jurisprudence that has been little explored. The existing scholarship tends to be either highly abstract or else focuses only on discrete doctrinal questions. A few scholars have pointed out that the application of the Fourth Amendment to computer networks will require considerable rethinking of preexisting law, but none have sketched out what that rethinking might be.

Id. at 1006 (internal citations omitted).

188. Diane Heckman, *Just Kidding: K-12 Students, Threats and First Amendment Freedom of Speech Protection*, 259 EDUC. L. REP. 381 (2010).

189. *See* Kissinger & Larsen, *supra* note 176, at 824.

190. *See id.*

to become involved in things that they would not necessarily be able to be a part of if they were required to share their identities.[191] "People define themselves by exercising power over information about themselves and a free country does not ask people to answer for the choices they make about what information is shared and what is held close."[192] Anonymity acts to help protect identities and allows people to act and speak without fear of things being personally imputed on them.[193] But there are potential issues with unregulated anonymous posting, cyberbullying being a huge one. Some necessary considerations are determining when it is okay for anonymity to be breached and whether anonymous student postings that threaten, harass, and publicly humiliate other students be restricted as well. To eradicate cyberbullying, the government must address when, within the context of student speech, anonymity is acceptable, and conversely, when a breach of anonymity is allowed or encouraged.

B. What Additional Issues Does Anonymous Posting Present?

Anonymous website postings create an additional hurdle for school and state officials. The anonymous nature of cyberspace is what initially makes the Internet attractive to young people, especially when there "is a nexus to the school, because it allows for the targeting of classmates or teachers without being easily detected."[194] When bullies look for their targets, they look for people who they feel are easily influenced and affected. Cyber perpetrators who bully their peers are no different.[195] Most cyberbullying is anonymous because many perpetrators use screen names to shield their identities.[196] They

191. Finn Orfano, *Anonymity and the Internet*, BRIGHT HUB (Feb. 16, 2012), http://www.brighthub.com/internet/security-privacy/articles/2848.aspx.

> Anonymity used on the Internet can be a good or bad thing depending on the intent of the user. Using an anonymous identity online has legitimate uses. It can help promote freedom of expression with writers and journalists. It can help protect human rights and persons reporting illegal activities, persons seeking help for problems like AIDs, harassment, racial issues, alcohol, gambling or drug abuse. It can help when searching for information about sexually transmitted diseases or personal gender issues or any other issue affected by social intolerance without the fear of being identified, censured, ridiculed, discriminated against, the target of a lawsuit, the loss of a job or physically harmed.

Id.

192. *Privacy Fundamentals: Why Is Privacy Important?*, PRIVACILLA.ORG, http://www.privacilla.org/fundamentals/whyprivacy.html (last visited Aug. 8, 2012).

193. *See id.*

194. MCQUADE III, *supra* note 36, at 144.

195. *Id.* at 5.

196. *Id.* at 44; *see also Cyberbullying—A Guide for Teachers*, YEARNING4LEARNING, http://yearning4learning.com/Cyberbullying_Guide.html (last visited Aug. 8, 2012) ("The anonymous

hide behind pseudonyms and well-disguised IP addresses, which make it difficult, if not impossible, for the victim to determine the source of the threat.[197] This anonymous nature of cyberbullying is perhaps the most troubling because it leaves child victims wondering which one of their classmates could be their cyber aggressor.[198]

Cyberbullying is extremely difficult on victims because attending school and confronting unknown perpetrators can be "like being on an island."[199] Fear of unknown cyber perpetrators among classmates and bullying that continues at school distracts all students—victims, bystanders, and perpetrators—from schoolwork.[200] Cyberbullying creates a hostile physical school environment and makes students feel unwelcome and unsafe.[201] Even more troubling is that traditionally, courts have been reluctant to permit restrictions of student speech that occur off school grounds unless it creates a substantial disruption to the educational environment.[202]

For cases involving cyberbullying carried at the school or completed using school technology, schools can take actions deemed "reasonable and necessary to ensure order, safety, and security for students, staff, and other people who may lawfully occupy campus facilities."[203] However, for off-campus incidents, schools must establish a clear nexus between the cyberbullying incident and a substantial disruption of school environments, which is not always easy to do.[204] When there is no record of who has sent the message or taunt, it is increasingly more difficult to find this nexus.

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nature of cyberspace first made it attractive to young people because it allows for the targeting of classmates or teachers without being easily detected . . . . Most cyberbullying is anonymous because bullies are shielded by screen names that protect their identity.").

197. McQuade III, *supra* note 36, at 5; *see also* John Suler, *The Online Disinhibition Effect*, 7 CyberPsychology & Behav. 321 (2004), *available at* http://users.rider.edu/~suler/psycyber/disinhibit.html.

198. McQuade III, *supra* note 36, at 5.

199. *Id.*

200. *Id.* at 44; *see also* Adria O'Donnell, *When Home is No Safe Haven: Cyberbullying on the Rise*, KidPointz, http://www.kidpointz.com/parenting-articles/tweens-teens/bullies-cyberbullying/view/cyberbullying-kids (last visited July 18, 2012).

201. McQuade III, *supra* note 36, at 44.

202. Verga, *supra* note 27, at 733.

203. McQuade III, *supra* note 36, at 107.

204. *Id.*; *see also* Larry Magid, *When Schools Can Discipline Off-Campus Behavior*, SafeKids.com (Feb. 25, 2010), http://www.safekids.com/2010/02/25/when-school-can-discipline-off-campus-behavior/.

C. Balancing Anonymity with the Right to Redress

Student speech has been restricted when the speech: (1) was school-sponsored by students that the school disfavors; (2) materially and substantially impacted the rights of the students or the school as a whole; (3) was not tied to political expression but advocated illegal drug use; and (4) was lewd or vulgar.[205] However, the Supreme Court has not yet considered the proper formula for weighing the clear conflicting rights of the anonymous Internet poster and the party on the other end when the party would like to know who has created the post.[206] The difficulty is quantifying the critical element, the level of specificity, and degree of burden that the plaintiff must demonstrate in order to have a claim to reveal their "masked" Internet adversary.[207] A few tests have emerged, one pertaining to infringing speech, and "the prima facie case" or "summary judgment" test that is relevant here.[208]

The prevailing opinion on the appropriate test to apply in deciding cases involving the intersection of expressive content and anonymity is to apply the "prima facie case" or "summary judgment" test.[209] This test requires the plaintiff to proffer evidence sufficient enough to support a prima facie case or "withstand a hypothetical summary judgment motion."[210] This, however, can be a difficult hurdle to overcome and can discourage the interest in reporting cyberbullying crimes.

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205. Heckman, *supra* note 188, at 383.

206. *See* Kissinger & Larsen, *supra* note 176, at 826.

207. *Id.*

208. *Id.* at 827-34. These standards essentially require Internet Service Providers to reveal the identity of anonymous posters if the plaintiff can make a showing that his case will be able to withstand a motion for summary judgment. The leading "summary judgment" test case is the Delaware case, *Doe v. Cahill*, 884 A.2d 451 (Del. 2005). In *Cahill*, a city council member sued anonymous, "John Doe" defendants, alleging defamation and invasion of privacy because of two statements that were posted on an Internet website sponsored by the Delaware State News called the "Smyrna/Clayton Issues Blog." *Id.* at 454. Finding that the plaintiffs failed to make a showing that the comments were "capable of a defamatory meaning," an essential element of any defamation claim, the court held that the plaintiffs did not meet the summary judgment standard and could not get the identities of the posters. *Id.* at 467. The "prima facie" standard was the standard used in the New York case, *Sony Music Entm't Inc. v. Does 1-40*, 326 F. Supp. 2d 556 (S.D.N.Y. 2004). In *Sony*, seventeen record companies sued forty unidentified "John Doe" defendants alleging copyright infringement based on illegal downloads and distribution of copyrighted and/or licensed songs using a "peer to peer" file copying network. *Id.* at 558-59. Here, however, the New York court held that the release of the John Doe identities was warranted because the plaintiffs made a sufficient "prima facie" case. *Id.* at 565-66.

209. Kissinger & Larsen, *supra* note 176, at 828.

210. *Id.*

V. WHAT CAN BE DONE TO PREVENT CYBERBULLYING IN THE FUTURE?

A. What Cyberbullying Laws Are Already in Existence?

With the increase in cyberbullying cases nationwide, both the federal and local governments have attempted to address the issue by passing legislation. As of July 2012, there are forty-nine states with anti-bullying laws on the books.[211] As for cyberbully laws, nine states have proposed cyberbullying laws and in 2009, the federal government proposed a law of its own.[212] As discussed briefly above, the Megan Meier Cyberbullying Prevention Act, sponsored by California representative Linda Sánchez, attempted to "amend the federal criminal code to impose criminal penalties on anyone who transmit[ted] in interstate or foreign commerce a communication intended to coerce, intimidate, harass, or cause substantial emotional distress to another person, using electronic means to support severe, repeated, and hostile behavior."[213] Though the bill was not enacted, some saw it as a step in the right direction towards cyberbullying prevention. Critics of the law questioned whether the law would act to simply allow prosecutors to "harass the harasser."[214]

The federal government has also pushed a national anti-cyberbullying initiative, led by President Obama's Chief Technology Officer Aneesh Chopra and Cybersecurity Coordinator Howard Schmidt.[215] Partnering with Facebook and MTV, the government has created the iPhone application, Over the Line?, which allows youth to share their own cyberbullying stories and how technology has complicated their day-to-day interactions.[216] With over 9,000 users submitting over 325,000 reader ratings, the application provides the government with information that is "valuable in learning about the digital ethics of

211. Sameer Hinduja & Justin W. Patchin, *State Cyberbullying Laws: A Brief Review of State Cyberbullying Laws and Policies* (July 2012), http://www.cyberbullying.us/Bullying_and_Cyberbullying_Laws.pdf. Montana does not have an anti-bully law. Washington, D.C. does, however, have an anti-bully law. *See Washington D.C. Anti-Bullying Laws & Policies*, STOPBULLYING.ORG, http://www.stopbullying.gov/laws/district-columbia.html (last visited Sept. 11, 2012).

212. Hinjuja & Patchin, *supra* note 211.

213. H.R. 1966, 110th Cong. (2008). For more information on this bill, see http://www.xgovtrack.us/congress/bills/111/hr1966.

214. Anna North, *Is Legislation the Way to Stop Cyberbullying?*, JEZEBEL (Oct. 1, 2009, 12:00 PM), http://jezebel.com/Megan-meier-cyberbullying-prevention-act/.

215. Elizabeth Montalbano, *White House, Facebook, MTV Fight Cyberbullying*, INFO. WK. GOV'T (Sept. 26, 2011, 4:38 PM), http://www.informationweek.com/government/security/white-house-facebook-mtv-fight-cyberbull/231602176.

216. *See id.* The app allows people to "share their stories via the application and others are invited to weigh in on whether the interaction has crossed the cyberbullying line." *Id.*

today's youth."[217] Additionally, the United States Department of Health and Human Services has created stopbullying.gov, a website intended to educate both students and parents on the dangers of cyberbullying.[218] However, even with all of these initiatives, there still remains the need to create a federal law that targets not only the prevention of cyberbullying while not infringing on the constitutional rights of student posters but also implements an in-school program to educate students on their rights and the dangers of cyberbullying.

B. What Additional Types of Laws and Programs Can Be Put in Place to Prevent Anonymous Cyberbullying?

Justin W. Patchin has said,

> I really don't want to criminalize this behavior. I think there is a role for both the federal and state governments in terms of educating local school districts about what cyber-bullying is and what they can do about it, and providing resources to help them prevent and respond to online aggression. But criminalization doesn't seem to me to be the best approach.[219]

Though I do not agree fully with Patchin, I do believe that laws are not enough. There must be a concerted effort to truly eradicate the issue and bring relief to victims of cyberbullying. This effort must include both legal interference and community level controls. The government should work with school officials to create a law that acts to dissuade. United States cyberstalking laws create a nice starting framework.

Criminal Law scholar, Nicolle Parsons-Pollard, wrote a paper focused on cyberstalking laws in the United States and looked at whether there is a need for uniformity for legal ramifications.[220] Parsons-Pollard's paper examined the existing cyberstalking laws and proffered changes to create a more universally-accepted response. This response is very much like the one that is needed for cyberbullying law. She suggested eight ways to craft effective legislation: (1) using the term in the statute (in this case "cyberbullying"); (2) not requiring threatening language; (3) defining harassment; (4) not requiring direct contact; (5) specifying their party harassing; (6) ensuring

217. *Id.*

218. For more information on this website and the United States Department of Health and Human Services' initiative, visit http://www.stopbullying.gov/cyberbullying/index.html.

219. North, *supra* note 214.

220. *See* Nicolle Parsons-Pollard, *Cyberstalking Laws in the United States: Is There a Need for Uniformity?*, 46 CRIM. L. BULL. 954 (Sept.-Oct. 2010).

that text messages are included; (7) not requiring the communication to be untrue or obscene; and (8) carefully using the prohibition method.[221] Although not directly in line, these suggestions could be extremely helpful for creating cyberbullying laws that can work regardless of the state, child, or specific instance of bullying.

Looking at these recommendations and the difficulty of preserving both anonymity and privacy when necessary, creating legislation that will be both fair and effective will be no easy feat. First, it is very important that any statute that is created use the term "cyberbullying" so that it is clear what act is prohibited. As an extension of that, the term should be defined as to prevent confusion and ensure that those that may be breaking the law are aware. As to part two of Parsons-Pollard's recommendations, it is also important that the statute that is drafted not require that the language used in the Internet posting be threatening. Many times, students post falsities and slanderous comments, comments that have no threat of physical violence on their face, but can seriously threaten the mental and social wellbeing of the victim. Requiring threatening language will undoubtedly decrease the number of cyberbullying claims and also prevent credible cases from reaching fruition.

Also, instead of simply punishing the student for his or her behavior, school administrators should create "learning opportunities" so that students realize the wrong and work to not repeat it.[222] Author Clay Calvert proposes five factors that should be considered when analyzing student off-campus Internet speech: "(1) the student's place of enrollment; (2) the place of origin of the speech; (3) the place of download of the speech; (4) the content of the speech; and (5) the presence or absence of a site disclaimer or warning."[223] These factors can also be helpful in an on-campus analysis. It is also very important to rely on the constitutional opinions that prove that content of speech matters.[224] Calvert also addresses this issue, suggesting that threatening language should be reported to the police.[225] Schools should also take into account whether the student bully attempted to spread the speech or knowledge of the speech to other students at the school.[226]

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221. *Id.*
222. Gibbs, *supra* note 40, at 46.
223. *Id.* at 46-47 (citing Clay Calvert, *Off Campus Speech, On Campus Punishment: Censorship of the Emerging Internet Underground*, 7 B.U.J. Sci. & Tech. L. 243, 262 (2001)).
224. *Id.*
225. *Id.*
226. *Id.* at 48.

When attempting to regulate off-campus speech of students, programs may also need to consider, but not solely rely on, the true threat doctrine. In *Watts v. United States*, the Supreme Court held that words must formulate true threats to be actionable.[227] If applied to anonymous cyberbullying situations, children can fail to have actionable claims if a bully's words are not threatening.[228] This would prevent a child from bringing a claim for attacks on their emotions or reputation and not fulfill the purpose of the legislation.

The government can draft legislation that strikes a balance between privacy, anonymity, and safety. Requiring schools to institute a login requirement to use on-campus computers will keep a record of what students are using any computer at a particular time. This will help mitigate the on-campus anonymous cyberbullying issue while only infringing on the student's rights if the Internet use is truly threatening, inappropriate in content, or dangerous to the overall safety and welfare of the school community as a whole. Schools can implement programs that teach through role-play the effects that anonymous bullying can have on the life of a classmate or friend.

The government can also require social networking and mass message websites to verify the age and identity of its users before allowing an account to be created. This would in turn require parents to be more involved in their child's computer usage. Software can be embedded into these websites to flag all suspicious posts and disallow them from showing up on the website without verification from the parent of a website administrator. To prevent infringement on privacy and anonymity rights, the program would only allow the parents to know the identity of the poster, but still allow either the parent or the administrator to accept or reject the post.

In addition to the law that the government should create to protect children from anonymous cyberbullying, schools and communities need to work together and start conversations about the issue. There should be marked safe spaces for those children that want to report that they are cyberbullied as well as those that want to know if their actions constitute bullying. Children, although not learned on the legal implications of their actions, must have the basic knowledge that

227. Watts v. United States, 394 U.S. 705, 706 (1969) ("The language of the political arena . . . is often vituperative, abusive, and inexact.").

228. *See, e.g.*, Finkel v. Dauber, 29 Misc. 3d 325, 330 (N.Y. Sup. Ct. 2010) ("[T]he entire context and tone of the posts constitute evidence of adolescent insecurities and indulgences, and a vulgar attempt at humor. What they do not contain are statements of fact.").

their actions are not only socially unacceptable, but illegal. It is clear that privacy and anonymity are important. However, protecting a child's mental, emotional, and physical health is the priority.

CONCLUSION

The balance between anonymity and protection is both difficult and unclear. However, after viewing the totality of the circumstances and balancing the privacy rights of anonymous cyberbullies with the personal right to protection of the cyberbullied, the government must intervene and create some form of legislation to address this problem. This legislation should require school officials and website owners to keep a log of the identity of those posting on their sites, while still allowing anonymous posting when necessary. This option covers websites that hold sensitive information or those that, if forced to document posters and retain their identities, would substantially infringe on the poster's right of privacy. This form of legislation will create an opportunity for school and state officials to request the identity of posters when the posts themselves violate the law (i.e. threats, libel, etc.) and prevent feeling of helplessness that anonymous cyberbullying can cause. This helplessness can lead to feelings and actions of violence and even suicide.

In addition, the federal government and academic communities need to have a joint conversation on the issue, one that addresses the problem but also proffers ways to a solution. The goal should not be to punish the bully but to create an environment where cyberbullying stands out, (to let it be known) that it is appalling and unacceptable to speak or behave a certain way.[229] The key component in creating this type of environment is instilling and encouraging empathy.[230] In a cyberbullying situation, empathy is missing because the target is not seen as a person, but a target.[231]

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229. Donna Boynton, *Laying Down the Law: Schools Toughen Policies on Bullies*, WORCESTER TELEGRAM & GAZETTE, Aug. 29, 2010, at A1, *available at* http://www.telegram.com/article/20100829/NEWS/8290411/1116.

> Those plans must include details about training and professional development for all staff—from school bus drivers and cafeteria workers to teachers and administrators; what resources are available to both bullies and their targets; roles of school leaders; development of age-appropriate curricula to help students identify and appropriately address bullying; and policies and procedures for reporting and investigating bullying complaints.

Id.

230. *Id.*

231. *Id.*

In response to cyber issues, a number of corporations are competing to develop age verification software for websites.[232] But relying on technology to confirm a user's identity is not without drawbacks.[233] There are legitimate reasons to hide a person's name and other information online, such as concern about identity theft or the need for comfort when asking for advice or help.[234] These reasons, however, should only be factors in determining legislation, not reasons to prevent the conversation or prevent changes to protect the leaders of tomorrow. The safety of all children, those that are bullied as well as bullies themselves, should be at the forefront of the minds of parents, school officials, and public officials so that children like Jennifer no longer have to suffer in silence.

232. Brian Stelter, *Guilty Verdict in Cyberbullying Case Provokes Many Questions Over Online Identity*, N.Y. TIMES, Nov. 28, 2008, at A28.

233. *Id.*

> MySpace's terms of service require users to submit "truthful and accurate" registration information. Ms. Drew's creation of a phony profile amounted to "unauthorized access" to the site, prosecutors said, a violation of the Computer Fraud and Abuse Act of 1986, which until now has been used almost exclusively to prosecute hacker crimes.

Id.

234. *Id.*

A New Regionalist Perspective on Land Use and the Environment

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INTRODUCTION

Human actions leave indelible footprints on the environment. These footprints are not confined, however, to the specific areas in which human action occurs. Instead, they leave trails in neighboring areas and often cross multiple geopolitical borders. Beginning in the 1970s, the environmentalism movement—in recognition of mankind's widespread effect on the environment—prompted numerous federal and state environmental laws and regulations.[1] Federal and state environmental initiatives have addressed numerous environmental issues such as water pollution,[2] air pollution,[3] solid and hazardous waste pollution,[4] coastal area management,[5] and the protection of endangered species.[6] Although our current environmental regulatory scheme recognizes those issues that are well-equipped for governance at the state and federal level, it does not recognize the inherent effects of land use planning—an issue traditionally handled by local governments—on our environment.[7]

1. *See* Jonathan Cannon, *Environmentalism and the Supreme Court: A Cultural Analysis*, 33 ECOLOGY L.Q. 363, 369-70 (2006) (discussing the modern environmentalism movement's affect on federal environmental action).

2. *See* Clean Water Act, 33 U.S.C. §§ 1251-1387 (2006).

3. *See* Clean Air Act, 42 U.S.C. §§ 7401-7700 (2006).

4. *See* Resource Conservation and Recovery Act, 42 U.S.C. §§ 6901-7000 (2006) (regulating the generation, transport, treatment, storage, and disposal of hazardous waste); s*ee also* Comprehensive Environmental Response, Compensation, and Liability Act, 42 U.S.C. §§ 9601-75 (2006) (regulating the cleanup of sites contaminated with hazardous substances).

5. *See* Coastal Zone Management Act, 16 U.S.C. §§ 1451-1466 (2006).

6. *See* Endangered Species Act, 16 U.S.C. §§ 1531-1544 (2006).

7. Several scholars note the ineffectiveness of the current practice of local land use regulation in regard to environmental protection. *See, e.g.*, Jamison E. Colburn, *Localism's Ecology: Protecting and Restoring Habitat in the Suburban Nation*, 33 ECOLOGY L.Q. 945 (2006); Geoffrey Heal et al., *Protecting Natural Capital Through Ecosystem Service Districts*, 20 STAN. ENVTL. L.J. 333 (2001); Rose A. Kob, *Riding the Momentum of Smart Growth: The Promise of Eco-Development and Environmental Democracy*, 14 TUL. ENVTL. L.J. 139 (2000); Nancy D. Perkins, *Livability, Regional Equity, and Capability: Closing in on Sustainable Land Use*, 37 U. BALT. L. REV. 157 (2008); Daniel B. Rodriguez, *The Role of Legal Innovation in Ecosystem Management: Perspectives from American Local Government Law*, 24 ECOLOGY L.Q. 745 (1997); Patricia E.

Land use policy affects the everyday lives of most citizens more than they recognize. Land use policies reflect communities' desire to construct spaces that are physically, socially, and economically appealing to individual citizens and business actors.[8] In order to reflect the values of its citizens, many communities institute zoning ordinances and other land use controls that regulate the development of the land within their borders.[9] Thus, one would think that land use policy would be directly tied with environmental protection, because after all, land use is aimed at the efficient use of a locality's environment—i.e., territory. Although such logic appears simple, modern land use planning still exhibits a lack of recognition that land use and environmental protection must be viewed hand in hand.[10] The end result of this phenomenon is a regulatory regime which addresses environmental protection issues at the federal and state level but that is rendered incomplete by a lack of environmental protection in local land use regimes.

The lack of environmental protection controls within local land use regimes is not a mere anomaly. Instead, the deficiencies within our current land use regimes are rooted in the history of local land use planning and environmental law.[11] While some federal environmental regimes do affect land use at the local level, their reach is limited and fails to address a number of environmental issues including some that are caused and exacerbated by local land use planning.[12] This Article presents those issues and argues for the integration of environmental controls into comprehensive federal land use legislation aimed at metropolitan regions.

Salkin, *From Euclid to Growing Smart: The Transformation of the American Local Land Use Ethic Into Local Land Use and Environmental Controls*, 20 PACE ENVTL. L. REV. 109 (2002); William A. Shutkin, *Realizing the Promise of the New Environmental Law*, 33 NEW. ENG. L. REV. 691 (1999); A. Dan Tarlock, *Land Use Regulation: The Weak Link in Environmental Protection*, 82 WASH. L. REV. 651 (2007); *see also* Ashira P. Ostrow, *Land Law Federalism*, 61 EMORY L. J. (forthcoming 2012).

8. *See* Richard Briffault, *The Local Government Boundary Problem in Metropolitan Areas*, 48 STAN. L. REV. 1115, 1124, 1142, 1146 (1996).

9. *See* Sara C. Bronin, *The Quiet Revolution Revived*: *Sustainable Design, Land Use Regulation, and the States*, 93 MINN. L. REV. 231, 233 (2008). Land use controls come in the form of zoning ordinances that "designate, with maps and with text, the areas in which certain permitted uses—such as industrial, residential, commercial, retail, or recreational—can occur." *Id.*

10. *See* Nancy Perkins Spyke, *The Land Use—Environmental Law Distinction: A Geo-Feminist Critique*, 13 DUKE ENVTL. L. & POL'Y F. 55, 62-70 (discussing the divergent paths and the lack of a full integration of environmental initiatives and land use planning).

11. *Id.*

12. *See* discussion *infra* Part II.B-C.

Although the differences in the history of land use regulation and environmental protection do contribute to the environmental problems facing metropolitan areas, the most influential cause and current barrier to environmentally-conscious land use regulation is the local governance theory of localism. Localism is one of the most common characteristics in communities big and small. In theory, localism provides for the efficient provision of public goods and greater democratic participation.[13] While this definition casts localism in positive light, it does not recognize localism's negative impacts in metropolitan regions.[14]

Localism, while providing individuals with the chance to shape their communities, also exacts costs against neighboring localities in metropolitan regions.[15] This occurs because localism promotes municipal competition within metropolitan regions that pits one locality against another in a race to garner greater revenues.[16] Because localism directly places localities within a metropolitan region in competition with one another, it incentivizes localities to implement policies that increase their economic attractiveness in a municipal race to the bottom.[17] The race to the bottom, as this Article will further discuss, prevents localities from integrating meaningful environmental controls into their respective land use regimes. Because environmental controls are often accompanied by increased costs and regulation, individual localities are apprehensive to integrate such controls into their respective land use regimes for fear that excess costs and regulation will lower their economic attractiveness to potential residents. This phenomenon weakens environmental protection not only in individual localities but also in their respective metropolitan regions as a whole.

Localism's barrier to the implementation of environmentally-conscious land use regulation in metropolitan areas requires a response.

13. "The scholarly proponents of greater local power . . . make their case in terms of economic efficiency, education for public life and popular political empowerment . . . ." *See* Richard Briffault, *Our Localism; Part I—The Structure of Local Government Law*, 90 COLUM. L. REV. 1, 1 (1990).

14. *See* discussion *infra* Part I.A.c.

15. *See* discussion *infra* Part I.A.c.

16. *See, e.g.*, Richard C. Schragger, *Mobile Capital, Local Economic Regulation, and the Democratic City*, 123 HARV. L. REV. 482, 505 (2009). For a brief discussion of the environmental race to the bottom that accompanies competition between localities see Michael Burger, *"It's Not Easy Being Green"; Local Initiatives, Preemption Problems, and the Market Participant Exception*, 78 U. CIN. L. REV. 835, 867-69 (2010).

17. *See* Schragger, *supra* note 16, at 495, 526.

This response cannot simply be a call for reformed land use policy but must also call for a reformulation in the local governance schemes implementing such policies. One form of governance that may remedy the problems caused and exacerbated by localism is new regionalism. New regionalism "describes any attempt to develop regional governance structures or interlocal cooperative arrangements that better distribute regional benefits and burdens."[18] New regionalism advocates for the formation of voluntary collaborative governance structures that incorporate representation from individual localities within a metropolitan region.[19] Additionally, new regionalism seeks to eliminate the inequity among localities produced by localism by promoting uniform standards across a metropolitan region.[20] Thus, new regionalism allows localities within a metropolitan region to compete on a more level playing field. In recognition of this fact, this Article argues that metropolitan areas should integrate environmental protection and land use controls through uniform regional standards promulgated by new regionalist governance structures.

This Article proceeds in three parts. Part I presents the normative debate over the proper form of local governance in metropolitan regions. It first examines the inherent powerlessness of American cities and the theoretical justifications for localism. Part I then highlights the negative externalities that localism produces in metropolitan regions, which ultimately justify a rejection of localism as a fundamental principle of local governance. Part I concludes by presenting the theory of new regionalism and the potential barriers that new regionalist initiatives face in metropolitan areas.

Part II examines the need for policies that integrate the goals of land use planning and environmental protection. First, Part II briefly presents the divergent development paths of land use planning and environmental regulation and how their different histories produced

18. Sheryll D. Cashin, *Localism, Self-Interest, and the Tyranny of the Favored Quarter: Addressing the Barriers to New Regionalism*, 88 GEO. L.J. 1985, 2028 (2000). Other scholars recognize new regionalism as a possible theory adept at countering the issues faced in metropolitan regions. *See, e.g.*, Laurie Reynolds, *Intergovernmental Cooperation, Metropolitan Equity, and the New Regionalism*, 78 WASH. L. REV. 93, 100-19 (2003); David D. Troutt, *Katrina's Window: Localism, Regionalism, and Equitable Regionalism*, 55 BUFF. L. REV. 1109, 1114 (2008).

19. *See* Lisa T. Alexander, *The Promise and Perils of "New Regionalist" Approaches to Sustainable Communities*, 38 FORDHAM URB. L.J. 629, 643 (2011). Professor Cashin argues that the "'New Regionalist' agenda accepts the political futility of seeking consolidated regional government. Instead, it attempts to bridge metropolitan social and fiscal inequities with regional *governance* structures . . . ." Cashin, *supra* note 18, at 2027.

20. *See* Alexander, *supra* note 19, at 632-33.

local land use regimes without meaningful environmental controls. It then presents several pieces of federal legislation that affect local land use decisions in narrow circumstances. Next, Part II argues that the predominant approach to land use planning and local governance still produces environmental problems. Recognizing this reality, Part II then calls for comprehensive federal legislation that incentivizes metropolitan areas to establish regional land use standards that integrate environmental protection controls through new regionalist governance structures. Part III concludes by presenting the essential components of a federal new regionalist initiative aimed at environmentally-conscious land use planning.

I. LOCALISM AND REGIONALISM: THE NORMATIVE DEBATE

In order to understand the effect of local governance structures on land use and environmental protection, one must first understand the theoretical underpinnings of local governance theory. Thus, Part I presents the normative debate between localist and new regionalist scholars. It presents the theory of localism and the inefficiencies produced by localism that severely hinder its ability to respond to the contemporary and future challenges posed by metropolitan governance.

A. Localism

The thought that local governments control the destiny of their respective communities is not entirely true. In fact, local governments only control those functions that their creator—state governments—allow them to control. As expressed by jurist John Forest Dillon, in what has become known as "Dillon's Rule", local governments "owe their origin to, and derive their powers and rights wholly from, the legislature."[21] Furthermore, the U.S. Supreme Court in *Hunter v. City of Pittsburgh* stated that "[t]he State . . . at its pleasure may modify or withdraw all powers" from a municipal government.[22] Thus, it is clear

21. "Municipal corporations owe their origin to, and derive their powers and rights wholly from, the legislature. It breathes into them the breath of life, without which they cannot exist. As it creates, so may it destroy. If it may destroy, it may abridge and control." *See* City of Clinton v. Cedar Rapids & Mo. River R.R. Co., 24 Iowa 455, 475 (1868).

22. The state . . . at its pleasure, may modify or withdraw all such powers, may take without compensation such property, hold it itself, or vest it in other agencies, expand or contract the territorial area, unite the whole or a part of it with another municipality, repeal the charter and destroy the corporation. All this may be done, conditionally or

that within the relationship between states and their respective local governments—the state is supreme. In contrast to this notion, scholars argue, under the theory of "localism," that greater local autonomy provides for the efficient provision of public services, increased democratic-participation, and an increased sense of community.

1. City Powerlessness

In his seminal work *The City as a Legal Concept*, Professor Gerald Frug asserts that cities are powerless entities without the power to solve their current problems or control future development.[23] Frug argues that modern cities are inherently powerless because the entirety of city power is granted from the state.[24] Any power granted to cities from their respective state governments, however, is often restricted by narrow judicial interpretations and the notion that any power exercised by a locality is inherently subject to the absolute control of the state.[25] Along with the limited views of city power conceived by state courts, interpretations of the U.S. Constitution, through the Fourteenth Amendment and the Commerce Clause, also serve as a mechanism that not only endorses greater control of cities by state governments but the federal government as well.[26]

> unconditionally, with or without the consent of citizens, or even against their protest. In all these respects the state is supreme, its legislative body, conforming its actions to the state Constitution, may do as it will, unrestrained by any provision of the Constitution of the United States.

See Hunter v. City of Pittsburgh, 207 U.S. 161, 178-79 (1907).

23. *See generally* Gerald E. Frug, *The City as a Legal Concept*, 93 HARV. L. REV. 1059 (1980) [hereinafter Frug, *The City*] (discussing how legal doctrine has contributed to the current powerlessness of American cities).

24. *Id.* at 1062.

25. *See id.*

26. *See, e.g.*, Moore v. City of E. Cleveland, 431 U.S. 494 (1977) (plurality opinion) (limiting city power under the Fourteenth Amendment); Dean Milk Co. v. City of Madison, 340 U.S. 349 (1951) (limiting city power under the Commerce Clause). It is important to note the case *National League of Cities v. Usery*. Nat'l League of Cities v. Usery, 426 U.S. 833 (1976). In *National League of Cities*, the Court held that certain Congressional action under the Fair Labor Standards Act exceeded the power granted to Congress under the commerce clause. In rendering its decision, the Court held that Congress's overextension of its power did not only apply to state entities but political subdivisions of the state as well. *See id.* at 855 n.20. Frug notes that *National League of Cities* stands as a rare exception of a case where the Court provided for constitutional protection of city authority. *See* Frug, *supra* note 23, at 1063 n.13. Although *National League of Cities* may serve as a case that practically preserves city authority, it is nonetheless vital to recognize that the Court, whether intentionally or unintentionally, still affirmed the notion that cities derive their powers solely from the state as political subdivisions. Thus, the question remains as to whether *National League of Cities* is truly an affirmation of federal protection of city power or simply a reaffirmation of the notion that cities are inherently powerless even under a federal scheme unless given some sort of power by their respective state government.

Although some posit that home-rule power granted to certain municipalities under state constitutions remedies the state of powerlessness encountered by most cities, home-rule's freedom from state interference is still limited to matters deemed by the state to be "purely local" in nature.[27] Frug asserts that few issues in modern society may be construed as sufficiently local in nature and thus renders even home-rule jurisdictions as mere creatures of the state.[28]

Cities' efforts to overcome their inherent powerlessness, however, are not only stifled by laws restricting their actions but by state and federal programs incentivizing certain policies and actions, undertaken at the municipal level, to achieve specific state and federal goals.[29] This type of powerlessness does not evince a pull effect in terms of disallowing certain city action. Instead, it represents a form of push governance whereby a more powerful governmental entity entices and arguably forces a city to enact certain policies at the risk of losing out on certain incentives.[30]

Frug asserts that this type of push governance by state and federal actors targets modern cities need to generate income.[31] The power to tax represents the lifeblood of any municipal body.[32] In efforts to generate income, cities, similar to the ability to govern locally, are inher-

27. Frug, *The City*, *supra* note 23, at 1062-63.

28. *Id.* at 1063.

29. Congress provides funds to local governments through grants-in-aid on the condition that the funds are spent on particular causes specified by Congress. *See* Heike Schroeder & Harriet Bulkeley, *Global Cities and the Governance of Climate Change: What Is the Role of Law in Cities?*, 36 FORDHAM URB. L.J. 313, 327 (2009). The Court has upheld Congress's use of its spending power provided that imposed conditions are not unrelated to the federal spending project and that the spending scheme is not found to be coercive. *See* South Dakota v. Dole, 483 U.S. 203, 207 (1987).

30. Frug, *The City*, *supra* note 23, at 1063 (noting how the economic condition of cities inherently requires compliance and acceptance of grant-in-aid programs). Although the Court's decision in *Dole* requires that federal spending programs must not be coercive, the economic reality of cities likely renders some grant-in-aid programs as de-facto coercive. Grant programs that also impose conditions on local and state governments are often characterized as endeavors in "conditional federal spending." Scholars have argued that conditional federal spending programs do not necessarily leave state and local governments with the discretion to adopt certain federal conditions that Congress could not likely exercise under the Tenth Amendment. Instead, conditional federal spending programs are often accompanied by massive federal funding incentives or restrictions that in essence leave local and state governments without any discretion as to their adoption. For further discussion of this phenomenon and Congress' usage of the spending power, see Lynn A. Baker, *Conditional Federal Spending After Lopez*, 95 COLUM. L. REV. 1911 (1995); David E. Engdahl, *The Spending Power*, 44 DUKE L.J. 1 (1994); and Albert J. Rosenthal, *Conditional Federal Spending and the Constitution*, 39 STAN. L. REV. 1103 (1987).

31. Frug, *The City*, *supra* note 23, at 1064.

32. *See* Laurie Reynolds, *Taxes, Fees, Assessments, Dues, and the "Get What You Pay For" Model of Local Government*, 56 FLA. L. REV. 373, 379-80 (2004) (discussing the role that taxation plays in providing municipal revenue).

ently powerless. Cities are increasingly dependent on their ability to gain and keep taxable income from citizens and corporations, who now contain a level of mobility never experienced in American history.[33]

In the thirty years since Frug's assertion that cities lack the ability to adequately capture, retain, and grow taxable revenue, our society has seen massive advances in globalization which in turn have led to an increase in the mobility of taxable revenue.[34] Cities, unlike the taxable entities they pursue, are placed based enterprises that are inherently immobile.[35] As globalization increases, factors such as historical ties to a specific locality or relationships with other actors in a locality diminish in light of the reality that businesses are inherently profit driven and often seek out locales with the greatest locational value.[36] Furthermore, the ability of cities to garner greater taxable revenue from those actors remaining within their borders is also hindered through the requirement in many municipalities that tax rates cannot surpass certain state determined amounts or must be approved by the state.[37] Thus, as global business competition increases and becomes more sophisticated through increased technology and emerging markets, the peril of powerless cities to maintain and increase their taxable revenue base will likely only increase.[38]

With the harsh economic realities posed by increasingly mobile capital, cities are likely forced to welcome, with open arms, federal and state government programs that mandate certain local actions.

33. *See, e.g.*, Yishai Blank, *Federalism, Subsidiarity, and the Role of Local Governments in an Age of Global Multilevel Governance*, 37 FORDHAM URB. L.J. 509, 513-16 (2010) (discussing the concept of globalization and its inherent effects on forms of governance); *see also* Christopher J. Tyson, *Annexation and the Mid-Size Metropolis: New Insights in the Age of Mobile Capital*, 73 U. PITT. L. REV. (forthcoming 2012) (discussing the plight of mid-size urban areas in light of increased globalization to maintain and increase revenue streams).

34. For the purposes of this Article, globalization refers to the thought that corporations engaging in business and investment activity are no longer entities that engage in activities within a small or discrete area but that instead operate in a global marketplace.

35. *See* Tyson, *supra* note 33. The inherent immobility of cities presents a unique problem when one considers that the entities from which cities can garner taxable revenue possess greater mobile capital than ever before. Mobile capital is the ability of business entities, investors, and conglomerations of private funds to move across geopolitical borders in pursuit of greater investment returns. Scholars argue that increased mobile capital is a mechanism that increases the risk of capital flight by economic actors from their present localities. The risk of capital flight by needed economic actors as well as the desire by cities to increase the number of economic actors within their borders mandates that localities engage in not only local but also global competition that often pits one metropolis against another. *See, e.g.*, Schragger, *supra* note 16, at 488-89.

36. *See* Tyson, *supra* note 33.

37. Frug, *The City*, *supra* note 23, at 1064.

38. *See, e.g.*, Tyson, *supra* note 33.

Thus, federal and state grant-in aid programs no longer serve as a mechanism in which cities may maintain discretion in their decision to participate.[39] Instead, cities now actively seek out such programs in return for further erosion of their already limited power in the form of mandated federal or state action at the local level.[40]

The dilemma of modern cities is apparent in light of the push and pull control exerted against such bodies by the state and federal government. Although not all control exerted by such entities is per se harmful, this fact does not undermine the notion that localities remain inherently powerless. Notwithstanding the view by some that cities are powerless, some scholars argue that certain issues can and should be handled through strengthened local governments.[41]

2. The Case for Localism

In defense of local autonomy, scholars argue that greater local autonomy provides several benefits to a locality's residents. First, local governments provide public goods and services more efficiently to its residents.[42] Second, local autonomy allows municipalities to shape their policies in a manner that gives individuals and business entities a freedom of choice that allows such actors to locate within localities that most closely match their goals.[43] Third, greater local power arguably generates a more robust and participatory form of local democracy.[44] Finally, enhanced local power allows local governments to shape policies that more directly align with their residents' specific issues and concerns to form a stronger sense of community.[45]

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39. *See* Edward A. Zelinsky, *Unfunded Mandates, Hidden Taxation, and the Tenth Amendment: On Public Choice, Public Interest, and Public Services*, 46 VAND. L. REV. 1355, 1384-87 (1993) (discussing that local officials are often pressured into accepting the benefits provided by conditional spending programs because of political pressures even when some spending programs may come in the form of an unfunded mandate).

40. *See id.* at 1386-87.

41. *See* Charles M. Tiebout, *A Pure Theory of Local Expenditures*, 64 J. POL. ECON. 416, 423-24 (1956).

42. *See id.* at 418.

43. *Id.* at 417 (discussing the role of consumer-voter preferences).

44. *See* Barry Friedman, *Valuing Federalism*, 82 MINN. L. REV. 317, 391-95 (1997) (arguing that citizens are more likely to interact with government officials at the local level and see direct results from their actions).

45. *See* Richard Thompson Ford, *Beyond Borders: A Partial Response to Richard Briffault*, 48 STAN. L. REV. 1173, 1175 (1996); Georgette C. Poindexter, *Collective Individualism: Deconstructing the Legal City*, 145 U. PA. L. REV. 607, 616-18 (1997). Several scholars argue, however, that increased local autonomy does not effectively promote a sense of community. *See* Cashin, *supra* note 18, at 2001-02, 2047.

Although this Article ultimately rejects localism as a proper theory of local governance, proponents of localism argue that greater local autonomy promotes the efficient distribution of public goods and services.[46] They assert that policies enacted by highly centralized governments may fail to reflect the characteristics of a particular locality and may result in not only politically unpopular rules and regulations, but also policies that do not benefit certain localities.[47] This argument rests on the belief that local governments are often more cognizant of their own internal problems and can therefore enact policies that directly reflect the conditions of that particular locality.[48] Because local governments possess specific knowledge of the issues within their boundaries, localist scholars argue that decentralization allows localities to narrowly tailor their services, rules, regulations, and taxation initiatives in a way that efficiently regulates the actors within their territorial limits.[49]

Local government scholar, Charles Tiebout, argues that greater local autonomy also gives consumers—i.e., citizens and business entities—a wider range of options in which to locate.[50] Greater local autonomy gives municipalities more discretion in determining their specific package of taxation, services, and regulation.[51] The end result is that in areas where numerous localities exist, consumers are given the choice of locating to a locality whose "package" most closely aligns with their own desires.[52] Thus, Tiebout's model argues that greater control by localities—in turn, giving consumers a wider range of locality options—allows localities and consumers to co-exist in a system of government that maximizes the mutually beneficial relationship between localities and the economic actors within their borders.[53] Furthermore, the freedom of choice that actors within a municipality possess also allows those same actors to freely move to neighboring

46. *See* Tiebout, *supra* note 41, at 418.

47. *See* Alex Anas, *The Cost and Benefits of Fragmented Metropolitan Governance and the New Regionalist Policies*, PLANNING & MARKETS, http://www-pam.usc.edu/volume2/v2i1a2s1.html (last visited July 15, 2012).

48. *See* Richard Briffault, *Localism and Regionalism*, 48 BUFF. L. REV. 1, 15 (2000).

49. *Id.* "Decentralization" is used throughout this Article to signal the control over a particular function by a local government body as opposed to a more centralized bodies such as the U.S. federal government and various state governments.

50. *See* Tiebout, *supra* note 41, at 418.

51. *See id.*

52. *See id.*

53. *See id.*

localities which offer a more beneficial package should their relationship with their initial municipality erode.[54]

Scholars argue that local governments promote democratic participation and provide citizens with more opportunities to influence public decision-making than more centralized units of government.[55] This argument rests on the notion that local officials and government bodies are more accessible.[56] In addition, the smaller size of local governments also allows for a single individual to adequately voice their concerns and significantly affect public policy.[57] Local democratic participation is linked with local autonomy, in that increased local autonomy spurs greater democratic participation.[58] Thus, if local governments are given real power to develop and implement policies, then society will react with increased participation in the debate that formulates those policies.[59]

A final argument for localism asserts that local autonomy allows for a greater sense of community.[60] Localities are far from a geographic piece of territory governed by uniform law. Instead, localities consist of individuals and business entities with shared values and concerns. Local governance through its spurring of democratic participation allows for the implementation of policies that directly reflect the values and concerns of a locality's residents.[61] Thus, greater local autonomy fosters a sense of community by transforming a locality's residents' values into public policy.

Localism's theoretical justifications cannot only function within the mind of scholars but in practice within modern metropolises. When viewed from a practical perspective, however, localism is far from picture perfect. The following section examines the negative impacts of localism that ultimately undermine localist governance's effectiveness.

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54. *See id.*

55. *See* JAYNE MANSBRIDE, BEYOND ADVERSARY DEMOCRACY 270-73, 281-85; Richard Briffault, *Our Localism: Part II—Localism and Legal Theory*, 90 COLUM. L. REV. 346, 393-95 (1990) [hereinafter Briffault, *Our Localism: Part II*].

56. *See* Friedman, *supra* note 44, at 391 (noting that individuals are more likely to call, write, and directly speak to their local officials).

57. *See* Jerry Frug, *Decentering Decentralization*, 60 U. CHI. L. REV. 253, 297 (1993); Poindexter, *Collective Individualism*, *supra* note 45, at 617 (noting that individuals are more likely to see direct results of their democratic participation at the local level).

58. *See* Frug, *The City*, *supra* note 23, at 1070 (noting that democratic participation is directly linked to local autonomy).

59. *Id.* at 1067-70.

60. *See* Briffault, *Localism and Regionalism*, *supra* note 48, at 17.

61. *See id.*

3. The Failure of Localism

Although Tiebout and others persuasively argue that increased local autonomy produces numerous benefits to municipalities, their arguments do not recognize that localist policies can have negative implications for metropolitan regions as a whole. First, greater local autonomy, within the context of metropolitan regions, does not likely provide for the efficient provision of public goods and services for several reasons. On a theoretical level, the Tiebout model concedes that localism as a method for fostering greater efficiency is premised on the assumption that local action "exhibit no external economies or diseconomies between communities."[62] While such an assumption may hold true for smaller municipalities without an extensive surrounding of suburban localities, it mischaracterizes the growth development of metropolitans areas as to render its very foundational premises curiously suspect.

The modern American city no longer possesses extensive amounts of unincorporated land along its borders.[63] In many cases, central cities directly border other small municipalities and suburbs and the residents of those bordering municipalities directly interact with central cities and vice versa.[64] Because of this geographic and societal shift, central cities and suburban municipalities now produce external effects on one another.[65] In the realm of land use planning, localities now engage in exclusionary zoning tactics that seek to specifically cater to a certain types of economic and social citizens and business residents.[66] Exclusionary zoning, however, effectively pushes citizens and business entities, outside of a locality's desired resident profile, into neighboring localities.

Exclusionary zoning is viewed by some as an efficient mechanism that allows local governments to maintain independence of their eco-

62. Tiebout, *supra* note 41, at 419.

63. *See* Briffault, *supra* note 8, at 1133 (discussing the diminishing amount of unincorporated land along the borders of modern metropolises).

64. *Id.*

65. *Id.*

66. Briffault notes that exclusionary zoning is "intended to protect the local fisc and preserve the class and social homogeneity of local communities regardless of the harm to other state residents . . . ." *See* Briffault, *Our Localism: Part I*, *supra* note 13, at 57. Scholars also critique exclusionary zoning as a mechanism that keeps lower-income household in certain areas by raising housing costs, restricting the supply of low-income housing, mandating minimum land and house purchases, and zoning out families with school-aged children. Henry A. Span, *How the Courts Should Fight Exclusionary Zoning*, 32 SETON HALL L. REV. 1, 9 (2001); *see also* J. Gregory Richards, *Zoning for Direct Social Control*, 1982 DUKE L.J. 761, 764-67 (1982) (noting the usage of exclusionary zoning as a mechanism to prohibit specific land uses).

nomic and cultural landscapes.[67] Exclusionary zoning, however, produces inefficiency at a societal level by pushing undesired residents along with their particular problems and desires into neighboring areas that do not possess the political economy to shape their own destiny.[68] In lay-men's terms, new localities can simply outsource their problems to other localities and segregate themselves from undesired residents and land uses.[69]

Furthermore, localist-minded economic policy produces externalities on neighboring localities as well. As previously stated, cities now pursue mobile capital in a more aggressive fashion than any time in history.[70] Cities' pursuit of mobile capital can come in many forms—e.g., tax breaks, incentive programs, construction of certain public works.[71] These policies, however, likely manifest themselves in a modern municipal race to the bottom pitting one municipality against another in a constant struggle for greater revenue.[72] While this function may align with the consumer-voting preferences of certain economic actors, this only occurs in the specific locality that wins the regional economic race to the bottom, while the metropolitan regions suffers as a whole.[73] Thus, any efficiency and benefits to the successful locality are likely negated by the negative externalities suffered by neighboring localities within the metropolitan region.

Local autonomy as a means for increased democratic participation is also undermined within the context of metropolitan regions. Scholars argue that local autonomy encourages participation among a locality's residents, but local autonomy does come at a price when one considers that local autonomy produces externalities on outside locali-

67. Some view exclusionary zoning as possessing numerous positive effects. *See* G. Alan Tarr & Russell S. Harrison, *Legitimacy and Capacity in State Supreme Court Policymaking: The New Jersey Court and Exclusionary Zoning*, 15 RUTGERS L.J. 513, 558 (1984) ("[The author notes that strict local zoning allows may] promote community values such as a family-oriented lifestyle protective of the needs of children and of those whose seek to raise them in a non-urban environment.").

68. *See* Kenneth A. Stahl, *The Suburb as a Legal Concept: The Problem of Organization and the Fate of Municipalities in American Law*, 29 CARDOZO L. REV. 1193, 1269-70 (2008).

69. *See* Cashin, *supra* note 18, at 2012-15 ("[The author discusses that the exportation of costs from one locality two occurs primarily in two forms:] (1) direct subsidization by the urban core of the suburban fringe's new infrastructure capacity; and (2) through the creation of social costs that flow from exclusive, low-density suburban development.").

70. *See* Schragger, *supra* note 16, at 488-89.

71. *See id.* at 491-97 (discussing several methods that municipalities utilize to garner mobile capital).

72. *See id.* at 495.

73. *See* Briffault, *Our Localism: Part II*, *supra* note 35, at 355-56 (noting that competition among localities results in certain localities receiving benefits at a cost of negative externalities being forced on neighboring localities).

ties.[74] The residents of localities affected by such externalities do not often possess a say in the political processes of localities producing externalities.[75] Instead, these negatively affected residents' voices are stifled within the democratic process although their own activities are being influenced by outside forces.[76] Thus, local autonomy, albeit unintended, in a way hinders democratic participation on certain individuals who possess absolutely no say in the policies of their neighboring localities that may also affect their own areas.[77]

Purely local democratic participation also stifles the effectiveness of policies geared towards solving problems that are inherently regional in nature as well. The inability of local governments to individually solve certain regional issues, however, does not necessarily come from the function of local government itself. Instead, local autonomy—when unaccompanied by discussion of regional considerations—prevents local governments from solving regional issues.[78] Local governance, however, that maintains a regionalist perspective in its actions can in fact promote democratic participation on regional issues.[79] As Richard Briffault notes, "local decision-making can play an important role in adapting regional norms to different local settings, and local institutions can provide a framework for the development of views about regional matters."[80] Thus, while pure local autonomy likely does not solve certain regional issues, local governance working within some type of regionalist mindset can not only solve regional issues but also preserve localities' autonomy.

The assertion that localism promotes a sense of community is a strong argument in favor of localism. The problem with such an assertion is that it presupposes that a sense of community is only vital at the local level. Modern metropolitan residents interact with different businesses, individuals, and governments on a daily basis. Within a typical day, an individual may traverse numerous localities and encounter individuals outside of their home locality.[81] Thus, individual actors, like their respective localities, are not only members of their

74. *See id.*
75. *See* Briffault, *Localism and Regionalism*, *supra* note 48, at 20-22 (discussing the limited democratic power of citizens in localities who are affected by the externalities caused by a neighboring locality's decisions).
76. *See id.*
77. *See id.*
78. *See id.* at 21 (noting that local governments are not apt to solve regional issues).
79. *See id.* at 22.
80. *Id.*
81. *Id.* at 3.

individual communities but also the metropolitan regions in which they reside and interact.

Although intensive interaction between actors occurs on a regional basis daily, the notion that the desire for regional community will trump the desire for a local sense of community is not likely achievable.[82] The vast geographical, economic, and cultural differences present in metropolitan regions certainly inhibit the formation of a shared vision or fate of a region.[83] The simple fact that a regional sense of community is unlikely in practice, however, does not justify the continuing viability of a narrow vision of local autonomy. Purely local views on community result in a narrowing of the mindset of the actors and policymakers within a locality.[84] This narrowed mindset results in a form of local governance that not only ignores but also exacerbates the externalities and divisions existing among a region's actors and localities.[85]

Finally, unbridled localism creates immense inequality among the actors inside and outside of a locality's boundaries. Professor Sheryll Cashin argues that localism reinforces the dominance of the so-called "favored quarter."[86] Professor Cashin notes that metropolitan regions now contain more independent political bodies than ever before.[87] Extensive amounts of political boundaries, however, facilitate a recruitment and selection practice that contributes to economic and racial stratifications.[88] Economically, boundaries serve an important role in determining the distribution of the resources available in a metropolitan region.[89] When residents flee central cities and establish new localities, their newly-formed political boundaries allow them to contain their resources within their own communities although these

82. Briffault notes that although individuals interact with multiple localities in their daily lives that a true sense of a regional community is unlikely. *Id.* at 23-24.

83. *Id.*

84. *Id.*

85. *See id.* at 18.

86. Professor Cashin notes that

> [a]n area can be fairly characterized as a 'favored quarter' if it meets three conditions: (1) it captures the largest or a disproportionate share of public infrastructure investments in the region; (2) it has the region's largest tax base and is the area of highest job growth; and (3) it retains local powers, which it uses in a manner that closes its housing markets to non-affluent regional workers, thus becoming 'both socially and politically isolated from regional responsibilities.

See Cashin, *supra* note 18, at 2004.

87. *See id.* at 1991-93; *see also* Briffault, *supra* note 8, at 1120 (discussing the expansive creation of new political subdivisions in metropolitan regions in the twentieth century).

88. Cashin, *supra* note 18, at 1994.

89. *See* Tyson, *supra* note 33.

same residents may nonetheless still depend on services provided by central cities in their everyday lives.[90] Thus, extensive boundaries allow suburban localities to not only contain their own resources but also utilize the resources of central cities that are constrained by declining tax bases, higher service costs, and increasingly mobile capital that may flee at a moment's notice.[91] This results in increased economic stratification between affluent and low-income localities within a metropolitan region.[92]

Localism also results in racial stratification. As Professor Cashin notes, greater local autonomy allows certain groups to exclude others for a variety of reasons often through the guise of local governance that further inhibits regional action.[93] In essence, localism allows a locality's residents the ability to adopt certain provisions that are supported by an underlying desire, a practice commonly known as locational sorting.[94] For many citizens, racial factors fundamentally define their preferences in choosing where to locate, and scholars note that the desire for racial homogeneity often gives rise to conflicts in areas where that racial homogeneity is threatened.[95] This desire may give rise to local government policies that reflect the desire for decreased heterogeneity of races in a locality.

Furthermore, the decreased interaction between individuals of different racial and ethnic backgrounds ultimately inhibits the ability of such communities to engage in any type of collective deliberation or action.[96] As certain racial and ethnic groups segregate from one another, their ability to empathize with each other's concerns erodes.[97] This phenomenon becomes more disconcerting when one recognizes that localism not only allows but also promotes the further stratification of localities with specific racial and ethnic enclaves by giving those localities the autonomy to further homogenize within their boundaries.[98] Thus, localism's stratification along racial and eth-

90. *See* Cashin, *supra* note 18, at 1997; *see also* Briffault, *Our Localism: Part II*, *supra* note 35, at 355, 408.

91. Briffault, *Our Localism: Part II*, *supra* note 35, at 355, 408.

92. *See id.*

93. Professor Cashin posits that a theory known as a "parochialism" rests on the belief that fragmented political borders results in a blind citizenry whose own self-interests override the potential benefits of cross-border initiatives. *See* Cashin, *supra* note 18, at 2016-19.

