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ARTICLES

PHARMACEUTICAL GATEKEEPERS

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INTRODUCTION

In an influential 1986 article, Reinier Kraakman explored the role of third party "gatekeepers" in deterring misconduct by declining to support primary wrongdoers.[1] Lawyers and accountants, for example, help to prevent the fraudulent issuance of securities or serious misrepresentations in financial statements by declining to provide the legal opinions or audits that are needed to close a deal.[2] Although Kraakman was primarily focused on wrongdoing by actors in the corporate finance sphere, the pharmaceutical marketplace provides fertile ground for the further development of a gatekeeping analysis. Few industries are characterized by such numerous and diverse potential gatekeepers, including physicians, public interest groups, insurance companies, and even patients themselves. In addition, a number of federal agencies act as gatekeepers of a different sort, wielding the power to withhold support from "wrongdoers" (to use Kraakman's term), but do so on the basis of a statutory duty rather than out of a desire to avoid potential liability.[3] These agencies include the United States Patent and Trademark Office (USPTO), the Food and Drug Administration (FDA), and the Federal Trade Commission (FTC).

This Article draws inspiration from Kraakman's framework to explore a particular and perhaps unexpected type of "wrongdoing" that is observed in the

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1. Reiner H. Kraakman, *Gatekeepers: The Anatomy of a Third-Party Enforcement Strategy*, 2 J. L. ECON. & ORG. 53 (1986).

2. *See, e.g.*, 17 C.F.R. § 229.601 (2013) (Exhibit Table) (noting that a legal opinion must be included as an exhibit for eight types of financial statements, including forms S-1 and S-3).

3. *See, e.g.*, Howard L. Dorfman et al., *Presumption of Innocence: FDA's Authority to Regulate the Specifics of Prescription Drug Labeling and the Preemption Debate*, 61 FOOD & DRUG L.J. 585, 588 (2006) (recognizing that statutes control the FDA in the labelling of prescription drugs.)

pharmaceutical industry: the lawful sale of medicines that have little or no therapeutic effect. Previous work has described the surprising absence of substantial efficacy or advantage exhibited by many of today's most celebrated pharmaceuticals.[4] This lack of efficacy is all the more unexpected given the presence of myriad expert gatekeepers, both public and private, that stand watch over consumer behavior. In fact, so many gatekeepers are at work in the pharmaceutical industry that a reasonable observer might be justifiably skeptical at the assertion that the currently regulatory structure fails to adequately guard against the prevalence of ineffective medicines. A closer examination of efficacy data merely turns this skepticism to bewilderment, confirming the absence of substantial efficacy but leading the observer to wonder how such impotent drugs could have traversed so many gatekeepers' watchful eyes, evoking perhaps the image of Dr. Seuss's ineffectual bee watcher-watcher.[5] This Article seeks to attend to that bewilderment by explaining how the numerous well-intentioned and often well-respected gatekeepers have not been successful in fulfilling their gatekeeping duty to protect patients from minimally effective medicines.

I. PRIVATE PARTIES AS GATEKEEPERS

Pharmaceutical gatekeepers can be divided into two broad categories: public gatekeepers such as the FDA, which regulate drug companies directly, and private gatekeepers such as doctors, which exert varying levels of influence and control over a patient's consumption of a given drug.[6] This Part examines the role of the private (non-governmental) pharmaceutical gatekeepers, which fall most comfortably within Kraakman's meaning of the term. These private gatekeepers include not only doctors, who can withhold prescriptions,[7] but also insurance companies, which can withhold reimbursement,[8] advocacy organizations, which can withhold endorsements,[9] and consumers themselves, who can withhold purchases and thereby vote with their pocket books.[10]

Although these private actors can be considered gatekeepers under

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4. *See* Jonathan J. Darrow, Pharmaceutical Efficacy: History and Regulation (unpublished S.J.D. dissertation, Harvard Law School) (on file with author); Donald W. Light et al., *Institutional Corruption of Pharmaceuticals and the Consequences for Patients*, 41 J. L. MED. & ETHICS 590 (2013); *see also* sources cited *infra* note 108.

5. DR. SEUSS, DID I EVER TELL YOU HOW LUCKY YOU ARE? 26 (1973).

6. For the public versus private (or market) gatekeeper distinction, see Kraakman *supra* note 1, at 62.

7. *See, e.g.*, Jessie Cheng, *An Antitrust Analysis of Product Hopping in the Pharmaceutical Industry*, 108 COLUM. L. REV. 1471, 1498 (2008) ("Physicians, acting as 'gatekeepers,' independently dictate the selection of prescription drugs for a patient's consumption.").

8. *See* Rebecca S. Eisenberg, *The Role of the FDA in Innovation Policy*, 13 MICH. TELECOMM. & TECH. L. REV. 345, 374 (2007).

9. *See id.* at 367.

10. *See id.* at 380 (noting that consumers may withhold the purchase of an expensive pharmaceutical product in favor of a less expensive one).

Kraakman's framework, they are in a sense at the fringe of his analysis, which is primarily directed at gatekeepers that can directly withhold support from the wrongdoers themselves.[11] In contrast, although pharmaceutical gatekeepers could be seen as potentially withholding support for drug company "wrongdoers" by refusing to prescribe or pay for a medicine, it is more natural to view them as withholding victims.[12] That is, these gatekeepers prevent patients from demanding the wrongdoer's products, rather than directly withholding the support needed for drug companies to make their products available on the market. This situation, where gatekeepers disrupt misconduct by withholding potential victims, is briefly alluded to by Kraakman in a footnote.[13] In another footnote, the possibility is raised that even victims themselves might serve as their own gatekeepers,[14] a fruitful point of inquiry in the present context given the ability of consumers to purchase over-the-counter drugs, to decline to purchase prescribed drugs, or to influence physician prescribing by requesting certain drugs by name. These two unique species of gatekeepers, briefly mentioned but largely undeveloped by Kraakman, are therefore especially relevant in the pharmaceutical marketplace and it is there that the discussion begins.

A. Physicians

One of the reasons that people find it so difficult to believe that many drugs lack substantial efficacy is that drugs are prescribed by doctors, who are often held in the highest of esteem. According to Gallup polls, doctors are the third most trusted professionals (after nurses and pharmacists), with public perception of doctor trustworthiness gradually increasing since the polls began in 1976.[15] This trust and esteem is not entirely misplaced. Physicians do have substantial, often highly specialized education and training. Some have extensive experience with specific medications, medical conditions, or even patients. In addition to substantial training and experience, physician gatekeepers are themselves regulated by "second-level" gatekeepers in the form of government licensing schemes, and are required to stay current via continuing medical education.[16] Most importantly, the vast majority of physicians likely have a sincere desire to

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11. *See* Kraakman *supra* note 1, at 62.

12. *Id*. at 64 n.31.

13. *Id.*

14. *Id.* at 62 n.21.

15. Jeffrey M. Jones, *Record 64% Rate Honesty, Ethics of Members of Congress Low*, GALLUP, Dec. 12, 2011, http://www.gallup.com/poll/151460/record-rate-honesty-ethics-members-congress-low.aspx, *archived at* http://perma.cc/LR2K-76G2 ("Ratings of Honesty and Ethics of Medical Doctors and Pharmacists").

16. *See* Timothy Stoltzfus Jost, *Oversight of Marketing Relationships Between Physicians and the Drug and Device Industry: A Comparative Study*, 36 AM. J.L. & MED. 326, 332 (2010) (noting that continuing medical education may be a requirement to maintain licensure or specialty designation).

make decisions that are in the best interests of their patients.[17] These and other factors combine in the minds of the public to cast an almost deity-like aura on those in the medical profession. One physician reported literally being referred to as "Dr. God" by an admiring patient.[18]

Nevertheless, there are a number of reasons why physicians do not make the infallible gatekeepers that their education, training, public trust, and authority to withhold prescriptions might suggest. In some cases, doctors simply are not involved in the decision to purchase a drug, as might be the case with over-the-counter products. When doctors are involved, a number of factors may push them in the direction of prescribing a drug despite a lack of substantial therapeutic value.[19] Pliny lamented that in ancient Greece, "not even the physicians know their facts" about pharmaceuticals, the sale of which is "plainly a showy parade of the art, and a colossal boast of science."[20] These sentiments were echoed more recently on the floor of the House of Representatives, with only slightly more restrained cynicism:

> [I]t is impossible for any doctor, from his own resources, to be able to pick out the good drugs from the bad ones. Unfortunately, many doctors rely heavily and sometimes almost exclusively on detail men for information with regard to drugs . . . . Drug companies have learned that doctors respond to the same kind of emotional appeals as laymen. They are influenced by the same advertising techniques that are used by mass consumer advertising. They accept new drugs with amazing rapidity.[21]

In addition, patients may request a drug in general or even a particular drug, which is an intended and therefore particularly expected consequence of direct-to-consumer (DTC) advertising.[22] Evidence suggests that sales often increase dramatically following DTC drug advertising.[23] Where the drug is reasonably

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17. *See In re* Gladstone, 44 A.D.3d 777, 778 (N.Y.S.2d 2007) (noting that consideration of the patient's best interest can be a regulatory requirement.

18. JERRY AVORN, POWERFUL MEDICINES 166 (2004).

19. *See* 108 CONG. REC. 19926 (Sept. 27, 1962) (statement of Rep. Celler) (quoted *infra* note 21).

20. PLINY THE ELDER, NATURAL HISTORY, Book XXIX 199 (W.H.S. Jones trans., 1963).

21. 108 CONG. REC. 19926 (Sept. 27, 1962) (statement of Rep. Celler) (internal quotations omitted).

22. *See* Nancy Ann Jeffrey, *A Little Knowledge . . . Doctors Are Suddenly Swamped With Patients Who Think They Know a Lot More Than They Actually Do*, WALL ST. J., Oct. 19, 1998, at R8; *Doctors Concerned by Requests for Drug Brands Seen in TV Ads*, AUSTIN AM. STATESMAN, Jan. 7, 1998, at D1; Elyse Tanouye, *Drug Ads Spur Patients to Demand More Prescriptions*, WALL ST. J., Dec. 22, 1997, at B1.

23. *See* Joel J. Davis, *Riskier Than We Think? The Relationship Between Risk Statement Completeness and Perceptions of Direct to Consumer Advertised Prescription Drugs*, 5 J. HEALTH COMMC'N: INT'L PERSPECTIVES 349, 350 (2000) (describing "[f]ive related trends [that] help to explain how DTC advertising affects product sales."); Milton Liebman, *Three Scenarios for Direct-to-Consumer Advertising*, 35 MED. MARKETING & MEDIA 72 (2000).

safe, as required to obtain FDA approval,[24] prescribing the drug for its labeled indication will satisfy the patient's demand while imposing no more than FDA-accepted levels of risk, which risk can be addressed by a brief verbal disclaimer to the patient.[25] The strong cultural tradition of respecting patient autonomy, even when patients wish to act against medical advice,[26] contributes to this tendency. In addition, doctors in the age of managed care face pressures to limit the amount of time spent with each patient.[27] Counseling a patient on his condition, or on appropriate non-drug treatments such as diet and exercise, can be time-consuming and might be viewed as time not particularly well spent in light of low patient compliance rates.[28] In contrast, once a patient has a prescription in hand, he can head out the door, satisfied that the doctor has done her job.

This is not to suggest that physicians would knowingly prescribe an ineffective drug when a substantially more effective drug is available. However, often there are simply no substantially effective drugs even in common therapeutic areas, such as depression or Alzheimer's.[29] In these cases, prescribing a drug can satisfy the patient, give the patient hope, and possibly even stimulate a genuine improvement caused by the placebo effect.[30] It can also give the doctor

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24. 21 U.S.C. § 355(d) (2013).

25. *See* Daniel W. Whitney, *Product Liability Issues for the Expanding OTC Drug Category*, 48 FOOD & DRUG L.J. 321, 329 (1993) (stating that the ultimate consumer must be warned in a learned intermediary situation).

26. *See, e.g.*, Stamford Hosp. v. Vega, 674 A.2d 821, 831-32 (Conn. 1996) (noting the common law right to refuse medical treatment).

27. *See, e.g.*, OHIO ELDER LAW § 13:24 (2013) (discussing time restraints on time with patients in light of Medicare coverage).

28. Sophie Desroches et al., *Interventions to Enhance Adherence to Dietary Advice for Preventing and Managing Chronic Diseases in Adults (Review)*, COCHRANE COLLABORATION, 2013 (Issue 2), at 3 (noting that non-adherence rates for medication and lifestyle changes are estimated to be between 50% and 80%).

29. C. Courtney et al., *Long-term Donepezil Treatment in 565 Patients with Alzheimer's Disease (AD2000): Randomized Double-Blind Trial*, 363(9427) LANCET 2105, 2105 (2004) (concluding that donepezil is "not cost effective, with benefits below minimally relevant thresholds"); Richard A. Hansen et al., *Efficacy and Safety of Donepezil, Galantamine, and Rivastigmine for the Treatment of Alzheimer's Disease: A Systematic Review and Meta-Analysis*, 3(2) CLIN. INTERVENTIONS IN AGING 211, 222 (2008) (finding "no clear evidence" that any of donepezil, galantamine or rivastigmine is more efficacious than the others); Irving Kirsch & Thomas J. Moore, *The Emperor's New Drugs: An Analysis of Antidepressant Medication Data Submitted to the U.S. Food and Drug Administration*, 5 PREVENTION & TREATMENT 1 (2002) (Article 23); *Petition to Ban 23 Milligram Dose of Donepezil (Aricept)*, PUB. CITIZEN, May 18, 2011, at 12, http://www.citizen.org/documents/1950.pdf, *archived at* http://perma.cc/ZBA4-D4UJ.

30. *See, e.g.*, Cara Feinberg, *The Placebo Phenomenon*, HARV. MAG. 36, 38 (2013), http://harvardmagazine.com/2013/01/the-placebo-phenomenon, *archived at* http://perma.cc/6XGH-KKR6 (describing a study where patients knew they were taking only placebos but nevertheless reported improvement "comparable to the improvement seen in trials for the best *real* IBS [irritable bowel syndrome] drugs.").

a sense of agency, even when there is little medicinally that can truly be done.[31] While prescribing what are essentially placebos in such circumstances may be a sensible option, or perhaps the only option, it chips away at the pristine image of today's doctors as wholly different from those of the last century, or even the last millennium. In modern times, chronocentrism[32] leads some to denigrate ancient healthcare workers (called "shamans," "medicine men," etc., rather than "doctors") as practicing superstitious medicine with no basis in science.[33] But in some cases, their treatments may have been just as effective as today's treatments.[34]

Adding to the problem is an absence of clearly presented and easily available efficacy data. Although drug labels are required to contain a section describing clinical trial results, this information is buried in section fourteen of the package insert,[35] is often written in such a way that it is difficult for doctors (let alone patients) to understand,[36] and is not standardized even among drugs within the same category,[37] making assessments of comparative efficacy difficult or impossible. The result is that even doctors do not have anything approaching adequate information regarding a drug's efficacy.

Worse, the void of non-biased information is often filled by drug company "detailers," who personally visit physicians for the primary purpose of

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31. *Id.* at 39 (introducing the idea of studying the mind of physicians as they treat patients).

32. Chronocentrism is defined as "the egotism that one's own generation is poised on the very cusp of history." TOM STANDAGE, THE VICTORIAN INTERNET: THE REMARKABLE STORY OF THE TELEGRAPH AND THE NINETEENTH CENTURY'S ON-LINE PIONEERS 213 (1998).

33. *See* DAVID EDWARD OWEN, BRITISH OPIUM POLICY IN CHINA AND INDIA 12 (1934) (describing tenth century Chinese opium prescriptions as "curious mixtures of shrewd empiricism and superstition"); Jerry Stannard, *Squill in Ancient and Medieval Materia Medica, With Special Reference to Its Employment for Dropsy*, 50 BULL. N.Y. ACAD. MED. 684, 703 (1974) (describing the medieval period as "a time in which the boundaries between science and superstition were vague").

34. *See* TALCOTT PARSONS, THE SOCIAL SYSTEM 315 (1951) ("[P]seudoscience is the functional equivalent of magic in the modern medical field."). Elsewhere Parsons explains that even "organic physician[s]" that seek to practice medicine as an empirical science nevertheless engage in "unconscious psychotherapy," a reflection that much of healing today, as always, lies not in pills but in perception, psychology and belief. *See id.* at 311.

35. *See* 21 C.F.R. § 201.56(d)(1) (2013).

36. *See* PETER TEMIN, TAKING YOUR MEDICINE: DRUG REGULATION IN THE UNITED STATES 9-11 (1980) ("Data on efficacy are scattered through a wide variety of medical journals that . . . are not easily understood without medical and statistical training. The extant data are, in addition, woefully incomplete so that even the trained investigator with access to a good medical library will find the pursuit of information on the comparative effectiveness of similar drugs . . . peculiarly frustrating . . . . Doctors generally are not well-qualified [in statistics].").

37. *See* Christine H. Kim, *The Case for Preemption of Prescription Drug Failure-to-Warn Claims*, 62 FOOD & DRUG L.J. 399, 407 n.86 (2007) ("Congress has not specifically addressed uniformity of prescription drug labeling.").

influencing prescribing decisions.[38] As one medical historian notes, "[d]octors are usually unable or ill-equipped to examine the research literature. As a result, they tend to learn about new drugs from roving representatives or from advertisements . . . ."[39] The result of this state of affairs is unsurprising. According to *Consumer Reports*, an independent nonprofit organization, "[m]any people (*including [many] physicians*) think that newer drugs are better. While that's a natural assumption to make, it's not true. Studies consistently find that many older medicines are as good as—and in some cases better than—newer medicines."[40]

The pharmaceutical pricing and payment structure provides an additional reason why doctors make imperfect gatekeepers. Physicians themselves do not pay for their patients' drugs, so there is no direct financial disincentive to prescribe any given medicine.[41] Doctors also know that most patients do not bear the full costs of medications, so there is not even an indirect disincentive to prescribe (unless a doctor wants to save a faceless insurance company some expense).[42] Where patients do bear costs, such as with over-the-counter drugs, uninsured patients, or prescription drug co-payments, doctors may not be attuned to patients' financial circumstances and "therefore may not think to recommend a lower cost but equally effective generic alternative."[43] Not surprisingly, studies have shown that doctors generally do not consider price at the time of prescribing.[44] In many cases, doctors do not even know the prices of treatments.[45]

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38. *See generally* Melissa N. Hoffman, *Pharmaceutical Detailing Is Not for Everyone: Side Effects May Include Sub-optimal Prescribing Decisions, Compromised Patient Health, and Increased Prescription Drug Spending*, 33 J. LEGAL MED. 381, 386-89 (2012) (explaining several negative impacts of detailing on physician prescribing, drug cost, and patient health).

39. JACALYN DUFFIN, HISTORY OF MEDICINE: A SCANDALOUSLY SHORT INTRODUCTION 109 (2d ed. 2010).

40. *See Evaluating Statin Drugs to Treat: High Cholesterol and Heart Disease,* CONSUMER REPORTS HEALTH BEST BUY DRUGS 1, 21 (2012), http://www.consumerreports.org/health/resources/pdf/best-buy-drugs/StatinsUpdate-FINAL.pdf, *archived at* http://perma.cc/J29Z-MPNH [hereinafter *Evaluating Statin Drugs to Treat*] (emphasis added).

41. *See* Cheng, *supra* note 7, at 1509 ("[P]hysicians who drive pharmaceutical demand are less price sensitive . . . .").

42. *See* Robert N. Rabecs, *Health Care Fraud Under the New Medicare Part D Prescription Drug Program*, 96 J. CRIM. L. & CRIMINOLOGY 727, 742 (2006) (recognizing there is no disincentive for physicians to prescribe medications under the Medicare Part D plan).

43. Aaron S. Kesselheim, *Think Globally, Prescribe Locally: How Rational Pharmaceutical Policy in the U.S. Can Improve Access to Essential Medicines*, 34 AM. J.L. & MED. 125, 129 (2008).

44. *Evaluating Statin Drugs to Treat*, *supra* note 40, at 21.

45. *See, e.g.*, *Appendix 2011 Interim Meeting of the House of Delegates Reports of Reference Committees*, AM. MED. ASS'N 249, 256 (2011), http://www.ama-assn.org/assets/meeting/2011i/i11-reference-committee-reports.pdf#page=8, *archived at* http://perma.cc/92TY-86ZV [hereinafter *Appendix 2011 Interim Meeting*] (noting that "costs of treatments are sometimes not transparent to physicians").

Even if the issue of cost is specifically brought to their attention, some physicians shrink from their responsibility to act as prudent stewards of healthcare resources. For example, in an ongoing discussion in the American Medical Association (AMA), the Council on Ethical and Judicial Affairs recommended that the AMA adopt a policy that, where benefits of a treatment are equal, physicians should choose the less expensive alternative.[46] Although the recommendation by its terms was limited to circumstances where benefits were equal, some physicians nevertheless expressed concern "that making cost-conscious decisions would hamper patient care,"[47] and the recommendation was not adopted.[48] A revised version was reintroduced in 2012 and finally adopted,[49] but only over objections that "physicians would no longer be putting the interests of their individual patients first if they had to consider the costs of care and the impact on health care resources."[50] A 1968 government task force put it thus:

> Some have attempted to justify this situation [where moderate or even enormous price differences may exist between pharmaceutical products of comparable quality] by describing the physician as the patient's expert purchasing agent. In the view of the Task Force, this concept is not valid; in most situations, a purchasing agent who purchased without consideration of both quality and price would be unworthy of trust.[51]

In summary, doctors make poor gatekeepers because there is little incentive for them to refrain from prescribing substantially ineffective medications, a continuous barrage of biased information flowing from drug companies and their detailers, and considerable reluctance to consider cost even where less expensive treatment options are otherwise equal. Even completely ineffective drugs can satisfy patient requests, speed patient throughput time, give patients hope, induce a placebo effect, and give doctors the satisfaction of having acted, all at no cost to the doctor, minimal cost to the insured patient, and with relatively low risk. It is truly astonishing that a drug that does almost nothing therapeutically can have

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46. Sharon P. Douglas, *Opinions of the Council on Ethical and Judicial Affairs*, AM. MED. ASS'N 85, 93 (2011), http://www.ama-assn.org/assets/meeting/2011i/i11-ceja-reports.pdf#page=5, *archived at* http://perma.cc/MDE8-XLL8 ("When alternative courses of action offer similar likelihood and degree of benefit but require different levels of resources, [physicians should] choose the course of action requiring fewer resources.").

47. *Appendix 2011 Interim Meeting*, *supra* note 45, at 256.

48. *Id.* (noting that the recommendation was "referred," i.e., sent back to the committee to be redrafted).

49. *See* Sharon P. Douglas, *Reports of the Council on Ethical and Judicial Affairs*, AM. MED. ASS'N 141, 145 (2012), http://134.147.247.42/han/JAMA/www.ama-assn.org/assets/meeting/2012a/a12-ceja-reports.pdf, *archived at* http://perma.cc/UGE6-449V.

50. *Appendix 2012 Annual Meeting of the House of Delegates Reports of Reference Committees* 475, 477 (2012), http://www.ama-assn.org/assets/meeting/2012a/a12-reference-committee-reports.pdf#page=3, *archived at* http://perma.cc/A9KJ-837N.

51. *Task Force on Prescription Drugs: Final Report*, *in* MICKEY C. SMITH, PRESCRIPTION DRUGS UNDER MEDICARE: THE LEGACY OF THE TASK FORCE ON PRESCRIPTION DRUGS 65 (2001).

so many benefits, but this unexpected mix of benefits goes a long way toward explaining why substantially ineffective drugs are able to survive in the market.

Returning to Kraakman's framework, we find four criteria that, when present, suggest that gatekeeping is likely to be an appropriate approach to deterring undesirable behavior. They are: "(1) serious misconduct that practicable penalties cannot [directly] deter; (2) missing or inadequate private gatekeeping incentives; (3) gatekeepers who can and will prevent misconduct reliably, regardless of the preferences and market alternatives of wrongdoers; and (4) gatekeepers whom legal rules can induce to detect misconduct at reasonable cost."[52]

This four-part framework is offered by Kraakman as a means to determine when imposing liability on gatekeepers will be an efficient means of deterring wrongdoing, and is not meant as a tool for evaluating the adequacy of an individual gatekeeper. Nevertheless, the third criterion is useful in helping to understand why doctors are not likely to foster successful gatekeeping, namely, because they fail the third criterion's requirement that the gatekeeper "can and will prevent misconduct reliably." As discussed above, doctors' ability to prevent misconduct is impaired by the absence of clearly presented efficacy information, while their willingness to prevent misconduct is eroded by the many reasons to prescribe even drugs that lack non-placebo efficacy altogether.[53] That doctors "fail" the third criterion does not mean that gatekeeping cannot work as a strategy to prevent the consumption of ineffective drugs, but it does suggest that if doctors are to be gatekeepers, their ability and willingness to refrain from prescribing minimally effective medications must somehow be enhanced.

B. Insurance Companies

It was stated above that the absence of cost reduces the incentive for doctors to act as effective gatekeepers. The same cannot be said of insurance companies, which do bear the financial costs of substantially ineffective drugs and therefore have an incentive to discourage their use.[54] Predictably, insurance companies have in fact taken steps to promote rational drug use. The most visible among these is the creation of tiered formularies, which attempt to provide a financial incentive to patients to avoid low value remedies by scaling co-payments.[55] One health insurer planned to pay pharmacists to convince consumers to switch to generic drugs, which by law must be "bioequivalent" but are almost always

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52. Kraakman, *supra* note 1, at 61.

53. *See supra* Part I.A.

54. *See* TOM BAKER, INSURANCE LAW AND POLICY 4 (2d ed. 2008) (discussing the "moral hazard" insurance companies face).

55. *See* Joseph J. Hylak-Reinholtz & Jay R. Naftzger, *Is It Time to Shed a "Tier" for Four-Tier Prescription Drug Formularies? Specialty Drug Tiers May Violate HIPAA's Anti-Discrimination Provisions and Statutory Goals*, 32 N. ILL. U. L. REV. 33, 41 (2011) (discussing the development of tiered formularies).

priced lower.[56] In light of workable solutions such as these, insurance companies may be best positioned for success as pharmaceutical gatekeepers.

In some cases, insurance companies' efforts at rational drug use have proved at least moderately successful. When combination drug BiDil (hydralazine and isosorbide) was introduced in 2005 for the treatment of heart failure, some insurance companies balked.[57] They stated that they would cover its two components separately, which were available as generics, but would either not cover the high-priced combination product at all or would place it in a disfavored formulary tier.[58] Despite a joint statement by the American Heart Association and the American College of Cardiology that either the generics or BiDil were reasonable, critics continued to condemn the insurers.[59] Notwithstanding this criticism, sales fell far short of their billion dollar estimates, hovering around $15 million between 2006 and 2008.[60]

Nevertheless, any enthusiasm at the prospect of insurance companies acting as white knights in the fight against substantially ineffective drugs must be tempered by a dose of reality. Although tiered formularies can help to screen out expensive drugs not justified by their efficacy advantage, the alignment with efficacy is imprecise and may be both under- and over-inclusive: under-inclusive because there is little incentive to screen out cheap but ineffective drugs, and over-inclusive because exorbitantly priced drugs might be placed on a disfavored tier even if they possess respectable efficacy.

An important psychosocial factor is also at play. If an insurance company attempts to discourage the use of an ineffective drug by requiring a high copayment or withholding payment altogether, it will be viewed not as a white knight protecting the public from worthless drugs, but as a cold and greedy corporation that only wishes to prevent everyone's grandparents from obtaining the medicines that they need (or at least think that they need).[61] This psychological factor can be seen in the BiDil case presented above. It is no surprise, therefore, that "most payers in both the public and private sectors willingly, if complainingly, pay for whatever doctors prescribe."[62]

Consumer groups, such as the AARP, do not help the situation. These groups generally advocate broader insurance coverage of medicines but do not

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56. *See* Associated Press, *Generics May Profit Pharmacists*, 36(19) MARKETING NEWS 14, 14 (2002).

57. Sylvia Pagan Westphal, *Heart Medication Approved for Blacks Faces Uphill Battle—As Insurers Debate Costs and Generics Loom, BiDil Fails to Reach Needy*, WALL ST. J., Oct. 16, 2006, at A1.

58. *Id.*

59. *Id.*

60. Sheldon Krimsky, *The Art of Medicine: The Short Life of a Race Drug*, 379 LANCET 114, 115 (2012).

61. *See, e.g.*, Andrew Pollack, *Finding Profits, at $28,000 a Vial*, N.Y. TIMES, Dec. 29, 2012, at BU1 (noting that Blue Cross Blue Shield initially refused to pay for an exorbitantly priced infantile spasm drug, but that "[a]fter a storm of publicity, the insurer backed down").

62. Jerry Avorn, *Sending Pharma Better Signals*, 309 SCIENCE 669, 669 (2005).

necessarily have either the inclination or expertise to discriminate in their efforts based on efficacy level.[63] In the international context, the absence of sensible discrimination against minimally effective drugs is exemplified by the vociferous demand for greater access to Plavix (clopidogrel) in Thailand. After public outcry, the government issued a compulsory license[64] notwithstanding substantial evidence that the efficacy of Plavix (clopidogrel) is no greater than that of aspirin,[65] while its risks may be greater.[66] Subsequent court proceedings in the United States echoed the lack of evidence of superior efficacy.[67]

Financial realities also help to explain the half-hearted efforts of insurance companies to rein in consumption of low-value drugs. Prescription drugs account for only around ten percent of total health care expenditures,[68] and therefore likely make up a relatively small percentage of insurance company payouts. Therefore, withholding payment for ineffective drugs that patients think they need is likely to offend many people and inflame anti-insurance-company sentiment, while saving relatively modest amounts of money. The urgency of reining in wasteful spending on substantially ineffective drugs dissipates when placed in the context of a $100,000 hospital stay (though this may be changing as some drug prices escalate well past the $100,000 per person per year threshold).[69] Insurance

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63. *See* Robert Pear & Robin Toner, *Medicare Plan Covering Drugs Backed by AARP*, N.Y. TIMES, Nov. 18, 2003, at A1; *What We Do*, AARP (Dec. 4, 2013, 10:21 PM), http://www.aarp.org/about-aarp/info-2011/what-we-do.html, *archived at* http://perma.cc/K4SY-7PRD (boasting of successful advocacy regarding improved drug coverage, but not mentioning drug efficacy).

64. *Facts and Evidences on the 10 Burning Issues Related to the Government Use of Patents on Three Patented Essential Drugs in Thailand*, THAI MINISTRY OF PUBLIC HEALTH 14–15 (Vichai Chokevivat ed., 2007), http://apps.who.int/medicinedocs/documents/s18718en/s18718en.pdf, *archived at* http://perma.cc/34PF-DQGS.

65. *See infra* notes 182-86 and accompanying text.

66. There is evidence that Plavix (clopidogrel) is less safe than aspirin combined with an anti-ulcer medication. *See* Francis K.L. Chan et al., *Clopidogrel Versus Aspirin and Esomeprazole to Prevent Recurrent Ulcer Bleeding*, 352 NEW ENG. J. MED. 238, 243 (2005) ("[A]spirin plus esomeprazole was superior to clopidogrel for the prevention of recurrent ulcer bleeding. Our observations do not support the current recommendation that clopidogrel be used for patients who have major gastrointestinal intolerance of aspirin.").

67. *See, e.g.*, Soloman v. Bristol-Myers Squibb Co., No. 07-1102, 2009 WL 5206120, at *3 (D.N.J. Dec. 30, 2009) ("[T]he actual findings of the CAPRIE Study were that Plavix was not proven to be significantly more effective than aspirin.").

68. *See Financial Burden of Prescription Drugs Is Dropping, but Costs Remain a Challenge for Many Families*, RAND CORP. (Feb. 8, 2012), http://www.rand.org/news/press/2012/02/08/index1.html, *archived at* http://perma.cc/534J-EW49 (estimating prescription drugs at 10% of total health care spending); *Health Care Costs: A Primer*, KAISER FAMILY FOUND. 1, 10 (2012), http://www.kff.org/insurance/upload/7670-03.pdf, *archived at* http://perma.cc/XCN8-U9QC.

69. *See* Pamela Jones Harbour, *The Competitive Implications of Generic Biologics*, FED. TRADE COMM'N 1, 4 (2007), http://www.ftc.gov/speeches/harbour/070614genbio.pdf, archived at http://perma.cc/AZ7P-CA6B ($100,000 per year for Avastin (bevacizumab)); Matthew Herper, *The World's Most Expensive Drugs*, FORBES.COM (Feb. 22, 2010), http://www.forbes.com/2010/02/

companies may therefore prefer to pick their battles, choosing to look the other way when it comes to a few worthless drugs in order to preserve their reputational capital for those non-drug areas where cost-cutting efforts are likely to have an even bigger impact on the bottom line, with less public push-back.

Kraakman suggests another financial dimension that can erode the effectiveness of insurance companies as gatekeepers: corruption.[70] Gatekeepers that can be bribed into complicity will obviously make less effective gatekeepers. This has occurred in the pharmaceutical industry where, according to *Money* magazine, "drug firms routinely offer insurers millions of dollars in discounts and cash rebates in exchange for favored places on 'formularies[].'"[71] Preferred formulary placement is a type of endorsement that can increase the volume of ineffective drugs sold. While price negotiation is a normal and expected part of a market economy, preferred formulary placement can be used to build customer loyalty and switching costs just before the patent on an older and equally effective medicine is about to expire.[72]

It is evident from this discussion that use of the term "bribery" is not intended to imply criminality in the legal sense, but to describe transfers of value that induce gatekeepers to be less fastidious in carrying out their gatekeeping duties, a meaning that is consistent with Kraakman's usage.[73] The seriousness of such soft corruption in the pharmaceutical context was acknowledged by Congress when it enacted the Patient Protection and Affordable Care Act of 2010, which included the Physician Payment Sunshine Act ("Sunshine Act").[74] The Sunshine Act requires disclosure of any "transfer of value" from drug manufacturers to physicians or teaching hospitals, although it does not prohibit such transfers.[75]

Industry pressure to endorse certain drugs can reach the highest levels. Richard Laing is a physician and former World Health Organization (WHO) medical officer that served as co-rapporteur[76] on the Expert Committee that develops the WHO's Model List of Essential Medicines, a formulary-like document that guides drug selection and use decisions around the world. Laing reports that in his earlier work in creating an essential medicines list for use in Zimbabwe, his team "involved the industry in the process of selecting the

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19/expensive-drugs-cost-business-healthcare-rare-diseases.html, *archived at* http://perma.cc/37CF-SCT4 ($400,000 per year for Soliris (eculizumab)).

70. Kraakman, *supra* note 1, at 69-71.

71. Peter Keating, *The Right Prescription?*, MONEY, Oct. 1999, at 71.

72. *See* Gardiner Harris, *Prilosec's Maker Is Switching Users to a Lookalike Pill While It Thwarts Generics*, WALL ST. J., June 6, 2002, at A1.

73. *See* Kraakman, *supra* note 1, at 71.

74. Patient Protection and Affordable Care Act, Pub. L. No. 111-148, § 6002, 124 Stat. 119, 689-96 (2010) (codified at 42 U.S.C. § 1320a-7h (2013).

75. 42 U.S.C. § 1320a-7h (2013).

76. *See 12th Expert Committee on the Selection and Use of Essential Medicines Meeting*, WORLD HEALTH ORG. (Apr. 15-19, 2002), http://archives.who.int/eml/expcom/expcom12/expertmembers.htm, *archived at* http://perma.cc/KZ8T-FZVC [hereinafter *12th Expert Committee*].

Essential Drug List."[77] Naturally industry representatives had commercial incentives for advocating selection of specific drugs, and they were successful in including many 'me-too' drugs."[78] Although the WHO Expert Committee itself has a stated policy of "taking steps to ensure scientific independence" in the drug selection process, representatives of the pharmaceutical industry were invited to provide input regarding that process,[79] and the policy continues to allow drug companies the opportunity to lobby for the inclusion of new drugs on the WHO list.[80] Members of the Expert Committee also report receiving various forms of financial support from companies such as GlaxoSmithKline, Novartis, and Pfizer.[81] In one case, only five of eleven experts reported no conflicts of interest.[82] The Committee itself has expressed some concern about the process, declaring that some applications for the inclusion of new drugs on the essential medicines list were submitted by manufacturers and may not have included all relevant data, or failed to contain critical statistical parameters such as confidence intervals.[83]

Even if insurers were inclined to work harder to prevent the consumption of ineffective drugs, they suffer from the same lack of information problems encountered by physicians and consumers. "It is surprisingly hard for a prescribing doctor—or even for the formulary committee of a large health care organization—to find reliable information that compares the benefits, risks, and costs of comparable drugs,"[84] notes Jerry Avorn, a Professor at Harvard Medical School.

C. Consumers as Their Own Gatekeepers

Kraakman hints that "either agents for victims . . . or victims themselves . . . might usefully be viewed as gatekeepers on occasion," but he does not develop the latter point.[85] In the same footnote, however, he does provide an example of

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77. Richard Laing, *Personal Reflections on 25 Years of the WHO Model List of Essential Medicines*, 23 ESSENTIAL DRUGS MONITOR [WORLD HEALTH ORG.] 1, 16 (2003), http://apps.who.int/medicinedocs/pdf/s4940e/s4940e.pdf, *archived at* http://perma.cc/NR95-F3KP.

78. *Id.*

79. *12th Expert Committee*, *supra* note 76, at 3-4.

80. *Id.* at 4; *see also The Selection and Use of Essential Medicines*, REPORT OF THE WHO EXPERT COMMITTEE, 2011, at 61, 63, http://whqlibdoc.who.int/trs/WHO_TRS_965_eng.pdf, *archived at* http://perma.cc/4W9R-EXNR (submission of Tibotec, an international pharmaceutical company, for the inclusion of etravirine; submission by Paladin Labs Barbados, a manufacturer, for the inclusion of miltefosine).

81. WORLD HEALTH ORG., THE SELECTION AND USE OF ESSENTIAL MEDICINES xi-xii (2011), *available a*t http://whqlibdoc.who.int/trs/WHO_TRS_965_eng.pdf, *archived at* http://perma.cc/SMW-9U73.

82. *Id.*

83. *Id*. at 10.

84. AVORN, *supra* note 18, at 275.

85. Kraakman, *supra* note 1, at 62 n.21.

how an agent for a victim could act as a gatekeeper, explaining that a sophisticated lender can protect borrowers from bad purchasing decisions by withholding credit. The implicit suggestion is that the borrowers' lack of sophistication prevents them from accurately valuing the wrongdoer's product, forcing them to rely on gatekeepers. This is a similar problem to that faced by patients in the context of substantially ineffective medicines, where doctors or insurance companies are in a position analogous to that of Kraakman's lenders, in that they are more sophisticated and may be in a position to assist consumers in valuing a given drug product.

Notwithstanding a relative lack of sophistication, it is not immediately obvious why patients cannot adequately serve as their own gatekeepers. Like all market participants, patients have a natural incentive to act in their own best interests, which in the present context means consuming medicines that possess the greatest efficacy (and do the least harm). Truth-in-labeling laws have been on the books for over 100 years, and now include required disclosures of clinical trial information. The Internet has dramatically increased patient access to drug information, providing relatively easy access to professional drug labels,[86] medical journal articles,[87] and critical reviews.[88] Patients intent on investigating have the ability to uncover substantial, if far from complete, information on drug efficacy, just as the author of this Article has done.

There are a plethora of reasons, however, why patients fail to screen out ineffective drugs. If efficacy information is challenging for physicians to understand, it is all the more so for laypersons. Information about efficacy is not only presented in tiny font that is buried deep within the lengthy package insert in a section labeled "clinical trials" rather than "efficacy," but is also generally described in impenetrable jargon that requires a simultaneous understanding of medicine, clinical trial practice, chemistry, statistics, and law. In the case of drugs that are consumed infrequently, patient demand for efficacy information may be inelastically low for the same reason that consumer demand is price inelastic for infrequent purchases: the transaction costs of obtaining information are high relative to the frequency of consumption. Pharmaceuticals and other health-related products are literally textbook examples of "credence goods"—products whose attributes are hidden, unknown, or difficult to discern, such as where information-acquisition costs cannot be justified.[89] Demand for efficacy information is also inelastically low both because the risk will generally be acceptably low due to FDA requirements for approval, and because financial

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86. *See Drugs@FDA*, FDA (Dec. 5, 2013, 10:33 PM), http://www.accessdata.fda.gov/scripts/cder/drugsatfda/, *archived at* http://perma.cc/ZLJ2-QG8E.

87. *See, e.g.*, *BMJ*, BRIT. MED. J. (Dec. 5, 2013, 10:34 PM), http://www.bmj.com/, *archived at* http://perma.cc/W7AX-T9F2 (providing freely available full-text articles).

88. *See, e.g.*, *Consumer Reports Health Best Buy Drugs*, CONSUMERREPORTS.ORG (Dec. 5, 2013, 10:35 PM), http://www.consumerreports.org/health/best-buy-drugs/index.htm, *archived at* http://perma.cc/6LHG-X8KZ.

89. GEOFFREY PAUL LANTOS, CONSUMER BEHAVIOR IN ACTION: REAL-LIFE APPLICATIONS FOR MARKETING MANAGERS 81-82 (2010).

cost may often be unnaturally low due to insurance, triggering a type of moral hazard. Patients might rationally conclude that they may as well consume a drug without bothering to investigate efficacy information, because there is little reason not to. These are among the many reasons that consumers have been characterized by the Ninth Circuit as "helpless because [they are] uninformed [about drugs]"[90] and assumed by the Supreme Court to be "unable to protect themselves in this field [of pharmaceuticals]."[91]

D. Consumer Organizations and Academics

If the absence of expertise and information is a problem, an obvious gatekeeping solution is to involve a third party that has sufficient expertise and that can translate and simplify the relevant information into a usable form. This is, more or less, the function performed by Kraakman's lawyers and accountants, who take complex information and convey its material aspects to others in the form of legal opinions and audit letters. Although practicing physicians and insurance companies may not adequately perform this function, as discussed above, they are not the only candidates for the role. In fact, the market has produced a number of third-party information brokers who can and do take complex pharmaceutical efficacy information and translate it into a form that can be more easily understood. These entities include Consumers Union, Public Citizen, and a host of academic authors, among others.[92]

Founded in 1936, Consumers Union is an independent, nonprofit organization[93] that is best known for its widely-respected *Consumer Reports* magazine. Its philosophy involves "empower[ing] consumers to protect themselves" by providing "a reliable source of information they [can] depend on to help them distinguish hype from fact and good products from bad ones,"[94] an orientation that makes Consumers Union an attractive potential gatekeeper in the pharmaceutical marketplace where hype and substantially ineffective products are

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90. Alberty Food Prods. Co. v. United States, 185 F.2d 321, 325 (9th Cir. 1950).

91. Kordel v. United States, 335 U.S. 345, 349 (1948).

92. In France, for example, an independent organization known as the *Association Mieux Prescrire* provides a monthly journal addressing drug efficacy and related issues. An international edition is also published regularly in English. *See Who We Are*, PRESCRIRE IN ENGLISH (Dec. 5, 2013, 10:54 PM), http://english.prescrire.org/en/82/169/0/0/About.aspx, *archived at* http://perma.cc/WRG5-4TDC. Other notable providers of high-quality efficacy information directed at medical professionals include *The Medical Letter* and *The Cochrane Collaboration*, non-profit organizations that each advocate for evidence-based decision making. *See About Us*, THE MED. LETTER ONLINE (Dec. 5, 2013, 10:54 PM), http://secure.medicalletter.org/about, *archived at* http://perma.cc/A4HJ-VVBQ; *About Us*, THE COCHRANE COLLABORATION (Dec. 5, 2013, 10:55 PM), http://www.cochrane.org/about-us *archived at* http://perma.cc/S53N-3WKU.

93. *About Us*, CONSUMERSUNION (Dec. 5, 2013, 10:57 PM), http://www.consumersunion.org/about/, *archived at* http://perma.cc/LL95-MHHQ.

94. *Id.*

commonplace. Since 2004,[95] Consumers Union has applied this philosophy in the pharmaceuticals marketplace by issuing a series of reports collectively entitled Consumer Reports Best Buy Drugs, which now covers more than 600 drugs that are used to treat more than fifty conditions.[96] For example, its report on insomnia notes that heavily advertised prescription treatments such as Lunesta (eszopiclone) and Ambien (zolpidem) are effective, but not necessarily any more effective than much older and less expensive drugs that are available over the counter, such as Nytol (diphenhydramine) or Benadryl (diphenhydramine).[97] They may also not be any more effective than much older prescription medicines called benzodiazepines, and may be *less* effective than non-drug treatments such as relaxation techniques.[98]

Other individuals or groups have similarly acted as information brokers, seeking to translate complex drug efficacy information into usable form. Public Citizen, the public interest organization founded by consumer activist Ralph Nader, has been assessing drug efficacy since 1971.[99] Its 1981 book, *Pills that Don't Work: A Consumer's and Doctor's Guide to over 600 Prescription Drugs the Lack Evidence of Effectiveness*,[100] describes the large number of prescription drugs that were still being prescribed years after an FDA-contracted report[101] had concluded that they lacked evidence of effectiveness.[102] More recently, it has petitioned the FDA to remove from the market certain drugs that lack effectiveness, such as Aricept (donepezil), which according to the petition was approved by the FDA division director over objections from both the FDA's statistical and medical reviewers.[103] A host of academic commentators have

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95. Press Release, *New Public Education Campaign Helps Consumers Save on Medicines*, CONSUMERSUNION (Dec. 9, 2004), http://www.consumersunion.org/news/new-public-education-campaign-helps-consumers-save-on-medicines/, *archived at* http://perma.cc/GBD3-ASLQ.

96. *Drugs A–Z*, CONSUMERSREPORTS.ORG (Dec. 5, 2013, 11:04 PM), http://www.consumerreports.org/health/drugs-a-z/best-buy-drugs/index-by-condition.htm, *archived at* http://perma.cc/Z33R-PXNX.

97. *Evaluating Newer Sleeping Pills Used to Treat: Insomnia*, CONSUMER REPORTS HEALTH BEST BUY DRUGS 1, 3 (2012), http://www.consumerreports.org/health/resources/pdf/best-buy-drugs/InsomniaUpdate-FINAL-July2008.pdf, *archived at* http://perma.cc/WLU5-7TGN.

98. *Id*. at 7, 9-10; *see generally* Donald W. Light, *Effectiveness and Efficiency Under Competition: The Cochrane Test*, 303 BRIT. MED. J. 1253, 1253 (1991) (questioning the value of drugs and other expensive treatments when compared to non-medical treatments such as participating in prayer, owning a pet, or bed rest).

99. *Drug Projects*, PUB. CITIZEN (Dec. 5, 2013, 11:23 PM), http://www.citizen.org/Page.aspx?pid=4374, *archived at* http://perma.cc/7D32-VXVW.

100. SIDNEY M. WOLFE ET AL., PILLS THAT DON'T WORK: A CONSUMER'S AND DOCTOR'S GUIDE TO OVER 600 PRESCRIPTION DRUGS THAT LACK EVIDENCE OF EFFECTIVENESS (1981).

101. *Drug Effectiveness Study: Final Report to the Commissioner of Food and Drugs, Food and Drug Administration, from the Division of Medical Sciences National Research Council* (1969).

102. WOLFE ET AL., *supra* note 100, at 4.

103. *Petition to Ban 23 Milligram Dose of Donepezil (Aricept)*, *supra* note 29, at 12.

similarly voiced their concerns with the absence of meaningful drug efficacy. Irving Kirsch, the Associate Director of the Program on Placebo Studies at Harvard Medical School,[104] exposed the surprisingly weak data supporting the efficacy of the depression medications in his book *The Emperor's New Drugs*.[105] Joanna Moncrieff, a medical doctor and faculty member at University College London,[106] wrote a similarly critical book entitled *The Myth of the Chemical Cure: A Critique of Psychiatric Drug Treatment*.[107] Dozens of others academic commentators as well as several investigative journalists have repeatedly explained the lack of robustness in the medicine cabinet, often critiquing some aspect of drug efficacy along the way.[108]

Despite the substantial volume of commentary and informational aids provided by consumer organizations and others, these third parties make poor

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104. *Harvard Catalysts Profiles: Irving Kirsch, Ph.D.*, HARV. CATALYST (Dec. 5, 2013, 11:30 PM), http://connects.catalyst.harvard.edu/profiles/profile/person/96221, *archived at* http://perma.cc/7YH5-3VND.

105. IRVING KIRSCH, THE EMPEROR'S NEW DRUGS: EXPLODING THE ANTIDEPRESSANT MYTH (2010).

106. *Dr. Joanna Moncrieff*, UNIV. COLL. LONDON (Dec. 5, 2013, 11:31 PM), https://iris.ucl.ac.uk/research/personal?upi=JMMON33, *archived at* http://perma.cc/VE3X-TNU9.

107. JOANNA MONCREIFF, THE MYTH OF THE CHEMICAL CURE: A CRITIQUE OF PSYCHIATRIC DRUG TREATMENT (2009).

108. *See, e.g.*, JOHN ABRAMSON, OVERDOSED AMERICA: THE BROKEN PROMISE OF AMERICAN MEDICINE (2008) (physician academic); MARCIA ANGELL, THE TRUTH ABOUT THE DRUG COMPANIES: HOW THEY DECEIVE US AND WHAT TO DO ABOUT IT (2004) (physician academic); AVORN, *supra* note 18 (physician academic); SHANNON BROWNLEE, OVERTREATED (2007) (journalist); JAY S. COHEN, OVERDOSE: THE CASE AGAINST THE DRUG COMPANIES (2001) (physician academic); BEN GOLDACRE, BAD PHARMA: HOW DRUG COMPANIES MISLEAD DOCTORS AND HARM PATIENTS (2012) (physician academic); KATHARINE GREIDER, THE BIG FIX: HOW THE PHARMACEUTICAL INDUSTRY RIPS OFF AMERICAN CONSUMERS (2003) (journalist); HEINZ KOHLER, CAUTION: SNAKE OIL! HOW STATISTICAL THINKING CAN HELP US EXPOSE MISINFORMATION ABOUT OUR HEALTH (2009) (academic statistician); RAY MOYNIHAN & ALAN CASSELS, SELLING SICKNESS: HOW THE WORLD'S BIGGEST PHARMACEUTICAL COMPANIES ARE TURNING US ALL INTO PATIENTS (2005) (journalist and policy researcher); MELODY PETERSEN, OUR DAILY MEDS (2008) (journalist); TIMOTHY SCOTT, AMERICA FOOLED: THE TRUTH ABOUT ANTIDEPRESSANTS, ANTIPSYCHOTICS AND HOW WE'VE BEEN DECEIVED (2006) (psychology professor); THE RISKS OF PRESCRIPTION DRUGS (Donald W. Light ed., 2010) (academic bioethicist); *see also* HAROLD AARON, GOOD HEALTH AND BAD MEDICINE (1940); STUART CHASE & F.J. SCHLINK, YOUR MONEY'S WORTH: A STUDY IN THE WASTE OF THE CONSUMER'S DOLLAR (1928) (chapters VII and VIII); JAMES COOK, REMEDIES AND RACKETS: THE TRUTH ABOUT PATENT MEDICINES TODAY (1958); PETER MORELL, POISONS, POTIONS & PROFITS (1937); MILTON SILVERMAN & PHILIP R. LEE, PILLS, PROFITS, AND POLITICS (1974); WOLFE ET AL., *supra* note 100; JAMES HARVEY YOUNG, THE TOADSTOOL MILLIONAIRES (1961); AMERICAN MEDICAL ASSOCIATION, NOSTRUMS AND QUACKERY (1911); BRITISH MEDICAL ASSOCIATION, SECRET REMEDIES: WHAT THEY COST AND WHAT THEY CONTAIN (1909); CONSUMER'S UNION, THE MEDICINE SHOW: SOME PLAIN TRUTHS ABOUT POPULAR REMEDIES FOR COMMON AILMENTS (1961) (six editions from 1961-1989).

gatekeepers because their messages are simply drowned out by the far more voluminous and accessible messages of the drug industry.[109] Moncreiff's book, for example, sold just over 4,500 copies during the three years following its publication.[110] Thus, unlike Kraakman's missing audit letter, which causes fraudulent securities transactions to collapse before they occur,[111] the lack of endorsement or even the well-articulated criticism of a drug product by a consumer organization or physician-academic does not have the same dramatic effect. While every television viewer is inundated with endless advertisements for the latest prescription drug, only a tiny minority of those will read a critical book. Similarly, when this author has described Consumer Reports' *Best Buy Drugs* series at academic presentations, audience members consistently report being unaware of the publications, with rare exception. Moreover, direct-to-consumer advertising is just the tip of the promotional iceberg. There is an extensive literature documenting the ability of pharmaceutical companies to proselytize to physicians,[112] influence legislators and the FDA,[113] and disseminate studies or information of questionable quality.[114]

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109. *See, e.g.*, Donald W. Light, *Bearing the Risks of Prescription Drugs*, *in* THE RISKS OF PRESCRIPTION DRUGS 9 (Donald W. Light ed., 2010) ("[P]hysicians . . . do not use independent sources like *The Medical Letter* . . . . Instead, they get their information from friendly, generous sales reps . . . .").

110. Email from Joanna Moncreiff to Jonathan J. Darrow, Dec. 6, 2012 (on file with author).

111. Kraakman, *supra* note 1, at 58.

112. *See, e.g.*, Murthy v. Abbott Labs., 847 F. Supp. 2d 958, 972 n.5 (S.D. Tex. 2012) (collecting studies regarding the influence of industry gifts on prescribing decisions); Susan Chimonas & Jerome P. Kassirer, *No More Free Drug Samples?*, 6 PLOS MED. 1000074 (2009); JEROME P. KASSIRER, ON THE TAKE: HOW MEDICINE'S COMPLICITY WITH BIG BUSINESS CAN ENDANGER YOUR HEALTH (2004); David Korn, *Conflicts of Interest in Biomedical Research*, 284 J. AM. MED. ASS'N 2234, 2235 (2000) (noting the "deep and extensive financial entanglements that may exist between medical school researchers (and often their parent institutions) and industry").

113. *See, e.g.*, M. Asif Ismail, *A Record Year for the Pharmaceutical Lobby in '07: Washington's Largest Lobby Racks Up Another Banner Year on Capitol Hill*, CENTER FOR PUB. INTEGRITY, June 24, 2008, http://www.publicintegrity.org/2008/06/24/5779/record-year-pharmaceutical-lobby-07, *archived at* http://perma.cc/4LD4-NAGN; Daniel P. Carpenter, *The Political Economy of FDA Drug Review: Processing, Politics, and Lessons for Policy*, 23 HEALTH AFF. 52, 53 (2004) ("FDA drug review is an exercise in learning shaped by organized interests."); Robert Pear, *Drug Companies Increase Spending to Lobby Congress and Governments*, N.Y. TIMES, May 31, 2003, at 33 (reporting $150 million in lobbying expenses by PhRMA alone).

114. *See, e.g.*, David H. Freedman, *Lies, Damned Lies, and Medical Science*, ATLANTIC, Nov. 2010, at 76; John P.A. Ioannidis, *Why Most Published Research Findings Are False*, 2 PLOS MED. 0020124 (2005); *see also* Michael Kelley et al., *Evidence Based Public Health: A Review of the Experience of the National Institute of Health and Clinical Excellence (NICE) of Developing Public Health Guidance in England*, 71 SOC. SCI. & MED. 1056, 1058 (2010) (noting that even the best "trials are always flawed in various ways").

E. Expert Bodies and the Drug Effectiveness Review Project

If the gatekeeping ability of doctors and patients is impaired by too little accessible data while the measured reports of consumer groups or academics are drowned out by too much promotional material, a possible solution is to engage a disinterested and adequately funded expert body that could delve into the data to determine which drugs are meaningfully effective and which are not. Like consumer organizations and academics, these entities could use their expertise to translate complex efficacy information into an understandable form. Unlike nonprofit consumer organizations, however, an expert body could be endowed by the government with the authority to influence policy.

The Agency for Healthcare Research and Quality (AHRQ)[115] is, like the FDA, one of the twelve agencies under the umbrella of the Department of Health and Human Services, and works with an annual budget of about $400 million.[116] Its mission is "to improve the quality, safety, efficiency, and effectiveness of health care for all Americans" by helping people to make more informed decisions.[117] Its mission is therefore quite broad and not limited to pharmaceutical efficacy. Nevertheless one of its principal activities involves the funding of eleven "evidence-based practice centers" that gather and examine existing evidence related to healthcare.[118] One of these, the Pacific Northwest Evidence-Based Practice Center, administers the Drug Effectiveness Review Project (DERP)[119] which, though not funded by AHRQ,[120] has produced and continues to update lengthy and detailed reports that synthesize available evidence of drug effectiveness.

The lengthy, professional-grade DERP reports are divided into a number of therapeutic categories such as allergy drugs, cardiovascular drugs, dermatologic

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115. Another initiative, the Patient-Centered Outcomes Research Institute (PCORI), was authorized by the Patient Protection and Affordable Care Act of 2010, but has a focus much broader than drug efficacy and so far has not devoted substantial resources to the efficacy of prescription drugs. *See Patient-Centered Outcomes Research Institute: National Priorities for Research and Research Agenda*, PCORI BOARD OF GOVERNORS, May 21, 2012, http://www.pcori.org/assets/PCORI-National-Priorities-and-Research-Agenda-2012-05-21-FINAL.pdf, *archived at* http://perma.cc/BVH6-CL9N (listing ten priority areas for comparative effectiveness research: prevention, acute care, care coordination, chronic disease care, palliative care, patient engagement, safety, overuse, information technology infrastructure, and impact of new technology).

116. *AHRQ at a Glance*, AGENCY FOR HEALTHCARE RESEARCH & QUALITY (Dec. 6, 2013, 7:55 AM), http://www.ahrq.gov/about/ataglance.htm, *archived at* http://perma.cc/8VF7-3FZ9.

117. *Id*.

118. *Pacific Northwest Evidence-Based Practice Center*, OR. HEALTH & SCI. UNIV. (Dec. 6, 2013, 7:57 AM), http://www.ohsu.edu/xd/research/centers-institutes/evidence-based-practice-center/, *archived at* http://perma.cc/ZJH4-3WZ9.

119. *See generally* Marian S. McDonagh et al., *Methods for the Drug Effectiveness Review Project*, 12 BMC MED. RES. METHODOLOGY 1 (2012).

120. E-mail from Kathryn Clark, Administrative Coordinator, Drug Effectiveness Review Project, to Jonathan J. Darrow (Jan. 2, 2013) (on file with author).

drugs, etc.,[121] and seem to have had some impact. Most visibly, the reports provide much of the information and analysis on which the Consumer Reports *Best Buy Drugs* series is based.[122] Less visible is the direct but difficult to quantify impact on policymakers. DERP is funded by eleven nonprofit state Medicaid agencies (as well as the Canadian Office of Health Technology Assessment),[123] and has gone through three rounds of such funding since its inception in 2003.[124] Organizers at DERP assert that the impact of the reports is reflected in the decisions of these Medicaid organizations to continue to provide funding to DERP, though not all have done so.[125]

Although DERP provides reports that are high quality, unbiased, comprehensive, up-to-date, and publicly available, the ability of DERP to act as a gatekeeper should not be overstated. If few people have heard of *Best Buy Drugs*, fewer still have engaged in careful study of any of the DERP reports, so direct impact on patients and physicians may be modest at best. Moreover, awareness of the DERP reports is not the only challenge; a presentation at the 2011 AHRQ annual conference listed "[i]nitial prescriber resistance [to change]" as an obstacle that frustrates evidence-based prescribing.[126] Indirect impact via Medicaid coverage decisions seems more likely, but specific changes in policy causally related to DERP's efforts are difficult to ascertain. Given that Medicaid prescription drug spending constitutes only around 6% of overall U.S. prescription drug spending,[127] the impact on medicine use may be modest.

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121. *Final Documents*, OR. HEALTH & SCI. UNIV. (Dec. 6, 2013, 8:03 AM), http://derp.ohsu.edu/about/final-document-display.cfm.

122. *Best Medicines for Less*, CONSUMER REPORTS 27, 28 (2008), http://www.consumerreports.org/health/resources/pdf/best-buy-drugs/CR-Jan-2008-Article-Best-Medicines.pdf, *archived at* http://perma.cc/9MH3-MFBQ.

123. Although the Pacific Northwest Center for Evidence-Based Policy is supported by the AHRQ, DERP does not appear to receive any direct funding from that agency.

124. *See About DERP*, OR. HEALTH & SCI. UNIV. (Dec. 6, 2013, 8:10 AM), http://www.ohsu.edu/xd/research/centers-institutes/evidence-based-policy-center/derp/about/index.cfm, *archived at* http://perma.cc/R25R-34M8 (founding 2003); McDonagh et al., *supra* note 119, at 3 fig.1 (listing the states that provide funding).

125. McDonagh et al., *supra* note 119, at 10 (suggesting that impact is "reflected by the ongoing financial support of the constituent organizations").

126. Siri Childs, *Washington's Prescription Drug Program: Using Systematic Reviews to Make Policy Decisions in the Effort to Contain Prescription Drug Expenditures*, AHRQ 2011 ANN. CONF., Sept. 20, 2011, at slide 7, http://www.ahrq.gov/legacy/about/annualconf11/bar-cohen_childs_qaseem/childs.htm, *archived at* http://perma.cc/KSF4-2V9A.

127. *See* Katrice Bridges Copeland, *Enforcing Integrity*, 87 IND. L.J. 1033, 1072 n.264 (2012) (noting that prescription drugs spending by Medicaid exceeded $20 billion in 2010); *Top U.S. Pharmaceutical Products by Spending*, IMS HEALTH 1, 1 (2013), http://tinyurl.com/ca7lmfm, *archived at* http://perma.cc/4NGY-FYGT (reporting total prescription drug spending in the U.S. in 2010 as $308.6 billion).

F. Expert Bodies and the UK Model: NICE

The United States is of course not alone when it comes to the need for the rational use of medicines. One of the AHRQ's foreign analogues, the United Kingdom's National Institute for Health and Care Excellence (NICE), is notable for the widespread attention it has received. Founded in 1999, NICE is an independent, government-funded expert body that evaluates new drugs and other treatments for evidence of effectiveness.[128] The expertise of its 270 staff members[129] is supplemented by four external collaborating centers[130] as well as the input of patient groups, healthcare organizations, pharmaceutical companies, clinicians, and other stakeholders.[131] Databases such as MEDLINE, CINAHL, and Cochrane are consulted for evidence. Once draft guidelines are developed, they are made available for external review by stakeholders, providing transparency and peer review, before final guidelines are issued.[132]

One might expect that NICE's focused expertise, broad input, transparency, government endorsement, and relative neutrality should earn its guidelines far more respect than what is accorded the advertisements and other promotional efforts of drug makers, whose interests in a market-based economy are obvious. In the view of much of the public, however, this is not the case. Instead of revering expert bodies for their help in screening out substantially ineffective drugs, NICE has been condemned as an arbiter of death,[133] a state of affairs that no doubt elicits exuberant jollity from drug manufacturers whose products do not even meet the very generous and flexible standard applied by NICE.[134] In effect, NICE and other similar organizations face a public relations conundrum not unlike that of insurance companies: if they decline to endorse a drug because it fails to meet even minimally relevant efficacy thresholds, they are reviled by the public.[135] Likely aware of this concern, the United Kingdom tipped the balance in favor of coverage by requiring the UK National Health Service (NHS) to pay

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128. *See* Robert Steinbrook, *Saying No Isn't NICE: The Travails of Britain's National Institute for Health and Clinical Excellence*, 359 NEW ENG. J. MED. 1977, 1977 (2008).

129. *Id.* at 1979.

130. Jennifer Hill et al., *A Summary of the Methods that the National Clinical Guideline Centre Uses to Produce Clinical Guidelines for the National Institute for Health and Clinical Excellence*, 154 ANNALS OF INTERNAL MED. 752, 752 (2011).

131. *Id.* at 753.

132. *Id.* at 756.

133. *See, e.g.*, Peter Singer, *Why We Must Ration Health Care*, N.Y. TIMES, July 19, 2009, at MM38 (noting criticism that "NICE regularly hands down death sentences to gravely ill patients" (internal quotes omitted)).

134. Michael D. Rawlins & Anthony J. Culyer, *National Institute for Clinical Excellence and Its Value Judgments*, 329 BRIT. MED. J. 224, 224 (2004) (noting that there is no "absolute threshold" of cost effectiveness beyond which a drug will be automatically rejected).

135. *See* Steinbrook, *supra* note 128, at 1977; Ed Silverman, *UK's NICE Loses Decision-Making Powers*, PHARMALOT, Nov. 2, 2010, http://www.pharmalot.com/2010/11/uks-nice-loses-decision-making-powers/, *archived at* http://perma.cc/GS49-5NKU.

for medicines that are endorsed by NICE, while allowing (but not requiring) the NHS to pay for medicines that do not receive NICE endorsement.[136] Even this was not enough. In 2010, reports circulated that the government would bow to public pressure and further reduce NICE's power.[137]

The public's condemnation of the negative evaluations by NICE is understandable, but misguided. It is arguably true, as the criticism often asserts, that placing a value on even a few weeks or months of extra life is not the place of government.[138] However, among the 21% of interventions that are not recommended by NICE[139] are drugs that have such little benefit that it would be unsurprising if further, more thorough and unbiased study showed them to be completely ineffective. The decision by NICE to not recommend certain Alzheimer's drugs in mild cases of the disease, for example, was harshly criticized[140] and vigorously opposed by industry,[141] notwithstanding reputable evidence that efficacy was "below minimally relevant thresholds."[142] Similarly, the decision by NICE to refrain from recommending Avastin (bevacizumab) in 2010 was characterized as a betrayal because the drug "can prolong the lives of breast . . . cancer patients,"[143] but in 2011 the FDA recommended removal of Avastin's (bevacizumab's) breast cancer indication because, according to the

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136. Andrew Dillon, Executive Director of NICE, *Presentation at the Massachusetts Institute of Technology*, Nov. 5, 2009; *see also* Corinna Sorenson et al., *National Institute for Health and Clinical Excellence (NICE): How Does It Work and What Are the Implications for the U.S.?*, NAT'L PHARM. COUNCIL 1, 9 (2008); *How Nice Is Nice: A Conversation with Tony Culyer*, HASTINGS CENTER, http://healthcarecostmonitor.thehastingscenter.org/admin/how-nice-is-nice-a-conversation-with-anthony-culyer/, *archived at* http://perma.cc/NMX4-ATYN (last visited July 10, 2014) ("NICE cannot ban anything. It issues guidance . . . ."); E-mail from Andrew Dillon to Jonathan J. Darrow (Dec. 9, 2012) (on file with author).

137. Sarah Boseley, *NICE to Lose Powers to Decide on New Drugs*, GUARDIAN [UK], Oct. 29, 2010, http://www.guardian.co.uk/politics/2010/oct/29/nice-to-lose-new-drug-power, *archived at* http://perma.cc/V2DR-UBG3.

138. *See, e.g.*, David Catron, *Obamacare Could Kill You*, AM. SPECTATOR, Jan. 15, 2009, http://spectator.org/archives/2009/01/15/obamacare-could-kill-you, *archived at* http://perma.cc/KML2-WGAZ.

139. *Technology Appraisal Recommendation Summary*, NAT'L INST. FOR HEALTH & CARE EXCELLENCE, www.nice.org.uk/newsroom/nicestatistics/TADecisionsRecommendationSummary.jsp (last visited July 10, 2014).

140. *NICE Accused of Ageism*, DOCTOR, Mar. 22, 2005, at 5.

141. *Independent Nurse: NICE Will Not Change Alzheimer's Advice*, GEN. PRACTITIONER, June 26, 2009, at 11.

142. Sarah Houlton, *Aricept Takes a Blow*, PHARM. EXEC., Aug. 2004, at 20 (quoting the Lancet study; internal quotes omitted).

143. Daniel Martin, *Betrayal of 20,000 Cancer Patients: Rationing Body Rejects Ten Drugs (Allowed in Europe) that Could Have Extended Lives*, DAILYMAIL, Mar. 15, 2010, http://www.dailymail.co.uk/health/article-1257944/NICE-rejects-cancer-drugs-extended-patients-lives.html, *archived at* http://perma.cc/WEW4-VGXY.

FDA, "the drug has not been shown to be safe and effective for that use,"[144] thus vindicating the NICE decision.

Oddly, public skepticism of expert, transparent bodies that methodically evaluate evidence and welcome input from a broad array of stakeholders is greater than its skepticism of self-interested pharmaceutical companies. Whether this reflects the triumph of irrational optimism over considered thought, a general distrust of government interference, or the power of advertising and promotion, the result is that expert bodies such as NICE make only somewhat effective gatekeepers. Because victims view these bodies as barriers to a chance at health, however small, rather than guardians against fraud and substantially ineffective medicines, such bodies can be of only limited effectiveness as gatekeepers.

II. THE GATEKEEPER ACHILLES HEEL: DRUG EFFICACY HEURISTICS

The absence of efficacy information combined with the difficulties faced in evaluating efficacy through use can lead to the use of heuristics when evaluating efficacy.[145] Although patients may be most susceptible to these heuristics, even experts such as physicians and members of insurance company formulary committees are not immune from their influence. Underlying them are a number of cognitive biases,[146] and so alluring can they be that the term "halo" will be used in order to convey the almost mystical aura of value that they engender. The halos described below are the Achilles heel of the gatekeepers' mission, distracting patients from acting as their own gatekeepers and causing push-back by patients and others when more rational or better informed gatekeepers try to perform their gatekeeping role.

A. The Patent Halo

Most new drugs are patented and thereby able to benefit from a "patent halo," the perception or assumption that patented items are of higher value than unpatented ones simply because they are patented.[147] According to one

144. FDA News Release, *FDA Begins Process to Remove Breast Cancer Indication from Avastin Label: Drug Not Shown to Be Safe and Effective in Breast Cancer Patients*, FDA (Dec. 16, 2010), http://www.fda.gov/newsevents/newsroom/pressannouncements/ucm237172.htm, *archived at* http://perma.cc/9FUG-XCDY.

145. *Cf.* Christine Jolls et al., *A Behavioral Approach to Law and Economics*, 50 STAN. L. REV. 1471, 1477 (1998) ("To deal with limited brain power and time, we use mental shortcuts and rules of thumb.").

146. Although in a similar vein to the heuristics and biases characterized by psychologists, most of the halos do not align especially well with them. *See generally* HEURISTICS AND BIASES: THE PSYCHOLOGY OF INTUITIVE JUDGMENT (Thomas Gilovich et al. eds., 2002); RICHARD H. THALER & CASS R. SUNSTEIN, NUDGE: IMPROVING DECISIONS ABOUT HEALTH, WEALTH, AND HAPPINESS 17-39 (2008) (discussing biases related to anchoring, availability, representativeness, optimism, losses versus gains, the status quo, and framing); Amos Tversky & Daniel Kahneman, *Judgment Under Uncertainty: Heuristics and Biases*, 185 SCIENCE 1124 (1974).

147. Evidence of this can be found in the acknowledged jury bias in favor of patentees. *See*

commentator, a patent "appears to consumers and investors as clear proof of superiority, the government's version of a Good Housekeeping Seal of Approval."[148] Donald Chisum, the author of the leading patent treatise, noted how this dynamic has been regarded as particularly important in the pharmaceutical industry:

> Early decisions established a higher standard of proof of the utility of inventions claimed to have value in the treatment of human disease. These decisions reasoned that issuance of a patent gave the drug or other medical invention an 'appearance of authenticity,' an 'oblique imprimatur of the Government' that might be used to mislead and deceive the consuming public.[149]

The Supreme Court has also long acknowledged the assumption of respect accorded to patented products,[150] and numerous commentators have noted the public's admiration and respect for patents in general,[151] no doubt spurred along by the romantic image of the brilliant independent inventor creating breakthrough products in his garage.[152] Pharmaceutical companies have sometimes quite

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John R. Allison & Mark A. Lemley, *Empirical Evidence on the Validity of Litigated Patents*, 26 AIPLA Q.J. 185, 251 (1998) (conducting an eight year empirical study of patent validity determinations and concluding that "juries are extremely favorable to patentees"); Kimberly A. Moore, *Judges, Juries, and Patent Cases—An Empirical Peek Inside the Black Box*, 99 MICH. L. REV. 365, 408 (2000) ("Juries find for the patent holder more often on validity, infringement, and willfulness issues . . . ."); *see also* Thompson v. Haight, 23 F. Cas. 1040, 1041 (S.D.N.Y. 1826) ("The most frivolous and useless alterations in articles in common use are denominated improvements, and made pretexts for increasing their prices, while all complaint and remonstrance are effectually resisted by an exhibition of the great seal."); Anthony Baldo, *Juries Love the Patent Holder*, FORBES, June 17, 1985, at 147 (quoting Pennie & Edmonds attorney John Kidd: "Juries believe in the patent system more than judges do.").

148. Andrew B. Dzeguze, *The Devil in the Details: A Critique of* KSR*'s Unwarranted Reinterpretation of "Person Having Ordinary Skill,"* 10 COLUM. SCI. & TECH. L. REV. 1, 6 (2009).

149. DONALD S. CHISUM, CHISUM ON PATENTS § 4.04[2] (2009); *see also* Isenstead v. Watson, 157 F. Supp. 7, 9 (D.D.C. 1957) ("While the granting of a patent does not legally constitute a certificate that the medicine to which it relates is a good medicine and will cure the disease or successfully make the test which it was intended to do, nevertheless, the granting of such a patent gives a kind of official imprimatur to the medicine in question on which as a moral matter some members of the public are likely to rely.").

150. Reckendorfer v. Faber, 92 U.S. 347, 351 (1875) (referring to the "prima facie respect arising from . . . government approval [i.e., arising from the patent]"); *see also* C.O. Marshall, *Comparative Utility as a Requisite to Patentability*, 550 J. PAT. OFF. SOC'Y 550, 553 (1919) (The prestige of the patent "has a distinct and immense money value to the public . . . .") (internal quotation omitted).

151. *See* sources cited *supra* note 147.

152. *See generally* Jessica Silbey, *The Mythical Beginnings of Intellectual Property*, 15 GEO. MASON L. REV. 319 (2008).

sensibly leveraged the patent halo as part of their efforts to increase sales.[153] As explained *infra*, there is no basis in patent doctrine to justify such a patent halo, since patents may be obtained on inventions that have lower value than existing products.[154]

The practice of implying that a government mark should be recognized as a symbol of drug efficacy is neither recent, nor limited to patents. More than 100 years ago, the British Medical Association noted that pharmaceutical advertisers "took to inserting in their advertisements phrases intended to suggest that the Inland Revenue stamp upon their packages implied some sort of Government guarantee of the efficacy of the remedy."[155] The stamp was in fact merely connected to the collection of taxes, but the government nevertheless eventually felt compelled to correct the public's misimpression, altering the stamp such that it bore the cautionary disclaimer: "This stamp implies no Government guarantee."[156]

B. The FDA Approval Halo

Patients falsely assume that if the FDA approved a drug, it must be very effective. A recent study by researchers at Dartmouth Medical School surveyed 2944 adults to assess their understanding of the meaning of FDA approval.[157] The researchers found nearly four in ten people believed, mistakenly, that the FDA only approves drugs that are "extremely effective."[158] One in four respondents erroneously believed that the FDA would not approve drugs with serious side effects, and the same proportion that only "extremely effective" drugs could be advertised.[159] As the researchers pointed out, none of these statements is true.[160] Others have pointed out the common misimpression that FDA approval of a new

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153. Explicit promotion of patent status is more often seen in non-prescription medications, such as sunscreen. *See, e.g.*, *Transformational Ideas*, JOHNSON & JOHNSON (Dec. 6, 2013, 9:47 AM), http://www.jnj.com/connect/about-jnj/company-history/healthcare-innovations?pageNo=2, *archived at* http://perma.cc/EV7Q-XLLH (boasting that "NEUTROGENA® and AVEENO® brands now use a patented advanced sun protection system"). However, in light of frequent news coverage of drug "patent cliffs" and the like, the public can reasonably infer that advertised medicines are probably patented. *See, e.g.*, Jessica Hogdson, *Big Pharma Tries to Look Past "Patent Cliff,"* WALL ST. J., Oct. 24, 2012, http://online.wsj.com/article/SB10001424052970203897404578076173187345806.html.

154. *See infra* Part III.A.

155. BRITISH MEDICAL ASSOCIATION, SECRET REMEDIES: WHAT THEY COST AND WHAT THEY CONTAIN 184 (1909), *available at* https://archive.org/stream/secretremedieswh00brit/secretremedieswh00brit_djvu.txt, *archived at* http://perma.cc/65WA-N2QY.

156. *Id.*

157. Lisa M. Schwartz & Steven Woloshin, *Communicating Uncertainties about Prescription Drugs to the Public: A National Randomized Trial*, 171 ARCH. INTERNAL MED. 1463 (2011).

158. *Id.* at 1465.

159. *Id*.

160. *Id.* ("Fifty-six percent held at least 1 of the foregoing misconceptions.").

drug in a given therapeutic category means that the drug must be better than pre-existing drugs.[161] Again, this is a popular view that is nevertheless without firm moorings to any statute. The overall message of these findings and observations is that FDA approval confers a halo of efficacy that is not warranted.

The fact that FDA approval suggests efficacy levels that are not warranted has not stopped businesses from using, or trying to use, the "imprimatur"[162] of FDA approval to their advantage. Internet pharmacies prominently boast that their products are "FDA-approved,"[163] while direct-to-consumer television advertisements for individual drugs often include the phrase "FDA approved" in a way that suggests a certification of value.[164] The biotechnology industry has welcomed the possibility of formal review by the FDA because the "FDA Seal of Approval" would be beneficial for marketing purposes.[165] The FDA "seal of legitimation" has been used for decades, thus conditioning generations of consumers to misunderstand the meaning of FDA approval in a way that favors sales.[166]

The significance of the FDA approval halo to the pharmaceutical industry is confirmed by the particularly interesting and unusual case of *Mutual Pharmaceutical Co. v. IVAX Pharmaceuticals*, in which Mutual claimed that IVAX was implicitly promoting its anti-malaria products as FDA-approved when in fact they were not.[167] The drug in question, quinine sulfate, was never FDA approved because it has been used for hundreds of years to treat malaria and was therefore "grandfathered" under the 1938 Federal Food, Drug and Cosmetic Act.[168] In 1998, the FDA restricted quinine products to prescription-only status on the basis of safety concerns, triggering the requirement that any further sale would require a New Drug Application (NDA).[169] Mutual filed an NDA and obtained FDA approval in 2005,[170] but IVAX and others did not, instead continuing to sell their quinine sulfate through channels that implied FDA approval.[171] The court found that IVAX's representations were likely false or

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161. *See, e.g.*, PAMELA ARMSTRONG, SURVIVING HEALTHCARE 270 (2004).

162. Mutual Pharm. Co. v. Ivax Pharms., Inc., 459 F. Supp. 2d 925, 941 (C.D. Cal. 2006).

163. *Id.* at 942.

164. *See, e.g.*, CommercialsUSA, *Lipitor Medication 2010 Commercial*, YOUTUBE (Jan. 4, 2011), http://www.youtube.com/watch?v=ogyC9rEjxDM; theBESTforYourNeeds, *Lyrica TV Commercial, 'Terry*,' YOUTUBE (Jul. 26, 2013), http://www.youtube.com/watch?v=UO6H9i8T--k.

165. HENRY I. MILLER & GREGORY P. CONKO, THE FRANKENFOOD MYTH 122 (2004).

166. *See* DANIEL CARPENTER, REPUTATION AND POWER: ORGANIZATIONAL IMAGE AND PHARMACEUTICAL REGULATION AT THE FDA 177 (2010).

167. Mutual Pharm. Co. v. Ivax Pharms., Inc., 459 F. Supp. 2d 925, 931 (C.D. Cal. 2006).

168. *See* Clark G. Sullivan, *Grandfathered Drugs: What's Behind the Huge Price Increases?*, ARNALL GOLDEN GREGORY LLP (June 1, 2011), http://www.lexology.com/library/detail.aspx?g=804cf4f9-83f6-431e-b4f2-6775d3909b8d, *archived at* http://perma.cc/GRS7-FR64.

169. 21 C.F.R. § 310.547 (1998).

170. *Mutual Pharm. Co.*, 459 F. Supp. 2d at 929.

171. *Id.* at 940.

misleading, and issued a preliminary injunction.[172]

However, this is not to suggest that FDA approval means nothing. As United States Senator Dodd recently stated, "[t]hroughout the world, the FDA seal of approval—the words 'FDA Approved'—has stood as the gold standard for safety and quality."[173] The FDA does act to ensure that manufacturing practices are up to par and that purity standards are met, for example. But these aspects of quality appear to be unjustifiably extended in the minds of a substantial proportion of consumers to assumptions about efficacy (and safety) that are not warranted. FDA oversight is therefore a double-edged sword. On the one hand, the FDA works to protect the public by assuring minimum levels of safety and quality. In this respect, the creation of the FDA has made the public safer and less likely to be duped than it was prior to the Pure Food and Drug Act of 1906. At the same time, however, FDA approval is often misunderstood to certify efficacy levels that are simply not part of its statutory mandate. This gives the patients a false sense of security that counter-intuitively increases the public's vulnerability. Whether the negative impacts of substituting "FDA approved" for *caveat emptor* exceed the benefits of FDA oversight is a subject ripe for future research.

C. The Novelty Halo

There is an acknowledged bias in favor of new products and against old ones,[174] what has sometimes been referred to as "the cult of the new."[175] "Just a simple count of the number of times you have heard the phrase 'new and improved' should indicate the size of the consumer appetite for new and supposedly better products[,]" offers a sales management textbook.[176] Use of the novelty halo to sell medical treatments goes back at least as far as Pliny (23-79 A.D.), who chronicles the successful tactics of physicians who achieved fame by "reversing the treatment" of their predecessors and "swe[eping] away all received doctrines."[177] As if he lived today, when every new drug is a breakthrough

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172. *Id.* at 946.

173. 151 CONG. REC. 7952 (Apr. 27, 2005) (statement of Sen. Dodd).

174. C.S. Lewis characterized this bias as "chronological snobbery." C.S. LEWIS, THE CASE FOR CHRIST 38 (1973); *see also* AVORN, *supra* note 18, at 273 ("In fact many new drugs are *not* better than already available alternatives.").

175. Trent Hamm, *The Cult of the New*, CHRISTIAN SCI. MONITOR (Mar. 9, 2010), http://www.csmonitor.com/Business/The-Simple-Dollar/2010/0309/The-Cult-of-the-New, *archived at* http://perma.cc/8J2K-FQSX.

176. ROBERT D HISRICH & RALPH W. JACKSON , SELLING AND SALES MANAGEMENT 7 (1993); *see also* T.C. Doyle, *The Lure of New and Improved*, CRN (July 13, 2005, 5:00 PM), http://www.crn.com/blogs-op-ed/the-daily-doyle/164903978/the-lure-of-the-new-and-improved.htm, *archived at* http://perma.cc/4XJD-QR7P ("Since the days of the Gillette Safety Razor, Americans have been tempted by two words that have proved nearly impossible to resist: 'new' and 'improved.'"). *See generally* RICHARD S. TEDLOW, NEW AND IMPROVED: THE STORY OF MASS MARKETING IN AMERICA (1996).

177. PLINY THE ELDER, *supra* note 20, at 187.

welcomed by an uncritical populace, Pliny wrote: "Medicine changes every day, being furbished up again and again, and we are swept along on the puffs of the clever brains of Greece."[178] A distant echo of Pliny, the *Consumer Reports* publication cited earlier confirms that the novelty bias continues its effect today, sweeping within its influence both laypersons and those in the medical profession itself: "Many people (including many physicians) also believe that newer drugs are always or almost always better . . . ."[179]

D. The Expert Halo

Patients assume that if a drug is prescribed by a physician, who is presumed to be knowledgeable about drug efficacy, the drug chosen by this expert must be the most effective drug available. In some cases, the expert halo is combined with the novelty halo. As one commentator mistakenly asserts, "the marketplace virtually demands that a new drug must be more effective than already established competitors if physicians are to prescribe it."[180] A review of top-selling drugs suggests otherwise. For example, the twelfth best-selling drug of 2012 was Plavix (clopidogrel),[181] a blood thinner, more than $5 billion of which was prescribed by doctors in that year alone.[182] Doctors prescribed this massive volume of Plavix (clopidogrel) even though the FDA repeatedly warned as early as 1998 of the lack of Plavix's (clopidogrel's) superior efficacy over time-tested aspirin, noting that Sanofi's "claims that suggest Plavix has been 'proven' to be more effective than aspirin are misleading because they are not based on substantial evidence."[183] The FDA again warned against Sanofi's misleading and unsubstantiated overstatements of efficacy in 2001,[184] and a study published in

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178. *Id.* at 189.

179. *Evaluating Statin Drugs to Treat*, *supra* note 40, at 16.

180. JAY S. COHEN, MAKE YOUR MEDICINE SAFE: HOW TO PREVENT SIDE EFFECTS FROM THE DRUGS YOU TAKE 479 (1998).

181. John D. Carroll, *The 15 Best-Selling Drugs of 2012*, FIERCE PHARMA (Oct. 9, 2012), http://www.fiercepharma.com/special-reports/15-best-selling-drugs-2012, *archived at* http://perma.cc/EZ8K-M29B.

182. *Plavix*, FIERCE PHARMA (Oct. 9, 2012), http://www.fiercepharma.com/special-reports/Plavix, *archived at* http://perma.cc/KW3-BXCG.

183. Letter from Janet Norden, Regulatory Review Officer, Div. of Drug Mktg., Adver. and Commc'ns, to Gregory M. Torre, Senior Director, Drug Regulatory Affairs, Sanofi Pharms. (Dec. 18, 1998) (on file with the FDA), http://www.fda.gov/downloads/Drugs/GuidanceComplianceRegulatoryInformation/EnforcementActivitiesbyFDA/WarningLettersandNoticeofViolationLetterstoPharmaceuticalCompanies/UCM166391.pdf, *archived at* http://perma.cc/E99M-37MC.

184. Letter from Andrew S.T. Haffer, Regulatory Review Officer, Div. of Drug Mktg., Adver., and Commc'ns, to Kenneth Palmer, Associate Director, Drug Regulatory Affairs, Sanofi-Synthelabo Inc. (May 9, 2001) (on file with the FDA), http://www.fda.gov/downloads/Drugs/GuidanceComplianceRegulatoryInformation/EnforcementActivitiesbyFDA/WarningLettersandNoticeofViolationLetterstoPharmaceuticalCompanies/UCM166467.pdf, *archived at* http://perma.cc/LH23-D2VS.

the Lancet in 2006 concluded that "the combination of clopidogrel plus aspirin was not significantly more effective than aspirin alone in reducing the rate of myocardial infarction, stroke, or death from cardiovascular causes."[185] Today, Plavix's (clopidogrel's) own labeling continues to acknowledge a "Lack of Established Benefit of Plavix plus Aspirin in Patients with Multiple Risk Factors or Established Vascular Disease."[186] The statement is made in the context of a study of 15,603 patients, presumably large enough to detect a meaningful efficacy difference if one exists. Moreover, the aforementioned lack of established benefit is in relation not to aspirin, but to placebo.

E. The Prescription Halo

Patients and others may assume that prescription products are more powerful than over-the-counter (OTC) products because the dispensing of prescription drugs is regulated by the government. Once again, the assumption of greater efficacy is not necessarily true. Most new OTC drugs today were initially sold as prescription products. Frequently cited examples include pain medicines like Advil (ibuprofen) and Tylenol (acetaminophen) and heartburn medicine Zantac (ranitidine),[187] but one could also add allergy medicines Zyrtec (cetirizine) and Claritin (loratadine), morning-after pill Plan B (levonorgestrel), heartburn medicine Prilosec (omeprazole), and antifungal Monistat (miconazole),[188] among many others. More generally, a drug's prescription status often has more to do with the amount of time since its entry on the market or with its safety profile than with efficacy. Nevertheless, consumers may misinterpret frequent advertising statements that drugs are "available by prescription"[189] to mean that the drug is very potent, when by law prescription status means only that "because of its toxicity or other potentiality for harmful effect . . . [a drug] is not safe for use except under the supervision of a practitioner licensed by law."[190]

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185. Deepak L. Bhatt et al., *Clopidogrel and Aspirin Versus Aspirin Alone for the Prevention of Atherothrombotic Events*, 354 NEW ENG. J. MED. 1706, 1714 (2006).

186. *Drug Label for Plavix (clopidogrel bisulfate), § 14.3 Lack of Established Benefit of Plavix plus Asprin in Patients with Multiple Risk Factors or Established Vascular Disease*, Full Prescribing Information, Plavix (Dec. 2011) (revised Sept. 2013), § 14.3, http://packageinserts.bms.com/pi/pi_plavix.pdf, *archived at* http://perma.cc/TJ75-YAXG.

187. F.M. Scherer, *The Pharmaceutical Industry*, in HANDBOOK OF HEALTH ECONOMICS 1300 (2000).

188. *Prescription to Over-the-Counter (OTC) Switch List*, FDA, http://www.fda.gov/AboutFDA/CentersOffices/OfficeofMedicalProductsandTobacco/CDER/ucm106378.htm, *archived at* http://perma.cc/9S54-ZZGU (last visited July 10, 2014).

189. *See, e.g.*, *Humira Ad, May 13, 2012*, http://www.youtube.com/watch?v=hlI7iSulmGc (last visited Feb. 4, 2013) ("By prescription only."); *LUNESTA® (eszopiclone) Sleeping Pill Commercial ad - USA (real one)*, http://www.youtube.com/watch?v=vu0rXFhsM8w (last visited July 10, 2014) ("Available by prescription only.").

190. 21 U.S.C. § 353(b)(1)(A) (2013).

F. The Premium Price Halo

It was noted above that credence goods, including many pharmaceuticals, are those goods whose utility is difficult for consumers to ascertain even after consumption.[191] Another economic concept relevant to the consideration of drug products is embodied by the concept of Veblen goods, which are those goods for which desirability counter-intuitively *increases* as price increases, based on the signaling value of price. Veblen goods can, perhaps, be distinguished in that the high price of a Veblen good is generally associated with high social status, luxury, or exclusivity, whereas high drug prices are more likely to be perceived as implying effectiveness or quality.[192] The signaling value of the high price, however, is shared in common.

Economists have long acknowledged the practice of relying on price as a proxy for value.[193] In a seminal 1945 article, Stanford economist Tibor Scitovszky explained that the perceived relationship between price and value might not be irrational, because if buyers do not find prices justified, sellers would eventually have to lower them.[194] Scitovszky cautioned, however, that the relationship may break down where goods are complex or where new products are frequently introduced to replace old ones,[195] the precise scenario faced with drugs where chemical formulae and clinical trial data are incomprehensible to the ordinary consumer and where dozens of new drugs are introduced each year.

Marketers evidently believe that a premium price can increase sales even with simple products whose characteristics can be directly and immediately perceived. Michelob, for example, once sold its beer using the slogan, "Michelob, America's highest-priced beer!"[196] More generally, retailers across the spectrum of product categories can readily be observed to use a two-price system: the "regular" price, to signal value, and the "sale" price,[197] both sometimes prominently marked upon

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191. Michael R. Darby & Edi Karni, *Free Competition and the Optimal Amount of Fraud*, 16 J. L. & ECON. 67-88 (1973); FRANCISCO CABRILLO & SEAN FITZPATRICK, THE ECONOMICS OF COURTS AND LITIGATION 159 (2008).

192. *See* Giovanni Mastrobuoni et al., *Price as a Signal of Product Quality: Some Experimental Evidence* 1 (Working Paper Feb. 2013), http://www.tetenov.com/wine_tastings.pdf, *archived at* http://perma.cc/ZU8S-ZP3P (distinguishing the signaling effect of price from its "status" effect). Mastrobuoni et al. also report that young/inexperienced consumers may be more greatly influenced by the price signal. *Id.* at 4; *see also* Akshay R. Rao & Kent B. Monroe, *Causes and Consequences of Price Premiums*, 69 J. BUS. 511, 511 (1996) (noting that "poorly informed consumers may rely on a 'You get what you pay for' decision rule").

