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# Advance

*The Journal of the ACS Issue Groups*

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# Introduction to *Advance*

Welcome to the inaugural issue of *Advance*, the Journal of the Issue Groups of the American Constitution Society for Law and Policy (ACS). ACS is one of the nation's leading progressive legal organizations, with a rapidly growing membership of lawyers, law students, scholars, policymakers and activists. Our mission is to ensure that our country's founding values of human dignity, individual rights and liberties, genuine equality and access to justice enjoy their rightful, central place in American law.

ACS Issue Groups are comprised of legal practitioners and scholars working together to articulate and publicize compelling progressive ideas. The Groups are led by distinguished co-chairs who are experts in their respective fields. They are open to all ACS members, and new members and new ideas are always welcome. The Issue Groups are currently organized into the following areas: Access to Justice; Criminal Justice; Constitutional Interpretation and Change; Democracy and Voting; Economic, Workplace and Environmental Regulation; Equality and Liberty; Religion Clauses; and Separation of Powers and Federalism.

Each issue of *Advance*, which will be published twice yearly, will feature a collection of articles advancing progressive ideas, proposals and views. While some editions of *Advance* will be comprised of papers on one particular topic emanating from a conference or other event hosted by one of the Issue Groups, most, like this one, will feature a selection of Issue Briefs written for ACS in the preceding several months, on topics spanning the breadth of the eight Issue Groups. ACS Issue Briefs—those included in *Advance* as well as others available at [www.acslaw.org](http://www.acslaw.org)—are intended to offer substantive analysis of a legal or policy issue in a form that is easily accessible to practitioners, policymakers and the general public. Some Issue Briefs tackle the high-profile issues of the day, while others take a longer view of the law, but all are intended to enliven and enrich debate in their respective areas.

ACS encourages its members to express their views and make their voices heard in order to further a rigorous discussion of important issues, and we invite those who are interested in writing an ACS Issue Brief to contact ACS. The expressions of opinion in *Advance* are those of the authors, as ACS takes no position on particular legal or policy initiatives.

We are confident that the scholarship and commentary published in this journal, along with all of the work of ACS's Issue Groups, lawyer chapters, student chapters and members, will help achieve a central goal of ACS: to *Advance* a progressive vision of the Constitution, law and public policy.

Lisa Brown  
Executive Director

# ACS Issue Groups

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## Access to Justice

The Access to Justice Group addresses barriers to access to our civil justice system, including, among other issues, efforts to strip courts of jurisdiction, raise procedural hurdles, remove classes of cases from federal court, insulate wrongdoers from suit, limit remedies and deprive legal aid services of resources. It focuses attention on ways to ensure that our justice system is truly available to all.

**Co-Chairs:** *Lucas Guttentag*, ACLU Immigrants' Rights Project  
*Marianne Lado*, New York Lawyers for the Public Interest  
*Bill Lann Lee*, Lewis, Feinberg, Lee, Renaker & Jackson, P.C.  
*Alan Morrison*, Stanford Law School

## Constitutional Interpretation and Change

Ideological conservatives have been quite successful in promoting neutral-sounding theories of constitutional interpretation, such as originalism and strict construction, and in criticizing judges with whom they disagree as judicial activists who make up law instead of interpreting it. The Constitutional Interpretation and Change Group works to debunk the neutrality of those theories and expose misleading criticisms. It also articulates effective and accessible methods of interpretation to give full meaning to the guarantees contained in the Constitution.

**Co-Chairs:** *Jack Balkin*, Yale Law School  
*Rebecca Brown*, Vanderbilt University Law School  
*Andrew Pincus*, Mayer, Brown, Rowe & Maw

## Criminal Justice

The administration of our criminal laws poses challenges to our nation's fundamental belief in liberty and equality. Racial inequality permeates the system from arrest through sentencing. The United States' imposition of the death penalty increasingly has set us apart from much of the world and has raised concerns about the execution of the innocent. Sentencing law and policy have led courts to impose lengthier sentences, resulting in the incarceration of an alarming percentage of our population. The recent invalidation of mandatory federal sentencing guidelines has left sentencing in flux. Failure to provide adequate resources for representation of accused individuals and investigation of their cases has weakened the criminal justice system. Restrictive rules governing collateral review of convictions have closed the courts to many. This Group explores these and other issues affecting criminal justice.

**Co-Chairs:** *David Cole*, Georgetown University Law Center  
*Gregory Craig*, Williams & Connolly  
*Carol Steiker*, Harvard Law School  
*Ronald Sullivan*, Yale Law School

## Democracy and Voting

The Democracy and Voting Group focuses on developing a comprehensive vision of the right to vote and to participate in our political process. It identifies barriers to political participation that stem from race, redistricting, the partisan and incompetent administration of elections, registration difficulties, felon disenfranchisement and other problems that suppress access to voting and threaten the integrity of our electoral process.

**Co-Chairs:** *Julie Fernandes*, Leadership Conference on Civil Rights  
*Pamela Karlan*, Stanford Law School  
*Nina Perales*, MALDEF  
*Sam Hirsch*, Jenner & Block

## Equality and Liberty

The protection of individual rights lies at the core of a progressive approach to the law. The Equality and Liberty Group addresses means of combating inequality resulting from race, color, ethnicity, gender, sexual orientation, disability, age and other factors. It also explores ways of protecting reproductive freedom, privacy and end-of-life choices and of making work accessible and meaningful.

**Co-Chairs:** *Alan Jenkins*, The Opportunity Agenda  
*Nina Pillard*, Georgetown University Law Center  
*Paul Wolfson*, Wilmer, Cutler, Pickering, Hale & Dorr

## Economic, Workplace, and Environmental Regulation

The work of the Economic, Workplace, and Environmental Regulation Group encompasses a broad range of issues in the areas of labor law, environmental protection, economic opportunity, and administrative law. Among the topics it examines are workplace democracy, climate change and the enforcement of environmental laws, the regulatory process, corporate governance, and wealth inequality.

**Co-Chairs:** *Stephen Berzon*, Altshuler Berzon LLP  
*Catherine Fisk*, Duke Law School  
*Albert H. Meyerhoff*, Lerach, Coughlin, Stoia, Geller, Rudman & Robbins

## Religion Clauses

No issue was more central to our Nation's founding than freedom of religion and no part of the Constitution continues to capture the imaginations and passions of Americans more than the Religion Clauses of the First Amendment. The Religion Clauses Group provides a forum for discussion about the meaning and interpretation of the Establishment and Free Exercise Clauses and also investigates broader questions regarding religion in America—including the appropriate relationship between church and state in contemporary society and the role of religion and religious belief in American politics and public life.

**Chair:** *William P. Marshall*, University of North Carolina School of Law

## Separation of Powers and Federalism

Recent years have witnessed an increase in executive power at the expense of the other branches of the federal government. This change has had a profound effect on our civil liberties, government transparency and the rule of law. The Separation of Powers and Federalism Group addresses the proper balance of power in our system of checks and balances, as well as other issues related to the power of the President. It also addresses the importance of preserving the independence of the judiciary. In addition, this Group focuses on the federalism jurisprudence of the Supreme Court, which has led it to strike down an unprecedented number of congressional enactments, threatening the ability of Congress to protect civil rights, the environment and workers. It also addresses positive visions of federalism that will promote the ability of government at all levels to pursue progressive policies.

**Co-Chairs:** *Preeti Bansal*, Skadden, Arps, Slate, Meagher & Flom  
*Dawn Johnsen*, Indiana University School of Law-Bloomington  
*Neil J. Kinkopf*, Georgia State University College of Law  
*Simon Lazarus*, Sidley, Austin, Brown & Wood  
*Christopher Schroeder*, Duke Law School



# Signing Statements and the President's Authority to Refuse to Enforce the Law

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Neil Kinkopf\*

## I. INTRODUCTION

Signing statements have been very much in the news lately. But this publicity has been as likely to engender confusion as understanding. In part this is because “signing statement” is used as a short-hand reference for two distinct issues: one issue has to do with whether and when the President may refuse to enforce a law that the President regards as unconstitutional; the other issue is whether the courts should take into account the views of the President when reviewing the legislative history of a statute. I propose to focus on the former issue because the current Bush Administration has so vigorously and frequently asserted the authority to refuse that the issue has taken on an immediate importance. For anyone interested in a full, scholarly treatment of the subject, I recommend Professor Dawn Johnsen’s outstanding article on the subject, which has informed and influenced the discussion that follows.<sup>1</sup>

Historically, signing statements have served a largely innocuous and ceremonial function. They are issued by the President to explain his reasons for signing a bill into law. A signing statement thus serves to promote public awareness and discourse in much the same way as a veto message. Controversy arises when a signing statement is used not to extol the virtues of the bill being signed into law, but to simultaneously condemn a provision of the new law as unconstitutional and announce the President’s refusal to enforce the unconstitutional provision. This refusal to enforce laws represents a controversial exercise of presidential power, but it is crucial to keep this controversy distinct from the vehicle by which that power is announced—the signing statement. There is nothing inherently wrong with or controversial about signing statements. Most do not contain an assertion of presidential power. For those that do, the signing statement itself ironically serves the laudable function of promoting accountability. Even if one rejects the idea that the President may refuse to enforce a law, at least the President is openly declaring what he plans to do. Put differently, if the President is to sign a bill into law with his fingers crossed, better that they be crossed where we can see them than that they be crossed behind his back. The controversy, then, is not over the use of signing statements but over the assertion of a non-enforcement power that is sometimes declared in signing statements.

The controversy over whether the President has the authority to refuse to enforce laws he views as unconstitutional has been sharpened during the current administration

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\* Associate Professor, Georgia State University College of Law. This Issue Brief was first released by ACS in June 2006.

<sup>1</sup> Dawn E. Johnsen, *Presidential Non-Enforcement of Constitutionally Objectionable Statutes*, 63 LAW & CONTEMP. PROBS. 7 (Winter/Spring 2000).

by the frequency with which it has asserted this authority. In a recent and important study, political science Professor Phillip J. Cooper has analyzed the exercise of this non-enforcement power by the Bush Administration. He found that President Bush has deployed the non-enforcement power with unprecedented breadth and frequency—over 500 times during the first term alone.<sup>2</sup> The figures from the study were updated in an excellent article by *Boston Globe* reporter Charlie Savage, which puts the number at over 750, which is more than all of President Bush’s predecessors combined.<sup>3</sup> As a result, a front page article in *USA Today* cataloging the ways in which the Bush Administration has sought to expand presidential power listed presidential non-enforcement (using the label “signing statements”) first.<sup>4</sup>

## II. THE CONTROVERSY

The assertion of a presidential power to refuse to enforce a law stands in deep tension with the Constitution. As the Supreme Court has repeatedly recognized, the Take Care Clause—which provides that the President “shall take care that the Laws be faithfully executed”—establishes that the President does not hold the royal prerogative of a dispensing power, which is the power to dispense with or suspend the execution of the laws. The Take Care Clause, then, makes plain that the President is duty-bound to enforce all the laws, whether he agrees with them or not.

A presidential power to refuse to enforce the laws is also inconsistent with the constitutional process for the enactment of legislation. As the old Saturday morning cartoon literally illustrates, the Constitution provides that a bill cannot become a law unless the President gives his assent. This assent must be given or withheld in whole, as the Supreme Court recently emphasized in striking down a statutory line-item veto.<sup>5</sup> In *The Federalist*, James Madison describes the system of checks-and-balances. The President’s principal weapon against legislative encroachments and against improvident legislation is his veto power. Under the Constitution’s design, then, if the President regards a provision of a bill to be unconstitutional, the appropriate remedy is a veto.

The case against a presidential power of non-enforcement seems quite powerful. Yet Presidents of both parties have over the course of many years refused to enforce unconstitutional laws, including laws they themselves have signed into existence. How can this be? The explanation has both pragmatic and formal elements. As a practical matter, some legislation cannot be vetoed. Especially as Congress turns more and more to the use of omnibus legislation which encompasses many indispensable provisions—funding for the military, for example—it becomes practically impossible for even the most scrupulous President to veto a bill simply because one minor and obscure provision is unconstitutional. As a formal matter, Presidents do not typically assert the power to refuse to enforce a law. Rather, Presidents note that because the Constitution is also a law, they must enforce the Constitution by refusing to enforce an unconstitutional law. To take an uncontroversial example, the Supreme Court ruled all legislative vetoes unconstitutional in *INS v. Chadha*.<sup>6</sup> After the *Chadha* decision,

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<sup>2</sup> Phillip J. Cooper, *George W. Bush, Edgar Allan Poe, and the Use and Abuse of Presidential Signing Statements*, 35 PRES. STUD. Q. 515, 522 (2005).

<sup>3</sup> Charlie Savage, *Bush Challenges Hundreds of Laws*, BOSTON GLOBE, Apr. 30, 2006, at A1.

<sup>4</sup> Susan Page, *Congress, Courts Push Back Against Bush’s Assertions of Presidential Power*, USA TODAY, June 6, 2006, at 1.

<sup>5</sup> *Clinton v. New York*, 524 U.S. 417 (1998).

<sup>6</sup> 462 U.S. 919 (1983).

no one has criticized the Presidents (of both parties) who have refused to enforce the thousands of legislative vetoes that remain on the books. Moreover, as Louis Fisher has pointed out, Congress has enacted hundreds of legislative vetoes since *Chadha*, and not even members of Congress expect the President to veto such legislation or to enforce the patently unconstitutional legislative veto provisions.<sup>7</sup> The President complies with, rather than violates, his Take Care Clause duty by adhering to the Constitution's requirements and by refusing to apply the incompatible and unconstitutional law. The principled and fairly consistent (between the political parties) position of the executive branch boils down to this: where a statute is unconstitutional, it is the President's duty to refuse to enforce the unconstitutional statute.

The executive branch's position raises a difficult question: when is a statute unconstitutional? It is surely the case that when a statute is definitively determined to be unconstitutional, such a statute should not be enforced. But there are many occasions where a law's constitutionality is indeterminate. For example, a statute may raise a question that has not been squarely addressed by the courts. Or, if squarely addressed, the President may nevertheless believe that he can convince the court in a subsequent case to draw a distinction or overrule its precedent—as President Franklin Roosevelt did with respect to his New Deal legislation. What is the President to do when he regards a law to be unconstitutional, but for one reason or another, there is no definitive resolution to the question? This is the most difficult aspect of the controversy.

### III. RESOLVING THE CONSTITUTIONAL TENSIONS

Some commentators take an absolutist position: until a statute's unconstitutionality is definitively established, the President must enforce the statute. The absolutist position is contrary to longstanding and consistent executive branch practice dating at least to 1860. Moreover, the absolutist position fails to account for the complexities of how constitutional meaning is established. For example, the President's determination that he will enforce a law that he regards as unconstitutional will sometimes deprive the judiciary of the opportunity to rule on the question. Imagine, for example, that Congress enacts a statute (overriding the President's veto) that forbids the Justice Department to pursue any investigation or prosecution of Tom Delay or William Jefferson. The President would almost certainly regard this statute as an unconstitutional encroachment on the prosecutorial discretion of the executive branch, but there is not sufficient precedent on the subject to predict with confidence what the Supreme Court would ultimately say. If the President were to order the Justice Department to comply with the statute and cease prosecution, there would be no occasion for the judiciary to rule on the constitutional question of whether the statute violates the constitutional powers of the executive. Similarly, had President Woodrow Wilson enforced the provisions of the Tenure in Office Act, there would have been no apparent basis for the lawsuit in *Myers v. United States*,<sup>8</sup> in which the Supreme Court ultimately declared the Act unconstitutional. Thus, the absolutist position can actually lead to a situation in which unconstitutional laws are enforced with no meaningful opportunity for judicial review.

If absolute enforcement is unacceptable, we must determine when it is appropriate for a President to decline to enforce a statute because the president regards the statute

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<sup>7</sup> Louis Fisher, *Congressional Research Service Report for Congress, Legislative Vetoes After Chadha*, CRS-5 (2005).

<sup>8</sup> 272 U.S. 52 (1926).

as unconstitutional. Walter Dellinger, writing as the head of the Justice Department's Office of Legal Counsel, set forth the classic treatment of this question in a memorandum for then-White House Counsel Abner Mikva. Dellinger concluded that "[a]s a general matter, if the President believes that the Court would sustain a particular provision as constitutional, the president should execute the statute, notwithstanding his own beliefs about the constitutional issue. If, however, the President, exercising his independent judgment, determines both that a provision would violate the Constitution and that it is probable that the Court would agree with him, the President has the authority to decline to execute the statute."<sup>9</sup>

But Dellinger emphasized that this authority does not represent an unbounded discretion. Rather, in determining how to act, the President must pursue the course of action that takes account of and advances all the relevant aspects of constitutional structure. The decision will inevitably be dependent on the context of the specific case. In deciding whether to enforce a statute, the President should be guided by: "a careful weighing of the effect of compliance with the provision on the constitutional rights of affected individuals and on the executive branch's constitutional authority. Also relevant is the likelihood that compliance or noncompliance will permit judicial resolution of the issue." The decision is to be guided by close consideration of the effect of enforcement on individual rights, the constitutional balance of power between the branches, and the Supreme Court's "special role in resolving disputes about the constitutionality of enactments."

So formulated, the President does not enjoy a power to decline to enforce a law whenever he sees fit, or whenever he can articulate a constitutional objection (which practically may amount to the same thing). Take the application of the Dellinger principles in the Clinton Administration. In 1996, Congress passed as part of the annual military appropriation bill a provision requiring the discharge from military service of anyone with human immunodeficiency virus (HIV).<sup>10</sup> The President believed that the HIV provision was unconstitutional but signed the bill into law because he could not deprive the military of the money it needed to operate (this coming on the heels of two government shutdowns). President Clinton decided to follow a two-pronged strategy. He would seek the repeal of the HIV provision and, failing repeal, he would enforce the provision in order to secure a judicial resolution of the controversy. Threatened with the prospect of judicial rebuke, Congress repealed the HIV provision.

#### IV. DISREGARD FOR THE CONSTITUTION

The Bush Administration's approach is in stark contrast with the Clinton Administration's. Far from a careful, contextual weighing of disparate constitutional factors framed by a respect for the special role of the Supreme Court in resolving constitutional issues, the Bush Administration has operated with a careless disregard for constitutional structure and has asserted its own raw power with contempt for the role of the Supreme Court. This is dramatically illustrated by the frequency with which the Bush Administration has articulated its intention not to enforce laws. The Bush Administration has not fought for the repeal of the more than 700 provisions it has identified as unconstitutional, much less has it carefully weighed the facts and

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<sup>9</sup> Walter Dellinger, *Presidential Authority to Decline to Execute Unconstitutional Statutes*, 18 U.S. Op. Off. Legal Counsel 35 (1994).

<sup>10</sup> National Defense Authorization Act for Fiscal Year 1996 § 567, Pub. L. No. 104-106, 10 U.S.C. § 1177 (1996).

circumstances of each of those instances. Indeed, a review of these objections shows that they are treated in a mechanical fashion, with boilerplate objections phrased over and over again in signing statements.

The contempt of the Bush Administration for constitutional limits on its own power is nowhere more evident than in the statement accompanying the signing of the McCain Amendment. The McCain Amendment forbids United States personnel from engaging in cruel, inhuman, and degrading treatment of detainees, adding these prohibitions to the existing prohibition on the use of torture.<sup>11</sup> Upon signing this provision into law, President Bush issued a statement declaring that the executive branch would interpret it “in a manner consistent with the constitutional authority of the President to supervise the unitary executive branch and as Commander in Chief and consistent with the constitutional limitations on the judicial power, ....”<sup>12</sup> The President cannot have concluded that his view would likely be vindicated by the Court. The “unitary executive” view of presidential power is an extreme construction that lacks judicial sanction. Moreover, it is precisely this view that supported the Administration’s infamous torture memo, which the Bush Administration itself pointedly refused to defend, and ultimately repudiated, after it became public.

It is even more remarkable that the language of the McCain Amendment signing statement is itself boilerplate. This “power to supervise the unitary executive” objection was raised, essentially verbatim, against 82 separate provisions of law during the first term of the Bush Administration alone, according to Professor Phillip J. Cooper’s study.<sup>13</sup> This simply cannot be the result of a careful balancing of constitutional considerations. Moreover, the clinching phrase about the constitutional limitations of the judicial power speaks volumes about the Administration’s contempt for the judiciary’s role in constraining executive power, coming as it did on the heels of the Supreme Court’s declaration in *Hamdi v. Rumsfeld*, that “a state of war is not a blank check for the President ....”<sup>14</sup>

These problems are not limited (if 82-and-counting occurrences can be called limited) to the President’s construction of his own power as unitary executive. President Bush’s arsenal includes boilerplate language for objecting to laws that he recommend legislation to Congress, that he disclose information to Congress or the public, that set qualifications for federal officeholders, or that so much as mention race. For example, the President signed into law a bill establishing an Institute of Education Sciences.<sup>15</sup> The signing statement pertaining to this law raised a constitutional objection in what seems like a laudable and unobjectionable goal for the new institute: “closing the achievement gap between high-performing and low-performing children, especially achievement gaps between minority and nonminority children and between disadvantaged children and such children’s more advantaged peers.”<sup>16</sup> The signing statement questions this provision’s conformity with “the requirements of equal protection and due process under the Due Process Clause of the Fifth Amendment.”

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<sup>11</sup> Detainee Treatment Act of 2005 §§ 1001 – 1006, Pub. L. No. 109-148, 42 U.S.C. § 2000dd (2005).

<sup>12</sup> President’s Statement on Signing of H.R. 2863, the “Department of Defense, Emergency Supplemental Appropriations to Address Hurricanes in the Gulf of Mexico, and Pandemic Influenza Act, 2006” (Dec. 30, 2005), available at <http://www.whitehouse.gov/news/releases/2005/12/20051230-8.html> (last visited Mar. 20, 2007).

<sup>13</sup> Cooper, *supra* note 2, at 522.

<sup>14</sup> 542 U.S. 507, 536 (2004).

<sup>15</sup> Education Sciences Reform Act of 2002 § 111, Pub. L. No. 107-279, 20 U.S.C. § 9543 (2002).

<sup>16</sup> *Id.* at § 115(a)(1).

There is no judicial precedent that would question the validity of this law under the Fifth—or any other—Amendment. Only under a radical and unsupported reconceptualization of the idea of equality could working to eliminate the achievement gap be considered constitutionally suspect. This is not the Dellinger paradigm of a President wrestling to resolve a conflict between statutory and constitutional law. The posture of the Bush Administration is that of an Administration that is wrestling to create conflicts in order to support the assertion of a power to dispense with the execution of the laws.

Because President Bush has found constitutional problems with statutes so readily and because he takes such a radically expansive view of his own power, President Bush's position amounts to a claim that he is impervious to the laws that Congress enacts. This amounts to the view articulated in President Richard Nixon's notorious dictum, "If the President does it, that means it is not illegal." Precisely to guard against such claims, Congress has enacted a law that requires the Attorney General to "submit to the Congress a report of any instance in which the Attorney General or any officer of the Department of Justice ... establishes or implements a formal or informal policy to refrain ... from enforcing, applying, or administering any provision of any Federal statute ... whose enforcement, application, or administration is within the responsibility of the Attorney General or such officer on the grounds that such provision is unconstitutional."<sup>17</sup> Subsection (e) of that statute extends this reporting obligation to the head of each executive agency or military department that implements such a policy of "constitutional noncompliance."<sup>18</sup> Such a report must be made within 30 days after the policy is implemented, and must "include a complete and detailed statement of the relevant issues and background (including a complete and detailed statement of the reasons for the policy or determination)."<sup>19</sup>

But President Bush apparently regards this reporting requirement, like so many others, to raise serious constitutional concerns. As such, he may be refusing to comply with it. If so, this represents a serious assault on the constitutional system of checks and balances. That system is premised on the idea that the President is not above the law but is, like all other citizens, bound to obey the law. The primary check that Congress has on the President is its power to legislate rules that govern everyone, including the President himself. This is the preeminent power in our constitutional system and explains why James Madison famously regarded Congress to be the most dangerous branch under our Constitution. If the President may dispense with application of laws by concocting a constitutional objection, we will quickly cease to live under the rule of law.

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<sup>17</sup> 21st Century Department of Justice Appropriations Authorization Act §202, Pub. L. No. 107-273, 28 U.S.C. § 530(D) (2002).

<sup>18</sup> *Id.* at § 530D(e).

<sup>19</sup> *Id.* at § 530D(e)(3).

# Neutrality Agreements and Card Check Recognition: Prospects for Changing Labor Relations Paradigms

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James J. Brudney\*

## I. INTRODUCTION

[I]t is important ... [to] not[e] ... what scientists never do when confronted by even severe and prolonged anomalies. Though they may begin to lose faith and then to consider alternatives, they do not renounce the paradigm that has led them into crisis ... [O]nce it has achieved the status of paradigm, a scientific theory is declared invalid only if an alternate candidate is available to take its place.<sup>1</sup>

**A**t the heart of the National Labor Relations Act (“NLRA” or “Act”) is § 7, guaranteeing workers the right to band together for collective bargaining “through representatives of their own choosing.”<sup>2</sup> This employee choice, including the right to refrain from unionizing, has long been analogized to voting in political elections. The resonance of the comparison between industrial and political democracy has helped make elections supervised by the National Labor Relations Board (“NLRB” or “Board”) the dominant explanatory structure, or paradigm, for the exercise of employee choice under the NLRA.

The past decade has witnessed a growing challenge to the election paradigm as the preferred approach for determining whether employees want union representation. A central component of this challenge is U.S. unions’ success securing agreements from employers to remain neutral during organizing campaigns. These agreements generally provide that the employer will not demand a Board-supervised election, but will recognize the union if a majority of employees sign authorization cards.

Neutrality agreements that include card check recognition provide a distinct mechanism for employees to select union representation. This approach has partially displaced NLRB elections, and has become the principal strategy pursued by many unions. Its non-electoral focus has provoked attention from labor law scholars, resistance from

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\* Newton D. Baker-Baker & Hostetler Chair in Law, The Ohio State University Moritz College of Law. This Issue Brief was first released by ACS in February 2007. It is an edited version of a longer and more extensively footnoted article published in March 2005 in the Iowa Law Review. See James J. Brudney, *Neutrality Agreements and Card Check Recognition: Prospects for Changing Paradigms*, 90 IOWA L. REV. 819 (2005). This shortened version appears with the permission of the Iowa Law Review. Card check recognition is currently often referred to as “majority sign up.”

<sup>1</sup> Thomas S. Kuhn, *The Structure of Scientific Revolutions* 77 (2d ed. 1970).

<sup>2</sup> 29 U.S.C. § 157 (2000).

the business community, and controversy in Congress. Competing bills have been introduced, with one side attempting to ban the technique and the other proposing to have the NLRB certify unions through neutrality and card check.

This Article examines the rise of neutrality agreements and card check as a challenge to the election paradigm. The underlying question it addresses is whether to modify or even abandon reliance on Board-supervised elections as the favored method to determine if employees want union representation. Proponents within organized labor contend that the new approach safeguards employee freedom of choice better than elections, promotes a structure for more civil labor-management discourse and encourages stable labor relations based on respect for voluntary agreements.

Business opponents criticize these arrangements as inherently threatening to employee free choice. They maintain that private agreements and reliance on authorization card signatures allow unions to exert pressure on individual employees, thereby undermining secrecy, confidentiality, and a non-coercive environment for determining employee preferences. However, these opponents fail to acknowledge how the fundamental asymmetry of power in the organizing context between employers and unions—an asymmetry deeply rooted in the current NLRB election structure—has long subverted the exercise of uncoerced choice by individual employees. Accordingly, the debate over neutrality and card check offers a chance to re-examine basic approaches to employee choice under the NLRA.

Part II of the Article describes the proliferation of neutrality plus card check agreements, and explains why unions favor these arrangements and why many employers accept them. Part III considers the business community's legal critique of these agreements, focusing on claims that they violate the NLRA by interfering with employee free choice. It concludes that these arguments are deficient: both neutrality agreements and their card check provisions are plainly permissible under the NLRA.

Part IV addresses deeper concerns about displacing the election paradigm, borrowing from Professor Thomas Kuhn's framework for explaining change in the natural sciences to analyze the possibility of such a shift taking place in American labor law. Despite the fact that the Supreme Court has long endorsed NLRB elections as the predominant and optimal method for determining employee choice, it is no longer appropriate to overlook the anomalies associated with this model. Participants on both sides understand that NLRB elections regularly feature employers' exercise of lawful yet disproportionate authority to influence election results, as well as the use of their power to affect outcomes unlawfully but with relative impunity. This conduct has helped to fuel the growth of alternative contractually based approaches to organizing. Part IV concludes by suggesting ways in which the process of establishing union representation might be restructured to be more sensitive to the imbalance of power between employers and employees.

## II. THE RISE OF NEUTRALITY AND CARD CHECK AGREEMENTS

### A. BYPASSING NLRB ELECTIONS SINCE THE MID 1990S

A union organizing campaign typically begins when a union is contacted by employees who feel unfairly treated in their work environment. In the course of its campaign, the union distributes authorization cards, providing supportive employees with the chance to designate the union as their bargaining representative. If the union has received card support from a majority of employees at the establishment, it ordinarily will request that the employer recognize the union and enter into a collective bargaining relationship. The employer may lawfully accede to this request (provided there is

in fact uncoerced majority support for the union). Employers, however, usually exercise their right to refuse recognition, setting the stage for a NLRB-conducted representation election in which management urges employees to vote against unionization. The election thus becomes a contest challenging the union's assertion that it enjoys majority support.

In the late 1970s, unions began to negotiate agreements with employers that modified this traditional approach by providing for employers to remain neutral in future organizing campaigns among their employees. Unions typically have sought these agreements in two contexts. First, they have attempted to negotiate neutrality with firms where they already represent some but not all of the company's employees. In addition, particularly in the service sector, unions have sought neutrality agreements from employers with whom they do not have an existing collective bargaining relationship.

Early neutrality agreements often conditioned an employer's neutral stance on "responsible" union behavior, pledging that management would remain neutral "providing the Union conducts itself in a manner which neither demeans the Corporation as an Organization nor its representatives as individuals."<sup>3</sup> This emphasis on mutual respect and non-confrontation is a significant aspect of the neutrality agreement approach. Whereas the "regulated" environment of a NLRB election is highly adversarial, the self-regulated regime under neutrality and card check is predicated on a pre-commitment to restraint: both labor and management agree not to injure the reputation of their opposite number.

By the late 1990s, as unions bargained for neutrality with greater frequency, these agreements had become a central component of their organizing strategy. In an important empirical study, Professors Adrienne Eaton and Jill Kriesky analyzed 132 neutrality agreements negotiated by twenty-three different national unions.<sup>4</sup> Approximately 80% of the agreements they examined were bargained during the 1990s. Not surprisingly, Eaton and Kriesky found considerable variation among these agreements. Almost all, however, included an employer commitment to neutrality, and some two-thirds included both neutrality and a provision for recognizing union majority status through a card check. In addition, most agreements called for union access to the employer's premises, thereby contracting around legal access restrictions established in 1992 by the Supreme Court. Nearly four-fifths of the agreements also imposed limits on union behavior—most often an agreement not to attack management during the campaign. Finally, more than 90% called for some mechanism, usually arbitration, to resolve allegations of non-neutral conduct or other disputes between the parties.

Eaton and Kriesky's findings suggest a link between what provisions are included in a neutrality agreement and the ultimate success of union organizing efforts. Organizing campaigns that featured an employer neutrality statement without providing for card check resulted in recognition for the union 46% of the time. By contrast, organizing campaigns in which parties agreed to both neutrality and card check ended with union recognition 78% of the time.

This 78% recognition rate is well above the average union win rate in Board elections since 1996. It also is more than twice the union win rate for elections that involve

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<sup>3</sup> Andrew M. Kramer et al., *Neutrality Agreements: The New Frontier in Labor Relations—Fair Play or Foul?*, 23 B.C. L. Rev. 39, 47 (1981) (quoting the Neutrality Agreement of June 6, 1979 between Philip Morris and Local 16 T of the Bakery, Confectionery, & Tobacco Workers Union).

<sup>4</sup> See Adrienne E. Eaton & Jill Kriesky, *Union Organizing Under Neutrality and Card Check Agreements*, 55 Indus. & Lab. Rel. Rev. 42, 45 (2001). Sources for this paragraph and the following paragraph of text may be found at id. 46-48, 51-52.

larger units of 500 or more employees, units in which unions recently have attained notable successes based on neutrality and card check campaigns.<sup>5</sup> As importantly, unions' rate of achieving a first contract in the nearly 200 successful organizing campaigns monitored by Eaton and Kriesky was nearly 100%.<sup>6</sup> That achievement far exceeds unions' 60% success rate for first contracts following NLRB election victories.<sup>7</sup>

Organized labor's increasing reliance on neutrality and card check agreements appears to have significantly reduced its use of NLRB elections. After remaining relatively constant at around 3500 per year from 1983 to 1998, the number of Board elections held annually declined by close to 30% between 1999 and 2003.<sup>8</sup> Strikingly, as union organizing activity has increased since the mid 1990s, the number of representation elections has reached its lowest level in over half a century.

The proliferation of neutrality plus card check agreements has become part of unions' larger commitment to modify the NLRB election-based approach to organizing. The AFL-CIO reported that its affiliates organized nearly three million workers from 1998 to 2003; less than one-fifth of these newly organized employees were added through NLRB elections.<sup>9</sup> Some of this success involved public sector employees or was attributable to other contractually-based approaches.<sup>10</sup> Still, neutrality plus card check has become a major weapon in labor's arsenal. The Service Employees, the Needletrades, Textile, Hotel and Restaurant Employees, and the Autoworkers all report that a plurality or majority of newly organized members have come through such contractual arrangements rather than NLRB elections.<sup>11</sup>

#### B. WHY UNIONS NEGOTIATE FOR NEUTRALITY WITH CARD CHECK

Given their comparative track records, it is easy to understand why unions prefer neutrality and card check over Board-supervised elections. The explanation for their success under this approach relates in large part to effects frequently associated with employer opposition during NLRB election campaigns. Neutrality arrangements allow unions to avoid these effects by sidestepping the consequences of both employer anti-union tactics and lengthy delays under the NLRB election regime.

Numerous studies have demonstrated the adverse impact of employer speech and conduct opposing unionization. The greater the amount of employer communication

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<sup>5</sup> For presentation and discussion of sources describing NLRB election win rates, see James J. Brudney, *Neutrality Agreements and Card Check Recognition: Prospects for Changing Paradigms*, 90 IOWA L. REV. 819, 830 & nn. 49-50 (2005). For recent reported examples where neutrality plus card check has led to success in organizing units of more than 500 workers, see *id.* at 830, n.51.

<sup>6</sup> See Eaton & Kriesky, *supra* note 4, at 52.

<sup>7</sup> See DUNLOP COMM'N ON THE FUTURE OF WORKER-MGMT. RELATIONS, FACT FINDING REPORT 73 (1994) [hereinafter DUNLOP COMM'N REPORT] (reporting that the success rate for obtaining first contracts between 1986 and 1993 was 56%); Paul Weiler, *Striking a New Balance: Freedom of Contract and the Prospects for Union Representation*, 98 HARV. L. REV. 351, 354-55 (1984) (reporting that certified unions obtain first contracts in only 60% of cases).

<sup>8</sup> For presentation of sources describing numbers of NLRB elections by year, see Brudney, *supra* note 5, 90 IOWA L. REV. at 827, nn.36-37.

<sup>9</sup> For detailed discussion of sources, see *id.* at 828-29, n.45. The figures on newly organized workers include public sector employees who are recruited wholly outside the NLRA domain.

<sup>10</sup> See, e.g., Agreement on Election Procedures Between Service Employees International Union ("SEIU") and Catholic Healthcare West 5 (Apr. 4, 2001) (specifying standards of conduct and privately supervised elections for up to eight separate units of employees at acute care hospitals) (on file with the Iowa Law Review).

<sup>11</sup> For discussion of sources reporting on these results, see Brudney, *supra* note 5, 90 Iowa L. Rev. at 830, n.48.

during a campaign, the less likely a union is to prevail in the election.<sup>12</sup> While one might suppose that this impact stems primarily from the informative aspects of employer speech, research in the past two decades strongly suggests it is the aggressive and hierarchical nature of the communication that generates increased management success.

When an employer delivers a series of forceful messages that unionization is looked upon with extreme disfavor, the impact on employees is likely to reflect management's power over their work lives rather than the persuasive content of the words themselves. Captive audience speeches, oblique or direct threats against union supporters, and intense personal campaigning by supervisors are among the lawful or borderline lawful techniques that have proven especially effective in defeating unionization.<sup>13</sup> Employers' unlawfully discriminatory conduct during campaigns—particularly the firing of union supporters—also has substantially curtailed unions' success.<sup>14</sup> By reducing or eliminating such tactics, neutrality agreements substantially improve unions' chances of securing majority support.

With regard to delay, there is again considerable evidence that unions fare less well as the gap widens between the filing of an election petition and the actual election.<sup>15</sup> This impact seems linked to employers' intimidating speech or conduct during the extended campaign.<sup>16</sup> The card check approach shortens the time period within which the union attempts to secure majority support and be recognized. Of even greater importance, neutrality agreements, with or without card check, minimize the prospects

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<sup>12</sup> See Richard B. Freeman & James L. Medoff, WHAT DO UNIONS DO? 234-36 (1984) (summarizing results from six studies). For a discussion of additional sources, see Brudney, *supra* note 5, 90 IOWA L. REV. at 832, n.58.

<sup>13</sup> See, e.g., Kate L. Bronfenbrenner, *Employer Behavior in Certification Elections and First-Contract Campaigns: Implications for Labor Law Reform*, RESTORING THE PROMISE OF AMERICAN LABOR LAW 75, 80-82 (Sheldon Friedman et al. eds. 1994) (reporting adverse impact from captive audience meetings and from increasing number of company letters transmitted to employees); William T. Dickens, *The Effect of Company Campaigns on Certification Elections: Law & Reality Once Again*, 36 INDUS. & LAB. REL. REV. 560 (1983) (reporting adverse impact of employer threats, captive audience speeches, and certain written communications); Richard B. Freeman & Morris M. Kleiner, *Employer Behavior in the Face of Union Organizing Drives*, 43 INDUS. & LAB. REL. REV. 351, 361, 364 (1990) (reporting adverse impact of supervisors speaking out against unions); Morris M. Kleiner, *Intensity of Management Resistance: Understanding the Decline of Unionization in the Private Sector*, 22 J. LAB. RES. 519, 526-30 (2001) (reporting adverse impact of captive audience speeches and threats against employees); see also Freeman & Medoff, *supra* note 12, at 234-37 (summarizing findings from eleven studies).

<sup>14</sup> See, e.g., GEN. ACCOUNTING OFFICE, CONCERNS REGARDING IMPACT OF EMPLOYEE CHARGES AGAINST EMPLOYERS FOR UNFAIR LABOR PRACTICES (1982) (reporting diminished success for unions in campaigns during which employer discrimination occurred); see also Freeman & Medoff, *supra* note 12, at 234-36 (summarizing findings from six studies); Bronfenbrenner, *supra* note 13, at 81 (describing how studies actually underestimate negative impact from firings because they do not include the many campaigns that collapse before an election once the employer has discharged key union supporters).

<sup>15</sup> See, e.g., Bronfenbrenner, *supra* note 13, at 78-79 (reporting that for 261 union elections occurring in 1986 and 1987, win rate declines from 50% if election is held within sixty days of petition to 31% if election is held 61-180 days after petition); Myron Roomkin & Richard N. Block, *Case Processing Time and the Outcome of Representation Elections: Some Empirical Evidence*, 1981 U. ILL. L. REV. 75, 88-89 (reporting that for over 45,000 union elections studied, win rate decreases steadily from 50% (if election occurs less than one month after petition is filed) to 30% (if election occurs four to seven months after petition is filed)).