94. *Id.*

95. *Id.* at 2016-17.

96. *Id.* at 2019-22.

97. *Id.* at 2019.

98. *Id.* at 2020.

nic lines results in a reduced capacity for bridging metropolitan socio-economic differences.[99] Ultimately, this reduced capacity hinders citizens' ability to recognize and pursue a mutual destiny with their other local counterparts to address issues that are truly regional in nature.[100]

The negative externalities produced by localism in metropolitan areas signal the need for a reformulation of the structure of local governance in metropolitan regions. Such a reformulation should reduce the inequities within metropolitan regions that localism produces while still preserving basic principles of democratic participation. With this in mind, the following section presents theory of regionalism as well as new regionalism and examines whether each presents an effective and feasible solution for metropolitan governance.

B. The Concept of Regionalism

Regionalism is a concept whose exact contours are not clearly defined and regionalist initiatives often vary in size and scope. Scholars, however, generally define regionalism in simplistic terms as a concept that shifts power from individual local governments to institutions, organizations, or procedural structures with a larger territorial scope that also contain larger population groups than existing local governments.[101]

Richard Briffault characterizes regionalism as a concept with three important elements. First, regionalism rests on the idea that a region is a real economic, social, and ecological unit.[102] Regions are real units in the sense that individuals often cross multiple localities in their daily activities.[103] As Briffault points out, individuals may live in one locality, work in another, shop in a third, and may seek entertainment or cultural activities in a fourth locality.[104] Simply, modern Americans in urban areas traverse numerous localities in the normal course of their daily lives. Regional activity, however, is not simply limited to the activity of humans. Cultural and educational institutions

99. *Id.*
100. *Id.*
101. *See* Richard Briffault, *supra* note 48, at 1. Although the concept of regionalism is not easily definable, scholars do present regionalism as a theory of governance that combats the problems exhibited by localist governance. *See generally* Briffault, *supra* note 13; Briffault, *Our Localism Part II*, *supra* note 35; Janice C. Griffith, *Regional Governance Reconsidered*, 21 J.L. & POL. 505 (2005).
102. Briffault, *supra* note 48, at 3.
103. *Id.*
104. *Id.*

often serve the interests of individuals located outside of their respective localities.[105] Additionally, businesses often look at the regional aspects of particular locations in order to find suppliers, workers, and customers.[106] Because of the large-scale mobility that persons and other institutions possess in their ability to transcend the boundaries of one locality to another, one can easily determine that urban society no longer acts within a single independent locality but instead operates in numerous localities for its specific needs and desires.

Second, regionalism is premised on society's desire for local governance that exhibits a region-wide perspective as opposed to a perspective confined to a specific locality.[107] Briffault notes that many regional governance proposals leave local powers and structures undisturbed, but through a combination of incentives or requirements that local actions conform to regional standards, push local policymakers to consider the external effects of their actions on a region-wide scale as opposed merely to the cost and benefits to their specific locality.[108]

Briffault's third element of regionalism is society's interest in creating new mechanisms capable of articulating regional concerns and implementing regional policies.[109] Regionalist initiatives, however, may exist in various forms—they do not necessarily require the formulation of unique regional institution.[110] Instead, localities, private groups, state governments, and the federal government may propose regional based policies.[111] In contrast, more formalized regional institutions also exist. Formalized regional institutions can take a variety of forms and rely on numerous entities to carry out their goals. The three

105. *Id.*
106. *Id.*
107. *Id.* at 5.
108. *Id.*
109. *Id.* at 6.
110. Briffault notes that most metropolitan regions avoid the creation of formalized regional governments that possess general policymaking authority. Instead, regionalist initiatives often take on two forms. The first form creates regional structures governing specific issues such as waste disposal and mass transit. The second form includes "federative plans" that cede power to regional metropolitan-level government for certain issues while leaving other issues to existing local governments. Examples of metropolitan regions that experiment with federative plan regional governments include Miami-Dade County, Nashville-Davidson County, Jacksonville-Duval County, Indianapolis-Marion County, and the metro areas of Portland, Seattle, and St. Paul and Minneapolis, MN. *See* Briffault, *supra* note 8, at 1117-19.
111. Briffault, *supra* note 48, at 6.

primary formal regional initiatives are metropolitan governments,[112] regional tax-sharing initiatives,[113] and regional service initiatives.[114]

Although regionalism presents a unique governance structure that may effectively limit the inequities produced by localism, formalized regional general-purpose governments are few and far between.[115] In addition, most formalized special purpose metropolitan regional entities do not possess any significant jurisdiction over land use planning.[116] The limited amount of regional institutions with general purpose or land use control likely exists because entrenched notions of localism within most metropolitan areas make the formation of such regional entities politically unfeasible.[117] In response to the political unfeasibility of traditional regionalism, new regionalism presents a new take on regional governance that may ultimately serve as the model for future governance at the regional level. The following section presents new regionalism and examines its potential as an effective form of metropolitan governance.

C. The Promise of New Regionalism

Proponents of new regionalism advocate that modern regional initiatives should be achieved through voluntary collaboration as opposed to the creation of general-purpose metropolitan governments

112. As previously noted, the United States contains four major metropolitan governments in Miami, Jacksonville, Indianapolis, and Nashville. Although these entities do allow the retention of certain powers by localities, they are by far the most far-reaching regionalist initiatives that resemble general policymaking bodies in that they share local power between the city and the localities within their countywide region. Portland, Seattle, and the Twin Cities possess regional governments with more limited general powers and tax-sharing powers. *See* Briffault, *supra* note 8, at 1117-19; Cashin, supra note 18, at 2028.

113. In a study of twenty-seven large metropolitan areas, Anita Summers found that each area engaged in some form of regional tax-sharing initiative. The metropolitan areas included: Atlanta, Georgia; Birmingham, Alabama; Boston, Massachusetts; Charlotte, North Carolina; Charlottesville, Virginia; Chicago, Illinois; Dallas, Texas; Dayton, Ohio; Denver, Colorado; Hartford, Connecticut; Houston, Texas; Indianapolis, Indiana; Jacksonville, Florida; Los Angeles, California; Louisville, Kentucky; Miami, Florida; Minneapolis/St. Paul, Minnesota; Nashville, Tennessee; New York, New York; Philadelphia, Pennsylvania; Pittsburgh, Pennsylvania; Portland, Oregon; San Antonio, Texas; San Francisco, California; Seattle, Washington; St. Louis, Missouri; and Washington, D.C. *See* Anita A. Summers, *Regionalization Efforts Between Big Cities and Their Suburbs*, *in* URBAN-SUBURBAN INTERDEPENCIES 181, 188-89 (Rosalind Greenstein & Wim Wiewel eds., 2000).

114. Regional service sharing initiatives are the most common form of regional cooperation and involve the "cross-border sharing and delivery of services." Cashin, *supra* note 18, at 2029. Regional service sharing initiatives often address the following issues: transportation, waste treatment and disposal, and public recreation. *See id.* at 2029-31.

115. *See id.* at 2028-31 (discussing the regionalist governance structures that currently exist in U.S. metropolitan areas).

116. *See id.* at 2029-30.

117. *Id.* at 2027 (noting that formalized regional governments are politically "futile").

that supplant local authority.[118] New regionalism's normative goals are similar to those at the heart of local government law: "(1) equity and inclusion within, and amongst, self-defined territorial communities; (2) democratic participation; and (3) efficient and accountable government."[119] Unlike unbridled localism, new regionalists argue that institutional arrangements and regulatory schemes must promote benefits within a region as a whole as opposed to individual localities within a metropolitan region.[120] By advocating for voluntary collaboration among localities on a regional level, new regionalism addresses localism's "failure to: (1) resolve cross-border, multi-issue challenge; (2) promote regional equity amongst independent localities; and (3) foster participation and collaboration across local boundaries."[121]

New regionalism embraces the creation of limited purpose metropolitan governments, regional cooperative measures and other informal and voluntary region-based collaborations.[122] As previously stated, new regionalism retreats from the call by many for formalized general-purpose regional governments. This retreat comes as no surprise given society's historical resistance to general-purpose regional governments.[123] The implementation of new regionalism, however, is not without its challenges. Professor Lisa Alexander argues that three common power dilemmas often affect the effectiveness of new regionalist initiatives: (1) demographic representation; (2) representative opportunism; and (3) representative acquiescence.[124]

Demographic representation occurs when the representative, whether an individual or organization, of a traditionally marginalized group is chosen based on that individual's alignment of interests with the marginalized group he or she represents.[125] While one may view this as simply a function of representative governance, this view ig-

118. *See* Alexander, *supra* note 19, at 643.

119. *See id.* at 632-33.

120. *Id.* at 633.

121. *Id.*

122. *See* Cashin, *supra* note 18, at 2027-28.

123. David Rusk notes that in the last half of the twentieth century, voters around the country rejected consolidated governments five times more often than they accepted such governance forms. *See* DAVID RUSK, INSIDE GAME / OUTSIDE GAME: WINNING STRATEGIES FOR SAVING URBAN AMERICA 9 (1999).

124. Professor Alexander outlines three power dilemmas that often exist in urban reform collaborations: (1) demographic representation; (2) representative opportunism; and (3) representative acquiescence. *See* Lisa T. Alexander, *Stakeholder Participation in New Governance: Lessons from Chicago's Public Housing Reform Experiment*, 116 GEO. J. ON POVERTY L. & POL'Y 117, 135-42 (2009).

125. *See id.* at 137-39.

nores the fact that representatives may often hold conflicting allegiances based on a variety of factors (e.g., race, social class, gender), which in turn inhibit their ability to truly represent marginalized groups who placed them in their representative capacity.[126] The conflicting allegiances of a representative can result in a form of representation, albeit in a collaborative environment, that in practice furthers the interests of empowered groups instead of those marginalized groups, whose interests the representative is chosen to represent.[127]

Professor Alexander's second barrier comes in the form of representative opportunism.[128] Representative opportunism occurs when a representative—motivated by social or economic goals—pursues his own selfish goals instead of ends desired by his constituency and the region as a whole.[129] The placing of private over collective interests is not, however, limited to individuals acting in a representative capacity but also organizations placed in such a capacity.[130] Because certain actors may be dependent on more dominant stakeholders within a region for economic or social capital, their representative allegiances are apt to persuasion at the hands of other stakeholders in a collaborative regime.[131] Ultimately, this phenomenon may lead representatives to pursue goals irrespective of the long-term interests of their constituents based on the representative's need for economic and social capital.[132] For the purposes of this Article, representative opportunism poses a significant threat to the viability of environmentally-conscious land use planning. Because land uses and environmental controls inherently affect the economic status of a regional actors, certain representatives may advocate for land uses that do not provide an equal

126. *See id.* at 138.

127. *See id.* at 157-58.

128. *See id.* at 139-41.

129. *Id.*

130. *See* JOEL F. HANDLER, DOWN FROM BUREAUCRACY: THE AMBIGUITY OF PRIVATIZATION AND EMPOWERMENT 20 (1996); Alexander, *supra* note 19, at 644.

131. *See* Alexander, *supra* note 19, at 644; *see also* HANDLER, *supra* note 130, at 20-21 (noting that non-profit and civic oriented organizations may depend on social capital provided by other private actors to validate such groups in the eyes of other participants in their area thus leading to greater financial resources and social opportunities).

132. *See* Alexander, *supra* note 124, at 141. It is important to note that the problem encountered in representative opportunism differs from the challenges presented by demographic representation. Demographic representation problems occur because of specific identity allegiances (e.g., race, gender, social class) while the challenges of representative opportunism are based on representatives' need for economic and social capital. *See id.* at 162. Thus, demographic representation is a problem that occurs because of pre-existing features of a representative unlike representative opportunism, which is fostered by future benefits that may come to a representative by supporting certain ends within a collaborative framework.

distribution of benefits to their constituents based on their own economic desires.

The third power dilemma in new regionalist structures is representative acquiescence.[133] Representative acquiescence occurs when a representative frames his or her position in a manner "that reflect[s] the dominant narratives of urban reform, rather than demand[ing] concessions that lead to the long term empowerment of their constituents."[134] In this instance, representatives do not act opportunistically for their own benefit or act under the influence of other allegiances. Instead, representative acquiescence is an exercise in which a representative consents to the framing of a regional problem in a manner detrimental to its constituents.[135] In such situations, the problem is not necessarily that the interests of a marginalized group are ignored or in conflict with the interests of empowered groups but that representatives simply accept solutions that further disempower their constituents.[136] Professor Alexander argues that acquiescence exists as a power dilemma because it "precludes fair and reasoned deliberation" between marginalized and empowered groups in a collaborative endeavor.[137] Within the realms of land use and environmental protection, representative acquiescence also poses serious threats to new regionalist land use initiatives. Because land use and environmental policy can be extremely technical in nature, those representatives that may lack a proper understanding of such issues are at a greater risk to have their views influenced by the rhetoric of empowered groups that may or may not contain legitimate justifications.

Representative acquiescence poses a substantial threat to fair and reasoned deliberation because it allows more assertive and or empowered representatives in a collaborative institution—"through narratives, ideology, and other psycho social processes"—to promulgate policies for their own benefit while further diminishing the power of

133. *Id.* at 138.

134. *Id.*

135. *Id.*

136. *Id.*

137. Fair and reasoned deliberation suggests a dynamic in which each stakeholder representative expresses his or her constituents' needs, desires, goals, and solutions. The deliberative network, then, considers the stated positions of each representative. From the arguments proffered, the deliberative network then selects amongst the expressed options based upon the strength of each expressed argument and each solution's ability to resolve multiple and often competing objectives.

Alexander, *supra* note 19, at 646.

marginalized groups.[138] In these situations, alternative or contrary solutions are not expressed or considered because of the acceptance of a more empowered group's framing of an issue.[139] Ultimately, representative acquiescence results in the implementation of policies that may be to the detriment of marginalized group's long-term interests, because the representatives of such groups are either unknowledgeable of outcomes more beneficial to their interests or because they simply accept the rhetorical framing of regional issues posited by empowered groups.[140]

In response to these dilemmas, new regionalists have argued that such regimes must possess two specific characteristics. First, new regionalist regimes must possess the broadest amount of participation that is compatible with effective decision-making.[141] Second, such initiatives must also contain effective and informed monitoring devices.[142] Part III will elaborate how such safeguards can be implemented into federal legislation incentivizing environmentally-conscious new regionalist land use regimes.

Ultimately, new regionalism presents a theory of voluntary collaboration among metropolitan localities that may provide a mechanism to combat the ills of localism. Because formalized regional general-purpose governments are unlikely in most metropolitan areas, new regionalism also likely represents the most feasible modern regional governance method as well. With this in mind, Part III will later present an examination of how to effectively implement new regionalism in a metropolitan land use initiative aimed at environmental protection.

II. LAND USE AND ENVIRONMENTAL PROTECTION

The goals of land use and environmental protection are often undertaken exclusive of one another. Although land use policies directly affect the use of land and therefore the environment, land use planning's goals do not necessarily encompass environmental protection at their core. In order to understand the development of the bifurcation of land use planning and environmental protection, it is necessary to

138. *See* Alexander, *supra* note 124, at 136.
139. *See id.* at 138.
140. *See* Alexander, *supra* note 19, at 646.
141. *See id.* at 648-49. *See generally* Grainne de Burca, *New Governance and Experimentalism: An Introduction*, 2010 WIS. L. REV. 227 (discussing the phenomenon of emerging forms of governance).
142. *See* Alexander, *supra* note 19, at 649.

recognize the historical roots of the land use and environmental movements and how each movement has taken on a path that diverges from the other. Although this bifurcation exists, certain federal programs do affect local land use decisions albeit in narrow circumstances. This part analyzes the divergent paths of land use and environmental protection as well as federal environmental programs that affect local land use planning. Ultimately, it concludes that local land use controls and the minimal federal legislation affecting land use do not effectively solve many of the environmental issues that still pervade metropolitan regions.

A. Land Use Planning and Environmental Protection: A Brief History

Modern land use planning is carried out through a variety of mechanisms that "dictate the types of use to which land may be put; the density at which development may happen; the height, size and shape of buildings; and the mix of commercial, residential, public, and other land uses in a specified locality.[143] Zoning ordinances are the primary method that localities use to define the specific social, physical, and economic layout of the area within their boundaries.[144]

The modern history of land use planning begins with the United States Supreme Court's decision in *Village of Euclid v. Ambler Realty Co*.[145] In *Euclid*, the Court held that municipal zoning, on its face, was not a constitutionally invalid practice by municipalities.[146] The Court's question in *Euclid* represented the first challenge to the early twentieth century movement calling for greater land use control by localities. In 1922, the United States Department of Commerce proposed the Standard State Zoning Enabling Act (ZEA).[147] By the time the Court addressed the validity of zoning in *Euclid*, forty-three states had adopted versions of the ZEA and over five hundred municipalities were implementing local zoning ordinances.[148]

In the decades following *Euclid*, land use planning continued its steady growth. As large cities grew into metropolitan regions with nu-

143. *See* John R. Nolon, *Comprehensive Land Use Planning: Learning How and Where to Grow*, 13 PACE L. REV. 351, 351 (1993).
144. *Id.*
145. Vill. of Euclid v. Ambler Realty, Co., 272 U.S. 365 (1926).
146. *Id.* at 397.
147. *See generally* U.S. DEP'T OF COMMERCE, STANDARD STATE ZONING ENABLING ACT (1926).
148. *See* Nolon, *supra* note 143, at 357.

merous distinct localities,[149] land use became an increasingly important tool for those new areas to shape their communities in a way that promoted the specific physical, economic, and cultural goals of their inhabitants.[150] The impediments to zoning's expansion primarily came in the form of challenges under due process and takings provisions found in the U.S. and state constitutions.[151] Environmental protection, during this period, was not a major concern within the land use movement.[152]

Land use planning would continue uninhibited by the concerns of environmental protection for over forty years until the environmentalism movement prompted federal regulation aimed at environmental concerns in the late 1960s.[153] Congress first addressed environmental protection with the passage of the National Environmental Policy Act of 1969 (NEPA).[154] Shortly after the passage of NEPA, Congress utilized its immense power granted to it under the Commerce Clause to enact other environmental statutes aimed at water pollution, air pollution, regulation of solid and hazardous wastes, and the protection of endangered species.[155] Congressional environmental action, albeit ex-

149. *See* Briffault, *supra* note 8, at 1120 (discussing the large amount of local governments in metropolitan regions).

150. *See id.* at 1141-44 (discussing the use of land use regulation as a method that localities utilize to shape the specific identities within their boundaries and the external effects of such regulation on bordering localities and metropolitan regions as a whole).

151. *See* Nolon, *supra* note 143, at 367.

152. *See* Spyke, *supra* note 10, at 61-63 (discussing the bifurcation of land use and environmental law).

153. Many point to the publication of Rachel Carson's work, SILENT SPRING, as the impetus for bringing environmental protection into the realm of public concern. *See, e.g.*, RACHEL CARSON, SILENT SPRING (1962). For a discussion of the environmentalism movement in the 1960s and modern times, see generally Zygmunt J.B. Plater, *For the Beginning, A Fundamental Shift of Paradigms: A Theory and Short History of Environmental Law*, 27 LOY. L.A. L. REV. 981 (1994); Peter Manus, *One Hundred Years of Green: A Legal Perspective on Three Twentieth Century Nature Philosophers*, 59 U. PITT. L. REV. 557 (1998); and A. Dan Tarlock, *New Directions in Environmental Law: Environmental Law: Then and Now*, 32 WASH. U. J.L. & POL'Y 1 (2010).

154. *See* National Environmental Policy Act of 1969, 42 U.S.C. § 4321 (2006).

155. Congress enacted numerous environmental statutes in the decade following its enactment of NEPA that still govern a variety of environmental issues today. *See* Endangered Species Act, 16 U.S.C. § 1531 (2006); Clean Water Act, 33 U.S.C. § 1251 (2006) (regulating water pollution); Clean Air Act, 42 U.S.C. § 7401 (2006) (regulating air pollution); Resource Conservation and Recovery Act, 42 U.S.C § 6901 (2006) (regulating the generation, treatment, transport, storage, and disposal of solid and hazardous wastes); Comprehensive Environment Response, Compensation, and Liability Act of 1980, 42 U.S.C. § 9601 (2006) (providing liability, compensation, cleanup, and emergency response for hazardous substances released into the environment and the cleanup of inactive hazardous waste disposal sites).

pansive in the age of environmentalism, did not fully integrate the principles of land use planning.[156]

In the wake of Congress' passage of NEPA, Senator Henry Jackson introduced the National Land Use Policy Act of 1970 (LUPA), which would have required states to implement land use policies in accordance with national guidelines.[157] Senator Jackson's plan specifically included land use regulation that addressed certain areas of environmental concern.[158] The plan, however, was halted after Congressional support for federal land use guidelines waned, thus continuing the divergence of land use planning and environmental protection.[159] After the rejection of federal land use guidelines, pollution control became the target of the vast majority of environmental legislation while states and municipalities maintained their control over land use decisions with little intrusion in the form of federal environmental guidelines.[160]

Thus, environmental law—a subset of the law that developed decades after land use planning—grew in sophistication and impact outside of land use regulation's scope.[161] Environmental legislation and regulation furthered this divide by implementing policies directed at public health through pollution control rather than land use regulations.[162] Nonetheless, some pieces of federal legislation do reach into

156. *See* Spykes, *supra* note 10, at 61-63.

157. Senator Jackson introduced Senate Bill 3354, the National Land Use Policy Act of 1970 (LUPA), a month after President Nixon signed NEPA into law. *See* S. 3354, 91st Cong. (1970). For a discussion of Senator Jackson's national land use plan, see Jayne E. Daly, *A Glimpse of the Past—A Vision for the Future: Senator Henry M. Jackson and National Land-Use Legislation*, 28 URB. LAW. 7 (1996).

158. LUPA required that states designate areas most appropriate for conservation and development. Section 406 of LUPA provided that state land use plans must identify areas of the state:

> (A) where ecological, environmental, geological, and physical conditions dictate that certain types of land-use activities are incompatible or undesirable,
> (B) whose highest and best use, based on projected State and National needs, on the Statewide Outdoor Recreation Plan required under the Land and Water Conservation Fund Act, and upon other studies, is recreational oriented use,
> (C) which are best suited for natural resource, heavy industrial, and commercial development,
> (D) where transportation and utility corridors are or should, in the future, be located, and
> (E) which furnish the amenities and basic essentials to the development of new towns and the revitalization of existing communities.

See S. 3354, § 406(b)(3); Daly, *supra* note 157, at 10-11.

159. *See* Daly, *supra* note 157, at 9-35 (discussing the failed attempts by Senator Jackson and other legislators to enact federal land use initiatives because of faltering congressional and presidential support).

160. *See* Spyke, *supra* note 10, at 61-62.

161. *Id.* at 61.

162. *See* Jerold S. Kayden, *National Land Use Planning in America: Something Whose Time Has Never Come*, 3 WASH. U. J.L. & POL'Y 445, 461 (2000).

the realm of land use. The following section analyzes these programs and questions whether federal legislation, in its current form, truly solves the environmental issues currently facing American metropolises.

B. Federal Environmental Legislation and Land Use Control

Although some scholars argue that the divide between land use and environmental protection widened during this time, federal environmental legislation did impact land use.[163] Environmental legislation's impact, however, does not come in the form of comprehensive land use policies. Instead, its impact comes in the form of narrow land use controls under specific provisions contained within statutes that are not primarily aimed at land use but other environmental concerns. This section highlights the land use controls within: (1) the Coastal Zone Management Act;[164] (2) Section 404 wetland dredge and fill permits under the Clean Water Act;[165] (3) the Endangered Species Act;[166] and (4) the National Environmental Policy Act.[167] The following sub-sections provide a brief overview of the aforementioned statutes' goals and their implications for local land use decisions.

1. Coastal Zone Management Act

Congress enacted the Coastal Zone Management Act (CZMA) in 1972 to promote "the national interest in effective management, beneficial use, protection, and development of the zone."[168] CZMA incentivizes states to implement comprehensive Coastal Management Plans (CMPs) that govern the development of their coastal areas in

> [N]ational environment policy emerged . . . in the wake of growing concern about links between chemical pesticides and health woes, links not specifically tied to land-use concerns. Indeed, ecologists highlighted the holistic character of the environment, . . . that inherently militated against localized remedies for environmental degradation. The national environmental movement ultimately seized upon pollution standards for air and water, as opposed to land . . . .

Id.

163. For an in-depth discussion of federal environmental legislation affecting local land use policies, see Ashira P. Ostrow, *Land Law Federalism*, 61 EMORY L.J. (forthcoming 2012), and J.B. Ruhl, *Biodiversity Conservation and the Ever-Expanding Web of Federal Laws Regulating Nonfederal Lands: Time for Something Completely Different?*, 66 U. COLO. L. REV. 555, 557-58 (1995).

164. *See* Coastal Zone Management Act, 16 U.S.C. § 1451 (2006).

165. *See* Clean Water Act, 33 U.S.C. § 1344 (2006).

166. *See* Endangered Species Act, 16 U.S.C. § 1531 (2006).

167. *See* National Environmental Policy Act of 1969, 42 U.S.C. § 4321 (2006).

168. *See* Coastal Zone Management Act, 16 U.S.C. § 1451(a) (2006).

accordance with federal standards.[169] Land use control is among one of the many policy areas addressed under CZMA. In order to receive federal incentives, state CMPs must identify "particular areas of concern" and "the means by which the State proposes to exert control over the land uses" in the coastal zone.[170] In addition, states must demonstrate how land uses in the coastal zone may be coordinated and controlled through state implemented standards for enforcement via: (1) local government regulation; (2) direct state regulation; or (3) the review of all state, local and private development proposals in the coastal zone.[171] CMPs may also adopt a hybrid approach combining any of the aforementioned coastal zone regulation measures.[172] Under CZMA, states may disapprove of any plans that affect land or water use or natural resources within a coastal zone unless they comply to the maximum extent possible with the state's CMP.[173] Thus, CZMA presents an example of federal legislation administered through standards imposed by a centralized body—state governments—that may have a direct effect on land use decisions.

2. Section 404 of the Clean Water Act

Section 404 of the Clean Water Act (Section 404) authorizes the issuance of permits "for the discharge of dredged and fill material into navigable waters at specified disposal sites."[174] The dredge and fill permit program is administered by the Army Corps of Engineers[175] in accordance with certain guidelines promulgated by the Environmental Protection Agency.[176] The EPA also maintains veto power of the Corps issuance of a permit that presents unacceptable adverse affects on the environment.[177] The most controversial land use control within Section 404 comes in its relation to activities conducted in areas defined as wetlands.[178] Although wetlands are not explicitly mentioned

169. *See id.* §§ 1454-1455 (2006).
170. *See id.* § 1455(d)(2)(C), (D).
171. *See id.* § 1455(d)(11).
172. *See id.* § 1455(d)(16).
173. *See id.* § 1456(c)(3)(B).
174. *See* Clean Water Act, 33 U.S.C. § 1344(a) (2006).
175. *Id.* § 1344(a), (d).
176. *See id.* § 1344(b)(1) (2006).
177. *See id.* § 1344(c) (2006). The EPA may veto certain dredge and fill disposal site permits if they "will have an unacceptable effect on municipal water supplies, shellfish beds and fishery areas (including spawning and breeding grounds), wildlife or recreational areas." *Id.*
178. *See* Ruhl, *supra* note 163, at 603 ("[The definition of w]etland . . . now comprise[s] the bull's eye of the Section 404 program.").

in the provisions of Section 404, courts have required the Corps to extend the Section 404 program to certain wetland areas.[179]

Section 404's permit requirements directly impact land use. Although certain projects may conform to local land use standards, Section 404 superimposes its own requirements in those localities allowing development within wetland areas.[180] Among those requirements under Section 404, certain land use decisions that may proceed without any impediment from a locality can suddenly be subject to mitigation measures as well as environmental assessments under NEPA.[181] Most importantly, the denial of a Section 404 permit can ultimately stifle certain land uses in sensitive wetlands. Thus, Section 404 presents an additional control over land uses normally controlled through local decision-making albeit in the narrow area of wetland development.

3. Endangered Species Act

Congress enacted the Endangered Species Act (ESA) in 1973 to protect endangered species and the ecosystems upon which they depend.[182] Under the ESA, all actors, whether public or private, may not "take" a species listed as endangered or significantly modify or degrade a critical habitat of such species.[183] Within the realm of land use,

179. *See* United States v. Riverside Bayview Homes, Inc., 474 U.S. 121, 131, 139 (1985) (holding that the Corps' regulatory authority under Section 404 included "wetlands" and that the Corps definition of waters of the United States, which included wetlands adjacent to navigable waters was proper regardless of whether such wetlands were not inundated or frequently flooded by navigable waters). *But see* Solid Waste Agency of N. Cook Cnty. v. U.S. Army Corps of Eng'rs, 531 U.S. 159, 174 (2001) (overturning a regulation that asserted federal jurisdiction over all wetlands used by migratory birds). In *Rapanos v. United States*, 547 715, 742 (2006), Justice Scalia's plurality opinion stated that "only those wetlands with a continuous surface connection to bodies that are 'water of the United States' in their own right, so that there is not clear demarcation between 'waters' and wetlands, are 'adjacent to' such waters and covered by the [CWA]". *Rapanos*, 547 U.S. at 742. Justice Kennedy's concurrence established a significant nexus test between a wetland and navigable waters. *Id.* at 759 (Kennedy, J., concurring).

180. *See* Clean Water Act § 1344.

181. *See id.*

182. *See* Endangered Species Act, 15 U.S.C. § 1531(b). The purpose of the ESA is "to provide a means whereby the ecosystems upon which endangered species and threatened species depend may be conserved." *Id.*

183. The ESA defines "taking" as any effort to "harass, harm, pursue, hunt, shoot, wound, kill, trap, capture, or collect . . . ." *Id.* § 1532(19). Critical habitat for threatened or endangered species is defined as :

> the specific areas within the geographical area occupied by the species . . . on which are found those physical or biological features (I) essential to the conservation of the species and (II) which may require special management considerations or protections; and specific areas outside the geographical area occupied by the species at the time it is listed . . . .

Id. § 1532(5)(A).

the modification or degradation of critical habitats may significantly affect development in certain areas.[184] For example, developments whose modification or degradation of a critical habitat is unavoidable may be prevented regardless of a locality's desire for development in that area.[185] In addition, critical habitat concerns also may subject projects to mitigation requirements or habitat conservation programs, which increase the cost of development in an area.[186] Thus, the ESA also presents a form of federal legislation that may potentially affect otherwise acceptable land uses within a locality.

4. National Environmental Policy Act

The National Environmental Policy Act of 1969 (NEPA) marked the first major piece of environmental legislation arising from the environmentalism movement.[187] NEPA established an environmental impact assessment procedure for all major actions funded, authorized, or carried out by the federal government that significantly affect the environment.[188] Under NEPA, the consideration of environmental effects is undertaken in reports known as Environmental Impact Statements (EIS).[189] NEPA does not require, however, that an action be suspended even in instances where the EIS discovers that the action will have a significant negative impact on the environment.[190]

184. For a discussion of the ESA's effect on local land use planning, see Jacalyn R. Fleming, *The Scope of Federal Authority Under the Endangered Species Act: Implications for Local Land Use Planning*, 65 ALB. L. REV. 497, 500-02 (2001).

185. *See id.* at 500-04.

186. *See* Endangered Species Act § 1531(5)(B), (C) (stating that certain species' critical habitats may be subject to special considerations and protections when development occurs near such habitats).

187. *See* National Environmental Policy Act of 1969. 42 U.S.C. § 4321. NEPA is lauded by many as the Magna Carta of U.S. environmental legislation and NEPA's passage is seen by many as the U.S. environmentalism movement's first great achievement. *See* Sam Kalen, *Ecology Comes of Age: NEPA's Lost Mandate*, 21 DUKE ENVTL. L. & POL'Y F. 113, 124-56 (discussing the history of the U.S. environmentalism movement and the events leading to the enactment of NEPA).

188. *Id.* § 4332.

189. *Id.* Prior to the execution of a full scale EIS report, agencies conduct an environmental assessment (EA) "which is a brief analysis of the need for an EIS." If the EA shows that the proposed action will not have significant environmental effects or the agency decides to not undertake a full EIS, then it must make a "'finding of no significant impact' (FONSI) available to the public." *See* DANIEL A. FARBER & ROGER W. FINDLEY, ENVIRONMENTAL LAW IN A NUT SHELL 38 (8th ed. 2010).

190. *See* Robertson v. Methow Valley Citizens Council, 490 U.S. 332, 350 (1989) (noting the NEPA does not mandate a particular environmental outcome but a procedure for environment assessment); Strycker's Bay Neighborhood Council, Inc. v. Karlen, 444 U.S. 223, 227-28 (1980) (noting that the role of a court is to ensure the consideration of environmental consequences and not "interject itself within the area of discretion of the executive" and decide the appropriate course of action); Vt. Yankee Nuclear Power Corp. v. Natural Res. Def. Council, Inc., 435 U.S.

Although NEPA's substantive bite is questionable because it does not mandate that an agency must choose the most environmentally preferable development option, it does nonetheless affect land use planning even in developments undertaken by private entities.[191] Because NEPA's jurisdiction extends to actions "authorized" by the federal government, developments seeking permits under federal regulatory regimes such as the Clean Air Act, Clean Water Act, and Resource Conservation and Recovery Act may be subject to environmental assessments if the project poses significant effects to the environment.[192] While NEPA's environmental assessment regime may not ultimately prohibit certain land uses, NEPA does increase expenditures in time and costs for certain land uses.[193] In a time where developers and localities are often at the whims of economic conditions, excess costs and time delays may render certain land uses unfeasible. Thus, while not banning certain land uses outright, NEPA may still prevent or stifle developments that significantly affect the environment.

C. An Incomplete Environmental Protection Regime

Although environmental legislation does affect land use in narrow instances, it and local land use regimes still are not integrated in a fashion that can meaningfully address the environmental problems produced by localist land use planning. As previously noted, land use planning allows localities to determine their patterns of development, building codes, and availability of public transportation.[194] In addition to these traditional controls, localities may often have the authority to regulate "farming practices, wetland draining, and the extraction of fossil fuels," but many localities choose not to regulate such actions.[195] Localities' decisions to not implement environmental controls within their land use regimes, however, can produce negative environmental

519, 558 (1978) (noting that NEPA's goals are essentially procedural); *see also* Daniel Mach, *Rules Without Reasons: The Diminishing Role Statutory Policy and Equitable Discretion in the Law of NEPA Remedies*, 35 HARV. ENVTL. L. REV. 205, 211 (2011).

191. *See generally* David J. Hayes & James A. Hourihan, *NEPA Requirements for Private Projects*, 13 B.C. ENVTL. AFF. L. REV. 61 (1985) (discussing NEPA's interaction with private developments).

192. *See id.* at 62.

193. Delays and excess costs because of NEPA environmental assessments do not relieve certain private developments of their obligations under NEPA. *See* Greene Cnty. Planning Bd. v. Fed. Power Comm'n, 455 F.2d 412, 422-23 (2d Cir. 1972).

194. *See* Ostrow, *supra* note 163, at 38.

195. *Id.*

effects.[196] This section analyzes some of the environmental issues facing metropolitan regions and how they are exacerbated by the municipal race to the bottom fostered by localism.

1. Urban Sprawl and Greenhouse Gas Emissions

Currently, local land use regimes significantly contribute to climate change through increased greenhouse gas emissions.[197] As noted earlier, modern land use planning has resulted in growing metropolitan regions as more individuals seek low-density single-family residences in suburbs outside the boundaries of central cities.[198] Because residents that flee central cities may often still depend on their central city neighbors for employment, entertainment, and other purposes, urban sprawl now plagues metropolitan regions.[199] Urban sprawl is often accompanied by the need for greater transportation infrastructure expenditures.[200] In response to the increased demand for infrastructure, metropolitan areas often respond with the expansion of road and highway systems.[201]

The decision to construct new roads and highways, however, poses negative environmental consequences for municipal areas. Unlike mass transit systems, expanded roadways increase the need for automobile use.[202] Increased automobile dependency produces greater greenhouse gas emissions and is arguably the most significant factor in the rise of such emissions.[203] For example, transportation produces nearly a third of all U.S. carbon dioxide emissions,[204] and

196. *Id.* at 40.

197. For an in-depth discussion on land use planning's effect on climate change through transportation policy, see Katherine A. Trisolini, *All Hands on Deck: Local Governments and the Potential for Bidirectional Climate Change Regulation*, 62 STAN. L. REV. 669, 707-718 (2010).

198. The trend of low-density development on the fringes of central cities is attributable to modern land use regulation. *See* Michael Lewyn, *New Urbanist Zoning for Dummies*, 58 ALA. L. REV. 257, 261 (2006).

199. *See* Briffault, *supra* note 48, at 3 (noting that many individuals interact with numerous localities on a daily basis).

200. *See* Chad Lamer, *Why Government Policies Encourage Urban Sprawl and the Alternatives Offered by New Urbanism*, 13 KAN. J.L. & PUB. POL'Y 391, 396-97 (2004).

201. *See* MATTHEW E. KAHN, GREEN CITIES: URBAN GROWTH AND THE ENVIRONMENT 111-12 (2006) (noting that decades of infrastructure growth geared towards automobile travel has resulted in a higher amount of miles traveled by vehicle).

202. *See* Lamer, *supra* note 200, at 397.

203. *See* SIMON MUI ET AL., U.S. ENVTL. PROT. AGENCY, A WEDGE ANALYSIS OF THE U.S. TRANSPORTATION SECTOR 16 (2007). The EPA recently noted that increases in the number of vehicles on the road and in vehicle usage are by far the most significant factor to past growth in greenhouse gas emissions from transportation. *Id.*

204. *See* REID EWING ET AL., URB. LAND. INST., GROWING COOLER: THE EVIDENCE ON URBAN DEVELOPMENT AND CLIMATE CHANGE 2 (2007).

automobile use accounts for roughly eighty percent of transportation emissions.[205]

Because of the inherent effect that greater automobile usage has on greenhouse gas emissions, it is clear that local land use regimes not only fail to address climate change issues but rather aggravate them. Numerous solutions exist—alternative to the building of more roadways—that could lessen metropolitan regions' carbon footprint such as improved public transit, vehicle usage fees, and more intensive land uses in suburban areas.[206]

Although these solutions do exist, localist-minded land use planning stifles their implementation. As previously discussed, localism produces a form governance that pits localities against one another in an effort to secure increasingly mobile capital.[207] In an effort to secure increased capital within their boundaries, localities are essentially required to implement policies preferred by most within society.[208] Society at large still favors, however, low-density single-family development that requires automobile transportation and disfavors increased expenditures in the form of vehicle usage taxes and greater public transit.[209] Therefore, localities are unlikely to adopt such solutions to combat greenhouse gas emissions because such solutions likely negatively impact their ability to secure new residents and economic entities.

2. Biodiversity Conservation

Land use decisions that are undertaken, irrespective of environmental protection, also pose negative ramifications for biodiversity.[210] Although the wide array of federal environmental statutes discussed earlier assists in the preservation of biodiversity, our current land use

205. *See id.* 3 fig. 1-2; U.S. ENVTL. PROT. AGENCY, SER. EPA-420-06-003, GREENHOUSE GAS EMISSIONS FROM THE U.S. TRANSPORTATION SECTOR 1990-2003, at 7 (2006).

206. *See generally* Christian Iaione, *The Tragedy of Urban Roads: Saving Cities from Choking, Calling on Citizens to Combat Climate Change*, 37 FORDHAM URB. L.J. 889 (discussing the link between urban transportation and climate changes and possible solutions to greenhouse gas emissions due to urban transportation policy).

207. *See* Schragger, *supra* note 35, at 483.

208. *See id.* 536-37.

209. *See* Iaione, *supra* note 206, at 900 (noting that society still favors automobile travel over other methods of transportation such as public transit).

210. Several scholars note land use's effect on biodiversity. *See, e.g.*, Bradley C. Karkkainen, *Biodiversity and Land*, 83 CORNELL L. REV. 1 (1997); *see also* Ruhl, *supra* note 163; Francesca Ortiz, *Biodiversity, the City, and Sprawl*, 82 B.U. L. REV. 145 (2002); A. Dan Tarlock, *Local Government Protection of Biodiversity: What is Its Niche?*, 60 U. CHI. L. REV. 555 (1993).

regime does not adequately foster biodiversity conservation.[211] This occurs because our current environmental regulatory regime only affects narrow aspects of the wide scope of issues encompassed within the concept of biodiversity.[212]

Biodiversity is defined as the "the full range of variability among living organisms and the natural communities in which they occur."[213] This broad definition of biodiversity contains four specific components: "regional ecosystem diversity; local ecosystem diversity; species diversity; and genetic diversity."[214] Most important to the call of this Article are the components of regional and local ecosystem diversity. Local ecosystem diversity "involves the diversity of all living and nonliving components within a given area and their interrelationships."[215] Regional ecosystem diversity is simply the patterns in diversity across local ecosystems in a region.[216]

Professor J.B. Ruhl argues that "direct physical alternation resulting from resource development and changing land use is perceived as the most pervasive cause of biodiversity loss."[217] Direct physical changes to habitats can destroy or fragment certain parts of an ecosystem, which can result in decreased biodiversity.[218] Even physical development that does not take place directly on a specific habitat negatively impacts biodiversity.[219] For example, increased pollution, the introduction of new plant and animal species, and stream flow modification can pose significant long-term threats to biodiversity.[220] Thus, while direct impact from certain land uses may only contribute in part to decreased biodiversity, they nonetheless do impact the ability of ecosystems to maintain some sort of variance among the specific species of flora and fauna within their boundaries.

When one considers that local ecosystem diversity is the most discrete level of biodiversity and is essentially the building block upon which all levels of biodiversity rests, the problems attributable to lo-

211. *See generally* Ruhl, *supra* note 163 (discussing federal environmental legislation's effect on biodiversity conservation).
212. *Id.* at 624-25 (discussing the shortcomings of federal legislation affecting biodiversity conservation).
213. *Id.* at 570.
214. *Id.*
215. *Id.*
216. *Id.*
217. *Id.* at 571.
218. *See id; see also* Ortiz, *supra* note 210, at 148-49 (noting how the physical impact of suburban development negatively effects biodiversity).
219. *See* Ruhl, *supra* note 163, at 571.
220. *Id.*

calist land use planning become more alarming than ever.[221] As previously discussed, localities currently engage in a municipal race to the bottom in order to secure increasingly mobile capital and enact policies that incentivize economic actors to locate within the their boundaries. Given the fact that measures aimed at environmental protection increase the cost of development in most areas, localities are unlikely to implement policies that increase biodiversity. Their reluctance to implement such policies likely stems from the need to maintain an advantageous position within their own regions—a position which could be lost if their local land use policies, directed at biodiversity conservation, presented potentially higher costs for potential businesses and residents. The end result of this municipal race to the bottom are local ecosystems with diminished biodiversity profiles that when combined with the ecosystems within other localities, also reluctant to increased environmental regulation, form regional ecosystems with decreased biodiversity profiles as well.[222]

3. Environmental Injustice

Localist-minded land use planning also exacts environmental injustice against certain groups in metropolitan regions.[223] Environmental justice advocates for "distributional and procedural equity in environmental and natural resource decisions."[224] Most often, environmental justice advocates argue that minority and low-income groups are subjected to a greater array of health risks because of their exposure to pollution and roadway congestion, as well as a lack of access to green spaces and clean water.[225] The environmental risks faced by such groups are directly linked to the disenfranchisement of racial and low-income populations from political and administrative processes that ultimately exact environmental injustice against them.[226] Although the disenfranchisement of these groups is tied to

221. *Id.* at 570.
222. *Id.* at 570-71.
223. For a discussion of the causal effect between localist land use planning and environmental justice, see generally Sheila Foster, *Environmental Justice in an Era of Devolved Collaboration*, 26 HARV. ENVTL. L. REV. 459 (2002); and Tessa Meyer Santiago, *An Ounce of Preemption Is Worth a Pound of Cure: State Preemption of Local Siting Authority as a Means for Achieving Environmental Equity*, 21 VA. ENVTL. L.J. 71 (2002). For a discussion of sustainable development and environmental justice, see generally J.B. Ruhl, *The Co-Evolution of Sustainable Development and Environmental Justice: Cooperation, Then Competition, Then Conflict*, 9 DUKE ENVTL. L. & POL'Y F. 161 (1999).
224. Foster, *supra* note 223, at 461.
225. *Id.*
226. *Id.*

the greater social inequities that pervade society at-large, localist land use planning exacerbates this phenomenon within the realm of environmental protection.

Municipal fragmentation has produced numerous suburban municipalities that are often racially and economically homogenous—white and wealthy.[227] The congregation of such individuals into their own independent localities produces an uneven distribution of wealth and power in metropolitan region.[228] Given this uneven distribution, affluent localities greatly benefit from localism while low-income and minority areas suffer.[229] With the localism's aid, affluent localities are likely to implement policies and initiatives that reflect the philosophy of "Not in My Backyard" (NIMBY).[230] NIMBY policies and initiatives are those that limit the siting of undesirable developments, at times environmental in nature, within a locality.[231] The problem with NIMBY policies is that they allow more affluent localities to export the costs and any benefits of an undesirable development to other areas.[232]

The problem within environmental justice is not, however, with the siting of environmentally undesirable developments within minority or low-income localities. Instead, it lies within the relative ease that more affluent localities can export the costs of such developments—

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227. *See* Cashin, *supra* note 18, at 2017 (noting that most suburbs are primarily white and middle- or upper-class).

228. *See id.* at 1995 (noting that economic segregation is increasing in metropolitan areas).

229. *See id.* at 1987 (arguing that more affluent localities prosper often at the expense of low-income and minority neighborhoods).

230. NIMBY is defined as the phenomenon of "local resistance to unpopular developments." *See* Ashira P. Ostrow, *Process Preemption in Federal Siting Regimes*, 48 HARV. J. ON LEGIS. 289, 298 (2011).

> NIMBYs [short for "Not in my Backyard"] show up at the zoning and planning board reviews, to which almost all developers of more-than-minor subdivisions must submit. If NIMBYs fail to reduce the scale and density of the project at these reviews, they often deploy alternative regulatory rationales, such as environmental impact statements, historic districts, aboriginal burial sites, agricultural preservation, wetlands, flood plains, access for the disabled and protection of (often unidentified) endangered species at other local, state and federal government forums, including courts of law . . . . And if NIMBYs fail in these efforts, they seek, often by direct democratic initiatives, to have the local zoning and planning regulations changed to make sure that similar developments do not happen again.

See id. at 299 (citing William A. Fischel, *Voting, Risk Aversion, and the NIMBY Syndrome: A Comment on Robert Nelson's "Privatizing the Neighborhood,"* 7 GEO. MASON L. REV. 881, 881-82 (1999)).

231. *See id.*; Vicki Been, *What's Fairness Got to Do With It?: Environmental Justice and the Siting of Locally Undesirable Land Uses*, 78 CORNELL L. REV. 1001, 1001 (1993); Alice Kaswan, *Environmental Justice: Bridging the Gap Between Environmental Laws and "Justice,"* 47 AM. U. L. REV. 221, 272-273 (1997) (discussing environmental justice and NIMBY).

232. *See* Ostrow, *supra* note 230, at 299.

regardless of whether an affluent locality provides the most beneficial site for a region as whole—into minority and low-income areas while still enjoying the relative benefits of those developments.[233] This phenomenon is not hard to envision considering that a locality inherently increases its economic attractiveness by allowing its residents to enjoy the benefits of an undesirable development without the burden of its costs. Regardless of whether a locality's desire to prevent environmentally undesirable developments from inhabiting their borders stems from racial or economic concerns, environmental justice initiatives do not effectively counter the relative ease of affluent localities to export undesirable developments to minority and low-income areas. Because environmental justice poses little hope for effectively distributing the benefits and burdens of environmentally undesirable developments, metropolitan regions must utilize their land use powers in a way that promotes equity in the siting of those developments that may pose negative environmental effects.

A Piecemeal Approach

The failure of federal environmental legislation to address the regional environmental concerns created by localist-minded land use policies reveals that federal environmental legislation alone cannot properly address those environmental problems that are attributable to local conditions. On the other hand, Part I noted that localism also does not lend itself to the resolution of truly regional problems. Thus, it is clear that the conventional wisdom surrounding the interaction between environmental law and land use planning will not adequately solve regional environmental problems.

The conventional wisdom that separates land use planning and environmental protection into distinct bodies of law that only affect one another in limited circumstances prevents either regime from combating the environmental protection issues inherent in land use planning. Those bodies determining the land use policies for a metropolitan region cannot simply operate in a vacuum that ignores the environmental consequences of planning. Policies aimed at a environmental protection must also, however, fundamentally shift from being devices that only affect land use in limited circumstances to mechanisms that can be readily applicable to the majority of land use policies. Therefore, comprehensive solutions that actively inte-

233. *Id.*

grate the concerns of land use planning and environmental protection are necessary.

The question that still remains, however, is how can society integrate environmental protection, a subject traditionally handled by federal law, and land use planning that is historically carried out by local governments? Such a question does not recognize that neither level of government is the appropriate location for decision-making regarding the environmental problems that plague metropolitan regions. For example, an integrated land use/environmental protection scheme subject to purely federal administration could potentially result in controls that do not adequately address a the unique factors of a metropolitan region that contribute to its environmental issues. Purely local control is likely even less beneficial when one considers that local governments will place their own interests over the collective interest of their respective metropolitan region. Thus, any sort of meaningful integration of land use and environmental protection that addresses issues facing metropolitan areas requires a break from purely federal or purely local decision-making and the embrace of regional governance structures that can establish uniform standards across a metropolitan regime.

The limited effectiveness of the current scheme of land use and environmental regulation signals the need for comprehensive regulation that fully integrates land use and environmental protection in one fell swoop. Such a regime must not only address the gaps within our current land use regime but also the flaws within certain forms of local governance that hinder effective land use and environmental protection. Part III argues how such a regime may be structured and also presents arguments that favor the integration of environmental protection and land use planning through new regionalism.

III. NEW REGIONALISM, LAND USE, AND ENVIRONMENTAL PROTECTION

This Article is not the first to posit that comprehensive land use legislation at the federal level may further the goals of environmental protection. Indeed, many scholars do recognize the benefits to the environment that may arise from federal land use legislation.[234] The proposals resulting from this recognition do not, however, also acknowledge the problems that federal land use legislation may cause

234. *See* sources cited *supra* note 7.

if carried out in localist governance structures. This part argues that while comprehensive federal land use legislation is necessary, such legislation must also foster regional governance structures in metropolitan areas through which to implement its directives. It examines how new regionalist initiatives can adequately integrate land use and environmental concerns as they exist in metropolitan regions. Ultimately, this part suggests the implementation of a federal program—integrating the goals of land use and environmental protection—that incentivizes land use planning by new regionalist entities in metropolitan areas.

A. New Regionalism: A Governance Solution

New regionalism presents the most effective governance method for federal land use legislation aimed at environmental protection. Unlike localism and traditional regionalist regimes, new regionalism allows for the implementation of federal standards in through collaborative interaction that limits the prospect of negative externalities. Furthermore, it likely prevents a municipal "race to the bottom" within a metropolitan region, because in new regionalist regimes—localities work in an atmosphere with a specific eye towards regional goals and standards that affect all localities equally. In order to ascertain if new regionalism can serve as the proper method for a federal metropolitan land use initiative, it is vital to determine how such proposal would work and the barriers it may face.

First, new regionalism focuses on the implementation of voluntary regional collaborative efforts among independent localities within a metropolitan region. Because new regionalist proposals call for voluntary participation, any federal land use initiative that conforms with new regionalism must be voluntary in nature. New regionalism encounters a barrier, however, when one considers that land use is traditionally an activity handled in localist governance structures. By creating a collaborative body, localities are inherently ceding power over their boundaries to a regional body. Thus, certain localities may hesitate if not outright refuse to participate in a new regionalist venture if such a venture may possibly weaken their own viability. Based on the likely reluctance that localities may possess when approached with the opportunity to enter into a regional governance regime, new regionalist initiatives addressing land use and environmental protection must contain incentives—likely economic in nature—that will prompt localities to enter into such a regime.

Although new regionalist approaches are voluntary in their participatory aspects, they must promulgate binding standards within a metropolitan region in order to truly be effective. Within the realm of environmental protection, a new regionalist initiative that lacks any sort of binding authority on individual localities would likely do nothing to curb the municipal race to the bottom promoted by localism. Thus, any type of federal legislation must grant some sort of regulatory authority to the collaborative body adopting environmentally-conscious land use policies.

New regionalist land use planning with the specific goal of environmental protection likely cannot function, however, simply with a group of civic leaders with regional policymaking authority. While related, land use and environmental protection still do possess some differences. Because the heart of land use is centered on the shaping of a community and environmental protection focuses on the prevention of pollution and the preservation of the natural environment, one can understand how it may be difficult for policymakers to formulate and adopt measures that truly promote sound land use and environmental protection. With this in mind, it is important that new regionalist land use initiatives contain some sort of mechanism that guides its policymakers.

The question is, however, what should a new regionalist entity use to guide the substantive questions presented to its policymakers? One mechanism is the possible creation of an administrative agency serving the regional body that studies and presents its findings to the new regionalist body for consideration. Another possible solution is the establishment of standards—produced by a federal or state government entity—which directly address the specific land use and environmental issues within a metropolitan region. The Article adopts, however, a hybrid approach of the aforementioned solutions.

As previously stated, land use and environmental protection are concepts that are largely governed by different entities. Land use planning primarily occurs at the local level while environmental protection regimes are largely promulgated by federal bodies and implemented by state government agencies. Considering this reality, the aforementioned solutions potentially may not adequately address those issues that are traditionally governed at the local or state/federal level respectively. Therefore, a hybrid approach that implements federal standards while maintaining a specific level of discretion at the local level likely better serves the purposes of regional land use regu-

lation. Under such an approach, a federal body would promulgate broad standards to which policies promulgated under the new regionalist regime must adhere in order to receive federal incentives.

Because the federal standards envisioned under this approach are broad in nature, the legislation creating such a regime must also provide for an advisory body that can sufficiently articulate the local land use and environmental characteristics of a metropolitan region in accordance with federal standards to the policymakers within the new regionalist governing body. By implementing a hybrid mechanism establishing broad standards that still maintain a level of local discretion, new regionalist bodies will likely enact policies that not only address important national environmental concerns but also issues specific to a region's specific geographic, economic, and societal topography.

1. Addressing the Barriers to New Regionalism

As previously discussed in Part I, several power dilemmas—demographic representation, representative opportunism, and representative acquiescence—present a barrier to effective governance through new regionalism. Therefore, it is essential that new regionalist land use regimes eliminate or, at the very least, diminish the impact of these power dilemmas.

The federal land use legislation advocated by this Article would incentivize metropolitan localities to establish new regionalist land use regimes. By providing incentives to areas adopting new regionalist regimes, the federal government through its spending power may condition that a new regionalist regime meet certain requirements or approvals in order to receive federal incentives. Thus, federal legislation could condition regional incentives by implementing a variety of conditions such as: (1) requiring approval of new regionalist enacted policies in accordance with federal guidelines; (2) selection criteria for representatives in a new regionalist entity; and (3) specific procedural requirements for new regionalist entities. The following sections examine how an approach integrating each of the aforementioned conditions can alleviate the burdens of demographic representation, representative opportunism, and representative acquiescence.

Countering Demographic Representation and Representative Opportunism

Demographic representation and representative opportunism both pose a barrier to effective new regionalist governance because of conflicting allegiances. Within the context of demographic representation, conflicting allegiances exist because representatives may hold allegiances based on race, ethnicity, or social class that do not conform to the group they are chosen to represent. On the other hand, representative opportunism presents an allegiance conflict of a different type. Unlike demographic representation, which is premised on a representative's conflicting allegiances to another social group, representative opportunism's conflict allegiance is a result of a representative's individual economic interests. Thus, responses to demographic representation and representative acquiescence should primarily eliminate or limit the effects of allegiance conflicts. With this in mind, new regionalist land use initiatives should require: (1) approval of new regionalist enacted policies in accordance with federal guidelines and (2) selection criteria for the representatives within a new regionalist governing body.

The requirement that new regionalist land use policies conform to federally established guidelines may serve as a barrier to the harmful effects of demographic representation. As discussed, demographic representation results in the stifling of a marginalized group's interest in a collaborative endeavor because of their specific representative(s)' conflicting allegiances. The implementation of federal guidelines for policies enacted through a new regionalist regime may, however, serve as a safeguard to the problems of conflicting allegiances. Guidelines can function as a set of safeguards by providing a minimum floor that the discretionary decisions of a new regionalist land use initiative must follow. In regard to the problems of demographic representation and representative opportunism, such standards can function as a check on the decisions of a new regionalist entity to make sure that each group or locality within a metropolitan region are taken into account. These same safeguards can ensure that decisions also do not foster massive inequities in the distribution of environmental protection and land use controls between localities. Thus, minimum federal guidelines can provide new regionalist regimes with the discretion needed to address the individual environmental and land use problems within their

boundaries while still ensuring the equitable distribution and costs within a region.