193. *See* Akshay R. Rao & Kent B. Monroe, *The Moderating Effect of Prior Knowledge on Cue Utilization in Product Evaluations*, 15 J. CONSUMER RES. 253, 254 (1988) ("[I]ntegrative reviews of this research stream indicate a positive price-perceived quality relationship.").

194. Tibor Scitovszky, *Some Consequences of the Habit of Judging Quality by Price*, 12 REV. ECON. STUD. 100, 100-01 (1944-45).

195. *Id.* at 101.

196. *Id.* at 100.

197. *Id.* at 101. The two-priced system can be commonly observed in: automobile dealerships,

the product.

Like other sellers, pharmaceutical companies have sometimes deliberately priced their products higher than a competitor's product regardless of comparative efficacy, in order to convey an impression of superiority. For example, in *Our Daily Meds*, Melanie Peterson describes Glaxo's strategy of pricing newcomer Zantac (ranitidine) at a substantial premium over incumbent Tagamet (cimetidine).[198] The two products both fall within the category of drugs known as H2 blockers, as reflected in their similar generic names, and research at the time showed them to be both safe and equally effective in the treatment of ulcers.[199] Nevertheless, the new drug was priced as much as 50% higher than Tagamet (cimetidine), a move described by Peterson as "like that of an underweight boxer trying to fool the prizefighter with his swagger."[200] Within three years, the demand of a credulous public allowed Zantac (ranitidine) to surpass Tagamet (cimetidine) in sales.[201] Even more disconcerting is that, although in this case the two drugs were nearly equivalent in efficacy, nothing prevents the use of such a pricing strategy even where the new drug is *inferior* in efficacy.

Such pricing strategies reflect the notion, articulated by historian Barbara Tuchman in the 1970s, that "a patient's sense of therapeutic value is in proportion to expense."[202] Tuchman was speaking of the powdered pearls, emeralds, and other rare treatments that were prescribed to victims of the plague during the 1300s, but she recognized that the perception of high price as a value proxy is "not unknown to modern medicine."[203] Indeed, the signaling value of high price may reflect an underlying universal human tendency. According to a commentator on the drug trade in ancient Rome, "[a] cheap concoction to them signified a bad one, and hence physicians and druggists were advised to add harmless spices, perfumes and suchlike to common, effective, and inexpensive bases in order to convince their rich customers that here was something really worth having."[204] Pliny himself railed against "the stupid convictions of certain

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where the manufacturer's suggested retail price (MSRP) is rarely the price paid; supermarkets, where "customer loyalty cards" allow consumers to pay less than the "regular" price, the pharmaceutical industry, where the average wholesale price (AWP) "[does] not reflect the physicians' actual acquisition cost, or anything close to it." In re Pharm. Indus. Avg. Wholesale Price Litig., 582 F.3d 156, 160 (1st Cir. 2009).

198. *See* PETERSEN, *supra* note 108, at 137.

199. John Feely & Kenneth G. Wormsley, *H2 Receptor Antagonists: Cimetidine and Ranitidine*, 286 BRIT. MED. J. 695, 697 (1983) (stating that both drugs were "equally effective").

200. *See* PETERSEN, *supra* note 108, at 137.

201. *See id.* at 138.

202. BARBARA WERTHEIM TUCHMAN, A DISTANT MIRROR: THE CALAMITOUS 14TH CENTURY 107 (1979).

203. *Id.* at 106-07.

204. Vivian Nutton, *The Drug Trade in Antiquity*, 78 J. ROYAL SOC'Y MED. 138, 142 (1985); *see also* LAURENCE M.V. TOTELIN, HIPPOCRATIC RECIPES: ORAL AND WRITTEN TRANSMISSION OF PHARMACOLOGICAL KNOWLEDGE IN FIFTH- AND FOURTH-CENTURY GREECE 259–60 (2009)

people who consider nothing beneficial unless it is costly."[205] More than 1000 years later in an entirely different medical culture, Chinese writer Hsu Ta-ch'un wrote accusingly, in 1757, that "stupid people believe that expensive drugs must be good drugs, while cheap drugs are supposed to be inferior[.]"[206] Even if people today are more intelligent or better informed that those of centuries past, a hypothesis itself pregnant with doubt, the allure of high price and its potential to distort perceptions of value should not be underestimated.

G. The Unrealistic Optimism Halo

Absent efficacy data, patients may significantly overestimate the likelihood of therapeutic value in the spirit of blind optimism. In an influential paper, Neil Weinstein of Rutgers University reported study findings demonstrating that people "tend to believe that they are more likely than their peers to experience positive events and less likely to experience negative events."[207] The relevance of this optimism bias in the health sector has been noted.[208] In the 1950s, Harvard sociologist Talcott Parsons discussed the "optimistic bias" that pervades medical treatment, often taking the form of an irrational belief in efficacy, and closely tied to the "physician's so frequent insistence that his patients should have 'confidence' in him."[209] It is plausible, furthermore, that such optimism bias could synergistically combine with pharmaceutical company claims of theoretical "subpopulations" to inflate any expected therapeutic benefit beyond reason. That is, because of the tendency to overestimate one's chances of experiencing positive events, patients may tend to believe that they are more likely to fall within the favored theoretical subpopulation than is objectively probable,[210] assuming *arguendo* that such subpopulations exist.

The placebo effect is perhaps the most tangible indication that irrational patient optimism regarding drug efficacy exists. As one team of researchers pointed out, placebos by definition do not produce any therapeutic effect; it is the meaning mistakenly ascribed to them that leads to the so-called "placebo

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(arguing that Hippocratic recipes were "based on luxury and exotic ingredients," while those during subsequent centuries were even more expensive and complex).

205. PLINY THE ELDER, *supra* note 20, at 201.

206. HSU TA-CH'UN, I-HSUEH YUAN LIU LUN [FORGOTTEN TRADITIONS OF ANCIENT CHINESE MEDICINE] 179 (Paul U. Unschuld trans., 1990) (1757).

207. Neil D. Weinstein, *Unrealistic Optimism About Future Life Events*, 39(5) J. PERSONALITY & SOC. PSYCH. 806, 818 (1980); *see also* Neil D. Weinstein, *Unrealistic Optimism About Susceptibility to Health Problems: Conclusions from a Community-Wide Sample*, 10 J. BEHAV. MED. 481 (1987).

208. *See, e.g.*, Kathrin Milbury et al., *Treatment-Related Optimism Protects Quality of Life in a Phase II Clinical Trial for Metastatic Renal Cell Carcinoma*, 42 ANNALS OF BEHAV. MED. 313, 315 (2011).

209. PARSONS, *supra* note 34, at 315.

210. *See* Light, *supra* note 109, at 8 (noting that drug executives and marketers "have developed some of the most elaborate institutions of hope and magic in modern culture").

effect."[211] In a study cited by those researchers, patients received either aspirin or placebo, each of which was labeled either as branded or unbranded, creating four possible combinations.[212] The percent of headaches reported by patients to be substantially improved following treatment was revealing: unbranded placebo (74%); branded placebo (78%); unbranded aspirin (86%); and branded aspirin (89%).[213] The slight outperformance of both branded categories over their unbranded counterparts suggests that some form of optimism is playing a role in outcomes, even where no placebo is involved. This inference is buttressed by the only modestly larger difference (about 10%) between placebo and aspirin, across both branded and unbranded categories, which suggests that the large majority of any therapeutic benefit in the case of aspirin and headache pain is created by optimism (i.e., placebo effect) rather than by the chemical agent.

H. The Last Resort Halo

Desperate patients will try anything, from risky or unproven experimental therapies,[214] to traveling abroad to obtain medical treatment that is criminalized in the United States,[215] to submitting themselves to the care of those whose only product or service is unadulterated fraud.[216] The unifying theme of patient actions such as these is the strong desire to believe that a treatment exists combined with the knowledge that there may be little or nothing to lose by trying.[217] In a statement to Congress in 1911, President Taft urged legislators to better protect the public from "the raising of false hopes of speedy cures," asserting that "[t]here are none so credulous as sufferers from disease."[218] If the desire to

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211. Daniel E. Moerman & Wayne B. Jonas, *Deconstructing the Placebo Effect and Finding the Meaning Response*, 136 ANNALS OF INTERNAL MED. 471, 472 (2002).

212. A. Branthwaite & P. Cooper, *Analgesic Effects of Branding in Treatment of Headaches*, 282 BRIT. MED. J. 1576 (1981).

213. *Id.* at 1577, Table 2 (percentage figures reflect the sum of the categories: "a lot better"; "quite a lot better"; "considerably better"; and "completely better").

214. *See, e.g.*, Nancy M.P. King & Gail Henderson, *Treatments of Last Resort: Informed Consent and the Diffusion of New Technology*, 42 MERCER L. REV. 1007 (1991).

215. *See* I. Glenn Cohen, *Circumvention Tourism*, 97 CORNELL L. REV. 1309, 1398 (2012) (addressing the question of whether countries that criminalize certain medical treatment should condone travel to other countries for the purpose of circumventing the domestic prohibition, and generally arguing that they should not).

216. *See, e.g.*, Press Release, *San Fernando Valley Doctor Convicted of Selling Bogus Cancer Cure to Christians Across the Nation*, FDA (Sept. 27, 2011), http://www.fda.gov/ICECI/CriminalInvestigations/ucm273777.htm, *archived at* http://perma.cc/HJ2W-HJ64 (describing a doctor who was convicted of peddling a treatment that could purportedly cure cancer, multiple sclerosis, Alzheimer's, diabetes, and other diseases, and for which she charged up to $150,000 per six-month treatment program).

217. *See* King & Henderson, *supra* note 214, at 1011.

218. Message from the President of the United States, 62 CONG. REC. 2380 (June 21, 1911) (Document No. 75).

believe, against evidence, that a "miracle cure" exists creates an unwarranted efficacy halo even where the product in question has been criminalized or adjudged worthless by an expert government body such as the FDA, it is easy to imagine what occurs when the counterweight of FDA disapproval is replaced with FDA approval and negative evidence is replaced with equivocal or confusing evidence. In these cases, the desire to believe that a treatment is meaningfully effective can predominate even where the medical condition in question is of only moderate or minimal severity.

I. Halo Convergence and Human Perception

Each halo might alone be sufficient to convince even educated and circumspect patients to believe in the efficacy of a substantially ineffective remedy. Halos are rarely found alone, however. Instead they generally converge to create an overwhelming impression of efficacy that is stubbornly difficult to dislodge even when the evidence is uncontroverted and clear. When a consumer compares a heavily advertised, new, patented, FDA-approved, and very expensive product that is prescribed by his trusted physician, to a much cheaper, older, over-the-counter product, the tendency to believe that the expensive new product is better can be irresistible. If it were not better, one might reason, how could it be the third (or fifth, or eleventh) best-selling drug in the world? As with movies and other forms of popular culture, wide awareness and success of a product can itself lead to greater success, constituting a type of cumulative product advantage.[219]

Study results have confirmed the triumph of halo convergence over actual product efficacy. One study of the Canadian pharmaceutical market, for example, revealed that 80% of the increase in drug spending between 1996 and 2003 resulted from consumer use of "new, patented drug products that did not offer substantial improvements on less expensive alternatives available before 1990."[220] Similarly, an independent French organization examined 998 new medicinal products and indications from the period 1990–2011 and concluded that only fifteen offered "a real advance" and of those fifteen, only two were breakthroughs ("bravo," to use the organization's own language).[221]

Patients, therefore, make poor gatekeepers due to a confluence of factors. Kraakman's analysis provides a starting point for understanding this

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219. *Cf.* Derek De Solla Price, *A General Theory of Bibliometric and Other Cumulative Advantage Processes*, 27 J. AM. SOC'Y INFO. SCI. 292, 292 (1976) (noting the benefits of cumulative advantage to income, academic publication success, citation success, and journal prominence).

220. *See* Steven G. Morgan et al., *"Breakthrough" Drugs and Growth in Expenditure on Prescription Drugs in Canada*, 331 BRIT. MED. J. 815, 815 (2005).

221. *New Drugs and Indications in 2011: France Is Better Focused on Patients' Interests After the Mediator Scandal, But Stagnation Elsewhere*, 21 LA REVUE PRESCRIRE 106, 107 (Apr. 2012) (table) (translating 32 LA REVUE PRESCRIRE 134 (Feb. 2012)) [hereinafter *New Drugs and Indications in 2011*].

phenomenon, suggesting that primary deterrence will fail where actors lack sufficient information or expertise to make appropriate decisions in their own self-interest.[222] Yet while a lack of expertise and capacity is certainly a factor for patients in the complex environment of pharmaceutical products, it only begins to explain the inadequacy of patients as gatekeepers. The proxies for efficacy discussed above, which can take on greater importance in the absence of information, take the theory a great deal further, explaining not only why consumers fail to screen out ineffective drugs, but why they may tend to affirmatively demand them.

III. REGULATORS AS GATEKEEPERS

The lack of efficacy exhibited by many drugs is surprising in light of the highly regulated nature of pharmaceutical products themselves, with substantial involvement by government agencies or actors from the time a drug is first patented to when it is advertised to when patients or others bring suit for physical or economic harms. This Part examines how ineffective drugs are able to slip through the hands of government gatekeepers, not as a consequence of incompetence, inadequate resources, or failure of attention to duty, but despite general compliance with all legal requirements at every stage.

It should be noted that government actors do not seem to be what Kraakman had in mind in his discussion of gatekeepers, which he limits to *private* third-parties that can prevent misconduct by withholding support.[223] He specifically distinguishes direct enforcement against wrongdoers from the enlistment of those wrongdoers' "associates and market contacts" in an effort to indirectly discourage undesirable behavior.[224] In addition, Kraakman is most interested in gatekeepers who are motivated by liability, and to some extent reputational harm, rather than statutory duty.[225]

Nevertheless, government actors are gatekeepers in several important senses that are consistent with Kraakman's framework. Most importantly, they are able to disrupt misconduct by withholding support, such as when the United States Patent and Trademark Office declines to grant a patent on a new molecular entity that might form the basis of a new drug. Moreover, much of the enforcement by government agencies that will be discussed is ex ante, serving to prevent wrongdoing by limiting access to the market rather than punishing conduct after the fact. This characteristic is consistent with the ordinary meaning of the word "gatekeeping," that is, controlling access.[226]

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222. Kraakman, *supra* note 1, at 56.

223. Kraakman's classification of "public" and "market" gatekeepers is not to the contrary, since by "public" Kraakman merely means those private gatekeepers who are motivated by liability rather than private incentives such as the fear of reputation loss. *See id.* at 62.

224. *Id.* at 53.

225. *Id.* at 53-54 & n.3, 60 (gatekeeper liability); *id.* at 61 & n.20 (reputational harm).

226. *Gatekeeper Definition*, OXFORD DICTIONARIES, http://oxforddictionaries.com/definition/english/gatekeeper, *archived at* http://perma.cc/K5CP-2NTX (last visited July 10, 2014) ("a person

It is also important to clarify what it is that these government gatekeepers are guarding against. Kraakman describes the deterrence of "misconduct" or "wrongdoing,"[227] and his examples reveal a focus on gatekeepers who can withhold support for misconduct that is criminal or at least obviously pernicious: doctors and pharmacists, as guardians against drug abuse;[228] sellers of firearms who must obtain export licenses to deter actions by foreign enemies;[229] social hosts that restrain the actions of their intoxicated guests;[230] and auditors that prevent securities fraud.[231] Although this type of wrongdoing could occur in the context of pharmaceutical efficacy, such as where a drug company fraudulently falsifies clinical trial data to obtain FDA approval, the "wrongdoing" that is the focus of the present discussion is ordinarily much more subtle, involving the induced but voluntary transfer of vast amounts of wealth to companies whose products in reality are worth little or nothing. It is "wrongdoing" in a systems-based sense, akin to Lawrence Lessig's concern with the institutional corruption of politicians.[232]

Voluntary transactions, of course, are the essence of a market-based economy, and it is not suggested that limitations should be placed on an individual's right to pay a high price for a small gain in health. The concern is that the absence of clearly communicated efficacy information is causing doctors, patients, and others to demand drugs that they never would ask for if they understood just how ineffective these drugs are. Kraakman does mention such gatekeepers against "soft" wrongs, such as his reference to lenders that protect unsophisticated borrowers from bad investments by refusing to lend.[233] The USPTO and the FDA are like Kraakman's lenders in that they can effectively prevent consumption of bad drugs by unsophisticated doctors and patients. Another government agency, the FTC, acts as a gatekeeper by policing misleading promotional activities. It is explained below why none of these agencies is an adequate gatekeeper, and why they may ironically be making the problem worse.

A. The U.S. Patent and Trademark Office

Few drugs are developed if they are not covered by strong patent protection.[234] In the United States, patents are granted by the United States Patent

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or thing that controls access to something").

227. Kraakman, *supra* note 1, at 53.

228. *Id.* at 54 n.3.

229. *Id.* at 64.

230. *Id.*

231. *Id.* at 58.

232. *See, e.g.*, Lawrence Lessig, *What Everybody Knows and What Too Few Accept*, 123 HARV. L. REV. 104, 106-07 (2009).

233. Kraakman, *supra* note 1, at 62 n.23.

234. Benjamin N. Roin, *Unpatentable Drugs and the Standards of Patentability*, 87 TEX. L. REV. 503, 513 (2009) ("[I]t is well known that pharmaceutical companies generally refuse to

and Trademark Office, thereby casting this organization into the role of potential gatekeeper against ineffective drugs. The USPTO is a sensible gatekeeper not only because it can withhold patent protection from undeserving products, but because patent doctrine straightforwardly specifies that an invention cannot be patented unless it is "useful."[235] This utility requirement traces its roots at least as far back as the United States Constitution, which provides that patents may be granted in order "to Promote the Progress of Science and useful Arts,"[236] and patents are therefore traditionally conceived of as temporary rewards for contributing useful inventions to society.

Any optimism that patent law's utility requirement could screen out ineffective drugs by negating patentability, however, can be quickly dispelled. The bar for patentable utility is so low that almost any invention will meet it.[237] Even an invention that could be "used" to mislead customers has been held patentable.[238] Patentable utility has thus appropriately been described as de minimis standard[239] and it has been noted that even inventions that have no proven use in the real world can meet it.[240] Reflecting this almost inconsequentially low threshold is the USPTO's cautionary statement to would-be inventors that an alleged utility "of a complex invention as landfill" would not be sufficient.[241]

The rationale for a minimal utility standard in patent law seems to be that the market is the best judge of an invention's worth. In the landmark opinion of *Lowell v. Lewis*, Justice Story rejected the view that an invention must be better than—or even as good as—the existing state of the art, stating that "whether it [the invention] be more or less useful [than existing products] is a circumstance very material to the interests of the patentee, but of no importance to the public. If it be not extensively useful, it will silently sink into contempt

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develop new drugs unless they have strong patent protection over them.").

235. 35 U.S.C. § 101 (2013).

236. U.S. CONST. art I, § 8, cl. 8.

237. *See* Kathleen N. McKereghan, *The NonObviousness of Inventions: In Search of a Functional Standard*, 66 WASH. L. REV. 1061, 1077 n.94 (1991) ("[T]he utility requirement has long had a very low threshold."); *see generally* GERALD R. FERRERA ET AL., CYBERLAW: TEXT AND CASES 179-80 (3d ed. 2012) (providing examples of arguably frivolous or banal utilities that have nevertheless been found sufficient for patentability purposes).

238. *See, e.g.*, Juicy Whip, Inc. v. Orange Bang, Inc., 185 F.3d 1364, 1368 (Fed. Cir. 1999).

239. *See* Joseph P. Pieroni, *The Patentability of Expressed Sequence Tags*, 9 FED. CIR. B.J. 401, 405 (2000) ("The utility requirement is usually considered a very low hurdle, a deminimis [sic] standard.").

240. *See* Robert P. Merges, *Commercial Success and Patent Standards: Economic Perspectives on Innovation*, 76 CAL. L. REV. 803, 812 (1988) ("Today, a patent will not be withheld even though the invention works only in an experimental setting, and has no proven use in the field or factory.").

241. Utility Examination Guidelines, 66 Fed. Reg. 1098 (Jan. 5, 2001).

and disregard."[242] While this may be true of the water pumps at issue in *Lowell*, where the invention's utility was easily understandable by laypersons, it may be less true with complex pharmaceutical inventions (and other credence goods) where even medical experts cannot articulate or even agree on the degree to which a drug has improved a given patient's condition. Justice Story could not have had in mind the modern pharmaceuticals marketplace, where consumers spend billions of dollars on products that scarcely merit the label "extensively useful." During the patent period at least, these products rarely sink into contempt and disregard on the basis of a lack of meaningful efficacy.

Another possible gatekeeping lever at the hands of the USPTO is the non-obviousness standard, another requirement for patentability.[243] Previous physician-commentators have advocated elevating this standard, thereby preventing the patentability of "one-atom changes" to existing molecules that result in supposedly-innovative new molecular entities.[244] Non-obviousness, however, is a very rough proxy for efficacy that focuses on the technical difficulty[245] of creating the invention, and not on its therapeutic value. It is entirely possible that a new drug with decidedly unimpressive efficacy might meet even an elevated non-obvious standard.[246] Celebrex (celecoxib), Vioxx (rofecoxib), and the other COX-2 inhibitors are good examples. These drugs resulted from years of research and development[247] that culminated in 1998 in the market entry of Celebrex (celecoxib), a type of supposed "super aspirin"[248] that selectively inhibits only one of two cyclooxigenase (COX) enzymes. The structures of the COX-2 drugs depart markedly from those of ibuprofen, aspirin and other previous non-steroidal anti-inflammatories (NSAIDS), the larger class to which COX-2 inhibitors belong.[249] As the first in its class, Celebrex

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242. Lowell v. Lewis, 15 F. Cas. 1018, 1019 (D. Mass. 1817).

243. 35 U.S.C. § 103 (2013).

244. Avorn, *supra* note 62, at 669; *see also* MARCIA ANGELL, THE TRUTH ABOUT THE DRUG COMPANIES: HOW THEY DECEIVE US AND WHAT TO DO ABOUT IT (2004) (describing the ways in which drug companies make similar drugs in the same therapeutic class appear to differ in efficacy, even when they likely do not, with particular attention to the statins).

245. *See* Merges, *supra* note 240, at 812 ("[N]onobviousness attempts to measure . . . the *technical accomplishment* reflected in an invention.").

246. Also problematic is the fact that an elevated obviousness standard could prevent the patentability of technically obvious drugs that exhibit exceptionally high efficacy, either because the technical challenge involved in creating them is small or even because they have already been described in the literature without recognition of their therapeutic value. *See* Roin, *supra* note 234, at 536-37.

247. *See, e.g.*, Univ. of Rochester v. G.D. Searle & Co., 358 F.3d 916, 918 (Fed. Cir. 2004) (noting that Rochester scientists filed a patent application in 1992 related to this research).

248. *Pfizer Settles College's Lawsuit over Development of Celebrex*, N.Y. TIMES, May 1, 2012, at B2.

249. Susan K. Paulson & Timothy J. Maziasz, *Role of Preclinical Metabolism and Pharmacokinetics in the Development of Celecoxib*, *in* APPLICATIONS OF PHARMACOKINETIC: PRINCIPLES IN DRUG DEVELOPMENT 405 (Rajesh Krishna ed., 2004).

(celecoxib) very likely deserved to be judged non-obvious by the USPTO, and even the manufacturer's praise of its own drug as a "scientific breakthrough"[250] was deserved. The manufacturer's adjacent claim that Celebrex (celecoxib) delivers "powerful" relief,[251] however, was less deserved. The expensive, new, innovative, patented, FDA-approved drug provided no greater pain relief than any other NSAID, nor did its sponsor claim that it could do so.[252] The government-funded Oregon Evidence-based Practice Center concluded bluntly that "COX-2 selective NSAIDs and nonselective NSAIDs did not clearly differ in efficacy for pain relief, based on many good-quality, published trials."[253] Thus, the two principal tools that the USPTO might use to screen out ineffective drugs are simply not up to the task.

Even if one were inclined to raise the utility or non-obvious standards, which has been recommended as appropriate where the pace of invention is fast,[254] it is no simple matter to discern the efficacy of a drug. As a primarily technical agency with expertise in invention but not in the clinical trials that produce evidence of efficacy, the Patent and Trademark Office is poorly positioned to evaluate questions of efficacy in the context of complex health policy considerations.[255] Following concerns over a lack of drug efficacy expressed by Congress[256] and the President[257] in 1962, a provision was enacted into law that requires the FDA, if requested by the USPTO, to provide technical assistance with respect to the patenting of a new drug product.[258] As codified and amended at 21 U.S.C. § 372(d), this provision now reads:

> The Secretary [of Health and Human Services] is authorized and directed, upon request from the Under Secretary of Commerce for

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250. *See, e.g.*, Celebrex Print Advertisement, EBONY, Feb. 2001, at 105 ("Celebrex is a scientific breakthrough . . . .").

251. *See id.* ("Celebrex . . . delivers powerful 24-hour relief of your osteoarthritis pain and inflammation.").

252. *See id*.

253. Roger Chou et al., *Comparative Effectiveness and Safety of Analgesics for Osteoarthritis*, OREGON EVIDENCE-BASED PRACTICE CENTER 1, 3 (2006), http://effectivehealthcare.ahrq.gov/repFiles/AnalgesicsFinal.pdf, *archived at* http://perma.cc/ZS36-W8K4.

254. Edmond W. Kitch, Graham v. John Deere Co.*: New Standards for Patents*, 1966 SUP. CT. REV. 293, 305 (citing an 1826 judicial opinion for the proposition that a higher utility standard is more appropriate the faster the rate of innovation.).

255. For example, a single drug may prove effective in treating multiple conditions or in certain subsets of the population; side effects must be weighed against benefits; statistical aspects of clinical trials may be intricate or subject to surreptitious manipulation.

256. *See* S. Rep. No. 87-1744 (1962), *reprinted in* 1962 U.S.C.C.A.N. 2884, 2900.

257. Letter from Pres. John F. Kennedy to Sen. Eastland on Pending Legislation Relating to Drug Mktg. (Apr. 11, 1962), http://www.presidency.ucsb.edu/ws/?pid=8596, *archived at* http://perma.cc/EH3X-4Q2K.

258. Drug Amendments of 1962, Pub. L. No. 87-781, § 308, 52 Stat. 780, 796 (1962) (codified as amended at 21 U.S.C. § 372(d) (2013)).

> Intellectual Property and Director of the United States Patent and Trademark Office, to furnish full and complete information with respect to such questions relating to drugs as the Director may submit concerning any patent application. The Secretary is further authorized, upon receipt of any such request, to conduct or cause to be conducted, such research as may be required.[259]

The stated purpose of § 372(d), as described in the accompanying 1962 Senate Report, was unambiguously to reduce the number of patents issued on therapeutically questionable drugs: "Presumably, if the Patent Office, which has no physicians or pharmacologists on its staff, is able to secure information from HEW [i.e., from the FDA[260]] on the therapeutic properties of drugs—which it is now able to obtain only with the consent of the patent applicant—fewer patents may be issued."[261] However, the USPTO appears to have rarely, if ever, requested information pursuant to this authority. Only three cases, all from the now-defunct Court of Customs and Patent Appeals, cite § 372(d): the first notes that the USPTO did not exercise its authority under the provision;[262] the second cites § 372(d) only to explain that the USPTO hypothetically could consider, as an aid when deciding the question of utility, the FDA's determination that a drug is "totally unsafe in all circumstances," a determination that the court found was not present in the case at bar;[263] and, the third cites the provision, in dissent and in a footnote, to further the dissent's argument that the USPTO rather than other agencies is ultimately responsible for determining patentability.[264] One commentator interpreted these cases as rebuffing the USPTO's attempts to exercise its authority under § 372(d),[265] though the cases themselves suggest that only publicly available information was used and that no information was "furnished" by the FDA in the collaborative sense suggested by the statute.[266]

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259. 21 U.S.C. § 372(d) (2013).

260. "HEW" refers to the Department of Health Education and Welfare, predecessor to the Department of Health and Human Services, the Department to which the FDA belongs.

261. S. Rep. No. 87-1744 (1962), *reprinted in* 1962 U.S.C.C.A.N. 2884, 2900; *see also id.* at 2888 (noting that the proposed bill "would help to insure that patents are promptly issued for those developments in the drug field that are true inventions which the patent system is designed to reward."); *id.* at 2897 (noting that the proposed bill would "assure consideration of therapeutic effectiveness in the granting of patents for drugs that are modifications of other drugs").

262. *In re* Sichert, 566 F.2d 1154, 1159 (C.C.P.A. 1977).

263. *In re* Anthony, 414 F.2d 1383, 1398-99 (C.C.P.A. 1969). The court ultimately held the drug to possess sufficient utility. *Id*. at 1399. The court also collected cases addressing the relationship of safety to utility with respect to drugs. *Id.* at 1394-95 nn.10-12.

264. *In re* Hartop, 311 F.2d 249, 264 (C.C.P.A. 1962) (Worley, C.J., dissenting).

265. C. Leon Kim, *The Utility Requirement for Patenting Therapeutic Inventions*, 24 BUFF. L. REV. 595, 596 (1975) ("The [Patent and Trademark] Office's assumption of such power [under § 372(d)], however, was vehemently opposed by the CCPA.").

266. *See, e.g.*, *In re Anthony*, 414 F.2d at 1391 (noting that the examiner relied upon articles appearing in the *New York Times* and the *Washington Daily News*); *see also Patent Law Revision:*

Moreover, even if the USPTO was to consistently supplement its own expertise by exercising its right under § 372(d), the evidence needed to ascertain a drug's true efficacy in humans is not usually available at the time of patenting, which occurs relatively early in the research and development process. The assistance that the FDA would be able to provide would therefore be limited. In summary, the USPTO cannot act as an effective gatekeeper because the utility and non-obviousness doctrines are not up to the task, because the agency lacks appropriate health-related expertise, and because the USPTO "gate" is too far upstream in the drug development process.

B. The U.S. Food and Drug Administration

The FDA is perhaps the most obvious gatekeeper given its statutory duty to decline approval of any drug for which "there is a lack of substantial evidence that the drug will have the effect it purports or is represented to have."[267] A careful reading of this statutory provision, however, reveals that there is no requirement that a drug possess any particular level of efficacy. So long as a drug company does not "purport or . . . represent" the drug to have greater efficacy than it actually has, the drug can be approved.[268] As a result, the efficacy of approved drugs ranges from near 100% in the case of certain contraceptives, antibiotics, and vaccines, to near 0% in the case of certain Alzheimer's medications, depression medications, and cancer medications. Like judicial attitudes toward patent law's de minimis utility standard, the prevailing view of the FDA's similarly de minimis efficacy requirement appears to be that the market is the best judge of a drug's worth. In other words, although the FDA is a gatekeeper against absolutely worthless drugs, "the market"—whatever entities or individuals that comprises—is erroneously assumed to be a good gatekeeper against almost-but-not-quite worthless drugs.

The FDA approval scheme, then, continues by and large to embrace the philosophy of *caveat emptor* with respect to any non-zero level of drug efficacy. Yet, at the same time the phrase "FDA approved" is used in advertisements, and perceived by the public, as if it were a guarantee that a drug has some meaningful level of efficacy.[269] Either of these approaches might have merit. One might take

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Hearing Before the Subcomm. on Patents, Trademarks, and Copyrights of the Senate Comm. on the Judiciary, 93d Cong. 292 (1973) (statement of Pharm. Mfr.'s Ass'n) ("In our view, 21 U.S. 372(d) [sic] is an acceptable provision by which the Patent Office may seek the advice of other government scientists in particular instances without significant adverse consequences to the public or to the patent applicant. 21 U.S.C. 372(d) was enacted in 1962 as an alternative to a proposal which would have in effect conditioned the patent grant upon a determination by a separate federal agency of greater therapeutic effect. A patentability requirement of this nature was wisely rejected by Congress.").

267. 21 U.S.C. § 355(d) (2013) ("[H]e *shall* issue an order refusing to approve the application.") (emphasis added).

268. *Id.* § 355.

269. *See* Jonathan J. Darrow, *Pharmaceutical Efficacy: The Illusory Legal Standard*, 70

the more traditional approach and reasonably argue that consumers (and their physicians) should take responsibility themselves for guarding against ineffective remedies, following the principle of *caveat emptor*. Alternately, one might more liberally argue that the FDA should be given the responsibility to protect the public from ineffective remedies. The current system, however, combines these two approaches in the most unfortunate way possible, with patients and physicians assuming that the FDA has vetted drugs for meaningful levels of effectiveness, while the FDA in fact leaves this discerning task to those same patients and physicians, fully compliant with its statutory duties. In this way FDA oversight ironically may make the efficacy problem worse, creating unjustified perceptions of government approval that can induce market players to let down their guard.

This is not to say that the FDA is always ineffective as a gatekeeper of efficacy. Not only does the FDA have the power to reject entirely fraudulent remedies, it also administers a statutory framework that provides incentives that are roughly—perhaps very roughly—scaled to a drug's likely level of efficacy. The Federal Food, Drug, and Cosmetic Act (FDCA) provides three years of exclusivity for new indications of existing medicines.[270] Because doctors can legally prescribe FDA-approved drugs for unapproved indications, the marginal gains in real-world efficacy brought about by a new indication approval are likely to be small. New molecular entities (NMEs), by contrast, are assumed to be a rough proxy for increased innovativeness and thus, indirectly, efficacy levels. The FDCA offers five years of exclusivity for such NMEs (or four years, if patent invalidity or noninfringement is alleged).[271] Under the Orphan Drug Act, seven years of market exclusivity may be granted for drugs that treat rare diseases or conditions.[272] The rationale, recorded in the corresponding session law, is that there may be no adequate drugs at all for these conditions "because so few individuals are affected" that pharmaceutical companies might not be expected to even attempt development of such drugs.[273] If no drugs are currently available to treat an orphan disease, it could be reasoned, the efficacy gains of a new medication are likely to be larger than if drugs are already available. Unfortunately, even in this category products all too often disappoint. An analysis by a French nonprofit drug evaluation organization found that "[n]one of the 6 orphan drugs examined by *Prescrire* in 2011 represented a real breakthrough."[274] Biologics, whose theorized impressive gains in efficacy have

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WASH. & LEE L. REV. 2073, 2122 (2013) (explaining that efficacy that is meaningful to a patient is often labeled "clinical efficacy" by physicians, but that by law clinical efficacy means only efficacy, of any amount, in humans).

270. *Id.* § 355(c)(3)(E)(iii) & (j)(5)(F)(iii).

271. *Id.* § 355(c)(3)(E)(ii) & (j)(5)(F)(ii). A thirty-month stay provision effectively extends these four- or five-year periods to seven and one-half years, if a patent infringement suit is timely commenced. *Id.*

272. *Id.* § 360cc(a).

273. Orphan Drug Act, Pub. L. No. 97-414, § 1(b), 96 Stat. 2049 (1983).

274. *New Drugs and Indications in 2011*, *supra* note 221, at 108.

so far proven largely elusive, may be granted twelve years of exclusivity under a 2009 law.[275]

The role of this scaled incentive regime on efficiently eliciting effective drugs may be deserving of further study, but is too large and complex an issue to be adequately explored here.[276] Suffice it to say that these scaled incentives are at best a very rough proxy for efficacy. Simply because a drug can be categorized as an NME or a biologic, or purportedly treats an orphan disease, does not necessarily say anything at all about its absolute (or even relative) level of efficacy.

IV. POST-HOC GATEKEEPING: ADMINISTRATIVE AND COURT-MEDIATED ENFORCEMENT

If overstatement of drug efficacy were truly a problem, it might be expected that government regulators and other interested parties would seek legal redress. In this regard, the record does not disappoint. A number of lawsuits have been brought by individuals, competitors, and insurance companies alleging fraud against drug companies for their inflated claims of efficacy. Government regulators, notably the FDA, have also acted via administrative channels to temper exaggerated drug efficacy claims. For various reasons explored below, the majority of these efforts have either failed or been only partially effective in preventing misleading information from reaching both consumers and the medical community.

A. Enforcement Actions by the FDA

The regulation of drug advertising is shared between the FTC, which regulates advertising for over-the-counter products,[277] and the FDA, which regulates the advertising of prescription drugs as well as labeling for both prescription and over-the-counter products.[278] Although the FTC has taken frequent action against overstatements of efficacy in the dietary supplements sector,[279] litigation by FTC against overstatements of efficacy for over-the-

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275. Biologics Price Competition and Innovation Act of 2009, Pub. L. No. 111-148, 124 Stat. 119 (2010).

276. *See generally* Eisenberg, *supra* note 8, at 387 (concluding that the FDA plays an important role in innovation policy).

277. *See* Anne V. Maher & Leslie Fair, *The FTC's Regulation of Advertising*, 65 FOOD & DRUG L.J. 589 (2010). The FTC's enforcement authority with respect to OTC drugs originates in Sections 5, 12 and 15 of the Federal Trade Commission Act. *See* Francis B. Palumbo & C. Daniel Mullins, *The Development of Direct-to-Consumer Prescription Drug Advertising Regulation*, 57 FOOD & DRUG L.J. 423, 427 (2002).

278. *See* DePriest v. AstraZeneca Pharms., 351 S.W.3d 168, 177 n.9 (Ark. 2009); Memorandum of Understanding Between the FTC and the FDA, 36 Fed. Reg. 18,539 (Sept. 16, 1971).

279. 279. *See, e.g.*, FTC v. Cent. Coast Nutraceuticals, Inc., No. 10C-4931 (N.D. Ill. Jan. 9, 2012) (stipulated order) (acai berry supplements); FTC v. CVS Pharmacy, Inc., No. CA-09-420

counter drugs has been sparse,[280] and as just mentioned, the FDA rather than the FTC regulates advertising of prescription drugs.

The FDA's authority derives from the Federal Food, Drug, and Cosmetic Act, which allows the FDA to take action against any drug that is "misbranded."[281] Misbranding includes not only "labeling [that] is false or misleading in any particular"[282] but also television advertisements for prescription drugs that contain untrue statements regarding "side effects, contraindications, and effectiveness."[283]

Pursuant to these provisions, the FDA rebukes drug companies with regularity for their overzealous claims of efficacy. A television advertisement for Amgen's Enbrel (etanercept) for example, resulted in a warning letter from the FDA that noted that the advertisement's description of the drug as a "BREAKTHROUGH," combined with other attributes of the advertisement, implied efficacy beyond what had been proven.[284] Despite the "overwhelming impression conveyed by the TV ad . . . that Enbrel completely clears skin with psoriasis," no evidence supported this claim.[285] To the contrary, the FDA offered its opinion that "Enbrel is not a breakthrough therapy for moderate to severe plaque psoriasis because it does not offer any documented material difference that offers a significant advantage over other drugs already available . . . ."[286]

In another case, G.D. Searle & Co. received a warning letter for distributing promotional materials for Celebrex (celecoxib) that, according to the FDA,

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(D.R.I. final order Sept. 9, 2009) (AirShield, a purported treatment for colds and influenza); FTC v. Airborne Health, Inc., No. CV-08-05300 (C.D. Cal. final order Sept. 5, 2008) (Airborne, a purported cold preventative); *In re* Vital Basics, Inc., 137 F.T.C. 254 (2004) (Focus Factor, a purported enhancer of concentration); FTC v. Rexall Sundown, Inc., Civ. No. 00-706-CIV (S.D. Fla. Mar. 11, 2003) (Cellasene, a purported anti-cellulite dietary supplement); *see also* Laurel A. Price, *Advertising and Unfair Competition: Federal Enforcement*, ST056 ALI-ABA 541 (2012) (collecting cases).

280. *See* Press Release, *FTC's Cutler Says OTC Drug Manufacturers Must Have High Advertising Standards*, FTC (Oct. 23, 1990), http://www.ftc.gov/opa/predawn/F93/bjc-otc-a1.htm, *archived at* http://perma.cc/L2ZS-XXNC (noting enforcement "sweeps" against unsubstantiated claims in the 1970s); *see also* Final Order, *In re* Novartis Corp. et al., 127 F.T.C. 580, 674 (May 13, 1999) (company may not make unsubstantiated claims of superior efficacy of analgesic products); Am. Home Prods. v. FTC, 695 F.2d 681,683 (3d Cir. 1983) (Anacin (400 mg aspirin plus 32.5 mg caffeine)); *In re* Thompson Med. Co., 104 F.T.C. 648 (F.T.C. Nov. 23, 1984), *aff'd*, Thompson Med. Co. v. FTC, 479 U.S. 1086 (1986) (Aspercreme).

281. 21 U.S.C. § 352 (2013).

282. *Id.* § 352(a).

283. *Id.* § 352(n); *see also* 21 C.F.R. § 202.1(e)(6) (2013) ("Advertisements that are false, lacking in fair balance, or otherwise misleading.").

284. Letter from Thomas W. Abrams, FDA, to Kevin W. Sharer, Chairman and Chief Exec. Officer, Amgen Inc. (Feb. 18, 2005), http://www.fda.gov/downloads/Drugs/GuidanceComplianceRegulatoryInformation/EnforcementActivitiesbyFDA/WarningLettersandNoticeofViolationLetterstoPharmaceuticalCcompanies/ucm055677.pdf, *archived at* http://perma.cc/HJ4F-36AS (Enbrel).

285. *Id*. at 4.

286. *Id*.

claimed superiority over not only Vioxx (rofecoxib), but also "all analgesic and anti-inflammatory therapies for the management of [arthritis]."[287] In fact, Searle had not demonstrated that Celebrex (celecoxib) was any better than other NSAIDs, such as aspirin, Advil (ibuprofen), or Vioxx (rofecoxib).[288] But these promotional materials along with other forms of promotion had already had their effect: How many members of the public today understand that Advil (ibuprofen) and Celebrex (celecoxib) have approximately the same level of efficacy in relieving pain? The $35 billion[289] that Celebrex (celecoxib) has earned Pfizer suggests that far too many patients—and doctors—have not reviewed the relevant literature do not understand that the drugs are approximately equivalent in efficacy.

Despite diligent efforts by the FDA's Office of Prescription Drug Promotion (OPDP, formerly the Division of Drug Marketing and Advertising, or DDMAC), a tide of information indicating or implying greater efficacy than is present continues to reach consumers. In part, this is due to the sheer magnitude of violations. OPDP issued twenty-eight enforcement letters in 2012,[290] thirty-one in 2011,[291] fifty-one in 2010,[292] and forty in 2009.[293] By way of context, the FDA

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287. Letter from Spencer Salis, FDA, to Jerome M. Prahl, Assoc. Dir. Reg. Aff., G.D. Searle & Co., at 3 (Oct. 6, 1999) [hereinafter Spencer Salis Letter], http://www.fda.gov/downloads/Drugs/GuidanceComplianceRegulatoryInformation/EnforcementActivitiesbyFDA/WarningLettersandNoticeofViolationLetterstoPharmaceuticalCcompanies/UCM166210.pdf, *archived at* http://perma.cc/5ACH-PLMF.

288. *Id.* ("[T]his global superiority claim has not been demonstrated by substantial evidence."). In fact, the statements of superiority criticized by the FDA did not directly assert superior *efficacy*, a subtlety that may well have been lost on the recipients of the information. *See id.*

289. Wendy Kaufman, *Pfizer Settles Suit Involving Celebrex*, NAT'L PUB. RADIO (May 2, 2012), http://www.npr.org/2012/05/02/151832691/pfizer-settles-suit-involving-celebrex, *archived at* http://perma.cc/SMH8-T468.

290. *Warning Letters 2012*, FDA Dec. 6, 2013, 11:54 AM), http://www.fda.gov/Drugs/GuidanceComplianceRegulatoryInformation/EnforcementActivitiesbyFDA/WarningLettersandNoticeofViolationLetterstoPharmaceuticalCompanies/ucm289143.htm, *archived at* http://perma.cc/Q7HV-7NU8.

291. *Warning Letters 2011*, FDA (Dec. 6, 2013, 11:53 AM), http://www.fda.gov/Drugs/GuidanceComplianceRegulatoryInformation/EnforcementActivitiesbyFDA/WarningLettersandNoticeofViolationLetterstoPharmaceuticalCompanies/ucm238583.htm, *archived at* http://perma.cc/72T9-43PW (many of these letters are untitled letters, which nevertheless warn against violations of the FDCA).

292. *Warning Letters 2010*, FDA (Dec. 6, 2013, 11:50 AM), http://www.fda.gov/Drugs/GuidanceComplianceRegulatoryInformation/EnforcementActivitiesbyFDA/WarningLettersandNoticeofViolationLetterstoPharmaceuticalCompanies/ucm197224.htm, *archived at* http://perma.cc/MH78-PRWU.

293. *Warning Letters 2009*, U.S. FOOD & DRUG ADMIN., http://www.fda.gov/Drugs/GuidanceComplianceRegulatoryInformation/EnforcementActivitiesbyFDA/WarningLettersandNoticeofViolationLetterstoPharmaceuticalCompanies/ucm055773.htm, *archived at* http://perma.cc/75TG-TWM8 (last visited July 10, 2014).

approved only thirty-nine new molecular entities in 2012,[294] thirty in 2011,[295] twenty-one in 2010, and twenty-six in 2009.[296] This means that, on average, there was more than one enforcement letter for every one new molecular entity approval.

FIGURE 1: ENFORCEMENT LETTERS AND NME APPROVALS, 2009-2012

	NME Approvals	Enforcement Letters
2012	39	28
2011	30	31
2010	21	51
2009	26	40
TOTAL	**116**	**150**

As noted above, post hoc enforcement letters are a second-best solution because, by the time they are received and acted upon, the public has already been exposed to misinformation.[297] To counteract this shortcoming, the FDA in 2007 was empowered by statute to require that any advertising and promotional materials be submitted to the FDA for review at least forty-five days prior to dissemination.[298] Funding for this program, however, was then withheld.[299] The FDA finally promulgated draft guidance in 2012,[300] but it has not yet been

294. *New Molecular Entity Approvals for 2012*, U.S. FOOD & DRUG ADMIN., http://www.fda.gov/Drugs/DevelopmentApprovalProcess/DrugInnovation/ucm336115.htm, *archived at* http://perma.cc/Y5VT-24T5 (last visited July 10, 2014).

295. *New Molecular Entity Approvals for 2011*, U.S. FOOD & DRUG ADMIN., http://www.fda.gov/Drugs/DevelopmentApprovalProcess/DrugInnovation/ucm285554.htm, *archived at* http://perma.cc/HHH9-TM8M (last visited July 10, 2014).

296. *NMEs Approved by CDER*, FDA 1, 1 (2010), http://www.fda.gov/downloads/Drugs/DevelopmentApprovalProcess/HowDrugsareDevelopedandApproved/DrugandBiologicApprovalReports/UCM242695.pdf, *archived at* http://perma.cc/GZM3-3N6Q (also providing data for 2008 (24 NMEs), 2007 (18 NMEs), and 2006 (22 NMEs)).

297. *Cf.* Upjohn Co. v. Finch, 422 F.2d 944, 953 (6th Cir. 1970) (quoting congressional testimony of the Commissioner of the New York Department of Health regarding the impact of drug efficacy legislation: "Long before governmental authorities are in a position to prove the illegality of these [advertising] practices and get the cumbersome legal machinery into motion and remove the drug from the market, grave harm has been done . . . .").

298. Food and Drug Administration Amendments Act of 2007, Pub. L. No. 110-85, § 901(d)(2), 121 Stat. 939 (2007) (codified at 21 U.S.C. § 353b (2013)); *see also* 21 C.F.R. § 314.550 (2013) (requiring promotional materials to be submitted 30 days in advance of dissemination, in the case of drugs subject to accelerated approval); 21 C.F.R.§ 601.45 (2013) (stating 30-day period for biologics subject to accelerated approval).

299. Gary C. Messplay & Colleen Heisey, *FDAAA Ad Program Stumbles: DTC PreReview Program Fails to Launch*, CONTRACT PHARMA: FDA WATCH, Mar. 2008, at 18.

300. *See Guidance for Industry Direct-to-Consumer Television Advertisements: FDAAA DTC Television Ad Pre-Dissemination Review Program*, FDA (2012), http://www.fda.gov/downloads/

finalized. The results are predictable: the FDA website notes that the agency "see[s] many ads at about the same time the public sees them."[301] The public (including doctors) therefore continues to be subjected to misleading efficacy information until corrective action is taken. Even if implemented in its current form, the guidance would only require submission for six categories of advertisements, in light of the FDA's limited resources.[302]

Even corrected or technically compliant advertisements may nevertheless convey an impression of effectiveness that is not warranted. For example, a Celebrex (celecoxib) advertisement aimed at physicians states that "[w]ith all the experience that you and thousands of other physicians just like you have with the proven efficacy and benefit of superior safety of Celebrex, why wouldn't you want to prescribe Celebrex?"[303] By strategically inserting the word "efficacy" among the words "proven," "benefit," and "superior," viewers are left with the impression that the efficacy of Celebrex (celecoxib) is superior, even though this was not stated. The effect is reminiscent of the legal cannon of *noscitur a sociis*, which "counsels that a word is given more precise content by the neighboring words with which it is associated."[304] In this case, however, the tendency of an audience to consider context has been used to mislead.

Pharmaceutical companies have little incentive to refrain from testing the limits of what they can claim or imply in advertisements. Although the FDA can and has taken action even against advertisements that only subtly overstate efficacy by the "totality of [the] presentation," warning letters themselves carry no penalties and generally request only that the recipient desist.[305] Legislation in

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Drugs/.../Guidances/UCM295554.pdf, *archived at* http://perma.cc/49P5-4GDK.

301. *Prescription Drug Advertising: Questions and Answers*, FDA (Dec. 6, 2013, 11:35 AM), http://www.fda.gov/Drugs/ResourcesForYou/Consumers/PrescriptionDrugAdvertising/UCM076768.htm, *archived at* http://perma.cc/MR4C-6UA3 ("[T]he public may see ads that violate the law before we can stop the ad from appearing . . . .").

302. *Guidance for Industry Direct-to-Consumer Television Advertisements—FDAAA DTC Television Ad Pre-Dissemination Review Program*, FDA 1, 2 (2012), http://www.fda.gov/downloads/Drugs/.../Guidances/UCM295554.pdf, *archived at* http://perma.cc/5Q7K-DUGS (The categories are: (1) the initial TV ad for a new prescription drug; (2) certain ads for drugs subject to REMS; (3) ads for Schedule II drugs; (4) ads following certain label updates pertaining to safety; (5) certain ads aired subsequent to the receipt of warning letters; and (6) those ads specifically identified by the FDA as subject to pre-review).

303. Spencer Salis Letter, *supra* note 287, at 3.

304. Freeman v. Quicken Loans, Inc., 132 S. Ct. 2034, 2042 (2012) (quoting United States v. Williams, 553 U.S. 285, 294 (2008)).

305. *See, e.g.*, Letter from Roberta T. Szydlo & Lisa M. Hubbard, FDA, to Randy Russell, Asst. Dir. Reg. Aff., Alcon Res., Ltd., Nov. 13, 2012, http://www.fda.gov/downloads/Drugs/GuidanceComplianceRegulatoryInformation/EnforcementActivitiesbyFDA/WarningLettersandNoticeofViolationLetterstoPharmaceuticalCcompanies/UCM328637.pdf, *archived at* http://perma.cc/ZV7T-B78J (Patanase); *see also* David C. Vladeck, *The Difficult Case of Direct-to-Consumer Drug Advertising*, 41 LOY. L.A. L. REV. 259, 273 (2007) ("The FDA has no statutory authority to impose civil penalties for misleading ads, and the only real sanction it has (apart from

2007 empowered the FDA to impose civil penalties of up to $250,000 for direct-to-consumer advertising that is false or misleading,[306] but only following a formal administrative hearing.[307] Given the significant resources required for such a hearing, it is not surprising that no reported cases indicate that such penalties have ever been imposed.[308] Even if a penalty were imposed, the statute allows reduction in dollar amounts based on a number of factors, including: subsequent, voluntary remedial action that is undertaken; whether the advertisement had been reviewed by qualified medical, regulatory, and legal reviewers prior to its dissemination; and whether the person promptly ceased distribution of the advertisement.[309] Even if the maximum amount were imposed, a rational drug company might still opt for inflating efficacy claims. A blockbuster drug that earns $1 billion per year translates into more than $2.7 million per day. If an overstatement of efficacy can increase sales by 10%, a $250,000 penalty is less than one day's additional revenue.

B. Lawsuits by Consumers Alleging Fraud

In theory, consumer fraud actions might also serve as a check against false or misleading claims of efficacy. Consumers and non-profit public interest organizations, however, have often encountered significant legal barriers when attempting to bring these claims. In one case, a group of consumers sought class action status in a suit against Johnson & Johnson for running advertisements that allegedly included misleading claims of superiority of Johnson & Johnson's Pepcid (famotidine) product over Tagamet (cimetidine). The plaintiffs were likely emboldened by a then-recent holding in the Southern District of New York that had enjoined the advertisements in question.[310] Despite this favorable precedent, the New Jersey trial court denied class certification, noting that although common questions of law and fact existed with respect to the allegedly misleading nature of the advertisements,[311] individual questions regarding

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bringing a misbranding action in court) is to issue public warning letters . . . .").

306. Food and Drug Administration Amendments Act of 2007, Pub. L. No. 110-85, § 901(d)(4), 121 Stat. 823 (2007) (codified at 21 U.S.C. § 333(g) (2013)). Criminal penalties may also be imposed. 21 U.S.C. § 333(a) (2013); *see also Guidance for Industry Direct-to-Consumer Television Advertisements—FDAAA DTC Television Ad Pre-Dissemination Review Program*, FDA 1, 7-8 (2012), http://www.fda.gov/downloads/Drugs/.../Guidances/UCM295554.pdf, *archived at* http://perma.cc/H8E9-53G6.

307. 21 U.S.C. § 333(g)(2) (2013).

308. A search of the Westlaw ALLCASES and JLR databases on November 21, 2012 for the search string "21 U.S.C. s 333(g)" produced 1 result and 4 results, respectively, but none indicated that a penalty had been imposed. Searches of the Federal Register and the FDA's website were similarly non-responsive.

309. 21 U.S.C. § 333(g)(3) (2013).

310. SmithKline Beecham Consumer Healthcare, L.P. v. Johnson & Johnson-Merck Consumer Pharms. Co., 906 F. Supp. 178, 183-86, 188 (S.D.N.Y. 1995).

311. Gross v. Johnson & Johnson-Merck Consumer Pharms. Co., 696 A.2d 793, 795 (N.J.

reliance on those advertisements predominated.[312]

The inability to bring a class action suit makes private enforcement by consumers much less cost effective, and therefore much less likely to occur.[313] In contrast to drug product liability litigation, where serious drug-related injury or death can lead to very large jury awards, the economic losses occasioned by misleading advertising are likely to be relatively small with respect to any one consumer, perhaps on the order of hundreds of dollars. This minimal amount is not enough to motivate most consumers to bring suit. In addition, although total economic losses may aggregate to millions or billions of dollars when one considers the entire consumer population for a given pharmaceutical product, the inability to aggregate the claims associated with those losses into a single lawsuit means that it will not be financially attractive for attorneys to undertake representation.

The inability to obtain class certification is only one of a number of challenges that consumers face in attempting to bring a successful fraud claim. Several of these challenges are illustrated in a 2003 New Jersey case, in which a state consumer advocacy group brought a fraud claim against Schering-Plough and two of its advertising agencies, alleging that the allergy medicine Claritin (loratadine) had been portrayed as more effective than it actually was.[314] The advertisement in question told consumers that "you . . . can lead a normal nearly symptom-free life again."[315] The New Jersey appeals court dismissed the action not because Claritin (loratadine) was in fact as effective as claimed, nor because the plaintiffs did not suffer a loss. Instead, the court provided three primary reasons for dismissing the action for failure to state a claim. First, it found the statement that assured patients that they could "lead a normal nearly symptom-free life again" was "not [a] statement[] of fact" but was instead "mere puffing" and as such not actionable.[316] Second, the court found the statement not actionable because the advertisement was subject to FDA oversight.[317] Third, the

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Super. Ct. Law Div. 1997).

312. *Id.* at 799. One legal commentator has described an emerging presumption against class certification and argued that this presumption creates a regulatory gap for potentially harmful drugs. *See* Young K. Lee, *Beyond Gatekeeping: Class Certification, Legal Oversight, and the Promotion of Scientific Research in "Immature" Pharmaceutical Torts*, 105 COLUM. L. REV. 1905 (2005).

313. Joseph J. Leghorn, *Defending an Emerging Threat: Consumer Fraud Class Action Suits in Pharmaceutical and Medical Device Products-Based Litigation*, 61 FOOD & DRUG L.J. 519, 530 (2006) ("In most instances, a consumer fraud action brought by one or more individual plaintiffs will not present an economically attractive proposition to the plaintiffs' bar."). Leghorn was speaking primarily about failure-to-warn claims, where harm to the health of a single plaintiff, and therefore damages, can be relatively high. With efficacy fraud claims, in contrast, the economic incentive would be even smaller.

314. N.J. Citizen Action v. Schering-Plough Corp., 842 A.2d 174, 176 (N.J. Super. Ct. App. Div. 2003).

315. *Id.* at 177.

316. *Id.*

317. *Id.*

court noted that in any event plaintiffs could not prove that their purchases were caused by the allegedly fraudulent statement, because Claritin was available only by prescription.[318] As such, the presence of the doctor as a "learned intermediary"[319] in the distribution chain broke the causal link between the alleged wrongdoing and the harm suffered.[320]

Schering-Plough is troubling for at least three reasons. First, the court failed to consider the nature of pharmaceutical products as both Veblen-like goods (to the extent that desirability rises as price rises)[321] and simultaneously as credence goods (goods for which consumers cannot ascertain value even after consumption).[322] With goods that exhibit both of these characteristics, "mere puffery" combined with elevated prices may have a greater impact than with ordinary goods, because there is little else on which to base value. It also ignores the obvious and measurable impact that advertising has on aggregate purchases. It is notable that the court specifically rejected the "fraud on the market" theory, often used in securities fraud litigation, as inappropriate in context of drug litigation.[323]

Second, in relieving the defendant of liability based on FDA oversight authority, the court apparently did not consider the possibility that the FDA might not have the resources to exercise that authority in all cases that merit such oversight. The court also failed to give sufficient weight to the fact that private litigants may bring suit alongside state and federal agencies in an analogous context where the consumer interest is implicated, namely, antitrust. In fact, United States antitrust law provides an incentive for private litigation in the form of treble damages awards,[324] based in part on the premise that private suits improve compliance with the law by harnessing the aggregated power of "private Attorneys General."[325] Even in the pharmaceuticals context, the Supreme Court has affirmed the right of private citizens to bring drug products liability claims based on state failure-to-warn laws, notwithstanding the FDA's substantial

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318. *Id.* at 177-78.

319. *See* Richard B. Goetz & Karen R. Growdon, *A Defense of the Learned Intermediary Doctrine*, 63 FOOD & DRUG L.J. 421 (2008) (defending the learned intermediary doctrine); *but see* Heather Harrell, *Direct-to-Consumer Advertising of Prescription Pharmaceuticals, the Learned Intermediary Doctrine, and Fiduciary Duties*, 8 IND. HEALTH L. REV. 69 (2011) (critiquing the learned intermediary doctrine).

320. *Id.*

321. *See* Jeremy N. Sheff, *Veblen Brands*, 96 MINN. L. REV. 769, 795-97 (2012) (describing Veblen goods as luxurious and signals of social status).

322. *See* Omari Scott Simmons, *Taking the Blue Pill: The Imponderable Impact of Executive Compensation Reform*, 62 SMU L. REV. 299, 318 (2009).

323. N.J. Citizen Action v. Schering-Plough Corp., 842 A.2d 174, 178 (N.J. Super. Ct. App. Div. 2003).

324. 15 U.S.C. § 15(a) (2013).

325. Mitsubishi Motors Corp. v. Soler Chrysler-Plymouth, Inc., 473 U.S. 614, 654 (1985) (Stevens, J., dissenting).

oversight of the warnings that appear on drug labels.[326]

Schering-Plough is also troubling for a third reason: Rejecting the plaintiff's claim based on the involvement of a physician immunizes a vast swath of potential wrongdoing from consumer suits. This is because, by definition, physicians (or other prescribers) will necessarily be involved in any lawful purchase by a lay consumer of prescription drugs.[327] If the presence of these prescribers is viewed as breaking the causal link between the advertising and the taking by patients of a medication, fraud cannot be established because causation is a necessary element of a fraud action. Even if plaintiffs were to put forth data showing a correlation between increased advertisements and increased drug sales, courts have repeatedly stated that such evidence would be insufficient to establish causation.[328] Because prescription drugs are the most advertised and most costly class of drugs, the largest economic losses will arise far more often in this context than in the context of non-prescription drugs. Unfortunately, *Schering-Plough* is not alone in dismissing fraud actions that allege misrepresentation of drug efficacy.[329]

C. Lawsuits by Insurers Alleging Fraud

Third-party payers, such as insurance companies, generally have greater institutional capacity to bring legal action based on fraudulent overstatements of efficacy. One might therefore expect that such relatively sophisticated third-party payers would enjoy a larger measure of success in bringing suit. In fact, analogous cases by payers have not only failed, but have done so at very early stages of the proceedings. As with the consumer lawsuits discussed above, the pharmaceutical manufacturer's shield from liability derives from the presence of physicians, who break the causal link.

In *Southern Illinois Laborers' and Employers Health and Welfare Fund v.*

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326. *See* Wyeth v. Levine, 555 U.S. 555 (2009).

327. *See* 21 U.S.C. § 353(b) (2013).

328. *In re* Neurontin Mktg. & Sales Practices Litig., 677 F. Supp. 2d 479, 494 (D. Mass. 2010) ("[T]rial courts have almost uniformly held that in a misrepresentation action involving fraudulent marketing of direct claims to doctors, a plaintiff TPP [third party payor] or class . . . cannot rely on aggregate or statistical proof.").

329. *See, e.g.*, Cooper v. Bristol-Myers Squibb Co., No. 07-885, 2009 WL 5206130, at *9 (D.N.J. Dec. 30, 2009) (noting evidence that called into question claims of the superior efficacy of Plavix (clopidogrel) over aspirin, but dismissing the case because the plaintiff had "fail[ed] to identify any specific advertisements he viewed, how he was misled by these advertisements, [or] how these advertisements affected his prescription for Plavix"); S. Ill. Laborers' & Emp'rs Health & Welfare Fund v. Pfizer, Inc., No. 08–5175, 2009 WL 3151807, at *5-6 (S.D.N.Y. Sept. 30, 2009) (dismissing a class action suit alleging the fraudulent overstatement of the efficacy of Lipitor (atorvastatin) on the ground that plaintiffs failed to adequately allege causation and therefore they lacked standing); *but cf.* In re Warfarin Sodium Antitrust Litig., 391 F.3d 516, 521-22 (3d Cir. 2004) (approving $44.5 million class action settlement following allegations that DuPont falsely claimed Coumadin (warfarin) was more effective than Barr's generic warfarin).

Pfizer, for example, a putative nationwide class of eleven third-party payers brought suit against Pfizer alleging that it had overstated the efficacy of its cholesterol-lowering drug Lipitor (atorvastatin), by promoting its use in patient groups in which Pfizer allegedly knew the drug would not be effective.[330] The payers alleged that they had sustained "economic loss as a result of paying [on behalf of their beneficiaries] for Lipitor instead of cheaper, safer, and equally effective courses of treatment."[331] The court dismissed claims brought under the federal Racketeer Influenced and Corrupt Organizations Act (RICO)[332] on the ground that the plaintiffs lacked standing; standing under RICO can be established only by showing that the RICO violation caused the injury.[333] Although plaintiffs alleged that Pfizer made misrepresentations to both physicians and Pharmacy Benefit Decision Makers (PBDMs), the plaintiffs did not specifically allege that the physicians or PBDMs relied on those representations in making their decisions to prescribe Lipitor (atorvastatin) or include it on a formulary, respectively. State law claims brought under the consumer protection laws of Ohio, Texas, and New Jersey were also dismissed because plaintiffs were not "consumers" as required to bring suit under those laws.[334] Other courts have dismissed efficacy fraud cases on similar reasoning.[335]

D. Lawsuits by State Attorneys General Alleging Fraud

State governments have also actively sought to protect their citizens from the economic harms that result from fraudulent overstatements of drug efficacy, but have encountered significant roadblocks. In 2011, the Attorney General of Michigan sought to recover up to the $20 million that the state had spent on Vioxx (rofecoxib) via its Medicaid program, arguing that it would not have spent that amount had Merck not made exaggerated efficacy (and safety) claims.[336] The

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330. *S. Ill. Laborers' & Emp'rs Health & Welfare Fund*, 2009 WL 3151807, at *1.

331. *Id.* at *5.

332. Organized Crime Control Act of 1970, Pub. L. No. 91-452, 84 Stat. 941, 941–48 (1970) (codified as amended at 18 U.S.C. §§ 1961-1968 (2013)).

333. *S. Ill. Laborers' & Emp'rs Health & Welfare Fund*, 2009 WL 3151807, at *4.

334. *Id.* at *8-10.

335. *See, e.g.*, *In re* Bextra & Celebrex Mktg., Sales Practices & Prod. Liab. Litig., No. 05–CV–01699, 2012 WL 3154957, at *8 (N.D. Cal. Aug. 2, 2012); *In re* Yasmin & Yaz (Drospirenone) Mktg., Sales Practices & Prods. Liab. Litig., Nos. 3:09-md-02100-DRH-PMF, 3:0-cv-20071-DRH-PMF, 2010 WL 3119499, at *7-8 (S.D. Ill. Aug. 5, 2010); Pa. Emp. Benefit Trust Fund v. Zeneca, Inc., 710 F. Supp. 2d 458, 480 (D. Del. 2010) (dismissing claims based on allegation that Zeneca had falsely portrayed Nexium (esomeprazole) as superior to Prilosec (omeprazole), because plaintiff third party payers failed to allege reliance on the allegedly false statements); *In re* Actimmune Mktg. Litig., 614 F. Supp. 2d 1037, 1052 (N.D. Cal. 2009) (dismissing claims because plaintiff consumers and insurance companies failed to allege that they, doctors, or any third party relied on the alleged misrepresentations of the efficacy of Actimmune (interferon gamma-1b)).

336. Attorney Gen. v. Merck Sharp & Dohme Corp., 807 N.W.2d 343, 344 (Mich. Ct. App.

appeals court, however, held that Merck was immune from liability under a state law that exempted drug companies from products liability suits regarding FDA-approved drugs.[337] One judge dissented, arguing that the statutory immunity was intended to protect drug manufacturers only from suits based on defective products, and that the economic loss suffered by the state did not meet this definition.[338] The majority, however, countered that "product liability" suits include those that involve allegations of "damage to property," and that damage to property included the economic losses stemming from the state's Medicaid reimbursement policies.[339] Merck thus prevailed not because its claims of efficacy were accurate, nor because the state did not sustain any loss, but because of the broad interpretation given by the court to a state law that was intended to exempt drug manufacturers from product liability suits where the drug in question had been FDA-approved. Perhaps in an attempt to assuage judicial guilt for what it feared might be perceived as an unjust result, the majority offered meekly that "[i]f the plain language of the statute results in an outcome that the Legislature now deems improper, it is for the Legislature, not this Court, to narrow the application of the statute by amending or redrafting its terms."[340]

Other lawsuits by state attorneys general have met with greater but hardly overwhelming success. In 2012, the attorney general of Texas brought a suit against Janssen Pharmaceutical alleging that the company overstated the effectiveness of the antipsychotic Risperdal (risperidone), among other charges.[341] In the middle of a four-week trial that produced testimony unflattering to Janssen, the company settled for $158 million, though the majority of this amount can likely be attributed to issues of safety rather than efficacy (the drug company had reportedly chosen not to publish three studies suggesting a possible link between Risperdal use and diabetes, among other things).[342] A 2006 suit by the attorney general of West Virginia alleging deceptive overstatements of efficacy for the antipsychotic Zyprexa (olanzapine)[343] was settled in 2009 for $22.5 million. As with the Risperdal (risperidone) settlement, much of the $22.5 million may be attributable to allegations that Eli Lilly withheld side effect information and encouraged sales for unapproved uses, rather than for efficacy-related claims.

2011).

337. *Id*. at 345.

338. *Id.* at 353 (Fitzgerald, J., dissenting).

339. *Id.* at 349 (majority opinion).

340. *Id.* at 350.

341. Tim Eaton, *State Attorney General Sues Drug Company*, STATESMAN, Jan. 8, 2012, http://www.statesman.com/news/news/state-regional/state-attorney-general-sues-drug-company-1/nRjZR/, *archived at* http://perma.cc/3NEN-SKGF.

342. Jef Feeley et al., *J&J to Pay $158M to Settle Texas Drug Case*, BLOOMBERG, Jan. 19, 2012, www.bloomberg.com/news/2012-01-19/johnson-johnson-to-pay-158-million-to-settle-texas-risperdal-drug-case.html.

343. Steve Korris, *AG Sues Drug Company for Fraud*, WEST VIRGINIA RECORD, Mar. 23, 2006, http://wvrecord.com/news/176601-ag-sues-drug-company-for-fraud, *archived at* http://perma.cc/L9CE-6DSZ.

Lilly admitted no wrongdoing.[344]

E. Lawsuits by Competitors Alleging Fraud

Competitors may also serve as a check against false or misleading claims that overstate a drug's efficacy. One such case pitted McNeil, the maker of Extra Strength Tylenol (1000 mg acetaminophen), against Bristol-Myers Squibb (BMS), the maker of Aspirin Free Excedrin (1000 mg acetaminophen combined with 130 mg caffeine).[345] At the time of the litigation, BMS planned to spend $10 million in an advertising campaign that touted Excedrin as more effective than Tylenol (acetaminophen).[346] Since both products contained identical amounts of acetaminophen, a pain reliever, the only difference in active ingredients was the presence in Aspirin Free Excedrin of 130 mg of caffeine. The court considered it "well settled by the FDA that caffeine acting alone is *not* effective in relieving headache pain," but noted that the FDA had not determined whether caffeine might be effective as an adjuvant, that is, a substance that is not effective itself but that increases the efficacy of the primary active pharmaceutical ingredient.[347] The court ultimately found the claims of Excedrin's (acetaminophen; caffeine) superiority over Tylenol (acetaminophen) to be literally false, and enjoined the advertising campaign.[348]

Other Lanham Act cases in the pharmaceuticals market have reached similar outcomes.[349] In another case involving Tylenol (acetaminophen), the Second Circuit upheld the district court's finding that claims of superiority of Anacin (aspirin; caffeine) over Tylenol (acetaminophen) were false.[350] Similarly, when the makers of competing heartburn medications Pepcid (famotidine) and Tagamet (cimetidine) sued each other for false claims of superiority, the court enjoined both parties' advertisements on the basis that they were false or misleading.[351] In another heartburn case, the Second Circuit found false or misleading claims by Procter & Gamble that Prilosec (omeprazole) provided relief for twenty-four

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344. Margaret Cronin Frisk et al., *Lilly to Pay $22.5 Million to Settle Zyprexa Suit (Update 3)*, BLOOMBERG, Aug. 20, 2009, http://www.bloomberg.com/apps/news?pid=newsarchive&sid=a8IVc794lcs4, *archived at* http://perma.cc/6UGJ-NXX9.

345. McNeil-P.P.C., Inc. v. Bristol-Myers Squibb Co., 755 F. Supp. 1206, 1207-08 (S.D.N.Y. 1990), *aff'd*, 938 F.2d 1544 (2d Cir. 1991).

346. *Id.* at 1208.

347. *Id.* at 1211-12 (citing 42 Fed. Reg. 35,482 (1977)).

348. *Id.* at 1219.

349. *See generally* I. Scott Bass & Stacey Hallerman, *Prescription Drug Advertising Under the Lanham Act*, 83 TRADEMARK REP. 521 (1993).

350. Am. Home Prods. Corp. v. Johnson & Johnson, 577 F.2d 160, 170 (2d Cir. 1978).

351. SmithKline Beecham Consumer Healthcare, L.P. v. Johnson & Johnson-Merck Consumer Pharms. Co., 906 F. Supp. 178, 183-86, 188 (S.D.N.Y. 1995); *see also* SmithKline Beecham Consumer Healthcare L.P. v. Johnson & Johnson-Merck Consumer Pharms. Co., No. 01 Civ. 2775(DAB), 2001 WL 588846, at *13 (S.D.N.Y. June 1, 2001) (Tums and Pepcid Complete).

hours.[352] And in a case by the predecessor of AstraZeneca against Eli Lilly, the court found claims that Lilly's Evista (raloxifene) reduced the risk of breast cancer to be "literally false."[353]

Rather than making explicit claims of superiority, companies sometimes take a more nuanced approach by seeking to convey a message of superiority by implication. In one contested television advertisement for the pain medication Aleve (naproxen), a narrator stated: "It [Aleve] lasts longer than EXTRA–STRENGTH TYLENOL. ADVIL isn't stronger, yet ALEVE is gentler to your stomach lining than aspirin."[354] As these words are spoken, the television viewer sees a visual of a medicine cabinet with the three competitor drugs, and each one is discarded as it is referred to.[355] The obvious implication is that Aleve (naproxen) is better than Advil (ibuprofen), Tylenol (acetaminophen), and aspirin, but a careful listener would notice that no claim of superiority to Advil (ibuprofen) was actually made, the only statement being that "ADVIL isn't stronger." The court held that, under Third Circuit precedent, there could be no liability for intent to mislead unless the defendant's conduct rose to "egregious proportions," which the court did not find to be present.[356]

Cases brought by competitors therefore appear to be among the most successful in checking exaggerated claims of efficacy. This success, however, is generally limited to checking claims of comparative, rather than absolute, efficacy. While these lawsuits may therefore represent a gain for one competitor or another, consumers can still be left with the impression that both medicines are more effective in absolute terms than they actually are. More importantly, a review of the cases just cited reveals that they address only over-the-counter products. The general absence of comparative efficacy litigation among sponsors of prescription drugs suggests that litigation is not having a substantial salutary effect on misleading claims for this class of drugs.

F. Antitrust Actions

Fraud may be the most likely legal doctrine to assail false claims of pharmaceutical efficacy, but it is not the only one. Antitrust law also provides a possible means for redress, at least where a defendant has attempted to obtain or maintain a monopoly position through unfair means. In *Walgreen Company v. AstraZeneca Pharmaceuticals*, Walgreen, Eckerd, Rite Aid, and other retailers alleged that AstraZeneca had attempted to monopolize the market, in violation of Section 2 of the Sherman Act, by "us[ing] distortion in its efforts to persuade

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352. Johnson & Johnson-Merck Consumer Pharms. Co. v. Procter & Gamble Co., 90 Fed. App'x 8, at *9 (2d Cir. 2003).

353. Zeneca Inc. v. Eli Lilly & Co., No. 99 Civ. 1452(JGK), No. 99 CIV. 1452(JGK), 1999 WL 509471, at *43 (S.D.N.Y. July 19, 1999).

354. Am. Home Prods. Corp. v. Procter & Gamble Co., 871 F. Supp. 739, 745-46 (D.N.J. 1994).

355. *Id.*

356. *Id.* at 751-52.

doctors . . . that Nexium offered advantages to Prilosec and in its advertising directed to lay persons."[357] As with the alleged efficacy-related fraud cases above, however, the court dismissed the claim, noting that the antitrust laws do not prohibit "market switching through sales persuasion" absent allegations of false representation or fraud.[358] In dismissing the antitrust claim, the *Walgreen* court noted that "[c]ourts and juries are not tasked with determining which product among several is superior."[359] The issue thus devolved to one of fraud, as in the cases above, and in this regard the court noted that "Plaintiffs cannot hope to make such a showing [of reliance] because Nexium sales necessarily depended on prescriptions written by medical professionals."[360] In other words, the learned intermediary doctrine once again barred recovery. Another district court dismissed a similar Sherman Act counterclaim brought by a generic drug manufacturer that sought to compete with AstraZeneca.[361]

G. Synthesis of Litigation and Implications

An examination of cases alleging fraudulent overstatement of efficacy reveals that the large majority of these cases have been dismissed, not because the drugs were found to in fact be very effective or even because plaintiffs did not experience a loss, but because plaintiffs did not adequately allege that the overstatements of efficacy *caused* the economic harm that resulted.[362] The clear message from the judiciary is that the various plaintiffs could not prove that they would not have purchased or reimbursed the drug, but for the statements of the manufacturer.

Legally, this outcome is understandable, even if not inevitable. If an action did not cause an adverse outcome, then the actor cannot be held responsible. What the cases fail to adequately answer, however, is the puzzling question of why the plaintiffs did not adequately allege causation, a traditional and well-known element of any fraud claim.[363] The failure of plaintiffs is all the more

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357. Walgreen Co. v. AstraZeneca Pharms. L.P., 534 F. Supp. 2d 146, 152 (D.D.C. 2008).

358. *Id.*

359. *Id.* at 151.

360. *Id.* at 152.

361. AstraZeneca AB v. Mylan Labs., Inc., Nos. 00 Civ. 6749, 03 Civ. 6057, 2010 WL 2079722, at *7 (S.D.N.Y. May 19, 2010).

362. *See* Joseph J. Leghorn, *Defending an Emerging Threat: Consumer Fraud Class Action Suits in Pharmaceutical and Medical Device Products-Based Litigation*, 61 FOOD & DRUG L.J. 519, 520 (2006) (noting four principal bases of dismissal of consumer fraud class action suits against pharmaceutical companies: "1) challenging standing to sue; 2) summoning the protections of [state consumer protection act] 'safe harbor' provisions; 3) asserting preemption under the Food, Drug, and Cosmetic Act (FDCA) . . . and 4) invoking the learned intermediary doctrine.").

363. *See, e.g.*, Kevin M. Ehringer Enters., Inc. v. McData Servs. Corp., 646 F.3d 321, 325 (5th Cir. 2011) ("To state a claim for fraudulent inducement under Texas law, a plaintiff must prove the basic elements of fraud: (1) a material misrepresentation; (2) that is false; (3) when the defendant made the representation, the defendant knew it was false or made the statement without any

puzzling in later cases, when attorneys were presumably aware of the earlier opinions where judges had emphasized the need for alleging causation in this particular context.

The seeming mystery, however, has an obvious explanation. Plaintiffs cannot allege that the defendant's misrepresentations caused the *plaintiff* (as opposed to his doctor) to rely to his detriment, because such reliance is barred by the learned intermediary doctrine.[364] In the words of one court:

> Even if [the plaintiffs] had offered evidence indicating that they had relied in some way on Defendants' misrepresentations, it would ultimately be of no consequence. The learned intermediary breaks the chain in terms of reliance, since the patient cannot obtain prescription drugs without the physician no matter what they believe about them.[365]

Therefore, in order to adequately allege causation, a plaintiff has to establish that the doctor who prescribed the medication would not have done so if that doctor had not viewed the television advertisements of (or other communications from) the manufacturer. The court must then be willing to allow a fraud claim to proceed based upon reliance by one party (the doctor) that caused harm to another party (the patient or insurance company). Fraud claims traditionally require reliance by the same party that experiences the loss,[366] but in the learned intermediary context, courts seem willing to flexibly apply the elements of fraud to allow recovery.[367]

The stumbling block, however, is that it is not easy for a physician to admit reliance, because to do so would be to admit that the principal reason she prescribed a drug was that she had recently viewed a television advertisement or other promotional material. Professional pride and the need to project an aura of competence in order to maintain an effective doctor-patient relationship make such a statement awkward at best. In addition, if causation derives not from a single discrete event, but rather from the accumulation of a number of communications that come to the doctor both directly and indirectly over a period of time, it may be difficult for the doctor to precisely determine which particular communication or communications caused her to prescribe, issues of professional image aside.

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knowledge of its truth; (4) the defendant intended the plaintiff to rely on the representation, and the plaintiff actually relied on the representation; and (5) the defendant's actions caused an injury.").

364. Heindel v. Pfizer Inc., 381 F. Supp. 2d 364, 384 (D.N.J. 2004).

365. *Id*.

366. *See, e.g.*, Mason v. Threshman, No. 3:12cv259, 2012 WL 3696177, at *4 (M.D. Pa. Aug. 27, 2012); Guiggey v. Bombardier, 615 A.2d 1169, 1173 (Me. 1992).

367. *See, e.g.*, *In re* Avandia Mktg., Sales Practices & Prods. Liab. Litig., No. 10-2401, 2011 WL 4006639, at *2 (E.D. Pa. Sept. 7, 2011); Lee v. Mylan, Inc., 806 F. Supp. 2d 1320, 1323-24 (M.D. Ga. 2011); Kline v. Pfizer, Inc., No. 08-3238, 2008 WL 4787577, at *3 (E.D. Pa. Oct. 31, 2008).

CONCLUSION

Patients, doctors, insurance companies, government regulators, and courts make poor gatekeepers for a variety of reasons, including lack of information, soft corruption, lack of financial incentives, and lack of statutory mandate. Part of the problem, however, ironically lies in the simple fact that there are so many regulators that responsibility becomes complex or even unclear; each potential gatekeeper assumes that the others are either individually or collectively performing the gatekeeper role. The FDA, for example, screens out drugs whose risks are not offset by sufficient efficacy or who have absolutely no efficacy at all, but otherwise assumes that patients and their doctors will determine whether a drug is worth using.[368] Similarly, the PTO issues patents on drugs (or any invention) that can meet the extremely minimal utility hurdle, leaving it to "the market" to weed out low value inventions.[369] Patients and doctors are willing to try anything that might work, so long as the risks are not too high, and assume that the FDA has done its job in only allowing sufficiently effective drugs onto the market.[370] Insurance companies may have a financial interest in preventing the consumption of ineffective drugs when cheaper alternatives would do as well, but cannot intrude too far into the physician (or patient) arena without risking a significant publicity backlash.[371] It is a complex web in which the buck is passed once and passed again but never settles with any one party. Regardless of responsibility or blame, however, it is ultimately the public that suffers.

368. *See supra* Part III.B.
369. *See supra* Part III.A.
370. *See supra* Part I.C.
371. *See supra* Part I.B.

LOCHNER, LIBERTY OF CONTRACT, AND PATERNALISM: REVISING THE REVISIONISTS? REVIEW ESSAY: DAVID N. MAYER, LIBERTY OF CONTRACT: REDISCOVERING A LOST CONSTITUTIONAL RIGHT[1]

HARRY G. HUTCHISON*

INTRODUCTION

> "Given the principle of freedom, as active freedom of association, the notion of scientific control of society is a palpable contradiction. . . ."[2]

More than "[o]ne hundred years after the Supreme Court invalidated a law regulating bakers' working hours as a violation of liberty of contract in *Lochner v. New York*,[3] the case and its legacy are at the forefront" of constitutional debates.[4] Liberals and conservatives continue to gain tenure by condemning controversial decisions that fail to reify their preferences as nothing more than a form of Lochnerian analysis.[5] The demonization of *Lochner* and its corresponding substantive due process[6] doctrine is built on the foundational claim

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1. DAVID N. MAYER, LIBERTY OF CONTRACT: REDISCOVERING A LOST CONSTITUTIONAL RIGHT (2011).

* Professor of Law, George Mason University School of Law. For helpful comments on earlier drafts, I am grateful to Elizabeth McKay, David Bernstein, Nathan Drake, and Logan Sawyer. The theme of this Article benefited from Nelson Lund's comments as well as a conversation with the members of the Joseph and Linda Cadariu Trust.

2. PETER J. BOETTKE, LIVING ECONOMICS: YESTERDAY, TODAY, AND TOMORROW 42 (2012) (quoting Frank H. Knight, *The Role of Principles in Economics and Politics*, SELECTED ESSAYS OF FRANK H. KNIGHT 361-91 (Ross Emmett ed., vol. 2, 1999)).

3. 198 U.S. 45 (1905).

4. David E. Bernstein, Lochner v. New York*: A Centennial Retrospective*, 83 WASH. U. L.Q., 1469, 1469 (2005) [hereinafter Bernstein, Lochner*: A Centennial Retrospective*]. *See also* Harry G. Hutchison, *Achieving Our Future in the Age of Obama?:* Lochner*, Progressive Constitutionalism, and African-American Progress*, 16 J. GENDER RACE & JUST. 483, 485 (2013) [hereinafter Hutchison, *Achieving Our Future in the Age of Obama*].

5. *See*, *e.g.*, Robert P. George, *Judicial Usurpation and the Constitution: Historical and Contemporary Issues*, 871 HERITAGE FOUND. LECTURES, Apr. 11, 2005, at 5 (characterizing the Court's decision in Lawrence v. Texas, 539 U. S. 558 (2003) as a form of 'Lochnerizing'); Cass R. Sunstein, *What if Bush Wins? Hoover's Court Rides Again*, WASH. MONTHLY, Sept. 2004, at 27, 35-36 (warning that a nascent conservative movement that aims to revive *Lochner* is on the horizon).

6. For a definition of substantive due process, see, e.g., Timothy Sandefur, *In Defense of Substantive Due Process, or the Promise of Lawful Rule*, 35 HARV. J.L. & PUB. POL'Y 283, 314 (2012) (defining substantive due process as follows: "In short, a lawful act is one the ruler is authorized to adopt or enforce. One must therefore inquire into the lawmaker's authority and the

that the New York law at issue protects vulnerable people.[7] Demonization is not new.[8]

According to the prevailing myth propagated by Progressives and New Dealers—and widely accepted today—Supreme Court Justices of the Lochner period, influenced by pernicious Social Darwinist ideology, sought to impose their laissez-faire views on the American polity through a tendentious interpretation of the Due Process Clause of the Fourteenth Amendment.[9] Condemning what they perceived as an egregious instance of "judicial activism," the doyens of the Progressive Movement asserted that judges, driven by their own policy preferences, made "new law rather than interpreting and applying existing rules of law."[10]

In reality, a skeptical examination of the period from *Plessy v. Ferguson to New Deal Labor Law* shows that Social Darwinism originated within the domain of progressive thought itself.[11] Consistent with anti-creedal trends emerging during the latter half of the nineteenth century and surfacing during the twentieth century, "Progress," on this view, was "not an accident, but a necessity. Surely must evil and immorality disappear; surely must men become perfect."[12] Hence, the cultural conversion of a society that featured natural rights[13] into one that fostered a new social and moral imperative grounded in science appeared both unstoppable and desirable.[14] Consistent with legal theories emanating from the early part of the nineteenth century and later amplified by legal positivists such as Hans Kelsen, this "new" state would not be susceptible to any limitation not imposed by itself, and, hence, any restriction upon it could not be derived validly from an external source since this would imply a diminution of its authority.[15]

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limits on that authority, both procedural and substantive, to determine whether an act satisfies the due process of law guarantee. When a government act exceeds the government's authority—due to a procedural shortcoming, a substantive violation, a logical contradiction, or any other flaw—that act cannot qualify as law, and thus any attempt to enforce it constitutes arbitrary or lawless action.").

7. *See*, *e.g.*, Louise Weinberg, *Holmes' Failure*, 96 MICH. L. REV. 691, 714 (1997) [hereinafter Weinberg, *Holmes' Failure*].

8. Bernstein, Lochner*: A Centennial Retrospective, supra* note 4, at 1470.

9. *Id.* at 1470-71.

10. MAYER, *supra* note 1, at 2.

11. *See*, *e.g.*, Harry G. Hutchison, *Waging War on the "Unfit"? From Plessy v. Ferguson to New Deal Labor Law,* 7 STAN. J. C.R. & C.L. 1, 5 (2011) [hereinafter Hutchison, *Waging War on the "Unfit"*].

12. PHILLIP RIEFF, THE TRIUMPH OF THE THERAPEUTIC: USES OF FAITH AFTER FREUD, 5 (40th Anniversary ed. 2006) (quoting Herbert Spencer in HERBERT SPENCER, SOCIAL STATICS 32 (London, 1892)).

13. *See*, *e.g.*, Randy E. Barnett, *Does the Constitution Protect Economic Liberty?*, 35 HARV. J.L. & PUB. POL'Y 5, 6-7 (2012) (claiming that the original public meaning of the Constitution suggests that people have certain natural rights).

14. RIEFF, *supra* note 12, at 5-6.

15. Bruce P. Frohnen*, Is Constitutionalism Liberal?*, 33 CAMPBELL L. REV. 529, 539 (2011)

Signifying their commitment to quasi-science and its consequent mandate favoring the elimination of all forms of imperfection in society, Progressives of various stripes[16] were at the forefront of a reform movement infected with biological determinism that gave rise to a variety of abhorrent developments, as richly illustrated by the life and times of Carrie Buck.[17] On one hand, progressive believers in Social Darwinism foresaw the future as inevitably governed by the laws of evolution and heredity.[18] "On the other, they worried whether the inevitable outcome of history that they foresaw could come about without their intervention."[19] Primed to facilitate this preordained outcome, members of the progressive vanguard denigrated the economic and social liberties of women, blacks, and immigrants as groups that were seen as unworthy of uplift.[20] Rightly appreciated, the demonization of *Lochner* has often supplied a convenient trope that has sheltered progressive paternalism and its consequences from critical review.

Bruiting below the surface of constitutional debates is the noticeable fact that we live in a "late modern, post-secular world."[21] Late modern post-secularity finds expression through an intensifying and unstable pluralism that signifies a dazed, confounding, and confused cultural milieu.[22] "This pluralism is particularly challenging and unsettling because it not only raises the specter of difference, but deep 'moral and metaphysical differences' that implicate how communities understand the nature of humanity and indeed the cosmos."[23] This claim signifies that radical differences within the community of scholars about the

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(suggesting such currents are supported by Supreme Court decision-making during the early nineteenth century).

16. It is worth pointing out though that there was a significant difference between being someone whose political views were in line with at least the more conservative aspects of the Progressive movement, which after all dominated American politics in the early twentieth century, and being someone who wholeheartedly adopted the Progressive vision of constitutional law, which involved replacing the natural rights tradition of inherent limits on government power with the "Living Constitution." I am indebted to David Bernstein for this clarification. *See* Email from David E. Bernstein, George Mason Univ. Found. Professor, to Harry G. Hutchinson, October 29, 2012 (on file with the author).

17. Hutchison, *Waging War on the "Unfit," supra* note 11, at 3-6 (describing the state-sponsored effort to remove Carrie Buck's reproductive capacity as an appropriate way to eliminate "unfit" people).

18. *Id.* at 5.

19. *Id.* at 5-6.

20. David E. Bernstein & Thomas C. Leonard, *Excluding Unfit Workers: Social Control Versus Social Justice in the Age of Economic Reform*, 72 LAW & CONTEMP. PROBS. 177, 177-80 (2009).

21. James Davison Hunter, *Law, Religion, and the Common Good*, 39 PEPP. L. REV. 1065, 1069 (2013).

22. *Id*. at 1068-69; *see also* Zachary R. Calo, *Faithful Presence and Theological Jurisprudence: A Response to James Davison Hunter*, 39 PEPP. L. REV. 1083, 1083-84 (2013).

23. Calo, *supra* note 22, at 1084.

meaning of *Lochner* and its progeny may be difficult to resolve, which gives rise to a quandary that "tests 'the limits of tolerable diversity'" of opinion.[24] Correspondingly, attaining a consensus about the meaning of liberty of contract as an aspect of basic liberty and as a fundamental right derived from the Due Process Clauses of the Fifth and Fourteenth Amendments[25] that is restrained by a valid exercise of the police power may be impossible.[26] Indeed, even if one accepts the proposition that "the due process of law guarantee is an effort—one with deep roots in the history of western civilization—to reduce the power of the state to a comprehensible, rational, and principled order, and to ensure that citizens are not deprived of life, liberty, or property except for *good reason*[,]" it is probable, nonetheless, that this claim gives rise to all sorts of normative questions, not least being the contested possibility that courts and legal scholars are willing to take seriously the idea that there are real answers to such normative questions.[27] These various contentions reverberate within the legal academy, irrespective of whether or not the *Lochner* decision can be defended as a valid exercise of judicial discretion[28] that safeguarded a constitutional rule securing the rights of individuals to freely enter into contracts against attempts by government to arbitrarily exercise its power. The domain of government has ballooned as human selfishness and solipsism have waxed, and self-control, community, and self-reliance have waned.[29] This gives rise to a nation of narcissists who are unable to control their own impulses and desires, either individually or collectively.[30] "A nation of narcissists turns out to be a nation of gamblers and speculators . . . and Ponzi schemers, in which household debt rises alongside public debt, and bankers and pensioners and automakers and unions all compete to empty the public trough."[31] This formulation yields a nation wherein limitless appetites spur unlimited government.