<sup>16</sup> See Bronfenbrenner, *supra* note 13, at 78 (observing that delays "give employers a longer time period in which to campaign aggressively"). Roomkin & Block, *supra* note 15, at 76 (indicating same, and adding that delay increases likelihood of turnover in the workforce, thereby undermining union efforts to retain employee support).

for delay in opening collective bargaining once a determination has been made that the union enjoys majority support.<sup>17</sup>

### C. WHY EMPLOYERS AGREE TO NEUTRALITY WITH CARD CHECK

At first glance, it is less obvious why employers agree to negotiate neutrality and card check. In a follow-up study, Eaton and Kriesky found that a majority of employers identified as their principal motive the costs they would incur if they did not agree to neutrality and card check.<sup>18</sup> Specifically, many employers cited the economic losses associated with a strike, the potential damage from union picketing or handbilling of customers<sup>19</sup> or the indirect costs of strained relations with third parties—such as the withholding of financial support or investment by a municipality or union pension fund, or loss of customer business from religious or community groups. Apart from the potential risks associated with resisting the union, employers also projected certain costs from entering into a neutrality agreement, such as increased labor costs from the ensuing collective bargaining agreement and diminished attractiveness as a merger or takeover target.

At the same time, Eaton and Kriesky found that a substantial minority of employers pointed primarily to the benefits derived from reaching a neutrality agreement.<sup>20</sup> In particular, many employers who anticipated that their increased labor costs would be substantial also believed that these costs would be offset by certain advantages. Importantly, Eaton and Kriesky described a range of benefits that employers expected to realize as a result of entering into neutrality agreements; these benefits are often reflected in other accounts of such arrangements. For some employers, neutrality agreements offered advantages in marketing products or services to unionized firms<sup>21</sup> or to union members themselves.<sup>22</sup> Other employers cited the importance of assistance

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<sup>17</sup> The most egregious delays in the Board elections process actually occur after the votes have been cast, when challenges to the results or conduct of the election typically take years to resolve. See INT'L CONFEDERATION OF FREE TRADE UNIONS (ICFTU), INTERNATIONALLY RECOGNIZED CORE LABOUR STANDARDS IN THE UNITED STATES: REPORT FOR THE WTO GENERAL COUNCIL REVIEW OF THE TRADE POLICIES OF THE UNITED STATES 3 (2004) [hereinafter ICFTU REPORT FOR WTO] (reporting backlog of 25,000 employer unfair labor practice cases in 2002 and average time of 557 days for NLRB to resolve such cases, not including subsequent court proceedings); Fred Feinstein, *The Challenge of Being General Counsel*, 16 LAB. LAW 19, 34-35 (2000) (reporting that it typically takes two years to litigate an unfair labor practice case to completion and that “[d]elay in resolving a challenge to a union election victory can seriously undermine employee support and ultimately make it impossible to achieve a collective bargaining agreement”).

<sup>18</sup> See Adrienne E. Eaton & Jill Kriesky, *Dancing with the Smoke Monster: Employer Motivations for Negotiating Neutrality and Card Check Agreements* (Dec. 2002) (unpublished manuscript, on file with the Iowa Law Review). Professors Eaton and Kriesky conducted telephone interviews with high-level human resource or labor relations executives from thirty-four employers that had agreed to neutrality and card check. *Id.* at 2-4. In this paragraph and the following paragraph support from the manuscript identified appears at *id.* 6-10, 12.

<sup>19</sup> For further discussion of employers' perceptions of costs with respect to neutrality and card check, see *id.* 10, 12. See also Steven Greenhouse, *Local 226, "The Culinary" Makes Las Vegas the Land of the Living Wage*, N.Y. TIMES, June 3, 2004, at A22 (reporting that employers' concern over “pickets ... blocking [hotel] driveways” led numerous Las Vegas hotels to agree to neutrality and card check).

<sup>20</sup> See Eaton & Kriesky, *supra* note 18, at 6-9.

<sup>21</sup> See *id.* at 7-9. See Brudney, *supra* note 5, 90 IOWA L. REV. at 837, nn.80-81 (discussing sources).

<sup>22</sup> See *Convention Center Board Seeks Neutrality from San Diego Hotel Developers, Owners*, DAILY LAB. REP. (BNA), at A-8 (May 15, 2000) (describing economic advantages for hotels that house union conventions, and reporting HERE promise to steer union convention business to San Diego if neutrality agreements signed).

from unions in lobbying for favorable legislative or regulatory outcomes.<sup>23</sup> Employers also determined that neutrality and card check might enhance their ability to attract qualified employees or promote a more cooperative stance by unions in collective bargaining.<sup>24</sup>

Eaton and Kriesky concluded that the best explanation for why the employers they studied chose not to oppose unionization was simple economic rationality.<sup>25</sup> In this respect, the decision to accede to unionization, like the decision to resist that prospect, is at root a matter of business judgment.

As the studies and accounts discussed in Part II indicate, neutrality agreements—generally accompanied by card check—have become a central feature of the labor organizing landscape over the past decade. Unions find them attractive for fairly obvious reasons. More intriguing is the fact that a substantial number of employers have been persuaded to abandon the aggressive stance they are entitled to adopt as part of an adversarial election campaign. Indeed, an important aspect of what is distinctive about the neutrality and card check approach is precisely its nonconfrontational character. I now consider whether such agreements to waive certain informational and combative advantages traditionally associated with campaign speech and conduct are themselves inherently suspect under the NLRA.

### III. THE BUSINESS CRITIQUE: DEFENDING EMPLOYEE FREE CHOICE

To put it mildly, not all employers or those sympathetic to the employer position have accepted organized labor's new approach. Concern or opposition has been expressed by a number of management attorneys and business lobbyists, by certain members of Congress, and by some labor relations scholars. Their challenges to the lawfulness of neutrality and card check revolve around the claim that such arrangements usurp or undermine the rights of individual employees under the NLRA. In essence, these critics contend that employees' § 7 right to choose "to form, join, or assist labor organizations ... and ... to refrain from any or all such activities"<sup>26</sup> is vindicated only through a spirited election campaign supervised by the NLRB, in which the employer and the union each seek to inform and persuade employees as to the merits of their respective positions.

A good sense of both the substance and rhetoric of the business challenge to neutrality and card check can be gleaned from the testimony of supporters of bills to prohibit card check recognition which were introduced by Republican members of

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<sup>23</sup> See Eaton & Kriesky, *supra* note 18, at 7; see also Kathy Robertson, *Bill Ensures Profits for Nursing Homes*, SACRAMENTO BUS. J., Aug. 20, 2004 (reporting on efforts by coalition of SEIU and nursing home chains to lobby for legislation increasing government support); *HERE Local 814 Signs Initial Accord at Waterfront Hotel in Santa Monica*, Daily Lab. Rep. (BNA), at A-5 (July 12, 2001) (reporting that city government, as owner of land on which hotel is located, made neutrality agreement a condition for approving hotel's sale to new owners); Michelle Amber, Avondale, *Unions Agree to Allow Workers to Decide if They Want Representation*, DAILY LAB. REP. (BNA), at AA-1 (Nov. 3, 1999) (reporting that as part of neutrality and card check agreement, union and management would work together to resolve pending matters before NLRB and OSHA).

<sup>24</sup> See Eaton & Kriesky, *supra* note 18, at 8 (describing management's emphasis on the need for skilled labor). Another bargaining objective often sought by management in connection with neutrality agreements is combination or streamlining of job classifications. See Greenhouse, *supra* note 19 (describing Las Vegas hotel's interest in having a small number of job categories for dishwashers, maids, and other hotel workers).

<sup>25</sup> See Eaton & Kriesky, *supra* note 18, at 22.

<sup>26</sup> 29 U.S.C. § 157 (2000).

Congress in 2002 and 2004.<sup>27</sup> These proposals sought to amend the NLRA so as to make it unlawful for an employer to recognize or bargain collectively with a union that has not been selected through a Board-supervised election. Testifying before a House hearing in 2002, attorney and former NLRB member Charles Cohen, representing the Chamber of Commerce, argued that neutrality and card check have as their “ultimate goal ... obtaining representation status without a fully informed electorate and without a secret ballot election” and “undermine the right of free choice.”<sup>28</sup> In the eyes of such critics, labor’s new approach represents an assault on the long-standing principle of democratic employee choice—the confidential, Board-regulated election that is claimed to be at once competitive and unpressured.

The very fact that critics of neutrality and card check have sought to pass legislation prohibiting it raises an inference that this approach may be permissible under existing law. There are, however, at least three distinct aspects to the argument that employer agreements to remain neutral and abandon the election process are unlawful under the NLRA. I analyze all three and conclude that none is persuasive in light of the settled doctrine or purposes and policies of the Act.

#### A. NEUTRALITY AGREEMENTS AND NLRA § 8(A)(2)

Section 8(a)(2) of the NLRA makes it unlawful for an employer “to dominate or interfere with the formation or administration of any labor organization or contribute financial or other support to it.”<sup>29</sup> Some employer advocates have maintained that an employer’s agreement to refrain from saying anything negative about unions, to allow union representatives to enter its facility and express pro-union views to its employees, and to accept authorization cards as evidence of majority union backing, is tantamount to contributing unlawful support or assistance toward a union. In essence, their argument is that an agreement not to engage in opposition effectively signals that the union enjoys favor, and that the employer’s expression of deference subtly but inevitably constrains its employees in their decisions. For several reasons, this argument cannot withstand analysis.

Initially, it is difficult to understand why the contractual nature of an employer’s refraining from opposing a union should have an unlawfully inhibiting impact on employees. Employers have the right to oppose unions, but they do not have a duty to do so. The fact that an employer’s indifference or even implicit receptivity toward the union is expressed in writing rather than through ad hoc oral declarations hardly transforms the employer’s voluntary stance into a coercive signal.

If anything, federal labor statutes not only tolerate but promote contractual arrangements between management and unions as conducive to labor peace. A key provision of the law is § 301 of the Taft-Hartley Act, which makes collectively bargained contracts enforceable in federal court. Respect for such arrangements, including

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<sup>27</sup> See H.R. 4636, 107th Cong. § 2 (2002), and Secret Ballot Protection Act of 2004, H.R. 4343, 108th Cong. § 3 (2004).

<sup>28</sup> *Compulsory Union Dues and Corporate Campaigns: Hearings on H.R. 4636 Before the Subcomm. on Workforce Prots. of the House Comm. on Educ. & the Workforce*, 107th Cong. 100 (2002) (statement of Charles I. Cohen, Senior Partner, Morgan, Lewis & Bockius LLP, on behalf of the U.S. Chamber of Commerce on Oct. 8, 2002); see also *Labor Organizing Campaigns: Hearing Before the Subcomm. on Employer-Employee Relations of the House Comm. on Educ. & the Workforce*, 108th Cong. (2004) (statement of Charles I. Cohen) (maintaining that neutrality/card check agreements amount to “gag orders” on lawful employer speech [that] limit employee free choice by limiting the information upon which employees make their decision”).

<sup>29</sup> 29 U.S.C. § 158(a)(2) (2000).

agreements to recognize a union upon proof of majority support secured outside the elections context, has long been a centerpiece of U.S. labor law.<sup>30</sup>

The Supreme Court has expressed concern that a contractual agreement between employer and union supported by only a minority of employees might provide a “deceptive cloak of authority with which [the union could] persuasively elicit additional employee support.”<sup>31</sup> But a neutrality agreement involves no such deception: the employer is simply stating its readiness to allow a union to secure majority support and its willingness to bargain with the union should it succeed.

Moreover, from a practical standpoint, employees themselves are not bound by neutrality agreements between employers and unions. Employees who wish to express opposition to unions remain free to do so. Such opposition may possibly trigger hostility from a union or its supporters, but misrepresentation, pressure, or reprisal can be fully addressed through existing NLRB procedures.<sup>32</sup> In addition, groups like the Chamber of Commerce also are not covered by neutrality agreements, and they can respond to employees seeking information on possible disadvantages of unions or disseminate such information to employees covered by a neutrality agreement.

Accordingly, there is no basis for inferring that neutrality agreements systemically inhibit the expressive options of employees who wish to oppose unionization. Indeed, Professors Eaton and Kriesky found that unions lost one out of five campaigns in which they relied on both neutrality and card check and some one-half of all campaigns involving neutrality agreements alone, suggesting that employees resisting unions retain an effective voice.

Stepping back, the argument that an employer’s formal neutrality compromises employee free choice seems to rest, at bottom, on the notion that the NLRA and, in particular, § 8(a)(2) contemplates a fundamentally adversarial relationship between management and labor. However, in adopting § 8(a)(2) Congress was focused on a more narrow issue: the need to eliminate in-house employer-dominated labor organizations in order to permit the growth of authentic collective bargaining.<sup>33</sup> A centerpiece of the bill that resulted in the NLRA was the proposed abolition of these company unions. Congress’ purpose, though, was not to stifle labor-management cooperation. Rather, it was to channel labor-management relations, whether cooperative or adversarial, through truly autonomous labor organizations in order to promote meaningful collective bargaining.<sup>34</sup>

This is not to suggest that neutrality agreements automatically fall outside the ambit of § 8(a)(2). The line between employer-union cooperation (which is encouraged) and employer support constituting undue interference (which is prohibited) remains important and is at times difficult to identify.<sup>35</sup> Employers may inhibit choice in unlawful ways,

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<sup>30</sup> See *Raley’s*, 336 N.L.R.B. 374, 385-86 (2001). See generally, *Goldsmith-Louison Cadillac Corp.*, 299 N.L.R.B. 520 (1990); *Alpha Beta Co.*, 294 N.L.R.B. 228 (1989); *Cam Indus.*, 251 N.L.R.B. 11 (1980), *enforced*, *NLRB v. CAM Indus., Inc.*, 666 F.2d 411, 412-13 (9th Cir. 1982).

<sup>31</sup> *Int’l Ladies’ Garment Workers’ Union v. NLRB*, 366 U.S. 731, 736 (1961).

<sup>32</sup> See, e.g., *Bookland, Inc.*, 221 N.L.R.B. 35, 36 (1975) (holding that misrepresentations regarding the purpose or effect of signing a card result in its invalidation); *Planned Bldg. Servs., Inc.*, 318 N.L.R.B. 1049, 1062-63 (1995) (holding that use of intimidating conduct when soliciting cards is unfair labor practice, and cards may not be used to establish majority support).

<sup>33</sup> For presentation and discussion of sources regarding legislative history of § 8(a)(2), see *Brudney*, *supra* note 5, 90 Iowa L. Rev. at 849, n.140.

<sup>34</sup> See *id.* at 851, n.152.

<sup>35</sup> See *NLRB v. Keller Ladders S., Inc.*, 405 F.2d 663, 667 (5th Cir. 1968) (discussing need to find balance between encouragement of cooperation that fosters stable and peaceful industrial relations and discouragement of interference that undermines employee freedom of choice).

by helping a union solicit signed authorization cards, by designating particular employees to assist a union organizing effort, or by convening a meeting between the union and employees at which supervisors monitor the employees' reactions. On the other hand, simply arranging for a meeting between union and employees on company premises, or allowing the union to solicit cards during the workday, do not constitute unlawful support and, in fact, fall within permissible instances of employer-union cooperation.<sup>36</sup>

The position adopted by the Board and the appellate courts indicates there is nothing presumptively suspect about employer statements expressing neutrality toward a union organizing effort. While there may be instances of abuse in implementation, an employer's announced willingness to allow employees to debate on their own whether to support an autonomous union is simply not the kind of 'mischief' that § 8(a)(2) was designed to address.

#### B. NEUTRALITY AGREEMENTS AND EMPLOYER WAIVER OF THE RIGHT TO COMMUNICATE WITH EMPLOYEES

Section 8(c) of the NLRA protects employers' freedom to speak out against unionization, so long as this sharing of views "contains no threat of reprisal or force or promise of benefit."<sup>37</sup> Enacted in 1947 after the Supreme Court had warned that Board restrictions on noncoercive employer speech raised constitutional questions,<sup>38</sup> § 8(c) was meant to permit and encourage employer debate on union organizing and bargaining.<sup>39</sup> It has been contended that neutrality agreements are incompatible with § 8(c) because they amount to the waiver of a fundamental employer right, a waiver that runs contrary to federal labor policy.<sup>40</sup> This second challenge also is without merit.

Accepting for argument's sake that an employer's right to engage in noncoercive speech during a union campaign implicates First Amendment considerations,<sup>41</sup> such a right may be waived if done "voluntarily, intelligently, and knowingly ... with full awareness of the legal consequences."<sup>42</sup> Neutrality agreements that are sufficiently explicit typically satisfy this standard. Waiver provisions negotiated by sophisticated, institutional parties are regularly deemed voluntary.<sup>43</sup> They also will likely be found knowing and intelligent, given that one party (the union) ordinarily relinquishes certain demands or makes certain promises in exchange for a pledge of neutrality by the other party (the employer).<sup>44</sup>

<sup>36</sup> See, e.g., *Tecumseh Corrugated Box Co.*, 333 N.L.R.B. 1, 3, 6 (2001); *New England Motor Freight Inc.*, 297 N.L.R.B. 848, 851-52 (1990).

<sup>37</sup> 29 U.S.C. § 158(c) (2000). The text of § 8(c) sets forth an evidentiary rule more than an actual right: while employer communication "shall not constitute or be evidence of any unfair labor practice," such communication may still serve as grounds for the Board to order a new election under its § 9 powers. See generally, *Excelsior Underwear, Inc.*, 156 N.L.R.B. 1236, 1245 (1966). For present purposes, however, I assume that the protection confers a positive right to speak. *Healthcare Ass'n of N.Y. State v. Pataki*, 471 F.3d 87, 100 (2d Cir. 2006) (holding that § 8(c) protects employer speech rights in the unionization campaign context); but see *United States Chamber of Commerce v. Lockyer*, 463 F.3d 1076, 1091 (9th Cir. 2004) (en banc) (holding that § 8(c) does not grant employer speech rights).

<sup>38</sup> See *NLRB v. Va. Elec. & Power Co.*, 314 U.S. 469, 477-79 (1941). See generally, *Thomas v. Collins*, 323 U.S. 516, 531-32 (1945).

<sup>39</sup> See *Linn v. United Plant Guard Workers*, 383 U.S. 53, 62 (1966).

<sup>40</sup> See *Int'l Union, UAW v. Dana Corp.*, 278 F.3d 548, 558 (6th Cir. 2002) (stating company's argument); *Kramer et al.*, *supra* note 3, at 72-76.

<sup>41</sup> See *NLRB v. Gissel Packing Co.*, 395 U.S. 575, 617 (1970).

<sup>42</sup> *D.H. Overmyer Co. v. Frick Co.*, 405 U.S. 174, 187 (1972) (setting forth standards for waiver of due process rights in civil context).

<sup>43</sup> See *id.* at 187-88.

<sup>44</sup> See William J. Guzick, *Employer Neutrality Agreements: Union Organizing Under a Nonadversarial Model of Labor Relations*, 6 INDUS. REL. L.J. 421, 458-59 (1984).

There remains the possibility that even a voluntary, knowing, and intelligent waiver may be invalid on public policy grounds. It has been asserted that any agreement by an employer to remain silent undermines § 7 rights by compelling employees to choose for or against unionization without adequate information.<sup>45</sup> The problem with this contention is that federal labor policy does not require employers to educate employees about the downsides of unionization.<sup>46</sup> Moreover, enforcing neutrality agreements actually promotes federal labor policy by respecting the parties' decision to forgo a divisive election process in favor of voluntary resolution of union-management differences.<sup>47</sup>

Finally, an employer's waiver of its right to speak during a union campaign does not deny employees' § 7 rights. That an employer is protected in speaking out against a union does not confer upon employees a right to hear such employer speech.<sup>48</sup> There is simply no basis for believing that employees opposed to unions cannot assert their own § 7 rights, even if one were to indulge the rather strained premise that an employer's interest in renouncing a voluntary neutrality agreement reflects its role as benevolent champion of these employees.<sup>49</sup>

### C. CARD CHECK RECOGNITION AND ACTUAL OR PRESUMPTIVE COERCION

As noted earlier, roughly two-thirds of all neutrality agreements include provisions for recognizing union majority status through card check. Critics have suggested that reliance on authorization cards to determine employee choice should be only a last resort because the signatures are obtained in circumstances that lack certain protective features of Board elections—the privacy of the voting booth, the secret ballot, and governmental oversight.

Taking note of such differences, the Supreme Court in a 1969 decision declared that cards were “admittedly inferior to the election process” as a means of reflecting employee choice.<sup>50</sup> At the same time, the Court made clear that authorization card signatures may serve as an adequate reflection of employee sentiment. In reaching this conclusion, the Court considered and dismissed claims that the card-signing process was inherently unreliable due to group pressure, lack of sufficient information being shared, or the presence of misrepresentation and coercion.<sup>51</sup>

Indeed, non-electoral paths to securing representative status have been approved under the NLRA since its inception. Employers whose unfair labor practices disrupt a

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<sup>45</sup> See *Dana Corp.*, 278 F.3d at 559 (reciting employer's argument); *Hotel Employees, Rest. Employees Union, Local 2 v. Marriott Corp.*, 961 F.2d 1464, 1470 (9th Cir. 1992) (same).

<sup>46</sup> See *Hotel Employees*, 961 F.2d at 1470.

<sup>47</sup> See, e.g., *Baseball Club of Seattle (Seattle Mariners)*, 335 N.L.R.B. 563, 564-65 (2001) (holding that employer must abide by neutrality agreement, and dismissing its decertification petition); *Verizon Info. Sys.*, 335 N.L.R.B. 558, 559-61 (2001) (holding that union must abide by neutrality agreement, and dismissing its representation petition).

<sup>48</sup> The legislative history to § 8(c) makes clear that the provision was meant to allow employers to speak, at their discretion, without being penalized; there is no evidence at all that Congress contemplated an audience right to receive information. See, e.g., H.R. REP. NO. 80-245, at 33 (1947); S. REP. NO. 80-105, at 23-24 (1947); 93 CONG. REC. 7487 (1947) (veto message of President Truman); 93 CONG. REC. 3953 (1947) (remarks of Sen. Taft); *id.* at 4261, 4266 (1947) (remarks of Sen. Ellender); *id.* at A3233 (1947) (remarks of Sen. Ball).

<sup>49</sup> *Compare Auciello Iron Works v. NLRB*, 517 U.S. 781, 790 (1996) (expressing doubts as to the “benevolence” of an employer acting “as its workers’ champion against their certified union”).

<sup>50</sup> *NLRB v. Gissel Packing Co.*, 395 U.S. 575, 603 (1969).

<sup>51</sup> See *id.* at 602-04 (holding that card drives will typically be accompanied by some employer information-sharing, and that group pressures on employees that accompany card-signing efforts are equally present in typical election campaign).

Board election or otherwise vitiates clear evidence of union support can be ordered by the Board to bargain based on a card majority. Employers also may be required to recognize a union based on evidence of majority status that they themselves have solicited, such as an employer-conducted poll. Further, employers always have been permitted to enter voluntarily into bargaining relationships with unions that possess a card majority. An employer may do so spontaneously, in response to a union's presentation of cards, or by contracting in advance to recognize a union if such a showing is made.<sup>52</sup> One example of the latter involves agreements providing for employees in newly acquired facilities to become part of an existing bargaining unit through card check. The Board has held that so long as the card check process protects the new employees' right to self-determination, it will give full effect to such "additional stores" clauses and will consider the employer to have waived the right to demand a Board election.<sup>53</sup> More generally, card check agreements cannot waive individual employees' rights under § 7, but those rights do not include the right of an individual employee to demand a secret ballot election.<sup>54</sup>

The fact that recognition of valid card majorities and contractual agreements to be bound by such majorities are presumptively lawful does not mean that cards are always lawfully obtained. Those soliciting signatures may misinform employees as to the content or import of the cards, may exert undue pressure to sign, or may promise benefits as an inducement for signatures. The federal courts and the Board have been attentive to such concerns and have established that signed cards may be rejected based on showings of misrepresentation, coercion, or improper promise of benefits. Likewise, courts reviewing the enforceability of neutrality and card check agreements have been careful to consider whether an agreement provides employees with a fair opportunity to decide for themselves to accept or reject the union.<sup>55</sup>

In the end, there is no evidence of systemic misconduct associated with card signatures, and no reason to believe that particular instances of misconduct are not adequately addressed through case-specific review of alleged abuses. The history of reliance on cards in a range of settings combined with the strong policy favoring voluntary labor-management agreements makes clear that card check recognition does not raise any serious problem of legality under the NLRA.

A common theme to the legal arguments reviewed in this Part is the assumption that employers and unions are meant to be adversaries, at least until the union wins its majority. It should now be evident, however, that neutrality agreements and card check fit within an exceptional but always available doctrinal alternative, premised on the idea that employees can make genuinely free choices when employer and union decide together to forgo a Board-supervised election campaign.

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<sup>52</sup> See *Goodless Elec.*, 332 N.L.R.B. 1035, 1038 (2001), and cases cited therein.

<sup>53</sup> See, e.g., *Kroger Co.*, 219 N.L.R.B. 388, 389 (1975); *Central Parking Sys. Inc.*, 335 N.L.R.B. 390 (2001). However, the current Board has indicated its willingness to revisit this question. See *Shaw's Supermarkets*, 343 N.L.R.B. No. 105 (2004) (granting review of whether public policy considerations preclude employer waiver of right to petition for Board election).

<sup>54</sup> *Cellco P'ship*, No. 4-CA-30729, 2002 WL 254221, at \*2 (N.L.R.B. Gen. Counsel, Jan. 7, 2002) (rejecting individual employee's claim that he had a right to a secret ballot election). However, despite long-established doctrine allowing a union a reasonable period to negotiate a collective bargaining agreement with an employer following lawful recognition, the current Board has questioned whether voluntary recognition should bar immediate petitions to decertify a union if supported by 30% of the employees. See *Dana Corp. and Metaldyne Corp.*, 341 N.L.R.B. No. 150 (2004) (granting review).

<sup>55</sup> See, e.g., *Hotel & Rest. Employees Union Local 217 v. J.P. Morgan Hotel*, 996 F.2d 561, 566 (2d Cir. 1993); *Hotel Employees, Rest. Employees Union, Local 2 v. Marriott Corp.*, 961 F.2d 1464, 1468 (9th Cir. 1992).

Still, as indicated in Part I, reliance on card check and neutrality over the past decade has gone well beyond the exceptional. The widespread use of a lawful approach predicated on contractually based cooperation rather than relatively unbridled competition thus presents a challenge to the notion that NLRB elections are the best method of ascertaining what employees want.

#### IV. CHALLENGING THE ELECTION PARADIGM

Historically, elections have been the primary mechanism used to determine whether employees wish to be represented by a union. In 1969 the Supreme Court stated with confidence that “[e]lections have been ... and will continue to be held in the vast majority of cases” to make this determination.<sup>56</sup> The predominance of the election is linked to its normative position as the morally legitimate pathway to vindicate employee free choice. This preference for elections rests on the belief that they are most likely to reflect the well-informed, uninhibited, and genuine choices of employees.

In short, the use of NLRB elections to determine what employees really want is our reigning explanatory theory or paradigm. For decades, it has been accepted as descriptively accurate and normatively satisfying within the relevant public policy community. In order to understand why the election approach may warrant modification or abandonment, I invoke by analogy the work of historian of science Thomas Kuhn, who theorized how change occurs in the natural sciences. By referencing Kuhn’s explanation for shifts in perception within the scientific community, I hope to shed light on the need to rethink our approach to ascertaining employee choice regarding union representation.

##### A. KUHN’S THEORY OF PARADIGMS AND SCIENTIFIC CHANGE

According to Kuhn, problem-solving in science takes place against the backdrop of an accepted theory or organizing set of beliefs—a paradigm.<sup>57</sup> There are always anomalies or unsolved questions, but the techniques of scientific discovery are applied to work out these problems. At some critical level, however, a tolerable amount of anomaly turns intolerable. When enough anomalies cannot be solved, or when practitioners reach enough conflicting solutions, the scientific community begins to disagree about the conceptual and procedural rules of the game. What can emerge from such quarrels is an embrace by the problem-solving community of a new paradigm—a “paradigm shift.”<sup>58</sup>

The discussion that follows maintains that the election-centered approach has failed to address the increasingly anomalous results associated with its use as the guiding principle on which to predicate employee free choice. Accordingly, the

<sup>56</sup> *NLRB v. Gissel Packing Co.*, 395 U.S. 575, 607 (1969). See also *Linden Lumber Div., Summer & Co. v. NLRB*, 419 U.S. 301, 302-10 (1974).

<sup>57</sup> See Kuhn, *supra* note 1, at 10 (defining paradigm in context of normal science). Kuhn’s book first appeared in 1962; the enlarged second edition, referred to here, was published in 1970.

<sup>58</sup> See *id.* at 77-83, 94-95, 109-10, 148-50, 154-59, 166-67. Kuhn’s emphasis on the social psychology surrounding scientific discovery has been vigorously challenged. At the same time, his theory has obvious relevance to law, where the objects of study are not data generated and defined within the research community itself but rather events experienced and given importance by other human actors. See Edward L. Rubin, *Law And and the Methodology of Law*, 1997 WISC. L. REV. 521, 525-26, 539-40 (describing data, on which national scientists rely, as “a passive subject of research that must be generated by the discipline itself” (even in fields that “rely heavily on observation” as opposed to experimentation), and contrasting this with events, on which social scientists and law professors rely, and which are not “discovered” in laboratories or nature but produced by other human beings).

increasing tension between NLRB elections and neutrality plus card check may reflect an emerging recognition of the need to change paradigms for considering how best to ensure employees' right to bargain collectively through "representatives of their own choosing."

## B. THE ELECTION PARADIGM AND IMPEDIMENTS TO EMPLOYEE FREE CHOICE

### 1. *The Elections Regime as Dominant Paradigm*

The NLRB election regime furnishes a description of how employees decide whether to be represented by a union and also a justification for this method as the fairest means for their exercise of free choice. Since the late 1940s, the Board has regulated organizing on the hypothesis that employers and unions would—and should—campaign like political candidates for the support of presumptively undecided voters.<sup>59</sup> For over fifty years, the election paradigm has helped shape the strategic and litigation approaches adopted by labor and management. It also has guided the NLRB and the courts in developing legal doctrines to address various problems arising under this regime.<sup>60</sup>

The NLRB and the courts explored these challenges from within the framework of the election model. Yet if one views reliance on NLRB elections as a Kuhnian paradigm, one sees that this approach has remained unchallenged even as serious anomalies have arisen. As the ensuing discussion indicates, the assumption that NLRB elections provide the best, or only, basis for promoting and protecting employee choice has lost its validity.

### 2. *Deterioration of the Election Paradigm*

Preliminarily, there is the uncertainty and delay associated with scheduling the election and resolving disputes about its conduct. Unlike political elections, which occur on dates established well before and independent of the campaign itself, NLRB elections may occur anywhere from several weeks to months after a petition is filed.<sup>61</sup> The election date typically is not set until some time after both sides have begun campaigning and may be postponed for months by employer challenges to the composition of the unit. In addition, post-election objections by the employer may delay the results for years.<sup>62</sup> Employers who oppose unionization understand that delay

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<sup>59</sup> Craig Becker, *Democracy in the Workplace: Union Representation Elections and Federal Labor Law*, 77 MINN. L. REV. 495, 545-47 (1993) (discussing § 8(c), enacted as part of Taft-Hartley, as establishing employers' right to campaign as if they were candidates seeking employees' support).

<sup>60</sup> Among the issues that the Board and courts have investigated under the election paradigm are the line to be drawn between lawfully predictive and unlawfully threatening employer speech, the coercive implications of employer or union promises of benefits during an election campaign, and the impact of employer misrepresentations. Agency and judicial decisionmakers also have struggled with issues of competitive access to the electorate, establishing a framework to accord employers and unions sufficient contacts with voters while not unfairly advantaging one side or the other. For discussion of the many court and Board decisions on these matters, see Brudney, *supra* note 5, 90 IOWA L. REV. at 866-67 and nn.234-39.

<sup>61</sup> See DUNLOP COMM'N REPORT, *supra* note 7, at 68, 82 (reporting median time from petition to election of roughly fifty days in 1993, about the same as in late 1970s and 1980s; 20% of elections occur more than two months after petition).

<sup>62</sup> See HUMAN RIGHTS WATCH, UNFAIR ADVANTAGE: WORKERS' FREEDOM OF ASSOCIATION IN THE UNITED STATES UNDER INTERNATIONAL HUMAN RIGHTS STANDARDS 23 (2000) [hereinafter UNFAIR ADVANTAGE] (discussing unit scope challenges and consequent delays); Feinstein, *supra* note 17, at 34-35 (reporting two year delays due to litigation in late 1990s).

diminishes the ultimate chance of union success.<sup>63</sup> Employees facing these uncertainties and obstacles are discouraged from maintaining interest in unionization.<sup>64</sup>

More important, however, is the impact of employer speech and conduct that is approved under the NLRB election paradigm. The law, as interpreted, permits employers to restrict employees' speech with co-workers,<sup>65</sup> while forcing them to attend meetings at which well-scripted managers "predict" dire consequences if employees unionize.<sup>66</sup> Employers make use of intense pressure tactics in the overwhelming majority of campaigns.<sup>67</sup> Union organizers who might counter employers' dire predictions are excluded from the worksite altogether in almost all circumstances.<sup>68</sup>

The stark inequality between employer "incumbents" and union "challengers" regarding rights of access to, or speech aimed at, the voters would be unthinkable in a political election setting. Individual employees attending sophisticated captive audience speeches, or participating in one-on-one encounters with their immediate supervisors, understandably may feel intimidated if not coerced by repeated oral, written, and electronic communications linking "union presence" to layoffs, plant closings, and permanent replacement during a lawful economic strike.<sup>69</sup> Even if an employer does not immediately follow through on such predictions, their repeated expression is likely to affect employees as they contemplate the range of subtler deprivations that union supporters may face in the future.

Unlawful employer campaign activity—most notably termination or other retaliation against union supporters—further damages possibilities for a genuinely free choice. Academic observers analyzing annual Board reports have demonstrated that discriminatory conduct against employees increased at an astounding rate between the late 1950s and 1980; this pattern of employer misconduct persists in robust form today.<sup>70</sup> By 1990, there were incidents of unlawful termination in fully 25% of organizing campaigns: one of every fifty union supporters in an NLRB election campaign

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<sup>63</sup> See John Logan, Consultants, Lawyers, and the "Union Free" Movement in the U.S.A. Since the 1970s, 33 IND. REL. J. 197, 200-01 (2002) (reporting that anti-union consultants and lawyers advise firms how to object to size and composition of bargaining unit, and how to file frivolous complaints with the Board, thus delaying election process and eroding employee confidence in the union and the NLRB).

<sup>64</sup> See, e.g., UNFAIR ADVANTAGE, *supra* note 62, at 69-70, 82-85 (describing how "slow[ness] ... of the legal mechanisms" and "availability of appeal after appeal" undermine unions' majority support).

<sup>65</sup> See *NLRB v. United Steelworkers of Am.*, 357 U.S. 357, 364 (1958); *Republic Aviation Corp. v. NLRB*, 324 U.S. 793, 803 (1945).

<sup>66</sup> See *Peerless Plywood Co.*, 107 N.L.R.B. 427, 428-29 (1953) (allowing captive audience speeches); *NLRB v. Gissel Packing Co.*, 395 U.S. 575, 618 (1969) (allowing predictions but not threats).

<sup>67</sup> See ICFTU REPORT FOR WTO, *supra* note 17, at 3 (reporting that 92% of employers in contested campaigns force workers to attend closed-door meetings and 78% require employees to meet one-on-one with supervisors).

<sup>68</sup> See *Lechmere, Inc. v. NLRB*, 502 U.S. 527, 535 (1992).

<sup>69</sup> See, e.g., UNFAIR ADVANTAGE, *supra* note 62, at 71-74 (reporting that employers threaten to close workplace in 50% of U.S. organizing campaigns); ICFTU REPORT FOR WTO, *supra* note 17, at 3 (reporting that employers threaten to relocate their business in 71% of all campaigns involving "non-mobile" manufacturing industries); James J. Brudney, *To Strike or Not to Strike*, 1999 WIS. L. REV. 65, 69-70 (1998); (discussing origins of permanent replacement doctrine in 1938 Supreme Court decision, and substantial increase in employer use of permanent replacements in strikes since 1980).

<sup>70</sup> See Paul Weiler, *Promises to Keep: Securing Workers' Rights to Self-Organization Under the NLRA*, 96 HARV. L. REV. 1769, 1779-80 (1983); Charles Morris, *A Tale of Two Statutes: Discrimination for Union Activity Under the NLRA and RLA*, 2 EMP. RTS. & POL'Y J. 327, 331 (1998); 68 NLRB ANN. REP. tbl. 2, 4 (2003). For detailed discussion of these and other sources regarding the frequency of employer unfair labor practices see Brudney, *supra* note 5, 90 IOWA L. REV. at 870-871, n.251-55.

could expect to be victimized.<sup>71</sup> A more recent study estimated that by the late 1990s, one out of every eighteen workers who participated in a union organizing campaign was the object of unlawful discrimination.<sup>72</sup>

Given pervasive employer resistance to unionization, it is not surprising that 40% of non-union, non-managerial employees believe their employer would fire or otherwise mistreat them if they campaigned for a union.<sup>73</sup> More than half of all employees who say they want union representation report management resistance as the main reason they do not have it.<sup>74</sup> A recent study estimated that, given a genuinely free choice, 44% of private sector employees would opt for union representation.<sup>75</sup>

Finally, the absence of effective remedies protecting employee free choice reinforces the ominous message for union supporters. In principle, when an employer's unlawful conduct has "interfere[d] with the elections process and tend[ed] to preclude the holding of a fair election," the Board may order the employer to bargain with a union based on a pre-election card majority.<sup>76</sup> These bargaining orders were described by the Supreme Court in 1969 as the best way to "effectuat[e] ascertainable employee free choice" as it existed before the employer's firings and unlawful threats.<sup>77</sup> Yet since the 1960s, the appellate courts have repeatedly reversed Board-issued bargaining orders,<sup>78</sup> and the NLRB's appetite for pursuing this remedy has diminished accordingly.<sup>79</sup>

One could argue that the election paradigm was flawed from its inception, in that employer-union competition differs fundamentally from a political election.<sup>80</sup> It may be that the election paradigm was more descriptively accurate and more normatively satisfying in the era following World War II, when employers acceded more readily to

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<sup>71</sup> See DUNLOP COMM'N REPORT, *supra* note 7, at 70. The incidence of illegal firings rose from one in twenty elections in the 1950s to one in four as of 1990. Firings affected one in 700 union supporters in the 1950s, but one in fifty by 1990.

<sup>72</sup> See Morris, *supra* note 70, at 330.

<sup>73</sup> See DUNLOP COMM'N REPORT, *supra* note 7, at 75 (reporting 41% figure from 1991 Fingerhut-Powers poll); see also Paul Weiler, GOVERNING THE WORKPLACE: THE FUTURE OF LABOR AND EMPLOYMENT LAW 117 n.25 (1990) (reporting that 43% of employees in 1984 Harris Poll thought their employer would fire, discipline, or otherwise retaliate against union supporters).

<sup>74</sup> See Richard B. Freeman & Joel Rogers, WHAT WORKERS WANT 30-37, 60-62, 86 (1999) (discussing methods for conducting national Worker Representation and Participation Study in 1994-1995, and reporting that 55% of non-union employees who said they wanted a union gave management opposition as the main reason for there not being one).

<sup>75</sup> See *id.* at 89.

<sup>76</sup> *NLRB v. Gissel Packing Co.*, 395 U.S. 575, 594 (1969) (stating Board's current practice as of late 1960s).

<sup>77</sup> See *id.* at 612, 614.

<sup>78</sup> For studies describing the appellate courts' extraordinarily high reversal rate for bargaining orders see Brudney, *supra* note 5, 90 IOWA L. REV. at 871-72 and n.260.