The second step at alleviating the burdens of conflicting allegiances is the establishment of selection criteria for representatives in a new regionalist entity. Because demographic representation and representative opportunism result from different types of conflicting allegiances, selection criteria could come in the form of a review of a representative's potential conflicts of interests. In regard to demographic representation, such a review would evaluate a potential representative's other allegiances based on those factors most often linked to the problem of demographic representation, race, socioeconomic class, etc. Representative opportunism conflicts may be addressed by determining economic interests of a representative and evaluating whether those interests may significantly present a barrier to adequate representation. In addition, representative selection guidelines should also ensure that a potential representative possesses at least a minimal working knowledge of the characteristics of his locality and metropolitan region as they relate to land use and environmental protection.

It is important to note that selection criteria should and conflicts reviews should not automatically disqualify a potential representative. After all, one of the goals of new regionalism is to ensure democratic participation. Thus, this Article suggests that the information gathered in the review stages for potential new regionalist representatives be made available to the body choosing a specific individual to represent their interests. By endorsing a form of disclosure as opposed to automatic disqualification, groups and localities within a metropolitan region would maintain their discretion in selecting a representative that best voices their own interests. Thus, the ultimate goal of selection criteria and conflicts review is to ensure that groups are informed and recognize the potential conflicts that their chosen representative may possess and consider those factors in their ultimate selection.

Countering Representative Acquiescence

As discussed earlier, representative acquiescence occurs when marginalized groups or localities within a metropolitan region allow regional issues to be framed in way that reflects the view of more empowered groups. The framing of regional issues from the viewpoint of empowered groups or localities does, however, stifle the open collaboration and discussion needed within a new regionalist regime. There-

fore, certain safeguards should ensure that regional issues are framed in a objective rather than subjective fashion.

One possible solution to the improper framing of regional issues is the implementation of procedural safeguards within a new regionalist governance structure. As opposed to informal presentation of matters of discussion that could lend itself to improper issue framing, presentation procedures could be implemented into a new regionalist regime. For example, when an issue is presented to the voting representatives of a new regionalist entity, an agent of the administrative planning body discussed earlier could present the issue as opposed to a voting representative. Because agents of such an administrative planning body would presumably examine issues on a regional scale without the political, economic, and social interests of particular groups or localities influencing their judgment, it is likely that such individuals could frame issues in a more objective fashion.

In addition, a new regionalist land use initiative should involve some aspect of public participation. Prior to major new regionalist policies' adoption, public town hall meetings should be conducted to inform a region's citizenry and allow them to voice their concerns. By giving the general public an active role in the policymaking function of a new regionalist body, the public can serve as a safeguard ensuring that their representatives as well as the new regionalist entity as whole enacts policies that promote equity throughout a metropolitan region.

B. The Benefits of New Regionalist Land Use in a Nutshell

Because metropolitan regions have yet to embrace new regionalism as a tool that may promote environmentally-conscious land use planning, this Article concedes that the benefits of new regionalist land use initiatives are mere conjecture at this stage. While this may be true, new regionalism's theoretical underpinnings do provide a recipe for success in metropolitan regions. By promoting equity among metropolitan localities in their approach to land use and environmental protection through uniform standards, new regionalist land use initiatives can eliminate the municipal race to the bottom's effect of environmental degradation. Furthermore, it places those localities without the resources of their more affluent neighbors on an even playing field by ensuring that the costs of environmental protection are evenly distributed throughout a metropolitan region. Finally, new regionalist land use initiatives allow metropolitan regions to solve en-

vironmental issues, such as sprawl and biodiversity conservation, that inherently cross the boundaries of individual localities.

CONCLUSION

Environmental problems still plague our metropolitan landscapes. Although our society has made great strides through the wide array of federal and state legislation aimed at environmental protection, we still lack meaningful local regulation. While this Article cannot provide a full description of each environmental and land use challenge facing our metropolises or pinpoint each governance issue that contributes to our inadequate land use and environmental protection regimes, it seeks to provoke discussion about how an integrated land use and environmental law regime can work in a new regionalist setting.

Such a call to action cannot, however, merely inhabit the mind of legislators and policymakers. Instead, it must take hold in the minds of society as a whole. Localism's grasp on land use decisions and their relationship with environmental protection are a reflection of one of localism's primary goals—policy that reflects views of an *individual* locality's citizenry. With this in mind, society can longer formulate their ideal landscape within the mind of their individual locality, but must instead envision their ideal landscape within the purview of their metropolitan region and all the other localities it may encompass.

Ultimately, this Article recognizes that land use decisions will affect the environment but also that these effects can be equally distributed among metropolitan regions. New regionalism allows and fosters such a distribution. It provides a region's citizenry with the governance structure necessary to implement regional views that ensure an equal voice and distribution of costs and benefits among metropolitan regions. In order to progress towards such a goal, it is necessary that the federal government provide a method for regions, long divided through localism's power, to implement new regionalism. If federal legislators are up to such a task, they cannot only reshape our views of land use and environmental protection but also metropolitan governance.

COMMENT

Toward a System of Least Restrictive Care: *Brown v. Plata* and the Eighth Amendment Right to Adequate Mental Health Care for the Incarcerated

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INTRODUCTION

Late last year, a stunning report came out of a Los Angeles County jail: a mentally ill prisoner had been brutally beaten by a deputy.[1] George Rosales died at the age of eighteen, days after being punched in the head by a sheriff's deputy who was entrusted with the job of keeping order and ensuring a level of safety within the jail where he was incarcerated.[2] While this story might make a smaller ripple if taken as another instance of police violence in Los Angeles, a historic mecca of police brutality and corruption,[3] the underlying issue

1. *See* Robert Faturechi, *Sheriff's Officials Investigate Inmate's Death*, L.A. TIMES, Oct. 7, 2011, at AA3, *available at* http://articles.latimes.com/2011/oct/07/local/la-me-inmate-death-20111008.

2. *Id.*

3. *See* SARAH LEIBOWITZ ET AL., ACLU, CRUEL AND USUAL PUNISHMENT: HOW A SAVAGE GANG OF DEPUTIES CONTROLS LA COUNTY JAILS (2011), *available at* http://www.aclu.org/prisoners-rights/report-cruel-and-usual-punishment-how-savage-gang-deputies-controls-la-county-jails (documenting the cruel treatment of prisoners in L.A. County jails); *Consent Decree Overview: Civil Rights Consent Decree*, L.A. POLICE DEP'T, http://lapdonline.org/search_results/content_basic_view/ 928 (last visited Aug. 31, 2012); *Flashback: Rodney King & the LA Riots*,

is not so quickly explained away.[4] Mr. Rosales was mentally ill—one of a population of nearly 1.25 million inmates nationwide suffering from some form of mental illness.[5] Due to problems of overcrowding, overwhelmed state budgets, and a lack of training, deputies and prison staff are more likely to render inadequate treatment to mentally ill inmates; ultimately, the combination of these systemic problems can lead to the type of brutality and treatment mismanagement that resulted in Mr. Rosales' death.[6]

Mr. Rosales' story is not an isolated incident.[7] Despite minor improvements, prison populations are still on the rise and reports of overcrowded and inhumane conditions of confinement seem to continually surface.[8] Inmates with mental illness are a particularly vulnerable part of the prison population; their conditions are historically underserved or stand at great risk of being entirely ignored once they enter into incarceration.[9] Many states are faced with a nearly impossi-

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BBC NEWS (Jul. 10, 2002, 4:59 PM), http://news.bbc.co.uk/2/hi/americas/2119943.stm; *LAPD Blues: Rampart Scandal*, PBS FRONTLINE, http://www.pbs.org/wgbh/pages/frontline/shows/lapd/scandal (last visited Aug. 31, 2012).

4. *See infra* Part I.

5. *U.S.: Number of Mentally Ill in Prisons Quadrupled: Prisons Ill Equipped to Cope*, HUM. RTS. WATCH (Sept. 6, 2006), http://www.hrw.org/news/2006/09/05/us-number-mentally-ill-prisons-quadrupled [hereinafter *Mentally Ill in Prisons Quadrupled*].

6. Thomas L. Hafemeister et al., *Forging Links and Renewing Ties: Applying the Principles of Restorative and Procedural Justice to Better Respond to Criminal Offenders with a Mental Disorder*, 60 BUFF. L. REV. 147, 174 (2012); Katherine L. Smith, Comment, *Lost Souls: Constitutional Implications for the Deficiencies in Treatment for Persons with Mental Illness in Custody*, 42 GOLDEN GATE U. L. REV. 497, 497-98 (2012) (explaining that conditions for those with mental health problems are quantifiably different for those without mental health problems, such as the high rate of violence toward mentally ill inmates); *see also infra* Part I.C.3. The punch to Mr. Rosales' head was not the ultimate cause of his death; instead, it may have been connected to an overdose of psychotropic drugs administered to manage his condition. Robert Faturechi & Jack Leonard, *Jail Inmate's Death Linked to Medication*, L.A. TIMES, Mar. 10, 2012, at AA1, *available at* http://articles.latimes.com/2012/mar/10/local/la-me-inmate-autopsy-20120310. His death is an unfortunate example of both the brutality and the inadequate treatment that prisoners with mental conditions endure.

7. Unfortunately, Mr. Rosales' story is one of many. *See* Michael Biesecker, *State Review Finds Mentally Ill Inmates Neglected in Prison*, NEWS OBSERVER (Nov. 14, 2011, 4:14 AM), http://www.newsobserver.com/2011/11/14/1642506/prison-neglects-the-ill.html; Jacques Billeaud, *Court Critical of Pink Underwear for Ariz. Inmates*, CNSNEWS (Mar. 8, 2012), http://cnsnews.com/news/article/court-critical-pink-underwear-ariz-inmates; Naomi Spencer, *Michigan: Mentally Ill Inmate Dies After Five Days of Abuse*, WORLD SOCIALIST WEB SITE (Nov. 17, 2006), http://wsws.org/articles/2006/nov2006/mich-n17.shtml.

8. *Southern Poverty Law Center Files Federal Lawsuit Against Louisiana Sheriff to End Prisoner Abuse at Jail*, S. POVERTY L. CENTER (Apr. 2, 2012), http://www.splcenter.org/get-informed/news/southern-poverty-law-center-files-federal-lawsuit-against-louisiana-sheriff-to-end.

9. Bob Ortega, *Arizona Inmates Denied Adequate Medical Care, Lawsuit Says*, ARIZ. REPUBLIC, Mar. 7, 2012, at A1, *available at* http://www.azcentral.com/arizonarepublic/news/articles/2012/03/06/20120306arizona-inmates-denied-adequate-medical-care-lawsuit-says.html (reporting that the Arizona Department of Corrections kept mentally ill inmates in solitary confinement under "brutal" conditions); *see also* Hafemeister, *supra* note 6, at 154 (explaining that placement

ble task: to maintain order and safety amid the chaos of overcrowding in extremely poor physical facilities.[10]

In May of 2011, the Supreme Court decided *Brown v. Plata*, a class action suit brought by a group of inmates with serious mental disorders who alleged profound violations of their constitutional rights under the Eighth and Fourteenth Amendments.[11] The *Brown* Court fell far short of dealing with the issue of adequate treatment of the incarcerated mentally ill head-on. Instead, the Court focused primarily on reducing overcrowding in California prisons as the only legitimate remedy to the plaintiffs' claims of a lack of adequate treatment, and ordered the State of California to reduce its prison population to 137.5% of capacity.[12]

As a result, much of the media coverage and substantive focus of the path taken by the State of California to address the Court's order has centered on the general issue of prison depopulation, not the underlying claim of the initial case: the right to adequate treatment for mentally ill inmates within the prison population and the provision of such treatment.[13] Because the opinion in *Brown* fell short, the plaintiffs in the case and their cohorts across the country undoubtedly continue to suffer from the inadequacies and indignities that have come to mark treatment of this marginalized population. Indeed, both pris-

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of mentally ill in correctional facilities exposes them to harm and is generally not the appropriate place for administering treatment).

10. U.S. CONST. amend. VIII; David M. Bierie, *Is Tougher Better? The Impact of Physical Prison Conditions on Inmate Violence*, 56 INT'L J. OFFENDER THERAPY & COMP. CRIMINOLOGY 338, 338 (2012), *available at* http://www.ncbi.nlm.nih.gov/pubmed/21489998 (explaining that poor physical conditions can lead to higher incidents of violence); *Judge Calls Maricopa County Jail Conditions Unconstitutional*, ACLU (Oct. 22, 2008), http://www.aclu.org/prisoners-rights/judge-calls-maricopa-county-jail-conditions-unconstitutional (ordering the jail to provide prisoners with access to toilets, sinks, toilet paper, and soap along with food that met minimum human consumption standards); Michael Kunzelman, *New Orleans Jail Conditions Violate Inmates' Rights: Department of Justice Report*, HUFFINGTON POST (Sept. 22, 2009, 8:52 PM), http://www.huffingtonpost.com/2009/09/22/new-orleans-jail-conditio_n_295512.html (stating inmates in New Orleans live in squalor); Clara Moskowitz, *Massive Rise in Prison Population May Have Serious Consequences*, LIVE SCI. (Feb. 22, 2012, 1:30 PM), http://www.livescience.com/18596-prison-population-rise-social-consequences.html; Stephen Ohlemacher, *Study: Prison Populations on the Rise*, COMMON DREAMS (Feb. 14, 2007), http://www.commondreams.org/headlines07/0214-07.htm (discussing rising prison populations).

11. Brown v. Plata, 131 S. Ct. 1910, 1922 (2011).

12. *See CDCR Submits Corrections Population Reduction Plan, Relies on Realignment and Timely Action*, CA CITIES ADVOCATE (June 8, 2011), *available at* http://newsletter.cacities.org/e_article002124914.cfm?x=0,b11,w. The Court in *Brown* mandated the California prison population be reduced to 135.7% (that is, the reduction of approximately 46,000 inmates). *Id.* The current population sits at 190% of design capacity, a reduction of approximately 30,000 inmates. *Id.*

13. Jennifer Medina, *California Begins Moving Prisoners*, N.Y. TIMES, Oct. 9, 2011, at A14, *available at* http://www.nytimes.com/2011/10/09/us/california-begins-moving-prisoners.html.

oners' rights advocates as well as correctional and governmental officials acknowledge that the criminal justice system's treatment of the incarcerated mentally ill is inadequate—many times of a constitutional proportion.[14]

While there is no dispute that crowding exacerbates existing problems with access to adequate mental healthcare,[15] overcrowding and lack of access are aggravating factors, not the root cause, of inadequate care for the incarcerated mentally ill. Inevitably, a decrease in the prison population will allow for greater access to care, but greater access does not ensure *adequate* treatment. Thus, the Court's decision in *Brown* will not help to solve the long-term problem of how to best provide adequate treatment for the incarcerated mentally ill. This Comment proposes that by adopting a program of least restrictive care, similar to those programs promulgated in the 1960s-1980s to deinstitutionalize mental hospitals,[16] states can simultaneously ease overcrowding while providing a real remedy to the inadequate provision of mental health care for the incarcerated. One such instance of deinstitutionalization is the case of *Pennhurst State School & Hospital v. Halderman*.[17] While the Supreme Court did not order Pennsylvania to close the institution, the state recognized that a better long-term method of treatment was the establishment of community-based least restrictive care programs for the patients at Pennhurst; and thus acted to shutter the institution and place the former residents of Pennhurst into least restrictive treatment programs.[18] Similarly, in the face of an inconclusive mandate from the Court, the state of California should act to establish a solution to the inadequate provision of mental health services for the incarcerated mentally ill by establishing community-based treatment facilities. Shifting to a system of least restrictive care for the incarcerated mentally ill will validate the Eighth Amendment rights of prisoners by providing a substantive solution to inadequate care. Such a system will also reduce recidivism amongst the mentally ill population, thereby reducing the prison population and saving

14. *See Brown*, 131 S. Ct. at 1922-24; Hafemeister et al., *supra* note 6, at 163.

15. *Problems with Prisons*, Interview with David Fathi, Dir., Am. Civ. Liberties Union's Nat'l Prison Project (Dec. 2011), *available at* 47-DEC JTLATRIAL 24 (Westlaw) [hereinafter, *Problems*].

16. Bernard E. Harcourt, *Reducing Mass Incarceration: Lessons from the Deinstitutionalization of Mental Hospitals in the 1960s*, 9 Ohio St. J. Crim. L. 53, 54 (2011); *see infra* Part II.C.

17. Pennhurst State Sch. & Hosp. v. Halderman, 465 U.S. 89 (1984).

18. Maryalice Yakutchik, *Pennhurst Closing Sets Rights Precedent*, Reading Eagle, Jan. 24, 1988, at A-3, *available at* http://news.google.com/newspapers?nid=1955&dat=19880124&id=4DUyAAAAIBAJ&sjid=5-UFAAAAIBAJ&pg=4916,1338129.

states money that would have previously been used to incarcerate these individuals.

Part I of this Comment will set forth the decision in *Brown*, including the current state of affairs as California moves toward 137.5% of capacity, and will note the shortcomings of the decision. Part I will also explain the Eighth Amendment constitutional right to adequate mental health care, including a brief discussion of prisoner's rights suits under the Prison Litigation Reform Act (PLRA). Lastly, Part I will outline the scope of the problem regarding inadequate treatment of the incarcerated mentally ill in the American prison population. Part II discusses the decision in *Pennhurst State School & Hospital v. Halderman*[19] as an analogous example of deinstitutionalization and the promulgation of least restrictive care for the mentally ill. Further, Part II discusses the parallels between the effort to deinstitutionalize mental hospitals and current problems associated with mass incarceration, and how the former process carries implications with respect to adequate care for the incarcerated mentally ill. Part III first offers a proposal suggesting that states should adopt a system of least restrictive care, similar to that developed in the state of Pennsylvania in response to the closing of Pennhurst State School & Hospital. Part III will also address the primary arguments against the deinstitutionalization of the incarcerated mentally ill into supervised release programs of least restrictive care. Finally, this Comment concludes that the model of least restrictive care adopted after *Pennhurst* should be the model used to address inadequate care of the incarcerated mentally ill, not just in California, but in the entire United States prison system.

I. THE *BROWN* DECISION, PRISONER'S RIGHTS SUITS, AND THE CURRENT STATE OF MENTAL HEALTH CARE FOR THE INCARCERATED

A. *Brown v. Plata*

In May 2011 the Supreme Court granted certiorari to hear a case involving a class of California prisoners with severe mental and physical disabilities. The *Brown v. Plata* case was the result of the consolidation of two prior federal cases—*Coleman v. Wilson*[20] and *Plata v.*

19. *Halderman*, 465 U.S. at 89.

20. Coleman v. Wilson, 912 F. Supp. 1282 (E.D. Cal. 1995), *appeal dismissed*, 101 F.3d 705 (9th Cir. 1996).

Schwarzenegger[21]—that found Eighth Amendment violations due to the inadequate state of mental and physical health care in California prisons.[22] In *Coleman*, the special master found a litany of troublesome conditions in the system of care provided to mentally ill inmates: serious problems with screening for mental illness, prisons with mental health departments that were "seriously and chronically understaffed," significant delays in access and outright denial of care, as well as a "deliberate indifference to the deficiencies" in the system.[23] While the *Coleman* case focused more directly on the treatment of mentally ill prisoners, *Plata* dealt with the provision of medical care for all California inmates.[24] In *Plata*, the initial relief order was issued to "implement specific remedial procedures to ensure . . . constitutionally adequate medical care," with instructions for implementation on a rolling basis within twelve prisons in California.[25] Both cases resulted in remedial injunctions, however, some years later, the special master appointed in *Coleman* and the *Plata* district court found that plans for the expansion of care and the implementation of programs outlined to remedy the identified problems had failed and that continued insufficiencies in the care provided to inmates remained.[26] As a result, the cases were consolidated and a three-judge court was convened.[27] The Court agreed with the Plaintiffs that the inadequate care they received was a violation of their Eighth Amendment rights, but held that crowding was the primary cause of the Eighth Amendment violation and further, that the only available remedy was depopulation.[28]

In affirming the order of the district court to reduce the population of California prisons to 137.5% of capacity,[29] the Court concluded that:

> The medical and mental health care provided by California's prisons falls below the standard of decency that inheres in the Eighth Amendment. This extensive and ongoing constitutional violation requires a remedy, and a remedy will not be achieved without a

21. Plata v. Schwarzenegger, No. C01-1351 TEH, 2009 WL 799392 (N.D. Cal. Mar. 31, 2009), *aff'd in part*, *dismissed in part*, 603 F.3d 1088 (9th Cir. 2010).

22. *Leading Cases*, 125 HARV. L. REV. 261, 262 (2011).

23. *Coleman*, 912 F. Supp. at 1296-97.

24. *Id.* at 1293; *see Plata*, 2009 WL 799392, at *1.

25. Plata v. Schwarzenegger, 603 F.3d 1088, 1091 (9th Cir. 2010).

26. *Leading Cases*, *supra* note 22, at 262-63.

27. *Id.* at 263. A three-judge panel is a requirement to issue a prison release order under the Prison Litigation Reform Act (PLRA). *Id.*

28. Brown v. Plata, 131 S. Ct. 1910, 1917-18 (2011).

29. *Leading Cases*, *supra* note 22, at 263.

> reduction in overcrowding. The relief ordered by the three-judge court is required by the Constitution . . . .[30]

The situations leading up to the litigation in *Brown v. Plata* are horrifying. By the time the case arrived at the Supreme Court, California prison officials estimated that "an average of one California inmate d[ied] needlessly every six to seven days."[31] The Court noted that: "overcrowding strains inadequate medical and mental health facilities; overburdens limited clinical and custodial staff; and creates violent, unsanitary, and chaotic conditions that contribute to the constitutional violations and frustrate efforts to fashion a remedy."[32]

Indeed, overcrowding in California prisons had become so severe that mentally ill inmates awaiting care were kept in phone booth-size cages.[33] Some prisoners even committed suicide while awaiting treatment.[34] The prisons served as literal "breeding grounds for disease," and fostered the occurrence of daily atrocities; in one instance, prison staff was unaware of the assault of a prisoner in a crowded gymnasium until hours after his death.[35] Moreover, at the time of the decision, California prisons were designed to hold a population of 80,000 prisoners, but were housing nearly twice as many.[36] The Court specified a two-year timeline for reduction of the prison population, but did not offer any guidelines to the state or specific measures to be taken to redress inadequate treatment head-on—it simply mandated a reduction of the population to 137.5% of capacity and told California to do it within two years.[37]

1. The Current State of Affairs as California Moves Toward 137.5%

Since the Court's decision in *Brown*, California has reduced its current prison population to 134,109—still 24,109 inmates beyond the

30. *Brown*, 131 S. Ct. at 1947.

31. Maureen Mullen Dove, *Law and Fact of Health Care in Prisons*, 45 MD. B.J. 4, 13 (2011); *Problems*, *supra* note 15, at 28.

32. *Brown*, 131 S. Ct. at 1932.

33. *Id.* at 1933.

34. *Id.*; *see also ACLU Releases Expert's Report on Nightmarish Conditions at Men's Central Jail in Los Angeles*, ACLU (Apr. 14, 2009), http://www.aclu.org/prisoners-rights/aclu-releases-experts-report-nightmarish-conditions-mens-central-jail-los-angeles [hereinafter *ACLU Releases Expert's Report*] (describing the suicide of a prisoner who was confined in solitary while being held for a drug possession charge).

35. *Brown*, 131 S. Ct. at 1933-34.

36. *Id.* at 1917.

37. *Id.*

requisite population mandated by the decision.[38] The State of California claimed that it had reduced the prison population by 19,000 (approximately 180% of capacity) as of June 2011.[39] However, it is difficult to tell how much of this is actually a "reduction" given that a process called "realignment"—which shifts inmates to local and county jails and thus "reduces" the prison population—has been a primary method for complying with the order in *Brown*.[40] Realignment has prisoners' rights advocates worried about increased instances of violence by even lesser-trained staff and a mere transfer of the problems of inadequate treatment and overcrowding to local and county jails:

> [S]everal advocates for prisoners say they worry that the state is not doing enough to ensure that the counties will consider alternatives to jail, and several counties have said they will deal with the influx simply by adding more beds to their jails. Many of the county jails across the state are already overcrowded; the Los Angeles County jails are being investigated by the F.B.I. over accusations of inmate abuse by deputies.[41]

The actions being taken by California are addressing the symptoms but not the disease of prisoner mistreatment and inadequate mental health care. Rather than actually contending with the problem of adequate treatment for the mentally ill amongst the incarcerated population, realignment has led to a circumvention of the problem.

One of the top concerns regarding the realignment process is that it will continue to put pressure on officials to release prisoners that will ultimately reoffend and jeopardize public safety.[42] Public opinion in response to *Brown* has been measured regarding the prospect of prisoner release into the general population. A poll released in 2011 by Farleigh Dickinson University just after the decision was handed down showed that public opinion tended to disfavor release of prisoners or depopulation, even in the face of significant overcrowding or

38. CAL. DEP'T OF CORR. & REHAB., WEEKLY REPORT OF POPULATION AS OF MIDNIGHT, AUGUST 8, 2012 (2012), *available at* http://www.cdcr.ca.gov/Reports_Research/Offender_ Information_Services_Branch/WeeklyWed/TPOP1A/TPOP1Ad120808.pdf.

39. John Gibeaut, *Reliving the Philadelphia Story: After Philadelphia Prison Case, Many Still Weigh the Effects of Releasing Inmates*, ABA JOURNAL, Sept. 1, 2011, at 24, *available at* http://www.abajournal.com/magazine/article/
after_prison_case_many_still_weigh_the_effects_of_releasing_inmates.

40. *Id.* at 25; Medina, *supra* note 13, at A14 ("[U]nder the plan, inmates who have committed nonviolent, nonserious and nonsexual offenses will be released back to the county probation system rather than to state parole officers.").

41. Medina, *supra* note 13, at A14.

42. Gibeaut, *supra* note 39, at 25.

potential danger to prison staff and deputies.[43] However, initial reactions to the decision may be somewhat misplaced because the infrastructure set up by California to administer the depopulation has been quite unclear, and thus may have unjustifiably heightened public concerns.

Given that the Court offered minimal guidance regarding the process by which California was to achieve 137.5% capacity, the resulting reshuffling of prisoners is not particularly surprising: moving the problem around inherently requires less effort than constructing a long-term solution. However, as discussed *supra*, realignment only serves to redistribute the problems of overcrowding amongst different levels of local and municipal government with varying resources for providing mental and medical health care, facility capacity, and staff training.[44] Some academics have even characterized the decision in *Brown* and the resulting changes occurring in the California prison system as only "minimal relief" for the incarcerated mentally ill.[45] As one scholar noted, "depopulating prisons in hopes of solving the problems of inadequate care and treatment is like expanding tax benefits for the wealthy in order to relieve joblessness and the serious social consequences of being unemployed."[46] This strategy of depopulation does nothing to directly address or ensure access to care for the incarcerated mentally ill, and is yet another reason why calculated depopulation through a targeted strategy of treatment for the incarcerated mentally ill, as opposed to blunt depopulation through realignment, is a better solution for states looking to provide adequate mental health care pursuant to the Eighth Amendment.

2. The Shortcomings of *Brown*

Justice Scalia called the majority's decision in *Brown*, "the most radical injunction issued by a court in our Nation's history."[47] But

43. Press Release, Fairleigh Dickinson Univ., U.S. Voters Weigh in on *Brown v. Plata*, Case Involving Prison Overcrowding (May 23, 2011), *available at* http://publicmind.fdu.edu/2011/brownvplata/.

44. *See supra* note 40 and accompanying text.

45. John W. Parry, *Supreme Court Embraces Minimal Relief for California Prisoners with Mental Disabilities and Other Serious Health Care Needs*, 35 MENTAL & PHYSICAL DISABILITY L. REP. 545, 545 (2011).

46. *Id.*

47. Brown v. Plata, 131 S. Ct. 1910, 1950 (2011) (Scalia, J., dissenting).

perhaps it wasn't "radical" enough.[48] In fact, the Court's opinion in *Brown* fell squarely within the bounds of the remedies authorized by the PLRA.[49] After mandating the reduction of the California prison population to 137.5% of capacity, the Court, in further deference to the state, left the method and manner of reduction up to the state.[50] The Court determined that the "primary cause" of the violation in *Brown* was overcrowding.[51] Undeniably, overcrowding exacerbates poor confinement conditions, but it is not the root cause of inadequate treatment for the incarcerated mentally ill.[52] *Brown* thus represents a missed opportunity by the Court to more firmly direct states toward focused remedies for adequate treatment of the incarcerated mentally ill, such as the establishment of least restrictive care programs.[53]

While the outcome in *Brown* is flawed in many respects, the majority's opinion was not unsupportive of the need to remedy the Eighth Amendment violation found in California prisons. Indeed, the Court "reaffirmed that when constitutional rights are violated, federal courts have the power . . . and duty . . . to step in and enforce them,"[54] but the controversial prison release order handed down in *Brown* was a blunt tool offered to solve the very nuanced problem of how states should remedy constitutional violations of prisoners' Eighth Amendment right to adequate mental and medical health care services.[55] As noted previously, the Court's order has primarily resulted in "realignment" of inmates to other local and county jails in the system,[56] a strategy sometimes undertaken in an attempt to relieve overcrowding.[57] While realignment may relieve the problems of overcrowding in prisons to an extent, merely shifting portions of the prison population

48. *See infra* Part III (proposing that adoption of a least restrictive program of care for mentally ill inmates is a better way to address the constitutional violations in *Brown* while simultaneously easing prison overcrowding).

49. 18 U.S.C. § 3626 (2006); *Brown*, 131 S. Ct. at 1941-42.

50. *Leading Cases*, *supra* note 22, at 261-62.

51. *Brown*, 131 S. Ct. at 1932.

52. *See supra* Part I.A.1.

53. Parry, *supra* note 45.

54. *See Brown*, 131 S. Ct. at 1928; *Problems*, *supra* note 15, at 25.

55. *Brown*, 131 S. Ct. at 1944 (stating that the "PLRA requires a court to adopt a remedy that is 'narrowly tailored'"); *see also* Alexander A. Reinert, *Release as Remedy for Excessive Punishment*, 53 WM. & MARY L. REV. 1575, 1601 (2012) ("Indeed, the Supreme Court found that the remedy of release was appropriate in Plata even though many of the prisoners benefiting from the release were not contemporaneously experiencing harm caused by prison overcrowding.").

56. *See supra* Part I.A.1.

57. Similar to the realignment administered by California, a similar process has also been undertaken in Harris County, Texas. *See* Marcia Johnson & Luckett Anthony Johnson, *Bail: Reforming Policies to Address Overcrowded Jails*, *the Impact of Race on Detention*, *and Commu-*

to smaller local and county facilities that are even less prepared to deal with mentally ill prisoners only serves to exacerbate the problem of delivering adequate mental health care.[58]

However, lawsuits challenging constitutional violations to the provision of adequate mental and physical health care in prisons are not enough to remedy the underlying violations.[59] Certainly, decreasing the prison population is a part of the solution, but the Court in *Brown* fell short of offering a real remedy to inadequate care. Simply using the blunt tool of depopulation, amounting to realignment of inmates, is not going to achieve adequate care for the incarcerated mentally ill.[60] Any strategy of depopulation must be coupled with a targeted treatment[61] program for this population of prisoners, and the onus rests with state governments to actively establish and invest in the success of such programs, as Pennsylvania did when it closed Pennhurst State School & Hospital.[62] As one commentator observed, it is unfortunate that "in institutional reform litigation of this sort, if the ancillary issues cannot be resolved, the litigation that results may gobble up resources that could more productively be used to ameliorate the conditions at issue."[63] Accordingly, if depopulation is not coupled with a plan for administering treatment to the incarcerated mentally ill, we will continue to see egregious cases wind their way through the court system decade after decade, "gobbling up" the resources necessary to promote real change in the conditions of incarceration and the adequate provision of mental health care for inmates.

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nity Revival in Harris County, *Texas*, 7 NW. J.L. & SOC. POL'Y 42, 45 (2012) (building more jails and jail cells).

58. Medina, *supra* note 13 and accompanying text; *see also* Michael Montgomery, *Were Counties Prepared for Flood of Inmates Under Realignment?*, THE CAL. REP. (Aug. 20, 2012), http://www.californiareport.org/archive/R201208200850/a; Bill Silverfarb, *Bracing for Extra Inmates*, SAN MATEO DAILY J., Aug. 2, 2011, http://www.smdailyjournal.com/article_preview.php?id=164203&title=Bracing%20for%20extra%20inmates.

59. *See* Amy L. Katzen, *African American Men's Health and Incarceration: Access to Care Upon Reentry and Eliminating Invisible Punishments*, 26 BERKELEY J. GENDER, L. & JUST. 221, 251 (2011) (stating the experience of incarceration itself is damaging to an inmate's health).

60. *See* Parry, *supra* note 45, at 545.

61. *See Leading Cases*, *supra* note 22, at 265 ("[The court determined that] a release order limited to the current plaintiffs 'would, if anything, unduly limit the ability of State officials to determine which prisoners should be released.'").

62. *See infra* Part II.A.

63. Dove, *supra* note 31, at 10.

B. The Eighth Amendment Mandate—a Constitutional Right to Adequate Treatment for the Incarcerated Mentally Ill

1. Eighth Amendment Obligations and the Prison Litigation Reform Act (PLRA)

> Excessive bail shall not be required, nor excessive fines imposed, nor cruel and unusual punishments inflicted. U.S. CONST. amend. VIII.

Inhumane conditions in jails have historically been regarded by courts as rising to the level of constitutional violations.[64] The law gives a clear mandate under the Eighth Amendment that prisoners' medical and mental health needs must be attended to adequately.[65] Indeed, "[t]he only population in the United States with a constitutional right to health care is the incarcerated."[66]

States are considered to have a "carceral" obligation under the Eighth Amendment to provide adequate mental health care and medical treatment.[67] This obligation came to include the right to adequate care for the incarcerated through the recognition that conditions of confinement are "punishment"[68] and that inadequate provision of basic necessities, including medical and mental health care, stand in violation of the Eighth Amendment when they are found to vitiate the basic human dignity of the inmate and result in the unnecessary infliction of pain.[69]

The jurisprudence regarding prisoner's rights cases under the Eighth Amendment has evolved significantly in the last century. At

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64. *See* Atkins v. Virginia, 536 U.S. 304, 311-12 ("'The basic concept underlying the Eighth Amendment is nothing less than the dignity of man . . . . The Amendment must draw its meaning from the evolving standards of decency that mark the progress of a maturing society.'") (quoting Trop v. Dulles, 365 U.S. 86, 100-01 (1958)); Johnson & Johnson, *supra* note 57, at 45-46.

65. Dove, *supra* note 31, at 5; *see also* BARRY ZACK ET AL., CTR. FOR AIDS PREVENTION STUDIES UNIV. CAL. S.F., WHAT IS THE ROLE OF PRISONS IN HIV, HEPATITIS, STD AND TB PREVENTION? (2000), *available at* http://www.heart-intl.net/HEART/Institut/Comp/Whtistheroleof prisonsinHIV.htm.

66. *See supra* note 65 and accompanying text.

67. Sharon Dolovich, *Cruelty*, *Prison Conditions*, *and the Eighth Amendment*, 84 N.Y.U. L. REV. 881, 881 (2009).

> At the heart of the argument is the recognition that the state, when it puts people in prison, places them in potentially dangerous conditions while depriving them of the capacity to provide for their own care and protection. For this reason, the state has an affirmative obligation to protect prisoners from serious physical and psychological harm. This obligation, which amounts to an ongoing duty to provide for prisoners' basic human needs, may be understood as the state's carceral burden.

Id.; *see also* Smith, *supra* note 6, at 522 (arguing that the state is obligated to provide necessary care when a prisoner is deprived of liberty).

68. Reinert, *supra* note 55, at 1595.

69. *Id.* (citation omitted).

one time, such cases were nearly unheard of, as there was a complete "hands-off" approach by the courts, which left the system of prisoner treatment entirely in the hands of state and federal officials. Further transitions occurred after the revival of the Civil Rights Act of 1871 by the Supreme Court in 1961 and the decision in *Robinson v. California*,[70] which found the Eighth Amendment applicable to the states through the Due Process Clause of the Fourteenth Amendment. This opened the door for federal prisoner's rights suits under the Eighth Amendment. However, the allowance of prisoners' rights suits that developed in the wake of *Robinson* gave way to the current governing statute—the Prison Litigation Reform Act (PLRA). The PLRA was promulgated amidst a political narrative contending that expansive prisoner access to the courts was resulting in a backlog of "frivolous law suits."[71] While the PLRA poses significant challenges and high burdens for prisoners seeking to sue for Eighth Amendment violations,[72] "courts . . . have increasingly recognized that there is a definite nexus between the right of a prisoner to essential medical care and his right to be spared from cruel and unusual punishment."[73]

The PLRA affords inmates standing to sue under federal statutory law and outlines the process for pursuing a claim. The PLRA changed three basic components of pursuing such claims.[74] First, the plaintiffs must "exhaust" all modes of redress within their individual jurisdiction in an attempt to remedy the problem that is central to their claim.[75] Secondly, the PLRA requires that prior consent decrees applicable to the matter are terminated before the suit can continue.[76] As such, many times the "exhaustion of remedies" requirement of the PLRA is demonstrated by the plaintiffs through proof that prior consent decrees enforced by special masters in an effort to address the

70. Robinson v. California, 370 U.S. 660, 667 (1962).

71. Dove, *supra* note 31, at 10.

72. *See infra* note 80 and accompanying text.

73. William H. Danne, Jr., Annotation, *Prison Conditions as Amounting to Cruel and Unusual Punishment*, 51 A.L.R. 3D 111 (2012).

74. *See* Philip White, Jr., Annotation, *Construction and Application of Prison Litigation Reform Act—Supreme Court Cases*, 51 A.L.R. FED. 2D 143 (1978).

75. *See* 42 U.S.C.A. § 1997e(a) (2006); White, Jr., *supra* note 74, § 8. This process is termed the "exhaustion of remedies." Supreme Court jurisprudence surrounding the PLRA has focused on interpreting the bounds of the statute, most often, what is meant by the requirement of "exhaustion of remedies." *See id.* § 12.

76. *Id.* § 14; *see also* John Boston, *The Prison Litigation Reform Act*, 640 PRACTISING L. INST. LITIG. & ADMIN. PRAC. COURSE HANDBOOK SERIES 687, 693 (2000) (terminating existing prospective relief).

alleged grievance were unsuccessful.[77] To that end, the PLRA arguably eliminated the prior discretion of district courts in granting a stay of these decrees pending litigation and instead imposed an automatic stay of the decrees. This provision cuts both ways: on the one hand it may save the state money and duplicitous effort to cease action under a prior consent decree; on the other hand, the automatic stay provision of the PLRA may cut short effective modes of redress and disallow courts an opportunity to evaluate long term effectiveness of a previous program created to address inadequacies of treatment within a prison.[78] Lastly, the PLRA imposed a reduction in attorney's fees in an effort to discourage litigation of "frivolous" claims.[79]

The PLRA also specifies the grounds upon which prisoner release orders, such as the one in *Brown*, may be issued. The following conditions must be satisfied: (1) the court has issued a previous less intrusive order for relief, which has not remedied the deprivation of the federal right; (2) the prison system has a reasonable amount of time to comply with the earlier order; (3) the remedy is ordered by a three-judge court; and (4) the three-judge court finds by clear and convincing evidence that overcrowding is the primary cause of the constitutional violation and no other relief will remedy the violation.[80] But a quick examination of this aspect of the PLRA demonstrates how significant constitutional violations experienced by prisoners may in fact languish for decades, waiting for consent decrees to result in something between marginal success and outright failure.[81]

The PLRA poses significant hurdles for prisoners seeking to challenge conditions of confinement as constitutional violations.[82] The statute has been strongly criticized by prisoner's rights advocates as "separate but unequal," noting that statutes of limitations in some

77. *See* Danne, Jr., *supra* note 73, § 9. This was demonstrated in *Brown* upon review of the *Coleman* consent decree and the failure of the state to comply with the District Court order in *Plata*. *See supra* Part I.A.

78. 42 U.S.C. § 1997e(a) (2006); Catherine T. Struve, *Time and the Courts: What Deadlines and Their Treatment Tell Us About the Litigation System*, 59 DEPAUL L. REV. 601, 615-16 (2010).

79. 42 U.S.C. § 1997e(d) (2006); *see* Janes v. Hernandez, 215 F.3d 541, 543 (5th Cir. 2000) (refusing to limit attorney's fees because Janes was not a prisoner, and thus the Act did not apply). *See generally* White, Jr., *supra* note 74 (explaining that the PLRA's reduction in hourly rate for attorney's fees applied prospectively).

80. 18 U.S.C. § 3626 (a)(3)(A), (E) (2012); Brown v. Plata, 131 S. Ct. 1910, 1929 (2011).

81. *See* Boston, *supra* note 76, at 693 ("[The PLRA is] a comprehensive charter of obstructions and disabilities designed to discourage prisoners from seeking judicial redress."); *see also* Joshua S. Moskovitz, Note, *The Usual Practice: Raising and Deciding Failure to Exhaust Administrative Remedies as an Affirmative Defense Under the Prison Litigation Reform Act*, 31 CARDOZO L. REV. 1859, 1860-62 (2010) (describing the hurdles for prisoner plaintiffs).

82. Moskovitz, *supra* note 81, at 1860-62.

cases under the PLRA are reduced to forty-eight hours.[83] In some instances there are requirements to first discuss the matter with the staff member being complained about; furthermore, there is no recovery for mental or emotional injury without an accompanying physical injury.[84]

Additionally, the "exhaustion of remedies" requirement of the PLRA means that a prisoner must take his or her complaint completely through the grievance system established at the jail or prison—a system established by the prison officials that these prisoners are likely seeking to sue.[85] These requirements create an incredibly high burden for prisoners to meet, despite the well-recognized constitutional mandate for adequate care under the Eighth Amendment.[86] Unfortunately, when it comes to suits arising under the PLRA, the Court seems unwilling to allow constitutional values to trump statutory requirements, valuing judicial efficiency over the fulsome evaluation and remedy of grievances regarding individual constitutional rights.

Undeniably, the PLRA restricted the Court's decision in *Brown*; the statute requires the relief in such litigation to be "narrowly drawn," by the "least intrusive means necessary to correct the [constitutional violation]" and "substantial weight [must be given to any possible] adverse impact on public safety [and] the operation of [the corrections system]."[87] As a result of the restrictions on court ordered remedies under the PLRA, the burden is on states to break this recursive cycle of litigation producing no real solution to the problem of inadequate mental health care for the incarcerated mentally ill. States must adopt long-term solutions for their own fiscal and societal benefit, by developing least restrictive care programs for the incarcerated mentally ill.

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83. *See Problems*, *supra* note 15, at 27.

84. *See id.* at 28 (denying emotional injuries without physical injuries); *see also* Oliver v. Keller, 289 F.3d 623, 626-27 (9th Cir. 2002) (holding that proof of injury must be more than de minimus). *See generally* Jonathan M. Purver & Patricia A. Hageman, *Asserting Claims of Unconstitutional Prison Conditions Under 42 U.S.C.A. § 1983*, 64 AM. JURIS. TRIALS 425, § 9 (1997) (explaining that compensatory damages are available under § 1983 only upon proof of actual injury).

85. *Problems*, *supra* note 15, at 27.

86. *Id.*

87. 18 U.S.C. § 3626(a)(1)(A) (2006).

C. The Current State of Affairs in the American Prison System

1. Incarceration Rates

The United States has the highest per capita rate of incarceration in the world, with nearly 2.3 million people behind bars—over a quarter of all prisoners in the world.[88] Further, between 1972 and 2008, the number of persons housed in penal facilities in the United States has accelerated by a rate of 705%.[89] Even more troubling, a significant portion of this population has some kind of mental disorder.[90]

The booming incarceration rate in the United States took flight beginning in the 1970s. While in 1970, just 300,000 people were incarcerated in the United States, by 1997, 1.6 million were incarcerated in this country.[91] Additionally, from 1995 to 2005 the total prison population added almost 600,000 inmates.[92] Much of the increase in incarceration can be attributed to the "War on Drugs," coupled with changes to the Federal Sentencing Guidelines that have caused the prison system to grow exponentially, locking up thousands upon thousands of nonviolent drug offenders.[93]

Indeed, prisons have become the de facto mental health system of the United States, despite uncontroverted evidence that incarceration of this population can exacerbate existing conditions.[94] In many states, jails operate as the largest mental health facilities in the state,[95]

88. *See* Hafemeister et al., *supra* note 6, at 163; Johnson & Johnson, *supra* note 57, at 44; *Problems*, *supra* note 15, at 28.

89. *See* Johnson & Johnson, *supra* note 57, at 44. Beyond the scope of this Comment are the consequences of racial inequality in the criminal justice system, though it is worth mentioning that these numbers are even more loathsome when race is taken into account: one in eleven African-American men are behind bars. *Problems*, *supra* note 15, at 29. Furthermore, extreme racial inequalities and a profound lack of oversight of the prison system heighten the crisis. *Id.* This confluence of issues has the result of making the enforcement and provision of adequate mental health care (among other "health, safety, and human dignity standards") extraordinarily complex and problematic. *Id.*

90. Hafemeister et al., *supra* note 6, at 155.

91. *See* Johnson & Johnson, *supra* note 57, at 47; *see also* Purver & Hageman, *supra* note 84, § 3 (prison population has soared).

92. Johnson & Johnson, *supra* note 57, at 48.

93. Hafemeister et al., *supra* note 6, at 171; THE SENTENCING PROJECT, THE FEDERAL PRISON POPULATION: A STATISTICAL ANALYSIS 1, *available at* http://www.sentencingproject.org/doc/publications/sl_fedprisonpopulation.pdf; U.S. DEP'T OF JUSTICE, THE IMPERATIVE TO INCREASE THE PRODUCTIVITY OF PUBLIC SAFETY EXPENDITURES IN AN ERA OF GOVERNMENTAL AUSTERITY 7 (2012), *available at* http://www.justice.gov/criminal/foia/docs/2012-annual-letter-to-the-us-sentencing-commission.pdf.

94. Hafemeister et al., *supra* note 6, at 155, 167, 174; *see also* Smith, *supra* note 6, at 522 (citing HUMAN RIGHTS WATCH, ILL-EQUIPPED: U.S. PRISONS AND OFFENDERS WITH MENTAL ILLNESS 1 (2003), *available at* www.hrw.org/sites/default/files/reports/usa1003.pdf).

95. Johnson & Johnson, *supra* note 57, at 52. In Harris County (Houston), Texas, it is estimated that nearly 25% of the inmates have a mental illness. *Id.*

and the "2000 Census of state and federal prisons reported that the 'primary or secondary function' of 150 prisons nationwide is 'mental health confinement.'"[96] In fact, Cook County and Los Angeles County jails in Illinois and California, respectively, have been commonly referred to as "two of the largest 'mental health' facilities in the country."[97]

Multiple factors have led to the dramatic increase of incarcerated mentally ill,[98] among them, the deinstitutionalization of mental hospitals without corresponding increases in funding for community-based treatment,[99] decreased toleration of homelessness,[100] and the "War on Drugs."[101] The problems that arise from failing to provide adequate treatment for the incarcerated mentally ill are evident to stakeholders on all sides. Law enforcement officials have even spoken out:

> Although we have made great progress . . . we are still unable to change the fundamental fact that has forced local law enforcement into the role of de facto mental health professionals: People simply cannot get the treatment and services they need to lead stable, healthy lives.
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> . . . .
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> . . . [M]any individuals with untreated mental illness who lack access to care end up cycling through the criminal justice system at a cost that is significantly higher to taxpayers than that of providing ongoing, community-based treatment and services . . . .[102]

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96. Hafemeister et al., *supra* note 6, at 172-73.

97. *Id.* at 173.

98. *See id.* at 171. Indeed, there are some who have said there is a direct correlation between the deinstitutionalization of mental hospitals and the increase in incarcerated mentally ill. Harcourt, *supra* note 16, at 87 (citing and discussing Steven Raphael, The Deinstitutionalization of the Mentally Ill and Growth in the U.S. Prison Populations: 1971 to 1996 (Sept. 2000) (unpublished manuscript) (on file with the Goldman School of Public Policy at University of California, Berkeley)).

99. Hafemeister et al., *supra* note 6, at 167-68.

100. *Id.* at 169-70.

101. *Id.* at 171. The "War on Drugs" led to increases of incarceration of the mentally ill because many mentally ill persons also have a drug abuse problem. *Id.*

102. Johnson & Johnson, *supra* note 57, at 53.

> A prime example of cost shifting has occurred within the Harris County Jail, now the largest mental health facility in Texas. The Harris County Jail treats more individuals with mental health issues on a daily basis than our state's 10 psychiatric hospitals combined. This is especially worrisome given that the United States Department of Justice reports that it costs 60 percent more to incarcerate inmates with serious mental illnesses than it costs to house typical inmates.

Id.; *see also* Sharaya L. Cabansag, Note, *Defending Access to Community-Based Services for Individuals with Developmental Disabilities in the Wake of the "Great Recession*," 55 How. L.J. 1025, 1039 n.102 (2012) (citing Ron Honberg et al., Nat'l Alliance on Mental Illness, State Mental Health Cuts: The Continuing Crisis 3 (2011), *available at* http://www. nami.org/ContentManagement/ContentDisplay.cfm?ContentFileID=147763 ("The situation has gotten so bad that Cook County Sheriff Tom Dart announced in May 2011 that he was considering

2. Mental Illness Amongst the General Population and the Incarcerated Population

In the general population, it is estimated that one in four Americans suffer from a diagnosable mental disorder,[103] with the rate of serious mental disorders (schizophrenia, major depression, bipolar disorder) between 5 and 7%.[104] However, nearly 46% of Americans will suffer some form of mental illness during their lifetime.[105] Furthermore, according to the National Alliance on Mental Illness, between 25 and 40% of Americans who ultimately suffer from mental illness will at some point enter the criminal justice system.[106]

Mental illness amongst the incarcerated is incredibly prevalent; there are estimates that 1.25 million people in U.S. prisons suffer from a mental disorder.[107] Obviously, the incarcerated mentally ill are no small subset of the prison population, with the Bureau of Justice Statistics estimating that more than half of all incarcerated individuals suffer from some form of mental illness.[108] As noted by multiple scholars: "[there are] 'three times more mentally ill people in prisons than in mental health hospitals, and . . . prisoners have rates of mental illness that are two to four times greater than the rates of members of the general public.'"[109] Mental illness can result in "disorganized thought processes, impaired reality testing, poor planning and prob-

filing a lawsuit against the state, 'accusing it of allowing the jail to essentially become a dumping ground for people with serious mental health problems.'")).

103. Hafemeister et al., *supra* note 6, at 156. The National Institute of Mental Health reports similar numbers. *See Prevalence of Serious Mental Illness Among U.S. Adults by Age, Sex, and Race*, NAT'L INST. OF MENTAL HEALTH, http://www.nimh.nih.gov/statistics/SMI_AASR.shtml (last visited Sept. 1, 2012).

104. *See supra* note 102 and accompanying text.

105. Hafemeister et al., *supra* note 6, at 156.

106. *Id.* at 172. *See generally* Jeneen Interlandi, *A Madman in Our Midst*, N.Y. TIMES, June 24, 2012, at MM24, *available at* http://www.nytimes.com/2012/06/24/magazine/when-my-crazy-father-actually-lost-his-mind.html?pagewanted=all (chronicling the author's own experience watching her father's journey through the criminal justice system as a result of his severe mental health issues).

107. *See Mentally Ill in Prisons Quadrupled*, *supra* note 5. Notably, estimates of the incarcerated mentally ill vary, though all estimates are a significant number of the prison population. Hafemeister et al., *supra* note 6, at 171 (estimating the number of mentally ill individuals in U.S. prisons to fall between 200,000 and 300,000).

108. Hafemeister et al., *supra* note 6, at 172. To be clear, this Comment in no way intends to imply that all persons with mental illness commit crimes. However, the "pattern of violence is real," and there is an unfortunate and undeniable collision between those suffering from serious mental disorders and the criminal justice system. Ilissa L. Watnik, Comment, *A Constitutional Analysis of Kendra's Law: New York's Solution for Treatment of the Chronically Mentally Ill*, 149 U. PA. L. REV. 1181, 1187 (2001).

109. Hafemeister et al., *supra* note 6, at 172.

lem solving skills, and impulsivity,"[110] in essence, behaviors that can readily lead to or make someone prone to criminal behavior.[111] Furthermore, incarceration exacerbates existing mental health problems, and can be extremely detrimental to the mental and physical health of previously healthy inmates,[112] let alone those with preexisting conditions.[113]

3. Adequate Treatment for the Incarcerated Mentally Ill: The Scope of the Problem

The high rate of mental illness amongst the incarcerated coupled with the dismal and aggravating conditions of confinement place these individuals in a recursive cycle of recidivism, violence, and extended incarceration.[114] Individuals with mental disorders have trouble following protocol while in jail—leading to common incidents of violence against them by both staff[115] and fellow inmates, as well as extended sentences for misbehavior.[116] Overcrowding undoubtedly affects the entire system,[117] but current methods of management for the incarcerated mentally ill are beyond woefully inadequate; they are inhumane.[118] Many of these prisoners are placed in "Supermax"[119]

110. *Id.* at 157.

111. *See id.* at 150 ("A significant proportion of individuals whose actions are brought to the attention of the criminal justice system have a mental illness.").

112. Katzen, *supra* note 59, at 228-31.

113. *Id.*; Hafemeister et al., *supra* note 6, at 154 ("Placement of an individual with a serious mental disorder within a correctional facility tends to place such individuals at risk of harming themselves or being harmed by others. Such facilities generally do not provide an appropriate environment for the treatment of these individuals.").

114. Smith, *supra* note 6, at 497 (explaining that over half of all incarcerated persons suffer from mental illness).

115. *See* Sabrina Canfield, *New Orleans Prison Described as a Gulag*, COURTHOUSE NEWS SERVICE, Apr. 4, 2012, http://www.courthousenews.com/2012/04/04/45303.htm; Hafemeister et al., *supra* note 6, at 175 ("[B]ecause jails and prisons are intended to administer punishment and protect society, their primary mission does not encompass the delivery of mental health services and, indeed, this is often antithetical to what staff perceives to be their primary responsibility.").

116. Hafemeister et al., *supra* note 6, at 174 ("Mentally ill prisoners are not only inherently vulnerable to abuse, but they are also often provocatively irritating and offensive to other prisoners and prison guards. Yelling, removing clothes, throwing food, setting fires to drive demons out of the cell are not unusual behaviors for them. Attacks, rapes and dominating relationships are often regular plights of mentally ill prisoners. Suicide is also a more common problem."); Johnson & Johnson, *supra* note 57, at 74-75.

117. *Problems*, *supra* note 15, at 26.

118. *See* Jules Lobel, *Prolonged Solitary Confinement and the Constitution*, 11 U. PA. J. CONST. L. 115 (2008) (noting the "disturbing trend" of growth of supermax prisons employing solitary confinement as a primary disciplinary tactic).

119. The term "Supermax" can be defined as a "dedicated unit or an entire prison where prisoners are held in long-term solitary confinement, meaning 23 or more hours a day locked in a cell with minimal social interaction and environmental stimulation—for months, years, or decades at a time." *Problems*, *supra* note 15, at 25.

facilities or wards, and this practice has become a "routine, long-term management strategy"[120] for inmates with mental illness. While not all prisoners who are isolated in these conditions are mentally ill, some states estimate that their facilities contain a third to "well over half" mentally ill inmates.[121] Not surprisingly, a large number of suicides have been reported amongst those housed in isolation;[122] this type of treatment is damaging to healthy human beings, but it is especially dangerous and can accelerate a noxious breakdown amongst people with a mental illness.[123]

The cycle of incarcerating the mentally ill does not start at adulthood. The practice of "warehousing youth with mental disorders in juvenile detention centers" is just as widespread as the "de facto mental health facilities" that adult prisons have become,[124] with as many as 50-75% of juvenile offenders having a mental health condition.[125] There are also concerns that prisons and penal facilities have become "criminogenic," serving to exacerbate currently manifested mental disorders and putting those with no preexisting condition at a high risk of developing one, both at juvenile and adult levels of incarceration.[126] The right method for providing adequate mental health care for this population cannot be accomplished through a reduction in overcrowding alone, but the method must establish a system that

120. *Id.*; *see also* Lobel, *supra* note 118, at 115 (noting the trend in the increasing use of solitary confinement as punishment in U.S. prisons).

121. *Problems*, *supra* note 15, at 25.

122. *See ACLU Releases Expert's Report*, *supra* note 34. A particularly horrific example of how isolation can lead to suicide is the Orleans Parish Prison in New Orleans, Louisiana, where upon admission, prisoners are denied medication and when they unsurprisingly become suicidal due to a lack of treatment and management of their condition, they are housed at OPP in the following fashion:

> Suicidal prisoners with mental health needs are transferred to a direct observation cell, in which they are held almost naked for days. Once they no longer express a desire to injure themselves, they then are transferred to the psychiatric tiers - where they are locked down in their cells for 23 hours a day and deprived of mental health interventions. People living there are not allowed to go outside or visit with their families. Overhead lights are on 24 hours per day, and the tier contains actively psychotic people living on the ground in overcrowded cells. Deputies do not walk the tiers.