Given the resilience of the opposition to liberty of contract, a doctrine that is epitomized by *Lochner*, and in light of a renaissance in revisionist scholarship that defends the *Lochner* Court, a development that coincides with a sharp rise in America's public debt, it is an opportune time to review David Mayer's contribution to the literature surrounding *Lochner.* In his new book, *Liberty of Contract: Rediscovering A Lost Constitutional Right*, Mayer maintains that the Court during the *Lochner* era was protecting liberty of contract as a fundamental right rather than enacting laissez-faire constitutionalism, as Justice Holmes and

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24. *See id.* (quoting Hunter, *supra* note 21, at 1077).

25. MAYER, *supra* note 1, at 1.

26. *See* Calo, *supra* note 22, at 1087.

27. Sandefur, *supra* note 6, at 285.

28. *See* Nathan S. Chapman & Michael W. McConnell, *Due Process as Separation of Powers*, 121 YALE L.J. 1672, 1793-94 (2012) (showing that neither the *Lochner* majority nor the dissent "squares with anything resembling the original understanding of due process").

29. ROSS DOUTHAT, BAD RELIGION: HOW WE BECAME A NATION OF HERETICS 235 (2012).

30. *Id*.

31. *Id*.

his intellectual heirs supposed.[32] Coherent with David Bernstein's mettlesome scholarship, Mayer unravels the myth of "laissez-faire constitutionalism," a fable that has often contaminated critiques of *Lochner* era Supreme Court decisions that nullified various state and federal laws that abridged the liberty of contract.[33] The Court's respect for the jurisprudential doctrine of liberty of contract made possible the invalidation of laws that abridged individuals' "freedom to bargain over the terms of their own contracts—maximum-hours laws, minimum wage laws, business licensing laws, housing-segregation laws, and compulsory education laws."[34] At the same time, this form of jurisprudence could not be isolated from its cultural milieu, and, hence, it often proved thoroughly ineffective when it came to protecting women from state-ordered sterilization[35] or African Americans from New Deal innovation that expunged them from the workforce.[36] On this score, Mayer neglects to adequately explain the Court's failure to consistently apply liberty of contract jurisprudence. Regardless of how defensible liberty of contract may be, and no matter how under-theorized the opposition to substantive due process may seem, it is possible that decisions seen as part of the freedom of contract canon were actually not inconsistent, on close inspection, with more moderate forms of progressive thought that, nonetheless, cultivated paternalism.[37] Consequently, neither the demonization of *Lochner* nor its path-breaking defense by revisionist scholars prevents this decision and its offspring from being seen as part of a global progressive consensus that led to the expansion of the modern regulatory state at both the state and federal levels.[38]

Part I of this Article sets forth Mayer's elucidation of the liberty of contract doctrine and his effort to distinguish *Lochner* from laissez-faire constitutionalism. This section also considers the efficacy of liberty of contract dogma in the context of progressive reform efforts. Part II examines the meaning and durability of this disputed doctrine, which protected individualism against its mortal enemy: majoritarian paternalism.[39] Building upon Professor Sawyer's exposition of *Hammer v. Dagenhart* and the Court's application of the harmless items doctrine,

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32. MAYER, *supra* note 1, at 115.

33. *Id.* at 1.

34. *Id.*

35. *See*, *e.g.*, Buck v. Bell, 274 U. S. 200, 207 (1927) (agreeing that the state had the right to eviscerate the reproductive capacity of certain women that the state arbitrarily classified as defective).

36. *See generally* Hutchison, *Waging War on the "Unfit," supra* note 11, at 1-46.

37. *See*, *e.g.*, Logan E. Sawyer III, *Creating* Hammer v. Dagenhart, WM. & MARY BILL RTS. J. 67, 110-17 (2012).

38. *See id*. at 93-123 (elaborating on Knox's effort to create and defend the federal police power and the harmless items limit as the best way to allow the federal government to "solve problems created by the increasing integration of the national economy").

39. DAVID E. BERNSTEIN, REHABILITATING *LOCHNER*: DEFENDING INDIVIDUAL RIGHTS AGAINST PROGRESSIVE REFORM 44 (2011) [hereinafter BERNSTEIN, REHABILITATING *LOCHNER*] (explicating the intense opposition to individualism expressed by leading progressives and explaining progressives equally intense support for majoritarian paternalism).

a guideline conceived by one of America's most influential lawyers, Philander Knox, Part III offers a non-orthodox conception of the *Lochner* Court. This contrasting viewpoint suggests that the Court's *Lochner* era decision-making correlates with the nation's and the Court's capitulation toward paternalism and progressive values rather than with a firm defense of liberty. Despite the *Hammer* Court's application of the harmless items doctrine to constrain Congress's police power, this decision, regardless of its critics' claims, was part of a shrewd calculus that ultimately subordinated individual liberty to the needs of an increasingly interconnected nation. Thus appreciated, *Hammer* implicates any principled understanding of *Lochner*. This Article shows that; notwithstanding the elegance of liberty of contract jurisprudence and quite apart from whether *Lochner* squares with anything resembling an originalist understanding of due process, a proposition that Chapman and McConnell deny;[40] the emergence of today's welfare state, which resembles a dystopian reality richly symbolized by the manifestation of legions of "one percenters" who insist on occupying America's capital city,[41] was an unfortunate but predictable outcome.

I. LIBERTY OF CONTRACT: REDISCOVERING A LOST CONSTITUTIONAL RIGHT?

Mayer argues that

> For a period of exactly 40 years, from 1897 until 1937, the Supreme Court protected liberty of contract as a fundamental right, one aspect of the basic right to liberty safeguarded under the Constitution's due process clauses, which prohibits government—the federal government, under the Fifth Amendment, and states, under the Fourteenth Amendment—from depriving persons of "life, liberty, or property without due process of

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40. Chapman & McConnell, *supra* note 28, at 1793-94; *see also* Frohnen, *supra* note 15, at 531 (suggesting the contention that the Constitution necessarily protects natural rights to "life, liberty and the pursuit of happiness" as a Lockean formulation that is highly protective of property rights, constitutes an un-nuanced view of the origins and purpose of American constitutionalism). *But see* Barnett, *supra* note 13, at 5-12 (defending *Lochner* through an application of the Privileges or Immunities Clause); and Barry Cushman, *Ambiguities of Free Labor Revisited: The Convict-Labor Question in Progressive-Era New York, in* MAKING LEGAL HISTORY: ESSAYS ON THE INTERPRETATION OF LEGAL HISTORY IN HONOR OF WILLIAM E. NELSON 117 (R. B. Bernstein & Daniel J. Hulsebosch eds., 2013) [hereinafter Cushman, *Ambiguities of Free Labor*] (indicating that "late-nineteenth century jurists viewed the inherent right of freedom of contract as embracing 'the right to use and dispose of property'"). More generally, questions arise as to whether the original public meaning of the Constitution can be defended as a sufficient for human flourishing. *See, e.g.*, Patrick McKinley Brennan, *Two Cheers for the Constitution of the United States: A Response to Professor Lee J. Strang*, 80 FORDHAM L. REV. RES GESTAE 104, 104-05 (2012) (expressing only qualified supported for the focus on original intent, original meaning).

41. John H. Fund, *The One Percenters' Fortress City*, THE AMERICAN SPECTATOR, June 2012, *available at* http://spectator.org/articles/35535/one-percenters-fortress-city, *archived at* http://perma.cc/A33B-WJDW (the top one-half of one percent of counties in the United States, two-thirds of the total, is dominated by counties surrounding Washington, D.C.).

law."[42]

Professor Mayer considers a number of important questions. Is a bakery employee free to work as many hours as he and his employer agree to in order to earn more money to support his family?[43] Does a homeowner have the right to sell her home to whomever she wishes despite a city ordinance precluding the sale to someone of a different race?[44] Can an owner of a new business enter a market in order to compete with established companies?[45] Are parents free to send their children to private schools, and are private schools free to compete with government-funded schools?[46] Mayer demonstrates that, "[a]t one time in American history, the Supreme Court answered yes to each of the above questions" premised on an individual's "liberty of contract" interest.[47] In addition, Mayer examines the philosophical underpinnings of liberty of contract and the conflict between economic substantive due process and the goals of progressive reformers, particularly in the economic arena, in order to dispute the dominant narrative regarding the "lost constitutional right."[48]

A. Historical Foundations of Liberty of Contract

It is possible that economic substantive due process can be "grounded in such antebellum ideological concerns [such] as the aversion to factional politics" and "class legislation" or the free labor ideology that is traceable to both the anti-slavery movement, and the notion of "self-ownership, and particularly ownership of one's own labor."[49] In any case, this doctrine and its corresponding liberty of contract rule have sparked a blizzard of claims and counter-claims regarding the identification of this principle as a legitimate right that deserves judicial protection. Among the many contentions are claims suggesting that the framers of the Fourteenth Amendment anticipated that economic liberties should be protected under the Privileges or Immunities Clause of the Fourteenth Amendment rather than the Due Process Clause,[50] that post-Reconstruction cases

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42. MAYER, *supra* note 1, at 1.

43. *Id.*

44. *Id.*

45. *Id.*

46. *Id.*

47. *Id.*

48. *Id.* at 1-2.

49. *See, e.g.*, Barry Cushman, *Ambiguities of Free Labor*, *supra* note 40 (quoting *Revisited: The Convict-Labor Question in Progressive-Era New York* (abstract)), *forthcoming in* MAKING LEGAL HISTORY: ESSAYS ON THE INTERPRETATION OF LEGAL HISTORY IN HONOR OF WILLIAM E. NELSON (R. B. Bernstein & Daniel J. Hulsebosch eds., 2012), *available at* http://ssrn.com/abstract=1807114 [hereinafter Cushman, *Ambiguities of Free Labor*]. Evidently, factional politics and class legislation generate unjustified special benefits for favored groups and individuals. *See id.*

50. *See, e.g.*, Kurt Lash, *The Constitutional Convention of 1937: The Original Meaning of the New Jurisprudential Deal*, 70 FORDHAM L. REV. 459, 464 (2001).

may exonerate *Lochner* of the charge of being unprecedented,[51] or that New Deal Justices appointed to end liberty of contract jurisprudence did so by emphasizing the constitutional text, and an interpretive method based upon the original meaning of the Constitution.[52] Nevertheless, the prevailing narrative emphasizes more orthodox claims. Although it is true that some members of the Progressive vanguard, such as Roscoe Pound, disagreed with the orthodox position that liberty of contract analysis arose from the desire of individual judges to project "their 'personal, social and economic views into the law,'"[53] they nonetheless presumed the correctness of the equally orthodox view that liberty of contract analysis was simply a new doctrine that appeared suddenly in late-nineteenth century jurisprudence.[54] Mayer shows that these claims were mistaken.[55]

First, Mayer densely examines the history of liberty of contract in order to illustrate that the application of this doctrine to state and federal legislation was not a newfangled effort. He demonstrates that substantive due process originated in two well-established precedents in American constitutional law: "the protection of economic liberty and property rights through . . . the U.S. Constitution's due process clauses or equivalent provisions in state constitutions" and "the limitation of state police powers through the enforcement of certain Constitutional rules . . . ."[56] What was novel during the latter part of the nineteenth century was the judicial identification of these doctrines as the right of "liberty of contract" and the protection of this right through the Due Process Clauses of either the Fourteenth[57] or the Fifth Amendment.[58]

> Fourteenth Amendment due process cases raised three primary issues: whether the party challenging government regulatory authority had identified a legitimate right deserving of judicial protection; the extent to which the court should or should not presume that the government was acting within its inherent "police power"; and, finally, taking the decided-upon presumption into account, whether any infringement on a recognized right protected by the Due Process Clause was within the scope of the states' police power, or whether instead it was an arbitrary, and therefore unconstitutional, infringement on individual rights.[59]

Evidently, "[t]he concept of liberty thus was central to Anglo-American constitutional thought during the era of the American Revolution; indeed, it was

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51. Chapman & McConnell, *supra* note 28, at 1794 (noting that the existence of post-Reconstruction cases is irrelevant to any argument that *Lochner* was consistent with the original public understanding of the Constitution, whether in 1791 or in 1868).

52. Lash, *supra* note 50, at 478-80.

53. MAYER, *supra* note 1, at 11.

54. *Id.* at 11-12.

55. *Id.*

56. *Id.* at 11.

57. *Id.*

58. *Id.* at 3.

59. BERNSTEIN, REHABILITATING *LOCHNER*, *supra* note 39, at 3-4.

central to early American law."[60] Hence, constitutional protection of individual liberty, including economic liberty and the protection of private property rights, drew on cultural and legal currents percolating through the nation that predated the Constitution itself.[61] Congruent with these insights, and contrary to modern scholars who assert that substantive due process did not originate until the middle of the 19th century with the *Dred Scott* case,[62] the record suggests that American courts began to apply substantive due process shortly after the adoption of the Constitution itself.[63]

Second, featuring far-reaching limits on public or state power, and putatively rejecting paternalism,[64] the implementation of doctrines that favored the interests and pursuits of happiness by individuals became the paramount goal of the nation.[65] Largely influenced by English radical Whig opposition during the Revolution, liberty was theorized as something more than mere freedom to do what the law allows.[66] Rather, Patriot leaders perceived that liberty is a natural right of individuals to do what they will, provided they do not violate the equal right of others.[67] This intuition signifies that "what was truly radical about the American Revolution was that it made the protection of individual rights (including liberty in this broader sense as well as property rights) the test for government's legitimacy."[68] Unquestionably, early American law diverged from the ideals envisioned by late nineteenth century classical liberals or modern libertarians.[69] Nonetheless, advanced by the idea that allowing an individual to live upon one's own terms (as opposed to the state of "'[s]lavery', which is 'to live at the mere [m]ercy of another'"),[70] and consistent with Thomas Paine's freedom agenda,[71] it appears that early American law "deviated radically from the British paternalistic system by the degree to which it . . . promoted individual freedom."[72] Rather than reflecting the preferences of a compliant judiciary that

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60. MAYER, *supra* note 1, at 12.

61. *Id.*

62. *Id.* at 22 (disputing this view).

63. *Id.* at 20.

64. *Id.* at 13 ("The rejection of paternalism was manifest in many developments in Revolutionary-era society, among them the rise of contract law and even the ever-growing popularity of laissez-faire economics, perhaps best illustrated by the Philadelphia merchants' opposition to price controls in 1777-78.").

65. *Id.*

66. *Id.* at 12.

67. *Id.* (Apparently, the framers of early American constitutions "understood two critically important foundational principles: first, that the essential function of government was to protect the rights of individuals (including their right of liberty); and second, that the essential function of a constitution was to limit or control government power").

68. *Id.*

69. *Id.* at 13.

70. *Id.* at 15.

71. *Id.* at 14.

72. *Id.* at 13.

favored entrenched interests, this deviation from paternalism and the accompanying preference for liberty were deeply conceptualized so as to encompass the right to property consistent with the notion that, for eighteenth-century Americans, property and liberty were inseparable companions.[73] Without security for one's property, one could only live on the basis of another's sufferance.[74] When liberty of contract was applied, courts were prepared to dismiss deceptive attempts to shelter legislation under the guise of promoting public health or some other aspect of a jurisdiction's police power,[75] and this is so despite an apparent lack of explicit evidence that *Lochner* and its correlative substantive due process doctrine were consistent with the original public understanding of the Constitution, both in 1791 or when amended by the Fourteenth Amendment in 1868.[76]

B. Economic Substantive Due Process in the Mirror of Progressive Reform

Modern scholars repeatedly return to the contention that *Lochner* represents the promulgation of judicial policy preferences as part of the commitment of judges to "laissez-faire" constitutionalism and to the advancement of the interests of rich capitalists.[77] This perspective, "originat[ing] in the legal scholarship . . . [of] the Progressive Era", led to the emergence of Progressivism, a moderate-to-radical reform movement involving a diverse collection of Americans who shared the conviction that government at all levels should play a more active role in regulating the economic and social life of the nation.[78] Although Progressives saw themselves as leaders of a novel movement, Mayer verifies that "Progressivism was itself based on the paternalistic and collectivist threads that ran deeply through the Anglo-American common-law tradition."[79]

> Like the Fabian socialists, their counterparts in Britain, who harkened back to the "Tory paternalism" of the 18th century, American Progressives championed various "protective" labor laws (particularly regarding women, children, and other supposedly vulnerable classes of workers), liquor prohibition and other forms of morals legislation, and in general a category of laws called 'social legislation' by modern scholars.[80]

Social progress legislation posed a challenge to individuals who asserted that government regulation infringed upon their legitimate liberty rights.

Since liberty of contract was largely attached to the concept of economic

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73. *Id.* at 16.
74. *Id.* at 16-17.
75. *Id.* at 22-23.
76. Chapman & McConnell, *supra* note 28, at 1794.
77. MAYER, *supra* note1, at 2-3.
78. *Id.* at 3.
79. *Id.* at 55.
80. *Id.*

liberty, conflict between this right and the tenets of both the Progressive Movement and the New Deal was inevitable. Mayer shows that economic liberty could be broken down into the following categories:

> [F]irst, freedom of labor (including the freedom of both employers and employees to bargain over hours, wages, and other terms of their labor contracts); second, freedom to compete (including the freedom to pursue a lawful trade or occupation and to compete with others already in the market); and third, freedom of dealing (including the right of refusal to deal . . .).[81]

Identification of one or more these rights might be sufficient to limit government police power. Although Mayer neglects to sufficiently emphasize the highly paradoxical effects of Progressive reform efforts, it is important to establish such effects for the purposes of this Article. Notably, some Progressive scholars, taking their cues from prominent Fabians such as Sidney and Beatrice Webb, were provoked by the claim that "workers who received less than the 'living wage' and employers who paid less, were parasites."[82] Progressive leaders surrendering to the enticing deduction that "social progress is 'a higher law than equality,'" "proposed the 'eradication of the vicious and inefficient'"[83] in order to further society's advance. In concert with the paternalistic and social progress inclinations that prompted them to act, many Progressives followed the exclusionary direction supplied by eugenics, race science, and the pursuit of perfection.[84] Congruent with the observation that "the scientistic path led not only to a false picture of man and society, but also gave the impressions that social science could be an effective tool for social control,"[85] Progressive experts sought ways to regulate immigrant groups that they perceived to be hereditarily predisposed to low standards of living, as well as schemes to mitigate the possibility that Anglo-Saxon males, who they saw as more productive, would otherwise be displaced by "less productive" Chinese, African-American, and Jewish workers who they saw as racially inferior.[86] Embracing this tempting illogical position, as well as the interpenetration of scientism and paternalism, Progressives were goaded by the presumption that large numbers of inferior people might outbreed superior races.[87]

Social progress reformers sought to expand the size and scope of government by coupling blithe self-confidence in their own capacity to design effective

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81. *Id.* at 70.

82. Harry G. Hutchison, *Waging War on "Unemployables"? Race Low-Wage Work, and Minimum Wages: The New Evidence*, 29 HOFSTRA LAB. & EMP. L.J. 25, 41 (2011) [hereinafter Hutchison, *Waging War on "Unemployables"*].

83. Bernstein & Leonard, *supra* note 20, at 183-84 (quoting Simon N. Patten).

84. Hutchison, *Waging War on the "Unfit," supra* note 11, at 21.

85. BOETTKE, *supra* note 2, at 177 (discussing F. A. Hayek's criticism of scientism Hayek).

86. Hutchison, *Waging War on the "Unemployables," supra* note 82, at 41.

87. *Id.* at 41-42.

programs with a "dangerous faith in the benevolence of the state and its agents."[88] Straying from concepts such as the invisible hand or the insight that voluntary human exchange leads to a spontaneous, durable, and defensible social order,[89] the reformers' faith in the benevolence of the state was reinforced by a rising hostility toward "the individualist philosophy that [Progressives] perceived in the courts' protection of liberty of contract."[90] Learned Hand, a true believer in the Progressive Movement, was so distressed by judicial decisions that invalidated maximum-hours and minimum-wage legislation that he advocated the total repeal of the due process provisions of the Fifth and Fourteenth Amendments in order to deny courts the power to protect liberty of contract.[91]

Contempt for *Lochner* era jurisprudence was catalyzed by Justice Holmes's dissent in *Lochner*.[92] According to Holmes, the *Lochner* majority's decision was driven simply by their prior surrender to laissez-faire ideology, quite apart from the Constitution itself.[93] Per Holmes's account,

> [t]he word 'liberty,' in the 14th Amendment, is perverted when it is held to prevent the natural outcome of a dominant opinion, unless it can be said that a rational and fair man necessarily would admit that the statute proposed would infringe fundamental principles as they have been understood by the traditions of our people and the law.[94]

A principled reading of Holmes's claim indicates that even he agreed with the proposition that there must be some limitation on majoritarian paternalism embedded in the contested maximum-hours legislation at issue in *Lochner*.[95] Still, in Holmes's defense, it can be argued that "[t]he liberty of contract on which the [*Lochner*] majority relies is not set forth anywhere in the Constitution and contradicts the uniform understanding from the Founding era through Reconstruction that legislatures have the authority to pass prospective and general legislation affecting contracts."[96] If this claim is correct, few constitutional limits on paternalism exist. Similarly, a principled reading of the majority's reasoning in *Lochner* supports elements of the paternalist agenda.[97]

Nevertheless, it is essential to isolate Holmes's *Lochner* dissent as a critical element in the perpetuation of the fable that laissez-faire constitutionalism and

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88. Andrew Scull, *Progressive Dreams, Progressive Nightmares: Social Control in 20th Century America*, 33 STAN. L. REV. 575, 577 (1981) (reviewing DAVID J. ROTHMAN, CONSCIENCE AND CONVENIENCE: THE ASYLUM AND ITS ALTERNATIVES IN PROGRESSIVE AMERICA (1980)).

89. BOETTKE, *supra* note 2, at 43-45.

90. MAYER, *supra* note 1, at 3.

91. *Id.*

92. *Id.* at 3-4.

93. *Id.* at 4.

94. Lochner v. New York, 198 U. S. 45, 76 (1905) (Holmes, J., dissenting).

95. MAYER *supra* note 1, at 4.

96. Chapman & McConnell, *supra* note 28, at 1793.

97. Nelson Lund, & John O. McGinnis, Lawrence v. Texas *and Judicial Hubris*, 102 MICH. L. REV. 1555, 1565 (2004); *see also infra* Part IV B.

liberty of contract are associated with legal formalism[98] and, as such, mandated judicial intervention grounded on the observation that "law [was] frozen, with its principles and values set and its rules determined for all time."[99] Legal formalism, so the story goes, operated in stark contrast with sociological jurisprudence, which Progressives saw as a more "realistic, democratic, and humane" theory of law.[100] Law, according to this viewpoint, was "not a body of immutable principles and rules" but rather a constantly changing and perpetually evolving "institution shaped by social pressures."[101] This scientistic view of law—as constantly changing and evolving—reified presumptions enunciated by Woodrow Wilson, who believed that "[g]overnment was not a machine but a living thing . . . [that] falls not under the Newtonian theory of the universe, but under the Darwinian theory of organic life."[102] Presumptively, the "ever-expanding power of the state was entirely natural"; correspondingly, constitutional limits on governmental power were a mere momentary phase in an irresistible evolutionary movement that would see individual citizens exchange their own sense of personal achievement for the greater good, as divined by Progressive experts who strove to submerge individuated human identity into an ever-growing collectivity.[103] Quaint principles, such as hostility to "class" legislation, "free labor" ideology in the antislavery movement, or liberty of contract (whether or not tied to the original meaning of the Fifth and Fourteenth Amendment's Due Process Clauses),[104] could not stand in the way of sociological jurisprudence or the intelligentsia's pseudo-scientific commitment to the evolutionary process. In contrast, building on a foundation provided by revisionist scholarship challenging the dominant, neo-Holmesian view of the *Lochner* era,[105] Mayer argues that the "orthodox view is wrong in virtually all of its assumptions, which were based on myths originally propounded by Progressive-Era scholars that have been perpetuated by modern scholars who similarly defend the policies of the modern regulatory state."[106]

The most important of these myths concerns the conflation of liberty of contract, as a possible defense against arbitrary government action, with laissez-faire constitutionalism.[107] Reacting furiously to a few successful legal challenges

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98. MAYER, *supra* note 1, at 4.

99. *Id.* at 4-5.

100. *Id.* at 5.

101. *Id.*

102. JONAH GOLDBERG, LIBERAL FASCISM: THE SECRET HISTORY OF THE AMERICAN LEFT FROM MUSSOLINI TO THE POLITICS OF MEANING 86 (2007).

103. *See id.* at 83-93.

104. MAYER, *supra* note 1, at 5; *see also* Barnett, *supra* note 13, at 9 (defending the passage of the Civil Rights Act of 1866 on grounds that by abolishing the economic system of slavery, the Thirteenth Amendment empowered Congress to protect the system of free labor and the underlying rights of property and contract that defined that system).

105. MAYER, *supra* note 1, at 5.

106. *Id.* at 6.

107. *Id.*

to federal and state police power, Progressives engaged in a sustained and sedulous effort to confuse liberty of contract with laissez-faire.[108] On the other hand, building on the historical[109] and philosophical foundations[110] of substantive due process, Mayer contends that "the Court was not engaged in judicial activism when it protected liberty of contract as a fundamental right during the 40-year period prior to 1937."[111] He avers instead that "the Court was simply enforcing the law of the Constitution, specifically the right to liberty as protected substantively under the Fifth Amendment's or the Fourteenth Amendment's due Process clause."[112] Although this claim is contestable as a matter of adjudication grounded in the original public meaning of the text of the Constitution,[113] per Mayer's account, the rights associated with liberty of contract were moderate if not modest, and they could not stand in the way of "laws that legitimately fit within one of the traditional exercises of the police power, for the protection of public health, safety, order, or morals."[114] While there are obvious dangers to this rather constrained construal of contract rights,[115] a construal that limits liberty rather than expanding it, Bernstein verifies "that the liberty of contract doctrine was grounded in precedent and the venerable natural rights tradition."[116] Taken as a whole, revisionist scholarship supports the impression that the Supreme Court viewed liberty of contract as a form of jurisprudence, which differs substantially from mythic accounts that suggest this doctrine: (1) was merely a convenient cover for judicial preferences favoring the rich and (2) appeared suddenly.[117]

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108. *See, e.g.*, Sawyer, *supra* note 37, at 1-3; *see also* EDWARD S. CORWIN, THE COMMERCE POWER VERSUS STATES RIGHTS: "BACK TO THE CONSTITUTION" 18, 253 (1936) (asserting that decisions such as *Hammer v. Dagenhart* are "as lacking in precedential antecedents" while placing the case in the "era of *laissez-faire*-ism on the Bench"); Kent Greenfield, *Law, Politics, and the Erosion of Legitimacy in the Delaware Courts,* 55 N.Y.L. SCH. L. REV. 481, 487 (asserting that the reasoning in *Hammer* was "incoherent, unworkable, and transparently political").

109. MAYER, *supra* note 1, at 11-42.

110. *Id.* at 43-67.

111. *Id.* at 66.

112. *Id.* at 66-67.

113. Chapman & McConnell, *supra* note 28, at 1794 (suggesting that revisionists who contend that the *Lochner* decision rested on sound principles of economics and liberty, that concepts of natural rights and liberty of contract had deep roots in political theory, and that the bakers' hours legislation struck down in the case was a disguised scheme to favor entrenched and well-heeled special interests, which may mean that conventional attacks on the underlying ideology of the decision may well be unfounded but any claim that the decision rested on sound legal principles is unpersuasive, at least as an originalist matter since the "liberty of contract idea" did not come to contract law until the 1870s, and was adopted by the Supreme Court as a constitutional right only in the 1890s).

114. MAYER, *supra* note 1, at 67.

115. *See infra* Part IV.

116. BERNSTEIN, REHABILITATING *LOCHNER*, *supra* note 39, at 3.

117. *See, e.g.*, *id.* at 8-23 (dispelling myths); *see also* RICHARD A. EPSTEIN, HOW

II. THE MEANING AND DURABILITY OF LIBERTY OF CONTRACT JURISPRUDENCE

Determining that liberty of contract analysis differs in substantial respects from the realm of myth gives rise to questions and confusion regarding the actual content and meaning of economic due process and liberty of contract as practiced by courts during the *Lochner* era. Confusion arises first because substantive due process and liberty of contract have been deployed to sort out the limits of both the state and federal police power,[118] as well as limits on the power of state governments to interfere with voluntary agreements negotiated by individuals and firms. Second, even if the liberty of contract doctrine was not issued by judges projecting their own personal preferences into law, and even if it was grounded in widely accessible precedent,[119] questions arise regarding the standards used by courts in applying this disputed doctrine. The following subsections address such questions.

A. The Police Power and Liberty of Contract?

To be clear, the police power is virtually indefinable, but "had its origins in the English common-law concept that one ought to use one's property in such a way as not to injure that of another."[120] Today, the police power encompasses the authority of state and federal legislatures to protect public health, safety, and morals[121] against contrary claims by individuals asserting that such regulation infringes upon legitimate rights. The deployment of the federal police power has the added complication that its use has often been intertwined with questions about the reach and content of the Commerce Clause, which raises questions regarding the extent of Congress's power to regulate interstate commerce and limit freedom of contract.[122] During the nineteenth century, courts, particularly

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PROGRESSIVES REWROTE THE CONSTITUTION 14-51 (2006) (suggesting that courts during the period before the New Deal and long before *Lochner*, evinced a deep respect for classical liberal values including competition and individual choice).

118. Barry Cushman, *Doctrinal Synergies and Liberal Dilemmas: The Case of the Yellow-Dog Contract*, 1992 SUP. CT. REV. 235, 241 [hereinafter Cushman, *Doctrinal Synergies*] (arguing that since the federal government, as a government of enumerated powers, did not have residuary police powers, but that Congress did possess a power analogous to the police powers of the state legislatures enabling it to protect the free flow of interstate commerce).

119. MAYER, *supra* note 1, at 11 (describing two lines of precedents that were well established in early American constitutional law).

120. *Id.* at 25.

121. *Id.*

122. *See* Cushman, *Doctrinal Synergies*, *supra* note 118, at 238-43 (examining the idea of liberty of contract in the context of Congress' power to regulate interstate commerce and suggesting judicial support for the notion that the Fifth Amendment may constitute an independent limitation on the federal power to regulate commerce but also admitting that a legitimate basis for regulating contractual relations of businesses affected with the public interest may exists).

state courts, recognized several limits on the police power.[123]

One limit of particular note regarding state legislative power was the prohibition against the enactment of any law that impaired the obligations of contract.[124] In addition, the police power was subject to unwritten limits that required equal treatment under the law, meaning that a law could not single out specific groups or classes for special treatment.[125] On the other hand, Mayer argues that *Lochner* and other liberty of contract decisions were based on substantive due process protection of liberty and property considerations that are independent of police power questions.[126] Whether or not this claim is correct exceeds the scope of this Article. In any case, what emerges from this confusion is the possible argument that

> a false dichotomy has been created by those modern revisionist scholars who debate *Lochner* era jurisprudence as an either-or alternative between the prohibition on class legislation [often used to limit the boundaries of a state's police power] and substantive due process protection of liberty [often deployed to protect what came to be known as liberty of contract].[127]

In reality, limits on either the police power or on liberty of contract became a tangled web that may be difficult to unravel.

In practice, state courts were principally focused on limiting police powers by enforcing prohibitions on class legislation (i.e., legislation granting particular benefits to some or imposing peculiar burdens on others).[128] Assertions of state police powers were met with skepticism, leading one court to invalidate a statute offered under the guise of advancing the public health, because the legislature had arbitrarily interfered with personal liberty and private property.[129] On the other hand, when and if the Supreme Court deployed liberty of contract and substantive due process analysis, it did so to prohibit a wide range of behavior, including English-only laws passed by the legislature of Nebraska[130] and the enforcement of a Louisville, Kentucky ordinance designed to interfere with the freedom of African-Americans to purchase homes in Caucasian neighborhoods.[131]

In considering the distinction between, if not the intersection of, police power limits and the prophylactic effects of liberty of contract, it is useful to note that Mayer refrains from defending a more robust conception of liberty, one that is

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123. MAYER, *supra* note 1, at 26 ("Ordinarily, courts were willing to declare invalid statutes that directly conflicted with positive constitutional prohibitions, including general protections of liberty and property rights under due process of 'law and the land' provisions.").

124. *Id.*

125. *Id.*

126. *Id.* at 30.

127. *Id.* at 32.

128. *Id.* at 28-29.

129. *Id.* at 23.

130. *Id.* at 89 (discussing Meyers v. Nebraska, 262 U. S. 390 (1923)).

131. *Id.* at 92 (discussing Buchanan v. Warley, 245 U. S. 60 (1917)).

conclusively grounded in the notion of higher law principles and, if applied, would prevent the exercise of the police power, except in cases that invoke the *sic utere* doctrine, which supports laissez-faire constitutionalism.[132] The s*ic utere* approach would preclude all police power regulation unless the actor used her freedom to inflict harm on the person or property of another.[133] As advanced by Christopher G. Tiedeman's police power analysis, enforcement of the *sic utere* doctrine would condemn as unconstitutional laws that regulate hours and wages of workers, usury laws, anti-miscegenation laws, and gambling laws.[134] It is relatively easy to deduce that such laws might be precluded by liberty of contract jurisprudence as well. One needs to look no further than *Lochner* itself, where the Supreme Court used liberty of contract analysis to invalidate New York's maximum hour law. Contrary to Tiedeman's view, "neither in *Lochner* nor in any of its other liberty-of-contract decisions did the Court follow any sort of laissez-faire ideology."[135] However, if the goal is liberty *per se*, then Mayer's analysis begs the question: what is wrong with the doctrine of laissez-faire? Rather than answer that question or make the normative case for laissez-faire and a more robust conception of liberty, Mayer shows that courts refused to honor the limits of the *sic utere* approach. Instead, the Supreme Court was prepared to rupture this doctrine premised on the reasonableness of police power that the legislative body asserted. This profoundly-weakened conception of liberty was consistent with the view that an individual's freedom was not unlimited.[136]

Nevertheless, in a police power context, when protecting an individual's liberty through a general rule that forbade legislative interference with freedom of contract, the Court, in effect, applied a general presumption in favor of liberty.[137] Of course, this presumption could be overcome rather easily by a judicial finding that the law in question was a legitimate exercise of one of the many recognized functions of the police power.[138] Parenthetically, this approach was also consistent with the philosophical underpinnings of *Hammer v. Dagenhart*, which enabled courts to constrain liberty premised on a reasonably broad conception of the federal police power so long as Congress did not breach the harmless items limit on its authority.[139] Still, legislative attempts to overcome the general presumption in favor of liberty were made more difficult by virtue of the fact that courts during the *Lochner* era did not always accept at face value the

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132. *Id.* at 60-61.

133. *Id.* As formulated by leading legal scholar Christopher G. Tiedeman, not only would the *sic utere* doctrine preclude the radical experimentation of social reformers, it would prevent virtually all forms of legal paternalism. *See id.* at 60. As used by Tiedeman, the doctrine of *sic utere* obliged everyone to use his own property to exercise his own liberty so as not to harm the property or liberty of another; the police power was limited to enforcing this principle. *Id*. at 61.

134. *Id.*

135. *Id.* at 67.

136. *Id.* at 64.

137. *Id.* at 65.

138. *Id.*

139. *See infra* Part IV.

government's rationale for a challenged law.[140] Mayer maintains that courts followed Justice Harlan's injunction to look at the substance of things: "that is, to critically examine whether 'a statute purporting to have been enacted to protect the public health, the public morals, or the public safety' had 'a real or substantial relation to those objects' or instead was 'a palpable invasion of rights secured by the fundamental law.'"[141] In protecting liberty of contract against the state's intersecting claim of police power legitimacy, Justice Peckham in his opinion for the Court in *Lochner,*[142] articulated the following test of statutory validity:

> Is this a fair, reasonable, and appropriate exercise of the police power of the State, or is it an unreasonable, unnecessary, and arbitrary interference with the right of the individual to his personal liberty, or to enter into those contracts in relation to labor which may seem to him appropriate or necessary for the support of himself and his family?[143]

The Court answered this question by determining that courts must apply a means-ends test.[144] The mere assertion that the subject relates to the public health or to some other legitimate exercise of the police power does not render the enactment valid; rather, the statute must have a more direct relation as a means to an end, and the end itself must be appropriate and legitimate before an act can be held valid, particularly when it interferes with the general right of an individual to be free in his person and in his power to contract with relation to his own labor.[145]

B. The Doctrine and Its Scope

As advanced by Professor Mayer, liberty of contract jurisprudence was simply a moderate paradigm centered on a presumption in favor of liberty.[146] The precise boundaries of this approach meant that courts protected liberty in a limited context—freedom to make contracts—rather than protecting, in all its aspects, a general and absolute right to liberty limited only by the definitional constraints imposed on liberty itself (i.e., doing no harm to others).[147] Second, the courts protected this freedom under a standard that permitted the government to restrict its application through various exercises of the police power by creating a rebuttable presumption that the challenged law exceeded the government's legitimate police power.[148] As an illustration of the scope of liberty protected by the Fourteenth Amendment's Due Process Clause, Mayer cites with approval the

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140. *See* MAYER, *supra* note 1, at 65.
141. *Id.*
142. *Id.*
143. *Id.*
144. *Id.*
145. Lochner v. New York, 198 U.S. 45 (1905).
146. MAYER, *supra* note 1, at 63.
147. *Id.* at 63-64.
148. *Id.*

Supreme Court's opinion in *Allgeyer v. Louisiana*[149]:

> The liberty mentioned in that Amendment means not only the right of the citizen to be free from the mere physical restraint of his person, as by incarceration, but the term is deemed to embrace the right of the citizen to be free in the enjoyment of all of his faculties, to be free to use them in all lawful ways; to live and work where he will; to earn his livelihood by any lawful calling; to pursue any livelihood or avocation, and for that purpose to enter into all contracts which may be proper, necessary and essential to his carrying out to a successful conclusion the purposes above mentioned.[150]

"[R]egarded as the Supreme Court's first unequivocal 'substantive due process' case,"[151] *Allgeyer* held "for the first time held that the Due Process Clause invalidated a prospective statute that prohibited entering into certain contracts."[152] Although *Allgeyer* has been criticized as a novelty and a break from the original meaning of the Fourteenth Amendment, the case offers, by its own terms, a strained conception of liberty that protects an individual's freedom to use her own faculties in all lawful ways to earn a livelihood by any lawful calling.[153] This formulation is coupled with one's right to realize one's freedom through legally enforceable contracts that were proper and necessary for one's purpose.[154] Mayer intuits that *Allgeyer*'s emphasis on freedom of contract meant that this liberty right was necessarily subject to certain legal constraints.[155] Yet what precise limits actually pertain to the liberty of contract doctrine? Evidently the constraints that emerge from duties owed by the individual to society, to the public, or to the government supply the appropriate boundary.[156] The internal logic of this claim implies that liberty is meaningless unless a principled conception of duties owed is on offer. Similarly, in *Adkins v. Children's Hospital*,[157] Justice Sutherland, while agreeing that freedom of contract is the general rule, added that freedom could be abridged by exceptional circumstances.[158] American history is rich in allegedly exceptional circumstances. Taken together, this analysis shows that only a minimal commitment to flexible language signals that doctrinal limitations—premised on the duties owed by an individual or, alternatively, the meaning of exceptional circumstances—in the hands of elites committed to regulatory encroachment

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149. Allgeyer v. Louisiana, 165 U.S. 578 (1887).

150. MAYER, *supra* note 1, at 64 (quoting *Allgeyer*, 165 U.S. 578).

151. Chapman & McConnell, *supra* note 28, at 1733.

152. *Id.*

153. MAYER, *supra* note 1, at 64.

154. *Id.*

155. *Id.*

156. *Id.*

157. 261 U.S. 525 (1923) (invalidating a Washington, D.C. minimum wage for women as a violation of liberty of contract).

158. *Id*. at 546.

gives rise to the probability that liberty of contract will be the subject of ruthless restrictions. In the hands of judges and legislators committed to expanding the perimeters of paternalism and postmodern language, these supposed limitations on freedom of contract are more accurately understood as an invitation to expand the size and scope of government.

C. Shrinking the Liberty of Contract Doctrine During the Lochner *Era*

Ample case law indicates just how fragile the liberty of contract doctrine was in protecting the rights of flesh and blood individuals against state legislatures. An excellent place to begin is "with the well-known decision of *Muller v. Oregon*, which sustained the constitutionality of a statute that limited female laundry workers to a maximum of 10 hours per day."[159] Evidently, assaults on the Oregon statute at issue rested on one simple proposition: that women are persons and citizens and, as such, are as competent to contract as men.[160] Despite its undeniable appeal, this claim was no match for the state's argument in favor of paternalism and the need to compensate for women's "obvious" inferiority by including additional protection for them. Writing securely within the Progressive tradition, and seduced by presumptive force of sociological jurisprudence, Louis Brandeis deployed detailed sociological studies to justify this differential legislation.[161] *Muller* was later reinforced by the Court's opinion in *West Coast v. Parrish*, overruling *Adkins v. Children's Hospital*'s liberty of contract holding. In upholding the State of Washington's enactment of a minimum wage for female workers in *West Coast*, Justice Hughes agreed that the Constitution does not speak of freedom of contract; rather, it speaks of liberty.[162] Liberty, as viewed by Hughes is necessarily subject to the restraints of due process and regulation; a statutory enactment, which is reasonable in relation to its subject and adopted in the interest of the community, is indeed due process.[163] In answering the question of whether it is reasonable to provide a minimum wage for women, Justice Hughes deliberated over whether the wage regime serves the community's interests as opposed to the interests of individual women before determining that nothing could be closer to the public interest than protecting the health of women from unscrupulous and overreaching employers.[164] Contrary to the paternalism residing at the heart of Justice Hughes's opinion, at the core of prior minimum wage decisions was a commitment to freedom of contract, long held to reside in the Due Process Clause of the Fourteenth Amendment.[165] Nonetheless, no matter how defendable freedom of contract may have been, it could not stand in the way

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159. EPSTEIN, *supra* note 117, at 90.

160. *Id.*

161. *Id.*

162. West Coast v. Parrish, 300 U. S. 379, 391 (1937).

163. *Id*.

164. JEFF SHESOL, SUPREME POWER: FRANKLIN ROOSEVELT V. THE SUPREME COURT 406 (2010).

165. *Id*.

of protecting the "weaker sex" from exploitation.[166]

This outcome exploits the vulnerability of an already disadvantaged class and indicates that liberty of contract could be constrained, regardless of whether the Court is dealing with state police power pleadings or adjudicating the federal police power within the parameters of the Commerce Clause. Evidently, the Court was persuaded that liberty of contract could be restricted without a substantive investigation of the merits of the legislation at issue so long as the unit of government proffers the claim that it acts in "public interest." Hinting at the Court's increasing dependence on flexible language, such reasoning anticipates the Court's complete withdrawal of substantive scrutiny from legislative enactments within the domain of economics and labor, and its comprehensive surrender to state and federal legislatures, which it announced one year later in *Carolene Products*.[167] Still, it is remarkable that the *West Coast* Court's ostensible solicitude for the position of women, even if allowable based on an originalist reading of the text of the Constitution, is subject to the same objection that may be lodged against the statute in *Muller*: it diminishes the contractual rights of women by excluding them from jobs that they would most prefer over any other available.[168] Hence, neither *Lochner* nor liberty of contract dogma was available to prevent paternalism from proceeding apace as the Court failed to notice that the laws designed to protect women served as a central means of oppressing them.[169]

Similarly, Epstein indicates that when President Woodrow Wilson resegregated the U.S. Civil Service, premised on a capacious conception of the federal government's police power and a restricted view of the contract rights of African Americans, the National Association for the Advancement of Colored People chose not to make a constitutional challenge to the government's decision.[170] Evidently, a deadly combination of a narrow conception of individual liberty and a broad conception of government police power ensured that attacks on this policy would have proved hopeless under *Plessy*.[171]

Coherent with the ideals that infected the Progressive Era, an argument was made that "if blacks lived close to whites, they would eventually cause the downfall of white civilization through race mixing."[172] The preferred solution required that African Americans be kept in a subservient role and denied political

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166. *Id*.

167. Louise Weinberg, *Unlikely Beginnings of Modern Constitutional Thought*, 15 U. PA. J. CONST. L. 291, 292 (2012) [hereinafter, Weinberg, *Unlikely Beginnings*] (stating that *Carolene Products* formalized that Supreme Court's acquiescence in the will of Congress and by extension, the will of state legislatures) (copy on file with the author).

168. EPSTEIN, *supra* note 117, at 93.

169. *Id.* at 90.

170. *Id.*

171. *Id.* at 102-03.

172. CAMERON MCWHIRTER, RED SUMMER: THE SUMMER OF 1919 AND THE AWAKENING OF BLACK AMERICA 63 (2011).

rights.[173] Fearing that African Americans carried contagious diseases and, secondarily, moved by the opinion that blacks had become disrespectful to their white superiors, President Wilson made an appeal to the broad police power that Progressives championed as a basis for this new policy.[174] Substantive due process review was rarely applied leaving the nation safe for President Wilson's subordinating maneuvers; therefore, it is no surprise that, between Reconstruction and the New Deal, African American workers viewed Lochnerism as "much too timid and ineffectual [as] courts gave far too much leeway to the regulatory powers of government, allowing powerful interest groups to profit from labor regulations at the expense of African Americans."[175] Although Court decisions that vindicated the right to freedom of contract often had ambiguous or even clear "pro-poor" distributive consequences, the Court nonetheless "upheld the vast majority of the laws that had been challenged as infringements on liberty of contract."[176] As a result, it is impossible to claim that liberty of contract consistently protected anyone, least of all those most in need of such protection.

It is true that before issuing its *Carolene Products* decision[177] and accompanying principles,[178] the Court, at times, protected liberty of contract by assessing whether the substance of challenged legislation limited a person's liberty in contradistinction to the procedures by which the law was enacted or enforced.[179] In addition, the Court placed some limits on the power of Congress and state legislatures in the realm of economic regulation.[180] Still, it is clear that substantive due process and the embedded doctrine of liberty of contract, even

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173. *Id.*

174. EPSTEIN, *supra* note 117, at 102.

175. DAVID E. BERNSTEIN, ONLY ONE PLACE OF REDRESS: AFRICAN AMERICAN, LABOR REGULATIONS, & THE COURTS FROM RECONSTRUCTION TO THE NEW DEAL 7 (2001).

176. BERNSTEIN, REHABILITATING *LOCHNER*, *supra* note 39, at 3.

177. United States v. Carolene Prods., 304 U. S. 144 (1938).

178. The opinion contains two well-known principles: (1) the presumption of constitutionality accorded legislation regulating economic activity when challenged under the Due Process Clauses and (2) the creation of Footnote Four, which indicated that deferential review would be inappropriate "when legislation appears on its face to be within a specific prohibition of the Constitution, such as those of the first ten Amendments, which are deemed equally specific when held to be embraced within the Fourteenth." Nor should such a robust presumption of constitutionality be warranted with regard to "legislation which restricts those political processes which can ordinarily be expected to bring about repeal of undesirable legislation" nor with respect to "statutes directed at particular religious," "national," "racial" or other "discrete and insular minorities." *Id.* at 152 & n.4 (citations omitted); *see also* Barry Cushman, Carolene Products *and Constitutional Structure*, SSRN, at 1 (Mar. 2012) [hereinafter Cushman, Carolene Products], *available at* http://ssrn.com/abstract=2030439 (explaining the two above-referenced principles associated with *Carolene Products*).

179. MAYER, *supra* note 1, at 2.

180. State and federal regulatory power within the realm of health, safety, morality, and general welfare was limited largely to the question whether the product in question was intrinsically harmful or not. *See* Sawyer, *supra* note 37, at 1 (discussing the *Hammer* case).

during the *Lochner* era, often proved to be an unreliable defense against regulatory encroachment.

Regardless of how constrained and unreliable liberty of contract was in practice, this doctrine was also diminished by the fact that it was a short-lived constitutional right.[181] Mayer offers three factors to explain this development: first, as leading libertarian justices left the bench, the Court transitioned away from dominance by moderate Lochnerians;[182] second, despite the doctrine's general presumption in favor of liberty, the standard of review used by the justices to protect liberty of contract was riddled with exceptions;[183] and third, significant changes in the law, both in constitutional law principles and in theories of jurisprudence, as illustrated by the development of legal realism and the justifications for expanding the scope of the police power, took hold during the first few decades of the twentieth century.[184] Although this explanation may be apt, it seems unduly epigrammatic.

Since many explanations abound regarding the demise of freedom of contract, in addition to Mayer's elucidation, one ought to first reconsider David Bernstein's analysis. Bernstein shows that, in theory, sociological jurisprudence constituted a coherent philosophy of law that was independent of political considerations.[185] In practice, of course, it justified Progressive advocates' political and ideological commitments.[186] Bernstein confirms that "[m]ost advocates of sociological jurisprudence were primarily motivated by their desire that reformist legislation, especially legislation regulating the labor market, have a near-absolute presumption of constitutionality."[187] Secondly, Bernstein demonstrates the importance of Holmes's reasoning in *Lochner* as a spark toward the fulfillment of the dreams of the progressive vanguard, dreams that substituted

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181. MAYER, *supra* note 1, at 97.

182. *Id.* at 98.

183. *Id.* at 99-103 (conceding that a majority of the justices during the period between the two world wars were unwilling to question (a) any exercises of the police power that seemed to protect workers' health, even if the legislation at issue effectively barred certain classes of person from particular occupations; (b) statutes relating to the performance of public work and statutes prescribing the character, methods, and time for payment of wages; (c) statutes regulating a business affected with the "public interest"; (d) statutes fixing the hours of work; and lastly (e) statutes involving matters within the traditional exercises of the police power including the protection of public morality).

184. *Id.* at 103-05 (describing (a) a fundamental shift in the way the American legal culture defined the police power from the well-defined categories of protecting the public health, safety and morality toward a looser, less well-delineated approach that include the notion of the promotion of the public welfare; and (b) a movement within the American legal culture from legal formalism to legal realism that was made possible by the acceptance of sociological theories of jurisprudence that extolled the notion that law should be seen as pragmatic and based on subjective principles as opposed to being based in natural law and natural rights and on objective principles).

185. BERNSTEIN, REHABILITATING *LOCHNER*, *supra* note 39, at 44.

186. *Id.*

187. *Id.*

evolutionary flux for natural law[188] and exchanged the notion of the common law based on natural rights and some form of higher law for an identifiable sovereign as an instrument for the institution of society's pragmatic will.[189] These dreams materialized in the form of Holmes's much belauded dissent in *Lochner*, which made him the intellectual leader of Progressive reformers regarding constitutional law[190] and an important legal theorist in the strategy to remove barriers to the elevation of dominant opinion.[191] Charles Beard, Benjamin Cardozo, and the *New Republic* chimed in to proclaim that Holmes's opinion was a "flash of lighting [in] the dark heavens" enabling Holmes to become the voice of a new dispensation in the realm of law.[192] Although it has been argued that Holmes's dissent did not really separate him from his fellow justices' methods, values, and jurisprudence,[193] widespread approval of Holmes's views by members of the social progress movement was grounded in distinct devotion to majoritarian paternalism.[194] Such devotion was fortified by escalating contempt for the natural law tradition, which was already in remission, and, as such, was seen as nothing less than a brooding omnipresence in the sky.[195] Approbation and contempt combined to reach their apotheosis in Justice Holmes's lecture in *Buck v. Bell*, which endorsed the advantages of majoritarianism, scientism, and human exclusion.[196]

"Operating in stark contrast to Lochnerian liberty-of-contract jurisprudence, which was [occasionally] invoked to justify expanding constitutional protection of African Americans and women," [197] the combination of the social progress movement, Holmes's dissent in *Lochner,* and his crushing rhetoric in *Buck* conforms to the jurisprudential path inaugurated by the Supreme Court in *Plessy*.[198] Established on a foundation fashioned by the observation that the

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188. *See, e. g.*, Bradley C. S. Watson*, Oliver Wendell Holmes, Jr. and the Natural Law*, THE WITHERSPOON INSTITUTE, *available at* http://www.nlnrac.org/critics/oliver-wendell-holmes, *archived at* http://perma.cc/8AZ8-4WGN ("Among [Holmes'] many accomplishments as a member of the Court was to help eradicate judicial reasoning based on principles of natural law or natural right. . . . For Holmes, law and society are always in flux, and courts adjudicate with an eye to law's practical effects. Morality has nothing to do with law; it amounts to little more than a state of mind. There are no objective standards for determining right and wrong and therefore no simply just answers to legal questions.").

189. *See, e.g.*, S. Pac. Co. v. Jensen, 244 U.S. 205, 222 (1917) (Holmes, J. dissenting) ("The common law is not a brooding omnipresence in the sky, but the articulate voice of some sovereign or quasi sovereign that can be identified.").

190. BERNSTEIN, REHABILITATING *LOCHNER*, *supra* note 39, at 45.

191. Hutchison, *Waging War on the "Unfit," supra* note 11, at 29.

192. BERNSTEIN, REHABILITATING *LOCHNER*, *supra* note 39, at 45.

193. Gerald Leonard, *Holmes on the* Lochner *Court*, B.U. L. REV. 1001, 1003 (2005).

194. *See* BERNSTEIN, REHABILITATING *LOCHNER*, *supra* note 39, at 44.

195. *Jensen*, 244 U.S. at 222 (Holmes, J. dissenting).

196. Hutchison, *Waging War on the "Unemployables," supra* note 82, at 42-43.

197. *Id.* at 42.

198. Hutchison, *Waging War on the "Unfit," supra* note 11, at 21-26, 28 (demonstrating the

Framers offered a mechanical, natural law theory in contradistinction to the recognition by members of the intelligentsia that society was a living organism that must obey the law of life and not mechanics, Progressives believed that the Constitution ought to be interpreted according to evolving Darwinian principles and standards.[199] Yet in order to effectuate Progressive polices as a vehicle to achieve societal transformation, Progressives sought judicial and legislative compliance with their highly paternalistic goals.[200] The bold effort to achieve a paternalistic future sparked the development of an intriguing scheme. Before being deployed, this scheme—a broad conception of the state or federal government's police power coupled with an equally broad conception of Congress's commerce power—required a constitutional champion, one who was willing to eviscerate the retrograde forces that continued to ascribe to the natural law and natural rights tradition. This is where Justice Holmes's audacious inclinations favoring deference to majoritarian pragmatism and paternalism took center stage.[201] The next section of this Article indicates that Holmes was not alone in defending paternalism. Instead, his inclinations, if not his language, accurately anticipated the subordination of liberty of contract and individualism to the forces of progress.

III. SHRINKING THE FORCE OF *LOCHNER* BY RECONSIDERING *HAMMER* AND PHILANDER KNOX?

Professor Sawyer's recent scholarship[202] reconsiders the limits placed on Congress's power to regulate interstate commerce in order to promote the health, safety, morality, and general welfare of the nation.[203] His work offers a valuable perspective on Professor Mayer's spirited efforts. First, Sawyer points out that the federal police power was seen as a vehicle to diminish the power of individual actors by turn-of-the-century Progressives who were increasingly looking to the national government to address social welfare problems, particularly those created by degenerative competition among the states.[204] After celebrating a number of early triumphs, progressive hierarchs found that Congress's authority to exercise its federal police power was significantly limited by the Supreme Court in *Hammer v. Dagenhart*.[205] Although the Court "disclaimed any inquiry into the purpose or intent of Congress, in enacting the statute,"[206] *Hammer* would only allow Congress to prohibit the interstate shipment of intrinsically harmful goods, like immoral lottery tickets, or impure food, but not items that were in and

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biological connection between *Plessy v. Ferguson* and progressive thought).

199. *Id.* at 26-27.

200. *Id.* at 27.

201. *Id.*

202. *See generally* Sawyer, *supra* note 37, at 1-63.

203. *Id.* at 1.

204. *Id.*

205. *Id.*

206. Cushman, Carolene Products, *supra* note 178, at 9 (citing Justice Day).

of themselves harmless, like the products of child labor.[207] This meant that the liberty of contract doctrine would not apply to protect the free movement of goods or otherwise constrain federal police power if the item at issue was inherently harmful. *Hammer* limited the exercise of Congress's police power to the regulation or prohibition of harmful, as opposed to harmless, items. This limit, adopted for purposes of Commerce Clause adjudication, has been subject to withering criticism, as inconsistent with precedent, incoherent as policy and the product of a backward-looking commitment to a laissez-faire economy.[208]

It is possible that the critics are wrong. Yet why might *Hammer* be relevant for purposes of grasping the parameters of liberty of contract as a constitutional right? A principled understanding of *Hammer* is crucial not only because of its prominent place in the canon of constitutional law but, more importantly, due to the central role it plays in (a) supporting a contested understanding of the *Lochner* Court, (b) appreciating the increasing inability of the liberty of contract doctrine to preclude the exercise of arbitrary government power,[209] and (c) defining the parameters of the police power itself. *Hammer* and its social welfare antecedents[210] indicate that the intentional effort made to diminish liberty of contract was part of a lengthy and culturally-conspicuous process that preceded *Lochner*, which implies that the *Lochner* opinion may well have been the end rather the beginning of the Court's commitment to liberty of contract.

The following subsections demonstrate that *Hammer* and its harmless items limit represented the culmination of a remarkable doctrinal evolution that helped to shape the federal police power,[211] influenced future interpretations of the states' police power, and helped to delineate liberty of contract jurisprudence. In all likelihood, an expansion of the domain of police power, either at the state or federal level, correlates with a consequent reduction in the scope of the liberty of contract doctrine as a bulwark against paternalism and accretions in government power. Sawyer's analysis provides a foundation to substantiate this probability.[212] In erecting this foundation, Sawyer concentrates his scholarship on the public career and rich private papers of the lawyer primarily responsible for establishing, propagating, and defending both the federal police power and the harmless items limit: Philander Knox.[213]

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207. Sawyer, *supra* note 37, at 1.

208. *Id.* at 1-2.

209. *Id.* at 2-3.

210. *Id.* at 1 (describing decisions that recognized the federal police power and included *Hoke v. United States*, 227 U.S. 308 (1913); *Hipolite Egg Co. v. United States*, 220 U.S. 45 (1911); and *Champion v. Ames*, 188 U.S. 321 (1903)); *see also* Cushman, Carolene Products, *supra* note 178, at 9 (adverting to Justice Holmes' dissent in *Hammer* pointing out that Congress had been expressly granted the power to regulate interstate commerce and, as such, "the exercise of its otherwise constitutional power by Congress" could not be "unconstitutional because of its possible reaction upon the conduct of the States in a matter upon which . . . they are free from direct control.").

211. Sawyer, *supra* note 37, at 3.

212. *Id.*

213. *Id.* (reconsidering the life's work of Philander Chase Knox). Mr. Knox was the leading

A. The Harmless Items Limit as a Vehicle to Adjust Constitutional Doctrine?

Sawyer shows that the harmless items limit was not invented in *Hammer* by a Supreme Court dedicated to promoting a laissez-faire economy; rather, the limit was invented by political moderates to reform the Commerce Clause doctrine well before *Hammer* and other *Lochner* era cases were decided.[214] Acting as a gap-filler within the realm of the Dormant Commerce Clause that prevented states from acting to preclude social evils,[215] the invention was designed to address the challenges of a new century while preserving what political moderates viewed as a valuable existing doctrine.[216] Inherent in any effort to address new challenges is the risk that such challenges will overwhelm any pre-existing doctrinal limits that might otherwise constrain the application of government power to individual citizens. Equally true, is the fact that the ongoing effort to address new challenges, a maneuver led largely by Progressives, may expose substantive due process as a rather impotent doctrine, in light of the nation's growing dependence on expertise.

Adverting to the nation's focus on collective action problems created by an increasingly integrated national economy,[217] and elevating human experience and the belief that government needed to play a dynamic role in ensuring that monopolies did not destroy functioning markets,[218] the record, per Sawyer's account, shows that the doctrine adopted in *Hammer* was not an ideological "attempt to return America to an imagined laissez-faire past, but was a half-way house on the road to the modern Commerce Clause doctrine" [219] and its corollary, the modern bureaucratic state. Sawyer's contribution to the literature simultaneously accomplishes two things: (1) it undermines the dominant contention that *Lochner* era judges who favored liberty of contract jurisprudence were engaged in a retrograde abuse of judicial power, and (2) it destabilizes the contention of revisionists scholars who maintain that Lochnerian jurisprudence can be separated from the legal and cultural currents of the day that favored progressivism, the regulatory state, and paternalism itself.[220] Consistent with the

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lawyer of his day; he was asked three times to join the Court by the same two Presidents who appointed all five members of the *Hammer* majority. *Id.* "As Attorney General, he shaped the establishment of the federal police power when he oversaw the litigation in *Champion v. Ames*; as a United States Senator, he helped define the limits of the doctrine in debates over the legislation that led to the decision in *Hipolite Egg*; and as a Presidential candidate and a nationally respected lawyer he defended the doctrine's limits in the legal literature." *Id.*

214. *Id.* (discussing the litigation in *Champion*, 188 U.S. 321, and opining that the harmless items limit was invented well before *Hammer* was decided).

215. *Id.* at 39 (citing Justice Harlan's majority opinion in *Champion*).

216. *Id.* at 3.

217. *Id.*

218. *Id.* at 23 (primarily discussing the views of Philander Knox).

219. *Id.* at 3.

220. *See, e.g.*, *id.* at 5-8 (discussing the advent of case law establishing a federal police power).

latter claim, Sawyer demonstrates that, in a number of decisions, the Court fortified the progressive agenda and the tenets of paternalism by expressly and substantially, weakening its commitment to substantive due process.[221] He demonstrates that in *Champion v. Ames*, a 1903 decision, the Court upheld a federal prohibition on the interstate movement of lottery tickets because it threatened the nation's morality.[222] In *Hipolite Egg Co. v United States*, a 1911 decision, the Court upheld the prohibition of impure or adulterated food and drugs in order to achieve federal police power ends;[223] and in 1913, in *Hoke v. United States*, the Court stated that Congress could prohibit the movement of anything in interstate commerce if the prohibition ultimately promoted the health, safety, morality, or general welfare of the nation.[224] On a doctrinal level, these decisions, which vindicated the police power and shredded freedom to contract, were coherent with the views of moderate Progressives, who advocated a comprehensive rejection of laissez-faire economics.[225] Notably, this rejection of laissez-faire economics by members of the progressive or moderately progressive vanguard including Philander Knox, among others, began as early as 1902,[226] three years before *Lochner* was decided.[227] By adopting and affirming moderate progressive teleology that was fashioned by larger structural forces beyond the justices' private preferences,[228] the Supreme Court's capitulation to this approach, in a number of *Lochner* era decisions, signals that if *Lochner* was a great victory for liberty, then it was an inevitably impermanent one.

Sawyer's intuition operates contrary to the dominant narrative, which stipulates that the *Hammer* majority simply ignored precedent and established a nonsensical rule that enabled Congress to prohibit the interstate shipment of harmful, but not harmless, goods.[229] The conventional view of *Hammer* is regularly joined with the conventional view of *Lochner* as grounds for indicting the early twentieth-century Supreme Court for the crime of "manipulating meaningless legal forms to protect a laissez-faire economy that privileged powerful business at the expense of workers, the people, and children."[230] This indictment has supported a particular view of judicial process as nothing more than the instantiation of judicial policy preferences, which leads to the corresponding conclusion that constitutional law is nothing more than preferences

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221. *Id.*

222. *Id.* at 5-6.

223. Hipolite Egg Co. v. United States, 220 U.S. 45 (1911).

224. Hoke v. United States, 227 U.S. 308 (1913); Sawyer, *supra* note 37, at 6-7.

225. Sawyer, *supra* note 37, at 23-29 (describing Knox's private and public rejection of laissez-faire economics including his rejection of the notion that the market is "natural" and existed prior to the creation of government).

226. *Id.* at 23.

227. *See* Lochner v. New York, 198 U.S. 45 (1905).

228. Sawyer, *supra* note 37, at 63.

229. *Id.* at 9.

230. *Id.* at 9-10.

writ large.[231] As we have previously seen,[232] reality is quite different from this highly reductionist view of constitutional law.[233] Although Sawyer confirms the revisionist contention that *Lochner* has been increasingly understood as having its "roots in an abolitionist concern with free labor and a long-standing judicial concern with the influence of factions in politics,"[234] he also states that the *Lochner* era Court justices stirred by the evolving *zeitgeist*, routinely upheld significant regulations of the economy that impaired the promotion of a principled conception of a free market economy.[235] *Hammer* heralds the Court's acceptance of moderate progressivism and, as such, was not inconsistent with the Court's evolving approach to state and federal regulation. In order to understand this, it is necessary to consider Philander Knox's ideological contributions to this development.

Focusing on the life and career of Philander Knox, Sawyer shows that moderate progressive views, as encapsulated by the harmless items limit on federal police power, were not idiosyncratic,[236] nor did they appear suddenly.[237] In 1908, as an active government participant and nationally respected lawyer who held the trust and admiration of President Taft and President Theodore Roosevelt,[238] Knox argued for a moderate position on the reach of Congress's commerce power.[239] In essence, Knox maintained that Congress should be able to use its power to regulate commerce by prohibiting the interstate movement of goods, regardless of whether or not the goods were harmful, if Congress did so in order to protect or promote interstate commerce.[240] Additionally, Congress should be able to "prevent the channels of interstate commerce from being used as a conduit for harmful goods, which meant that it could prohibit goods recognized as harmful."[241] On the other hand, Congress could not prohibit "the interstate shipment of intrinsically harmless goods," thus anticipating the rule that the Supreme Court adopted in *Hammer* a decade before the decision was issued.[242] The Knox doctrine provides, "the commerce clause was a judicially enforceable limit on the *ends* Congress could pursue, rather than the grant of a *means* Congress could use to pursue other ends."[243] More precisely, Knox asserted that,

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231. *Id.* at 10.
232. *See supra* Parts II & III.
233. Sawyer, *supra* note 37, at 10.
234. *Id.* at 11.
235. *Id.* at 10.
236. *Id.* at 13-14.
237. *Id.* at 15-16 (discussing Philander Knox's position in 1907 and 1908).
238. *Id.* at 15.
239. *Id.* at 16.
240. *Id.*
241. *Id.*
242. *Id.*
243. *Id.*

> Congress may employ such means as it chooses to accomplish that which is within in [sic] power. But the end to be accomplished must be within the scope of its constitutional powers. The legislature's discretion extends to the means and not the ends to be accomplished by use of the means.[244]

If an item inflicted harm in the state of destination,[245] then prohibition of harmful interstate commerce was within the realm of Congress's authority; however, Congress could not, under the guise of a commercial regulation, deny a person the right to engage in interstate commerce for doing that which it could not prohibit him from doing.[246] Congress, accordingly, did not have a general police power to prohibit the interstate shipment of any goods whenever that prohibition would advance police power ends.[247]

Contesting this view, Justice Holmes rejected virtually all limits on Congress's power to regulate interstate commerce.[248] While Holmes's modern defenders doggedly insist that any opposition to Congress's power to regulate interstate commerce amounts to a commitment to a laissez-faire economy,[249] in reality, Holmes's virtually unconstrained deference to legislative authority was so broad that it allowed Congress to prohibit the interstate transportation of all goods from states in which divorce is allowed, or in which a husband was allowed to abuse his wife.[250] Responding to the implications of this distasteful syllogism, Professor Thomas Reed Powell rejected the suggestion of Holmes's dissent in *Hammer* that any prohibition of movement in interstate commerce qualified as a "regulation of interstate commerce."[251] The pivotal point in Powell's analysis was the claim that in any activity involving the interstate commerce of intrinsically harmful goods, Congress could still regulate harmless products if a sufficient *nexus* could be demonstrated between the harm to be prevented and the interstate movement itself.[252] This reasoning clarifies Knox's somewhat narrower view, which would permit Congress to use the federal police power to prohibit the interstate shipment of harmful goods only.[253] Knox offered "a formal doctrinal rule of the kind then common throughout the Court's constitutional jurisprudence that required a tight, rather than loose, connection between the means of prohibition and the end of regulating interstate

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244. *Id.*

245. Cushman, Carolene Products, *supra* note 178, at 10.

246. Sawyer, *supra* note 37, at 17.

247. *Id.*

248. *Id.* at 18.

249. *Id.*

250. *Id.* at 19 (citing Professor Thomas Reed Powell).

251. *Id.* Equally clear, Professor Powell also rejected the majority's approach in *Hammer*. *Id*.

252. *Id.*

253. *Id.* at 19-20.

commerce."[254]

What does this all mean in the context of intersection of the police power, liberty of contract, and *Lochner*? Among other things, Knox and his enthusiasts would allow legislative regulatory reform consistent with the harmless items limit only when the reform efforts resembled something similar but not identical to an intermediate level of judicial scrutiny rather than a rational basis review.[255] Although the Court eventually migrated from intermediate scrutiny to rational basis review of economic legislation,[256] the harmless item approach signified that prohibition was allowable "[i]f an article was itself immoral, unhealthy, or unsafe, [or if] its shipment in interstate commerce would cause real harm in the receiving state."[257] Hence, prohibition would prevent a harm that was causally related to the item's movement in interstate commerce,[258] but disguised and deceptive legislation of the kind later favored by FDR[259] could not pass muster.[260] Within this framework, if the means chosen by Congress fit tightly with the end of regulating interstate commerce, then the law should be upheld.[261] On the other hand, if the article was intrinsically harmless, then the fit was loose, and this looseness suggested that the law was simply an, "attempt to use the commerce power to regulate a subject reserved for state authority and should therefore be struck down."[262] Whether or not the harmless items limit is a doctrinal line that requires too tight of a connection between interstate commerce and the harm that Congress sought to prevent is a question beyond the scope of this Article. What Sawyer's analysis demonstrates is that Knox, the Court, and a raft of Progressives on both sides of the political aisle[263] adopted an analytic approach that was calculated to advance rather than impede a paternalistic agenda. Although speed limits were placed on the advance of the progressive reform agenda, Knox, the Court, and many politicians embraced the harmless items limit, which

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254. *Id.* at 20.

255. *Id.* (showing that Knox's harmless items limit was, in some ways, "similar to the same kind of means-end analysis now common in equal protection jurisprudence requiring a kind of strict or intermediate level scrutiny rather than rational basis review").

256. *See, e.g.*, Cushman, Carolene Products, *supra* note 178, at 1 (explicating Justice Stone's rational basis test for regulatory initiatives affecting economic activity); *see also* Weinberg, *Unlikely Beginnings*, *supra* note 167, at 1-2 (stating that *Carolene Products* formalized that Supreme Court's acquiescence in the will of Congress and, by extension, the will of state legislatures).

257. Sawyer, *supra* note 37, at 20.

258. *Id.*

259. Ilya Somin, *Voter Knowledge and Constitutional Change: Assessing the New Deal Experience*, 45 WM. & MARY L. REV. 595, 652 (2003) (discussing FDR's deceptive strategy for eliciting public support for the National Industrial Recovery Act).

260. *See* MAYER, *supra* note 1, at 22-23 (discussing the Jacobs case involving a federal law and the People v. Marx involving a New York state law).

261. Sawyer, *supra* note 37, at 20.

262. *Id.*

263. *Id.* at 21.

successfully married liberty to the regulatory spirit of the age.[264] This marriage implicates our contested understanding of *Lochner* while simultaneously suggesting that the liberty of contract doctrine, much like the federal police power, could be the subject of endless adjustments necessitated by an evolving economy.

It bears repeating that in *Hammer,* the Justices did not concoct the distinction between harmful and harmless items in order to protect a laissez-faire economy, putatively threatened by the federal police power.[265] Rather, this distinction was designed as a moderately progressive lubricant that would legitimize the increasingly frequent application of federal regulatory power to the complexities of a progressively interconnected economy. Although the formal pedigree of this approach could be traced back more than a decade to Knox's 1908 article in the *Yale Law Journal,*[266] the most disquieting implication is that the effort to advance paternalism and adjust constitutional doctrine to accommodate the needs of an increasingly complex society might be traceable back to *Lochner* itself.

B. Analysis: Revising the Revisionists?

After the Supreme Court withdrew even mild constitutional protection for liberty of contract in the 1930s, a hostile perspective inherited from the Progressives has virtually monopolized scholarly discussion of the Court's liberty of contract decisions.[267] Although *Lochner* languished in obscurity for some time,[268] it was rescued from oblivion as its notoriety increased, "when both the majority and dissent in *Griswold v. Connecticut*—a high profile, controversial case decided in 1965—used it as a foil."[269] Ever since, *Lochner* has been part of a highly fossilized substrate of the anti-canon in American constitutional debates.[270] Historians have had a rather easy time discrediting some of the elements of the dominant narrative pursued by the contemporary inheritors of the progressive movement.[271] Revisionist scholarship shows that "the Supreme Court justices who adopted the liberty of contract doctrine did not have the cartoonish reactionary motives attributed to them by Progressive and New Deal critics."[272] Today the Court continues to use substantive due process to protect certain aspects of liberty, including most of the rights enumerated in the Bill of Rights as well as other "personal" rights, [273] such as the right to privacy implicated by *Griswold*. However, following the "New Deal Revolution" of 1937, an

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264. *Id.* at 22.
265. *Id.* at 22-23.
266. *Id.* at 23.
267. BERNSTEIN, REHABILITATING *LOCHNER*, *supra* note 39, at 2.
268. *Id.* (*Lochner*'s obscurity commenced during the late 1930s).
269. *Id.*
270. *Id.*
271. *Id.* at 3.
272. *Id.*
273. MAYER, *supra* note 1, at 2.

intellectual transformation occurred in relatively obscure cases prefiguring the advent of tiered scrutiny characteristic of modern rights-based constitutional litigation;[274] the Court "ceased protecting liberty of contract, a right it had first explicitly recognized merely [forty] 40 years before."[275] This decision led to a new judicial acquiescence to the will of the legislative branches of both the federal and state governments[276] and a further acceleration in the growth of both size and scope of government.[277]

Whether or not Mayer's contention that the dominant critique of *Lochner* era adjudication was primarily the result of a sustained misreading of liberty of contract/substantive due process review,[278] and whether this misreading foreshadowed reform efforts of the 1930's, it must be stressed that his analysis neglects to satisfactorily explain why the Court's putative commitment to liberty of contract during the *Lochner* era was merely sporadic at best. As scholars Lund and McGinnis show, substantive due process led to only occasional decisions to invalidate statutes and, accordingly, it was less like a hegemonic tool of constitutional interpretation and more like a "random strike of lighting."[279] Liberty of contract jurisprudence, regardless of its ostensible appeal as a bulwark against state or federal interference in the quotidian affairs of citizens, could not reliably preclude the instantiation of Progressive reforms since it did not provide a principled basis for doing so.[280] More worryingly, it is likely that the liberty of contract doctrine, when honestly examined, is little more than an intriguing doctrine that decelerated, albeit while swiftly paving the way forward toward Progressive paternalism. This proposition seems particularly true when one ponders the deliberate attempt by political moderates during the *Lochner* era to reform the Commerce Clause doctrine so as to empower Congress to take a more active role in addressing the problems created by an increasingly integrated national economy.[281] Sawyer's analysis, which concentrates on *Hammer*, the harmless items limit, and the views of one of America's leading lawyers and

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274. Weinberg, *Unlikely Beginnings*, *supra* note 167, at 291.

275. MAYER, *supra* note 1, at 2.

276. *See, e.g.*, Weinberg, *Unlikely Beginnings*, *supra* note 167, at 291-92 (suggesting that Footnote Four of the *Carolene Products*'s decision "is surely one of the great revolutionary achievements of the New Deal Court" that marked "a new judicial acquiescence in the will of Congress").

277. This move leads inevitably to a contest to capture government-controlled resources. *See, e.g.*, JOHN GRAY, POST-LIBERALISM: STUDIES IN POLITICAL THOUGHT 4 (1996).

278. *See generally* MAYER, *supra* note 1, at 95.

279. Lund & McGinnis, *supra* note 97, at 1565.

280. *See, e.g.*, *id.*

281. Sawyer, *supra* note 37, at 69; *see also* Samuel Issacharoff & Catherine M. Sharkey, *Backdoor Federalization*, 53 UCLA L. REV. 1353, 1354-60 (2006) (suggesting that the Court has increasingly become a willing partner of Congress in providing federal oversight to state interference with the national market, and describing the greatly expanded power of Congress in recognition of the fact that we live in a world with an increasingly interconnected national commercial market).

statesmen, Philander Knox, indicates that Court decisions characterized in the popular imagination as standing for one proposition may be accurately understood as standing for the opposite.

It bears emphasizing that Knox, perhaps the most influential lawyer of his era, advanced his commitment to the "pre-historicist and teleological assumptions of Social Darwinism not to support laissez-faire economic theory, but to undermine it."[282] Once laissez-faire and its philosophical underpinnings were vanquished by Social Darwinism, little stood in the way of a determined effort to destabilize society's modest commitment to economic liberty; including a similarly moderate conception of liberty of contract. In keeping with the early views of Progressives[283] and the contention that "evolutionary pressures driving social development would ensure that the 'social tendencies' that survived would be those that would be most helpful for future generations,"[284] Knox, like many of his contemporaries, "accepted that the law of the survival of the fittest was 'as valid and inexorable among social phenomena and forces as in any other field of biology.'"[285] Competition, in this view, "produced progress in nature and in society and that iron law of development was largely beyond the control of mankind."[286] Mankind could resist its consequences; however, society and the nation's Constitution ultimately had to accommodate this "iron law."[287] Such views led to others, including the contention that "uncontrolled competition like unregulated liberty is not really free."[288]

The plausible implication of such Knoxian contentions for democratic governance, and economic policy is that freedom must be secured through quasi-scientific control and regulation.[289] Although the notion that quasi-science managed by bureaucrats should control society contradicts the principle of freedom based on freedom of association,[290] it is nevertheless true that Knox's views reflecting his explicit commitment to the iron law of evolutionary development, while moderate in tone, were not dissimilar to the more radical views of Justice Holmes, whose thinking reflected the notion that legal systems,

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282. Sawyer, *supra* note 37, at 90.

283. Hutchison*, Waging War on the "Unfit," supra* note 11, at 22-23 (describing Progressives as those who subscribed to the notion that government was a living thing freighted by irresistible impulses requiring ever-expanding power as part of the natural evolutionary process).

284. Sawyer, *supra* note 37, at 90.

285. *Id.*

286. *Id.*

287. *Id.*

288. *Id.* at 91 (quoting Memorandum of Philander C. Knox, U.S. Att'y Gen., Comment on "underlying laws" (in all social and industrial movements) as suggested by Kidd's Principles of Western Civilisation (1902)).

289. *Id.* (quoting Memorandum of Philander C. Knox, U.S. Att'y Gen., Comment on "underlying laws" (in all social and industrial movements) as suggested by Kidd's Principles of Western Civilisation (1902)).

290. BOETTKE, *supra* note 2, at 42 (quoting Frank H. Knight, *The Role of Principles in Economics and Politics*, 1-29 AM. ECON. REV. 42 (1951)).

language, and the cosmos gradually evolve to bring order out of chaos.[291] The convergence of Knox and Holmes's views was part of a widespread and infectious consensus compatible with both paternalism and the tendency toward authoritarianism that is embedded in modern democracies.[292] Individual freedom must surely suffer in the process. Consequently, and in keeping with arguments that I have offered elsewhere,[293] women, whose reproductive capacity the state of Virginia saw as an intrinsically harmful attribute, were placed at risk both by Justice Holmes's pulverizing rhetoric in *Buck* and by the Knoxian logic of *Hammer*. All that was necessary for this risk to be realized was for society to see human reproductive capacity in the same light (i.e., as a harmful attribute) and then to couple it with the ideology of societal advancement and the willingness to follow Nietzsche's example, which is signaled by the will to use power without moral restraint.[294] Consistent with Knox's perspective, which suggests that law must learn from biology,[295] this capitulation to Social Darwinism unleashed Progressive reformers to "pursue standards to identify individuals and groups who were unfit,' as part of an . . . effort to transform society."[296] Whether moderately or immoderately Progressive, adherents to this view were unwilling to allow the text of documents such as the Constitution or antique conceptions of liberty to stand in the way of a mounting effort to root out harmful products and, by extension, harmful people.[297] Surprisingly, a rigorous examination of the *Lochner* opinion suggests potential sympathy with such global views. Specifically, while examining the police power and its application to the state of New York's legislation, the *Lochner* majority wrote:

> There are, however, certain powers existing in the sovereignty of each state in the Union, somewhat vaguely termed police powers, the exact description and limitation of which have not been attempted by the courts. Those powers, broadly stated, and without, at present, any attempt at a more specific limitation, relate to the safety, health, morals, and general welfare of the public.[298]

One need not surrender to the language and grammar of postmodernism nor lapse into a solipsistic spasm in order to understand that relatively minor shifts in factual assumptions regarding the limits of the state or federal police power can

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291. Susan Haack, *Pragmatism, Law and Morality: The Lessons of* Buck v. Bell, 3 EUROPEAN J. OF PRAGMATISM AND PHILOSOPHY, 65, 69-70 (2011), *available at* http://ssrn.com/abstract=2116371 (describing Holmes' views).

292. *See, e.g.*, Richard H. Pildes, *The Inherent Authoritarianism in Democratic Regimes, in* OUT OF AND INTO AUTHORITARIAN LAW 125-151 (Andras Sajo ed., 2003) (showing that authoritarianism is "an inherent structural tendency of democratic regimes").

293. *See generally* Hutchison, *Waging War on the "Unfit," supra* note 11, at 1-46.

294. *See generally id.* at 21.

295. *See generally id.* at 22.

296. *See generally id.*

297. *See generally id.*

298. Lochner v. New York, 198 U.S. 45, 53 (1905).

produce seismic shifts in adjudicatory doctrine.[299] And if the Constitution is living, then neither living originalism[300] nor the text of the Constitution itself could save Carrie Buck, *Buck v. Bell*'s tragic victim, or anyone else from perdition driven by Mankind's quest to attain perfection. Perfection, on this view, is achievable by an ever-expanding regulatory state that operates under a banner declaring that resistance to progress is pointless.[301]

Neither modern critics nor revisionist defenders of Lochnerian jurisprudence have adequately explained why state and federal police power[302] occurred simultaneously with the *Lochner* epoch. Correlatively, the Supreme Court, both before and during the *Lochner* era, recognized the "federal police power," analogous to the powers of state legislatures,[303] to promote the health, safety, morality and general welfare of the nation,[304] as well as the states' police power to limit the hours worked by female employees[305] on grounds that women were inferior and, therefore, in need of protection.[306] Lund and McGinnis confirm that the law invalidated by the *Lochner* majority was no more paternalistic than the public health measures approved both before and after the *Lochner* decision.[307] Indeed, it is possible that neither the *Lochner* majority nor the dissent squares with anything resembling the original understanding of due process, an outcome that Chapman and McConnell explain in some depth.[308] First, they show that the New York enactment failed because it was not a "necessary or appropriate" way to affect the state's interest in protecting the health of its citizens, and, therefore, was not a valid exercise of its police powers,[309] which implies that a more modest interference with liberty would have been acceptable to the Court. Second,

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299. *See* Suzanna Sherry, *Foundational Facts and Doctrinal Change*, 2011 U. ILL. L. REV. 145, 145 (focusing largely on doctrinal shifts within the judiciary).

300. JACK M. BALKIN, LIVING ORIGINALISM 154-55 (2011) (discussing commerce as intercourse, which enables the Supreme Court to work around older cases without overruling them explicitly as part of the federal courts' evolutionary form of common law decision-making that enables human progress).

301. *See* EDWIN BLACK, WAR AGAINST THE WEAK: EUGENICS AND AMERICA'S CAMPAIGN TO CREATE A MASTER RACE 9 (2003) (describing mankind's quest for perfection).

302. *See, e g.*, Sawyer, *supra* note 37, at 67 (citing Hoke v. United States, 227 U.S. 308 (1913); Hipolite Egg Co., v. United States, 220 U.S. 45 (1911); Champion v. Ames, 188 U.S. 32 (1903)).

303. Cushman, *Doctrinal Synergies*, *supra* note 118, at 241.

304. *See id.* (*Hammer* allowed Congress to exercise its federal police power by prohibiting the interstate shipment of harmful goods, but not items that were in themselves harmless, like the products of child labor).

305. *See, e. g.*, Muller v. Oregon, 208 U. S. 412 (1908).

306. EPSTEIN, *supra* note 117, at 90-93.

307. Lund & McGinnis, *supra* note 97, at 1564 (showing that all of the Justices who participated in the *Lochner* decision appeared to agree that the legislature was "perfectly free to regulate the hours of bakers in order to protect their health").

308. Chapman & McConnell, *supra* note 28, at 1792-94.

309. *Id.* at 1793.

Chapman and McConnell show that "[t]hree of the Justices would have watered down this means-ends analysis, making it easier for the state to comply, and one Justice would have invalidated the statute only if it interfered with what a 'rational and fair man' would have recognized as a 'fundamental' right,"[310] and accordingly, "[n]one of these opinions squares with anything resembling the original understanding of due process, whether in 1791 or in 1868."[311] Third, the liberty of contract doctrine "on which the majority relies is not set forth anywhere in the Constitution and contradicts the uniform understanding from the Founding era through Reconstruction that legislatures have the authority to pass prospective and general legislation affecting contracts."[312] Fourth, Chapman and McConnell assert that "[t]he idea that individuals possess a freedom to contract with other persons to do anything they would be permitted to do individually may be attractive in the abstract (or not), but it does not appear anywhere in the Constitution."[313] Fifth, they maintain that liberty of contract "has no basis in the Due Process Clause, which allows deprivations of natural liberty so long as they are achieved with due process of law, meaning proper enactment by the legislature and proper enforcement by the courts."[314] Finally, they show that "the Court's limitation of legitimate state legislative authority to 'police powers' has no textual basis."[315] If Chapman and McConnell's bracing analysis is accurate, it is doubtful that *Lochner* provides a secure plinth to advance liberty. Rather, it provides a rather limp instrument that is unable to reliably deny states the power to enact and enforce paternalism borne of Progressive presumptions or any other forms of majoritarianism.[316] Equally ominous, *Hammer's* harmless items limitation on the federal police power and the Commerce Clause can be seen not as part of an effort to advance liberty, but rather as part of a deliberate strategy to advance paternalism within Knoxian limits. This conclusion operates consistently with the views of "living originalist" scholars who see commerce as intercourse, and enables the Supreme Court to work around older cases without necessarily overruling them explicitly as part of the federal courts' evolutionary form of common law decision-making that facilitates human progress.[317]

Given this record, Professor Mayer's defense of the inherent value of *Lochner*, which incorporates his careful explication of the difference between liberty of contract jurisprudence and laissez-faire ideology, fails to consider the probability that the doctrine developed by *Lochner* and its progeny has always

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310. *Id.*

311. *Id.*

312. *Id.*

313. *Id.*

314. *Id.* at 1793-94.

315. *Id.* at 1794.

316. *Id.* (arguing that the Federal Constitution does not purport to limit the powers of state government except in specific ways and concluding that the Tenth Amendment guarantees that all powers not denied to the states by the Constitution are reserved to them, an understanding that contradicts the *Lochner* majority opinion).

317. BALKIN, *supra* note 300, at 154-55.

been incapable of securing the constitutional right of liberty. Contrary to Mayer's claims, skeptical analysis shows that *Lochner* cannot be separated from a movement that created statutes consistent with the paternalistic and collectivist threads that ran deeply through the Anglo-American common law tradition during the middle of the nineteenth century in Great Britain.[318] However contested our understanding of *Lochner* may be,[319] the *Lochner* Court's moderate commitment to paternalism can be seen as part of process that diminished[320] Americans' liberty interests and culminated in the contemporary contention that no limits exist on the federal government's power to impose its will on individuals who engage in "harmful" inactivity within the nation's healthcare market.[321] Notwithstanding its revisionist defenders, the *Lochner* decision, which evinced a moderate commitment to liberty and a rather spacious commitment to paternalism,[322] can be convincingly separated from classical Liberalism and the natural rights tradition; which necessitated limited government in order to protect individual rights and liberties.[323]

Equally plausible is the idea that *Lochner*, as the life and times of Philander Knox demonstrate, cannot be fully distinguished from the normative views of Progressives who justified an expansion in the size and scope of government as the inevitable consequence of evolution. Premised on the proposition that society was one indivisible whole that left no room for individuals or firms who declined to comply or otherwise consistently evolve with the needs of a modern and interconnected nation.[324] Positing the regulatory state as an ontology of necessity and the prerogative of scientism, this embryonic cycle gave birth to a predatory process that repudiated classical liberalism and liberty of contract as static relics. Thus understood, it appears that *Lochner* and *Hammer* were less concerned with advancing liberty and more concerned with placing speed limits on an already advancing paternalism.

Whether swift or slow, paternalism's advance has been richly described by John Gray, who indicates that the modern state now acts as an instrument of

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318. MAYER, *supra* note 1, at 55 (critiquing this approach).

319. For a discussion of contrasting explanations of the *Lochner* Court, see, e.g., Sawyer, *supra* note 37, at 68-70.

320. *Id.* (suggesting that the *Lochner* Court was part of a process that suggested few limits on government power).

321. *See, e.g.*, Nat'l Fed'n of Indep. Bus. v. Sebelius, 132 S. Ct. 2566 (2012) (noting that the federal government asserts that there is no temporal limit in the Commerce Clause for its power to dictate the conduct of an individual today because of a "prophesied future activity").

322. *See, e.g.*, Lund & McGinnis, *supra* note 97, at 1564 (showing that all of the Justices who participated in the *Lochner* decision appeared to agree that the legislature was perfectly free to regulate the hours of bakers in order to protect their health).

323. Harry G. Hutchison, *Employee Free Choice or Employee Forged Choice? Race in the Mirror of Exclusionary Hierarchy*, 15 MICH. J. RACE & L. 369, 381 (2010) [hereinafter Hutchison, *Employee Free Choice*].

324. *Id*.

oppression rather than as an umpire enforcing the rules of civil association.[325] Reflecting the cultural forces that were set in motion during the latter part of the nineteenth century, forces that ignited the Progressive Era as a tendentious effort to rid the nation of harmful products and people, as well as "destructive" competition, the evolution of this highly symbiotic process is explainable: government power expands in part because of the vast assets it already controls or owns, but also because no private or corporate asset is safe from invasion or confiscation by the state.[326] This symbiosis correlates with state and federal legislative behavior, which can be best understood as the quest for the maximization of individual utilities by politicians rather than the search for phantom public interest.[327] Far from favoring a Madisonian conception of equality as the basis for every law,[328] the promulgation of legal and regulatory innovation has now become an all-encompassing activity that diminishes liberty and enables highly organized groups to hijack the political process for their own benefit.[329]

History shows that this move (i.e., the initiation of paternal process that aims to eliminate all sorts of harms) appears to be the central moral and cultural tendency of modern democratic societies.[330] Reflecting a corset of cultural and social constraints that diminished previously dominant notions associated with an atomistic classical political economy[331] attached to the natural rights tradition, the liberty of contract doctrine, as transmuted and vitiated by moderate or immoderate Progressives during the period from 1902 to 1920, was incapable of stopping this evolving progression.

Skeptically considered, *Lochner*, *Hammer,* and other similar cases signaled the inevitability of "Progress," as well as the contention that government has a duty to protect both the nation and individuals from the risks associated with harmful products and people, and from the threats posed by collective action problems arising in an increasingly integrated economy. Taken together, *Lochner* era cases accommodated the nation's response to such fears while conforming to Philander Knox's belief that in a "survival of the fittest" world, resistance to the forces of progress was futile.[332] Despite Mayer's capable research, it is likely that his comprehensive defense of liberty of contract jurisprudence is diminished by analytical gaps that fail to satisfactorily account for the history and potency of the social, cultural, and quasi-scientific currents permeating the nation before, during,

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325. GRAY, *supra* note 277, at 12.

326. *Id.*

327. DANIEL T. RODGERS, AGE OF FRACTURE 64 (2011).

328. MAYER, *supra* note 1, at 28.

329. GRAY, *supra* note 277, at 12.

330. *Id.* at 11-12.

331. *See, e.g.*, RODGERS, *supra* note 327, at 45 (cultural and social developments conspired to constrain previously dominant notions associated with an atomistic and individualist classical political economy).