<sup>79</sup> See James J. Brudney, *Reflections on Group Action and the Law of the Workplace*, 74 TEX. L. REV. 1563, 1587 (1996) and sources cited therein (reporting that number of bargaining orders issued annually fell from over 100 in late 1960s to just 15 by early 1990s). This decline of 85% in the twenty-five years after *Gissel* approved the bargaining order remedy substantially exceeded the 50% decline in election activity over the same period. Given the 28% increase in § 8(a)(3) charges filed between 1970 and 1990, one can hardly attribute the sharp decrease in bargaining orders to more law-abiding conduct by employers. See *id.*

<sup>80</sup> See UNFAIR ADVANTAGE, *supra* note 62, at 18-25; Becker, *supra* note 59, at 569-70; Logan, *supra* note 63, at 201-04. In a NLRB election campaign an employer has the authority to set wages and benefits, assign tasks, monitor performance, and impose discipline on the voters—all on a daily basis. This power to create and communicate dependency and dominance inevitably invigorates an employer's campaign statements. By contrast, the union—even if it prevails on election day—holds neither economic nor legal power over the employees.

unionization, and analogies between industrial and political democracy reflected a societal impulse to celebrate recent national triumphs.<sup>81</sup> Even assuming, however, that the restrictions on campaign conduct imposed under the election paradigm were once defensible in principle, the pervasive practical difficulties of the past thirty years have rendered the paradigm inapplicable. The law regulating NLRB elections has developed since 1970 to exacerbate the inequalities between labor and management.<sup>82</sup> Relying on the advice of “union avoidance” consultants, employers now take greater advantage of what the law permits or does not deter.<sup>83</sup> As expressed by one eminent labor law scholar, “[t]he intensity of opposition to unionization which is exhibited by American employers has no parallel in the western industrial world.”<sup>84</sup>

### 3. Tenacity of the Election Paradigm

Although academic observers and government commissions have documented serious problems in the NLRB election regime over a period of decades, the deterioration of the election paradigm has not triggered its rejection in favor of something new. To borrow from Kuhn’s analysis, the public policy community’s consensus around this paradigm now stands as an impediment to otherwise predictable change.<sup>85</sup>

Organized labor’s shift in its practices is a noteworthy response to the decline of the election paradigm. Some three million new members were organized by AFL-CIO unions between 1998 and 2003, with over 80% of this activity occurring outside the domain of NLRB elections. The Court’s 1969 statement, that elections “will continue to be held in the vast majority of cases,”<sup>86</sup> no longer reflects reality. Further, given that major unions are relying on neutrality plus card check and that the approach readily survives a facial legal challenge, it is likely to remain a basic organizing strategy.

Whether neutrality and card check *should* supplant elections deserves further attention and discussion. For proponents of neutrality, the very existence of a contractual agreement signifies that the employer and union have achieved some degree of mutual respect. That manifestation of the employer’s attitude, albeit within a narrow scope, may help alleviate employees’ otherwise rational perception that their employer may have a punitive stake in how they exercise their choice.

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<sup>81</sup> See generally Reuel E. Schiller, *From Group Rights to Individual Liberties: Post-War Labor Law, Liberalism, and the Waning of Union Strength*, 20 BERKELEY J. EMP. & LAB. L. 1, 11-18 (1999); Katherine Van Wezel Stone, *The Post-War Paradigm in American Labor Law*, 90 YALE L.J. 1509, 1525 (1981); William M. Wiecek, *America in the Post-War Years: Transition and Transformation*, 50 SYRACUSE L. REV. 1203, 1217 (2000).

<sup>82</sup> See *Lechmere Inc. v. NLRB*, 502 U.S. 527, 535 (1992) (restricting union organizer access); *Midland Nat’l Life Ins. Co.*, 263 N.L.R.B. 127, 133 (1982) (relaxing rules against employer misrepresentation); Weiler, *supra* note 70, at 1787-93 (1983) (discussing ineffectiveness of backpay awards and reinstatement remedy); *supra* notes 78-79 (discussing appellate courts’ action to place severe limits on availability of bargaining orders).

<sup>83</sup> See ICFTU REPORT FOR WTO, *supra* note 17, at 3 (reporting that 75% of employers hire outside consultants and security firms to run anti-union campaigns); Logan, *supra* note 63, at 200-09 (discussing in detail the vast array of ‘union-avoidance’ tactics used by firms and their hired aids during organizing campaigns).

<sup>84</sup> Theodore J. St. Antoine, *Federal Regulation of the Workplace in the Next Half Century*, 61 CHI.-KENT L. REV. 631, 639 (1985).

<sup>85</sup> See Kuhn, *supra* note 1, at 77 (contending that scientific community’s faith in reigning paradigm is overcome not simply based on paradigm’s failure to explain natural events or conditions, but by simultaneous community-wide decisions to accept a new paradigm).

<sup>86</sup> *NLRB v. Gissel Packing Co.*, 395 U.S. 575, 607 (1969).

Opponents of neutrality often counter that if employees cannot hear from the employer, they will not be able to make a suitably informed and reasoned choice. That contention invites doubt on two grounds. One is that the employer already has the opportunity and motive to present arguments against unionization before a union appears, and is likely to have done so over months, if not years. A second is that the optimal time for informed choice about union representation will occur during contract negotiations, when employees can see how a collectively bargained workplace actually would look.<sup>87</sup>

Supporters of elections also worry that individuals sign cards without giving the matter enough thought, or from fear of criticism by fellow employees. It is not at all clear that workers succumb so readily to indifference or peer pressure.<sup>88</sup> Assuming they do, however, a union seems unlikely to retain employees' backing in negotiations unless it can persuade them that its bargaining proposals deserve majority support and even application of group pressure if warranted.

In sum, it is worth asking if the potential risks for employee free choice from a neutrality and card check approach are less than those that have been demonstrated in relation to NLRB elections. Participants and observers whose faith in the electoral process has been disrupted by its "severe and prolonged anomalies" must decide whether "an alternate candidate is available to take its place."<sup>89</sup>

### C. FUTURE PROSPECTS

This Article is meant to initiate a more open conversation about the need to rethink a legal framework; it is not the place to formulate detailed alternatives to the election paradigm. I do want to suggest, however, that several plausible models exist in comparable legal systems where promotion of collective bargaining is integrated with protection of employee choice. It may not be necessary to embrace a single option; given our federal structure and a tradition of encouraging voluntary agreements, a revised approach might allow for the coexistence of several alternative procedures.

One possibility is to follow the Canadian model, which prescribes card check certification as a basic method for establishing collective bargaining rights. Under the Canadian national labour code, as well as four provincial labour codes, a union will be certified if a majority of employees (in two provinces, a supermajority) sign authorization cards.<sup>90</sup> This willingness to defer to card majorities as reflecting employee free choice includes certain safeguards. Labour boards typically investigate the circumstances surrounding card-signing for signs of direct or tacit management support or union fraud or intimidation. Further, some boards will order an election when the union possesses only a narrow card majority, or conditions otherwise suggest a closely contested outcome.

A second option used in Canada is to retain elections as the primary tool while compressing the campaigning period to minimize intimidation or coercion. Four provincial labour codes require boards to hold an election within five to seven days of receiving a petition supported by a card majority. The assumption behind such an

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<sup>87</sup> See Weiler, *supra* note 70, at 1815-16.

<sup>88</sup> Any pressure more direct or overt than what is socially generated is already prohibited by law. See *supra*, paragraph of text preceding note 55.

<sup>89</sup> See *supra* note 1 and accompanying text (quoting Kuhn on prospects for changing paradigms).

<sup>90</sup> For presentation and discussion of Canadian labor law sources and scholarly commentary on developments in Canada's law of organizing, see Brudney, *supra* note 5, 90 IOWA L. REV. at 878-79, nn.287-90, 293-94, 297.

“instant ballot” approach is that it is neither necessary nor appropriate for the employer to play the same role as the union in a representation campaign.

The Canadian system has accepted the principle of limiting employer opportunities to oppose unionization as consistent with employee free choice. Win rates for unions organizing under the two approaches discussed are comparable to those for U.S. campaigns involving neutrality and card check. Canadian unions have maintained fairly steady levels of support in the workforce at a time when in the U.S. union representation has precipitously declined.<sup>91</sup> Meanwhile, there is scant evidence that the Canadian options undermine employees’ ability to express their true preferences.<sup>92</sup>

A third alternative involves borrowing from recently revised British labour law. The Employment Relations Act of 1999 provides for a statutory recognition procedure that effectively encourages non-electoral recognition as the primary option with elections as a fallback.<sup>93</sup> When a union formally requests recognition and the employer does not accede voluntarily, the new British statute provides two possible pathways. The union will first apply to the Central Arbitration Committee (“CAC”), a governmental entity charged with determining whether there is in fact majority support within an appropriate unit. If the CAC is satisfied that the union enjoys majority status, it can declare the union recognized without an election.

As with the Canadian model, there are exceptions. The CAC must hold an election, even if a majority of employees are union members, in three situations: (i) when an election is in the interest of good industrial relations; (ii) when a significant number of workers inform the CAC they do not want the union; and (iii) when “evidence” regarding the circumstances under which employees became union members creates doubts about whether a significant number of workers really want the union. On the other hand, the British statute includes provisions that create incentives for employers to explore voluntary recognition. An employer that resists a recognition request accompanied by strong employee support and instead opts for an election must grant the union reasonable access to employees during the campaign. In addition, if the union prevails the CAC can impose a procedure setting forth detailed standards for the conduct of collective bargaining.

Initial results indicate that employers are inclined to sign voluntary agreements and avoid the CAC election process if the union has majority support. Over 90% of recognition arrangements established between 2000 and 2003 resulted from voluntary agreements between employer and union with no government supervision. One British commentator, noting employers’ frequently neutral or receptive attitudes towards

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<sup>91</sup> See Douglas G. Gilbert et al., CANADIAN LABOUR AND EMPLOYMENT LAW FOR THE U.S. PRACTITIONER 27 (2003) (stating that Canadian unions as of 2001 continued to represent about 32% of nonagricultural workforce, compared to 14% in the United States; recent successful campaigns at Wal-Mart and McDonald’s highlight differences); *U.S.-Based Unions Lost Ground in Canada from 1977 to 2003, New Study Determines*, DAILY LAB. REP. (BNA), at A10-11 (Sept. 1, 2004) (reporting 43% growth in Canadian union membership from 1977 to 2003, roughly parallel to increases in Canadian employment levels; unionization at 32.6% in 1977 and at 30.5% as of June 2004).

<sup>92</sup> Canadian and provincial labour boards monitor use of both card check recognition and expedited elections, and they have imposed penalties for the serious misuse or exploitation that has occasionally occurred. See R.C. Purdy Chocolates Ltd. & C.E.P., Local 2000, 77 C.L.R.B.R. (2d) 1, 21 (Can. Lab. Bd. 2002) (noting that certification of union was obtained with forged cards, and emphasizing this was only such known instance since Labour Code provision was enacted twenty-eight years earlier; Board cancels union’s certification).

<sup>93</sup> For presentation and discussion of British labor law sources and scholarly commentary on developments under the new 1999 statute, see Brudney, *supra* note 5, 90 IOWA L. REV. at 881-82, nn.301-09.

unionization, has suggested that these employers perceive a range of business advantages to unionization similar to those cited by U.S. employers when they enter into neutrality plus card check arrangements.<sup>94</sup>

Each of the options summarized here stems in part from legislators' periodic willingness to rethink their basic approach for protecting workers' ability to choose whether to support a union. In the United States, such rethinking is only possible through substantial movement by Congress. The "Employee Free Choice Act," initially introduced in the House and Senate in 2003, would require the NLRB to certify a union that has received majority support through authorization cards, precluding employers from insisting on a Board election.<sup>95</sup> However, the myriad factors that have made so many U.S. employers fiercely resistant to unions likely will fuel strong opposition to such a reform. Thus, while the election paradigm no longer reflects descriptive reality, it remains useful in strategic and rhetorical terms to explain and justify the status quo.

Neutrality agreements plus card check have not wholly supplanted NLRB elections, nor are they likely to do so. Yet when properly structured, with safeguards to ensure that cards are signed voluntarily and a neutral reviewer to verify majority support, they may grow into the primary option exercised by employees and unions under our federal labor law framework. There are ample policy-related reasons to encourage such growth. As demonstrated, neutrality plus card check poses no serious doctrinal challenge to employee freedom of choice. From a practical standpoint, neutrality agreements seem to promote employee free choice at least as effectively as the faltering elections-based regime—by minimizing obstacles posed by lengthy election-related delays and by reducing the corrosive impact of lawful and unlawful employer pressure.

Neutrality plus card check also advances two distinct values fundamental to our labor laws. By transforming union organizing campaigns from bitterly divisive contests into more civil arrangements, neutrality and card check agreements encourage stable and peaceful labor relations. In addition, neutrality plus card check celebrates voluntary and separately negotiated solutions to labor management disputes. Such voluntary contractual arrangements have long been a favored element of our national labor policy.

## V. CONCLUSION

The development of neutrality and card check as a competing paradigm indicates its emerging importance in structuring the organizing process. A series of challenges are facing the Board and the courts as unions and employers probe the opportunities and risks accompanying this new approach.<sup>96</sup> Assuming that Congress neither ratifies

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<sup>94</sup> See Gregor Gall, *Trade Union Recognition in Britain, 1995-2002: Turning a Corner?*, 35 INDUS. REL. J. 249, 255-56 (2004) (citing employers' perception that unions often can contribute to enhanced employee productivity, leverage in securing public sector contracts, and assistance in dealing with complex regulatory environment); compare *supra* Part I.C (discussing U.S. employers' similar motivations).

<sup>95</sup> See H.R. 800, 110th Cong. (2007); S. 842, 109th Cong. (2005). As of February 2007, the House bill, introduced by Rep. Miller (D-Cal.), had 233 cosponsors; the Senate bill from the 109<sup>th</sup> Congress, introduced by Sen. Kennedy (D-Mass), had forty-four cosponsors.

<sup>96</sup> See, e.g., *Healthcare Ass'n of N.Y. State v. Pataki*, 471 F.3d 87 (2d Cir. 2006) (addressing whether state or local laws encouraging or requiring neutrality are preempted by the NLRA); *Hotel Employees & Rest. Employees Union, Local 57 v. Sage Hospitality Res.*, 390 F.3d 206 (3d Cir. 2004) (same); *United States Chamber of Commerce v. Lockyer*, 463 F.3d 1076 (9th Cir. 2004) (en banc) (same); *Hotel & Rest. Employees Union, Local 217 v. J. P. Morgan Hotel*, 996 F.2d 561 (2d Cir. 1993) (addressing challenges to enforceability of neutrality agreements under § 301 of LMRA); Shaw's Supermarkets, 343 N.L.R.B. No.

nor disapproves the alternative framework, it seems likely that both NLRB elections and neutrality plus card check will coexist as potentially preeminent descriptive and normative accounts of the employee self-determination process.

Further discussion regarding these competing paradigms will take place against a backdrop of growing economic uneasiness. The sharply diminished role played by unions in the U.S. economy since the 1960s has been accompanied by a substantial growth of economic inequality. Earnings for non-supervisory employees have been stagnant for the past three decades,<sup>97</sup> employees work longer hours,<sup>98</sup> the gap between workers in the upper and lower tiers has widened,<sup>99</sup> and the divide between salaries for CEOs and average workers has become simply breathtaking.<sup>100</sup>

The possibility of a shift in paradigms does not signify that the overall rate of unionization will increase. Despite polls showing heightened interest in unions among U.S. workers, there has been no real growth in unionization during recent times. Absence of growth may be attributed to many factors—weaknesses of the legal regime, fierceness of employer resistance, but also lack of sufficient energy or imagination among unions, and broader economic pressures and conditions. Over the past decade, however, organizing activity has become more intense, and the success of neutrality plus card check has begun to shift the tenor of debate. That shift may help to initiate a more frank discussion of how to improve conditions of employment for workers in a society characterized by ever-increasing disparities in wealth.

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105 (2004) (addressing whether public policy considerations preclude enforcement of after-acquired stores clause as waiver of employer right to petition for Board election); *Dana Corp. and Metaldyne Corp.*, 341 N.L.R.B. No. 150 (2004) (addressing whether voluntary recognition of union by employer should preclude decertification election petitions filed by employees); *New Otani Hotel & Garden*, 331 N.L.R.B. 1078 (2000) (addressing whether unions' request for neutrality and card check constitutes demand for recognition giving employer the right to insist on a Board election).

<sup>97</sup> See DUNLOP COMM'N REPORT, *supra* note 7, at 19 (discussing stagnation of real earnings as of early 1990s); Freeman & Rogers, *supra* note 74, at 13 & n.16 (discussing various studies on stagnation of earnings); Thomas I. Palley, PLENTY OF NOTHING: THE DOWNSIZING OF THE AMERICAN DREAM AND THE CASE FOR STRUCTURAL KEYNESIANISM 52, 57 (1998) (discussing the decline in average compensation for non-supervisory workers from 1970 to 1995).

<sup>98</sup> See DUNLOP COMM'N REPORT, *supra* note 7, at 19 (reporting modest decline in length of vacation and holiday time for fully employed U.S. workers from early 1970s to early 1990s; U.S. workers averaged 200 more hours of work per year than workers in Europe, with amount of vacation time a major reason for difference).

<sup>99</sup> See, *id.* at 18 (reporting that male workers in the top decile earn 2.14 times median earnings in United States compared to 1.4 to 1.7 times the median in most European countries, and that U.S. earnings distribution has widened greatly in recent years); Freeman & Rogers, *supra* note 74, at 13 (reporting that top 10% of U.S. workers earn 5.6 times as much as bottom 10%, compared with 2.1 times in European Union and 2.4 times in Japan).

<sup>100</sup> See Palley, *supra* note 97, at 57-58 (reporting that in 1960, average CEO pay was forty-one times average factory worker pay; by 1996, average CEO received 212 times average factory worker pay).



# And Justice For All? Litigation, Politics, and the State of Marriage Equality Today

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Suzanne B. Goldberg\*

## I. INTRODUCTION

When civil rights are the subject of national conversation, the debate—both in and out of court—is often a sharp one that reflects varied political, religious, and social agendas. Indeed, sharp might be a gentle way to describe the work of these agendas in today’s conflicts over marriage rights for same-sex couples. In the cases themselves, parties and amici draw on everything from scripture to social science to federalism to advance their legal claims. Outside of court, grassroots activists, leaders of religious communities, and elected officials on both sides of the issue invoke these same sources in efforts to influence popular opinion and legislative outcomes.

This position paper sketches the legal and political landscape related to marriage for same-sex couples, distilling and analyzing the key issues that are often obscured in both judicial opinions and the rapid-fire public debate. It offers two central observations. The first is that, even as opposition to marriage equality remains strong in many jurisdictions, the terms of the debate shifted in important ways following the recognition of marriage rights in Massachusetts in 2003.<sup>1</sup> The shift has moved the central question from whether gay couples could marry at all to why they can marry in some jurisdictions but not others. In response, a new generation of litigation and political activity aims to establish—or disestablish—the Massachusetts approach as the status quo.

The second observation is that although the cultural debate may remain fervent for some time, the legal arguments being advanced to justify excluding same-sex couples from marriage have little logical or factual force. Even courts that embrace these rationales, which include, among others, preferences for heterosexual parents over gay parents, tend not to rely on them exclusively. Instead, they typically stress institutional legitimacy concerns at least as much as any gay-specific rationale, claiming that they are rejecting marriage equality claims out of respect for the people’s will. Even in New Jersey, the state supreme court recently concluded that the state must provide equal rights and benefits to same- and different-sex couples but deferred to the legislature to determine whether marriage or civil union status would be the appropriate remedy. Legislators likewise often hold themselves out as protecting tradition when they reject gay couples’ demands for equal marriage rights but avoid engaging with the argument that discriminatory traditions should not be sustained.

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<sup>1</sup> *Goodridge v. Dep’t of Pub. Health*, 798 N.E.2d 941 (Mass. 2003).

This posturing is not surprising, given the long history of courts and legislatures deferring to majoritarian preferences, even at the expense of a minority group's civil rights. But the easy invocation of "deference to the majority" and to "tradition" does not tell the whole historical story. Indeed, at its proudest moments, government, through courts and legislatures, has pushed back against majoritarian discomfort with vulnerable minorities and made meaningful the guarantee of equality for all.

Part II of this paper puts today's litigation in context by offering an abbreviated history of marriage litigation and an up-to-the-minute<sup>2</sup> description of current cases being litigated by lesbian and gay couples seeking marriage rights. This part also provides an update regarding the status of marriages sanctified in early 2004 at the behest of local elected officials in several jurisdictions around the country. Part III reviews the litigation challenging the federal Defense of Marriage Act and similar state marriage bans. Part IV provides a quick summary of legislative developments regarding marriage. Part V then sets out the major arguments for marriage equality and debunks six leading arguments offered by states and others to exclude same-sex couples from marriage, substantiating the point that no good legal arguments exist to support unequal marriage laws.

## II. A QUICK TOUR OF MARRIAGE EQUALITY LITIGATION PAST AND PRESENT

Marriage litigation related to rights for same-sex couples can be grouped roughly into three categories: (1) cases brought by same-sex couples seeking marriage rights; (2) cases related to the authority of government officials to grant marriage licenses; and (3) cases challenging measures that restrict the recognition of marriages and other relationship rights. This section will discuss the first two categories, which both relate to affirmative efforts to recognize marriages. The next section will address litigation related to marriage bans.

### A. THE COUPLES' CASES

#### 1. *The History*

For many, the issue of marriage for same-sex couples first appeared on the radar in 1993, when the Hawaii Supreme Court ruled that the state's refusal to grant marriage licenses to several lesbian and gay couples gave rise to a sex discrimination claim under the state constitution's Equal Rights Amendment.<sup>3</sup> Although the lower court held, after a full trial, that the state lacked a compelling justification for reserving marriage to different-sex couples,<sup>4</sup> marriage rights did not follow. While the appeal

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<sup>2</sup> Because the landscape changes so continuously, the up-to-the-minute promise will surely become outdated shortly after publication. To keep up with the latest developments in litigation, see <http://www.library.law.pace.edu/research/same-sex-marriage.html>. Groups handling much of the litigation of marriage cases also offer updated news and copies of litigation documents on their websites. See, e.g., ACLU Gay, Lesbian, Bisexual, Transgender Rights Project, <http://www.aclu.org/lgbt/index.html>; Gay and Lesbian Advocates and Defenders, [http://glad.org/GLAD\\_Cases/#marriage\\_&\\_civil\\_unions](http://glad.org/GLAD_Cases/#marriage_&_civil_unions); Lambda Legal, <http://www.lambdalegal.org>; and National Center for Lesbian Rights, <http://www.nclrights.org/>.

<sup>3</sup> *Baehr v. Lewin*, 852 P.2d 44 (Haw. 1993).

<sup>4</sup> *Baehr v. Miike*, 1996 WL 694235, at 21 (Haw. Circ. Ct. 1996). The court noted that "the burden is on Defendant to show that the statute's sex-based classification is justified by compelling state interests and the statute is narrowly drawn to avoid unnecessary abridgments of constitutional rights," *Id.* at 19. The court held that:

Defendant has failed to present sufficient credible evidence which demonstrates that the public interest in the well-being of children and families, or the optimal development of children

was pending,<sup>5</sup> Hawaii voters amended their constitution and authorized the state's legislature to restrict marriage to male-female couples, which it promptly did, thereby mooting the case.<sup>6</sup>

Hawaii provided the first glimpse of success, but it was not nearly the first state to face a legal challenge to its marriage laws. Back in 1971, the Minnesota Supreme Court, in *Baker v. Nelson*, the first appellate ruling on the issue, denied two men the right to marry.<sup>7</sup> The court held that the Minnesota marriage statute did not authorize the marriage of same-sex couples even though the statute itself had no different-sex requirement for prospective spouses. It held, too, that restricting marriage to male/female couples did not violate the constitution.<sup>8</sup> For the next twenty-plus years, every court asked to consider marriage rights for same-sex couples responded with a resounding rejection.<sup>9</sup>

Thus, it was perhaps not surprising that when the Hawaii Supreme Court opened the door to the possibility of marriage rights for lesbian and gay couples, opponents of marriage equality reacted forcefully to this perceived "close call." Congress responded quickly, and, in September 1996, the same month as the Hawaii marriage case was being tried, President Clinton signed the Defense of Marriage Act (DOMA) into law. DOMA provides, in essence, that the federal government will not recognize

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would be adversely affected by same-sex marriage. Nor has Defendant demonstrated how same-sex marriage would adversely affect the public fisc, the state interest in assuring recognition of Hawaii marriages in other states, the institution of traditional marriage, or any other important public or governmental interest. *Id.* at 21.

<sup>5</sup> The trial court's judgment was stayed while the appeal to the Hawaii Supreme Court was pending.

<sup>6</sup> HAW. CONST. art. I, 23; David Orgon Coolidge, *The Hawai'i Marriage Amendment: Its Origins, Meaning and Fate*, 22 HAWAII L. REV. 19 (2002) (detailing the Amendment's passage). Alaska voters similarly amended their constitution while a marriage equality lawsuit was pending in state court. *See Brause v. Dept. of Health & Soc. Svcs.*, 21 P.3d 357 (Alaska 2001) (noting that the 2001 state constitutional amendment provides that "[a] same-sex relationship may not be recognized by the state as being entitled to the benefits of marriage").

<sup>7</sup> 191 N.W.2d 185 (Minn. 1971).

<sup>8</sup> *Id.* at 185-86 ("Minn.St. c. 517, which governs 'marriage,' employs that term as one of common usage, meaning the state of union between persons of the opposite sex. It is unrealistic to think that the original draftsmen of our marriage statutes, which date from territorial days, would have used the term in any different sense.") (footnote omitted). Because the U.S. Supreme Court summarily affirmed the decision, some states argue today that *Baker* still controls and that state courts must reject marriage claims by same-sex couples. To date, no court has rejected a marriage equality claim based exclusively on *Baker*. *See, e.g., Hernandez v. Robles*, 7 N.Y.3d 338, 362 (N.Y. 2006) (rejecting "defendants' argument that the Supreme Court's ruling without opinion in *Baker* bars us from considering plaintiffs' equal protection claims" (internal citation omitted)); *In re Kandu*, 315 B.R. 123, 138 (Bankr. W.D. Wash. 2004) (holding that *Baker* is no longer binding precedent). Gay rights advocates have maintained that the tremendous legal changes since *Baker* have diluted any authority the decision might once have carried. *But see Wilson v. Ake*, 354 F.Supp.2d 1298, 1304-05 (M.D. Fla. 2005) (holding that *Baker* controlled adjudication of DOMA challenge).

<sup>9</sup> *See, e.g., Jones v. Hallahan*, 501 S.W.2d 588 (Ky. Ct. App. 1973) (finding that marriage constituted a union between a man and a woman and that the two female applicants could not be issued a marriage license); *De Santo v. Barnsely*, 476 A.2d 952 (Pa. Super. Ct. 1984) (holding that two men could not enter into a common law marriage in Pennsylvania); *Singer v. Hara*, 522 P.2d 1187 (Wash. 1974) (determining that the legislature had not authorized marriage for same-sex couples); *see also Adams v. Howerton*, 486 F.Supp. 1119 (C.D. Cal. 1980) (refusing to recognize a marriage between two men in Colorado in context of immigration sponsorship), *aff'd* 673 F.2d 1036 (9th Cir. 1982); *Dean v. District of Columbia*, 653 A.2d 307 (D.C. 1995) (finding that the District of Columbia's constitution did not permit same-sex couples to marry); *Standhardt v. Superior Ct.*, 77 P.3d 451 (Ariz. Ct. App. 2003) (holding that same-sex couples could not be issued marriage licenses); *Anonymous v. Anonymous*, 325 N.Y.S.2d 499, 500 (Sup. Ct. 1971) (refusing to recognize a marriage between two men when, at the time of marriage one thought the other was a woman, with the court holding that "marriage is and always has been a contract between a man and a woman").

marriages of same-sex couples and that states need not recognize marriages of same-sex couples that have been sanctioned by other states.<sup>10</sup>

Despite DOMA's sweeping language and the waves of similar state-based bans,<sup>11</sup> the press for marriage equality in the courts continued. After Hawaii, the Vermont Supreme Court took the next step forward, holding in 1999 that same-sex couples were entitled to the same "benefits and protections" available to different-sex married couples based on the Common Benefits Clause of the Vermont constitution.<sup>12</sup> Rather than ordering the state not to enforce its male-female marriage eligibility rule, however, the court empowered the state legislature to provide a remedy. In response, in 2000, the Vermont legislature created a "civil union" regime, through which the state provides the same benefits and responsibilities to same-sex couples that it accords to different-sex couples through marriage.<sup>13</sup> At that time, leading advocates did not pursue the case further, accepting the result not as an end in itself but rather as a step toward full marriage equality.

Four years later, in 2003, the Supreme Judicial Court of Massachusetts, in *Goodridge v. Dept. of Public Health*, held, in a 4-3 ruling, that Massachusetts violated the state's equal protection and due process guarantees by denying marriage rights to same-sex couples.<sup>14</sup> The Court later held that marriage, not civil union, was required to remedy the constitutional violations.<sup>15</sup>

Since *Goodridge*, two other state high courts have ruled against marriage equality claims since *Goodridge* and a third has ruled for equalization of marital rights and benefits. Most recently, the New Jersey Supreme Court, in October 2006, unanimously held that the state's denial of marital rights and responsibilities to same-sex couples

<sup>10</sup> DOMA has two central provisions. The first, addressing the Full Faith and Credit Clause, states: No State, territory, or possession of the United States, or Indian tribe, shall be required to give effect to any public act, record, or judicial proceeding of any other State, territory, possession, or tribe respecting a relationship between persons of the same sex that is treated as a marriage under the laws of such other State, territory, possession, or tribe, or a right or claim arising from such relationship. 28 U.S.C. § 1738C (2000).

The second, addressing the federal definition of "marriage" and "spouse," states:

In determining the meaning of any Act of Congress or any ruling, regulation, or interpretation of the various administrative bureaus and agencies of the United States, the word "marriage" means only a legal union between one man and one woman as husband and wife, and the word "spouse" refers only to a person of the opposite sex who is a husband or a wife. 1 U.S.C. § 7 (2006).

<sup>11</sup> See Toni Lester, *Adam and Steve vs. Adam and Eve: Will the New Supreme Court Grant Gays the Right to Marry?*, 14 AM. U.J. GENDER SOC. POL'Y & L. 253, 274-78 (2006) (discussing the prevalence of state DOMAs).

<sup>12</sup> *Baker v. State*, 744 A.2d 864 (Vt. 1999). That Clause provides in part:

That government is, or ought to be, instituted for the common benefit, protection, and security of the people, nation, or community, and not for the particular emolument or advantage of any single person, family, or set of persons, who are a part only of that community[.] Vt. Const. ch. I, art 7.

<sup>13</sup> Notably, Vermont civil unions do not equalize treatment of same- and different-sex couples under federal law.

<sup>14</sup> *Supra* note 1.

<sup>15</sup> Opinions of the Justices to the Senate, 802 N.E.2d 565 (Mass. 2004). The victory of the lesbian and gay plaintiffs in *Goodridge* has been followed by numerous rounds of litigation. Those opposing equal marriage rights attempted to have the decision reversed by a federal court. See *Largess v. Supreme Judicial Court for Mass.*, 317 F. Supp. 2d 77 (D. Mass. 2004), aff'd, 373 F.3d 219 (1st Cir.), cert. denied, 543 U.S. 1002 (2004). They are now in the process of organizing a voter initiative to amend the Massachusetts constitution and reverse the *Goodridge* decision. See Elizabeth Mehren, *Initiative Would Overturn Same-Sex Marriage in Massachusetts*, L.A. Times, June 10, 2006, at A10.

violated the state constitution's equality guarantee.<sup>16</sup> The four-person majority remanded the case to the legislature to decide whether to address this violation by marriage or by some other status, such as civil union, to provide equivalent rights and benefits.<sup>17</sup> Three other justices would have granted full marriage rights. Earlier in the year, New York's Court of Appeals and Washington's Supreme Court both ruled that their respective state legislatures reasonably could have believed that concerns related to procreation and childrearing justified excluding same-sex couples from marriage.<sup>18</sup> Appellate courts in Indiana and Arizona have rejected marriage equality claims as well.<sup>19</sup>

Outside the United States, marriage equality claims have met with greater success. Same-sex couples now enjoy the right to marry in Belgium, Canada, the Netherlands, and Spain.<sup>20</sup> In December 2005, South Africa's Constitutional Court held that same-sex couples are entitled to marry.<sup>21</sup> The court mandated that equal access to marriage be in place by the end of 2006.<sup>22</sup> Numerous other countries offer marriage-like status to same-sex couples as well.<sup>23</sup>

## 2. Pending Cases

Litigation is now pending in California, Connecticut, Iowa, and Maryland, with mixed results thus far.<sup>24</sup>

In the loss column, a Connecticut trial court rejected marriage claims of same-sex couples in the summer of 2006.<sup>25</sup> Unlike the high courts in New York and Washington, the Connecticut court did not rely on either tradition or a preference for heterosexuals as parents.<sup>26</sup> Instead, the court found that because legislatively approved civil union status in Connecticut now provides equivalent in-state rights and benefits to marriage, the reservation of marriage to different-sex couples did not cause cognizable injury.<sup>27</sup>

<sup>16</sup> *Lewis v. Harris*, 908 A.2d 196 (N.J. 2006).

<sup>17</sup> *Id.* at 224.

<sup>18</sup> *Hernandez v. Robles*, 7 N.Y.3d 338 (N.Y. 2006); *Andersen v. King County*, 138 P.3d 963 (Wash. 2006).

Notably, the majority opinions in both cases were contested by forceful dissents, illustrating that the arguments for inclusion of same-sex couples within marriage, even if unsuccessful, are receiving far more traction today than they did before *Baker* and *Goodridge*. See *Hernandez*, 7 N.Y.3d at 380-397 (Kaye, C.J., dissenting); *Andersen*, 138 P.3d 1012-1027 (Wash. 2006) (Fairhurst, J., dissenting); *id.* at 1027-1040 (Bridge, J., concurring in dissent); *id.* at 1040-1043 (Chambers, J., concurring in dissent).

<sup>19</sup> *Morrison v. Sadler*, 821 N.E.2d 15 (Ind. Ct. App. 2005); *Standhardt v. Superior Ct.*, 77 P.3d 451 (Ariz. Ct. App. 2003). The cases in Indiana and Arizona are no longer pending. The next section addresses additional appellate rulings that rejected marriage claims and are now on appeal before state high courts.

<sup>20</sup> See Human Rights Campaign, International Marriage Rights, available at [http://www.hrc.org/Content/ContentGroups/Issues1/International\\_Law/International\\_Marriage.htm](http://www.hrc.org/Content/ContentGroups/Issues1/International_Law/International_Marriage.htm).

<sup>21</sup> *Minister of Home Affairs v. Fourie*, 2005 (3) BCLR 241 (SCA) (S. Afr.).

<sup>22</sup> *Id.* at para. 161 ("[I]f Parliament fails to cure the defect within twelve months, the words 'or spouse' will automatically be read into section 30(1) of the Marriage Act."); see also 365Gay.com, *South Africa Cabinet OKs Gay Marriage Bill*, Aug. 24, 2006, available at <http://365gay.com/Newscon06/08/082406saf.htm> ("The court ordered Parliament to amend marriage laws within 12 months. If it fails to act within that time-frame, the court said the ruling would automatically change the law to include same-sex unions.").

<sup>23</sup> See International Gay and Lesbian Human Rights Commission, Rights Conferred on Same-Sex Partners Worldwide, available at <http://www.iglhrc.org/site/iglhrc/content.php?type=1&id=91#AZCountry> (last visited Sept. 4, 2006) (detailing various forms of legal recognition for same-sex partnerships at national, regional, and local levels).

<sup>24</sup> See *infra* notes 27-32.

<sup>25</sup> *Kerrigan v. Comm'r of Public Health*, 270 Conn. 447 (Conn. Super. Ct. 2006).

<sup>26</sup> *Id.* at 21-22.

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

The California Court of Appeal likewise held, in October 2006, that the state's reservation of marriage to different-sex couples was constitutionally permissible.<sup>28</sup> Specifically, the court held that "the opposite-sex requirement in the marriage statutes is rationally related to the state's interest in preserving marriage in its historical opposite-sex form, while also providing comparable rights to same-sex couples through domestic partnership laws."<sup>29</sup> It invoked institutional legitimacy concerns too, opining that its deference to the legislature and the voters was "especially warranted where the issue is so controversial and divisive."<sup>30</sup>

At the other end of the spectrum, a lower court in Maryland<sup>31</sup> issued an opinion declaring that exclusion of same-sex couples from marriage violates state constitutional guarantees. For this court, neither tradition nor any other argument could justify the infringement of constitutional rights caused by rules excluding same-sex couples from marriage.

An additional case is pending in Iowa, where the state answered the plaintiffs' complaint in early 2006 and maintained that its exclusion of same-sex couples from marriage did not violate the state constitution's due process and equal protection guarantees.<sup>32</sup> Trial is currently scheduled for February 2007.

#### B. CASES REGARDING THE AUTHORIZATION TO MARRY

A separate set of marriage recognition cases flared up—and seemed to die down almost as quickly—in connection with marriages sanctioned either by mayors or clerks during 2004. The February 2004 decision of San Francisco Mayor Gavin Newsom to provide marriage licenses to same-sex couples within his city opened the initial floodgates, sparking a small movement among local officials in New Mexico, New York, New Jersey, and Oregon to issue marriage licenses to same-sex couples.<sup>33</sup>

Despite the eager response of lesbian and gay couples (and the headlines and photos around the world of couples lined up to formalize and celebrate their relationships), none of those marriages is valid today. The California Supreme Court resoundingly rejected Mayor Newsom's claim that he had authority to issue the licenses and voided all the licenses that had been issued.<sup>34</sup> In New Paltz, New York, Mayor Jason West faced criminal charges within a week of performing marriage ceremonies for same-sex couples.<sup>35</sup> In March 2004, two Oregon counties began to issue marriage licenses, only to be stopped shortly thereafter by court order in one jurisdiction and political vote the another.<sup>36</sup> At the same time, Asbury Park, New Jersey's deputy

<sup>28</sup> *In re Marriage Cases*, 49 Cal.Rptr.3d 675 (Cal. Ct. App. 2006).

<sup>29</sup> *Id.* at 723.

<sup>30</sup> *Id.* at 725.

<sup>31</sup> *Deane & Polyak v. Conaway*, 2006 WL 148145 (Baltimore City Cir. Ct. 2006).

<sup>32</sup> Answer of Defendant Timothy J. Brien, *Varnum v. Brien*, No. CV5965 (D. Iowa Polk Cty. 2006), available at [http://www.domawatch.org/cases/iowa/Varnum%20v.%20Brien/Answer\\_Timothy\\_Brien.pdf](http://www.domawatch.org/cases/iowa/Varnum%20v.%20Brien/Answer_Timothy_Brien.pdf).

<sup>33</sup> For details of these developments, see the website of the National Conference of State Legislatures, available at <http://www.ncsl.org/programs/cyf/samesexime.htm> (last visited July 14, 2006).

<sup>34</sup> *Lockyer v. City and County of San Francisco*, 33 Cal. 4th 1055 (Cal. 2004).

<sup>35</sup> See *supra* note 33. It is a misdemeanor in New York for a person to marry a couple that does not possess a marriage license. See, e.g., *People v. Greenleaf*, 780 N.Y.S.2d 899 (N.Y. J. Ct. Ulster Cty. 2004). The criminal charges were later rejected by another trial court, which held that the denial of marriage to same-sex couples was unconstitutional. *People v. West*, 780 N.Y.S.2d 723 (N.Y. J. Ct. Ulster Cty. 2004). But see *Hernandez v. Robles*, 7 N.Y.3d 338 (N.Y. 2006) (holding that the denial of marriage to same-couples was not unconstitutional).

<sup>36</sup> *Li v. State*, 338 Or. 376 (Or. 2005); Same-Sex Unions in Oregon on Answers.com, available at <http://www.answers.com/topic/same-sex-unions-in-oregon> (last visited July 22, 2006).

mayor solemnized the marriage of a same-sex couple, and the New Jersey Attorney General warned town officials that they would face prosecution for issuing invalid marriage licenses if they did not cease and desist.<sup>37</sup>

Although these local efforts to advance marriage equality were short-lived, they illustrate that outrage at the denial of equality inherent in most of the country's marriage laws now extends far beyond those couples directly affected by the exclusion.