Canfield, *supra* note 114 (citation omitted).

123. *Problems*, *supra* note 15, at 26 (explaining that solitary confinement is especially damaging for those with mental illness). *See generally* Craig Haney, *Mental Health Issues in Long-Term Solitary and* "*Supermax*" *Confinement*, 49 CRIME & DELINQ. 124 (2003) (discussing the mental health issue that can be exacerbated or triggered by solitary or "Supermax" confinement).

124. Simone S. Hicks, Note, *Behind Prison Walls: The Failing Treatment Choice for Mentally Ill Minority Youth*, 39 HOFSTRA L. REV. 979, 981 (2011).

125. *Id.* at 982.

126. *Id.* at 988; *see also* Mary D. Fan, *The Political Climate Change Surrounding Alternatives to Incarceration*, 38 HUM. RTS. 6, 6 (2011).

fundamentally changes the way that treatment is approached for the incarcerated mentally ill.[127]

II. *PENNHURST* AND OTHER LESSONS FROM THE DEINSTITUTIONALIZATION OF MENTAL INSTITUTIONS

A. Precedent Through Action, Not Through Decision: The Practical Effect of the Closing of Pennhurst State School and Hospital

In 1984, the Supreme Court considered a claim brought on behalf of the mentally ill and developmentally disabled patients residing at Pennhurst State School & Hospital in Pennsylvania.[128] Though the *Pennhurst* decision was not specifically dispositive on the issue of adequate treatment of the institutionalized citizens in Pennhurst's care, the ultimate process by which the hospital was closed and its patients released can lend lessons to California and other states seeking to remedy inadequate treatment of the incarcerated mentally ill.

The plaintiffs in *Pennhurst* alleged distressingly insufficient treatment and abuses including physical and sexual abuse by staff, unhygienic living conditions, inattention leading to patient-on-patient violence, and overall treatment conditions resulting in a reversion of progress amongst the plaintiffs in their rehabilitation.[129] Plaintiffs alleged that these conditions were in violation of their federal constitutional and statutory rights.[130]

The Court's decision in *Pennhurst*, unlike the order handed down by the district court, did not address the conditions of confinement head-on nor did it offer a specific remedy for them.[131] Instead, the Court focused on the Eleventh Amendment implications at issue, finding that the district court had overstepped its bounds by ordering

127. The first step is an easing of crowding through a least restrictive care program, but also using the lessons from these models to incorporate better standards of treatment for the incarcerated mentally ill who remain behind bars. *See infra* Part.III.

128. Pennhurst State Sch. & Hosp. v. Halderman, 465 U.S. 89, 89 (1984).

129. *Id.* at 92-93 ("[The Supreme Court noted that] [c]onditions at Pennhurst are not only dangerous, with the residents often physically abused or drugged by staff members, but also inadequate for the "habilitation" of the retarded." (citing *Pennhurst I*, 451 U.S. 1, 7 (1981)).

130. *Id.* at 92. However, the core legal issues in the case revolved around the Eleventh Amendment and the Court's ability to order state officials to act in conformity with state law. *See id.* at 121.

131. *Id.* at 92-93.

the state to investigate through a special master, ultimately closing the school.[132]

The legal rule handed down in *Pennhurst* was that federal courts are not empowered to compel state officers to act in compliance with their state-law promulgated duties.[133] The Eleventh Amendment rendered such courts unable to grant the injunction requested by the petitioners litigating on behalf of patients at Pennhurst School and Hospital.[134]

While *Pennhurst* is primarily notable for its states' rights ruling, the practical effect of the decision and the subsequent action of the state of Pennsylvania is of greater importance here. Once the school closed, the state of Pennsylvania developed a system of "least restrictive care" for the former patients of Pennhurst, placing them in residential homes and other community-based treatment arrangements.[135] The Supreme Court did not order such a system; in fact, the decision issued left action entirely in the hands of state officials.[136] In response, the state systematically began to screen patients at Pennhurst and moved them into various least restrictive care settings: group homes, placement with relatives, and other community based treatment.[137] Certainly, not all types of community based treatment will be appropriate for the incarcerated mentally ill, however, a similar system of screening and methodical transfer of eligible candidates to GPS-monitored, secure group homes is a least restrictive care alternative that could be undertaken by California in response to *Brown*.

The closing of Pennhurst, and types of programs that were set up for Pennhurst's former patients were in furtherance of a movement toward "least restrictive care," which is now the prevailing standard for treatment of the non-incarcerated mentally ill and developmentally disabled.[138]

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132. *Id.* at 97-125.

133. *Id.* at 123-24.

134. *Id.*

135. *See generally* VALERIE J. BRADLEY ET AL., HUMAN SERVICES RESEARCH INST., A LONGITUDINAL STUDY OF THE COURT-ORDERED DEINSTITUTIONALIZATION OF PENNHURST: IMPLEMENTATION ANALYSIS # 3: ISSUES AFFECTING COMPLEX LITIGATION (1983), *available at* http://www.mnddc.org/parallels2/pdf/80s/83/83-hsri-long-study-deinst-pennhurst.pdf (discussing the effects of deinstitutionalization in Southeast Pennsylvania in response to the *Pennhurst* decision).

136. *See Pennhurst*, 465 U.S. at 123-25.

137. *See* Yakutchik, *supra* note 18.

138. *See* Olmstead v. L.C. *ex rel.* Zimring, 527 U.S. 581, 597, 599-601 (1999).

B. What Is Least Restrictive Care?

Least restrictive care typically includes placement in community-based residential homes coupled with individualized treatment plans that incorporate counseling by trained professional mental health staff and the measured use of psychotropic drugs.[139] "Least restrictive" is also a term of art that applies in many legal contexts, but was applied to those with mental disabilities through the promulgation of extended due process rights in the 1980s.[140] The Developmental Disabilities Bill of Rights and the Mental Health Bill of Rights applied the "least restrictive" doctrine to the mentally ill.[141] A central objective of both bills was the broadening of personal liberty interests of mentally ill persons, including autonomy regarding choice and planning of treatment options as well as the expansion of procedural due process rights in involuntary commitment situations.[142]

The development of least restrictive care within the field of treatment for mental and developmental disabilities has become so solidified that community-based least restrictive treatment is actually a statutory right for those with disabilities under Title II of the Americans with Disabilities Act (ADA) and *Olmstead*.[143] Ultimately, in the face of an inconclusive mandate by the Supreme Court in *Brown*, California and other states in similar positions should adopt a program of least restrictive care for the incarcerated mentally ill, similar to the actions taken by the state of Pennsylvania after the decision in *Pennhurst*.[144]

Current levels of mental health care treatment in California prisons only account for traditional in-house treatment and do not include a method of least restrictive care.[145] The concept of least restrictive care may be considered incongruent with the terms of incarcera-

139. *See* Jan C. Costello & James J. Preis, *Beyond Least Restrictive Alternative: A Constitutional Right to Treatment for Mentally Disabled Persons in the Community*, 20 LOY. L.A. L. REV. 1527, 1528 n.10 (1987).

140. *Id.*; *see also* Michael L. Perlin & Deborah A. Dorfman, *Therapeutic Jurisprudence and the Civil Rights of Institutionalized Mentally Disabled Persons: Hopeless Oxymoron or Path to Redemption?*, 1 PSYCHOL. PUB. POL'Y & L. 80, 82 (1995).

141. *See* 42 U.S.C. § 9501 (2006).

142. *See id.*

143. *See generally* Cabansag, *supra* note 102 (discussing the effects of curbing community mental health services and the struggle to continue to provide such services in the present economy).

144. *See* discussion *infra* Part III.

145. *See Frequently Asked Questions*, CA.GOV., http://www.cphcs.ca.gov/faq.aspx (last visited Sept. 1, 2012).

tion.[146] However, as was found through the process of deinstitutionalization of mental health facilities, mentally ill inmates stand at great risk of deterioration while confined, serving to exacerbate existing mental conditions.[147] This type of care, one that emphasizes individualized, deinstitutionalized treatment of mentally ill persons, has fast become one of the most successful methods of treatment for mental illness,[148] and is the cornerstone of treatment for persons with mental disorders.[149] The successful use of this method of care can and should be adapted to provide adequate treatment, and remedy Eighth Amendment violations, for the incarcerated mentally ill.[150]

C. Drawing Parallels: Alternatives to Mass Incarceration and the Deinstitutionalization of Mental Hospitals

Recently, scholars have noted the parallels between the deinstitutionalization of mental hospitals beginning in the 1960s and the emerging movement for a reduction of mass incarceration in the American criminal justice system.[151] The rates of institutionalization of individuals in mental hospitals and current rates of incarceration

146. Prisoners transferred to least restrictive care programs in residential homes may be considered to have it "easier" than those in prisons, and further, that placement in a "home" no matter how restricted does not require the prisoner to pay penance in the same way as incarceration in a jail or prison. *See* NORVAL MORRIS & MICHAEL TONRY, BETWEEN PRISON AND PROBATION, INTERMEDIATE PUNISHMENTS IN A RATIONAL SENTENCING SYSTEM 4 (1990).

147. It is well established that for those with mental illness—incarcerated or otherwise—institutionalization can exacerbate existing behavioral, social, and severe mental illness. *Problems*, *supra* note 15, at 26.

148. *See supra* note 135 and accompanying text.

149. *See* GARY R. BOND, BEHAVIORAL HEALTH RECOVERY MGMT. PROJECT, ASSERTIVE COMMUNITY TREATMENT FOR PEOPLE WITH SEVERE MENTAL ILLNESS 2 (2002), *available at* http://www.bhrm.org/guidelines/actguide.pdf (explaining that there are better long-term outcomes for people with mental illness in least restrictive care); WORLD HEALTH ORG., WHAT ARE THE ARGUMENTS FOR COMMUNITY-BASED MENTAL HEALTH CARE? 11 (2003), *available at* http://www.euro.who.int/document/E82976.pdf (explaining that in a study of patients released to community care, two thirds of patients were still living in original residences, fewer than 1 in 100 became homeless, and patients, quality of life greatly improved by move to community). Relatedly, least restrictive care is such a cornerstone of treatment that in involuntary commitment situations, the State must prove that least restrictive care is *not* available before a person can be institutionalized. 53 AM. JUR. 2D *Mentally Impaired Persons* § 55 (2012).

150. SUBSTANCE ABUSE & MENTAL HEALTH SERVS. ADMIN., NAT'L GAINS CTR. FOR BEHAVIORAL HEALTH & JUSTICE TRANSFORMATION, THE NATHANIEL PROJECT: AN ALTERNATIVE TO INCARCERATION PROGRAM FOR PEOPLE WITH SERIOUS MENTAL ILLNESS WHO HAVE COMMITTED FELONY OFFENSES 5 (2002), *available at* gainscenter.samhsa.gov/pdfs/jail_diversion/nathaniel_project. pdf (offering best practices for a successful least restrictive care program in New York); *see also* Hicks, *supra* note 124, at 1003-07.

151. Harcourt, *supra* note 16, at 54-56; *see* John Monahan, et al., *Mandated Treatment in the Community for People with Mental Disorders*, 22 HEALTH AFFAIRS 28, 28 (2003) (connecting the deinstitutionalization of mental health facilities with rising incarceration rates).

are quite similar.[152] And yet, as one scholar points out, relatively little has been written on the topic.[153] But, "this country has deinstitutionalized before,"[154] and indeed the factors that produced a push toward deinstitutionalization in the 1960s are present today: a strong impetus to reduce the prison industrial complex and mass incarceration, the advent of progressive developments in the area of psychotropic drugs, strained economic times, and an evolving and progressive view regarding the rights of prisoners.[155] Similar to the period of deinstitutionalization of mental hospitals, the presence of these factors may help to foster a political and social environment receptive to addressing the problem of inadequate treatment of the incarcerated mentally ill in a more direct and aggressive way.[156]

Prisoners' rights advocates and state governments looking to take advantage of such an amicable environment should seek to establish community-based least restrictive mental health care programs, such as those resulting from the deinstitutionalization of mental hospitals, including Pennhurst. Indeed, least restrictive care is the foundation influencing the treatment of individuals with disabilities and mental disorders today,[157] and it is the best model of treatment to be gleaned from the era of deinstitutionalization of mental hospitals.

While the focus of *Brown* was on prison depopulation, the underlying problem of inadequate treatment is bubbling up not only in California, but in North Carolina, Louisiana, and other states.[158] One can only hope that *Brown* does not represent the last opportunity to establish legal remedies for inadequate treatment of the incarcerated mentally ill. Further, if presented with a tangential issue, the Court and states facing this issue should choose to engage the problem of inadequate treatment straight on by mandating deinstitutionalization through the development of a system that incorporates least restric-

152. *See* Harcourt, *supra* note 16, at 54. For a contrasting view, see Monahan, et al., *supra* note 151, at 28.

153. Harcourt, *supra* note 16, at 55.

154. *Id.* at 54.

155. *Id.* at 72-85.

156. *See id.*

157. 56 C.J.S. *Mental Health* § 104 (2012) (expressing that persons with mental illness should be held in the least restrictive environment possible) (citations omitted).

158. *See Inmate Conditions at N.C. Prison Troubling*, CHARLOTTE OBSERVER, Nov. 23, 2011, http://www.charlotteobserver.com/2011/11/23/2797687/inmate-conditions-at-nc-prison.html; Laura Maggi, *Orleans Parish Prison Conditions Unconstitutional, Justice Department Finds*, NOLA.COM (Sept. 22, 2009, 9:00 PM), http://www.nola.com/crime/index.ssf/2009/09/justice_department_finds_some.html.

tive care for the incarcerated mentally ill, as outlined in the next section.

III. PROPOSAL: LEAST RESTRICTIVE CARE AS A MODEL FOR ADEQUATE PROVISION OF TREATMENT FOR THE INCARCERATED MENTALLY ILL

A. Mandating Depopulation Through a System of Individualized Care

The California prison system and a myriad of other state systems throughout the country face colossal problems. However, unlike the holding in *Brown*, the system of depopulation and treatment advocated here does not simply shift the problem around to county jails and prisons—this proposal offers a substantive solution to inadequate treatment of the incarcerated mentally ill. Instead of blunt depopulation of prisons as a remedy for inadequate treatment, states should pursue a system of individualized care akin to that established after *Pennhurst* and similar to successful juvenile programs in other jurisdictions.[159] Individualized care does not abandon supervision, nor does it preclude restitution that must be paid for crimes that have been committed.[160]

With a dramatic rise in the social consciousness of prisoners' rights issues, it has become largely uncontroversial that prisoners have the right to "the same level of medical care as free people."[161] This fact coupled with an awareness of the extraordinary financial costs of incarceration during a time of economic recession and corresponding cuts to state budgets creates an environment ripe for the implementation of least restrictive programs of care for the incarcerated mentally ill.[162] As one prisoners' rights advocate has characterized the current problem of inadequate care, "[t]here is a confluence of strong legal standards, tremendous need, and gross deficiencies in many, if not most, jurisdictions."[163]

159. Hicks, *supra* note 124, at 1005-07; *see also* 14A C.J.S. *Civil Rights* § 484 (2012). *See generally supra* note 134 and accompanying text.

160. *See* NORVAL MORRIS & MICHAEL TONRY, BETWEEN PRISON AND PROBATION, INTERMEDIATE PUNISHMENTS IN A RATIONAL SENTENCING SYSTEM 4-5 (1990). Undergoing treatment and serving time in a least restrictive care facility will still come with the personal autonomy restrictions that are allegedly manifested in the "retribution" of prison isolation. *Id.*

161. *Problems*, *supra* note 15, at 29.

162. *Id.*

163. *Id.* at 28.

Different approaches have been offered to deal with the incarcerated mentally ill, among them Mental Health Courts[164] and whole-system reform to place emphasis on principles of restorative justice.[165] Mental Health Courts and principles of restorative justice help to restructure the criminal justice system in a way that honors the procedural rights of those affected by a mental disorder (though not the criminally insane); this strong movement toward early diversion for the mentally ill is progressive, but these programs don't go far enough to address and model a sustainable method of *treatment* for this population once incarcerated. A system of least restrictive care is not a repackaged prisoner release or parole-style diversion program—it couples elements of empirically successful community-based treatment with measured and appropriate restrictions on autonomy and movement (such as GPS monitoring and secure yet community-based residential housing). In this way, the addition of least restrictive care programs would not only save this population from falling through the proverbial cracks in the procedural justice system,[166] but would facilitate adequate treatment to reduce recidivism and rehabilitate the mentally ill inmate.[167] Admittedly, similar to parole programs, there would have to be an acceptance of the fact that some amongst this population will re-offend. However, with proper treatment recidivism should decrease,[168] and the long-term benefits of a system of least restrictive care outweigh this cost.

B. Benefits of Least Restrictive Care

Least restrictive care offers substantial benefits over the status quo of incarceration or the blunt depopulation remedy of *Brown*. Benefits of least restrictive care include: (1) a general decrease in the prison population; (2) reduced recidivism through increased rehabilitation; and (3) lower costs of criminal justice enforcement to states, realized through reduced levels of incarceration.[169]

164. *See* Hafemeister et al., *supra* note 6, at 183. Mental Health Care Courts are diversion focused, attempting to implement court-supervised treatment—like drug courts—as an alternative to incarcerating those with a diagnosed mental disorder in the first place. *Id.*

165. *See id.* at 191 (proposing theories to handle criminals with mental disorders).

166. *See id.* at 183.

167. *Cf.* Johnson & Johnson, *supra* note 57, at 44 ("The criminal justice policies that the United States has adopted have produced a tidal wave of imprisonment in this country.").

168. Hicks, *supra* note 124, at 1006.

169. *See infra* Part III.B.

Transferring mentally ill inmates out of incarceration and into least restrictive care programs will reduce the number of persons behind bars in the United States.[170] Furthermore, it has been recognized that "active efforts" like improvement in mental health care services for prisoners and parolees help to decrease recidivism and thus deter crime.[171] In turn, rehabilitation through least restrictive care programs would also reduce the overall prison population—providing both a substantial economic and social benefit to states.[172]

Unfortunately, despite support for community-based health programs for the mentally ill,[173] such as those established in the wake of *Pennhurst* and other instances of deinstitutionalization, corresponding funding for such programs has been inconsistent at best, and non-existent at worst.[174] However, under this proposal, money that would ultimately be spent to incarcerate these individuals would be diverted to establish community-based mental health programs that would provide substantive treatment for the incarcerated mentally ill. Instead of pouring money into the prison industrial complex, those funds will be redirected to viable treatment programs at a fraction of the cost of incarceration.[175] States should pursue least restrictive care as an effective long-term strategy of treatment for the incarcerated mentally ill.

It is well known that the costs of incarceration are increasingly exorbitant, especially when compared to least restrictive care programs.[176] In California alone, it costs $48,000 per prisoner per year to incarcerate, in contrast to about $3,200 for the cost of a parolee and a fiscal gain of $25,000 when a prisoner is released and eases overcrowding.[177] Thus, a system of least restrictive care that incorporates the use of residential homes and elements of parole-based, GPS-monitored release would not only promote adequate care for the incarcerated mentally ill, but it could also help to end the cycle of incarceration for individuals with mental disorders, and have the added benefit of saving states' money by reducing overcrowding in pris-

170. Hicks, *supra* note 124, at 1006.
171. Johnson & Johnson, *supra* note 57, at 47.
172. *See supra* note 151 and accompanying text.
173. *See* Hafemeister et al., *supra* note 6, at 155 n.19.
174. *Id.*
175. *See infra* note 193 and accompanying text.
176. Fan, *supra* note 126, at 6 (discussing that as of 2005 it was estimated to cost "an average of $23,876 a year" to house a single prisoner).
177. Mark A.R. Kleiman & Kelsey R. Hollander, *Reducing Crime by Shrinking the Prison Headcount*, 9 Ohio St. J. Crim. L. 89, 105-06 (2011).

ons. We should "[r]eturn to [o]ur [r]oots" in the "rehabilitative ideal"[178] as we focus on adequate and effective *treatment* for the incarcerated mentally ill.[179]

In so doing, programs like those promulgated by the Missouri Division of Youth Services should be modeled and adapted to adult populations. Under the successful Missouri program,[180] youth with mental illnesses are placed in community-based residential homes where they receive individualized least restrictive care.[181] Amongst youth offenders with mental illnesses, these programs[182] significantly help to reduce recidivism as well as the overall cost of incarceration to the state.[183] Programs such as the one established by the Missouri Division of Youth Services demonstrate the efficacy of least restrictive care programs to address inadequate treatment for the incarcerated mentally ill.[184]

Similar to the concerns of advocates of mental patients that institutionalized persons should have "a constitutional right to treatment that will improve their condition and that will be provided in the least restrictive environment,"[185] the best way to facilitate rehabilitation and treatment within the mandates of the Eighth Amendment is to afford the inmates in *Brown* and their counterparts across the country a right to adequate treatment in a least restrictive environment.

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178. Fan, *supra* note 126, at 8.

179. As Justice Kennedy stated in a speech in 2003 to the American Bar Association:

> We have to find some way to bridge the gap between skepticism about rehabilitation and the fact that so many of your fellow citizens and your fellow humans are being maintained in prison. We have to ask, "why are they there?" We have to ask if there are some better ways to prevent the addition of crime which causes the cycle of recidivism.

Id.

180. Hicks, *supra* note 124, at 1005-07.

181. *Id.*

182. Individualized care programs are most often advocated in the juvenile justice field but could be adapted to the treatment of mentally ill adult inmates; additional examples include programs in Georgia and New Mexico. *See, e.g.*, *Court Services and Supervision*, *Facilities & Programs*, GA. DEP'T JUV. JUST., http://www.djj.state.ga.us/FacilitiesPrograms/fpCourtSvcsOffices.shtml (last visited Sept. 1, 2012); *Juvenile Justice Programs*, 13TH JUD. DISTRICT ATT'Y—N.M., http://www.da.state.nm.us/districts/thirteenth/Brochures/Juvenile%20Justice%20Program%20Brochure.pdf (last visited Set. 1, 2012).

183. Hicks, *supra* note 124, at 1006.

184. *See supra* note 151 and accompanying text.

185. Carol A. Richardson, *The Right to Treatment:* Society for Good Will to Retarded Children, Inc. v. Cuomo, 80 NW. U. L. REV. 1355, 1382 (1986) (discussing Soc'y for Good Will to Retarded Children, Inc. v. Cuomo, 737 F.2d 1239 (2d Cir. 1984)).

C. Addressing Counter Arguments: Why Should We Care About the Incarcerated Mentally Ill?

Undoubtedly, some will argue that the incarcerated mentally ill have a lesser right of access to mental health care than those in the general population and particularly those who are adjudicated mentally ill but have no criminal history. The arguments that least restrictive care programs will jeopardize public safety and the contention that the incarcerated mentally ill are not worthy of such access to care at taxpayer expense are not entirely unfounded. The resources, staff, facilities, and medication necessary to adequately treat a mentally ill person yet maintain public safety are indeed significant.[186] However, if we are to move toward a society in which we can permanently reduce the prison population through decreased rates of recidivism, we must be open to long-term solutions that require substantial investment in such resources.

First, opponents of a program of least restrictive care for the incarcerated mentally ill will likely have concerns regarding the impact of such programs upon public safety. However, in giving "substantial weight" to public safety as the PLRA requires, the Court in *Brown* decided that leaving the order in the hands of state officials for the design and implementation of the population reduction, "protected public safety by leaving sensitive policy decisions to responsible and competent state officials."[187] Under the PLRA, while the court must give substantial weight to public safety, it is not required to ensure its order has no negative impact.[188] Similarly, rehabilitation and reduced recidivism through least restrictive care programs is a better answer to concerns about public safety than an endless cycle of re-incarceration;[189] offering a long-term solution and helping to actually treat the root cause of recidivism amongst the incarcerated mentally ill and rehabilitate them for reentry into society.

Secondly, opponents of least restrictive care for the incarcerated mentally ill may contend that we should not provide for the criminal mentally ill when as a society we are struggling to provide for the non-

186. *See* Johnson & Johnson, *supra* note 57, at 53.

187. *Leading Cases*, *supra* note 22, at 265.

188. *Id.*

189. Emily Ray, Comment, *Waiver, Certification, and Transfer of Juveniles to Adult Court: Limiting Juvenile Transfers in Texas*, 13 ST. MARY'S L. REV. MINORITY ISSUES 317, 353 (2010) (noting, in another context, that reduced recidivism increases public safety).

criminal mentally ill.[190] However, as discussed in Part I.B.1., *supra*, under the Eighth Amendment, there is a clearer constitutional mandate for the provision of adequate mental and physical health care of this population than any other population in the country.[191] Further, it is well recognized that prisons are the de facto mental health care system of the United States;[192] if the solution is not to be focused on this population—it begs the question, where should it be focused?

Retribution is no doubt necessary and important, and the concept serves to draw a sharp contrast between the treatment of the incarcerated mentally ill and the treatment of individuals with a mental disorder in the general population. However, if we are to strive towards a society with reduced rates of recidivism and actual rehabilitation of prisoners, the courts, state governments, and by extension society, must be open to methods of care for the incarcerated mentally ill that involve more progressive forms of treatment like least restrictive care. Not only as good social policy, but as good economic policy,[193] least restrictive care is a method of treatment that was overlooked in the wake of *Brown* but should not be discounted as litigation of mentally ill prisoners' rights moves forward.

This Comment argues that the methods used to deinstitutionalize mental institutions beginning in the 1960s and continuing through the litigation in *Pennhurst* should serve as a model for deriving an adequate remedy to the claims of mentally ill prisoners asserting Eighth Amendment violations due to prison overcrowding. Ultimately, the *Pennhurst* approach of individualized, least restrictive care should be favored over the blunt "depopulation" strategy of *Brown*.

Quite simply, the Court missed the point in *Brown*. The majority's highlighting of the egregious conditions of confinement experienced by inmates in California is admirable, but it was for naught, if the actual method of *treatment* for these prisoners remains unaddressed. Depopulation alone does not serve the needs of a highly marginalized mentally ill inmate population. Ultimately, in the wake of *Brown*, the State of California should focus on creating a sustaina-

190. *See generally* Cabansag, *supra* note 102 (discussing the effects of curbing community mental health services and the struggle to continue to provide such services in the present economy).

191. *See supra* Part I.B.1.

192. *See supra* Part I.C.3.

193. Indeed, at a cost of over $48,000 per prisoner per year, incarcerating less people will undoubtedly cost the state of California less money. Kleiman & Hollander, *supra* note 177, at 106.

ble method of adequate treatment through community-based least restrictive treatment for eligible prisoners. Instead, it seems the Court's order mandating California to reduce its prison population is only reshuffling the problems of overcrowding while doing nothing to provide adequate treatment for the incarcerated mentally ill.

Least restrictive care is the best way to treat individuals with mental disorders—incarcerated or otherwise. In order to achieve significant progress in their condition, the incarcerated mentally ill should be placed in least restrictive treatment methods: group homes with adequately trained staff, counseling services that take place in clean, open, facilities. These programs will house prisoners with mental illness in a healthy environment that incorporates the essential factors that can lead to rehabilitation—regular individualized treatment, exercise, good food, and clean places to sleep. The incarcerated mentally ill should be surrounded by counselors and other individuals who will positively impact their progress—not those who are ill-equipped to deal with their condition or respond with violence when the condition manifests in disruptive or disturbing behavior. Ultimately, it is up to both courts and state governments to place value upon the rehabilitation of these prisoners through establishment of least restrictive care programs—validating their basic human dignity and acknowledging their dependency upon the state.

While the decision in *Pennhurst* did not offer legal guidance on the issue of depopulation of the Pennhurst State School, the actions undertaken by the state of Pennsylvania in response to the push for least restrictive treatment for the institutionalized mentally ill offer a model of deinstitutionalization that can work for prisons and has worked in programs piloted by juvenile facilities.[194] This model would not only reduce prison populations, but actually address the adequacy and access to treatment at the heart of the claim brought by the class of plaintiffs in *Brown*.

Ultimately, the adoption of *Pennhurst*-style deinstitutionalization, that of releasing mentally ill inmates to community-based least restrictive treatment programs, will help to achieve a dual goal—both reducing the costs of incarceration along with depopulating prisons to a more manageable size. Furthermore, these types of programs will decrease recidivism and improve the success rates of treatment amongst the incarcerated mentally ill. Programs of this type should not only be

194. Hicks, *supra* note 124, at 1005-07.

instituted in California in response to *Brown* but should also be sought by other states seeking to redress Constitutional concerns regarding the lack of adequate treatment for the mentally ill amid massive prison overcrowding.

The adequate provision of treatment for the incarcerated mentally ill is a bellwether. The way society treats the most marginalized and most at-risk in our community—despite the commitment of a transgression—is a reflection of the quality of justice in the system in general. A move toward a *Pennhurst*-style model of care will go far in achieving this goal and affirm of the human dignity of all persons in our society.

COMMENT

The Affirmative Duty to Disintegrate Concentrations of Impoverished Communities

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INTRODUCTION

Upon scaling the steps of the Columbia Heights metro, I am both overwhelmed and surprised at the bustling activity swirling around me. I quickly reach into my left-chest jacket pocket to turn off my Ipod in efforts to both hear and feel the discourse, movement, and energy of the surrounding blocks. Turning to my immediate left, I am both saddened and discouraged to find four men, ages ranging from twenty-six to forty-five, in various states of fatigue and despair. Their sweatpants are heavily soiled, and their jeans in tatters. Their only comforts while napping and mumbling in their sleep at 3:30 p.m. are discarded beer cans and ratty blankets stowed behind garbage cans daily. After traversing their semi-circle of hopelessness, I am quickly comforted by the appearance of a small Latino family. A petite elderly woman no taller than five-foot -one inches is pushing an infant boy in a stroller while simultaneously encouraging a school-age girl to keep up with her frenetic pace. Thirty yards ahead of me, a group of eight teenage black boys and girls are gathered on the corner in school-issued khakis and polo shirts, boisterously horse playing and eating pizza obtained from the local 7-Eleven. After nodding to one of the youngsters, I view a cheerful college-age Caucasian couple enter my street walking a beagle. My block consists of multiple subsidized apartment buildings and a public recreation center accompanied by a motley collection of economy vehicles, mid-size luxury sedans,

and a BMW X3 with the vanity plate "YNVME."[1] These now familiar scenes are no doubt, the result of changing economic and real estate patterns within Washington, D.C. Different communities are attracting persons of various backgrounds and economic circumstances, while forcing incumbent residents to reconsider and alter their former lifestyles and choices of residence. This change is welcomed by some and disparaged by others, often depending on their respective allegiance to the former composition and distribution of persons throughout Washington, D.C.[2] In Washington, the devastating fiscal crisis from the early to mid-1990s resulted in drastic reductions in public services and an erosion of public confidence in the District's government.[3] This development contributed to "a rapid out-migration of moderate- and middle-income black families, particularly into suburban Maryland counties to the east of the central city.[4] The poor were left behind in economically isolated neighborhoods with increasing poverty rates."[5]

Throughout Washington, D.C., from Anacostia to Shaw, from the H Street Corridor to Columbia Heights, middle- and upper-class people are moving into the city.[6] Rich cities like Washington, D.C. are closely comparable to or even exceed the surrounding region in terms of per capita income, property values, poverty rate, and populations of color.[7] In affluent cities, like Washington, the forces of gentrification combine with already tight housing markets, resulting in the pricing out and displacement of low-income residents from the central city into economically isolated pockets.[8] Although gentrification induced displacement usually exacts a heavy toll on all dislocated families, black families priced out of their own residences are forced to endure

1. Read "Why Envy Me?"

2. This representation reflects the perceptions of the author alone and may or may not reflect the typical actions, activities, characteristics, or nature of the residents and neighborhood of Columbia Heights.

3. William Julius Wilson, *Why Both Social Structure and Culture Matter in a Holistic Analysis of Inner-City Poverty*, 629 ANNALS AM. ACAD. POL. & SOC. SCI. 200, 212 (2010).

4. *Id.*

5. *Id.*

6. *Hey D.C., It's Not a Black and White Issue*, WASH. POST, Aug. 11, 2002, at B03 (presenting the changing economic and ethnic demographic of Washington, D.C. as an inevitable result of favorable city development with the ability to benefit young, new, and old residents).

7. John A. Powell & Marguerite L. Spencer, *Giving Them the Old "One-Two": Gentrification and the K.O. of Impoverished Urban Dwellers of Color*, 46 HOW. L.J. 433, 446 (2003); *see* John A. Powell, *Sprawl, Fragmentation and the Persistence of Racial Inequality: Limiting Civil Rights By Fragmenting Space*, *in* URBAN SPRAWL: CAUSES, CONSEQUENCES, AND POLICY 95 (Gregory D. Squires ed., 2002).

8. Powell & Spencer, *supra* note 7, at 478.

further hardship seeking affordable relocation housing in a challenging and discriminatory private housing market.[9]

The blessing of states and municipalities has contributed greatly in fueling the process of gentrification.[10] The government provides for and reinforces the development of city communities through code enforcement, zoning alterations, and historical designations.[11] Residential segregation is a long-standing characteristic of U.S. housing markets.[12] Three main theories are employed to explain residential segregation along racial lines: the discrimination theory, the socioeconomic class theory, and the self-segregation theory.[13] The discrimination theory states people of color are denied access to white neighborhoods because of discriminatory housing market practices.[14] The driving force behind the segregation theory is racial prejudice.[15] The class theory states segregation is the result of the unequal socioeconomic distribution of racial groups.[16]

Although popularized as a "black" and "white" issue, gentrification is more properly understood as providing for clashes among eco-

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9. Jon C. Dubin, *From Junkyards to Gentrification: Explicating a Right to Protective Zoning in Low-Income Communities of Color*, 77 MINN. L. REV. 739, 769 (1993) ("These obstacles are sometimes compounded by the efforts of the new residents or 'gentry' who, in the name of integration, obstruct the development of new subsidized housing which could permit displaced residents to resettle in their old neighborhoods.").

10. *Id.*

11. *Id.*; Reginald Leamon Robinson, (book review) *Poverty, the Underclass, and the Role of Race Consciousness: A New Age of Critique of Black Wealth/White Wealth and American Apartheid*, 34 IND. L. REV. 1377, 1389 (1992) ("[T]he state has played, and continues to play, a vital but non-exclusive role in the persistence of poverty. By state, I mean social structure, which in part means the manner in which social systems distribute resources like wealth, income, and property.").

12. JAMES B. STEWART, THE HOUSING STATUS OF BLACK AMERICANS 32 (Wilhelmina A. Leigh & James B. Stewart eds., 1992).

13. *Id.*

14. *Id.*

15. *Id.* An explanation for this concept is as follows:

> First, before 1900, racial segregation did not exist, and therefore we had to construct the ghetto. . . . After the Civil War, black-white living patterns changed not only because slavery no longer defined social roles, but also because employment patterns drove blacks into very poor housing stock. . . .
>
> Supported by complex social forces, racial segregation begins with black ghettos. . . .
>
> [W]hite racist tactics and structural factors were still at work in the north and south, keeping pace with economic factors like industrialization and urban development patterns.
>
> Until post-WW II, America's white racism arrayed formidable barriers like violence and neighborhood improvement associations to prevent blacks were integrating all white neighborhoods. . . . Basically, between 1940 and 1970, institutionalized racism operated not only with federal authorities and financial institutions, but also within local real estate boards and urban housing markets.

Robinson, *supra* note 11, at 1405-06.

16. *Id.* at 1405.

nomic classes.[17] "The most pronounced negative effect of gentrification, the reduction in affordable housing, results primarily not from gentrification itself, but from the persistent failure of government to produce or secure affordable housing [for residents that need it the most]."[18] It is imperative the federal government take responsibility for ensuring adequate housing opportunities for low-income residents *throughout* the district by seizing private residences and mandating the entrance of low-income persons therein. One must acknowledge and align the interests of all residents towards the attainment of safe schools, less crime, dependable services, and accessible business[19] to all neighborhoods when devising remedies for marginalized city populations.

This Comment explores the debilitating effects of gentrification on concentrated neighborhoods of impoverished persons within Washington, D.C. Part I introduces gentrification and its effects on affluent and low-income residents, as well as the economic ramifications of gentrification for a developing city. Part II analyzes the benefits and flaws of multiple housing programs designed to improve housing opportunities for low-income residents. Part III introduces and analyzes three historic areas of poverty within Washington, D.C. and the effects of recent housing developments for new and old residents. Part IV discusses the affirmative duty of municipalities to provide adequate housing opportunities for low-income residents. Finally, Part V challenges the government to enter the housing market foray through eminent domain, in efforts to re-distribute low-income persons throughout the District while reserving adequate housing units for said persons. The government must become more active in employing a mobility or deconcentration approach, emphasizing the

17. *See* Audrey G. McFarlane, *The New Inner City: Class Transformation, Concentrated Affluence and the Obligations of the Police Power*, 8 U. PA. J. CONST. L. 1, 29 (2006) ("The most troubling aspect of gentrification is that race, and secondarily, age and class are used to distinguish the new arrivals from the old occupants."); Powell & Spencer, *supra* note 7, at 442 ("[Neighborhoods that are gentrifying] are ones in which racial and economic changes occur rapidly, often fueled by various governmental policies and actions.").

18. J. Peter Byrne, *Two Cheers for Gentrification*, 46 HOW. L.J. 405, 406 (2003).

19. Nancy A. Denton, *The Role of Residential Segregation in Promoting and Maintaining Inequality in Wealth and Property*, 34 IND. L. REV. 1199, 1206 (2001) ("[S]egregated neighborhoods often lack access to job networks and transportation to available jobs . . . . '[T]he value of a family's home positively affects how much offspring work when they become adults, suggesting support for spatial (neighborhood) dynamics.'").

mobility of the concentrated poor out of inner-city[20] neighborhoods to more suburban locations where economic and social structures may be sounder within the District.[21]

I. EFFECTS OF GENTRIFICATION

Despite the attractiveness of economic development within American metropolitan areas, it is necessary to remain cognizant of the welfare of resident stakeholders throughout processes of city development. Gentrification describes trends in land development characterized by the "revitalization" of previously "underdeveloped" areas.[22] Revitalized areas are more attractive to persons of higher incomes who consequently enter lower income urban areas with the intent to change the physical and social fabric of their new community to meet their needs and preferences.[23]

Gentrification is best understood as manifesting in multiple waves.[24] From the 1950s through 1970s, public subsidies and urban renewal transformed major cities as sporadic reinvestment combated growing suburbanization.[25] The second great push occurred in the post-recession 1970s, driven by public-private partnerships and integration into national and global economic and cultural processes.[26] Finally, in the post recession 1990s, gentrification surged with growing capital investment and growing inner-city housing markets.[27]

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20. JAY MACLEOD, AIN'T NO MAKIN' IT 247 (1995) ("The relative success and security of the black middle class contrast sharply with the plight of poorer blacks who are trapped in the secondary labor market and in blighted inner cities.").

21. Scott A. Bollens, *Concentrated Poverty and Metropolitan Equity Strategies*, 8 STAN. L. & POL'Y REV. 11, 12 (1997).

22. Bus. Ass'n of Univ. City v. Landrieu, 660 F.2d 867, 874 (3d Cir. 1981) ("Gentrification is a deceptive term which masks the dire consequences that 'upgrading' of neighborhoods causes when the neighborhood becomes too expensive for either rental or purchase by the less affluent residents who bear the brunt of the change.").

23. Byrne, *supra* note 18, at 406.

24. Powell & Spencer, *supra* note 7, at 449.

25. *Id.*

26. *Id.*

27. *Id.*; Justin Stec, *The Deconcentration of Poverty as an Example of Derrick Bell's Interest-Convergence Dilemma: White Neutrality Interests, Prisons, and Changing Inner Cities*, 2 NW. J. L. & SOC. POL'Y 30, 53-54 (2007) ("Land in former or changing areas of concentrated poverty . . . are open territories for investment speculators, redevelopment agencies, and affluent professionals who reject the suburban form of living, but demand, and can easily pay for, luxury residential, commercial retail, entertainment, and other intangible spatial amenities.") (internal quotations omitted).

A. Urban Economics

For some, the newly restructured city is the fulfillment of the post-modern American dream: a post-industrial, culturally hybrid entity that covets urban life while implicitly rejecting some of its "grittier" aspects.[28] For others, the restructuring signals a welcome change in community character from declining and impoverished to popular and affluent.[29] Local governments have direct economic incentives for stimulating the redevelopment of decaying city neighborhoods.[30] As a result of redevelopment, cities can increase property taxes and thereby raise the tax base.[31] Additionally, the prevalence of tax delinquencies and tax lien foreclosures are likely to decline in revitalizing communities.[32] Consequently, the revitalizing city is likely to collect taxes while incurring fewer administrative costs.[33] Improving the quality of a city's infrastructure, residential areas, and business districts often assists in attracting commerce, tourism, and industry into a once blighted location.[34] Washington, D.C. is well suited to preserve the historical characteristics of its most prized districts, while benefiting from the private redevelopment of the same areas.[35] The economic and social benefits of gentrification are not to be ignored.

B. Economically Disadvantaged Persons

Unfortunately, economically marginalized residents bear a considerable burden from city development. Gentrification, through conversion and rehabilitation, exacerbates existing shortages of

28. McFarlane, *supra* note 17, at 5.

29. *Id.* ("All recognize that affluent people bring business and government attention and improved services to their neighborhoods. On the other hand, the changes are also viewed with a sense of foreboding as . . . the changes signal ominously that the residents' departure form the community is imminent.").

30. James Geoffrey Durham & Dean E. Sheldon, III, *Mitigating the Effects of Private Revitalization on Housing for the Poor*, 70 MARQ. L. REV. 1, 8 (1986); *see also* Donald Bryant & Henry W. McGee, *Gentrification and the Law: Combatting Urban Displacement*, 25 WASH. U. J. URB. & CONTEMP. L. 43, 48 (1983); Peter L. MacDonald, Note, *Displacement in Gentrifying Neighborhoods: Regulating Condominium Conversion Through Municipal Land Use Controls*, 63 B.U. L. REV. 955, 959 (1983).

31. Ray Telles, Comment, *Forgotten Voices: Gentrification and Its Victims*, 3 SCHOLAR 115, 118 (2000); *see also* James Mosher, *Baltimore Officials Consider Tougher Standards on Developers*, THE LEGAL LEDGER, Feb. 20, 2006 ("'They seem to be leaving the door open for commercial' development . . . . A desire to increase tax revenue may be part of the answer. 'There is the need to maintain a tax base.'") (citations omitted).

32. Telles, *supra* note 31, at 118.

33. *Id.*

34. *Id.*; *see also* John J. Betancur, *Can Gentrification Save Detroit? Definition and Experiences from Chicago*, 4 J.L. SOC'Y 1, 9 (2002).

35. Telles, *supra* note 31, at 118.

affordable housing for low-income persons by removing existing low- and moderate-income housing from the rental market.[36] As competition among persons seeking suitable housing increases, property values also increase.[37] Property taxes may spike whether property is improved or not because rising property values of areas around it make said property a more likely candidate for rehabilitation.[38] Unfortunately, for low-income residents, property owners may opt to pass on the result of higher property taxes onto the rents of tenants.[39]

Tenants may suffer displacement because of eviction or through "voluntary" abandonment of their residences.[40] Voluntary abandonment is often driven by rising rents, deteriorating housing conditions, or intimidation from landlords or other housing personnel.[41] The poor become marginalized externalities ejected from their former neighborhoods to reside in prematurely decaying areas where their concerns for low-income housing, economic advancement, and social welfare go unbeknownst to gentrifiers.[42] A troubling result of outmover displacement is clustering.[43] All studies have shown movers generally relocate to within their former neighborhood, or resettle in a nearby community.[44] Poor persons are least likely to have the reserve funds necessary to conduct an extensive housing search.[45] This may help explain the mixed satisfaction and limited housing opportunities exercised by out movers.[46]

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36. MacDonald, *supra* note 30, at 961.

37. Durham & Sheldon, *supra* note 30, at 8; *see also* Frank DeGiovanni, *An Examinaion of Selected Consequences of Revitalization in Six U.S. Cities*, *in* GENTRIFICATON, DISPLACEMENT AND NEIGHBORHOOD REVITALIZATION 73 (J. Palen & B. London eds., 1984).

38. Durham & Sheldon, *supra* note 30, at 8.

39. *Id.*

40. Lawrence K. Kolodney, *Eviction Free Zones: The Economics of Legal Bricolage in the Fight Against Displacement*, 18 FORDHAM URB. L.J. 507, 507 (1991).

41. *Id.*

42. *See also* RICHARD PLUNZ, A HISTORY OF HOUSING IN NEW YORK 339 (1990). *See generally* Keith Aoki, *Race, Space, and Place: The Relation Between Architectural Modernism, Postmodernism, Urban Planning, and Gentrification*, 20 FORDHAM URB. L.J. 699, 818 (1993) (describing how certain shifts in the aesthetic ideology of urban planners and architects affected suburban and urban spatial distribution in the United States during the nineteenth and twentieth centuries).

43. Durham & Sheldon, *supra* note 30, at 16.

44. *Id.*; *see also* Benjamin Zimmer, *A Deregulatory Framework for Alleviating Concentrated African-American Poverty*, 9 HASTINGS RACE & POVERTY L.J. 555, 585 ("The problem is that the displaced residents of public housing projects need somewhere to live, and as long as the overall structure of governmental regulations continues to entrench concentrated poverty, they are likely to remain in poor neighborhoods.").

45. Durham & Sheldon, *supra* note 30, at 16.

46. *Id.*

II. INSTRUMENTS INFLUENCING LOW-INCOME HOUSING

A. HOPE VI Program

Congress responded to the recommendations of the National Commission on Severely Distressed Public Housing in 1992 with the creation of the Urban Revitalization Demonstration Program (URD), better known as Housing Opportunities for People Everywhere (HOPE VI).[47] The HOPE VI program is designed to renovate deteriorating public housing communities of highly concentrated impoverished persons with modern, mixed-income, low-density neighborhoods.[48] HOPE VI assists public housing authorities in improving the living environment of the poor through the removal, rehabilitation, reconfiguration, or replacement of obsolete housing projects.[49] Additionally, HOPE VI regulations allow for up to fifteen percent of a HOPE VI grant to be used to fund economic and social support activities.[50] The tenets of this program drive the efforts to deconcentrate and disperse low-income persons throughout Washington, D.C.[51]

The program was designed to attract private investment to long-isolated communities.[52] Dollars funneled through the U.S. Department of Housing and Urban Development pay for demolition of deteriorated public housing and give private investors help in building the homes.[53] The goal is for urban wastelands to give way to more stable neighborhoods where market-rate and subsidized houses stand side-by-side.[54] The federally funded HOPE VI program is extremely com-

47. Edward Bair & John M. Fitzgerald, *Hedonic Estimation and Policy Significance of the Impact of HOPE VI on Neighborhood Property Values*, 22 REV. OF POL'Y RESEARCH 6, 3 (2005).

48. Lynn E. Cunningham, *Islands of Affordability in a Sea of Gentrification: Lessons Learned From the D.C. Housing Authority's HOPE VI Projects*, J. AFFORDABLE HOUS. & CMTY. DEV. L., 353, 353.

49. *Id.* at 355.

50. Dana L. Miller, Comment, *HOPE VI and Title VIII: How a Justifying Government Purpose Can Overcome the Disparate Impact Problem*, 47 ST. LOUIS U. L.J. 1277, 1290 (2003); *see also* Fiscal Year 1993 Appropriation Act, Pub. L. No. 102-389, 106 Stat. 1571 (1992) (explaining that the Hope Program initially allowed for the use of up to 20% of the total grant to be used to fund economic and social support activities); Notice of Funding Availability for Revitalization of Severely Distressed Public Housing HOPE VI Revitalization Grants, 67 Fed. Reg. 49, 766, 49,778 (July 31, 2002) (cutting the percentage allowance to 15%).

51. Cunningham, *supra* note 48, at 355.

52. Debbi Wilgoren, *Housing Program Chalks Up Win; New Residences Replace Blighted Complexes*, WASH. POST, Oct. 22, 2003, at B01 [hereinafter Wilgoren, *Housing Program*].

53. *Id.*

54. *Id.*

petitive.[55] In 2001, the national budget of $565 million provided for a total of approximately twenty to thirty major projects a year.[56] This comes to one project per major city.[57] Public Housing Authority applicants must meet certain threshold criteria including the "severe distress" of the targeted property, submission of a housing market centered proposal, and involvement of the community residents.[58]

1. Forced Relocation

Positive Results

Tenant leaders working towards the implementation and realization of HOPE VI revitalization of public housing are not deterred by the necessary, albeit temporary displacement of community residents.[59] Although families will be forced to relocate for at least two years while neighborhoods are rebuilt, hundreds of senior citizens are provided the option to remain in their home while new housing is constructed for them.[60] D.C. public housing officials claim all displaced families can benefit if they participate in the social programs and job opportunities HOPE VI projects are designed to offer.[61] HOPE VI is supposed to include supportive and community services for residents such as childcare, job training and counseling, education, substance abuse treatment, and recreation centers.[62] Official studies of HOPE VI outcomes have consistently reported people feel safer.[63] D.C. Public officials declare that persons returning to the rebuilt neighborhoods experience positive life transformation.[64] The following unanswered question remains, whether former residents of the public housing complexes will forge bonds with their market-rate neighbors,

55. *Id.*; Lini S. Kadaba, *Blighted Chester Housing Project Being Razed*, PHILA. INQUIRER, Mar. 4, 2008, at B01 ("It also won three of the highly competitive federal Hope VI revitalization grants to help fix an additional 615 units . . . .").

56. Wilgoren, *supra* note 52, at B01.

57. *Id.*

58. *Id.*

59. Debbi Wilgoren, *D.C. Gets Grant to Redo Area; Public Housing to Be Replaced With Mixed-Income Dwellings*, WASH. POST, Oct. 20, 2001, at B02 [hereinafter Wilgoren, *D.C. Gets Grant*].

60. *Id.*

61. Wilgoren, *Housing Program*, *supra* note 52, at B01.

62. Sheila Crowley, *HOPE VI: What Went Wrong*, *in* FROM DESPAIR TO HOPE: HOPE VI AND THE NEW PROMISE OF PUBLIC HOUSING IN AMERICA'S CITIES 236 (Henry G. Cisneros & Lora Engdahl eds., 2009).

63. *Id.* at 233.

64. Wilgoren, *Housing Program*, *supra* note 52, at B01.

who ultimately will make up a substantial percentage of residents within new developments.[65]

Negative Results

Forced relocation, under any conditions, always causes trauma to those who are displaced.[66] Place attachment describes the deep connection felt between residents and their dwellings within a neighborhood populated with familiar people and reliable services.[67] Despite being dismissed as dysfunctional by policymakers and the general public, poor communities are comprised of intricate webs of social connections offering communal support for numerous members throughout trying times.[68] Elderly people are among the most vulnerable to physical and emotional damage when they are uprooted from their homes and respective support systems.[69] Relocation is especially problematic for school-age children, who risk falling behind in their studies when moving during the school year.[70] Interestingly, the health status of many residents displaced by HOPE VI may have actually deteriorated.[71]

Since their inception, public housing programs have included more than housing—they have also focused on creating communities with the encouragement and support of tenant councils and other forms of resident participation.[72] Although this goal was reaffirmed in the HOPE VI rules, which require residents to be active participants in the decision to apply for a HOPE VI grant and application preparation,[73] actual involvement of residents was weak.[74] Outreach to residents with the purpose of informing them of their resident housing

65. *Id.*

66. Crowley, *supra* note 62, at 230.

67. *Id.*; Wilgoren, *Housing Program*, *supra* note 52, at B01 ("One national study found that 11.4 percent of public housing residents displaced by HOPE VI projects had returned or were expected to return.").

68. Crowley, *supra* note 62, at 231.

69. *Id.* at 232.

70. *Id.*

71. *Id.*

72. *Id.* at 234.

73. *Id.*; Ngai Pindell, *Is There Hope for HOPE VI?: Community Economic Development and Localism*, 35 CONN. L. REV. 385, 392 (2003) ("In addition to evaluating the overall strength of an applicant's proposal, Housing Authorities must also demonstrate that affected residents and members of the surrounding community have meaningful involvement in the planning and implementation of the revitalization effort.").

74. Crowley, *supra* note 62, at 232.

authority's interest in applying for a HOPE VI application is characteristically sporadic and haphazard.[75]

2. Housing Supply in Washington, D.C. After HOPE VI

The HOPE VI Program produced mixed results in providing low-income residents with adequate housing options within the booming Washington, D.C. housing market.[76] For example, the Townhomes on Capitol Hill were designed to replace conventional public housing units with approximately 134 mixed-income cooperative units.[77] The units are internally subsidized to permit low-income persons to own nearly one-third of the co-op units.[78] Unfortunately, the surrounding neighborhood has transformed greatly due to gentrification, and pushed housing prices outside of the reach of targeted low-income persons.[79] Nearly 20,000 low-income households remain on the waiting list for District of Columbia Housing Authority housing or Section 8 vouchers while able gentrifiers occupy the limited units.[80] Similarly, the East Capitol Dwellings HOPE VI project will demolish 577 units of public housing townhomes and apartments and two additional public housing high-rises for the elderly, providing 530 units, totaling 1,107 units.[81] The new site will include only 555 units, containing 196 units of public housing rentals and only 150 units for elderly and assisted care.[82] The obvious reduction in housing options for low-income and elderly persons is a worrisome product of multiple HOPE VI projects in Washington, D.C.[83]

Housing built for middle- and upper-income homebuyers may be desirable for the advancement of the city's finances, but it is com-

75. *Id.*

76. Cunningham, *supra* note 48, at 357.

77. *Id.*

78. *Id.*

79. *Id.*; Matthew H. Greene, *The HOPE VI Paradox: Why Do HUD's Most Successful Housing Developments Fail to Benefit the Poorest of the Poor*, 17 J.L. & Pol'y 191, 209 (2008).

80. Cunningham, *supra* note 48, at 357; Greene, *supra* note 79, at 210-11 ("From the perspective of the approximately 20,000 low-income households on the waiting list for DCHA housing or Section 8 vouchers, it looks like another tool in the hands of the area's gentrifiers to reduce the number of affordable units.").

81. Cunningham, *supra* note 48, at 358.

82. *Id.*

83. Philip Langdon, *Unlocking Dutch Point: A Recent Federal Grant Will Allow Hartford to Demolish the Dutch Point Public Housing Project and Replace it with Mixed-Income Housing. That Can't Happen Soon Enough*, The Hartford Courant, Apr. 6, 2003, at C4 ("Nationally, some low-income housing advocates have complained that HOPE VI creates fewer new public housing units than are being demolished.").

pletely beyond the reach of public housing tenants.[84] Mixed-income communities will hopefully encourage the retention of upwardly mobile families, who still unable to afford Washington's high-priced housing, have too often moved to Prince George's County.[85] These families could support many of the troubled neighborhoods that are devoid of persons with the disposable income, valuable cultural capital,[86] and humanity necessary to cultivate the children populating Washington's communities.[87]

B. Housing Choice Voucher Program (Formerly Known as Section 8)

The Section 8 program is named for the portion of the Federal Housing and Community Development Act that created the program in 1974.[88] The law states that the program was developed "for the purpose of aiding lower-income families in obtaining a decent place to live and of promoting economically mixed housing."[89] Section 8 assists tenants of yet to be constructed apartments, existing residences, and older buildings undergoing rehabilitation.[90] Section 8 vouchers are easier to implement effectively on a massive scale.[91] Typically, tenants qualify because of income and pay twenty-five percent of their incomes, before deductions, in rent and Department of Housing and Urban Development (HUD) pays the difference.[92] This program provides builders with guaranteed payment from HUD for new apartments prior to construction.[93] The program helps tenants of existing

84. Cunningham, *supra* note 48, at 361.

85. William Raspberry, *THE FUTURE: If Washington Is to Become the City it Can Be During the Next 30 Years, the Achievements of its African American Middle Class Must Somehow be Passed to the Next Generation*, WASH. POST, Feb. 1, 1998, at W24.

86. MACLEOD, *supra* note 20, at 13 ("By embodying class interests and ideologies, schools reward the cultural capital of the dominant classes and systematically devalue that of the lower classes.").

87. Raspberry, *supra* note 85, at W24.

88. *Program Designed to Aid Needy*, WASH. POST, July 20, 1978, at 3. Although the Section 8 program is now referred to as the Housing Choice Voucher Program, this comment will refer to the program as Section 8. *See* Housing Choice Vouchers Fact Sheet, HUD. GOV., http://portal.hud.gov (follow "Topic Areas" hyperlink; then follow "Housing Choice Voucher Program (Section 8)" hyperlink) (last visited Oct. 13, 2012).