332. Sawyer, *supra* note 37, at 26.

and after the onset of the *Lochner* era.[333] Naturally, these currents destabilized the influence of laissez-faire economics, advanced Social Darwinism, moderated and then robbed the effectiveness of liberty of contract, and shrunk individual liberty. This remains true despite David Bernstein's contention that, in the 1920s, the Court became more aggressive about reviewing government regulations in the economic sphere, as the Justices "began to acknowledge the broader libertarian implications of *Lochner* and other liberty of contracts cases" as an enforceable limit on government authority.[334]

While proof of cause and effect remains complex, Mayer's shortcomings regarding the potency of the social and cultural currents saturating the nation lead to other shortcomings. Toward the end of his book, Mayer appears to confirm public choice theory's key insight that people and groups act to further their own private interest rather than the public interest, whether they do so publicly or privately.[335] Ratifying John Gray's incisive analysis, and implicating Warren Samuels's emphasis on the irreducible embeddedness of all economic processes in the political and legal nexus,[336] Mayer inspects *United States v. Carolene Products Co.*,[337] a decision that has occupied scholars for decades. This decision upheld the federal Filled Milk Act of 1923, a statute that prohibited the interstate shipment of all skimmed milk compounded with any fat or oil aside from milk fat.[338] Mayer shows that this decision "was 'an utterly unprincipled example of special interest legislation' that mainly targeted skimmed milk laced with coconut oil, which was cheaper than canned milk containing milk fat."[339] Since the major force behind the act was a privileged segment of the dairy industry that sought an economic advantage over its less privileged competitors, the legacy of *Carolene Products* is deepened by noting its reification of the primacy of special interest group politics.[340] Mayer reacts to this development by stating that *Carolene Products*, along with its Footnote Four dictum protecting certain rights and minorities from discrimination, establishes a double standard.[341] Per Mayer's account, the double standard signifies that "the Court . . . gives less constitutional

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333. *See, e.g.*, RODGERS, *supra* note 327, at 4 ("In contrast to mid-nineteenth-century notions of the self as a free-standing, autonomous production of its own will and ambition, twentieth-century social thinkers had encircled the self with wider and wider rings of relations, structures, contexts, and institutions.").

334. BERNSTEIN, REHABILITATING *LOCHNER*, *supra* note 39, at 5.

335. MAYER, *supra* note 1, at 110-11 (inspecting United States v. Carolene Prods., 304 U.S. 144 (1938)). *Carolene Products* upheld the Federal Filled Milk Act of 1923, a law mainly targeting skimmed milk laced with coconut oil, which was cheaper than canned milk containing milk and hence the law can be seen as favoring special interest in a process that verifies public choice theory's insights.

336. BOETTKE, *supra* note 2, at 109 (quoting Samuels).

337. 304 U.S. 144 (1938).

338. MAYER, *supra* note 1, at 110.

339. *Id.*

340. *Id.*

341. *Id.* at 111.

protection to economic liberty and property rights—the rights formerly protected by its *Lochner*-era liberty-of-contract jurisprudence—than it gives to other rights."[342] Given the special interest group legacy of *Carolene Products*, and in light of the fact that disadvantaged groups have less access to power and influence,[343] it is possible to dispute this contention on grounds that what the decision grants in Footnote Four, it takes away within the framework and legacy of the decision itself. Rather than truthfully creating a double standard within the domain of substantive due process jurisprudence,[344] which blocks any legislation disfavoring members of minority groups, *Carolene Products,* in practice, favors entrenched groups at the expense of African Americans and other outsiders[345] "[s]o long as the government's action bears some connection to a minimally rational economic policy . . . ."[346]

A rich harvest of toxic fruit has been produced in the pursuit of "Progress" and the Public Good. Eschewing the "harmful" and surrendering to a salvific belief in expertise and social science as instruments of social control, this harvest signifies paternalism's deification. The police power, which is amply armed with language from *Lochner*, *Hammer*, or other cases from the liberty of contract canon, provides the Supreme Court with a ready justification for minimal scrutiny: the protection of the safety, morals, health and general welfare of the public.[347] Although it may be doubtful that the federal government, as a regime of enumerated powers, ever had residuary police powers,[348] Sawyer shows that a consensus emerged in 1906 regarding freedom of contract and the Commerce Clause, implying that if a regulation was a legitimate adjustment of interstate commerce, then, by definition, it was not a violation of freedom of contract.[349] Equally true, state regulations that advanced police power purposes—health, safety, morality, or general welfare—were legitimate,[350] which suggests, but does not necessarily prove, that substantive due process and liberty of contract were

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342. *Id.*

343. Harry G. Hutchison, *Racial Exclusion in the Mirror of New Deal Responses to the Great Crash*, NEXUS: 15 CHAPMAN'S J. L. & POL'Y 5, 13 (2009-2010) [hereinafter Hutchison, *Racial Exclusion*] (observing that government intervention disfavors the individuals and groups that lack political and economic clout).

344. *See* MAYER, *supra* note 1, at 111 (arguing that *Carolene Products* created a double standard in the Supreme Court's modern substantive due process jurisprudence).

345. *See* Hutchison, *Employee Free Choice*, *supra* note 323, at 396-405 (cataloguing statutes and their consequences on African Americans during the New Deal, a process ultimately approved by the Supreme Court).

346. MAYER, *supra* note 1, at 110 (citing Timothy Sandefur).

347. Lochner v. New York, 198 U.S. 45, 54 (1905).

348. Cushman, *Doctrinal Synergies, supra* note 118, at 241 (showing that Congress did possess a power analogous to the police powers of the state legislatures, enabling it to protect the free flow of interstate commerce, which may provide a basis for interfering with the contractual relations of businesses that are affected with the public interest).

349. Sawyer, *supra* note 37, at 47-48.

350. *Id.* at 48.

conceptualized as moderate in theory but rather feckless in practice. This is so despite the efforts of *Lochner*'s ablest defender, David Bernstein, who suggested "that the decision rested on sound principles of economics and liberty, that concepts of natural rights and liberty of contract had deep roots in political theory, and that the bakers' hours legislation struck down in the case was a disguised scheme to favor entrenched and well-heeled special interests."[351] Although conventional attacks on the underlying ideology of the *Lochner* decision may well be unfounded,[352] and while the outcome of the Court's adjudication of economic liberty might well have been changed by the discovery of a robust conception of liberty in the text of the Constitution, today, the mere assertion that the subject relates even remotely to any of the categories of the police power pantheon, or alternatively implicates the Commerce Clause, appears to legitimate a statutory enactment, no matter how noxious the enactment.[353] Although it cannot be argued that any one case alone ensured Progressivism's questionable achievements, and while history is inherently agnostic about the soundness of *Lochner*[354] and *Hammer*, it is doubtful that either case offers a moral principle that would necessarily inhibit the advance of majoritarian paternalism. Taken together, this tidy paradigm confirms Ralph Inge's remarkable intuition that when defenders of liberty marry the regulatory spirit of the age, they unavoidably become widowers.[355] Properly considered, to enshrine the harmless item limit within the doctrine of liberty of contract is to advance the culturally potent goals of the regulatory state rather than the rediscovery of a lost constitutional right. The widespread acceptance of this Knoxian approach signals that to the extent that liberty of contract is traceable to *Lochner* and *Lochner*-era cases, this doctrine spent its force *ab initio*.

Because Americans live in a late modern, post-secular world characterized by collective and individuated narcissism reinforced by solipsism,[356] it would be naïve to believe that any single book could bridge the differences in tolerable opinion about deeply contestable matters such as the meaning, scope, and duration of liberty of contract jurisprudence. It is doubtful that substantive due process jurisprudence can be resuscitated by its subversive defense on the part of revisionist and originalist scholars; and this is true regardless of whether or not substantive due process is seen as legitimate or if originalism is seen as

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351. Chapman & McConnell, *supra* note 28, at 1794.

352. *Id.*

353. *See, e.g.*, Brazier Constr. Co. v. Chao, 2002 U.S. Dist. LEXIS 28523 (D.D.C. Apr. 26, 2002) (upholding the Davis-Bacon Act, an act designed to protect white males against a claim that it was passed with discriminatory intent or purpose in violation of the Equal Protection guarantees of the Constitution. In reality, the Davis-Bacon Act and its progeny honor the legacy of Robert Bacon, co-author of the Act, who denied anti-African American animus but made clear his discomfort with "defective" workers taking jobs that rightfully belong to white union men); *see also* Hutchison, *Employee Free Choice, supra* note 323, at 412-13.

354. BERNSTEIN, REHABILITATING *LOCHNER*, *supra* note 39, at 6.

355. DOUTHAT, *supra* note 29, at 106.

356. *Id.* at 234-35, 240.

wrongheaded.[357] Consistent with this deduction, this Article maintains that Professor Mayer's endeavor to rediscover a "lost constitutional right" is not fully tenable. Although it is true that disadvantaged individuals and groups would have benefited marginally had the Lochnerian liberty of contract doctrine been practiced consistently, at the end of the day it is probable that the size and scope of government would have approached its current apex predicated on the need to control and regulate an increasingly interconnected country. The liberty of contract doctrine, either in the hands of the *Lochner* Court majority or guided by the "moderate progressive" preferences of Philander Knox, appears to be inherently insufficient to preclude the instantiation of the regulatory state and its consequent subordination of human liberty to the paternal, if not the maternal, impulse.

The need to protect vulnerable people and markets along with the desire to ensure the health, safety, morals, and general welfare of society generates a culturally persuasive approach that glorifies Leviathan and shelters the search for economic and ideological rents from thorough scrutiny. Ably assisted by flexible, if not living language regarding both the notion of harm and the text of the Constitution, the Supreme Court has had little difficulty in legitimating the regulatory state. This maneuver is richly represented by the New Deal and its dubious achievements.[358] Any sustained inspection of the New Deal and its progeny reveals a paradox: the attempt to attain social justice through government planning and regulation has often produced the opposite result.[359] This irony appears to be the result of modern humans' quest for organizational predictability, predicated on the presumptive viability of social science[360] and its correlative conceit, sociological jurisprudence. The search for order and certainty as a cure for human insecurity[361] creates a demand not only for law, but a demand for more precise law.[362] Since organizational success and predictability exclude one another, the project of creating a predictable society through endless quasi-scientific efforts by government bureaucrats is doomed by the very facts of social life.[363] This is so because humans respond in unexpected ways to new regulatory thrusts, thus rendering organizational success based on bureaucratic managerialism and Progressivism as exemplary elements of a totalizing ideology that describes modern democratic states as nothing less than a factual and moral fiction.[364]

While it is true that after the death camps, the Gulag, and the New Deal slave

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357. Chapman & McConnell, *supra* note 28, at 1675.

358. *See, e.g.*, Hutchison, *Racial Exclusion*, *supra* note 343, at 5-13.

359. *Id.* at 8 (discussing Goldberg's analysis).

360. ALASDAIR MACINTYRE, AFTER VIRTUE 88-108 (2007) (discussing the human search for predictability through social science generalizations).

361. Frohnen, *supra* note 15, at 536.

362. *Id.* at 537.

363. MACINTYRE, *supra* note 360, at 106.

364. *Id.* at 106-07.

camps,[365] it was harder to credit the naïve Progressive belief that the modern scientistic age, with its deadening focus on technique,[366] represented a long march toward enlightenment and peace;[367] and, while the consistent enforcement of the substantive due process doctrine had, and perhaps still has the potential to curb the expansion of the regulatory state, the pregnant capacity of this construct has gone unrealized. Because the *Lochner* Court, along with moderate Progressives of the day, was prepared to embrace as virtuous of a version of paternalism that differs only in degree from the state of New York's capitulation to special interest groups' pleadings in the form of legislation designed to favor large bakeries at the expense of small ones,[368] it is inconceivable that the rediscovery of a lost constitutional right purportedly embedded in this case could reliably thwart clear and present dangers to liberty. These risks have materialized in a sharp expansion of the regulatory state, a process that demonstrates that the belief in social control, as advanced by Philander Knox and embodied in the notion of expertise, is a masquerade.[369]

CONCLUSION

Professor Mayer offers elegant arguments for rehabilitating liberty of contract that deserve admiration rather than obloquy. However, a conscientious assessment of the language and grammar of *Lochner, Champion, Hipolite, Hammer,* and *Hoke,* as well as a portfolio of cases decided during the period from 1897 to1937, in combination with an assessment of the life and times of Attorney General-turned-Senator Philander Knox, raise doubts regarding the success of this project. This Article's examination of Mayer's project suggests that neither the Court nor the nation, at least since the latter part of the nineteenth-century, was prepared to reliably accept a modest conception of liberty of contract jurisprudence as a constraint on the government's reach. Instead, both the Court and the nation were primed to embrace majoritarian paternalism all the way down. Paternalism and the ever-growing modern state were grounded on legal positivism and succeeding forms of jurisprudence, which combined to favor the idea "that we cannot have law without an underived authority. Law, on this view, must come from somewhere and is in its nature a command, so a commander

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365. *See* RISA L. GOLUBOFF, THE LOST PROMISE OF CIVIL RIGHTS 1-2 (2007) (richly documenting the attempts by African American workers to escape the virtual slaves camps that were established with the approval of the federal government during the early 1940s).

366. BOETTKE, *supra* note 2, at 176-77.

367. DOUTHAT, *supra* note 29, at 23.

368. *See* MAXWELL L. STEARNS & TODD J. ZYWICKI, PUBLIC CHOICE CONCEPTS AND APPLICATIONS IN LAW 80 (2009) (suggesting that the disputed regulation at issue was designed for bakers who worked at the larger industrial bakeries that already complied with the various state safety and hours regulations, as reflected in the New York law, at the expense of small, often immigrant-owned bakeries that did not).

369. MACINTYRE, *supra* note 360, at 107.

must issue the laws and to do so must be in a position subservient to no one,"[370] or, by extension, no principle. Representing an immense concentration of power in the state, this move toward positivism has fatally undermined notions of liberty and natural law that might otherwise limit the power of government.[371]

This trend has been hastened by the increasing inability of Americans to restrain their appetite for government-supplied goods and services, a development reflected in the nation's bloated public debt. This trend creates an immodest if not degenerate domestic government at both the state and federal levels "that tries to be all things to all people no matter which political party is in power . . . ."[372] This progression has been encouraged by partisans who oscillate between circulating apocalyptic fears regarding harmful people and products and offering messianic delusions to save us from ourselves without the need for either self-control or personal sacrifice.[373] Rightly deconstructed, the nation's political and juridical enterprise, mirroring the moderately Progressive architecture of Knox and the immoderate ideology of Holmes, shields society from the conclusion that no human institution can protect us from the unpredictability or the inescapable disappointments of life lived in the shadow of hope and injustice.

Consequentially, this process evokes Orwell's admonition that saints should be judged guilty until they are proven innocent,[374] which supplies a suitable metaphor for measuring judges, politicians, citizens, and claims of constitutional rights in our current epoch, an era that unfurls under a banner offering new threats to human contingency, mortality, and the possibility of eternity. Until citizens, politicians, and judges display modesty regarding the nation's capacity to solve the human problem and immodesty regarding an individual's right and responsibility to solve her own difficulties in voluntary communion with others, it remains doubtful that the rediscovery of liberty of contract, as a lost constitutional right, can become anything but an attractive anachronism.

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370. Frohnen, *supra* note 15, at 538.

371. *Id.* at 529.

372. DOUTHAT, *supra* note 29, at 5.

373. *Id.*

374. *Id.* at 229 (citing Orwell).

EDUCATION RIGHTS AND THE NEW DUE PROCESS

ARETO A. IMOUKHUEDE*

INTRODUCTION

This Article argues for a human dignity-based, due process clause analysis to recognize the fundamental duty of government to provide high quality, public education. Access to public education is a fundamental duty, or positive fundamental right because education is a basic human need and a constituent part of all democratic rights.

In *The Fifth Freedom*, I argued that there is a fundamental duty under the U.S. Constitution to provide public education and that the reason a fundamental right to public education has not been recognized is because of a profound confusion regarding fundamental rights as duties.[1] The Court is biased towards protecting negative rights or liberties over enforcing positive rights or duties.[2] As a result, the Court has failed to develop a framework for protecting even the most basic and widely accepted of fundamental duties, the constitutional duty to provide high quality, public education.[3]

Here, I demonstrate that education is essential to any meaningful concept of personal liberty and to democracy. Without an educated citizenry, liberty and democracy are merely empty concepts devoid of meaning for all but the economically privileged and socially advantaged. For instance, voter turnout is much lower amongst people with no college educations as compared to people with college and graduate level degrees.[4] The voter turnout rate for adults who

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1. Areto A. Imoukhuede, *The Fifth Freedom: The Constitutional Duty to Provide Public Education*, 22 U. FLA. J.L. & PUB. POL'Y 45,(2011).

2. *See* San Antonio Indep. Sch. Dist. v. Rodriguez, 411 U.S. 1, 55 (1973); Imoukhuede, *supra* note 1, at 81.

3. Plyler v. Doe, 457 U.S. 202, 223 (1982) ("Undocumented aliens cannot be treated as a suspect class because their presence in this country in violation of federal law is not a 'constitutional irrelevancy.' Nor is education a fundamental right; a State need not justify by compelling necessity every variation in the manner in which education is provided to its population."); *Rodriguez*, 411 U.S. at 35 ("Education . . . is not among the rights afforded explicit protection under our Federal Constitution. Nor do we find any basis for saying it is implicitly so protected.").

4. *See*, *e.g.*, Barry C. Burden, *The Dynamic Effects of Education on Voter Turnout*, 28

have not completed high school is even lower.[5] Hence, it is well understood that education inspires and enables meaningful democratic engagement.[6]

Recognizing that public education is a basic capability that is essential to human dignity requires application of a due process clause analysis similar to that applied in the 2003 human dignity-based holding of *Lawrence v. Texas*.[7] Ironically, *Lawrence*, which is a negative-rights and liberty-based holding, can serve as the template for recognizing the positive right of access to public education.[8] While the basic right recognized in *Lawrence* is the right to privacy, free of government intrusion, *Lawrence* rests on a broader notion of substantive due process: that privacy is essential to liberty and human dignity.[9] Like the right to privacy, education is also essential to liberty. However, the case for a dignity-based due process clause protection of the right to public education is even stronger for education than the case for the right to privacy. This is because education is essential to both the liberty and the democracy components of human dignity.[10]

This Article begins in Part I by discussing the nature of the U.S. "national education crisis"[11] and reasons for why improving public education across the U.S. would help advance innovation and the nation's long term gross domestic product. I then discuss empirical research that demonstrates that educational

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ELECTORAL STUD. 540 (2009) (analyzing survey data from 1952 to 2004, showing that the effect of college education increased starting in 1980s, thereby magnifying the ability of educational attainment to predict turnout); Aina Gallego, *Understanding Unequal Turnout: Education and Voting in Comparative Perspective,* 29 ELECTORAL STUD. 239, 240 (2010) (discussing findings that well-educated citizens vote more frequently than the poorly educated in some countries, including the United States).

5. Rachel Milstein Sondheimer & Donald P. Green, Using Experiments to Estimate the Effects of Education on Voter Turnout, 54 AM. J. POL. SCI. 174-79 (2009) (arguing that there is a powerful relationship between education and voter turnout and pointing out that political participation is the function of one's level of education; people with mere high school education or less are less likely to vote).

6. *See* Terry Smith, *Autonomy Versus Equality: Voting Rights Rediscovered*, 57 ALA. L. REV. 261, 262 (2005) (arguing that autonomy as a constitutional value was always implied in many fundamental rights, but neglected in voting specially when the political autonomy to vote of the minorities and that minority voters must experience for themselves the value of autonomy).

7. 539 U.S. 558 (2003) (finding that the Texas statute which made it a crime for people of the same sex to engage in sexual conduct was unconstitutional as applied to males who engaged in these same sex sexual activities in the privacy of their own homes).

8. *Id.*

9. *Id.*

10. *See* Smith, *supra* note 6, at 301-02 (arguing that autonomy as a constitutional value was always implied in many fundamental rights, but neglected in voting especially when the political autonomy to vote of the minorities and that minority voters must experience for themselves the value of autonomy).

11. *See infra* note 29 and accompanying text.

inequality based on race, ethnicity, and wealth has only become worse.[12] Race and socioeconomic educational inequality comparisons between the U.S. and Canada demonstrate that the way things are with regard to U.S. educational inequity is not the way things have to be or have to remain. The section closes with the Deweyan insight that in addition to affecting economic prosperity, education also impacts the capability of citizens to fully and meaningfully engage in the political process.[13]

Part II demonstrates that equal and fair access to high quality education is essential to democracy and human dignity. This Part argues with the support of classical, enlightenment, and modern philosophers such as Aristotle,[14] Jacques Rousseau,[15] and John Dewey,[16] that a well-educated citizenry is essential to democracy. This Part connects concepts of liberty with the capabilities approach as applied by Amartya Sen[17] and Martha Nussbaum.[18] This approach supports protecting basic capabilities that enhance freedom; including the capability to be educated.[19] The capabilities approach treats education as important to economic and political participation.[20] Based on this capabilities based analysis, Part II

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12. *See infra* note 27 and accompanying text.

13. *See* JOHN DEWEY, DEMOCRACY AND EDUCATION 4 (Free Press 1966) (1916); *see also* Thomas Jefferson, *Bill for the More General Diffusion of Knowledge (1779)*, *in* Education in the United States: A Documentary History 739-40 (Sol Cohen ed., 1974) [hereinafter EDUCATION IN THE U.S.]; MARTHA C. NUSSBAUM, CREATING CAPABILITIES: THE HUMAN DEVELOPMENT APPROACH 32-33 (Harvard Univ. Press 2011); AMARTYA SEN, THE IDEA OF JUSTICE 231-35, 275-76, 283, 291-96, 300, 304 (Belknap Press 2011) [hereinafter SEN, THE IDEA OF JUSTICE].

14. Aristotle, The Politics 229 (Carnes Lord trans., Univ. of Chicago Press 1984) [hereinafter ARISTOTLE, THE POLITICS] ("Since there is a single end for the city as a whole, it is evident that education must necessarily be one and the same for all . . . .").

15. *See, e.g.*, DEMOCRACY: A READER 100 (Ricardo Blaug & John Schwarzmantel eds., 2000). See generally JEAN-JACQUES ROUSSEAU, THE SOCIAL CONTRACT AND DISCOURSES, 11-15 (G.D.H. COLE TRANS., 1968) (explaining that "through the social contract we gain civil liberty and moral liberty: the former involves being ruled by a general will instead of our individual self-interest. The latter means obedience to rules which we, in association with our fellow citizens, have made.")

16. *See* DEWEY, *supra* note 13, at 4.

17. *See* AMARTYA SEN, DEVELOPMENT AS FREEDOM 4-5, 10-11, 36-49, 144 (1999) [hereinafter SEN, DEVELOPMENT AS FREEDOM].

18. *See* NUSSBAUM, *supra* note 13, at 32-33. Among Nussbaum's brief list of ten centrally important capabilities is the capability for "Senses, Imagination, and Thought." *Id*. at 33. Nussbaum explains that the capability to think and reason in a "truly human" way requires an adequate education. *Id*.

19. *See*, *e.g.*, *id.*

20. *See* SEN, THE IDEA OF JUSTICE, *supra* note 13, at 231-35, 275-76, 283, 291-96, 300, 304. Sen first discusses the link between economic wealth and substantive freedoms; for example, while there is a link between higher income and "freedom from premature mortality," other factors come into play including public healthcare, access to medical care, access to education, and social unity.

concludes that being educated is essential to liberty, democracy, and human dignity.[21]

Part III explains how modern Equal Protection Clause jurisprudence has retreated from its early equality aspirations as it has continued to embrace an increasingly libertarian perspective.[22] This Part begins by discussing the U.S. Supreme Court's early proclamations regarding the importance of education and how the Warren Court overcame problematic liberal theories of equality that had previously been used to justify "separate but equal" in education and other contexts.[23] Part III concludes by recognizing that the modern Court has abandoned equality as a viable principle of justice, in favor of a liberty-centered jurisprudence that ignores the equality principle.[24]

Part IV prescribes an alternative approach for recognizing and protecting a right to public education based in a due process clause analysis. Such an approach would allow education rights advocates to overcome the Equal Protection Clause limitations described in Part III.[25] Part IV critiques Kenji Yoshino's "pluralism anxiety" and argues for applying the more accurate label of "xenophobia" to describe the societal pressures animating the Court's abandonment of equality. Despite this critique of Yoshino's pluralism anxiety label, this part embraces Yoshino's central argument that a due process clause-based human dignity approach to recognizing constitutional duties is more likely to achieve success, because the Court appears to have already applied human dignity as a proxy for other rights, most recently when examining privacy rights in *Lawrence v. Texas*.[26]

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21. *Id*. at 226-27.

22. *See, e.g*., Richard H. Pildes, *The Constitutionalization of Democratic Politics*, 118 HARV. L. REV. 28, 55-57, 83 (2004); *see also* Jamie B. Raskin, *Affirmative Action and Radical Reaction*, 38 HOW. L.J. 521, 525-29 (1995) (arguing that the political gains made by African Americans and other minorities during the Civil Rights era and under the Warren Court have been reduced by the current conservative Court); Kyron Huigens, *Rethinking the Penalty Phase*, 32 ARIZ. ST. L.J. 1195, 1201-02 (2000) (arguing that the Court has made it clear that equality is not a factor to observing Eighth Amendment challenges).

23. Brown v. Bd. of Educ., 347 U.S. 483 (1954).

24. *See* Leslie Meltzer Henry, *The Jurisprudence Of Dignity*, 160 U. PA. L. REV. 169 (2011). Henry explores and expands the concept of dignity in the U.S. Constitutional Law context and makes three important findings. First, the Court's reliance on dignity is increasing, and the Roberts Court is accelerating that trend. Second, in contrast to its past use, dignity is now as likely to be invoked by the more conservative Justices on the Court as by their more liberal counterparts. Finally, the study demonstrates that dignity is not one concept, as other scholars have theorized, but rather five related concepts.

25. *See* Kenji Yoshino, *The New Equal Protection*, 124 HARV. L. REV. 747, 776-87 (2011). Kenji Yoshino connects liberty and equality through a concept of human dignity and suggests that a liberty-centered human dignity approach that derives respect and equal dignity for all is more likely to achieve litigation success than an equality based approach.

26. *Id*. at 776-96 (using *Lawrence v. Texas* as an example of the liberty-based dignity claim).

I. THE NATURE OF THE EDUCATION PROBLEM

Ensuring that every child in the U.S. at least receives a high quality primary and secondary school education is obviously important in our increasingly complex, global society.[27]

> [A]ccess to an equitable, empowering education for all people has become a critical issue for the American nation as a whole. No society can thrive in a technological, knowledge-based economy by depriving large segments of its population of learning. But at a time when three-quarters of the fastest-growing occupations require post-secondary education, just over one-third of our young people receive a college degree. Meanwhile, in many European and Asian nations, more than half of young people are becoming college graduates.[28]

Despite this need for what Darling-Hammond frames as an "equitable and empowering education," the U.S. is in the midst of what some, including myself, have characterized as "a national education crisis."[29] Fear of lagging economic growth lies at the heart of many current political and economic debates both in the U.S. and across the world.[30] Economists recognize high quality education can aid in enhancing innovation, thereby advancing a nation's long term gross domestic product.[31] Thus, improving public education across the U.S. can be a

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27. *See* Linda Darling-Hammond, *Soaring Systems: High Flyers All Have Equitable Funding, Shared Curriculum, and Quality Teaching*, AM. EDUCATOR, Winter 2010-2011, http://www.aft.org/pdfs/americaneducator/winter1011/DarlingHammond.pdf, *archived at* http://perma.cc/AX4U-47SG [hereinafter Darling-Hammond, *Soaring Systems*].

28. *Id.* at 19.

29. Dennis J. Condron & Vincent J. Roscigno, *Disparities Within: Unequal Spending and Achievement in an Urban School District*, 76 SOC. OF EDUC. 1, 20 (2003) ("[R]acial and class inequality in school funding illustrate[s] these realities in the contemporary era, showing how being of a minority or poor social-class is often synonymous with attending a school that is dilapidated, overcrowded, unsafe, and unhealthy"); Imoukhuede, *supra* note 1, at 49-50; Regina Ramsey James, *How to Mend a Broken Act: Recapturing Those Left Behind By No Child Left Behind*, 45 GONZ. L. REV. 683, 694-97 (2010) ("Millions of children in our nation's public education system are still not receiving the fair, equal, and significant opportunity for a high-quality education").

30. *Economic Crisis and Market Upheavals*, N.Y. TIMES, http://topics.nytimes.com/top/reference/timestopics/subjects/c/credit_crisis/ (summarizing the chronology of the current economic crisis, from housing bubble to credit crunch and financial crisis) (last visited May 23, 2014); *see also* James Crotty, *Structural Causes of the Global Financial Crisis: A Critical Assessment of the 'New Financial Architecture*, 33 CAMBRIDGE J. ECON. 563 (2012) (arguing that the current financial crisis is the result of deregulation, financial innovation, a variety of booms and bust, and the structural flaws of the financial system).

31. *See* Imoukhuede, *supra* note 1, at 74 (citing Philip Stevens & Martin Weale, *Education and Economic Growth*, *in* INTERNATIONAL HANDBOOK ON THE ECONOMICS OF EDUCATION 164, 164-67 (Geraint Johnes ed., 2004) (construing a formula regarding economic prosperity and quality of education in democratic society, *Ln GDP per Capita = 0.35 in enrollment rate + 5.23*.

real factor in advancing our nation's long term gross domestic product.[32] The simple recognition that high quality public education positively effects long term economic growth should by itself be more than sufficient reason for our nation to take seriously the current national education crisis in order to ensure our nation's prosperity for posterity.[33]

Irrespective of the overall or average adequacy of the U.S. education system, one point that is not in serious debate is the woeful race and wealth-based inequities in public education.[34] Sadly, Julius Chambers' statement regarding race, poverty and education is as true today as it was back in 1987:

> In America. . . the quality and quantity of education that children receive remain tied to the race and economic status of their family. Many black and poor children, through no fault of their own, continue to be deprived of training in even the most basic skills, such as reading, writing and arithmetic. This deprivation works a profound and lifelong injury to these neglected youths, and cripples their ability to participate in political and economic life.
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> . . . .
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> The United States is often romantically portrayed as a meritocracy. Yet, the continuing poverty of a disproportionate number of black children, their increasing isolation in largely segregated school systems,

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"According to Stevens and Weale's theory, increased investments in education ultimately increase innovation, which in the long term increases a nation's GDP." *Id.*).

32. *Id.*

33. Michael A. Rebell, *Poverty, "Meaningful" Educational Opportunity, and the Necessary Role of the Courts*, 85 N.C. L. REV. 1467, 1467 (2007). Rebell argues:

> Through state standards-based education reform initiatives and the Federal No Child Left Behind Act, the United States has made an unprecedented and extraordinary commitment to ensuring that all children will meet challenging academic proficiency standards. To date, however, little progress has been made toward meeting this ambitious mandate, largely because state and federal educational policies fail to deal with the enormous impediments to learning that are posed by the conditions of poverty in which millions of school children live.

Id. at 1467; *see also* Sarah L. Browning, *Will Residency Be Relevant to Public Education in the Twenty-First Century?*, 8 PIERCE L. REV. 297, 339 (2010) ("In order for present-day students to compete in this rapidly growing technological environment, our public education system may require a reconfiguration of both the curriculum and the delivery system to prepare our students for a promising future in the Information Age. This will require new thinking about the entire public policy dimension of public education at the national and state levels.").

34. *See* Linda Darling-Hammond, *Restoring Our Schools: The Quest for Equity in the United States*, 51 EDUC. CANADA, no. 5, 2011, at 14; *see also* Julius Chambers, *Adequate Education for All: A Right, an Achievable Goal*, 22 HARV. C.R.-C.L. L. REV. 55, 55-58 (1987) (arguing that racial and economic inequality lead to inequality in opportunity to adequate education and to make matters worse, racial and economic inequality are tied, thus minorities are prone to inadequate education.); Darling-Hammond, *Soaring Systems*, *supra* note 27, at 19.

> and the resistance of white citizens both to full integration and to adequate funding of all school districts, have perpetuated a system in which the potential achievement of a child is highly correlated with the race and economic status of his parents.[35]

More recently, education scholar, Linda Darling-Hammond's research demonstrates that if anything, the racial inequities in education have only worsened.[36]

> In 2011, the four-year high school graduation rate remains stagnant at about 70 percent; the achievement gap between minority and White students in reading and math is larger than it was in 1988; and U.S. performance on international tests has continued to drop…
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> . . . .
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> . . . In the U.S., the impact of socio-economic factors on student performance is almost double what it is in Canada. . . . . In the U.S., White and Asian students score just above the average for the European OECD nations in each subject area, but African-American and Hispanic students—many of whom are in highly segregated schools that lack qualified teachers and up-to-date materials—score so much lower that the national average plummets to the bottom tier. Thus, the poor U.S. standing is substantially a product of unequal access to the kind of intellectually challenging learning measured on these international assessments.[37]

Darling-Hammond's research demonstrates that many empirical studies regarding the overall or average quality of American education frequently overlook the abysmal quality of education the U.S. education system affords most racial and ethnic minorities and impoverished children.[38] Darling-Hammond's socioeconomic and racial comparisons between the U.S. educational system and Canada's, indicates that the way things are in the U.S. is not the way things have to be or have to remain. However, the notion of a U.S. education system is itself a bit of a misnomer. Under current Constitutional law doctrine, the federal government can only play a limited role in public education and therefore, the individual states are primarily involved in creating and ensuring the quality of their own state and local public education systems.[39] The federal government's

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35. Chambers, *supra* note 34, at 55-56.

36. Darling-Hammond, *Soaring Systems*, *supra* note 27, at 19.

37. *Id.*

38. *Id*.

39. Milliken v. Bradley, 418 U.S. 717, 741-42 (1974) (discussing that "no single tradition in public education is more deeply rooted than local control over the operation of schools); *see also* San Antonio Indep. Sch. Dist. v. Rodriguez, 411 U.S. 1, 39 (1973) (stating that "the Texas system . . . should be scrutinized under judicial principles sensitive to the nature of the State's efforts and to the rights reserved to the States under the Constitution . . . [l]ocal control is not only vital to continued public support of the school, but it is of overriding importance from an educational

role in public education is limited largely to its constitutional power to tax and spend for the general welfare under Article I, Section 8, Clause 1 of the U.S. Constitution.[40] However if this power were coupled with the Fourteenth Amendment's Equal Protection Clause based duty of government to protect equal access to publicly provided services, ought to provide sufficient legal protection of the right of poor and minority children to receive at least the same quality of public education as their more privileged peers. However, as to the issues of economic privilege, current constitutional law doctrine fails to recognize wealth as a category of discrimination that would invoke meaningful constitutional law protection.[41] As to race and ethnicity, the U.S. Supreme Court, has largely retreated from its earlier mid-twentieth century integrationist and equality aspirations for protecting equal access to public education.[42]

The quality of education affects more than economic prosperity, it also impacts the capability of citizens to fully and meaningfully engage in the political process.[43] This connection between democracy and education has been recognized since the founding and has continued to be recognized since that time.

> Thomas Jefferson and his fellow founding fathers wrote official declarations and papers that espoused a civic philosophy that public education is essential to a democracy. They espoused normative arguments favoring public education that have continued to be articulated by more contemporary educational philosophers like John Dewey.[44]

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standpoint as well."); Paynter v. State, 797 N.E.2d 1225, 1229-30 (N.Y. 2003) (discussing how education has, and should always remain in, local control).

40. U.S. CONST. amend. I, § 8, cl. 1 ("The Congress shall have 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; but all Duties, Imposts and Excises shall be uniform throughout the United States.").

41. ERICA FRANKENBERG ET AL., A MULTIRACIAL SOCIETY WITH SEGREGATED SCHOOLS: ARE WE LOSING THE DREAM? 14 (2003); Imoukhuede, *supra* note 1, at 85; Brenna Bridget Mahoney, *Children at Risk: The Inequality of Urban Education*, 9 N.Y.L. SCH. J. HUM. RTS. 161, 169 (1991).

42. Darling-Hammond, *Soaring Systems*, *supra* note 27, at 19 (discussing the quality of education in predominantly poor and minority communities; the inequity of results and the inequity of quality of teachers); Imoukhuede, *supra* note 1, at 49; Mahoney, *supra* note 41, at 162; Eric P. Christofferson, Note, *Rodriguez Reexamined: The Misnomer of "Local Control" and a Constitutional Case for Equitable Public School Funding*, 90 GEO. L.J. 2553, 2553-55 (2002) ("[d]isparities in the quality of education from one school district to the next are both real and considerable.").

43. Jefferson, *Bill for the More General Diffusion of Knowledge (1779)*, *in* EDUCATION IN THE U.S., *supra* note 13, at 739-40; Dewey, *supra* note 13, at 4; *see also* NUSSBAUM, *supra* note 13; SEN, THE IDEA OF JUSTICE, *supra* note 13.

44. Imoukhuede, *supra* note 1, at 60; *see also* Jefferson, *Bill for the More General Diffusion of Knowledge (1779)*, *in* EDUCATION IN THE U.S., *supra* note 13, at 739-40; DEWEY, *supra* note 13, at 4.

In American democracy, "we the people" are not ruled, but rather we actively participate in deciding who will be elected to serve us by voting for representatives who we believe will further our interests.

Absent the capability of citizens to comprehend the issues and thereby make informed choices as to how best to further the public good, American democracy may begin to lose its democratic character.[45] Our republic will begin to look more like an aristocracy run exclusively by those with sufficient wealth or other privilege to attain a largely unattainable quality of education. Those few will effectively rule over a populace of largely uneducated people, incapable of meaningfully evaluating the performance of those they have technically "elected," but who have actually been selected through a process that few understand.[46] Such a failure of education would diminish our grand republic into a form of aristocratic demagoguery that would be less institutionally accountable or limited than a straightforward aristocracy.[47] The highly regarded education philosopher, John Dewey, believed: "[T]he aim of education [is] to help in correcting unfair privilege and deprivation, not to help perpetuate them . . . . [T]he school becomes the chief means for the reform of society toward a better condition. . . . Yet education is not limited to the school."[48] Dewey believed education to be a lifelong process: "Education is continuous travel through life in which the only arrival to speak of is death."[49] This insight underscores education's value to democracy and its role in avoiding a descent into an undemocratic aristocracy or plutocracy.

Education is the ultimate access point to opportunity.[50] Many in the U.S. believe that all should have an equal opportunity to obtain the basic skills necessary to succeed in life, even if there is disagreement as to what those basic skills might include before some demonstration of merit becomes necessary in order to be entitled to further education.[51] There is significant support for the

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45. *See* DEWEY, *supra* note 13, at 8; Imoukhuede, *supra* note 1, at 63 ("Formal education has become increasingly important as the scope of resources, achievements, and responsibilities in society has grown more complex. No longer can children get by with a mere three years of formal basic education and from there go on to apprentice themselves to adults.").

46. *See generally* ANNE MICHAELS EDWARDS, EDUCATIONAL THEORY AS POLITICAL THEORY 81-96 (Avebury 1996) (summarizing John Dewey's educational and political theories).

47. *Id*. at 85-87.

48. *Id.* at 87.

49. *Id*. at 95.

50. JOHN M. ALEXANDER , CAPABILITIES AND SOCIAL JUSTICE: THE POLITICAL PHILOSOPHY OF AMARTYA SEN AND MARTHA NUSSBAUM 126 (2008) ("[T]he political community needs to provide both the required level of material resources, education and social conditions for the pursuit of the good life."); SEN, DEVELOPMENT AS FREEDOM, *supra* note 17, at 39 ("[P]olitical participation may be hindered by the inability to read newspapers or to communicate in writing with others involved in political activities.").

51. *See* ALEXANDER, *supra* note 50, at 126; *see also* Goodwin Liu, *Interstate Inequality In Educational Opportunity*, 81 N.Y.U. L. REV. 2044, 2090 (2006).

modern need for higher education, here defined as any education after the twelfth grade.[52] This Article focuses on a matter of which there is even less dispute; the necessity for providing access to high quality, primary and secondary education as a vehicle for providing the equal opportunity that today's concept of human dignity requires.[53]

II. EDUCATION IS ESSENTIAL TO DIGNITY

Dignity is fundamental to modern concepts of justice, and education is essential to human dignity.[54] Human dignity has been referenced by American judges with increasing frequency since World War II.[55] According to Leslie Meltzer Henry, there has been a resurgence of human dignity-based decision making in the current Roberts Court.[56] Human dignity has now become the basis for much of international human rights law.[57] Dignity was seen by Immanuel Kant as flowing from the uniquely human consciousness and the ability to discern, make laws and thereby shape reality.[58] For Kant, dignity was something every human being had, simply by virtue of being human.[59]

The modern view that dignity is fundamental to justice and that education is essential to human dignity was shared by the late American education philosopher and psychologist, John Dewey, who famously believed in an education-centered concept of meliorism.[60] Dewey believed that the world can be improved through

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52. *See generally* GEORGE VERNEZ ET AL., CLOSING THE EDUCATION GAP: BENEFITS AND COSTS, RAND CENTER FOR RESEARCH ON IMMIGRATION POLICY (1999), *available at* http://www.rand.org/content/dam/rand/pubs/monograph_reports/2007/MR1036.pdf; Laura S. Yates, Plyler v. Doe *and the Rights of Undocumented Immigrants to Higher Education: Should Undocumented Students Be Eligible for In-State College Tuition Rates?*, 82 WASH. U. L. REV. 585 (1999).

53. "Education," unless specifically stated otherwise, refers in this Article to primary and secondary education, which is the focus of this Article. Focusing on primary and secondary education is not intended at all to indicate that higher education does not bring to bear similar concerns and implicate a similar duty under the U.S. Constitution.

54. BETTY A. REARDON, EDUCATING FOR HUMAN DIGNITY: LEARNING ABOUT RIGHTS AND RESPONSIBILITIES 5-7 (1995).

55. Henry, *supra* note 24, at 172-73, nn.17-26 ("[F]ew concepts dominate modern constitutional jurisprudence more than dignity does without appearing in the Constitution. The Supreme Court has invoked the term in connection with the First, Fourth, Fifth, Sixth, Eighth, Ninth, Eleventh, Fourteenth, and Fifteenth Amendments." *Id.*).

56. *Id*. at 169-73.

57. SEN, THE IDEA OF JUSTICE, *supra* note 13, at 226-27.

58. IMMANUEL KANT, GROUNDWORK OF THE METAPHYSICS OF MORALS 42-43 (Mary Gregor ed. & trans., Cambridge Univ. Press 1997)

59. *Id*. Kant argued that dignity is an end in itself. It does not have an instrumental value, which has relative price or worth but rather dignity is an inner worth—something that is intrinsically endowed on any rational and autonomous individual.

60. DEWEY, *supra* note 13, at 61-105 (arguing for the process of progress in society as

human action and that human action can be inspired and improved through education.[61] He criticized popular approaches to education as creating followers and conformists rather than leaders and reformers who would be capable of inspiring progress.[62] For Dewey, "[t]he whole point of democracy is to provide the wherewithal for change, for improvement."[63] Education was viewed by Dewey as essential to progress. "If some people within a democratic society are practically enslaved, even those who are privileged suffer as a result."[64] This insight connects with then State Senator Barack Obama's acclaimed speech at the 2004 Democratic National Convention:

> It's not enough for just some of us to prosper. For alongside our famous individualism, there's another ingredient in the American saga. A belief that we're all connected as one people. If there is a child on the south side of Chicago who can't read, that matters to me, even if it's not my child. If there is a senior citizen somewhere who can't pay for their prescription drugs, and having to choose between medicine and the rent, that makes my life poorer, even if it's not my grandparent. If there's an Arab American family being rounded up without benefit of an attorney or due process that threatens my civil liberties.[65]

Those famous words from 2004 continue to summarize the American ethic and observed reality that deprivation and oppression anywhere in society is detrimental even to the most privileged within that society. Protecting human dignity is therefore essential if the U.S. hopes to realize the words on the Great Seal of the United States of *E. Pluribus Unum*—out of many one.

I begin this section by first examining the concept of human dignity and its relationship to education.[66] Education rights advocates and leaders have suggested various educational approaches over the years, but a theme that most of these approaches share is an unstated but widely understood goal of enhancing human dignity.[67] I therefore look at the concept of liberty, its general relevance

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dependent in the education of citizenry, which in turn leads to society that progresses improves over time as a consequence of education being a social function); EDWARDS, *supra* note 46, at 78 (discussing the process of progression that fulfills the needs of the existing community and improves the existing life so that the future will be better than the past).

61. The belief has much in common with what is considered the cornerstone of progressive political ideology, which believes in progress through social and political change. *See* James W. Ceaser, *Progressivism and the Doctrine of Natural Rights*, 29 SOC. PHIL. & POL'Y 177, 177-95 (2012).

62. EDWARDS, *supra* note 46.

63. *Id.* at 78.

64. *Id.* at 75.

65. Senator Barack Obama, Keynote Address at the 2004 Democratic National Convention (July 27, 2004).

66. KANT, *supra* note 58, at 24, 43.

67. *See*, *e.g.*, Robin West, *The Constitution and the Obligations of Government to Secure the Material Preconditions for a Good Society: Rights, Capabilities, and the Good Society*, 69

to democracy, and its special relevance to American democratic society. The idea of the individual and the protection of individual liberty are essential components to democracy. Human dignity is essential to any meaningful concept of liberty, and education is essential to dignity and democracy.

A. Defining and Applying Human Dignity

1. The Components of Dignity.—The relationship between education and dignity is that education is essential to the development of the capabilities necessary to be a fully realized human being.[68] Human dignity includes people's freedom to pursue their ambitions without being unfairly or unjustly hindered. Human dignity requires a degree of influence over those structures that occasionally impinge on individual freedom. Hence, modern political and legal theory views the protection of and respect for what is generally framed as "human dignity" as an essential function of any modern government or political system.[69] Such influence is relevant for ensuring that individual liberty is not undermined without individual consent. Liberty is an essential component to dignity, as is democracy.[70]

Leslie Meltzer Henry explains in *The Jurisprudence of Dignity* that the concept of dignity is dynamic, so that its meaning depends on the context of its usage.[71] In exploring the concept of dignity in the constitutional law context, she finds, among other things, that the Court's reliance on dignity is increasing and the Roberts Court is accelerating that trend.[72] A recent example of this increased

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FORDHAM L. REV. 1901, 1902 (2001). West argues:

> Many citizens of even prosperous democratic states cannot possibly enjoy such a minimal threshold, furthermore, without some state involvement in the distribution of resources, particularly with the inequalities that persist and threaten to worsen today. States are required, by justice and goodness both, to treat citizens with dignity, and with equal dignity at that.

Id. at 1902; *see also* Rex D. Glensy, *The Right to Dignity*, 43 COLUM. HUM. RTS. L. REV. 65, 68-69 (2011) (discussing the concept of human dignity and relevant approaches to reaching it, including negative and positive rights theories); Imoukhuede, *supra* note 1, at 60 ("Thomas Jefferson and his fellow founding fathers wrote official declarations and papers that espoused a civic philosophy that public education is essential to a democracy. They espoused normative arguments favoring public education that have continued to be articulated by more contemporary educational philosophers like John Dewey.").

68. There is a necessary connection between autonomy and dignity, as Kant proclaimed that "[a]utonomy is therefore the ground of the dignity of human nature and of every rational creature." KANT, *supra* note 58, at 43.

69. NUSSBAUM, *supra* note 13, at 77-79.

70. Alexander Tsesis, *Dignity and Speech: The Regulation of Hate Speech in a Democracy*, 44 WAKE FOREST L. REV. 497, 498-502 (2009).

71. Henry, *supra* note 24, at 177, 186-88.

72. *Id*. at 171-72.

application of dignity-based arguments is the decision in *Lawrence v. Texas*.[73]

2. Lawrence v. Texas *Applied Human Dignity to Expand Constitutional Rights.—Lawrence v. Texas* underscores the current application of human dignity-based arguments in construing and expanding U.S. constitutional rights. In *Lawrence*, the Court applied a human dignity-based due process clause analysis to hold that a Texas sodomy law was an unconstitutional infringement on the right to privacy.[74]

The facts of *Lawrence* involved local police responding to a neighbor's noise complaint to discover two men engaging in homosexual sodomy.[75] Police arrested the men pursuant to the Texas anti-sodomy law that was later challenged as an unconstitutional violation of the Fourteenth Amendment.[76] Here, the Court overturned *Bowers v. Hardwick*, holding that the right to privacy protects the right to be free from invasive governmental intrusion into a private sexual encounter between consenting adults because a right to privacy in such an intimate setting is essential to human dignity.[77]

Justice Kennedy's majority opinion explicitly relied on the concept of dignity as the basis for recognizing a protected "zone of liberty."[78] Kennedy's interpretation ultimately broadens the Court's liberty doctrine and effectively broadens the scope of recognized constitutional rights.[79] The liberty doctrine is broadened by applying and interpreting a concept that is never explicitly mentioned in the text of the Constitution, human dignity.[80] "These matters, involving the most intimate and personal choices a person may make in a

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73. Lawrence v. Texas, 539 U.S. 558, 578-79 (2003) (ruling a Texas anti-sodomy statute unconstitutional based on liberty, privacy, and dignity interest in having a safe zone for intimate relationships).

74. *Id*.

75. *Id*.; James Paulsen, *The Significance of* Lawrence v. Texas, 41 HOUS. LAW. 32, 33 (2004) (discussing the facts of the case and how Justice Kennedy's analysis that stressed dignity and liberty is a better approach than using Equal Protection Clause and that the case signifies a shift from privacy jurisprudence to liberty centered rationale).

76. *Lawrence*, 539 U.S. at 562-63.

77. *Id*. ("The liberty protected by the Constitution allows homosexual persons the right to choose to enter upon relationships in the confines of their homes and their own private lives and still retain their dignity as free persons."); Lisa K. Parshall, *Redefining Due Process Analysis: Justice Anthony Kennedy and the Concept of Emergent Rights*, 69 ALB. L. REV. 237, 238-39, 280-82 (2005) (discussing that liberty-centered approach is a better way to frame fundamental rights, that an Equal Protection analysis may be deemed erroneous with intolerable results (like the State could have banned sodomy altogether), and that the concept of emergent rights can be support by the analysis in *Lawrence*); Yoshino, *supra* note 25, at 779 (discussing the importance of the Lawrence Court's liberty-based dignity analysis, which could be asserted more often in the future).

78. *Lawrence*, 539 U.S. at 562; Parshall, *supra* note 77, at 239.

79. Glensy, *supra* note 67, at 68-69.

80. *Lawrence*, 539 U.S. at 574 ("these matters, involving the most intimate and personal choices a person may make in a lifetime, choices central to personal dignity and autonomy, are central to the liberty protected by the Fourteenth Amendment").

lifetime, choices central to personal dignity and autonomy, are central to the liberty protected by the Fourteenth Amendment."[81]

The Court has thus demonstrated its continuing willingness to first, recognize and enforce extra-textual constitutional rights, in the form of fundamental rights, and to interpret those rights using extra-textual terms. The *Lawrence decision* also demonstrates the Court's willingness to interpret those rights by applying a particular extra-textual concept, human dignity as it relates to liberty.[82] A similar human dignity-based interpretation of the due process clause can be applied to recognize a right to public education.

B. Education is Essential to the Liberty Component to Human Dignity

I have suggested that human dignity has two major components, a liberty component and a democracy component. Education is essential to the liberty component of human dignity because education is a basic human capability that is necessary to achieve valuable human functionings or achievements.[83] Any denial of opportunities for individuals to develop their capabilities undermines human dignity.[84]

1. Rousseau and Dewey Connect Education with Liberty and Dignity.—Jean-Jacques Rousseau and John Dewey have both suggested that education is essential to individual liberty and human dignity. Rousseau's education philosophy holds that education is the vehicle through which the individual can be trained to fully participate in society.[85] In the *Emile*, Rousseau set out his paradigm for educating children as a vehicle for improving society, the individual, and the political community.[86] Rousseau uses the example of

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81. *Id.*

82. *Lawrence*, 539 U.S. at 574 (quoting Planned Parenthood of Se. Pa. v. Casey, 505 U.S. 833, 851 (1992).

83. AMARTYA SEN, COMMODITIES AND CAPABILITIES, 7, 9 (Oxford Univ. Press 1999) [hereinafter SEN, COMMODITIES AND CAPABILITIES] ("A functioning is an achievement of a person, what he or she manages to do or to be.").

84. NUSSBAUM, *supra* note 13, at 18-20.

85. EDWARDS, *supra* note 46, at 7.

86. *Id*. Among his important contributions is the idea that education should be in harmony with the development of the child's natural capacities by a process of apparently autonomous discovery. *Id*. Learning by way of autonomous discovery, otherwise known as discovery based learning, is frequently applied in the legal academy by way of a strategy popularly known as the Socratic method. *See also* JEAN JACQUES ROSSEAU, EMILE 142 (Barbara Foxley, trans. Nu Vision Publications, LLC 2009).

While specific pedagogical method evaluation is beyond the scope of this Article, it is within the scope to recognize that notwithstanding the costs and benefits to the autonomous discovery approach, there is an underlying philosophy of respecting individual autonomy and attempting to reinforce it when educating through a process of self-discovery. Discovery based learning, in part, is meant to cultivate individual liberty by encouraging independent thought and understanding. While Rousseau's methods from *Emile* have been critiqued for their effectiveness in cultivating

educating a boy named Emile to examine education and development through childhood and emphasizes the significance of developing a child's capabilities and ensuring individual autonomy and liberty through education.[87]
Likewise, the more modern education philosophy of John Dewey calls for enhancing individual liberty by way of guaranteeing opportunities to learn and develop essential capabilities.

> In educating to produce the 'best' person, Dewey stresses the freedom of the individual. . . . Their own particular talents, abilities, and qualities are to be developed in accord with their own nature. . . . The success and happiness of the individual is impossible without the individual being an integral part of the group, the society.[88]

Thus, Dewey emphasized individual freedom, development of capabilities, and acculturation into democratic society as cornerstone goals for education. Dewey, much like Rousseau, was "primarily interested in the development of the qualities [and] capacities which . . . make up autonomy."[89] In order for there to be any meaningful concept of personal liberty, as defined by the capability to think and act independently, both Rousseau and Dewey believed education was necessary. "An enormous part of personal liberty for Dewey [was what he referred to as] freedom of intelligence, observation, or judgment. . . . [P]eople cannot become significantly more autonomous without freedom of expression."[90]

For Dewey, education was a necessary component to being able to think well enough to effectuate the basic civil liberty of free expression. Dewey's approach foreshadowed the contemporary capabilities approach. Indeed, both Dewey and today's capabilities theorists share an insight regarding the fundamentality of education in protecting and advancing human dignity.

2. Education Is a Basic Human Capability.—Education is a basic human capability that is necessary for advancing both liberty and human dignity under Amartya Sen and Martha Nussbaum's capabilities approach.[91] The capabilities approach is particularly relevant to the discussion of an education right because it has become an internationally embraced modern theory of justice that shares an American embrace of equal opportunity while accepting some social and economic inequality when it is a consequence of mertiocracy.[92]

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individual liberty, this was clearly a central goal for Rousseau.

87. *See* ROUSSEAU, *supra* note 15.

88. EDWARDS, *supra* note 46, at 9-10; *see also* DEWEY, *supra* note 13, at 15 (arguing that education is a social function and that a person needs society to be educated and in turn, society as a whole benefit).

89. EDWARDS, *supra* note 46, at 6.

90. *Id*. at 73.

91. *See*, *e.g.*, SEN, DEVELOPMENT AS FREEDOM, *supra* note 17, at 5 ("What people can positively achieve is influenced by economic opportunities, political liberties, social powers, and the enabling conditions of good health, basic education, and the encouragement and cultivation of initiatives.").

92. Imoukhuede, *supra* note 1, at 46-47; *see also* NUSSBAUM, *supra* note 13, at ix-xii; *id.* at x.

The capabilities approach holds that the well-being of the people in a society should be assessed by the capabilities of the people living within that society to obtain what Sen describes as "valuable functionings," which can be thought of as important life achievements.[93] Valuable achievements include such important components to life and liberty as education, as well as food, self-respect, and political participation.[94] Absent such valuable achievements, quality of life and meaningful freedom is undermined.[95] Capabilities can be simply defined as access or opportunity to achieve.[96] It is the capability to achieve and not the achievements themselves that are of central concern under the capabilities approach. Notably, under the capabilities approach, education is both an achievement and a capability.[97]

Sen has suggested that access to certain fundamental services that advance human capabilities must be considered when the United Nations and other international bodies evaluate a society or a nation.[98] Nussbaum has gone beyond Sen's original approach and has generated a list of ten basic capabilities that are necessary for governments to guarantee; among those ten basic capabilities is education.[99] Nussbaum specifically advocates for the fundamentality of

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93. The capabilities approach is an approach to evaluating a society based on the capability of the people within the society to "achieve valuable functionings." ALEXANDER, *supra* note 50, at 56 (citing Sen's work). Under the capabilities approach, "functionings" refers to individual achievements and what individuals manage to do or become. *See* SEN, COMMODITIES AND CAPABILITIES, *supra* note 83, at 7-9. A just political system or ideal society is a society that enhance people's capabilities, where capabilities refers to what "reflects the various combinations of functionings [a person] can achieve . . . and, "a functioning is an achievement of a person what he or she manages to do or to be." *Id*. at 7.

94. *See* SEN, DEVELOPMENT AS FREEDOM, *supra* note 17, at 3 (arguing that freedom is contingent on social and economic arrangements that include facilities for education and health care).

95. *See* NUSSBAUM, *supra* note 13, at 17-18.

96. "A just political system or ideal society is a society that enhance people's capabilities, where capabilities refers to what "reflects the various combinations of functionings [a person] can achieve . . . and, a functioning is an achievement of a person what he or she manages to do or to be." SEN, COMMODITIES AND CAPABILITIES, *supra* note 83, at 7, 9.

97. NUSSBAUM, *supra* note 13, at 33-34, 152-54; *see also* Amartya Sen, *Capability and Well-being*, *in* THE QUALITY OF LIFE 30, 31 (Martha Nussbaum & Amartya Sen eds., 1993) (stating that "[t]he *capability* of a person reflects alternative combinations of functionings the person can achieve, and from which he or she can choose one collection.").

98. SEN, THE IDEA OF JUSTICE, *supra* note 13, at 226-27.

99. NUSSBAUM, *supra* note 13, at 33-34. This is unlike Sen, who refuses to suggest a list of capabilities because he believes that any list ought to be the product of a deliberative democratic process and not dictated by experts and theorists. ALEXANDER, *supra* note 50, at 64. *See generally* SEN, DEVELOPMENT AS FREEDOM, *supra* note 17. Nussbaum, while sharing Sen's commitment to democratic decision-making, argues for protecting a basic list of those capabilities that are so essential to Aristotle's concept of "truly basic human functioning." ALEXANDER, *supra* note 50, at 125; NUSSBAUM, *supra* note 13, at 125-31 (summarizing the views of Aristotle and the Stoics).

education and a few other essential rights as precursors to liberty and democracy.[100] The capabilities approach as an economic and legal theory today influences international evaluative criteria for a nation's well-being to the point that the United Nations Development Programme now uses capabilities approach inspired measurements as developmental goals, as bases for evaluating progress, and in formulating objective measures for comparing nations.[101]

As both Sen and Nussbaum have noted, without an education an individual cannot meaningfully engage in political deliberation.[102] Additionally, education is the vehicle for potentially furthering other basic human achievements such as longer life expectancy and good health, as well as the more complex human achievements of self-respect and social status.[103] If we translate capabilities as shorthand for equal opportunity, then we see education as the ultimate capability, and essential to any meaningful conception of dignity and freedom.

3. Equal Opportunity to Achieve is Essential to Liberty.—Equal opportunity in the form of equal access to public education is essential to liberty. The U.S. embraces individual liberty both politically and socially, so that respect for individual liberty and human dignity requires that individuals not be arbitrarily barred from developing their capabilities. [104] Stated differently, equal and fair opportunity is essential to American liberty.

During a less enlightened time in U.S. history it was acceptable for housing and occupation options to be limited based solely on place of birth, race, or gender.[105] All other limitations violate our principle of equality, which is itself based in a concept of meritocracy. Despite progress in advancing human dignity, even today everyone is not entitled to work and live wherever they want, but rather, people can live and work wherever they want only to the extent that their abilities and individual merit entitles them to that privilege. Hence, our concept of human dignity has transformed from one that is limited by immutable characteristics into one that is only limited by individual merit, ability or achievements.[106]

Today, the concept of American meritocracy is applied to help justify what are clear affronts to human dignity. For example, the unsafe and unclean living conditions of the impoverished are justified based on an unstated assumption that

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100. NUSSBAUM, *supra* note 13, at 33-35.

101. *See id.*

102. *Id.*

103. *Id*. at 16, 19-20, 29-33, 78-79.

104. A corollary to this national faith is the belief that government should play a role in removing arbitrary and unjust barriers to attaining the capabilities necessary for valuable achievements such as wealth and status. JOHN RAWLS, A THEORY OF JUSTICE 63, 87-88 (Belknap, rev. ed. 2003) (1971).

105. *Id.* at 87. John Rawls discusses undeserved merit. "The naturally advantaged are not to gain merely because they are more gifted, but only to cover the costs of training and education and for using the endowments in ways that help the less fortunate as well. No one deserves his greater capacity nor merits a favorable starting place in society." *Id*.

106. *See id*. at 87-88.

those who are impoverished—those who have less than they would need to function in a dignified manner—are where they are because they are somehow underserving. Under this ideology, poverty demonstrates that the impoverished lack the merit that would afford them the privileges of the more deserving, the more dignified. That human dignity is intrinsic to all human beings is a truism that still continues to have a qualifier, a qualifier based in merit. The concept of merit is itself justified as flowing from a respect for individual liberty. Underlying both the conceptions of merit and liberty is another qualifier, equal opportunity.

The existence of equal opportunity—an equal and fair chance to become capable of achieving—provides the popular justification for what are obvious affronts to human dignity in the forms of actual inequality of resources, power, and privilege.[107] Despite a respect for human dignity, such inequalities are acceptable under a meritocratic system that purports to reward the best and brightest who have achieved success in a fair political, legal and economic system that guarantees fair and equal access.[108]

Some undesirable and unjust inequality might be logically expected given that no human system is perfect.[109] However, America's failure to adequately and equally provide meaningful opportunities for the children of low-income and minority parents to develop their capabilities is consistent and systemic and not random.[110] This failure must be corrected because these failures undermine the ability of these children to develop their individual capabilities and therefore undermines their liberty to pursue their goals.[111]

Individual liberty has long been recognized as essential to democracy. Education philosopher and historian, Anne Michaels Edwards notes, "[w]hatever

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107. Susan H. Bitensky, *Theoretical Foundations for a Right to Education Under the U.S. Constitution: A Beginning to the End of the National Education Crisis*, 86 NW. U. L. REV. 550, 595 (1992).

108. *Id*. at 551, 618; *see also* NUSSBAUM, *supra* note 13, at 152-54; Imoukhuede, *supra* note 1, at 47-48.

109. Such acceptance would be based in a pragmatic view that secular and religious philosophies have at times begrudgingly accepted; such notions as "the poor you will always have with you" and "to err is human" encapsulate that even idealistic models recognize the limitations of human capabilities. *Mark* 14:7 (New International Version), ALEXANDER POPE, POPE'S ESSAY ON CRITICISM (Frederick M. A. Ryland ed., Blackie & Son 1900) (1711).

110. *See supra* Part I; *see also* SEN, DEVELOPMENT AS FREEDOM, *supra* note 17, at 3-5. This situation is not based in the inevitability of human failure or the tragedy of imperfect human institutions. *See* Jerome McCristal Culp, Jr., *To the Bone: Race and White Privilege*, 83 MINN. L. REV. 1637, 1662-64 (1999).

111. *See* Mark Tushnet, *Social Welfare Rights and the Forms of Judicial Review*, 82 TEX. L. REV. 1895, 1917 (2004); *see also* Goodwin Liu, *Rethinking Constitutional Welfare Rights*, 61 STAN. L. REV. 203, 210 (2008); Frank I. Michelman, *Foreword: On Protecting The Poor Through The Fourteenth Amendment*, 83 HARV. L. REV. 7, 18 (1969); Frank I. Michelman, *In Pursuit of Constitutional Welfare Rights: One View Of Rawls' Theory Of Justice,* 121 U. PA. L. REV. 962, 991 (1973).

else education is, and whatever other goals it may have, it is clear that one of the goals of any and all education is a particular kind of person."[112] Edwards, like others, recognizes that central to any system of education is a goal of inculcating the values necessary to function within a particular social and political system.[113] Therefore, it is important to appreciate that in the American context, education is concerned with using public education to inculcate democratic values such as a concept of individual liberty.

C. Education Is Essential to the Democratic Component to Human Dignity

Education is essential to the democratic component of human dignity because at the heart of democracy is the protection of individual autonomy.[114] As A. John Simmons has noted, for Locke, individuals ought not to be "obligated to support or comply with any political power unless he [or she] has personally consented to its authority."[115] Locke's government consent ideal is based in a respect for the liberty component of human dignity that is closely linked with the Greek roots for democracy, which literally translates to "rule by the people.[116] Democracy, with its attendant requirement of popular consent, is an essential component to furthering human dignity.[117] Hence, at its very root, democracy is defined as the ultimate respect for liberty, the freedom of the people to make their own choices by deciding their own legal constraints.[118]

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112. EDWARDS, *supra* note 46, at 2.

113. *Id*. at 2-3.

114. Thus, the underlying theory is that the only legitimate system for passing laws that may constrain individual liberty is a form of government that functions with the consent of the individual's being governed. JOHN LOCKE, SECOND TREATISE OF GOVERNMENT 55 (C. B. Macpherson ed., Hackett Pub. Co. 1980) (1690) ("[T]he *governments* of the world, that were begun in peace, had their beginning . . . , and were *made by the consent of the people*; there can be little room for doubt, either where the right is, or what has been the opinion, or practice of mankind, about the *first erecting of governments*."). *See also* ROUSSEAU, supra note 15, at 148-149.

115. A. John Simmons, *Tacit Consent and Political Obligation*, 5 PHIL. & PUB. AFF. 274, 274 (1976).

116. *Id*. at 714. According to Locke: "Every man being, as has been shewed, *naturally free*, and nothing being able to put him into subjection to any earthly power, but only his own *consent*; it is to be considered, what shall be understood to be a *sufficient declaration* of a man's *consent*, to *make him subject* to the laws of any government." LOCKE, *supra* note 114, at 63; *see* ARISTOTLE, THE POLITICS, *supra* note 14, at 275 (defining "democracy" as "any regime in which the 'people' (*dēmos*) rule or control the authoritative institution of the city; more properly, rule of the poor or the majority in their own interests").

117. John Locke's model is not without its criticisms. Hume famously objects to John Locke's consent theory as described in Locke's social contract based on its concept of "tacit consent." *See* DAVID HUME, A TREATISE ON HUMAN NATURE 490 (L. A. Selby-Bigge ed., Oxford Univ. Press 1978) (1739); *see also* Simmons, *supra* note 115, at 274.

118. ROUSSEAU, *supra* note 15, at 162 ("Strictly speaking, laws are merely the conditions of civil association. The populace that is subjected to the laws ought to be their author.").

1. Theories of Dignity and Education have Progressed Alongside Theories of Liberty and Democracy.—The idea of the individual and the attendant concepts of dignity, democracy and public education, have developed together through a related historical progression towards greater respect for the dignity, capabilities, and rights of people.[119] Classical thinkers such as Plato and his student, Aristotle did not believe each person ought to participate in politics and governance nor did they believe that every citizen needed a shared baseline of education.[120] Plato and Aristotle instead believed in a form of aristocracy where the most innately brilliant and qualified would govern and that only those selected aristocrats ought to be educated enough to participate in governance and political decision-making.[121] The aristocrats would be the ruling elite and therefore needed to have a certain freedom to think and an education sufficient to ensure that they were capable of properly ruling.[122] It is notable that despite their restrictive theories of governance, both Plato and Aristotle recognized public education of the ruling elite as essential to responsible governing.[123]

Later, Rousseau suggested a broader scope for who ought to be educated, but, like the classical thinkers, he continued to believe that there ought to be a class of people not involved in governing.[124] Rousseau believed that for that non-

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119. MICHAEL ROSEN, DIGNITY 11-18 (2012).

120. PLATO, *The Republic Book VI*, *in* THE PORTABLE PLATO 510-512 (Scott Buchanan, ed. and & Benjamin Jovett, trans., Penguin Books 1977) [hereinafter PLATO, *The Republic Book VI*].

121. *See* ARISTOTLE, THE POLITICS, *supra* note 14, at 129 ("Only the regime that is made up of those who are best simply on the basis of virtue . . . is justly referred to as aristocracy . . . ."); *see also* NUSSBAUM, *supra* note 13, at 129-30 (discussing how the Stoics put their theories into practice when they campaigned for the equal education of women, one former slave (Epictetus) and one foreigner (Seneca)). *Id*. at 492; PLATO, *The Republic Book VI*, *supra* note 120, at 510-12.

> Until philosophers are kings, or the king and princes of this world have the spirit and power of philosophy, and political greatness and wisdom meet in one, and those commoner natures who pursue either to the exclusion of the other are compelled to stand aside, cities will never have rest from their evils—no, nor the human race, as I believe,—and then only will this our state have a possibility of life and behold the light of day.

122. ARISTOTLE, THE POLITICS, *supra* note 14, at 129; NUSSBAUM, *supra* note 13, at 129-130.

123. ARISTOTLE, THE POLITICS, *supra* note 14, at 229 ("Since there is a single end for the city as a whole, it is evident that education must necessarily be one and the same for all . . . .").

124. Rousseau and other Enlightenment era thinkers adopted broader views regarding the scope of who ought to be educated and trained for governance. However, even Rousseau believed that certain classes of people and forms of work were unsuitable for active participation in politics and governance, and hence, members of such classes were not seen as needing education. *See* Michalina Clifford-Vaughan, *Enlightenment and Education*, 14 BRIT. J. OF SOC. 135, 135-36 (1963). Dennis Diderot was another enlightenment thinker who valued education as much as "[d]isciples of Rousseau, the legislators of the First Republic wanted to make citizens free by liberating their minds from prejudice through education." *Id*. at 135. *See generally* ARISTOTLE, THE POLITICS, *supra* note 14; ARISTOTLE, THE NICHOMECHEAN ETHICS (Roger Crisp ed. & Trans., Cambridge Univ. Press 2000) [hereinafter ARISTOTLE, THE NICHOMECHEAN ETHICS].

governing class of people, liberty should be constrained by the educated ruling class because the non-ruling class' preferences were irrelevant and potentially hostile to social order.[125] This history of education and liberty parallels Michael Rosen's history of the meaning of dignity.[126] Dignity, like education was initially viewed as an exclusive privilege for the powerful ruling elites.[127] Today the concept of dignity has been expanded to apply to all human beings.[128]

Likewise, democracy has not historically been the most widely used or preferred system of government; that has changed as the idea of the individual and the concept of human dignity has been broadened to grant a broader range of people individual liberty and freedom.[129] Liberty has different meanings and is arguably more constrained in the contexts of autocracy, aristocracy, and plutocracy.[130] Democracy, given its central concern with majority consent, provides the greatest respect for individual liberty for the greatest number of individuals.[131] Plutocracy, which literally means "rule by the wealthy," does not similarly value the concerns of all the people, but only those of the wealthy.[132] The democratic and dignity-based critiques of plutocracy directly apply to current fears regarding a rising "corporatocracy;"[133] the concerns regarding rule by

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125. *See generally* ARISTOTLE, THE NICHOMECHEAN ETHICS, *supra* note 124; ARISTOTLE, THE POLITICS, *supra* note 14.

126. ROSEN, *supra* note 119, at 11-18.

127. *Id*.

128. *Id*.

129. ARISTOTLE, THE POLITICS, *supra* note 14, at 97 ("What makes democracy and oligarchy differ is poverty and wealth: whenever some rule on account of wealth, whether a minority or a majority, this is necessarily an oligarchy, and whenever those who are poor, a democracy.").

130. These forms of government are all quite unlike our modern U.S. democracy, where an individual's liberty to make life decisions is constrained by laws that are passed by representatives of the people. Aristocracy has as its Greek root "aristokratia," which literally means "rule by the best," where "aristos" means "best." WEBSTER'S DICTIONARY 24 (HarperCollins Publ'ns 2003) (definition of "aristocracy"). Autocracy is the authority of the autocrat, the government in which one person possesses unlimited power. *Id.* at 31 (definition of "autocracy"). Autocrat is defined as a monarch with unlimited power. *Id*. (definition of "autocrat"). In an autocracy, governance by a single ruler, the concept of autonomy and the related freedom of the individual to make life choices would be seen as being properly limited by the will of the autocrat, who could be a monarch or dictator.

131. *See id.* at 124 (definition of "democracy").

132. Plutocracy has as its root Pluto, the god of the underworld. Pluto is less widely known as the god of wealth and treasure. The Greek root of the word plutocracy is "plutos," which means "wealth" in Greek. *Id.* at 362 (definition of "plutocracy").

133. *See* Priti Nemani, Note, *Globalization Versus Normative Policy: A Case Study on the Failure of the Barbie Doll in the Indian Market*, 13 ASIAN-PAC. L. & POL'Y J. 96, 99-100; *see also* Thayer Watkins, *The Economic System of Corporatism*, SAN JOSE STATE UNIVERSITY, http://www.sjsu.edu/faculty/watkins/corporatism.htm, *archived at* http://perma.cc/4GXH-78CH (last visited May 7, 2014). Watkins states:

The basic idea of corporatism is that the society and economy of a country should be

wealthy interest groups whose only governing morality is the enhancement of their group's wealth and power.[134] As Priti Nemani notes:

> Journalist John Perkins describes the advancement of the global empire as a result of the omnipotent "corporatocracy," a tripartite financial and political power relationship between multinational corporations ("MNCs"), international banks, and governments. The corporatocracy works to guarantee the unwavering support and belief of its constituents schools, business, and the media--in the "fallacious concept" of growing global consumer culture Members of the corporatocracy promote common values and goals through an unceasing effort "to perpetuate and continually expand and strengthen the system" of the current global culture. Unfortunately, the global culture is not one of social understanding and sensitivity to individual cultures; rather, the new global culture is one marked by the ability to empower one's citizens to consume as if product consumption is the ultimate civic duty.[135]

Arguably, the potential erosion of civic virtue in the face of plutocratic governance models coincides with a decrease in respect for individual liberty and human dignity.[136]

Respect for individual liberty and the dignity of every human being has long been central to the U.S. national creed.[137] As Alexis de Tocqueville observed, American democracy is structured to further equality.[138] In the U.S., the government and its leaders within it are defined as subject to the people, so that those who lead are public servants and not rulers. [139]

> organized into major interest groups (sometimes called *corporations*) and representatives of those interest groups settle any problems through negotiation and joint agreement. In contrast to a market economy which operates through competition a corporate economic [sic] works through collective bargaining.

Id.

134. *See* JOHN PERKINS, CONFESSIONS OF AN ECONOMIC HIT MAN 26-28 (2005); Nemani, *supra* note 133, at 99-100.

135. Nemani, *supra* note 133, at 99-100; *see also* PERKINS, *supra* note 134, at 26-28.

136. Linda L. Fowler, *The Best Congress Money Can Buy?*, 6 ELECTION L.J. 417, 419 (2007); ROUSSEAU, *supra* note 15, at 151 ("What man loses through the social contract is his natural liberty and an unlimited right to everything that tempts him and that he can acquire. What he gains is civil liberty and propriety ownership of all he possesses.").

137. *See* ALEXIS DE TOCQUEVILLE, DEMOCRACY IN AMERICA 94-95, 123-24, 175, 287-88 (David Campbell trans., Everyman's Library 1995) (1835, 1840).

138. *Id*.

139. This commitment to equality is not entirely unique to the U.S. Indeed, many modern autocracies style themselves "constitutional monarchies" and recognize a realm of individual liberty that even an autocrat may not infringe. However, the fundamental principle underlying even these constitutional monarchies is that the people are subjects to the ruler and thus sit beneath their government as subservient or subject to it. *Id*. According to Fowler,

American democracy in its ideal form represents progress towards a more inclusive concept of human dignity. However, because each citizen is expected to be capable of meaningfully participating in the political process, everybody, both the elected representatives and those who elect them, needs to be educated enough to be capable of self-governance.[140]

2. Education Is Essential to Democratic Society.—Education philosopher John Dewey recognized that education is essential to democratic society for reasons similar to those espoused by today's capabilities approach theorists.[141] "The task of democracy is the creation of freer experiences in which all participate . . . . If democracy has an ideal meaning 'it is that a social return be demanded from all and that opportunity for development of distinctive capacities be afforded all.'"[142] Dewey considered democracy as the most legitimate system of government because it educates citizens so that they are capable of ruling.[143] Likewise, Amy Gutmann also discusses the necessary constraints on democracy and expounds upon the need for "more democratic education to make our politics more democratic."[144] Like Dewey, Gutmann

> [I]n large part, opts for more of a collective control over education, but by recognizing that a democratic education is one where many individuals and groups have a say in the goals of education, she recognizes that parents, teachers, citizens, and public officials, as well as the children themselves, must all have a hand in determining goals,

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> Every election cycle sparks stories of wealthy candidates pumping millions of their own money into campaigns to buy a seat in the House or Senate. The successful ones prompt cries of alarm about plutocrats hijacking the American democracy; the failures invite scorn for underestimating the capacity of ordinary voters to refuse to be bought.

Id. at 417; *see* RAYMOND V. PADILLA, EPISTEMOLOGY, KNOWLEDGE PRODUCTION, AND SOCIAL CHANGE 8 (2004) (citing ROBERT K. GREENLEAF, DON M. FRICK & LARRY C. SPEARS, ON BECOMING A SERVANT LEADER (1996)). According to Padilla,

> Citizenship includes the cultivation of civic life and the creation of leaders as public servants. Through the practice of leadership and civic life, a set of relations is established by each individual with society. It is within this set of social relations that specific collective issues can be explored, such as justice, ethics, philanthropy, politics, etc., issues having to do with our need to get along with others and to lead productive lives.

Id. at 8.

140. EDWARDS, *supra* note 46, at 76.

141. *See id*. at 85.

142. *Id*. at 76 (quoting DEWEY, *supra* note 13, at 122).

143. *Id*.

144. EDWARDS, *supra* note 46, at 118. In *Liberal Equality*, Gutmann argues that "people who do not have a standard of living sufficient to secure basic welfare for themselves simply cannot be expected to participate in politics as extensively and with as much political information as the more advantaged." *Id.* (quoting AMY GUTMANN, LIBERAL EQUALITY 190 (1980)).

policies, and functions for the schools.[145]

Regardless of what policies are enacted, or what definition of "quality" is ultimately applied, to be legitimate, quality definitions and school policies ought to be determined through a democratic process.[146]

Gutmann recognizes the special importance of education to democratic society by suggesting that as long as children are educated to a certain threshold for democratic participation, there is no concern regarding equality in funding or resources.[147] This insight suggests a need for at least a minimally adequate public education.[148] While Gutmann's perspective regarding minimum adequacy is somewhat inconsistent with a full commitment to human dignity, at least she acknowledges that minimally adequate educational is essential to maintaining a functional democracy.[149] Preservation of democracy is important, the principle aim of both public education and democracy is to enhance human dignity by developing individual's capabilities.[150] "[D]emocracy's obligation to education goes beyond mere schooling. The state must provide access to a variety of other goods and services—'decent housing, job training and employment for parents, family counseling, day care and after-school programs for children, etc.'"[151]

For believers in the modern, universal concept of human dignity, a possible reversion to less democratic and less inclusive form of governance after millennia of long historical progress in liberalizing the concept of human dignity is cause for concern.[152] Whether the alternative system of governance is autocracy, aristocracy, plutocracy, or some derivation thereof, in all these other forms of governance, only the members of the select ruling class are expected to obtain the basic education necessary to govern.[153] Education is, as it always has been, essential to ensuring that true democracy continues.

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145. EDWARDS, *supra* note 46, at 13-14.

146. For Gutmann, "the value of democratic deliberation is so great as to override 'the value of being governed by just laws that are not democratically enacted.'" *Id*. at 119 (quoting AMY GUTMANN, HOW LIBERAL IS DEMOCRACY? 37 (1983)).

147. For Gutmann, the goal of education should be to ensure '"children learn enough to participate effectively in the democratic process[.]' . . . [I]t doesn't require, however, that either the 'inputs' or the 'outcomes' be equalized." *Id*. at 120-21 (quoting AMY GUTMANN, DEMOCRATIC EDUCATION 170 (1987) [hereinafter GUTMANN, DEMOCRATIC EDUCATION]).

148. *See id*. at 120-21.

149. *See* Imoukhuede, *supra* note 1, at 86.

150. From Gutmann's perspective, positive rights connect together through what she views as the most essential obligations of democratic government: the duty to provide public education.

151. EDWARDS, *supra* note 46, at 120-21 (quoting GUTMANN, DEMOCRATIC EDUCATION, *supra* note 147, at 151).

152. As compared to autocracy, the scope of those with influence over law and liberty choices is expanded in an aristocracy and in plutocracy to include a group that is considered to be particularly suited to make such decisions—whether because of birth right, talent, or wealth in the case of plutocracy. However, that group remains small especially when compared to democracy.

153. EDWARDS, *supra* note 46, at 120-21.

Like the right to privacy, education is also essential to liberty. The connection between education and liberty has been recognized in the classical, enlightenment era, and modern philosophies of Aristotle, Rousseau, John Dewey, and today's capabilities theorists.[154] The case for a human dignity-based constitutional protection for the right to public education is even stronger than the already recognized human dignity-based constitutional protection for the right to privacy. This is because, unlike the right to privacy, education is essential to both the liberty component and to the democracy component of human dignity. Despite a broad consensus regarding the importance of primary and secondary education, educational opportunity is systematically denied to the children of racial-ethnic minorities and to underprivileged children of every race.[155] No single factor is more indicative of the sort of education a child will receive than the socioeconomic status of that child's parents.[156] As stated, systemic failures are not incapable of correction. However, U.S. Constitutional law doctrine has gotten in the way.

III. FAILURES OF EQUAL PROTECTION DOCTRINE

Equal Protection clause jurisprudence has retreated from the early commitment to equal access to high quality, public education that the Court demonstrated in *Brown v. Board of Education*.[157] *Brown* demonstrated an unambiguous recognition that public education is important.[158]

Since *Brown*, there has been a marked jurisprudential shift away from this recognition by the Burger Court, the Rehnquist Court, and today's far right-of-center Roberts Court.[159] The Court has all but abandoned its earlier "equality jurisprudence" in favor of a "liberty-centered jurisprudence," which it wrongly perceives as being in conflict with the principle of equality. Equality remains a fundamental principle of American democracy, but because of the Court's negative rights bias, it has failed to recognize how equality and liberty can be reconciled.[160]

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154. *See* Part I.B.

155. Chambers, *supra* note 34, at 55-59.

156. *Id*.

157. 347 U.S. 483, 493 (1954).

158. *Id*.

159. Yoshino, *supra* note 25, at 748. According to Yoshino,

> The jurisprudence of the United States Supreme Court reflects this pluralism anxiety. Over the past decades, the Court has systematically denied constitutional protection to new groups, curtailed it for already covered groups, and limited Congress's capacity to protect groups through civil rights legislation. The Court has repeatedly justified these limitations by adverting to pluralism anxiety. These cases signal the end of equality doctrine as we have known it.

Id.

160. *See id*.; CASS R. SUNSTEIN, THE SECOND BILL OF RIGHTS: FDR'S UNFINISHED REVOLUTION AND WHY WE NEED IT MORE THAN EVER 13 (2004) (noting the inclusion and

The negative rights bias refers to the concern that the Court favors negative rights, which are otherwise referred to as liberties, over positive rights, which are otherwise referred to as duties.[161] The Court's preference towards recognizing liberties, which have been defined as freedoms from government action, has animated a libertarian perspective that has driven our constitutional jurisprudence to the point that the Court is so deeply biased against recognizing the most obvious situations where government ought to have a duty to act.[162]

Education is an obvious example of where there is a well-recognized duty to fairly and equally provide quality education.[163] A right to public education is obviated by the modern concepts of human dignity and related democratic theory-based support for the duty of government to ensure a well-educated citizenry.[164] Additionally, each state within the U.S. today recognizes a right to public education. Despite the fact that each of the United States recognizes this duty, the Supreme Court would have us believe that the United States Constitution does not.[165]

The Court was clearly wrong in *San Antonio Independent School District v. Rodriguez* when it declared that there is no right to public education.[166] The Court has not always gotten this wrong.[167] *Brown v. Board of Education* and

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importance of "the right to a good education" in President Franklin D. Roosevelt's Second Bill of Rights); Erwin Chemerinsky*, The Deconstitutionalization of Education*, 36 LOY. U. CHI. L.J. 111, 123 (2004) (concluding that federal courts have been "tragically wrong" in failing to find a constitutional right to education); Goodwin Liu, *Education, Equality, and National Citizenship*, 116 YALE L.J. 330, 334 (2006) (arguing that the federal government has a constitutional duty to ensure that every child has the opportunity to receive an education).

161. *See* CHARLES FRIED, RIGHT AND WRONG 110 (1978) (1935).

162. *See* Jenna MacNaughton, *Positive Rights in Constitutional Law: No Need to Graft, Best Not to Prune*, 3 U. PA. J. CONST. L. 750, 759-61 (2001); *see also* Frank B. Cross, *The Error of Positive Rights,* 48 UCLA L. REV. 857, 913-14 (2001).

163. *See* Jon Mills & Timothy McLendon, *Strengthening the Duty to Provide Public Education*, 72 FLA. B.J., no. 9, 1998, at 28, 34.

164. *See* ROSEN, *supra* note 119, at 25-27; Henry*, supra* note 24, at 171-73 (discussing the concept of dignity being a governing notions in many cases).

165. *See* Plyler v. Doe, 457 U.S. 202, 223 (1982) ("Undocumented aliens cannot be treated as a suspect class because their presence in this country in violation of federal law is not a 'constitutional irrelevancy.' Nor is education a fundamental right; a State need not justify by compelling necessity every variation in the manner in which education is provided to its population."); San Antonio Indep. Sch. Dist. v. Rodriguez, 411 U.S. 1, 35 (1973) ("Education . . . is not among the rights afforded explicit protection under our Federal Constitution. Nor do we find any basis for saying it is implicitly so protected.").

166. *Rodriguez*, 411 U.S. at 35.

167. *See* Brown v. Bd. of Educ., 347 U.S. 483, 493-95 (1954) (holding public school segregation unconstitutional); Daniel S. Greenspahn, *A Constitutional Right to Learn: The Uncertain Allure of Making a Federal Case out of Education* 59 S.C. L. REV. 755, 762 (2008); *see also* Donald E. Lively, *Equal Protection and Moral Circumstance: Accounting for Constitutional Basics*, 59 FORDHAM L. REV. 485, 485-87 (1991) (arguing that the concept of equal protection has

other Warren Court era decisions indicate a prior willingness to consider freedom and equality from more than a negative perspective.[168] However, from the Burger Court onward, the Supreme Court has been redefining equality and freedom from a libertarian perspective, without appreciation for the basic tools and access required for any meaningful concept of liberty or democracy.[169]

One solution that is alluded to in the title of the *Fifth Freedom* is to conceive of education as a liberty rather than as a duty.[170] Deconstructing the negative versus positive rights dichotomy to the point that an education, a positive duty of government, is treated as a freedom[171] is a strategy that could hold some promise beyond the education rights setting.[172] So-called "false dichotomies" in law tend

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probably raised and dashed more expectations of social progress than any other constitutional provision and that the Equal Protection Clause has under-achieved its promise). Lively argues:

> [T]he Court's school desegregation jurisprudence not only promised unitary school systems but also equal educational opportunity. Such aspirations have not been realized, however, and have actually been undercut by limiting constructions of the amendment that have left educational equality interests substantially unimproved or worse off. Recent decisions, despite their rhetoric, exhibit a reluctance to confront the persistent reality of racial discrimination and suggest that the usefulness of the equal protection guarantee as a means of accounting for minority interests has been substantially undercut.

Id. at 489-90.

168. Greenspahn, *supra* note 167, at 762. Greenspahn argues that *Brown* clearly recognized the fundamental right to education, but the Court has since retreated from the promise of *Brown*. *Id*. at 776.

169. Imoukhuede*, supra* note 1, at 77-78. In that article, I argue that

> The *libertarian perspective* is primarily concerned with maintaining existing privileges and liberties, while deemphasizing the importance of positive rights or duties. The *libertarian perspective* helps to enshrine an unjust distribution of resources by protecting the rights of the unfairly privileged to maintain exclusive privileges.

Id. at 81 (emphasis added).

170. *Id*. at 83.

171. *Id.* at 47.

172. *See* Kenneth B. Nunn, *Rights Held Hostage: Race, Ideology and The Peremptory Challenge*, 28 HARV. C.R.-C.L. L. REV. 63, 78-79 (1993) ("The theoretical limitations of colorblindness arise from its obsession with procedure and its willful ignorance of results. Colorblind analysts tinker with the rules but need not attend to the outcome of the game. Richard Delgado calls this preference for equality of opportunity over equality of result a false dichotomy." (footnote omitted)); Dorothy E. Roberts, *The Priority Paradigm: Private Choices And The Limits Of Equality,* 57 U. PITT. L. REV. 363, 389 (1996) ("The process of counterbalancing white individuals' private interests against government programs that promote racial equality sets up a false dichotomy between private choices on the one hand and government action on the other."); *see also* Gary Peller, *Race Consciousness*, 1990 DUKE L.J. 758, 845; Mark Tushnet, *Critical Legal Studies: A Political History*, 100 YALE L.J. 1515 (1991); Mark Tushnet, *The Degradation of Constitutional Discourse*, 81 GEO. L.J. 251 (1992); Mark Tushnet, *The Left Critique of Normativity: A Comment*, 90 MICH. L. REV. 2325 (1992).

to reify legally constructed differences to the point of creating unnecessary policy challenges.[173] Such a false dichotomy arguably exists in the context of negative versus positive rights.[174] Education is a liberty, the liberty that President Lyndon B. Johnson famously referred to as "the freedom from ignorance."[175]

A. Early Proclamations regarding Importance of Education

1. Education Was Viewed as Essential to Component to Freedom During Reconstruction.—Education has long been recognized and officially proclaimed as especially important by America's founding leaders, law makers, and judges.[176] America's founders shared the previously described recognition that education is fundamental to democracy.[177]

Education's significance continued to be emphasized through declarations in the post-Civil War Reconstruction era by various leaders who recognized the importance of education to the freedom and full citizenship for the newly freed slaves.[178] During the Reconstruction, the federal agency known as the Freedman's Bureau worked to do many things in order to help integrate the newly freed slaves into society, including establishing public schools throughout the South, where none had previously existed.[179] Senators Blair, Hoar, and Perce were among the greatest proponents for establishing these "freedmen's schools."[180] They and other proponents of education legislation respected the

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173. *See* Robert A. Schapiro, *Judicial Deference and Interpretive Coordinacy in State and Federal Constitutional Law*, 85 CORNELL L. REV. 656, 710 (2000); *see also* Erwin Chemerinsky, *Making The Right Case For A Constitutional Right To Minimum Entitlements*, 44 MERCER L. REV. 525, 535-36 (1993).

174. *See* Jeanne M. Woods, *Justiciable Social Rights As A Critique of the Liberal Paradigm,* 38 TEX. INT'L L.J. 763, 764-65 (2003); *see also* Chemerinsky, *supra* note 173, at 535-536 (arguing for the affirmative duty of government to provide basic entitlements as Constitutional rights, including education); Liu, *supra* note 111 (modifying and formulating theory of social welfare rights, which justify and include the positive right to education).

175. President Lyndon B. Johnson, Special Message to the Congress on Education: "The Fifth Freedom," Pub. Papers 54 (Feb. 5, 1968) ("The fifth freedom is freedom from ignorance. It means that every[one], everywhere, should be free to develop his talents to their full potential—unhampered by arbitrary barriers of race or birth or income."). *See* Imoukhuede, *supra* note 1, at 61.