### III. LEGAL CHALLENGES TO MARRIAGE BANS

To date, federal and statewide measures banning marriage for same-sex couples have faced relatively few challenges. The number of cases filed is expected to increase significantly, however, as soon as more lesbian and gay couples have the option to marry out of state and then return home demanding full citizenship rights in the form of recognition for their marriages.<sup>38</sup>

#### A. CHALLENGES TO DISCRIMINATORY FEDERAL LAW

Of the few challenges thus far to the federal DOMA, none has succeeded in having the law declared unconstitutional. In two cases, federal courts have sustained DOMA, holding that government interests related to procreation and childrearing supported the different marriage recognition rules for gay and non-gay couples.<sup>39</sup> In a third case, the Ninth Circuit did not reach the merits and instead dismissed the lawsuit on the grounds that the gay couple challenging DOMA lacked standing.<sup>40</sup> The court reasoned that because the couple did not have a valid marriage, the federal government's refusal to recognize marriages of same-sex couples could not infringe the couple's rights.

#### B. STATE-LEVEL BANS ON THE RECOGNITION OF SAME-SEX COUPLES' RELATIONSHIPS

State amendments banning same-sex couples' unions also have faced litigation in cases brought by plaintiffs who are seeking to have the measures invalidated but are not seeking marriage rights. In one that initially had been highly celebrated by marriage equality advocates, a federal district court struck down a Nebraska constitutional amendment banning the provision of any rights to same-sex couples.<sup>41</sup> Relying

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<sup>37</sup> Jonathan Wald, *N.J. Town Halts Gay Weddings* (Mar. 10, 2004), CNN.COM, available at <http://www.cnn.com/2004/LAW/03/10/same.sex.nj/index.html>.

<sup>38</sup> Recognition of marriage in Massachusetts has not led to a significant jump in the number of marriages by out-of-state residents because of a state law that forbids the grant of a marriage license to a couple residing in a state that would not recognize the marriage. This law, which was enacted originally to prohibit interracial marriages by couples who resided in states with anti-miscegenation laws, was upheld against a facial challenge. See *Cote-Whitacre v. Dep't of Pub. Health*, 844 N.E.2d 623 (Mass. 2006). More recently, the Supreme Judicial Court of Massachusetts held that Rhode Island residents can legally marry in Massachusetts, notwithstanding the 1913 law. *Cote-Whitacre v. Dep't of Pub. Health*, 2006 WL 3011295 (Mass. Super. 2006). Updates on as-applied challenges to the Massachusetts statute brought by out-of-state residents can be found on the website of Gay and Lesbian Advocates and Defenders, the organization that litigated *Goodridge* and continues to handle related cases. Available at: [http://www.glad.org/marriage/howtogetmarried.html#If\\_i\\_live\\_in\\_another\\_state](http://www.glad.org/marriage/howtogetmarried.html#If_i_live_in_another_state).

<sup>39</sup> See *Wilson v. Ake*, 354 F. Supp. 2d 1298 (M.D. Fla. 2005); *Smelt v. County of Orange*, 374 F. Supp. 2d 861 (C.D. Cal. 2005); *In re Kandu*, 315 B.R. 123 (Bankr. W.D. Wash. 2004); see also Freedom To Marry, Federal DOMA Cases, available at <http://www.freedomtomarry.org/node.asp?id=3690>.

<sup>40</sup> See *Smelt v. County of Orange*, 447 F.3d 673 (9th Cir. 2006).

<sup>41</sup> *Citizens for Equal Protection v. Bruning*, 368 F. Supp.2d 980 (D. Neb. 2005), *rev'd*, 455 F.3d 859 (8th Cir. 2006).

in part on *Romer v. Evans*,<sup>42</sup> which invalidated a Colorado constitutional amendment barring antidiscrimination protections for gay people, the court held that the Nebraska measure's broad sweep violated the equal protection rights of lesbians and gay men in the state. In July 2006, however, the Eighth Circuit reversed, holding that the ban was rationally related to the state's interests in responsible procreation and in children having heterosexual parents.<sup>43</sup>

Separately, the Georgia Supreme Court recently upheld a state constitutional amendment banning recognition of marriages or other unions of same-sex couples.<sup>44</sup> The lower court had held that the ban violated the state rule limiting the content of voter initiatives to a single subject because it reached both marital and non-marital relationships.<sup>45</sup> The supreme court, however, found the ban permissible, holding that "it is apparent that the prohibition against recognizing same-sex unions as entitled to the benefits of marriage is not 'dissimilar and discordant' to the object of reserving the status of marriage and its attendant benefits exclusively to unions of man and woman."<sup>46</sup>

#### IV. LEGISLATIVE DEVELOPMENTS—FROM MARRIAGE EQUALITY TO DISCRIMINATORY MARRIAGE BANS

Although some reports suggest that legislative debates regarding marriage equality are all doom and gloom, the political glass is not entirely empty. Connecticut enacted a civil union law that took effect in late 2005, and, like Vermont's, provides the same state-created rights and responsibilities to same-sex couples that are available to different-sex couples through marriage.<sup>47</sup> Three states (Hawaii, Maine, and New Jersey) and the District of Columbia also have in place laws that provide to unmarried couples some of the same rights accorded to married couples.<sup>48</sup> California's domestic partnership statute is the most comprehensive of these measures (other than civil unions), providing registered domestic partners with almost all of the rights and responsibilities available through marriage.<sup>49</sup> The California legislature also passed a bill to equalize marriage rights for same-sex couples, but Governor Arnold Schwarzenegger vetoed it.<sup>50</sup>

Yet, the glass is not nearly half-full. On the other side of the ledger are nineteen states that have passed constitutional amendments restricting marriage to one man

<sup>42</sup> 517 U.S. 620 (1996).

<sup>43</sup> *Citizens for Equal Protection*, 455 F.3d at 867.

<sup>44</sup> *Perdue v. O'Kelley*, 632 S.E.2d 110 (Ga. 2006).

<sup>45</sup> *O'Kelley v. Perdue*, 2006 WL 1350171 (Ga. Super. Ct. 2006).

<sup>46</sup> *Perdue*, 632 S.E.2d at 113. A similar pre-election challenge to Florida's proposed ban on recognition of same-sex couples' marriages failed for much the same reason. See *Advisory Opinion to the Attorney General re: Florida Marriage Protection Amendment*, 926 So. 2d 1229 (Fla. 2006).

<sup>47</sup> CONN. GEN. STAT. § 46b-38nn (2006). As noted above, a Connecticut trial court cited the law as justification for the state's denying marriage to same-sex couples. See *Kerrigan v. Comm'r of Public Health*, 909 A.2d 89 (Conn. Super. Ct. 2006).

<sup>48</sup> See D.C. Code Ann. §§32-701 to 710 (LexisNexis 2001); Haw. Rev. Stat. § 572C-4 (2003) (listing the requirements to establish a reciprocal beneficiary relationship, Hawaii's equivalent of a civil union); Haw. Rev. Stat. Ann. § 527C-1 to C-7 (LexisNexis 1999); Haw. Rev. Stat. Ann. §§572C-4 to -5 (1997); 2004 Me. Legis. Serv. 672 (2004); N.J. Stat. Ann. § 26:8A-2 (2004); Domestic Partnership Act, 2004 N.J. Sess. Law Serv. 246 (West).

<sup>49</sup> Cal. Fam. Code §§ 297-98 (2006) (first enacted in 1999 with additional rights granted periodically in subsequent years). The law makes the same set of benefits available to different-sex couples whose members are 62 and over. *Id.* at § 297(b)(5)(B).

<sup>50</sup> *In re Marriage Cases*, 49 Cal.Rptr.3d 675, 697 (Cal. Ct. App. 2006).

and one woman.<sup>51</sup> An additional twenty-six states have laws limiting marriage to one man and woman.<sup>52</sup> And, at the federal level, the Defense of Marriage Act, which was enacted in 1996, remains in force, as noted above.

In addition, the Federal Marriage Amendment, which would amend the U.S. Constitution to exclude same-sex couples from marriage, remains a lively topic of political conversation at the federal level, notwithstanding its rejection by Congress two terms in a row. The most recent version, rejected by the Senate in June and the House in July 2006, provides:

Marriage in the United States shall consist only of the union of a man and a woman. Neither this Constitution, nor the constitution of any State, shall be construed to require that marriage or the legal incidents thereof be conferred upon any union other than the union of a man and a woman.<sup>53</sup>

Republican leaders are actively promising to continue to treat the marriage ban as a priority and reintroduce it with renewed vigor next term.<sup>54</sup>

## V. THE LEADING ARGUMENTS FOR AND AGAINST MARRIAGE EQUALITY

Given the relative success of those who support restricting marriage to male-female couples, one might think that either the plaintiffs' arguments for marriage equality are terribly weak or that the rationales advanced to support the exclusion of same-sex couples from marriage are terrifically strong. As this section will show, however, the arguments challenging marriage rules that treat same-sex couples differently from different-sex couples rest on traditional, uncomplicated constitutional commitments to autonomy and equality. At the same time, the counterarguments advanced by states and amici lack both factual and logical grounding, reinforcing the views of many advocates that their acceptance by courts turns on political considerations rather than legal reasoning.

### A. THE PLAINTIFFS' CONSTITUTIONAL CLAIMS

In virtually every complaint seeking marriage rights for same-sex couples, the challenge is framed as a basic denial of both the fundamental right to marry and the right,

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<sup>51</sup> These states are: Alabama, Alaska, Arkansas, Georgia, Idaho, Kentucky, Louisiana, Michigan, Mississippi, Missouri, Montana, Nebraska, Nevada, North Dakota, Ohio, Oklahoma, Oregon, Texas, Utah. Of these, the amendments in Georgia and Nebraska have been invalidated, as noted above, and are the subject of pending litigation. Some of these laws may limit state recognition of non-marital relationships between same-sex couples as well. Editor's note: this brief published before the November 2006 election, updated information can be found on the websites of the Human Rights Campaign, <http://www.hrc.org>; the National Gay and Lesbian Task Force, <http://www.thetaskforce.org>; Freedom to Marry, <http://www.freedomtomarry.org>; and Marriage Equality, <http://www.marriageequality.org>.

<sup>52</sup> These include Arizona, California, Colorado, Connecticut, Delaware, Florida, Hawaii, Idaho, Illinois, Indiana, Iowa, Maine, Maryland, Minnesota, New Hampshire, North Carolina, Pennsylvania, South Carolina, South Dakota, Tennessee, Vermont, Virginia, Washington, Wisconsin, West Virginia, and Wyoming. The laws in Iowa and Maryland are the subject of pending litigation, as noted above.

<sup>53</sup> S.J. Res. 1, 109th Cong. (2006); H.R.J. Res. 39, 109th Cong. (2006).

<sup>54</sup> See, e.g., Shailagh Murray, *Gay Marriage Amendment Fails in Senate*, WASH. POST, June 8, 2006, at A01 (quoting Republican Senator Sam Brownback after the Senate vote: "We're making progress, and we're not going to stop until marriage between a man and a woman is protected ... protected in the courts, protected in the Constitution, but most of all, protected for the people and for the future of our children in this society.") (ellipses in original).

grounded in equal protection, to be free of discrimination based on sex<sup>55</sup> and sexual orientation.<sup>56</sup> Each of these arguments is cast as requiring heightened scrutiny by the court, on the theory that invasions of fundamental rights and governmental line-drawing based on suspect classifications both warrant demanding judicial review.<sup>57</sup> Advocates maintain, in addition, that even if heightened scrutiny is not applied, they should still prevail because no rational basis exists to deny marriage rights to same-sex couples.

### 1. *The Fundamental Right to Marry*

Every state government to address this argument has insisted that the fundamental right to marry, which has been safeguarded by courts in cases involving interracial couples, prison inmates, and fathers who are delinquent in paying child support,<sup>58</sup> refers not to a general right to marry the partner of one's choice but rather the right to marry a partner of the other sex. But, equal marriage rights advocates respond, the Court's discussion of these laws focuses on the importance of interdependent relationships, not the importance of heterosexuality. In invalidating the antimiscegenation law in *Loving v. Virginia*, for example, the Court did not limit its protection of marriage rights to different-sex couples. It held, instead, that "[t]he freedom to marry has long been recognized as one of the vital personal rights essential to the orderly pursuit of happiness by free men."<sup>59</sup>

### 2. *Discrimination Based on Sex and Sexual Orientation*

Adversaries of equal marriage rights launch two similar objections to the sex and sexual orientation discrimination claims. They maintain that restricting marriage to male-female couples does not amount to unconstitutional sex or sexual orientation discrimination because men and women are equally barred from marrying someone of the same sex and because gay people are likewise free to marry someone of the other sex. When confronted by *Loving's* holding that "equal application" of a discriminatory rule did not render the rule permissible,<sup>60</sup> they say that *Loving* turned on Virginia's interest in enforcing racial hierarchy whereas the male-female couple rule for marriage does not aim to subordinate either sex.

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<sup>55</sup> The sex discrimination claims in these cases rely on the states' general equal protection guarantee and, if available, on the states' constitutional Equal Rights Amendment.

<sup>56</sup> Some complaints have alleged, too, that denial of marriage violates the freedom of expression of lesbian and gay couples. See, e.g., Complaint at 29, *Samuels v. N.Y. State Dep't of Health*, No. 1967-04 (N.Y. Albany Cty. Dec. 7, 2004), available at [http://www.nyclu.org/gay\\_marriage\\_complaint.pdf](http://www.nyclu.org/gay_marriage_complaint.pdf). Some complaints also allege violations of constitutional protections that are particular to the states in which they are filed, as in *Baker v. State*, 744 A.2d 864, 869-886 (Vt. 1999) (plaintiffs argued that denial of marriage rights violated the Vermont Constitution's Common Benefits Clause).

<sup>57</sup> Heightened scrutiny—whether it is labeled strict or intermediate scrutiny—typically requires that a government identify a compelling or important interest that actually justifies its infringement of rights or discriminatory line drawing.

<sup>58</sup> *Loving v. Virginia*, 388 U.S. 1 (1967) (regarding interracial couples); *Turner v. Safley*, 482 U.S. 78 (1987) (regarding prison inmates); *Zablocki v. Redbail*, 434 U.S. 374 (1978) (regarding fathers delinquent in paying child support).

<sup>59</sup> *Loving*, 388 U.S. at 12; see also *Turner*, 482 U.S. at 95-96 (stressing as the essential attributes of marriage the facilitation of "emotional support," "public commitment," and "personal dedication"); *Zablocki*, 434 U.S. at 384 ("the right to marry is of fundamental importance for *all* individuals") (emphasis added).

<sup>60</sup> See *Loving*, 388 U.S. at 8 ("[W]e reject the notion that the mere 'equal application' of a statute containing racial classifications is enough to remove the classifications from the Fourteenth Amendment's proscription.").

Advocates for equal marriage rights return to the language of *Loving*. They point out that while the Court addressed the racial bias that animated Virginia’s law, it also identified separate, additional constitutional problems flowing from a state rule that barred individuals from marrying the person of their choice, even if the rule applied its racial restriction to all prospective spouses.

## B. THE RATIONALES TO EXCLUDE SAME-SEX COUPLES FROM MARRIAGE—AND THEIR FATAL FLAWS

While states, amici curiae, and organizers against marriage equality advance numerous arguments to justify excluding same-sex couples from marriage, none survives careful consideration.

### 1. Families and Children

Two favorite arguments of marriage equality adversaries—that marriage should be reserved to heterosexuals because (1) “children do better with a mother and father;” and (2) “heterosexuals are more likely to procreate accidentally”—defy both simple logic and overwhelming evidence.

#### a. THE ROLE MODEL ARGUMENT

The argument that heterosexual parents are better role models than lesbian or gay parents typically takes one of two forms. In one version, the government (or amici) will argue that “since we just don’t know the consequences of this ‘new’ family form” in which children have two mothers or two fathers, the legislature is entitled, under rational basis review, to conclude that children are better off with heterosexual parents. The other version of the argument—and one increasingly offered by groups of academics through amicus briefs<sup>61</sup>—points to social science literature to claim that children do better with their “natural” parents and that the legislature should reserve marriage to heterosexual couples to encourage adults to raise their biological children together.

Both of these arguments run into serious constitutional and factual problems. First, hornbook equal protection law reminds us that governments may not burden a group of people based on dislike, discomfort, or fear.<sup>62</sup> Marriage law, in other words, may not be a vehicle for sending a hostile message regarding gay people. Second, every study of children raised by gay parents has found no material differences in the healthy development of children in two-mom, two-dad, or one mom-one dad households.<sup>63</sup> While some of the studies on which marriage equality adversaries rely show that children do better when raised by their biological parents than when raised by one biological parent and the parent’s partner, these studies do not examine children being raised

<sup>61</sup> Brief for Association to Benefit Children et al. as Amici Curiae Supporting Petitioners, *Hernandez v. Robles*, No. 98084, (N.Y. App. Ct. 2006), available at [http://www.lambdalegal.org/binary-data/LAMBDA\\_PDF/pdf/652.pdf](http://www.lambdalegal.org/binary-data/LAMBDA_PDF/pdf/652.pdf).

<sup>62</sup> *Romer v. Evans*, 517 U.S. 620 (1996); *City of Cleburne v. Cleburne Living Ctr.*, 473 U.S. 432 (1985); *United States Dep’t of Agric. v. Moreno*, 413 U.S. 528 (1973).

<sup>63</sup> See generally Gregory M. Herek, *Legal Recognition of Same-Sex Relationships in the United States: A Social Science Perspective*, 61 *Am. Psychologist* 607 (2006); Ellen C. Perrin, *Technical Report: Coparent or Second-Parent Adoption by Same-Sex Parents*, 109 *Pediatrics* 341 (2002); Judith Stacey & Timonty Biblarz, *(How) Does the Sexual Orientation of Parents Matter?*, 66 *Am. Sociological R.* 159 (2001); Policy Statement, American Psych. Association, *Sexual Orientation, Parents & Children*, 2004, available at <http://www.apa.org/pi/lgbcpolicy/parents.html>; American Psychological Association, *Lesbian and Gay Parenting*, 1995, available at <http://www.apa.org/pi/parent.html>.

by committed lesbian or gay couples who planned, together, to bring a child into their family either by birth or adoption. Indeed, the nation's leading association of psychologists came out in support of equal marriage rights in 2004.<sup>64</sup> In 2006, the American Academy of Pediatrics issued a report stating that marriage for same-sex couples serves, rather than undermines, children's best interests.<sup>65</sup>

Still, marriage equality adversaries persist in arguing that, on rational basis review, the facts do not matter and governments should remain free to rely on their intuitions.<sup>66</sup> But, while rational basis review is no doubt a lenient test, it is not an entirely non-evaluative rubber stamp. As the Supreme Court observed in *Romer v. Evans*, classifications must "bear a rational relationship to an independent and legitimate legislative end [to] ensure that [they] are not drawn for the purpose of disadvantaging the group burdened by the law."<sup>67</sup> Without any credible evidence showing material differences between gay and non-gay parents in connection with raising healthy children, references to intuitions and common sense to support preferences for heterosexual parents must be understood as standing in for precisely the sorts of discomforts that cannot be the basis for lawmaking that complies with equal protection guarantees.<sup>68</sup>

#### b. THE CARELESS PROCREATION RATIONALE

This rationale, which has been accepted by several courts,<sup>69</sup> boldly suggests that marriage should be reserved to heterosexuals not because of any flaw associated with gay and lesbian couples, but because heterosexuals are at risk of procreating carelessly and so need the enticement of marriage to encourage responsibility for their offspring. According to this argument, there is no similar reason to offer marriage to couples who, by definition, cannot procreate without third-party assistance.

While there is plenty of rhetoric in judicial opinions reinforcing the view that marriage and procreation are indelibly linked, the argument suffers from fatal factual and doctrinal weaknesses. As a factual matter, lesbian and gay couples *do* regularly have children together—whether through donor insemination, surrogate motherhood, or adoption—even if the conception is deliberate rather than accidental. Many heterosexual couples also become parents in these ways. But, some contend, lesbian and gay couples are on stronger footing than heterosexual couples because they necessarily have to plan in advance to have children and, consequently, they do not need the same level of state support as their heterosexual counterparts.

Still, the legal question is not whether the goal of securing parent-child relationships justifies the inclusion of heterosexuals in marriage, but rather whether it justifies the exclusion of same-sex couples. Limiting benefits to children whose parents in

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<sup>64</sup> Press Release, American Psych. Association, APA Supports Legalization of Same-Sex Civil Marriages and Opposes Discrimination against Lesbian and Gay Parents (July 28, 2004), available at <http://www.apa.org/releases/gaymarriage.html>.

<sup>65</sup> James G. Pawelski et al., *The Effects of Marriage, Civil Union, and Domestic Partnership Laws on the Health and Well-being of Children*, 118 *Pediatrics* 349 (2006). The Academy separately, in 2002, published a policy statement and a related paper supporting "legislative and legal efforts to provide the possibility of adoption of the child by the second parent or coparent in these families." Available at: <http://aappolicy.aappublications.org/cgi/content/full/pediatrics%3b109/2/339>.

<sup>66</sup> *Hernandez*, 7 N.Y.3d at 359 ("Intuition and experience suggest that a child benefits from having before his or her eyes, every day, living models of what both a man and a woman are like.").

<sup>67</sup> 517 U.S. 620 (1996).

<sup>68</sup> See *Lawrence v. Texas*, 539 U.S. 558, 574-76 (2003); *Romer*, 517 U.S. at 631-35; *Cleburne*, 473 U.S. at 446-47; *id.* at 454-55 (Stevens, J., concurring).

<sup>69</sup> See *Hernandez*, 7 N.Y.3d at 365; *Morrison v. Sadler*, 821 N.E.2d 15, 31 (Ind. Ct. App. 2005).

theory could have conceived accidentally stretches the bounds of rationality past the breaking point. As a practical matter, too, this “weakness of heterosexual couples” rationale would surely surprise most married couples were they to learn that their right to marry depended not on their love and commitment to each other but rather on the risks associated with their having unprotected sex.

Second, while procreation often occurs within marriage, it is not and has never been the essence of marriage. Most obviously, many heterosexual couples who have long, fulfilling marriages never have children. For these couples, it is the long-term, interdependent relationship with another adult that forms the essence of marriage. We see this delinking of marriage and procreation in the case law as well. When the Supreme Court in *Griswold v. Connecticut* held that married couples have a fundamental right to use contraceptives to avoid procreation,<sup>70</sup> for example, it effectively recognized that one can be in a committed marriage yet also be committed to avoiding procreation. Notably, too, neither disinterest in nor inability to procreate provides grounds for annulment of a marriage in most states.<sup>71</sup> Instead, as virtually every marriage statute suggests, both in the statement of purpose and in the rights and obligations of marriage itself, the point of marriage today is the couple’s interdependence.<sup>72</sup> Whether that couple chooses to have children is entirely up to the individuals involved and not at all up to the state.

## 2. History and Tradition

Many argue—and some courts have agreed—history and tradition support the restriction of marriage to different-sex couples. As the Supreme Judicial Court of Massachusetts stated in *Goodridge*, “it is circular reasoning, not analysis, to maintain that marriage must remain a heterosexual institution because that is what it historically has been.”<sup>73</sup> In other contexts, the U.S. Supreme Court likewise has affirmed that historical pedigree alone does not immunize a traditional position from constitutional review.<sup>74</sup>

Moreover, the suggestion that marriage has “always” been static is wrong as an historical matter. Until the mid-1800s, marriage *meant* that a woman lost her independent legal identity when she gained a husband. Under the legal regime known as “coverture,” a married woman could not contract, own property, sue or be sued, or

<sup>70</sup> 381 U.S. 479 (1965).

<sup>71</sup> See Laurence Drew Borten, Note, *Sex, Procreation, and the State Interest in Marriage*, 102 COLUM. L. REV. 1089 (2002); Suzanne B. Goldberg, *A Historical Guide to the Future of Marriage for Same-Sex Couples*, 15 COLUM. J. GENDER & L. 249, 269 (2006).

<sup>72</sup> See, e.g., N.Y. DOM. REL. LAW § 7(1)-(5) (2004) (providing for nullification when a party to the marriage was incapable of consent or consent arose from force, duress, or fraud); N.Y. DOM. REL. LAW § 236(B)(6)(a)(5), (8) (2004) (setting out conditions for maintenance awards based on one party having foregone opportunities or provided homemaking or other services for the other).

<sup>73</sup> *Goodridge*, 798 N.E.2d at 962, n.23.

<sup>74</sup> See, e.g., *Pac. Mut. Life Ins. Co. v. Haslip*, 499 U.S. 1, 18 (1991) (“[N]either the antiquity of a practice nor the fact of steadfast legislative and judicial adherence to it through the centuries insulates it from constitutional attack . . . .”) (alteration in original) (quoting *Williams v. Illinois*, 399 U.S. 235, 239 (1970)); *Marsh v. Chambers*, 463 U.S. 783, 790 (1983) (“Standing alone, historical patterns cannot justify contemporary violations of constitutional guarantees . . . .”); *Walz v. Tax Comm’n*, 397 U.S. 664, 678 (1970) (“It is obviously correct that no one acquires a vested or protected right in violation of the Constitution by long use, even when that span of time covers our entire national existence and indeed pre-dates it.”).

even earn wages in her own name.<sup>75</sup> Indeed, until recently, in numerous jurisdictions, marriage meant that a husband had an obligation to support his wife, but that she had no similar obligation to him. In some locales a husband could rape his wife without criminal penalty. Similarly, in many parts of the country, marriage was a relationship status unavailable to people held as slaves and, later, a relationship status reserved exclusively for couples of the same race.

A careful look at history thus shows that, over time, marriage has evolved significantly. Marriage law today does not distinguish between the responsibilities of husbands and wives or, indeed, of mothers and fathers to their children. Consequently, the rule limiting marriage to male-female couples has become an anachronism. It is the only sex-based rule left standing in the context of marriage law and, as such, it can no longer rely on the residual rationales related to enforcement of sex roles that arguably might once have justified its existence.

### 3. *Statewide Uniformity*

Although some states have argued that excluding same-sex couples from marriage is a reasonable means of preserving uniformity with other states, this argument likewise must fail. For one, as a practical matter, there is no longer uniformity in the United States with respect to this aspect of marriage law, given that same-sex couples can marry in Massachusetts.

Second, although some states claim that they would prefer to keep within the mainstream of marriage law for the benefit of their state and their residents, this argument does not hold its weight as a legal position. The fact that most states discriminate in their marriage laws does not provide a legitimate basis for any state to retain its own discriminatory law. Moreover, from a broader perspective, there is little absolute uniformity across states in marriage law. Instead, marriage laws differ in numerous ways, including regarding the age of consent, degree of relation, residency requirements. The appropriate remedy for the risks posed by lack of uniformity is not to deny marriage equality but instead to provide information about the state of the law to couples considering marriage so that they can make an informed decision about whether to proceed. Continuing enforcement of a discriminatory rule is simply not a viable alternative as a constitutional matter.

### 4. *Slippery Slope Arguments*

While some argue that allowing marriage for same-sex couples would mean the end of other restrictions on marriage, such as bans on plural marriage, these arguments are the proverbial red herrings and should not bar full and fair consideration of the marriage claims of same-sex couples. After all, the question in any equal protection or due process case is whether the government may either draw a classification or infringe an individual's right consistent with the constitution. In response, a court must first determine whether a right has been infringed and then evaluate the government's rationales for infringing the right.

Even if we assume that a lawsuit challenging a polygamy ban stated a claim under both equal protection and due process guarantees, for example, the ban would not necessarily be struck down. Instead, the outcome of the polygamy law challenge would turn on the government's justifications for restricting marriage to two-person partnerships. Those justifications are simply not part of the cases regarding marriage

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<sup>75</sup> For further discussion of the evolution of marriage, see generally Goldberg, *supra* note 71.

rights for same-sex couples. Thus, a decision requiring states to authorize marriages for lesbian and gay couples would not answer the question whether plural marriage bans can remain in place.<sup>76</sup>

Second, we must recognize that cases seeking marriage rights for same-sex couples are not the first in which polygamy arguments have been invoked to support traditional marriage rules. In the context of bans on interracial marriage, for example, the Tennessee Supreme Court in 1877 concluded that if it were to quash an indictment of an interracial couple for violating the state's antimiscegenation law, it would leave itself unable to enforce prohibitions against polygamy.<sup>77</sup> If polygamy had been treated as an absolute barrier to serious constitutional review of antimiscegenation laws or laws mandating different roles for husbands and wives, we might still be living with bans on interracial marriage and legal enforcement of wifely subservience.

### 5. Religious Freedom

The argument that marriage must be restricted to different-sex couples to preserve religious freedom is one heard more often in public debates than in courtrooms. Whatever its merits may be, the claim is obviously not a valid one as a matter of U.S. law. Under state (and federal) law, marriage is a purely *civil* institution through which a state guarantees a married couple certain benefits in exchange for their commitment.<sup>78</sup> To reap these benefits, the parties must receive a marriage license from the appropriate city clerk and have the marriage solemnized by an authorized official. Only after the license is obtained may the parties seek to have their legal marriage consecrated by a religious authority should they so choose. There is no serious argument that a religious institution could be forced by the state to consecrate a same-sex couple's marriage any more than the state could force a religious body to consecrate the marriage of non-believers.

### 6. The Role of Courts

The popular argument that the legislature, and not the courts, should decide the marriage equality question is also deeply flawed, as the history of marriage litigation itself demonstrates. Courts have long been called upon to review the constitutionality of laws, including marriage laws, that reflect deeply-rooted and still-popular traditions. A strikingly close parallel to today's conflict can be found in a 1948 California Supreme Court ruling. In that case, the court faced tremendous public pressure to leave review of the state's interracial marriage ban to the legislature. Notwithstanding that pressure, the court fulfilled its obligation to provide meaningful constitutional review and invalidated the ban.<sup>79</sup> The Supreme Judicial Court of Massachusetts

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<sup>76</sup> A brief filed in one case sought to illustrate the different issues raised by bilateral and multilateral relationships in this way:

[W]hich of multiple spouses would have decision-making authority if one spouse became incapacitated? Which of multiple spouses would inherit if one dies intestate? How would custody, visitation, and child support issues be handled if spouses divorce? In contrast, permitting same-sex partners to marry requires nothing more than construing the marriage eligibility requirements to be gender neutral.

Reply Brief for Plaintiffs-Appellants at 17 n.6, *Hernandez v. Robles*, No. 103434/04 (N.Y. App. Ct. 2006).

<sup>77</sup> *State v. Bell*, 66 Tenn. 9, 11 (1872).

<sup>78</sup> See BLACK'S LAW DICTIONARY 987 (7th ed. 1999) (defining marriage as "a civil status or relationship").

<sup>79</sup> *Perez v. Sharp*, 198 P.2d 17 (1948).

similarly explained in *Goodridge* that while courts “owe great deference to the Legislature to decide social and policy issues, ... it is the traditional and settled role of courts to decide constitutional issues.”<sup>80</sup>

### 7. *Civil Unions vs. Marriage*

A final issue that arises both in litigation and popular debate concerns remedy. If the rights of same-sex couples are violated by the denial of marriage, some argue that civil unions, rather than marriage, can serve as a sufficient remedy. Both the New Jersey Supreme Court and a Connecticut trial court have recently accepted this argument, as discussed above, while the Supreme Judicial Court of Massachusetts, in post-*Goodridge* proceedings rejected it.<sup>81</sup>

Although a legal regime in which either civil unions or marriage (or both) were available to all might be ideal, a framework that makes one status available to some couples and a different, though similar, status available to others has all of the problematic hallmarks of the “separate but equal” doctrine rejected in *Brown v. Board of Education*.<sup>82</sup> As the Court recognized in *Brown*, the problem with separation inheres not only in the occurrence of unequal conditions but also in the expression, via separation, that the excluded group is not as deserving as those who are included. By reserving “marriage” for heterosexual couples, the state effectively creates a “badge of inferiority” for those not deemed worthy of entering the longstanding, important tradition.

Second, in this country’s current legal framework, marriage is *the* relationship status that receives interstate recognition (indeed it is the only legal status that establishes a couple and their children as a family worldwide). Thanks to the U.S. Constitution’s Full Faith and Credit Clause, married couples cross freely from one state to another without worries about becoming unmarried.<sup>83</sup> The creation of an entirely new civil union framework that will wreak havoc with cross-border relationship recognition reinforces the suggestion that the impermissible purposes of hostility and/or discomfort are at play in efforts to offer gay couples a similar status by a different name.

## VI. THE NEXT ROUNDS—WHAT TO EXPECT FROM FUTURE LITIGATION

The landscape for marriage equality claims changes almost daily, it seems. Although prognostication is always a risky business, the odds are almost certain that there will be plenty of twists and turns before the debate is deemed more or less settled. Without promises, here are some predications:

### A. INTERSTATE MARRIAGE RECOGNITION LITIGATION

Some advocates are predicting that at least one and possibly several states will soon join Massachusetts in recognizing marriages of same-sex couples. If this happens, we are likely to see a sharp jump in cross-state recognition litigation that we have not seen from Massachusetts because of the state law there that prevents most non-residents

<sup>80</sup> *Goodridge*, 798 N.E.2d at 996.

<sup>81</sup> Opinions of the Justices to the Senate, 802 N.E.2d 565 (Mass. 2004).

<sup>82</sup> 378 U.S. 483 (1954).

<sup>83</sup> While the Defense of Marriage Act undercuts that presumption of stability for same-sex couples, its imposition of different marriage recognition rules remains subject to constitutional challenge. See Lester, *supra* note 11, at 298-301.

from obtaining marriage licenses.<sup>84</sup> (About 8,000 couples—mostly state residents—have married to date in Massachusetts).<sup>85</sup> Most states do not have similar residency requirements. Consequently, if marriage rights are recognized in any of the states with pending litigation, gay and lesbian couples from around the nation will be free to travel to that state, get married, and return to their home states demanding formal recognition of their new marriage licenses.

If that occurs, the home states will likely invoke the provision of the federal DOMA that authorizes them to disregard marriages of same-sex couples that were validated by other states.<sup>86</sup> Thus, while most of the litigation against marriage bans to date has concentrated on state-level prohibitions, the next serious wave of litigation is likely to involve federal constitutional challenges to the federal DOMA.

## B. MARRIAGE RECOGNITION BY THE FEDERAL GOVERNMENT

A related issue is whether same-sex couples should seek marriage recognition from the federal government. For some, this litigation is particularly tempting because the federal government offers married individuals significant economic benefits (in connection with taxes and social security, for example), immigration rights, and other protections that are not available to unmarried couples. The possibility of securing marriage rights for a broader number of people, unrestricted by state borders, adds to the lure of federal litigation.

Yet almost no marriage recognition suits have been filed in federal court to date. In part, this conservative course is driven by the same point that makes federal litigation appealing—its reach. A loss on federal grounds will likely have a broader sweep than a loss on state constitutional grounds. And, of course, a loss at the Supreme Court would not only limit legal rights but also have a potentially heavy influence on state courts' interpretations of their own constitutions, much like the negative legacy of *Bowers v. Hardwick* for state-based gay rights litigation.

This is not to say that federal constitutional claims are weak. To the contrary, in theory, both federal equal protection and privacy jurisprudence would require an end to discrimination in marriage law for the reasons discussed above.

But, being pragmatic, advocates recognize that federal courts historically have been less supportive than state courts of gay plaintiffs' claims (other than perhaps in the first amendment context<sup>87</sup>). Moreover, while the Supreme Court did take important steps to protect gay rights in *Romer v. Evans* and *Lawrence v. Texas*, the Court, as currently constituted, has not signaled that it would be favorably inclined toward marriage equality claims. The tremendous victories in *Romer* and *Lawrence* both involved measures that were relative outliers, unlike marriage bans, which have blanketed the country. In addition, state courts had created significant momentum through their invalidations of sodomy laws. With only one state court requiring marriage and several state courts having rejected marriage claims, that momentum has yet to be achieved regarding marriage. Further, although she is no longer on the Court, Justice O'Connor,

<sup>84</sup> See *supra* note 39 and accompanying text.

<sup>85</sup> Dan Ring, *8,100 Gay, Lesbian Couples Marry after 2004 Decision*, May 17, 2006, MassEquality.org, available at: [http://www.massequality.org/news/news\\_story.php?id=273](http://www.massequality.org/news/news_story.php?id=273).

<sup>86</sup> See 28 U.S.C. § 1738C (2000).

<sup>87</sup> For examples of the Supreme Court supporting gay plaintiffs' first amendment claims, see, e.g., *ONE v. Olesen*, 355 U.S. 371 (1958), *rev'g* 241 F.2d 772 (9th Cir. 1957); *Southworth v. Grebe*, 529 U.S. 217 (2000), *rev'g in part* 151 F.3d 717 (7th Cir. 1998). *But see Hurley v. Irish-American Gay, Lesbian and Bisexual Group of Boston, Inc.*, 515, U.S. 557 (1995).

in her *Lawrence* concurrence, sought to carve out a defense for restrictive marriage rules, stating pointedly that “preserving the traditional institution of marriage” would amount to a legitimate state interest.<sup>88</sup> Consequently, although federal claims might (and certainly should) succeed, framing suits in terms of state constitutional claims appears to be the more prudent course.

### C. ADDITIONAL FAMILY RECOGNITION EFFORTS

Finally, because same-sex couples, with and without children, inhabit every state in the country and continue to need recognition, whether through marriage or by other means, we can expect to see continued litigation and public policy advocacy in this area. As the general public moves increasingly toward greater understanding that it is fundamentally unfair for same-sex couples to be denied the rights and benefits freely available to different sex couples who marry, we are likely to see courts following suit, even if some of their rulings, as in New Jersey, fall short of granting full marriage equality.<sup>89</sup>

## VII. CONCLUSION

When all of the facts—as well as our history and legal traditions—provide no meaningful support for the position that marriage should be reserved to different-sex couples, it is the job of courts to push back against longstanding rules and social preferences to make meaningful our constitutional guarantees of equality under law. It is the job of legislatures, too, to ensure that all of their constituents enjoy meaningful equality.

Until this unequal situation is rectified, couples will have little choice but to go to court as well as to their elected representatives to seek the protections and responsibilities that are associated with marriage. They will also continue to expose and dismantle the myths that same-sex couples are lesser contributors to society than heterosexuals and that heterosexuals are better parents than gay men or lesbians simply by virtue of their sexual orientation.

These efforts, and the related national conversation, are already creating change. Polling data shows a steady increase in support for marriage and other rights for same-sex couples.<sup>90</sup> Demographic studies suggest that this trend is only expected to intensify.

As a result, although the road ahead will be long and challenging, we can be reasonably sure that the judicial rulings and political votes against equality that have

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<sup>88</sup> *Lawrence v. Texas*, 539 U.S. 558, 585 (2003) (O’Connor, J., concurring in the judgment). On the other hand, Justice Scalia observed that because the majority had rejected a morals-based rationale for Texas’s law criminalizing sexual intimacy between consenting adults of the same sex, it would, as a logical matter, also have to recognize equal marriage rights. *Id.*, at 601 (Scalia, J., dissenting).

<sup>89</sup> Up-to-date information on many family recognition lawsuits can be found on the websites of the national gay and lesbian legal advocacy organizations. See *supra* note 2.

<sup>90</sup> See The Pew Research Center, *Less Opposition to Gay Marriage, Adoption and Military Service*, March 22, 2006, available at <http://people-press.org/reports/display.php3?ReportID=273> (stating that “[c]urrently, 51% oppose legalizing gay marriage, down from a recent high of 63% just two years ago in February of 2004. The percent who favor allowing gay marriage has increased from a low of 29% in August of that year to 39% today.”); Thomas Frank, *Same-Sex Marriage Returns to Ballot, As Voters’ Mood Changes*, USA TODAY (Oct. 12, 2006), available at [http://www.usatoday.com/news/nation/2006-10-12-gay-marriage\\_x.htm](http://www.usatoday.com/news/nation/2006-10-12-gay-marriage_x.htm); Gregory M. Herek, *Legal Recognition of Same-Sex Relationships in the United States: A Social Science Perspective*, 61 AM. PSYCHOLOGIST 607, 609 (2006).

occurred in recent months will come to be seen as a failure of will in the face of an opportunity to do justice. And as more courts and legislatures move to equalize marriage rights in the near future, they, like the Supreme Judicial Court of Massachusetts in *Goodridge*, ultimately will be celebrated as another important step in realizing our nation's commitment to equal justice under law.