89. *Id.*

90. *Id.*

91. Zimmer, *supra* note 44, at 587.

92. *Program Designed to Aid Needy*, *supra* note 88, at 3; Zimmer, *supra* note 44, at 587 ("[The Section 8 Program] essentially allows poorer households earning less than half the median income in an area to rent something close to the median-price apartment in their area without having to spend more than 30% of their own income in the process.").

93. *Program Designed to Aid Needy*, *supra* note 88, at 3.

apartments meet unpaid portions of their rent after an agreement is reached between the Housing Opportunities Commission and their respective landlords.[94] Unfortunately, although the Section 8 program has contributed positively to poverty deconcentration on the margins, it has failed[95] to spur systematic change over nearly four decades of existence.[96]

C. Mixed Finance Development

Mixed financing leverages private and public funds in efforts to create mixed-income communities including both affordable and market-rate housing.[97] Housing authorities are responding to possible cuts in government funding for community planning endeavors by delving into real estate finance.[98] Fortunately, traditional sources of public funding from the HUD can be used for mixed-finance purposes. Housing authorities secure their private funding from the sale of tax credits and bonds through their state's housing finance agency.[99] This combination of public and private funds enables housing authorities to revive substantial urban swaths with modern construction and infrastructural improvements despite fluctuating government funding.[100] Mixed-finance projects are subject to the mixed-finance amendment, which secures the delivery of HUD capital dollars to the authority for the units within the mixed-finance development.[101] This document ensures the units are operated according to public housing regulations.[102]

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94. *Id.*

95. Deborah Kenn, *Paradise Unfound: The American Dream of Housing Justice for All*, 5 B.U. PUB. INT. L.J. 69, 87 (1995) ("Another major shortcoming of the Section 8 program is its woefully inadequate ability to accommodate even a small percentage of those eligible for the program.").

96. Zimmer, *supra* note 44, at 588.

97. Carl R. Greene, *Reshaping the Landscape: Mixed-Finance Development Could Bring About an Urban Housing Renaissance*, NAT'L L. J., Feb. 14, 2005; *see* Paulette J. Williams, *The Continuing Crisis in Affordable Housing: Systemic Issues Requiring Systemic Solutions*, 31 FORDHAM URB. L.J. 413, 458 (2004).

98. Greene, *supra* note 97.

99. *Id.*; Peter W. Salsich, Jr., *Does America Need Public Housing?*, 19 GEO. MASON L. REV. 689, 689-90 (2012) (discussing public housing authority reform movement utilizing public and private investment in efforts to produce a more inclusive socioeconomic mix of residents).

100. Greene, *supra* note 97.

101. *Id.*

102. *Id.*

D. Rent Control

Historically, housing policy makers have regarded rent control with some suspicion, rarely making it the central focus of their activity.[103] Price regulation has been enacted and implemented primarily at the federal and state levels of government.[104] Residential rent control operates within a political and organizational framework that is largely local, rarely turning on great issues of economic efficiency dominating the larger regulatory debates.[105] Rent control is not limited to people who are priced out of decent housing.[106] Rent control, like price controls, results in a systematic gap between the large quantity of goods demanded (because the price is low) and the small quantity of goods supplied.[107] Rent control often exacerbates the problem by decreasing the market incentive to increase the housing stock.[108]

Positive Results

Residents of controlled units perceive the increased affordability of said units as the primary benefit of rent control.[109] In addition to rent savings, District tenants value the sense of security provided by the rent controls.[110] Residents reported rent control provided them with the security to remain in their apartments, if they so desired.[111] Although affordability problems in the District are still severe, a much larger number of renter households would have had excessive rent burdens in the absence of rent control.[112] Unfortunately, the rent savings generated by controls were not evenly distributed among D.C. renters.[113] Since the majority of renters are middle and upper income by any reasonable definition, they surely receive the bulk of the bene-

103. W. Dennis Keating et al., Rent Control: Regulation and The Rental Housing Market 1 (1998).
104. *Id.* at 2.
105. *Id.*
106. Edgar O. Olsen, *Is Rent Control Good Social Policy?*, 67 Chi.-Kent L. Rev. 931, 933 (1991).
107. Richard A. Epstein, *Rent Control and the Theory of Efficient Regulation*, 54 Brook. L. Rev. 761, 767 (1988).
108. Alex Kozinski, *The Dark Lessons of Utopia*, 58 U. Chi. L. Rev. 575, 588 (1991).
109. Keating et al., *supra* note 103, at 112.
110. *Id.*
111. *Id.*
112. *Id.* at 114; *see also* Richard J. Devine, Who Benefits from Rent Control 74 (1986) ("[R]ent control has done little to alleviate the affordability problems faced by one out of every three renters. But it has just about guaranteed that those who could easily pay more will never have to.").
113. Keating et al., *supra* note 103, at 114.

fits in the years immediately after the imposition of controls.[114] Over time, the distribution of benefits depends upon how long these persons stay in their controlled units.[115] The households experiencing the greatest rent savings were those remaining in their controlled units for six or more years.[116]

Negative Results

Unfortunately, for low-income residents, the most recent economic downturn, coupled with the District's booming rental development market, has provided developers with an incentive to move away from rent-controlled housing.[117] While D.C. renters enthusiastically support rent control, landlords generally perceive it as a significant deterrent to investment in rental housing.[118]

A majority of owners viewed the administrative costs of rent control as a significant factor in their operations.[119] Approximately 80.5 % of owners of District-controlled units reported they did not plan on investing in D.C. rental housing in the future.[120] From the landlord's perspective, these findings confirm that controls reduce the profitability of investment in rental housing.[121] Apartment building owners say the ability to change market rents for newly vacant units has allowed them to renovate and improve their buildings and preserve low rents for existing tenants.[122] Strict rent controls, they argue, have forced many smaller owners to sell or convert their properties.[123] Despite the steep rent increases, low-income tenants have stayed in their apartments and fought change.[124] This resistance is not met with

114. Olsen, *supra* note 106, at 939.
115. *Id.*
116. KEATING ET AL., *supra* note 103, at 115.
117. Derek Kravitz, *Fight a Sign of D.C. Rent-Control Issues*, WASH. POST, Sept. 22, 2010, at B08.
118. KEATING ET AL., *supra* note 103, at 113; *see also* Jorge O. Elorza, *Absentee Landlords, Rent Control and Healthy Gentrification: A Policy Proposal to Deconcentrate the Poor in Urban America,* 17 CORNELL J. L. & PUB. POL'Y 1, 51 (2007); Epstein, *supra* note 107, at 770 ("Instead, [rent control] is used as a substitute for what could be a highly, though surely not perfectly, competitive market.").
119. KEATING ET AL., *supra* note 103, at 113.
120. *Id.*
121. *Id.*
122. Kravitz, *supra* note 117, at B08.
123. *Id.*; Richard F. Muth, *Redistribution of Income Through Regulation in Housing*, 32 EMORY L.J. 691, 695 (1983) ("[A]fter Washington, D.C., adopted rent controls in the post Vietnam era previously rented units began to be converted to condominium ownership. Since the real returns to rental property tend to decline because of controls, it becomes profitable to their owners to seek out alternative uses for them where possible.").
124. Kravitz, *supra* note 117, at B08.

speedy adjudication. The appeals process with the D.C. Housing and Community Development may take years to conclude.[125]

Rent Control in Washington, D.C.

The District of Columbia's rent control program was established in 1975 in response to rapid inflation in rent levels during the early 1970s.[126] The central objective of the District's rent control program was to protect tenants from excessive rents and rent increases.[127] The District's rent control regime is a moderate one, explicitly seeking to maintain the profitability of investment in rental housing.[128] Like other rent control programs implemented in the 1970s, the District's system provides incentives for landlords to maintain their existing rental properties and to produce new ones.[129] Approximately three-quarters of the District's rental housing stock is covered by rent controls.[130] In 2000, about 100,000 rental units in the District were rent-controlled.[131] A decade later, according to various estimates, there are between 10,000 and 25,000 fewer rent-controlled units.[132]

The Rental Housing Act of 1985 was designed to protect tenants from rising costs and provide incentives for new construction and improvements.[133] The Rental Housing Act of 1985 was set to expire in 2011, and more recently, the D.C. Council considered making the city's rent control laws permanent.[134] The aim is to codify rent-control regulations so tenants are empowered to fight cases filed on constitutional grounds.[135] The Rental Housing Act Extension

125. *Id.*

126. KEATING ET AL., *supra* note 103, at 113.

127. *Id.*

128. *Id.*

129. *Id. See generally* Richard Muth, *supra* note 123, at 695 (discussing the propensity of owners to withdraw capital from dwellings, thus worsening housing shortages, without rent control related incentives).

130. KEATING ET AL., *supra* note 103, at 111.

131. Kravitz, *supra* note 117, at B08.

132. *Id.*; *see also* Annys Shin, *Low Rents in D.C. Vanish as Downscale Goes Upscale*, WASH. POST, May 7, 2012, at A01 ("As a result, low-cost rental housing is disappearing at a faster rate than it was during the height of the housing boom, according to a new analysis of census data by the D.C. Fiscal Policy Institute.").

133. Kravitz, *supra*, note 117, at B08; *see also What You Should Know About Rent Control in the District of Columbia*, DHCD.DC.GOV, http://och.georgetown.edu/uploadedfiles/rentcontrolfactsheet0409.pdf (last visited Apr. 3, 2012).

134. Kravitz, *supra* note 117, at B08.

135. *Id. But see*, George F. Will, *Rent Control's Absurdity*, WASH. POST, Feb. 16, 2012, at A19 ("Rent control is unconstitutional because it is an egregious and uncompensated physical occupation of property.").

Amendment Act of 2010 amended the Rental Housing Act of 1985, extending the sunset provision to December 31, 2020.[136]

In 2006, the city made the most sweeping changes to its rent-control statutes in more than two decades, capping yearly rent increases, changing the way vacant rent-controlled apartments are priced, and making it easier for tenants to form tenant associations and to receive information on how rents are computed.[137] These changes manifested as a response to the city's rapidly shrinking, and increasingly expensive, rental housing stock.[138] In the last meeting of 2010, the D.C. Council approved a bill extending rent-control laws that limit annual increases to about two percent, plus inflation, and no more than ten percent a year in most cases for ten years.[139] Increases for the elderly and disabled are limited to five percent a year and rents on vacant units are limited to no more than thirty percent rise by this legislation.[140]

Evidence from the District of Columbia shows that a carefully balanced program of rent control can make a positive difference on a city's renters without causing serious adverse effects on either housing maintenance or new rental housing production.[141] Investors adding to the supply of rental housing in the District of Columbia are not subject to regulatory restrictions on the rents they charge.[142] The only rental units exempt from rent regulation are: (1) units held by owners of fewer than five D.C. rental units; (2) units added to the rental stock since 1975; (3) units in continuously vacant buildings; (4) cooperative units; and (5) publically subsidized rental housing.[143] The District's rent control program allows owners of units properly registered and in compliance with the city's housing code to increase rents annually by the lower of ten percent or the rate of increase in the Consumer Price Index.[144]

136. Rental Housing Act Extension Amendment Act of 2010, D.C. CODE § 42-3509.07 (2011).

137. Kravitz, *supra* note 117, at B08.

138. *Id.*

139. *Bills Passed by D.C. Council at Final 2010 Meetings*, WASH. POST, Dec. 22, 2010, at B10.

140. *Id.*

141. KEATING ET AL., *supra* note 103, at 110.

142. *See id.* at 111; Muth, *supra* note 123, at 696 (describing potential investor apprehension due to the possibility that new units may be made subject to controls).

143. KEATING ET AL., *supra* note 103, at 111.

144. *Id.*

III. REMAINING LOCALES OF POVERTY

It is helpful to take a critical eye to recent transformative areas of Washington currently manifesting the effects of gentrification and municipal development. The following section introduces three notorious areas of Washington and subsequent developments within each community, focusing on the availability of respective affordable housing opportunities and qualities of life. In the early 2000s, Washington identified fourteen "hot spots," communities where open-air drug dealing had taken over neighborhoods.[145] The identified "hot spots" were located just outside the gentrification bubble.[146] The targeted areas of despair are dubbed "New Communities."[147] The New Communities initiative follows and builds upon the foundation left by the HOPE VI federally funded program by getting residents involved in planning the development.[148] Four housing projects[149] have been identified as the first New Communities.[150] Columbia Heights and two of the four-targeted housing projects are examined below.

A. Barry Farm

The delayed arrival of gentrification east of Anacostia is no surprise.[151] This sector was the District of Columbia's last to settle, occurring well into the 20th Century.[152] For decades, working-class whites largely populated this region.[153] World War II led to the doubling of Anacostia's population, but after the war, conditions worsened due to poor housing policy.[154] These white residents eventually

145. Nikita Stewart, *Gentrification, With a Difference City Hopes a Mix of High and Low Incomes Will Stamp Out Drug Havens,* WASH. POST, July 20, 2006, at T01.

146. *Id.*

147. *Id.*

148. *See id.*; John W. Fountain, *Old Law Used in New Attack on Crack Houses; Neighbors, Lawyers Document Nuisances*, WASH. POST, Feb. 13, 1998, at B03 ("The residents, most of them seniors, came to the recent meeting at Community United Methodist Church to help make their streets cleaner and safer as part of the District's new community policing program. High on the agenda was the eradication of drug dens in the Trinidad neighborhood . . . .").

149. Stewart, *supra* note 145, at T01 ("The city has chosen four housing projects as its first New Communities: Northwest One/Sursum Corda in Northwest, Lincoln Heights in Northeast, Barry Farm in Southeast and Park Morton in Northwest.").

150. *Id.*

151. Eugene L. Meyer, *A Comeback Story Decades in the Making*, N.Y. TIMES, Jan. 30, 2008, at C7.

152. *Id.*

153. *Id.*

154. Roger K. Lewis, *Museum Offers Lessons From Thousands of Years in Anacostia*, WASH. POST, Oct. 27, 2007, at F05.

moved to the suburbs after school integration in the 1950s.[155] From the late 1940s to the 1970s, the area east of the river became the only option for the mostly black D.C. residents displaced by urban renewal and others unable to afford housing elsewhere.[156] This region, isolated from the core of the District, was considered ideal for concentrating developments of high-density, low-income, subsidized apartments.[157] Poor blacks quickly filled these vacancies, occupying the same garden apartments and public housing units now characterized as "crime-ridden slums."[158]

In the 1960s, predominantly white and predominantly black civic associations petitioned the local government for the services they deserved.[159] These associations combined with churches and various fraternal organizations to help craft viable communities, even in economically depressed communities.[160] Private developers were hesitant to enter this market –apparently concerned about reports of drive-by shootings and other crimes.[161] "[Ward 8 is] a depressed area . . . the unavailability of goods and services causes an economic and psychological depression where people begin to feel helpless and hopeless," said John Kinard, director of the Smithsonian's Anacostia Museum.[162] Ward 8 residents chiefly hope the people living in the area will be able to benefit tangibly from any and all economic revitalization.[163]

Barry Farm is an extremely aged[164] community within southeast Washington, D.C. best known for violent crime,[165] poverty, and dilapidated housing opportunities.[166] Barry Farm skirts Anacostia in south-

155. *Id.*; Lewis, *supra* note 154, at F05 ("In 1950, white families were 82 percent of Far Southeast's population. By 1980, that percentage had dwindled to 14 percent.").

156. Lewis, *supra* note 154, at F05.

157. *Id.*

158. *Id.*

159. Raspberry, *supra* note 85, at W24.

160. *Id.*

161. Meyer, *supra* note 151, at C7.

162. Lynne Duke, *Opportunity and Suspicion; Some in Ward 8 Wary of Development*, WASH. POST, Aug. 18, 1988, at D1.

163. *See id.*; Bruce Duffy, *Across the River; A Novelist's Anacostia Discovery*, WASH. POST, July 23, 1995, at C01 ("Even the beautiful river view worries residents, who fear Anacostia may go the way Georgetown did 40 years ago, when black working people were systematically moved out of townhouses that now fetch $500,000. 'Ain't just paranoia,' says one Ward 8 resident. 'Get the poor folks out and there's gold in these hills.'").

164. Stewart, *supra* note 145, at T01.

165. Duffy, *supra* note 163, at C01.

166. Serge F. Kovaleski, *Problems Grow Worse for D.C.'s Public Housing; During Kelly Years, Program Slips to Bottom of HUD Ratings*, WASH. POST, May 23, 1994, at A1 ("Some tenants have taken maintenance into their own hands. Tenant leaders at Barry Farms recently

east Washington and contains approximately 430 housing units.[167] Barry Farm continues to lag behind various District communities in commercial property value.[168] In 1993, the complex was characterized as a "four-square block killing ground," where thirty-nine people were murdered.[169] From 2006 to 2008, the commercial property value of Barry Farm improved from $18,906,590 to a recorded value of $39,336,170.[170] For comparison sakes, the commercial property value of Columbia Heights jumped from $231,821,510 to $405,810,860 during the same period.[171]

In 1981, Mayor Marion Barry[172] pledged to spend approximately $61.4 million to renovate one-third of the city's public housing units within three years.[173] Construction historically lagged, sometimes years, behind schedule for this needy housing project.[174] Additionally, significantly more units became vacant rather than rehabilitated.[175] Change is abounding in areas of Anacostia.[176] Approximately 1,000 units of assisted and subsidized housing, private, and public were in the process of being demolished in 1998.[177] Additionally, a number of requests for proposals were submitted to refurbish another 600 units for rent or sale.[178] The groundwork for mixed-income housing is manifesting in Anacostia, with the support of some residents seeking a greater quality of life.[179]

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received a $2,000 grant from the D.C. Urban Forestry Council to fix up the grounds around their development."); *see also* Serge F. Kovaleski, *D.C. Public Housing: Life Amid the Ruins; 'Survivors' Find Safety in City's Failure*, WASH. POST, Mar. 27, 1994, at A1.

167. Rochelle Riley, *At 80, She Fights the Battles of Barry Farms*, WASH. POST, Dec. 10, 1987, at J1.

168. *Feeling Their Pain: How Commercial Assessments Rise*, WASH. POST, July 26, 2007, at DZ03 [hereinafter *Feeling Their Pain*].

169. Ruben Castaneda & Philip P. Pan, *Homicides in D.C. Fell 10% Last Year; Drop Brings Killings to Lowest Level in 8 Years*, WASH. POST, Jan. 16, 1996, at B01.

170. *Feeling Their Pain*, *supra* note 168, at DZ03.

171. *Id.*

172. Virginia Mansfield, *Public Housing Pledge Unmet; Renovation Work Falls Behind; City Cites Relocation Problems*, WASH. POST, July 11, 1985, at D1; Sylvia Moreno, *Spreading a Message of Peace in Troubled Barry Farm*, WASH. POST, Jan. 27, 2008, at C04; *see also* Yolanda Woodlee, *Bus Brings Job Search Close to Home; City Initiative Helps Expand Opportunities*, WASH. POST, May 13, 2004, at T10 (discussing that former Mayor Barry is the current councilmember for Ward 8, which contains Barry Farms).

173. Mansfield, *supra* note 172, at D1.

174. *Id.*

175. Kenneth Bredemeier, *City Plagued by Deserted Buildings*, WASH. POST, July 8, 1984, at A1.

176. Raspberry, *supra* note 85, at W24.

177. *Id.*

178. *Id.*

179. *See id.*; Debbi Wilgoren, *From 8th Street, a Walk Through Time; New Trail Marks Hill District's Long Heritage*, WASH. POST, Dec. 12, 2004, at C08; Debbi Wilgoren, *Funding Sought to*

In 2005, the D.C. Council approved former Mayor Anthony Williams's "New Communities" Program.[180] Barry Farm was selected as one of four New Communities, during the Williams administration[181] making it the focus[182] of a proposed public-private development partnership.[183] Barry Farm activists initially rejected the Fenty administration's efforts to implement the redevelopment process, but did not prevail.[184] The first phase of the $550 million development plan is currently underway.[185] A total of sixty replacement units are planned to come online at Sheridan Station on Sheridan Road SE, and Matthews Memorial Terrace on Martin Luther King, Jr. Avenue SE, within the next six months for Barry Farm residents.[186] The redevelopment of Barry Farm is expected to produce approximately 1,500 total mixed-income units.[187] Recently, the current mayor, Mayor Vincent C. Gray announced the relocation of a new ink-jet manufacturing plant within the Washington Highlands neighborhood of Southeast Washington, which will bring 300 new jobs to Ward 8; several new

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Replace Three SE Housing Projects; New Development is Step in Anacostia Waterfront's Rebirth, WASH. POST, May 10, 2001, at T03.

180. *Renewal or Removal*, WASH. POST, May 17, 2005, at A20.

181. Stu Kantor, *Former D.C. Mayor Anthony Williams Joins the Urban Institute's Board of Trustees*, URBAN INSTITUTE (Dec. 18, 2009), http://www.urban.org/publications/901311.html (discussing Anthony A. Williams's membership on the Urban Institute's Board of Trustees after serving as mayor of the District of Columbia from 1999 to 2006).

182. *For Whom the Cranes Toll*, WASH. POST, Nov. 11, 2007, at B08.

> What is the difference between what the Williams administration promised and what the Fenty admnistration has devlivered? What is the difference between 35 percent and 60 percent for the rich? . . . Under the Williams plan the city would have devoted $169 million to building the first "New Community," but Mayor Adrian M. Fenty's administration is willing to spend only $74 million.

Id.

183. John Miller, *Is Barry Farm Going Dutch*, GREATER GREATER WASHINGTON (Nov. 18, 2011, 11:58 AM), http://greatergreaterwashington.org/post/12777/is-barry-farm-going-dutch/.

184. David Nakamura & Robert E. Pierre, *The Promise of Poplar Point; As D.C. Mayor, Developer Forsee Prosperity, Anacostia Residents Fear Exclusion*, WASH. POST, Apr. 8, 2007, at C01.

> Three Years ago, Williams announced a 20-year plan to redeveop both sides of the Anacostia River . . . . During his campaign, Fenty had heard demands for more government investment east of the Anacostia River and pledged to redirect public resources . . . . On January 20th, three weeks after Fenty's inauguration, city planners held a public workshop at a high school in Ward 8. The goal was to refine options for Poplar Point . . . . Appalled residents, confronted with an apparent fait accompli, lined up at a microphone and mocked the stadium, demanding to know how they would benefit.

Id.

185. *Id.*

186. *Id.*

187. *Id.*

restaurants and shops will augment further development in this area.[188]

B. Sursum Corda

Sursum Corda, once a notorious crime and drug-infested low-income housing complex, is located just north of the U.S. Capitol.[189] Sursum is a manifestation of a progressive plan to provide affordable, quality housing to poor residents displaced due to the razing of a sprawling slum on the site bounded by K, M, and North Capitol streets during the urban renewal of the time.[190] Sursum started out in the late 1960s as a rental project sponsored by the Department of Housing & Urban Development.[191] This horseshoe-shaped urban village developed into a fortified enclave of illicit drug activity after the onset of crack cocaine in the 1980s.[192] In 1992, the Sursum Corda Housing project was turned over to the tenants as a private cooperative.[193]

In this housing development, where more than a third of residents reside below the poverty line, disgruntled residents fought spiritedly against a District of Columbia redevelopment program.[194] Prior to former Mayor Adrian Fenty's first term, the District government proposed a $556 million, 1,600-unit redevelopment scheme for the Sursum Corda neighborhood.[195]

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188. Nikita Stewart & Jonathan O'Connell, *Plant to Bring 300 New Jobs to Ward 8*, WASH. POST, June 28, 2011, at B01.

189. Lori Montgomery & Sue Anne Pressley, *Sursum Corda Residents' Faith in Developer's Vision Runs Low*, WASH. POST, Dec. 5, 2005, at A01.

190. Serge F. Kovaleski & David A. Fahrenthold, *NW Housing Complex a Tangle of Drugs, Despair,* WASH. POST., Feb. 1, 2004, at A01 (explaining the goals driving the development of Sursum Corda and the social ills currently plaguing residents).

191. Robert H. Nelson, *Privatizing the Inner City*, FORBES, Dec. 12, 2005, at 48.

192. Kovaleski & Fahrenthold, *supra* note 190, at A01 ("Dealers can quickly disperse and hide in townhouses that line Sursum Corda's horseshoe, off the unit block of M Street NW, or lose themselves in the tangle of alleyways and courtyards. Or they work 'the backside'–K Street–where, police say, much of the dealing occurs in the Temple Courts apartment building.").

193. Robert H. Nelson, *Postmodern Politics in Action*, REASON.COM (Apr. 2006), http://reason.com/archives/2006/04/02/postmodern-politics-in-action.

194. Marc Fisher, *At the Sursum Corda Housing Project, a Standoff Awaits the Mayor-Elect*, WASH. POST, Nov. 14, 2006, at B01 ("'Yes, I asked them to go,' says David Chestnut, who was hired by the project's resident board to manage Sursum Corda. City officials 'were coming here to say that we are unfairly raising rents, inciting rather than informing. They want this population scattered to the winds. But these 167 families living here now are in control. They own this piece of land, and they demand more than the city is offering.'") (citations omitted).

195. *Id.*

In October 2005, after the opening of a nearby Metro stop, the board of directors voted to sell the entire project to leading developer, KSI, in the Washington area.[196] The 167 low-income families residing in Sursum Corda received approximately $80,000 per unit, a share in KSI's development profits, and an option to purchase a discounted home in the new 500-unit project to be constructed on the premises.[197]

Later, in December 2007, Mayor Fenty announced that two Washington developers were selected to tear down the low-income Sursum Corda Cooperative and Temple Courts housing complex in efforts to redevelop the area with high-density housing, retail and office space.[198] The development partnership, called "One Vision," is led by William C. Smith & Co. and the Jair Lynch Cos. and includes Banneker Ventures and Community Preservation Development, a provider of affordable housing.[199] The project, called "Northwest One"[200] will hold 40,000 square feet of retail space, 220,000 square feet of office space, and a 21,000 square-foot health clinic providing a new facility for the already existing Unity Health Clinic.[201] Receiving the support of Sursum Corda residents who own the complex was a factor in the city's selection of the developers.[202] Affordable-housing rates are set for families earning thirty to sixty percent of the median income, $56,000, for a family of four in the District.[203] Three hundred sixty units will be set at the thirty percent of median income level, about $16,800.[204] The remaining units will be available for families earning up to sixty percent of the median, about $33,600.[205] The development is slated for completion by 2014.[206]

196. Nelson, *supra* note 193.

197. Nelson, *supra* note 193.

198. Joshua Zumbrun, *Partnership Chosen for Mixed-Income Redevelopment*, WASH. POST, Dec. 14, 2007, at B04 ("[Discussing an] ambitious strategy to attract mid- and upper- income families to help revitalize a struggling and once crime-ridden neighborhood without displacing residents.").

199. *See id.*; Marc Fisher, *The Man in the Backdrop of Sursum Corda's Rebirth*, WASH. POST, Dec. 18, 2007, at B03.

200. Lori Montgomery, *Sursum Residents Fear Loss of Homes; D.C. Seeks Use of Eminent Domain in Area North of Capitol*, WASH. POST, Mar. 16, 2006, at B09.

201. Zumbrun, *supra* note 198, at B04.

202. *See id.*; *see also* Lori Montgomery & Lindsay Ryan, *Residents Decry Plan to Replace NW Park; Site Would Get Mixed Housing*, WASH. POST, Aug. 15, 2005, at B01 ("The development plan grew out of four days of meetings in July with residents of Sursum Corda and of the surrounding neighborhood.").

203. Zumbrun, *supra* note 198, at B04.

204. *Id.*

205. *Id.*

206. *Id.*

C. Columbia Heights

In their heyday—from the 1940s through the early 1960s—the 7th Street NW, 14th Street NW, and H Street NE corridors were bustling shopping strips, primarily for Washington's black middle-class.[207] By April 1968, a largely poor, working class black population inhabited the neighborhoods from Seventh and Fourteenth and H streets.[208] This poor population endured rat-infested housing and low-paying jobs.[209] The children attended dysfunctional decaying, public schools, where three of every four students read below the national average.[210] Riots swept Washington on Thursday, April 4, 1968[211] after the assassination of Dr. Martin Luther King, Jr., manifesting in approximately 200 fires burning simultaneously throughout the city.[212]

By the 1990s, wealthy investors descended on the riot corridors, spurred in part by the District's offer of tax incentives.[213] Columbia Heights's stately Victorian row houses and proximity to downtown became attractive again to home buyers and investors in Washington as a real estate boom began in 1999.[214] From 1998 to 2004, more than a dozen high-end residential and commercial projects were spawned on Fourteenth Street.[215] In Columbia Heights, groups such as Jubilee Housing, Washington Inner City Self Help (WISH) and the Development Corporation of Columbia Heights (DCCH) developed housing, shopping, and social service centers.[216] These nonprofit groups entered a vacuum left by disinterested private investors.[217]

Community development accompanied an average median family income of just $20,905 in 1998.[218] Rising property values, and consequently, the average price for homes in the area forced lower-income families to look for housing opportunities elsewhere.[219] Residents

207. Paul Schwartzman & Robert E. Pierre, *From Ruin to Rebirth in D.C.; Condos and Cafes Have Replaced Gutted Shops, but Who's Profiting?*, WASH. POST., Apr. 6, 2008, at A01.
208. *Id.*
209. *Id.*
210. *Id.*
211. Cindy Loose, *The Power Brokers of 14th Street; Since 1968 Riots, Nonprofits Have Taken Charge of Corridor's Renewal*, WASH. POST, Apr. 4, 1993, at A01.
212. Schwartzman & Pierre, *supra* note 207, at A01.
213. *Id.*
214. Carol D. Leonnig, *Columbia Heights Joins Forces to Save Community,* WASH. POST, Dec. 4, 2005, at C06.
215. Schwartzman & Pierre, *supra* note 207, at A01.
216. Loose, *supra* note 211, at A01.
217. *Id.*
218. *Id.*
219. Larry N. Kaggwa, *Digging in to Fight Blight; Low-Cost Housing Project Aims to Revive Columbia Heights*, WASH. POST, Aug. 5, 1993, at J5.

working in the service industries, the secretaries, clerks, hotel workers—in other words, the stable, unhip middle class family—was locked out of adequate housing opportunity.[220]

In response, the Development Corporation of Columbia Heights launched the "Nehemiah Project," to build fifty-seven middle-income housing units and a commercial strip on the formerly bleak corner of Florida Avenue and 14th Street.[221] A new Metro stop in 1999 was followed by an influx of retail development, including the city's first Target store, followed by the predictable barrage of luxury condos.[222] The blocks surrounding the Metro are now reminiscent of a suburban mall, while chain restaurants and independent businesses revitalize the previously desolate Eleventh Street Corridor.[223]

D. Three Troubled Neighborhoods and Greater Washington, D.C.

Between 1990 and 2000, the number of census tracts of concentrated poverty—where forty percent or more of the residents are below the poverty line—more than doubled in the District.[224] The tract containing Barry Farm is one that contributed to those counter-trends, becoming poorer over that period.[225] As a result of HOPE VI Anacostia development projects, Barry Farm is the host of numerous transplants.[226] Consequently, Barry Farm's 432 units stand ninety-nine percent occupied on any given day, according to the D.C. Housing Authority.[227] As of 2011, Barry Farm remained one of the poorest neighborhoods in D.C., with a median household income of $18,500.[228] Drug and gun-related crimes continue to occur within the violence plagued Barry Farm apartment complex.[229] Unfortunately, innocent persons complying with the judicial system are not immune

220. Juan Williams, *Mrs. Kelly's Neighborhoods; How Can the City Save Them?*, WASH. POST, Oct. 11, 1992, at C1.

221. *Id.*

222. Carla Dorsey, *It Takes a Village: Why Community Organizing is More Effective Than Litigation Alone at Ending Discriminatory Housing Code Enforcement*, 12 GEO. J. POVERTY LAW & POL'Y 437, 453 (2005) ("At the time . . . Columbia Heights . . . was on the road to gentrification by upper-income whites along with other nearby neighborhoods."); Brendan Spiegel, *Surfacing: A Hip Strip in Washington*, N.Y. TIMES, Feb. 20, 2011, at 11.

223. Spiegel, *supra* note 222, at 11.

224. Monte Reel, *The Bleak View from Barry Farm; D.C. Prosperity Bypasses Complex*, WASH. POST, May 25, 2003, at C01.

225. *Id.*

226. *Id.*

227. *Id.*

228. Shemar Woods, *Barry Farm's Summer Vocation*, WASH. POST, June 30, 2011, at A01.

229. Paul Duggan, *10 Alleged SE Gang Members Are Indicted for Additional Crimes; New Charges Field in Alleged Gang Case*, WASH. POST, Sept. 11, 2010, at B03.

from falling prey to violent practices undertaken by self-serving criminals.[230]

A few blocks up Martin Luther King Avenue, simply "The Avenue" for many, the picture brightens.[231] Near the Anacostia, the census tract's main commercial strip sits on the edge of a multibillion-dollar plan that aims to revitalize the waterfront.[232] The plan envisions a waterfront full of hotels, restaurants, monuments and residential areas, where public housing comingles with market-rate dwellings.[233] Residents of Barry Farm will concede positive changes near the river, but they say that has little or no impact on their lives.[234] Nearby construction projects including the building of a new St. Elizabeth's, do not normally provide many of the public housing residents – few of whom have had job skills training, with employment.[235]

In Sursum Corda, despite gains in establishing improved housing opportunities for residents of a range of incomes, the area is still characterized as a poor, crime-ridden neighborhood.[236] Sursum Corda is located within walking distance of the highly esteemed Jesuit institution, Gonzaga College High School.[237] Privileged Gonzaga students continue to be surprised by encounters with the pervasive poverty of Sursum Corda, just blocks away from the school, a pillar of social and economic hope for all enrolled.[238] On the fringes of Capital Hill, a fleeting memorial of a youth slain sums up the sentiment of some Sursum Corda residents.[239] A pile of stuffed animals and a poem is placed; the refrain of the poem reads: "I HURT."[240]

Columbia Heights is currently characterized as a mixed-income neighborhood in the midst of an economic transformation.[241] New-

230. *Id.*
231. Reel, *supra* note 224, at C07.
232. *Id.*
233. *Id.*
234. *Id.*
235. *Id.*
236. Samia Fam & Avis. E. Buchanon, *Sursum Corda Has Rights,Too*, WASH. POST, June 13, 2010, at C06.
237. Michelle Boorstein, *Jesuits Spread Ideals as Their Ranks Decline*, WASH. POST, Apr. 24, 2011, at C06 (discussing the decline in the number of Jesuit priests within the District).
238. Susan Kinzie, *An Advanced Education in Life; At the District's Elite Gonzaga College High, Many Students Get Their First Exposure to Poverty–and Their First Chance to Help*, WASH. POST, Apr. 27, 2010, at B01.
239. Lonnae O'Neal Parker, *Streets of the Dead; When Washington Youths Get Killed, Memorials Pay Testament to the Victims — and to the Grim Realities of Life in the District*, WASH. POST, Mar. 16, 2008, at W20.
240. *Id.*
241. Luke Jerod Kummer, *Welcome to DC!*, WASH. POST, Mar. 5, 2011, at E03.

comers to Columbia Heights immediately meet persons living in subsidized housing along Fourteenth Street, in addition to individuals residing in market-rate housing along the same stretch.[242] Low-income and high-income people live side by side, but integration among those substantially disparate means is lacking.[243]

From July 2008 to July 2009, a net of 6,550 people migrated to D.C. according to a Census Bureau analysis of Internal Revenue Service data.[244] According to the D.C. Fiscal Policy Institute, which examines the city's rental housing market, rents have increased more in the District than they have in most major cities, and renters are spending a larger portion of their paychecks to keep a roof over their heads,.[245] Despite the District's rent-control laws, the number of less-expensive rentals has decreased significantly.[246] There were 23,700 fewer apartments that cost $750 or less a month in 2007 than in 2000, a decrease of more than thirty-three percent.[247] During that same period, the number of units that cost in excess of $1,500 more than doubled from 12,200 to 27,400.[248] The median monthly rent for an apartment in the District rose from $630 to $930 from 2000 to 2007.[249] The median household income rose from $49,300 to $54,300.[250] During the same period, rental-housing prices rose faster in the District than in most other large cities in the country, including New York, Boston, Chicago, Los Angeles, and Atlanta.[251] The circumstances for Barry Farm, Sursum Corda, and Columbia Heights represent the plight suffered by many low-income residents that have not experienced the benefits of gentrification within Washington, D.C. The experiences of current and former residents of these areas, are characterized by disappointment, isolation, and unmet expectations for quality of life.[252]

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242. *Id.*

243. *Id.*

244. *Id.*

245. Ovetta Wiggins, *Digging Deeper to Pay the District's Rising Rents; Prices up 23% Since 2000; Affordable-Housing Supply Hurt, Study Finds*, WASH. POST, Feb. 6, 2010, at B01.

246. *Id.*

247. *Id.*

248. *Id.*

249. *Id.*

250. *Id.*

251. *Id.*

252. Lewis M. Simons, *Cities Within Washington; And White Immigration Increases It Project Dwellers Feel Isolation; Public Housing Dwellers Feel Isolation; And It Increases as Whites Return to D.C.*, WASH. POST, May 5, 1978, at C1.

IV. AFFIRMATIVE DUTIES OF MUNICIPALITIES

The Constitution does not guarantee access to dwellings of a particular quality to all citizens.[253] The Constitution fails to provide judicial remedies for every social and economic ill.[254] Absent constitutional mandate, the assurance of adequate housing and the definition of landlord-tenant relationships are legislative, not judicial, functions.[255]

In 1975, a reformist New Jersey Supreme Court announced a new doctrine founded on the state constitution that became the first step in the articulation of extensive requirements for creating statewide low- and moderate-income housing opportunities.[256] The *Mount Laurel* doctrine holds municipalities, developing or not, responsible for providing adequate housing opportunities to low-income citizens.[257] The *Mount Laurel* doctrine is derived from underlying concepts of fundamental fairness in the exercise of government power.[258] The *Mount Laurel* decisions establish a foundational obligation for the exercise of the police power: municipalities must design and administer their local land use regulations while taking into consideration regional needs for reasons of class equity and economic and racial integration.[259] The Sovereign controls the use of *all* of the land.[260] In exercising this control, the State is prohibited from favoring the affluent over the impov-

253. Lindsey v. Normet, 405 U.S. 56, 74 (1972) (holding the purpose of the Oregon Forcible Entry and Wrongful Detainer Statute constitutionally permissible and the challenged classification rationally related to that purpose, thus the statute is not repugnant to the Equal Protection Cause of the Fourteenth Amendment).

254. *Id.*

255. *Id.*

256. S. Burlington Cnty. NAACP v. Twp. of Mt. Laurel, 336 A.2d 713, 728 (N.J. 1975); Rusty Russell, *Equity in Eden: Can Environmental Protection and Affordable Housing Comfortably Cohabit in Suburbia?*, 30 B.C. ENVTL. AFF. L. REV. 437, 465 (2003).

257. S. Burlington Cnty. v. Twp. of Mount Laurel, 456 A.2d 390, 423, 441-50 (N.J. 1983); Peter W. Salsich, Jr., *Displacement and Urban Reinvestment: A Mount Laurel Perspective*, 53 U. CIN. L. REV. 333, 366 (1984).

258. *Twp. of Mount Laurel*, 456 A.2d at 415.

259. McFarlane, *supra* note 17, at 54-56 ("The first obligation is for affordable housing . . . . [A] second obligation [of] the police power: [a strong principle of socio-economic and racial integration] . . . . The third related obligation implicit in Mt. Laurel II is a principle of community preservation . . . .").

260. *Twp. of Mount Laurel*, 456 A.2d at 415; John M. Payne, *Fairly Sharing Affordable Housing Obligations: The Mount Laurel Matrix*, 22 W. NEW ENG. L. REV. 365, 371-372 (2001) ("But . . . the state's sovereign power to regulate the use of land is so frequently and thoroughly passed through to the local level of government . . . it makes sense to treat local governments as a distinct entity for purposes of constructing a practical and effective approach to Mount Laurel compliance.").

erished.[261] The State cannot legislatively set aside dilapidated housing in urban areas for the poor, while simultaneously providing quality housing opportunities for everyone else.[262] Although the State may not have the ability to eliminate poverty, it cannot use that condition to further disadvantage certain citizens.[263] Consequently, municipalities are delegated the same responsibility of the States by the Constitution to represent all citizens in the realm of residential opportunities.[264]

The constitutional power to zone, delegated to the municipalities subject to legislation, is one component of the police power – and therefore, must be exercised for the general welfare.[265] The general welfare includes more than that of the municipality and its residents, but includes the welfare of the housing needs of those within and outside the municipality.[266] Municipal land use regulations conflicting with the general welfare abuse the police power provided by the Constitution and must be deemed unconstitutional.[267] Regulations that have failed to provide the requisite opportunity for a fair share of the region's need for low- and moderate-income housing conflict with the general welfare and violate state constitutional requirements of substantive due process and equal protection.[268]

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261. *Twp. of Mount Laurel*, 456 A.2d at 415; Dennis J. Coyle, *Taking Jurisprudence and the Political Cultures of American Politics*, 42 CATH. U.L. REV. 817, 838 (1993).

262. *Twp. of Mount Laurel*, 456 A.2d at 415; Salsich, Jr., *supra* note 257, at 369 ("[M]unicipalities should not be permitted to disregard the interests of citizens of the state who may not be able to competent [sic] in an unregulated marketplace or one that is skewed in favor of higher income persons.").

263. *Twp. of Mount Laurel*, 456 A.2d at 415; Salsich, Jr., *supra* note 257 at 366.

264. *Twp. of Mount Laurel*, 456 A.2d at 415; Salsich, Jr. *supra* note 257, at 366 ("[T]he same applies to the municipality, to which this control over land has been constitutionally delegated.").

265. *Twp. of Mount Laurel*, 456 A.2d at 415; McFarlane, *supra* note 17, at 54.

266. *Twp. of Mount Laurel*, 456 A.2d at 415.

267. *Id.*

268. *Id.* at 415; *see also* John J. Delaney, *Addressing the Workforce Housing Crisis in Maryland and Throughout the Nation: Future Housing Supply and Demand Analysis for the Greater Washington Area*, 33 U. BALT. L. REV. 153, 157 (2004); Laura M. Padilla, *Reflections on Inclusionary Housing and a Renewed Look at its Viability*, 23 HOFSTRA L. REV. 539, 612-613 (1995).

> Courts use two general standards in reviewing challenges under the equal protection clause of the 14th Amendment: "strict scrutiny" and "rational basis." . . . Economic regulations and land use regulations thus continue to be measured against the rationality standard. The use of this standard has been justified because: [m]ost zoning and land ordinances affect population growth and density . . . . As commentators have observed, to insist that such zoning laws are invalid unless the interests supporting the exclusion are compelling in character, and cannot be achieved by an alternative method, would result in wholesale invalidation of land use controls and endanger the validity of city and regional planning.

Id. (citations omitted).

The municipal obligation to provide a realistic opportunity for low- and moderate-income housing is not satisfied by a good faith attempt.[269] The provided housing opportunity, must, in fact, be the substantial equivalent of the fair share.[270] Determination of fair share requires resolution of three separate issues: identifying the relevant region, determining its present and prospective housing needs, and allocating those needs to the municipality or municipalities involved.[271] A municipality's fair share should include both low- and moderate-income housing in a proportion that reflects consideration of all relevant factors, including the proportion of low and moderate income housing that make up the regional need.[272] Municipalities' affirmative obligation to provide a realistic opportunity for the construction of low- and moderate-income housing includes the use of inclusionary devices, such as density bonuses and mandatory set-asides, as well as the elimination of unnecessary cost-producing land use requirements and restrictions.[273]

Several state and local governments have adopted inclusionary zoning techniques that involve the use of zoning and land use regulation to encourage the development of affordable housing.[274] The following techniques include legislation that changes the process for appeals of zoning decisions, provides incentive to developers of affordable housing, and mandates that developers provide for affordable housing in exchange for permission to build.[275] Incentive zoning is the practice of offering optional "economic incentives to developers by relaxing various restrictions in the zoning requirements applicable to the land in exchange for the development of desired types of projects or amenities within projects."[276]

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269. *Twp. of Mount Laurel*, 456 A.2d at 419.

270. *Id.*; Salsich, Jr., *supra* note 257, at 365.

271. *Twp. of Mount Laurel*, 456 A.2d at 436 ("The most troublesome issue in *Mount Laurel* litigation is the determination of fair share. It takes the most time, produces the greatest variety of opinions, and engenders doubt as to the meaning and wisdom of *Mount Laurel*.").

272. *Id.* at 419; McFarlane, *supra* note 17, at 56 ("The Mount Laurel decisions therefore establish a foundational obligation for the exercise of the police power: municipalities must design and administer their local land use regulations while taking into consideration regional needs for reasons of class equity and economic and racial integration.").

273. *Twp. of Mount Laurel*, 456 A.2d at 441-50; Salsich, Jr., *supra* note 257, at 366.

274. Jennifer M. Morgan, Comment, *Zoning For All: Using Inclusionary Zoning Techniques to Promote Affordable Housing*, 44 EMORY L.J. 359, 369 (1995) ("Thus, these governments have adopted inclusionary zoning techniques which involve the use of zoning and land use regulation to encourage the development of affordable housing.").

275. *Id.*

276. *Id.* at 377.

Localities can encourage the development of affordable housing by granting zoning variances to developers of such projects.[277] A common form of zoning variance granted in this type of incentive program is an allowance of higher density development, frequently termed a "density bonus."[278] A density bonus allows a developer to build the same number of units originally intended on a smaller parcel of land, thereby lowering land costs per unit and allowing the developer to realize a larger profit.[279]

A mandatory set-aside ordinance requires each new housing development covered by the ordinance to include a minimum number of units for sale or rental to low- or moderate-income households.[280] Such an ordinance is beneficial because it causes a dispersal of low-income housing amongst conventionally priced units.[281] In addition to possible sociological benefits of economic integration, this dispersal allows low-income individuals access to better educational and employment opportunities.[282] A mixed project encourages better quality construction of affordable units because the marketability of conventional units is likely to be affected by the appearance of nearby low-income units.[283] The provision of affordable housing to low- and

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> In 1969, Massachusetts adopted zoning appeals legislation which applies to low and moderate income housing . . . [and] aids the development of low and moderate income housing by simplifying the process for obtaining permits to build such housing. The Act allows a public agency, limited dividend corporation, or nonprofit organization proposing to build affordable housing to apply to the local zoning board of appeals for a comprehensive permit, in lieu of the usual requirement of filing separate applications seeking approval from several local boards.

Id. at 370.

277. *Id.* at 377.

278. *Id.*; Mark Bobrowski, *Affordable Housing v. Open Space: A Proposal for Reconciliation*, 30 B.C. ENVTL. AFF. L. REV. 487, 494-95 (2003); Sheila R. Foster & Brian Glick, *Integrative Lawyering: Navigating the Political Economy of Urban Redevelopment*, 95 CALIF. L. REV. 1999, 2039-40 (2007).

> They began to investigate inclusionary zoning as a means of combating secondary displacement. Under this approach, city government allows a developer to build more on a given footprint (by building higher an on more of the area) only if the developer sets aside for permanently affordable housing a percentage of the floor area it gains through this density bonus.

Id.

279. Morgan, *supra* note 274, at 377; Padilla, *supra* note 268, at 550 ("This is justified because any lost profits resulting from the provision of housing at below market rates will be offset by income from extra units allowed by the density bonus.").

280. Jane E. Schukoske, *Housing Linkage: Regulating Impact on Housing Costs*, 76 IOWA L. REV. 1011, 1017 (1991); Morgan, *supra* note 274, at 379.

281. Morgan, *supra* note 274, at 379.

282. *Id.*

283. *Id.*; *see also* Thomas Kleven, *Inclusionary Ordinances–Policy and Legal Issues in Requiring Private Developers to Build Low Cost Housing*, 21 UCLA L. REV. 1432, 1461-62 (1974).

moderate-income households is a legitimate state interest,[284] and a mandatory set-aside ordinance directly advances this state interest by requiring the development of affordable housing units.[285]

Housing linkage ordinances require private developers to construct affordable housing or to contribute money for the creation of such housing in order to obtain approval for nonresidential development.[286] The requirement that nonresidential developers provide for affordable housing is justified on the basis that nonresidential development will attract employees, some of whom will need lower income housing.[287] Linkage ordinances are similar to mandatory set-asides in that they require private developers to provide for a public problem.[288] If, however, a linkage cost is so high when the ordinance is applied to a particular proposed development that it makes development economically infeasible, the ordinance may be found unconstitutional.[289]

V. GOVERNMENT TAKING OF PROPERTY

The Constitution provides two ways for governments to control land-use under its "eminent domain" power and under its "police power."[290] Under the Fifth and Fourteenth Amendments of the Con-

284. Serena M. Williams, *The Need for Affordable Housing: The Constitutional Viability of Inclusionary Zoning*, 26 J. MARSHALL L. REV. 75, 101 (1992).

> To show that providing affordable housing is a legitimate state interest, the municipality need look no further than the programs and policies of the federal government. The nation has had a housing policy for over fifty years. Since the United States Housing Act of 1937, the federal government has provided housing assistance to low-income persons. Section 23 of that Act stated that public housing agencies were to provide low-rent housing which "will aid in assuring a decent place to live for every citizen."

Id.(citations omitted).

285. Morgan, *supra* note 274, at 380 ("In order to survive a takings challenge, a land use regulation must substantially advance a legitimate state interest, showing a clear nexus between the state interest and the regulation.").

286. *Id.* at 381; Schukoske, *supra* note 280, at 1022.

287. Morgan, *supra* note 274, at 381-82.

> In 1985, San Francisco adopted a linkage ordinance entitled the Office Affordable Housing Production Program (OAHPP). The ordinance explicitly states that it was enacted in response to the "causal connection between [large-scale office] developments and the need for additional housing . . . particularly housing affordable to households of low and moderate income."

Id.; *see also* Schukokse, *supra* note 280, at 1019-20.

288. Morgan, *supra* note 274, at 382; *see also* Holmdel Builders Ass'n v. Twp. of Holmdel, 583 A.2d 277, 290 (N.J. 1990) ("[Expressing] a preference for mandatory set-asides because that device serves to ensure the provision of affordable housing."); Rachel M. Janutis, *Nollan and Dolan: "Taking" A Link Out of the Development Chain*, 1994 U. ILL. L. REV. 981, 1002 (1994).

289. Morgan, *supra* note 274, at 383.

290. Martin H. Belsky, *The Public Trust Doctrine and Takings: A Post-Lucas View*, 4 ALB. L.J. SCI. & TECH. 17, 18 (1994).

stitution, a person or private entity may have his, her, or its property taken for a public purpose provided adequate compensation is paid.[291] Contrasted with this eminent domain power is the inherent "police power" of government to regulate, without compensation, to protect the public.[292]

In *Kelo v. City of New London*, ten residences and five other properties were condemned as part of a 2000 development plan in New London, Connecticut.[293] Planners intended to transfer the property to private developers for the stated purpose of promoting economic growth in the area.[294] The U.S. Supreme Court, upheld the economic development rationale of the New London takings, and mandated broad judicial deference to government decision-making on public use issues.[295] The Court rejected the property owners' argument that the transfer of their property to private developers rather than to a public body required any heightened degree of judicial scrutiny.[296] The *Kelo* majority noted merely pretextual purposes do not satisfy the public use requirement, but also failed to define the term "mere pretext."[297]

Fortunately, Professor Daniel Kelly identified four criteria that courts can use to determine whether a private-to-private taking is pretextual: (1) the magnitude of the public benefit created by the condemnation,[298] if the benefits are large, it seems less likely that they are merely pretextual; (2) the extensiveness of the planning process that led to the taking; (3) whether or not the identity of the private beneficiary of the taking was known in advance; if the new owner's identity was unknown to officials at the time they decided to use eminent domain, it is hard to conclude the government undertook the

291. Susan Bayerd, Comment, *Inverse Condemnation and the Alchemist's Lesson: You Can't Turn Regulations into Gold*, 21 SANTA CLARA L. REV. 171, 171 n.1 (1981); Travis E. Booth, Comment, *Compensatory Mitigation: What is the Best Approach?*, 11 U. BALT. J. ENVTL. L. 205, 206 (2004).

292. Belsky, *supra* note 290, at 18.

293. Ilya Somin, *The Judicial Reaction to Kelo*, 4 ALB. GOV'T L. REV. 1, 5 (2011).

294. *Id.*

295. *Id.* at 6; Michele Alexandre, *"Love Don't Live Here Anymore": Economic Incentives for a More Equitable Model of Urban Redevelopment*, 35 B.C. ENVTL. AFF. L. REV. 1, 8 (2008) ("The government . . . usually argues that eminent domain is necessary to solve holdout problems that market inefficiencies create . . . . The use of eminent domain is designed to be a tool of last resort . . . .").

296. Somin, *supra* note 293, at 6; *see also* Kelo v. City of New London, 545 U.S. 469, 487-88 (2005).

297. Somin, *supra* note 293, at 24.

298. Ilya Somin, *Let There Be Blight: Blight Condemnations in New York After* Goldstein *and* Kaur, 38 FORDHAM URB. L.J. 1193, 1211 (2011).

condemnation in order to advance his or her interests; and (4) the subjective intent of the condemning authorities.[299] Under this approach, courts would investigate the motives of government decision-makers to determine the true purpose of the taking.

In *Kelo*, New London was not planning to open the condemned land—at least not in its entirety—to use by the general public.[300] The Supreme Court long ago rejected any literal requirement that condemned property be put into use for the general public.[301] Not only did the "use by the public" test prove difficult to administer (e.g., What proportion of the public need have access to the property? At what price?), but it proved to be impractical.[302] As the Court began applying the Fifth Amendment to the States at the close of the 19th Century, it embraced a broader and more natural interpretation of public use as "public purpose."[303] The Court has consistently rejected the narrow test ever since. Providing indigent populations with adequate housing opportunities in efforts to improve their welfare and the social and economic advancement and stability of the Washington region surely will satisfy the aggressive governmental taking of private housing units. Private development plays a critical role in uplifting depressed communities by providing direct public benefits including new jobs and affordable housing for residents, increased tax dollars for the municipality, increased property values, and improved facilities and public areas for the community.[304]

The first part of the Takings Clause, the Public Use Clause, bars the government from seizing an individual's property unless the property is put to a public post-condemnation use.[305] The second part, the Just Compensation Clause, requires the government to pay for the property it acquires from private owners, which is typically defined as the fair market value of the acquired property.[306] For the purposes of

299. *Id.*

300. *Kelo*, 545 U.S. at 478.

301. *Id.*; Alexandre, *supra* note 295, at 9 ("In recent years, the Supreme Court has embraced the more expansive notion of takings for public use purposes, culminating in a broader notion of public purpose announced in *Kelo*.").

302. Olga V. Kotlyarevskaya, *"Public Use" Requirement in Eminent Domain Cases Based on Slum Clearance, Elimination of Urban Blight, and Economic Development*, 5 CONN. PUB. INT. L.J. 197. 209 (2006).

303. *Kelo*, 545 U.S. at 480.

304. Asher Alavi, Note, Kelo *Six Years Later: State Responses, Ramifications, and Solutions for the Future*, 31 B.C. THIRD WORLD L.J. 311, 314 (2011).

305. Alberto B. Lopez, *Revisiting* Kelo *and Eminent Domain's "Summer of Scrutiny"*, 59 ALA. L. REV. 561, 566 (2008).

306. *Id.*

this Comment, the government would be required to compensate private dwelling owners for units obtained throughout the District for the occupation of low-income residents at reduced rents. Instead of solely advocating the government taking of blighted[307] areas, often leading to corruption and land grabbing,[308] I am most interested in the government taking of more highly regarded housing units within affluent enclaves throughout Washington.[309]

The government could successfully wrest control of an adequate number of units to provide for improved housing for displaced District citizens. This government activity, combined with the razing of various "blighted" housing areas within Washington, theoretically, would redistribute poor populations throughout the District producing a considerably less homogeneous economic distribution of city residents. The pitfalls of the discretion reserved to indigent residents seeking housing could be avoided with a government mandate. This government mandate would empower residents with the opportunity to locate housing on the open market or occupy reserved units within formerly privatized developments, seized and offered by the government through eminent domain.[310]

VI. SOCIAL EFFECTS OF DECONCENTRATION

A. Benefits

Research suggests that concentrated poverty increases the likelihood of social isolation; joblessness; dropping out of school; lower educational achievement; involvement in crime; unsuccessful behavior development and delinquency among adolescents; non-marital child-

307. Martin E. Gold & Lynne B. Sagalyn, *The Use and Abuse of Blight in Eminent Domain*, 38 FORDHAM URB. L.J. 1119, 1127 (2011).

> Blight is less an objective condition than it is a legal pretext for various forms of commercial tax abatement that, in most settings, divert money from schools and country-funded social services. Redevelopment policies originally intended to address unsafe or insufficient urban housing are not more routinely employed to subsidize the building of suburban shopping malls.

Id. (citation omitted).

308. Alavi, *supra* note 304, at 337.

309. *Id.* at 311.