176. *See, e.g.*, Thomas Jefferson, *A Bill for Amending the Constitution of William and Mary, and Substituting More Certain Revenues for Its Support* (1779), *in* EDUCATION IN THE U.S., *supra* note 13, at 745-47; Thomas Jefferson, *From Thomas Jefferson to George Wythe (Aug. 13, 1786)*, *in* EDUCATION IN THE U.S., *supra* note 13, at 750-51; Thomas Jefferson, *Notes on the State of Virginia*(1801), *in* EDUCATION IN THE U.S., *supra* note 13, at 747-51.

177. *See generally* SAMUEL KNOX, AN ESSAY ON THE BEST SYSTEM OF LIBERAL EDUCATION, ADAPTED TO THE GENIUS OF THE GOVERNMENT OF THE UNITED STATES (1799).

178. W.E.B. DUBOIS, BLACK RECONSTRUCTION IN AMERICA 638 (Atheneum 1975).

179. *Id*. at 647-48.

180. Liu, *supra* note 160, at 371-99.

centrality of education to any meaningful concept of liberty and full democratic citizenship and political participation.[181]

The Reconstruction Era freedmen's schools were a manifestation of the social, political, and legal recognition of the centrality of education to any meaningful concept of American liberty and citizenship.[182] As W.E.B. DuBois notes in his ground-breaking classic, *Black Reconstruction in America*, these efforts to establish freedmen's schools in the South were the first efforts in the South to provide public education.[183] Up until the Civil War, education in the South was largely seen as an enterprise for the privileged few; hence, there was no system of public schools prior to the efforts of African Americans and their northern allies.[184] DuBois discusses in his lauded historical work, *Black Reconstruction in America*, how the public schools in the southern United States were founded:

> The first great mass movement for public education at the expense of the state, in the South, came from Negroes. Many leaders before the [Civil War] had advocated general education, but few had been listened to. Schools for indigents and paupers were supported, here and there, and more or less spasmodically. Some states had elaborate plans, but they were not carried out. Public education for all at public expense was, in the South, a Negro idea.[185]

That free public education was a foreign concept to the South, imported from the North, is hardly surprising given the substantially different pre-Civil War or antebellum economies of both regions.[186] The Northern economy was at the forefront of the global industrial revolution and therefore an educated populace was centrally important, if not to labor, then to innovation.[187] Whereas, the Southern economy an exploitative system of free slave labor, where the majority of "free" southern whites were subsistence level laborers with little hope of sharing in the wealth generated by such labor.[188] Within this system, owners of property in the antebellum South did not believe laborers needed education and therefore did not want to be taxed for it.[189] This further demonstrates the Southern ruling class's adherence and continuing belief in an undemocratic, Aristotelian model for aristocratic governance and restrictive access to education.[190]

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181. DUBOIS, *supra* note 178, at 641.

182. *Id*.

183. *Id*. at 647-48.

184. *Id*. at 638

185. *Id*.

186. *Id*. at 641.

187. *Id*.

188. *Id*.

189. *Id*.

190. *See* ARISTOTLE, THE POLITICS, *supra* note 14, at 96 (defining "aristocracy" as "[rule] of the few (but of more than one person) is called aristocracy—either because the best persons are

Poor white laborers also saw no need for being educated.[191] According to DuBois, poor whites accepted "their subordination to the slaveholders, and looked for escape from their condition only to the possibility of becoming slaveholders themselves.[192] Education was "regarded as a luxury connected with wealth."[193] The concept of education as a luxury good may seem foreign to our modern understandings.[194] Implicit to the current constitutional doctrine that education is not a fundamental right is a belief that even if education is important, it is something that people should find for themselves if they have the means. This again harkens to a view of education that is inconsistent with modern views of democratic participation and governance. In this case, the education limitation appears to follow Rousseau's view that certain forms of occupation were incompatible with the ability for self-governance and full education.[195]

According to DuBois, "[i]t was only the other part of the laboring class, the black folk, who connected knowledge with power; who believed that education was the stepping-stone to wealth and respect, and that wealth, without education, was crippled."[196] Southern public schools owe their existence to the triumph of the North, the legitimizing of what began in the pre-Civil War South as clandestine African American schools, and the post-Civil War Freedman Bureau's sponsorship of mixed and segregated public schools.[197] These schools, founded after the emancipation of the slaves, were the foundation for the creation of public schools throughout the South.[198]

Despite the Southern whites early and general disdain for public education, southern state constitutions came to embody, at least on paper, a progressive approach to education.[199] Some states mandated systems of free, racially mixed, public schools.[200] Some even went so far as to create a duty for the legislature to construct a system of free, public education for children up to the age of twenty-one.[201]

Animating much of this was the previously-described recognition by the newly freed women and men that education was the path to full constitutional personhood, to full human dignity.[202] DuBois recognized that early on local control was the enemy of educational progress, explaining that "wherever there

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ruling, or because they are ruling with a view to what is best for the city and those who participate in it . . . .").

191. DUBOIS, *supra* note 178, at 641.

192. *Id*.

193. *Id*.

194. *Id*. at 665-66.

195. *See* ROUSSEAU, *supra* note 15.

196. DUBOIS, *supra* note 178, at 641.

197. *Id*. at 664-65.

198. *Id*. at 664.

199. *Id*. at 665.

200. *Id*. at 637-69.

201. *Id*.

202. *Id*. at 639, 664-65.

was retrogression, particularly in Negro schools, it can be traced to the increased power of the county and district administrators."[203] African Americans and their northern allies who helped fund these education reforms recognized the connection between education and any meaningful conception of liberation.[204]

2. The U.S. Supreme Court Revised Its Rights Doctrine Because of Education's Importance.—Finally, in the rightly famous *Brown v. Board of Education* case,[205] a Court that was reluctant to end segregation in other contexts nonetheless found that education was so especially important that segregation was not just morally wrong, but contrary to America's foundational law, the U.S. Constitution.[206] This recognition in the context of education laid the foundation for later holdings that racial segregation was unconstitutional in other contexts.[207] It is noteworthy that the end of segregation and "separate but equal" began with an education case.[208]

Despite obviously significant examples of the publicly-recognized social, political, and legal significance of education, the U.S. Supreme Court has retreated from its doctrinal recognition that education is especially important.[209] The Court has instead embraced a confused conception of liberty over the duty to provide public education. Donald Lively argues that *Brown* was a good starting point for equal protection, but recognizes that the Court's subsequent failure to clearly define equality has led to the trampling of minority rights.[210] Lively states:

> Absent an explicit command to actuate the equal protection guarantee in comprehensive and substantive fashion, it is not surprising that the provision has demonstrated limited utility in vindicating minority interests. Born of limited aims and aspirations and crafted by a culturally homogeneous group, much like the Constitution's original provisions, the fourteenth amendment reflected the influence of white superiority. The result was a fundamental but qualified demand for racial equality limited to contract and property rights, individual security and legal

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203. *Id*. at 665.

204. *Id*.

205. 347 U.S. 483 (1954).

206. *See* U.S. CONST.; Katherine Tonnas, *The Legacy of* Brown v. Board of Education, 51 LA. B.J. 346 (2004).

207. Loving v. Virginia, 388 U.S. 1 (1967); *see also* Tonnas, *supra* note 206.

208. *See Brown*, 347 U.S. at 493.

209. Greenspahn, *supra* note 167. Greenspahn argues that *Brown* clearly recognized the fundamental right to education. *Id*. at 762. But the Court has retreated from the promise of *Brown*. *Id*. at 772. Greenspahn suggests that *San Antonio Independent School District v. Rodriguez*, 411 U.S. 1 (1973) does not necessarily foreclose the possibility of a right to public education. *Id*. at 768. However, Greenspan acknowledges that litigating for a fundamental right to education would be useless because of the current Court's reluctance to add rights. *Id*. at 783.

210. Lively, *supra* note 167.

status.[211]

Education was important to the newly freed slaves and several bills were passed to ensure that education was made available to them.[212] Goodwin Liu explains that the Freedmen's Bureau and its education bills were enacted pursuant the newly-enacted Fourteenth Amendment's creation of national citizenship.[213] National citizenship had not previously existed in a clear and obvious fashion under the Constitution.[214] With the creation of national citizenship came a new responsibility to "extend educational opportunity to all children."[215] The Freedmen's Bureau's creation and charges were a legislative recognition by the U.S. Congress of their duty under the Constitution to "enforce and give substance to the guarantee of American citizenship" that was granted in the Fourteenth Amendment.[216] As Liu notes, "guided by a national standard of literacy for effective citizenship, the proposals envisioned a distribution of aid that would lessen educational inequality across states."[217]

B. Liberal Theories of Equality Effectively Abandon Equality as a Viable Principle of Justice

The primary weakness of the Equal Protection Clause as the Court is currently interpreting it, is that rights may be violated, so long as they are violated equally. Such a definition of equality is obviously problematic. As a matter of constitutional doctrine, it effectively resurrects a theory of equality that was the foundation for the infamous "separate but equal" doctrine.[218] *Plessy v. Ferguson*[219] and *The Civil Rights Cases*[220] narrowly construed the equality principle embedded within the equal protection clause to be limited to liberal equality.[221]

Together these cases served to limit the possibilities of the Fourteenth Amendment generally.[222] Of particular relevance here is that these cases completely undermined the central equality concerns that inspired passage of the Fourteenth Amendment.[223] Those concerns were to further racial equality and to

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211. *Id*. at 486-487.

212. DUBOIS, *supra* note 178, at 637-69; Liu, *supra* note 160, at 335 (arguing that the federal government has a constitutional duty to ensure that every child has the opportunity to receive an education).

213. Liu, *supra* note 160, at 335.

214. *Id*. at 339.

215. *Id*.

216. *Id.* at 330, 394.

217. *Id.* at 395.

218. Plessy v. Ferguson, 163 U.S. 537, 547 (1896).

219. *Id*.

220. 109 U.S. 3 (1883).

221. *Id*.; *Plessy*, 163 U.S. 537.

222. *Plessy*, 163 U.S.537; *The Civil Rights Cases*, 109 U.S. 3.

223. *See* Francisco M. Ugarte, *Reconstruction Redux: Rehnquist, Morrison, and the Civil*

end institutionalized white supremacy in the form of legally sanctioned slavery as well as the American racial caste system.[224]

As William Julius Wilson notes, the Court's retrograde concept of liberal equality[225] is limited in that this concept of equality leaves out considerations of historical context, but instead focuses almost exclusively on treating people identically.[226] The sameness standard of liberal equality does not appreciate or adjust to concepts of social hierarchy or historical context.[227] Under such an ahistorical approach, a law that mandates separate facilities based solely on race is not necessarily furthering inequality unless it can be shown that the quality of those facilities are themselves unequal.[228] The social hierarchy that such a law reinforces is ignored. This liberal construction of the equality principle was applied for over half a century in the form of the infamous, separate but equal doctrine to validate segregation laws as consistent with the principle of equality so long as the facilities were "equal."[229]

The decisions in these cases flowed not from some outdated academic exercise that yielded unintentionally unjust results. The Reconstruction Era Court's members were contemporaries of the Civil War Amendments' framers and therefore had every reason to be fully aware of the context of racial oppression, exclusion, and white supremacy that together those amendments were meant to address.[230] Yet, the Court chose to ignore the context of the Fourteenth Amendment in order to weaken the scope of what ought to have been broad protective powers to further a uniquely American conception of equality.[231]

Rights Cases, 41 HARV. C.R.-C.L. L. REV. 481, 483-84 (2006).

224. *Id.*

225. William Julius Wilson, *Public Policy Research and the Truly Disadvantaged*, *in* THE URBAN UNDERCLASS 461-479 (Christopher Jencks & Paul Peterson eds., Brookings 1991) (criticizes the concept of colorblindness for not appealing to the reasons why minorities are poor to begin with); *see also* Barbara Flagg, *"Was Blind, But Now I See:" White Race Consciousness and the Requirement of Discriminatory Intent*, 91 MICH. L. REV. 953 (1993) (arguing that colorblindness fails, which is why liberal conception of equality also fails); Charles R. Lawrence III, *The Id, the Ego, and Equal Protection: Reckoning with Unconscious Racism*, 39 STAN L. REV. 317 (1987) (arguing that color-blindness as advocated by classical liberals, who also use the term "formal equality," is flawed due to the fact that liberal conception of equality through color-blindness does not take into account unconscious racism).

226. *See* Richard Delgado, *Introduction to Critical Race Theory*, *in* CRITICAL RACE THEORY: THE CUTTING EDGE, at xiii, xv (Richard Delgado ed., 1995).

227. *See* Timothy D. Lynch, Note, *Education as a Fundamental Right: Challenging the Supreme Court's Jurisprudence*, 26 HOFSTRA L. REV. 953, 954 (1998).

228. *Id.* at 955.

229. *See* Martin Schiff, *Reverse Discrimination Re-Defined as Equal Protection: The Orwellian Nightmare in the Enforcement of Civil Rights Laws*, 8 HARV. J.L. & PUB. POL'Y 627 (1985).

230. *See* Michael J. Klarman, *The* Plessy *Era*, 1998 SUP. CT. REV. 303, 304-05.

231. *Id.*; *see also* Daniel R. Gordon, *One Hundred Years After Plessy: The Failure of Democracy and the Potentials for Elitist and Neutral Anti-Democracy*, 40 N.Y.L. SCH. L. REV. 641

Today's Supreme Court is in the process of reverting to Jim Crow Era constructions of "equality" and therefore abandoned "equality" as a viable principle of justice.[232] The Court's holdings in *Rodriguez* and later in *Milliken v. Bradley* demonstrate a transparent avoidance if not outright abandonment of the principle of equality.[233] These cases more closely resemble *Plessy*'s doctrine of "separate but equal" than *Brown* and *Brown's* progeny's conclusion that separate is inherently unequal.[234]

Absent robust protection of a right to high quality public education, minority and economically disadvantaged children will have no recourse as the quality of their education continues to erode.[235] The previously referenced data and research demonstrates that the average quality of American education has fallen sharply.[236] Minority and economically disadvantaged children as a group, however, underperform even this already low and plummeting U.S. average.[237]

According to Julius Chambers, schools that predominantly serve non-white children are underfunded in comparison to majority white public schools.[238] These funding differences have been argued to be contributing factors in the overall performance gap between students graduating from majority white versus majority non-white public schools.[239] Similarly, schools in impoverished and working class communities tend to be significantly underfunded compared to more economically privileged public schools.[240] Here again, these funding differences have also been argued to be contributing factors to the overall performance gap between students graduating from public schools in economically privileged communities.[241] If there is currently a general U.S. education crisis, then the education situation for racial and ethnic minorities and working class children who as a group receive an even worse than average education is nearing a state of complete dysfunction.

(1996).

232. *See* Roy L. Brooks, *American Democracy and Higher Education for Black Americans: The Lingering-Effects Theory*, 7 J. L. & SOC. CHALLENGES 1, 11 (2005); Klarman, *supra* note 230, at 304-05.

233. Milliken v. Bradley, 418 U.S. 717 (1974); San Antonio Indep. Sch. Dist. v. Rodriguez, 411 U.S. 1 (1973).

234. Plessy v. Ferguson, 163 U.S. 537 (1986); Brown v. Bd. of Educ., 347 U.S. 483 (1954).

235. *See* Chambers, *supra* note 34, at 55-58 (arguing that racial and economic inequality lead to inequality in opportunity to adequate education and to make matters worse, racial and economic inequality are tied, thus minorities are prone to inadequate education).

236. *See* Darling-Hammond, *Soaring Systems*, *supra* note 27, at 19; Floyd D. Weatherspoon, *Racial Justice and Equity for African-American Males in the American Educational System: A Dream Forever Deferred*, 29 N.C. CENT. L.J. 1, 4-5 (2006).

237. *See* Darling-Hammond, *Soaring Systems*, *supra* note 27, at 19.

238. *See id.*

239. *See* Linda Darling-Hammond, *Cracks in the Bell Curve: How Education Matters*, 64 J. NEGRO EDUC. 340 (1995).

240. Darling-Hammond, *Soaring Systems*, *supra* note 27, at 19.

241. *Id.*.

The decisions in these cases were not merely the result of some unintentional confusion regarding how best to define equality.[242] Much like the Reconstruction Era Court, which issued contextually inconsistent and racially hostile rulings that effectively bolster what has been referred to alternatively as a racial caste system or system of white supremacy, so too, the modern Court has chosen to ignore the lessons from *Brown*: that Fourteenth Amendment equality means more than just identical but separate facilities.[243] Equality connects with the Preamble's acclamation to form "a more perfect Union."[244] The Supreme Court has all but abandoned the principle of equality as a viable principle of justice in the education context.[245]

IV. PROTECTING HUMAN DIGNITY VIA THE DUE PROCESS CLAUSE

An alternative approach for recognizing a right to public education, based instead in a due process clause analysis, would allow us to overcome the current Court's libertarian bias and equal protection clause limitations. The seeds of a new, expanded due process clause approach can be found in *Lawrence v. Texas*, where the majority recognized a liberty interest in human dignity.[246] *Lawrence* ultimately expanded the scope for protecting the right to privacy by way of a human dignity-based argument.[247] *Lawrence* broadened the right to privacy to protect the liberty to privately engage in intimate sexual relations based on the recognition that liberty is an essential to human dignity.[248] Hence, *Lawrence* agrees with the long held view that liberty is an essential component to human dignity.[249]

An advantage to framing the education rights concern in terms of human dignity is that human dignity is necessarily defined as an evolving standard that is inherently contextual as to time and circumstances.[250] Thus, a human dignity-based analysis has the potential for overcoming the current limits of the Equal Protection Clause analysis by inserting a contextual component that is universally applicable.[251]

The Due Process and Equal Protection clauses are both central to our

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242. *See* Imoukhuede, *supra* note 1, at 51.

243. Loving v. Virginia, 388 U.S. 1 (1967); Brown v. Bd. of Educ., 347 U.S. 483(1954).

244. U.S. CONST. pmbl.

245. Imoukhuede, *supra* note 1, at 51.

246. Lawrence v. Texas, 539 U.S. 558, 562 (2003) ("Freedom extends beyond spatial bounds. Liberty presumes an autonomy of self that includes freedom of thought, belief, expression, and certain intimate conduct."). *See* Paulsen, *supra* note 75, at 34-37 (arguing that the significance of *Lawrence* can be extended to other contexts); Yoshino, *supra* note 25, at 749-50, 776-80.

247. *See Lawrence*, 539 U.S. 558.

248. *Id.* at 567.

249. *Id.* at 574.

250. *See* Henry, *supra* note 24, at 171-73, 203-05, 209-12 (discussing a line of U.S Supreme Court cases that invoke dignity).

251. *See* Yoshino, *supra* note 25.

fundamental rights doctrine.[252] The Equal Protection Clause analysis of fundamental rights is primarily used to protect people from being selectively deprived of their fundamental rights. The Due Process Clause analysis is primarily concerned with whether a right even exists. One component of the *San Antonio v. Rodriguez* analysis was a Due Process Clause determination that education is not a fundamental right.[253]

Kenji Yoshino suggests that in *Rodriguez,* the Court conducted an equality-based due process clause analysis that focused squarely on the fundamentality of the right to public education and on wealth as a suspect classification.[254] While the Court has consistently avoided identifying wealth as a separate suspect classification,[255] as Yoshino notes, the Court has in other contexts found ways to protect the impoverished by applying its liberty-based analyses to protect against blatant forms of discrimination.[256]

A. Xenophobia Animates Modern Judicial Abandonment of Equal Protection

Kenji Yoshino suggests that rather than directly acknowledging the racial, ethnic, and other group based inequalities in education and other areas, the Court prefers to avoid finding an Equal Protection Clause concern.[257] For Yoshino, the solution to this avoidance of the Equal Protection clause is to instead frame inequality concerns in terms that universalize the application of a liberty interest and in so doing obscure any group based inequalities and subordination concerns.[258] Obscuring the subordination aspects of such cases is among the purported advantages of a liberty based dignity approach.[259] This Article joins Yoshino in endorsing a dignity-based due process clause analysis.[260] However, obscuring the truth is rarely if ever advantageous, especially when dealing with matters of justice.[261]

Yoshino's human dignity approach suffers from at least two problems. First, it frames the central animating concerns regarding Equal Protection in terms of the seemingly benign concept of "pluralism anxiety,"[262] which obscures what

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252. U.S. CONST. amend. XIV (1868).

253. San Antonio Indep. Sch. Dist. v. Rodriguez, 411 U.S. 1 (1973). *See* Imoukhuede, *supra* note 1, at 71.

254. *See* Yoshino, *supra* note 25, at 791 n.311.

255. *Id*. at 790-91 (discussing the Court's unwillingness to recognize the poor as suspect class); *id*. at 791 n.311. *See Rodriguez*, 411 U.S. at 22-25 (holding that wealth-based classifications do not draw heightened scrutiny).

256. Yoshino, *supra* note 25, at 790-91.

257. *Id*.

258. *Id*.

259. *See id*.

260. *Id*.

261. *See* MARI J. MATSUDA ET AL., WORDS THAT WOUND: CRITICAL RACE THEORY, ASSAULTIVE SPEECH, AND THE FIRST AMENDMENT 7-10 (1993).

262. Yoshino, *supra* note 25.

truly animates the decreasing effectiveness of the Equal Protection jurisprudence. The misleading characterization of pluralism anxiety bleeds into the second problem, which is Yoshino's failure to appreciate that civil rights advocates, particularly education rights advocates, have long been pioneers in framing equality concerns using the universalist concept of civil liberties.[263] In fact, the infamous *Rodriguez* case is actually an emblematic example of advocates applying liberty-based arguments to what could also have been framed as an equality concern. Despite applying this universalist approach, the court still failed to recognize a fundamental right to public education.[264]

Regarding the first problem, Yoshino's concept of "pluralism anxiety," is premised on alleviating what he terms as a post-Warren Court, "pluralism anxiety," which he defines as "apprehension of and about [America's] demographic diversity."[265] He sees this anxiety as flowing from the legal recognition of "'new' kinds of people and 'newly visible' kinds of people."[266] Pluralism anxiety is a new, euphemistic umbrella term for concepts that are all too familiar. Where the "new" or "newly visible" are people with different national origins, such a fear is typically described as xenophobia.[267] Where those people are non-whites, such a fear is called racism.[268] Where the "newly visible" are women, then the fear is called sexism.[269] Where the "new" or "newly visible" are gay, lesbian, bi-sexual, or transgendered, the fear is called homophobia. "Fear of outsiders" or "fear of the other" is what Yoshino's "pluralism anxiety" is truly describing.[270] Framed thusly, Yoshino's observation is nothing new or controversial. Using the term "pluralism anxiety" is problematic because it appears to white-wash foul views, implicitly validating what is a disturbingly retrograde influence on American jurisprudence. The term "xenophobia" more fully captures the concerns and motivations than the neutral sounding and potentially misleading term "pluralism anxiety."

Xenophobia under the classical definition of the term is etymologically the more appropriate umbrella term for encapsulating these fears or "anxieties" because, despite its more limited English language definition, its origin literally means fear of strangers, foreigners, or in short, "fear of outsiders."[271] Xenophobia, used as a term to summarize this fear of outsiders, crystallizes the value of human dignity as a counterbalance. Any fear that "we," who view

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263. *See* LESLIE BENDER & DAAN BRAVEMEN, POWER, PRIVILEGE, AND LAW: A CIVIL RIGHTS READER 1-5 (2d ed. 1995).

264. *See* San Antonio Indep. Sch. Dist. v. Rodriguez, 411 U.S. 1 (1973).

265. Yoshino, *supra* note 25, at 751.

266. *Id*.

267. *See* MATSUDA ET AL., *supra* note 261, at 7-10.

268. *See id*.

269. *See id*.

270. *See* Yoshino, *supra* note 25.

271. The term "xenophobia" owes its etymology to the Greek. Its constituent roots are the term "*phobia,"* which means "fear" or "fear of" and "*xenos,*" which means stranger or outsider. WEBSTER'S DICTIONARY, *supra* note 130, at 542 (definition of "xenophobia").

ourselves as insiders, will lose power and privilege by fully dignifying the presence of outsiders, can be countered by recognition that we and the outsiders are all human beings who have a shared right to human dignity.

The second concern that Yoshino introduces the universal concept of human dignity without acknowledging that civil rights advocates have long been dealing with a xenophobia-inspired, post-*Brown* jurisprudence by consciously invoking universalist themes, such as a right to public education.[272] What appears to be lost is what once upon a time was obvious. The term "civil rights" itself embodies a universalist theme that is meant to resound beyond the limiting and frequently dismissible confines of racial equality.[273] Use of "civil rights" as a term is meant to elevate these concerns for inclusion within the broader inclusive arena of American civil liberties.[274] Far from embracing a paradigm of difference, as Yoshino indicates, civil rights advocates have consistently sought to universalize the struggle for civil rights and equality.[275] Yoshino's approach to overcoming xenophobia's retrograde influence on equality fails to appreciate the sophistication of civil rights advocates and thus mischaracterizes the scope of the equality concerns,[276] while exaggerating the liberty potential, especially in the context of public education.[277]

Race and ethnicity have long been problematic to invoke directly; this is why the *Rodriguez* plaintiffs couched what was clearly an issue of Mexican-American school children being denied equal educational opportunities as a question of liberty: their freedom to obtain a public education.[278] The plaintiffs went a step further in providing an opportunity for the Court to avoid xenophobia concerns.[279] They addressed the inequality aspects alternatively, in terms of wealth-based inequality, thus giving the Court the option of avoiding the more inflammatory

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272. *But see* Yoshino, *supra* note 25, at 794 (arguing that application of a dignity-based approach would help overcome *Rodriguez* by approaching education issues not as issues of equality, but as an issue regarding a due process clause-based right to public education).

273. BENDER & BRAVEMEN, *supra* note 263, at 1 (quoting Alice Walker: "'Civil Rights' is a term that did not evolve out of black culture, but, rather, out of American law. As such, it is a term of limitation. It speaks only to physical possibilities—necessary and treasured, of course—but not of the spirit.").

274. *See id.*

275. *See* JESSE L. JACKSON, JR. & FRANK E. WATKINS, A MORE PERFECT UNION: ADVANCING NEW AMERICAN RIGHTS 330 (2001) (arguing for a proposed constitutional amendment guaranteeing to all citizens the right to a high-quality public education); Martin Luther King, Jr., Speech at the March on Washington: I Have a Dream (Aug. 28, 1963), *available at* http://www.archives.gov/press/exhibits/dream-speech.pdf, *archived at* http://perma.cc/QL2T-3XQ8.

276. *See* Yoshino, *supra* note 25, at 751.

277. *Id*. at 794.

278. R. Craig Wood, *Constitutional Challenges to State Education Finance Distribution Formulas: Moving from Equity to Adequacy,* 23 ST. LOUIS U. PUB. L. REV. 531, 535 (2004); Matthew A. Brunell, Note, *What Lawrence Brought for "Show and Tell:" The Non-Fundamental Liberty Interest in a Minimally Adequate Education*, 25 B.C. THIRD WORLD L.J. 343, 368 (2005).

279. Yoshino, *supra* note 25, at 751.

xenophobic concerns regarding race and ethnicity.[280] Yet, the *Rodriguez* Court failed to recognize either a right to public education, or that this form of obvious and systemic subordination of the children of the less fortunate violated either equality or due process.[281] *Rodriguez* is just one of many examples of where sophisticated civil rights advocates were thwarted in their creative attempts to apply universalist themes to class specific inequalities.[282]

Despite these weaknesses within Yoshino's human dignity-based liberty approach, this approach may still be helpful in furthering a right to public education.

B. Human Dignity as a Proxy for Education Rights

The Court's failure to recognize a fundamental right to public education does not necessarily foreclose the possibility that access to a high quality, public education can be protected as a component to human dignity. A human dignity-based due process clause analysis could be applied as a vehicle to affect a right to public education. This approach would be similar to the Court's application of the fundamental right to privacy as a vehicle for recognizing other important rights, including women's reproductive rights.[283] More recently, the Court applied its dignity-based due process clause analysis to use the constitutional right to privacy to protect the rights of homosexuals by protecting a broader right to intimate sexual relations.[284]

Lawrence broadened the right to privacy to protect the liberty to privately engage in intimate sexual relations based on the recognition that liberty is essential to human dignity.[285] Hence, *Lawrence* agrees with the long held view that liberty is an essential component to human dignity. The case for applying a dignity-based due process clause protection of the right to public education is even stronger for education than for the right to privacy. This is because, unlike the right to privacy, education is essential to both the liberty component and to the democracy component of human dignity.

Treating access to high-quality public education as a component to a fundamental right to human dignity would fit well within already existing U.S. constitutional law doctrine. Human dignity has already been recognized by the U.S. Supreme Court as fundamental to American concepts of liberty and equality. Human dignity has already been applied by the U.S. Supreme Court as a vehicle for protecting other rights, most notably, the right to privacy.[286]

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280. *Id.*

281. *See* Brunell, *supra* note 278, at 353-54.

282. *See* Plyler v. Doe, 457 U.S. 202 (1982) (discussing the right to education in the context of undocumented alien children).

283. *See* Roe v Wade, 410 U.S. 113 (1973).

284. Lawrence v. Texas, 539 U.S. 558, 574 (2003).

285. *Id.* at 558.

286. *See* Glensy, *supra* note 67; Maxine D. Goodman, *Human Dignity in Supreme Court Constitutional Jurisprudence*, 84 NEB. L. REV. 740, 751 (2006); Yoshino, *supra* note 25, at 749-50.

The right to privacy has since been applied to add universal character to subordination critiques involving women and homosexuals. The right to dignity's potential to universalize rights, avoids Yoshino's xenophobia concerns. For as *Lawrence* demonstrates, when the Court has been willing to correct for obvious inequalities, it would rather "universalize" rights rather than confront the xenophobia-based fears that would come from recognizing a new suspect classification. However, the goal is not to placate xenophobia but to overcome it.

Given that *Lawrence* applied dignity to interpret and expand the extra-textual but yet judicially recognized fundamental constitutional right to privacy, this opens the door to finding other dignity-based due process clause rights, including the right to public education.[287] Obviously, the right to privacy is a negative right or liberty that fits squarely within the current Court's negative rights biased, libertarian perspective as elucidated in *The Fifth Freedom*.[288] However, *Lawrence's* application of dignity, with its attendant positive rights implications regarding ensuring opportunity to achieve basic and essential human achievements,[289] demonstrates the falsehood of the negative and positive rights dichotomy.[290] Applying the concept of human dignity to interpret a due process clause based right, helps expose the true connection between duty and freedom as well as the connection between democracy and liberty.

CONCLUSION

Education is essential to human dignity because education is essential to the two fundamental components to human dignity: liberty and democracy. Despite the importance of education to liberty and democracy, the U.S. Supreme Court has refused to recognize education as a fundamental right or even to consistently protect against blatant inequalities in access to and quality of public education. However, the Court's human dignity jurisprudence opens a possibility for recognizing a right to public education by way of a dignity-based due process clause analysis.

Lawrence v. Texas has expanded the scope for protecting the right to privacy through a human dignity-based argument that privacy is essential to liberty and liberty is essential to dignity. The case for a human dignity-based recognition of the right to public education is even stronger for education than for the right to privacy. This is because, unlike the right to privacy, education is essential to both the liberty and the democracy components of human dignity.

The Court's continuing failure to recognize and protect the right to education undermines liberty and jeopardizes the very foundation of American democracy.

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287. Yoshino, *supra* note 25, at 749-50.

288. Imoukhuede, *supra* note 1, at 81.

289. SEN, DEVELOPMENT AS FREEDOM, *supra* note 17, at 4-5, 10-11, 36-49, 144 (arguing for basic capabilities that enhance freedom, including the capability to be educated, and arguing that education is important to economic and political participation).

290. *See* Nunn, *supra* note 172, at 78-79; Roberts, *supra* note 172, at 389.

Without equal and fair access to education, liberty becomes meaningless and democracy an empty concept capable of immediate devolution into aristocracy or plutocracy.

Applying this analysis in the context of public education would be a significant step towards unhinging our constitutional doctrine from the false rights dichotomy inherent in the current Court's libertarian and anti-equality bias. Today, education is once again specially situated as the bridge for overcoming separate but equal styled inequality, just as it did before in *Brown v. Board of Education*.

The positive right of access to public education will require a new form of constitutional analysis under the due process clause if it is to be recognized and meaningfully enforced. This new due process would be based in a human dignity jurisprudence[291] that applies the insights from the capabilities approach pioneered by Amartya Sen and Martha Nussbaum.[292] The mechanics of this new due process will need to be further developed, but it promises to have ramifications well beyond the education rights context. Applying this new due process could finally lead to meaningful recognition and enforcement of government's other fundamental duties or positive rights.

Government has a duty to act, if for no other purpose than to preserve human dignity. Education is essential to human dignity and a duty for government to provide equal access to a high quality, public education can and should be enforced by way of a dignity-based due process clause analysis.

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291. Glensy, *supra* note 67 (discussing the concept of human dignity and relevant approaches to reaching it, including negative and positive rights theories).

292. NUSSBAUM, *supra* note 13, at 17-18. According to Nussbaum:

> "Capability Approach" and "Capabilities Approach" are the key terms in the political/economic program Sen proposes in works such as *Inequality Reexamined* and *Development as Freedom*, where the project is to commend the capability framework as the best space within which to make comparisons of life quality, and to show why it is superior to utilitarian and quasi-Rawlsian approaches.

REFRAMING AND RECONSTITUTING NORMATIVE VIEWS OF MILITARY TRAUMA: MOVING BEYOND GENDERED PARADIGMS AND CORRECTING POLICIES THAT UNDULY AND UNLAWFULLY SUBJECT NON-COMBAT TRAUMA CLAIMS TO STRICTER SCRUTINY

JOEL MARRERO*

INTRODUCTION

"Trauma" is a troublesome term in military law and culture. The term is inconsistently and incoherently defined in legal, policy, and historical settings. Its conceptualizations can take on feminine or masculine and visible and invisible forms. In a time of war and imminent military drawdown, when many service members are expected to return home injured, it is imperative to use a definition of trauma that comprehends the manifold challenges wounded service members experience as they transition into civil society and encounter the realities of military-related trauma. A focus on the intense interpretative conflicts between combat trauma and other forms of trauma that are conveyed through law and public discourse can contribute to such a project. A richer understanding of what constitutes trauma not only emboldens our collective will to care for those who have sacrificed much to defend us, but can also improve legal and policy interventions.

One program that defines trauma in a troubling way is the Traumatic Injury Protection Servicemember Group Life Insurance ("TSGLI") program, which Congress created in 2005 to address the financial hardships that some severely wounded service members experience.[1] TSGLI provides a service member who sustains certain traumatic injuries some financial assistance while rehabilitating.[2] Yet, not all service members who qualify for compensation under the law's eligibility criteria are approved for compensation.[3] A 2009 report by the

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1. Emergency Supplemental Appropriations Act for Defense, the Global War on Terror, and Tsunami Relief, Pub. L. No. 109-13, 119 Stat. 231 (2005); 38 U.S.C. § 1980A (2013).

2. TSGLI PROCEDURES GUIDE, Traumatic Injury Protection Under Servicemembers' Group Life Insurance (TSGLI) 2.16 (The Dep't of Veterans Affairs 2012) [hereinafter TSGLI GUIDE].

3. *See generally* U.S. GOV'T ACCOUNTABILITY OFFICE, GAO-09-108, TRAUMATIC BRAIN INJURY: BETTER DOD AND VA OVERSIGHT CAN HELP ENSURE MORE ACCURATE, CONSISTENT, AND TIMELY DECISIONS FOR THE TRAUMATIC INJURY INSURANCE PROGRAM (2009) [hereinafter GAO REPORT].

Government Accountability Office found that the Department of Veteran Affairs ("VA") and Department of Defense ("DOD"), through the branches of service, may have wrongfully denied claims in significant numbers.[4] The report partly attributed this finding to ambiguities in the eligibility criteria and confusion among medical service providers.[5]

The source of wrongful denials may lie somewhere between confusion among service providers and claimants, on the one hand, and government-promulgated administrative procedures that contravene and attempt to supplant the statute and regulations, on the other.[6] The administrative guidelines subject certain types of claims, namely claims for trauma sustained outside of combat, to stricter scrutiny than claims for combat-related trauma.[7] Under the VA's standards,[8] those who are injured in combat are likely to qualify, while those who are not injured in combat but are in fact eligible under the law, face a greater likelihood of receiving a denial letter.[9] And yet the law does not distinguish between combat and non-combat wounds. The law, however, does disregard a host of other traumas, such as Post Traumatic Stress Disorder ("PTSD") and traumas caused by assaults within the military, such as Military Sexual Trauma ("MST").[10] While the law recognizes a certain set of traumas as compensable[11] and the administrative procedures recognize a narrower subset of traumas as compensable,[12] neither recognize trauma in a robust and holistic sense. The hierarchy between combat trauma and non-combat trauma trades on a culture that presents the visibly combat-wounded soldier as the chief victim of military service. And herein lays the source of conflicts between policy and law, on the one hand, and reality on the other.

This Article argues that the value system and culture presenting the combat-wounded soldier as the paradigmatic victim of military service are at the root of the interpretive conflicts. A paradigm of thought, centered on a culture, belief system, and set of assumptions, idolizes the soldier as a combat warrior. The wounded combat-warrior is the idyllic representation of heroism, bravery, and sacrifice. The combat-warrior is the chief and only protagonist in a narrative that underwrites support for the TSGLI legislation and its promulgation in the

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4. *Id*. at 4.

5. *Id*. at 25.

6. *See infra* Part III.

7. *See infra* Part III.

8. *SGLI Traumatic Injury Protection Program (TSGLI)*, U.S. DEP'T. OF VETERANS AFFAIRS (Nov. 14, 2013, 8:13 PM), http://benefits.va.gov/insurance/tsgli.asp, *archived at* http://perma.cc/5CZ8-CPSX.

9. *See infra* Part I.A.1.

10. *Traumatic Servicemembers' Group Life Insurance Frequently Asked Questions*, DEP'T OF VETERANS AFFAIRS 2 (2008), *available at* https://www.hrc.army.mil/site/crsc/tsgli/documents/TSGLI_FAQ_w_Benefits_Expansion_12022008.pdf, *archived at* http://perma.cc/E4Y8-HX5R (excluding psychological and mental illnesses and disorders as covered under TSGLI).

11. *See* 38 C.F.R. § 9.20(f) (2013).

12. *See* TSGLI GUIDE, *supra* note 2.

administrative procedures.

The paradigm is far from gender-neutral and, in actuality, is imbued with a long history of exclusionary beliefs, biases, and policies.[13] While it places one aspect of military service at the apex of heroism, it also obfuscates other aspects of military service, sacrifices, and contributions. The paradigm even works to the detriment of the very service member whose prerogative it appears to advance because it does not account for other types of wounds, such as wholly invisible psychological wounds, incurred in all forms of service,[14] and disregards vulnerabilities that service members face outside the battlefield. This dated paradigm fosters conflict on the micro level between the administrative procedures and statute, and on the macro level between narrow perceptions of military trauma and the comprehensive reality of military service.

The Article proceeds in the following manner: Part I discusses the background of the TSGLI legislation, pertinent issues identified by the GAO Report, and an example of a claim for non-combat trauma that was denied under the VA's and DOD's rigorous administrative guidelines. Part I concludes that under the TSGLI disability program, wounds are conceived on a continuum and subject to different levels of scrutiny: visible combat wounds receive the greatest recognition, followed by physical combat wounds that result in invisible injuries, followed by non-combat related wounds recognized under the statute, and wounds that receive no recognition whatsoever. This continuum exists despite the statute and regulations, which make no distinctions between non-combat and combat trauma.

Part II explains the conflict on a macro level, namely attributing the difference in trauma recognition to a normative framework, set of beliefs, and a paradigm of thought that views combat as the authentic and primary source of military trauma. Part III then explains how administrative law principles can arbitrate the interpretative conflict between definitions of trauma found in the administrative procedures or administrative decisions and those found the statute and regulations. The section concludes that when administrative procedures subject a claim to greater scrutiny because the claim fails to adhere to a normative conception of military trauma, principles of administrative law affords the claimant some recourse.

Because principles of administrative law have their limits in assisting a wrongfully denied claimant, Part IV proposes a special set of federal court cases that could tip the scale in favor of the service member. The Article concludes that recognition of trauma grounded in the multiple dimensions of military service and free from gender bias is critical to shaping our collective understanding of the risks inherent with military service, as well as fashioning effective policies and laws aimed to give service members care and relief.

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13. *See infra* note 103 and accompanying text.

14. *Id*.

I. TSGLI BRIEF HISTORY

Before we can improve the lives of wounded service members, it is critical to understand how military benefits operate.

A. TSGLI Background

On May 11, 2005, the U.S. Congress enacted Public Law 109-13, codified in Section 1980A of Title 38 of the United States Code, which created the Traumatic Injury Protection Servicemembers' Group Life Insurance ("TSGLI") program, effective December 1, 2005.[15] TSGLI was designed to offset the financial hardships that traumatically injured service members incur during treatment and rehabilitation periods regardless of where they are injured.[16] According to the VA and congressional records, military service members who are totally and permanently injured commonly incur financial costs directly associated with the long and arduous treatment and rehabilitation period.[17]

Take the example of an injured soldier returning to the United States from deployment. Ordinarily, the soldier is first brought to a field hospital, then to Landstuhl Regional Medical Center in Germany, and finally to Walter Reed National Military Medical Center, located in the Washington, D.C. area.[18] Depending on the severity of the injury and type of treatment required, the soldier can remain in convalescence between hospitals for days if not weeks.[19] The financial burden generally sets in when family members travel from far and wide to be at the bedside of the injured soldier.[20] In many instances, family members relocate to Washington, D.C. indefinitely.[21] The costs brought on by new or additional living expenses, travel, lodging, and sometimes job loss, not to mention loss of future employment opportunities, can be onerous.[22] TSGLI is designed to relieve some of that burden by providing immediate financial relief in the form of lump-sum payments ranging anywhere from $25,000 to $100,000.[23]

The statute requires the VA to define the losses payable under TSGLI, prepare the regulations, and write procedures.[24] In practice, the VA implements the regulations and procedures, while the DOD, through each branch of service, decides TSGLI claims.[25] Of particular importance is a feature of the statute,

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15. Emergency Supplemental Appropriations Act for Defense, the Global War on Terror, and Tsunami Relief, Pub. L. No. 109-13, 119 Stat. 231 (2005); 38 U.S.C. § 1980A (2013).

16. *See generally* 38 U.S.C. § 1980A (2013).

17. GAO REPORT, *supra* note 3, at 7.

18. KYNDRA MILLER ROTUNDA, MILITARY AND VETERANS LAW 78-79 (West 1st ed. 2011).

19. *Id*.

20. *Id*.

21. *Id*.

22. *Id.*

23. 38 C.F.R. § 9.20 (2013); *see also* GAO REPORT, *supra* note 3, at 9.

24. 38 U.S.C. § 1980A(b)(1) (2013).

25. GAO REPORT, *supra* note 3, at 10. TSGLI is implemented as an insurance rider to the

which extends coverage to service members who are injured on or after December 5, 2005, for a traumatic injury sustained *anywhere*.[26] To qualify for TSGI, a service member must show a traumatic injury directly resulting from a traumatic event.[27] Under the legislation's granting authority, the VA created an "other traumatic permanent injury category to act as a "catch-all."[28] This "other traumatic injury" category is meant to cover injuries not specifically enumerated in 38 U.S.C. § 1980A, but instead found in 38 C.F.R. § 9.20, injuries that may nevertheless be the product of combat trauma.[29]

Servicemembers' Group Life Insurance ("SGLI") plan and coverage is automatic upon entry into service with premiums at $1 per month for those with full-time SGLI coverage. *Id.* The DOD, through the branches of service, pays any claims in excess of the premiums received. *Id.* at 1. Although the program was broadly modeled after commercial Accidental Death and Dismemberment ("AD&D") insurance coverage, TSGLI differs from AD&D commercial policies to account for the unique needs of military activity. *Id*. For instance, a military service member who is permanently disabled, unable to continue in the military, and qualifies for TSGLI may also qualify for military disability benefits. Once that military service member is medically separated, he or she may also qualify for VA disability benefits. For VA disability benefit requirements, see generally *Disability Compensation*, U.S. Dep't of Veterans Affairs (Nov. 14, 2013, 9:33 PM), http://www.va.gov/explore/disability-compensation.asp?gclid=CJ7ruNLf5boCFcZV4god-HUALA, *archived at* http://perma.cc/MN36-TWY5.

26. 38 U.S.C. § 1980A(a)(1) (2013).

27. Specifically, the claimant must: (1) show a qualifying injury or loss directly caused by a (2) traumatic event which occurs before midnight on the day that the member separates from the uniformed services, (3) show injury or loss that manifests within 730 days (two years) of the traumatic event, and (4) survive for at least seven days from the date of the traumatic injury. 38 C.F.R. § 9.20(d) (2013). The legislation and regulations provide some important eligibility caveats. An injury cannot be caused by a mental disorder, mental or physical illness or disease, unless caused by pyogenic infection, biological, chemical or radiological weapon. *Id.* § 9.20(e)(4). TSGLI also does not cover attempted suicide or injuries sustained while committing or attempting to commit a felony, injuries caused by self-inflicted wounds, medical or surgical treatment of an illness or disease, or willful use of an illegal or controlled substance, unless administered or consumed on the advice of a medical professional. *Id.* § 9.20(e)(3). The regulations also identify the schedule of losses. Some examples include $50,000 for the total and permanent loss of speech, $25,000 for total and permanent loss of hearing in one ear, and $100,000 for paralysis such as quadriplegia, paraplegia, and hemiplegia. *Id.* § 9.20(f).

28. *See* Veterans' Housing Opportunity and Benefits Improvement Act of 2006, Pub. L. 109-233(4)(b), 120 Stat. 397; 38 U.S.C. § 1980A (2013). *See also* Servicemembers' Group Life Insurance Traumatic Injury Protection Program—Genitourinary Losses, FEDERAL REGISTER, https://www.federalregister.gov/articles/2011/12/02/2011-31020/servicemembers-group-life-insurance-traumatic-injury-protection-program-genitourinary-losses (last visited July 9, 2014).

29. (1) Inability to perform certain daily activities ("ADL") for at least 30 consecutive days, (2) hospitalization for at least 15 consecutive days, or (3) hospitalization and inability to perform activities of daily living for specified periods of time. 38 C.F.R. § 9.20(f) (2013). The ADLs are (1) bathing, (2) continence, (3) dressing, (4) eating, (5) toileting, and (6) transferring in and out of bed or a chair. *Id.* § 9.20(e)(5)(vi). If the claimant can show an inability to perform two of these

B. Recognized and Non-Recognized Wounds Exist Along a Continuum

Per 38 U.S.C. § 1980A(a)(2), payment is granted, "if a member suffers more than one such qualifying loss as a result of traumatic injury from the same traumatic event."[30] Section 1980A(b)(1) of 38 U.S.C., the section awarding TSGLI benefits to eligible service members, states, "a member who is insured against traumatic injury under this section is insured against such losses due to traumatic injury (in this section referred to as "qualifying losses") as are prescribed by the Secretary by regulation."[31] The regulation promulgating the statute, 38 C.F.R. § 9.20(b)(1), defines traumatic event as "the application of external force, violence, chemical, biological or radiological weapons, or accidental ingestion of a contaminated substance causing damage to a living being."[32] Section 9.20(c)(1) of 38 C.F.R. defines traumatic injury as "physical damage to a living body that is caused by a traumatic event as defined in paragraph (b) of this section."[33] The regulations continue by defining the exclusions to "traumatic injury" and "traumatic event." Because the term "traumatic event" modifies the term "traumatic injury," a qualifying "traumatic injury" is one that is caused only by a "traumatic event" as defined by the statute or regulation.[34]

While the regulations provide guidance on what constitutes a "traumatic injury" and "traumatic event,"[35] the VA promulgates TSGLI procedures to guide claim adjudicators in determining whether a claim meets the criteria set forth in the statute and regulations.[36] The guide defines "traumatic event" as the "the application of external force, violence, chemical, biological, or radiological weapons, accidental ingestion of a contaminated substance, or exposure to the elements that causes damage to the body."[37] External force is "force or power that causes an individual to meet involuntarily with an object, matter, or entity that causes the individual harm."[38] However, the term "involuntary," which materially modifies "external force," is absent from the legislation[39] or

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six functions for a period of 30 consecutive days, he or she can recover $25,000. *Id.* § 9.20(f). For each additional thirty days the claimant is entitled to an additional $25,000, but no more than $100,000. *Id*. A service member with a traumatic brain injury, an injury also not specifically enumerated, can also recover under TSGLI if they are in a coma or can demonstrate an inability to perform two of the six ADLs after only fifteen consecutive days instead of thirty. *Id*.

30. 38 U.S.C. § 1980A(a)(2) (2013).
31. *Id.* § 1980A(b)(1).
32. 38 C.F.R. § 9.20(b)(1) (2013).
33. *Id.* § 9.20(c)(1).
34. *Id.* § 9.20(c)(1).
35. *See generally id.* § 9.20(b)-(c).
36. *See generally* TSGLI GUIDE, *supra* note 2.
37. *Id*. at 4.
38. *Id*.
39. *See generally* 38 U.S.C. § 1980A (2013).

regulations.[40]

Under the "involuntary external force" criteria set forth by the VA in its procedures guide,[41] service members injured in combat are more likely meet the criteria while service members injured in non-combat situations are likely to be denied. However, under 38 U.S.C. § 1980A and 38 C.F.R. § 9.20, a service member who sustains a traumatic injury anywhere may be eligible for compensation,[42] regardless of whether they are in engaged in combat. For instance, if a full time active duty service member is traumatically injured during a basketball game while on leave, under 38 U.S.C. § 1980A and 38 C.F.R. § 9.20 the service member may be eligible. The application of the "involuntariness" standard in the administrative procedures would likely lead an adjudicator to find that the basketball game was not involuntary. Conversely, an adjudicator would be remiss to deny a claim from a soldier who is accidentally injured during combat, an ultra-hazardous activity that carries a greater risk of "involuntary" trauma. Indeed, it is coincidence that the administrative guide is replete with examples of combat trauma as claims that are likely to be recognized for compensation.[43]

Despite the friction between the standards in the regulations and the standards in the administrative procedures, the law and administrative procedures together illustrate concepts of compensable and non-compensable injuries along on a continuum: claims for visible combat wounds receive the greatest recognition; claims for invisible combat wounds sustained physically, like traumatic brain injury, are legally recognized but in practice are difficult to prove; claims for visible non-combat wounds are in legal-limbo status where they are recognized by law but in practice face a likelihood of denial; and all other wounds, including invisible wounds of combat that have a tenuous physical connection such as PTSD or trauma caused by assault within the military, i.e., MST, are at the bottom of the hierarchy receiving no legal recognition for purposes of TSGLI.[44] The following subsections illustrate this continuum.

1. Combat Wounds Receive Greatest Recognition.—A statement delivered by former Senator Larry Craig of Idaho in support of the TSGLI amendment demonstrates the genesis of the program and the centrality of soldiers visibly injured in the course of combat as the chief benefactors of the program. On April 21, 2005, Craig made remarks before the Senate to discuss TSGLI.[45] Craig stated

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40. The guide further elaborates on external force indicating, "there is a distinct difference between internal and external forces. 'Internal forces' are forces acting between body parts, and 'external forces' are forces acting between the body and the environment, including contact forces and gravitational forces as well as other environmental forces." TSGLI GUIDE, *supra* note 2, at 4. Like the regulations, the procedures guide defines "traumatic injury" as the "physical damage to your body that results from a traumatic event." *Id*.

41. *Id.*

42. 38 U.S.C. § 1980(A) (2013); 38 C.F.R. § 9.20 (2013).

43. TSGLI GUIDE, *supra* note 2, at 8; 12; 13.

44. 38 C.F.R. § 9.20(f) (2013).

45. 151 CONG. REC. S4094-02 (daily ed. Apr. 21, 2005) (statement of Sen. Craig) [hereinafter

he wanted to discuss the "tremendous gap in the coverage that exists in the treatment of the soldiers, sailors, marines, and airmen" fighting in Afghanistan and Iraq at the very moment the remarks were being delivered.[46] According to Craig, "it is widely known that due to the incredible advances in medicine, service members who may not have survived life-threatening injuries in previous wars are now making it back home alive from Iraq and Afghanistan."[47] Unfortunately, these service members, "must live with injuries that may have left them without their limbs, sight, hearing, or speech ability, or even more."[48] These service members generally return home through, and remain at, the Walter Reed National Military Medical Center where they "learn, through physical and occupational therapy, how to reengage back into society."[49]

During this rehabilitation period, these service members incur acute financial hardships. "For many Guard and Reserve members at Walter Reed, they already have foregone higher paying civilian jobs prior to their deployment."[50] The more time spent in recovery the greater the financial stress.[51] In addition, "family members of injured soldiers bear the burdens necessary to travel from great distances to provide the love and emotional support that is absolutely essential for any successful rehabilitation."[52] Hence the genesis and purpose of TSGLI, to provide "immediate payment [which] would be to give injured service members and their families the financial cushion they need to sustain them before their medical discharge from the service, when veteran benefits kick in."[53]

Senator Craig specifically invoked the story of Army Staff Sergeant, Heath Calhoun, who "had both of his legs amputated after being struck during a rocket-propelled grenade attack in Iraq."[54] Craig spoke about the "financial problems [Sgt. Calhoun] had endured after [his wife] quit her job to be with Heath during convalescence."[55] Although the family was able to barely meet their financial needs during the whole year that it took the military to medically discharge him, that period was an "extremely trying period."[56] Craig closed his remarks by reminding his colleagues to "be vigilant in our care for those who are still fighting to regain the normalcy of the lives they enjoyed prior to sustaining catastrophic injuries in the defense of our freedoms."[57]

While Senator Craig's April 21, 2005, statement before Congress may seem

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Craig Statement].

46. *Id*.
47. *Id*.
48. *Id*.
49. *Id*.
50. *Id*.
51. *Id*.
52. *Id*.
53. *Id*.
54. *Id*.
55. *Id*.
56. *Id*.
57. *Id.*

like a one-off, on September 7, 2006, Craig, as the chairman of the United States Senate Committee on Veterans' Affairs, held a hearing entitled "Hearing on Wounded Warrior Insurance: A First Look at a New Benefit for Traumatically Injured Servicemembers."[58] At the hearing, Craig presented testimony from a combat-wounded soldier to tout the benefits that soldiers, who are injured in combat, drive from the program.[59] Interestingly, rather than referring to the program as TSGLI, Craig along with other senators and speakers referred to the insurance program as the "Wounded Warrior Insurance Program."[60]

Based on Craig's statement before Congress, one has the impression that service members injured in combat are chiefly eligible for TSGLI recovery. This is because Craig's statement places the combat-wounded soldier front and center. Soldiers with traumatic and enduring wounds of war indeed deserve accolades for their priceless sacrifices. Craig's statement was perhaps effective in marshalling support for the amendment. But, despite his worthy intentions, Craig spoke of only one dimension of the reality of military trauma and service.

2. Visible Combat Wounds Privileged Over Invisible Combat Wounds.— According to the VA, "TSGLI has been widely acknowledged as a successful program that has met its intended purpose," claiming that, "4,408 veterans and servicemembers have been paid $273,450,000 under the TSGLI program," as of April 30, 2008.[61] The VA's claim of success, however, may be overstated. One report by the GAO, which analyzed the rate of approval for claims filed by service members with traumatic brain injury ("TBI"), found the "actual approval rate may be lower"[62] for claims involving traumatic brain injury.[63]

Although the GAO's report narrowly concerns claims for TBI, the report shows how service members with invisible combat wounds confront greater challenges in obtaining TSGLI compensation as compared to service members with visible combat wounds.[64] While the evidentiary burden for establishing TSGLI eligibility on a claim for TBI on the basis of a coma is relatively uncomplicated, the task of showing a loss of an Activity of Daily Living due to TBI can be relatively complicated.[65] The GAO, in part, predicates this arduous

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58. *Hearing on Wounded Warrior Insurance: A First Look at a New Benefit for Traumatically Injured Service-Members*, 109th Cong. 746 (2006) (statement of Sen. Craig, Chairman, H. Committee on Veterans' Affairs).

59. *Id*.

60. *Id.*

61. U.S. DEP'T. OF VETERANS AFFAIRS, SERVICEMEMBERS' GROUP LIFE INSURANCE TRAUMATIC INJURY PROTECTION: YEAR ONE REVIEW 5 (2008).

62. GAO REPORT, *supra* note 3, at 3.

63. *Id.* The GAO, in part, attributed discrepancy between the VA's claim and the GAO's findings to the DOD's and VA's lack of "assurance that claim decisions are accurate, consistent, and timely within and across the services." *Id*. The rate of actual approval may be lower, or conversely the rate of denial may be higher, because the VA did not capture all denials for traumatic brain injury in its data. *Id*. at 6.

64. *See generally id*. at 1-3.

65. *Id*.

evidentiary task on the obstacles that service members with TBI have in the basic task of gathering evidence.[66]

The GAO also posits that the difficulty lies in the subjective and unclear eligibility criteria.[67] The GAO attributes the subjectivity and lack of clarity in the eligibility criteria to the applicant and recommends that greater educational outreach would improve service members' and medical providers' understanding of TSGLI.[68] However, the GAO appears to have missed the mark in only attributing subjectivity to medical providers and claimants.[69] The report omits any analysis of wrongful denials by the VA and DOD under their administrative procedures.[70] The following is a case in point in which a service member who would otherwise have been eligible for the military disability benefit was denied under the VA's administrative standard because the injury was not the product of "involuntary external force," an outcome that he would have likely dodged had he sustained the same wound in the course of combat.

3. Non-Combat Traumatic Wounds Are Likely to Receive Lower Recognition.—The story of Army Major W.D. Foster demonstrates the greater level of scrutiny that non-combat trauma claims undergo under the administrative procedures. On November 28, 2004, Foster was deployed to Iraq where he remained stationed until November 3, 2005. [71] During a mandatory bi-annual Army physical fitness test, Foster totally and permanently injured himself.[72] It occurred while performing sit-ups. Foster first completed the push-up portion of the physical fitness test, which measured his chest, shoulder, and triceps muscle endurance. After he completed the push-ups, within two minutes, Foster immediately threw himself on his back onto cement ground where there was loose gravel to commence the sit-up portion of the test. On command, Foster assumed the starting position by lying on his back with his knees bent at a forty-five-degree angle. With full speed, Foster lowered his body to the ground until

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66. *Id*.

67. *Id*. at 4.

68. *Id* at 20, 23.

69. *Id*. at 4-5.

70. *See generally id*. (excluding attribution of TSGLI denials for service members based on insufficient administrative procedures).

71. Foster v. United States, 111 Fed. Cl. 658 (2013).

72. *Id.* at 660 (The Army physical fitness test measures three events: push-ups, sit-ups, and a timed two-mile run. *See APFT Standards*, U.S. ARMY BASIC (Nov. 15, 2013, 11:53 PM), http://usarmybasic.com/army-physical-fitness/apft-standards#.Uob5sr4o7IU, *archived at* http://perma.cc/N5YA-WY6M. Each portion of the exam is scored based on the number of repetitions performed or the time run, and the soldier's gender and age category. *Id.* Soldiers who fail any portion of the fitness test must retake the entire fitness test within three month and are "flagged." A flag renders a soldier ineligible for promotion, reenlistment, or enlistment extension. *APFT—Army PT Test*, U.S. ARMY BASIC (Nov. 15, 2013, 11:54 PM), http://usarmybasic.com/army-physical-fitness/apft#.Uob8Lb4o7IU, *archived at* http://perma.cc/D6DD-7WHC. Failure to pass two or more fitness exams can lead to separation from the Army. *Id.* Conversely, a soldier whose score exceeds an exceptional threshold is awarded a physical fitness badge. *Id.*).

the bottom of his shoulder blades touched the ground.

Foster performed a few sit-ups short of thirty-two when sharp pain rushed through his lower back. After the event, Foster attempted to lift himself in preparation for the running portion, but was unable to do so. He experienced numbness in his legs and could not walk. He was rushed to the Army hospital where he underwent an MRI and later learned that he had a spinal stroke. The stroke caused total and permanent paralysis from the waist down. Foster's doctors identified external blunt force trauma against his back while doing countless sit-ups as the most probable cause of his injury. While there was no obvious bleeding or fracture of the spine, Foster's injury more likely than not resulted from a "traumatic event."[73]

Foster applied for TSGLI benefits, but twice the TSGLI adjudicators denied his claim because the injury was not "a direct result of a qualifying traumatic event."[74] Foster then appealed to the Army Board for Correction of Military Records ("ABCMR") in his final administrative appeal.[75] The ABCMR affirmed the denial but on the grounds that the injury was not caused by an "involuntary" traumatic event as defined by the VA's TSGLI procedures guide.[76] Because the Army's appellate system is designed to reverse errabund military disability adjudications, it is also unlikely that Foster's case is an aberration.[77] The Army's affirmance of Foster's denial suggests systemic denial of claims filed by service members for injuries sustained outside of combat, which under the statute and regulations may be compensable.[78] Had Foster sustained the injury in the course of combat by no fault of his own, his injury would likely be considered a product of "involuntary" force.[79] The distinction between a "voluntary" and "involuntary" external force[80] even is thus more than just semantics. Instead it conceives combat-incurred wounds as categorically distinct from those that are incurred outside of combat.

4. Other Service-Related Traumatic Wounds Receive No Recognition.—To reiterate, 38 U.S.C. § 1980A was developed to provide traumatically injured service members financial assistance during the trying treatment and rehabilitation period.[81] Absent from the statute, regulations, and procedures is any mentioning or recognition of other forms of traumatic injuries that leave service members in financial straits during the treatment and rehabilitation period before they are separated from the military. For instance, the statute and regulations disregard enduring invisible wounds such as PTSD or MST, or even visible traumatic wounds incurred by military assault, or even pregnancies that

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73. *Id.*
74. *Id*.
75. *Id*.
76. *Id*.
77. *Id*.
78. *See generally* 38 U.S.C. § 1980A (2013); 38 C.F.R. § 9.20 (2013).
79. *See* TSGLI GUIDE, *supra* note 2.
80. *Id.*
81. *See generally* GAO REPORT, *supra* note 3.

are the product of rape. While unabated stress experienced during deployment to combat duties is the leading cause of PTSD among service members, unlike TBI, it is typically not caused directly by a physical traumatic force to the head.[82] Moreover, unlike TBI, which is recognized as a compensable injury, PTSD generally carries stigma.[83] Thus, the presumption is that those service members injured during combat receive greater recognition than those who are traumatically injured during their course of military service in a non-combat activity.

II. THE ARCHETYPE OF A COMBAT-WOUNDED SOLDIER AND ITS ROOTS IN A CULTURE WHERE PARADIGMS OF IDEALIZED WOUNDED SOLDIERS SHAPE HOW REALITY IS COMPREHENDED

While TSGLI may be thought to benefit only those who are traumatically injured in the course of combat, in actuality, the legislation covers circumstances where service members are injured outside the battlefield.[84] At the micro level is the issue of what remedies are available to a service member wrongfully denied under unduly rigorous administrative criteria. At the macro level is the interpretive conflict between the reality of military trauma, which encompasses combat trauma and military assault trauma, and the centrality of the combat soldier in a military benefit program. This Article argues that the perception of visibly combat-injured soldiers as the paradigmatic victims of military service conforms to the demands of military culture, normative views of military identity, and gendered paradigms. The idealized masculine soldier, one whose primary purpose and duty is to engage in combat, is seen as impervious to non-combat trauma, including PTSD, MST, or visible non-combat wounds.[85] The idealized soldier, however, is saddled with other burdens largely related to physical combat

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82. *How Common Is PTSD?*, U.S. DEP'T. OF VETERANS AFFAIRS (Nov. 6, 2013, 11:02 AM), http://www.ptsd.va.gov/public/pages/how-common-is-ptsd.asp *archived at* http://perma.cc/MW5B-6XGC.

83. Mary Tramontin, *Exit Wounds: Current Issues Pertaining to Combat-Related PTSD of Relevance to the Legal System*, 29 DEV. MENTAL HEALTH L. 23, 24 (2010).

84. 38 C.F.R. § 9.20(d)(1). A full-time active-duty service member who is insured, which occurs automatically, is covered anywhere. *Traumatic Servicemembers' Group Life Insurance Frequently Asked Questions*, *supra* note 10, at 1. This means that if a service member is on vacation and sustains a traumatic injury he or she may be eligible for TSGLI. *Id*. at 1-2. If the service member is injured as a result of a traumatic event, he or she may recover even if the event occurred on a base in Texas or on a ship in the Mediterranean. *Id*.

85. Lara Stemple makes a similar observation on the types of gender biases that inform normative notions of masculinity and manhood in anti-violence law, stating "assumptions that real men are sexual aggressors and never victims promote harmful perceptions about the 'one' way to be a man. They can justify violent behavior as an archetypal manifestation of maleness, promoting a sense of inevitability about its continuation. Such perceptions may influence behavior. . . ." Lara Stemple, *Male Rape and Human Rights*, 60 HASTINGS L.J. 605, 634 (2008).

hazards.[86]

It is not an aberration that Senator Craig deployed the archetype of the combat-wounded soldier when touting the net-positive of the military's disability program. This is a view of soldiering that plays on dichotomies of gender, which reiterate and instantiate military cultural identities, behavior, and value choices.[87] The following discusses gendered paradigms that contribute to perceptions of wounds conveyed through the TSGLI law as well as administrative practices used to evaluate a TSGLI disability claim. The discussion argues that the centrality of combat in Craig's touting of the law, the continuum of wounds under the TSGLI program with combat wounds at the top of the hierarchy, and the disregard of particular wounds maps a gendered paradigm under-gridding military culture, identity, values, and ethos. The section illustrates that non-combat trauma claims are subject to greater scrutiny, in part, because non-combat trauma is perceived less meritorious as compared to combat trauma.

A. The Paradigm of the Combat Warrior

Paradigms are important because they shape perceptions of reality.[88] A paradigm is a lens or framework through which stories are told, experiences reach comprehension, and assumptions linger unstated.[89] It is the "foundation for our values, attitudes, and notions."[90] What shaped Senator Craig's statement before Congress and, maybe even, perceptions of military benefits at large, is the paradigm of the combat warrior. Feminist legal scholars and sociologist have long theorized on the role that paradigms play in shaping law, policy, and human behavior.[91] One such theorist, Karen O Dunivin, discusses the role that

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86. *See* Jill Elaine Hasday, *Fighting Women: The Military, Sex, and Extrajudicial Constitutional Change*, 93 MINN. L. REV. 96, 104-07 (2008) (discussing the risks and burdens of combat soldiering).

87. Karen O. Dunivin, *Military Culture: Change and Continuity*, 20 ARMED FORCES & SOC'Y 531, 532-34 (1994).

88. *Id*.

89. *Id*.

90. For additional writings on the paradigm of the combat masculine warrior, see Karen O. Dunivin, *Military Culture: A Paradigm Shift?*, AIR WAR C., Maxwell Paper No. 10 (2001).

91. Catharine A. MacKinnon, *Difference and Dominance: On Sex Discrimination, in* THE MORAL FOUNDATIONS OF CIVIL RIGHTS 144-58 (Robert K. Fullinwider & Claudia Mills eds., 1986) (discussing the role of paradigms in keeping women in second-class status under equality law); Kimberle Crenshaw, *Demarginalizing the Intersection of Race and Sex: A Black Feminist Critique of Antidiscrimination Doctrine, Feminist Theory and Antiracists Politics*, 1989 U. CHI. LEGAL F. 139 (arguing that paradigms shape how the experiences of black women are perceived in theoretical, political, and legal discourse); Kim Lane Schepple, *Legal Story Telling*, 87 MICH. L. REV. 2073 (1989) (containing articles by authors including feminist legal theorist, Mari Matsuda, on the use of stories and narratives to disrupt dominant paradigms); *see also* Judith Butler, *Imitation and Gender Insubordination*, THE LESBIAN AND GAY STUDIES READER 307, 308 (Routledge 1993) (explaining how paradigms of thought inform identity categories which can "be instruments of

paradigms in military culture.[92]

In *Military Culture: Change and Continuity*, Dunivin coined the term "combat-masculine warrior paradigm" to describe the relationship between combat and gender in military culture.[93] The concept of the paradigm combat warrior recognizes several important concepts and observations. First, the military is an institution that is by and large comprised of men.[94] Because of this, the military's culture is shaped by and reflects the ideas of men.[95] However, because the military has evolved and diversified as a result of external demands, male-centric norms, experiences, and value-choices permeate military culture, more at some levels than others.[96] Second, "soldiering" is viewed as a masculine role because it is the profession of war, defense, and combat, work that society sees as men's work.[97] This is a view of military service that is identified as hegemonic, pervasive, and historical.[98] Third, there is a symbiosis between perception and reality: men are enticed to join the military's "cult of masculinity," the military swells with men throughout all ranks, and society views the military and its culture as naturally male-centric because of its large male composition.[99] General reviews of the military are shaped by images of the military and its culture and, concomitantly, images of the military and military culture are shaped by general perceptions. Indeed, the popular military advertising slogan, "We're looking for a few good men" depicts the military as largely dominated by and for men.[100] Fourth, the concept of combat defines the military's and, as a consequence, a soldier's core objective.[101]

The concept of the paradigm of the combat masculine warrior is a collection of these views of the military culture and identity. The notion of combat is central feature of the paradigm because:

> military structures and forces are built around combat activities—ground combat divisions, fighter air wings, and naval aircraft battle groups. The Services organize and train themselves around their combat roles,

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regulatory regimes, whether as the normalizing categories of oppressive structures or as the rallying points for a liberatory contestation of that very oppression").

92. *See generally* Dunivin, *supra* note 87.

93. *Id.* at 532-34.

94. *Id*. at 534.

95. *Id*. at 535.

96. Dunivin, *supra* note 90, at 3-4.

97. *See, e.g.*, MARTIN BINKIN & SHIRLEY J. BACH, WOMEN AND THE MILITARY (Brookings Institution, 1977); CYNTHIA ENLOE, DOES KHAKI BECOME YOU? THE MILITARIZATION OF WOMEN'S LIVES 7-15 (1983).

98. *See, e.g.*, Jamie R. Abrams, *The Collateral Consequences of Masculinizing Violence*, 16 WM. & MARY J. WOMEN & L. 703, 711-15 (2010).

99. Dunivin, *supra* note 87, at 534.

100. *Id*. at 2 (citing Michael McCarthy & Darryl Haralson, *The Few. The Proud. The Ad.*, USA TODAY, Mar. 20, 2003, at B3).

101. Dunivin, *supra* note 87, at 534-37.

> distinguishing between combat arms and support activities. Since the primary role of the military is preparation for and conduct of war, the image of the military is synonymous with the image of combat.[102]

Because combat is defined as an extension or exertion of physical power and because the military is largely comprised of men, military culture consequently exalts idealized norms of a soldier as "a man in power, a man with power, and a man of power."[103] The combat warrior paradigm thus reflects the military's cultural belief of what constitutes the ideal soldier.[104]

The following demonstrates the paradigm of the combat warrior pervasively influences military law and policy. While Dunivin argues that the paradigm has shifted towards greater inclusion and gender neutrality as a result of the inclusion of women in combat roles, Dunivin maintains that, notwithstanding the gradual change in gender makeup of the military, the paradigm continues to place male-centric demands on female soldiers.[105]

B. How the Paradigm Gains Prominence Within the Military Culture and Policy

One way to think about the paradigm is that it shapes policies that influence behavior and goads soldiers, including women, toward masculinized ideals. For instance, the military academies honor code, "we will not lie, cheat, or steal," guides "the ethical development of cadets and midshipmen in preparation for their service as 'officers and gentlemen.'"[106] This honor code idealizes an officer as honest, trustworthy, and male. Ideals of what constitute a combat soldier are also found in the Uniform Code of Military Justice ("UCMJ").[107] Under the UCMJ a service member can face punishment for "behavior unbecoming an officer," which includes acts of adultery, financial irresponsibility, and fraternization.[108]

The paradigm of the combat warrior is seen in laws and policies that are exclusionary in nature.[109] For example, military laws have historically segregated "units commanded by white officers, limited the number of service women in uniform, and prohibited women from performing duties aboard combat ships or

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102. *Id*. at 533.

103. *See* Abrams, *supra* note 98 (citing R.W. CONNELL, MASCULINITIES 77 (University of California Press, 1995) (describing hegemonic masculinity theory); *see also* MICHAEL S. KIMMEL, MASCULINITY AS HOMOPHOBIA: FEAR, SHAME, AND SILENCE IN THE CONSTRUCTION OF GENDER IDENTITY, IN SEX, GENDER AND SEXUALITY 58, 61 (Ferber et al. eds., 2009) (discussing hegemonic masculine ideals).

104. For similar discussions on the intersections of masculinity and military culture, see MICHAEL L. RUSTAD, WOMEN IN KHAKI: THE AMERICAN ENLISTED WOMAN (1982); JUDITH H. STIEHM, BRING ME MEN AND WOMEN 65-66 (1981).

105. Dunivin, *supra* note 90, at 5-9.

106. Dunivin, *supra* note 87, at 535.

107. *Id*.

108. *Id*.

109. *Id*.

aircraft."[110] Women remain excluded from combat-related roles such as "flying, infantry, armor, and sea duty."[111] This is because, according to the Congressional testimony of DOD Under Secretary of Defense Edwin Dorn, "the combat exclusion reflects and reinforces widespread attitudes about the place of women in the military. . . . Put bluntly, women may not be regarded as 'real' soldiers until they are able to do what 'real' soldiers do, which is to kill and die in combat."[112] These laws, at one point or another, reflected the ideal archetype of soldier: white, male, and combat-able.[113] The military justified exclusionary laws and policies "on the grounds of preserving combat effectiveness."[114] That is, homogeneity helped achieve unit cohesion, a critical element of combat effectiveness.

The paradigm of the combat warrior reinforces socializing norms and values. For instance, the ability to conform to the combat warrior role demonstrated manhood because "combat arms provided men the opportunity to demonstrate their masculinity."[115] The military operationalizes the paradigm of the combat warrior through training that imparts the ethos of masculinity.[116] This is evident during basic training where "traditional images of independent, competitive, aggressive, and virile males are promoted and rewarded."[117] Those who cannot meet these norms, like women or homosexuals, are systemically excluded as outsiders or deviants and because their presence, especially in war, challenge and undermine the paradigm of the masculine combat warrior.[118] For this reason, they may be especially vulnerable to punishment, disenfranchised from certain military benefits, or viewed as possessing a handicap. It is no surprise that, "the combat exclusion laws and policies that restrict women's assignments lead some members to perceive women as inferiors."[119]

Gendered exclusionary policies have affected the allocation of military benefits. Take the United States Supreme Court case Frontiero v. Richardson.[120] Frontiero concerned a female service member's right to claim her husband as a "dependent" for purposes of certain benefit laws.[121] The Supreme Court found the difference standards for determining "dependency" for women and men

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110. Dunivin, *supra* note 90, at 8.

111. *Id*.

112. Dunivin, *supra* note 87, at 536.

113. *Id.*

114. *Id*.

115. *Id*.

116. *See* HELENA CARREIRAS, GENDER AND THE MILITARY: WOMEN IN THE ARMED FORCES OF WESTERN DEMOCRACIES 41, 43 (2006).

117. Dunivin, *supra* note 90 (citing Joseph H. Pleck, *The Male Sex Role: Definitions, Problems and Sources of Change*, 32 J. SOC. ISSUES 155 (1976)).

118. *Id*.; *see also* William Arkin & Lynne R. Dobrofsky, *Military Socialization and Masculinity*, 34 J. SOC. ISSUES 151, 155 (1978).

119. Dunivin, *supra* note 90, at 536.

120. 411 U.S. 677 (1973).

121. *Id*. at 678.

unconstitutional.[122] In a plurality opinion, Justice Brennan challenged the continued accuracy of the assumption of that female spouses were normally dependent, pointing out the increasing involvement of women in the labor force, and invoking employment and income statutes to support his analysis.[123] The assumption of the law at issue in Frontiero rested on the timeworn conviction that women could not and should not fully participate in military service because their true responsibilities were non-combat related. While there have been modest changes in gender attitudes in the military, the paradigm still maintains some grip on cultural perceptions within the military.

C. How the Paradigm Explains Traumatic Injury Benefit Eligibility Criteria

A military disability benefit program designed to accommodate a variety of combat and non-combat related injury but, that in practice, privileges combat trauma over non-combat trauma is an extension of the combat-warrior paradigm. We saw this in Senator Craig's statement before Congress. His narrative suggests an innocent, deep-rooted belief in a military tradition—a fundamental belief that the identity of the soldier benefiting from the military disability program springs from their role as heroes willing to sacrifice their lives. As a collective of men, the military is perceived as powerful, but alone, the individual male soldier can feel powerless.[124] Consider Craig's narrative on Sgt. Calhoun who was discharged and cannot count on the financial support of the military to meet his financial needs during the rehabilitation and separation period. Sgt. Calhoun's wife too is powerless due to the financial distress resulting from by her husband's disabling injuries. Craig's narrative of Sgt. Calhoun's experience demonstrates that military combat is difficult and hazardous work that leads to significant acts of heroism. For his work and ability to adhere to a combat warrior paradigm, Sgt. Calhoun deserves praise, reward, and sympathy. He sacrificed his limbs as well as the ability to perform the primary combat role of soldier and breadwinner, two traits that animate the ideals of the combat warrior paradigm.

While the narrative helps garner support for a military disability program designed to aid Sgt. Calhoun and similarly-situated service members, it also helps create the perception that members who are injured outside the fog of war are excluded. The combat warrior paradigm and the ideals that Senator Craig espoused do not entirely comprehend the experiences of those injured in non-combat situations.[125] The idyllic picture of Sgt. Calhoun or the soldier injured in combat does not always accurately reflect the reality of soldiers who suffer other types of traumas not covered by TSGLI that also bring about financial hardships

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122. *Id*. at 679.

123. *Id*. at 685-88.

124. Ann McGinley makes a similar observation in the context of firefighters. *See* Ann McGinley, Ricci v. DeStefano*: A Masculinities Theory Analysis*, 33 HARV. J.L. & GENDER 581, 619 (2010) (stating "masculinity theory also recognizes that although men as a group benefit from the 'patriarchal dividend,' individual men often feel powerless in their own lives and jobs").

125. *See supra* Part I.B.4.

during the rehabilitation and convalescence period.[126] Again, these other traumas include sexual trauma, assault by other soldiers, or PTSD.[127] These types of traumas, unlike combat-related traumas, do not promote the construction of masculinity within the military or society's perception of the military as a masculine ideal.[128]

The non-combat-related traumas undermine the image of the masculine soldier because PTSD and sexual trauma fail to demand the type of normative and hegemonic views of heroism enshrined in the combat warrior paradigm.[129] The difference in view between combat-related wounds and other forms of wounds, which are poor representations of the male-centric paradigm, is channeled into perceptions of the law and promulgation of administrative procedures that burden claims for non-combat traumatic injuries.[130] Because combat tests a soldier's manhood or masculinity, serving in combat and demonstrating wounds of combat are ways to illustrate one's manhood.[131] Wounds that are poor illustrations of a soldier's manhood are deemed ill-deserving of recognition or compensation.[132] It is no wonder that female veterans who suffer from military sexual trauma face a relatively arduous evidentiary burden to qualify for VA disability benefits, a notably more difficult burden of proof than their male counterparts.[133] It is also no wonder that service members face tremendous stigma when they are afflicted with PTSD or seek mental health treatment.[134] The stigma attached to PTSD and MST stands in stark contrast to the accolades that visibly combat-wounded

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126. *Id.*

127. *Id.*

128. Abrams, *supra* note 98, at 718 (citing MATHEW J. MORGAN, THE AMERICAN MILITARY AFTER 9/11: SOCIETY, STATE, AND EMPIRE 47 (2008); *see also* CATHERINE MACKINNON, FEMINISM UNMODIFIED: DISCOURSES ON LIFE AND LAW 26, 34 (1987) (noting male biases in the definitions of sports, workplace benefits and expectations, scholarship, art, military service, family, history, and sex).

129. Holly Seesel et al., *Consequences of Combat*, 1 VETERANS L. REV. 254, 255 (2009) (reviewing ILONA MEAGHER, MOVING A NATION TO CARE: POST-TRAUMATIC STRESS DISORDER AND AMERICA'S RETURNING TROOPS (2007); DARYL S. PAULSON & STANLEY KRIPPNER, A REVIEW OF HAUNTED BY COMBAT: UNDERSTANDING PTSD IN WAR VETERANS INCLUDING WOMEN, RESERVISTS, AND THOSE COMING BACK FROM IRAQ (2007)).

130. *See* Abrams, *supra* note 98, at 704 (making a similar observation in the context of domestic violence law reforms and resultant consequences of military law).

131. *See, e.g.*, Rosemarie Garland-Thomas, *Integrating Disability, Transforming Feminist Theory*, 14 NWSA J. 1, 6 (2002) (stating that "even the general American public associates femininity with disability").

132. *See* Seesel et al., *supra* note 129, at 255 ("PTSD . . . weakens this heroic vision of soldiers").

133. Jennifer C. Schingle, *A Disparate Impact on Female Veterans: The Unintended Consequences of Veterans Affairs Regulations Governing the Burdens of Proof for Post-Traumatic Stress Disorder Due to Combat and Military Sexual Trauma*, 16 WM. & MARY J. WOMEN & L. 155, 165 (2009).

134. Tramontin, *supra* note 83, at 29.

soldiers often receive.[135]

Defenders of the combat-centric military disability benefit program may contend that soldiers who engage in combat are at greater risks of incurring total and permanent traumatic injuries.[136] Rather than a privileging of combat wounds for ideological or cultural reasons, the disability program reflects the reality that combat situations are inherently riskier.[137] The program aims to provide financial assistance to soldiers who are most likely to sustain the types of injuries that impose severe financial burdens.[138] Because combat soldiers are at a greater risk of literally losing life or limb, they are entitled to greater recognition even at the expense of relegating other forms of military hazards to obscurity.[139]

While these defenses are fair in that they highlight the fact that soldiers, and male soldiers to be precise, are by and large the dominant casualties and injuries of war, the defenses ignore the language of the legislation that allows for compensation regardless of whether an injury is sustained in combat or not.[140] The subjecting of non-combat trauma to greater scrutiny trades on the idea that there are only two forms of wounds sustained because of military service: those which reinforce dominant paradigms of military service and those which do not.[141] Furthermore, the defense in no way explains the omission of coverage of sexual trauma or PSTD and disregards that an invisible war wound, like PTSD, is an incidence of combat just as a visible war wound. This omission conforms to the view that violence can only take two forms: a masculinized or feminized form.[142] Combat is seen as a direct outlet of hyper-masculine exertions of power and control.[143] Combat links strength, success, and control.[144] Wounds that are invisible or the product of sexual assault connote powerlessness and loss of control, which only engender shame, fear, or isolation.[145] Highlighting the risks

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135. *See* GAO REPORT, *supra* note 3, at 1-3 (explaining that service members with visible combat wounds experience fewer challenges in obtaining TSGLI compensation as compared to service members with invisible combat wounds).

136. *See supra* Part I.B.1.

137. *Id.*

138. *See* TSGLI GUIDE, *supra* note 2.

139. *See supra* Part II.C.

140. *See supra* Part I.B.

141. *Id.*

142. Nancy E. Dowd, *Masculinities and Feminist Legal Theory*, 23 WIS. J.L. GENDER & SOC'Y 201, 220 (2008) (noting that violence is often seen as an extension of gender, so much so that violence "is doing gender").

143. *See* Kenneth L. Karst, *The Pursuit of Manhood and the Desegregation of the Armed Forces*, 38 UCLA L. REV. 499, 501 (1981) (stating that if "[m]asculinity is traditionally defined around the idea of power[, and] the armed forces are the nation's preeminent symbol of power[,]" then one preeminent symbol of masculinity is military might).

144. *See id.* at 500-01 (discussing these traits in the context of masculinity).

145. *See* Dowd, *supra* note 142, at 213 ("masculinity is thus to a large degree about fear and shame and emotional isolation"); *see also* Garland-Thomas, *supra* note 131, at 21 ("Our collective cultural consciousness emphatically denies the knowledge of vulnerability, contingency, and

inherent in war combat dodges the relative normality of male involvement in combat soldiering and the incongruence of masculine qualities such as violence, strength, and aggression with femininity.[146]

Lastly, a defense of the military benefit program that reiterates the risks inherent with combat reinforces the dated notion that soldiering is only synonymous with combat.[147] Today, the military is responsible for a diversity of contingencies. More than ever, the military engages in peacekeeping missions, which are non-combat in nature and support political and economic objectives. Advances in technology, the use of drones, and the outsourcing of ultra-hazardous activities to private military contractors further illustrate the decentralization of combat as the military's preeminent objective.[148]

III. LEGAL REMEDIES FOR WRONGFUL MILITARY BENEFIT DENIALS UNDER PRINCIPLES OF ADMINISTRATIVE LAW

A military service member denied of a disability benefit under unduly arduous adjudicatory procedures has some recourse under principles of administrative law.[149] Congress, through the Administrative Procedures Act ("APA"),[150] established the basic procedural standards for federal agencies.[151] Through statutes, Congress delegates special powers to an agency, board, or commission to oversee and monitor activities in complex areas, such as the securities market, labor force, and, in the present case, military personnel matters.[152] The APA provides two basic types of procedures for agency decision-

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mortality. Disability insists otherwise, contradiction such phallic ideology.").

146. Abrams, *supra* note 98, at 722.

147. *See id.* at 721.

148. *See, e.g.*, David Johnston & John M. Broder, *F.B.I. Says Guards Killed 14 Iraqis Without Cause*, N.Y. TIMES, Nov. 14, 2007, http://www.nytimes.com/2007/11/14/world/middleeast/14blackwater.html?_r=0 (illustrating the risk and use of private military companies in combat); James Risen, *Use of Iraq Contractors Costs Billions, Report Says*, Aug. 11, 2008, http://www.nytimes.com/2008/08/12/washington/12contractors.html?_r (illustrating the cost of private military contractors). *See also* Milena Rodban, On Demand Armies: Private Military Company Involvement in Internal Conflicts (Nov. 18, 2009) (unpublished M.A. thesis, Georgetown University), *available at* https://repository.library.georgetown.edu/bitstream/handle/10822/553572/rodbanMilena.pdf?sequence=1.

149. ROTUNDA, *supra* note 18, at 237.

150. 5 U.S.C. §§ 551-559 (2013).

151. *See* Martin Shapiro, *Administrative Law Unbounded: Reflections on Government and Governance*, 8 IND. J. GLOBAL L. STUD. 369, 370 (2000) (noting that in enacting the APA, Congress recognized that while the executive, legislative, and judicial branches are directly responsible for the performance of their constitutional responsibilities, these bodies of government cannot always decide discrete or complex matters).

152. *See* Richard B. Stewart, *Administrative Law in the Twenty-First Century*, 78 N.Y.U. L. REV. 437, 438 (2003). Stewart discusses the APA's four basic components of U.S. Administrative law: procedural requirements for agency decisionmaking, threshold requirements for the

making: notice and comment rulemaking, and formal adjudication through trial-type hearings. [153] These procedures generate an administrative record that serves as the exclusive basis for agency decision and judicial review.[154] Under the APA, a federal court is authorized to review four basic types agency issues: an agency's compliance's with applicable procedural requirements, the sufficiency of the record evidence to support agency factual determinations, the conformity of an agency action with applicable constitutional and statutory strictures, and a determination of whether an agency's discretionary action is "arbitrary, capricious, an abuse of discretion, or otherwise not in accordance with law."[155]

A TSGLI military disability benefit determination results from application of the Veterans' Benefits statute[156] and regulations promulgated by the DOD and the VA.[157] The statute and regulations apply to all stages of military disability claim, from the initial review to the final administrative appeal to the Board for Correction of Military Records.[158] For these reasons, a TSGLI benefit decision is subject to administrative law principles and judicial review. The DOD and VA must rely on administrative procedures that subject non-combat wounds to greater scrutiny, but this standard is inconsistent with statute and regulations, wherein both combat and non-combat trauma are compensable.[159] When the military denies a benefit to a service member under administrative standards that differ from those in a statute or regulation, the issue is twofold: (1) whether the administrative standards and procedures used to adjudicate the benefit determination conforms to applicable law, and (2) whether the claimant is entitled to relief notwithstanding the administrative standard.[160] Relief may be granted to the claimant if the facts support relief and if the agency abused its discretion.[161]

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availability of judicial review, principles defining the scope of judicial review, and provisions regarding public access to agency information. *Id.*

153. *See* STEPHEN BREYER ET AL., ADMINISTRATIVE LAW AND REGULATION POLICY 652-60, 685-99, 872-86 (5th ed. 2001).

154. *Id*.

155. 5 U.S.C. § 706(2)(A) (2013).

156. 38 U.S.C. § 1980A (2013).

157. 38 C.F.R. § 9.20 (2013).

158. 38 U.S.C. § 1968(a) (2013).

159. *See supra* Part I.B.

160. *See, e.g.*, Richey v. United States, 322 F.3d 1317, 1329 (Fed. Cir. 2003) (finding that the existence of error in military board's decisions does not entitle plaintiff to relief); Murphy v. United States, 993 F.2d 871, 874 (Fed. Cir. 1993) (addressing justiciability of a military administrative decision); Sargisson v. United States, 913 F.2d 918, 921 (Fed. Cir. 1990) (finding that the issue of whether the decision to release the officer from active duty applied with applicable regulations was non-justiciable).

161. Wronke v. March, 787 F.2d 1569, 1576 (Fed. Cir. 1986); *see also* Greig v. United States, 640 F.2d 1261, 1268 (Ct. Cl. 1981) (stating that the agency's decision is final unless arbitrary or capricious, or unsupported by the evidence).

A. Judicial Review of Agency's Factual Determination

First a court determines whether it can exercise jurisdiction over the government.[162] In most cases involving military benefits, either a federal court or the United States Court of Federal Claims can exercise jurisdiction.[163] Then, a court, without hearing the merits of the case, will determine whether a governmental agency's factual determination is entitled to deference.[164] A federal court will hear de novo a military disability determination by a service member if the denial was "arbitrary, capricious, or contrary to law" or unsupported by "substantial evidence."[165] Although both standards are found throughout federal court military disability cases, they are often conflated or misapplied. However, because the "unsupported by substantial evidence" standard is less rigorous than the "arbitrary, capricious, and contrary to law" standard, a litigant is well advised to seek review under both standards.

1. Unsupported by Substantial Evidence.—In *Universal Camera Corp. v. National Labor Relations Board*, the United States Supreme Court stated that "substantial evidence" is "such relevant evidence as a reasonable mind might accept as adequate to support a conclusion."[166] To determine whether substantial evidence supports a decision, a court considers the entire record, including that which "fairly detracts from its weight."[167] If a preponderance of the evidence or substantial evidence does not support a military disability decision, a court will set it aside.

In *Peoples v. United States*,[168] the Court of Federal Claims applied the substantial evidence test to hear a Navy employment and separation decision.[169] The Board for Correction of Navy Records ("BCNR"), the Navy's equivalent of the ABCMR, declined to correct a veteran's military records and denied postponement of his mandatory separation for medical reasons because the evidence submitted was insufficient to establish probable material error or

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162. The question of subject matter jurisdiction is a threshold issue that a court determines at the outset of a case. *See* Steel Co. v. Citizens for a Better Env't, 523 U.S. 83, 94-95 (1998).

163. Pursuant to the Tucker Act, the Court of Federal Claims has jurisdiction over "any claim against the United States founded either upon the Constitute, or any Act of Congress or any regulation of an executive department, or upon any express or implied contract with the United States, or for liquidated or unliquidated damages in cases not sounding in tort." 28 U.S.C. § 1491(a)(1). The Tucker Act does not create a substantive cause of action, which means that "a plaintiff must identify a separate source of substantive law that creates the right to money damages." Fisher v. United States, 402 F.3d 1167, 1172 (Fed. Cir. 2005) (en banc in part). "In the parlance of Tucker Act cases, that source must be money-mandating." *Id.*

164. Chambers v. United States, 417 F.3d 1218, 1227 (Fed. Cir. 2005).

165. *Id.*

166. 340 U.S. 474, 477 (1951).