# The “Crack/Powder” Disparity: Can the International Race Convention Provide a Basis for Relief?

Nkechi Taifa\*

## I. INTRODUCTION

Unequal treatment of people of color has been well established at each stage of the criminal justice continuum, from profiling to sentencing. Over the past twenty years voluminous statistics and analyses have outlined this predicament. In his 2003 seminal address before the American Bar Association, Justice Kennedy challenged the ABA to engage in public discourse that will help shape the political will to find more just solutions and humane policies to the inadequacies and injustices of our prison and correctional systems, finding “new ideas, new insights, and new inspiration.”<sup>1</sup>

Among the most unjust inequities in our criminal justice system is the disparity between mandatory minimum sentences for those convicted of crack and powder cocaine offenses. Under federal law, possession of five grams of crack cocaine carries the same penalty as distribution of 500 grams of powder cocaine. Blacks comprise the vast majority of those convicted of crack cocaine offenses while the majority of those convicted of the latter are white. This disparity has led to inordinately harsh mandatory sentences disproportionately meted out to African American defendants that are far more severe than sentences for comparable activity by white defendants. Indeed, it is the single biggest contributor to the sentencing gap between blacks and whites in the federal prison system.<sup>2</sup>

The Constitution has afforded no remedy to those affected by this discriminatory sentencing scheme. It requires that defendants establish racially discriminatory intent in the enactment of the mandatory minimum crack statutes. This requirement downplays the effect of the sentencing structure as well as the subtle nature of much of 21st

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<sup>1</sup> Anthony M. Kennedy, Associate Justice, Supreme Court of the United States, Speech at the American Bar Association Annual Meeting (Aug. 9, 2003).

<sup>2</sup> See nn.5-13 *infra* and accompanying text.

century racism, which often results from unconscious discrimination and institutional and structural arrangements that perpetuate a discriminatory status quo.

International jurisprudence, however, is enlightened in this perspective, recognizing that racism manifests in various forms, and allowing unlawfulness to be premised on actions and impact. Indeed, the International Convention on the Elimination of All Forms of Racial Discrimination (ICERD), which the United States has ratified but not made self-executing, allows laws and practices that have an invidious discriminatory *impact* to be condemned, regardless of *intent*, reaching both conscious and unconscious forms of racism. Thus, domestic recognition of global norms—specifically provisions of the U.S.-ratified ICERD—could eliminate a critical barrier to relief presented by current law and practice and assist in the eradication of racism in the U.S. criminal justice system.

## II. THE SENTENCING DISPARITY

### A. THE 100-TO-1 QUANTITY RATIO AND DISPROPORTIONATE RACIAL IMPACT

The federal criminal penalty structure for the possession and distribution of crack cocaine is one hundred times more severe than the penalty structure relating to powder cocaine.<sup>3</sup> Possession of five grams of crack cocaine carries the same penalty as distribution of 500 grams of powder cocaine. This is commonly referred to as a “100-to-1 quantity ratio.” For example, a first time offender tried in federal court and found in possession of five grams of crack cocaine would be subject to a mandatory felony sentence of at least five years in prison without parole. Possession of the same amount of powder cocaine, a misdemeanor, requires no prison time. A person convicted of fifty or even 499 grams of powder cocaine would face a maximum penalty of one year in prison. It takes trafficking in 500 grams of powder cocaine to receive the same sentence as one convicted of simple possession of five grams of crack cocaine.

In its Special Report to Congress, the United States Sentencing Commission<sup>4</sup> pronounced that “federal sentencing data leads to the inescapable conclusion that blacks comprise the largest percentage of those affected by the penalties associated with crack cocaine.”<sup>5</sup> Nationwide statistics compiled by the Commission revealed that blacks were more likely to be convicted of crack cocaine offenses, while whites were more likely to be convicted of powder cocaine offenses.<sup>6</sup> In 1994, 96.5% of those sentenced federally for crack cocaine offenses were non-white.<sup>7</sup> The Commission’s 2000 Source of Federal Sentencing Statistics revealed that 84.2% of blacks were convicted of crack cocaine cases, as compared with 5.7% whites. Asserting that these statistics do “not mean ... that the penalties are racially motivated,”<sup>8</sup> the Commission nevertheless found that the high percentage of blacks convicted of crack cocaine offenses is “a matter of great concern.”<sup>9</sup>

This concern was accentuated by a study on federal sentencing policies which disclosed that “between 1986 and 1990 both the rate and average length of imprisonment

<sup>3</sup> 21 U.S.C. § 841(b)(1)(A)(ii) (1994); 21 U.S.C. § 841(b)(1)(B)(ii) (1994).

<sup>4</sup> The U.S. Sentencing Commission is an independent agency in the judicial branch with the responsibility for advising Congress on sentencing matters.

<sup>5</sup> U.S. Sentencing Commission Special Report to Congress: Cocaine and Federal Sentencing Policy, xi (1995) (issued after a review of cocaine penalties as directed by Pub.L.No. 103-322, § 280006).

<sup>6</sup> *Id.* at 156, 161.

<sup>7</sup> See United States Sentencing Commission, 1994 Annual Rep. 107 (Table 45).

<sup>8</sup> *Id.* at xi.

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

for federal offenders increased for blacks in comparison to whites,” and that the higher proportion of blacks charged with crack offenses was “the single most important difference [accounting for] the overall longer sentences imposed on blacks, relative to [other groups].”<sup>10</sup> Its conclusion, “[i]f legislation and guidelines were changed so that crack and powdered cocaine traffickers were sentenced identically for the same weight of cocaine, this study’s analysis suggests that the black/white disparity in sentences for cocaine trafficking would not only evaporate but it would slightly reverse.”<sup>11</sup> The Sentencing Commission recently reported that revising this one sentencing rule would do more to reduce the sentencing gap between blacks and whites “than any other single policy change,” and would “dramatically improve the fairness of the federal sentencing system.”<sup>12</sup>

Despite the statistics on convictions and sentencing described above, there is evidence that African Americans are less involved in crack use than whites. Statistics from the National Institute on Drug Abuse (NIDA) reveal that the greatest number of documented crack users are white.<sup>13</sup> Seventy-five percent of those reporting cocaine use in 1991 were white; 15% were black, and 10% Hispanic.<sup>14</sup> Of those reporting crack use in the same year, 52% were white, 38% were black and 10% Hispanic.<sup>15</sup>

Although there are larger numbers of documented white cocaine users, national drug enforcement and prosecutorial policies and practices have resulted in the “war on drugs” being targeted almost exclusively at inner-city communities of color. This has caused the overwhelming number of prosecutions to be directed against African Americans.<sup>16</sup>

## B. QUESTIONABLE PROSECUTORIAL DISCRETION

Prosecutorial discretion in selection of jurisdictional venue has perpetuated racial disparities in the criminal justice system with respect to cocaine cases. An illustration

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<sup>10</sup> DOUGLAS C. McDONALD & KENNETH E. CARLSON, SENTENCING IN THE FEDERAL COURTS: DOES RACE MATTER? THE TRANSITION TO SENTENCING GUIDELINES, 1986-90 13 (Office of Justice Programs Bureau of Justice Statistics) (1993).

<sup>11</sup> *Id.* at 2.

<sup>12</sup> United States Sentencing Commission, Fifteen Years of Guidelines Sentencing (Nov. 2003), at 132. Disparate racial impact is not limited to mandatory sentences for crack cocaine, but extends to mandatory minimum sentences in general. U.S. Sentencing Commission Special Report to the Congress: Mandatory Minimum Penalties in the Federal Criminal Justice System (1991). The disparate application of mandatory minimum sentences in cases in which available data strongly suggest that a mandatory minimum is applicable appears to be related to the race of the defendant, *where whites are more likely than non-whites to be sentenced below the applicable mandatory minimum* ... This differential application on the basis of race ... reflects the very kind of disparity and discrimination the Sentencing Reform Act, through a system of guidelines, was designed to reduce. (emphasis added).

<sup>13</sup> See Special Report to Congress: Cocaine, at 38, citing National Institute on Drug Abuse, Overview of the 1991 National Household Survey on Drug Abuse (1991) (NIDA Capsules).

<sup>14</sup> *Id.* at 39.

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

<sup>16</sup> Discriminatory enforcement of cocaine laws appears to be part of a pattern of discrimination in the enforcement of the nation’s drug laws in general. See Sam Meddis, *Is the Drug War Racist? Disparities Suggest the Answer is Yes*, USA TODAY, July 23, 1993, at 1A:

Although law enforcement officials say blacks and whites use drugs at nearly the same rate, a USA Today computer analysis of 1991 drug arrests found that the war on drugs has, in many places, been fought mainly against blacks. USA Today first studied the issue four years ago and found blacks, about 12% of the population, made up almost 40% of those arrested on drug charges in 1988, up from 30% in 1984. The new analysis, which uses city-by-city racial breakdowns from the 1990 census and arrest data from police agencies that report to the FBI, found that by 1991 the proportion of blacks arrested for drugs increased to 42%.

is *U.S. v. Armstrong*, a case involving allegations that federal prosecutors in Los Angeles selectively pursued and charged blacks in crack cocaine cases.<sup>17</sup> Since the inception of mandatory minimum cocaine laws in 1986 to the advent of the *Armstrong* case, not a single white offender had been convicted of a crack cocaine offense in federal courts serving Los Angeles and its six surrounding counties.<sup>18</sup> Rather, virtually all white offenders were prosecuted in state court, where they were not subject to that drug's lengthy mandatory minimum sentences.<sup>19</sup> The impact of the decision to prosecute the black defendants in federal court was significant. In federal court they faced a mandatory minimum sentence of at least ten years and a maximum of life without parole if convicted of selling more than fifty grams of crack. By contrast, if prosecuted in California state court, the defendants would have received a minimum sentence of three years and a maximum of five years.<sup>20</sup>

In an appeal to the Supreme Court on a discrete issue regarding the scope of discovery to be afforded a defendant, the *Armstrong* defendants did not prevail. The Court held that a defendant who alleges selective prosecution based on race must make a threshold showing that the Government declined to prosecute similarly situated suspects of other races.<sup>21</sup> Without access to the discovery necessary to demonstrate discriminatory intent, this represents a hollow possibility.

### III. THE DIFFICULTY OF PROVING AN EQUAL PROTECTION VIOLATION UNDER DOMESTIC LAW

One of the primary challenges to the constitutionality of the disparity in penalty structure between crack and powder cocaine has been that it deprives victims of equal protection. The 14<sup>th</sup> Amendment's Equal Protection Clause requires that "all persons similarly circumstanced shall be treated alike."<sup>22</sup> A "rational basis test" is applied where there is no indication of a suspect classification based on race, religion, or other constitutionally protected interest.<sup>23</sup> The "substantial interest test" is used when substantial interests of the state are involved and give rise "to recurring constitutional difficulties."<sup>24</sup> The "strict scrutiny test" involves classifications based on factors such as race, which are "constitutionally suspect."<sup>25</sup> Laws which purposely discriminate against people of color are easily invalidated under the strict scrutiny standard, which requires that classifications based on race must be narrowly drawn to promote a "compelling governmental purpose."<sup>26</sup>

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<sup>17</sup> *United States v. Armstrong*, 21 F.3d 1431 (9th Cir. 1995) (*Armstrong I*), *rev'd on reh'g en banc* 48 F.3d 1508 (9th Cir. 1995) (*Armstrong II*), *rev'd and remanded*, 116 S. Ct. 1480 (1996) (*Armstrong III*).

<sup>18</sup> Dan Weikel, *War on Crack Targets Minorities Over Whites*, L.A. TIMES, May 21, 1995, at B1.

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

<sup>20</sup> *Armstrong II*, 48 F.3d at 1511. This selective prosecution pattern is not unique to Los Angeles. An investigative report by the LOS ANGELES TIMES revealed that:

Only minorities were prosecuted for crack offenses in more than half the federal court districts [handling] crack cases ... No whites were federally prosecuted in 17 states and many cities, including Boston, Denver, Chicago, Miami, Dallas and Los Angeles. Out of hundreds of cases, only one white was convicted in California, two in Texas, three in New York and two in Pennsylvania. *See infra* note 18.

<sup>21</sup> *Armstrong III*, 116 S. Ct. at 1480.

<sup>22</sup> *Plyer v. Doe*, 457 U.S. 202, 216 (1982) (citation omitted).

<sup>23</sup> *See Village of Arlington Hts. v. Metro. Housing Dev. Corp.*, 429 U.S. 252, 266 (1976).

<sup>24</sup> *Plyer*, 457 U.S. at 217.

<sup>25</sup> *Bolling v. Sharpe*, 347 U.S. 497, 499 (1954).

<sup>26</sup> *Plyer*, 457 U.S. at 217.

An equal protection violation, however, can also be established by showing that a facially neutral statute is applied in a racially discriminatory way.<sup>27</sup> Under appropriate circumstances, an inference of discriminatory purpose can be drawn from a statute's disproportionate impact upon a particular group<sup>28</sup> and, as argued in dissent by Justice Marshall, may also be inferred from the "inevitable or foreseeable impact of a statute."<sup>29</sup> In *Washington v. Davis*, a case involving race-based employment discrimination, the Supreme Court developed the principle that although the Fifth Amendment's Due Process Clause contains an equal protection component prohibiting the United States from invidious discrimination, it does not follow that a law is unconstitutional solely because it has a racially discriminatory effect. The Court held, "disproportionate impact is not irrelevant, but it is not the sole touchstone of an invidious racial discrimination."<sup>30</sup>

The Court gave additional voice to the necessity to prove discriminatory intent or purpose in *Village of Arlington Heights v. Metropolitan Hous. Dev. Corp.*, in which the Court again ruled that discriminatory intent must first be shown in order to find a "race-neutral" law violative of the Equal Protection Clause, even when it results in a discriminatory impact.<sup>31</sup> The Court went on to uphold a neutral law—a zoning restriction, which resulted in racially segregated housing.<sup>32</sup> The Court, however, established several "circumstantial evidentiary sources" for judicial review of legislative or executive motivation to determine whether a racially discriminatory purpose exists,<sup>33</sup> acknowledging that "[s]ometimes a clear pattern, unexplainable on grounds other than race, emerges from the effect of state action even when the governing legislation appears neutral on its face."<sup>34</sup>

The Supreme Court reaffirmed its position requiring proof of discriminatory purpose where a law is challenged on equal protection grounds in *Personal Adm'r of Mass. v. Feeney*. In this case of gender-based employment discrimination, the Court highlighted the importance of identifying the discriminatory intent of legislators in order to find a valid equal protection challenge to a law. The Court acknowledged the "objective factors" set forth in *Arlington Heights*, as a "practical" basis for proving discriminatory intent. Yet, the Court went on to hold, "[w]hen the basic classification is rationally based, uneven effects upon particular groups within a class are ordinarily of no constitutional concern ... the manner in which a particular law reverberates in a society, is a legislative and not a judicial responsibility."<sup>35</sup> The Court upheld the gender-neutral law which disparately impacted women veterans.

Where litigants have brought equal protection challenges to laws codifying crack/powder sentencing disparities, appellate courts have almost universally applied

<sup>27</sup> *Id.* at 216.

<sup>28</sup> See *Personal Adm'r of Mass. v. Feeney*, 442 U.S. 256, 279-81 (1979).

<sup>29</sup> *Id.* at 281 (Marshall, J., dissenting). See *Gomillion v. Lightfoot*, 364 U.S. 339 (1960); *Yick Wo v. Hopkins*, 118 U.S. 356 (1886).

<sup>30</sup> *Washington v. Davis*, 426 U.S. 229, 242 (1976).

<sup>31</sup> *Village of Arlington Heights v. Metro. Hous. Dev. Corp.*, 429 U.S. 252, 265-66 (1977).

<sup>32</sup> *Id.*

<sup>33</sup> These subjects of inquiry include (1) adverse racial impact of the official action; (2) historical background of the decisions; (3) specific sequence of events leading up to the challenged decision; (4) departures from normal procedure sequence; (5) substantive departure from routine decisions; (6) contemporary statements made by the decision makers; and (7) the inevitability or foreseeability of the consequences of the law. See lower court decision in *United States v. Clary*, 846 F. Supp. at 783 (E.D.Mo. 1994).

<sup>34</sup> *Village of Arlington Heights*, 429 U.S. at 266.

<sup>35</sup> *Feeney*, 442 U.S. at 272.

rational basis review, a standard in which the government need only demonstrate a legitimate reason for its action.<sup>36</sup> Thus, although the disproportionate impact against African Americans of the facially neutral cocaine legislation is evident, racially discriminatory intent has been virtually impossible to prove.

The current interpretation of the Equal Protection Clause makes it very difficult to remedy racial discrimination in the criminal justice system. It is clear that few prosecutors, law enforcement officers, or legislators will affirmatively announce, 'I have the specific intent to discriminate against black people,' or 'I specifically targeted African Americans for federal court prosecution where I knew they would be subjected to long mandatory sentences,' or 'I specifically voted for penalties for crack cocaine that are 100 times more severe than penalties for powder cocaine because I wanted to insure lengthy incarceration periods for African Americans.' Yet that level of honesty appears to be what interpretation of current law requires.

In reality, many of the disparities in the criminal justice system arise from institutional and structural racism. Policies and practices in the U.S. are often defined or "structured" by race and racism. Such structural racism has been defined as a system in which "public policies, institutional practices, cultural representations and other norms work in various, often reinforcing ways to perpetuate racial group inequities."<sup>37</sup> Institutional racism, a subset of structural racism, is a theory wherein unwarranted racially disparate treatment is codified within the structural fabric of social institutions and manifests routinely without the need for a discrete actor to overtly perpetuate a discriminatory act.<sup>38</sup>

Scholars have argued, therefore, that the current intent standard "ignores the way racism works"<sup>39</sup> and because racial inequality can manifest "irrespective of the

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<sup>36</sup> INTERNATIONAL HUMAN RIGHTS LAW GROUP, U.S. RATIFICATION OF THE INTERNATIONAL CONVENTION ON THE ELIMINATION OF ALL FORMS OF RACIAL DISCRIMINATION: AN OVERVIEW OF UNITED STATES LAW WITH ANALYSES OF POTENTIAL RESERVATIONS, UNDERSTANDINGS, AND DECLARATIONS TO THE CONVENTION, 3-4 (International Convention on the Elimination of all Forms of Racial Discrimination) (1994). See also Nkechi Taifa, *Cracked Justice: A Critical Examination of Cocaine Sentencing*, 27 UWLA L. REV. 107, 144-45 (1996); See e.g., *United States v. Clary*, 34 F.3d 709 (8th Cir. 1994); *United States v. Maxwell*, 25 F.3d 1389, 1401 (8th Cir.), cert. denied, 115 S. Ct. 610 (1994) (racially disparate impact not a basis upon which a court may rely to impose a sentence outside of the applicable guidelines range); *United States v. Angulo-Lopez*, 7 F.3d 1506 (10th Cir. 1993) (following standard set by other circuit courts in rejecting defendant's equal protection challenge under rational basis review); *United States v. Bynum*, 3 F.3d 769, 774 (4th Cir. 1993), cert. denied, 114 S. Ct. 1105 (1994) (explaining that discriminatory impact not proper basis for downward departure); *United States v. Lattimore*, 974 F. 2d 971, 975-76 (8th Cir. 1992) (disparate impact is not an aggravating or mitigating circumstance warranting downward departure from Sentencing Guidelines); *United States v. Harding*, 971 F.2d 410 (9th Cir. 1992).

<sup>37</sup> The Aspen Institute, STRUCTURAL RACISM AND COMMUNITY BUILDING, at 11 (June 2004).

<sup>38</sup> The American Bar Association's Summit on Racial and Ethnic Bias in the Justice System recognized institutional racism as "statutes, rules, policies, procedures, practices, events, conduct and other factors, operating alone or together, that have a disproportionate impact upon one or more persons/people of color." AMERICAN BAR ASSOCIATION, ACHIEVING JUSTICE IN A DIVERSE AMERICA: A SUMMIT ON RACIAL AND ETHNIC BIAS IN THE JUSTICE SYSTEM, A PRELIMINARY REPORT AND PLAN FOR ACTION 2 (1994). The Summit continued by stating, "(o)ur definition therefore rejects the limitations of 'active' bias to discrete and provable instances of intentional bigotry ... We view our challenge as extending also to passive bias where it has a systemic effect on the administrative of justice." *Id.* at 3.

<sup>39</sup> Charles R. Lawrence, *The Id, Ego, and Equal Protection: Reckoning with Unconscious Racism*, 39 STAN. L. REV. 317 (1987); THE JUSTICE COLLECTIVE, REDEFINING DISCRIMINATION: USING SOCIAL COGNITION THEORY TO CHALLENGE THE FAULTY ASSUMPTIONS OF THE 'INTENT DOCTRINE' IN ANTI-DISCRIMINATION LAW; Linda Hamilton Krieger, *The Content of Our Categories: A Cognitive Bias Approach to Discrimination and Equal Employment Opportunity*, 47 STAN. L. REV. 1161 (1995); Ian Haney Lopez, *Institutional Racism: Judicial Conduct and a New Theory of Racial Discrimination*, 109 YALE L.J. 1717 (2000).

decision-maker's motive,"<sup>40</sup> the remedy to that inequality must likewise not be dependent upon provable intentional conduct. "Sophisticated racists have learned to code their language and not leave behind a paper trail of racism."<sup>41</sup> Although cognizable reasons may exist for the courts declining to extend an equal protection remedy beyond cases of provable intentional discrimination,<sup>42</sup> such arguments, no matter how colossal they may appear, should not continue to be allowed as justification to circumscribe justice. Novel analyses must be advanced which will, in time, trigger novel solutions. Current equal protection analysis must not be allowed to block creative solutions.

#### IV. REMEDIES UNDER INTERNATIONAL LAW

##### A. DOMESTIC RECOGNITION OF INTERNATIONAL LAW

Though domestic law, as currently interpreted, has not remedied sentencing disparities, international law may provide relief. Increasingly, human rights organizations in the United States are including domestic U.S. scrutiny within their monitoring apparatuses, and issuing reports detailing abuses in American institutions.<sup>43</sup> More recently, in the criminal justice and other arenas, traditional civil rights and civil liberties groups have also sought to extend their analyses to the international sphere as well, often in collaboration with traditional human rights organizations.<sup>44</sup> Lawyers in capital cases are increasingly raising legal challenges pursuant to various international treaties and customary international law,<sup>45</sup> and a myriad of human rights conventions and standards have likewise been analyzed in the context of children in the U.S. juvenile justice system.<sup>46</sup>

<sup>40</sup> Lawrence, *The Id, Ego and Equal Protection*, 39 STAN. L. REV. at 319.

<sup>41</sup> Richard Drorak, *Cracking the Code: Decoding Colorblind Clues*, 5 MICH. L. REV. 611 (2000).

<sup>42</sup> Reasons in *Washington v. Davis* include that the Court would be in the untenable position of having to address "serious questions . . . about a whole range of tax, welfare, public service, regulatory, and licensing statutes that may be more burdensome to the poor and to the average black than to the more affluent white," 426 U.S. at 248; *See also McClesky v. Kemp*, Justice Powell warned that "if we accepted McClesky's claim that racial bias has impermissibly tainted the capital sentencing decision, we could soon be faced with similar claims as to other types of penalty, 481 U.S. 279 (1987); *Hernandez v. New York*, 500 U.S. 352, 374 (1991) (O'Connor, J., concurring—"In *Washington v. Davis* we outlined the dangers of a rule that would allow an equal protection violation on a finding of mere disproportionate effect. Such a rule would give rise to an unending stream of constitutional challenges.").

<sup>43</sup> *See e.g.*, Reports of Human Rights Watch, International Human Rights Law Group (now Global Rights); Amnesty International USA; Penal Reform International; Lawyers Committee for Human Rights (now Human Rights First).

<sup>44</sup> *See* American Civil Liberties Union, *Human Rights at Home: International Law in U.S. Courts Conference* (Oct. 9-11, 2003), available at <http://www.aclu.org/hrc/>; National Citizens United for the Rehabilitation of Errants (CURE), *Proceedings of International Conference on Human Rights & Prison Reform* (Oct. 6-11, 2001) (on file with author); Women's Institute for Leadership Development for Human Rights, *Making the Connections: Human Rights in the United States* (2000) (on file with author); SENTENCING PROJECT AND HUMAN RIGHTS WATCH, *LOSING THE VOTE: THE IMPACT OF FELONY DISENFRANCHISEMENT LAWS IN THE UNITED STATES* (1998) (on file with author); Letter from Human Rights Watch, International Human Rights Law Group & NAACP Legal Defense and Educational Fund, to the Honorable Warren Christopher, Former Secretary of State (Oct. 27, 1995) (on file with author); *International Convention on the Elimination of All Forms of Racial Discrimination: Hearings Before the Senate Comm. On Foreign Relations*, 103d Cong. 47 (1994) (statement of Wade Henderson, Director of the Washington Bureau of the NAACP); HUMAN RIGHTS WATCH & AMERICAN CIVIL LIBERTIES UNION, *HUMAN RIGHTS VIOLATIONS IN THE UNITED STATES: A REPORT ON U.S. COMPLIANCE WITH THE INTERNATIONAL COVENANT ON CIVIL AND POLITICAL RIGHTS* (1993).

<sup>45</sup> *See generally* SANDRA L. BABCOCK, *INTERNATIONAL LAW IN CAPITAL CASES* (2003).

<sup>46</sup> *See* Rosemary Sarri and Jeffrey Shook, "Human Rights and Juvenile Justice in the United States,"

It is clear that there is a growing, distinct human rights movement in the U.S.<sup>47</sup> The U.S. Human Rights Network was formed in 2003 to promote U.S. accountability to universal human rights standards, by building linkages between organizations and individuals working on human rights issues in the United States. The Network is currently coordinating the shadow reporting process to U.S. government reports on U.S. compliance with human rights treaties.<sup>48</sup> Shadow reports fill in any gaps to the government's official reports, and allow organizations to dialogue with the Treaty Committees about any concerns they may have.

In early 2006, the Justice Roundtable<sup>49</sup> and the American Bar Association petitioned the Inter-American Commission on Human Rights<sup>50</sup> to examine the issue of the discriminatory impact of mandatory minimum sentences in the U.S. criminal justice system. This request resulted in the granting of an historic hearing on March 3, 2006 where oral and written testimonies emphasized the crack/powder sentencing disparity as one of the most flagrant examples of such discriminatory impact.<sup>51</sup>

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(Univ. of Michigan), (*available at* [http://www.aclu.org/hrc/JuvenileJustice\\_Sarri.pdf](http://www.aclu.org/hrc/JuvenileJustice_Sarri.pdf)).

<sup>47</sup> Upon the U.S. ratification of the International Covenant on Civil and Political Rights, the former director of Human Rights Watch and current president of the Open Society Institute, Aryeh Neier, stated, "(t)he international human rights cause has achieved a legitimacy comparable to that of the movement for the promotion of rights and liberties domestically." Aryeh Neier, *Political Consequences of the United States Ratification of the International Covenant on Civil and Political Rights*, 42 DEPAUL L. REV. 1233, 1234 (1993). He continued optimistically, "despite the Bush Administration's reservations, declarations, and understandings, the Covenant will, over time, prove valuable in civil liberties litigation in the United States and, conceivably, will also be helpful in shaping the decision making of the executive and legislative branches of government." *Id.* at 1235.

<sup>48</sup> Current shadow reports addressing issues of domestic torture and other human rights violations will be reviewed by the United Nation's Committee Against Torture and its Human Rights Committee. See [www.ushrnetwork.org](http://www.ushrnetwork.org).

<sup>49</sup> The Justice Roundtable is a broad network of advocacy groups seeking reform on the U.S. justice system.

<sup>50</sup> The Inter-American Commission on Human Rights is an autonomous organ of the Organization of American States, whose members are elected by the OAS General Assembly. One of its main functions is to address the complaints or petitions received from individuals, groups of individuals or organizations that allege human rights violations committed in OAS member countries. Its recommendations have led States to modify sentencing procedures, eliminate discriminatory laws, and strengthen protections of basic rights.

<sup>51</sup> See testimonies at [www.sentencingproject.org](http://www.sentencingproject.org). Witnesses testifying at the hearing included the Honorable Patricia Wald, former Chief Judge of the U.S. Court of Appeals for the District of Columbia Circuit and Judge on the International Criminal Tribunal for the Former Yugoslavia (1999-2001); Professor Charles Ogletree of Harvard Law School; Ms. Kemba Smith, a victim of crack cocaine sentencing; and Attorney Gay McDougall, then Executive Director of Global Rights and the first United Nations Independent Expert on Minority Issues. Written testimony was submitted from three Members of Congress—Charles Rangel, Ranking Member of the House Ways and Means Committee; Robert "Bobby" Scott, Ranking Member of the House Crime Subcommittee; and Congresswoman Maxine Waters, member of the House Judiciary Committee. The Justice Roundtable's petition and testimony included the American Civil Liberties Union, the Sentencing Project, the Criminal Justice Policy Foundation, Penal Reform International, Global Rights, Charles Hamilton Houston Institute for Race and Justice; International Citizens United for the Rehabilitation of Errants, Justice Policy Institute, Law Enforcement Against Prohibition, Lawyers' Committee for Civil Rights Under Law, Leadership Conference on Civil Rights, National Association for the Advancement of Colored People, NAACP Legal Defense and Educational Fund, National Black Police Association, Human Rights Watch, U.S. Human Rights Network, National Council of La Raza, Families Against Mandatory Minimums, National Association of Criminal Defense Lawyers, Drug Policy Alliance, Washington Bar Association, Break the Chains-Communities of Color and the War on Drugs, Interfaith Drug Policy Initiative, Unitarian Universalists for Drug Policy Reform, and the Open Society Policy Center.

In addition to civil society organizations, the top echelon of the American judiciary has been vocal in recognizing the importance of integrating international law into domestic jurisprudence. For example, United States Supreme Court Justices Ginsburg, Breyer, Stevens, and Kennedy have cited positively to international law in recent years, whether in the context of the death penalty,<sup>52</sup> affirmative action,<sup>53</sup> or anti-sodomy laws,<sup>54</sup> or in interviews and speeches stressing the importance of consultation and guidance regarding selected decisions of foreign courts and the need for comparative analysis in a growing global community.

Justice Breyer, in encouraging lawyers to be proactive in analyzing and referring “relevant comparative material” to the judiciary, clearly signaled the receptivity of the courts to international jurisprudence by acknowledging:

By now, however, it should be clear that the chicken has broken out of the egg. The demand is there. To supply that demand, the law professors, who teach the law students, who will become the lawyers, who will brief the courts, must themselves help to break down barriers ... so that the criminal law professor as well as the international law professor understands the international dimensions of the subject ...<sup>55</sup>

This clarion call for an openness to international precepts should be heeded, and the growing framework of human rights analyses should be considered in effectuating domestic reform. Indeed, a human rights approach to issues of domestic U.S. concern could very well mark the next frontier of advocacy.

## B. OVERVIEW OF THE INTERNATIONAL RACE CONVENTION

The International Convention on the Elimination of All Forms of Racial Discrimination (ICERD) has been described as “the most comprehensive and unambiguous codification in treaty form of the idea of the equality of the races.”<sup>56</sup> Important to the analysis in this paper, the Convention requires the elimination of discrimination not only when there is discriminatory intent, but also where there is unjustified discriminatory effect. It prohibits racial discrimination, defined as “any distinction, exclusion, restriction or preference based on race, colour, descent, or national or ethnic origin which has the purpose or *effect* of nullifying or impairing the recognition, enjoyment or exercise, on an equal footing, of human rights and fundamental freedoms in the political, economic, social, cultural or any other field of public life.”<sup>57</sup> (Emphasis added).

The Convention goes on to affirm that “(e)ach State Party shall take effective measures to review governmental, national and local policies, and to amend, rescind or

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<sup>52</sup> *Atkins v. Virginia*, 536 U.S. 304 (2002) (prohibiting execution of the mentally retarded).

<sup>53</sup> *Grutter v. Bollinger*, 539 U.S. 306 (2003) (upholding use of race in affirmative action).

<sup>54</sup> *Lawrence v. Texas*, 539 U.S. 558 (2003) (striking down anti-sodomy laws).

<sup>55</sup> Stephen Breyer, Associate Justice, Supreme Court of the United States, *The Supreme Court and the New International Law*, The American Society of International Law, 97<sup>th</sup> Annual Meeting (April 4, 2003).

<sup>56</sup> Egan Schwelb, *The International Convention on the Elimination of Racial Discrimination*, 15 INT'L & COMP. L.Q. 996, 1057 (1966).

<sup>57</sup> ICERD, Part 1, Art. 1, cl.1.

nullify any laws and regulations which have the *effect* of creating or perpetuating racial discrimination wherever it exists.”<sup>58</sup> (Emphasis added). Finally, Parties to the Convention are legally obligated to eliminate racial discrimination within their borders and are required to enact whatever laws are necessary to ensure the exercise and enjoyment of fundamental human rights free from discrimination.<sup>59</sup>

The European Union’s Race Equality Directive<sup>60</sup> incorporates anti-discrimination norms found in various European and international instruments, including ICERD. The Directive addresses the issue of disparate impact, by prohibiting “indirect discrimination,” which “shall be taken to occur where an apparently neutral provision, criterion or practice would put persons of a racial or ethnic origin at a particular disadvantage compared with other persons, unless that provision, criterion or practice is objectively justified by a legitimate aim and the means of achieving that aim are appropriate and necessary.”<sup>61</sup> This Directive is yet another indication of the growing consensus of the need to concretize global norms domestically.

The provision within the International Convention on the Elimination of All Forms of Racial Discrimination relating to criminal justice concerns is subsumed within Article 5:

In compliance with the fundamental obligations laid down in article 2 of this Convention, States Parties undertake to prohibit and to eliminate racial discrimination in all its forms and to guarantee the right of everyone, without distinction as to race, colour, or national or ethnic origin, to equality before the law, notably in the enjoyment of the following rights:

- (a) The right to equal treatment before the tribunals and all other organs administering justice;
- (b) The right to security of person and protection by the State against violence or bodily harm, whether inflicted by government officials, or by any individual, group or institution;
- (c) Political rights, in particular the rights to participate in elections—to vote and to stand for election—on the basis of universal suffrage, to take part in the Government, as well as in the conduct of public affairs at any level and to have equal access to public service ....<sup>62</sup>

Enumerating a panoply of other civil rights encompassing the civil, political, economic, social and cultural spheres, the Convention goes on to state the following:

States Parties shall assure to everyone within their jurisdiction effective protection and remedies, through the competent national tribunals and other State institutions, against any acts of racial

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<sup>58</sup> ICERD, Part 2, Art. 1(c).

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

<sup>60</sup> Council Directive 2000/43/EC, adopted by the Council of the European Union on 29 June 2000.

<sup>61</sup> *Id.* at Art. 2(2)(b).

<sup>62</sup> ICERD, Part 1, Art. 5 (a-c).

discrimination which violate his human rights and fundamental freedoms contrary to this Convention, as well as the right to seek from such tribunals just and adequate reparation or satisfaction for any damage suffered as a result of such discrimination.<sup>63</sup>

To ensure that everyone has notice of these provisions: States Parties undertake to adopt immediate and effective measures, particularly in the fields of teaching, education, culture and information, with a view to combating prejudices which lead to racial discrimination and to promoting understanding, tolerance and friendship among nations and racial or ethnic groups, as well as to propagating the purposes and principles of the Charter of the United Nations, the Universal Declaration of Human Rights, the United Nations Declaration on the Elimination of All Forms of Racial Discrimination, and this Convention.<sup>64</sup>

In 1994 the U.S. ratified the ICERD, following an unfortunate tradition of ratifying human rights treaties with limiting reservations, understandings and declarations. One limitation issued within the U.S. CERD ratification is a declaration that the Convention will not be self-executing and will not create rights directly enforceable in U.S. courts, absent implementation of specific legislation. One should not, however, be daunted by the strictures of that limitation. Analogous to the examination of the same declaration in another treaty, Neier states that although the International Covenant on Civil and Political Rights would provide a “stronger source of protection” if implementing legislation were adopted by Congress,<sup>65</sup> “(t)hat the United States has declared that the Covenant is non-self-executing will not prevent the courts or the other branches of government from shaping their decisions to conform to international standards to which the United States has now proclaimed its adherence.”<sup>66</sup> And, encouragingly, the United States in its ratification process of the ICERD, did not make a direct reservation to the Convention’s “effects” provisions, despite the fact that under current U.S. constitutional law analysis, there is no affirmative duty to remedy de facto discrimination pursuant to equal protection laws unless a party can establish discriminatory intent.

As noted above, one of the key standards within ICERD is the condemnation of invidious racially discriminatory effects or impact, regardless of intent. The disparity in penalty structure between crack and powder cocaine represents one of the most flagrant examples of a law that, on its face, is neutral, but whose impact is discriminatory. Although the U.S. judicial record is replete with a myriad of legal challenges to the racially disparate impact of the crack-powder cocaine distinction in federal sentencing statutes and guidelines, no federal appellate court has yet to hold the disparity unconstitutional, whether the challenge was equal protection or due process, cruel and unusual punishment or vagueness. This failure is due, in large part, to a rejection by the courts that Congress acted with racially discriminatory intent in differentiating

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<sup>63</sup> *Id.* at Part 1, Art. 6.

<sup>64</sup> *Id.* at Part 1, Art. 7.

<sup>65</sup> Neier, *Political Consequences of the United States Ratification of the International Covenant on Civil and Political Rights*, 42 DEPAUL L. REV. 1233, 1239 (1993).

<sup>66</sup> *Id.* at. 1237.

between crack and powder cocaine when enacting the cocaine statutes in 1986 and 1988. The following quote is instructive:

‘I ain’t cheat’n, I’m just lucky.’ Spoken with sincerity, these incredulous words of the professional gambler as he takes the gullible mark’s last dollar are a most telling statement. If the cards are handled correctly, the mark is left stunned in disbelief. To him, the outcome undoubtedly seems unfair, but he cannot prove it. And so it is with the criminal defendant who first encounters the [mandatory minimum crack statutes].<sup>67</sup>

This scenario aptly illustrates the quandary defense attorneys face in litigating crack cocaine cases—although the disproportionate impact of the crack statute against African Americans is unmistakable, similar to the dilemma faced by the mark above, racially discriminatory intent has been virtually impossible to prove. The disparity in penalty structure between crack and powder cocaine represents just one manifestation of racial disparity in the U.S. criminal justice system that could benefit from a human rights construct.

Indeed, guidance from international norms and, specifically, provisions of the ICERD affirming the importance of recognizing discriminatory impact, could eliminate barriers presented by current domestic law and practice with respect to racism in the criminal justice system in general, and the crack/powder cocaine differential in particular. Even absent implementing legislation that would directly enforce the treaty in U.S. law, one commentator asserts that if international law were used to assist in interpreting constitutional rights, “the right attains greater credence as one that has universal recognition.”<sup>68</sup>

Each of the three branches of government should look to the principles in ICERD in attempting to resolve the crack cocaine/powder cocaine disparity. Congress is urged to remedy the unwarranted racially discriminatory impact of cocaine sentencing by enacting legislation equalizing the penalty structures between crack and powder cocaine, at the current level set for powder cocaine. Judges are urged to interpret equal protection analysis in light of the ICERD’s clause abrogating laws with an invidious discriminatory effect, irrespective of proof of intent, enabling the higher standard of strict scrutiny to apply. The State Department is encouraged, in its next periodic report to the United Nations Committee to Eliminate Racial Discrimination, to directly address the issue of the racial impact of United States drug laws and enforcement,<sup>69</sup> and provide detailed information for the Committee’s review with respect to U.S. compliance with the “effect” provisions of the ICERD to insure that there is “equal treatment before the tribunals and all other organs administering justice.”<sup>70</sup>

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<sup>67</sup> MICHAEL LASLEY, *DISPARATE TREATMENT: MANDATORY MINIMUMS, THE FEDERAL SENTENCING GUIDELINES AND AFRICAN AMERICANS*, reprinted in Taifa, *Cracked Justice: A Critical Examination of Cocaine Sentencing*, 27 UWLA. L. REV. at 144.