310. Alexander Polikoff, *Racial Inequality and the Black Ghetto*, 1 Nw. J. L. & SOC. POL'Y 1, 19 (2006).

> Where government assists the redevelopment process, the assistance should be conditioned on housing for the poor as part of the mix. Where is does not (although usually some form of assistance will be involved), inclusionary zoning can mandate that some low-income housing be included in all new residential development above a threshold number of units.

Id.

birth; and unsuccessful family management.[311] Public housing in the United States remains segregated by race.[312] Unlike their white counterparts, a majority of black public housing residents live in neighborhoods populated by large concentrations of poor blacks.[313] Based on the 2000 Census, the rate of desegregation has slowed in comparison to the desegregation rate of past generations.[314] For example, the decline in segregation for blacks between 1980 and 1990 was 6.8%, while the decline from 1990-2000 was 5.6%.[315]

The successful movement and settlement of impoverished persons of color within historically white enclaves has the potential of encouraging further integration throughout the city.[316] Participants in mobility programs generally prefer their neighborhoods, citing a greater feeling of safety and improved public schools and services.[317] Integrated people of color are likely to look more favorably upon the possibility of entering a previously ethnically homogenous neighborhood after becoming aware of other successful transplants.[318] Formerly apprehensive low-income residents will be less inclined to remain in their dilapidated neighborhood as the number of desperate neighbors opt into residential opportunities elsewhere.[319] As integration becomes more widespread, affluent members of increasingly diverse communities will be less likely to flee their transforming neighborhoods, expecting similar trends to take place throughout the municipality.[320]

There are notable benefits of integrating predominantly white middle- and upper-class neighborhoods with displaced persons of

311. Denton, *supra* note 19, at 1208 ("Living in segregated neighborhoods thus constrains a group's average class standing, which, in turn, limits estate size. Both of these phenomena are both reflected in the lower net worth of the most segregated group, African Americans."); Wilson, *supra* note 3, at 206.

312. Cara Hendrickson, *Racial Desegregation and Income Deconcentration in Public Housing*, 9 GEO. J. ON POVERTY LAW & POL'Y 35, 53 (2002).

313. *Id.*

314. Michael Selmi, *Race in the City: The Triumph of Diversity and the Loss of Integration*, 22 J.L. & POL. 49, 58 (2006) ("Moreover, to the extent that segregated housing is the product of attitudinal barriers, one would expect a softening of those barriers with time, thus creating the greater possibility of integration with each passing decade.").

315. *Id.*

316. Richard H. Sander, *Individual Rights and Demographic Realities: The Problem of Fair Housing*, 82 NW. U. L. REV. 874, 929 (1988).

317. Hendrickson, *supra* note 312, at 60.

318. *Id.*

319. OWEN FISS A WAY OUT: AMERICA'S GHETTOS AND THE LEGACY OF RACISM 34 (Joshua Chen et al., eds., 2003).

320. *Id.*

color suffering from residential displacement.[321] Economic integration would likely enhance access to employment opportunities, better schools and social services, quality housing, and higher-quality retail establishments.[322] Adults would be posed with more fruitful career options within environments conducive to further developing personal social and intellectual capital.[323] Children of low-income transplants would also be provided with safer surroundings and greater institutional resources that are essential to advancing personal growth outside of the home and classroom.[324] There is some evidence that low-income minority in-movers that stay in stable housing in new neighborhoods, can generate positive, supportive ties resting on shared norms.[325] Making poorer neighborhoods more mixed and making affluent neighborhoods more accessible to the poor and minorities should reduce spatial inequalities over time.[326] To accomplish this, municipalities and the nation will have to *protect* housing choices—by enforcing fair housing rights as patterns of discrimination change—but also *expand* those choices and *encourage* a wide variety of people to make new kinds of locational choices.[327]

B. Community Responses to Deconcentration

Courts have often employed "mobility relief" to remedy racial discrimination in public housing.[328] These efforts most commonly manifest as interdevelopment or interproject transfers or the provi-

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321. *Id.* at 29.

322. *Id.*; *see also* Xavier de Souza Briggs, *Entrenched Poverty, Social Mixing and the "Geography of Opportunity": Lessons for Policy and Unanswered Questions*, 13 GEO. J. ON POVERTY LAW & POL'Y 403, 412 (2006).

323. FISS, *supra* note 319, at 28.

324. *Id.* at 29.

325. Briggs, *supra* note 322, at 409.

326. *Id.* at 412 ("Old prejudices of place, stigmas attached to images of decline and people who live in poor neighborhoods, create clear patterns of neighborhood avoidance by households that have the widest choices.").

327. *Id.* at 413.

> Although conventional wisdom in low-income housing policy emphasizes helping the persistently poor move out of very poor and racially segregated places or upgrading places where the poor live through community development, reducing the housing *instability* of low-income households over time--especially that of low-income black households--is an important piece of this policy puzzle. For now it is a largely unrecognized one.

Id.

328. Michelle Adams, *Separate and UnEqual: Housing Choice, Mobility, and Equalization in the Federally Subsidized Housing Program*, 71 TUL. L. REV. 413, 447 (1996) ("Mobility relief refers to efforts to make housing available for black or Hispanic victims of discrimination in the federally subsidized housing program in areas where their race does not predominate.").

sion of Section 8 certificates or vouchers.[329] The first effort provides a tenant with the opportunity to move into a new or vacant unit in a development in which the tenant's ethnicity does not predominate.[330] The latter program provides tenants with an opportunity to secure federally assisted housing in nonracially impacted areas.[331] It may be necessary to mandate the movement and economic interaction of low-income persons within more affluent residential areas.[332]

Studies suggest when black movers[333] are free to choose a new neighborhood, they move to "areas with large black populations compared to those census tracts to which Hispanics move, and vice versa."[334] All residents may not take to relocating immediately due to affinity for one's neighbors and the community in general, despite its pitfalls.[335] Many black mobility participants are conflicted about moving from a predominantly black or mixed-race neighborhood to a predominantly white neighborhood.[336] Program participants who move often do so in order to flee unsafe neighborhoods rather than per se segregation, and exhibit ambivalence about leaving their homes.[337]

Although increasing numbers of whites support residential integration in principle,[338] resistance to significant number of black re-

329. *Id.* ("Some advocates of mobility relief have also argued that this relief should be provided so that victims of housing discrimination may secure housing in better served areas, even if those areas are predominantly minority.").

330. *Id.*

331. *Id.*

332. *See id.* ("As a solution to housing discrimination, mobility relief attempts to alleviate the isolation caused by segregation by moving victims of discrimination closer to better schools and a better supply of jobs in safer areas.").

333. *See* Wilson, *supra* note 3, at 211.

> "When we consider that the vast majority of black families living in America's poorest neighborhoods come from families that have lived in similar environments for generations . . . continuity of the neighborhood environment, in addition to continuity of individual economic status, may be especially relevant to the study of cultural patterns and social norms among disadvantaged populations."

Id. (citation omitted).

334. Adams, *supra* note 328, at 452-53 ("Many movers had difficulty relocating to the suburbs because they experienced 'significant discrimination in the process of finding apartments,' as well as increased levels of racial discrimination and harassment.") (citation omitted).

335. Fiss, *supra* note 319, at 33; *see also* Adams *supra* note 328, at 453 ("While mobility programs have unquestionably offered some concrete improvements to participants, they also require some sacrifice, as participants must uproot themselves and their families in order to seek equality in housing and attendant services.").

336. Adams, *supra* note 328, at 450.

337. *Id.*

338. *Id.* at 456.

sidents in white neighborhoods is still extremely widespread.[339] Whites have embraced[340] the lack of a contemporary civil rights agenda advocating for greater integration of people of color within their communities.[341] Many white residents view the entry of blacks and various low-income persons as harbingers of declines in property values increases in crime, drug abuse, and violence.[342] Such brash generalizations about the lifestyles and characteristics of communities of color are directly tied to whites' and affluent residents' desire to maintain the status quo of residential demographics.[343] This discrimination manifests in housing-market transactions, evidencing the prejudices maintained by realtors, lenders, and others acting on their beliefs on what the housing market requires.[344] Despite the probable push back and challenges inherent in a newly mixed-income community, such developments could be positive locations for low-income families—safer, better served, and more prosperous than areas of concentrated poverty—even if these places rarely function as the most social of worlds.[345]

CONCLUSION

The economic benefits of gentrification on a sizable municipality are not to be considered in isolation. Indigent city residents are deserving of more care from local and national government in the preservation of housing opportunities. A *laissez faire*[346] approach to the economic and residential welfare of city residents is ineffective and ultimately denigrating to those with little perceived and actual control over their living conditions. A government acting under a broad interpretation of "public purpose"[347] may provide the ultimate remedy

339. *Id.* at 455; *see also* Reynolds Farley et al., *Stereotypes and Segregation: Neighborhoods in the Detroit Area*, 100 AM. J. SOC. 750, 755-61 (1994).

340. Wilson, *supra* note 3, at 203 ("The idea that the federal government 'has a special obligation to help improve the living standards of blacks' because they 'have been discriminated against for so long' was supported by only one-fifth of whites in 2001 and never has been supported by more than one-quarter of whites since 1975.").

341. Selmi, *supra* note 314, at 66.

342. Adams, *supra* note 328, at 456; *see also* Farley et al., *supra* note 339, at 760-61.

343. Adams, *supra* note 328, at 456; *see also* Farley et al., *supra* note 339, at 774-76.

344. Adams, *supra* note 328, at 456.

345. Briggs, *supra* note 322, at 411.

346. MERRIAM-WEBSTER.COM, http://www.merriam-webster.com/dictionary/laissez-faire (last visited Sept. 3, 2012) ("[*Laissez faire* is] a doctrine opposing governmental interference in economic affairs beyond the minimum necessary for the maintenance of peace and property rights.").

347. Kelo v. City of New London , 545 U.S. 469, 480 (2005).

through mandated movement of poor persons in concentrated locales of poverty, to characteristically affluent areas through condemnation and just compensation to owners of formerly private residences. This plan of action promises to challenge transplanted persons, private parties, and economic stakeholders in various ways. The imminent conflict concerning the compensation of private parties in lieu of government seizure should not, and must not dissuade the government from making good on its promise to represent *all* citizens in the realm of residential opportunities.[348]

348. S. Burlington Cnty. v. Twp. of Mount Laurel, 456 A.2d 390, 415 (N.J. 1983).

> The clarity of the constitutional obligation is seen most simply by imagining what this state could be like were this claim never to be recognized and enforced: poor people forever zoned out of substantial areas of the state, not because housing could not be built for them but because they are not wanted; poor people forced to live in urban slums forever not because suburbia, developing rural areas, fully developed residential sections, seashore resorts, and other attractive locations could not accommodate them, but simply because they are not wanted.

Id.

NOTE

Timely Death of the Show-Up Procedure: Why the Supreme Court Should Adopt a Per Se Exclusionary Rule

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INTRODUCTION

"It is a facet of our society that eventually touches all of its citizens. The prospect of innocents languishing in prison or, worse, being put to death for crimes that they did not commit, should be intolerable to every American, regardless of race, politics, sex, origin, or creed."[1] In 1981, Clyde Charles was wrongfully arrested and later convicted for the rape of a woman alongside the road after her car broke down.[2] The conviction hinged on a one-on-one show-up procedure at the hospital where the woman identified Clyde as the assailant.[3] After serving nineteen years in prison, Clyde was exonerated, due to DNA evidence revealing his innocence, which led to the eventual arrest of the real culprit.[4] Clyde Charles died in 2009 after spending the majority of his life behind bars for a crime he did not commit.[5] In 1983, Habib Wahir Abdal was wrongfully convicted for the rape of a woman in a nature reserve.[6] The woman made an initial description of the suspect as a black man wearing a hooded jacket, although she claimed that the assailant blindfolded her.[7] Four months later, police conducted a show-up procedure with Habib as the only suspect and the victim identified him as the perpetrator.[8] Habib was convicted solely on the basis of the identification, even though evidence existed that the hair found on the victim did not match Habib's hair.[9] He served sixteen years in prison before DNA evidence exonerated him and he was released in 1995.[10] He died in 2005, only ten years after his release.[11] In 1992, William Gregory was convicted of the rape and attempted robbery of two women living in his same apartment

1. *About The Innocence Project*, THE INNOCENCE PROJECT, http://www.innocenceproject.org/about/ (last visited Aug. 27, 2012).

2. *Clyde Charles*, THE INNOCENCE PROJECT, http://www.innocenceproject.org/Content/Clyde_Charles.php (last visited Aug. 27, 2012). "The [Innocence] Project is a national litigation and public policy organization dedicated to exonerating wrongfully convicted individuals through DNA testing and reforming the criminal justice system to prevent future injustice." *About the Innocence Project*, *supra* note 1.

3. *Clyde Charles*, *supra* note 2.

4. *Id.*; *see also Clyde Charles*; *Convict Was Cleared of Rape After Suing to Get DNA Test*, L.A. TIMES, Jan. 21, 2009, at B9 (stating that Clyde Charles's brother actually committed the crime).

5. *Id.*

6. *Habib Wahir Abdal*, THE INNOCENCE PROJECT, http://www.innocenceproject.org/Content/Habib_Wahir_Abdal.php (last visited Aug. 27, 2012).

7. *Id.*

8. *Id.*

9. *Id.*

10. *Id.*

11. *Id.*

complex.[12] The only evidence tying Gregory to the crime was a show-up identification by one of the victims and evidence of hair that was allegedly of "Negroid" origin.[13] Gregory served seven years of a seventy year sentence before he was finally released from prison in 2000 based on mitochondrial testing.[14]

Suggestive police procedures, similar to the ones mentioned above, have been the cause of far too many erroneous identifications and wrongful convictions. Recently, in *State v. Henderson*, the Supreme Court of New Jersey addressed the concerns involving witness identifications obtained through suggestive police procedures.[15] The court decided to revamp the existing legal framework that judges used when determining the admissibility of witness identifications potentially tainted by suggestive police procedures. *Henderson* created a new system for determining the admissibility of eyewitness testimony potentially affected by suggestive police procedures that critics believe constitutes a "landmark decision" in state criminal law.[16] Pundits agree that New Jersey is a forerunner in the field of criminal law and continues to be a leader in developing procedures that judges follow when handling this form of testimony.[17] This makes the decision important not only to the state of New Jersey, but pivotal in influencing decisions made across the nation concerning the revamping of witness identification procedures. This also makes the decision a bull's eye for critique and analysis to determine whether the new rules in New Jersey adequately protect defendants from due process violations and whether the decision comports with the general goals of evidence and the burden of the prosecution.

The court's decision in *Henderson* allows defendants the opportunity to challenge certain police procedures in court by first supplying evidence of suggestiveness.[18] Once this evidence is produced, the judge conducts a hearing whereby he or she analyzes a host of variables to consider when determining the admissibility of the testimony.[19] These variables are the result of extensive research

12. *William Gregory*, THE INNOCENCE PROJECT, http://www.innocenceproject.org/Content/William_Gregory.php (last visited Aug. 27, 2012).
13. *Id.*
14. *Id.*
15. *See* Benjamin Weiser, *In New Jersey, Sweeping Shifts on Witness IDs*, N.Y. TIMES, Aug. 25, 2011, at A1.
16. *Id.*
17. *Id.*
18. State v. Henderson, 27 A.3d 872, 878 (N.J. 2011).
19. *Id.*

conducted by the court, which uncovered factors that were unknown to courts in the past.[20] Although adding a host of variables for judges to consider is a great step towards protecting defendants from wrongful convictions, this alone is insufficient to protect the innocent from an unwarranted prison sentence. This Note contends that the Supreme Court of New Jersey's refusal to adopt a per se exclusionary rule when police use unnecessarily suggestive procedures severely limits the framework's capacity to protect defendants from erroneous identifications and wrongful convictions, specifically in cases where show-up procedures are used. Accordingly, federal and state courts should adopt a per se exclusionary rule for show-up procedures, permitting only those show-up identification procedures that were conducted out of necessity. This rule, alongside conducting extensive pretrial hearings in every felony case turning on witness identification, is the most fitting solution to saddle overly zealous police officials[21] and protect the innocent from wrongful convictions. This conclusion follows from the fact that judges are more prone to admitting eyewitness testimony (suggestive or not) than excluding it,[22] and evidence that jurors are generally unable to determine how an unnecessarily suggestive procedure truly affects the accuracy of an eyewitness's identification.[23] Part I explains the suggestiveness of show-up procedures and

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20. *Id.*

21. *See* United States *ex rel* Kirby v. Sturges, 510 F.2d 397, 405 (7th Cir. 1975) ("The purpose of a strict rule barring evidence of unnecessarily suggestive confrontations would be to deter the police from using a less reliable procedure where a more reliable one may be available . . . .").

22. *Henderson*, 27 A.3d at 888. The court stated that courts in the past, "bravely assumed that the jury is capable of evaluating [eyewitness] reliability." *Id.* (quoting United States v. Brown, 461 F.2d 134 (D.C. Cir. 1972) (Bazelon, C.J., concurring & dissenting)). One author suggests another reason why judges are less prone to excluding this form of evidence:

> [B]ecause so many criminal cases turn on eyewitness testimony, judges likely are not willing to exclude the testimony as a way to avoid such mini-trials, notwithstanding concerns about its generic reliability. Even if eyewitness testimony is the most frequent basis for erroneous convictions, the percentage of cases tainted by such errors likely is relatively small, and judges likely view potentially undermining a broad range of criminal prosecutions as too bitter a pill to swallow.

Peter J. Smith, *New Legal Fictions*, 95 GEO. L.J. 1435, 1476 (2007).

23. Michael H. Hoffheimer, *Requiring Jury Instructions on Eyewitness Identification Evidence at Federal Criminal Trials*, 80 J. CRIM. L. & CRIMINOLOGY 585, 589 (1989) ("The common knowledge of fact finders does not include an understanding of factors that determine the accuracy of identification testimony: to fact finders eyewitness testimony is credible, and its persuasiveness depends more on the eyewitness's conviction and credibility than on the truth or accuracy of the identification."); *see also* Editorial, *Challenging Eyewitness Evidence*, L.A. TIMES (Jan. 13, 2012), http://articles.latimes.com/2012/jan/13/opinion/la-ed-eyewitness-20120113 ("[T]he Supreme Court has ruled that judges may suppress eyewitness testimony before trial if there is evidence that police 'have arranged suggestive circumstances leading the witness to identify a particular person as the perpetrator of a crime.' This is an important safeguard because jurors

summarizes the Supreme Court's most recent declarations on witness identification as they relate to the due process clause of the Fourteenth Amendment. Part II discusses *State v. Henderson* and how the case changes the framework for determining the admissibility of eyewitness testimony in New Jersey. Part III explains the problems with the new framework. Part IV explains the approaches used in other jurisdictions that utilize a per se exclusionary rule or a similar framework. Part V includes a proposed solution to the shortcomings of the *Henderson* approach. Part VI concludes with a summary of the proposal and the arguments in support of that proposal.

I. SUGGESTIVE PROCEDURES

A. Show-Ups

"Show-ups are eyewitness identifications in which the police present a single suspect to the eyewitness to see if he or she can identify that person as the perpetrator."[24] Show-ups are sometimes used in emergency situations where the eyewitness's life is in imminent danger potentially foreclosing a chance to conduct an identification procedure at all.[25] Show-ups are inherently highly suggestive.[26] One expert opined that they are "'the most grossly suggestive identification procedure now or ever used by the police.'"[27] There is no doubt that show-ups have been the cause of wrongful convictions, some overturned by DNA evidence and others are very likely unknown.[28] This form of identification procedure has been condemned by courts and experts.[29] However, police continue to use this identification method to charge suspects with crimes, and courts continually permit this form of evidence.[30] Proponents of the show-up argue that this form of police procedure is necessary under certain circumstances, reasoning

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tend to give too much weight to eyewitness testimony, even if the judge advises them that it can be fallible for various reasons.").

24. Jessica Lee, Note, *No Exigency, No Consent: Protecting Innocent Suspects from the Consequences of Non-Exigent Show-Ups*, 36 COLUM. HUM. RTS. L. REV. 755, 758 (2005).

25. *Id.* at 762.

26. *See id.* The concern about show-up procedures is not a new one. *See* Stoval v. Denno, 388 U.S. 293, 302 (1967) ("The practice of showing suspects singly to persons for the purpose of identification, and not as part of a line-up, has been widely condemned.").

27. Lee, *supra* note 24, at 769.

28. *See id.* at 755 (providing an example of how a show-up procedure resulted in the wrongful conviction of William Gregory).

29. *Id.* at 756.

30. *Id.*; *see also* State v. Taylor, 594 N.W.2d 158, 161-62 (Minn. 1999) (holding that a one-person show-up is not per se unnecessarily suggestive).

that a formal line-up is implausible in every situation.[31] However, there are many show-ups that are conducted under "non-exigent" circumstances, and this evidence is allowed in court.[32] Police and courts also find these procedures quicker and more convenient than traditional line-ups, which is why they are sometimes favored.[33] However, using this form of identification procedure is dangerous because although show-ups provide a quick and convenient substitute for traditional line-ups, they are unnecessary and highly suggestive making them prone to producing misidentifications.[34]

1. Unnecessarily Suggestive Procedures

However suggestive the show-up procedure might be, suggestiveness alone does not warrant the exclusion of the identification. Judges do not expect identification procedures to be completely free of suggestiveness.[35] The main requirement is that the procedure be conducted fairly.[36] It is not enough that an identification procedure was conducted in a suggestive manner, the suggestion must be unnecessary.[37] As long as police use reasonable efforts to make the procedure fair, the courts typically do not find unnecessary suggestion.[38] Also, even if the procedure is deemed unnecessary and suggestive, the court may nonetheless find the identification reliable and admit the evidence.[39] And even if the out-of-court identification is inadmissible, the judge may admit an in-court identification if there is an indepen-

31. Lee, *supra* note 24, at 763.

32. *See generally* United States v. Hefferon, 314 F.3d 211, 218-19 (5th Cir. 2002) (permitting a show-up procedure under non-exigent circumstances); Lee, *supra* note 24, at 790-94 (describing a case where a man was wrongfully convicted of rape due to a non-exigent show-up procedure).

33. *Id.*

34. *See* Israel v. Odom, 521 F.2d 1370, 1373 ("While photographic identification undoubtedly provides an effective and useful investigatory tool, especially in cases such as the present where the crime is fresh and the perpetrator still at large . . . there can be no doubt that use of a single picture compromises much of this advantage . . . ."). Although this quote addresses single-photo identifications, the same problem arises with show-up procedures.

35. ANDREW E. TASLITZ ET AL., CONSTITUTIONAL CRIMINAL PROCEDURE 888 (3d ed. 2007).

36. *See id.*

37. *Id.*

38. *Id.*

39. *See* United States v. Brownlee, 454 F.3d 131, 138–39 (3d Cir. 2006) ("But unnecessary suggestiveness alone does not require the exclusion of evidence. A 'suggestive and unnecessary identification procedure does not violate due process so long as the identification possesses sufficient aspects of reliability . . . .'") (citations omitted).

dent basis for it.[40] For instance, "a witness who observed a robber in bright light for twenty minutes and who gave an excellent detailed description of the robber to the police probably had a reliable independent basis for selecting the defendant . . . ."[41] As a result, the prosecution has ample opportunities to utilize witness identifications even if they are tainted by suggestive police procedures.[42]

So what is an unnecessarily suggestive procedure? Unfortunately, for those who are presently searching for consistency, courts differ significantly in defining unnecessarily suggestive procedures.[43] Some courts have found that a presumption of unnecessary suggestiveness occurs where police breach guidelines for conducting identification procedures created by the Attorney General.[44] Other states have held that a procedure such as a line-up is only unnecessarily suggestive if "it is 'virtually inevitable' that the witness will select the defendant."[45] Courts have found unnecessary suggestiveness for show-up procedures where other more reliable methods for obtaining the identification were available.[46] Moreover, "[t]here are numerous other examples of courts reaching contrary conclusions on almost identical facts."[47] Courts even disagree as to what level of involvement the police actions must reach to render identification unnecessarily suggestive.[48] Some courts require the police to actively cause the

40. *Id. See generally* Moore v. Illinois, 434 U.S. 220 (1977) (explaining the factors to be considered when determining whether an independent basis for identification exists).

41. TASLITZ ET AL., *supra* note 35, at 889.

42. *See* McGuff v. Alabama, 566 F.2d. 939, 941 (5th Cir. 1978) (affirming the murder conviction of the appellant and denying his due process violation claim even though the identification procedure used by police was deemed suggestive and unnecessary).

43. *See* Rudolf Koch, Note, *Process v. Outcome: The Proper Role of Corroborative Evidence in Due Process Analysis of Eyewitness Identification Testimony*, 88 CORNELL L. REV. 1097, 1106 n.50 (2003) ("Although the qualification, 'unnecessarily,' certainly suggests that something more than inherent suggestiveness is required, the Supreme Court has never clearly defined what transforms an identification from suggestive to unnecessarily suggestive.") (citation omitted).

44. State v. Henderson, 27 A.3d 872, 877 (N.J. 2011).

45. Benjamin E. Rosenberg, *Rethinking The Right to Due Process in Connection with Pretrial Identification Procedures: An Analysis and a Proposal*, 79 KY. L.J. 259, 282 (1991); *see* Caver v. Alabama, 537 F.2d 1333, 1335 (5th Cir. 1976) ("[A] line-up is unduly suggestive when it is virtually inevitable that the witness will select the individual whom the police have singled out.").

46. *See* United States v. Brownlee, 454 F.3d 131, 138-39 (3d Cir. 2006) (stating that there was no reason the police could not have conducted a more reliable line-up procedure).

47. Rosenberg, *supra* note 45, at 282.

48. *Id.*

suggestiveness, whereas other courts find suggestiveness even if the police took no part in tainting the testimony.[49]

The court in *State v. Henderson* listed a host of "system variables" within the state's control that, if violated, could render a police procedure unnecessarily suggestive.[50] Such variables include the way line-ups are conducted, feedback given to witnesses, and using composites as a few examples.[51] In any event, judges have the final say in determining whether or not a procedure was unnecessarily suggestive. As a result, it leaves very little guidance for police to determine which procedures are acceptable and which cross the line of impermissibility. What is worse is that the current framework used in most states permits unnecessarily suggestive procedures, such as non-exigent show-ups, in spite of their suggestiveness as long as certain reliability factors are met.[52] Therefore, courts may allow certain unnecessarily suggestive procedures into court at the judge's discretion. This is problematic, because judges are more inclined to admit eyewitness testimony under the mistaken belief that jurors are prudent enough to place adequate weight on eyewitness testimony.[53] Certain procedures, such as show-ups, should be excluded; relying upon a judge's wisdom to determine reliability, because in all but a fraction of cases they are unnecessary and so highly suggestive that they are inherently unreliable. Giving the judge the discretion to suppress this form of evidence that is already deemed highly suggestive is unwise, in light of judges' recognized propensity to admit it under the assumption that juries can adequately evaluate the evidence.[54]

49. *See* People v. Moore, 143 A.D.2d 1056, 1056 (N.Y. App. Div. 1988) (holding that the line-up procedure conducted by police was unduly suggestive because they failed to cover up the heads of the suspects in order to protect the only suspect in the line-up wearing braids). *But see* Coleman v. Alabama, 399 U.S. 1, 6 (1970) (finding that although the defendant was the only person in the line-up wearing a hat, no one forced him to do so and therefore, did not render the line-up unduly suggestive).

50. State v. Henderson, 27 A.3d 872, 896-904 (N.J. 2011).

51. *Id.*

52. Rosenberg, *supra* note 45, at 273-74. By reaffirming *Biggers*, the *Manson* court focuses on the outcome and not the procedure. *See id.* at 274. The procedure may be unnecessarily suggestive; however, if the judge concludes that the identification was otherwise reliable based on the five factors, the evidence will be admitted. *Id.*

53. *Henderson*, 27 A.3d at 888. "[Courts in the past,]bravely assumed that the jury is capable of evaluating eyewitness reliability." *Id.*

54. *Id.*

2. Current Framework

Although a few states have tweaked the existing framework, the current system that most states use to determine "when due process requires suppression of an out-of-court identification produced by suggestive police procedures" was created in *Manson v. Brathwaite.*[55] In *Manson*, an undercover police officer conducting a sting operation perceived a person making a drug sale in an apartment complex.[56] Approximately eight minutes after the officer perceived the person, he visited the police station and described the alleged culprit's features.[57] After relaying what he saw to his colleagues, another officer, suspecting that Mr. Braithwaite might be the culprit, placed a single photo of Braithwaite on the officer's desk for identification.[58] Mr. Braithwaite was eventually convicted of possession and sale of heroin despite his adamant assertions that he was nowhere near the scene of the crime.[59] Eventually, after Braithwaite's several unsuccessful appeals, the Supreme Court granted certiorari on the issue "as to whether the Due Process Clause of the Fourteenth Amendment compels the exclusion, in a state criminal trial, apart from any consideration of reliability, of pretrial identification evidence obtained by a police procedure that was both suggestive and unnecessary."[60] The Supreme Court rejected a per se rule; it held that reliability was the linchpin for determining the admissibility of evidence and went on to outline the framework for determining whether or not to exclude the testimony.[61]

The Court's inquiry began with a two-step analysis. First, the defendant must show that the identification procedure was unnecessarily suggestive. Once shown, the defendant must provide evidence that under the totality of the circumstances the identification is unreliable.[62] The key elements for determining reliability are: (1) the oppor-

55. *See* Timothy P. O'Toole & Giovanna Shay, Manson v. Brathwaite *Revisited: Towards a New Rule of Decision for Due Process Challenges to Eyewitness Identification Procedures*, 41 VAL. U. L. REV. 109, 109 (2006). "In recent years state courts continue to apply the same factors Manson enunciated to determine the reliability of pre-trial eyewitness identification." Ruth Yacona, Manson v. Brathwaite, *The Supreme Court's Misunderstanding of Eyewitness Identification*, 39 J. MARSHALL L. REV. 539, 546 n.58 (2006).

56. Manson v. Brathwaite, 432 U.S. 98, 100 (1977).

57. *Id.* at 101.

58. *Id.*

59. *Id.* at 102.

60. *Id.* at 99.

61. *Id.* at 114.

62. *Id.*

tunity of the witness to view the criminal at the time of the crime; (2) the witness's degree of attention; (3) the accuracy of his prior description of the criminal; (4) the level of certainty demonstrated at the confrontation;[63] and (5) the time between the crime and the confrontation.[64] The judge is to weigh these factors against the damaging effects of the suggestive procedure.[65] In *Manson*, the court concluded that the damaging effect of a single photo display procedure did not outweigh the factors supporting the reliability of the identification.[66] This is the general framework that the majority of state courts use when determining the admissibility of unnecessarily suggestive procedures.[67] It is apparent that placing the single photo on the eyewitness' desk was unnecessary, because the officer could have conducted a photo array instead of a single photo procedure. Also, the procedure was highly suggestive since the photo was the only one placed in his office by a fellow officer (similar to a show-up procedure). A per se rule would have prevented this pre-trial testimony from reaching the jury. This would not have precluded the prosecution from using an in court identification as long as an independent basis for the in court identification existed. This would have been a more just solution than simply admitting the testimony procured by an unnecessary and highly suggestive procedure.

The Court's framework has been criticized on several grounds. The decision in *Manson* has been viewed as a "hands off" and "lenient" approach to due process in witness identification procedures that provides little protection against wrongful convictions.[68] Most significantly, the court refused to adopt a per se exclusionary rule for witness identifications obtained through unnecessarily suggestive procedures.[69] The Court in *Manson* called a per se approach to unnecessarily suggestive procedures "draconian" and stated that "[c]ertainly, inflexible rules of exclusion that may frustrate rather than

63. *Cf.* Richard A. Wise et al., *How to Analyze the Accuracy of Eyewitness Testimony in a Criminal Case*, 42 CONN. L. REV. 435, 458-59 (2009) (concluding that the level of confidence an eyewitness displays does not correlate with accuracy).

64. *Id.*

65. *Id.* at 463.

66. *Manson*, 432 U.S. at 116.

67. *Id.*

68. Guerra Thompson, *Eyewitness Identifications and State Courts as Guardians Against Wrongful Conviction*, 7 OHIO ST. J. CRIM. L. 603, 609 (2010). Under the *Manson* framework, "the Supreme Court has only ruled one identification so suggestive as to render it inadmissible." Radha Natarajan, *Racialized Memory and Reliability: Due Process Applied to Cross-Racial Eye-Witness Identifications*, 78 N.Y.U. L. REV. 1821, 1825 n.23 (2003).

69. *Manson*, 432 U.S. at 112.

promote justice have not been viewed recently by [the] Court with unlimited enthusiasm."[70] Consequently, evidence may be highly suggestive and a judge may still deem it reliable after applying the five factor analysis.[71] Additionally, as research has shown, at least one of the factors – the level of certainty demonstrated at the confrontation – has no correlation to reliability.[72] Moreover, the other *Manson* reliability factors are inconsistent with contemporary research, which designates a host of variables that affect reliability.[73] Critics view the court's decision as placing more concern on the potentially guilty going free rather than on the innocent going to prison.[74] Critics also argue that unnecessarily suggestive procedures are not the only causes of unreliable witness identification testimony, making the court's holding very limited in its reach, which is why judges should conduct extensive pre-trial hearings in every felony case based largely on eyewitness testimony.[75]

3. New Jersey Previously Follows *State v. Manson*

In *Madison*, a case involving the identification of an alleged robbery suspect, the New Jersey Supreme Court continued to follow the *Manson* framework for determining due process violations resulting from unnecessarily suggestive procedures.[76] There, the defendant was identified in a photo identification procedure that contained thirty-eight pictures with the defendant appearing in at least thirteen of the photos.[77] The court analyzed the first prong of *Manson* and found that the procedure was unnecessarily suggestive due to the unnecessary showing of multiple photographs of the defendant.[78] The court concluded, based on the two month delay in bringing the witness in for identification procedures and the witness's failure to consistently identify the defendant in several other photos, that the factors favored prohibiting the evidence, unless an independent basis for the identification existed.[79] The conviction was vacated and remanded.[80] This

70. *Id.* at 113.
71. *See* O'Toole & Shay, *supra* note 55, at 109.
72. *See infra* Part III.
73. *See generally* State v. Henderson, 27 A.3d 872 (N.J. 2011) (conducting research that uncovered various factors that affect eyewitness identification reliability).
74. Thompson, *supra* note 68, at 612.
75. *Id.* at 610.
76. State v. Madison, 536 A.2d 254, 259 (N.J. 1988).
77. *Id.* at 255.
78. *Id.* at 262.
79. *Id.* at 263–65.

opinion produced the previous "*Manson*/*Madison*" test that was used in all cases involving unnecessarily suggestive procedures in New Jersey prior to the recent decision in *State v. Henderson*.[81]

II. *STATE V. HENDERSON* AND NEW JERSEY'S NEW FRAMEWORK

A. Background

In *Henderson*, James Womble witnessed the murder of an acquaintance during a New Year's get-together.[82] Thirteen days after the murder, Womble visited the police station to assist police officials in making an identification of the suspect.[83] The identification procedure was conducted primarily by two officers who presented Womble with an array of photos consisting of seven filler suspects and one photo of the defendant.[84] After the officer shuffled the eight photos and presented them one by one, Womble immediately eliminated five of the photos.[85] Of the last three, Womble vacillated between two photos and stated that he was not 100% sure about making an identification.[86] At this point, other officers entered the room and attempted to calm Womble by reassuring him that his concerns of potential reprisal resulting from identifying a suspect were unnecessary.[87] One officer instructed Womble "to calm down, to relax" and informed him that "any threats against [him] would be put to rest by the Police Department." [88] Another officer stated "just do what you have to do, and we'll be out of here."[89] Suddenly, after these comments were made, Womble was able to make an identification of the defendant.[90]

The trial court found that nothing surrounding the procedure was improper and that the identification was reliable.[91] The court specifically noted that Womble "displayed no doubts about identifying defendant Henderson, that he had the opportunity to view [the]

80. *Id.* at 265.
81. *Id.*
82. State v. Henderson, 27 A.3d 872, 879 (N.J. 2011).
83. *Id.* at 880.
84. *Id.* at 881.
85. *Id.*
86. *Id.*
87. *Id.*
88. *Id.*
89. *Id.*
90. *Id.*
91. *Id.* at 882.

defendant at the crime scene, and that Womble fixed his attention on defendant 'because he had a gun on him.'"[92] The trial court admitted the evidence and the defendant was convicted based almost solely on the witness identification made by Womble.[93] On appeal, the appellate division disagreed.[94] Using the first prong of the *Manson/Madison* framework, the appellate court found the identification procedure unnecessarily suggestive based on a material breach of the Attorney General's guidelines for such procedures.[95]

B. The Supreme Court's Findings

After reviewing the case on certification and appointing a special judge to conduct extensive research with the purpose of analyzing the effectiveness of the previous system for evaluating witness identification testimony, the New Jersey Supreme Court concluded that the *Manson/Madison* framework did not meet its goals of reliability and deterrence of inappropriate police conduct.[96] The court found that research conclusively showed the "many vagaries of memory encoding, storage, and retrieval; the malleability of memory; the contaminating effects of extrinsic information; the influence of police interview techniques and identification procedures; and the many other factors that bear on the reliability of eyewitness identifications" warranted a revision of the *Manson/Madison* test. [97]

The court also held that where suggestive procedures were used, all relevant system and estimator variables must be evaluated to determine the admissibility of the evidence.[98] System variables are the aspects of witness identification procedures that police officials control, such as blind administration of line-ups, proper pre-identification instructions, line-up construction, avoiding feedback and recording confidence, multiple viewings, simultaneous versus sequential line-ups, composites, and show-ups.[99] Each of these variables are to be

92. *Id.*
93. *Id.* at 882-83.
94. *Id.* at 884.
95. *Id.* at 883.
96. *Id.* at 877-78; *see Evidence–Eyewitness Identifications – New Jersey Supreme Court Uses Psychological Research to Update Admissibility Standards for Out-of-Court Identifications* – State v. Henderson, 27 A.3d 872 (N.J. 2011), 125 HARV. L. REV. 1514, 1516 (2012) [hereinafter *Evidence*] ("Based on these findings, the high court revised the Manson/Madison test to better reflect the current state of science and to generally heighten courts' scrutiny of eyewitness identifications.").
97. *Henderson*, 27 A.3d at 916.
98. *Id.* at 878.
99. *Id.* at 896-902.

considered alongside the estimator variables, which are factors outside of the police officer's influence, such as stress, weapon focus, duration, distance and lighting, witness characteristics, perpetrator characteristics, memory decay, race bias, private actors, and speed of identification.[100]

In order to evaluate whether there is sufficient suggestiveness to warrant a hearing to determine the admissibility of the identification, the court is to evaluate the facts in light of the system variables.[101] The court will determine whether or not variables such as multiple viewings, simultaneous versus sequential line-ups, or composites have made the procedure suggestive.[102] Once suggestiveness is shown, the court combines the system variables with the estimator variables to determine the reliability of the evidence.[103] This approach builds significantly on the *Manson*/*Madison* framework, which does not provide an extensive explanation of what makes a procedure suggestive. Also, *Manson* only provided five factors for determining the reliability of the identification, whereas *Henderson* creates a host of factors to use for determining reliability.[104]

There is another significant conclusion derived from the *Henderson* opinion that is less provocative: the court rejected the defendant and the Association of Criminal Defense Lawyers of New Jersey's (ACDL) recommendation to adopt a per se exclusionary rule for evidence derived from unnecessarily suggestive procedures.[105] The court agreed with the Innocence Project's[106] approach, which was to evaluate the suggestive nature of the conduct with the other reliability factors.[107] The court concluded that the potential bar of reliable evidence outweighed the deterrent effect of a per se exclusionary rule.[108] This conclusion by the court reinforces the view in *Madison*

100. *Id.* at 904-09.
101. *Id.* at 878.
102. *Id.* at 920.
103. *Id.* at 878.
104. *Compare supra* Part I.B (describing the current framework for the admissibility of out-of-court identification procedures) *with supra* Part II (explaining New Jersey's framework).
105. *Henderson*, 27 A.3d at 922.
106. *Id.* at 917. "The Innocence Project is a national litigation and public policy organization dedicated to exonerating wrongfully convicted individuals through DNA testing and reforming the criminal justice system to prevent future injustice." *The Innocence Project*, THE INNOCENCE PROJECT, http://www.innocenceproject.org/ (last visited Aug. 29, 2012).
107. *Henderson*, 27 A.3d at 917.
108. *Id.* at 922. *But see* Commonwealth v. Johnson, 650 N.E.2d 1257, 1263 (Mass. 1995) ("[T]he admission of unnecessarily suggestive identification procedures under the reliability test would likely result in the innocent being jailed while the guilty remain free.").

that the possibility of guilty people going free is of greater concern to the court than protecting the potentially innocent.

The result of *Henderson* is as follows: if a defendant believes that suggestive procedures were used by the police to obtain an identification then he must proffer evidence of suggestiveness through the system variables, which include, but are not limited to, the eight factors previously mentioned.[109] If there is no evidence of suggestiveness or the judge finds that the defendant's claims of suggestiveness are unpersuasive, the hearing is concluded and the identification is permitted, absent some other basis for exclusion.[110] However, if the evidence does convince the judge that the witness's identification is unreliable due to suggestion, then the judge must evaluate the thirteen estimator variables in connection with the system variables to determine the reliability of the evidence.[111] The burden lies with the defendant to prove a substantial likelihood of misidentification as a result of the procedure.[112] Theoretically, a police officer could point to the culprit for the witness and if the judge decides that the reliability factors favor admissibility, the judge may admit the evidence.

The court remanded the case for Henderson to receive another pre-trial hearing and directed the trial court to consider the testimony in light of the new standards, but refused to express its view of the reliability based on the facts.[113] In conclusion, the court's reasoning behind the changes was to address the twin goals of criminal law: "that guilt shall not escape or innocence suffer."[114] *Henderson* went on to

109. *Henderson*, 27 A.3d at 922.

110. *Id.* at 918.

111. *Id.* at 921.

112. The court in *Henderson* stated:

> First, to obtain a pretrial hearing, a defendant has the initial burden of showing some evidence of suggestiveness that could lead to a mistaken identification. That evidence, in general, must be tied to a system—and not an estimator—variable.
>
> Second, the State must then offer proof to show that the proffered eyewitness identification is reliable—accounting for system and estimator variables—subject to the following: the court can end the hearing at any time if it finds from the testimony that defendant's threshold allegation of suggestiveness is groundless.
>
> Third, the ultimate burden remains on the defendant to prove a very substantial likelihood of irreparable misidentification. To do so, a defendant can cross-examine eyewitnesses and police officials and present witnesses and other relevant evidence linked to system and estimator variables.
>
> Fourth, if after weighing the evidence presented a court finds from the totality of the circumstances that defendant has demonstrated a very substantial likelihood of irreparable misidentification, the court should suppress the identification evidence. If the evidence is admitted, the court should provide appropriate, tailored jury instructions . . . .

Id. at 920 (internal citations omitted).

113. *Id.* at 930.

114. *Id.* at 928 (citation omitted).

argue that the purpose behind refusing to adopt a per se exclusionary rule was to avoid bright line rules that might exclude evidence for mistakes made by police officials. [115] However, the court failed to address procedures conducted by police that were unnecessary and were not mistakes at all. These types of procedures include show-up procedures where police are completely aware of the procedure's suggestiveness and continue to use the procedure in non-exigent situations. The failure to address these police procedures is one of the reasons why the court's refusal to adopt a per se exclusionary rule for procedures that are unnecessarily suggestive is troubling.

For example, applying the *Henderson* approach to the Clyde Charles case likely produces similar results. In Clyde Charles's case, a *Henderson* approach would have allowed the judge to look at the system variables at play, which in this case was the show-up procedure. Although the judge may have found the show-up procedure suggestive, *Henderson* also requires a look at the estimator variables that were present before determining admissibility.[116] In this case, the only relevant estimator variables were perhaps race bias (the victim was white and the suspect was black) and lighting (the crime occurred at night). A judge using the *Henderson* approach has the discretion to exclude the identification from the show-up procedure or admit it based on their analysis of the evidence.[117] Clyde's future would depend on the whims of a judge (who, as previously mentioned, had a propensity to admit evidence), which is why a per se rule is necessary to exclude show-up procedures; they are generally unnecessary and unreliable and the use of this procedure has landed innocent people like Clyde Charles in prison.

III. PROBLEMS WITH THE FRAMEWORK

As previously mentioned, the framework in *Manson* has been widely criticized by numerous legal scholars around the nation. These criticisms are relevant to *Henderson*, because the two significant pitfalls of the *Manson* approach remain present in the *Henderson* decision: (1) the rules only apply to identifications that were a product of suggestion; and (2) the court refused to adopt a per se exclusionary rule where certain suggestive procedures are used.[118] These two

115. *Id.*
116. *Id.* at 903-04.
117. *Id.*
118. Thompson, *supra* note 68, at 614.

drawbacks raise questions about the strength of the new framework's ability to satisfy *both* of its goals: preserving vital evidence *and* protecting the rights of the innocent. There is little doubt that allowing a judge the discretion to determine the reliability of evidence satisfies the first goal, especially since judges are more prone to admitting witness identification evidence than excluding it,[119] but what protection if any does this afford the innocent? Nonetheless, there are counterarguments to the per se rule contending that juries are capable of evaluating the reliability of evidence without holding preliminary hearings to test the trustworthiness of every witness identification, and that a per se exclusionary rule is too stringent.[120] The question remains whether those arguments are convincing enough to allow evidence derived from unnecessarily suggestive procedures to go before the jury.

Moreover, the court seeks to turn to the question of suggestiveness, without regard to reliability. Thus significant estimator variables may exist that render an identification unreliable, yet a defendant is not entitled to challenge this identification unless he or she first proves that the identification was unnecessarily suggested to the witness.[121] The judge will rely on the jury's ability to evaluate witness identifications even though evidence shows that jurors are substantially influenced by witness identifications.[122]

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119. *Henderson*, 27 A.3d at 888. The court stated that courts in the past, "bravely assumed that the jury is capable of evaluating [eyewitness] reliability." *Id.* (quoting United States v. Brown, 461 F.2d 134 (D.C. Cir. 1972)).

120. *See* Manson v. Brathwaite, 432 U.S. 98, 112-13 (1977); *see also Henderson*, 27 A.3d at 888-89.

121. *See Evidence*, *supra* note 96, at 1518

> By tying the initial burden to system variables–thereby making external suggestion necessary for suppression–*Henderson* will deter police misconduct. However, identification testimony that is untainted by procedural suggestiveness, but otherwise exhibits indicia of unreliability related to estimator variables, still poses a risk of false conviction since the defendant cannot make the initial showing that would entitle him to a Wade hearing.

Id.

122. *Id.* at 1520–21.

> [M]any studies have shown that juries are particularly susceptible to placing too much faith in eyewitness identifications . . . . [R]ight now, the court relies on the ability of jurors, with the aid of enhanced jury instructions and expert testimony, to properly pick out and resolve essential identification issues even in cases in which an identification is the crucial centerpiece of the prosecution's case.

Id.

A. The Key Shortcomings of the New Framework

Henderson only permits a preliminary hearing where there is evidence that suggestive procedures were used.[123] Consequently, a judge may rule that the evidence is insufficient to warrant a hearing to determine the reliability of the identification.[124] This holding is consistent with *Manson* and is problematic for a number of reasons.[125] One reason is that certain identifications should not reach the jury, even if there is no evidence of suggestiveness.[126] This view is supported by research showing that a great deal of unreliable eyewitness identifications stems from factors such as age, lighting, and weapon focus that bear no relation to suggestiveness.[127] These circumstances may render an eyewitness's identification so unreliable as to violate principles of fairness.

For example, researchers agree that a victim's or observer's memory is inherently malleable.[128] Although an observer believes that they are giving an accurate account of what happened, they are often reconstructing the events in their mind based on factors aside from perception.[129] This leads to a recounting of an event by the observer with gap filling information that is probably inaccurate or imprecise.[130] Moreover, "[witnesses] tend to overestimate the accuracy of their perceptions and memory."[131] This is troublesome, because a witness's confidence in his or her own testimony is malleable, which means that outside influences may increase the witness's belief in the accuracy of their observation.[132] Since juries rely heavily on the level of confidence that the witness exhibits at trial while testifying, the wit-

123. *Henderson*, 27 A.3d at 878.

124. *Id.*

125. *See Evidence*, *supra* note 96, at 1514 ("The court should have treated equally all factors that might undermine the reliability of an identification, rather than providing for a pretrial hearing only where something 'suggestive' has occurred.").

126. JENNIFER L. OVERBECK, *Beyond Admissibility: A Practical Look at the Use of Eyewitness Expert Testimony in the Federal Courts*, 80 N.Y.U. L. Rev. 1895, 1906-07 (2005) (stating that procedural safeguards for suggestiveness do little to address other variables detrimental to reliable identifications).

127. *See* Wise, *supra* note 63, at 499-505; *see also* Thompson, *supra* note 68, at 610.

128. *Henderson*, 27 A.3d at 878.

129. Wise, *supra* note 63, at 455.

130. *Id.* at 455-56 ("[T]he eyewitness unknowingly fills in the gaps in his or her factual memory of the crime based on such factors as the eyewitness's expectations, attitude, beliefs, and knowledge of similar events.").

131. *Id.* at 458.

132. *Id.*

ness's over confidence could give jurors a false impression.[133] *Henderson* attempts to address the pitfalls of human memory by including witness feedback and recording confidence as system variables to consider when determining suggestiveness.[134] However, the factors of witness memory decay and overall malleability are only evaluated if suggestiveness is found, and influences other than the police may cause a witness to overestimate his or her confidence in his or her identification. This inevitably allows suspect evidence into court for the jury to evaluate regardless of its reliability. One way judges can avoid this result is to conduct a hearing for every witness's identification, in order to determine the strength of the witness's memory, before allowing the jury to hear the evidence, given the jury's susceptibility to witness identifications.[135]

Race bias is another factor that reduces the reliability of witness identifications.[136] This occurs when a person of one race is asked to identify a particular person from another race.[137] Studies analyzing the effects of "racial impairment" while making cross-racial identifications suggest that race bias may have the same effects as poor lighting and proximity of the perpetrator.[138] This fact is especially troubling for African Americans who are more susceptible to misidentifications resulting from race bias on average than are whites.[139] It is included as yet another estimator factor in *Henderson*'*s* analysis that is never reached without proof of suggestiveness.[140]

Another potential factor that may affect the accuracy of a witness's identification is weapon focus. Research has revealed that a witness's focus on a weapon increases the chances of the witness mak-

133. *Id.* at 459-60; *see also* Hon. D. Duff Mckee, *Challenge to Eyewitness Identification Through Expert Testimony*, *in* 35 AMERICAN JURISPRUDENCE: PROOF OF FACTS 1, 20 (3d ed. 2011) ("[T]here is no correlation between a witness' own confidence level and the actual accuracy of the identification.").

134. State v. Henderson, 27 A.3d 872, 900 (N.J. 2011).

135. *See* Manson v. Brathwaite, 432 U.S. 98, 119-20 (1977) (Marshall, J., dissenting) ("[J]uries unfortunately are often unduly receptive to [witness identifications].").

136. John P. Rutledge, *They All Look Alike: The Inaccuracy of Cross-Racial Identifications*, 28 AM. J. CRIM. L. 207, 210 (2001); *see* Natarajan, *supra* note 68, at 1821 ("Scientists agree that people are far better at recognizing members of their own race than they are at recognizing members of another race and that this own-race bias causes mistaken identifications.").

137. *See* Rutledge, *supra* note 136, at 211. "[I]t is established that people are more accurate in identifying people of their own race than they are in identifying people of different races." Rosenberg, *supra* note 45, at 297.

138. *See* Rutledge, *supra* note 136, at 211-12.

139. *Id.* at 212.

140. State v. Henderson, 27 A.3d 872, 926 (N.J. 2011).

ing an erroneous identification.[141] Witnesses faced with these circumstances tend to focus on the weapon instead of the assailant.[142] In *Henderson*, the court alluded to a study that showed the disparity in accuracy between witnesses viewing a person brandishing what appears to them to be a weapon versus a person holding an innocuous object in a benign way.[143] The witnesses' misidentifications increased significantly where a weapon was used.[144] The court also noted that weapon focus distorts the witness's ability to convey an accurate depiction of the alleged assailant.[145] These factors were specifically relevant in *Henderson*, because the alleged perpetrator was pointing a gun directly at the witness's chest.[146] Unfortunately, the *Henderson* framework offers no discussion about weapon focus unless the system variables are sufficient to support a conclusion of suggestiveness. That determination is left to the discretion of the trial judge whose decision is given significant deference by higher courts.[147] Memory malleability, race-bias, and weapon focus are three of many estimator variables that can affect the reliability of witness identifications;[148] however, a defendant is not entitled to a preliminary hearing addressing these factors without some level of suggestiveness.[149] Theoretically, a witness's memory of the identification could be tainted, a weapon could have drastically limited his or her ability to focus on the perpetrator, and the witness may be identifying a person from another race. Despite these dangers, the identification is admitted with jury instructions and zealous advocacy as the only safeguard against the tainted evidence.

The second major problem with the New Jersey framework is the court's refusal to adopt a per se exclusionary rule where suggestiveness has been shown. The court concluded that although a per se exclusionary rule would have a stronger deterrent effect, it would also

141. *Id.* at 905; *see also* Mckee, *supra* note 133, at 3 ("[W]itness[es] tend to focus on the weapon to the exclusion of all else.").

142. *Henderson*, 27 A.3d at 905.

143. *Id.*

144. *Id.*

145. *Id.*

146. *Id.* at 882.

147. State v. Locurto, 724 A.2d 234, 238 (N.J. 1999) ("[On a review of a motion to suppress, a court] should give deference to those findings of the trial judge which are substantially influenced by his opportunity to hear and see the witnesses and to have the 'feel' of the case, which a reviewing court cannot enjoy.").

148. *Henderson*, 27 A.3d at 904–08.

149. *Id.* at 928.

result in the exclusion of a significant amount of reliable material.[150] The court seems to ignore other rules and procedures that require exclusion of reliable and relevant evidence where guidelines were not followed.[151] Not to mention, critics suggest "that testimony derived from unnecessarily suggestive pretrial procedures is inadmissible per se, without regard to reliability, because such procedures violate the defendant's right to procedural fairness."[152] These are just a few of the reasons *Henderson's* refusal to adopt a per se exclusionary rule limits its ability to protect the innocent.

The failure to adopt a per se exclusionary rule provides very little incentive for police officers to refrain from using suggestive procedures while conducting witness identifications.[153] In fact, a per se rule adds an incentive to discontinue use of suggestive procedures where other procedures are available.[154] Instead, the court in *Henderson* rejected the arguments by the defendant and the Association of Criminal Defense Lawyers of New Jersey (ACDL) who both advocated adopting a per se exclusionary rule where unnecessarily suggestive procedures are used.[155] Both the defendant and the ACDL argued that in cases where unnecessarily suggestive procedures are used, the court should adopt an approach similar to *Miranda v. Arizona.*[156] This landmark case established a per se rule excluding confessions gained during interrogations without first apprising the detainee of his or her right to an attorney, right to remain silent, and a right notification that anything they say can and will be used against them in a court of law.[157] Certainly confessions are often reliable forms of evidence proving an individual's culpability; however, the court decided that protecting the defendant's rights to due process was more important than preserving testimonies derived from questionable proce-

150. *Id.* at 922.

151. *See* Rosenberg, *supra* note 45, at 303. Also, note that prior to the decision in *Neil v. Biggers*, 409 U.S. 188 (1972), several lower courts applied a per se exclusionary rule to determine the admissibility of an out-of-court identification. Rudolf Koch, *Process v. Outcome: The Proper Role of Corroborative Evidence in Due Process Analysis of Eyewitness Identification Testimony*, 88 CORNELL L. REV. 1097, 1113 (2003).

152. Rosenberg, *supra* note 45, at 297.

153. Commonwealth v. Johnson, 650 N.E.2d 1257, 1263 (Mass. 1995) ("[I]t appears clear to us that the reliability test does little or nothing to discourage police from using suggestive identification procedure.").

154. United States *ex rel* Kirby v. Sturges, 510 F.2d 397, 405 (7th Cir. 1975).

155. *Henderson*, 27 A.3d at 915.

156. *Id.*

157. *See generally* Miranda v. Arizona, 384 U.S. 436 (1966) (holding that statements obtained from defendants during interrogation by police, without being told of their constitutional rights, were inadmissible as a violation of the Fifth Amendment privilege against incrimination).

dures, a conclusion courts in the past have made about unnecessarily suggestive procedures as well.[158] This same reasoning makes sense for show-up procedures, which are inherently suggestive and unnecessary.