167. Nippon Steel Corp. v. United States, 458 F.3d 1345, 1351 (Fed. Cir. 2006) (quoting *Universal Camera Corp.*, 340 U.S. at 488).

168. 87 Fed. Cl. 553, 570 (2009).

169. *Id.*

injustice.[170] The defendant motioned for judgment on the administrative record, which is a mini-trial in which the court makes "factual findings . . . from the record evidence as if it were conducting a trial on the record."[171]

"Substantial evidence" tested whether the evidence in the records substantially supported the Navy's determination. Although the Navy was not required to explain the reasons for its decision in great detail, it was required to provide the veteran enough detail to permit him to rebut its action, including evidence supporting its finding.[172] First, a Navy Director "misportrayed the record, and by doing so, developed a potentially erroneous presumption about" the veteran's ability to serve.[173] Second, the court found no substantial evidence supporting a link between the medical finding and the veteran's fitness to serve.[174] Third, and most importantly, the Navy failed to provide adequate evidence and guidance in its decision, so as to allow the veteran a fair shot at rebutting the Navy's decision.[175] The court stated that "[w]ithout the guidance of a well-supported decision from the [Navy], and in light of the wholly discretionary nature of the Navy's decision whether to defer plaintiff's mandatory separation, the court cannot determine what record evidence should truly be afforded the most weight in ascertaining whether an injustice has occurred."[176] For these reasons, the court found the Navy's decision lacked substantial evidence.[177]

2. Arbitrary, Capricious, and Contrary to Law.—Courts will also reverse an agency's decision if it is "arbitrary, capricious, or…contrary to law, regulation, or mandatory published procedure."[178] Under this standard, a federal court examines all relevant factors to determine whether there was a clear error of judgment.[179] While courts do not substitute their own judgment regarding sound policy for those of the agency, courts do require the agency to justify its exercise of power and articulate an explanation that rationally connects the facts to the decision.[180] Although an agency is free to modify or reverse a prior decision, the agency must also provide a reason for that change.[181] The decision is arbitrary and capricious if the agency: (1) relied on factors that Congress did not want it to consider; (2) entirely failed to consider an important aspect of the problem; (3) offered an explanation that runs counter to the evidence; or (4) is so implausible that it could not be described as a difference in view or the product of agency

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170. *Id.* at 564.

171. *Id.* at 569 (quoting Bannum, Inc. v. United States, 404 F.3d 1346, 1357 (Fed. Cir. 2005)).

172. *Id.* at 576 (citing Craft v. United States, 544 F.2d 468, 474 (Ct. Cl. 1976)).

173. *Id.* at 579.

174. *Id.*

175. *Id.*

176. *Id.*

177. *Id.*

178. Clayton v. United States, 225 Ct Cl. 593, 595 (1980).

179. Motor Vehicles Mfrs. Ass'n of the United States v. State Farm Mut. Auto. Ins. Co., 463 U.S. 29, 43 (1983).

180. S.E.C. v. Chenery Corp, 332 U.S. 194, 196 (1947).

181. *Id.* at 199.

expertise.[182]

Van Cleave v. United States,[183] a U.S. Court of Federal Claims case, demonstrates the application of the "arbitrary, capricious, or contrary to law" standard in a military disability case.[184] In that case, a pro se veteran suffered debilitating headaches during active duty in the Navy, was rated at 10% disability by the Navy, and was subsequently medically discharged with severance pay.[185] After the discharge, the veteran discovered that the Navy rated him upon an erroneous diagnosis of chronic headaches rather than the correct diagnosis of migraine headaches.[186] He petitioned the BCNR, the Navy's administrative appellate board, for an upward adjustment of his disability rating.[187] A rating based on the veteran's actual disability would have entitled him to a higher rating and therefore higher severance pay.[188]

The BCNR refused to adjust the veteran's disability rating.[189] Under statute, the BCNR is empowered to correct an "error" or "injustice" in a military record.[190] However, the BCNR held that the disability rating on the basis of a headache and not the veteran's actual disability did not constitute an "error" or "injustice" in the military records.[191] First, the board assailed the veteran's credibility by stating that his migraine diagnosis was based on his subjective reports to his physicians.[192] Second, the board stated that having a prescription for migraine medication did not mean that he required medication to treat the migraine.[193] Third, the board stated that he sought a medical discharge, not because he had debilitating migraines, but because he failed to meet the body-fat standards for promotion and continuation on active duty.[194] Lastly, the board used evidence of the veteran's performance to show that he satisfied performance standards while simultaneously accusing the veteran of malingering to show that he did not deserve an increased rating.[195]

The U.S. Court of Federal Claims held that the board "launched an attack on Mr. Van Cleave's credibility and character, criticized [its own personnel] appointed by authority of the Secretary of the Navy, and questioned the integrity of Naval medical personnel and professionalism of the VA's 'general medical

182. *Motor Vehicles Mfrs. Ass'n*, 463 U.S. at 43.
183. 70 Fed. Cl. 674 (2006).
184. *Id.* 684.
185. *Id.* at 675.
186. *Id.* at 676.
187. *Id.*
188. *Id.*
189. *Id.*
190. *Id.* at 679.
191. *Id.*
192. *Id.*
193. *Id.* at 680.
194. *Id.* at 678.
195. *Id.* at 685.

officers.'"[196] Moreover, the evidence suggested that the board considered facts that Congress did not want it to consider, such as failing to reassess the veteran at a higher disability rating, entirely failing to consider sound medical opinions supporting the veteran's claim, and offering explanations that ran counter to the evidence, such as its assertion that the evidence of prescription medication meant that the veteran required the medication for treatment of the condition.[197]

B. Judicial Review of Agency Interpretation

At issue is how to interpret "traumatic event" and "traumatic injury."[198] The VA, through its administrative procedures, inserted the term "involuntary" external force to the term "traumatic event."[199] However, the term "involuntary" is found nowhere in the statute and regulations. A court will determine whether the VA's interpretation or application of the word "involuntary" impermissibly reads an express limitation into the statute.

The United States Supreme Court announced the analytical framework for judicial review of an agency's interpretation of a Congressional statutory provision in *Chevron, U.S.A., Inc. v. Natural Resources Defense Council*.[200] That case involved the Environmental Protection Agency's ("EPA") interpretation of "stationary source" contained in the Clean Air Act.[201] The EPA promulgated regulations that allowed a state to authorize an existing plant to obtain permits for new equipment that did not meet the permit conditions as long as the alteration did not increase the total emissions of the plant.[202] The Natural Resources Defense Council, an environmental defense group, challenged the EPA's interpretation of "stationary source" contained in the regulations.[203] Before the Supreme Court was the question of whether a court can defer to the EPA's interpretation of the statute.[204] The Supreme Court upheld the EPA's

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196. *Id.* at 686.

197. *Id.* at 684-85.

198. *See* 38 U.S.C. § 1980A(a)(2) (stating "[i]f a member suffers more than one such qualifying loss as a result of a traumatic injury from the same traumatic event, payment shall be made . . . ."; *id.* § 1980A(b)(1) (stating "[a] member who is insured against traumatic injury under this section is insured against such losses due to traumatic injury . . . as are prescribed by the Secretary by regulation." Ergo, Congress delegated the power to define "traumatic injury" to the Secretary *but by regulation only*.); *see also* 38 C.F.R. § 9.20(b)-(c) (defining traumatic event as "the application of external force, violence, chemical, biological, or radiological weapons, or accidental ingestion of a contaminated substance causing damage to a living being" and defining traumatic injury as "physical damage to a living body that is caused by a traumatic event as defined in paragraph (b) of this section.").

199. TSGLI GUIDE, *supra* note 2, at 4.

200. 467 U.S. 837, 842-43 (1984).

201. *Id.* at 846-57.

202. *Id.* at 840.

203. *Id.*

204. *Id.* at 843-44.

interpretation and announced a two-part test to determine whether a court will defer to the interpretation of a statute by the agency tasked with its implementation.[205]

In step one of its *Chevron* analysis, a reviewing court must determine whether the statute is ambiguous.[206] The court must ascertain "whether Congress has directly spoken" on the issue.[207] If, by "employing traditional tools of statutory construction," including canons of construction, the reviewing court determines that Congress's intent is clear, then "that is the end of the matter."[208] In step two, after a court finds a statute to be ambiguous, the court must determine whether the construction adopted by the agency is permissible.[209]

A determination of whether an agency interpretation is reasonable depends on where the interpretation is found.[210] In *United States v. Mead Corp.*, the Supreme Court modified Chevron's doctrine of deference finding that a court will defer to an interpretation of a statute by an agency tasked with its promulgation if Congress intended for the agency to act with the "force of law."[211] Agency interpretations of statutes not promulgated as regulations, which undergo the rigors of the "notice and comment" provisions of section 553 of the APA, have the "force of law."[212] In the present case, 38 C.F.R. § 9.20, the TSGLI regulations, have the force of law because they were promulgated after undergoing "notice and comment" pursuant to the APA and Congress's mandate under 38 U.S.C. § 1980A. However, interpretations found only in an agency's administrative procedure guide enjoy less deference, and if they contravene law, they enjoy no deference.[213] The Supreme Court addressed this issue in *Christensen v. Harris County*.[214]

In *Christensen*, employees of the Harris County sheriff's department brought an action against the county for requiring employees to use compensatory before they reached the limit which would require overtime payments.[215] The employees, relying on a U.S. Department of Labor opinion letter stating that an employer may only compel use of "comp time" if agreed to in advance, alleged that this requirement violated of the Fair Labor Standards Act ("FLSA").[216] The U.S. Supreme Court accorded the agency's opinion letter minimal deference and,

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205. *Id.* at 863-64.

206. *Id.* at 842-43.

207. *Id* at 842.

208. Regions Hosp. v. Shalala, 522 U.S. 448, 457 (1998) (quoting *Chevron*, 467 U.S. at 842-43).

209. *Chevron*, 467 U.S. at 843.

210. United States v. Mead Corp., 533 U.S. 218, 230 (2001).

211. *Id.* at 226-27.

212. *Id.* at 226.

213. *Id.*

214. 529 U.S. 576, 587-88 (2000).

215. *Id.* at 581.

216. *Id.*

therefore, was not binding on the court.[217] The Supreme Court reasoned that an agency's opinion letter was not "subject to the rigors of the Administrative Procedur[e] Act, including public notice and comment," and therefore it was entitled "some deference," but not the same deference as an agency's regulations.[218] The Supreme Court drew a bright line between formal agency documents, such as legislative regulations, and less formal ones, including opinion letters, agency manuals, policy statements, and enforcement guides.[219] An agency's interpretation of a statute found only in its administrative procedures is subject to lesser deference under *Skidmore v. Swift & Co.*[220]

In *Skidmore*, seven employees of the Swift & Company packing plant at Fort Worth, Texas brought an action under the Fair Labor Standards Act of 1938 to recover overtime, liquidated damages, and attorneys' fees.[221] At issue was the deference due to the U.S. Department of Labor's interpretation of overtime work.[222] The Supreme Court held that the agency's interpretation was persuasive but not binding.[223] An agency's interpretation will be accorded deference if the interpretation meets a four-factor test: (1) the thoroughness of the agency's investigation; (2) the validity of its reasoning; (3) the consistency of its interpretation over time; and (4) other persuasive powers of the agency.[224]

1. Step One in Chevron Analysis.—The first step in the *Chevron* analysis is to determine whether there is ambiguity in the statute after applying traditional canons of statutory interpretation.[225] Although the C.F.R. does not define or modify the term "external force," as discussed below, courts, in the absence of language that modifies or defines a term, will apply the plain meaning of the language. One Federal Circuit court did just that in *Nielson v. Shinseki*,[226] a case that concerned the meaning of the words "service trauma" in a statute that conferred military benefits.[227]

At issue was whether the veteran's removal of teeth in service by military dentists as a result of a periodontal infection constituted "service trauma."[228] The statute and C.F.R. did not define "service trauma."[229] The court applied the prevailing Webster dictionary definition of trauma at the time the statute was enacted as an "injury or wound to a living body caused by the application of

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217. *Id.* at 587.
218. *Id.* (quoting Reno v. Koray, 515 U.S. 50, 61 (1995)).
219. *Id.*
220. 323 U.S. 134, 140 (1944).
221. *Id.* at 135.
222. *Id.* at 139-40.
223. *Id.* at 140.
224. *Id.*
225. Chevron, U.S.A., Inc. v. Natural Res. Def. Council, 467 U.S. 837, 842-43 (1984).
226. 607 F.3d 802 (Fed. Cir. 2010).
227. *Id.* at 805-08.
228. *Id.* at 803.
229. *Id.* at 805.

external force or violence."[230] The pulling of teeth, according to the court, was an act of force that produced a physical injury.[231] However, the court construed the word "trauma" narrowly because it was preceded by the word "service."[232] The words in the statute, "combat wounds or other service trauma," suggested that Congress intended to include only injuries sustained during the performance of military duties, and not medical treatment. [233] Because a "fundamental canon of statutory construction [requires] that the words of a statute must be read in their context and with a view to their place in the overall statutory scheme," the word juxtaposition of the word "service" to "trauma" narrowed the definition of trauma.[234]

Consistent with the *Nielson* court's application of the principle that terms be given their plain meaning when they are not defined by the statute, Webster's dictionary defines trauma as "an injury (as a wound) to a living tissue caused by an extrinsic agent" or "an agent, force, or mechanism that causes trauma."[235] Webster's dictionary defines "external" as "capable of being perceived outwardly," "of, related to, or connected with the outside or an outer part," and "arising or acting from outside."[236] Webster's dictionary defines "force" as "strength or energy exerted or brought to bear," "cause of motion or change," or "violence, compulsion, or constraint exerted upon or against a person or thing."[237] These definitions contain no requirement of or involve no "voluntary" or "involuntary" action. Because Congress made no express distinction between combat and non-combat wounds, under the plain language of the statute and regulations, any service member who sustains a "traumatic injury" as a result of "external force," in or outside of combat or voluntarily or involuntarily, would qualify for compensation.[238]

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230. *Id.* at 806.

231. *Id.*

232. *Id.* at 807.

233. *Id.*

234. *Id.* (quoting Davis v. Michigan Dep't of Treasury, 489 U.S. 803, 809 (1989)).

235. THE MERRIAM-WEBSTER DICTIONARY 1331 (11th ed. 2003).

236. *Id.* at 443.

237. *Id.* at 489.

238. *See* 38 § U.S.C. 1980A (The regulations also lack language that narrows the term "external force." Instead, the regulations contain language that may expand the term's meaning. Applying the statutory canon that "the words of a statute must be read in their context and with a view to their place in the overall statutory scheme" as the *Nielson* court advanced, it is apparent that Congress intended a comprehensive reading of "external force" when it enacted 38 U.S.C. § 1980A. The word "external force" in 38 C.F.R. § 9.20(b) is adjacent to "violence, chemical, biological, or radiological weapons, or accidental ingestion," would suggest an inclusive reading of "external force." A trauma caused by "accidental ingestion," or a working of the internal body, is antithetical to an injury caused by "external force." Likewise, the irrationality of the VA's "involuntary" standard is palpable when applied to circumstances where service members sustain trauma as a result of "accidental ingestion." It is inconceivable that Congress intended this paradox. More importantly, when Congress amended the statute, it extended coverage to traumatic injuries

In analyzing whether there is ambiguity in a statutory term, a federal court is also guided by the basic principle that congressional purpose subordinates an agency's interpretation.[239] A court will rely on legislative history to divine congressional intent only after expressing a belief that the statutory language is not plain, but instead is unclear or ambiguous.[240] Again, according to the congressional record of the Senate dated April 21, 2005, Senator Craig expressed his, and co-sponsoring Senators', reasons for an amendment, which its passage culminated in the creation of the TSGLI program.[241] To reiterate Craig's statement, "[the] amendment addresses the coverage gap through the creation of a new traumatic injury protection insurance program for the benefit of severely disabled service members."[242] The program was created to give "injured service members and their families the financial cushion they need to sustain them before their medical discharge from the service, when veterans benefits kick in."[243] Congress intended to ensure injured troops a "financial cushion" in situations where service members are severely disabled and are unable to secure VA benefits because they are in limbo between active duty and medical discharge. The absence of an "involuntary" requirement in the Congressional records conspicuously demonstrates no Congressional intent underpinning the VA's standard to adjudicate TSGLI claims.

2. Step Two Under the Chevron Analysis.—If a reviewing court finds no ambiguity in the terms "traumatic event," "traumatic injury," or "external force," then the definition controls, and a court will not defer to the agencies' contravening interpretation.[244] However, if a reviewing court finds ambiguity in a term, it will determine whether the agency tasked with promulgating the statute proffered a permissible interpretation.[245] In a circumstance where an agency's administrative procedures modify regulations, the interpretation offered by and applied under the administrative guidelines is analyzed under *Skidmore's* four part test: (1) the thoroughness of the agency's investigation; (2) the validity of its reasoning; (3) the consistency of its interpretation over time; and (4) other

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sustained even in non-military contexts. The words "external force" should therefore be read liberally as Congress intended so as to encompass traumatic events in non-combat situations as well as combat situations.)

239. United States v. Mead Corp., 533 U.S. 218, 230 (2001).

240. *See* Ratzlaf v. United States, 510 U.S. 135, 147-48 (1994) (noting that on the other hand, "we do not resort to legislative history to cloud a statutory text that is clear."); United States v. Great N. Ry. Co., 287 U.S. 144, 154-55 (1932) ("In aid of the process of construction we are at liberty, if the meaning be uncertain, to have recourse to the legislative history of the measure and the statements by those in charge of it during its consideration by the Congress.").

241. Craig Statement, s*upra* note 45, at S4094-95.

242. *Id.*

243. *Id.* at S4095.

244. *See* Regions Hosp. v. Shalala, 522 U.S. 448, 457 (1998) (quoting Chevron, U.S.A., Inc. v. Natural Res. Def. Council, 467 U.S. 837, 842-43 (1984)) (explaining that if the reviewing court determines that Congress's intent is clear, then "that is the end of the matter.)"

245. United States v. Mead Corp., 533 U.S. 218, 230 (2001).

persuasive powers of the agency.[246]

First, there is no evidence the VA conducted a thorough investigation of what constitutes "involuntary." Second, the "involuntary" standard can lead to paradoxical outcomes, as the guidelines do not define "involuntary." If one is to take the notion of voluntariness to its most extreme, then no service member would ever qualify for the benefit in an all volunteer army. Third, for this same reason, the standard nurtures inconsistency. Lastly, the agency's other persuasive powers, including its authority to promulgate regulations, would offer little basis to accord deference to an administrative guide. As addressed in *Christensen*, under the APA a federal agency may promulgate a substantive rule or regulation, but only if the agency subjects the rule or regulation to the rigors of the notice and comment process.[247] The VA may have exceeded its authority by implementing a substantive standard subjecting it to the APA's notice and comment process. When an agency's interpretation of a regulation or statute contravenes the plain language of the regulation's or statute's text, and thereby exceeding their grant of power, the agency's interpretation is accorded no deference.[248]

IV. WHEN THERE IS AMBIGUITY, PRECEDENT REQUIRES A TIPPING OF THE SCALES IN THE SERVICE MEMBER'S FAVOR

The above section discusses the principles of administrative law as they relate to a military administrative decision reviewed under a standard of scrutiny inconsistent with statute and regulations. Ultimately, *Chevron* and its progeny granted agencies latitude in promulgating regulations and official interpretations of statute and crafted agency-friendly judicial review standards.[249] The Supreme Court's trend after *Chevron* is consistent with cases involving a review of a military disability decision.[250] Deference accorded to military disability cases is also consistent with 10 U.S.C. § 1216(a), which gives broad authority to the military services to administer the disability system.[251] Yet, even when a military decision is contrary to law, a court may be disinclined to second-guess a military administrative decision.[252]

There are several veterans and military service members benefit cases where courts have checked the military's authority without relying on administrative law principles.[253] In these cases, courts have held that the VA or military may not simply select any interpretation of statutory term that conforms to the agency's

246. Skidmore v. Swift & Co., 323 U.S. 134, 140 (1944).

247. Christensen v. Harris Cnty., 529 U.S. 576, 587 (2000).

248. *See* Gonzalez v. Oregon, 546 U.S. 243, 257 (2006).

249. *See supra* Part III.

250. *See infra* Part IV.

251. *See* 10 U.S.C. § 1216(a) (2013) ("The Secretary concerned shall prescribe regulations to carry out this chapter within his department.").

252. *See id.*

253. *See supra* Part III.A.

understanding of the law.[254] Under these cases, courts have found that the military or VA must select any interpretation that favors the veteran or service member when the scales are equal.[255]

A seminal case demonstrating these principles is *Brown v. Gardner*,[256] which concerned a veteran challenging the VA's regulatory interpretation of a statute that accorded the veteran a benefit. The regulation required the veteran to show that the agency was at fault for injuries resulting from medical care provided by the VA for the veteran to be eligible for compensation.[257] The statute itself did not say anything about VA fault. Similar to how the VA presently asserts "involuntary" into its adjudicatory standards, the VA in *Brown* argued that the word "injury" in the statute allowed it to read fault in order to justify its interpretation. [258] The *Brown* court rejected this argument, stating: "[t]he most, then, that the Government could claim on the basis of this term [injury,] is the existence of an ambiguity to be resolved in favor of a fault requirement (assuming that such a resolution would be possible after applying the rule that interpretive doubt is to be resolved in the veteran's favor)." [259]

Thus, the Court in *Brown* recognized that when there is ambiguity in a statute that confers a benefit onto a veteran or service member, the universe of permissible interpretations are restricted to that which favors the veteran or service member.[260] Veteran or military service member-friendly cases need not be read as subverting *Chevron*. Instead, a veteran or military service member-friendly interpretation of a statute can coincide with *Chevron*. Indeed, a joint application of both *Chevron* and a service member-friendly reading is implied in

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254. *Id.*

255. *Id.*

256. 513 U.S. 115 (1994).

257. *Id.* at 553.

258. *Id.*

259. *Id.* at 555.

260. *See* Fishgold v. Sullivan Drydock & Repair Corp., 328 U.S. 275, 285 (1946) ("This legislation is to be liberally construed for the benefit of those who left private life to serve their country in its hour of great need."); *see also* Henderson v. Shinseki 131 S. Ct. 1197, 1206 (2011) (quoting King v. St. Vincent's Hosp., 502 U.S. 215, 220-21 (1991)) ("We have long applied 'the canon that provisions for benefits to members of the Armed Services are to be construed in the beneficiaries' favor."); Sears v. Principi, 349 F.3d 1326, 1331-32 (2003) (finding a statute ambiguous and affirming the VA interpretation because it favored veterans in the "vast majority of cases" but not all); Boone v. Lightner, 319 U.S. 561, 575 (1943) ("The Soldiers' and Sailors' Civil Relief Act is always to be liberally construed to protect those who have been [obligated] to drop their own affairs to take up the burdens of the nation."); Boyer v. West, 210 F.3d 1351, 1355-56 (Fed. Cir. 2000) (finding statute providing benefits to veterans unambiguous and rejecting the veteran's proposed interpretation); Smith v. Brown, 35 F.3d 1516, 1526 (Fed. Cir. 1994), *superseded on other grounds by* 38 U.S.C. § 7111 (2005), *as recognized in* Samish Indian Nation v. United States, 419 F.3d 1355, 1367 (2005) (reviewing a VA interpretation of an unambiguous statute not providing benefits to veterans and noting that a veteran may not "rely upon the generous spirit that suffuses the law generally to override the clear meaning of a particular provision").

Brown.[261] The set of cases that advance a favorable reading of benefit-conferring statutes to a veteran or service member filter the field of possible interpretations of "permissible" under *Chevron* to those that favor the veteran or service member. Put another way, these cases are part of the "thumb on the scale in the veteran's favor in the course of administrative and judicial review of VA decisions."[262]

Although several federal courts have tipped the scale in the service member's favor when there is ambiguity in a law that accords the service member benefits,[263] a reliance on these cases is not without risk. First, federal courts have departed from these cases and, as a consequence, have introduced uncertainty into the administration of laws governing benefits for service members. Secondly, and perhaps more importantly, these pro-veteran and pro-service member cases may rely on the same or similar paradigm upon which led the VA to erroneously narrow the applicability of TSGLI. That is, courts have also played a role in propagating the paradigm of the combat-wounded warrior. By elevating the image of the heroic and self-sacrificing combat-wounded warrior to the level of constitutional mantra, a court may also risk obscuring situations where service members who sustain appreciable trauma outside the battlefield or sustain trauma of an invisible form. This is may be of special concern to female service members who are not allowed in combat but may be acutely vulnerable to other forms of trauma that too would place them and their family in financial distress. A court can mitigate these risks by applying a favorable interpretation of statute or regulation to a service member's particular situation. This would help account for realities that law and decision makers disregard or overlook when administering laws that confer benefits to service members.

CONCLUSION

Congress enacted TSGLI to provide traumatically injured service members with financial assistance.[264] Congress intended to give traumatically injured service members some reprieve from the financial hardships that set in during the rehabilitation period.[265] This principle, however, is not always the guiding principle behind every TSGLI claim evaluation. Adjudicators, policy makers, and even lawmakers are guided by stereotypes, paradigms, or beliefs, grounded not in law, but in a longstanding pervasive military culture that places, even innocently or seemingly benignly, gender-biased prerogatives.[266] In an institution that enjoys greater deference than most federal civilian staffed and run agencies, what incentive does the military and those who create military laws have to think critically about its laws and policies? Is there any impulse or motive to challenge,

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261. *Brown*, 513 U.S. at 117.

262. *Henderson*, 131 S. Ct. at 1205 (quoting Shinseki v. Sanders, 556 U.S. 396, 416 (2009) (Souter, J., dissenting)).

263. *See supra* Part III.A.

264. *See supra* Part I.

265. *Id.*

266. *See supra* Part II.

undo, or uproot laws or policies that reflect a combat-warrior centered mindset? What interest is there to administer a benefits program like TSGLI in such a way that service members who are traumatically injured and incur financial hardship as a result are comprehensively cared for regardless of whether the injured occurred in combat?

This Article provides some reasons for an impetus to effect modest change and reform. There are countless male and female service members who have dedicated many years to military service and made priceless sacrifices. Many serve in a variety of combat and non-combat roles, some with a greater proximity to war hazards than others. However, many service members, including women, are vulnerable to workplace violence and assault.[267] The resultant trauma may be as lasting, deep, and disabling as trauma sustained in the war field. But because combat trauma occupies a preeminent role in military disability policy, non-combat trauma is often disregarded and relegated to obscurity.[268] To support the system in its current iteration would give the military license to abdicate its role as a sentinel of justice and inspire faithlessness among service members, especially those who are particularly vulnerable to assault within the military. A paradigm of thought that elevates an ideal at the cost of relegating certain experiences and realities to obscurity too would arouse sentiments of injustice and unfairness among service members. If unit cohesion is of paramount priority, then yes there is ample interest to jettison paradigms of thoughts and allow the reality of military service, in all of its facets, to dictate policies, laws, and the administration of military benefits.

267. *Id.*
268. *Id.*

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NOTES

HOW A GROCERY STORE GROUNDED AIR JORDAN AND WHY JORDAN SHOULD SUCCEED IN THE REMATCH: REDEFINING COMMERCIAL SPEECH FOR THE MODERN ERA*

CAITLIN BRANDON**

INTRODUCTION

"Commercial speech is like obscenity. . . we can't seem to define it, but we know it when we see it."—Jef I. Richards, Author

In 2009, when basketball legend Michael Jordan ("Jordan") was inducted into the Hall of Fame, a local Chicago grocery store by the name of Jewel Osco ("Jewel") placed a page in *Sports Illustrated* magazine congratulating Jordan on his induction.[1] The page itself featured a pair of basketball shoes,[2] with Jordan's famous number twenty-three appearing on the tongue of each shoe, spotlighted on a hardwood basketball court.[3] The following message was positioned above the shoes:

> A Shoe In! After six NBA championships, scores of rewritten records books and numerous buzzer beaters, Michael Jordan's elevation in the Basketball Hall of Fame was never in doubt! Jewel Osco salutes # 23 on his many accomplishments as we honor a fellow Chicagoan who was "just around the corner" for so many years.[4]

Apparently, Jordan did not take kindly to this page referring to him without his permission and sued Jewel, alleging the page violated the Illinois Right of

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* Many thanks to my friends Chris Park and Taylor Donnell; without their creative input, this Note may have been without a cheeky title.

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1. Jordan v. Jewel Food Stores, Inc., 851 F. Supp. 2d 1102, 1104 (N.D. Ill.2012).

2. Rebecca Tushnet, *Congratulations! Your Ad Isn't Commercial Speech*, REBECCA TUSHNET'S 43(B)LOG (Feb. 17, 2012), http://tushnet.blogspot.com/2012/02/congratulations-your-ad-isnt-commercial.html.

3. *Jordan*, 851 F. Supp. 2d at 1104.

4. *Id.* at 1104.

Publicity Act,[5] the Lanham Act,[6] the Illinois Consumer Fraud and Deceptive Trade Practices Act,[7] and the common law tort of unfair competition.[8]

In February 2012, the United States District Court for the Northern District of Illinois, in the case of *Jordan v. Jewel Food Stores, Inc.* ("*Jordan v. Jewel*") held that the page produced by Jewel was noncommercial speech and thus fully awarded First Amendment protection.[9] The court held the page was not commercial speech because it did not propose a commercial transaction, the page was not an advertisement, the page did not refer to a specific product, and the store having an economic motivation did not necessarily render the page commercial speech.[10]

This Note explores the distinction between commercial and noncommercial speech under the First Amendment, critiques the application of the commercial speech test by the court in *Jordan v. Jewel*, and, finally, proposes an original test for classifying speech as commercial or noncommercial that is more appropriate for modern society.

The most substantial issue with the current test for determining whether speech is commercial or noncommercial for free speech purposes is not that it is simply vague; it is arguably common knowledge that many legal "tests" are vague.[11] The greater issue with the commercial speech test is that rather than viewing the speech itself *and* how consumers may view the speech, the current test focuses almost exclusively on the first element—the content and manner of the speech itself.[12] The test proposed, while by no means suggesting a bright-line rule, provides clarification and an additional "consumer related" aspect to the current commercial speech test to make the test more adaptable to the modern arena of business advertising, promotional activities, marketing and other types of speech in the marketplace today. The speech at issue in *Jordan v. Jewel* is a classic example of what scholars refer to as "mixed speech,"[13] and thus provides

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5. 765 ILL. COMP. STAT. 1075 (2012).

6. 15 U.S.C. § 1125(a) (2006).

7. 815 ILL. COMP. STAT. 505 (2012).

8. *Jordan*, 851 F. Supp. 2d at 1104.

9. *Id.* at 1112.

10. *Id.* at 1106.

11. *See, e.g.*, Larry A. Dimatteo, *The Counterpoise of Contracts: The Reasonable Person Standard and the Subjectivity of Judgment*, 48 S.C. L. REV. 293, 295 (1997) (exploring the vague reasonable person standard and the use of the objective reasonable person being reconciled with the subjective, discretionary nature of judicial decision-making); Thomas V. Mulrine, *Reasonable Doubt: How in the World is it Defined?*, 12 AM. U.J. INT'L L. & POL'Y 195 (1997) (discussing the vagueness of the "beyond a reasonable doubt" standard in criminal cases).

12. Jonathan W. Emord, *Contrived Distinctions: The Doctrine of Commercial Speech in First Amendment Jurisprudence*, CATO Policy Analysis No. 161, CATO INSTITUTE (Sept. 23, 1991), http://www.cato.org/pubs/pas/pa-161.html, *archived at* http://perma.cc/X8HC-5J4B (describing the commercial speech doctrine as a "content-based" approach).

13. For purposes of this Note, "mixed speech" refers to speech that has both commercial and noncommercial aspects. *See* Alex Kozinski & Stuart Banner, *Who's Afraid of Commercial*

an excellent vehicle for analysis of both the current test and the proposed test.

To clarify, while mentioned briefly toward the conclusion of this Note, the purpose of this Note is not to discuss the four-factor test, referred to most commonly as the *Central Hudson* test,[14] which is used to determine whether the government may regulate commercial speech, once the speech has been successfully labeled as commercial. This Note focuses on the step prior to the application of the *Central Hudson* test: determining whether the speech is commercial at all.

Part I of this Note discusses the First Amendment and free speech generally, with an emphasis on the underlying justifications for granting freedom of speech. Part II examines the rise of commercial speech and the vague, unsettled test courts use to determine commercial speech. Part III recaps and subsequently critiques the court's reasoning in *Jordan v. Jewel*. Part IV proposes an original test for courts to use in determining whether speech is commercial or noncommercial. This proffered test more accurately embodies the underlying justifications for granting freedom of speech. Part V examines the *Jordan v. Jewel* case under the microscope of the newly proposed test.

I. THE FIRST AMENDMENT AND THE VALUES UNDERLYING THE DOCTRIN0E OF FREE SPEECH

The United States Constitution's First Amendment relevantly provides: "Congress shall make no law . . . abridging the freedom of speech . . . ."[15] Although the text of the amendment mentions only Congress explicitly, the U.S. Supreme Court has held the Due Process Clause of the Fourteenth Amendment makes the freedom of speech provision applicable to state and local governments.[16] This expanded protection permits a broad arena for persons to communicate their ideas, opinions, and beliefs, no matter how unpopular, without fear of prosecution by the government.[17]

Speech?, 76 VA. L. REV. 627, 644 (1990) ("[T]he classification of mixed commercial and noncommercial speech as commercial leads to a result seemingly at odds with the principles underlying the [F]irst [A]mendment.").

14. Cent. Hudson Gas & Elec. Corp. v. Pub. Serv. Comm'n, 447 U.S. 557, 566 (1980) (explaining the four-part analysis as (1) a court "must determine whether the expression is protected by the First Amendment" and "[f]or commercial speech to come within that provision, it at least must concern lawful activity and not be misleading, (2) a court asks "whether the asserted governmental interest is substantial" and if both inquiries yield positive answers, a court must determine (3) "whether the regulation directly advances the governmental interest asserted," and "whether it is not more extensive than is necessary to serve that interest").

15. U.S. CONST. amend. I.

16. Gitlow v. New York, 268 U.S. 652, 666 (1925) (noting that "freedom of speech and of the press, which are protected by the First Amendment from abridgment by Congress are among the fundamental personal rights and 'liberties' protected by the due process clause of the Fourteenth Amendment from impairment by the States").

17. Scott Wellikoff, *Mixed Speech: Inequities that Result from an Ambiguous Doctrine*, 19

At the time of the ratification of the First Amendment, it would appear that protecting truth and democracy was at the forefront of the Founding Fathers' minds, as almost all commentary surrounding the drafting and ratifying of the First Amendment is focused on protecting politically-oriented speech.[18] Thomas Jefferson wrote the following passage on the importance of free speech to self-government and democracy:

> The people are the only censors of their governors: and even their errors will tend to keep these to the true principles of their institution . . . . The basis of our governments being the opinion of the people, the very first object should be to keep that right; and were it left to me to decide whether we should have a government without newspapers, or newspapers without a government, I should not hesitate a moment to prefer the latter.[19]

Even today, one may speculate that many people view the most obvious protections granted by the First Amendment as the freedom to express opinions regarding politics and religion.[20] Especially in this age of the Internet, this can be illustrated by the hundreds upon thousands of political and religiously-related posts seen daily on social media sites like Facebook and Twitter, as well as blogs which are devoted to discussions of the same. The Supreme Court has found a few general exceptions to the First Amendment's freedom of speech, including child pornography laws, libel and slander laws, obscenity, speech that incites imminent lawless action, and the regulation of commercial speech.[21]

Legal scholars and writers have long pontificated as to the underlying justifications for free speech.[22] Specifically, some scholars have summed up the arguments that underlie free speech values as truth discovery, social stability and interest accommodation, exposure and deterrence of abuse of authority, autonomy and personality development (also known as self- realization),[23] and liberal

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ST. JOHN'S LEGAL COMMENT. 159, 160 (2004) (citations omitted).

18. Kozinski & Banner, *supra* note 13, at 632 (citations omitted).

19. Letter from Thomas Jefferson to Edward Carrington (Jan. 16, 1787), *reprinted in* THE FOUNDER'S CONSTITUTION 122 (P. Kurland & R. Lerner eds., 1987).

20. *See* Filip Spagnoli, *What is Democracy? (43): A System Characterized by Free Speech*, P.A.P.-BLOG, HUMAN RIGHTS ETC. (June 19, 2009), http://filipspagnoli.wordpress.com/2009/06/19/human-rights-quote-135-democracy-and-free-speech/ *archived at* http://perma.cc/EK7G-WUNK (summarizing the views of Justice Brandeis, who believed free speech was necessary for democracy in three ways, most relevantly to inform the government of the will of the people).

21. *See* R.A.V. v. St. Paul, 505 U.S. 377, 382 (1992) (noting that restrictions upon the content of speech are permitted 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)." (quoting Chaplinksy v. New Hampshire, 315 U.S. 568, 572 (1942)).

22. For a good general discussion and summary, see Kent Greenwalt, *Free Speech Justifications*, 89 COLUM. L. REV. 119 (1989).

23. For an in-depth analysis of the self-realization value as it applies to free speech, see R. George Wright, *The Openness of the Commercial Free Speech Test and the Value of Self-*

democracy.[24] This list is by no means inclusive of all free speech values. However, these are the values used in formulating a new test for distinguishing commercial speech from noncommercial speech as proposed by this Note.

II. COMMERCIAL SPEECH: WHAT IS IT AND HOW DO COURTS KNOW WHEN THEY SEE IT?

At the risk of sounding elementary, one will note that neither the text of the First Amendment nor the documented history surrounding the First Amendment's passing mention the distinction between commercial and noncommercial speech.[25] The concept of "commercial speech" was introduced in 1942 in the case of *Valentine v. Chrestensen*,[26] where the Supreme Court infamously held: "We are equally clear that the Constitution imposes no such restraint on government as respects purely commercial advertising."[27] While the Court refers to "commercial advertising," the term "commercial speech" is found nowhere in the opinion.[28] *Valentine* was interpreted for years to mean that "purely commercial advertising" was not duly protected by the First Amendment and could be regulated without question by the government.[29]

The 1976 case of *Virginia State Board of Pharmacy v. Virginia Citizens Consumer Council, Inc.*[30] overturned *Valentine* and struck down a Virginia law that banned advertising of prescription drug prices on First Amendment grounds.[31] While the Supreme Court did not give an explicit test for determining what *is* commercial speech, it did give some insight into what was *not* considered commercial speech.[32] Commercial speech is neither speech that solicits money nor speech that is sold for a profit.[33] Speech is also not necessarily commercial just because money was spent to project it.[34]

Consider for a moment if commercial speech *was* to be defined as speech that solicits profits, speech sold for a profit, or speech that was economically funded. In this instance, then, movies, books, and works of art, most of which are sold for profit or at least are intended to be, would in turn be subject to government regulation simply for falling under the broadly construed label. However, luckily for the movie lover and the politically-charged author, case law on the subject has

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Realization, 88 U. DET. MERCY L. REV. 17 (2010).

24. Greenwalt, *supra* note 22, at 130.

25. *See* U.S. CONST. amend. I; *see also* Kozinski & Banner, supra note 13, at 627.

26. 316 U.S. 52 (1942).

27. *Id.* at 54.

28. *Id.*

29. *See, e.g.*, Rosenbloom v. Metromedia, 403 U.S. 29, 43 (1971); Martin v. Struthers, 319 U.S. 141 (1943); Jamison v. Texas, 318 U.S. 413, 416 (1943).

30. 425 U.S. 748 (1976).

31. *Id.* at 750.

32. *See id.* at 761.

33. *Id.*

34. *Id.*

reaffirmed that speech is not automatically commercial just because it solicits money or is sold for a profit.[35]

Further, in *Virginia State Board of Pharmacy*, the Court noted that both the individual consumer and society at large have strong interests in the free flow of information, and thus, the fact that an advertiser's interest in commercial advertisement is purely economic does not necessarily disqualify him from First Amendment protection.[36] One may note, this "free flow of information for society" is very much in sync with the free speech values of truth discovery, social stability and interest accommodation, exposure and deterrence of abuse of authority, as well as self-realization.[37] The Court explained that people will only realize what is best for them if they are well-informed with truthful and non-misleading sources.[38] While the *Virginia State Board of Pharmacy* case expanded upon the commercial speech doctrine, by 1976, there was still no explicit test for distinguishing commercial speech from noncommercial speech.[39] It was not until 1980, in *Central Hudson Gas & Electric Corp. v. Public Service Commission of New York*,[40] that the Supreme Court gave a definite, albeit vague, test for determining whether speech was commercial or noncommercial. First, the majority defined commercial speech as an "expression related solely to the economic interests of the speaker and its audience."[41] Next, the Court proffered the now infamous test for distinguishing commercial speech from noncommercial, fully protected speech. According to the Supreme Court, commercial speech is "speech that proposes a commercial transaction."[42] Using both the word "speech" and "commercial" in the definition of commercial speech is not ambiguous enough, you say? It gets worse: The Supreme Court further muddied the waters in 1983 when it provided additional factors to determine whether speech is commercial in the *Youngs Drug* case.[43] The Court offered the following considerations: just because the speech being analyzed is an

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35. *See* Smith v. California, 361 U.S. 147, 150 (1959) (holding the distribution of books and literature, although for profit, are within the essential freedoms granted by the First Amendment); Joseph Burstyn, Inc. v. Wilson, 343 U.S. 495, 502 (1952) (holding that expression within motion pictures is protected by the First Amendment).

36. *Va. State Bd. of Pharm.*, 425 U.S. at 762-65.

37. *See supra* Part I.

38. *Va. State Bd. of Pharm.*, 425 U.S. at 770.

39. *See* Joseph T. Hanlon, *CASENOTE: FIRST AMENDMENT – Commercial Speech – Notwithstanding a State's Twenty-first Amendment Power to Ban the Use of Alcohol Entirely, a State May Not Completely Prohibit Truthful, Non-Misleading Advertising of Liquor Prices* – 44 Liquormart, Inc. v. Rhode Island*, 116 S. Ct. 1495 (1996)*, 7 SETON HALL CONST. L.J. 1009 (1997) (describing the development of the commercial speech doctrine).

40. 447 U.S. 557 (1980).

41. *Id.* at 561 (citing Friedman v. Rogers, 440 U.S. 1, 11 (1979); Bates v. State Bar of Ariz., 433 U.S. 350, 363-64 (1977); *Va. State Bd. of Pharm.*, 425 U.S. at 762).

42. *Central Hudson*, 447 U.S. at 562.

43. Bolger v. Youngs Drug Prods. Corp., 463 U.S. 60, 66-67 (1983) (citing N.Y. Times Co. v. Sullivan, 376 U.S. 254, 265-66 (1964)).

advertisement clearly does not compel the conclusion that it is commercial speech,[44] the reference to a specific product does not by itself render speech as commercial,[45] and a speaker having an economic motivation for the speech would clearly be insufficient by itself to turn the materials into commercial speech.[46]

In sum, the "speech proposing a commercial transaction" test is the most widely accepted, although highly criticized, test for categorizing speech as commercial or noncommercial.[47]

III. THE *JORDAN V. JEWEL* CASE: RECAP AND ANALYSIS

A. The United States District Court for the Northern District of Illinois's Reasoning

The court made the following holdings in the *Jordan v. Jewel* case: (1) the page did not propose a commercial transaction,[48] (2) the page was not an advertisement,[49] (3) the page did not refer to a specific product,[50] and (4) the store having an economic motivation did not render the page commercial speech.[51]

First, in reaching the second holding from above—that the page was not an advertisement—the court noted that something is not an "advertisement" simply because it is referred to as one, and there is no other shorthand name to identify a "page honoring and congratulating a person."[52] As the court's statement on there being no other shorthand for a "page honoring and congratulating a person" is well reasoned, the speech at issue here will hereinafter be referred to as "the page" for the sake of consistency and clarity.

In further explaining why the page cannot be an advertisement, the court notes it is not possible that the page is an advertisement because there was also *another page* in the commemorative issue from *another grocery store* and "fierce competitor," Dominick's.[53] To substantiate this broad statement, the court wrote the presence of both of these pages would "instinctively" alert the consumer to the fact that Jewel's page was not an advertisement, because consumers must know that Jordan "does not play [for two teams]. . . . Jordan is Hanes, not Jockey or Fruit of the Loom; Nike, not Adidas or Reebok; Chevrolet, not Ford or

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44. *Id.*

45. *Id.* (citing Associated Students for Univ. of Cal. at Riverside v. Att'y Gen., 368 F. Supp. 11, 24 (C.D. Cal. 1973)).

46. *Id.*; *see also* Bigelow v. Virginia, 421 U.S. 809, 818 (1975); Ginzburg v. United States, 383 U.S. 463, 474 (1966); Thornhill v. Alabama, 310 U.S. 88, 95 (1940).

47. *See, e.g.*, Bd. of Tr. of State Univ. of N.Y. v. Fox, 492 U.S. 469 (1989) (applying the *Central Hudson* test).

48. Jordan v. Jewel Food Stores, Inc., 851 F. Supp. 2d 1102, 1106-09 (N.D. Ill. 2012).

49. *Id.* at 1109-10.

50. *Id.* at 1110.

51. *Id.* at 1110-11.

52. *Id.* at 1109-10.

53. *Id.* at 1110.

Chrysler; McDonald's, not Burger King or Wendy's."[54] Finally, the court further determined the page is not an advertisement because Jewel paid no money to publish the page.[55]

Next, the court considered whether the page referred to a specific product.[56] Although Jordan argued that the use of Jewel's slogan and logo effectively worked as a reference to *all* of Jewel's products and services, the court found this unpersuasive.[57] The court went on to explain, "[t]he name and slogan of any business will evoke that business's products or services *in general*," but this page did not refer to a specific product, a "relevant inquiry" in the court's opinion.[58] Interestingly, the court then goes on to concede, "[t]his is not to say that the failure to refer to a specific product or service automatically renders speech noncommercial."[59] Confused yet? Just wait, it gets better. Finally, the court explains, "[i]f Jewel's page pictured a fully set Thanksgiving table, but no food or other products sold at Jewel stores, the page might have been commercial."[60] The analysis of the "economic motivation" factor and the "proposing a commercial transaction" test has been saved for last, as these are the most relevant aspects of the commercial speech test and also the most flawed.

In discussing whether Jewel had an economic motivation for the page, the court says, "[t]o say that a for-profit corporation like Jewel has an 'economic motivation' for taking any particular action is to state a truism."[61] Economic motivation found, two points for Jordan, right? Wrong. The court *did* agree with Jordan's contention that Jewel congratulated him "in the commemorative issue to promote itself to customers, to enhance its goodwill, and to convey [itself as] a good Chicago citizen."[62] However, the court then goes on to explain that, although some have argued corporations' speech should *always* be commercial,[63] the prevailing case law from the Supreme Court in *Youngs Drug* has explained that economic motivation by the speaker is simply "not enough."[64] Specifically

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54. *Id.*

55. *Id.* at 1109.

56. *Id.* at 1110.

57. *Id.*

58. *Id.*

59. *Id.*

60. *Id.*

61. *Id.*

62. *Id.* at 1111.

63. *See* Tom Bennigson, *Nike Revisited: Can Commercial Corporations Engage in Non-Commercial Speech?*, 39 CONN. L. REV. 379, 395 (2006) ("[A]ll corporate expenditures—including expenditures for corporate speech—are supposed to further the interests of the corporation, and the interests of the corporation are purely economic. Thus any speech financed by a for-profit corporation, if it is not a misappropriation of corporate funds, is commercial, in that the only legitimate criterion for deciding to fund the speech is whether it serves the commercial interests of the company.").

64. *Jordan*, 851 F. Supp. 2d at 1109 (citing Bolger v. Youngs Drug Prods. Corp., 463 U.S. 60, 67 (1983) ("[T]he fact that [the speaker] has an economic motivation for mailing the pamphlets

the court stated, "[t]he governing precedents require that there be something more, and that something is missing from this case."[65] Perhaps unsurprisingly, exactly what the "something more" consists of is not found in the opinion.[66]

In determining whether Jewel's page "proposed a commercial transaction," the court noted, "[i]t is difficult to see how Jewel's page could be viewed, even with the benefit of multiple layers of green eyeshades, as proposing a commercial transaction."[67] Next, the court said the page does not propose *any kind* of commercial transaction, as "readers would be at a loss to explain what they have been invited to buy."[68] After this general statement, the court goes no further.

The court does not explicitly address the seemingly obvious argument that consumers may feel invited to buy anything, or everything, or simply use the service of the grocery store. Instead, the court indirectly tackles this issue by dismissing Jordan's argument related to Jewel's use of its trade name and its advertising slogan in effectively linking Jordan to the store and thereby inviting the readers to enter into the commercial transaction.[69] The court writes,

> It is highly unlikely that the slogan's presence would lead a reasonable reader to conclude that Jewel was linking itself to Jordan in order to propose a commercial transaction. And even if the slogan's presence somehow could be viewed as introducing some minimal element of commercialism, that element is intertwined with and overwhelmed by the message's noncommercial aspects, rendering the page noncommercial as a whole.[70]

B. Why this Standard Analysis Does Not Work in This Instance or in the Modern Era

1. The Advertisement Factor.—The court's reasoning that one would know the page was not an advertisement because "instinctively" the reader knows Jordan does not play for "two teams"[71] is unpersuasive as it relies on the bold assumption that the "reader" has an in-depth knowledge about the endorsement background of Jordan and presumes that the reader would use that knowledge to distinguish the page as not an advertisement. There is also no way to tell that the reader would even necessarily *see* the second advertisement by Dominick's or relate it back to Jewel's page.

Imagine, for example, an elderly woman who has never seen a basketball game in her entire life. This elderly woman does not know Michael Jordan from

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would *clearly* be insufficient by itself to turn the materials into commercial speech.").

65. *Id.* at 1111.

66. *Id.* at 1102.

67. *Id.* at 1106.

68. *Id.* at 1107.

69. *Id.*

70. *Id.* at 1108.

71. *Id.* at 1110.

Larry Bird and could not distinguish an alley-oop from an airball. Her only knowledge of Michael Jordan comes from the ramblings of her male grandchildren. Upon viewing the two pages it would not be "instinctive" to her that the Jewel page was not an advertisement under the court's reasoning. If her grandchild were to bring home the commemorative issue, and she were to glance through the pages, she could arguably see both Jewel's page and Dominick's page as being endorsed by Jordan, not understanding the irony of Jordan being so loyal to only certain brands. Thus the court's analysis of the page as not an advertisement on this point fails for its false assumptions regarding consumers.

As to the second element of finding the page as not an advertisement, it is correct that Jewel paid no money for the page, but Jewel *did* agree to stock copies of the commemorative issue in its stores.[72] While many advertisements are paid for, according to the Funk & Wagnalls's Dictionary, there is no specific requirement that an announcement *must* be paid for in order to fall under the classification of "advertisement."[73] By stocking the magazine containing the page within the store, Jewel presumably stood to make a profit in the end (due to sales of the magazine), especially because they did not pay anything for the free publicity to begin with. Further, the Court in *Youngs Drug* stated: "[t]he mere fact that these pamphlets are conceded to be advertisements clearly does not compel the conclusion that they are commercial speech."[74] Stemming from this statement, one may logically argue that just because a page is *not* an advertisement does not compel the conclusion that it is necessarily *non-commercial* speech. For example, a consumer would likely not see the statement of alcohol content on the label of a beer bottle or an attorney's letterhead as "advertisements." However, courts have held that these are both areas that fall under commercial speech.[75]

Based on this analysis, the factor determining whether commercial speech is an advertisement is largely irrelevant as a stand-alone factor. For this reason the advertisement factor should be eradicated; it should be the content of the page on the whole and the way consumers view the content, rather than the arbitrary classification as to the type of media it is, which determines the constitutional protection provided.

The content of what is being displayed—the words, pictures, ideas, and beliefs— are the driving force in allowing readers to discover truth and obtain

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72. *Id.* at 1109.

73. FUNK & WAGNALLS NEW STANDARD DICTIONARY OF THE ENGLISH LANGUAGE 42 (Isaac K. Funk et al. eds., 1963) [hereinafter FUNK & WAGNALLS] (defining advertisement as any "public notice, statement or announcement, usually printed . . . giving information, stating a want, fact, intention, or coming event").

74. Bolger v. Youngs Drug Prods. Corp., 463 U.S. 60, 66 (1983).

75. *See* Wellikoff, *supra* note 17, at 176 n.99 (citing Rubin v. Coors Brewing Co., 514 U.S. 476, 481-82 (1995) (accepting statement of alcohol content on the label of beer bottle as commercial speech)); *see also* Ibanez v. Fla. Dep't of Bus. & Pro'f Regulation, 512 U.S. 136, 142 (1994) (explaining commercial speech includes statements on attorney's letterhead and business cards identifying attorney as CPA and CFP).

self-realization because the content is what consumers pay attention to.[76] For this reason, it is also the content which may allow a reader to conclude that a company is abusing authority.[77] If a consumer or reader views something in his or her mind as an advertisement and acts based on that view, it makes no difference whether the advertisement was paid for or if it would technically be classified as an advertisement at all.

2. The Specific Product Factor.—The *Jordan v. Jewel* court's "specific product" analysis is equally as unpersuasive for multiple reasons. Notably, hidden in footnote fourteen of the *Youngs Drug* majority opinion, the Supreme Court writes, "we express no opinion as to whether reference to any particular product or service is a necessary element of commercial speech."[78] If the Supreme Court itself did not deem the "specific product" as a necessary element, lower courts should also forego this analysis, as it works only to further complicate an already complex issue.

Additionally, the "specific product" factor is outdated in the realm of commercial transactions in the modern marketplace. The factor is particularly misguided because it does not acknowledge that consumers often subconsciously associate particular products with certain logos, slogans or trademarks, which identify only the *source* of the product and not any particular product.[79] Using the *Jordan v. Jewel* court's own example of McDonald's evoking the idea of fast food,[80] one might argue that instead, a reasonable consumer may automatically think of "Big Mac" or "delicious French fries" rather than "fast food" in a general sense. Likewise, in this case, in seeing the Jewel's slogan and trade name, one may draw to mind that Jewel always has the best prices on fresh deli meat or cheese, rather than thinking of the grocery store in a general sense.

Alternatively, one may argue the logo and slogan *do* refer to a specific service,[81] the service of providing affordable groceries close to home or as Jewel's own slogan indicates, "just around the corner."[82] This would seem to align with the court's example of a Jewel page with a "fully set Thanksgiving table" and no other products likely being commercial speech. The reasoning here would likely be something along the lines of the "fully set Thanksgiving table"

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76. *See* Mike Masnick, *Advertising Is Content; Content Is Advertising*; TECHDIRT (Mar. 19, 2008), http://www.techdirt.com/articles/20080318/004136567/advertising-is-content- content-is-advertising.shtml, *archived at* http://perma.cc/HL2F-4UBC (arguing that "advertising" and "content" can no longer be thought of as separate parts, and that any content is advertising something).

77. *Id.*

78. *Youngs Drug*, 463 U.S. at 67 n.14.

79. *See* 15 U.S.C. § 1051 (2006) (explaining that trademarks are meant to provide a *source*-identifying function with respect to the underlying goods).

80. Jordan v. Jewel Food Stores, 851 F. Supp. 2d 1102, 1110 (2012).

81. *See* JEWEL-OSCO, Registration No. 2,128,535 (identifying the classification of services as "retail supermarket and drug store services featuring food, drugs, household goods, automotive goods, and like general merchandise").

82. *Jordan*, 851 F. Supp. 2d at 1114.

referring to a plethora of Jewel products, ones that would be needed for a Thanksgiving meal.

In light of the foregoing analysis, the "specific product" element is not only superfluous as noted by the Supreme Court, but also furthers no free speech value. Again, a look at the entire speech itself, *on the whole*, and how it is viewed by consumers is a more productive venture in determining whether speech should receive First Amendment protection.[83]

3. The Economic Motivation of the Speaker Factor.—As for the "economic motivation of the speaker" factor, the Court in *Youngs Drug* explained that having an economic motive does not surely and unequivocally render the speech as commercial.[84] However, a finding of economic motivation for speech *should* require a closer analysis of the content of the speech, and the way the speech is viewed by consumers, in order to decide whether or not it should be constitutionally protected.[85]

Take the following example: Imagine the owner of a convenience store has a daughter with Down syndrome. He places a page in a magazine or newspaper with a picture of him and his daughter, a written description of who they are, the logo for the store, and then some type of reference to a specific entity that raises money for Down syndrome research. Surely, one may argue, there is some type of economic motivation for this. There is a strong argument that almost anything a business undertakes has at least a tint of economic motivation.[86] The owner of the store may have wanted the consumer to reason, "well, he supports Down syndrome research, so I should shop at his store," thus effectively bringing more business to his store and increasing his profit.

The difference between the above scenario and most other speech by commercial speakers is that in this instance, the average consumer could just as likely reason the owner had instead placed the page to raise awareness for Down syndrome research and to show support for his child. While the owner of the grocery store in this example may have had an underlying economic motivation, it could arguably be outweighed by the other motivations evidenced by the page, mainly raising awareness for a cause that affects him personally and has a significant impact on his day-to-day life. In this instance, even with a potentially slight economic interest, a court could reasonably find this speech was noncommercial in nature and thus fully protected by the First Amendment.

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83. *See infra* Part IV.

84. *Jordan*, 851 F. Supp. 2d at 1109 (citing Bolger v. Youngs Drug Prods. Corp., 463 U.S. 60, 67 (1983) (explaining "the fact that [the speaker] has an economic motivation for mailing the pamphlets would clearly be insufficient by itself to turn the materials into commercial speech")).

85. *See infra* Part IV.

86. *See* Bennigson, *supra* note 63, at 395 ("[A]ll corporate expenditures—including expenditures for corporate speech—are supposed to further the interests of the corporation, and the interests of the corporation are purely economic. Thus any speech financed by a for-profit corporation, if it is not a misappropriation of corporate funds, is commercial, in that the only legitimate criterion for deciding to fund the speech is whether it serves the commercial interests of the company.").

Conversely, in the *Jordan v. Jewel* case, it is reasonable to say that the economic motivation heavily outweighs any other motivation of simply "being a good citizen" and "congratulating" Jordan on the induction into the Hall of Fame. Arguably, Jordan's induction was not likely an important "cause" near and dear to Jewel's heart, as in the convenience store owner example above. While many people and businesses take sports and sports honors very seriously, Jewel's page does not have any underlying political message, religious opinions, or charitable cause that works to overtly combat and outweigh its economic motivation of getting consumers to reason: "Well, Jewel supports Michael Jordan, I like Michael Jordan, and thus will support Jewel."

Unlike the "advertisement" and "specific product" factors, which can be dismissed entirely from the commercial speech analysis as independent factors, the "economic motivation" of the speaker is arguably a more a significant and revealing factor to be considered and thus should not be dismissed. This will be discussed further in Part IV, in the proposal of the new test.

4. The "Proposing a Commercial Transaction" Test.—Finally, and most importantly, is a discussion on whether or not the page "proposes a commercial transaction." With no definition ever set forth by the Supreme Court as to what this phrase technically means, judges in lower courts have been free to interpret it however they see fit. Breaking the test down into definable terms is helpful.

Funk & Wagnalls New Standard Dictionary defines the word "propose" most relevantly as "to [set forth] before [the] mind" (as an offer, or to present or put forth for discussion).[87] The definition of "commercial" is commonly "of or related to the nature of commerce."[88] Commerce in this sense means the buying and selling of things. Finally, "transaction" as defined by Funk & Wagnalls means "any act as affecting legal rights, or obligations," such as exchanging or transferring goods or services.[89] Taken literally, in order to be considered a "proposal of commercial transaction," the speech must only set forth an exchange of goods and services.

One important aspect that Jordan did not raise as to the question of a proposal of a commercial transaction is the *placement* of the Jewel Osco trade name and trademarked advertising slogan on the page (as opposed to the argument he did raise regarding its mere presence).[90] "Jewel Osco" is nearly dead center of the page, and stands out in bold colorful lettering.[91] Even a casual observer can see the lettering of "Jewel Osco" is significantly larger than the rest of the text.[92] This stylistic and strategic placement was no coincidence; instead the Jewel Osco name was intentionally placed for maximum consumer recognition. Indeed, this extra placement of Jewel's trade name was not absolutely necessary to "identify

87. FUNK & WAGNALLS, *supra* note 73, at 1987.

88. *Id.* at 536.

89. *Id.* at 2548.

90. Jordan v. Jewel Food Stores, Inc., 851 F. Supp. 2d 1102, 1107 (2012).

91. For a look at the page at issue, see Tushnet, *supra* note 2.

92. *Id.*

the speaker" as the court says,[93] because the text itself says, "Jewel Osco salutes #23. . . ."[94]

To say the page does not "propose a commercial transaction" because it is congratulatory is to assume that consumers even read the text in order to reason that it was "merely a congratulatory ad." Without reading the text, one might see the shoes on the hardwood basketball court and the number twenty-three (the Jordan reference) and the Jewel Osco trade name and registered trademark largely displayed in the center of the page, and without further investigation or contemplation assume there is a connection between the two.

The court seems to hold that the page does not propose a commercial transaction because it does not expressly state, "Hey you! Go to our store and buy X product for Y price." But this is neither what the "proposal of a commercial transaction" test implies based on the simple definitions of the words, nor is it the state of advertising in the modern era. According to the definitions provided *supra*, Jewel's page need only set forth in the mind the idea of doing some type of business with the grocery store. For example, this may be seen in not necessarily running to Jewel and buying groceries right after seeing the page, but rather, when later faced with a choice of grocery stores, choosing Jewel due to the page it posted using a reference to Jordan.

IV. MEET THE NEW TEST, NOT LIKE THE OLD TEST

As the history of commercial speech jurisprudence demonstrates, commercial speech is a very tricky thing. It would be a gross misstatement to say that any one test could or would easily solve any and every commercial versus noncommercial free speech case to ever come about. Commercial speech is not algebra, it is not a scientific study, there is no predefined equation and thus the answers will not always be clear. The commercial versus noncommercial speech distinction is convoluted, but we can and, indeed, must do better at giving this distinction a more defined test.

According to commercial speech case law, whether a communication is commercial or noncommercial is a question of law, and thus, whether a communication is commercial or not will be decided by the court.[95] From a pure efficiency of the court system standpoint, the proposition that judges should decide this issue as a matter of law is sound.[96] However, the test judges use to define the distinction must take into account the communication from the view of the average consumer.[97] This is not a new concept, as many courts have indirectly focused on consumer views, and scholars have taken a similar

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93. *Jordan*, 851 F. Supp. 2d at 1107.

94. *Id.* at 1104.

95. *See generally* Connick v. Myers, 461 U.S. 138 (1983) (insisting that the ultimate question of whether speech is commercial is not factual, but is a question of law).

96. Roger A. Arnold, *Efficiency vs. Ethics: Which is the Proper Decision Criterion in Law Cases*, J LIBERTARIAN STUD., VOL. VI., NO. 1 (1982).

97. *See infra* Part IV.C.

consumer-oriented view.[98] As the test stands now, with "common sense distinctions" and "proposals of commercial transactions," the court is free to classify the communication in whichever way it pleases.

What follows is an original three-part test that better functions to identify speech as commercial or noncommercial. The test is generally as follows: (1) identify the speaker and weigh the speaker's motivations, (2) look at the content of the speech itself, and (3) assess how the average consumer or reader would view the speech.

A. Identifying the Speaker

The first and most obvious step in determining whether speech is commercial or noncommercial is to identify the speaker and the motive of the speaker. As explained in Part III, having an "economic motivation" for the speech does not certainly and unequivocally render the speech commercial. However, speech from a public or private for-profit corporation should be presumed to be commercial in nature.

For-profit corporations in today's competitive market always have the goal of pushing product or services and gaining profits for their shareholders.[99] Even smaller closely-held businesses share this profit-driven motive.[100] Thus, it is reasonable to allow a rebuttable presumption that their speech is also, at least partially, serving the profit-gaining motive and thus
strongly favoring the speech as commercial. If the company or corporation can then provide a legitimate political, religious, charitable, or informational non-economic motivation, the motivations can be weighed against one another as commercial or noncommercial.

However, identifying the speaker as a corporation or company with an economic motive is not sufficient under this test; it would only count as a strike against the speech having full First Amendment protection.

B. The Content and Mode of the Speech

The content of the speech is undeniably a very significant factor. It is under this "content" factor that the question of "does the speech propose a commercial transaction" would fall. The first thing to examine under the content of the

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98. *See* Zauderer v. Office of Disciplinary Counsel, 471 U.S. 626, 651 (1985) ("[T]he extension of First Amendment protection to commercial speech is justified principally by the value to consumers of the information such speech provides."); Va. State Bd. of Pharm. v. Va. Citizens Consumer Council, Inc., 425 U.S. 748, 762 (1976) (focusing on the consumers' right to truthful information and basing commercial decisions on as much information as possible); *see also* Bennigson, *supra* note 63, at 384 (arguing in favor of the original audience-based rationale for commercial speech doctrine); Burt Neuborne, *The First Amendment and Government Regulation of Capital Markets*, 55 BROOK L. REV. 5, 5 (1989) (promoting a "hearer-centered" concept of the First Amendment).

99. *See* Bennigson, *supra* note 63, at 395.

100. *Id.*

speech is whether it is political or religious in nature. Most would agree, based on the fundamental rationale for free speech discussed earlier in this Note, that speech classified as political or religious in nature has a strong presumption of protection under the First Amendment.[101] Under the revised test, speech with a primarily political or religious message would be assumed to be noncommercial even if the speaker was earlier identified as a for-profit corporation.

Assuming the speech is not overtly political or religious, the test must more readily capture the state of commercial speech in this modern day and age. Likely no one would deny that classical advertising and commercial speech has changed from the stereotypical "Store X is selling Y for Z price" seen only in newspapers and on cable channels. Instead, consumers are constantly barraged with "speech proposing a commercial transaction," but instead of only in newspapers and television commercials, advertising and commercial speech can be found on the Internet, buses and billboards, office supplies, door hangers on doorknobs, flyers under windshield wipers, purchased word-of-mouth, T-shirts, publicity stunts, and virtually everywhere else.[102] Commercial speakers have had to get more creative to gain consumer attention and create lasting impressions.[103] Indeed, in recent years, creative marketers have gone so far as "to put messages on fire hydrants and potholes, on eggs, in urinals, [and] on the bellies of pregnant women," all for the sake of attention from consumers and the hope that one may present a lasting impression.[104]

Looking at the content and the mode of the speech itself is where the earlier *Youngs Drug* factors of "is it an advertisement" and "does it refer to a specific product" may fall. While these two factors are not necessarily helpful as stand-alone categories due to the noted changes in types of advertising and marketing, they may be helpful for a court in determining whether the overall content of the speech refers to a commercial transaction.

Finally, in analyzing the content of the speech, this test proposes taking into account the use of intellectual property rights of others by the speaker. For example, does the speech contain the trademark of another? Does it infringe the right of publicity of another? Notably, not all unauthorized use of another's trademark is considered trademark infringement, and the First Amendment often shields speakers from infringement as long as the use is noncommercial.[105]

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101. *See supra* Part I.

102. Roy H. Williams, *10 Unusual Ways to Advertise*, ENTREPRENEUR (Mar. 13, 2006), http://www.entrepreneur.com/article/83812, *archived at* http://perma.cc/366W-3T7D.

103. *See generally* KEN SACHARIN, ATTENTION! HOW TO INTERRUPT, YELL, WHISPER, AND TOUCH CONSUMERS 3 (Wiley Pub. 2001) (explaining the ever-growing problem of advertiser's inability to reach consumers due to "advertising clutter" and proposing new ways to solve this problem, including taking advantage of word of mouth marketing).

104. Rebecca Tushnet, *Attention Must Be Paid: Commercial Speech, User-Generated Ads, and the Challenge of Regulation*, 58 BUFF. L. REV. 721, 725 (internal citations omitted).

105. *See* J. THOMAS MCCARTHY, MCCARTHY ON TRADEMARK AND UNFAIR COMPETITION § 11: 45 (4th ed. 2001) (describing trademark fair as allowing a junior user to use a descriptive term in good faith in its primary descriptive sense other than as a trademark).

However, in a society where trademarks and publicity rights are becoming ever more valuable assets,[106] courts should take ever more care to analyze the unauthorized use of trademarks in speech, and one's publicity rights in endorsements, to ensure that the use is unquestionably noncommercial and does not, instead, add commercial value to the speech at the expense of another.

C. How the Average Consumer Would View the Speech

Recall Jef Richards's quote from the beginning of this Note: "Commercial speech is like obscenity . . . we can't seem to define it, but we know it when we see it." This quote concerns the ambiguity that overwhelms defining both commercial speech and obscenity, especially by courts.

Despite obscenity's ambiguous nature, in the 1957 obscenity case of *Roth v. United States*,[107] Justice Brennan eloquently adopted the following test for determining obscenity: "whether to the average person, applying contemporary community standards, the dominant theme of the material taken as a whole appeals to prurient interest."[108] If the average person could reasonably find the speech on a whole to be obscene, this speech would fall outside the protection of the First Amendment. So why not view commercial speech in a similar vein?

While Brennan's test for obscenity was later replaced by the three-part *Miller* test,[109] his "average person view" (which was not completely abandoned in *Miller*) works well within the context of the other proposed factors of this new test. The court, after identifying the speaker and analyzing the content of the speech involved should finally, and perhaps most importantly, look to the way the average consumer in the relevant community, locality, or perhaps cyber-locality would view the speech.

The test includes the "context" of the speech in a broad, rather than narrow, fashion. This means that rather than analyzing how the average consumer would view the speech in isolation, the test would also look to relevant circumstances that could affect how the speech is viewed. While certainly not an exhaustive list, factors such as information on the relevant demographic most likely to view the speech, as well as current events, prior advertising or speech of the speaker, or societal issues, may have an effect on how the speech is interpreted and should

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106. *See* Sean Stonefield, *The 10 Most Valuable Trademarks*, FORBES (June 15, 2011, 11:22 AM), http://www.forbes.com/sites/seanstonefield/2011/06/15/the-10-most-valuable-trademarks/2/, *archived at* http://perma.cc/W33X-R344 (estimating the monetary value of such trademarks as "GOOGLE" and "MICROSOFT" at $44.3 billion and $42.8 billion, respectively).

107. 354 U.S. 476 (1957).

108. *Id.* at 489.

109. Miller v. California, 413 U.S. 15, 24 (1973) (holding the basic guidelines for the trier of fact (in determining obscenity) must be: (a) "whether the average person, applying contemporary community standards would find that the work, taken as a whole, appeals to the prurient interest, . . . (b) whether the work depicts or describes, in a patently offensive way, sexual conduct specifically defined by the applicable state law; and (c) whether the work, taken as a whole, lacks serious literary, artistic, political, or scientific value" (internal citations omitted)).

not be discounted.

It may be easiest for courts to determine how the average consumer in the relevant community may view the speech if each party to a case were required to bring in consumer surveys depicting whether or not consumers, on average, view the speech as commercial. This would likely give courts and judges a realistic understanding of how the average consumer or reader viewed the speech. However, this is neither efficient nor realistic. Often, consumer surveys are found to be unreliable,[110] and thus courts should evaluate the average consumer viewpoint apart from consumer surveys.

Courts should make this subjective average consumer determination of commercialism by assessing such factors as: would the consumer gain some type of truth or objectively useful information from the speech (if the informative aspect outweighs the commercial aspect this would weigh in favor of classifying the speech as noncommercial, protecting the rights of the listener/average consumer to as much information as possible); is there a trademark or trade name used which would trigger a commercial association in the mind of the consumer, allowing the consumer to believe the speaker is speaking commercially; or possibly would a persuaded reader be more likely to engage in a commercial transaction with the speaker after viewing the speech?

While these factors are certainly not exclusive, they are a starting point for courts in assessing whether or not the average consumer might classify speech as commercial.

CONCLUSION: ASSESSING *JORDAN V. JEWEL* UNDER THE NEW TEST AND MOVING FORWARD

By way of example and conclusion to the current *Jordan v. Jewel* chapter and this Note, an analysis of the speech in question using the newly proposed test is required.

A. Identifying the Speaker and Weighing Motivations

Identifying the speaker is not a difficult task when the speaker's trade name, logo, and slogan are front and center of the page. At this point in the analysis, there is no denying that Jewel is a commercial speaker with an economic motivation behind the speech at issue. The real question is whether Jewel's alternative motivation—namely, congratulating Jordan—outweighs the economic motive. And the real answer is: not likely, friends.

The group of Jewel executives who authorized the page at issue may truly admire Michael Jordan. In fact, they may really, *really* enjoy him. However, if

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110. From January 2006 to June 2011 the National Advertising Division found seventy-one percent of consumer surveys as unreliable based on absence of adequate controls, limited probative value, leading or suggestive questions, the absence of adequate filter questions, or the respondents not actually being shown the actual advertisement or claim. *Not All Surveys Are Created Equal*, LAW360 (Sept. 9, 2011), www.kelleydrye.com/publications/articles/1518/_res/id=Files/index=0/, *archived at* http://perma.cc/338W-NRRD.

they had wanted the page to be all about congratulating Michael, why is the Jewel trade name directly in the middle? Why did the Jewel slogan have to be used in order to congratulate Jordan? The argument that this placement was required to "identify the speaker" is an excellent lawyering tactic, but not necessarily the whole truth. For example, a small footnote at the bottom of the page identifying Jewel (along with the text of the page itself identifying Jewel) would work as well, and not take the limelight from congratulating Jordan.

Absent some information about Jewel which is not discussed in the *Jordan v. Jewel* case, economic motivation is the overwhelming motive in this instance. There is no apparent political, religious, or charitable motivation behind the speech. This factor weighs in favor of Jordan in the rematch. Or, as esteemed sports announcer Gus Johnson would say, "Rise and fire . . . count it!"[111]

B. Analyzing the Speech Itself

In this instance, identifying the speaker and the analysis of the speech itself overlap due to the prominent use of Jewel's trade name, logo, and slogan. Aside from this, the page is in a commemorative issue magazine dedicated entirely to Jordan, presumably placed among many articles and photos about Jordan. In viewing the context of the entire commemorative issue and changes in the type of advertising and promotion seen in society today, there is no reason that Jewel's page would not at least arguably promote Jewel's products and services.

However, even if the promotion of Jewel's products and services could be seen as a draw, the use of Jordan's name and intellectual property rights inevitably weighs in favor of Jordan prevailing. Jordan has owned a U.S. Federal Trademark Registration for MICHAEL JORDAN in relation to promoting the goods and services of others through the issuance of product endorsements since 1988.[112] This means that Jordan often licenses his name for use by others for product endorsements, *with his permission*.

Under this test, a court would need to be *certain* that the use of Jordan's valid trademark (in this instance his own name) by Jewel is absolutely noncommercial (for example, if used in an article writing about Jordan's statistics or in an interview with LeBron James detailing how Jordan has affected James's career). Jordan should have the right to protect his trademark and only allow it to be used in instances he deems proper (presumably where he actually *does* want to endorse a product or service).

So, in this instance, even if the page itself had some commercial and some noncommercial aspects, the test would weigh in favor of Jordan, the valid rights holder, over Jewel, which used the mark without permission. This is not to be taken to imply that trademark rights are more important than free speech rights. But here, where it has been established that Jewel has an underlying economic

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111. David S. Glasier, *Gus Johnson Happy to Be a Part of Sports*, MORNING J. (Mar. 18, 2011, 12:00 AM), http://www.morningjournal.com/general-news/20110318/gus-johnson-happy-to-be-a-part-of-sports.

112. MICHAEL JORDAN, Registration No. 1,487,719.

motivation that outweighs a public informational or truth-revealing motive, Jordan should be able to control how his trademark is used.

C. How Would the Average Consumer View the Page?

Defining the "average consumer" or "average reader" in this instance, or in any litigation using this test, may be a highly debatable issue. Is the average consumer the average person shopping at Jewel with enough sports-related interest to buy a sports magazine? Are young children included in this group? Is the relevant audience male or female and does it matter?

According to Mega Media Marketing's statistics for the average issue of *Sports Illustrated*, the average readers are 4:1 male to female and the median age is approximately thirty-seven years old.[113] In this instance, the male to female ratio is not particularly relevant because both males and females would be considered consumers of Jewel's goods and services (not only one sex goes to the grocery store). For purposes of this analysis, the average reader would be the average middle-aged adult.

Would the average middle-aged adult gain any particularly useful information or truth from Jewel's page? This depends on one's definition of "useful." The only piece of objective information set forth in the page is that Jewel supports Michael Jordan, and this would not have any significant impact on a consumer's life. Arguably, readers and consumers are not better off because they have suddenly become aware, by way of this page, that Jewel grocery store supports Michael Jordan.

Imagine, however, if the page had perhaps congratulated Jordan on making it into the Hall of Fame and congratulated him on his continuous devotion to good health. Perhaps then the page would give information regarding a healthy diet and exercise and the benefits of staying fit. This health information would be valuable to consumers, something that allows them to gather a bit of truth and knowledge from the page. If the page had contained something of this nature, one might argue more strongly for Jewel's First Amendment right to free speech. This average reader, as a middle-aged adult, is also likely to understand general concepts of trademarks and logos and how these things identify and promote businesses. Jewel's logo and slogan on the page could very likely leave a distinct commercial impression on the average reader, as this is the entire concept of marketing and exactly what logos, slogans, and trademarks are meant to do. The average reader, with a median age of thirty-seven, is also seemingly intelligent enough to gather that Jewel has some reasonable interest in linking itself to Jordan in order to promote its own goodwill and bring people into the store.

For these reasons, there is a valid argument that the average reader may, in fact, see Jewel's page as commercial rather than purely congratulatory.

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113. *See* Mega Media Marketing, DEMOGRAPHICS, http://megamediamarketing.net/demographics.html, *archived at* http://perma.cc/C45E-J8RB (last visited May 5, 2014).

D. Conclusion

Free speech is a fundamental right guaranteed to each person in the United States. Our society depends on free speech to continue moving forward and to protect the opinions and ideas of each individual. However, we should not allow the true value of free speech to be diluted by allowing free speech to act as a shield to protect a commercial speaker in the exploitation of another. As the modes and views of commercial speech change, so should the test for distinguishing commercial from noncommercial speech. Free speech is important, but the Supreme Court has acknowledged that so too is the proper regulation of commercial speech.

This is not to say that Jewel could not have published its congratulatory page. It simply would have had to ask Jordan for permission first. And while each individual may have differing views on celebrities being stingy about granting permission for use or requiring unreasonable licensing fees, at the end of the day, it is the celebrity's decision. If Jordan would have denied permission, Jewel could have been quoted in an article detailing the denial and stating its belief that the denial was unreasonable. *That* would be Jewel's free speech right and is clearly different from the speech at issue here.

Critics may submit that the new test proposed in Part IV is as equally unclear as the current "proposal of a commercial transaction" test. They may argue this test is simply substituting a vague test for another vague test. However, with such rampant criticism of the current test, is it not time to try something, perhaps anything, to attempt to shed light on this ambiguous doctrine? The proposed test is not a bright-line rule, nor does it pretend to be. However, as this Note has explained, the proposed test has one vital element that the current test does not: the requirement for courts to at least address how the average consumer or reader would view the speech. After all, it is the consumer who is exposed to this speech and the average consumer who should be protected with proper regulation of commercial speech.

The implementation of this new test by courts may often reach the same result as the old test. However, by analyzing the speech from all of the perspectives in the new test—the speaker and the speaker's motive, the speech itself and context surrounding it, as well as the average consumer—judges may be more inclined to investigate the speech more thoroughly, providing more consistency to opinions and shedding light on an ambiguous doctrine.

SAY WHAT YOU NEED TO SAY: A CONCURRING OPINION REGARDING INTRA-RELIGIOUS HATE CRIMES AFTER THE MATTHEW SHEPARD AND JAMES BYRD, JR. HATE CRIMES PREVENTION ACT AND *UNITED STATES V. MULLET*

R. ZACHARY KARANOVICH*

INTRODUCTION

In the fall of 2011, the newspapers told of a strict Amish bishop disciplining one-time members of his Amish community. Samuel Mullet, Sr., had a history of out-of-the ordinary disciplinary and educational methods, particularly related to the sexual activity of the members of his Amish community.[1] Members of Mullet's community refused to comply with his orders and Mullet coordinated disciplinary measures with members still loyal to his leadership.[2] Over the course of a few weeks, Mullet's followers cut the beards and hair of numerous victims within the Amish community, which considers beards and hair as sacred symbols.[3]

Mullet and his followers were charged under the Matthew Shepard and James Byrd, Jr., Hate Crimes Prevention Act of 2009 (HCPA),[4] which requires imprisonment for acts of violence "because of . . . actual or perceived religion."[5] Prior to their recent conviction, Mullet and his followers challenged the applicability of the HCPA on the basis that the action was "intra-religious," since all of the individuals involved were Amish.[6] Mullet also maintained that his actions were religious discipline.[7]

The district court found against Mullet, explaining that the statute allows for convictions intra-religiously and that history provides numerous examples of "internecine violence."[8] The court held:

> By the Defendants' logic, a violent assault by a Catholic on a Protestant, or a Sunni Muslim on a Shiite Muslim, or an Orthodox Jew on a non-Orthodox Jew, would not be prohibited by this statute. There is no logical reason why such acts of violence should be excepted from the reach of the Hate Crimes Prevention Act, and, in the absence of any

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1. United States v. Mullet, 868 F. Supp. 2d 618, 621 (N.D. Ohio 2012).
2. *Id*.
3. *Id*. at 620-21.
4. 18 U.S.C. § 249 (Supp. 2010).
5. *Id*. § 249(a)(2)(A).
6. *Mullet*, 868 F. Supp. 2d at 624.
7. *Id*.
8. *Id*.

> language suggesting such limitation, the Court is not going to create such an exception.[9]

While the holding is accurate in its assertion that courts should not view the types of intra-religious violence given as examples outside the scope of the HCPA, the actual bounds of the application of the HCPA are left undefined.

The examples the district court provided are indeed intra-religious; however, they are also inter-denominational. Although Catholics and Protestants are both Christian, they are quite distinct. This distinction is exemplified in the dogma, polity, and practice of each community.[10] Here, it is Mullet's perspective that he was the victims' bishop and spiritual leader seeking to bring them back into compliance with his leadership.[11] At least on its face, it seems a logical impossibility to commit a hate crime based on religion within a denomination or sect on the basis of that denomination or sect, distinct from between individuals of different denominations or sects.

In reaching that question, however, the use of the HCPA in the intra-religious context presented in *Mullet* gives the legal community an opportunity to test the bounds of hate crime legislation as it is understood by the legislature that enacts the laws and the society those laws touch. This Note discusses the intra-religious element of the new face of hate crimes legislation and the decision that has since validated the broader reading of the HCPA. Through this discussion, this Note urges the courts to define hate crimes more precisely in intra-religious contexts to avoid even the possibility of loopholes being present. With a lack of clarity, the courts may allow bias-motivated criminals to avoid necessary enhanced sentences.

Part I of this Note frames the problem and addresses the "logical impossibility" of intra-group hate crimes. Part II discusses hate crimes legislation from a federal perspective. There is no present need for an analysis of the detail found in the historical development of hate crimes legislation; however, there is insight in a more in-depth look at the development and implementation of the HCPA. Part III analyzes the few cases that have dealt with intra-religious hate crimes. The case law analysis will reveal uniformity in the lack of specificity the courts provide. Part IV introduces a new tool in analyzing hate crimes: bias crime indicators. Finally, Part V provides a means of moving forward to reframe the question and remove confusion from the application of hate crimes legislation

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9. *Id*.

10. This distinction might most easily be characterized by the recognition of the Roman Pontiff, or Pope, as a legitimate church leader and teaching authority. While Catholics recognize him as such, Protestants do not. *See* Wendy Thomas Russell, *12 Simple Differences Between Catholics and Protestants*, WENDY THOMAS RUSSELL BLOG (June 10, 2013) http://wendythomasrussell.com/catholics-protestants/.

11. Thomas J. Sheeran, *Samuel Mullet, 15 Other Amish GUILTY of Hate Crimes in Beard Cutting Attacks*, HUFFINGTON POST, Sept. 21, 2012, http://www.huffingtonpost.com/2012/09/20/16-amish-guilty-hate-crimes-beard-cutting-attacks_n_1901895.html, *archived at* http://perma.cc/USM4-CVZP.

to intra-group crime.

I. FRAMING THE PROBLEM: *MULLET*, THE HCPA, AND FUNDAMENTAL SOCIETAL UNDERSTANDING

The court in *Mullet* was not the first court to hold that the act of an individual performing a crime against another individual of the same class or group can qualify as a hate crime.[12] In 1996, the Illinois Court of Appeals held the same after a young Jewish boy and two of his friends verbally accosted an Orthodox Jewish boy of about the same age and threw parts of a knife, including the blade, at the boy.[13] Although the courts were applying two different laws,[14] the conclusions were the same: individuals of the same religion can perform religiously-based hate crimes against one another.[15] However, what the courts meant to say compared with what the courts said leaves significant questions unanswered, particularly in light of public opinion.

Especially mindful of the racial tensions that have existed—and continue to exist—in our country's history, society generally understands hate crimes as between individuals of different classes on the basis of that class distinction.[16] Moreover, that common understanding presumably would not encompass the notion that a hate crime can occur between individuals of the same class on the basis of that class (a white man committing a crime against another white man on the basis of that man being white).[17]

But the HCPA defines "hate crimes" more broadly as: violent acts based on the "actual or perceived religion, national origin, gender, sexual orientation, gender identity, or disability of any person."[18] There is no necessary requirement that the actor be a member of a different class, at least on the face of the statute. What the HCPA most essentially does is provides additional—and to transgender individuals, the first—protections for the Lesbian, Gay, Bisexual, and Transgender community and removes the requirement that in order to qualify as a hate crime there must be interference in the performance of a federally protected

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12. *In re* Vladimir P., 670 N.E.2d 839 (Ill. App. Ct. 1996).

13. *Id*. at 845.

14. *See id*. at 841 (applying 720 ILL. COMP. STAT. ANN. 5 / 12-7.1 (West 1994)); *Mullet*, 868 F. Supp. 2d at 620 (applying the HCPA).

15. *Mullet*, 868 F. Supp. 2d at 624; *In re Vladimir P.*, 670 N.E.2d at 845.

16. Lisa M. Fairfax, *The Thin Line Between Love and Hate: Why Affinity-Based Securities and Investment Fraud Constitutes a Hate Crime*, 36 U.C. DAVIS L. REV. 1073, 1110 (2003) (discussing the apparent consensus in scholarship and criminal justice that hate crimes occur between individuals or groups of different classes).

17. Noah Feldman, *Is Cutting Off a Beard a Hate Crime?*, BLOOMBERG (Sept. 9, 2012, 6:34 PM), http://www.bloomberg.com/news/2012-09-09/is-cutting-off-a-beard-a-hate-crime-.html, *archived at* http://perma.cc/V9QV-7TB9 (discussing his concern with the expansion of hate crimes legislation within class groups leading to more difficult litigation and arbitrary sentence enhancements).

18. 18 U.S.C. § 249(a)(2)(A) (Supp. 2010).

act (for example, voting).[19]

The problem lies in the disconnect between the plain language of the HCPA and what reason seems to dictate. Does the application of the HCPA further the desired curbing of hate crimes or does it unnecessarily enhance the punishment for crimes that are already punishable? It is certainly within our government's legal purpose to protect citizens from violence of any kind. But as the above analysis seems to conclude, declaring all criminal acts with even the most attenuated religious character as hate crimes might be problematic, if not a logical impossibility in some circumstances.

As mentioned at the outset, the HCPA's application in *Mullet* permits a conviction for "intra-religious" acts.[20] However, the examples provided in the district court's opinion do not give clarity to the assertion Samuel Mullet makes that because they are all of the Amish faith, there can be no hate crime.[21] The court's examples are certainly apparent—Catholic against Protestant, Sunni against Shiite.[22] However, Samuel Mullet and his followers were making a different argument: namely, he was the bishop or religious leader of all of the individuals, victims and co-defendants alike.[23] This means that Mullet might have considered the action not just "intra-religious," but "intra-denominational." The analysis would not be the same as a Catholic against a Protestant, but rather a Catholic against a Catholic. There is no meaningful distinction between the two individuals' religious belief system, at least facially. That is a significant departure from what the district court was analyzing and a more significant departure from the reasonable understanding of hate crimes that exists in scholarship and criminal justice institutions.[24] The opinions of the *Mullet* court, the academic community, and the criminal justice system seem to paint a picture that is inconsistent and inaccurate. However, that inaccuracy does not combat too offensively against the societal belief system outlined above. The inconsistency might. To overcome the burden of the beliefs of a society about what form hate crimes take requires a firm clarity from the courts and the legislature.

The problematic lack of clarity in the analyses the courts are providing on the issue is not unfounded. The legislature has also been unclear on the precise meaning and purpose of hate crimes legislation in light of the plain meaning of the statutory language and the legislative history.[25]

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19. *It's Official: First Federal Law to Protect Transgender People*, NAT'L CENTER FOR TRANSGENDER EQUALITY: NEWS, http://www.transequality.org/news09.html#first_law, *archived at* http://perma.cc/6GQW-QS4P (last visited July 15, 2014); David Stout, *House Votes to Expand Hate-Crime Protection*, N.Y. TIMES, May 4, 2007, http://www.nytimes.com/2007/05/04/washington/04hate.html, *archived at* http://perma.cc/WEH6-3BF8.

20. *Mullet*, 868 F. Supp. 2d at 624.

21. *Id*.

22. *Id*.

23. Sheeran, *supra* note 11.

24. Fairfax, *supra* note 16, at 1110.

25. *See* discussion *infra* Part II.

II. BEHIND THE MATTHEW SHEPARD AND JAMES BYRD, JR. HATE CRIMES PREVENTION ACT

As mentioned, the HCPA in the federal context removed certain roadblocks that kept hate crimes from being categorized as such and also provided additional protections for different classes.[26] The passage of the HCPA did not come without disagreement. The legislation was sent to both President George W. Bush and President Barack Obama for a signature before being signed into law by President Obama on October 28, 2009.[27] On both occasions, the bill sent to the President was attached to a Defense Appropriations bill,[28] though the first time it did not turn out the way its advocates had hoped.

The legislation was passed as a long-awaited response to the horrific attacks against Matthew Shepard.[29] Matthew Shepard was a college student and was also gay.[30] At the conclusion of his evening at a bar, he left with a couple of men.[31] Shepard was brutally beaten that evening by those men and was tied to a fence post, where he eventually died five days later.[32]

The other named individual in the HCPA, James Byrd, Jr. had a similar fate. On his way home from his parents' house, three white supremacists picked up forty-nine-year-old Byrd (an African American), beat him in the woods, "then chained [Byrd] to [a] truck and dragged [him] for two miles."[33] Byrd gruesomely died in the process; his head and an arm were nearly a mile from where his torso was found.[34] Just as the 2012 mass shooting at Sandy Hood Elementary School in Newton, Connecticut, sparked societal conversation for legislative action about gun control, the gruesome deaths of Shepard and Byrd motivated the legislature to act on hate crimes. The same could be said of the legislature's response to the deaths of Shepard and Byrd at the hands of bias-motivated individuals.

"The Shepard Act altered existing hate crimes sentence enhancements to

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26. *See* discussion *supra* Part I.

27. Matthew Shepard Local Law Enforcement Hate Crimes Prevention Act of 2007, H.R. 1585, 110th Cong. § 1023 (2007), 153 CONG. REC. S12562 (2007); Presidential Veto Message, 154 CONG. REC. H5 (2008); Matthew Shepard and James Byrd, Jr. Hate Crimes Prevention Act, Pub. L. No. 111-84, §§ 4701-13, 123. Stat. 2835-44 (2009).

28. *See* National Defense Authorization Act for Fiscal Year 2008, H.R. 1585, 100th Cong. (2007); National Defense Authorization Act for Fiscal Year 2010, Pub. L. No. 111-84, 123 Stat. 2190 (2009).

29. Lisa Kye Young Kim, Comment, *The Matthew Shepard and James Byrd, Jr. Hate Crimes Act: The Interplay of the Judiciary and Congress in Suspect Classification Analysis*, 12 LOY. J. PUB. INT. L. 495, 496 (2011).