<sup>68</sup> Lisa Kline Arnett, *Comment, Death at an Early Age: International Law Arguments Against the Death at an Early Age: International Law Arguments Against the Death Penalty for Juveniles*, 57 U. CIN. L. REV. 245, 261 (1988).

<sup>69</sup> See generally HUMAN RIGHTS WATCH, INTERNATIONAL HUMAN RIGHTS LAW GROUP, NAACP LEGAL DEFENSE & EDUCATIONAL FUND, *SUMMARY OF CONCERNS ABOUT RACE DISCRIMINATION IN THE U.S. CRIMINAL JUSTICE SYSTEM* (1995).

<sup>70</sup> ICERD, Title 1, Art. 5(a).

## V. CONCLUSION

Over 100 years ago, W.E.B. DuBois predicted that the problem of the 20<sup>th</sup> century would be the problem of the color line. And now, during the 21<sup>st</sup> century, the problem of race in society is still pernicious. Current interpretation of domestic law has proven inadequate in providing relief. The application of international human rights law to U.S. criminal justice jurisprudence could be a pivotal strategy which eradicates racism and its deleterious effects.

The Race Convention embodies the world community's expression that a universal, international standard against race discrimination is necessary if racial and ethnic bias is to be eliminated. The executive, legislative and judicial branches of government must be challenged to take appropriate measures to ensure that U.S. laws, policies, and practices are in conformity with the dictates of this Convention.



# The Merits of the Proposed Journalist-Source Privilege

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Geoffrey R. Stone\*

**T**he ability of journalists to protect the confidentiality of their sources is essential to a robust and independent press and to a well-functioning democratic society. When journalists disregard lawful court orders because they are serving a “higher” purpose, they endanger the freedom of the press itself by showing a disregard for the rule of law. At the same time, the rule of law must respect the legitimate needs of a free press. A federal statute granting a journalist-source privilege is one way to resolve the tension between these competing interests.

## I. THE NATURE OF A PRIVILEGE

The goal of most legal privileges is to promote open communication in circumstances in which society wants to encourage such communication. There are many such privileges, including the attorney-client privilege,<sup>1</sup> the doctor-patient privilege, the psychotherapist-patient privilege, the privilege for confidential spousal communications, the priest-penitent privilege, the executive privilege, and the “Speech or Debate Clause” privilege for members of Congress.<sup>2</sup>

In each of these instances, three judgments implicitly support recognition of the privilege: (1) the relationship is one in which open communication is important to society; (2) in the absence of a privilege, such communication will be inhibited; and (3) the cost to the legal system of losing access to the privileged information is outweighed by the benefit to society of open communication in the protected relationship.

Consider, for example, the psychotherapist-patient privilege. If patients knew that their psychotherapists could routinely disclose or be compelled to disclose their confidential communications made for the purpose of treatment, they would naturally be more reluctant to reveal intimate or embarrassing facts about their experiences, thoughts, and beliefs. But without those revelations, psychotherapists would be hindered in their ability to offer appropriate advice and treatment to their patients. To facilitate treatment, we would want to create a privilege that prohibits psychotherapists from disclosing confidential matters revealed to them by their patients, unless the patient elects to waive the privilege.<sup>3</sup>

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<sup>1</sup> The attorney-client privilege is recognized in every jurisdiction in the United States. Other privileges are recognized in varying forms in different jurisdictions.

<sup>2</sup> Not all privileges take this form. The privilege against compelled self-incrimination, for example, has a separate and distinct rationale, designed to deter abusive interrogation practices, avoid reliance upon unreliable confessions, and respect the dignity of the individual. The trade secret privilege is designed in part to encourage open communication, but is also designed to protect property rights.

<sup>3</sup> Suppose, for example, a Patient tells Psychotherapist that he was sexually abused by Teacher several years earlier. Teacher is now under investigation for sexual abuse of his students, and Psychotherapist is called to testify before the grand jury. Psychotherapist is asked, “Did Patient tell you he had been sexual-

It is impossible to measure precisely the cost of privileges to the legal process. If a patient would not have disclosed information to a psychotherapist in the absence of a psychotherapist-patient privilege, then a criminal investigation loses *nothing* because of the privilege. This is so because, without the privilege, the psychotherapist would not have learned of the patient's experiences in the first place. In that circumstance, the privilege creates the best of all possible outcomes: it promotes effective treatment at no cost to the legal system.

However, if a patient would have revealed the information to a psychotherapist *even without the privilege*, then the privilege imposes a cost because it shields from disclosure a communication that would have been made even in the absence of a privilege. The ideal rule would privilege only those communications that would not have been made without the privilege.

This highlights an important feature of privileges: the privilege "belongs" to the person whose communication society wants to encourage (*i.e.*, the client or patient), not to the attorney or doctor. If the client or patient is indifferent to the confidentiality of the communication at the time it is made, or elects to waive the privilege at any time, the attorney or doctor has no authority to assert the privilege. The attorney or doctor is merely the agent of the client or patient.

## II. THE JOURNALIST-SOURCE PRIVILEGE

The logic of the journalist-source privilege is similar to that between a patient and psychotherapist. Public policy supports the idea that individuals who possess information of significant value to the public should ordinarily be encouraged to convey that information to the public. We acknowledge and act upon this policy in many ways, including, for example, by providing copyright protection.

Sometimes, though, individuals who possess such information are reluctant to have it known that they are the source. They may fear retaliation, gaining a reputation as a "snitch," losing their privacy, or simply getting "involved." A congressional staffer, for example, may have reason to believe that a Senator has taken a bribe. She may want someone to investigate, but may not want to get personally involved. Or, an employee of a corporation may know that his employer is manufacturing an unsafe product, but may not want coworkers to know he was the source of the leak.

In such circumstances, individuals may refuse to disclose the information unless they have some way to protect their confidentiality. In our society, often the best way to reveal such information is through the press. But without a journalist-source privilege, such sources may decide silence is the better part of wisdom.

A journalist-source privilege thus makes sense for the same reason as the attorney-client privilege, the doctor-patient privilege, and the psychotherapist-patient privilege. It is in society's interest to encourage the communication, and without a privilege the communication will often be chilled. Moreover, in many instances the privilege will impose no cost on the legal system, because without the privilege the source may never disclose the information at all. Consider the congressional staffer example. Without a privilege, the staffer may never report the bribe and the crime will remain undetected. With the privilege, the source will speak with the journalist, who may publish the

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ly abused by Teacher?" If a psychotherapist-patient privilege exists in the jurisdiction, Psychotherapist will be barred from answering the question without Patient's permission. The effect of the privilege is to deprive the investigation of relevant evidence in order to promote open communication in the treatment setting.

story, leading to an investigation that may uncover the bribe. In this situation, law enforcement is actually better with the privilege than without it, and this puts to one side the benefit to society of learning of the alleged bribe independent of any criminal investigation.

For this reason, forty-nine states and the District of Columbia recognize some version of the journalist-source privilege either by statute or common law.<sup>4</sup> The time is ripe for the federal government to enact such a privilege as well. There is no sensible reason for the federal system not to recognize a journalist-source privilege to deal with situations like the whistleblower examples of the congressional staffer and the corporate employee. In these circumstances, the absence of a journalist-source privilege actually may *harm* the public interest. Some form of journalist-source privilege is essential to foster the fundamental value of an informed citizenry.

Moreover, the absence of a federal privilege can create a difficult situation for both journalists and sources. Consider a reporter who works in New York whose source is willing to tell her about an unsafe product, but only if the reporter promises him confidentiality. New York has a shield law, but the federal government does not. If the disclosure results in litigation or prosecution in the state courts of New York, the reporter can protect the source, but if the litigation or prosecution is in federal court, the reporter cannot invoke the privilege. This generates uncertainty, and uncertainty breeds silence. The absence of a federal privilege then undermines the policies of forty-nine states and the District of Columbia and interferes with the legitimate and good faith understandings and expectations of sources and reporters throughout the nation. This is an unnecessary state of affairs.

### III. THE FIRST AMENDMENT

One response to the call for federal legislation in this area is that such a law is unnecessary because the First Amendment should solve the problem. This argument is wrong on many levels. Most obviously, constitutional law sets only the baseline for the protection of individual liberties. It does not define the ceiling of such liberties. That a particular practice or policy does not violate the Constitution does not mean it is good policy. This is evident in an endless list of laws that go far beyond constitutional requirements in supporting individual rights, ranging from the Civil Rights Act of 1964, to legislative restrictions on certain surveillance practices, to tax exemptions for religious organizations, to regulations of the electoral process.

Moreover, the journalist-source privilege poses not only a question of individual liberties, but also an important public policy issue about how best to support and strengthen the marketplace of ideas. Just as the non-constitutional attorney-client privilege is about promoting a healthy legal system, the nonconstitutional journalist-source privilege is about fostering a healthy political system.

In 1972 the Supreme Court, in *Branzburg v. Hayes*,<sup>5</sup> addressed the question of whether the First Amendment embodies a journalist-source privilege. The four dissenting justices concluded that “when a reporter is asked to appear before a grand jury and reveal confidences,” the government should be required to “(1) show that there is probable cause to believe that the newsman has information that is clearly relevant to a specific probable violation of law; (2) demonstrate that the information

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<sup>4</sup> Thirty-one states have recognized the privilege by statute and eighteen have recognized it by judicial decision. The only state that has not recognized the privilege in any form is Wyoming.

<sup>5</sup> 408 U.S. 665 (1972).

sought cannot be obtained by alternative means less destructive of First Amendment rights; and (3) demonstrate a compelling and overriding interest in the information.”

The opinion of the Court, however, rejected this conclusion and held that, as long as an investigation is conducted in good faith and not for the purpose of disrupting “a reporter’s relationship with his news sources,” the First Amendment does not protect either the source or the reporter from having to disclose relevant information to a grand jury.

If this were all there was to *Branzburg*, it would seem clearly to have settled the First Amendment issue. But Justice Powell did something quite puzzling, for he not only joined the opinion of the Court, but also filed a separate concurring opinion that seemed directly at odds with the Court’s opinion. Specifically, Powell stated that in each case the “asserted claim of privilege should be judged on its facts by the striking of a proper balance between freedom of the press and the obligation of all citizens to give relevant testimony with respect to criminal conduct.”

Thus, Justice Powell seemed to embrace an approach between that of the four justices in dissent and the four other justices in the majority. Had he not joined the majority opinion, his concurring opinion, as the “swing” opinion, would clearly have stated the “law,” even though no other justice agreed with him. But because he joined the opinion of the Court, no one has ever quite been sure what to make of his position. The result has been chaos in the lower federal courts about the extent to which the First Amendment embodies a journalist-source privilege.<sup>6</sup> As it stands, it is unclear whether there is essentially no privilege, as suggested in the *Branzburg* majority opinion, or a balancing approach, as suggested by Justice Powell’s concurrence. For more than thirty years, the Court has allowed this confusion to percolate in the lower federal courts.

This confusion provides an additional reason for the adoption of a federal privilege statute. The current state of affairs leaves sources, journalists, prosecutors, and lower federal courts without any clear guidance, and the scope of the First Amendment-based journalist-source privilege differs significantly from one part of the nation to another. A federal law recognizing a journalist-source privilege would eliminate this confusion and offer much-needed guidance about the degree of confidentiality participants in the federal system may and may not expect. Especially in situations like these, where individuals are making difficult decisions about whether to put themselves at risk by revealing information of significant value to the public, clear rules are *essential*.

A journalist-source privilege is not required by the First Amendment, but, apart from considerations of uniformity, there are other reasons why Congress should enact a statutory privilege that goes beyond whatever the Court held in *Branzburg*. In rejecting a privilege grounded in the First Amendment, the Court in *Branzburg* relied heavily on two important doctrines to justify its decision, neither of which speaks directly to the issue of federal legislation. Indeed, that is why, despite *Branzburg*, forty-nine states and the District of Columbia have felt comfortable recognizing some form of the journalist-source privilege.

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<sup>6</sup> Building upon Justice Powell’s concurring opinion in *Branzburg*, most federal courts of appeals have held that the First Amendment protects some form of journalist-source privilege. *See, e.g., United States v. Caporale*, 806 F.2d 1487 (11th Cir. 1986); *LaRouche v. National Broadcasting Company*, 780 F.2d 1134 (4th Cir. 1986); *Zerill v. Smith*, 656 F.2d 705 (D.C. Cir. 1981); *Stillman v. Globe Newspaper Co.*, 633 F.2d 583 (1st Cir. 1980); *United States v. Criden*, 633 F.2d 346 (3rd Cir. 1980); *Miller v. Transamerican Press, Inc.*, 621 F.2d 721 (5th Cir. 1980); *Silkwood v. Kerr-McGee Corp.*, 563 F.2d 433 (10th Cir. 1977); *Farr v. Pritchess*, 522 F.2d 446 (9th Cir. 1975); *Baker v. F & F Investment*, 470 F.2d 778 (2d Cir. 1972).

First, as a general matter of First Amendment interpretation, the Court is reluctant to invalidate a law merely because it has an *incidental* effect on First Amendment freedoms. Laws that *directly* regulate expression (e.g., “No one may criticize the government” or “No one may distribute leaflets on the Mall”) are the central concern of the First Amendment. Laws that only incidentally affect free expression (e.g., a speed limit as applied to someone who speeds to get to a demonstration on time or who speeds in order to express his opposition to speed limits) will almost never violate the First Amendment.

The reason for this doctrine is not that such laws cannot dampen First Amendment freedoms, but that the implementation of a constitutional analysis that allowed *every* law to be challenged whenever it allegedly impinged even indirectly on someone’s freedom of expression would be a judicial nightmare.

To avoid such ad hoc line-drawing, the Court simply *presumes* that laws of general application are constitutional, even as applied to speakers and journalists, except in extraordinary circumstances. Predictably, the Court invoked this principle in *Branzburg*: “[T]he First Amendment does not invalidate every incidental burdening of the press that may result from the enforcement of civil or criminal statutes of general applicability.”

This is a sound basis for the Court to be wary of constitutionalizing a strong journalist-source privilege, but it has no weight in the *legislative* context. Courts necessarily proceed on the basis of precedent, and they are quite sensitive to the dangers of “slippery slopes.” Legislation, however, properly considers problems “one step at a time” and legislators need not reconcile each law with every other law in order to meet their responsibilities.

A Court could reason that to recognize a journalist-source privilege might require recognition of a privilege of journalists to commit burglary or wiretapping but for Congress to address the privilege issue without fretting over journalistic burglary or wiretapping is simply not a problem. This is a fundamental difference between the judicial and legislative processes.

Second, recognition of a journalist-source privilege necessarily requires someone to determine who, exactly, is a “journalist.” For the Court to decide this question *as a matter of First Amendment interpretation* would fly in the face of more than two hundred years of constitutional wisdom. The idea of defining or “licensing” the press in this manner is anathema to our constitutional traditions. The Court has never gone down this road, and with good reason. As the Court observed in *Branzburg*, if the Court recognized a First Amendment privilege “it would be necessary to define those categories of newsmen who qualified for the privilege, a questionable procedure in light of the traditional doctrine that liberty of the press is the right of the lonely pamphleteer [just] as much as of the large metropolitan publisher.”

Although this was a serious constraint on the Court in *Branzburg*, it poses a much more manageable issue in the context of legislation. Government often treats different speakers and publishers differently from one another. Which reporters are allowed to attend a White House press briefing? Which are eligible to be embedded with the military? Broadcasting is regulated, but print journalism is not. Legislation treats the cable medium differently from both broadcasting and print journalism. These categories need not conform perfectly to the undefined phrase “the press” in the First Amendment. Differentiation among different elements of the media is constitutional, as long as it is not based on viewpoint or any other invidious consideration, and as long as the

differentiation is reasonable.<sup>7</sup> Whereas the Court is wisely reluctant to define “the press” for purposes of the First Amendment, it should grant Congress considerable deference in deciding who, as a matter of sound public policy, should be covered by the journalist-source privilege.

Thus, the primary reasons relied upon by the Court in *Branzburg* for its reluctance to recognize a robust First Amendment journalist-source privilege do not stand in the way of legislation to address the issue. To the contrary, the very weaknesses of the judicial process that make it difficult for a court to address this problem as a constitutional matter are precisely the strengths of Congress to address it well as a legislative matter.

#### IV. THE COSTS OF A JOURNALIST-SOURCE PRIVILEGE

The primary argument against *any* privilege is that it deprives the judicial or other investigative process of relevant evidence. There is nothing novel about that. Almost all rules of evidence deprive the fact-finder of relevant evidence. This is true not only of privileges, but also of rules against hearsay and opinion evidence, rules excluding proof of repairs and compromises, the exclusionary rule, the privilege against compelled self-incrimination, and rules protecting trade secrets and the identity of confidential government agents. The law of evidence inherently involves trade-offs between the needs of the judicial process and competing societal interests. But it is important to recognize that there is nothing unique about this feature of privileges.

A central question in assessing any such rule is how much relevant evidence will be lost if the rule is enacted. It is impossible to know this with any exactitude, because this inquiry invariably involves unprovable counterfactuals. But, as noted earlier, privileges have a distinctive feature in this regard that must be carefully considered.

If, in any given situation, we focus on the moment the privilege is invoked (for example, when the reporter refuses to disclose a source to a grand jury), the cost of the privilege will seem high, because we appear to be “losing” something quite tangible because of the privilege. But if we focus on the moment the source speaks with the reporter, we will see the matter quite differently.

Assume a particular source will not disclose confidential information to a reporter in the absence of a privilege. If there is no privilege, the source will not reveal the information, the reporter will not be able to publish the information, the reporter will not be called to testify before the grand jury, and the grand jury will not learn the source’s identity. Thus, in this situation, the absence of the privilege will deprive the grand jury of the *exact same evidence* as the privilege. But with the privilege, the public and law enforcement will gain access to the underlying information through the newspaper report. In this situation, the privilege is *costless* to the legal system, and at the same time provides significant benefits both to law enforcement and the public.

Of course, some, perhaps many, sources will reveal information to a reporter even without a privilege. It is the evidentiary loss of *those* disclosures that is the true measure of the cost of the privilege. (The same analysis holds for other privileges as well, such as attorney-client and doctor-patient.) It is essential to examine the privilege in this manner in order to understand the actual impact of the journalist-source privilege.

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<sup>7</sup> See, e.g., *Turner Broadcasting Inc. v. Federal Commc’ns Comm’n*, 512 U.S. 622 (1994) (upholding “must carry” provisions that favored broadcast over cable programmers); *Leathers v. Medlock*, 499 U.S. 439 (1991) (upholding a state law exempting newspapers and magazines but not cable television from a gross receipts tax); *Red Lion Broadcasting Co. v. Federal Commc’ns Comm’n*, 395 U.S. 357 (1969) (upholding regulations for broadcasting that would be unconstitutional for print media).

There are several ways to assess the relative costs and benefits. First, on balance, it is probably the case that the most important confidential communications, the ones that are of greatest value to the public, are those that would get the source in the most “trouble.” Thus, the absence of a privilege is most likely to chill the most valuable disclosures. Second, if one compares criminal prosecutions in states with an absolute privilege with those in states with only a qualified privilege, there is almost certainly no measurable difference in the effectiveness of law enforcement. Even though there may be a difference in the outcomes of a few idiosyncratic cases, the existence of even an absolute privilege probably has no discernible effect on the legal system *as a whole*. Focusing on these large-scale effects, rather than on a few highly unusual cases when the issue captures the public’s attention, it seems clear that the benefits society derives from the privilege outweigh its negative effects on law enforcement. This is so because the percentage of cases in which the issue actually arises is vanishingly small and because, in serious cases, prosecutors are almost always able to use alternative ways to investigate the crime.

As forty-nine states and the District of Columbia have concluded, public policy strongly supports the recognition of a journalist-source privilege. Indeed, the absence of a federal journalist-source privilege seems inexplicable.

## V. FRAMING A FEDERAL JOURNALIST-SOURCE PRIVILEGE

Many questions arise in framing such journalist-source privilege. Three of them are: Who can invoke the privilege? Should the privilege be absolute? What if the disclosure by the source is itself a crime?

### A. WHO CAN INVOKE THE PRIVILEGE?

At the outset, it must be recalled that, as a general rule, the privilege belongs to the source, not to the reporter. When the reporter invokes the privilege, she is merely acting as the agent of the source.<sup>8</sup> With that in mind, the question should properly be rephrased as follows: To whom may a source properly disclose information in reasonable reliance on the belief that the disclosure will be protected by the journalist-source privilege?

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<sup>8</sup> In several cases, however, courts have held that the journalist-source privilege belongs to the reporter and cannot be waived by the source. *See, e.g., Palandjian v. Pahlavi*, 103 F.R.D. 410, 413 (D.D.C. 1984); *Los Angeles Mem'l Coliseum Comm'n v. NFL*, 89 F.R.D. 489, 494 (C.D. Cal. 1981); *United States v. Cuthbertson*, 630 F.2d 139, 147 (3d Cir. 1980). This view of the privilege seems to assume that the primary purpose of the privilege is to maintain the independence of the press rather than to encourage open communication by sources. This view makes sense insofar as the issue is whether journalists should enjoy a “work product” privilege analogous to the attorney’s work product doctrine. To the extent such a doctrine applies to journalists, it would then be necessary to define precisely who is a journalist. Proposals for a “work product” doctrine for journalists generally assume that a qualified privilege would be adequate to protect this interest, as it is in the attorney work product situation. *See, e.g., Free Speech Protection Act of 2005*, S. 369, 109th Cong., 1st Sess. (2005) (proposed by Senator Dodd).

On the attorney work product doctrine, see *Hickman v. Taylor*, 329 U.S. 495, 510-511 (1947):

It is essential that a lawyer work with a certain degree of privacy, free from unnecessary intrusion by opposing parties and their counsel. Proper preparation of a client's case demands that he assemble information, sift what he considers to be the relevant from the irrelevant facts, prepare his legal theories and plan his strategy without undue and needless interference.

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This work is reflected, of course, in interviews, statements, memoranda, correspondence, briefs, mental impressions, personal beliefs, and countless other tangible and intangible ways... . Were such materials open to opposing counsel on mere demand, much of what is now put down in writing would remain unwritten. An attorney's thoughts, heretofore inviolate, would not be his own. Inefficiency, unfairness and sharp practices would inevitably develop in the giving of legal advice and in the preparation of cases for trial. The effect on the legal profession would be demoralizing. And the interests of the clients and the cause of justice would be poorly served.

The answer should be a functional one. The focus should not be on whether the reporter fits within any particular category. Rather, the source should be protected whenever he makes a confidential disclosure to an individual, reasonably believing that that individual regularly disseminates information to the general public, when the source's purpose is to enable that individual to disseminate the information to the general public.

Such a definition does not resolve every possible problem of interpretation. "General public," for example, should include specific communities, such as a university or a specialized set of readers. But the essence of the definition is clear. What should be of concern is the *reasonable* expectations of the source, rather than the formal credentials of the recipient of the information.

#### B. ABSOLUTE OR QUALIFIED PRIVILEGE?

Thirty-six states have a qualified journalist-source privilege.<sup>9</sup> In these states, the government can require the journalist to reveal confidential information if the government can show that it has exhausted alternative ways of obtaining the information and that the information is necessary to serve a substantial government interest. The logic of the qualified privilege is that it appears never to deny the government access to the information that the government really "needs." Correlatively, it appears to protect the privilege when breaching it would serve no substantial government interest. As such, it appears to be a sensible compromise. Nothing could be farther from the truth.

Although the qualified privilege has a superficial appeal, it is deeply misguided. It purports to achieve the best of both worlds, but instead achieves the opposite. For quite persuasive reasons, other privileges, such as the attorney-client, doctor-patient, psychotherapist-patient, and priest-penitent privileges, which are deeply rooted in our national experience, do *not* allow such ad hoc determinations of "need" to override the privilege.

The qualified privilege rests on the illusion that the costs and benefits of the privilege can properly be assessed at the moment the privilege is asserted; this is false. The real impact of the privilege must be assessed, not when the privilege is asserted, but when the source speaks with the reporter. By focusing on the wrong moment in time, the qualified privilege ignores the disclosures it *prevents* from ever occurring. That is, it disregards the cost to society of all the disclosures that sources *do not make* because they are chilled by the uncertainty of the qualified privilege. It is thus premised on a distorted "balancing" of the competing societal interests.

Imagine yourself in the position of a source. You are a congressional staffer who has reason to believe a Senator has taken a bribe. You want to reveal this to a journalist, but you do not want to be known as "loose-lipped" or "disloyal." You face the prospect of a qualified privilege. At the moment you speak with the reporter, it is impossible for you to know whether, four months hence, some prosecutor will or will not be able to make the requisite showing to pierce the privilege. This puts you in a craps-shoot.

But the very purpose of the privilege is to *encourage* sources to disclose useful information to the public. The uncertainty surrounding the application of the qualified privilege undercuts this purpose and is unfair to sources whose disclosures we are attempting to induce. This is precisely why other privileges are not framed in this manner.

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<sup>9</sup> Eighteen states have a qualified statutory privilege, including Alaska, Arizona, Arkansas, Colorado, Florida, Georgia, Illinois, Louisiana, Michigan, Minnesota, New Jersey, New Mexico, North Carolina, North Dakota, Oklahoma, Rhode Island, South Carolina, and Tennessee. Another eighteen states have a qualified judicial privilege.

As a result, thirteen states and the District of Columbia have reached the conclusion that the journalist-source privilege must be absolute.<sup>10</sup> And, indeed, there is considerable virtue in a simple, straightforward, unambiguous privilege. At the same time, however, there may be *some* narrowly-defined circumstances in which it may seem quite sensible to breach the privilege.

For example, if a journalist broadcasts information, obtained from a confidential source, about a grave crime or serious breach of national security that is likely to be committed imminently, it may seem irresponsible to privilege the identity of the source. More concretely, suppose a reporter broadcasts a news alert that, according to a reliable, confidential source, a major terrorist attack will strike New York the next day, and law enforcement authorities want the reporter to reveal the name of the source so they can attempt to track him down and possibly prevent the attack. Is this a sufficiently compelling justification to override the privilege? It would certainly seem so, and this would be analogous to the rule in the psychotherapist-patient context that voids the privilege if the psychotherapist learns that her patient intends imminently to inflict serious harm on himself or others.

But even in this situation the matter is not free from doubt. It must be borne in mind that, as a practical matter, without an absolute privilege the source might not be willing to disclose this information. Thus, in the long-run, this exception could well hinder rather than support law enforcement. Public officials are better off knowing that a threat exists, even if they do not know the identity of the source, than knowing nothing at all. Thus, breaching the privilege in even this seemingly compelling situation may actually prove counterproductive in the long-run. It is for this reason that the attorney-client privilege generally provides that no showing of need is sufficient to pierce the privilege.<sup>11</sup> Apart from this very narrowly-defined exception, however, an absolute privilege will best serve the *overall* interests of society.

### C. WHAT IF THE SOURCE'S DISCLOSURE IS ITSELF UNLAWFUL?

A relatively rare but interesting twist occurs when the source's disclosure is itself a criminal act. Suppose, for example, a government employee unlawfully reveals to a reporter classified information that the United States has broken a terrorist code or confidential information about a private individual's tax return. As we have seen, the primary purpose of the privilege is to encourage sources to disclose information to journalists because such disclosures promote the public interest. But when the act of disclosure is itself unlawful, the law has already determined that the public interest cuts *against* disclosure. It would thus seem perverse to allow a journalist to shield the identity of a source whose disclosure is itself punishable as a criminal act. The goal of the privilege is to foster whistleblowing and other lawful disclosures, not to encourage individuals to use the press to commit criminal acts.<sup>12</sup>

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<sup>10</sup> The thirteen states with an absolute privilege are Alaska, Delaware, Indiana, Kentucky, Maryland, Montana, Nebraska, Nevada, New York, Ohio, Oregon, and Pennsylvania.

<sup>11</sup> See, e.g., *Admiral Insurance Co. v. U.S. District Court*, 881 F.2d 1486, 1495 (9th Cir. 1989) ("The attorney-client privilege cannot be vitiated by a claim that the information sought is unavailable from any other source.... Such an exception would either destroy the privilege or render it so tenuous and uncertain that it would be little better than no privilege at all").

<sup>12</sup> An interesting question is whether the same principle should apply when the leak is not a crime, but a tort. For example, suppose a confidential source makes a false statement of fact to a newspaper, which publishes the statement, attributing it to a confidential source. Can the newspaper be compelled to reveal the identity of the source on the theory that there is no public policy to encourage people to make false statements of fact to newspapers?

A rule that excluded all unlawful disclosures from the scope of the journalist-source privilege would be consistent with other privileges. A client who consults an attorney in order to figure out how to commit the perfect murder is not protected by the attorney-client privilege, and a patient who consults a doctor in order to learn how best to defraud an insurance company is not protected by the doctor-patient privilege. And this is so regardless of whether the attorney or doctor knew of the client's or patient's intent at the time of the conversation. Such use of doctors and lawyers is not what those privileges are designed to encourage.

By the same reasoning, a source whose disclosure is unlawful is not engaging in conduct that society intends to encourage. To the contrary, the very purpose of prohibiting the disclosure is to *discourage* such conduct. It would therefore seem sensible to conclude that such a source is not entitled to the protection of the journalist-source privilege.

There are, however, several objections to such a limitation on the privilege. In some circumstances, it may not be clear to the reporter, or even to the source, whether the disclosure is unlawful. If the privilege does not cover unlawful disclosures, but it is unclear whether a particular disclosure was unlawful, the reporter should make clear that a promise of confidentiality should be understood as binding *only to the extent allowed by law*. A similar question may arise in the imminent crime/ national security situation. Ultimately, it is for the court, not the reporter, to resolve these issues. In the unlawful disclosure context, the court should protect the privilege unless it finds that the source knew or should have known that the disclosure was unlawful.

A second objection to an unlawful disclosure limitation is that some unlawful disclosures involve information of substantial public value. The *Pentagon Papers* case<sup>13</sup> is a classic illustration. Although the government can ordinarily punish an employee who unlawfully leaks classified information,<sup>14</sup> it does not *necessarily* follow that the privilege should be breached if the information revealed is of substantial value to the public. This is a difficult and tricky question.

In the context of unlawful leaks, the journalist-source privilege may be seen as an intermediate case. On the one hand, government employees ordinarily can be punished for violating reasonable confidentiality restrictions with respect to information they learn during the course of their employment.<sup>15</sup> On the other hand, the media ordinarily may publish information they learn from an unlawful leak, unless the publication creates a clear and present danger of a grave harm to the nation.<sup>16</sup> The journalist-source privilege falls between these two rules. Because the leak is unlawful, it seems perverse to shield the source's identity. But because the press has a constitutional right to publish the information, it seems perverse to require the press to identify the source.

A resolution of this dilemma is to uphold the privilege in this situation if the unlawful leak discloses information of substantial public value. This strikes a reasonable

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<sup>13</sup> *New York Times v. United States*, 403 U.S. 713 (1971).

<sup>14</sup> It is important to note that if the leaker cannot constitutionally be punished for the leak, then the leak is not unlawful, and this entire analysis is irrelevant.

<sup>15</sup> See, e.g., *Snepp v. United States*, 444 U.S. 507 (1980) (upholding a restriction on the publication by a former CIA agent of information learned during the course of his employment by the CIA).

<sup>16</sup> See, e.g., *Landmark Commc'ns, Inc. v. Virginia*, 435 U.S. 829 (1978) (holding that the government cannot prohibit the publication of confidential information); *Nebraska Press Ass'n v. Stuart*, 427 U.S. 539 (1976) (holding that the government cannot prohibit the publication of confessions and other facts strongly implicative of the accused in a criminal case); *New York Times Co. v. United States*, 403 U.S. 713 (1971) (holding that the government could not enjoin publication of the Pentagon Papers).

accommodation between full protection of the source's identity and no protection of his identity, based on the contribution of the leak to public debate.<sup>17</sup> Although this rule will inevitably involve some uncertainty in marginal cases, it would apply only in cases in which the leak is itself unlawful, so any chilling effect would be of relatively minor concern.<sup>18</sup>

## VI. CONCLUSION

Not every conversation between a source and a journalist is confidential. To meet this standard, the journalist must either expressly promise confidentiality, or the circumstances and content of the conversation must be such that the source would reasonably assume confidentiality.

Reporters have no legal or moral right to promise confidentiality beyond what is recognized in the law. It is the responsibility of the source as well as the reporter to understand that the reporter cannot legally promise more than the law allows. If a reporter expressly promises more than the law allows, that promise is legally ineffective, like any other promise that is contrary to public policy. A reporter who knowingly deceives a source by promising more than the law authorizes is properly subject to professional discipline and civil liability to the source.

Supporters of an absolute journalist-source privilege argue that anything less than an absolute privilege will "chill" free expression. It is true that some disclosures that should not occur will be chilled, and some disclosures that should occur will be chilled. The former is the reason for a less than absolute privilege; the latter is the cost of a less than absolute privilege.

It is in the nature of free speech that it is easily discouraged. Most people know that their decision to participate in public debate by attending a demonstration, signing a petition, or disclosing information to the press is unlikely to change the world in any measurable way. Except in extraordinary circumstances, any one person's participation will have no discernible impact. As a consequence, any risk of penalty for speech will often cause individuals to forego their right of free expression. This is a serious concern whenever we shape rules about public discourse.

But this argument can be made against *any* restriction of free expression. Taken to its logical conclusion, it means that no restriction of speech is ever permissible, because every restriction will chill some speech that should not be chilled. The chilling effect argument must be used with some restraint. In part because of chilling effect concerns, the complete absence of a federal journalist-source privilege is indefensible and the qualified journalist-source privilege strikes the wrong balance. But an absolute privilege may go too far.

A rule that limits the privilege (a) when the government can convincingly demonstrate it needs the information to prevent an imminent and grave crime or threat to the national security or (b) when the disclosure is unlawful and does not substantially contribute to public debate strikes the right balance. It unduly sacrifices neither

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<sup>17</sup> This is a higher standard of newsworthiness than the Supreme Court has applied in deciding when the press has a First Amendment right to publish or broadcast information obtained from unlawful sources. See *Bartnicki v. Vopper*, 532 U.S. 514 (2001) (holding that a radio commentator could not constitutionally be held liable for damages for broadcasting an unlawfully recorded telephone call, where the broadcast involved "truthful information of public concern").

<sup>18</sup> To illustrate what I mean by "substantial public value," I would place the Pentagon Papers and the leak of the Abu Ghraib scandal on one side of the line, and Karl Rove's conversation with Matt Cooper about Valerie Plame and James Taricani's leak of grand jury evidence in Rhode Island on the other.

compelling law enforcement interests nor the equally compelling interests in promoting a free and independent press and a robust public discourse.

Finally, in light of the substantial interstate effects of the media, it seems appropriate and sensible for Congress to enact a shield law that governs not only federal proceedings, but state and local proceedings as well. Because of the interstate nature of modern communications, a common set of expectations among sources, journalists, law enforcement officials, and courts is essential, and federal legislation is the best way to achieve this result.<sup>19</sup>

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<sup>19</sup> Under the Supremacy Clause, states could not offer a weaker journalist-source privilege than that provided in such federal legislation, but they could of course offer a more protective privilege for state and local proceedings. Thus, such a law would not interfere with the thirteen states that currently recognize an absolute journalist-source privilege.

# The Canon of Constitutional Avoidance and Executive Branch Legal Interpretation in the War on Terror

Trevor W. Morrison\*

A common thread runs throughout many of the most controversial episodes of executive branch legal interpretation in the war on terror, including the initial “torture memorandum” issued by the Justice Department’s Office of Legal Counsel, the President’s signing statement regarding the McCain Amendment’s ban on the mistreatment of detainees, and the Justice Department’s defense of the National Security Agency’s warrantless wiretapping program. Each involved the interpretation of a federal statute, and each employed a rule known as the canon of constitutional avoidance to support its interpretation.

This paper assesses the legitimacy of the avoidance canon in executive branch statutory interpretation generally, and in the above-mentioned war-on-terror episodes in particular. To do that, Part I proposes an analytical framework for thinking about this issue as a general matter, emphasizing the importance of considering both the theoretical underpinnings of the avoidance canon and the institutional context within which it is being used. Part II then applies that framework to the three episodes mentioned above, and shows how each entailed a serious abuse of the avoidance canon.

## I. GENERAL CONSIDERATIONS AFFECTING THE LEGITIMACY OF CONSTITUTIONAL AVOIDANCE IN THE EXECUTIVE BRANCH

The avoidance canon, as it is colloquially known, provides that “[w]here an otherwise acceptable construction of a statute would raise serious constitutional problems, the Court will construe the statute to avoid such problems unless such a construction is plainly contrary to the intent of Congress.”<sup>1</sup> Although it has been the target of considerable academic criticism over the last fifteen years, it appears frequently in judicial opinions and has long been embraced by the Supreme Court as a “‘cardinal principle’ of statutory interpretation.”<sup>2</sup> Interestingly, avoidance also appears quite frequently in the work of the executive branch, including in the examples cited above and also in the more routine work of a variety of administrative agencies like the Federal Communications Commission (FCC), the Environmental Protection Agency (EPA), and the Federal Energy Regulatory Commission (FERC). Virtually without exception,

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<sup>1</sup> *Edward J. DeBartolo Corp. v. Fla. Gulf Coast Bldg. & Constr. Trades Council*, 485 U.S. 568, 575 (1988).

<sup>2</sup> *Zadvydas v. Davis*, 533 U.S. 678, 689 (2001) (quoting *Crowell v. Benson*, 285 U.S. 22, 62 (1932)).

however, the question whether the avoidance canon should apply at all in the executive branch receives no real attention. Instead, the validity of the avoidance canon is typically taken as “settled,”<sup>3</sup> its accepted status in the courts treated as sufficient to justify its use in the executive branch as well.<sup>4</sup>

What these executive invocations of avoidance tend not to provide is any consideration of whether the *reasons* supporting the judicial use of avoidance are relevant in the executive branch. Are those reasons specific to the federal judiciary—for example, do they seek to facilitate judicial deference to legislative majorities, to minimize counter-majoritarianism, or to respect the “case or controversy” limitations of Article III—or do they relate to other substantive norms not confined to the courts? Similarly absent is any sustained examination of interpretive context. As described by the courts, the avoidance canon applies only in circumstances of statutory ambiguity.<sup>5</sup> Can executive branch actors ever overcome ambiguity by calling upon sources of statutory meaning not available to courts, thus rendering the avoidance canon unnecessary? In short, determining whether the avoidance canon is appropriate in any particular instance of executive branch legal interpretation should entail considering both the *theory* underlying the canon and the *context* in which it will be deployed.

#### A. TWO THEORIES OF AVOIDANCE: JUDICIAL RESTRAINT AND CONSTITUTIONAL ENFORCEMENT

Assessing whether the avoidance canon should apply in the executive branch starts with a consideration of how the courts have developed and justified the canon. The cases and the academic commentary supply two theories of the canon, each of which is worth considering.

Two related but distinct rules travel under the avoidance canon’s banner. The first, which Adrian Vermeule calls “classical avoidance,” provides that, when faced with statutory ambiguity, courts should avoid interpretations that render statutes *actually unconstitutional*.<sup>6</sup> This rule essentially implements the familiar presumption that Congress intends to legislate within constitutional boundaries. The second avoidance rule, which Professor Vermeule calls “modern avoidance,” came to prominence in the early twentieth century and is the more commonly invoked rule today. As noted above, modern avoidance directs courts to construe ambiguous statutes to avoid not only actual unconstitutionality, but *serious constitutional doubts* as well.

The move from classical to modern avoidance is commonly associated with the Supreme Court’s decision in *United States ex rel. Attorney General v. Delaware & Hudson Company*.<sup>7</sup> In that case, the Court became concerned that classical avoidance

<sup>3</sup> See, e.g., *Limitation on the Detention Authority of the Immigration and Naturalization Service*, 2003 WL 21269067 (Op. Off. Legal Counsel, Feb. 20, 2003) (“It is settled, of course, that where there are two or more plausible constructions of a statute, a construction that raises serious constitutional concerns should be avoided.”).