However, there are arguments supporting the decision made in *Henderson*. The court notes that the state has an obligation to provide public safety.[159] Accordingly, the suppression of reliable evidence could allow criminals to walk free and commit crimes again. This concern is legitimate, and some might argue that the benefit to the public at large outweighs the possibility of a few innocent individuals going to jail. Another argument for the *Henderson* framework is that it avoids the overwhelming task of conducting a hearing for every case involving witness identifications.[160] *Henderson* states that judges will permit witness identifications in the vast majority of cases and that the best solution to preventing decisions based on unreliable evidence is to include enhanced jury charges.[161]

There are a few problems with these viewpoints. First, when the innocent are imprisoned the experience has a drastic effect on their psychological well-being. The effects of incarceration are more damaging to the innocent than those individuals who actually committed a crime.[162] This affects society in two ways: (1) those who were wrongfully convicted and had children before entering prison will find it difficult to reunite with them, which negatively impacts society as a whole; and (2) the wrongfully convicted may also find it difficult to find employment, which could lead to a cycle of criminality that never existed before.[163]

Secondly, procedural guideline requirements are usually analyzed under a balancing test. The Supreme Court in *Mathews v. Eldridge* specifically expressed the factors of inquiry for determining the constitutionality of refusing to implement procedural safeguards in certain

158. *See* Robert P. Mosteller, *The Duke Lacrosse Case*, *Innocence*, *and False Identification: A Fundamental Failure to* "*Do Justice*", 76 FORDHAM L. REV. 1337, 1411 (2007) ("[Courts before *Manson* excluded identifications based on the] dual rationale of eliminating evidence of uncertain reliability given the 'awful risks of misidentification' and deterring misconduct by police and prosecutors.").

159. *Henderson*, 27 A.3d at 922.

160. *Id.* at 923.

161. *Id.* at 878.

162. Zieva Konvisser, *Psychological Consequences of Wrongful Conviction*, OBVIOUS ANSWERS (Aug. 31, 2010), http://obviousanswers.presspublisher.us/issue/august-2010/article/psychological-consequences-of-wrongful-conviction.

163. *See* Gabriel J. Chin et al., *Effective Assistance of Counsel and the Consequences of Guilty Pleas*, 87 CORNELL L. REV. 697, 699 (describing the negative effects of convictions).

adjudicatory proceedings.[164] The court is to use a balancing test weighing the private interest affected by the official conduct; the risk of deprivation of the interest without the procedure, alongside the probable value of the proposed procedure; and the government's interest in the matter.[165] Here, the private interest potentially affected without the pretrial hearing is the freedom of the individual, which is a substantial interest. The risk of deprivation based on erroneous witness identifications is considerable based on numerous reports and research.[166] Also, the pretrial hearings would prove significantly valuable, because it could prevent unreliable evidence from reaching the jury, reducing the likelihood of an erroneous conviction. Moreover, although the government has a profound interest in reducing administrative burdens, that interest is outweighed by the state's interest in protecting the innocent from going to prison. Lastly, educating a jury about the frailties of witness identifications, to enhance a jury's ability to determine whether a witness's identification is reliable is insufficient protection for the innocent, especially when done through cross examination.[167] Although expert testimony would assist the jury in making a more informed decision, this type of testimony is generally not admitted.[168]

IV. ALTERNATIVE APPROACHES

A. States Adopt Different Approaches

In *Commonwealth v. Johnson*, the police conducted a show-up procedure that the trial court found unnecessarily suggestive.[169] Upon review, the Massachusetts Supreme Court decided to reject the reliability factors used in the *Manson* framework, specifically maintaining

164. *See generally* Mathews v. Eldridge, 424 U.S. 319 (1976) (holding that an evidentiary hearing is not required prior to termination of disability benefits, and that the present administrative procedures for such termination fully comport with due process).

165. *Id.* at 321.

166. Matthew J. Reedy, *Witnessing the Witness: The Case for Exclusion of Eyewitness Expert Testimony*, 86 NOTRE DAME L. REV. 905, 906–07.

> The Innocence Project, a "national litigation and public policy organization dedicated to exonerating wrongfully convicted people," estimates that eyewitness identification was a factor in seventy-five percent of convictions overturned through DNA testing, making it the "single greatest cause of wrongful convictions" in the United States. "More than 4250 Americans per year are wrongfully convicted due to sincere, yet woefully inaccurate eyewitness identifications."

Id. (internal citations omitted).

167. Thompson, *supra* note 68, at 620–21.

168. *Id.* at 620.

169. Commonwealth v. Johnson, 650 N.E.2d 1257, 1258 (Mass. 1995).

a per se exclusionary rule that *Manson* refused to adopt.[170] Similar to *Henderson*, the court in *Johnson* requires that a defendant first establish that he or she was subjected to suggestive procedures; however, once unnecessary suggestiveness is shown, the identification is automatically excluded.[171] The court espoused a need to provide the utmost protection to defendants against inaccurate witness identifications.[172] The court specifically rejected *Manson's* premise that the suppression of potentially reliable evidence would result in the guilty going free.[173] On the contrary, *Johnson* stated that the "inverse of this is probably more accurate: the admission of unnecessarily suggestive identification procedures under the reliability test would likely result in the innocent being jailed while the guilty remain free."[174] The court also acknowledged that the Manson approach (namely the failure to adopt a per se exclusionary rule) provided insufficient deterrence for police, allowing the activities to flourish and persist.[175] Johnson relied on the documented evidence showing the dangers of witness identifications.[176] The court emphatically concluded by stating "[o]nly a rule of per se exclusion can ensure the continued protection against the danger of mistaken identification and wrongful convictions."[177] The court in *Johnson* reached a conclusion that serves a number of goals: (1) it deters police from using procedures that dilute the strength of a witness' identification; (2) it protects defendants from erroneous identifications; and (3) it increases the likelihood that a determination of guilt or innocence will turn on reliable evidence.[178]

In *State v. Dubose*, the defendant challenged a conviction based on a witness identification that was conducted while he was sitting in the back of a squad car.[179] Soon after this identification, the police conducted another show-up with the defendant at the police station.[180] During this show-up, the defendant was again the only sus-

170. *Id.* at 1265.
171. *Id.* at 1266.
172. *Id.* at 1261.
173. *Id.* at 1263.
174. *Id.*
175. *Id.* at 1263–64.
176. *Id.* at 1261.
177. *Id.* at 1265.
178. *Id.* at 1264.
179. State v. Dubose, 699 N.W.2d 582, 585–86 (Wis. 2005).
180. *Id.* at 586.

pect included in the procedure.[181] The defendant argued that the show-up procedure, specifically the initial show-up, was unnecessarily suggestive and likely to cause a misidentification.[182] However, the trial court and the court of appeals disagreed and the defendant's conviction was upheld.[183] The Supreme Court of Wisconsin took the appeal and overturned the decision.[184] The court, which previously followed the *Manson* framework, decided that recent research warranted a new approach to identification procedures.[185] The court's new approach creates a presumption of inadmissibility of show-ups, which, in the court's view, are inherently suggestive.[186] Although the court refused to adopt a per se exclusionary rule as the defendant requested, the court created a rebuttable presumption that show-ups are excluded unless there is evidence that the procedure was necessary.[187] The court found the show-up to be unnecessary and inadmissible under the new framework.[188]

Dubose, like *Henderson*, refused to adopt a per se exclusionary rule for unnecessarily suggestive evidence.[189] However, *Dubose* went a step further than *Henderson* by creating a rebuttable presumption, which offers more protection to the defendant.[190] According to *Dubose*, the onus is on the state to proffer sufficient evidence that the procedure was necessary, otherwise the evidence is excluded.[191] Conversely, *Henderson* requires the defendant to prove that the procedure was suggestive before the burden shifts to the state.[192] Although show-ups are system variables that are considered when determining suggestiveness, there is no presumption of exclusion.[193] The *Dubose* approach is more tenable especially given the strong support that show-ups are inherently suggestive.[194] Requiring the defendant to further prove the suggestive nature of the procedure is an unnecessary

181. *Id.*
182. *Id.*
183. *See id.* at 584–85.
184. *Id.* at 584.
185. *Id.* at 592–94.
186. *Id.* at 594.
187. *Id.* at 599.
188. *Id.* at 587.
189. *Id.* at 599; *see* State v. Henderson, 27 A.3d 872, 922 (N.J. 2011).
190. *Dubose*, 699 N.W.2d at 599.
191. *Id.* at 584–85.
192. *See supra* Part II.
193. *See id.*
194. *See supra* Part I.

hurdle that the state should be required to leap, especially since they are in a better position to explain why the procedure was necessary.

In *People v. Adams*, New York's highest court adopted a per se rule of exclusion for evidence that is gained through unnecessarily suggestive procedures.[195] This case involved yet another highly suggestive show-up procedure.[196] Here, the police rounded up a group of suspects, including the defendant, immediately after a robbery and conducted an identification procedure where the victims had only the suspects to choose from.[197] Additionally, the police suggested to the victims the suspect's culpability before the line-up procedure was conducted.[198] The defendant was identified as one of the culprits and was later convicted for burglary partially based on the pre-identification procedure.[199] The defendant appealed the conviction and contested, among other things, the trial court's refusal to suppress the pre-trial identification as unnecessarily suggestive.[200] The New York Court of Appeals disagreed with the trial court's conclusion regarding the pre-identification procedure and concluded that the procedure "could hardly have been more suggestive" given the circumstances of the case.[201] The court also disagreed with the prosecution's request to follow the *Manson* framework by using a balancing approach to admit the evidence.[202] The court noted that states may provide additional protection that extends beyond the reach of federal law.[203] It concluded that states are not required in every case to adopt federal standards regarding constitutional rules of procedure.[204] The court went on to assert the importance of excluding improper pretrial identifications in order to prevent the risk of wrongful conviction.[205] It strongly stated:

> Permitting the prosecutor to introduce evidence of a suggestive pretrial identification can only increase the risks of convicting the innocent in cases where it has the desired effect of contributing to a conviction. In most instances, where the witness is able to make an

195. *See generally* People v. Adams, 423 N.E.2d 379, 384 (N.Y. 1981) (holding that a per se rule of exclusion was appropriate for show-up procedures).
196. *Id.* at 382.
197. *Id.* at 381–82.
198. *Id.* at 381.
199. *Id.*
200. *Id.*
201. *Id.* at 383.
202. *Id.* at 383-84.
203. *Id.* at 383.
204. *Id.*
205. *Id.* at 383-84.

> untainted identification in court, proof of the suggestive show-up only serves to bolster the People's case. However, if the jury finds the in-court identification not entirely convincing it should not be permitted to resolve its doubts by relying on the fact that the witness had identified the defendant on a prior occasion if that identification was made under inherently suggestive circumstances.[206]

The court went on to reinforce the fact that the prosecution is not completely without recourse where such identifications are suppressed.[207] If there is an independent basis for an out-of-court identification, then that evidence is permitted.[208] In fact, the defendant's conviction in *Adams* was upheld in part because an independent basis existed for the identifications.[209]

This decision in New York is further evidence that states around the nation realize the importance of excluding evidence obtained through unnecessarily suggestive procedures. Furthermore, it dilutes the argument that such a rule would deprive the prosecutor of valuable evidence needed to prove their case.

V. PROPOSED SOLUTION

Courts should exclude show-ups unless the procedure is absolutely necessary (in essence, adopting a *Dubose* approach), only then should the court consider its reliability. As Texas Senator Rodney Ellis once stated, "I think because of the outrageous number of wrongful convictions in Texas, it's time to begin the dialog [to ban show-ups]."[210] This dialogue should begin in every state and not just Texas. Courts should only allow show-ups in a small number of circumstances. For instance, if the identifier is facing impending death, a show-up procedure would be necessary and therefore permissible to obtain the identification before the identifier's death, if the procedure is later deemed reliable. However, if the judge concludes that the police conducted a show-up that was unnecessary under the circumstances, an unnecessarily suggestive procedure is found and the out-of-court identification should be excluded per se notwithstanding its reliability. This bears little difference from the exclusion of reliable confessions solicited without apprising the suspect of their Miranda

206. *Id.*
207. *Id.* at 384.
208. *Id.*
209. *Id.*
210. *Innocence Blog*, THE INNOCENCE PROJECT (Oct. 15, 2008, 4:05 PM), http://www.innocenceproject.org/Content/Texas_Senator_proposes_an_end_to_show-up_identifications.php.

rights. Other types of actions that might apprise the identifier of the police's suspicions would include those system variables described in *Henderson*.[211] If these variables are present unnecessarily, the procedure is an unnecessarily suggestive procedure and is excluded per se. This provides guidance to the judge and the police, because both know exactly what actions will warrant exclusion. Furthermore, it will serve as an incentive for police to refrain from using suggestive procedures except where they are absolutely necessary.

Secondly, as another precaution to protect the defendant, the judge should hold a preliminary hearing in every felony case where the basis of guilt is a witness identification. The judge's role in this hearing would be to determine the reliability of the evidence using all of the variables that affect reliability. The judge should use their experience and prudence (except for in per se exclusionary decisions) to determine as a matter of law whether certain evidence meets the threshold of reliability before it ever reaches the jury's ears. Filtering witness identification evidence is extremely important given the aforementioned susceptibility of jurors to witness identification testimony. This preliminary hearing coupled with *Henderson's* suggested additional jury instructions will serve to prevent unreliable identifications from submission to the jury.

Lastly, once the judge has determined that no suggestive procedures have been used to obtain the witness identification, and she conducts a hearing and concludes that the evidence is reliable, then the last resort to protect the defendant from a wrongful conviction arising from an erroneous witness identification should be special jury instructions. The common knowledge of jurors does not include factors that might affect the accuracy of eyewitness identifications.[212] Jurors tend to equate credibility with the conviction of the eyewitness, two factors that may have no bearing on the accuracy of the identification.[213] Instructions would warn jurors about concepts such as perception, retention and retrieval, and the relationship between eyewitness confidence and accuracy.[214] Special jury instructions would apprise the jury of these considerations when determining the accuracy of the testimony. In fact, most jurisdictions encourage or require special jury

211. *See supra* Part II.

212. Hoffheimer, *supra* note 23, at 588; *see also* Overbeck, *supra* note 126, at 1903.

213. Hoffheimer, *supra* note 23, at 588.

214. Christian Sheehan, *Making the Jurors the Experts: The Case for Eyewitness Identification Jury Instructions*, 52 B.C. L. REV. 651, 656–59 (2011).

instructions where witness identification testimony is being used to inculpate a defendant.[215] Special jury instructions are an inexpensive, speedy and effective way to eliminate wrongful convictions.[216] The jury instructions should point to the circumstances that enhance the likelihood of a witness making an erroneous identification. However, the judge should deliver these special instructions before the eyewitness approaches the stand and gives his or her testimony. Typically, these types of jury instructions are given at the end of a trial;[217] however, "[s]tudies have shown that jurors usually form firm opinions about evidence (and the defendant's guilt) before the close of trial."[218] Jurors are more likely to focus on relevant factors if those factors are revealed to them before the eyewitness testifies as opposed to hearing the testimony first and then attempting to recall the witness' testimony later during jury instructions.[219] For example, studies show that a witness's perception is enhanced when they actually understand the nature of the event that is happening.[220] Hence, "accuracy . . . increases with the severity of a crime, so long as the crime is non-violent."[221] The judge should give the jury this information before the witness testifies, so that when the witness is testifying the jury can focus on whether or not the witness was actually aware of what was happening. If these instructions are given after a long trial, the jury may not remember what the eyewitness's testimony was about, let alone whether the person actually perceived what was happening when it happened.

Another example illustrates why having the jury instructions before the eyewitness testifies deals with post-event information. Post-event information can negatively affect the retention and retrieval of information stationed in a person's memory.[222] This information can cause a person's memory to change and also impress new

215. Hoffheimer, *supra* note 23, at 585-86; *see also* U.S. v. Kavanagh, 572 F.2d 9, 12 (1st Cir. 1978) ("Four of the remaining circuits have approved the concept of giving a special identification charge in appropriate circumstances, but have vested broad discretion in the district courts to frame the language and content of it.").

216. Hoffheimer, *supra* note 23, at 595-96.

217. Sheehan, *supra* note 214, at 681-83.

218. *Id.* at 683.

219. *Id.* at 684.

220. *Id.* at 656.

221. *Id*.

222. *Id.* at 658; *see also* Thompson, *supra* note 68, at 627 ("Based on scientific studies about memory distortion, a strong argument can be made that an earlier suggestive identification procedure will permanently distort any later identification by the same witness, including an in-court identification.").

ideas into the person's memory that were not present prior to receiving the information.[223] If the judge delivers the special instructions before the eyewitness testifies and on cross examination the witness is asked questions about their encounters with information regarding the perceived event, the jury will have an opportunity to properly determine how much weight to place on the witness's testimony. These are only a few examples demonstrating why jury instructions should be mandatory in every case that turns on eyewitness identification, and why the court should give these instructions before the eyewitness takes the stand.

CONCLUSION

In conclusion, the framework adopted in *Henderson* is a significant leap towards protecting defendants. The court's extensive research has led to the creation of a framework that considers a myriad of variables when considering whether or not a judge should allow eyewitness testimony into the courtroom.[224] This approach goes well beyond the minimal requirements of *Manson*.[225] However, there is still much work to be done. Courts can begin by excluding evidence that is unnecessarily suggestive such as non-exigent show-up procedures. They can create an additional barrier for unreliable eyewitness testimony by requiring a hearing, not only in cases where suggestive procedures may have been used, but also in felony cases where eyewitness testimony is the sole or primary form of evidence against the accused. Lastly, the court should require special jury instructions before eyewitnesses are to take the stand so that juries are able to make informed decisions about the weight they should place on the testimony of those witnesses. These additional safeguards will help to protect people like William Gregory, Clyde Charles, and Habib Wahir Abdal, who, because of show-up procedures, were wrongfully convicted of rape and spent several years in prison before they were exonerated based on DNA evidence. It is time to put an end to the show-up procedure, and in turn decrease the chances of wrongful convictions and future victims.

223. Sheehan, *supra* note 214, at 658; *see also* Thompson, *supra* note 68, at 611.
224. *See supra* Part II.
225. *See supra* Part I.B; *supra* Part II.

COMMENT

Uncle Sam v. Napoleon: Who Owns the Security Estate Property Under the New African Uniform Law on Securities?

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> "To a civil lawyer 'property' is a thing; to a common lawyer 'property' is a relationship to a thing."[1]

INTRODUCTION

In the legal fiction world known as the market of legal doctrines,[2] superheroes constantly fight each other. The fight involves no swords, drones, or other conventional weapons. Using their powers, superheroes compete to provide the most efficient solutions to given legal problems.[3] Uncle Sam, the American superhero whose superpower produces the American common law, battles Napoleon, the French superhero and master of the civil law system.[4] Their fights, similar to the fights between other superheroes,[5] often result in changes to legal systems around the world, because countries determine the winning superhero by adopting the most efficient solution to a given problem.[6] Because the market of legal doctrines is borderless,[7] the battle of superheroes can take place in any country. Having dominated Napo-

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1. COLIN BAMFORD, PRINCIPLES OF INTERNATIONAL FINANCIAL LAW 77 (2011).

2. There is a market of legal doctrines similar to the market of commodities. Ugo Mattei, *Efficiency in Legal Transplants: An Essay in Comparative Law and Economics*, 14 INT'L REV. L. & ECON. 3, 8 (1994). The market of legal doctrines is borderless and subject to foreign competition. *See id.* at 8-9. In the market of legal doctrines, "the bundles of rights, powers, and liability protected by the legal system" are similar to any other commodities, and the focus is on their desirability (efficiency). *Id.* at 9. In that market, suppliers include judges—who may create or change new laws during the adjudicating process—and law professors, while consumers include lawyers, their clients, and legislatures (in every legal system during the codification). *Id.* Judges may also be consumers when they apply a rule created by another judge, a statute, or a law professor. *Id.* Many civil law countries have adopted the trust, a common law legal doctrine because of its efficiency. *Id.* at 10.

> A trust is an equitable obligation, binding a person (called a [security] trustee) to deal with property . . . (called trust property, being distinguished from his private property [owned by him]) for the benefit of persons (called beneficiaries or, in old cases, *cestuis que trust*), of whom he may himself be one, and any one of whom may enforce the obligation.

DAVID J. HAYTON & ARTHUR UNDERHILL, LAW RELATING TO TRUSTS AND TRUSTEES 3 (16th ed. 2003). In this paper, we are not dealing with the traditional trust. Instead, we are dealing with the commercial trust as used in commercial transactions in the United States.

3. *Cf.* Mattei, *supra* note 2, at 8 (stating that for a given problem, legal systems produce different solutions or legal doctrines; these legal doctrines enter the market of legal doctrines, in which through a competitive process, only the most efficient legal doctrine survives).

4. There is a huge rivalry between Napoleon and Uncle Sam. *See, e.g.*, *id.* at 10 (stating that many civil law countries have adopted the trust, a common law legal doctrine, because of its efficiency).

5. Napoleon and Uncle Sam are not the only superheroes. Because legal systems produce legal doctrines that enter the market of legal doctrines, there are as many superheroes as there are countries. *See id.* at 8.

6. Most changes in the majority of legal systems result from the borrowing of legal principles from one country to another. *Id.* at 3-4.

7. *See* Mattei, *supra* note 2, at 9.

leon in Louisiana,[8] Uncle Sam is now battling Napoleon in Sub-Saharan Africa. That African battle is the subject of this Comment.

In 2010, several Sub-Saharan African countries that regrouped under the *Organisation pour l'Harmonisation en Afrique du Droit des Affaires* ("OHADA"),[9] passed a law permitting secured creditors to appoint a third party, the security agent, to manage their securities on their behalf.[10] The assets that these creditors transfer to the security agent go in a security estate[11] that the security agent's bankruptcy cannot affect.[12] Only owners of debts stemming from the management of the security estate may seize the assets in the security estate.[13] For

8. *See, e.g.*, *infra* Part II.B.1.

9. To spur economic development, seventeen sub-Saharan African countries harmonized their business law by a treaty that established the *Organization pour l'Harmonisation en Afrique du Droit des Affaires* (The Organization for the Harmonization of Business Law in Africa—OHADA). *See* Mancuso Salvatore, *The New African Law: Beyond the Difference Between Common Law and Civil Law*, 14 ANN. SURV. INT'L & COMP. L. 39, 40-41 (2008). The OHADA Treaty was passed on October 13, 1993 and became effective in July 1995. *Id.* at 40. The uniform law comes into existence with the enactment of texts, called Uniform Acts, in particular areas of law. *Id.* at 41. To date, eight OHADA Uniform Acts have been adopted, including the OHADA Uniform Act Organizing Securities, which became applicable on January 1, 1998. *See* OHADA LEGIS, http://www.ohadalegis.com/anglais/regltionohadagb.htm (last visited Sept. 16, 2012) (listing the adopted Uniform Acts). While the OHADA Uniform Act Organizing Securities, like other Uniform Acts, made significant changes to the legal system of OHADA countries, it soon became outdated and not appropriate for business. Lionel Yondo et al., *Note d'Orientation Relative a la Relecture de l'Acte Uniforme OHADA Portant Organisation des Sûretés*, AFD-Banque Mondial (Aout 2009) [Instructions on the *Amendment of OHADA Uniform Act Organizing Securities AFD-World Bank*, (Aug. 2009)] *in Avant Projet d'Amendements a l'Acte Uniforme Portant Organisation des Sûretés* [Preparatory Work on the Amendement of the Uniform Act on Securites] (on file with the OHADA Permanent Secretary Office). With the help of the World Bank, OHADA countries amended the Uniform Act regulating securities. *IFC Partner OHADA Facilitates Access to Finance in Africa*, IFC (Dec. 20, 2010), http://www.ifc.org/ifcext/gfm.nsf/Content/IFC_Ohada_Africa. The Amendment became applicable in May 2011 and introduced to OHADA member states the "legal regime for the taking of security by a security agent—a significant step forward in the context of multi-lender financings and syndication." Anthony Giustini et al., *The New OHADA Uniform Act on Securities*, CLIFFORD CHANCE 1, 1 (May 19, 2011), http://www.cliffordchance.com/publicationviews/publications/2011/05/the_new_ohada_uniformactonsecurity.html.

10. ACTE UNIFORME OHADA PORTANT ORGANISATION DES SÛRETÉS art. 5 [OHADA UNIFORM ACT ORGANIZING SECURITIES] [hereinafter UNIFORM ACT SEC.]. This article has been translated. *See* Giustini, *supra* note 9, at 2 ("[A]ll security or other guarantees for the performance of an obligation can be granted, registered, filed, managed, and enforced by a national or foreign financial institution or credit institution acting in its own name and in its capacity as security agent for the benefit of creditors of the secured obligations that have appointed it.").

11. UNIFORM ACT. SEC., *supra* note 10, art. 9 (providing that assets transferred to the security agent by secured creditors who have appointed her go to a security estate (*patrimoine d'affectation*) separate from the security agent's estate).

12. *Id.* (stating that the bankruptcy of the security agent does not affect the security estate and only owners of debts originating from the administration and management of the security estate may seize assets in the estate).

13. *Id.*

some commentators, the security agent is close to the American notion of a security trustee.[14] The security agent, they argue, is closer to the security trustee[15] than the French law concept of *fiducie*.[16] However, for other commentators, it is not exactly clear whether the security agent is similar to a trustee or any other legal concept.[17] Assuming that the new OHADA law on securities has some features of the American commercial trust, the question is how far did it go in adopting U.S. trust laws? Unfortunately, the statute is silent. This silence leads to uncertainties. For instance, may owners of debts stemming from the management of the security estate go after the assets of the creditors who appointed the security agent?[18] What are the exact in-

14. *See, e.g.*, *Enhancing Structured Lending into Francophone African Countries: OHADA Adopts a Major Reform of Its Uniform Act Organizing Security Law*, MAYER BROWN 1, 2 (Apr. 2011), http://www.mayerbrown.com/files/Publication/a1e8d808ecb24a7c9bf316b21edc5e0e/Presentation/PublicationAttachment/f449f57d5cd9491e8c63179a59f48f85/10768.pdf [hereinafter *Enhancing Structured Lending*] ("[Because OHADA does not recognize the concept of trust, the drafter of the Amended Uniform Act on Securities tried to bring] the security agent as close as possible to the anglo-saxon [sic] security trustee since the act creates a security estate (comprising the security interests granted to the security agent) which is separate from the agent's estate and is not affected by the bankruptcy of the security agent."); *Revised Security Regimes in Africa: The OHADA Reforms*, LINKLATERS 1, 19 (Apr. 2011), http://www.linklaters.com/pdfs/mkt/london/A12946208%2020v0.12%2020Banking%2020update_1104.pdf [hereinafter *Revised Security Regimes in Africa*] ("The introduction of a security agent is therefore a major development and a point on which the [Revised Uniform Act on Securities] has actually gone further than French law where the recently adopted security agent/*fiducie* regime remains to be improved."). *But cf.* Giustini et al., *supra* note 9, at 2 ("[While the security agent may be viewed as innovative], there are still several issues to be resolved, including defining the rights and obligations of security agents (presumably left to the parties to decide by contract), better understanding the nature of the security agent's role (is it akin to a trustee, an agent or is it *sui generis*?).").

15. *See generally* Steven L. Schwarcz, *Commercial Trusts as Business Organizations: An Invitation to Comparatists*, 13 DUKE J. COMP. & INT'L L. 321, 321 (2003) (explaining that the trust is now used in many commercial transactions).

16. *See, e.g.*, *Enhancing Structured Lending*, *supra* note 14, at 2; Giustini et al., *supra* note 9, at 2; *Revised Security Regimes in Africa*, *supra* note 14, at 19. Under French law, a *fiducie* is "a contract according [to] which a settlor transfers all or part of its assets, rights or securities to a fiduciary that, in maintaining them separately from its own [estate], acts according to a specific objective for the benefit of its beneficiaries or the settlor itself." Valerio Forti, *Comparing American Trust and French Fiducie*, 2010 COLUM. J. EUR. L. 28, 32 (2011), *available at* http://www.cjel.net/wp-content/uploads/2011/01/Forti-Final2.pdf.

17. Giustini et al., *supra* note 9, at 2-3 (suggesting that the role of the security agent is not clearly defined). *Contra Security Interest in OHADA–New Uniform Act*, ALLEN AND OVERY 1, 4 (May 16, 2011), http://www.allenovery.com/publications/en-gb/Pages/Security-Interest-in-OHADA—-new-Uniform-Act.aspx?print=true ("The role of the OHADA security agent is clearly defined and its powers extensive: it represents the creditors, can act for them and undertake judicial procedures on their behalf.").

18. Under *fiducie* law, the assets of the person or entity that appoints the *fiducie* secure the debts of the security estate. CODE CIVIL [C. CIV.] art. 2025 (Fr.) (providing that assets of the person or institution that appoints the fiduciare—who manages the *fiducie*—secure debts originating from the *fiducie*). In the United States as a general rule, "any interest a settlor retains in property transferred into trust is automatically subject to attachment by the settlor's creditors." John E. Sullivan III, *Gutting the Rule Against Self-Settled Trusts: How the New Dela-*

terests of the beneficiaries and the security agent in the assets of the security estate? In other words, who really owns the assets in the security estate? Is it the security agent who can manage the security estate but not benefit from it, or do these assets belong to the beneficiaries, who may enjoy the fruits but not manage them?[19] In most civil law countries, including OHADA countries, the right to ownership is complete and indivisible ("unitary ownership").[20] However, this is no longer the case in a few civil law countries, because they have borrowed from common law countries the partition of ownership rights resulting from the trust—the equitable and the legal titles ("split-ownership").[21]

This Comment proposes that Article 9 of the Amended OHADA Uniform Act on Securities is an exception to the Napoleonic principle of unitary ownership, because it provides for a split-ownership of the security estate property. Using civil law's statutory interpretation methods,[22] that allow the use of comparative law and economics,[23] this Comment argues that the security agent has the legal title to assets in the security estate and the beneficiaries have an incorporeal right—a right akin to the equitable title.[24] Similar to the common law,

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ware Trust Law Competes with Offshore Trusts, 23 DEL. J. CORP. L. 423, 426 (1998). But there are a few exceptions. *See, e.g.*, *id.* at 441-42 (stating that in Delaware, settlors might legitimately use self-settled trusts to shield their assets from future creditors).

19. *See infra* Part II.B (discussing the Louisiana Supreme Court's decision in Reynolds v. Reynolds, 388 So. 2d 1135 (La. 1979), where the court faced similar questions).

20. Civil law countries such as France, from which most OHADA countries inherited their legal systems, adhere "to a 'unitary theory of property rights' under which, as a general rule, all property rights in an asset must be concentrated in the hands of a single owner rather than divided into partial rights shared among two or more persons." Henry Hansmann & Reinier Kraakman, *Property, Contract, and Verification: The Numerus Clausus Problem and the Divisibility of Rights*, 31 J. LEGAL STUD. 373, 375 (2002). There are only a limited number of exceptions to this principle of unitary ownership including "cotenancy, servitudes on real property, mortgages on real property, and security interests in personal property." *Id.* The trust does not fit in these exceptions. *Id.* For the purpose of this Comment, we will use the French Code of 1804 ("Napoleonic Code") as a reference. Belgium, France, and Portugal are all Napoleonic jurisdictions. PHILIP WOOD, MAPS OF WORLD FINANCIAL LAW 37 (6th ed. 2008). All OHADA member states are also Napoleonic jurisdictions. *Id.* Also, unless otherwise specified, the translation from French to English of the Napoleonic Code of 1804 is from George Spencer. *See infra* note 141.

21. GEORGE T. BOGERT, TRUSTS 109 (6th ed. 1987) (stating that the beneficiary has a right against the trustee that the trust be carried out and an equitable ownership of property in the trusts).

22. *See infra* Part II (discussing the current framework for statutory interpretation in France, which is also applicable in OHADA countries).

23. By "economics" we refer to Richard Posners's economic theory of legislation. *See infra* Part II.B.2.

24. *See infra* Part II.B.1.

OHADA is judge-made law.[25] Because judge-made law ought to be efficient,[26] OHADA judges must focus on efficiency in defining what interest(s) the security agent has in the security estate assets. A legal doctrine is efficient when it does well in the market of legal doctrines.[27] The American commercial trust has had a tremendous success in the market of legal doctrines.[28] Thus the American commercial trust is efficient. As a result, OHADA judges should look to the American common law in defining the respective interests in the security estate.

Part I of this Comment provides general background information about the OHADA legal system, including the uniform law reform. It also provides an overview of the commercial trust in the United States. Part II summarizes the statutory interpretation framework for defining the interests of the security agent and the beneficiaries, namely, the exegetic and the teleological methods as used in France and countries with a legal system similar to France—Napoleonic countries, such as OHADA members states. Using French statutory interpretation frameworks, Part III argues that the drafters of the Amended OHADA Uniform Act on Securities meant to vest the legal title of the security estate property in the security agent and convey an incorporeal right to the beneficiaries for several reasons, including that split-ownership is more likely to spur multiple lenders transactions than unitary ownership.

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25. *See infra* Part I.A.1.

26. Lewis Kornhauser, *The Economic Analysis of Law*, STAN. ENCYCLOPEDIA PHIL. (Aug. 12, 2011), http://plato.stanford.edu/archives/fall2011/entries/legal-econanalysis.

> Posner . . . asserted [the claim that] the common law ought to be efficient. He interpreted efficiency as "wealth maximization" but then interpreted wealth maximization as "willingness to pay." This interpretive stance yielded an argument that judges in (common law) cases ought to choose the legal rule that maximized the ratio of benefits to costs as measured by the sum of individual willingness to pay.

Id. In this paper, the consumer's willingness to adopt a legal rule from the market of legal doctrine is similar to an "individual's willingness to pay." *See* Mattei, *supra* note 2, at 8 (discussing the desirability of legal rules in the market of legal doctrines).

27. Mattei, *supra* note 2, at 10 ("[I]f a doctrine enjoys a wide success in the competitive arena of international legal thinking and practice, this means that it is more efficient than its alternatives.").

28. *Id.* ("[The U.S.] trust has obtained an easy and well-deserved victory in the competition in the market of legal doctrines.").

I. BACKGROUND

A. A Brief History of the OHADA Legal System[29]

1. An Overview of the OHADA Legal System

The OHADA treaty created two main institutions: the *Conseil des Ministres* ("Council of Ministers") and the Common Court of Justice and Arbitration ("CCJA").[30] The Council of Ministers is comprised of ministers of finance and ministers of justice from each member state.[31] The Council of Ministers also has a subdivision, the Permanent Secretary Office,[32] which prepares texts harmonizing law in member states.[33] In preparing uniform texts, the Permanent Secretary Office must consult with governments of member states.[34]

The Council of Ministers approves uniform laws, called "Uniform Acts,"[35] after receiving advice from the CCJA.[36] To prevent the adoption of conflicting laws that would defeat the goal of harmonizing business in member states, only the Council of Ministers has authority to adopt Uniform Acts.[37] Once adopted and published, Uniform Acts

29. There are seventeen OHADA member states. *See* Claire Moore Dickerson, *Informal-Sector Entrepreneurs, Development and Formal Law: A Functional Understanding of Business Law*, 59 AM. J. COMP. L. 179, 187 n.35 (2011) (listing OHADA member states: Benin, Burkina Faso, Central African Republic, Cameroon, Chad, Comoros, Congo, Cote d'Ivoire, the Democratic Republic of Congo, Equatorial Guinea, Gabon, Guinea, Guinea-Bissau, Mali, Niger, Senegal, and Togo).

30. Treaty on the Harmonisation of Business Law in Africa art. 3, Oct. 17, 1993 [hereinafter OHADA Treaty], *translated in* JURIS INTERNATIONAL (2000), http://www.jurisint.org/ohada/text/text.01.en.html ("The realisation of the tasks planned in the present Treaty shall be implemented by an organisation called the Organisation for the Harmonisation of Business Law in Africa (OHBLA), consisting of a Council of Ministers and a Common Court of Justice and Arbitration. The Council of Ministers shall be assisted by a Permanent Secretary Office to which is attached a Regional High Judiciary School.").

31. *Id*. art. 27. ("The Council of Ministers shall consist of the Ministers responsible for Justice and Ministers responsible for Finance.").

32. *Id.* art. 3.

33. *Id.* art. 6 ("Uniform Acts are to be prepared by the Permanent Secretary Office in consultation with the Governments of Contracting States. They are to be debated and adopted by the Council of Ministers in consultation with the Common Court of Justice and Arbitration."); *see* Salvatore, *supra* note 9, at 41.

34. OHADA Treaty, *supra* note 30, art. 6 ("Uniform Acts are to be prepared by the Permanent Secretary Office in consultation with the Governments of Contracting States; [and] [t]hey are to be debated and adopted by the Council of Ministers on consultation with the Common Court of Justice and Arbitration.").

35. *Id.* art. 5 ("Acts enacted for the adoption of common rules as provided for in Article 1 of the present Treaty are to be known as 'Uniform Acts.'").

36. *Id.* art. 6 ("[Uniform laws are] to be debated and adopted by the Council of Ministers on consultation with the Common Court of Justice and Arbitration.").

37. *See id.* art. 6 ("Uniform Acts are to be prepared by the Permanent Secretary Office in consultation with the Governments of Contracting States; [and] [t]hey are to be debated and adopted by the Council of Ministers on consultation with the Common Court of Justice and Arbitration.").

become applicable and binding to all member states regardless of any conflicting provision existing in local laws.[38] In fact, the enactment of a Uniform Act automatically repeals any conflicting present or future national laws.[39] Thus, by adopting the OHADA treaty, member states relinquished some of their sovereignty.[40]

As to the CCJA, it is a supranational court of last resort with interpretive, appellate, and arbitral powers.[41] First, as interpreter of OHADA law, after a petition from a member state or a national court,[42] the CCJA issues interpretive rulings regarding questions of OHADA law.[43] Second, as a court of last resort regarding claims involving OHADA law, the CCJA hears appeals from the states' highest courts.[44] However, while other courts of last resort in the civil law system do not make decisions on factual issues,[45] the CCJA, "sitting as

38. *Id.* art. 10 ("Uniform Acts are directly applicable and overriding in the Contracting States notwithstanding any conflict they may give rise to in respect of previous or subsequent enactment of municipal laws."); Salvatore, *supra* note 9, at 41 ("[The Uniform Acts] are directly applicable and binding in all OHADA countries, notwithstanding any contradictory provisions in existing or future national laws.").

39. *See* OHADA Treaty, *supra* note 30, art. 10.

40. *See* Claire Moore Dickerson, *Harmonizing Business Law in Africa: OHADA Calls the Tune*, 44 COLUM. J. TRANSNAT'L L. 17, 55 (2005) [hereinafter Dickerson, *Harmonizing Business*] ("The simple adoption of uniform laws is a relinquishment of sovereignty contemplated by the OHADA Treaty: a law that OHADA adopts is automatically and immediately an internal law of each of OHADA's member states.").

41. *See id.* at 56.

> The OHADA Treaty awards the interpretive function to the [CCJA] . . . . This court is a complete judicial system that is supranational within the OHADA territory and operates parallel to the national systems. The CCJA has two principal roles with respect to the business laws adopted under OHADA: it offers a forum for international arbitration, and it also serves as the court of last resort for judgments rendered and arbitrations instituted within member states.

Id.

42. This concept is similar to the "certify question" concept in U.S law, whereby a state supreme court may answer questions certified to it by an appeals court if:

> There are involved in any proceeding before it questions of law of [that] state which may be determinative of the cause then pending in the certifying court and as to which it appears to the certifying court there is no controlling precedent in the decisions of the supreme court and the court of appeals of this state.

KAN. STAT. ANN. § 60-3201 (2001).

43. OHADA Treaty, *supra* note 30, art. 14 ("The Common Court of Justice and Arbitration will rule on, in the Contracting States, the interpretation and enforcement of the present Treaty, on such Regulations as laid down for their application, and on the Uniform Acts.").

44. *Id.* art. 13-15.

45. Salvatore, *supra* note 9, at 52.

> It is well known that courts of last instance in civil law legal systems are not called upon to decide on points of fact. The CCJA will solve the case by applying a rule, which it will interpret by providing something very similar to what has been identified as ratio decidendi in the common law system. Judges of member countries will then follow that interpretation and resulting decision when a similar case is presented.

Id.

a court of final appeal can hear and decide points of facts."[46] Because the decisions of the CCJA are final and binding to all member states,[47] judges of all member states follow the CCJA's interpretations and rulings, and apply them to similar cases when presented.[48] The enactment of Uniform Acts by a single body, the Council of Ministers, and their interpretation by the highest court, the CCJA, has resulted in a sophisticated[49] and unified body of business law among member states.[50] They are all critical to economic development.[51]

OHADA hoped that the harmonization of business law would "decrease transaction costs, create more legal certainty for investors, and encourage investment in OHADA nations."[52] However, while OHADA law helped create a more stable and predictable investment environment, "several studies and surveys . . . found that the investment climate in the [seventeen] countries of the OHADA zone still requires considerable improvement."[53] As a result, OHADA member countries amended several uniform laws, including the OHADA Uniform Act on Securities.

46. OHADA Treaty, *supra* note 30, art. 14; *see* Salvatore, *supra* note 9, at 51.

47. OHADA Treaty, *supra* note 30, art. 20.

48. Salvatore, *supra* note 9, at 52. *Contra* Dickerson, *Harmonizing Business*, *supra* note 40, at 58 n.165 (stating that some assert that the CCJA is a court of limited jurisdiction and should only hear questions of law).

49. This is compared to the colonial law that existed prior to OHADA. *See* Salvatore, *supra* note 9, at 39-40.

50. OHADA law currently covers these areas: General Commercial Law, Companies and Partnerships, Arbitration, Bankruptcy, Security Interests and Mortgages, Debt Recovery and Enforcement, Contracts for the Transportation of Goods by Road, and Corporate Accounting. *OHADA Project: Economic Development Through Regional Integration and Commercial Law Reform*, WORLD BANK GROUP (Oct. 2008), https://www.wbginvestmentclimate.org/uploads/FIASDMSpotlightOHADA+Project.pdf [hereinafter *OHADA Project*].

51. *Id.*

52. Duncan Alford, Book Review: *Unified Business Laws for Africa: Common Law Perspectives on OHADA*, 38 INT'L J. LEGAL INFO. 104, 104-05 (2010).

53. *OHADA Project*, *supra* note 50. For instance, OHADA jurisdictions lacked a registration system where creditors could register collaterals to perfect their security interests. *Id.* Fortunately, the International Finance Corporation (IFC) financed the Amendment of OHADA Uniform Acts, including the Uniform Act Organizing Securities. *Id.* IFC also financed "the design and establishment of Business and Collateral Registries (RCCM): this activity . . . support[s] the development of a framework for the design and implementation of modern and well functioning registry solutions in OHADA member countries." *Id.*

2. The Amended Uniform Act on Securities: The Birth of a Security Agent Armed with a Security Estate.

OHADA amended its uniform laws to address two main issues: the "access to finance and the quality of the legal framework."[54] OHADA specially revamped the legal framework applicable to securities; it adopted new securities registration rules, including the computerization of its security registration system; and it created a security agent.[55] The ultimate goal of the legal reform is "to enhance the availability of international project financing and promote direct investments in [OHADA] countries."[56]

The creation of the security agent is fundamental in "multi-lender and syndicated financing."[57] The OHADA Uniform Act on Securities provides that:

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54. Press Release, World Bank, Progress in Regulatory Reform Expands Business Opportunities Across OHADA Member States (Jan. 25, 2012), *available at* http://web.worldbank.org/WBSITE/EXTERNAL/COUNTRIES/AFRICAEXT/0,,contentMDK:23095430~menuPK:2246551~pagePK:2865106~piPK:2865128~theSitePK:258644,00.html ("'The overhaul of the common business legislation addressed two of the top constraints to enterprise development and investment in Africa: access to finance and the quality of the legal framework,' said Pierre Guislain, Director of Investment Climate Advisory Services of the World Bank Group."). "The first set of revisions, which were adopted by the OHADA Council of Ministers mid-December 2010, will bring significant changes. The modernization of secured transactions regimes is expected to make more than $250 million in credit available to the private sector in OHADA countries over a three-year period." *Major Reforms to OHADA Laws Lead to Breakthroughs in 16 African Member States*, WORLD BANK GROUP, https://www.wbginvestmentclimate.org/advisory-services/regulatory-simplification/secured-transaction-and-collateral-registries/ohada-facilitates-access-to-finance-in-africa.cfm (last visited Sept. 2, 2012) [hereinafter WORLD BANK GROUP, *Major Reforms*].

55. *Enhancing Structured Lending, supra* note 14, at 1 ("The main features of the reform include: a major overhaul of the legal framework applicable to security; a reform of the commercial registry (RCCM) and new security registration rules; and the creation of a security agent.").

56. *Id.* ("It aims at facilitating the creation and enforcement of security in the OHADA member states, in particular by improving the existing security and creating new securities with a view to enhance the availability of international project financing and promote direct investments in such countries.").

57. Giustini et al., *supra* note 9, at 1. There are generally three types of multi-lender financing: loan participation, interbank loan, and syndication. *See* J.J. Norton & C.D. Olive, *Lender Liability Concerns in Loan Participation Agreements*, *in* LENDER LIABILITY LAW AND LITIGATION 11(Joseph Jude Norton & W. Mike Baggett eds., 1995).

> The most common multiple lending agreement is the loan participation that involves two independent, bilateral relationships: the first between the borrower and the lead bank and the second between the lead bank and the participants. As a general rule, the participants do not have privity of contract with the underlying borrower. In an interbank, one bank lends the funds of another bank, which, in turn, lends to the borrower. In a syndication loan agreement, the banks jointly lend money.

Id. "A syndicated loan is made to a single borrower by [several] direct [lenders], on similar terms and conditions, using common documentation and administered by a common agent bank or separate agent banks. Common documentation and direct co-lending are the crucial elements that hold the syndicate of [lenders] together." Joseph J. Norton, *International Syndicated Lending: The Legal Context for Economic Development in Latin America*, 2 NAFTA: L. & BUS. REV.

> [A]ll securities or other guarantees for the performance of an obligation can be granted, registered, filed, managed, and enforced by a national or foreign financial institution or credit institution acting in its own name and in its capacity as security agent for the benefit of creditors of the secured obligations that have appointed it.[58]

The contract appointing the security agent must: state the obligation(s) secured, identify the secured creditors, the security agent and its headquarters, state the duration of the relationship and the powers of the security agent, and provide the terms under which the security agent is responsible to the secured creditors.[59] A contract that fails to meet these requirements is void.[60] The secured creditors may include in the agreement nominating the security agent the duties of the security agent.[61] Otherwise, the security agent will have the duties of a "paid agent."[62]

> When the creation or execution of a security results in the transfer of title to the security agent, these properties go into a security estate that is separate from the security agent own estate, and only owners of debts stemming from the management and administration of the security estate may seize the security estate's assets.[63]

The bankruptcy of the security agent does not affect the security estate.[64]

AM. 21, 24-25 (1996). "In a syndicated loan, the originating lender and the other financial institutions become co-lenders, with the originating or 'lead' lender usually appointed as the 'agent' for the other lenders as well as for itself in its capacity as a lender." Charles L. Menges, *Minimizing the Lead Lender's Liability to Co-Lenders in Syndicated Loans (with Sample Clauses)*, 19 No. 2 PRAC. REAL EST. LAW. 17, 17-18 (2003). "However, by becoming an agent, the lead lender assumes certain duties and responsibilities that, unless properly dealt with in the loan agreement, may expose the lead lender to far greater liability than if the lender had merely sold participations." *Id.*

58. UNIFORM ACT SEC. art. 5.

59. *Id*. art. 6.

60. *Id*.

61. *Id*. art. 11.

62. Under French law, a paid agent has higher duties than a non-paid agent does. CODE CIVIL [C. CIV.] art. 1992 (Fr.) ("An agent is liable not only for intentional breach, but also for faults committed in his management . . . the liability for faults is implemented less rigorously against the one whose agency is gratuitous than against the one receiving a salary.").

63. UNIFORM ACT SEC., *supra* note 10, art. 9.

64. *Id*.; *see also Enhancing Structured Lending*, *supra* note 14, at 2 ("[T]he [Amended OHADA Uniform Act on Securities] creates a security estate (comprising the security interests granted to the security agent) which is separate from the agent's estate and is not affected by the bankruptcy of the security agent or the debtor.").

3. The Unresolved Issue: The Nature of the Security Agent's and the Beneficiaries' Interests in the Security Estate

Property law in most OHADA countries is inspired from France, where "[ownership] is the right of enjoying and disposing things in the most absolute manner, provided they are not used in a way prohibited by the laws or statutes."[65] This provision clearly articulates the principle of absolute and indivisible ownership.[66] Thus, one may assume that the security agent has sole ownership of property in the security estate. However, because most commentators agree that the security agent is akin to the security trustee,[67] it might be argued that under the new OHADA law, ownership is "split" between the security agent and the beneficiaries. In other words, the security agent's interest is not absolute and indivisible. Unfortunately, the Act is silent as to that issue.[68] Overcoming that hurdle requires one to first obtain a deep understating of the commercial trust, because it is the source of Article 9 of the Amended OHADA Act on Securities.

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65. CODE CIVIL [C. CIV.] art. 544 (Fr.); Paul McCarthy, *The Enforcement of Restrictive Covenants in France and Belgium: Judicial Discretion and Urban Planning*, 73 COLUM. L. REV. 1, 2-3 (1973) (translating Article 544 of the French Civil Code).

66. McCarthy, *supra* note 65, at 2 ("The Code Napoleon of 1804, still in force in France and Belgium, embraced the principle of unencumbered use of one's property and demonstrated hostility towards any restriction on that freedom. This attitude was expressed most clearly in article 544 of the Civil Code . . . ."). This was "an endeavor to discard remnants of feudal burdens which restricted ownership." Kathryn Venturatos Lorio, *Louisiana Trusts: The Experience of a Civil Law Jurisdiction with the Trust*, 42 LA. L. REV. 1721, 1722 (1982). This unitary principle was subsequently transplanted to other former French "colonies" including Louisiana. *See generally id.* (discussing the incorporation of trust law into the Louisiana civil law system and OHADA countries).

> [In French colonies of Africa], [t]he official policy was that of "assimilation", at least since the last quarter of the nineteenth century (that is during the period of the great colonial expansion). This meant that the law in force should be, as a rule, modern law, either the law of the "mother country", applying equally to all residents, "natives" and settlers, or, at least, a special law, enacted by the colonial power and adapted to the local conditions.

Xavier Blanc-Jouvan, *The Encounter Between Traditional Law and Modern Law in French-Speaking Africa: A Personal Reflection*, 25 TUL. EURO. & CIV. L.F. 197, 198 (2010); *see also* WOOD, *supra* note 20, at 37 (stating that all OHADA members states are Napoleonic jurisdictions). However, in both the common law and the civil law, while a person who owns an asset may freely grant contractual claims on that asset to others, that owner is not equally free to grant property rights on that asset to third parties unless an exception applies. Hansmann & Kraakman, *supra* note 20, at 375. Thus, the common law simply has exceptions (such as the trust) that the civil law does not recognize. *Id.*

67. *See Enhancing Structured Lending*, *supra* note 14, at 2; Giustini et al., *supra* note 9, at 2; *Revised Security Regimes*, *supra* note 14, at 19.

68. *See infra* Part III.A (explaining why the Amended OHADA Uniform Act on Securities is vague).

B. The Commercial Trust in the United States

1. The Commercial Trust Defined

"A trust . . . is a fiduciary relationship with respect to property, subjecting the person [holding the property's title] to equitable duties to deal with the property for the benefit of another person, which arises as a result of a manifestation of an intention to create it."[69] A typical trust involves three parties: "the 'settlor' transfers property to the 'trustee,' who is charged with the duty to administer the property for the benefit of the 'beneficiary.'"[70] The trustee owes a fiduciary duty to the beneficiary.[71] That is, the trustee owes the beneficiary the "duty to act for the [beneficiary's] benefit as to matters within the scope of the [trust]."[72] While trusts have been traditionally used for gratuitous transactions, in the United States, trusts are increasingly used for commercial purposes.[73] The commercial use of trusts is referred to as "commercial trusts."[74]

2. The American Trust Law as a Prized Commodity in the Market of Legal Doctrines

In the market of legal cultures, "the bundles of rights, powers, and liability" that trust law protects is a commodity favored around the world.[75] Foreign countries admire trust law because of the contractual rules that trust law establishes with respect to creditors of the

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69. RESTATEMENT (SECOND) OF TRUSTS § 2 (1959).

70. Henry Hansmann & Ugo Mattei, *The Functions of Trust Law: A Comparative Legal and Economic Analysis*, 73 N.Y.U. L. REV. 434, 438 (1998).

71. RESTATEMENT (SECOND) OF TRUSTS § 2 (1959).

72. *See id.* § 2 cmt. b. A trust may be created for charitable (charitable trust), private (private trust), or mixed purposes. *See id.* § 27.

73. Schwarcz, *supra* note 15, at 321. For instance, trusts are generally used in "asset securitization transactions, [which] have become a primary tool for investing pension moneys (sic), and are the preferred form for structuring mutual funds." *Id.*; John H. Langbeinn, *The Secret Life of the Trust: The Trust as an Instrument of Commerce*, 107 YALE L.J. 165, 166 (1997) ("It will be seen that well over 90% of the money held in trust in the United States is in commercial trusts as opposed to personal trusts.").

74. Schwarcz, *supra* note 15, at 321.

75. Mattei, *supra* note 2, at 9.

> [A]s soon as [the trust's] potentialities became clear to the economic and legal community, this institution became very fashionable. Many mixed jurisdictions—like Louisiana, Quebec, and Scotland—even if very keen on protecting their civilian heritage, have never resisted the use of trusts. Many South American civilian systems have adopted the institution of trust by legislation. The same has been done in Japan and Lichtenstein. After a period of technical gestation, in 1985 in [sic] The Hague civil law and common law countries entered a convention on the recognition of trusts and the law applicable to them. Trust has obtained an easy and well-deserved victory in the competition in the market of legal doctrines.

Id. at 10.

three principal parties—the settlor, the trustee, and the beneficiaries—instead of the rules applying to the relationship between these three principal parties.[76]

The Relationship Among Principals

Whenever the parties characterize their contractual relationship as a "trust" between the settlor and the trustee, the law of trust inserts different standards into their agreement.[77] These standards include the authority of the trustee to incur expenses in the administration of the assets in the trust; the power of the trustee to lease or sell the assets in the trust where appropriate;[78] the duty to preserve the assets in the trust, make them productive, and pay an income to the beneficiary;[79] and fiduciary duties,[80] which include the duty of care[81] and the duty of loyalty.[82]

Even though the trustee owes the preceding duties to the beneficiaries, "they are undertaken by the [trustees] in the first place to satisfy the (perhaps altruistic) desires of the [settlor], and hence are effectively terms in the agreement between [the settlor and the trustee]."[83] The beneficiary can enforce the trustee's performance of her duties.[84]

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76. *See generally* Langbeinn, *supra* note 73, at 179-85 (analyzing characteristics of the trust that make it suitable for commercial uses).

77. Hansmann & Mattei, *supra* note 70, at 447; *see also* Langbeinn, *supra* note 73, at 179 ("To the planners of commercial transactions, a central attraction of the trust form is the treatment under trust law of an unusual but most worrisome event, the insolvency of the trustee. . . . [T]he beneficiary is entitled to retain [his] interest as against the general creditors of the trustee.").

78. RESTATEMENT (SECOND) OF TRUSTS §§ 188-90 (1959).

79. *Id.* §§ 176, 181-82.

80. [O]ne of the trait(s)] of the trust form that is of fundamental importance to transaction planners is that the trust automatically invokes the distinctive protective regime of trust fiduciary law for safeguarding the interests of investors or other beneficiaries. Effective management of modern financial assets usually requires that the trustee be granted extensive powers to transact with the trust property. Trust fiduciary law offsets and controls this power, requiring the trustee to exercise it in the best interests of the trust beneficiaries.

Langbeinn, *supra* note 73, at 182.

81. *See* RESTATEMENT (SECOND) OF TRUSTS § 174 (1959); Hansmann & Mattei, *supra* note 70, at 447 (explaining that the duty of care is the "duty to exercise reasonable care and skill").

82. *See* RESTATEMENT (SECOND) OF TRUSTS § 170 (1959); Hansmann & Mattei, *supra* note 70, at 447 (explaining that the duty of loyalty is "the duty not to deal with the Managed Property contrary to the Recipient's interests").

83. Hansmann & Mattei, *supra* note 70, at 447.

84. *See* RESTATEMENT (SECOND) OF TRUSTS §§ 197-99 (1959).

The Principal Parties' Relationships with Their Personal Creditors

The creditors of the beneficiary and the settler are luckier than the trustee's creditors. "Creditors of the beneficiary of a trust can by appropriate proceedings reach his interest and thereby subject it to the satisfaction of their claims against him."[85] However, if the settlor believes that the beneficiary is not financially responsible, she may protect the beneficiary's interest in the trust by creating a "spendthrift trust",[86] which by definition cannot be reached by the beneficiary's creditors.[87]

Similar to the beneficiary's creditors, the creditors of the settlor may reach any interest that the latter retain in the trust. In the United States, as a general rule, "any interest a settlor retains in property transferred into trust is automatically subject to attachment by the settlor's creditors."[88] Even though the transfer to the trust was not done for fraudulent purposes, the settlor's interest in the trust is available to his creditors "regardless of how much time has passed since the date on which the trust was settled."[89] However, in a few states, settlers might legitimately use self-settled trust to shield their assets from future creditors.[90]

Finally, unlike the beneficiary's and the settlor's creditors, the personal creditors of the trustee cannot seize trust assets to satisfy the trustee's personal obligation if she becomes insolvent.[91] Thus, the trustee's filing of bankruptcy does not affect the interest of the beneficiary in the trust's assets.[92] Even when the trustee intentionally

85. *Id.* § 147.