30. *Id*. at 495.

31. *Id*.

32. *Id*. at 495-96.

33. Carol Marie Cropper, *Black Man Fatally Dragged In a Possible Racial Killing*, N.Y. TIMES, June 10, 1998, http://www.nytimes.com/1998/06/10/us/black-man-fatally-dragged-in-a-possible-racial-killing.html?ref=jamesjrbyrd, *archived at* http://perma.cc/5L23-5AK7.

34. *Id*.

protect new groups: gender, disability, sexual orientation, and gender identity . . . ."[35] According to the Anti-Defamation League, the HCPA also allows the federal government to assist in the investigation and prosecution of bias-motivated crimes, supplementing protections for at most thirty-eight and providing initial protections for at least twenty states whose laws did not include one of the newly added classes under which hate crimes could qualify.[36]

The need for and the likely results from the HCPA were also outlined by the Anti-Defamation League from the 2009 FBI statistics, required to be compiled by the Federal Hate Crimes Statistics Act.[37] The Anti-Defamation League noted that between 2008 and 2009, reported hate crimes decreased by approximately 1100 crimes.[38] In particular, religion-based crimes decreased approximately 200 crimes; hate crimes against gay and lesbian individuals reduced by approximately seventy (reflecting 300 fewer victims); and crimes against Hispanics decreased by almost eighty.[39]

In addition to the factual basis the Anti-Defamation League provided, the legislature also made findings of fact within its procedure implementing the HCPA.[40] Among those were more general findings, such as: "violence motivated by the actual or perceived race, color, religion, national origin, gender, sexual orientation, gender identity, or disability of the victim poses a serious national problem."[41] Additionally, it "disrupts the tranquility and safety of communities."[42] The findings noted that "[e]xisting Federal law is inadequate to address this problem" and that "greater Federal assistance" was needed.[43] The legislature determined that "violent crime motivated by bias . . . devastates not just the actual victim and the family and friends of the victim, but frequently savages the community sharing the [victim's] traits."[44]

More interestingly, the legislature provided findings that discussed the need to eliminate "to the extent possible, the badges, incidents, and relics of slavery and involuntary servitude."[45] Because certain religious communities are considered "races[,] . . . it is necessary to prohibit assaults on the basis of real or perceived religions or national origins."[46]

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35. Kim, *supra* note 29, at 496.

36. ANTI-DEFAMATION LEAGUE, MATTHEW SHEPARD AND JAMES BYRD, JR. HATE CRIMES PREVENTION ACT (HCPA): WHAT YOU NEED TO KNOW 1 (n.d.), http://www.adl.org/assets/pdf/combating-hate/What-you-need-to-know-about-HCPA.pdf, *archived at* http://perma.cc/L6H6-YRVV.

37. 28 U.S.C. § 534 (2006).

38. ANTI-DEFAMATION LEAGUE, *supra* note 36, at 2.

39. *Id*.

40. Pub. L. No. 111-84, § 4702, 123 Stat. 2190, 2835 (2009).

41. *Id*.

42. *Id*.

43. *Id*.

44. *Id*.

45. *Id*. § 4702, 123 Stat. at 2836.

46. *Id*.

Aside from the expansion of classes covered under the HCPA, the bill also made it easier to enforce the protections against hate crimes by removing the previous requirement for hate crimes legislation that a victim be attacked because they were engaged in federally-protected activities.[47] "The new federal hate crimes legislation is, therefore, intended to 'fill the gap' for the few states that still lack hate crime legislation."[48] Though, if one reads a bit beyond what the phrase indicates, it seems the federal government was raising the bar to ensure uniform protection of the classes they added in the HCPA and to cure any other deficiencies that might be present in states' own hate crimes laws.

As mentioned above, this legislation did not pass without its own challenges. "Opponents of hate crime legislation argue that it is inappropriate because it creates special groups of victims, thereby countermanding equal protection under the law."[49] Additionally, there were concerns raised based on sexual orientation's inclusion in the protected classes.[50]

The Senate debates in preparation of the conference report provide valuable insight into the disagreement of the legislation's passage, particularly as it related to its addition into defense spending bills, but also the rationale behind its passage and interpretation.[51] Senator John McCain noted in the Senate's debate on the bill:

> I strongly disagree with the majority's decision to include hate crimes legislation in the national defense authorization bill . . . I again objected to the inclusion of this nongermane, nonrelevant language as an amendment to the defense authorization bill when the bill was being considered on the floor of the Senate. Today, I remain strongly opposed to its inclusion in the conference report . . . The stand-alone legislation . . . has not even been considered by the Senate Judiciary Committee, where it could have been debated, modified, and brought to the floor . . . .[52]

Senator McCain also considered it inappropriate to expand the laws "to cover a certain class of citizens from 'perceived injustices.'"[53] His criticism was not that violence against individuals should not be stopped, as he quoted an editorial from the *Detroit News*:

> Certainly, threats of violence or violence against individuals for any reason should be prosecuted to the full extent of the law. Not, however, because the victims are members of a particular race or sex, adherents of a particular religion or are gay. These crimes should be punished

47. ANTI-DEFAMATION LEAGUE, *supra* note 36, at 1.
48. Kim, *supra* note 29, at 502.
49. *Id*.
50. *Id*.
51. 155 CONG. REC. S10663, 10666 (2009).
52. *Id*.
53. *Id*.

> because the victims are uniquely valuable individuals who deserve the protection of the law solely on that basis. The idea of special prosecutions for "hate crimes" is inherently divisive.[54]

Senator McCain went further in his disapproval, but his objections were just as much procedural as they were substantive.[55] He was not only concerned about the expanding protections, but also that the bill had been attached to a "veto-proof" piece of legislation.[56] A number of other Senators voiced similar opinions.[57]

However, the discontent with the passage of the HCPA on a substantive and procedural level was not universal. Senator Cardin spoke his support for the HCPA:

> The passage of the legislation demonstrates that the Congress is fighting for people such as Stephen Johns, who was killed at the U.S. Holocaust Museum; Lawrence King, a 15-year-old student murdered in his high school because he was gay; James Byrd, who was beaten and dragged by a truck for 2 miles because he was Black; and for the 28-year-old California woman who was gang-raped by four men because she was lesbian. Today, we stand and say: No more. No longer shall we tolerate these types of actions.[58]

Here, Senator Cardin provided insight into the types of violations that constitute hate crimes. Interestingly, none of the examples of hate crimes provided by Senator Cardin—or any other Senator—mirror the circumstances in *Mullet*.

Although the arguments were generally the same, the House of Representatives was not without its own debate in the preparation of the conference report regarding the propriety of having such a bill, particularly on a substantive level.[59] None of the discussions reached the possibility of having hate crimes within the same class on the basis of that class as *Mullet* presents. The members of Congress in both chambers continued the common understanding of hate crimes as occurring between individuals of different classes.[60] It is possible that none had heard of situations, circumstances, or cases that had dealt with the intra-group hate crime issue before. At least one case found a hate crime in an intra-religious context before the passage of the HCPA and the comments that led to the development of the conference reports that were analyzed *supra*,[61] but it

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54. *Id*.

55. *Id*.

56. *Id*. *But see* Presidential Veto Message, 154 CONG. REC. H5 (2008) (discussing that even thought the first HCPA to make it to President George W. Bush's desk was within the "veto-proof" Defense Appropriations bill, Bush still vetoed it).

57. 155 CONG. REC. S10663 (2009).

58. *Id*. at S10675.

59. *Id*.

60. *Id*.

61. *In re* Vladimir P., 670 N.E.2d 839 (Ill. App. Ct. 1996).

was a minor event that led to a mere juvenile adjudication.[62] Additionally, even a cursory review of the Internet turns up few references to the case, particularly compared to the *Mullet* decision.[63]

The work behind the development of the HCPA, the findings of fact the legislature provided with the bill, and the overarching desire by its proponents to make targeting hate crimes more possible, led to a facially broad statute. The relevant portion of the statute states:

> (2) Offenses involving actual or perceived religion, national origin, gender, sexual orientation, gender identity, or disability.
>
> (A) In general. Whoever, whether or not acting under color of law, in any circumstance described in subparagraph (B) or paragraph (3), willfully causes bodily injury to any person . . . or attempts to cause bodily injury to any person, because of actual or perceived religion, national origin, gender, sexual orientation, gender identity, or disability of any person-
>
> (i) shall be imprisoned . . . .[64]

To ensure coverage under the law by the commerce clause—"guaranteeing constitutionality"—subparagraph (B) and paragraph (3) include that the actions must either explicitly be in interstate commerce or "otherwise affect[] interstate or foreign commerce."[65]

Again, note that nothing in the language of the statute indicates a limitation for hate crimes occurring intra-group or intra-religiously. However, through the legislative history discussed *supra*, it does not seem to be the explicit intention of the proponents of the bill to cover such circumstances.

III. INTRA-RELIGIOUS HATE CRIMES: A CASE ANALYSIS

In searching through the many hate crimes cases that have been decided by different courts, it is not at all common that this question of intra-religious—or even intra-group—hate crimes arises. It is an extremely rare occurrence. It is not troubling to find so few hate crimes cases on point, but it is troubling that both cases which will be discussed *infra* are off the mark in providing adequate analysis. The courts provide so little in their opinions and seem to express disbelief that a party would raise such an "obvious" claim.

The first of these cases is *In re Vladimir P.*[66] A young Orthodox Jewish boy, Bergovoy, was walking home one afternoon "wearing a head covering (yarmulke)

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62. *Id*. at 841.

63. The development of the Internet must be considered along with the comment. In 1996, the ability to "post" Internet materials certainly was not the same procedure it is in 2012. It is likely not the case that if the Internet were more widely accessible that *In re Vladimir P.* would have been more known.

64. 18 U.S.C. § 249(a)(2)(A) (Supp. 2010).

65. *Id*. § 249(a)(2)(B).

66. 670 N.E.2d 839 (Ill. App. Ct. 1996).

and prayer tassels (tzitzis), symbolizing his religious beliefs."[67] The respondent, Vladimir P., was with two friends sitting near Bergovoy's route home.[68] At least one of the boys began yelling: "Fuck you Jew, get out of here Jew, I am going to kill you Jew, fuck you Jew."[69] At that point, the boys threw a knife blade and the knife's handle at Bergovoy.[70] Vladimir had thrown the knife blade.[71]

After the knife was thrown, Bergovoy ran home; upon his arrival, he was obviously afraid.[72] Bergovoy's mother went outside to see who had done it and Vladimir's friend "approached and yelled, 'Fuck you Jew.'"[73] Vladimir explained that the reasons for their actions were that they were "bored" and Bergovoy "looked funny."[74]

Vladimir was found guilty of assault under the Illinois Hate Crime Statute based on the religion of the victim.[75] The state statute provided, in relevant part, and similarly to the HCPA:

> (a) A person commits a hate crime when, by reason of the actual or perceived race, color, creed, religion, ancestry, gender, sexual orientation, physical or mental disability, or national origin of another individual or group of individuals, he commits . . . [a crime].[76]

However, Vladimir's mother testified on her son's behalf, noting that Vladimir "knew what Bergovoy's head covering and tassels represented because [Vladimir] was Jewish."[77] Beyond that, Vladimir "and his family had come to the United States from Russia two years prior to this incident . . . because, as Jewish people, they did not feel safe."[78] Vladimir argued that his actions could not qualify as a hate crime because he himself was Jewish.[79] The court disagreed.[80] The court spoke to the fact that the statute merely requires the victim to be chosen "by reason of" his religion.[81] That statute seems to mirror what Congress would eventually provide in the HCPA: a broad enough statute that is not restricted by a requirement that the offender and victim be of different groups. However, the inference that these individuals are not members of different groups may not be so accurate.

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67. *Id*. at 841.
68. *Id*.
69. *Id*.
70. *Id*.
71. *Id*.
72. *Id*.
73. *Id*.
74. *Id*.
75. *Id*.
76. *Id*. at 841-42 (citing 720 ILL. COMP. STAT. ANN. 5 / 12-7.1 (West 1994)).
77. *Id*. at 841.
78. *Id*.
79. *Id*. at 845.
80. *Id*.
81. *Id*.

Vladimir challenged the application of the hate crimes legislation to his crime through a variety of hypothetical circumstances in which he questioned whether the legislation reached that far.[82] One such hypothetical asked whether the hate crime would be committed if a "bigoted white man threatens or attacks another white man because the second man dates an African American woman."[83] The court responded, interestingly, by citing a Illinois Court of Appeals decision, *In re B.C.*,[84] stating, "in situations where an alleged victim is neither a member of the group to whom the hatred is directed towards nor perceived by the offender to be a member of that group, section 12 7.1 is inapplicable."[85]

This dialogue between Vladimir and the court is relative to a void-for-vagueness challenge by Vladimir,[86] but speaks to the much larger problem about the applicability of hate crimes legislation to intra-group crimes. Did the court mean to say what it did? Did the court realize the implication of its response? But before seeking a means of reconciling what the court has said with what the court likely meant and how it decided the case, one must look beyond the precise language of the court's decision and analyze what the court's perspective might be.

One such scholar considers *In re Vladimir P.* in her evaluation of the inclusion of affinity-based securities and investment fraud within hate crimes legislation.[87] In discussing *In re Vladimir P.*, Lisa M. Fairfax brings to light the distinguishing elements of hate crimes based on differing analytical models: the discriminatory selection model and the racial animus model.[88] Although the analysis of these models is less important, she describes different scenarios, which under these models would still qualify an action as a hate crime. First, "[b]ecause the defendant and his friends identified the victim as Jewish and yelled offensive religious slurs at him, the defendant specifically selected the victim because of his race . . . [therefore] the defendant's conduct [is] a hate crime."[89] In addition:

> [T]he defendant claimed that he and his friends were bored and decided to pick on the victim because . . . [he] "looked funny." . . . [E]ven if there was insufficient evidence to prove that the defendant uttered offensive religious slurs, the trial court could infer that the defendant was not acting independently because he failed to disassociate himself from the group of boys, at least one of whom did utter such slurs.[90]

This interpretation of what constitutes a hate crime provides a wide array of

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82. *Id*. at 844.
83. *Id*.
84. 661 N.E.2d 1148 (Ill. App. Ct. 1996), *rev'd*, 680 N.E.2d 1355 (Ill. 1997).
85. *In re Vladimir P.*, 670 N.E.2d at 844.
86. *Id*.
87. Fairfax, *supra* note 16, at 1111-15.
88. *Id*.
89. *Id*. at 1111.
90. *Id*. at 1112.

circumstances under which an individual could be convicted. Moreover, Fairfax considers that even if there were no actual hate involved, it would still be possible to commit a hate crime.[91]

Fairfax calls this broader option the "Violent Show Off" criminal, a term originally coined by Professor Frederick Lawrence.[92] She notes "[t]he 'Violent Show Off' selects and assaults his victim in order to impress friends, but otherwise bears no ill will towards the victim."[93] Even though there is no hate, the offender still performs the crime "because his knowledge of his friends' animus ultimately drives" it.[94] The attack either manifests itself as an attack because of his friend's hatred or "a reckless disregard for the consequences of this action, and therefore [he] may be as culpable as those who commit" hate crimes.[95] Fairfax concludes "the defendant classifies as a hate crime perpetrator under the discriminatory selection model because he selected the victim because of race, and under the racial animus model because he commits the crime with full awareness of the hostility such act generates towards the victim."[96]

The conclusion that Fairfax draws is not unfounded, nor is it inconsistent with the legislature's broad writing and the court's broad reading of the law: it does not dismiss intra-group crimes. But, again, is that what is being posited here?

In a footnote, Fairfax raises the bigger concern, but passes on the issue's validity since the discussion was lacking in the court's opinion:

> In this case, the victim was an Orthodox Jew. While it is possible that one could argue that the defendant and the victim did not belong to the same identity group because one was Jewish and the other an Orthodox Jew, the court and the defendant appeared to concede that both the defendant and victim belonged to the same identity group for purposes of the hate crime statute. Thus, the court appeared to suggest that even if both the defendant and victim were Orthodox Jews, the fact would not preclude the defendant's enhancement under the hate crime statute.[97]

Fairfax also concludes that the distinction being drawn by Vladimir was irrelevant because hate crimes statutes seek an end to bias-motivated crimes not because of their cause, but because of their effects, as victims "suffered a greater degree of harm."[98] Additionally, "[b]y refusing to exclude same religion crimes, the court implied that the defendant['s] actions inflicted the harm the state was seeking to redress."[99]

Why does the court's decision need to be a passing rationale? Why is the

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91. *Id*. at 1112-13.
92. *Id*. at 1112.
93. *Id*.
94. *Id*.
95. *Id*.
96. *Id*. at 1113.
97. *Id*. at 1111 n.189.
98. *Id*. at 1111 n.190.
99. *Id*.

refusal to exclude same-religion crimes merely "implied"? If the consequences of hate crimes are so grave, why not say precisely what the rationale is to remove any belief that somehow if courts find common ground with the victim's class the offender can avoid hate crime prosecution?

Given Fairfax's analysis of *In re Vladimir P.*, and the same court's response to Vladimir's example of the white-on-white attack because of an African-American girlfriend, what conclusions can be drawn? The most important conclusion is that there is extreme inconsistency in how Fairfax would respond to the hypothetical and how the court responds.

The court's response was a reference to *In re B.C.*, a Illinois Court of Appeals case that discussed a peculiar hate crime analysis question.[100] Two minors had been charged with delinquency for committing hate crimes.[101] The petition against the minors indicated that they "displayed patently offensive depictions of violence toward African Americans in such unreasonable manner as to alarm and disturb James Jeffries and provoke a breach of the peace . . . ."[102] Interestingly, however, Jeffries was not an African-American, nor did anyone contend that the minors perceived him as a member of the race.[103]

Through the use of statutory interpretation rules, the court stated that if it allowed a hate crime to be found in the action based on a victim not having to be, or even thought to be, a member of the targeted group, "the word 'perceived' [in the statutory language] would be superfluous."[104] It noted that the legislature used that word "to encompass situations in which the perpetrator directed his hate crime against a person he thought was a person of a particular race, color, creed, etc., but who was actually not a member of that class."[105] As a result, the court held that because the victim was neither African-American nor perceived as such, the juvenile court did not err in dismissing the petitions against the juveniles and was therefore affirmed.[106]

The *In re Vladimir P.* court apparently found this persuasive enough for its purposes. The court combated Vladimir's contention that the hate crime statute was too vague to accurately interpret and implement, particularly in circumstances of intra-group hate crimes.[107] However, the true meaning of the analysis renders the logic of the court unreasonable. There are likely reasons that individuals engage in hate crimes other than the mere membership or apparent membership in certain defined classes of victims.

Fairfax provides some rationales for the importance of recognizing intra-group hate crimes. Her analysis begins with the notion that a court should not rule out intra-group hate crimes because that "discounts the fact that such

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100. 661 N.E.2d 1148 (Ill. App. Ct. 1996), *rev'd*, 680 N.E.2d 1355 (Ill. 1997).

101. *Id*. at 1149.

102. *Id*.

103. *Id*.

104. *Id*. at 1150.

105. *Id*.

106. *Id*.

107. *In re* Vladimir P., 670 N.E.2d 839, 844 (Ill. App. Ct. 1996).

members can experience feelings of prejudice towards members of their own group."[108] She cites the doll selection study performed by Kenneth Clark, which was considered by the Supreme Court in its *Brown v. Board of Education* decision, in which African-American children chose white dolls as superior to African-American dolls due to the effects of racism and segregation on personal value.[109] Fairfax notes that "minority groups can internalize feelings of racial inferiority," which can lead to intra-group hate, and potentially to intra-group crimes.[110]

Fairfax uses popular culture and the arts to provide context: "[T]he film 'Boyz in the Hood' depicts a black police officer harassing a young black boy while using racial epitaphs and claiming to hate black people. This phenomenon suggests that we cannot reject the possibility that racial animus impacts same race or religion crimes."[111]

Fairfax's opinion appears accurate in theory. The difficulty, however, is that there are no clear examples in our court system to see how the rationale would actually be delineated. Instead, the courts are inaccurately analyzing the issue, not providing the clarity needed.

Similar to the decision in *In re Vladimir P.*, the *Mullet* court came to the correct conclusion, though provided inaccuracies in its analysis.[112] Distinct from *In re Vladimir P.*, however, the *Mullet* court had an opportunity to address a possibly closer similarity between the offenders and the victims. As Fairfax indicated, and as discussed above, there was much assumed by the *In re Vladimir P.* court that might have been telling if actually written.[113] If the offending boys yelled obscenities at Bergovoy because of his head covering and tzitzis, saying that he "looked funny," yet Vladimir claimed to be of the same Jewish sect, there would be inconsistencies. Hasidic Jews wear particular clothing that distinguishes them from the rest of society—and even the rest of the Jewish faithful.[114] What would the result have been had Vladimir also been wearing a yarmulke and tzitzis?

Mullet gets closer to that question. Mullet himself argued not only that they were both Amish, as Vladimir argued they were both Jews or a denomination of Judaism, but that he was the spiritual leader of their particular community and only punishing them because they did not "adhere to his directives."[115] It is a much closer alignment between the religious communities than if Mullet and his

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108. Fairfax, *supra* note 16, at 1113.

109. *Id*.

110. *Id*. at 1113-14.

111. *Id*. at 1115.

112. *See* United States v. Mullet, 868 F. Supp. 2d 618, 624 (N.D. Ohio 2012) (finding that a hate crime can occur intra-religiously, yet providing an analysis surrounding inter-denominational violence).

113. Fairfax, *supra* note 16, at 1111 n.189.

114. Joseph Berger, *Dressing With Faith, Not Heat, In Mind*, N.Y. TIMES, June 28, 2012, at A19.

115. *Mullet*, 868 F. Supp. 2d at 624.

violent followers were members of a Pennsylvania Amish community and the victims were members of the Ohio Amish community. Similarly, Vladimir did not allege that, beyond his being Jewish, the two boys' families belonged to the same synagogue. That would have provided a closer opportunity to analyze the issue presented here.

Yet the *Mullet* opinion does not even indicate an interest in discussing that proximity between the offender and the victim. Rather, the decision avoids the discussion in terms that close and instead provides an analysis within a larger category that seemingly is "intra-," though more realistically still "inter-group."[116]

As mentioned at the outset of this Note, to state that the actions were intra-religious is not an inaccuracy, but that perspective does not go far enough to answer the question that *Mullet* and *In re Vladimir P.* have posed to the courts: What if it is closer than the same religion and gets to the same denomination? Is an intra-denominational hate crime possible?

Ultimately, *In re B.C.* was overturned by the Illinois Supreme Court.[117] "The statute [at question] includes no expression that the victim or complainant of the underlying offense must be that individual or of that group of individuals."[118] After reviewing the legislative debates, the court did "not find that the legislature contemplated penalty enhancement of the underlying offenses because of any improper motive in *selecting* victims."[119] The court noted that the legislation should be read expansively because a hate crime perpetrator could avoid conviction resulting from a misperception of the victim,[120] which would reasonably avoid the purpose behind protecting individuals from fear of violence.

The Illinois Supreme Court concluded all that was needed, and all that was present, were "patently offensive depictions of violence toward African-Americans that disturbed an individual [class not relevant] and provoked a breach of the peace."[121]

As a result of the Illinois Supreme Court's decision, the response provided to Vladimir was inaccurate. This inaccuracy is accentuated by another element of hate crime analysis: bias crime indicators.[122]

IV. THE LITTLE ELEMENT IN ANALYSIS: THE IMPORTANCE OF BIAS CRIME INDICATORS

A bias crime indicator is a clue that "law enforcement professionals look for in determining if a case should be investigated as a bias crime."[123] The list of bias

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116. *Id*.

117. *In re* B.C., 680 N.E.2d 1355 (Ill. 1997).

118. *Id*. at 1359.

119. *Id*.

120. *Id*. at 1360.

121. *Id*. at 1363.

122. *See* discussion *infra* Part IV.

123. K.A. MCLAUGHLIN ET AL., NAT'L CTR. FOR HATE CRIME PREVENTION, RESPONDING TO HATE CRIME: A MULTIDISCIPLINARY CURRICULUM FOR LAW ENFORCEMENT AND VICTIM

crime indicators was compiled for publication by the National Center for Hate Crime Prevention's Education Development Center.[124]

The list is a set of "objective facts, circumstances, or patterns attending a criminal act(s) which, standing alone or in conjunction with other facts or circumstances, suggest that the offender's actions were motivated, in whole or in part, by any form of bias."[125] Their presence suggests the possibility of motivation for hate crimes, but must be analyzed in the circumstances of each case.[126]

The indicators are each listed with examples provided and are quite varied. They include: racial, ethnic, gender, and cultural differences; comments, written statements, or gestures; drawings markings, symbols, or graffiti; organized hate groups; previous bias crimes or incidents; perceptions of the victim; offender's motive; the location of the incident; and the likes.[127]

Importantly, some of the examples provided within the categories of bias indicators give light to the circumstances both in *Mullet* and *In re Vladimir P.* Those include: the victim's "race, religion, ethnicity/national origin, disability status, gender, or sexual orientation . . . differs from that of the offender"; "[h]istorically, animosity exists between the victim's group and the offenders group"; and most importantly, "the victim was perceived by the offender as violating or breaking from traditional conventions."[128]

If the bias crime indicators are used by any law enforcement agency, or are the grounds for any prosecution, it is easy to see that the motivations behind the actions by Vladimir and Mullet and his posse were precisely those types of actions that provide grounds for the possibility of a bias motivation of a hate crime.

First, Mullet's and Vladimir's perspectives—regardless of what they stated in their court filings—were that the victims were not of a different religion than the offender. "Religion," as defined by *Black's Law Dictionary*, is:

> A system of faith and worship usu[ally] involving belief in a supreme being and usu[ally] containing a moral or ethical code; esp[ecially], such a system recognized and practiced by a particular church, sect, or denomination. In construing the protections under the Establishment Clause and the Free Exercise Clause, courts have interpreted the term *religion* quite broadly . . . .[129]

Religion, at least in this broad legal context, encompasses systems at a denominational level. That denominational analysis might be more apparent in

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ASSISTANCE PROFESSIONALS 14 (2000), https://www.ncjrs.gov/ovc_archives/reports/responding/files/sessionA.pdf, *archived at* http://perma.cc/8NEL-RWRN.

124. *See generally id*.

125. *Id*. at 15.

126. *Id*.

127. *Id*. at 15-17.

128. *Id*. at 15-16.

129. BLACK'S LAW DICTIONARY 1404 (9th ed. 2009).

Vladimir's case, in which it is likely that the offender and victim belonged to different branches of Judaism, even over Fairfax's opinion that the assumption by the court was that they were both Orthodox.[130]

In Mullet's case, it is not quite clear that the offenders and victims were of differing denominations. The only indication that the offenders and victims were of different groups is what news outlets allude to: a splintering off of the victim's group from Mullet's followers sometime around 2005.[131] Does that alone constitute a variety in the religious denomination to qualify as a hate crime?

There is a second relevant bias crime indicator: "[H]istorically animosity exists between the victim's group and the offender's group."[132] The court in *In re Vladimir P.* would likely not have found this relevant, considering that Orthodox Jews have—at least by its absence in the newspapers—been living a peaceful co-existence with other Jewish branches in this country for many years. However, the already-existing split within Mullet's Amish community might have indicated a bias motivation behind his and his group's actions.

Mullet broke away from mainstream Amish communities in the mid-1990s as a result of Mullet's perception of the "dissolution of traditional Amish culture. Boys rode their buggies while listening to stereos, girls skated on rollerblades . . . There were parties with beer in the woods and girls 'in their birthday suits' inviting dates into their beds."[133] After that initial break, Mullet's community had problems of its own: if men broke the rules, they "were paddled and locked in empty chicken coops."[134] Mullet had also been accused of having sex with married women and incestuous relationships with his own daughters.[135] In 2005, it was revealed that Mullet was having an affair with his son's wife, leading to the hospitalization of the son for a mental breakdown.[136] After this revelation, the group split, which led Mullet's followers to "reaffirm (sic) their loyalty to the group . . . eventually [leading] to the beard-cutting attacks."[137]

This split of the group resulting from the ongoing "punishment" and other extreme disciplinary practices could well be considered a "history of animosity between the victim's group and the offender's group." This would indicate additional elements of a bias motivation from the list of indicators.

The third relevant bias indicator might be most persuasive. It states, "[t]he victim was perceived by the offender as violating or breaking from traditional

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130. Fairfax, *supra* note 16, at 1111 n.189.

131. Michael McLaughlin, *Sam Mullet, Amish Leader Convicted Of Beard-Cutting Attacks, Gives Jailhouse Interview*, HUFFINGTON POST (Dec. 6, 2012, 11:54 AM), http://www.huffingtonpost.com/2012/12/05/sam-mullet-amish-beard-cutting-attacks_n_2246129.html, *archived at* http://perma.cc/7VZG-C9LY.

132. MCLAUGHLIN ET AL., *supra* note 123, at 16.

133. McLaughlin, *supra* note 131.

134. *Id.*

135. *Id*.

136. *Id*.

137. *Id*.

conventions . . . ."[138] There is no further explanation as to what a break from traditional conventions would look like, but the examples provided in the *In re Vladimir P.* court and the *Mullet* court seem to precisely fit this suggestion. The only question left would be how far we can consider breaks from traditional conventions within a denomination. Said differently, how minute can the break be for a crime to be considered a hate crime?

In *In re Vladimir P.*, reason mandates a reading that Vladimir himself was wearing neither a yarmulke nor tzitzis, otherwise the purpose behind his attacking Bergoloy because he "looked funny" is completely unfounded. It would seem that Vladimir's actions toward the victim were based on his perceived break from traditional conventions, presumably that he still, or ever, wore those religiously-significant objects. His actions were likely based on a perceived and perhaps real distinction between their religions and a break from the traditional conventions to which Vladimir or, more likely, Vladimir's family, subscribed.

Mullet was much more obviously guided by this precise element, given his legal position. Not only does his past indicate a propensity to magnify the distinctions between his perspective of traditional conventions and those of other Amish communities (the stereos, rollerblades, and beer parties), but he responded publicly, either through schism or extreme discipline.[139] The break from the traditional conventions was the catalyst that led to the beard-cutting attacks, and therefore should qualify as a hate crime. But the analysis is and should be distinct.

V. REFRAMING THE QUESTION

In reviewing the bias crime indicators that work to the benefit of those determining whether to qualify a crime as a bias-motivated or hate crime, there exists an opportunity to reframe the question presented to the courts. The courts should no longer be asked (or asking themselves) if there could be a hate crime intra-religiously, or within any group. Rather, the courts should ask if there is a distinction present with enough mass to drive even the smallest divide between the class to which the offender belongs and the class to which the victim belongs, even if their groups are or become a group of one. The other bias crime indicators should help provide additional light when seeking to define the potential divide.

The courts, then, should no longer conclude with statements affirming the possibility of intra-religious hate crimes. That conclusion, though potentially against the grain of public opinion, is more obviously within the realm of possibility than the circumstances presented to the court in the cases of *In re Vladimir P.* and *Mullet*. The courts are now asked to go further in their analysis, concluding not just that intra-group or intra-denominational hate crimes are possible, but that regardless of the pictures the offenders paint of being within the same class as the victim, a divide exists that can be seen by the court. The divide

138. MCLAUGHLIN ET AL., *supra* note 123, at 16.

139. McLaughlin, *supra* note 131.

can qualify the circumstances as "us versus them"—precisely the "badges, incidents, and relics of slavery and involuntary servitude" that Congress seeks to abolish.[140]

Now, instead of asking the possibility of intra-group or intra-religious hate crimes, the court should start its analysis from the "other side." It should ask a series of questions: What was the crime? What distinguishes the offender from the victim? What bias crime indicators help define the distinctions that do exist? Is the distinction central enough to the conflict that it is reasonable to conclude that it was the motivation of the crime? Is the distinction based on one of the protected classes?

Although the discussions might be more in depth, the courts will be supporting their conclusions reasonably, instead of avoiding the precise issue at hand. Then, if it is found to be outside the scope of the legislature's intent, the legislature can make the necessary amendments to ensure their purpose is met.

CONCLUSION

Congress's long road to provide the protections it desired for the classes they sought to protect resulted in a broad statute with little definition to provide guidance to the courts. The Matthew Shepard and James Byrd, Jr. Hate Crimes Prevention Act of 2009 expanded the protections against bias crimes not just to new classes of individuals, but also to qualifying classes of individuals that were still unprotected because they were not engaged in a federally protected activity. Although some states have provided some protections for those classes, it was not universally to the level that Congress has now provided.

Crimes are indeed terrible acts. Hate crimes, however, raise the bar of evil in our society. The HCPA has provided a necessary means of ridding our society of those acts. However, in doing so, the legislature, likely unintentionally, left the limits of the scope of that legislation quite vague. Considering members of Congress did not discuss intra-group hate crimes either in theory or in the examples of actual hate crimes that have been committed, it seems unlikely they considered those circumstances even a possibility. However, there is an unexpected gift in the breadth of the legislation: hate crime perpetrators are no longer able to hide behind their common membership in a group with their victims.

The courts in *Mullet* and *In re Vladimir P*. address this particular problem. When acts are clearly within the bounds of hate crimes—acts motivated by the perceived or actual religion of the victim—punishment cannot, and should not, be escaped. However, because the courts' analyses have not provided the precise language needed to ensure that outcome, the door was left open for future offenders to do just that.

In defining intra-religious hate crimes as the courts did after the challenges raised by the defendants in those cases, the courts avoided the hole that needed to be filled. In defining the conflict as they did, the courts were not necessarily

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140. Pub. L. No. 111-84, § 4702, 123 Stat. 2190, 2836 (2009).

contradicting the intentions of Congress. They were, however, leaving interpretive room for future courts to reach flawed conclusions. With the aid of the bias crime indicators, and the more expansive reading of hate crimes legislation that the courts are beginning to accept, the courts are now armed with the needed tools to address the inadequacy in the way the courts have explained and answered the question of intra-religious acts as hate crimes.

As to *Mullet*, the court was indeed correct in its conclusion, but the path to that conclusion must explicitly recognize that, in light of bias crime indicators, there is enough distinction between the victims' identity and Mullet's identity to constitute separate groups. Because the separate group exists, there is a divide of enough mass to allow a hate crime to be committed. The court should have examined the attacks with a clear and large worldview as well as with a magnifying glass strong enough to catch the nuance distinguishing the belief systems to which the perpetrators and victims subscribed. In tightening up the language used to explain true intra-religious actions versus inter-denominational actions, they provide the protections necessary and adequate for the victims of this crime and the victims of future crimes.

JOINT TENANCIES IN BANKRUPTCY: PRESERVING POST-PETITION SURVIVORSHIP RIGHTS FOR DEBTORS AND NON-DEBTORS ALIKE

JONATHAN D. LUKE*

INTRODUCTION

Fourteen years ago, Debora and her sister Sandra decided to help Federico, their father, buy a house worth $250,000. Federico had recently secured employment as a project foreman, so the sisters thought if he handled the monthly mortgage payments, they could contribute $30,000 (proceeds from their hard-won Mary Kay cosmetics sales), toward the fifteen percent down payment the bank required for a mortgage. Their father, who had lived many years in a moldy basement apartment, was touched by the sisters' plan and heartily accepted it. The bank approved the loan, and Debora, Sandra, and Federico signed the note and deed to the property, taking title as joint tenants with right of survivorship. A joint tenancy served Federico's interests best because he wanted the sisters to have the home when he died. The sisters, though initially not wanting to profit from what they considered a gift to their father, honored his wish, and Federico moved in, assured of both a mold-free house and the succession to it.

As the years rolled by, the national economy suddenly took a sharp turn for the worse. Bubbles burst, the job market sagged, and housing prices fell through the roof. Nevertheless, Federico never missed a payment on the home loan. His daughters, however, were not so lucky. Sandra pulled out of the Mary Kay sales business, and Debora, sadly without a steady income, fell seriously behind on her mortgage, car, and credit card payments. At the same time, Debora was burdened with excess cosmetics inventory no one wanted to buy during a recession. Faced with nearly imminent foreclosure, daily phone calls from creditors, and several court judgments against her, Debora approached a lawyer to file a Chapter 7 bankruptcy petition.

Debora's bankruptcy lawyer was knowledgeable and reasonably experienced, but as he began listing Debora's real property on Schedule A of her bankruptcy petition, the amount and nature of Debora's interest in Federico's home grew perplexing. Does Debora's interest include all the equity Federico built up in the home over the years, or is Debora's interest merely some one-third portion thereof?[1] And what about personal property Debora holds in joint tenancy, like

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* J.D. Candidate, 2014, Indiana University Robert H. McKinney School of Law, Indianapolis; B.A., with University Honors, 2010, Brigham Young University, Provo, Utah. I thank my wife for her patience and support, my mentor on the law review for reading a draft of this paper, and of course, the editors of the *Indiana Law Review*. I owe special thanks to my faculty advisor, Professor Max Huffman, as well as to a clerk of the bankruptcy court for her edits and encouragement. Additional thanks go to Carl Stevens of the Colorado Bar for answering my questions on Colorado joint tenancy law. I dedicate this Note to my son, Ben, who may own property jointly with his dad someday.

1. Under Indiana law, Debora would be assigned a one-third undivided interest in the whole

the car Debora and her husband own? Can she exempt the full value of the car, saving it from sale by the bankruptcy trustee, or is Debora entitled to exempt only half its value?[2] These difficult questions led the lawyer to a broader question of greater impact that significantly affected Debora and her family: Will filing Debora's bankruptcy petition sever her joint tenancies, causing them to devolve into tenancies in common?[3]

The joint tenancy with right of survivorship provides tenants with a convenient way of avoiding the expense of probate in the event of sudden death, and for that reason, joint property is sometimes called "the poor man's estate plan."[4] Thus, it comes as little surprise that when "poor" men and women fall into bankruptcy, a joint tenant's property interest also falls subject to the Bankruptcy Code[5] and the demands of creditors.[6] Although it appears in Debora's case to be a threshold issue determining the nature and extent of the bankruptcy estate, surprisingly few courts have ruled on whether filing a bankruptcy petition severs a joint tenancy with right of survivorship,[7] and courts that have decided the question merely contribute to an ever-prevailing split of authority.[8] Facing a dearth of published work on the issue,[9] this Note documents the extent of the split of authority on whether filing a bankruptcy petition severs a joint tenancy,[10] and giving due deference to state law with respect to property interest formation, urges Congress to amend the Bankruptcy Code to provide that filing a bankruptcy petition does not sever a joint tenancy.[11] The Note presents

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tenancy. *See infra* Part III.

2. Debora would likely be able to claim the full vehicle exemption allowed under state law no matter the number of existing debtor and non-debtor cotenants. *See, e.g.*, *In re* McLean, 505 B.R. 361, 364 (Bank. D. Me. 2014) (holding that since joint tenants own coequal shares (*per* my) of the whole (*per tout*), the debtors, filing jointly as husband and wife, could each claim the full state exemption under Maine law in one of two jointly owned vehicles, thus exempting them both); *In re* Halcomb, No. 2:10-CV-334-WTL-DKL, 2011 WL 2133560, at *3 (S.D. Ind. May 25, 2011) (unpublished opinion) (ruling that "[b]ecause the Jeep cannot be divided, and because each Debtor has a right to use and enjoy the whole vehicle, either the Husband or the Wife could exempt the entire value of the Jeep.").

3. *See infra* notes 20-21; *see also infra* Part III.

4. 2 RICHARD L. STOCKTON, EST. TAX & PERS. FIN. PLAN. § 17:45 (Edward F. Koren ed., 2012).

5. The Bankruptcy Code of 1978, 11 U.S.C. §§ 101-1532 (2006).

6. *See*, *e.g.*, Mangus v. Miller, 317 U.S. 178, 184 (1942) ("Utah accepts the general common law rules relating to joint tenancies, including the rules permitting alienation of the interest of a joint tenant, and making it property subject to execution and separate sale. . . . When so locally recognized the interest of a joint tenant is a property interest subject to the jurisdiction of the bankruptcy court. . . .").

7. *See infra* Part II.

8. *Id.*

9. *See infra* notes 31-33.

10. *See infra* Part II.

11. *See infra* Part V.

draft language for such an amendment.[12]

This Note also recommends that courts hold that filing a bankruptcy petition only severs a joint tenancy in a limited number of Chapter 7 cases and not in the Chapter 11 or 13 case.[13] In this way at least, the nature of a debtor-tenant's property will not change unnecessarily when a petition is filed where the debtor intends to maintain property in its original state throughout the bankruptcy process. So holding would provide the benefit of preserving survivorship rights for Chapter 11 and 13 debtors and non-debtor cotenants once the case is closed. The preferred alternative, however, would be amending the Code itself because it would also preserve the survivorship rights of non-debtor cotenants who by no fault of their own have those rights terminated because a fellow joint tenant filed Chapter 7 bankruptcy. These proposed changes are rooted in concepts of "fundamental fairness"[14] and the idea that bankruptcy law should not alter the nature and extent of estate property unless federal reasons exist for doing so.[15] Short of an argument that the Bankruptcy Code causes title to estate property to pass to the bankruptcy trustee,[16] courts have only used state law rationales in the past for severing joint tenancies in bankruptcy.[17]

Courts seemingly address this severance question as part of a deathbed repentance, postponing its address until a tenant—debtor or not—actually dies during the bankruptcy process.[18] At this point in the proceedings, players involved in the bankruptcy gain a strong incentive to litigate severance because of the right of survivorship, the joint tenancy's chief feature.[19] The right of survivorship ensures that when a joint tenant dies the surviving tenant takes the property "free and clear of the claims of the creditors or heirs of the deceased tenant."[20] In contrast, a surviving cotenant's interest in a tenancy in common "is subject to the liability of the surviving estate for the debts of the deceased tenant in common, a liability which does not exist in the case of a survivorship incident

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12. *See infra* Part V.A.

13. *See infra* Part II.C.

14. *See infra* Part V.B.

15. *See* Butner v. United States, 440 U.S. 48, 54 (1979) ("Property interests are created and defined by state law. Unless some federal interest requires a different result, there is no reason why such interests should be analyzed differently simply because an interested party is involved in a bankruptcy proceeding. Uniform treatment of property interests by both state and federal courts within a State serves to reduce uncertainty, to discourage forum shopping, and to prevent a party from receiving "a windfall merely by reason of the happenstance of bankruptcy."' (quoting Lewis v. Manufacturers Nat'l Bank, 364 U.S. 603, 609 (1961))).

16. *See infra* Part II.

17. *See infra* Part II.

18. *See infra* Part II.A-B.

19. Many courts recognize the right of survivorship as the joint tenancy's chief characteristic. *See*, *e.g.*, *In re* Estelle's Estate, 593 P.2d 663, 665 (Ariz. 1979) (naming the right the joint tenancy's "distinguishing feature"); Tenhet v. Boswell, 554 P.2d 330, 334 (Cal. 1976) (its "principal feature"); In re Estate of Thomann, 649 N.W.2d 1, 7 (Iowa 2002) (its "hallmark characteristic").

20. 48A C.J.S. *Joint Tenancy* § 2 (2013).

to a properly created joint tenancy."[21] Therefore, when a debtor-tenant or non-debtor cotenant dies during the bankruptcy process, creditors claim that filing a bankruptcy petition severs a joint tenancy and creates a tenancy in common; the surviving cotenants, seeking the protection of the survivorship right, argue no severance occurred.[22] These arguments come before the bankruptcy court every so often when a joint tenant dies, but this has not always been the case.

Before Congress enacted the Bankruptcy Code of 1978, courts had a clear answer to the question of whether a joint tenancy severs when a debtor-tenant files a bankruptcy petition. Section 70a of the then-current Bankruptcy Act of 1898 provided that the bankruptcy trustee held title to all estate property once the petition was filed.[23] Given the plain language of section 70a, courts reasoned that passing title from the petitioner to the bankruptcy trustee disrupted unity of title, one of the four common law unities traditionally required to create and maintain joint tenancies.[24] Consequently, under the former Bankruptcy Act, courts concluded that a joint tenancy necessarily severed when a joint tenant filed a bankruptcy petition.[25]

However, the Bankruptcy Code of 1978 replaced the title-transfer provision of section 70a with expansive granting language which left the courts in doubt about whether trustees in bankruptcy continued to hold legal title to estate property.[26] In broad strokes, section 541 of the Code provides that "all legal or equitable interests of the debtor in property as of the commencement of the case" pass to the bankruptcy estate.[27] Because title no longer passes by the plain language of current law to the trustee,[28] the trustee's claim on title to estate property is in doubt. The trustee's current role under the Code is simply "the representative of the estate."[29]

Because of this change in bankruptcy law, courts began fighting in the 1980s over the implications for both debtor-tenants who file bankruptcies and their

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21. 86 C.J.S. *Tenancy in Common* § 5 (2013) (quoting Anson v. Murphy, 32 N.W.2d 271, 273 (1948)).

22. *See infra* Part II.

23. *See* The Bankruptcy Act of 1898, 11 U.S.C. § 70a (1976) (repealed 1978) ("Title to Property. a. The trustee of the estate of a bankrupt and his successor or successors, if any, upon his or their appointment and qualification, shall in turn be vested by operation of law with the title of the bankrupt as of the date of the filing of the petition initiating a proceeding under this title, except insofar as it is to property which is held to be exempt, to all of the following kinds of property wherever located.").

24. *See*, *e.g.*, Flynn v. O'Dell, 281 F.2d 810, 817 (7th Cir. 1960) (discussing Illinois law on severance in view of the four unities).

25. *See id.* ("If one joint tenant becomes a bankrupt, the involuntary transfer of his interest to the trustee, which then takes place, [presumably operates] to effect a severance. . . .").

26. *See infra* Part II.A-B.

27. 11 U.S.C. § 541(a)(1) (2006).

28. *Id.* § 323 (makes no mention of trustee gaining title to estate property).

29. *Id.* § 323(a).

fellow non-debtor cotenants.[30] Former wisdom about the severance of joint tenancies became moot, and surprisingly, scholars have yet to fully unpack the split of authority that still plagues this issue. Although the literature on the joint tenancy itself is well developed, scholarly treatment of what happens to it in the event of bankruptcy has fallen by the wayside. Commentators who have taken up the issue either treat one side of cases in the split as undisputed law,[31] in some cases even developing legal theories based on this unsupported view,[32] or mention the split and do not discuss its implications.[33]

This Note clarifies the positions courts have taken on this issue, and based on current bankruptcy law and justifications for holding joint tenancy property, recommends a statutory solution favoring joint tenancies given their increasing prevalence and long-standing donative utility. Simply filing a bankruptcy petition should not create millions more tenancies in common in real and personal property when joint tenancies were originally intended. While some creditors may find it easier to recoup their losses if joint tenancies immediately convert to tenancies in common in the event of a tenant's bankruptcy, there are many reasons for avoiding this result. Severing a joint tenancy upon bankruptcy disrupts the original intent of the grantor merely because of the malfeasance or plain misfortune of the grantee, destroys what has become an important estate planning tool,[34] and as an ultimate consequence, further debilitates the bankrupt debtor in a process that is supposed to work towards his rehabilitation.[35] However, this recommendation does not come without due consideration given to the equitable rights of creditors. States can appropriately address the great weight of this concern by following Indiana's example in its treatment of mortgage liens. Ultimately, though, Congress needs to address the overall issue by amending the Code to provide that filing a bankruptcy petition does not sever a joint tenancy.

Part I of the Note introduces the issue, discussing the current prevalence of joint tenancies and bankruptcies in general, in order to reach the conclusion that courts will inevitably be forced to continue to address the dying debtor-tenant or non-debtor cotenant issue. Part II discusses the split of authority in the bankruptcy courts, contributing to it with an analysis of the different duties the trustee fulfills under the Code's various chapters. Part III summarizes Indiana's

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30. *See infra* Part II.

31. *See*, *e.g.*, Donald L. Swanson, *Bankruptcy-Probate and the Twain Shall Meet*, 20 CREIGHTON L. REV. 435, 446-48 (1987) (discussing only cases which hold that the tenancy severs).

32. *See* Jacquelyn L. Mascetti, Note, *Going for Broke in the Music Industry: Aligning the Code with the Interests of Recording Artists*, 19 AM. BANKR. INST. L. REV. 185, 196 (2011). (relying exclusively on cases which do not sever the joint tenancy to argue that co-authors of copyrights should be treated as joint tenants in bankruptcy).

33. *See, e.g.*, R. H. Helmholz, *Realism and Formalism in the Severance of Joint Tenancies*, 77 NEB. L. REV. 1, 31 (1998).

34. *See generally* 2 STOCKTON, *supra* note 4, § 17:45.

35. *In re* Morris, 10 B.R. 448, 451 (Bankr. N.D. Iowa 1981), *vacated in part*, 21 B.R. 816 (Bankr. N.D. Iowa 1982) (stating that the ultimate goal of bankruptcy is rehabilitation).

law on joint tenancies and provides a necessary state law backdrop to the discussion overall. Part IV relies on Indiana law and decisions of courts across the country to urge courts in Indiana and similarly situated states to hold that filing a bankruptcy petition does not sever a joint tenancy. In view of this recommendation, Part V concludes by providing a sample amendment to the Bankruptcy Code to resolve this problem, while also considering Supreme Court precedent and additional justifications for such an amendment in property theory and the Bankruptcy Code itself.

I. BANKRUPTCY AND THE GROWING PREVALENCE OF THE JOINT TENANCY WITH RIGHT OF SURVIVORSHIP

This particular severance problem will continue to compound in the courts until Congress amends the Code because of two considerations that, when taken together, form a recipe for continued confusion. First, the use of the joint tenancy as a form of property ownership has been increasing steadily throughout the past century, and indications are that this trend will continue.[36] Second, bankruptcy has taken its place as a mainstay of the U.S. economy, and based on current data, the number of bankruptcies in the United States is increasing, or at the very least, the number of filings per year remains high irrespective of the economic climate.[37] The interaction of these two variables will inevitably force courts to face more cases of dying debtor-tenants or non-debtor cotenants in the future. And because the Code is unclear on whether severance occurs upon filing bankruptcy, further cases will only contribute to the current split of authority. Given that bankruptcy law is at its core code-based, a statutory solution is necessary to protect survivorship rights that have been the defining characteristic of the joint tenancy for hundreds of years.

A. Joint Tenancies Were Historically Favored

The joint tenancy has been in use since the Middle Ages as an efficient means of passing property from one tenant to another, admittedly without the dreaded incidents which accompanied a property-holder's death. However, tax interests notwithstanding, during the Middle Ages, the common law favored joint tenancies over tenancies in common. The joint tenancy allowed owners to consolidate a fee interest in the hands of a few individuals, which made feudal services and incidents easier to enforce at the time.[38] Additionally, the joint tenancy remained the only means of estate planning for many years. These considerations caused courts to find a presumption in favor of joint tenancy creation.

Slow changes in English law from 1500-1700 CE, while at times eliminating the need for this presumption, nevertheless did not cause the joint tenancy to fall

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36. *See infra* Part I.B.

37. *Id.*

38. PAUL GOLDSTEIN & BARTON H. THOMPSON, JR., PROPERTY LAW: OWNERSHIP, USE, AND CONSERVATION 738 (Robert C. Clark et al. eds., 2006).

out of favor. The Statute of Uses in 1535 transformed equitable estates into legal estates and eliminated the need for the presumption in favor of joint tenancies.[39] Statutes adopted in 1539 and 1540 allowed for the partition of land, including joint tenancies.[40] The Statute of Wills in 1540 provided for direct succession of property at death, finally provisioning a legal alternative to joint tenancies.[41] Ultimately, the Statute of Tenures in 1660 abolished feudal dues.[42]

These statutes, though illustrating feudalism's steady decline, did not overturn property holders' favor of the joint tenancy, however.[43] Once the need for feudal dues was eliminated, property holders still saw the survivorship rights attached to a joint tenant's interest as a great benefit to their estate and heirs.[44] These benefits, derived from the equitable title that each joint tenant held, were manifold:

> [T]he joint tenancy gained strength as a means of avoiding the charges payable to the overlord on succession at death (i.e., the relief). The inability to transfer freely at death, the limitations on the types of future interests that could be created, and the problem of a minor heir could all be avoided by delaying legal succession of land ownership at death. By transferring the land to a group of individuals as joint tenants, succession was avoided until the last of the joint tenants finally died. Joint tenancy, thus, separated equitable ownership ('for the use of') from legal ownership.[45]

Therefore, as the legal strictures that held feudalism in place slowly gave way, property owners still found that the joint tenancy served their best interests as a way to evade incidents at death.[46] Because legal title did not pass to an heir until all joint tenants died, death taxes did not mature immediately upon a grantor's death.[47] However, the presumption in favor of joint tenancy creation did not last long.[48] Perhaps paradoxically, the very elements that made a joint tenancy desirable in England from the Middle Ages through the Late Renaissance caused the joint tenancy to fall into nearly universal legal disfavor as the new American Republic was born.[49]

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39. Stephanie J. Willbanks, *Taxing Once, Taxing Twice, Taxing Joint Tenants (Again) at Death Isn't Nice*, 9 PITT. TAX REV. 1, 4-5 (2011).

40. *Id.*

41. *Id.*

42. *Id.*

43. *Id.* at 4.

44. *Id.*

45. *Id.*

46. *Id.*

47. *Id.*

48. *Id.* at 5.

49. *Id.*

B. Joint Tenancies Are Currently Disfavored at Law but Are Widely in Use

In a trend that began in early nineteenth century America, state statutes began to disfavor the creation of joint tenancies.[50] Although tax benefits at death remained in place, courts and legislatures continued to object to the right of survivorship, the joint tenancy's most distinctive feature, as "an 'odious thing' that too often deprived a man's heirs of their rightful inheritance."[51] Following this trend, which works in favor of devisees, assignees, and intestate heirs, modern state statutes and courts continue—nearly universally—to announce disfavor with the joint tenancy as a form of property ownership.[52]

However, despite the current presumption against joint tenancy creation, many states provide for the creation of joint tenancies by statute or common law.[53] Persons living together, whether as couples or in groups, take liberal advantage of these statutes. For example, one scholar noted in the mid-1980s that "[the joint] tenancy is the most popular form of spousal residential property ownership in the United States. Indeed, it is safe to say that millions of land titles representing billions of dollars of capital investment are held in joint tenancy in this country."[54] It is also notable that "[m]any same-sex couples view joint tenancy with its automatic right of survivorship as an attractive way to own their property."[55]

Empirical evidence demonstrates that use of the joint tenancy in the United States has increased significantly over the past century. As part of a resurgence of interest in the joint tenancy as a form of property ownership, legal scholars in the 1960s published a study of real estate deeds of counties in California revealing that, in 1959 and 1960, residents held over two-thirds of the property

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50. GOLDSTEIN & THOMPSON, *supra* note 38, at 740.

51. N. William Hines, *Real Property Joint Tenancies: Law, Fact, and Fancy*, 51 IOWA L. REV. 582, 585 (1966), *cited in* GOLDSTEIN & THOMPSON, *supra* note 38, at 740.

52. *See, e.g.*, Larson v. Anderson, 167 N.W.2d 640, 644-45 (Iowa 1969) ("Our court as early as 1869 . . . said that estates in joint tenancy are disfavored by our law."); Edwin Smith, L.L.C. v. Synergy Operating, L.L.C., 285 P.3d 656, 663 (N.M. 2012) ("Th[e] preference for tenancies in common over joint tenancies has been incorporated into our law since territorial times."); Smith v. Cutler, 623 S.E.2d 644, 647 n.4 (S.C. 2005) ("[C]ourts have moved away from construing language in conveyances in favor of a joint tenancy.").

53. The number of states that allow for joint tenancies is a topic of dispute (mainly on the question of whether a state that allows for tenancies by the entireties for married couples also allows for a joint tenancy held by those couples), but it is accepted that the vast majority of states allow for common law joint tenancies or a statutory variant. *See* Samuel M. Fetters, *An Invitation to Commit Fraud: Secret Destruction of Joint Tenant Survivorship Rights*, 55 FORDHAM L. REV. 173, 173 n.1 (1986) (refuting the idea that the twenty-two states which allow tenancies by the entirety between married couples do not also allow them to hold their property as joint tenants).

54. *Id.* at 173-74.

55. 1 PATRICIA A. CAIN, SEXUAL ORIENTATION AND THE LAW § 5:24 (Karen Moulding ed., 2012).

as cotenants.[56] Additionally, eighty-five percent of the couples held the property as joint tenants.[57] A second study published in 1966 found that joint tenancies in Iowa "rose from less than 1 percent of land acquisitions in 1933 to over a third of farm acquisitions and over half of urban acquisitions in 1964."[58]

More recent studies confirm the growing trend toward using the joint tenancy as a preferred form of property ownership. A survey in 1999 of three hundred randomly selected deeds in Michigan discovered twenty-four of the deeds "specified a joint tenancy. Of those 24 deeds, four (16.7 percent of the joint tenancy deeds) described the grantees as joint tenants without express words of survivorship. The other 20 (83.3 percent) all specified some form of a right of survivorship."[59] And, more broadly, in a sample of deeds recorded in 1890, 1920, 1940, 1960, and 1980, in Bucks County, Pennsylvania, "nearly all real estate was in the name of a single individual. Usually the husband in a married couple took title solely for the pair; however, by 1980, almost 70% of Bucks County deeds named a husband and wife as co-grantees—typically as joint tenants with right of survivorship."[60]

This Author was unable to find a published study rebutting this evidence. Although some scholars and practitioners recommend that married couples take advantage of the more durable survivorship rights attached to tenancies by the entirety,[61] the great weight of the evidence supports the conclusion that over the past century persons living together have increasingly favored the joint tenancy as a form of property ownership.[62] This tendency appears to continue despite the ongoing legal presumption against joint tenancy creation in courts and state legislatures.[63] Therefore, because the joint tenancy has proven resilient and popular in the face of this adverse presumption, and because no contradicting evidence suggests otherwise, the joint tenancy will likely continue as a permanent and well-used feature of American property law for years to come.

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56. Yale B. Griffith, *Community Property in Joint Tenancy Form*, 14 STAN. L. REV. 87, 88 n.4 (1961).

57. *Id.*

58. GOLDSTEIN & THOMPSON, *supra* note 38, at 740 (construing Hines, *supra* note 51, at 586).

59. Byron D. Cooper, *Continuing Problems with Michigan's Joint Tenancy "With Right of Survivorship,"* 78 MICH. B.J. 966, 966 (1999).

60. CAROLE SHAMMAS ET AL., INHERITANCE IN AMERICA FROM COLONIAL TIMES TO THE PRESENT 172 (1987), *cited in* Robert C. Ellickson, *Unpacking the Household: Informal Property Rights Around the Hearth*, 116 YALE L.J. 226, 261 (2006).

61. *See, e.g.*, Damaris Rosich-Schwartz, *Tenancy by the Entirety: The Traditional Version of the Tenancy Is the Best Alternative for Married Couples, Common Law Marriages, and Same-Sex Partnerships*, 84 NOTRE DAME L. REV. 23, 24 (2008) (listing asset protection, probate avoidance, and protection against unilateral severance as some of the possible overarching advantages of a tenancy by the entirety).

62. *See supra* notes 50-60 and accompanying text.

63. *See supra* notes 50-52 and accompanying text; *see also* Part III.

C. The Widespread Use of Bankruptcy and the Inevitability of More Court Conflict

The United States has also experienced a widespread use of the bankruptcy process in recent years to discharge, repay, and reorganize debt. In the United States, 1,311,602 people filed bankruptcy from June 2011 to June 2012 alone.[64] Yearly filings as reported in June since 2000 have consistently been over one million, except for the years 2007 and 2008.[65] It is widely speculated that this decrease was due to uncertainties caused by the Bankruptcy Abuse Prevention and Consumer Protection Act (BAPCPA), which was taking effect at the time.[66]

However, towards the end of the Great Recession of 2007-2009, yearly filings increased to over one million once again in 2009 and exceeded 1.5 million in both 2010 and 2011.[67] Furthermore, even if the U.S. economy returns to peak output levels as experienced during the mid-to-late 1990s, it is likely that the number of bankruptcies filed in the United States will remain high because national filings consistently exceed one million even during relatively healthy economic periods.[68]

The social stigma that once attached to bankruptcy is perhaps also fading, thus contributing a social factor to the greater number of bankruptcy filings.[69] One commentator has pointed to two social causes for the increased public perception that bankruptcy is losing its stigma: one, a "shifting societal attribution of fault [to outside forces] for financial failure;" and two, the decline of "both guilt internalization and external non-legal sanctions [like the shaming and

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64. THE UNITED STATES COURTS, U.S. BANKRUPTCY COURTS—BANKRUPTCY CASES COMMENCED, TERMINATED AND PENDING DURING THE 12-MONTH PERIODS ENDING JUNE 30, 2011 AND 2012, TABLE F (2012).

65. THE UNITED STATES COURTS, U.S. BANKRUPTCY COURTS—BANKRUPTCY CASES COMMENCED, TERMINATED AND PENDING DURING THE 12-MONTH PERIODS ENDING JUNE 30, 2007 AND 2008, TABLE F (2008); THE UNITED STATES COURTS, U.S. BANKRUPTCY COURTS—BANKRUPTCY CASES COMMENCED, TERMINATED AND PENDING DURING THE 12-MONTH PERIODS ENDING JUNE 30, 2006 AND 2007, TABLE F (2007).

66. Lois R. Lupica, *The Costs of BAPCPA: Report of the Pilot Study of Consumer Bankruptcy Cases*, 18 AM. BANKR. INST. L. REV. 43, 51 (2010) ("In recent years, however, numerous consumers in financial distress chose not to file for bankruptcy: the number of consumers filing for bankruptcy protection declined following BAPCPA's enactment.").

67. THE UNITED STATES COURTS, U.S. BANKRUPTCY COURTS—BANKRUPTCY CASES COMMENCED, TERMINATED AND PENDING DURING THE 12-MONTH PERIODS ENDING JUNE 30, 2010 AND 2011, TABLE F (2011); THE UNITED STATES COURTS, U.S. BANKRUPTCY COURTS—BANKRUPTCY CASES COMMENCED, TERMINATED AND PENDING DURING THE 12-MONTH PERIODS ENDING JUNE 30, 2009 AND 2010, TABLE F (2010).

68. *See* THE UNITED STATES COURTS, U.S. BANKRUPTCY COURTS—BANKRUPTCY FILINGS, 12-MONTH PERIOD ENDING JUNE, BY CHAPTER AND DISTRICT 19-30 (1983-2003).

69. *See generally* Rafael Efrat, *Bankruptcy Stigma: Plausible Causes for Shifting Norms*, 22 EMORY BANKR. DEV. J. 481 (2006).

ostracizing of bankrupts]."[70] Although a continuing point of contention in the literature,[71] some argue that the crippling stigma once associated with bankruptcy has faded,[72] and some even posit that bankruptcy is beneficial for persons in certain careers.[73]

Whether debtors' motives are economic or social, the data support a projection that a high number of bankruptcy filings will continue nationally.[74] When considered alongside increasing numbers of joint tenancies in real and personal property,[75] it becomes evident that courts will continually confront the issue of the dying debtor-tenant or non-debtor cotenant in the future. Add to this calculation the notorious backlog that both state and federal courts face, and the problem exacerbates.[76] Because the current Code makes bankruptcy courts ill-equipped to deal with the issue of whether a tenancy severs when a bankruptcy petition is filed, and because bankruptcy should not fundamentally change the nature of estate or post-petition property, Congress should amend the Code to provide that filing a bankruptcy petition does not sever a joint tenancy.

II. DISCUSSION OF THE BANKRUPTCY CODE IN LIGHT OF A SPLIT OF AUTHORITY IN THE COURTS

The bankruptcy courts, and now a state appellate court, have been split since the 1980s over whether filing a bankruptcy petition severs a joint tenancy under the current Code, and as previously stated, commentators have given this legal problem little consideration.[77] As for the courts, they did not fully flesh out the

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70. *Id.* at 489.

71. *See, e.g.*, Teresa A. Sullivan et al., *Less Stigma or More Financial Distress: An Empirical Analysis of the Extraordinary Increase in Bankruptcy Filings*, 59 STAN. L. REV. 213, 246 (2006) ("The declining fortunes of those who are willing to file for bankruptcy, the significant underreporting of bankruptcy, and the characterization of bankruptcy as a terrible event only slightly less awful than losing a child all point to the possibility that stigma might be increasing even as bankruptcy filings continue to climb.").

72. *See* Efrat, *supra* note 69.

73. *See* Mascetti, *supra* note 32, at 185 ("[W]hile filing bankruptcy may not be exactly what the recording artist envisioned as a part of his or her career, it may be the recording artist's best option for success.").

74. *See supra* notes 64-68 and accompanying text.

75. *See supra* notes 56-60 and accompanying text.

76. *See* Christopher D. Bryan, *The Role of Law Clerks in Reducing Judicial Backlog*, 36-MAY COLO. LAW. 91, 94 (2007) ("By FY 2008, filings will have increased by 139 percent in a thirty year period, while judicial officers will have increased only 48 percent . . . . Judicial officers have not kept pace with increases in population which will have increased 76 percent over the same time period." (emphasis in original)); *see also* Toby J. Stern, *Federal Judges and Fearing the "Floodgates of Litigation,"* 6 U. PA. J. CONST. L. 377, 391 (2003) ("[T]he future of the federal court caseloads remains in a 'setting of profound uncertainty.'") (quoting RICHARD A. POSNER, THE FEDERAL COURTS: CHALLENGE AND REFORM 123 (1996)).

77. *See supra* notes 31-33.

reasoning found in the bankruptcy cases until the Appellate Court of Illinois decided *Maniez v. Citibank, F.S.B.*[78] in 2010. Although the *Maniez* court accomplished this feat, it ultimately decided the case on state law grounds, thus leaving the federal question open for further review.[79]

Upon review, it appears bankruptcy courts have generally confined their discussion of this issue to three subjects: 1) the strength of the trustee's claim to title over estate property as judged from the administrative chapters of the Code (Chapters 3 and 5); 2) the legislative history behind these sections; and 3) state laws, whether touching on bankruptcy or not, which may independently resolve the severance question. Sensing a need for clarity in this area, this part of the Note will review the split of authority in the bankruptcy courts based on their interpretations of the first two subjects and will reserve a discussion of the third topic for Parts III and IV. Going beyond mere recitation, this part will also conclude with a brief contribution to the courts' severance debate by providing a discussion of the bankruptcy trustee's roles as described in Chapters 7, 11, and 12 of the Bankruptcy Code. Despite the long-standing split of authority outlined below, no court or published opinion found by this Author has fully examined the roles of the trustee to resolve the bankruptcy severance debate.[80]

A. The Case for Severance

Courts rely mainly on legislative history and emphasize certain language in the Code to find a complete severance of a joint tenancy once a debtor files a bankruptcy petition. Three cases, two involving Chapter 7 liquidations and one involving a Chapter 11 reorganization, provide the principal support for this position. As the facts show in most cases, a debtor joint tenant or non-debtor cotenant died during the bankruptcy process, forcing the court to address the issue of whether filing a Chapter 7 or Chapter 11 petition severs a joint tenancy.

According to *Maniez*, the chief case providing the legal basis for severance is *In re Lambert*.[81] In *Lambert*, the debtor was a joint tenant in property along with his sister.[82] The debtor filed a Chapter 7 bankruptcy petition, and he and his cotenant argued that the bankruptcy estate's interest in the property was subject to the sister's survivorship right.[83] In other words, the debtor took the rather dubious position that the bankruptcy estate had no interest in the joint tenancy because of the right of survivorship.[84] In response, the court held that filing a

78. 937 N.E.2d 237 (Ill. App. Ct. 2010).

79. *Id.* at 251 ("[U]nder Illinois law, more than a transfer of the debtor's interest in property is required to sever the joint tenancy. Illinois law requires a conveyance, which does not occur until the trustee sells or otherwise disposes of the property and title passes. Therefore, in Illinois, the filing of a bankruptcy petition does not sever a joint tenancy.").

80. *See infra* Part II.C.

81. 34 B.R. 41 (Bankr. D. Colo. 1983).

82. *Id*. at 42.

83. *Id.*

84. *Id.* at 41.

petition severs a joint tenancy, giving "an undivided one-half interest in the subject property which is property of the [bankruptcy] estate."[85]

In reaching this conclusion, the court relied heavily on legislative history. The court noted that although it is true Congress deliberately replaced the title granting language of section 70a of the Bankruptcy Act, the court quoted the following lines from a Senate report suggesting that Congress intended title to pass from the debtor under § 541:

> "The debtor's interest in property also includes 'title' to property, which is an interest, just as are a possessory interest, or leasehold interest, for example. . . ." And further, in that same report, it is stated: "Once the estate is created, no interests in property of the estate remain in the debtor. Consequently, if the debtor dies during the case, only property exempted from property of the estate . . . will be available to the representative of the debtor's probate estate. The bankruptcy proceeding will continue *in rem* with respect to property of the estate, and the discharge will apply in personam to relieve the debtor, and thus his probate representative, of liability for dischargeable debts."[86]

The debtor did not provide any contradictory legislative history to refute the contents of this Senate Report, and the court did not feel that the removal of the title-granting language alone won the debtor's case.[87] However, even the contents of this report do not completely support the proposition that the Code causes title to pass to the trustee, disrupting the essential common law unity of title.

For additional support, the court looked to two Code sections:[88] Section 363, which allows the trustee to sell estate property,[89] and Section 522, which allows the debtor to exempt property from the estate.[90] In both sections, the court found special significance in the Code's use of the past tense of the verb "to have."[91] The court emphasized that subsection 363(h) provides that "'the trustee may sell both the estate's interest . . . and the interest of any co-owner in property which the debtor had, immediately before the commencement of the case, an undivided interest as a . . . joint tenant.'"[92] The court accentuated similar language in section 522: "[A] debtor may exempt from property of the estate 'any interest in property in which the debtor had, immediately before the commencement of the case, an interest as a. . . joint tenant. . . .'"[93]

Considering that the Senate Report provided that title passes from the debtor and that two sections of the Code included the past tense of "to have," the court

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85. *Id.* at 43.
86. *Id.* (quoting S. REP. NO. 95-989, at 82-83 (1978)).
87. *Id.*
88. *Id.*
89. 11 U.S.C. § 363 (2006).
90. *Id.* § 522.
91. *In re Lambert*, 34 B.R. at 43.
92. *Id.* (quoting 11 U.S.C. § 363(h) (1982)).
93. *Id.* (quoting 11 U.S.C. § 522(b)(2)(B) (1982)).

concluded that, in effect, title indeed passes to the trustee upon the filing of a bankruptcy petition.[94] On this basis, the court ultimately held that "the filing of a petition in bankruptcy effects a severance of any joint tenancy the debtor may have had in property and that the Trustee and the other former joint tenants of the debtor become tenants in common."[95]

Other courts were quick to follow *Lambert*'s lead. *In re Tyson*[96] involved a Chapter 11 reorganization of a husband and wife's estate.[97] The estate included property held in joint tenancy, but the husband died while the case was still pending.[98] The *Tyson* court quoted much of the court's reasoning in *Lambert* and concluded that by filing a joint Chapter 11 reorganization petition, the husband "lost any joint tenancy he may have had in real estate he owned with his wife. As a result, the bankruptcy estate of [the husband] has a one-half interest in the property in question."[99] In other words, by jointly filing a bankruptcy petition, the husband and wife had converted their separate, undivided interests in the property to tenancies in common.[100]

However, the *Tyson* court was faced with an argument that did not exist in *Lambert*: a trustee had not yet been appointed in *Tyson*, and therefore, the debtors argued, title had not passed to anyone in particular.[101] To resolve this Chapter 11 (and Chapter 13) problem, the *Tyson* court emphasized the differences between the debtor prepetition and the debtor's new, distinct, and unrelated role as debtor in possession—a role whose "rights, powers, and *duties* [are] analogous to those of a trustee had a trustee been appointed."[102] The court found that, although the Tysons had held the property jointly as husband and wife prepetition, and they continued in possession during the bankruptcy, the doctrine of the debtor in possession had, in effect, caused the debtors to pass title from themselves as debtors to themselves as debtors in possession, thus severing the tenancy.[103] *Tyson* therefore extended *Lambert*'s severance regime to Chapter 11 cases where the debtor assumes the trustee's role while remaining in possession.

Two Maryland cases following *Lambert* demonstrate that the case for severance of the joint tenancy in bankruptcy has modern staying power. *In re Panholzer*[104]and *In re Un Chin Kim*[105] arose out of two Chapter 7 bankruptcies in which the debtor died and the non-debtor cotenant died, respectively. *Panholzer* contributed some additional support to *Lambert*'s Code analysis in the form of a

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94. *Id.*
95. *Id.*
96. *In re* Tyson, 48 B.R. 412 (Bankr. C.D. Ill. 1985).
97. *Id*. at 413.
98. *Id.*
99. *Id.*
100. *Id*.
101. *Id.* at 414.
102. *Id.* (emphasis in original).
103. *Id.*
104. *In re* Panholzer, 36 B.R. 647 (Bankr. D. Md. 1984).
105. *In re* Yun Chin Kim, 288 B.R. 431 (Bankr. D. Md. 2002).

hearing before the U.S. House of Representatives in 1976.[106] The transcript offered the opinion of Professor Stefan A. Riesenfeld on whether the new Bankruptcy Code forced severances of tenancy property once a petition was filed: "'In a joint tenancy the trustee has title but it results in severance. Bankruptcy affects and converts anything that is joint tenancy into a tenancy in common.'"[107] Based on this observation, and *Lambert*'s prior reasoning, the court found that

> [t]he conclusion is inescapable, that if a joint tenancy is terminated 'if one of the cotenants conveys his interest to a third person,' that upon the filing of a voluntary Chapter 7 petition by a cotenant, he has similarly effected a conveyance that severs the tenancy. A comprehensive conveyance by the debtor to the Chapter 7 trustee takes place with the commencement of the proceeding and the creation of the bankruptcy estate under § 541(a).[108]

Yun Chin Kim, a 2002 case, followed *Panholzer*'s "inescapable" conclusion as binding precedent.[109] The court noted that, based on *Panholzer*'s holding, "[a]t the time of the bankruptcy filing, the joint tenancy would have been severed, and the Property would have been held as tenants in common."[110]

Lambert and its progeny thus stand for the surprising proposition that joint tenancies cannot exist in bankruptcy. Based on a combination of legislative history and emphasized readings of a few Code sections, these cases conclude that the Bankruptcy Code is embedded with a sort of innate enmity towards the joint tenancy as a form of property ownership in bankruptcy. If the *Lambert* line of cases were applied to Debora's case introduced at the beginning of this Note, filing a bankruptcy petition would cause her joint tenancies to sever, thus making them tenancies in common. Solely on this basis, if Debora were then to unfortunately die intestate, Sandra, unprotected by rights of survivorship and as closest of kin, would be liable for any of Debora's personal judgment liens that attached to her previous joint tenancy interest in Federico's home. However, a separate line of cases dismisses the legislative history the *Lambert* line finds persuasive and looks at Congress's intent and the Bankruptcy Code in a different light.

B. The Case for Preservation of the Right of Survivorship

In re Anthony[111] and *In re Spain*[112] oppose the *Lambert* line of cases and

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106. *In re Panholzer*, 36 B.R. at 651.

107. *Id.* (quoting *Hearings on H.R. 31 and H.R. 32, pt. 3 Before the Subcomm. on Civil and Constitutional Rights of the Comm. on the Judiciary*, 1519 (1976) (statement of Prof. Riesenfeld)).

108. *In re Panholzer*, 36 B.R. at 651 (quoting CORNELIUS J. MOYNIHAN, A PRELIMINARY SURVEY OF REAL PROPERTY 131 (1st ed. 1940)).

109. *In re Yun Chin Kim*, 288 B.R. at 433 n.1.

110. *Id.*

111. 82 B.R. 386 (Bankr. W.D. Pa. 1987).

112. 55 B.R. 849 (Bankr. N.D. Ala. 1985).

refute their severance arguments in two ways.[113] First, *Anthony* endeavored to find textual support to show that the *Lambert* leap to vesting title in the trustee simply did not hold up under closer analysis of § 363.[114] Second, *Spain* vigorously refuted *Panholzer*'s assertion that § 541 also served to pass title to the trustee and combated legislative history with the fact that Congress intentionally took out section 70a, which previously had explicitly given title to the trustee in estate property.[115] These two cases form the bulwark of the case for preservation of the right of survivorship under the current Code.

In *Anthony*, the debtor owned her residence jointly with her elderly mother, but during the debtor's Chapter 7 bankruptcy proceedings, her mother died.[116] The lender argued that the joint tenancy severed and became a tenancy in common when the debtor filed the bankruptcy petition.[117] Following this argument would have meant that while the debtor's liens could be avoided under § 522(f) only in the debtor's one-half of the estate, the liens could not be avoided in the deceased mother's one-half.[118] The lender pressed the case, arguing that because the debtor inherited the common tenancy property and not "by right of survivorship," the debtor also inherited her mother's lien at death.[119]

As in *Lambert*, the court looked to subsections (h), (i) and (j) of § 363 for clues as to whether the joint tenancy is automatically severed by the filing of a bankruptcy petition.[120] The court found that "[t]he trustee is permitted to sell only if partition is impractical, if sale of the total would produce significantly more than the parts, and if the benefits to the estate outweigh the detriment to co-owners."[121] From this language the court concluded that the trustee's right to sell was not absolute: "It sounds permissive, as though the trustee may sever a joint tenancy if the estate benefits and if the rights of the non-debtor/co-tenant are protected."[122] *Anthony* thus attempted to refute *Lambert*'s past tense analysis of "to have" by looking at what it viewed as the section's permissive language.

On this basis, the *Anthony* court held that the filing of a petition does not sever a joint tenancy with right of survivorship "unless the trustee actually executes against such property by attempting to sever or to sell the whole in order to liquidate such property."[123] The court then allowed the debtor to amend the value of the property and avoid the judicial lien and constable's levy to the extent that the liens impaired the debtor's exemption.[124] *Anthony* stands out among

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113. *See id.* at 853; *see also In re Anthony*, 82 B.R. at 388.
114. *In re Anthony*, 82 B.R. at 388
115. *In re Spain*, 55 B.R. at 853.
116. *In re Anthony*, 82 B.R. at 386.
117. *Id*. at 387.
118. *Id*.
119. *Id*.
120. *Id.* at 388.
121. *Id*.
122. *Id.*
123. *Id.*
124. *Id.*

federal bankruptcy jurisprudence in this area because it rebutted *Lambert*'s conclusion that § 363 continued to vest title to estate property in the trustee, reasoning instead that it merely gives the trustee permission to sell joint property in limited circumstances.[125]

Predating *Anthony*, *In re Spain* shores up the case against the *Lambert* line because it recounted the history behind tossing out section 70a of the old Bankruptcy Act, and ultimately, concluded that it did not have jurisdiction to decide whether the trustee has title to joint property not included in the bankruptcy estate. [126] *Spain* involved a case in which a husband filed an individual Chapter 7 bankruptcy petition including property held with his wife in joint tenancy with right of survivorship.[127] The trustee sought to sell the entire property, including the interest the wife had in joint tenancy as a non-debtor cotenant.[128] The wife objected in the strongest terms, arguing that the joint tenancy itself is indestructible and not subject to levy or sale under the laws of Alabama.[129] Although *Spain* cited state precedent which refuted the wife's state law argument, the court was not prepared to find that the tenancy severed because of the husband's bankruptcy petition.[130]

In reviewing the severance question, the *Spain* court first recounted that Congress had discarded section 70a of the old Bankruptcy Act,[131] thus causing the then-prevailing conception that the trustee held title over estate property to become moot.[132] Thereafter, the court concluded that, while "[i]t was the declared purpose of the drafters of the 1978 Act to disregard state law and to take as property of the estate any lands of the husband and wife for the payment of the husband's debts,"[133] Congress did not give the bankruptcy trustee title over the property in order to do so. In the court's words, bankruptcy law had become "confused,"[134] and "if it was the purpose of the drafters of the Code to disregard titles as defined under state law, Section 541 falls short of doing so. Of course, title to land was never created by federal law and it was clearly not Congress' intention to devise new estates in property."[135] Therefore, *Spain* drew on Congress's disposal of section 70a and state governments' traditional hold over

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125. *Id.*

126. *In re* Spain, 55 B.R. 849, 854 (Bankr. N.D. Ala. 1985).

127. *Id.* at 855.

128. *Id.* at 850.

129. *Id.*

130. *Id.* at 855.

131. *See id.* at 852 ("There is yet a more perplexing problem when the *trustee* in bankruptcy of the husband's estate seeks to sell the wife's interest against her will and consent. This issue brings into play a glaring defect in the title of the trustee caused by the failure to carry forward into the Bankruptcy Reform Act of 1978, former Section 70(a) of the Bankruptcy Act, which transferred title of the bankrupt to the trustee.").

132. *See id.* (referencing 4A Collier on Bankruptcy § 70, at 60 (14th ed. 1978)).

133. *Id.* at 853.

134. *Id* at 854.

135. *Id.*

granting title to property, while ignoring *Lambert*'s use of legislative history, to find that the trustee lacked title to estate property.

Assured in this conclusion, the court then proceeded to attack the opposing precedents that supported severance, namely *Lambert*, which the trustee presumably cited for support. The court in *Spain* began its attack with vigorous opposition to *Lambert*'s view that the tenancy severed because the trustee took title to bankruptcy property:

> Where does he get this? This concept is evidently from the fantasy world of make believe or born as a result of wishful thinking. It is just not true. . . . The debtor retains the full use, possession and enjoyment jointly with the trustee and the right to refuse to turn over or deliver such property in proper cases. There is no voluntary or involuntary transfer of property upon filing. . . . The trustee has no title to property of the estate until he elects to take affirmative action and proceedings are had or orders made.[136]

The court then moved to *Lambert*'s emphasis on the past nature of the debtor's property, the past tense analysis on Section 363, in which the *Lambert* court italicized "had" in subsection (h) to conclude that non-debtor cotenants had lost title to property when the debtor files a bankruptcy petition.[137] In response, *Spain* highlighted the words "at the time of the commencement of the case" which come after the "had" in subsection (h) in order to show that such analysis was not dispositive.[138]

Ultimately, the court refrained from ordering a sale of the wife's property, finding that the decision turned on a question of unsettled state law "because there are no provisions in the Code standing alone that would render it a matter of federal law."[139] The court even directed the trustee "to bring a bill of sale for division in the proper state court and test his title against that of the wife and debtor and have that court determine the quantum and nature of his estate."[140] *Spain* thus leveled an attack against *Lambert* and its progeny by emphasizing Congress's deletion of Section 70a, looking at the plain letter of Section 541 and ignoring its legislative history, finding no severance of joint tenancies when a bankruptcy petition is filed, and finally concluding that the Court lacked jurisdiction to decide the extent and nature of the estate the trustee would have otherwise.

Together, *Anthony* and *Spain* stand for the proposition that the debtor's property held in joint tenancy does not sever at the commencement of the case. *Anthony* found that *Lambert*'s interpretation of Section 363 was wanting:[141] the trustee does not have an absolute right to sell co-owned property not included in

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136. *Id.*

137. *Id.* at 855.

138. *Id.*

139. *Id.*

140. *Id.*

141. *In re* Anthony, 82 B.R. 386, 388 (Bankr. W.D. Pa. 1987).

the estate because his ability to sell such property is limited to circumstances where partition of the property is impracticable, the sale of the estate free and clear of such interests realizes significantly more for the estate than if the estate simply sold the debtor's prior interest, and the benefit to the estate from the sale outweighs the detriment to the non-debtor co-owners.[142] Reasoning that because these restraints on the sale of property would otherwise not exist if the trustee had title, *Anthony* concluded that the trustee had no title over estate property, and therefore no severance occurs.[143] Additionally, *Spain* contributed to the case for the preservation of the right of survivorship by finding that the legislative history *Anthony* propounded did not match up with the plain letter of Section 541.[144] The *Spain* court added a reading of subsection 363(h) which took emphasis away from the past nature of the co-owner's interest, held that the trustee did not have title to estate property, and even if the trustee had title, the court found it did not have jurisdiction to determine the quantum and nature of it.[145] *Anthony* and *Spain* are therefore the chief cases finding no severance of joint tenancies when either a voluntary or involuntary case commences under the Bankruptcy Code.

C. The Role of the Trustee

The *Lambert* line of cases and both *Anthony* and *Spain* centered their severance discussion around whether the trustee possesses title to estate property, pouring through relevant sections of the Code and looking to legislative history for guidance, but it appears these cases did not examine the differing roles the Bankruptcy Code assigns to the trustee under Chapters 7, 11, and 13—particularly with respect to the trustee's rights of alienation of estate property. Because the ability to sell and transfer title to property is incident to the rights of ownership,[146] it is also an indicator that the transferor likely possesses title to the property.[147] This generally being the case, it follows *a fortiori* that if the Code

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142. *See* 11 U.S.C. §§ 363(h) (1)-(4) (2006).

143. *In re Anthony*, 82 B.R. at 388.

144. *In re Spain*, 55 B.R. at 853-54.

145. *Id.* at 855.

146. The incidents of property ownership—particularly alienation—are ancient common law rights. *See* Brandon v. Robinson, 18 Vesey, 429 ("[O]ne of the inseparable incidents to the ownership of personal property, is, that it shall be liable for the debts of the owner, and that a restraint upon its alienation is void.") (quoted in Lenoir v. Rainey, 15 Ala. 667, 670 (1849)).

147. Indeed, longstanding precedent in New York states,

> The ownership of the fee cannot exist in one person while the ownership of the right of alienation and of its fruits, exists in a different person. This is a principle older than the common law of England. *Grotius,* (*Book* 1, *Ch.* 6, § 1,) says, "Since the establishment of property, men who are masters of their own goods, have by the law of nature the power of disposing of, or of transferring all or any part of their effects, to other persons; for this is the very nature of property; I mean of full and complete property;" and, therefore, Aristotle says, "It is the definition of property to have in one's self the power of alienation."

gives the power to sell property to the trustee in one instance, but not in another, then the trustee has a greater claim to title over property that she is entitled—or better yet *commanded*—to sell. The differences in the roles assigned to the trustee under each chapter of the Code reveal that, if there is any chapter of the Code under which the trustee could assert a claim to title over estate property, it is likely Chapter 7 and not any other chapter.[148] Only Chapter 7 commands the trustee to sell all non-exempt property of the estate.[149]

Section 704 of the Code lists twelve duties for a trustee in a Chapter 7 case.[150] These duties include being accountable for all estate property, investigating the financial affairs of the debtor, and opposing a discharge if advisable.[151] However, first on the list of the trustee's duties under Section 704(a)(1), and perhaps the Chapter 7 trustee's primary duty, is the following: "[C]ollect and reduce to money the property of the estate" and "close such estate as expeditiously" as possible.[152] The Code gives the Chapter 7 trustee broad powers in order to accomplish the sometimes tedious job of selling off estate property. These remarkable powers include the trustee's "strong arm" powers, typified by Sections 542 through547, which among other things, provide for the turnover of estate property to the trustee,[153] grant to the trustee the rights and powers of a lien creditor or bona fide purchaser of real property in relation to other claimants,[154] and authorize the trustee to avoid preferential transfers to creditors ninety days before the petition is filed.[155] The Code reinforces the trustee's strong arm powers with the ability to sell, lease, and use estate property and, as *Lambert*, *Anthony*, and *Spain* make clear,[156] sell property interests that are not part of the estate like those of non-debtor cotenants.[157] The Code thus gives the Chapter 7 trustee extensive powers in order to sell property belonging to and not belonging to the estate in order to fulfill the trustee's mandate to "reduce to money" estate property.

Although the strong arm powers and the powers of sale of Chapters 3 and 5

De Peyster v. Michael, 6 N.Y. 467, 493 (1852).

148. *See* 11 U.S.C. §§ 704(a)(1)-(12) (2006).

149. *See id.* § 704(a)(1); *see also* Looney v. Hyundai Motor Mfg. Alabama, LLC, 330 F. Supp. 2d 1289, 1292 (M.D. Ala. 2004) ("Under 11 U.S.C. § 704(1), the trustee of a Chapter 7 estate possesses a responsibility and power that a Chapter 13 trustee does not, that is, a Chapter 7 trustee shall 'collect and reduce to money the property of the estate . . . .'" (quoting 11 U.S.C. § 704(a)(1))).

150. *See* 11 U.S.C. §§ 704(a)(1)-(12) (2006).

151. *See id.* §§ 704(a)(2)-(6).

152. *Id.* § 704(a)(1).

153. *See id.* § 542.

154. *See id.* § 544.

155. *See id.* § 547.

156. *See supra* Part II.A-B.

157. *See* 11 U.S.C. § 363(f)-(j) (2006).

are also available to trustees in Chapter 11[158] and Chapter 13[159] cases (and Chapter 12, for that matter), those powers are to be used for purposes other than the complete sale and closure of the estate. Because Chapters 11 and 13 aim at rehabilitating debtors and establishing payment plans for debts to creditors,[160] Sections 1106 and 1302 leave out the absolute command to sell all things belonging to the estate. Instead, Section 1106 makes the Chapter 11 trustee generally accountable for the property, maintenance, and betterment of the bankruptcy estate.[161] Similarly, the Chapter 13 trustee is not commanded to seek the rapid sale of estate assets under Section 1302, but rather that section mandates that she perform supervisory duties, like advising and assisting the debtor in performance of the approved Chapter 13 plan.[162] Although both sections provide that Chapter 11 and Chapter 13 trustees should account for all estate property, and in all cases both trustees are under fiduciary duties to vigorously pursue all property that should belong to the estate,[163] Chapter 11 and Chapter 13 trustees do not have an absolute mandate to expeditiously sell off estate property.

The difference in mandates between Chapter 7 trustees on one side and Chapter 11 and Chapter 13 trustees on the other impinges upon the severance debate. If what really is at stake in *Lambert* and *Spain* is the strength of the trustee's claim to title over estate property, and the ability to alienate certain property is the *sine qua non* of title ownership, then Section 704's command that the trustee sell estate property indicates that a Chapter 7 trustee's claim to title over estate property is greater than either a Chapter 11 or Chapter 12 trustee's claim. Therefore, this also indicates that if the transfer of title to a tenant's interest is required to sever a joint tenancy, then severance will likely occur only in a Chapter 7 context—rather than in a Chapter 11 or Chapter 13 case. This title analysis, which bankruptcy courts have determined to be crucial to the severance debate,[164] therefore reveals that federal courts operating under the Bankruptcy Code should sever joint tenancies, if at all, only when a debtor files a Chapter 7 bankruptcy petition.[165]

III. INDIANA JOINT TENANCY LAW AS A HEURISTIC DEVICE

By and large, bankruptcy courts look to non-bankruptcy law in order to

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158. *See id.* § 1106.

159. *See id.* § 1302.

160. Chapter 11 bankruptcy, or reorganization, involves rehabilitation. CHAPTER 11 REORGANIZATIONS § 12.01 (2d ed. 2013). In addition, Chapter 13 bankruptcy is titled "Adjustment of Debts of an Individual with Regular Income," suggesting the setting up of payment plans.

161. 11 U.S.C. § 1106(a)(1) (2006) ("A trustee shall perform the duties of a trustee, as specified in paragraphs (2), (5), (7), (8), (9), (10), (11), and (12) of section 704(a).").

162. *See id.* § 1302(b)(1) (leaving section 704(a) out of the Chapter 13 trustee's mandate).

163. *See id.* 11 U.S.C. § 1106(a)(1); *see also id.* § 1302(b)(1).

164. *See supra* Part II.A-B.

165. *But see infra* Part IV (explaining that such a result will likely obtain only in states following the common law of joint tenancies)..

determine the nature of the debtor's interest in property,[166] and by the same token, bankruptcy courts also look to state law in order to determine how joint tenancies sever.[167] In order to understand why some bankruptcy courts require the trustee to prove he has title to estate property before allowing the joint tenancy to sever, it will be useful to briefly explore the common law of joint tenancies. Indiana has been faithful to this law, with one important exception to be discussed later, and will serve both as an example of the common law of joint tenancies and as a valuable counterpoint to more contemporary trends in joint tenancy law to be discussed in Part IV.