<sup>4</sup> See, e.g., *Presidential Certification Regarding the Provision of Documents to the House of Representatives Under the Mexican Debt Disclosure Act of 1995*, 20 Op. Off. Legal Counsel 253, 265 (1996) (noting the courts’ use of the avoidance canon and then stating that “[t]he practice of the executive branch is and should be the same.”).

<sup>5</sup> See *Clark v. Martinez*, 125 S. Ct. 716, 726 (2005) (“The canon of constitutional avoidance comes into play only when, after the application of ordinary textual analysis, the statute is found to be susceptible of more than one construction; and the canon functions as a means of choosing between them.”); *United States v. Oakland Cannabis Buyers’ Coop.*, 532 U.S. 483, 494 (2001) (“[C]anon of constitutional avoidance has no application in the absence of statutory ambiguity.”).

<sup>6</sup> See Adrian Vermeule, *Saving Constructions*, 85 Geo. L.J. 1945, 1949 (1997).

<sup>7</sup> 213 U.S. 366 (1909).

entails providing what amounts to an advisory opinion. Its reasoning was as follows: A court is faced with a statute that could mean either X or Y. Although both readings are plausible, conventional tools of statutory interpretation suggest that X is the best reading. But X also raises serious constitutional concerns. The court proceeds to examine those constitutional concerns and concludes that X is indeed unconstitutional. At that point, classical avoidance directs the court to read the statute to mean Y instead, thus arguably transforming its pronouncement of X's unconstitutionality into an advisory opinion.<sup>8</sup> To avoid those and related problems, the Court in *Delaware & Hudson* and later cases embraced the modern rule that courts should construe statutes not just to avoid actual unconstitutionality, but also to avoid serious constitutional doubts.<sup>9</sup>

The critical point here is that the modern avoidance canon emerged out of a set of concerns specific to the federal judiciary—the rule against advisory opinions and, more broadly, concerns about the countermajoritarian nature of judicial review. I call this account of modern avoidance, which is the dominant account in current doctrine, the *judicial restraint theory* of avoidance. In a nutshell, the judicial restraint theory casts modern avoidance as an attempt to implement the presumed congressional intent underlying classical avoidance (*viz.*, that Congress intends to pass statutes that comply with the Constitution) in a manner consistent with the institutional limitations of the federal judiciary (*viz.*, the need to avoid advisory opinions and, more broadly, to respect legislative supremacy). Whatever we think of the reasoning underlying the judicial restraint theory, clearly it has no purchase outside the judiciary. Thus, if the avoidance canon is understood on these terms, it would seem entirely out of place in the executive branch.

There is, however, an alternative account of modern avoidance. On this account, which I call the *constitutional enforcement* theory, the avoidance canon is simply a means of enforcing the underlying constitutional provision. The idea is that as Congress approaches constitutional boundaries, it activates a constitutional interest in keeping government within them. The avoidance canon guards those boundaries by making it more difficult for Congress even to come near them.<sup>10</sup> This account of avoidance is especially forceful in areas where the underlying constitutional provision tends to be underenforced by the judiciary.<sup>11</sup> In those circumstances, the avoidance canon provides an indirect means of enforcing whatever norm is embedded in the constitutional provision.

On this alternative account, modern avoidance would seem to apply just as well in the executive branch as in the courts. Enforcing the Constitution is not an exclusively judicial task. The President's oath of office imposes on him a duty to "preserve,

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<sup>8</sup> By modern standards this is probably not a literal advisory opinion. But whatever we now think of *Delaware & Hudson's* advisory opinion concern, that concern is what drove it to embrace modern avoidance.

<sup>9</sup> See *Delaware & Hudson*, 213 U.S. at 408; *Ashwander v. Tennessee Valley Auth.*, 297 U.S. 288, 345-46 (1936) (Brandeis, J., concurring).

<sup>10</sup> There are a number of prominent accounts of avoidance along these lines. See, e.g., William Eskridge, Jr., *Dynamic Statutory Interpretation* (1994); Philip Frickey, *Getting from Joe to Gene (McCarthy): The Avoidance Canon, Legal Process Theory, and Narrowing Statutory Interpretations in the Early Warren Court*, 93 Cal. L. Rev. 397, 450-55 (2005); Ernest A. Young, *Constitutional Avoidance, Resistance Norms, and the Preservation of Judicial Review*, 78 Tex. L. Rev. 1549 (2000); Cass R. Sunstein, *Nondelegation Canons*, 67 U. Chi. L. Rev. 315 (2000).

<sup>11</sup> The classic work on underenforced constitutional norms is Lawrence Gene Sager, *Fair Measure: The Legal Status of Underenforced Constitutional Norms*, 91 Harv. L. Rev. 1212 (1978).

protect and defend the Constitution,”<sup>12</sup> and that duty is not contingent on judicial enforcement. To the contrary, it is especially significant in areas where the constitutional norm is judicially underenforced. The underenforced norms thesis says that when institutional or other factors inhibit robust judicial enforcement of a particular constitutional provision, it falls to the executive branch (and the legislative branch) to enforce the provision more fully. In a similar vein, Akhil Amar and others have argued that the Constitution builds in a preference for the most government-restrictive view of the law adopted by any of the three branches.<sup>13</sup> On this account, even if the underlying constitutional provision is *not* especially underenforced by the courts, the Constitution is designed to prefer whichever branch’s implementation of the provision is most protective.

Analogizing from these accounts of direct constitutional interpretation to instances of statutory construction, executive use of the avoidance canon would appear entirely appropriate. After all, the fundamental aim of avoidance as envisioned by the constitutional enforcement theory is to implement constitutional norms by resisting congressional forays into constitutionally sensitive areas. On this view, the avoidance canon is a statutory means of enforcing constitutional values. Employing the avoidance canon, then, can be viewed as fulfilling the executive branch’s independent obligation to enforce the Constitution itself.

In sum, the propriety of modern constitutional avoidance in executive branch statutory interpretation depends, first, on which theory of avoidance one chooses. Under the judicial restraint theory, modern avoidance seems inapplicable in the executive branch. The constitutional enforcement theory, in contrast, is not institutionally specific. If it provides a persuasive account of the avoidance canon in the courts, it should be persuasive in the executive branch as well.

## B. THE NEED FOR CONGRESSIONAL NOTIFICATION

There is one important condition on the executive’s use of avoidance under the constitutional enforcement theory: Congress should be notified when the executive branch uses the canon. As described above, the enforcement theory views avoidance as a means of resisting congressional incursions on constitutional values by requiring Congress to speak clearly before its enactments will be read to implicate those values. But implicit in—indeed, central to—that view is the presumption that Congress knows (or could know, upon investigation of the public record) when its enactments have been narrowed by way of avoidance. That presumption is invariably correct in the judicial context, since courts announce their interpretations in published opinions.

The executive branch is a different matter, however. Many executive interpretations are not disclosed to the public, at least not intentionally so. But if the executive’s use of avoidance is to be justified under the constitutional enforcement theory, some mechanism for informing Congress seems essential. Indeed, if Congress does not even know that the executive branch has used avoidance to construe a statute narrowly, avoidance cannot be defended as a means of protecting constitutional norms by remanding Congress to the legislative process. Congress, after all, would not even know of the remand.

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<sup>12</sup> U.S. Const. art. II, § 1, cl. 8. Similarly, the Take Care Clause requires the President to “take care that the laws be faithfully executed,” *id.* art. II, § 3, which entails an obligation to respect both federal statutes and the Constitution.

<sup>13</sup> See Akhil Reed Amar, *Of Sovereignty and Federalism*, 96 Yale L.J. 1425, 1504 (1987).

### C. INSTITUTIONAL SELF-PROTECTION AND THE RISK OF ABUSE

Assuming one accepts the constitutional enforcement theory of avoidance, and apart from the congressional notice point just discussed, one might still be inclined to think that certain executive uses of the avoidance canon are especially problematic. In particular, one might worry about what could be called “self-dealing” uses of avoidance to enhance executive power. Whereas, for example, the use of avoidance to narrowly construe a speech-restrictive statute would generally benefit a private actor at the expense of the executive branch, in other situations the executive branch might employ avoidance to shield itself from legislative attempts to regulate or restrict the actions of the executive branch itself. In these circumstances, the avoidance canon arguably becomes a means for the executive branch to evade legitimate legislative restrictions. Accordingly, one might argue that it is categorically illegitimate for the executive branch to employ the avoidance canon when the statute in question restricts the actions of the executive branch itself.<sup>14</sup>

I disagree. To be sure, executive use of the avoidance canon in the separation of powers area can sometimes carry an air of self-dealing. But that alone does not make it illegitimate. To the contrary, the constitutional design contemplates such self-interested actions. “Ambition,” James Madison explained, “must be made to counteract ambition.” To that end, “the great security against a gradual concentration of the several powers in the same department consists in giving to those who administer each department the necessary constitutional means and personal motives to resist encroachments of the others.”<sup>15</sup> The avoidance canon provides just such a means for an executive branch motivated to protect itself from legislative intrusions.

Yet there must be limits. In particular, to conclude that the constitutional enforcement theory provides a generally workable justification for avoidance in the executive branch is emphatically not to say that *all* executive uses of avoidance are beyond reproach. There remains a risk that executive actors will abuse the avoidance canon by employing it in circumstances where, by its own terms, it does not apply. Specifically, they might impose avoidance on a statute that is not sufficiently ambiguous to trigger the canon, and/or they might rely on a marginal or even fanciful constitutional “concern” to drive the analysis. For obvious reasons, the risk of such abuse is especially acute in “self-protective” areas. Faced with legislation purporting to impose limits on the executive branch, executive officials will have an institutional incentive to resist those limits however they can. The avoidance canon is particularly attractive for those purposes, since it enables the executive branch to evade the congressional limitations in question without having to commit to a (perhaps politically costly) position that the limits are actually unconstitutional. In order to repel congressional encroachments upon executive power in a “quieter” fashion, the executive branch may thus be tempted to abuse the avoidance canon by fabricating statutory ambiguity and trumping up constitutional concerns.

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<sup>14</sup> For example, H. Jefferson Powell has argued in a short essay that executive branch lawyers “should never [use the avoidance canon] when the issue involves the commander-in-chief power or other questions about the separation of powers between Congress and the President.” H. Jefferson Powell, *The Executive and the Avoidance Canon*, 81 Ind. L.J. 1313, 1314-15 (2006); *see id.* at 1315 (“It is an error for the executive branch to employ the avoidance canon when the statute at issue implicates legislative-executive separation of powers issues generally, and emphatically so when the statute bears on, or seeks to structure, the exercise of the President’s authority as commander-in-chief.”).

<sup>15</sup> The Federalist No. 51, at 321-22 (James Madison) (Clinton Rossiter ed., 1961); *see Clinton v. City of New York*, 524 U.S. 417, 452 (1998) (Kennedy, J., concurring) (stating that the purpose of separation of powers is to “ensure the ability of each branch to be vigorous in asserting its proper authority”).

Abuse is not inevitable, however, and the risk of abuse need not impeach all self-protective uses of the avoidance canon. Instead, we should focus on whether individual applications of avoidance in the executive branch—particularly those that serve the executive’s own institutional interests—are consistent with the canon’s basic predicates of genuine statutory ambiguity and legitimate constitutional concerns. If those predicates are not met in a particular case, then we will have identified an abuse of the avoidance canon as applied in that case. As we will see in Part II, there is a strong argument that each of the war-on-terror episodes cited at the beginning of this paper involved an abuse of this sort.

#### D. THE IMPORTANCE OF INTERPRETIVE CONTEXT

The risks of abuse just mentioned points to a final general consideration—the precise institutional context within which the executive employs the avoidance canon. The avoidance canon is a tool for managing statutory ambiguity by assigning a particular consequence to the ambiguity. Whether it is appropriate to assign that consequence depends on the interpreter’s ability to resolve the ambiguity by other, more direct means. Thus, determining whether it is appropriate for executive officials to use the avoidance canon requires considering the information available to them about the statute in question.

Statutory interpretation in the executive branch often takes place in a much more information-rich context than does judicial statutory interpretation. By appearing before and corresponding with the congressional committees that drafted a statute, for example, agency and other executive branch officials may be both more familiar with the considerations that went into the statute’s drafting and better able to place certain parts of the legislative record in the proper context.<sup>16</sup> This informational superiority may, in turn, bring clarity to otherwise ambiguous statutory language. When that occurs, there is no need for the avoidance canon. That is, although the plain text of a statute might appear ambiguous, and although one possible reading of the statute would raise constitutional doubts sufficient to trigger the avoidance canon, the relevant executive actor may be in a position to resolve the statutory ambiguity without recourse to the avoidance canon. In such circumstances, executive use of the avoidance canon is not only unnecessary but inappropriate.<sup>17</sup> In short, even if one accepts the constitutional enforcement theory as providing a generally sound theoretical grounding for the executive’s use of the avoidance canon, specific uses of the canon must also be evaluated in light of the statutory information available to the executive interpreters in question.

## II. SPECIFIC WAR-ON-TERROR EXAMPLES OF AVOIDANCE IN THE EXECUTIVE BRANCH

Having established a general analytical structure for evaluating executive branch uses of the avoidance canon, we can now turn to some specific examples. I focus here

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<sup>16</sup> See generally Peter L. Strauss, *When the Judge is Not the Primary Official With Responsibility to Read: Agency Interpretation and the Problem of Legislative History*, 66 Chi.-Kent L. Rev. 321 (1990).

<sup>17</sup> This point assumes a general approach to executive branch statutory interpretation that looks not only to the text itself but also to legislative history and other extratextual sources. Although the use of legislative history in the courts is a topic of considerable academic debate, there may be reasons to accept such use in the executive branch even if one opposes it in the courts. In any event, there is a long and continuing practice of executive officials employing legislative history when interpreting statutes.

on the three examples identified at the beginning of the issue paper: the Office of Legal Counsel's (OLC's) Bybee Memorandum regarding statutory prohibitions on the use of torture, President Bush's signing statement regarding the McCain Amendment, and the Justice Department's defense of the National Security Agency's (NSA's) warrantless wiretapping program. In each of these examples, as demonstrated below, the executive's use of the avoidance canon is highly problematic.

#### A. THE BYBEE MEMORANDUM

In the Bybee Memorandum,<sup>18</sup> OLC addressed the constraints imposed by a federal criminal statute implementing the international Convention Against Torture. The statute makes it a crime for any person "outside the United States [to] commit[] or attempt[] to commit torture."<sup>19</sup> The overall thrust of the Bybee Memorandum was to construe the statute narrowly so that it prohibited only a small set of particularly brutal actions. In addition, though, the Bybee Memorandum concluded that the statute would raise serious constitutional problems if it were construed to apply to *any* interrogation ordered by the President pursuant to his constitutional authority as Commander in Chief. Enter the avoidance canon:

In light of the President's complete authority over the conduct of war, without a clear statement otherwise, we will not read a criminal statute as infringing on the President's ultimate authority in these areas. We have long recognized, and the Supreme Court has established a canon of statutory construction that statutes are to be construed in a manner that avoids constitutional difficulties so long as a reasonable alternative construction is available... . This canon of construction applies especially where an act of Congress could be read to encroach upon powers constitutionally committed to a coordinate branch of government.

In the area of foreign affairs, and war powers in particular, the avoidance canon has special force... . We do not lightly assume that Congress has acted to interfere with the President's superior position as Chief Executive and Commander in Chief in the area of military operations... .

The President's power to detain and interrogate enemy combatants arises out of his constitutional authority as Commander in Chief. A construction of Section 2340A that applied the provision to regulate the President's authority as Commander in Chief to determine the interrogation and treatment of enemy combatants would

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<sup>18</sup> Memorandum from Jay S. Bybee, Assistant Attorney General, Office of Legal Counsel, to Alberto Gonzales, Counsel to the President, at 34 (Aug. 1, 2002) [hereinafter Bybee Memorandum], subsequently withdrawn and replaced by Memorandum from Daniel Levin, Acting Assistant Attorney General, Office of Legal Counsel, to James B. Comey, Deputy Attorney General, (Dec. 30, 2004). The Bybee Memorandum gets its name from its ostensible author, then-Assistant Attorney General (and now-federal judge) Jay S. Bybee. As just noted, after being issued on August 1, 2002, it was withdrawn and replaced by a more modest memorandum on December 30, 2004. I do not discuss the Bybee Memorandum here for purposes of establishing current OLC views on the law of torture, but simply as an illustration of the ways OLC has employed the avoidance canon.

<sup>19</sup> 18 U.S.C. § 2340A.

raise serious constitutional questions... . Accordingly, we would construe Section 2340A to avoid this constitutional difficulty, and conclude that it does not apply to the President's detention and interrogation of enemy combatants pursuant to his Commander-in-Chief authority.<sup>20</sup>

In the two years since it was leaked to the public, the Bybee Memorandum has been withered by criticism.<sup>21</sup> Focusing just on its use of the avoidance canon, the Memorandum perfectly illustrates the ways in which the canon can be abused, especially in circumstances of institutional "self-protection." First, although the avoidance canon is limited to cases of statutory ambiguity, the torture statute does not appear ambiguous on the point in question. By its terms it contains no suggestion that presidentially-ordered torture is somehow exempt from its prohibitions.<sup>22</sup> Thus, there is no ambiguity for the avoidance canon to engage. Second, the constitutional vision driving the Bybee Memorandum's analysis is seriously flawed. Indeed, the Memorandum failed even to cite, much less discuss, the most significant separation of powers precedent of the post-World War II era—Justice Jackson's concurring opinion in the *Steel Seizure Case*.<sup>23</sup> In these respects, even if one is inclined to accept (pursuant

<sup>20</sup> Bybee Memorandum at 34-35. The Memorandum went on to conclude, in the alternative, that if Section 2340A must be read to apply to interrogations ordered by the President, it would be unconstitutional. See *id.* at 36-39. That conclusion rests on the same problematic constitutional analysis that I discuss in the text.

<sup>21</sup> See, e.g., W. Bradley Wendel, *Legal Ethics and the Separation of Law and Morals*, 91 Cornell L. Rev. 67, 68 (2005) ("The overwhelming response by experts in criminal, international, constitutional, and military law was that the legal analysis in the [Bybee Memorandum] was so faulty that the lawyers' advice was incompetent."); Confirmation Hearing on the Nomination of Alberto R. Gonzales to be Attorney General of the United States Before the Senate Committee on the Judiciary, 109th Cong. 158 (2005) (statement of Harold Hongju Koh, Dean, Yale Law School) ("[I]n my professional opinion, the [Bybee Memorandum] is perhaps the most clearly erroneous legal opinion I have ever read."); Adam Liptak, *Legal Scholars Criticize Memos on Torture*, N.Y. Times, June 25, 2004, at A14 (quoting, *inter alios*, Cass Sunstein describing the legal analysis as ... very low level, . . . very weak, embarrassingly weak, just short of reckless"); Eric Lichtblau, *Justice Nominee Is Questioned on Department Torture Policy*, N.Y. Times, Jul. 27, 2005 (reporting that Timothy Flanigan, who had been Deputy White House Counsel when Bybee Memorandum was issued, stated during hearings regarding his (later withdrawn) nomination to be Deputy Attorney General that he found the Memo "sort of sophomoric").

<sup>22</sup> 18 U.S.C. § 2340A(a) & (b) reads in full:

- (a) Offense.— Whoever outside the United States commits or attempts to commit torture shall be fined under this title or imprisoned not more than 20 years, or both, and if death results to any person from conduct prohibited by this subsection, shall be punished by death or imprisoned for any term of years or for life.
- (b) Jurisdiction.— There is jurisdiction over the activity prohibited in subsection (a) if—
  - (1) the alleged offender is a national of the United States; or
  - (2) the alleged offender is present in the United States, irrespective of the nationality of the victim or alleged offender.

All agree that the statute's reference to "whoever" includes U.S. government officials. That point is reinforced by the statute's definition of torture as "an act committed by a person acting under the color of law specifically intended to inflict severe physical or mental pain or suffering (other than pain or suffering incident to lawful sanctions) upon another person within his custody or physical control." See *id.* § 2340(1). Moreover, the rule requiring a clear statement before a statute will be read to apply to the President does not apply here, since the question is not whether the President himself may be prosecuted for violating the statute, but whether any government official may be prosecuted under the statute for actions ordered or authorized by the President.

<sup>23</sup> See *Youngstown Sheet & Tube Co. v. Sawyer*, 343 U.S. 579 (1952). For a collection of statements regarding the influence of Justice Jackson's analytical framework, see Trevor W. Morrison, *Hamdi's*

to the constitutional enforcement theory) that the avoidance canon does have a place in executive branch statutory interpretation, the Bybee Memorandum stands as a prominent example of the ways in which the canon can be abused.

In addition, the fact that Congress was not notified of the Bybee Memorandum when it was issued highlights the importance of congressional notification.<sup>24</sup> The Memorandum was written in August 2002, but did not become publicly known until it was leaked to the press almost two years later.<sup>25</sup> Until the leak, members of Congress were presumably unaware that this extremely significant executive branch opinion had relied on the avoidance canon to “conclude that [the statutory prohibition on torture] does not apply to the President’s detention and interrogation of enemy combatants pursuant to his Commander-in-Chief authority.”<sup>26</sup> Such secret uses of avoidance are at odds with the operating premises of the constitutional enforcement theory—that the avoidance canon functions as a means of notifying Congress that it was not sufficiently clear about its intentions to force the (purportedly) constitutionally doubtful construction in question. Put simply, the lack of timely congressional notification stands as an independent and fatal flaw in Bybee Memorandum’s use of avoidance.

#### B. THE PRESIDENT’S SIGNING STATEMENT REGARDING THE MCCAIN AMENDMENT

The use of presidential signing statements has become an extremely controversial practice. I do not propose to join that larger debate here. Instead, I want to focus on one particular signing statement to highlight the ways in which the avoidance canon may be abused in this context.

As discussed above, executive actors may often face circumstances where, owing to their past negotiations and other interactions with Congress, they know precisely what was, and was not, intended by a particular statutory provision. The avoidance canon becomes inapplicable in such circumstances, because the executive officials’ intimate knowledge of congressional intent and purpose removes the statutory ambiguity needed to trigger the canon. Thus in the signing statement context, if the bill on the President’s desk was the subject of close negotiations between executive and congressional leaders, the President may know precisely what is meant by each provision. If a court or other uninvolved third party were to read the bill, it might deem certain provisions ambiguous. But the executive branch’s relationship to the bill is different—not that of an uninvolved third party treating the text like a cold record, but that of an intimately involved participant in the production of the text itself.<sup>27</sup>

The issue for the use of the avoidance canon in signing statements, then, is whether the President’s potentially more detailed, intimate familiarity with the statute’s intended meaning and purpose removes the ambiguity needed to trigger avoidance. Consider President Bush’s statement on signing the 2006 Defense Appropriations bill. The bill included the McCain Amendment, which provides that “[n]o individual in the custody or under the physical control of the United States Government, regardless of

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*Habeas Puzzle: Suspension as Authorization?*, 91 Cornell L. Rev. 411, 413-14 (2006).

<sup>24</sup> See *supra* Part I.B.

<sup>25</sup> See Dana Priest & R. Jeffrey Smith, *Memo Offered Justification for Use of Torture: Justice Dept. Gave Advice in 2002*, Wash. Post, Jun. 8, 2004, at A01 (discussing a “newly obtained memo,” which was the Bybee Memorandum).

<sup>26</sup> Bybee Memorandum, *supra* note 18, at 34—35.

<sup>27</sup> See generally, Clinton Rossiter, *The American Presidency* 110 (2d ed. 1960) (discussing the modern President’s extensive involvement in the legislative process).

nationality or physical location, shall be subject to cruel, inhuman, or degrading treatment or punishment.”<sup>28</sup> That fairly absolutist language notwithstanding, President Bush’s signing statement reserved substantial leeway for the executive branch: “The executive branch shall construe [the relevant provisions] relating to detainees[] in a manner consistent with the constitutional authority of the President to supervise the unitary executive branch and as Commander in Chief and consistent with the constitutional limitations on the judicial power ... .”<sup>29</sup> Although the statement is not explicit on this point, the premise of the reservation is evidently that serious constitutional questions would be raised by a categorical statutory prohibition on certain conduct that a President might order in his capacity as Commander in Chief. To avoid those concerns, the signing statement reads an implicit exception into the McCain Amendment’s prohibitions.

As with the Bybee Memorandum, the McCain Amendment signing statement is premised on a highly controversial vision of expansive, unilateral presidential power under Article II of the Constitution. Here, though, I want to set aside the problems with the underlying constitutional analysis and focus specifically on the avoidance canon. On that point, the question is whether the President’s invocation of avoidance-style reasoning in the signing statement was an appropriate response to ambiguous legislation, or was instead an attempt effectively to rewrite the statute. Even if one were to look only at the rather unambiguous text of the McCain Amendment, this could well look like a case of statutory rewriting, not interpretation. But the point I want to stress is that the President had much more than the text to guide him, and that the extratextual evidence makes his statement even harder to justify.

Senator McCain made clear in public statements that a fundamental aim of the Amendment was to prohibit categorically the torture and other cruel, inhuman, or degrading treatment of detainees in the war on terror.<sup>30</sup> The Administration understood the McCain Amendment to do just that, and for that reason spent several months resisting and even threatening to veto it.<sup>31</sup> The impasse was ultimately broken when the Administration changed course and decided to support the Amendment, but *not* because of any suggestion that it could be construed to avoid imposing substantial limitations on the executive branch. Rather, the change came partly because there were clearly enough votes in Congress to overcome a veto, and partly because the Administration had obtained a number of concessions on related matters, including a

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<sup>28</sup> Title X, Division A, § 1003(a) of H.R. 2863 (2005). The McCain Amendment further provides that “‘cruel, inhuman, or degrading treatment or punishment’ means the cruel, unusual, and inhumane treatment or punishment prohibited by the Fifth, Eighth, and Fourteenth Amendments to the Constitution of the United States, as defined in the United States Reservations, Declarations and Understandings to the United Nations Convention Against Torture and Other Forms of Cruel, Inhuman or Degrading Treatment or Punishment done at New York, December 10, 1984.” Id. § 1003(d).

<sup>29</sup> President’s Statement on Signing of H.R. 2863, The “Department of Defense, Emergency Supplemental Appropriations to Address Hurricanes in the Gulf of Mexico, and Pandemic Influenza Act, 2006” (Dec. 30, 2005), available at: <http://www.whitehouse.gov/news/releases/2005/12/print/20051230-8.html>.

<sup>30</sup> See, e.g., 151 Cong. Rec. S11063-64 (daily ed. Oct. 5, 2005) (noting that “the prohibition against cruel, inhumane, and degrading treatment has been a longstanding principle in both law and policy in the United States” but that recently “confusion about the rules [had] become[] rampant again,” with “so many different legal standards and loopholes that our lawyers and generals are confused”; proposing the McCain Amendment to “restore clarity on a simple and fundamental question: Does America treat people inhumanely? My answer is no. And from all I have seen, America’s answer has always been no.”).

<sup>31</sup> See Eric Schmitt, *Senate Moves to Protect Military Prisoners Despite Veto Threat*, N.Y. Times, Oct. 6, 2005, at A1; Charles Babington & Shailagh Murray, *Senate Supports Interrogation Limits*, Wash. Post, Oct. 6, 2005, at A01.

set of provisions severely restricting the federal courts' jurisdiction to review enemy combatant detentions at Guantanamo Bay.<sup>32</sup> In other words, the McCain Amendment became law as part of a negotiated bargain whose cost to the executive branch was the Amendment's categorical prohibition on cruel, inhuman, or degrading treatment of prisoners. The President himself appeared to accept this bargain at a press conference announcing his newfound support for the Amendment.<sup>33</sup>

Viewed in this context, the President's subsequent signing statement reads like a unilateral alteration of the legislative bargain. As Senators McCain and Warner explained in a public response to the signing statement, "the President understands Congress's intent in passing by very large majorities legislation governing the treatment of detainees included in the 2006 Department of Defense Appropriations and Authorization bills. *The Congress declined when asked by administration officials to include a presidential waiver of the restrictions included in our legislation.*"<sup>34</sup>

Thus, even assuming that the bare text of the McCain Amendment might permit the narrowing construction announced in the President's signing statement (which it almost certainly cannot), the Administration's intimate involvement in the negotiations that produced the Amendment leaves no room for doubt as to its meaning. And in the absence of any actual uncertainty about the Amendment's meaning, the signing statement's avoidance-inspired construction is indefensible. Indeed, invoking avoidance in those circumstances is tantamount to rewriting the legislation itself. And that the President may not do.

### C. THE JUSTICE DEPARTMENT'S DEFENSE OF THE NSA SURVEILLANCE PROGRAM

Avoidance also played a central—and problematic—role in the Justice Department's defense of the NSA's warrantless gathering of "signals intelligence" within the United States, from communications involving United States citizens.<sup>35</sup> One of the core legal issues in this controversy is whether the surveillance complies with the Foreign Intelligence Surveillance Act (FISA), which lays out the basic legal structure governing electronic surveillance within the United States.<sup>36</sup> As a general matter, FISA authorizes electronic surveillance within the United States only upon certain specified showings, and only with a court-issued warrant.<sup>37</sup> Beyond that, FISA makes it a criminal offense

<sup>32</sup> See Senate Amendment 2524, reprinted at 151 Cong. Rec. S12771-72 (daily ed. Nov. 14, 2005).

<sup>33</sup> See Josh White, *President Relents, Backs Torture Ban*, Wash. Post, Dec. 16, 2005, at A01 (quoting President Bush as saying "[w]e've been happy to work with [Senator McCain] to achieve a common objective, and that is to make it clear to the world that this government does not torture and that we adhere to the international convention [on] torture, whether it be here at home or abroad"). Admittedly, in referring only to torture and not to "cruel, inhuman, or degrading treatment," the President did not explicitly embrace the precise terms of the McCain Amendment. But neither did he withhold support for any part of the Amendment. Given his claim to have "been happy to work with [Senator McCain] to achieve a common objective," a reasonable listener would surely have understood the President to be expressing support for the McCain Amendment, not warning that he would soon use a signing statement to nearly nullify it.

<sup>34</sup> Sen. John V. Warner (R-VA) and Sen. John McCain (R-AZ), Statement on Presidential Signing Detainee Provisions, Jan. 4, 2006 (emphasis added).

<sup>35</sup> For an explanation of "signals intelligence," see Presidential Authority to Conduct Warrantless Electronic Surveillance to Gather Foreign Intelligence Information, Congressional Research Service Mem., at 1 n.1 (Jan. 5, 2006).

<sup>36</sup> See 50 U.S.C. §§ 1801 et seq.

<sup>37</sup> FISA does permit warrantless domestic electronic surveillance during wartime, but only for the first fifteen days of a war. See 50 U.S.C. § 1811.

to engage in any electronic surveillance not authorized by statute,<sup>38</sup> and another provision in the federal code specifies that FISA and certain other provisions governing wiretaps for criminal investigation are the “exclusive means by which electronic surveillance ... may be conducted.”<sup>39</sup>

Shortly after news broke that the President had authorized the surveillance in question,<sup>40</sup> the Justice Department offered a formal defense of the program in a letter addressed to members of the House and Senate Intelligence Committees.<sup>41</sup> The letter was later supplemented by a much more detailed white paper sent to the Senate majority leader,<sup>42</sup> though the basic argument remained the same. It had two essential parts. First, the Department argued that the President has substantial constitutional authority to order warrantless intelligence surveillance even within the United States. Second, and more pertinently for present purposes, the Department asserted that the Authorization for Use of Military Force (AUMF) of September 18, 2001 “confirms and supplements” the President’s inherent constitutional authority in this area.<sup>43</sup>

The AUMF empowers the President to “use all necessary and appropriate force against those nations, organizations, or persons” he determines to be responsible for the September 11 attacks, but says nothing whatever about surveillance within the United States.<sup>44</sup> On its face, therefore, the Justice Department’s AUMF argument would appear to conflict with FISA’s express identification of the statutory provisions setting forth “the exclusive means” for conducting domestic electronic surveillance.<sup>45</sup>

The Justice Department attempted to manage the conflict in two ways. First, it relied upon the Supreme Court’s construction of the AUMF in *Hamdi v. Rumsfeld*.<sup>46</sup> In that case, a divided Court held that the AUMF authorized the executive detention, without charge, of a U.S. citizen alleged to be an enemy combatant. In particular, Justice O’Connor’s plurality opinion concluded that although the AUMF does not mention detention, its authorization of “all necessary and appropriate force” satisfies a separate federal statute known as the Non-Detention Act, which provides that “[n]o citizen shall be imprisoned or otherwise detained by the United States except pursuant to an Act of Congress.”<sup>47</sup> The Justice Department relied on that conclusion in its defense of the NSA surveillance program. Specifically, the Department argued that if the AUMF’s authorization of “all necessary and appropriate force” satisfies the statutory requirement that citizens be detained only pursuant to a federal statute, it must also be enough to overcome FISA’s identification of the “exclusive means” for conducting electronic surveillance.<sup>48</sup>

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<sup>38</sup> See 50 U.S.C. § 1809(a)(1) (providing that “a person is guilty of an offense if he intentionally ... engages in electronic surveillance under color of law except as authorized by statute”).

<sup>39</sup> 18 U.S.C. § 2511(2)(f).

<sup>40</sup> The New York Times broke the story in late 2005. See James Risen & Eric Lichtblau, *Bush Lets U.S. Spy on Callers Without Courts*, N.Y. Times, Dec. 16, 2005, at A1.

<sup>41</sup> See Letter from William E. Moschella, Assistant Attorney General, U.S. Dep’t of Justice, to Senator Pat Roberts, Chairman, Senate Select Comm. on Intelligence, et al. (Dec. 22, 2005) (hereinafter “DOJ Letter”).

<sup>42</sup> See U.S. Dep’t of Justice, Legal Authorities Supporting the Activities of the National Security Agency Described by the President (Jan. 19, 2006) (hereinafter DOJ White Paper), available at <http://news.findlaw.com/hdocs/docs/nsa/dojnsa11906wp.pdf>.

<sup>43</sup> DOJ White Paper at 10; see *id.* at 2.

<sup>44</sup> Authorization for Use of Military Force, Pub. L. No. 107-40, § 2(a) 115 Stat. 224 (2001).

<sup>45</sup> 18 U.S.C. § 2511(2)(f).

<sup>46</sup> 542 U.S. 507 (2004).

<sup>47</sup> 18 U.S.C. § 4001(a) (2000). See *Hamdi*, 542 U.S. at 517-18 (plurality opinion of O’Connor, J.).

<sup>48</sup> See DOJ Letter at 3; DOJ White Paper at 12–13.

The *Hamdi* analogy is unpersuasive, however. The Non-Detention Act's requirement that U.S. citizens be detained only "pursuant to an Act of Congress" does not, on its face, require an express statement of congressional authorization.<sup>49</sup> FISA, in contrast, is explicit in its identification of the "exclusive means" for conducting electronic surveillance. To conclude that the AUMF *satisfies* the Non-Detention Act is to conclude that it provides the statutory authority required by that Act; to conclude that the AUMF *overcomes* FISA is to make the very different determination that it impliedly repeals FISA's express exclusivity provision.<sup>50</sup> The significance of that distinction is confirmed by the Supreme Court's recent decision in *Hamdan v. Rumsfeld*.<sup>51</sup> There, the Court cited *Hamdi* for the proposition that the AUMF "activated the President's war powers," but then held that such activation did not impliedly repeal or amend the limitations on military commissions set forth in the pre-existing Uniform Code of Military Justice (UCMJ).<sup>52</sup> If *Hamdi* does not support reading the AUMF to repeal or amend the UCMJ, surely it likewise does not support reading the AUMF to repeal or amend FISA.

In any event, it is the Justice Department's second attempt to overcome the tension between FISA and the AUMF that is of greater interest here. For that attempt, the Department turned to the avoidance canon:

Some might suggest that FISA could be read to require that a subsequent statutory authorization must come in the form of an amendment to FISA itself. But under established principles of statutory construction, the AUMF and FISA must be construed in harmony to avoid any potential conflict between FISA and the President's Article II authority as Commander in Chief... . Accordingly, any ambiguity as to whether the AUMF is a statute that satisfies the requirements of FISA and allows electronic surveillance in the conflict with al Qaeda without complying with FISA procedures must be resolved in favor of an interpretation that is consistent with the President's long-recognized [constitutional] authority.<sup>53</sup>

As with the Bybee Memorandum and the McCain Amendment signing statement, there are a number of difficulties with the use of avoidance here. For one thing, the underlying constitutional theory of exclusive and inviolable executive power is extremely aggressive.<sup>54</sup> But as with the McCain Amendment signing statement, I want to

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<sup>49</sup> That said, there is substantial force to the idea, endorsed by Justice Souter in his separate opinion in *Hamdi*, that the Non-Detention Act should be construed, in light of its history and purpose, to impose a clear statement requirement, and that the AUMF did not satisfy such a requirement.

<sup>50</sup> The Supreme Court has long made clear that repeals by implication are disfavored. *See, e.g., Branch v. Smith*, 538 U.S. 254, 273 (2003) ("We have repeatedly stated ... that absent 'a clearly expressed congressional intention,' ... 'repeals by implication are not favored.'") (quoting *Morton v. Mancari*, 417 U.S. 535, 551 (1974), and *Universal Interpretive Shuttle Corp. v. Washington Metro. Area Transit Comm'n*, 393 U.S. 186, 193 (1968)).

<sup>51</sup> 126 S. Ct. 2749 (2006).

<sup>52</sup> *Id.* at 2755 ("[T]here is nothing in the text or legislative history of the AUMF even hinting that Congress intended to expand or alter the authorization set forth in Article 21 of the UCMJ.").

<sup>53</sup> DOJ Letter at 4 (citing *Zadvydas v. Davis*, 533 U.S. 678, 689 (2001), and *INS v. St. Cyr*, 533 U.S. 289, 300 (2001), for the avoidance point).

<sup>54</sup> This and other problems with the Justice Department's argument are discussed in a letter submitted to Congress by several constitutional law scholars and former government officials. *See* Letter from

stress an additional problem relating to the executive's knowledge of legislative history, congressional purpose, and statutory context.

To put the point bluntly, it appears that leaders in the White House and the Justice Department knew that, in the period immediately before and shortly after the AUMF was enacted, the congressional leadership did not view the AUMF as authorizing the surveillance in question. Just before the Senate voted on the AUMF, the White House reportedly sought to insert the words "in the United States and" into the resolution, so that it would authorize the President to "use all necessary and appropriate force *in the United States and* against those nations, organizations, or persons" responsible for the September 11 attacks.<sup>55</sup> But the Senate leadership refused, apparently on the grounds that it did not want to grant the President expansive powers within the United States.<sup>56</sup>

Later in the fall of 2001, the Bush Administration sought and obtained a number of amendments to FISA in the USA PATRIOT Act.<sup>57</sup> The Administration did not, however, formally request an amendment to authorize the surveillance at issue here. The reason, according to Attorney General Gonzales in a December 2005 press conference, was that the congressional leadership advised the Administration that securing such an amendment "would be difficult, if not impossible."<sup>58</sup> The Attorney General subsequently clarified his explanation to say that the difficulty in question was not a matter of congressional unwillingness to provide the requisite authority, but concern that passing an amendment conferring the authority would compromise the secrecy, and thus the effectiveness, of the government's surveillance efforts.<sup>59</sup> Although that claim is somewhat difficult to credit as a matter of mere common sense,<sup>60</sup> the critical point for

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Curtis Bradley et al., to Bill Frist, Majority Leader, United States Senate et al. (Jan. 9, 2006), available at <http://cdt.org/security/20060109legalexperanalysis.pdf>, and reprinted in *N.Y. Rev. of Books* (Feb. 9, 2006), at 42.

<sup>55</sup> See Tom Daschle, *Power We Didn't Grant*, *Wash. Post*, Dec. 23, 2005, at A21.

<sup>56</sup> *Id.*; see also Ron Suskind, *The One Percent Solution: Deep Inside America's Pursuit of Its Enemies Since 9/11*, 17 (New York: Simon & Schuster, 2006) ("Minutes before the vote, the White House officials had pressed for even more—after 'use all necessary and appropriate force,' they wanted to insert 'in the United States,' to, essentially, grant war powers to anything a president deigned to do within the United States. Senators shot that down.").