86. "*Spendthrift trusts*: The situations in which the interest of the beneficiary of a trust cannot be voluntarily transferred by him or in which creditors cannot subject it to the satisfaction of their claims . . . ." *Id.* § 147 cmt. e.

87. *See id.*

88. Sullivan, *supra* note 18, at 426; *see also* RESTATEMENT (SECOND) OF TRUSTS § 156 (1959) ("Where a person creates for his own benefit a trust with a provision restraining the voluntary or involuntary transfer of his interest, his transferee or creditors can reach his interest.").

89. Sullivan, *supra* note 18, at 426-27.

90. *See, e.g.*, *id.* at 441-42 (stating that in Delaware, settlors might legitimately use self-settled trusts to shield their assets from future creditors).

91. *See* RESTATEMENT (SECOND) OF TRUSTS § 266 (1959) ("A person to whom the trustee has become liable cannot reach trust property in an action at law against the trustee, although the liability was properly incurred by the trustee in the course of the administration of the trust.").

92. Hansmann & Mattei, *supra* note 70, at 469 (stating that because the bankruptcy of the trustee does not affect the assets in the trust, the trust has been widely used in commercial transactions). The successful use of the trust has created in the business world an impact that has been so huge that most civil law countries, including France, decided to adopt trust-like legal instruments to mirror the results of the commercial trust. *See, e.g.*, Forti, *supra* note 16, at 31

breaches the fiduciary duties she owes to the beneficiary by granting a security in the trust property to a third party who is not aware that the assets are held in trust, that third party creditor cannot enforce that security interest.[93]

3. The Nature of the Trustee's and Beneficiaries' Interests in the Trust

The creation of a trust is not complete unless the settlor transfers the title to the trustee.[94] The trustee must accept the tendered title and office.[95] The trustee generally becomes the holder of the legal title while the beneficiary receives the equitable title.[96] Under the Amended OHADA Uniform Act on Securities, it is not clear whether the security agent, similar to the trustee, receives the legal title of the security estate assets and the beneficiary obtains the equitable title. As a result, using the framework developed in the next section, Article 9 of the Amended OHADA Uniform Act on Securities will be interpreted.

II. THE STATUTORY INTERPRETATION FRAMEWORK

Under French law, there are generally two ways to interpret statutes: the exegetic and the teleological methods.[97] The two methods, which are applicable to OHADA countries,[98] are described below.

(analyzing the *fiducie*, a trust-like device that France adopted in 2007 to enable French companies to create trust-like entities).

93. RESTATEMENT (SECOND) OF TRUSTS § 286 (1959). The law is different in the case of third party purchasers of the legal title to trust property who act in good faith and pay reasonable value: they get good title to the trust property even if the trustee sells in breach of trust. *See id.* § 284.

94. BOGERT, *supra* note 21, at 109 ("Whatever title the trustee is to have must be given to him before the trust can be said to be completely created as to that trustee.").

95. *Id.*

96. *Id.*; *see also* 76 AM. JUR. 2D TRUSTS § 1 (2012) ("The fundamental nature of a trust is the division of title, with the trustee being the holder of legal title and the beneficiary that of equitable title."). The equitable title is "[t]he ownership interest of one who has equitable [ownership] as contrasted with [the legal title which is the] legal ownership of property." Benedict v. United States, 881 F. Supp. 1532, 1551 (D. Utah 1995) (quoting BLACK'S LAW DICTIONARY 539, 540 (6th ed. 1990)).

97. *See* JOHN BELL ET AL., PRINCIPLES OF FRENCH LAW 34-35 (1998).

98. For the purpose of this Comment, we will use the French statutory interpretation framework because most OHADA members are Napoleonic jurisdictions that retained the law they inherited during the colonial period. *See* WOOD, *supra* note 20, at 37; Hansmann & Kraakman, *supra* note 20, at 375.

> [Also, each OHADA] country has retained the contract law left to it as a legacy of the colonial period. That is to say, contract law in Guinea-Bissau reflects the Portuguese legal tradition, the Spanish tradition holds way in Equatorial Guinea, the Belgian tradition in the Democratic Republic of Congo and the French tradition in all the other

A. The Exegetic Method

While the French civil code does not contain rules of statutory interpretation,[99] in practice judges use two main theories of legal interpretation: the exegetical, and the teleological methods.[100] Under the exegetic method, judges should respect the will of the legislator, and should not interpret a clear text.[101] Judges should apply a clear text unless this would lead to an absurd result.[102] When the text is vague or ambiguous, judges determine the legislature's will, "and, in the clear thinking of the legislature, the meaning of obscure provisions."[103] They "first [examine] the text itself with care, and [consider] commentaries written about the text. This is not limited to the provision to be applied but includes the chapter or the entire law. Often a provision is obscure only if separated from its context."[104] If they still cannot decipher the legislative intent, judges would then refer to the legislative history, which of course, is not binding.[105] Nevertheless, this does not mean that judges may set the text aside, because

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countries. Cameroon is special in that it incorporates both the French and *common law* traditions.

Only a very few countries have adopted a new contract law or a new law of obligations. Examples are Senegal (law of 10 July 1963 in respect of the general part of the Code of Civil and Commercial Obligations), Guinea-Conakry (the Civil Code of 1983) and Mali (law of 29 August 1987 laying down the general rules of obligations). All these texts have their own unique features, but by and large they follow the French tradition. Elsewhere, the texts brought in by the former colonial powers apply (or, where the English-speaking population of Cameroon is concerned, the *common law* as it stood at the time of independence).

MARCEL FONTAINE, INT'L INST. FOR THE UNIFICATION OF PRIVATE LAW, OHADA UNIFORM ACT ON CONTRACT LAW: EXPLANATORY NOTES TO THE PRELIMINARY DRAFT 7-8 (2004) (emphasis in original), *available at* http://www.unidroit.org/english/legalcooperation/ohada%20explanatory%20note-e.pdf. Finally, "[i]n most [OHADA] countries . . . scholarly writings are rare, and the local case law is hardly accessible. The legislative reforms that have taken place in Europe have had little or no fall-out locally." *Id.* at 8.

99. Claire M. Germain, *Approaches to Statutory Interpretation and Legislative History in France*, 13 DUKE J. COMP. & INT'L L. 195, 201-02 (2003).

100. BELL ET AL., *supra* note 97, at 34-35 (stating that the exegetic school believes the statute to be complete in itself and uses the legislative history in exceptional cases where the interpretation is necessary; and that later judges were faced with gaps in the legislation and began filling these gaps, giving rise to a method of free scientific research—the teleological method); Germain, *supra* note 99, at 201-02 (explaining that the major methods of interpretation under different classifications are exegetic and teleological, according to French scholarship).

101. Germain, *supra* note 99, at 198.

102. *Id.* at 201 ("When a text is clear, it should be applied and not interpreted, unless an absurd result would follow.").

103. *Id.* at 198.

104. *Id.* at 202.

105. *Id.* ("If this study is insufficient, courts often go to the *travaux préparatoires* [legislative history] to discover the legislature's thinking. The Cour de cassation [one of the highest courts in France] agrees with this process, but also states that the *travaux préparatoires* [legislative history] never bind the court.").

judges need to, at the least, begin from a text even though the text does not immediately solve the dispute.[106] Finally, if it was futile to consult the legislative history, either because the legislative history is vague or the law is too old, some courts, usually the highest courts, will fall back to the teleological method.[107]

B. The Teleological Method

The teleological method stands for the idea that judges facing an ambiguity in the statute have to clarify that ambiguity. In so doing, their decision and reasoning will take into account things such as the social and economic context of the time, and the law in other countries.[108] For the purpose of this article, under the teleological method, we will take into account the Louisiana Supreme Court's decision in *Reynolds v. Reynolds*,[109] and Richard A. Posner's[110] economic view of legislation.

1. *Reynolds v. Reynolds* or the Downfall of the Unitary Ownership in Napoleonic Louisiana

In *Reynolds v. Reynolds*, the Louisiana Supreme Court had to decide whether a Louisiana statute defining a trust as "the relationship resulting from the transfer of title to property to a person to be administered by him as fiduciary for the benefit of another" vested an ownership right in both the trustee and the beneficiary, although the Napoleonic code, then in place, provided that ownership was absolute and indivisible.[111] The court interpreted the statute as vesting ownership of the corpus of the trust to the trustee, and ownership of a bene-

106.

> When a text does not directly provide the solution for a dispute, judges need at least to start from a text to situate the rule that they will design. French judicial decisions almost always invoke a text, and it is exceptional for a court not to refer to a legal text. However, sometimes courts invoke general principles of law.

Id. at 202.

107. *Id.*

108. BELL ET AL., *supra* note 97, at 34-35; *see also* Germain, *supra* note 99, at 199 ("Faced with an obscurity or gap in the law, a judge must become a legislator and be concerned about social needs, the ideals of the moment, comparative law, plus history, which will show institutional evolution.").

109. Reynolds v. Reynolds, 388 So. 2d 1135 (La. 1979).

110. Richard A. Posner is an American Judge and scholar, pioneer of the law and economics movement. *See The Faculty*, UNIVERSITY OF CHICAGO, http:// www.law.uchicago.edu/faculty/posner-r (last visited Sept. 2, 2012).

111. *See infra* Part II.B.1.a-c.

ficial interest, an incorporeal right—akin to the equitable title—to the beneficiary.[112]

The Factual and Procedural Background

In *Reynolds*, a woman executed a will creating a spendthrift trust in which she gave her farm to a trustee[113] to hold the property in trust for her grandchildren who survived her, until all of her grandchildren attained twenty-one years of age.[114] At the woman's death, the trustee was constituted and thereafter, one of the grandchildren, Margaret S. Romero got married to Glynn W. Reynolds.[115] Margaret failed to file a declaration of paraphernality.[116] During the marriage, the trustee distributed some funds from the trust, and deposited Margaret's share in a bank account that she exclusively controlled.[117] Later, Margaret divorced; at the time of the divorce, there was $555.18 in the bank account and the trustee still held the undistributed amount of $11,434.80.[118] Margaret claimed that her portion of the undistributed trust funds was her separate property; instead her ex-husband asserted that each spouse was entitled to half of these funds because the funds

112. *Id.*

113. *Reynolds*, 388 So. 2d at 1136.

114. *Id.*

115. *Id.* Margaret and her husband had a community of property (community). *See id.* at 1136. In Louisiana, the "property of married persons is either community or separate." LA. CIV. CODE ANN. art. 2335 (2012). "Each spouse owns a present undivided one-half interest in the community property. Nevertheless, neither the community nor things of the community may be judicially partitioned prior to the termination of the regime." *Id.* art. 2336.

> The community property comprises: property acquired during the existence of the legal regime through the effort, skill, or industry of either spouse; property acquired with community things or with community and separate things, unless classified as separate property under Article 2341; property donated to the spouses jointly; natural and civil fruits of community property; damages awarded for loss or injury to a thing belonging to the community; and all other property not classified by law as separate property.

Id. art. 2338. The separate property of a spouse includes "property acquired by a spouse prior to the establishment of a community property regime [and] property acquired by a spouse by inheritance or donation to him individually." *Id.* art. 2341.

116. *Reynolds*, 388 So. 2d at 1137. In Louisiana,

> [the] declaration [of paraphernality] allowed a wife to reserve for herself any fruits from her paraphernal property (nondotal property she brought into the marriage); it also gave her the right to manage such property and the fruits from such property. . . . Under the Louisiana marital property laws in effect at that time, the husband would, absent such a declaration, have the right to manage the fruits of the wife's paraphernal property, and those fruits would thus normally fall into the community property.

Oettinger v. Oettinger, 474 U.S. 912, 912-13 (1985).

117. *Reynolds*, 388 So. 2d at 1136.

118. *Id.* at 1136-37.

were part of the community.[119] Margaret also claimed the restitution of part of the distributed income that she spent for the community.[120]

The trial court found in favor of Margaret, holding that "the distributed and the undistributed sums belonged to her separate estate."[121] However, the trial court denied the restitution of the distributed funds Margaret spent for the community.[122] The appellate court reversed, holding instead that the distributed funds, including those that Margaret spent for the community, and the undistributed interest in the trust, were fruits of her separate property and fell into the community.[123] The appellate court reasoned that at the time of her marriage, Margaret had "a vested interest in the corpus of the trust, which interest formed part of her separate estate. Therefore, not having executed and recorded the declaration of paraphernality . . . the fruits of her estate fell into the community."[124] These fruits were the funds that the trustee had distributed as well as Margaret's share of those that the trustee was still holding in trust.[125]

The Louisiana Supreme Court's Initial Opinion

The Louisiana Supreme Court reversed.[126] First the court held that only the trustee owned the property in the trust.[127] The court found that a "trustee is a person to whom title to the trust is transferred to be administered by him as a fiduciary."[128] The facts that "the title transferred to the trustee in the case at bar was intended to vest ownership in the trustee is made manifest by the meaning of the word 'title.'"[129] In the law, title is commonly "used in the sense of

119. *Id.* at 1137.

120. *Id.*

121. *Id.* The court reasoned that:

> [T]he fruits of the trust estate did not belong to the wife's separate estate because she was not the owner of the property which produced them. Instead, the court held, during the existence of the trust the corpus of the trust belonged to the trustee. The decision was based upon Section 1781 of Title 9 of the revised Statutes to the effect that "(a) trustee is a person to whom title to the trust property is transferred to be administered by him as a fiduciary."

Id.

122. *Id.*

123. *Id.* at 1138.

124. *Id.*

125. *Id.*

126. *Id*.

127. *Id.*

128. *Id.* (quoting La. Rev. Stat. Ann. art. 9:1781 (2012)).

129. *Id.*

ownership of property."[130] Because the clear meaning and letter of a text should not be set-aside as a pretext for applying its spirit, and because words in a statute should be understood in their ordinary meaning, the ownership on the corpus of the trust was vested in the trustee.[131] As a result, Margaret, the beneficiary, had no rights "in the property which entitle her to its fruits unless, as in this case, the trustee willed it so."[132] Therefore, since ownership vested in the trustee, the fruits of the property could not fall into the community between the beneficiary wife and her husband.

Second, the court held that both the distributed and the undistributed funds from the trust were Margaret's separate property. The funds distributed to Margaret prior to the dissolution of the marriage were "'property', which she received from the income of the trust corpus owned by the trustee [instead of fruits of her property]."[133] Because only interest from the wife's separate property may fall into the community existing between spouses, and there is no evidence that the funds that the trustee distributed to Margaret prior to the dissolution of the marriage produced interest, her failure to "execute the affidavit of paraphernality had no effect on this property [because the property] had produced no fruits."[134] Thus, Margaret's share of the funds that the trustee distributed prior to the dissolution of the marriage did not fall into the community then existing between her and her ex-husband.[135]

Finally, the undistributed funds, held the court, did not fall in the community because they remained the property of the trust.[136] Only the trustee had the discretion to order the distribution of the funds and these funds remained the property of the trust so long as the trus-

130. *Id. Compare* LA. CIV. CODE ANN. art. 477 (2012) ("Ownership is the right that confers on a person direct, immediate, and exclusive authority over a thing. The owner of a thing may use, enjoy, and dispose of it within the limits and under the conditions established by law."), *with* CODE CIVIL [C. CIV.] art. 544 (Fr.) ("Property is the right of enjoying and disposing of things in the most absolute manner, provided they are not used in a way prohibited by the laws or statutes.").

131. *Reynolds*, 388 So. 2d at 1138.

132. *Id.* at 1138.

133. *Id.* at 1139.

134. *Id.*

135. *Id.*

136. *Id.*

tee held onto them, because the settlor did not intend beneficiaries like Margaret to administer or control the undistributed revenues.[137]

The Re-Hearing Opinion

On re-hearing, the court reconsidered the status of the trust income.[138] The court first determined the nature of the beneficiary's interests in the trust.[139] The court reiterated its holding that unlike the trustee, the beneficiary of the trust does not own the corpus of the trust.[140] However, the court held that the beneficiary of the trust owns a "beneficial interest, an incorporeal right,"[141]—a right that has no "tangible substance".[142] The revenues from that incorporeal right were "civil fruits".[143] These civil fruits became the property of the

137. *Id.* ("The settlor of the trust plainly did not intend that the beneficiaries of the trust acquire administration or control of the corpus or undistributed revenues of the trust until the trust was terminated.").

138. *See id.* at 1141. The court also reconsidered Margaret's claim of reimbursement for the portion of distributed trust that she spent for the benefit of the community. *See id.* However, this issue is irrelevant to the one analyzed in this Comment and will therefore not be addressed.

139. The nature of the beneficiary's interest in the trust is fundamental to the court's determination of whether Margaret's portion of the funds that the trustee distributed fell into the community that existed between her and her husband. *Id.* at 1144 (Dixon, J., dissenting in part and concurring in part).

140. *Id.* at 1142 n.3 (citing LA. REV. STAT. ANN. art. 9:1731 (2012)) ("A trust, as the term is used in this Code, is the relationship resulting from the transfer of title to property to a person to be administered by him as a fiduciary for the benefit of another.").

141. *Id.* at 1142 n.6 (quoting LA. CIV. CODE ANN. art. 461 (2012)). "Corporeals are things that have a body, whether animate or inanimate, and can be felt or touched. Incorporeals are things that have no body, but are comprehended by the understanding, such as the rights of inheritance, servitudes, obligations, and right of intellectual property." *Compare id.* (repeating the language of the 1804 French Civil Code), *with* CODE CIVIL [C. CIV.] art. 527-29 (Fr.).

> Property is moveable in its nature or by the determination of the law.
>
> Moveables in their nature are bodies which may be transported from place to place, whether they move themselves like animals, or whether like inanimate things, they are incapable of changing their place, without the application of extrinsic force.
>
> Moveables by determination of law are, bonds and actions relating to sums demandable or personal effects, actions and interests in companies for objects of finance, commerce, or industry, although immoveable depending on such undertakings belong to the companies.

CODE CIVIL [C. CIV.] art. 527-29 (Fr.). Even though "meubles" from the original text has been translated as "incorporeals" in the Louisiana Civil Code, and as "moveables" by George Spence, the two legal provisions have the same meaning. For the purpose of this Comment, I will prefer Louisiana's version of the translation.

142. 63C AM. JUR. 2D *Property* § 9 (2012) ("'Incorporeal property' are rights which have no corporeal tangible substance, or which are intangible.").

143. *Reynolds*, 388 So. 2d at 1142 n.8. "Fruits are things that are produced by or derived from another thing without diminution of its substance." LA. CIV. CODE ANN. art. 551 (2012). There are two types of fruits: "natural fruits and civil fruits." *Id.* While "[n]atural fruits are products of the earth or of animals, [c]ivil fruits are revenues derived from a thing by operation of law or by reason of a judicial act, such as rentals, interest, and certain corporate distributions." *Id.* These sections of the Louisiana code defining fruits are identical to those of the 1804 French Civil Code, which is still effective in France and OHADA member states. *See* CODE CIVIL [C. CIV.] art. 583 (Fr.) ("Natural [fruits] are those which the earth produces spontaneously. The

beneficiary once distributed.[144] Therefore, while the undistributed funds in the trust did not fall in the community,[145] the funds distributed to Margaret prior to the dissolution of the marriage were civil fruits[146] falling in the community, and the original opinion erred in holding that the $555.18 balance of distributed trust funds did not belong to the community.[147]

In short, *Reynolds* stands for the proposition that because the statute defined a trust as "the relationship resulting from the transfer of title to property to a person to be administered by him as a fiduciary for the benefit of another," the Louisiana legislature intended to set aside the principle of indivisibility of ownership in favor of split-ownership of the trust property, the trustee owning the corpus of the trust, and the beneficiary owing the incorporeal.[148] Thus, taking into account *Reynolds v. Reynolds* under the teleological method means considering the possibility that similar to the Louisiana legislature, the drafters of the Amended OHADA Uniform Act on Securities intended to set aside the principle of indivisibility of ownership in favor of split-ownership of the security estate assets. The economic view of legislation would also help fill the gap in the Amended OHADA Uniform Act on Securities.

2. The Economic View of Legislation: The Special Interest Theory

Under the teleological method, a judge may use comparative law to fill a statutory gap.[149] In that respect, the economic theory of legislation is relevant to the interpretation of Article 9 of the Amended OHADA Uniform Act on Securities. The statutory interpretation is an inherent part of the full economic theory of legislation because "the meaning of a statute is not fixed until the courts have interpreted

production and increase of animals are also natural fruits."); CODE CIVIL [C. CIV.] art. 584 (Fr.) ("Civil fruits are rents of houses, interest on sums due, arrears of rent. The value of farms is also ranged under the class of civil fruits.").

144. *Reynolds*, 388 So. 2d at 1142.

145. *Id.* The dissent argued that it was unreasonable to characterize Margaret's beneficiary interest as ownership because it lacked the necessary elements of ownership: "immediacy, dominion, and authority." *Id.* at 1147 (Dixon, J., dissenting in part and concurring in part). Besides, the dissent argued that there was no evidence that the legislator intended to change the established unitary principle of ownership because there was no statutory provisions changing the meaning of ownership nor will an impediment to the function of trust occur by the application of the Civil Code concept of ownership. *Id.* at 1149.

146. Products of her incorporeal. *See* 63C AM. JUR. 2D *Property* § 9 (2012).

147. *Reynolds*, 388 So. 2d at 1143.

148. *See supra* Part II.B.1.c.

149. BELL ET AL., *supra* note 97, at 34-35.

the statute."[150] Although the "economic view of legislation" seemingly clashes with its traditional legal view, "legal tradition in interpreting statutes becomes more, rather than less, intelligible when an economic view of legislation is adopted."[151] There are several approaches to the economic view of legislation including the public interest view, which "conceives both the ideal and the actual function of legislation to be to increase economic welfare by correcting market failures such as crime and pollution,"[152] and the interest group theory that "asserts that legislation is a good demanded and supplied much as other goods, so that legislative protection flows to those groups that derive the greatest value from it, regardless of overall social welfare."[153] Because the legislative protection under the interest group theory must always flow toward those who benefit the most from a legal rule, the interest group theory appears at odds with the public interest theory.

However, while the public interest theory and the interest group theory are apparently opposed, in some instances they are entwined and become complementary because "the interest group theory does

150. Richard A. Posner, *Economics, Politics, and the Reading of Statutes and the Constitution*, 49 U. CHI. L. REV. 263, 264 (1982) ("That the economist takes statutes to be complete when enacted is striking to a lawyer, who realizes that the meaning of a statute is not fixed until the courts have interpreted the statute.").

151. *Id.*

> [T]he apparent discordance between an economic view of legislation, which emphasizes the efforts of interest groups to redistribute wealth in their favor, and a traditional legal view, which requires the court to divine and effectuate the public interest goal of legislation, is not real; that courts have generally been realistic about legislation; and that the legal tradition in interpreting statutes becomes more, rather than less, intelligible when an economic view of legislation is adopted.

Id.

152. *Id.* at 265. There is no conflict between the traditional legal view and the public interest doctrine. *Id.* ("There is little, if any, tension between the economist's public interest theory and the traditional lawyer's view of legislation. The lawyer's view is also that legislation is designed to protect the public interest, implicitly defined in utilitarian terms.").

153. *Id.*

> An important determinant of the net benefit of legislative protection to a group, and the primary focus of this literature, is the cost of organizing effective political action. That cost increases as group membership becomes larger and the group less cohesive. The size of the group also bears on the benefits of legislative protection. As the group becomes larger, the benefits to each member are likely to become smaller, and hence the individual's incentive to contribute to the group's endeavor will be weakened. Should the group try to overcome this problem by seeking so large a redistribution that all members would benefit substantially, the redistribution will be much more costly to those outside the group who will be taxed to defray its cost, and this will increase resistance to the group's objective. From an analysis of such factors, the literature concludes that effective interest groups are usually small and directed toward a single issue. The benefits of a redistribution in their favor are concentrated, the costs of organizing the group are small, and the costs of the redistribution are so widely diffused that nobody has much incentive to oppose it.

Id. at 265-66.

not deny the possibility that a large group—perhaps the whole society—occasionally might procure legislation on its own behalf."[154] This suggests that applying the economic view of legislation to the interpretation of Article 9 of the Amended OHADA Uniform Act on Securities will render such an interpretation more intelligible.

III. THE OWNERSHIP OF TRUST PROPERTY IS SPLIT BETWEEN THE SECURITY AGENT AND BENEFICIARIES

A. The Vagueness of the Amended OHADA Uniform Act on Securities Regarding the Nature of the Security Agent's and the Beneficiaries' Interests in the Security Estate Property

CCJA judges should interpret statutory provisions applicable to the security agent's interest in the security estate because they are not clear. Unlike clear texts, a judge facing a vague text should determine the legislature's will, "and in the clear thinking of the legislature, the meaning of the obscure provisions."[155] OHADA law provides that "[w]hen the creation or execution of a security results in the transfer of title to the security agent, the property or properties transferred go into a security estate that is separate from the security agent's own estate."[156] While the Amended OHADA Uniform Act on Securities creates a security estate,[157] the Act is silent as to the nature of the interests of the security agent and the beneficiaries in the security estate assets. In other words, even though the Act provides for a trans-

154. *Id.* at 269. "If the benefits to the individual members of a large group are great enough and the costs to nonmembers small enough (there may be few or even no nonmembers), the legislation will be enacted." *Id.* For instance, this would include laws against murder. *Id.* Under the exegetic method, civil law judges, similar to American judges in non-constitutional interpretation cases, look for the legislative intent and fail to speculate as to the motive of the legislator passing the statute. *See id.* at 272; Germain, *supra* note 99, at 202 (noting that when a text is not clear, judges look for the legislative intent). However, since the teleological method allows the judge to fill gaps in the statute by looking at extra-textual means such as comparative law, economic and social policy, civil law judges, including OHADA judges applying the teleological methods would also consider the motive behind the passing of the statute as advocated by economic view of legislation. *See* BELL ET AL., *supra* note 97, at 34-35 (stating that French judges fill gaps in the legislation by using comparative law, social and economic policy).

155. Germain, *supra* note 99, at 198.

156. UNIFORM ACT SEC., *supra* note 10, art. 9 ("When the creation or execution of a security results in the transfer of title to the security agent, the property or properties transferred go into a security estate that is separate from the security agent owns estate . . . only owners of debts stemming from the management and administration of the security estate may seize security estate assets.").

157. UNIFORM ACT SEC., *supra* note 10, art. 9.

fer of title to the security agent, the Act does not say whether the security agent or the beneficiary is owner of the corpus of the security estate.[158] Since most commentators agree that the security estate is similar to the American commercial trust estate,[159] one could argue that the security agent owns the legal title of the security estate assets, and the beneficiaries own an incorporeal right—akin to the equitable title.[160] However, because the unitary principle of ownership is applicable in OHADA countries[161] and the Amended OHADA Uniform Act on Securities expressly provides for a transfer of title to the security agent,[162] it can also be argued that ownership of the assets in the security estate vests in the security agent only. As a result, the Act is vague because it leads to two plausible outcomes: a divided and an undivided ownership.

B. The Determination of the Security Agent's and the Beneficiaries' Interests in the Security Estate

1. The Interest of the Security Agent in the Security Estate as Determined by the Exegetic Method

When faced with a vague text, civil law judges look for the legislative intent.[163] In so doing, they "first examine[ ] the text itself with care, and consider commentaries written about the text. This is not limited to the [statutory] provision to be applied but include[ ] the chapter or the entire law."[164] First, regarding the interest of the security agent in the security estate property, a close look at Article 9 of the Amended OHADA Uniform Act on Securities suggests that the security agent owns the corpus of the security estate because the article provides for a transfer of title or ownership to the security agent. Under the Napoleonic code, "[ownership] is the right of enjoying and disposing of things in the most absolute manner, provided they are not

158. Similar to the Trust statute's provision in *Reynolds*, the Amended OHADA Uniform Act on Securities is silent as to the interests of the security agent and the beneficiaries in the trust estate. *See supra* Part II.B.1.

159. *See supra* note 15 and accompanying text.

160. 76 Am. Jur. 2d *Trusts* § 1 ("The fundamental nature of a trust is the division of title, with the trustee being the holder of legal title and the beneficiary that of equitable title."). The equitable title is "[the] ownership interest of one who has equitable [ownership] as contrasted with [the legal title which is] the legal ownership of property." Benedict v. United States, 881 F. Supp. 2d 1532, 1551 (D. Utah 1995).

161. *See* Bogert, *supra* note 21.

162. Uniform Act Sec., *supra* note 10, art. 9.

163. Germain, *supra* note 99, at 201-02.

164. *Id.* at 202.

used in a way prohibited by the laws or statutes."[165] Because the secured creditors transfer ownership to the security agent, it follows that the security agent owns the security estate property.

However, because the security agent may administer and manage the property for the benefit of the beneficiaries, it may be questioned whether the security agent's interest in the security estate qualifies as ownership. Ownership entails the right to enjoy and dispose of things in an absolute manner.[166] Because the security agent might not enjoy, one might argue that ownership does not vest upon her.

While it is true that ownership implies the right to enjoy, a person who has no right to enjoy a thing might still own that thing. This is the case with the civil law concept of usufruct,[167] where the owner grants the right of full enjoyment of the thing to another person, the usufructuary, but keeps the right to dispose.[168] Because a person who has granted a usufruct does not lose her ownership right in a thing even though she is unable to enjoy it, it follows that the security agent can also be owner of the assets in the security estate even though she has no right to enjoy. The legislative history of the Amended OHADA Uniform Act on Securities confirms this position.

The legislative history also shows that the drafters of the Amended OHADA Uniform Act on Securities intended to grant ownership to the security agent because the Uniform Act was amended to bring the security agent closer to the "security trustee."[169] Since the drafters intended to bring the security agent closer to the trustee and the legal title of trust assets vests in the trustee,[170] the security agent must also own the corpus of the security estate. Nevertheless, while the Amended OHADA Uniform Act expressly provides for a transfer of ownership to the security agent, it is silent as to whether the security agent shares this ownership interest with the beneficiaries. Unless OHADA Judges determine the nature of the bene-

165. CODE CIVIL [C. CIV.] art. 544 (Fr.).

166. *See id.* art. 544.

167. CODE CIVIL [C. CIV.] art. 578 (Fr.) ("Usufruct is the right of enjoying things of which the property is in another, in the same manner as the proprietor himself, but on condition of preserving them substantially.").

168. *Id.*

169. *Avant Project D'Amendements A L'Acte Uniforme Portant Organization Des Suretes – Tableau De Bord Des Modifications* [Table of Amendments, in Preparatory Work on the Amendment of the Uniform Act on Securities] (on file with the OHADA Permanent Secretary Office) [hereinafter *Preparatory Work - Table of Amendments*] (stating that the security agent is closer to the security trustee and this was intended to spur syndicated lending).

170. 76 AM. JUR. 2D *Trusts* § 1 ("The fundamental nature of a trust is the division of title, with the trustee being the holder of legal title and the beneficiary that of equitable title.").

ficiaries' interest, the question of whether the security agent shares ownership on the assets in the security estate will remain unanswered.

2. The Beneficiaries' Interest in the Security Estate: An Equitable Title-Like Interest

The Silence of the Exegetic Method

The Amended OHADA Uniform Act on Securities gives standing to the security agent to defend the interests of the beneficiaries in court.[171] This suggests that the beneficiaries have an interest in the security estate assets. Although, the Amended OHADA Uniform Act is silent as to the nature of the beneficiaries' interest in the security estate assets, because the drafters intended to bring the security agent closer to the security trustee,[172] we can infer that the beneficiaries of the security estate have an ownership interest similar to the one vested in the beneficiary of a commercial trust—an equitable title or something similar.[173]

Nonetheless, because the legislative history is not binding, we cannot say for sure that that the drafters intended to split ownership between the security agent and the beneficiaries, a practice that the Napoleonic principle of unitary ownership explicitly prohibits.[174] Even if the legislative history was binding, according to the same legislative history, the drafters wrote that the security agent acts "for the benefit of . . ." instead of "on behalf of . . ." to underscore the fact that the security agent is not a mere agent, but a fiduciary, akin to the security trustee.[175] This suggests that the drafters intended to bring the security agent closer to the security trustee not by split-ownership, but by establishing a heightened standard of responsibility between the security agent and the beneficiaries. Therefore, a doubt persists as to the nature of the beneficiaries' interest in the security estate, and

171. UNIFORM ACT SEC., *supra* note 10, art. 8 (stating that subject to limitations included in the contract appointing her, the security agent represents secured creditors in their relations with the debtor and third parties; the security agent has standing to sue to defend the interest of secured creditors).

172. *Preparatory Work - Table of Amendments*, *supra* note 169.

173. The equitable title is "[the] ownership interest of one who has equitable [ownership] as contrasted with [the legal title which is] the legal ownership of property." Benedict v. United States, 881 F. Supp. 2d. 1532, 1551 (D. Utah 1995).

174. *See* French CODE CIVIL [C. CIV.] art. 544 (Fr.) ("Property is the right of enjoying and disposing of things in the most absolute manner, provided they are not used in a way prohibited by the laws or statutes.").

175. *Preparatory Work - Table of Amendments*, *supra* note 169.

vicariously, the full nature of the security agent's interest. The teleological method can lift that doubt.

The Teleological Method Shows that the Beneficiaries Own an Equitable Title-Like Interest.

Reynolds as the Answer

The Louisiana Supreme Court's decision in *Reynolds* clarified that, notwithstanding the Napoleonic unitary principle of ownership, both the security agent and the beneficiaries had an "*ownership*" interest in the trust estate. Similar to OHADA member states, at the time when the court rendered the *Reynolds* decision, Louisiana was a Napoleonic jurisdiction, even today, its statutes are inspired and sometimes identical to the French Civil Code of 1804.[176] In Louisiana, a trust "is the relationship resulting from the transfer of title to property to a person to be administered by him as a fiduciary for the benefit of another."[177] Similarly, the Amended OHADA Uniform Act on Securities provides that "when the creation or execution of a security results in the transfer of ownership to the security agent, a security estate is created."[178] The security agent manages and administers the assets in the security estate for the benefit of the secured creditors that have appointed him.[179] Although the Act does not call the relationship resulting from the transfer of ownership to the security agent during the creation or execution of a security a "trust," the relationship resulting in such circumstances is functionally similar to the trust.

In both instances, the settlor(s) or secured creditors transfer ownership to the manager (the security agent, and the trustee) who owes fiduciary duties to the beneficiaries.[180] The property transferred to the manager goes into a security estate separate from the manager's

176. *See, e.g.*, *supra* notes 119, 130-31.

177. Reynolds v. Reynolds, 388 So. 2d 1135, 1142 n.3 (1979) (quoting LA. REV. STAT. ANN. art. 9:1731 (2011)).

178. *Compare* UNIFORM ACT SEC., *supra* note 10, art. 5 (stating that secured parties may appoint a security agent to manage and enforce the security for their benefit), *and* UNIFORM ACT SEC., *supra* note 10, art. 9 ("When the creation or execution of a security results in the transfer of ownership to the security agent, a security estate is created."), *with* LA. REV. STAT. ANN. art. 9:1731 (2011) ("A trust . . . is the relationship resulting from the transfer of title to property to a person to be administered by him as a fiduciary for the benefit of another.").

179. UNIFORM ACT SEC., *supra* note 10, art. 5.

180. *See* UNIFORM ACT SEC., *supra* note 10, art. 9 (discussing the higher standard of responsibility of the security agent); Langbeinn, *supra* note 73, at 182 (stating that because the efficient management of financial assets requires that the settler grant extensive powers to the trustee, fiduciary duties control these powers by requiring that the trustee exercises its powers in the best interests of the trust beneficiaries).

own estate.[181] Like the Louisiana Trust Code effective at the time *Reynolds* was decided, the Amended OHADA Uniform Act on Securities is silent as to the nature of the manager's and beneficiary's interests in the security estate.[182] Because the Louisiana Supreme Court held that the trustee owned the legal title, and the beneficiary the incorporeal right,[183] and because of the similarities between the two statutes and the two legal systems,[184] we can infer that the drafters meant to vest the legal title to the security estate assets in the security agent, and confer the beneficiaries with an incorporeal right, an ownership right capable of producing civil fruits.[185]

Yet, the similarity between the texts of the Louisiana Trust Code and the Amended OHADA Uniform Act on Securities can be questioned. While the Amended OHADA Uniform Act applies only in secured lending situations,[186] the Louisiana Trust Code does not.[187] Also, while Louisiana adopted statutory provisions expressly referring to the "trust,"[188] OHADA did not, even though the drafters were aware of trust laws.[189] In fact, the fact that the Act contains some features of the trust such as the security estate,[190] and fiduciary duties,[191] and that it is silent as to others, namely the equitable title of

181. UNIFORM ACT SEC., *supra* note 10, art. 9.

182. *See supra* Part II.B1.

183. *See supra* Part II.B1.

184. Like the OHADA member states, at the time when *Reynolds* was decided, the Napoleonic principle of unitary ownership was the law.

185. *See supra* notes 139-44 and accompanying text.

186. UNIFORM ACT SEC., *supra* note 10, art. 9 (stating that when the creation or execution of a security results in the transfer of ownership to the security agent, a security estate is created).

187. *See* Reynolds v. Reynolds, 388 So. 2d 1135, 1142 (1979) (quoting LA. REV. STAT. ANN. art. 9:1731(2011)) ("A trust . . . is the relationship resulting from the transfer of title to property to a person to be administered by him as a fiduciary for the benefit of another."). Thus in Louisiana, even where there is no secured lending, a trust can is created. *See id.*

188. *See generally* LA. REV. STAT. ANN. arts. 9:1721- 9:2252 (2011) (governing the trust regime in Louisiana).

189. *See Preparatory Work - Table of Amendments*, *supra* note 169 ("[stating that the drafters chose the wording] for the benefit of . . . ." instead of "on behalf of . . ." the beneficiaries to underscore the fact that the security agent is not a mere agent, but a fiduciary, akin to the security trustee).

190. UNIFORM ACT SEC., *supra* note 10, art. 9 (providing that when the creation or execution of a security results in the transfer of ownership to the security agent, a security estate is created).

191. UNIFORM ACT SEC., *supra* note 10, art. 11 ("Unless otherwise provided in the contract appointing the security agent, the latter's standards of responsibility to the beneficiaries are similar to those of a paid agent."). Under French law, as well as the law of OHADA's member states, the standards of responsibility of a paid agent are higher than the responsibilities of a non-paid agent. *See* CODE CIVIL [C. CIV.] art. 1992 (Fr.) (An agent is responsible for fraud and mistakes made during the agency. However, the standards of responsibility of a paid agent are higher than the responsibilities of a non-paid agent.). The standards of responsibility of a paid agent are similar to that of a fiduciary. *See Preparatory Work - Table of Amendments*, *supra*

the beneficiaries, suggests that the drafters did not intend to do away with the Napoleonic principle of unitary ownership by granting an ownership to both the security agent and the beneficiaries. Although these concerns are admirable, they are unwarranted.

As to the first concern, the similarity between the Amended OHADA Uniform Act on Securities and the Louisiana Trust Code does not lie on the scope of the application of the two statutes, but on the legal consequences resulting at the inception of each relationship. Although the Amended OHADA Uniform Act only applies to business transactions involving secured loans and the Louisiana trust statute is of general application, the two statutes are similar because they both become applicable when the ownership of property is transferred to a manager, to manage and administer the property for the profit of beneficiaries[192]—who simply happen to be secured creditors under OHADA.[193] In both circumstances, the transfer of ownership to the manager results in the creation of an estate that is immune from the manager's creditors.[194] Not only do the two statutes expressly provide for a transfer of ownership to the manager, they are both silent as to the ownership interest of the beneficiaries.[195] Since the Louisiana Supreme Court held that the beneficiaries had an incorporeal right, logic suggests that the beneficiary under OHADA law should also receive an incorporeal right, because of the similarity of circumstances.[196]

Second, the fact that the Act contains certain features of the American trust such as the security estate and that, it is silent as to the interest of the beneficiaries in the security estate property does not necessarily mean that the drafters intended to deny an ownership interest to the beneficiaries, because not every statute is complete in itself.[197] The very fact that the OHADA Treaty grants the power to

note 169 (stating that the drafters chose the wording "for the benefit of" instead of "on behalf of" the beneficiaries to underscore the fact that the security agent is not a mere agent, but a fiduciary, akin to the security trustee).

192. *See supra* notes 169-72 and accompanying discussion.

193. In fact, the Louisiana Trust Code also allows settlors to become beneficiaries. LA. REV. STAT. ANN. art. 9:1804 (1964) ("A settlor may be the sole beneficiary of income or principal or both, or one of several beneficiaries of income or principal or both.").

194. *See supra* Parts I.A.2, I.B.2.b.

195. *Id.*

196. *Id.*

197. BELL ET AL., *supra* note 97, at 34-35 (stating that the method of free scientific research was born when judges realized that statutes were sometimes not complete in themselves and began filling gaps in the legislation by using comparative law, economic, and social policy).

interpret OHADA law to the CCJA[198] shows that the drafters of the OHADA Uniform Acts recognized that OHADA law would at times be vague.

It is undisputed that at least part of the Amended OHADA Uniform Act on Securities is a transplantation of American commercial trust. The trust is a success in the market of legal doctrines because it protects the interests of beneficiaries in case of bankruptcy of the trustee.[199] The fact that Article 9 of the Amended OHADA Uniform Act on Securities creates a security estate suggests that the drafters intended to protect the secured creditors' interests in the security estates from the security agent's bankruptcy just like American trust law. This suggests that the beneficiaries do have an ownership interest in the security estate. Otherwise, there would be no purpose for creating a security. Therefore, the drafters intended to adopt split-ownership. The application of the special interest theory to the interpretation of the OHADA provision regulating the interests of the security agent and the beneficiaries in the security estate strengthens the position that the drafter intended to vest an ownership interest—the incorporeal right—to the beneficiaries.

The Economic View of Legislation Confirms *Reynolds*'s Answer.

There should be split-ownership between the security agent and the beneficiaries because the Amended OHADA Uniform Act on Securities is a special interest legislation passed to spur lending in OHADA member states. Legislation "is a good demanded and supplied much as other goods, so that legislative protection flows to those groups that derive the greatest value from it, regardless of overall social welfare."[200] Because OHADA amended the Uniform Act organizing securities to ease access to credit,[201] we can infer that borrowers, and vicariously lenders,[202] are the two groups that draw the highest value from the Act. As a result, the "legislative protec-

198. OHADA Treaty, *supra* note 30, art. 14 ("The Common Court of Justice and Arbitration will rule on, in the Contracting States, the interpretation and enforcement of the present Treaty, on such Regulations as laid down for their application, and on the Uniform Acts.").

199. *See generally* Langbeinn, *supra* note 73, at 179 (analyzing characteristics of the trust that make it suitable for commercial uses).

200. Posner, *supra* note 150, at 265-66.

201. *See* World Bank, Press Release, *supra* note 54.

202. If lenders are not willing to lend, borrowers, we believe, would have no access to credit. Thus, borrowers benefit when lenders are willing to lend. *See, e.g.*, WORLD BANK GROUP, *Major Reforms*, *supra* note 54 (stating that the modernization of secured transactions regimes is expected to make millions in credit available to private borrowers in OHADA).

tion" must flow to these two groups."[203] In other words, OHADA judges should determine the interests of the security agent and the beneficiaries in a way that protects lenders and borrowers.

The World Bank is one of the main lenders to African countries, including OHADA member states.[204] The International Finance Corporation ("IFC"), a member of the World Bank Group, is one of the main lenders to private companies in developing countries, including OHADA member states.[205] IFC helped finance the amendment of the Uniform Act on Securities.[206] One of the goals of the amendment was to create in OHADA countries, a concept similar to the American security trustee,[207] because in practice borrowers prefer granting a security interest to a trustee.[208] This suggests that IFC, a lender itself, financed the amendment of the Uniform Act on Securities to create in OHADA Countries a legal regime similar to the American security trustee. As a result, the motive behind the amendment of the OHADA Uniform Act on Securities was to fulfill IFC's[209] wish of cre-

203. Posner, *supra* note 150, at 265.

204. *Exploring Africa-Unit Two: Studying Africa Through the Social Studies*, EXPLORING AFRICA, http://exploringafrica.matrix.msu.edu/students/curriculum/m9/activity9.php (last visited Sept. 3, 2012) (stating that the World Bank, foreign governments and private transactional banks are the primary lender to African countries).

> [However, while] the World Bank has been a major lender to African countries . . . some of the World Bank loans have been controversial. Some critics of World Bank policy point out that at times the Bank will loan money only for projects that the Bank and its major depositors (the more wealthy nations) think are important.

Id.

205. *About IFC*, IFC, http://www1.ifc.org/wps/wcm/connect/corp_ext_content/ifc_external_corporate_site/about+ifc (last visited Apr. 19, 2012) ("IFC, a member of the World Bank Group, is the largest global development institution focused exclusively on the private sector in developing countries.").

206. Pierre Crocq, *Rapport de Presentation Des Amendements Relatifs A L'Acte Uniforme Portant Organization des Suretes* [Report on the Amendment of the Uniform Act of Securities], *in Preparatory Work on the Amendment of the Uniform Act on Securities* (on file with the OHADA Permanent Secretary Office); *IFC Partner OHADA Facilitates Access to Finance in Africa*, IFC (Dec. 10, 2010), http://www.ifc.org/ifcext/gfm.nsf/Content/IFC_Ohada_Africa ("[OHADA] has taken major steps to facilitate access to credit in its 16 member states, including new secured lending and commercial laws . . . IFC provides both technical expertise and financing to OHADA.").

207. WORLD BANK AND IFC, DOING BUSINESS DANS LES ETATS MEMBRES DE L'OHADA 2012 [DOING BUSINESS IN OHADA MEMBER STATES 2012] 53 (2012), *available at* http://www1.ifc.org/wps/wcm/connect/7e5939804a6813fc838cfff998895a12/DB12-OHADA-French.pdf?MOD=AJPERES (stating that the Amendment of the OHADA Act on Securities facilitates the administration of sureties in cases of syndicated lending or complex financing by the creation of the security agent—"security trustee"); Crocq, *supra* note 206 (stating that akin to a security trustee, the security agent was created to manage and administer securities in cases of syndicated lending).

208. *Preparatory Work - Table of Amendments*, *supra* note 169.

209. IFC is not the sole lender to OHADA members because it sometimes partners with banks. *See, e.g.*, *IFC, BNP Paribas Team Up to Boost Agriculture Financing in Sub-Saharan*

ating a security trustee—like legal regime in OHADA countries. Since the security trustee has the legal title of the trust property and the beneficiary has the equitable title, we can infer under the special interest theory that ownership is identically split between the security agent and the beneficiaries—the legal title of the assets in the security estate vesting in the security agent and the incorporeal right vesting in the beneficiaries. Otherwise, the legislative protection would not flow to lender and borrowers, because the security agent would have nothing to protect if the beneficiaries—secured creditors—had no ownership interest in the security estate.[210]

However, because the security estate may exist only in transactions involving a surety, and the Napoleonic principle of unitary ownership applies in all other cases, one could argue that splitting ownership between the security agent and the beneficiaries would render OHADA law complex because the Napoleonic unitary ownership will coexist with the split-ownership. This would violate OHADA's goal of simplifying OHADA business law.[211] Because OHADA would not intentionally violate its own goal, it is less likely that lenders such as IFC, and borrowers could have convinced OHADA to violate its own goal. Thus, it is doubtful that the intent or motive of the drafters was to set aside the unitary principle of ownership in secured lending transactions where the title of the surety is transferred to the security agent. Such an argument would be misplaced because it fails to look at the totality of circumstances.

In fact, this criticism overlooks the fact that the OHADA Treaty's preamble also provides for the adoption of business laws that are "modern and adaptable."[212] The fact that an increasing number of civil law countries adopt the trust or trust-like institutions[213] shows that creating a security trust to spur lending is the modern trend. Furthermore, secured lenders are generally sophisticated.[214] Thus, splitting ownership between the security agent and the beneficiary does

Africa, Eastern Europe, IFC (Apr. 12, 2012), http://www.ifc.org/ifcext/pressroom/ifcpressroom.nsf/0/6F6EC7F5D83DE13C852579D400531CE3?OpenDocument.

210. *See supra* Part III.B.2.a.

211. *See* OHADA Treaty, *supra* note 30, at pmbl. ("[Establishing an African Economic Community] demands an application in the Contracting States of a business law which is simple, modern and adaptable.").

212. *See id*.

213. *See supra* note 76 and accompanying text.

214. First Citizens Fed. Sav. & Loan Ass'n v. Worthen Bank & Trust Co., 919 F.2d 510, 514 (9th Cir. 1990) ("Banks and savings institutions engaged in commercial transactions normally deal with one another at arm's length . . . .").

not render the law complex because lenders would be able to understand the process.[215] Therefore, because split-ownership does not render OHADA business law complex, and since it is the modern trend, it does not conflict with OHADA's goal of adopting business law that is simple, adaptable, and modern.[216] In reality, split-ownership actually makes access to credit easier, as it simplifies multi-lender transactions.

C. The Efficacy of Split-Ownership of the Security Estate Property

While the parties may forgo split-ownership when the syndicated loan is unsecured, issues arise when the "syndicated loan is to be secured . . . and the individual loans are capable of assignment or transfer in whole or in part."[217] In a secured syndicated loan, parties not using trust law—split-ownership—may at the outset have the borrower grant a security interest to each bank in the syndicate, and the latter can make contractual arrangements for the enforcement of their individual security interest.[218] However, since co-lenders often transfer or assign their loans, proceeding without trust law or at least split-ownership can render the transaction extremely complex because "in relation to each transfer, new arrangements would have to be made to cope with the change in security interests and alteration of the enforcement arrangements."[219] As an illustration, a syndicate is made of three banks, X, Y, and Z. Each bank is to grant a loan of $200.00 to B, a borrower located in Dakar, Senegal. The borrower is to grant a security interest in her cotton farm worth $900.00 to each bank. The syndicate appoints S, a bank also located in Dakar as security agent. To close the deal, the parties do not need to use split-ownership, because the lenders can agree as to ways to enforce their respective security interests.[220] In that respect, the security agent has no ownership interest and merely acts as an agent. However, every time each se-

215. *See id.*

216. *See* OHADA Treaty, *supra* note 30, at pmbl.

217. BAMFORD, *supra* note 1, at 102.

218. According to Bamford, when the syndicated loan is to be secured, each bank in the syndicate should receive a security to secure the loan it has made. *Id.* at 102. "It might be possible at the outset of the syndicated loan for charges or mortgages to be given to each of the banks to secure its loan, and for contractual arrangements to be reached between them for the enforcement of their individual charges." *Id.*

219. *Id.*

220. *Id.* In the United States for instance, creditors may agree to share a first lien on a common collateral by entering into an intercreditor agreement. Debra J. Schnebel, *Intercreditor and Subordination Agreements – A Practical Guide*, 118 BANKING L.J. 48, 50-51 (2001). This can be structured in two ways:

cured lender's interest is transferred, the parties will have to make new arrangements and this can be cumbersome.

The parties can easily deal with this situation by using the common law's split-ownership concept.[221] Thus, at the outset the syndicate of banks appoint a security agent that will hold the legal title of the security for the benefit of the Banks X, Y, Z; these banks would each keep an incorporeal right. As the lending interest's degree "of those banks change, and new banks are introduced, [the provision of the contract appointing the security agent] will vary so that the [security agent] will hold [the legal title] in accordance with their agreement. This arrangement allows for flexibility in the documentation and clarity in the practical arrangement."[222] In other words, granting a legal title to the security agent and an incorporeal to the beneficiaries would be more efficient because it would allow members of the syndicate to easily transfer or assign individual loans.

With respect to loan participations, split-ownership is more efficient because it provides the parties with the option to draft their participation agreement as a sale or a loan. Participation might be a sale or a loan, depending on the intent of the parties.[223] When the parties intend their participation to be a loan, "the loan [is] from the participant(s) to the lead and not to the underlying borrower."[224] And the underlying loan from the lead to the borrower will secure the participant's loan to the lead.[225] Since loans are generally assigned or trans-

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> First, each of the lenders may separately take a security interest in the borrower's assets and enter into an intercreditor agreement which establishes that the rights of the two lenders as to the collateral shall be [in equal footing]. This would be the case, for example, if one lender had a pre-existing relationship with the borrower. In such case, the preexisting intercreditor agreement can be used to alter the priorities of the lenders otherwise established by statute.
>
> Alternatively, a collateral agent can be the secured party on behalf of each of the lenders, on [an equal footing] basis. The collateral agent may be one of the two lenders, or an independent third party. The intercreditor agreement would then need to address the rights and obligations of the collateral agent, as well as the respective rights of the lenders as to the collateral.

Id.

221. BAMFORD, *supra* note 1, at 102.

222. *Id.*

223. Debora L. Threedy, *Loan Participations-Sales or Loans? Or is that the Question?*, 68 OR. L. REV. 649, 652-53 (1989) (stating that while a participation is generally deemed as a sale, it might be considered a loan if the parties intended it to be a loan); *see also* Michael Cavendish, *New Analysis of the Repurchase Obligation in Participation Agreements*, 127 BANKING L.J. 417, 423 n.7 (2010) ("There is no question that if the contracting parties draft a participation-like agreement to exist as a loan it can be enforced as such.").

224. Threedy, *supra* note 223, at 663.

225. *Id.* at 664 ("The collateral for the loan from the participant to the lead would be the underlying loan from the lead to the borrower.").

ferred,[226] the participation loan will become as complex as a secured syndicated loan[227] and "in relation to each transfer, new arrangements would have to be made to cope with the change in security interests and alteration of the enforcement arrangements."[228] This problem may easily be resolved by appointing a co-participant as security agent to hold the legal title of the security—the underlying loan from the lead to the borrower—for the benefit of all co-participants.[229] Thus, using split-ownership would "allow for flexibility in the documentation and for clarity in the practical arrangement."[230]

CONCLUSION[231]

In conclusion, I simply question whether we are proposing too much far too early: too much because adopting split-ownership also entails accepting the consequences that stem from that adoption. For instance, split-ownership comes with other rules governing trust law. Trust law does not exist in OHADA and none of the OHADA member states, Cameroon excepted, speak English. So, judges and practitioners will have to refer to American precedents to understand split-ownership, assuming that all common law concepts involving trusts can be translated from English to French.[232] Should prospective translation issues be taken into account in the definition of the security agent's interest in the security estate? And do our submissions come too early in that we assume that local courts will not regard

226. *See* BAMFORD, *supra* note 1, at 102 (stating that multiple lender loans are generally assigned or transferred); *but see Multiple Lender/Multiple Borrower Transactions*, 904 PLI/COMM 349, 359 (2008) ("Participation certificates are generally not transferable. Subparticipations are often prohibited. This is changing as large banks establish programs that sell participations to mutual funds that invest in loans.").

227. *See* BAMFORD, *supra* note 1, at 102.

228. *Id.*

229. *Id.*

230. *Id.*

231. My conclusion is inspired from a conclusion found in ELIZABETH FAJANS & MARY R. FALK, SCHOLARLY WRITING FOR LAW STUDENTS 153 (2011).

232. In Cameroon, a mixed jurisdiction, civil law and common law translation is already an issue. *See* Martha Simo Tumnde, *Harmonization of Business Law in Cameroon: Issues, Challenges and Prospects*, 25 TUL. EUR. & CIV. L.F. 119, 125-26 (2010).

> In most of the Uniform Acts, the procedure for seizing the competent jurisdiction is by '*assignation*.' *Assignation* has been translated in some Uniform Acts as writ of summons, summons or motion on notice. However, '*assignation*' as a civil law concept has no equivalent in the common law. Unlike '*assignation*' which is an extra-judicial act, a writ of summons is signed by a judge, magistrate or other officer empowered to sign summonses.

Id. at 125.

split-ownership as an attack to their cherished civil law?[233] Should the nature of the security agent's and the beneficiaries' interests in the security estate depend on what the people—legislature and not executive—think it should be? Regardless, one issue remains clear, the Amended OHADA Uniform Act on Securities is a work in progress—and the African battle between Uncle Sam and Napoleon is not over.

233. In Cameroon for example, common law courts received OHADA Law with suspicion because they deemed it an attack to their cherished common law. *See id.* at 124 ("Generally OHADA was received with great suspicion [by Cameroonian common law courts; a Cameroonian Justice] said: It is with great suspicion and reserve that common law courts have received the Treaty and its Uniform laws."). This suggests that Civil Law Courts and practitioners in OHADA states might also receive split-ownership with suspicion, especially because this would make them go back to the drawing board and learn a new language—American English.