By Indiana statute, there is a codified preference for tenancies in common over joint tenancies, but persons wanting to hold property as joint tenants can overcome the preference if either of the following are met: "(1) [I]t is expressed in the conveyance or devise that the grantees or devisees hold the land or interest in land in joint tenancy and to the survivor of them; or (2) the intent to create an estate in joint tenancy manifestly appears from the tenor of the instrument."[168] In addition, Indiana accepts the four common law unities of time, title, interest, and possession for the purposes of creating and maintaining a joint tenancy.[169] As Blackstone explained, "joint-tenants have one and the same interest, accruing by one and the same conveyance, commencing at one and the same time, and held by one and the same undivided possession."[170] Debora's joint tenancy introduced at the beginning of this Note would have had to fulfill the four common law unities in order to have been created in Indiana: Debora, Sandra, and Federico would all have had a one-third undivided fee interest in the estate (unity of interest); acquired their interest by the same deed (unity of title); obtained that interest at the same time (unity of time); and been entitled to possess the entire estate (unity of possession).

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166. *See* Butner v. United States, 440 U.S. 48, 54 (1979) ("Property interests are created and defined by state law. Unless some federal interest requires a different result, there is no reason why such interests should be analyzed differently simply because an interested party is involved in a bankruptcy proceeding."); *see also In re* Ford, 3 B.R. 559, 565 (Bankr.. D. Md. 1980) ("[I]n the absence of a federal law of property, the existence and nature of the debtor's interest in tenants by entireties property are determined by nonbankruptcy law.").

167. See,. *e.g.*, *In re* Spain, 55 B.R. 849, 854 (Bankr. N.D. Ala. 1985) (stating that the state court had jurisdiction over the issue).

168. IND. CODE § 32-17-2-1(b)(1)-(2) (2012).

169. *See* Hornung v. Biggs, 223 N.E.2d 359, 360-61 (Ind. App. 1967) ("[T]he prerequisites of an estate in joint tenancy are: 'First. The tenants must have one and the same interest. Second. The interest must accrue by one and the same conveyance. Third. The interest must commence at one and the same time. Fourth. It must be held by one and the same undivided possession.'" (quoting Case v. Owen, 38 N.E. 395, 395 (Ind. 1894)). However, the requirement of unity of time, at the very least, has been relaxed for joint tenancies in personal property. *See* Robison v. Fickle, 340 N.E.2d 824, 833 (Ind. Ct. App. 1976) ("[W]e consider them to be a vestige of the past with no requisite application to creation of joint tenancies with right of survivorship as to savings accounts, bank certificates of deposit or corporate common stock.").

170. 2 WILLIAM BLACKSTONE, COMMENTARIES ON THE LAWS OF ENGLAND 180 (1979).

The common law joint tenancy severs and becomes a tenancy in common if any one of these unities fails. Therefore, a joint tenancy in Indiana severs if a tenant alienates his interest, thus defeating the unity of title.[171] Debora, for example, could have accomplished this by unilaterally conveying her interest to her husband. Severance can also occur at the request of a joint tenant who files a petition in state court to partition the estate.[172] Indiana courts partition joint tenancies *pro rata* by giving each tenant coequal shares.[173]

Importantly, the Indiana joint tenancy is distinct at state law and bankruptcy law from similar forms of joint property ownership like the tenancy by the entireties. Only married couples can own entireties property in Indiana, and because the state has opted out of the federal bankruptcy exemptions, entireties tenants are allowed to take the homestead exemption for both husband and wife.[174] Indiana law exempts entireties property from the bankruptcy estate but not joint tenancy property.[175] These realities will be given due consideration in this Note's recommendations for state and national treatment of the joint tenancy when a debtor-tenant finds herself on the verge of bankruptcy.

IV. RECOMMENDATION FOR COURTS IN INDIANA AND SIMILARLY FORMALIST STATES

The distinction between realism and formalism in joint tenancy law among the several states plays a significant role in whether a joint tenancy severs when a bankruptcy petition is filed. States like Indiana, which follow a more formalist approach, consider whether one of the common law unities has failed once a petition is filed.[176] States like Colorado, however, which judicially discarded its notion of the common law unities in favor of a realist approach, focus on the debtor's intent in filing a bankruptcy petition to determine if severance occurs.[177] As may be expected,[178] it is easier to sever a tenancy in a realist state. Thus, a

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171. Morgan v. Catherwood, 167 N.E. 618, 622 (Ind. App. 1929).

172. Cunningham v. Hastings, 556 N.E.2d 12, 13 (Ind. Ct. App. 1990).

173. *Id.*

174. IND. CODE § 34-55-10-2(c)(1) (2012) ("(c) The following property of a debtor domiciled in Indiana is exempt: (1) Real estate or personal property constituting the personal or family residence of the debtor or a dependent of the debtor, or estates or rights in that real estate or personal property, of not more than fifteen thousand dollars ($15,000). The exemption under this subdivision is individually available to joint debtors concerning property held by them as tenants by the entireties.").

175. *See id.* § 34-55-10-2(c)(5) ("Any interest that the debtor has in real estate held as a tenant by the entireties. The exemption under this subdivision does not apply to a debt for which the debtor and the debtor's spouse are jointly liable.").

176. *See* Hornung v. Biggs, 223 N.E.2d 359, 360-61 (Ind. App. 1967) (setting forth the four unities that are prerequisites for an estate in joint tenancy).

177. *See* Taylor v. Canterbury, 92 P.3d 961, 966 (Colo. 2004).

178. *See* Helmholz, *supra* note 33, at 31 ("If one looked honestly at the filer's probable intent, had he given it any thought, the severance would occur at the moment of filing.").

state court in formalist Illinois held that filing a petition does not sever a joint tenancy,[179] while bankruptcy courts in Colorado held that filing a petition in that state does sever the tenancy.[180] Therefore, this Note recommends, at the very least, that courts in formalist states not sever joint tenancies when a debtor-tenant files a Chapter 11 or Chapter 13 bankruptcy petition.

Maniez v. Citibank, the recent Illinois case identifying the split of authority in the bankruptcy courts over the severance issue,[181] illustrates how formalist states interpret the Bankruptcy Code in relation to state property law when a debtor-tenant files a bankruptcy petition in the state.[182] As in many of the relevant bankruptcy cases, the facts involve a death in the family.[183] A wife, faced with a judgment lien against her and other personal debts, decided to file individually for bankruptcy.[184] She received a discharge, but shortly thereafter, her husband died.[185] The creditor holding the judgment lien argued that because the husband was not involved in the bankruptcy, the judgment lien passed to the wife despite her discharge because she inherited the estate and its encumbrances.[186] In support of this argument, the lien creditor advanced the theory that by filing the bankruptcy petition the wife severed the joint tenancy and her survivorship right, which would have protected her from inheriting the perfected lien attached to the property.[187]

In response, the *Maniez* court followed the reasoning of *Spain* and *Anthony*, and depended on Illinois' four unities requirements for the creation and maintenance of joint tenancies, to conclude that filing a bankruptcy petition does not sever a joint tenancy in Illinois.[188] The court first acknowledged that, in Illinois, simply filing a lien on property does not amount to a conveyance of title from the joint tenant title-holder to the lien-holder.[189] From this, the court

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179. *See* Maniez v. Citibank, F.S.B, 937 N.E.2d 237, 249 (Ill. App. Ct. 2010).

180. *See Taylor*, 92 P.3d at 967.

181. *Maniez*, 937 N.E.2d at 248.

182. *Id.* at 248-49.

183. *Id*. at 241.

184. *Id*.

185. *Id*. at 242.

186. *Id*. at 248.

187. For states like Illinois that reject the title theory of mortgages, a lien attached to joint property only survives as long as the mortgaging tenant survives and does not pass through right of survivorship to other co-tenants, though they may otherwise be the decedent's heirs. *See, e.g.*, Harms v. Sprague, 473 N.E.2d 930, 934 (Ill. 1984) (internal citations omitted) ("[W]e find that the mortgage executed by John Harms does not survive as a lien on plaintiff's property. A surviving joint tenant succeeds to the share of the deceased joint tenant by virtue of the conveyance which created the joint tenancy, not as the successor of the deceased. The property right of the mortgaging joint tenant is extinguished at the moment of his death. While John Harms was alive, the mortgage existed as a lien on his interest in the joint tenancy. Upon his death, his interest ceased to exist and along with it the lien of the mortgage.").

188. *Maniez*, 937 N.E.2d at 248.

189. *Id*. at 249.

explained, it follows that perfecting a lien interest in property does not disrupt the unity of title required to maintain the tenancy.[190] The court then summarized its holding as follows, relying on *Spain* and *Anthony*'s holdings that no transfer of title of debtor property occurs when the debtor files his petition:

> [T]he Bankruptcy Code provides that the debtor's legal and equitable interests in property are transferred to the bankruptcy estate. However, under Illinois law, more than a transfer of the debtor's interest in property is required to sever the joint tenancy. Illinois law requires a conveyance, which does not occur until the trustee sells or otherwise disposes of the property and title passes. Therefore, in Illinois, the filing of a bankruptcy petition does not sever a joint tenancy.[191]

As a result, the judgment lien simply disappeared when the husband died, leaving the wife, as beneficiary of her survivorship rights, with title free and clear of the lien she had originally discharged in her Chapter 7 case.[192] Thus, formalist states, which require a full disruption of unity of title by complete conveyance to another entity, afford joint tenants greater protection from creditors by holding that the tenancy remains intact when a tenant files a bankruptcy petition.

In contrast, courts in realist states, which focus on the intent of a tenant rather than four unities continuity to decide severance questions, are more likely to hold that a tenancy severs when a debtor-tenant files a bankruptcy petition. The realist revolution in joint tenancy law began in the 1950s and continues to this day:

> During the 1950s, a series of articles, comments, and case notes appeared in American law reviews dealing with the then-current law relating to severance of joint tenancies. It is not too much to say that they echoed a single theme: The inherited law of severance was based upon a needless and outmoded formalism. The commentators concluded that the law of severance of joint tenancies had become "thoroughly burdened with concepts which might be described as archaic."[193]

The Colorado Supreme Court, as an example of an authority bearing the realist torch, followed the call of the 1950s reformists in *Taylor v. Canterbury*,[194] observing that "[i]n stark contrast to traditional common law, the modern tendency is to not require that the act of the co-tenant be destructive of one of the essential four unities of time, title, possession or interest before a joint tenancy is terminated."[195] The better approach, according to the court, was to "[recognize] that a joint tenancy may be terminated by mere agreement between the joint

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190. *Id.* at 248.

191. *Id*. at 251.

192. *Id*. at 251-52.

193. Helmholz, *supra* note 33, at 1 (quoting Robert W. Swenson & Ronan E. Degnan, *Severance of Joint Tenancies*, 38 MINN. L. REV. 466, 466 (1954)).

194. 92 P.3d 961 (Colo. 2004).

195. *Id.* at 966 (citing Mann v. Bradley, 535 P.2d 213, 214 (1975)).

tenants, despite the fact that no property is conveyed or interests alienated."[196] This led the court to discontinue looking to the four unities for issues of tenancy severance, relying instead on the intent of the parties in any particular case.[197] Under this scheme, the severance issue becomes a question of fact, as "[a]ctions that are inconsistent with the right of survivorship may terminate a joint tenancy."[198]

After the Colorado Supreme Court's *Taylor* decision in 2004, the federal district court in Colorado, the source of *In re Lambert* twenty-nine years earlier,[199] was "compelled" to hold in *In re Slifco*[200] that filing a bankruptcy petition severs a joint tenancy.[201] In *Slifco*, a husband and wife held four parcels of property in joint tenancy which were subject to a lien.[202] The husband independently filed a Chapter 7 bankruptcy petition and separated from his wife.[203] Meanwhile, as the wife attempted to sell the properties to satisfy the encumbering lien, the husband died while his petition was before the bankruptcy court.[204] Upon these facts and in view of *Taylor*, the court, although noting an independent basis for finding that the parties intended for the tenancy to sever,[205] concluded that "filing for Chapter 7 bankruptcy evinces an *intent* to sever joint tenancy interests in any property scheduled as nonexempt. This analysis is exactly what is prescribed by the Colorado Supreme Court in *Taylor*."[206]

The *Slifco* court also partially based its conclusion on a second Colorado case, *Mangus v. Miller*,[207] which held that an option to purchase an interest in a joint tenancy causes it to sever.[208] Pointing to subsection 363(h) of the Bankruptcy Code, the district court observed that the trustee has the option of selling estate property "under certain conditions, at any time."[209] And further, pointing to subsection 363(i), the court noted that if the trustee chooses to sell, non-debtor cotenants have a right of first refusal.[210] Taking these two options together in conjunction with the holdings in *Mangus* and *Taylor*, and setting aside

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196. *Id.*

197. *Id.*

198. *Id.* (citing *Mann*, 535 P.2d at 214-15).

199. *See supra* Part II.

200. *In re* Slifco, No. CIVA 06CV-01781-EWM, 2007 WL 1732782 (D. Colo. June 14, 2007) (unpublished opinion).

201. *Id.* at *8.

202. *Id*. at *1.

203. *Id*.

204. *Id*.

205. *Id.* at *6 (finding that a previous agreement between the husband and wife to sell the properties and divide the proceeds was an action inconsistent with the right of survivorship).

206. *Id.* (emphasis in original).

207. Mangus v. Miller, 532 P.2d 368 (Colo. Ct. App. 1974).

208. *See id.* at 369-70 ("The right of either party to insist upon a sale to one or the other is wholly inconsistent with the continuance of a joint tenancy relationship.").

209. *In re Slifco*, 2007 WL 1732782 at *8.

210. *Id.*

the opposite holdings in *Anthony* and *Spain* as only dealing with four unities analysis, the federal court in *Slifco* felt it did not have to concern itself with where title falls when a bankruptcy petition severs a joint tenancy: "If the Colorado Supreme Court, in making severance easier, was not discouraged by any possible uncertainty with respect to property titles, this court is equally unconcerned."[211] Therefore, the realist state law in Colorado caused the Colorado district court to observe that severance of joint tenancies is easy in the state, not concerning itself with unity of title problems, and thus filing a petition for bankruptcy causes a Colorado joint tenancy to sever.

Taking stock of differences in state law between formalist and realist conceptions of joint tenancies, this Note recommends—at the very least—that courts in states still recognizing the four unities hold that filing a Chapter 11 or Chapter 13 bankruptcy petition does not sever a joint tenancy. Because analysis in these states focuses on whether title passes to the bankruptcy trustee, and a Chapter 7 trustee has an absolute mandate to sell off estate property (using section 363(h)), courts in those states may find that title passes in the Chapter 7 context. However, because the Chapter 11 and Chapter 13 trustee lacks such a mandate, state law centering around the four unities, as illustrated in *Maniez*, will likely cause states to find that no severance occurs.

V. A PROPOSED AMENDMENT TO THE BANKRUPTCY CODE

As illustrated in Part I, the joint tenancy is an increasingly prevalent form of property ownership across America.[212] Bankruptcy is also a common economic mainstay, critical for debt collection and debtor rehabilitation.[213] Thus, given the number of bankruptcy filings and the widespread use of the joint tenancy, the two will continue to collide until a resolution surfaces to the current split of authority in the bankruptcy courts. The collision will continue because the death of a tenant or non-debtor cotenant gives rise to severance litigation.[214] When a party in interest dies during the bankruptcy process, the trustee is obliged to pursue property which may belong to the estate, and the surviving tenants want their share of the pie—preferably without the deceased tenant's obligations.

Further, the split of authority shows no sign of healing since its inception in the 1980s, and with the recent decisions in *Maniez*, *Yun Chin Kim*, and *Slifco*, it appears courts are splintering in their rationales rather than unifying behind a single authority.[215] State courts treat severance questions differently based on whether they have caught the tide of realist change or continue to analyze severance based on the age-old four unities test. Bankruptcy courts are at loggerheads over whether the Code provides for severance or not, with some

211. *Id.*
212. *See supra* Part I.B.
213. *See supra* Part I.C.
214. *See supra* Part II.
215. *See supra* Part II. This paragraph summarizes its contents.

emphasizing the departure of old section 70a to find no severance[216] and with others searching in legislative history to find the trustee does have title, thus finding severance.[217] Others choose to emphasize the past tense of words in the Code, finding on this basis that non-debtor cotenants lost title to their property when the debtor-tenant filed his petition.[218] Opposing courts highlight words directly following the verb in past tense to show that such readings are strained.[219] While this may all be part of the diligent work of a lawyer, this is no way to run a railroad. The train seems only to lurch back and forth, and worse, someone usually must die for it to move at all.

At bottom, the question of whether a joint tenancy severs when a debtor-tenant files a bankruptcy petition should be resolved in section 541, where the Code delimits the boundaries of estate property. The following proposed amendment can be added as subsection 541(g): "Notwithstanding any other provision of this title, the commencement of a case under Sections 301, 302, and 303 does not sever a joint tenancy with right of survivorship." By including this short addition to section 541, labeled "Property of the Estate," it would ensure both that all debtor property passes to the bankruptcy estate and that the tenancy does not sever, preserving survivorship rights given by state codes. When a debtor-tenant files a bankruptcy petition, all legal and equitable rights to the joint property held by the debtor-tenant would pass to the estate under section 541(a)(1), and the bankruptcy estate—not the trustee—would assume the debtor's previous survivorship rights. If a non-debtor cotenant died while the case was still pending, the bankruptcy estate would be enriched by a greater portion of the estate and would take the whole of the property in fee simple if no other tenants remain. Of course, in all cases, the trustee could exercise the Section 5 strong arm powers or Section 363 powers of sale in order to dispose of estate property, thus severing joint tenancies in favor of creditors if the estate's portion of the equity in joint tenancy property exceeds appropriate exemptions.[220] Therefore, the proposed subsection 541(g) would only prevent joint tenancy severance when a bankruptcy case commences. Applicable state severance law would apply to all other severance questions as the case continues before the bankruptcy court or on appeal.

A. Mending the Split of Authority

In effect, the proposed subsection 541(g) addresses the disputed severance question ex ante instead of ex post as the courts in the split of authority have done. When a debtor fills out Schedule A of a Chapter 13 bankruptcy petition, she should be confident in describing the nature of her interest as a "joint tenant with right of survivorship" instead of wondering whether that status will change

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216. *See In re* Spain, 55 B.R. 849, 855 (Bankr. N.D. Ala. 1985).

217. *See In re* Lambert, 34 B.R. 41, 43 (Bankr. D. Colo. 1983).

218. *See id.*

219. *See In re Spain*, 55 B.R. at 854.

220. *See supra* Part II.C.

by filing the petition.[221] Subsection 541(g) would unequivocally provide that joint tenancies can exist in bankruptcy, assuring debtors, non-debtors, and their lawyers of the debt protections survivorship rights provide. This in turn would allow debtor-tenants like Debora, who does not want her father, Federico, or her sister, Sandra, to be potentially liable for her debts, to file bankruptcy petitions unworried about possible effects on family members or legatees.

In this way, 541(g) allows for a satisfying conclusion to the split of authority discussed in Part II. It is indeed notable that 541(g) provides this remedy without addressing the heart of the severance debate: whether the trustee has title to estate property.[222] Resolving the trustee title problem is unnecessary, however, to assure that cotenants maintain their rights of survivorship during bankruptcy. Addressing the trustee title issue directly would likely have unforeseen or deleterious effects on other areas of law[223] and would certainly tread on states' traditional authority to determine property rights.[224] Subsection 541(g) avoids these pitfalls by simply providing that a tenancy does not sever when a petition is filed.[225] The end goal of the proposed section is to allow joint tenancies to exist in and after bankruptcy, where *Lambert* and its progeny do not. Thus, under 541(g), joint tenancies and attendant survivorship rights may pass unharmed through Chapter 11, 13, and the "no asset" subset of Chapter 7 cases.[226]

Overruling the *Lambert* line and specifically the *Tyson* holding, subsection 541(g) ensures the preservation of joint tenant survivorship rights under Chapters

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221. Schedule A of a Chapter 7 or Chapter 13 petition requires debtors to describe the location of property, the nature of the debtor's interest in the property, its current value, and the amount of any secured claims on the property. *See* B6A (OFFICIAL FORM 6A), SCHEDULE A-REAL PROPERTY, *available at* http://www.uscourts.gov/uscourts/RulesAndPolicies/rules/BK_Forms_1207/B_006A_1207f.pdf, *archived at* http://perma.cc/65V9-ZBUY.

222. See *supra* Part II for a full discussion.

223. *See, e.g.*, Lisa M. Hebenstreit, *Tying Together the Tax and Bankruptcy Codes: What Is the Proper Tax Treatment of Abandonments in Bankruptcy?*, 54 OHIO ST. L.J. 859 (1993) (illustrating the tax effects of giving title to the trustee in abandonment cases).

224. *See* Butner v. United States, 440 U.S. 48, 54 (1979) ("Property interests are created and defined by state law. Unless some federal interest requires a different result, there is no reason why such interests should be analyzed differently simply because an interested party is involved in a bankruptcy proceeding. Uniform treatment of property interests by both state and federal courts within a State serves to reduce uncertainty, to discourage forum shopping, and to prevent a party from receiving 'a windfall merely by reason of the happenstance of bankruptcy.'") (quoting Lewis v. Manufacturers Nat'l Bank, 364 U.S. 603, 609 (1961)).

225. *See supra* Part V.

226. *See* Teresa A. Sullivan et al., *Less Stigma or More Financial Distress: An Empirical Analysis of the Extraordinary Increase in Bankruptcy Filings*, 59 STAN. L. REV. 213, 227 n. 46 (2006) (citing Michael J. Herbert & Domenic E. Pacitti, *Down and Out in Richmond, Virginia: The Distribution of Assets in Chapter 7 Bankruptcy Proceedings Closed in 1984-1987*, 22 U. RICH. L. REV. 303, 310 (1988) ("Almost all consumer bankruptcies are 'no asset' cases, with nothing available to be sold to pay creditors, primarily because of security interests, taxes, and exemptions.").

11 and 13, where debtor rehabilitation is the focus. Consider Debora's case under a Chapter 11 or 13 scenario, where Debora, now with a solid monthly income but unable to service her debts, submits a plan to the bankruptcy court to repay outstanding obligations.[227] Her petition would list the joint ownership interests Debora, Sandra, and Federico possess in Federico's home. Once her plan is approved and her case is settled, her undivided stake in the joint tenancy would remain unchanged. Federico's original exercise of his right to devise and bequeath his property as he sees fit would go unmolested; creditors would be entitled their due under the approved plan; and Debora would have the chance of further rehabilitation under a non-probate scheme if Federico or Sandra die. Importantly, Federico and Sandra, who were never involved in Debora's bankruptcy, would also keep their survivorship rights after Debora's bankruptcy petition, during her bankruptcy, and afterwards in the event any tenant dies. Although this Note recommends that this Chapter 11 and 13 result should nevertheless obtain in bankruptcy filings in formalist states under the current Code,[228] the proposed subsection 541(g) would put to rest any claim that joint tenants lose survivorship rights because one of them restructures debts in bankruptcy.

Additionally, unlike the *Lambert* line's interpretation of the Bankruptcy Code, 541(g) would also preserve survivorship rights in common Chapter 7 "no asset" cases. Simultaneously, it would allow for severance in bankruptcy where the debtor's joint tenancy interest has any value which would further satisfy the debtor's obligations. For example, consider the situation where Federico has accumulated $60,000 of equity in his home, and Debora's portion as a joint tenant is $20,000. Debora's bankruptcy case would be a "no asset" case if her overstock of Mary Kay inventory were subject to a security interest up to the full value of the collateral and all her other personal and real property was exempt. If Debora lived with her father in a state opting out of the federal exemptions contained in section 522(d),[229] and the state allowed a $17,600 exemption in real estate, then Debora's Chapter 7 case would not be a "no-asset" case because her joint tenancy interest exceeds the applicable exemption by $2400. The trustee could justly seek the sale of Federico's home under section 363(h), [230] thus severing the tenancy, in order to obtain the $2,400 to further satisfy Debora's unsecured credit card debts.

In contrast, if federal exemptions apply in Debora's case, she would be entitled to exempt up to $21,625,[231] and her case would be a "no asset" case because the federal exemption covers the full $20,000 value of her joint tenancy

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227. *See generally* 11 U.S.C. § 1123 (2006 & Supp. 2013); *id.* § 1322 (outlining the requirements of a Chapter 11 or 13 plan).

228. *See supra* Part IV.

229. *See* 11 U.S.C. §§ 522(b)(2)-(3) (2006 & Supp. 2013) (allowing states to opt out of federal exemptions and write their own).

230. *See id.* § 363(h) (permitting the trustee to sell interest in property).

231. *See id.* § 522(d)(1) (providing for an exemption in real property that the debtor or a dependent of the debtor uses as a residence).

interest. It makes little sense to sever the tenancy in such a "no asset" case, thus depriving cotenants of survivorship rights, where the trustee has no right or ability to sell the estate's interest in the joint tenancy.[232] In order to preserve these rights, 541(g) would prevent the severance of joint tenancy when a debtor files a Chapter 7 petition in a "no asset" case.

This scheme does not depend on the inconclusive nature of the legislative history on which *Lambert* relied. Nor is it based on overemphasized readings of the verb "to have." Additionally, it does not depend for a foundation upon Congress's dismissal of section 70a of the Bankruptcy Act, as the court in *Spain* partially did to find no severance of joint tenancies in bankruptcy.[233] Instead, influenced by *In re Anthony*'s conclusion that the trustee's powers of sale are permissively given, though his Chapter 7 mandate absolute,[234] 541(g) seeks a clean slate where joint tenancies enter the bankruptcy estate and leave intact if the debtor-tenant's interest is of no practical value for creditors. This is a fair result for creditors, and importantly, it is fair for both debtors and non-debtor cotenants whose survivorship rights are at stake. Therefore, adding this subsection to the Bankruptcy Code will resolve the split of authority, advance the interests of the estate and debtor where necessary, and not inequitably dissolve the rights of persons not involved in the bankruptcy. Filing a bankruptcy petition in federal court in either a formalist or realist state should not unilaterally cause a joint tenancy with right of survivorship to sever.[235]

B. Theoretical Underpinnings

Although bankruptcy courts deal in equity, the idea of "fairness" as the foundational rationale behind an amendment to the Bankruptcy Code may strike some as odd. After all, bankruptcy is like the Dickensian debtors' prison where failed consumers go to atone for their sins and where creditors find cruel pleasure in exacting every last farthing from debtors' impoverished families. Luckily, however, debtors' prisons were federally abolished in the United States in 1948,[236] but a search for the "deep structure"[237] of bankruptcy law continues. To

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232. *See* 11 U.S.C. § 363(h)(3) (2006) (mandating in a sale of a co-owner's interest that the benefit of the sale to the estate outweigh the detriment to the co-owners).

233. *See supra* Part II.B.

234. *See supra* Part II.C.

235. The Colorado Legislature came to this very conclusion in 2008 when it overruled the *Taylor* and *In re Slifco* decisions discussed in Part IV. *See* COLO. REV. STAT. ANN. § 38-31-101(5)(b) (2013) ("Filing a petition in bankruptcy by a joint tenant shall not sever a joint tenancy."); *see also* Carl G. Stevens, *Evolution of Joint Tenancy Law in Colorado: Changes to CRS § 38-31-101*, 2009, 38-APR. COLO. LAW. 65, 65 (2009) (highlighting specific changes the law makes and the joint tenancy's "sophisticated planning options").

236. *See* 28 U.S.C. § 2007 (2006) (providing that debtors shall not be imprisoned for debts in federal courts in states where imprisonment for debt is abolished) (originally enacted as Act of June 25, 1948, ch. 646, 62 Stat. 960).

237. David G. Carlson, *Philosophy in Bankruptcy*, 85 MICH. L. REV. 1341, 1389 (1987).

explore the theoretical underpinnings of proposed section 541(g), this section focuses on the scholarly debate between Donald Korobkin's contractarianism[238] and Thomas Jackson's "creditors' bargain"[239] over the true function of bankruptcy in society. Although there may be room for subsection 541(g) in Jackson's theory, the proposed amendment's emphasis on the survivorship rights of non-debtor cotenants—a noncreditor entity—fits this amendment into "the probable implications"[240] of Korobkin's "bankruptcy choice model."[241] Korobkin's concern for including the voice of noncreditors in the formation of fundamentally fair bankruptcy law[242] matches proposed subsection 541(g)'s concern for the preservation of a joint tenant's survivorship rights in bankruptcy.

Korobkin's bankruptcy choice model views bankruptcy law as society's approach to resolving "financial distress."[243] Korobkin roots his theory in John Rawls's contractarian paradigm where persons unaware of their relative advantaged or disadvantaged positions in society "define an 'appropriate initial status quo.'"[244] He then tasks these hypothetical persons to form the principles upon which "relationships in financial distress are to be governed."[245] As previously stated, these persons are placed behind the Rawlsian "veil of ignorance,"[246] where no one knows if they are creditor, debtor, employee, or cotenant as they essentially determine what is fair for all parties involved in financial distress. Backing this principle of anonymity, and militating against Jackson's creditors' choice model,[247] is the assumption that a piece of legislation "effectively mirrors the interests and concern of those persons who have chosen it."[248]

This Author maintains that if such a group of hypothetical, anonymous

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238. Donald R. Korobkin, *Contractarianism and the Normative Foundations of Bankruptcy Law*, 71 TEX. L. REV. 541 (1993).

239. Thomas H. Jackson, *Bankruptcy, Non-Bankruptcy Entitlements, and the Creditors' Bargain*, 91 YALE L.J. 857 (1982).

240. Korobkin, *supra* note 238, at 628.

241. *Id.* at 544.

242. *Id.* at 545-51.

243. *See* Donald R. Korobkin, *Rehabilitating Values: A Jurisprudence of Bankruptcy*, 91 COLUM. L. REV. 717, 763-66 (1991) (defining financial distress as including a set of conflicting interests, such as an embattled corporation and its employees).

244. Korobkin, *supra* note 238, at 545 (quoting JOHN RAWLS, A THEORY OF JUSTICE 12 (1971)).

245. *Id.*

246. *Id.* at 559 (quoting RAWLS, *supra* note 244, at 136-42).

247. *See id.* at 555 ("Because [participation in the creditors' choice model is limited to creditors], the creditors' bargain model generates results that disadvantage those persons who have been excluded from representation. Accordingly, it is not surprising that Jackson concludes that contract creditors would agree to maximize the value of assets available for distribution to contract creditors. Nor does the outcome of this normative model purport to protect the interests of other persons affected by financial distress.").

248. *Id.*

persons assembled to write the Bankruptcy Code, these persons would conclude that dissolving the survivorship rights of non-debtor cotenants when a debtor-tenant files a bankruptcy petition is fundamentally unfair. Given that the historical point of the right of survivorship was to lessen liabilities and consolidate land ownership,[249] and considering that survivorship rights are widely recognized as effective protection against a cotenant's creditors,[250] it flies in the face of fairness to deprive non-debtor cotenants of their survivorship rights when they need them most—when a debtor-tenant files bankruptcy. Add to this the fact that creditors elected to lend to a joint tenant singly, thus exposing themselves to the possibility of losing the benefit of their bargain to the well-known right of survivorship. In sum, the conclusion to be made here is one the California Supreme Court reached in 1976 in *Tenhet v. Boswell*,[251] when the court considered the policy behind allowing a surviving to succeed by right of survivorship to a tenancy encumbered by a lease:

> More significantly, we cannot allow extraneous factors to erode the functioning of joint tenancy. The estate of joint tenancy is firmly embedded in centuries of real property law and in the California statute books. Its crucial element is the right of survivorship, a right that would be more illusory than real if a joint tenant were permitted to lease for a term continuing after his death. Accordingly, we hold that under the facts alleged in the complaint the lease herein is no longer valid.[252]

Therefore, the ancient character of the joint tenancy and its crucial rights of survivorship suggest that a body of legislators, acting behind a "veil of ignorance,"[253] should fairly protect the survivorship rights of non-debtor cotenants when a debtor-tenant files a bankruptcy petition.

Jackson's creditors' bargain theory, however, is not concerned with fairness. Instead, Jackson argues, "[a] more profitable line of pursuit might be to view bankruptcy as a system designed to mirror the agreement one would expect the creditors to form among themselves were they able to negotiate such an agreement from an *ex ante* position."[254] Thus, according to Jackson, "most of the bankruptcy process is in fact concerned with creditor-distribution questions."[255] To Jackson, the Bankruptcy Code originates in what amounts to a concerted effort among a debtor's common creditors to avoid a race to the courthouse when the debtor defaults. Races are an unfortunate result that likely "lead to a premature termination of debtor's business"[256] or profitability. Instead, bankruptcy allows creditors a common forum and establishes priorities that, in

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249. *See supra* Part I.A.

250. *See* Korobkin, *supra* note 238, at 553.

251. 554 P.2d 330 (Cal. 1976).

252. *Id.* at 337.

253. Korobkin, *supra* note 238, at 559 (quoting RAWLS, *supra* note 244, at 136-42).

254. Jackson, *supra* note 239, at 860.

255. *Id.* at 857.

256. *Id.* at 862.

Jackson's view, "reduce strategic costs,"[257] increase the aggregate pool of assets, and make collecting debt more administratively efficient.[258]

Because allowing for severance of joint tenancies upon the filing of a bankruptcy petition dispenses with survivorship rights, which effectively erase creditors' liens upon a debtor-tenant's death, creditors in the creditors' bargain model would likely force tenancies to sever in bankruptcy. Further, creating tenancies in common rather than joint tenancies in bankruptcy would allow debtors' interests to descend, with liens attached, to heirs who may contribute more to the aggregate pool of assets. It is therefore improbable that creditors would accept a situation in which survivorship rights continue during bankruptcy.

The following hypothetical, however, illustrates a situation in which allowing severance actually decreases the overall pool of assets, perhaps indicating that the creditors' bargain model would support the proposed subsection 541(g). Consider the situation in which Federico, in an effort to support a grandson in college, decides to take out a second mortgage of $40,000 on $60,000 of equity he built up in the home he owns jointly with Debora. Debora declares Chapter 7 bankruptcy, severing the joint tenancy when she files her petition. While her case is pending before the bankruptcy court, Federico dies, and Debora inherits Federico's interest in the tenancy in common along with the second mortgage lien. Although the value of the bankruptcy estate has increased by $10,000, the bankruptcy estate now has an additional, unforeseen secured creditor which decreases the aggregate pool of assets available for distribution to unsecured creditors by $40,000. This suggests there is perhaps something "unfair" about recognizing the surprise claims of secured creditors who appear because of the loss of the right of survivorship.[259]

Whether the creditors' bargain model accepts proposed subsection 541(g) or not, Korobkin's bankruptcy choice model provides a sound theoretical basis for accepting the new amendment. Because the bankruptcy choice model concerns itself with the representation of noncreditors in order to put together fair bankruptcy legislation,[260] Korobkin's theory provides a sound fit for 541(g), a main purpose of which is to allow non-debtor cotenants to keep their survivorship rights (and thus their defense against the debtor-tenant's creditors) before, during, and after bankruptcy.

CONCLUSION

The joint tenancy with right of survivorship is a prevalent form of property ownership in the United States and has existed for hundreds of years.[261] The principal feature of the joint tenancy is the right of survivorship, which affords

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257. *Id.* at 861.

258. *See id.* at 861-69.

259. Compare this scenario to the hypothetical Jackson presents with one foreseen secured creditor in the mix. *See id.* at 870.

260. Korobkin, *supra* note 238, at 609.

261. *See supra* Part I.A.

surviving tenants protection from a deceased tenant's creditors.[262] The joint tenancy's prevalence coincides with a widespread use of bankruptcy in order to discharge, reorganize, and collect debt. Because joint tenancy formation and bankruptcy are both frequent occurrences, joint tenancies will likely continue to appear with relative frequency in bankruptcy litigation.[263] Specifically, the question of whether filing a petition severs a joint tenancy continues to arise and is the source of a thirty-year-old split of authority in the bankruptcy courts.[264] The holdings of these courts have cemented over the years and show little sign of movement. Seeking to advance the discussion, this Note contributes to the courts' holdings,[265] suggests an alternative judicial solution to them,[266] and proposes a new amendment to the Bankruptcy Code in order to fully resolve the split.[267]

This Note contributes to the courts' holdings by examining the bankruptcy trustee's roles under Chapter 7, 11, and 13 of the Bankruptcy Code. This analysis, in conjunction with a review of the split of authority, reveals that if any trustee can assert title over estate property, it is the Chapter 7 trustee.[268] This suggests that, in states which still recognize the four unties test in order to create and maintain a joint tenancy at common law, bankruptcy courts should hold that a tenancy severs upon the filing of a bankruptcy petition only in the Chapter 7 case.[269]

The preferred alternative is to amend the Bankruptcy Code to state that filing a bankruptcy petition does not sever a joint tenancy.[270] A logical place for this short but powerful amendment is in section 541, where the Bankruptcy Code discusses what property of the debtor belongs in the bankruptcy estate.[271] This amendment resolves the split of authority but avoids resolving the dispute over whether the trustee has title.[272] Instead, it simply allows joint tenancies to exist during bankruptcy and afterwards. This result is fair for creditors because they should already be aware of the financial risks of lending singularly to joint tenants.[273] It is also fair because it protects non-debtor cotenants who, by no fault of their own, have their survivorship rights in jeopardy when a debtor-tenant declares bankruptcy. Therefore, in the interests of fundamental fairness, filing a bankruptcy petition should not sever a joint tenancy.

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262. *See* 48A C.J.S. *Joint Tenancy* § 2 (2013).
263. *See supra* Part I.B-C.
264. *See supra* Part II.
265. *See supra* Part II.C.
266. *See supra* Part II.C; *see also supra* Part IV.
267. *See supra* Part V.
268. *See supra* Part II.C; *see also supra* Part IV.
269. *Id.*
270. *See supra* Part V.
271. *See* 11 U.S.C. § 541 (2006).
272. *See supra* Part V.A.
273. *See supra* Part V.B.

DON'T FORGET TO KNOCK: ELIMINATING THE TENSION BETWEEN INDIANA'S SELF DEFENSE STATUTE AND NO-KNOCK WARRANTS

CHASE PATTERSON*

INTRODUCTION

On January 14, 2003, a police SWAT team dressed in black masks and camouflage outfits conducted a raid on the home of Jillian D. King's boyfriend in Muncie, Indiana.[1] The officers were executing a no-knock warrant after finding cocaine inside the car of another resident of the house.[2] After seeing the police officers approach the house and fearing they were intruders, King, who had previously been robbed at gunpoint, fired at the officers.[3] King was charged with felony criminal recklessness and drug possession.[4]

King originally pled guilty to the charges, but after a judge refused the terms of the guilty plea, her case went to trial.[5] At trial, King explained she "saw what appeared to be a burglar jerking at the door," and then "ran down and got a gun and shot out a window."[6] King further stated she "would have opened the door" if she had known the intruders were police.[7] The prosecutor trying King's case described her as having "an itchy trigger finger."[8] While the Muncie SWAT team testified they had announced themselves before entering, video of the raid showed officers prying open the door before knocking or announcing their presence.[9] The jury ultimately deadlocked on the issue of King's guilt and the validity of her self-defense claim.[10]

It is fortunate that no one was injured during the police raid in which King was involved.[11] Despite this good fortune, King's case raises an interesting question on what the result would have been had she injured or killed one of the police officers. Mainly, would the jury have been deadlocked if King had

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1. RADLEY BALKO, OVERKILL: THE RISE OF PARLIAMENTARY RAIDS IN AMERICA 68 (2006), *available at* http://www.cato.org/pubs/wtpapers/balko_whitepaper_2006.pdf, *archived at* http://perma.cc/R444-3Z83.
2. *Id*.
3. *Id*.
4. *Id*.
5. *Id*.
6. *Id*.
7. *Id*.
8. *Id*.
9. *Id*.
10. *Id*.
11. *Id*.

successfully shot, or even killed one of the police officers? Does it matter that the police officers failed to announce their presence until after prying open the door? Finally, did King have a valid defense under Indiana law to use force, including deadly force, to resist the police officers intrusion into her home, even when the officers had a valid warrant?

An individual's right to resist unlawful arrest originated from English common law and was adopted early in America's history.[12] Beginning in the twentieth century, the right to resist unlawful arrest began to draw criticism from both legal scholars and judges.[13] They argued the rationale behind the law was one's ability to protect oneself from the state's overarching police powers when the individual was in fact innocent.[14] With the advent of avenues such as bail, suppression of evidence, and civil remedies against unlawful and excessive police power, proponents of abolishing the right to resist unlawful arrest argued the law was out of date and no longer necessary.[15] As a result, many states began to eliminate the right to resist unlawful arrest altogether.[16] Recently, however, many states have started to reinforce an individual's right to resist unlawful arrest by codifying the common law doctrine.[17]

Along with codifying an individual's right to resist unlawful arrest, state legislatures have also begun to codify the "castle doctrine."[18] The old adage, "a man's home is his castle," conveys the notion that an individual's home is his sanctuary and he can defend it against an intruder at all costs.[19] The right to protect oneself and others, with deadly force if necessary, dates back to the beginning of English common law.[20] The "castle doctrine" created an exception to the general rule that before someone could make a claim of self-defense, he first had to try to disengage or retreat from the attacker.[21]

As a citizen's ability to resist unlawful arrest and protect himself and his property has increased, so too has police officials' ability to conduct search and seizures of an individual's property.[22] Specifically, courts have loosened the

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12. Craig Hemmens & Daniel Levin, '*Not a Law at All*': *A Call for a Return to the Common Law Right to Resist Unlawful Arrest*, 29 SW. U. L. REV. 1, 13 (1999).

13. *Id*. at 18.

14. *Id*.

15. *Id*. at 18-24.

16. *Id*. at 24.

17. *Id*.

18. STEVEN JANSEN & M. ELAINE NUGENT-BORAKOVE, EXPANSIONS TO THE CASTLE DOCTRINE: IMPLICATIONS FOR POLICY AND PRACTICE 3 (2008), *available at* http://www.ndaa.org/pdf/Castle%20Doctrine.pdf, *archived at* http://perma.cc/CRA4-7L4Y.

19. *Id*.

20. *Id*.

21. *Id*.

22. *See* G. Todd Butler, Note, *Recipe For Disaster: Analyzing The Interplay Between the Castle Doctrine And The Knock-And-Announce Rule After Hudson v. Michigan*, 27 MISS. C. L. REV. 435 (2008).

requirements necessary to obtain and execute no-knock warrants.[23] Furthermore, "[t]he proliferation of SWAT teams, police militarization, and the Drug War [has] given rise to a dramatic increase in the number of 'no-knock' or 'quick-knock' raids on suspected drug offenders."[24] These no-knock raids are notoriously unreliable because they are often based on tips from unreliable, confidential informants and often result in a SWAT-style raid on the wrong home or on the homes of nonviolent, misdemeanor drug users.[25] Such highly volatile and confrontational search tactics cause an extreme amount of disturbing terror for the individual whose home is being broken into.[26] Beside the fear no-knock warrants induce in the individuals whom are subject to the raids, what is even "more disturbing are the number of times such 'wrong door' raids unnecessarily lead to the injury or death of suspects, bystanders, and police officers."[27]

Indiana is among states that have codified the right for citizens to resist unlawful arrest and unlawful entry into their homes.[28] Indiana case law has also loosened the rules pertaining to no-knock warrants, following the national trend of allowing greater police discretion when executing these warrants.[29] While Indiana's codification of the right to resist unlawful arrest and the "castle doctrine" are similar to many other states following the same path, Indiana's law differs in that it allows citizens to use deadly force against police officers.[30]

This Note examines the tension between Indiana's newly codified self-defense statute—Indiana Code section 35-41-3-2—and recent Indiana court decisions liberalizing the requirements necessary for police officials to execute a no-knock warrant. The main contention of this Note is that, through the increase of a militarized police force, combined with the advent of lessening the knock-and-announce requirement and the codified right of Indiana's citizens to use force against police officers to protect their homes, the Indiana courts and legislature have placed both its citizens and police officers in a dangerous position which may lead to deadly results. Part I of this Note gives a historic overview of how and why Indiana's self-defense statute, section 35-41-3-2, was modified to include police officers as a class of individuals for whom the defense applied, as well as the Indiana court decisions that allow greater police powers to execute no-knock warrants. Next, Part II analyzes the text of section 35-41-3-2

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23. *See id*.

24. Kiriath Jearim, *Botched Paramilitary Police Raids: An Epidemic of "Isolated Incidents*," FREE REPUBLIC BROWSE (Nov. 27, 2006, 1:12 PM), http://www.freerepublic.com/focus/news/1744654/posts (quoting BALKO, *supra* note 1).

25. *Id*.

26. *Id*.

27. *Id*.

28. *See* IND. CODE § 35-41-3-2 (2012).

29. *See* Lacey v. State, 946 N.E.2d 548 (Ind. 2011) (holding that Indiana's state constitutional provision prohibiting unreasonable searches and seizures does not require prior judicial authorization for the no-knock execution of a warrant when justified by exigent circumstances, even if such circumstances were known by police when the warrant was obtained).

30. IND. CODE § 35-41-3-2(k).

to determine whether the new law may offer an affirmative defense to a citizen who wrongfully uses deadly force against a police officer executing a no-knock warrant. Finally, Part III offers different proposals on how to protect both citizens and police officers from the violence and destruction the tension between the two laws create.

I. BACKGROUND: INDIANA'S "CASTLE DOCTRINE" AND KNOCKING WITH WARRANTS

The Indiana defense of person and property statute, section 35-41-3-2, allows Indiana citizens to use reasonable force, including deadly force, against another person or a police officer.[31] In regard to using force against a police officer, section 35-41-3-2 provides:

> A person is justified in using reasonable force against a public servant if the person reasonably believes the force is necessary to:
> (1) protect the person or a third person from what the person reasonably believes to be the imminent use of unlawful force;
> (2) prevent or terminate the public servant's unlawful entry of or attack on the person's dwelling, curtilage, or occupied motor vehicle; or
> (3) prevent or terminate the public servant's unlawful trespass on or criminal interference with property lawfully in the person's possession, lawfully in possession of a member of the person's immediate family, or belonging to a person whose property the person has authority to protect.[32]

With regard to deadly force, section 35-41-3-2 states:

> A person is not justified in using deadly force against a public servant whom the person knows or reasonably should know is a public servant unless:
> (1) the person reasonably believes that the public servant is:
> (A) acting unlawfully; or
> (B) not engaged in the execution of the public servant's official duties; and
> (2) the force is reasonably necessary to prevent serious bodily injury to the person or a third person.[33]

Before section 35-41-3-2 was amended in May 2012, the statute was silent on whether the defense was applicable to police officers. The changes allowed for deadly force to be justified against a public servant under certain circumstances and were the state legislature's response to the highly controversial Indiana Supreme Court decision *Barnes v. State*.[34]

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31. *See* IND. CODE § 35-41-3-2.
32. *Id.* § 35-41-3-2(i).
33. *Id.* § 35-41-3-2(k).
34. *See* IND. GEN. ASSEMBLY, FINAL REPORT OF THE LEGISLATIVE COUNCIL BARNES V.

A. The Barnes Decision

Few cases decided by the Indiana Supreme Court have grasped and provoked the attention of Indiana citizens as much as the *Barnes v. State* decision.[35] On November 18, 2007, police officers were dispatched to the home of Richard Barnes in response to a possible domestic battery.[36] When arriving on the scene, police officers found Barnes to be agitated and yelling very loudly in the parking lot of his apartment complex.[37] When Barnes's wife entered their apartment, Barnes followed her to the doorway and then blocked the police officers from entering.[38] When an officer attempted to move around Barnes and enter the apartment, Barnes got physical and pushed the police officer.[39] Barnes was arrested and charged with Class A misdemeanor battery on a police officer, Class A misdemeanor resisting law enforcement, Class B misdemeanor disorderly conduct, and Class A misdemeanor interference with the reporting of a crime.[40]

Before his trial, Barnes tendered a jury instruction that he had the common law right to reasonably resist unlawful entry by police officers into a citizen's home.[41] Barnes's instruction read: "[w]hen an arrest is attempted by means of a forceful and unlawful entry into a citizen's home, such entry represents the use of excessive force, and the arrest cannot be considered peaceable. Therefore, a citizen has the right to reasonably resist the unlawful entry."[42] The trial court refused Barnes's instruction, and he was convicted of battery on a police officer, resisting law enforcement, and disorderly conduct, all of which he appealed.[43] On appeal, the court found the trial court's refusal to proffer Barnes's jury instruction was not a harmless error and ordered a new trial on the battery and resisting charges.[44] The Indiana Supreme Court then granted transfer.

In *Barnes v. State*, the Indiana Supreme Court found Barnes was not entitled to the jury instruction he requested, and there was sufficient evidence to find him guilty of his convictions.[45] In its reasoning, the court determined the right to

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STATE SUBCOMMITTEE, at 1 (2011), http://www.in.gov/legislative/interim/committee/reports/LCBSEB1.pdf, *archived at* http://perma.cc/LX7Z-FDCP [hereinafter LEGISLATIVE REPORT] ("The Legislative Council directed the Subcommittee to review the Supreme Court's opinion in *Barnes v. State* . . . and consider a possible legislative response.").

35. Joel M. Schumm, *Recent Developments in Indiana Criminal Law and Procedure*, 45 IND. L. REV. 1067, 1073 (2012).

36. Barnes v. State, 946 N.E.2d 572, 574 (Ind.), *aff'd on reh'g*, 953 N.E.2d 473 (Ind. 2011).

37. *Id*.

38. *Id*.

39. *Id*.

40. *Id*. at 574-75.

41. *Id*. at 575.

42. *Id*. at 575 n.1.

43. *Id*. at 575.

44. *Id*.

45. *See id*. at 576-78.

resist lawful and unlawful entry by police officers into one's home is against public policy.[46] Instead of physically resisting officers, the court thought other alternatives such as bail, suppression of evidence, and civil remedies were appropriate steps aggrieved individuals could take against police officers who overstepped their boundaries.[47] At the end of its analysis, the court stated the "right to reasonably resist an unlawful police entry into a home is no longer recognized under Indiana law."[48]

The initial *Barnes* ruling brought a multitude of reactions from both the legal and greater Indiana community.[49] What caused such stir and debate was not the court's decision, but rather the language it used to address the issue.[50] Many in the legal profession felt the court's ruling went too far and would have unforeseen consequences.[51] In light of such critical attention, the court agreed to rehear the case.

In the rehearing of *Barnes*, the court affirmed its prior decision.[52] In clarifying its position, the court held Indiana courts would not recognize the common law right of the "castle doctrine" as a defense to the statutory charge of battery or other violent acts on a police officer.[53] The court reiterated its ruling was statutory and not constitutional, and it did not change the law regarding citizens' Fourth Amendment rights to be secure in their persons, houses, and papers against unreasonable searches and seizures.[54]

In response to the court's ruling on rehearing, the Indiana legislature amended section 35-41-3-2 to circumvent the *Barnes* decision.[55] With the new language adding police officers as a class of individuals to whom the self-defense statute now applies, an individual charged with shooting a police officer during a raid may be able to argue that section 35-41-3-2 applies as an affirmative defense.[56]

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46. *Id*. at 576.

47. *Id*.

48. *Id*. at 577.

49. Brief Of Amicus Curiae Members of the General Assembly in Support of Appellant's Petition For Rehearing at 1-2, Barnes v. State, 946 N.E.2d 572 (Ind. 2011) (No. 82S05-1007-CR-343) [hereinafter Amicus Brief] ("Few issues before this Court have galvanized the public's attention and concern as the declaration in this case that the right to reasonably resist an unlawful police entry into a home is no longer recognized under Indiana law.") (internal quotation marks omitted); Schumm, *supra* note 35, at 1073.

50. *See* Amicus Brief, *supra* note 49, at 2.

51. Schumm, *supra* note 35, at 1074.

52. Barnes v. State, 953 N.E.2d 473, 475 (Ind. 2011).

53. *Id* at 474.

54. *See id*. at 474-75.

55. *See* LEGISLATIVE REPORT, *supra* note 34, at 1 ("The Legislative Council directed the Subcommittee to review the Supreme Court's opinion in *Barnes v. State* . . . and consider a possible legislative response.").

56. *See* IND. CODE § 35-41-3-2 (2012).

B. No-Knock Warrants and Indiana Case Law

In the same week the Indiana Supreme Court heard the initial *Barnes* case, they also addressed the controversial issue of the circumstances under which police officials may disregard the knock-and-announce rule in executing a search warrant, and instead, carry out a no-knock warrant.[57]

The knock-and-announce rule is an extension of a citizen's Fourth Amendment right to be protected from unreasonable searches and seizures.[58] The rule requires an officer to first knock and announce his presence before physically entering an individual's home, even if he has a valid warrant.[59] The U.S. Supreme Court first recognized the knock-and-announce rule as a component of the Fourth Amendment in *Wilson v. Arkansas*.[60] In its decision, the Court stated the "common-law 'knock and announce' principle forms a part of the reasonableness inquiry under the Fourth Amendment."[61]

While the Court has recognized the knock-and-announce rule as part of the Fourth Amendment protections, the rule is not absolute, and there are situations in which police officials may circumvent the rule.[62] For instance, some jurisdictions permit police officers to execute no-knock warrants.[63] The Supreme Court has held no-knock warrants are constitutional "when a warrant applicant gives reasonable grounds to expect the futility or to suspect that one or another . . . exigency already exists or will arise instantly upon knocking, a magistrate judge is acting within the Constitution to authorize a 'no-knock' entry."[64] Furthermore, even if a no-knock warrant is not issued, the Supreme Court has allowed police officers to dispense with the knock-and-announce rule "if circumstances support a reasonable suspicion of exigency when the officers arrive at the door, they may go straight in."[65] Finally, even if police officers execute a warrant unlawfully by not announcing their presence, the Court has stated suppression of the evidence found during the search is not an appropriate remedy, thus further lessening an individual's right against police search and seizure.[66] While the U.S. Supreme Court has ruled police officers may execute a no-knock warrant if exigent circumstances exist at the time the officers arrive at the door, some jurisdictions have held that officers may not circumvent the knock-and-announce rule and execute a no-knock warrant unless they have received express

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57. Lacey v. State, 946 N.E.2d 548 (Ind. 2011).

58. E. Martin Estrada, *A Toothless Tiger in the Constitutional Jungle: The "Knock and Announce Rule" and the Sacred Castle Door*, 16 U. FLA. J.L. & PUB. POL'Y 77, 81 (2005).

59. 1 CHARLES ALAN WRIGHT ET AL., FEDERAL PRACTICE & PROCEDURE: FEDERAL RULES OF CRIMINAL PROCEDURE § 56 (4th ed. 2013).

60. Wilson v. Arkansas, 514 U.S. 927 (1995).

61. *Id*. at 929.

62. JOHN M. BURKOFF, SEARCH WARRANT LAW DESKBOOK § 12:9 (2013).

63. *Id.*

64. *Id*.

65. United States v. Banks, 540 U.S. 31, 37 (2003).

66. Hudson v. Michigan, 547 U.S. 586, 591 (2006).

authorization to do so, and the circumstances that justified its issuance existed at the time of the warrant's execution.[67]

Indiana, like many jurisdictions, requires that police officers knock-and-announce their presence before executing a valid search warrant.[68] The requirement, however, is not absolute and police officers may execute a no-knock warrant when exigent circumstances exist.[69] The issue of whether an officer must receive express authorization from a magistrate to execute a no-knock warrant was decided in *Lacey v. State*.[70]

In *Lacey*, the defendant was charged with unlawful possession of a firearm by a serious violent felon, possession of marijuana, and maintaining a common nuisance.[71] The charges were brought after police obtained evidence, pursuant to a search warrant, from the defendant's residence in Fort Wayne, Indiana.[72] The police officers executed the search warrant without knocking-and-announcing their presence.[73] At trial, the defendant filed a motion to suppress the evidence obtained by the police officials, arguing the search warrant was not supported by probable cause, and the manner in which the police officers executed the warrant violated Indiana constitutional law.[74] The trial court denied the defendant's motion.[75] On appeal, the appellate court held there was sufficient probable cause to issue the warrant, but found the search did violate Indiana constitutional law and suppression of the evidence was the appropriate remedy.[76] The Indiana Supreme Court then granted transfer to determine whether the search violated the Indiana Constitution.[77]

In his appeal, the defendant acknowledged that Indiana law, which requires police officers to first knock-and-announce their presence before entering a home to execute a warrant, is not an absolute rule, and police officials may circumvent the law if exigent circumstances exist.[78] The defendant also did not argue that the factors the police officers had relied upon to execute the no-knock warrant were inadequate.[79] Instead, the defendant argued the police's execution of a no-knock warrant to gain entry into his residence was illegal because the officers did not first gain approval from the magistrate who issued the warrant enabling them not

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67. *See* BURKOFF, *supra* note 62.

68. IND. CODE § 35-33-5-7 (2012).

69. *See* Beer v. State, 885 N.E.2d 33, 43 (Ind. Ct. App. 2008) ("We conclude that Indiana law supports no knock warrants under certain circumstances.").

70. Lacey v. State, 946 N.E.2d 548 (Ind. 2011).

71. *Id*. at 549.

72. *Id*.

73. *Id*.

74. *Id*.

75. *Id*.

76. Lacey v. State, 931 N.E.2d 378, 386 (Ind. Ct. App. 2010).

77. *Lacey*, 946 N.E.2d, at 548.

78. *Id*. at 549.

79. *Id*.

to comply with the knock-and-announce requirement.[80] Put more simply, the defendant argued article 1, section 11 of the Indiana Constitution, which prohibits unreasonable search or seizure, requires police officers to first tell the magistrate issuing the warrant of the exigent circumstances justifying the execution of a no-knock warrant, and then gain approval from the magistrate to execute the no-knock warrant.[81]

The Indiana Supreme Court disagreed that police officers must first inform the magistrate issuing the warrant of the existing exigent circumstances.[82] Instead, "courts will assess the reasonableness of entry based on the totality of the circumstances at the time the warrant was served."[83] While it would be better practice for police officers to disclose all circumstances known at the issue of the warrant, it still is not required.[84] The court ultimately found evaluating the reasonableness of the police officers decision to enter a home without knocking and announcing his presence in light of the totality of circumstances appropriate, because "whatever arguably exigent factors may be known by police when a warrant is obtained, their significance at the moment the warrant is executed may vary considerably due to the then-existing circumstances."[85] The Indiana Supreme Court also decided to follow the United States Supreme Court rule that suppression of the evidence found during the illegal search is not a proper remedy, even if a police officer is found to have unlawfully executed a warrant by not announcing his presence.[86]

Therefore, by following the national trend of loosening the rules for police officers to use and execute no-knock warrants, the Indiana Supreme Court effectively lessened Indiana citizens' Fourth Amendment rights. Alarmingly, the updated language to section 35-41-3-2 allowing citizens an affirmative right to reasonably defend their home from intrusion seems to directly conflict with the court's knock-and-announce ruling.

II. ANALYSIS: HOW TO APPLY INDIANA' NEW SELF-DEFENSE STATUTE

Section 35-41-3-2 offers citizens an affirmative defense when using force against a police officer trying to unlawfully enter their home.[87] Understanding the new law is important to understand how and when a citizen may raise the defense against a police officer. First, one must determine how to statutorily

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80. *Id*.

81. *Id*.

82. *Id* at 551.

83. *Id*. at 552-53.

84. *Id*.

85. *Id*. at 552.

86. *See* Wilkins v. State, 946 N.E.2d 1144, 1148 (Ind. 2011) ("Even if the circumstances were considered to have been insufficient to justify the no-knock entry, however, such a violation would not entitle the defendant to the exclusion of the resulting evidence under federal jurisprudence.").

87. IND. CODE § 35-41-3-2 (2012).

interpret the language of the law. Mainly, should the defense apply if an individual can show he or she reasonably believed the police intrusion during a no-knock raid was unlawful, or does an individual have to show the police intrusion was actually unlawful? Second, looking at the policy and rationale behind the added language to the law may offer valuable insight on a judge's interpretation of whether the law may apply to police officers in executing a no-knock raid. Finally, it will be helpful to look at Indiana case law dealing with an individual's right to resist unlawful arrest to better understand the law's potential breadth.

A. Statutory Interpretation

Under Indiana law, "[t]he courts have the exclusive responsibility and duty to interpret the law, including the Constitution, legislation, and case law, and to apply the law to the case at issue."[88] "Thus, statutory interpretation is the responsibility of the court and within the exclusive province of the judiciary."[89] Furthermore, "[a] statute is examined and interpreted as whole and language itself is scrutinized, including grammatical structure of clause or sentence at issue."[90]

Looking plainly at the text of the statute: "[a] person is justified in using reasonable force against a public servant if the person *reasonably* believes the force is necessary to [prevent unlawful entry],"[91] and "a person is not justified in using deadly force against a public servant whom the person knows or reasonably should know is a public servant unless (1) the person *reasonably* believes that the public servant is acting unlawfully."[92] In both provisions of the statute, the legislature placed the word "reasonably" in the text before the phrase "unlawfully." Following rules of grammar, the word "reasonably" qualifies the phrase "unlawful entry."[93] It would appear, therefore, the statute allows an individual to use force on a reasonable belief that a police official is unlawfully entering their home.

Statutory construction can also help courts interpret section 35-41-3-2. "the meaning of the statute. The construction of a statute is necessary only where the statute is ambiguous and of doubtful meaning, and if the language of a statute is

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88. 5A TRACY FARRELL ET AL., INDIANA LAW ENCYCLOPEDIA: CONSTITUTIONAL LAW § 59 (2012) (citing Miller v. Mayberry, 506 N.E.2d 7 (Ind. 1987); State *ex rel*. Mass Transp. Auth. of Greater Indianapolis v. Ind. Revenue Bd., 255 N.E.2d 833 (Ind. Ct. App. 1970)).

89. *Id*. (citing Ashley v. State, 757 N.E.2d 1037 (Ind. Ct. App. 2001); Golden Rule Ins. Co. v. McCarty, 755 N.E.2d 1104 (Ind. Ct. App. 2001); Dora v. State, 736 N.E.2d 1254 (Ind. Ct. App. 2000); Brooks v. Gariup Const. Co., 722 N.E.2d 834 (Ind. Ct. App. 1999); State v. Hensley, 716 N.E.2d 71 (Ind. Ct. App. 1999)).

90. 26 LILA A. ZAKOLSKI, INDIANA LAW ENCYCLOPEDIA: STATUTES § 80 (2012) (citing Blasko v. Menard, Inc., 831 N.E.2d 271 (Ind. Ct. App. 2005)).

91. IND. CODE § 35-41-3-2 (i) (2013) (emphasis added).

92. *Id*. § 35-41-3-2 (k) (emphasis added).

93. Dimitri Epstein, Note, *Cops or Robbers? How Georgia's Defense of Habitation Statute Applies to No-Knock Raids by Police*, 26 GA. ST. U. L. REV. 585, 596 (2010).

plain and unambiguous, there is no occasion for construction to ascertain "[94] Accordingly, a statute is "ambiguous," and thus open to judicial interpretation, when it is susceptible to more than one interpretation.[95] If a statute is ambiguous, a court must ascertain the legislature's intent and interpret the statute to effectuate that intent.[96]

One could arguably read "reasonably" in section 35-41-3-2(i) and (k) as qualifying the sections that follow the main phrase, or instead, read the phrase "reasonably" as only applying to the first sentence of the section. When there is an ambiguity concerning the ambit of criminal statutes, the ambiguity should be resolved in favor of lenity.[97] The "'[r]ule of lenity' requires that penal statutes be construed strictly against state and any ambiguities resolved in favor of the accused."[98] Looking at the ambiguity, courts should construe the term "reasonably" to qualify the entire section of the statute, in order to give fair warning to Indiana citizens invoking the defense.

B. Legislative Intent

"The cardinal rule, and primary goal, of statutory construction is to determine and give effect to the true intent of the legislature."[99] The Court's decision in *Barnes* to no longer recognize the common law right to resist law enforcement from unlawfully entering one's home was received with a flurry of outrage and protest from Indiana citizens and government officials.[100] One of the largest concerns was that the decision abrogated any right for citizens to defend themselves against illegal police activities.[101] In the amicus curiae brief asking the Indiana Supreme Court to reconsider the initial *Barnes* ruling, members of the General Assembly argued the ruling would create an incentive for individuals to portray themselves as police officers and demand access into citizens' homes

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94. 26 LISA A. ZAKOLSKI, INDIANA LAW ENCYCLOPEDIA: STATUTES § 60 (2012) (citing Romack v. State, 446 N.E.2d 1346 (Ind. Ct. App. 1983); Bowen v. Review Bd., 362 N.E.2d 1178 (Ind. App. 1977); Reome v. Edwards, 79 N.E.2d 389 (Ind. 1948); Piersol v. Hays, 47 N.E.2d 838 (Ind. App. 1943); Tucker v. Muesing, 39 N.E.2d 738 (Ind. 1942)).

95. *Id*. (citing Elmer Buchta Trucking, Inc. v. Stanley, 744 N.E.2d 939 (Ind. 2001); D.O. McComb & Sons, Inc. v. Feller Funeral Home, Inc., 720 N.E.2d 454 (Ind. Ct. App. 1999); Ballard v. State, 715 N.E.2d 1276 (Ind. Ct. App. 1999); U.S. Outdoor Adver. Co. v. Ind. Dep't of Transp., 714 N.E.2d 1244 (Ind. Ct. App. 1999); Amoco Prod. Co. v. Laird, 622 N.E.2d 912 (Ind. 1993); Hinshaw v. Bd. of Comm'rs, 611 N.E.2d 637 (Ind. 1993)).

96. Cnty. Council of Porter Cnty. v. RDA, 944 N.E.2d 519, 524 (Ind. Ct. App. 2011).

97. Skilling v. United States, 130 S. Ct. 2896, 2905-06 (2010).

98. Meredith v. State, 906 N.E.2d 867, 872 (Ind. 2009).

99. 26 LISA A. ZAKOLSKI, INDIANA LAW ENCYCLOPEDIA: STATUTES § 63 (2012) (citing Westbrook v. State, 770 N.E.2d 868 (Ind. Ct. App. 2002); Hatcher v. State, 762 N.E.2d 170 (Ind. Ct. App. 2002); Snider v. State, 753 N.E.2d 721 (Ind. Ct. App. 2001); Lakes & Rivers Transfer v. Rudolph Robinson Steel Co., 736 N.E.2d 285 (Ind. Ct. App. 2000)).

100. *See* Amicus Brief, *supra* note 49, at 1-2; Schumm, *supra* note 35, at 1073.

101. Schumm, *supra* note 35, at 1073.

based off of the *Barnes* ruling.[102] Fearing the court's ruling left Indiana citizens with absolutely no rights to defend themselves against illegal police activity, legislative officials looked to draft a bill that would statutorily bar the *Barnes* decision.[103] The initial legislative response to *Barnes* included a draft proposal of a bill expanding the crime of official misconduct to include unlawful entry by police officers in certain circumstances, and another bill proposal permitting citizens, in certain circumstances, to resist unlawful entry by police officers.[104] The language of the bill expanding the crime of official police misconduct included:

> A law enforcement officer who, knowing that the entry is unlawful, enters the residence of another person without having a reasonable belief that the unlawful entry is necessary to prevent injury or death commits unlawful entry by law enforcement, a Class D felony. However, the offense is a class C felony if it results in serious bodily injury to another person.[105]

The language of the proposed bill permitting citizens to resist unlawful entry by police officers is now part of section 35-41-3-2. Along with allowing citizens to use reasonable force against police officers, the Indiana legislature also added the text:

> In enacting this section, the general assembly finds and declares that it is the policy of this state to recognize the unique character of a citizen's home and to ensure that a citizen feels secure in his or her own home against unlawful intrusion by another individual or a public servant. By reaffirming the long standing right of a citizen to protect his or her home against unlawful intrusion, however, the general assembly does not intend to diminish in any way the other robust self defense rights that citizens of this state have always enjoyed. Accordingly, the general assembly also finds and declares that it is the policy of this state that people have a right to defend themselves and third parties from physical harm and crime. The purpose of this section is to provide the citizens of this state with a lawful means of carrying out this policy.[106]

The Indiana legislature ultimately found that adopting the additions to section 35-41-3-2, identified the best approach to dealing with the *Barnes* decision.[107] By allowing Indiana citizens to use force against police officers if the entry is unlawful, the Indiana law would afford the same protections against police officials as it did against regular citizen intrusion.

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102. Amicus Brief, *supra* note 49, at 5.

103. LEGISLATIVE REPORT, *supra* note 34, at 1.

104. *Id*.

105. *Id*.

106. IND. CODE § 35-41-3-2(a) (2012).

107. LEGISLATIVE REPORT, *supra* note 34, at 1.

C. Past Cases

Before the *Barnes* decision, Indiana courts had ruled on the issue of resisting unlawful police entry into one's home. Looking at past cases dealing with the issue may also offer some insight into how courts may interpret the new provisions to section 35-41-3-2.

In *Heichelbech v. State*, the Indiana Supreme Court recognized the common law right to resist unlawful arrest.[108] Though the *Heichelbech* court found the defendant's arrest to be lawful, it recognized that the defendant would have been "entitled to resist the arrest only if the officer had no right to arrest."[109] Because the court found the right inapplicable, it added no further explanation as to what exactly constitutes prohibited and permissible resistance.[110]

Even though the Indiana Supreme Court has not clarified its language regarding resisting unlawful arrest in *Heichelbech*, the Indiana Court of Appeals has considered an individual's right to resist unlawful arrest in number of cases. In earlier cases, the appellate court's decisions seemed to be going towards the trend of abolishing a citizen's right to resist unlawful arrest.[111] However, the court did limit those earlier case decisions to circumstances occurring in public, and applied different rules when the arrest occurred in an individual's home.[112]

In *Casselman v. State*, a police officer went to the home of the defendant to issue a body attachment order entered at a bankruptcy proceeding.[113] After the defendant attempted to close the door, the officer forced his way into the defendant's home, drew his revolver, and placed the defendant under arrest.[114] On appeal, the court reversed the defendant's charge of resisting law enforcement.[115] The court determined the officer illegally entered the defendant's home, and the defendant properly resisted the illegal arrest.[116] The court's decision ultimately ruled on the sanctity of an individual's home, noting there is a greater privilege to resist an unlawful entry into private premises than to resist unlawful arrest in a public place.[117] In essence, the *Casselman* decision affirmed the "castle doctrine." *Barnes* effectively overruled *Casselman*, but judges may look to the court's analysis in *Casselman* when interpreting the new provisions

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108. 281 N.E.2d 102 (Ind. 1972).

109. *Id*. at 104.

110. 16 WILLIAM ANDREW KERR, INDIANA PRACTICE: CRIMINAL PROCEDURE—PRETRIAL § 1.9d (2012).

111. *Id*.

112. *See* Casselman v. State, 472 N.E.2d 1310, 1317 (Ind. Ct. App. 1985) ("[The] line extends across the doorway of Casselman's house and separates his situation [from those] who knowingly resisted arrests in public places. The common law right to resist such arrests has been abrogated; the right to offer reasonable resistance to an unlawful entry has not.").

113. *Id*. at 1312.

114. *Id*.

115. *Id*. at 1318.

116. *Id*.

117. *Id*. at 1317.

in section 35-41-3-2.

III. PROPOSAL

Indiana courts should interpret Indiana's self-defense statute to allow citizens to use force if they reasonably believe the police officers entry was unlawful, even if the entry was lawful. By requiring the police entry to actually be unlawful goes against the intent of the legislature.[118] Allowing a citizen an affirmative defense against an imposter disguised as a police officer but not against an actual police official when the citizen reasonably believes the entry is unlawful is not fair and places the brunt of risk onto the citizen's shoulders during a deadly encounter.[119] As one writer states:

> For criminal law, the current rule that self-defense is a complete defense if the defendant's fear was both real and reasonable is appropriate. An actor's conduct based on a reasonable fear of death or serious injury does not merit punishment and, when life is at stake, criminal sanctions will not deter deadly force. It is also unlikely that such an actor represents a future danger to the public. Most important, a violent response towards another is not wrongful when it is based on a reasonable fear that the other is perpetrating a deadly attack on the actor or a third party.[120]

Just as in Jillian King's case, many people will confuse militarized search tactics employed by police officials to enter their homes as an actual attack on themselves and their property.[121] Prosecuting these individuals will not deter other citizens from making the same mistake because individuals will always employ tactics of self-defense when they reasonably believe their families' lives or their own are at stake.[122] Therefore, section 35-41-3-2 should be read to offer an affirmative defense to citizens who use force, including deadly force, against police officers if they reasonably believe the officer is entering unlawfully, even though their entry is in fact lawful. In determining whether an individual's mistake in shooting a police officer is reasonable, the court should apply an objective standard with clear guidelines to offer clarity to both citizens and police officers in navigating the new law. Furthermore, to help curb unneeded violence and death among citizens and law abiding police officers, the Indiana legislature should pass a new law requiring police officers to knock-and-announce their presence before entering a citizen's home to execute a warrant.[123] By forcing police officers to first knock-and-announce their presence, the Indiana legislature may guard Indiana citizens' strong liberty interest in protecting their homes,

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118. LEGISLATIVE REPORT, *supra* note 34, at 1.

119. Epstein, *supra* note 93, at 611-12.

120. Caroline Forell, *What's Reasonable?: Self-Defense and Mistake in Criminal and Tort Law*, 14 LEWIS & CLARK L. REV. 1401, 1433 (2010).

121. BALKO, *supra* note 1, at 68.

122. Forell, *supra* note 120, at 1433.

123. Butler, *supra* note 22, at 449.

while still protecting both citizens and police officers from mindless violence that results from no-knock warrants.[124]

A. A Reasonable Belief: Applying an Objective Reasonable Test

Allowing citizens the right to use force against police officers based on the "castle doctrine," while simultaneously granting the police almost unlimited power to enter an individual's home with a valid warrant will almost certainly lead to deadly results.[125] Opponents of the "castle doctrine" contend it creates a "trigger happy" mentality in citizens' minds and encourages individuals to "shoot first, ask questions later."[126] The "castle doctrine" sends conflicting messages to citizens regarding when they can and cannot use lethal force with impunity.[127] At the same time, critics of the abrogation of the knock-and-announce rule in favor of no-knock warrants argue it places both citizens and police in dangerous situations, often times causing injury and death.[128] If an officer executes a no-knock warrant and does not announce his presence, it is easy to imagine a situation where an unassuming homeowner would engage the officer in violent interaction for fear of burglary or an intruder.[129] Such a situation creates a problematic scenario for judges and juries when defendants can claim they thought the officer was an unknown intruder against whom they had the right to shoot on sight.[130]

The disastrous situation of a man named Cory Maye illustrates the tension between the "castle doctrine" and no-knock warrants. On December 26, 2001, police in Prentiss, Mississippi executed a no-knock search warrant on the apartment of Cory Maye.[131] After attempting unsuccessfully to enter through the front door, the police officers broke down the home's back door which led to Maye's bedroom.[132] Maye, who had no criminal record, and his eighteen month old daughter were sound asleep when the police executed the no-knock raid.[133] Fearing for their lives after being startled awake, Maye fired three shots at the first police officer to enter his room, hitting the officer once in the abdomen, causing death shortly thereafter.[134] After Maye realized it was the police entering his home, he dropped his weapon and allowed the police to take him into custody.[135] Upon searching Maye's apartment, police only found small traces of

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124. BALKO, *supra* note 1, at 68.
125. Butler, *supra* note 22, at 448.
126. *Id*. at 450.
127. *Id*.
128. *Id*.
129. *Id*. at 451.
130. *Id*.
131. BALKO, *supra* note 1, at 68.
132. *Id*. at 69.
133. *Id*.
134. *Id*.
135. *Id*.

marijuana after first telling reporters they had found no drugs at all.[136] In May of 2004, a jury found Maye guilty of capital murder and sentenced him to death.[137]

Were Maye's actions wrong? Did he have a right to protect both his daughter's safety and his own? Under Indiana's self-defense law, Maye would argue he did not know nor reasonably should have known the individuals breaking down his door in the middle of the night were police officers. To determine whether Maye's beliefs were reasonable or not, the court should apply an objective standard test.[138] By applying an objective reasonability test, police officers can then consider the factors the court will use in making its assessment to determine whether or not a raid is the only option.[139]

When assessing whether the individual's apprehension of danger is objectively reasonable or not, the court should consider several factors including the defendant's general behavior, the time of day and the location at which the raid takes place, whether or not the defendant has a past criminal record, and the method of entry the police officers used to enter the home.[140] While these factors would be relevant in the objective test, they are not an exhaustive list and the court may consider other factors when making its determination.

When considering the defendant's general behavior, the court should consider how the defendant reacted to police invasion.[141] In Maye's case, he fired at the police officers from his bedroom after they had stormed into his home.[142] He did not have time to assess the situation nor have any way of knowing the individuals breaking into his home were police officers.[143] After finding out the home invaders were police, Maye instantly stopped resisting.[144] Based on his actions, it would appear Maye acted out of instinct to protect his daughter and himself from danger, without any intent to resist the police officers advancement.

Next, the court should consider the time of day and where the raid takes place.[145] If the raid takes place in the middle of the night, there is an increased likelihood that the defendant may be asleep and would not be able to make an alert or oriented decision as to whether the individuals entering his home are burglars or police officials.[146] Furthermore, if the defendant's home is in a crime ridden neighborhood or he has been subject to a home intruder in the past, he may be much more likely to mistake a police invasion for an unlawful and life-threatening intrusion.[147] In Maye's situation, the police officers had not only

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136. *Id*.
137. *Id*.
138. Epstein, *supra* note 93, at 612.
139. *Id*.
140. *Id*. at 613.
141. *Id*.
142. BALKO, *supra* note 1, at 69.
143. *Id*.
144. *Id*.
145. *See* Epstein, *supra* note 93, at 613.
146. *Id*.
147. *Id*.

broken into his home, but entered into his bedroom through the back entrance in the middle of the night.[148] Being startled awake to the sound of one's bedroom door being kicked down would certainly scare most anyone. Along with being sound asleep, which most likely disoriented Mayes, the lack of light likely made it that much more difficult for him to ascertain that the individuals breaking into his bedroom were in fact police officers. Taking into account the time of night and the specific room the police broke into, it seems Maye acted reasonably in believing the police officers were actual intruders.

Another factor for the court to consider in determining whether the defendant's actions were reasonable is whether the defendant has a past criminal record. If the homeowner has a past criminal record or has been subject to police search on another occasion then they are more likely to be on notice that intruders into his home may actually be the authorities.[149] Maye did not have a criminal record,[150] and he did not have any reason to believe anyone would need to break down his door in the middle of the night other than to commit an unlawful entry. Without having any reason to fear a militarized police raid into his home, Maye could argue that even if he knew the individuals were police officers, he reasonably believed they were acting unlawfully and his force was reasonably necessary to prevent the serious bodily injury to his daughter and himself.

By applying an objective test with strong standards, the court will place both a strong pressure on police officers to execute police raids and searches in as safe and peaceful manner as possible, while still forcing the homeowner to act reasonably for the self-defense law to apply if they mistake police officers for home intruders, instead of trying to hide behind the statute after irrationally attacking a police officers who lawfully enters their home.[151]

B. Eliminating the Tension: Requiring Officers to Knock-and-Announce Their Presence

Maye and other citizens in "castle doctrine" states should be able to defend themselves and their families in good faith against no-knock raids.[152] However, allowing individuals to use force against police officers during a no-knock search or raid may dissuade Indiana police and legal officials because it would basically be authorizing citizen violence against the police.[153] Essentially "[l]egalizing such deadly encounters will not solve the problem, but our justice system should not blame and punish the police or private citizens for taking reasonable actions in pursuit of self-preservation."[154] Instead, "the fault lies with the bad public

148. BALKO, *supra* note 1, at 69.
149. Epstein, *supra* note 93, at 613.
150. BALKO, *supra* note 1, at 69.
151. Epstein, *supra* note 93, at 613.
152. *Id*. at 611-12.
153. *Id*.
154. *Id*.

policy that puts police officers in such unnecessarily perilous situations."[155]

In order to protect both Indiana citizens and police officers from dangerous situations resulting from the tension between the "castle doctrine" and no-knock warrants, the Indiana legislature should amend the state's search warrant statute**,** Indiana code section 35-33-5-7, to require police officers to strictly adhere to the knock-and-announce requirement while executing a warrant. Requiring police officers to adhere to the knock-and-announce rule when executing a warrant alleviates the bad public policy no-knock raids place both citizens and police officers in.[156] As Justice Brennan stated, complying with the knock-and-announce rule acts as "a safeguard for the police themselves who might be mistaken for prowlers and be shot down by a fearful householder."[157]

By requiring strict adherence to the knock-and-announce principle, the Indiana legislature will further its goal to recognize the unique character of a citizen's home, and ensuring that every citizen feels secure in their home against unlawful intrusion by another individual or a public servant.[158] As one writer notes,

> While a "no-knock" entry is not the *most* pernicious sort of governmental privacy intrusion, it strikes at the individual's sense of security. Of further concern is the potential shame and fear resulting from an inability to prevent outsiders from breaching the castle door. The "knock and announce" rule recognizes the thoroughly distasteful effects of having unknown intruders enter the home.[159]

The potential fear and shame caused by no-knock warrants seems to be exactly what the Indiana legislature looked to prevent when rewriting section 35-41-3-2.[160]

After the *Barnes* decision, many in the Indiana legislature feared the court's decision destroyed Indiana citizens' right to be safe from police intrusion into their homes.[161] These fears seemed to flow from the court's decision to abrogate the common law ruling of the "castle doctrine" as a defense against unlawful police intrusion.[162] As many writers have pointed out, the Fourth Amendment's search and seizure clause can be traced back in large part to the "castle doctrine"[163] and the Founding Fathers concerns of protecting the private sphere

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155. *Id*. at 612.

156. Butler, *supra* note 22, at 451.

157. *Id*.

158. *See* IND. CODE § 35-41-3-2 (2012) ("In enacting this section, the general assembly finds and declares that it is the policy of this state to recognize the unique character of a citizen's home and to ensure that a citizen feels secure in his or her own home against unlawful intrusion . . . .").

159. Estrada*, supra* note 58, at 84.

160. LEGISLATIVE REPORT, *supra* note 34, at 1.

161. *See* Amicus Brief, *supra* note 49, at 1-2; Schumm, *supra* note 35, at 1073.

162. *Id.*

163. *See* Estrada*, supra* note 58, at 84.

from governmental intrusion.[164] Thus, it seems the "Fourth Amendment's indefatigable guarding of the home is an outcropping of the liberalistic tradition."[165]

If the ultimate purpose of the Fourth Amendment is to protect citizens' individualist liberty, it only seems logical that the knock-and-announce principle, an extension of the Fourth Amendment, "flows from this liberalistic inheritance as a constitutional mechanism for tempering the evils of governmental intrusion into the sacred home."[166] By forcing Indiana police officers to strictly adhere to the knock-and-announce requirement, the Indiana legislature would ensure "governmental authorities accord due respect to domestic tranquility even in the case of suspected criminals."[167] "In essence, the 'knock and announce' rule guards individual dignity."[168]

Proponents of no-knock warrants argue the state's primary interest in executing an unannounced entry is it allows the police officers to take command of the search scene quickly and efficiently.[169] There are two primary benefits from the state's interest.[170] First, allowing police officers to enter quickly and unannounced reduces the possibility of the targeted suspect destroying the evidence.[171] While this is a valid interest, there are less violent approaches than barging into one's home unannounced to prevent the destruction of drugs or other evidence that may be in the home.[172] These less violent alternatives include the tactic of shutting off the house's water or trying to use a ruse to gain entry first.[173]

The second benefit arising from the state's interest in executing a no-knock entry is the safety of the police officer.[174] The safety of police officers is a "weighty" interest when executing a valid warrant.[175] When executing a warrant, officers are most vulnerable when attempting to enter the house.[176] The officer is disadvantaged by not knowing the location of the house's occupants or the layout of the house, allowing hiding places for occupants who wish to resist.[177] Furthermore, occupants may have the chance to arm themselves and prepare for confrontation if the officer is first forced to announce his presence.[178]

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164. *Id*. at 84-85.

165. *Id*. at 85.

166. *Id*.

167. *Id*. at 86.

168. *Id*.

169. Mark Josephson, *Fourth Amendment—Must Police Knock and Announce Themselves Before Kicking in the Door of a House?*, 86 J. CRIM. L. & CRIMINOLOGY 1229, 1258 (1996).

170. *Id*.

171. *Id*.

172. *Id*.

173. *Id*.

174. *Id*. at 1259.

175. *Id*. (quoting Pennsylvania v. Mimms, 434 U.S. 106, 110 (1979) (per curiam)).

176. *Id*.

177. *Id*.

178. *Id*.

While police safety is an extremely important issue, "safety is not necessarily maximized by allowing officers to enter a house unannounced."[179] Furthermore, "civilians should not [have to] shoulder all the risks of a deadly encounter" with police officers executing a no-knock raid on their home.[180] Police are "significantly more prepared to deal with deadly situations and to avoid harm than private citizens."[181] Both Jillian King and Cory Maye's stories show it is "unrealistic and unfair to expect civilian occupants to show remarkable poise and composure, exercise good judgment, and hold their fire, even as teams of armed assailants are swarming their homes."[182]

Furthermore, when weighing the citizen's privacy interest against the state's efficiency and safety interest, the Supreme Court pointed out in *Richards v. Wisconsin,* "governmental interests in preserving evidence and maintaining safety may not outweigh the individual privacy interests intruded upon by a no-knock entry."[183] The Court recognized that

> [w]hile it is true that a no-knock entry is less intrusive than, for example, a warrantless search, the individual interests implicated by an unannounced, forcible entry should not be unduly minimized . . . . [T]he common law recognized that individuals should be provided the opportunity to comply with the law and to avoid the destruction of property occasioned by a forcible entry. These interests are not inconsequential.[184]

The Court went on to explain "[t]he brief interlude between [the police] announcement and entry with a warrant may be the opportunity that an individual has to pull on clothes or get out of bed."[185] Concern for the integrity of the "castle" door is what is at the core of the Court's interest in the knock-and-announce rule doctrine.[186] "Thus, at the heart of the lofty, genteel dignity interests undergirding the 'knock and announce' rule lies a strikingly prosaic concern: protecting the castle door."[187] The "castle" door conveys power to the occupant of the home, it allows one to exclude or include others of the activities occurring within, and it provides safety by presenting both a physical and symbolic obstacle to intruders.[188] Protecting "[t]his interest is paramount in the present political climate where the public's desire for security is at a premium."[189]

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179. *Id*.
180. Epstein, *supra* note 93, at 610-11.
181. *Id*. at 611.
182. *Id*. (internal quotation marks and citation omitted).
183. Richards v. Wisconsin, 520 U.S. 385, 393 (1997).
184. *Id*. at 393 n.5.
185. *Id*.
186. Estrada, *supra* note 58, at 86.
187. *Id*. at 87.
188. *Id*.
189. *Id*.

Thus, the Indiana legislature may protect Indiana citizens' strong desire for security, while still protecting both police officers and citizens from deadly encounters by forcing police to strictly adhere to the knock-and-announce rule. The individual safety and liberty interests the knock-and-announce rule protects go hand in hand with the new language added in section 35-41-3-2. At the same time, requiring police officers to announce their presence before entering offers a safeguard that will allow citizens to not be reasonably confused or mistaken as to the identity of the officers.[190] While there is concern for efficiency and police officers' safety in announcing their presence, the police have extensive training and equipment that may help them minimize the added risks, which allows a balancing of the citizen's private security interest.[191] Therefore, the knock-and-announce requirement will allow Indiana's new self-defense statute to recognize the unique character of an individual's home, while removing the bad public policy that puts police officers in such unnecessarily perilous situations.[192]

In order to further support both Indiana citizens' liberty interest, while still protecting police officers from mindless shootings, the Indiana legislature should also circumvent the Indiana Supreme Court's decision to follow the precedent set forth in the Supreme Court case *Hudson v. Michigan*[193] that suppression of the evidence found during a search where the officers did not adhere to the knock-and-announce rule is not a proper remedy. By not requiring the suppression of evidence found during a search where the police officers did not first stop and announce their presence, police officers will have no incentive to strictly adhere to any rule requiring they announce their presence.[194] As Justice Breyer stated in his dissent of the *Hudson* rule, "the Court destroy[ed] the strongest legal incentive to comply with the Constitution's knock-and-announce requirement."[195] Furthermore, as one writer notes, the civil remedies stated by the majority in *Hudson* that force police officers to strictly adhere to the knock-and-announce requirement are insufficient because:

> First, it is unlikely that a criminal defendant would file a lawsuit over a knock-and-announce violation because there is no right to counsel in civil suits. Second, the criminal defendant would face difficulty obtaining private counsel because such a case is unattractive considering the "expensive [and] time-consuming" nature of the suit when compared with the nominal recovery that would probably be awarded. Third, recovery is unlikely, even if the criminal defendant does file a suit, because officers are often shielded by the doctrine of qualified immunity. Fourth, research suggests that jurors favor police officers in civil actions, especially where the plaintiff is an individual convicted of a crime. For

190. Butler, *supra* note 22, at 451.

191. *See* Epstein, *supra* note 93, at 611; Josephson, *supra* note 169, at 1258-59.

192. *See* BALKO, *supra* note 2, at 35.

193. 547 U.S. 586, 602 (2006).

194. Butler, *supra* note 22, at 451.

195. *Hudson*, 547 U.S. at 605.

these reasons, civil liability, at best, is a dubious deterrent substitute.[196]

It is hard to believe that Indiana police officers will not disregard a strict knock-an-announce requirement created by the legislature if they know any evidence found during an illegal search where they did not first knock will not be suppressed.

By forcing police officers to strictly adhere to the knock-and-announce requirement while executing a warrant and suppressing any evidence found when they do not, the Indiana legislature can allow Indiana citizens to still have a robust right to defend themselves and their homes as was the intention of section 35-41-3-2,[197] while still protecting both citizens and police officers alike from serious injury and death.[198]

CONCLUSION

The Indiana Supreme Court's decision in *Barnes v. State* to abrogate the common law defense allowing an Indiana citizen to resist unlawful entry into their home by police officers met fierce criticism from citizens and law makers alike. In response to the court's decision, the Indiana legislature updated the language of Indiana's self-defense statute, section 35-41-3-2, to include police officers as a class of individuals to whom it applies. At the same as the *Barnes* decision, the Indiana Supreme Court's ruling in *Lacey v. State* that police do not have to gain confirmation to execute a no-knock warrant further strengthened an officer's ability to enter a citizen's home without the citizen's knowledge. Furthermore, in citing the Supreme Court precedent issued in *Hudson v. Michigan*, the Indiana Supreme Court ruled that the suppression of evidence is not an appropriate remedy when it is found that the searching officers did not comply with the knock-and-announce rule in executing a warrant. In following the *Hudson* rule, the Indiana Supreme Court further incentivized police officers to execute no-knock warrants, which place both police and private citizens in dangerous situations.

This Note focuses on the potentially violent conflicts that could result when police officials who are authorized to execute no-knock warrants become a class of people to whom section 35-41-3-2 applies, thus laying the groundwork for potentially dangerous responses from homeowners acting within the limits of the self-defense law. The self-defense law should offer an affirmative defense to citizens who reasonably mistake a lawful officer as an intruder. By allowing an affirmative defense to a reasonable mistake, the courts will guard the liberty interest citizens have in protecting their homes, without having to fear punishment for making a wrong split second decision. In order to determine

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196. Butler, *supra* note 22, at 448 (citations omitted).

197. *See* IND. CODE § 35-41-3-2 (a) (2012) ("In enacting this section, the general assembly finds and declares that it is the policy of this state to recognize the unique character of a citizen's home and to ensure that a citizen feels secure in his or her own home against unlawful intrusion . . . .").

198. *See* Butler, *supra* note 22, at 451.

whether the citizen's mistake was reasonable, the court should apply an objective test that sets clear guidelines for both citizens and police on what the law is.

Finally, to further protect citizens and police officers from deadly encounters, the Indiana legislature should pass a law requiring police officers to strictly adhere to the knock-and-announce rule when executing a warrant. No-knock warrants are bad policy and place citizens in an the uncomfortable decision of having to make a split second decision on whether the person breaking into their home is a law abiding police officers or an unlawful intruder. By forcing police officers to announce their presence before entering, citizens will be on notice and therefore, will not have to make a reasonable mistake. By taking affirmative action, the legislature can take steps to alleviate the potential problem the new self-defense law creates with regards to no-knock warrants, while still allowing Indiana citizens to protect and recognize the importance of privacy within their homes.