<sup>57</sup> Pub. L. No. 107-56, 115 Stat. 272.

<sup>58</sup> Press Release, White House, Press Briefing by Attorney General Alberto Gonzales and General Michael Hayden, Principal Deputy Director for National Intelligence (Dec. 19, 2005) (hereinafter "Gonzales Press Conference"), available at: [www.whitehouse.gov/news/releases/2005/12/20051219-1.html](http://www.whitehouse.gov/news/releases/2005/12/20051219-1.html).

<sup>59</sup> See Remarks by Homeland Security Secretary Chertoff and Attorney General Gonzales on the USA PATRIOT Act (Dec. 21, 2005) (hereinafter "Gonzales Remarks") "We were advised that it would be virtually impossible to obtain legislation of this type without compromising the program. And I want to emphasize the addition of, without compromising the program. That was the concern.").

<sup>60</sup> The claim seems to depend on the idea that amending FISA would have "tipped off" the targeted terrorists, who would otherwise have proceeded on the assumption that their telephone communications were effectively immune from surveillance. Yet surely the targeted terrorists have generally proceeded on precisely the opposite assumption—that they are the targets of a wide array of surveillance efforts by the United States and/or its allies. It would be folly to assume otherwise. See Richard A. Clarke & Roger W. Cressey, *A Secret the Terrorists Already Knew*, *N.Y. Times*, Jun. 30, 2006, at A23 ("Terrorists have for many years employed nontraditional communications ... precisely because they assume that international calls ... are monitored not only by the United States but also by Britain, France, Israel, Russia and even many third-world countries.").

The other premise of the claim is that a statutory amendment would necessarily reveal the specific contents of the surveillance program it was authorizing. But statutory authorization need not speak in specific terms about the precise mechanics of the surveillance. The Justice Department itself acknowl-

present purposes is that, even under the Attorney General's clarified explanation, *the Administration knew that the statutory authorization was not forthcoming*. Even if the leaders in the Administration believed that some members of Congress wanted to grant the authority if it could be done with adequate secrecy, an in-principle desire to provide statutory authority is a far cry from statutory authority itself.

Even more problematically, it was apparently only after concluding that it could not obtain an amendment to FISA that the Administration decided to rely on the earlier-enacted AUMF.<sup>61</sup> Yet there is no indication that Congress thought the AUMF authorized the warrantless surveillance in question. Indeed, had anyone in the congressional leadership viewed the AUMF that way, then presumably they would have responded to the Administration's subsequent inquiries about the possibility of amending FISA by saying it was unnecessary, since the AUMF had already accomplished the task. But no one said that. Instead, as noted above, congressional leaders told the Administration that the statutory authorization it sought could not be provided.

Given what Administration leaders knew about the purpose and intended limits of both FISA and the AUMF, the statutory ambiguity needed to trigger the avoidance canon is simply nowhere to be found. Indeed, the Justice Department's invocation of avoidance to support its construction of the AUMF appears nothing less than disingenuous.

Finally, and separately, the NSA example again highlights the need for adequate congressional notification. The NSA surveillance program had been in effect for a number of years by the time the press reported on it in late 2005. During that time, very few members of Congress knew of the program. Of those who did know, there is no indication they were told that the Administration was relying on the avoidance canon to justify the program.<sup>62</sup> In a July 17, 2003 letter to Vice President Cheney, for example, Senator Rockefeller noted the "profound oversight issues" raised by the NSA program on which he, Senator Roberts, and a few others had just been briefed.<sup>63</sup> He went on to state that, "[g]iven the security restrictions associated with this information, and my inability to consult staff or counsel on my own, I feel unable to fully evaluate, much less endorse, these activities... . Without more information and the ability to draw on any independent legal or technical expertise, I simply cannot satisfy lingering concerns raised by the briefing we received."<sup>64</sup> The letter contains no acknowledgment that the Administration was justifying the NSA's activities by claiming

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edged this, insofar as it claimed that the vague and open-ended language of the AUMF authorized the surveillance in question. See DOJ Letter at 2-4, *supra* note 41. If the AUMF itself did not intolerably "tip off" the terrorists, surely the same would be true if it were amended to provide, for example, that the President may "use all necessary and appropriate force against those nations, organizations, or persons [responsible for the September 11 attacks], including intercepting their communications within and without the United States."

<sup>61</sup> See Gonzales Press Conference, *supra* note 58 ("We've had discussions with members of Congress ... about whether or not we could get an amendment to FISA, and we were advised that ... that was not something we could likely get, certainly not without jeopardizing the existence of the program, and therefore, killing the program. And ... so a decision was made that because we felt that the authorities were there, that we should continue moving forward with the program.")

<sup>62</sup> Other parts of the Justice Department's defense of the program, such as its reliance on the Supreme Court's 2004 decision in *Hamdi v. Rumsfeld*, obviously post-dated the initiation of the program.

<sup>63</sup> Letter from Senator John D. Rockefeller, IV (D-WV), Vice Chairman, Senate Select Committee on Intelligence, to Richard B. Cheney, Vice President, at 1 (Jul. 17, 2003).

<sup>64</sup> *Id.* at 1-2.

authorization from Congress itself, and it seems highly unlikely that any such statement was included in the briefing. As discussed in Part I.B, however, timely and appropriate notice to Congress is a critical predicate of the constitutional enforcement theory of avoidance. In the absence of such notice, the Justice Department's avoidance-based defense of the NSA program simply cannot get off the ground.

### III. CONCLUSION

The propriety of constitutional avoidance in executive branch statutory interpretation is not easily determined. But especially given the canon's prominence of late, the undertaking is worth the effort. As I have tried to show here, the analysis must begin with a consideration of the values underlying the canon. If the canon is understood to serve the judiciary-specific values associated with the judicial restraint theory, then it would appear to have no place in the work of the executive branch. If, on the other hand, the canon is viewed as means of implementing substantive constitutional commitments along the lines suggested by the constitutional enforcement theory, then as a general matter it would seem perfectly appropriate for the executive branch to employ it.

Even if one accepts the constitutional enforcement theory, however, individual applications of the avoidance canon in the executive branch may still be problematic. And as I have tried to show, there are serious problems with each of the executive's most prominent uses of avoidance in connection with the war on terror. The Bybee Memorandum, the McCain Amendment signing statement, and the Justice Department's Defense of the NSA wiretapping program all deploy avoidance in the service of a non-mainstream view of the constitutional allocation of power, and in the absence of the kind of statutory ambiguity required to trigger the canon. They are, in short, perfect examples of abusive avoidance.

# The Prison Litigation Reform Act—A Proposal For Closing the Loophole For Rapists

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Deborah M. Golden\*

## I. INTRODUCTION

Most Americans would be shocked to know that in this country, a rape victim might not be able to bring a suit for money damages against her or his attacker when that attacker is an employee of the state, specifically an employee of a prison or jail.<sup>1</sup> Internationally, custodial rape is considered torture. Domestically, in order to allow suits by rape victims, courts hold that rape simply is “not part of the penalty” offenders should pay for their criminal conduct.<sup>2</sup> All fifty states, the District of Columbia and the federal government now criminalize sexual contact between correctional staff and prisoners. These statutes reflect the belief that the power imbalance between guard and guarded renders true consent impossible. Unfortunately, some correctional staff do abuse their authority and sexually assault those in their custody. When the victims try to seek redress in court, they are forced to overcome a congressionally created obstacle. The Prison Litigation Reform Act (“PLRA”) may prevent rape victims from bringing lawsuits against their attackers. In order to receive monetary compensation, the PLRA requires that any plaintiff demonstrate that she or he has a physical injury. In the current legal system, this torture must be analyzed within the framework created by the PLRA that “no federal civil action may be brought by a prisoner confined in a jail, prison, or other correctional facility, for mental or emotional injury suffered while in custody without a prior showing of physical injury.”<sup>3</sup> The PLRA leaves one with a simple choice in a complex area. Is rape an emotional injury or a physical one? Rape must leave a physical injury within the meaning of the 42 U.S.C. § 1997e(e) to be actionable. However, to avoid judicial confusion and wasted judicial resources, Congress should amend the PLRA to make it clear that rape and all forms of sexual assault are compensable injuries, whether there is discernable physical injury or not.

In this paper, I first examine the landscape of custodial rape and sexual assault. I examine the data regarding the number of rapes behind bars and the enactment of the Prison Litigation Reform Act. I next review the case law analyzing rape under the Act,

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<sup>1</sup> “Prison” and “jail” have distinct meanings within the criminal justice system. As the particular distinctions are not relevant the analysis presented in this article, the terms will be used interchangeably. If a distinction needs to be made, it will be noted.

<sup>2</sup> See, e.g., *Farmer v. Brennan*, 511 U.S. 825, 834 (1994) (quoting *Rhodes v. Chapman*, 452 U.S. 337, 347 (1981)).

<sup>3</sup> 42 U.S.C. § 1997e(e).

looking at cases where courts declare without analysis that rape is a physical injury, cases where courts focus on other less serious injuries, and one case where a court ruled sexual assault was not a physical injury. I then suggest that courts must be clearer and rule that rape is a compensable injury. Finally, I conclude that the best solution is for Congress to amend the PLRA to read:

No Federal civil action may be brought by a prisoner confined in a jail, prison, or other correctional facility, for mental or emotional injury suffered while in custody without a prior showing of physical injury or sexual assault or abuse.

## II. PREVALENCE OF RAPE BEHIND BARS

Just as the prevalence of rape in the free world is hard to quantify, so is the frequency of rape behind bars. Even the studies of custodial sexual misconduct that do exist must be viewed with a skeptical eye, as the nature of imprisonment, with its complex inmate and staff subcultures, encourages opacity.<sup>4</sup> Recognizing this knowledge void, Congress passed the Prison Rape Elimination Act of 2003 (“PREA”) to “provide for the analysis of the incidence and effects of prison rape in Federal, State, and local institutions and to provide information, resources, recommendations, and funding to protect individuals from prison rape.”<sup>5</sup> The House Report on the Act summarized the findings of the Congressional hearings:

Insufficient research has been conducted and insufficient data reported on the extent of prison rape. However, experts have conservatively estimated that at least 13 percent of the inmates in the United States have been sexually assaulted in prison. Many inmates have suffered repeated assaults. Under this estimate, nearly 200,000 inmates now incarcerated have been or will be the victims of prison rape. The total number of inmates who have been sexually assaulted in the past 20 years likely exceeds 1,000,000.<sup>6</sup>

The Bureau of Justice Statistics has only begun the complicated process of fulfilling its statutory obligation to quantify sexual assaults in prison. The first report under the Prison Elimination Act of 2003 found that facilities holding 79% of all children and adults in the United States reported 2,922 allegations of sexual harassment or sexual misconduct in 2004.<sup>7</sup> That is a rate of 1.67 allegations per 1,000 people incarcerated per year.<sup>8</sup> Shocking as these numbers are, the report’s authors caution that the statistics are not necessarily reliable, as they depend entirely on information reported by the very correctional facilities under study. The true numbers are undoubtedly much higher.

<sup>4</sup> D. J. Cotton & A. N. Groth, *Inmate Rape: Prevention and Intervention*, 2 J. PRISON & JAIL HEALTH 47, 48 (1982).

<sup>5</sup> Prison Rape Elimination Act of 2003, Pub. L. No. 108-79, 117 Stat. 972 (2003) (herein PREA).

<sup>6</sup> H.R. Rep. No. 108-219, at § 2(2) (2003).

<sup>7</sup> See Allen J. Beck & Timothy A. Hughes, *Sexual Violence Reported by Correctional Authorities, 2004*, BUREAU OF JUSTICE STATISTICS, 7 (2005).

<sup>8</sup> See *id.*

### III. THE ENACTMENT AND EFFECT OF THE PRISON LITIGATION REFORM ACT

Congress enacted the PLRA in 1996, ostensibly intending to unclog the federal courts from frivolous prisoner litigation, but unwittingly erecting major road blocks to federal civil right actions for rape.<sup>9</sup> The law mandates that, “No Federal civil action may be brought by a prisoner confined in a jail, prison, or other correctional facility, for mental or emotional injury suffered while in custody without a prior showing of physical injury.”<sup>10</sup>

There is no reason to assume that Congress intended to prevent a woman raped by a prison guard from being remunerated for the violation of her Eighth Amendment right against cruel and unusual punishment.<sup>11</sup> “The U.S. Constitution’s prohibition against cruel and unusual punishment is a clear indication that the founding fathers did not intend jails or prisons to be institutions where correctional officials could deliberately harm inmates through odious policies or specific abusive actions.”<sup>12</sup> Unfortunately, because Congress did not define what constitutes a mental or emotional injury or a physical injury, some argue for an interpretation of the PLRA that prevents redress for prison rape victims. It is hard to imagine this particular result was intended or desired.

Statements by the PLRA’s sponsors indicated a basic regard for rights of the incarcerated. Senator Spencer Abraham, one of the bill’s sponsors, remarked:

[C]onvicted criminals, while they must be accorded their constitutional rights, deserve to be punished. I think virtually everybody believes that while these people are in jail they should not be tortured, but they also should not have all the rights and privileges the rest of us enjoy, and that their lives should, on the whole, be describable by the old concept known as hard time.<sup>13</sup>

Senator Robert Dole stated that the purpose of the PLRA was to curtail frivolous suits that involved issues such as “insufficient locker space, a defective haircut by a prison barber, the failure of prison officials to invite a prisoner to a pizza party for a departing prison employee, and yes, being served chunky peanut butter instead of the limited to these sorts of lawsuits.”<sup>14</sup> It appears that no one considered the effect that the PLRA might have on rape cases, most likely because no one conceived of it possibly applying to rape cases.

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<sup>9</sup> As an advocate for human rights and the rule of justice and law, I believe the enactment of the PLRA was an assault on human dignity and the rule of law. This article focuses on only one aspect of that assault, but the PLRA provisions, from limiting access to in forma pauperis lawsuits (28 U.S.C. § 1915(b) (2004)), to limiting attorney fees (42 U.S.C. § 1997e(d) (2004)), to requiring exhaustion of inane grievance processes in all cases (42 U.S.C. § 1997e(a) (2004)), serve only to ensure prisoners can be mistreated and abused by guards and prison officials with impunity.

<sup>10</sup> 42 U.S.C. § 1997e(a) and (e) (2004).

<sup>11</sup> U.S. CONST. AMEND. VIII. The Constitution itself provides no mechanism for plaintiffs to enforce in court the rights it comprises. Plaintiffs must sue state actors under 42 U.S.C. § 1983 or federal actors under the theory delineated in *Bivens v. Federal Bureau of Narcotics*, 403 U.S. 388 (1971).

<sup>12</sup> Roger A. Hanson & Henry W.K. Daley, CHALLENGING THE CONDITIONS OF PRISONS AND JAILS: A REPORT ON SECTION 1983 LITIGATION (U.S. Department of Justice 1994).

<sup>13</sup> 141 Cong. Rec. S14316 (1995) (remarks of Sen. Abraham).

<sup>14</sup> See, e.g., 142 Cong. Rec. S2292 (1996) (remarks of Sen. Graham).

Despite this history, rape victims must confront the PLRA and satisfy its dictates, and, because of the narrow statutory language, courts must ask what type of injury rape causes.

#### IV. STATE OF LAW UNDER THE PLRA

##### A. THE PHYSICAL INJURY REQUIREMENT GENERALLY

Before examining sexual assault case law specifically, it is helpful to understand the interpretation of the physical injury requirement in a non-rape context. One of the best expressions of the general rule is found in a case from the United States District Court for the Northern District of Texas: “would the injury require or not require a free world person to visit an emergency room, or have a doctor attend to, give an opinion, diagnosis and/or medical treatment for the injury? In effect, would only home treatment suffice?”<sup>15</sup>

Courts have dismissed cases involving inmates’ nausea and vomiting, general bruising, bruised ribs, minor swelling, minor bleeding, abrasions and lacerations, skin fungus, dehydration, migraine headaches, increased blood pressure, aggravated hypertension, dizziness, insomnia, loss of appetite, burning eyes, shortness of breath, chest pain, mosquito bites resulting in fever, and the smell of cells smeared with feces rendering sleep impossible.

In cases where the symptom seems to be a physical manifestation of stress, courts are particularly reluctant to find a physical injury for PLRA purposes. As one court stated:

The court notes [increased blood pressure, aggravated hypertension, dizziness, insomnia, and loss of appetite] are all symptoms typically associated with people suffering stress or mental distress. Prison itself is a stressful environment. If the symptoms alleged by [the plaintiff] were enough to satisfy the physical injury requirement ... very few plaintiffs would be barred by the physical injury rule from seeking compensation on the claims for emotional distress. The court has no basis upon which to conclude that result was intended by Congress. The court finds that construing the allegations in the light most favorable to Plaintiff, the injuries alleged do not pass the de minimus test.<sup>16</sup>

The above approach is probably sensible in most cases, but its application to rape cases is problematic.

Very few courts have reached the direct questions of whether a rape, in and of itself, is a physical injury within the purview of the PLRA.<sup>17</sup> Only one circuit, the Second Circuit, has held that rape is inherently a physical injury. Most courts dodge

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<sup>15</sup> *Luong v. Hatt*, 979 F. Supp. 481, 486 (N.D. Tex. 1997). It is worth noting that nothing in this formulation states whether this reasonable person is insured or uninsured. This oversight may have class implications in future developments if courts expand upon this notion.

<sup>16</sup> *Todd v. Graves*, 217 F. Supp. 2d. 958, 960 (S.D. Iowa 2002).

<sup>17</sup> Rape is not the only area where courts are struggling with the definition of the PLRA’s “physical injury” requirement. In *Clifton v. Eubank*, 418 F.Supp. 2d 1243 (2006), the court denied defendants’ motion for summary judgment. At issue was alleged improper jail medical care which resulted Ms. Clifton having a stillbirth. The court held that delayed labor resulting in stillbirth was a PLRA physical injury and that it was unconstitutional for the PLRA to bar plaintiff’s access to the only possible relief, damages. *Id.*

the issue by focusing on accompanying injuries, however minor. One court has gotten it wrong by implicitly ruling that rape is not a physical injury. The confusion evidenced by these decisions can only be solved by Congressional action.

#### B. SOME COURTS DECLARE RAPE A PHYSICAL INJURY, BUT PROVIDE NO USEFUL ANALYSIS

Some courts have held that rape is an inherent physical injury. Unfortunately, while setting good law, these cases have omitted any in-depth examination of the issues, limiting their usefulness as persuasive case law outside of their circuit.

The premiere example of this approach is *Liner v. Goord*.<sup>18</sup> Mr. Liner alleged, among other things, that prison guards had sexually assaulted him on three separate occasions.<sup>19</sup> The district court dismissed these claims for failure to allege a physical injury, but the Second Circuit, noting that the PLRA did not define a physical injury, reversed.<sup>20</sup> Its only explanation for its holding was that “the alleged sexual assaults qualify as physical injuries as a matter of common sense.”<sup>21</sup>

One notable Second Circuit case has followed *Liner*, but it too lacks a satisfactory analysis.<sup>22</sup> In *Noguera v. Hasty*, a female inmate filed suit alleging that a male officer sexually assaulted her and then put her at further danger by spreading rumors that she was a snitch.<sup>23</sup> Defendants argued that the retaliatory rumor-spreading was not compensable, since there was no physical injury.<sup>24</sup> Citing *Liner*, the court held that the rape is a physical injury, and thus all the acts, considered together, were compensable.<sup>25</sup> The court justified its holding by noting that “[t]he potential for frivolous suits and feigned emotional injuries is greatly diminished in rape cases where the victim makes a showing of physical injury resulting from the rape itself.”<sup>26</sup> This reasoning raises an important point. If Congress did not intend that the PLRA shut deserving plaintiffs out of court, then amending the PLRA to include rape makes sense and is faithful to the Act’s original intent. Once rape is proven, it should follow that a suit is not frivolous.

Two district courts outside the Second Circuit adopt the reasoning of *Liner*. The first, *Nunn v. Michigan Department of Corrections*, denied defendants’ motion to dismiss, holding, “that allegations of rape and sexual assault are latent with the notion of physical injury sufficiently to support Plaintiffs’ claim and to survive a Rule 12(b)(6) motion.”<sup>27</sup> The decision unfortunately provides no further analysis regarding the physical injury of rape.<sup>28</sup>

<sup>18</sup> *Liner v. Goord*, 196 F.3d 132 (2d Cir. 1999).

<sup>19</sup> *Id.* at 133.

<sup>20</sup> *Id.* at 135.

<sup>21</sup> *Id.*

<sup>22</sup> *Noguera v. Hasty*, No. 99 Civ. 8786, 2001 U.S. Dist. LEXIS 2458 (S.D.N.Y. Mar. 12, 2001).

<sup>23</sup> *Id.* at \*13. Being identified as a snitch inside the prison may have injurious and even fatal consequences for those so identified. See Jeffrey Ian Ross & Stephen C. Richards, BEHIND BARS: SURVIVING PRISON 23 (2002).

<sup>24</sup> *Noguera*, 2001 U.S. Dist. LEXIS 2458, at \*14.

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

<sup>26</sup> *Id.* at \*15 (citation omitted).

<sup>27</sup> *Nunn v. Michigan Dept. of Corrections*, 1997 WL 33559323, at \*4 (E.D.Mich. 1997).

<sup>28</sup> For another example of a case that bases its reasoning on *Liner* without any analysis, look to *Marrie v. Nickels*, 70 F. Supp. 2d 1252 (D. Kan. 1999). In that case the court was faced with a claim by two inmates involving separate incidents of sexual assault that fell short of rape. The court held that such allegations of “physical injury” were enough to survive a motion to dismiss. *Id.* at 1264.

These decisions provide limited persuasive authority for other courts, which might not share the same outlook or the same definition of “common sense.” Other courts have taken a different tack.

### C. SOME COURTS AVOID THE QUESTION BY FOCUSING ON ACCOMPANYING PHYSICAL INJURIES

A tempting alternative is to avoid the question of whether rape is a physical injury in and of itself by focusing on other, sometimes minor physical injuries that may be present after a rape. True, courts should refrain from deciding unnecessary questions, but these cases are different—courts are purposely avoiding the central question that needs to be addressed by exaggerating accompanying injuries that may actually be minor. With seemingly little regard for the insignificance of these injuries compared to the significance of the violation of the rape itself, some courts have latched onto minor injuries to get past the 42 U.S.C. § 1997e(e) requirements in male rape cases.

The Sixth Circuit, in a brief, unpublished decision, implicitly decided that a rape itself is not enough of a physical injury to overcome the PLRA requirement and looked to other injuries reportedly suffered by the inmate.<sup>29</sup> In *Styles v. McGinnis*, Mr. Styles, a prisoner in the Michigan state system, appealed the District Court’s dismissal of his action alleging sexual assault during the course of a physical exam by an emergency room doctor after he was admitted for angina.<sup>30</sup> Mr. Styles complained that he received an unnecessary and nonconsensual rectal exam.<sup>31</sup> The trial court dismissed the case directly on the grounds that Mr. Styles did not allege a physical injury that would satisfy the requirements of 42 U.S.C. 1997e(e).<sup>32</sup>

The appellate court seemed concerned that an alleged “sexual assault” would not meet the requirements of the PLRA. The alleged assault was a digital rectal examination, assumed for the purpose of a motion to dismiss to be nonconsensual on the part of Mr. Styles.<sup>33</sup> This is not the typical conception of what constitutes sexual assault, and perhaps the court was therefore not as outraged. However, Mr. Styles did characterize this event as a sexual assault.<sup>34</sup> Rather than hold that unwanted penetration is a physical injury or conduct any analysis as to whether it should be so considered, the court skirted the issue by focusing on Mr. Styles’ “increased blood pressure, chest pain, tachycardia, and numerous premature ventricular contractions.”<sup>35</sup> In other words, the court focused on the relatively minor symptoms that Styles claimed to be a result of the “sexual assault” (rather than recognizing that these symptoms perhaps had resulted from the angina with which he was originally admitted to the emergency room) and concluded that these physical injuries allowed Mr. Styles to defeat a motion to dismiss.<sup>36</sup> It is not clear in the court’s short decision how they distinguished the symptoms resulting from the sexual assault from the increased blood pressure and chest pain that accompanies angina.<sup>37</sup> Additionally, the court never discussed how tachycardia (i.e., rapid heart beats)

<sup>29</sup> *Styles v. McGinnis*, 28 Fed. Appx. 362 (6th Cir. 2001).

<sup>30</sup> *Id.* at 363.

<sup>31</sup> *Id.* at 364.

<sup>32</sup> *Id.* at 363.

<sup>33</sup> *See id.* at 364-65.

<sup>34</sup> *Id.* at 363.

<sup>35</sup> *Id.* at 364.

<sup>36</sup> *See id.* at 364-65.

<sup>37</sup> *See* THE MERCK MANUAL OF DIAGNOSIS AND THERAPY 501 (Robert Berkow ed., 16th ed. 1992).

and premature ventricular contractions, both of which occur in healthy people under stress, are cognizable physical injuries distinguishable from stress,<sup>38</sup> which is generally understood as an emotional, rather than a physical, state.

Despite its somersaults of reasoning, the court must have been uncomfortable with its own analysis and mentions *Liner v. Goord*<sup>39</sup> for the proposition that rape is a physical injury in and of itself, but does not go so far as to rule on these grounds. Because of its unwillingness to face the central issue, the opinion focuses entirely on the symptoms of the presenting disease or stress.

*Kemner v. Hemphill* is another case concerning a male inmate who was sexually assaulted.<sup>40</sup> The District Court for the Northern District of Florida performed analytical gymnastics similar to the court in *Styles*: reaching a conclusion that accompanying minor physical injuries (mostly symptoms of stress) allow a suit to survive the PLRA's limiting language.<sup>41</sup> The facts are this: Mr. Kemner alleged he was left alone in the cell with another inmate who sexually assaulted him and forced him to perform oral sex.<sup>42</sup> Mr. Kemner alleged that he suffered "physical pain, cuts, scrapes, and bruises," in addition to vomiting after the other inmate ejaculated in his mouth.<sup>43</sup> Faced squarely with a challenge from the defendants that these injuries were not sufficient under 42 U.S.C. § 1997e(e),<sup>44</sup> the court had to address what would be a sufficient physical injury under the PLRA. As the court stated, "The courts are troubled, however, where offensive bodily intrusion or sexual touching is involved."<sup>45</sup> In dicta, the court discusses the nature of sexual assault and rape:

There can be no question, therefore, that sexual battery is an extreme act of violence to human dignity, and that sexual battery involving penetration is "repugnant to the conscience of mankind."

Sexual battery often involves more than a *de minimus* use of force. But where only fear and intimidation are used, it might appear that no physical force is present. But that is error. A sexual battery involves, at a minimum, the physically forceful activity of the assailant. Copulation requires movement. . . . This kind of physical force, even if considered to be *de minimus* from a purely physical perspective, is plainly "repugnant to the conscience of mankind." Surely Congress intended the concept of "physical injury" in § 1997e(e) to cover such a repugnant use of physical force.<sup>46</sup>

In the end, though, the court was unwilling to hold that sexual assault was a *per se* physical injury. Resting on the plaintiff's claims of cuts, bruises, abrasions, shock, and

<sup>38</sup> See *id.* at 488; STEDMAN'S MEDICAL DICTIONARY 1550 (25th ed. 1990).

<sup>39</sup> See *Liner v. Goord*, 196 F.3d 132 (2nd Cir. 1999).

<sup>40</sup> 199 F.Supp. 2d 1264 (N.D. Fla. 2002).

<sup>41</sup> See *id.*

<sup>42</sup> *Id.* at 1266. Because this assault appeared to have arisen from the purposeful ignorance of the correctional staff, Mr. Kemner was able to overcome the additional constitutional difficulties present in inmate on inmate rape cases. See *supra* Part IVA.

<sup>43</sup> *Kemner*, 199 F.Supp. 2d at 1266.

<sup>44</sup> See *id.*

<sup>45</sup> *Id.* at 1269.

<sup>46</sup> *Id.* at 1270.

vomiting, the court found that the plaintiff had suffered a physical injury.<sup>47</sup> This was despite the fact that bumps and bruises are often considered too mundane in other contexts to overcome the barrier of 42 U.S.C. § 1997e(e), and shock and vomiting are often considered signs of stress, not physical injuries.

Neither of the analyses in the above two cases is satisfying. First, they both avoid the central question: whether a rape itself is a physical injury. Second, they both avoid the question by focusing on injuries that in other contexts are not considered even remotely serious enough to defeat the requirements of 42 U.S.C. § 1997e(e).<sup>48</sup>

#### D. UNFORTUNATELY, AT LEAST ONE COURT HAS HELD THAT RAPE IS NOT AN INJURY

The lack of focus on the exact injury of rape is dangerous. While attempting to be true to the language of the PLRA, the above courts have left open the possibility of courts using “common sense” to reach opposite results. One such example comes out of a Fifth Circuit district court. In deciding a motion for summary judgment, the District Court for the Southern District of Mississippi held that the plaintiffs’ allegations that the defendant “sexually battered them by sodomy, and committed other related assaults” were insufficient to satisfy the PLRA’s physical injury requirement.<sup>49</sup> Displaying a disturbing application of “common sense,” the court held, with no further analysis, that the victim needed to do more than “make a claim of physical injury beyond the bare allegation of sexual assault,” to meet the requirements of 42 USC § 1997e(e).<sup>50</sup>

#### V. COURTS MUST BE CLEAR THAT RAPE IS PHYSICAL INJURY BY DEFINITION

By squarely confronting whether rape is in and of itself a physical injury, courts can avoid repetition of this sort of holding. In support of holdings that rule that rape is physical injury is the fact that, since the beginning of recorded law, rape has been considered a heinous crime. Rape has been classified as an offense worthy of the death penalty. It violates the boundaries of the physical body and intrudes into the sanctity of the sexual conception of the self.

Rape is simply not equivalent to receiving chunky peanut butter or bad hair cuts, examples of subjects of frivolous complaints cited by the PLRA’s proponents. Rape is so heinous and injurious that it falls into that category that “virtually everybody believes”<sup>51</sup> is too torturous to force upon any convicted criminal. Rape is much more than an “emotional injury.”<sup>52</sup> “Prison rape, like all other forms of sexual assault, is torture.”<sup>53</sup> Rape, therefore, must be a compensable injury within the meaning of 42 U.S.C. § 1997e(e).

<sup>47</sup> *Id.* at 1271.

<sup>48</sup> It is interesting to note that the only case holding that nausea is a qualifying physical injury is one where the nausea was caused by a man having to taste ejaculate.

<sup>49</sup> *Hancock v. Payne*, 2006 U.S. Dist. LEXIS 1648 (D. Miss. Jan. 4, 2006).

<sup>50</sup> *Id.* at \*10.

<sup>51</sup> 141 Cong. Rec. S14316 (1995) (remarks of Sen. Abraham).

<sup>52</sup> 42 U.S.C. § 1997e(e) (2004).

<sup>53</sup> *The Prison Rape Reduction Act of 2002: Hearing on S. 2619 Before the Sen. Judiciary Comm.*, 107th Cong. (2002) (statement of Hon. Frank R. Wolf (R-VA)).

## V. CONGRESS MUST ACT TO ENSURE THAT PRISON RAPE IS COVERED

While I believe that that rape must be considered a physical injury within the contours of the PLRA, as indicated by court holdings to date, it is not a foregone conclusion. To avoid future confusion and to clarify that custodial rape is a compensable Eighth Amendment harm, Congress should act.<sup>54</sup> If addressing the incidence of rape in custody is hindered by an unintended consequence of the PLRA, Congress must either accept the PLRA's formulation with the understanding that some courts may leave rapes unaddressed or amend the PLRA to remove the confusion.

Congress must either repeal the PLRA in its entirety; repeal the physical injury requirement of 42 U.S.C. § 1997e(e); or amend the PLRA to clarify that rape is a compensable injury, either as a physical injury or in its own right. The last option seems to have the least political downside and would do a great deal to address what Congress knows to be a great problem.

### A. CONGRESS HAS ALREADY ESTABLISHED THAT RAPE IN PRISON IS A LARGE PROBLEM, AND IT SHOULD BE ADDRESSED

As discussed above, Congress recently passed the Prison Rape Elimination Act of 2003. The testimony presented at both Senate and House hearings and the official findings demonstrate that, at a minimum, Congress understands that rape in custody is a large problem. Congress has already recognized that custodial rape “involves actual and potential violations of the United States Constitution.”<sup>55</sup> As part of our civilized society, Congress has also recognized that we must have “a zero-tolerance standard for the incidence of prison rape in prisons in the United States.”<sup>56</sup>

### B. AMENDING THE PLRA WILL REDUCE SPURIOUS CLAIMS OF QUALIFIED IMMUNITY

Another important consequence of amending the PLRA to explicitly include rape would be to reduce the potential for rapists to raise a qualified immunity defense. Qualified immunity is a doctrine that protects government agents from liability unless they violate “clearly established statutory or constitutional rights of which a reasonable person would have known;”<sup>57</sup> or it was not objectively reasonable for the defendant to believe that a right was not being violated.<sup>58</sup> To prevent a successful qualified immunity defense, plaintiffs are required to demonstrate that the specific law protecting their rights has been or is currently well-settled. Thus, given the possible ambiguities of the PLRA's physical injury requirement, Congress should clarify that rape is a physical injury.

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<sup>54</sup> Alternatively, the U.S. Supreme Court could definitively issue a decision that rape falls within the PLRA definition of “physical injury.” The Court only has the opportunity to announce rulings in the less than 100 cases per year it hears, and real cases generally tend to have several legal issues presented, rather than one clear issue that forms the crux of the case. Rather than waiting for all the right circumstances to fall into place for a Supreme Court pronouncement, and letting countless victims suffer in the meantime, Congress should act now.

<sup>55</sup> PREA § 2(13).

<sup>56</sup> *Id.* at § 3(1).

<sup>57</sup> *Harlow v. Fitzgerald*, 457 U.S. 800, 818 (1982).

<sup>58</sup> *Anderson v. Creighton*, 483 U.S. 635, 638-39 (1987).

While attempts to claim qualified immunity are generally unsuccessful in the rape context, government prison employees and agents assert it in every conceivable situation. The defense has been raised unsuccessfully by defendants asserting various excuses, such as that they did not know sexual assault was prohibited,<sup>59</sup> or that sexual contact was consensual,<sup>60</sup> that they were not guards but agents of the prison,<sup>61</sup> that they were only a lookout for the rapist,<sup>62</sup> that they were only supervisors,<sup>63</sup> and that the plaintiff was transgendered.<sup>64</sup>

Many conclusions could be drawn from this array of examples, but it is clear that custodial rapists will always assert that they did not realize that rape was a basic violation of a person's constitutional rights. Congressional action will thwart those arguments and free the judicial resources that are being wasted hearing them.

### C. CONGRESS HAS CLARIFIED OTHER RAPE STATUTES IN SIMILAR CIRCUMSTANCES

In 1996, the First Circuit held that for purposes of sentencing enhancement, rape was not a "serious bodily injury" within the meaning of the federal anti-carjacking statute.<sup>65</sup> Congress acted swiftly by passing the Carjacking Correction Act clarifying that rape was a serious bodily injury.<sup>66</sup> Upon signing the bill, President Clinton issued a statement calling the court decision "plain wrong," and stating that "[s]exual assault causes serious bodily injury."<sup>67</sup> Rape victims in prison deserve no less from Congress than any other rape victims, especially given the fact that they are being held in the care of the State, with little ability to protect themselves.

## VI. CONCLUSION

The PLRA unfortunately erected an unintended major hurdle for prison rape victims to overcome before receiving compensation for this violation. The "physical injury" barrier forces victims to prove that rape was in and of itself a physical harm, rather than having that reality established within the statute's definition.

In the few cases that have arisen since the PLRA's enactment, courts have taken one of two approaches. They have either declared rape a physical injury without useful analysis or have focused on injuries that in other contexts would most certainly be ruled too minor to qualify as "physical injuries" in other contexts.

Most observers would consider this unjust. Rape may be different from other types of assaults, but it has long been recognized as among the most severe. It should be grounds for a constitutional suit for damages when it is perpetrated by a prison official against a prisoner.

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<sup>59</sup> *Williams v. Prudden*, 67 Fed. Appx. 976, 978 (8th Cir. 2003). See also *Mathie v. Fries*, 935 F. Supp. 1284, 1301 (E.D.N.Y. 1996) ("The Court finds that any reasonable prison Director of Security knew that to try to force unwanted and prohibited sexual acts on a powerless inmate is objectively unreasonable and in violation of the inmate's rights.")

<sup>60</sup> *Smith v. Cochran*, 216 F. Supp. 2d 1286, 1295 (N.D. Okla. 2001), *aff'd*, 339 F.3d 1205 (10th Cir. 2003).

<sup>61</sup> *Id.* at 1296.

<sup>62</sup> *DeFoor v. Rotella*, No. 99-1202, 2000 U.S. App. LEXIS 5028, at \*10-11 (10th Cir. Mar. 24, 2000).

<sup>63</sup> *Morris v. Eversley*, 205 F. Supp. 2d 234, 242-43 (S.D.N.Y. 2002); *Noguera v. Hasty*, 99 Civ. 8786, 2000 U.S. Dist. LEXIS 11956, at \*62 (S.D.N.Y. Jul. 21, 2000).

<sup>64</sup> *Schwenk v. Hartford*, 204 F.3d 1187, 1198 (9th Cir. 2000).

<sup>65</sup> *United States v. Rivera*, 83 F. 3d 542, 548 (1st Cir. 1996).

<sup>66</sup> Pub. L. 104-217 (1996).

<sup>67</sup> President on Signing the Carjacking Correction Act of 1996, 1996 WL 556455 (Oct. 2, 1996).

Congress needs to act in order to ensure that prison sexual assault that amounts to rape is in fact grounds for a suit. Failure to do so undermines the appearance of the strong commitment to ending custodial sexual assault that Congress made in passing the PREA. It also leaves federal judges without necessary guidance and leaves a gap in the basic net of human rights protections that our nation should provide to everyone.

The simplest way for Congress to fix this problem is to add five words to 42 U.S.C. § 1997e(e). The law would then read:

No Federal civil action may be brought by a prisoner confined in a jail, prison, or other correctional facility, for mental or emotional injury suffered while in custody without a prior showing of physical injury or **sexual assault or abuse**.

That simple addition would make clear that while rape is qualitatively different from other assaults, it is actionable. This change would allow plaintiffs to sue when they are raped by those charged with their orderly safekeeping. A simple amendment would make sure that those who would sexually assault other human beings held in the State's care are not unwittingly protected by law.



# Preserving and Expanding the Right to Vote: Ranked-choice Voting

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## I. INTRODUCTION

**A**lthough it is far from sufficient, the right to vote is a necessary—even critical—condition for a genuine and robust democracy. Most fundamentally, this is because of the *potential* connection that exists between voting and the political power to influence the public decisions that shape our lives. Such a connection, however, does not exist on its own. To a large degree, it depends on who is organized politically and thus in a position to take advantage of elections to advance their interests and concerns. But it also depends on how the electoral system is designed—that is, not only who among us has the right to vote, but also the meaningfulness of that vote. In other words, it is not simply a matter of having the right to enter a voting booth and have our votes counted. It is also the right to a meaningful and diverse set of choices that gives us the opportunity to elect candidates that represent our views and endows us with the capacity to hold both candidates and elected officials accountable.

Building a connection between voting and political power, moreover, requires organized political struggle. The history of the United States demonstrates that the right to vote is neither the product of good fortune nor a gift from benevolent and enlightened elites. Rather, it is the result of long and often bitter struggles by ordinary men and women, many of whom risked—and in many cases, lost—their lives in the fight for suffrage rights. Indeed, some of the most significant mass movements in U.S. history have been devoted to the struggle for voting rights, the civil rights movement being perhaps the most prominent example. Another key lesson of that historical struggle, however, is that the right to vote is not permanent. That is to say, the fight is never over, not only because our hard-won rights always face the threat of possible rollback, but also because there is a great deal of room to build on the historical accomplishments of earlier struggles.

Thus, at every historical moment, our predecessors have faced the same dual challenge: to preserve the rights of those who came before; and to carry the fight forward for deeper and broader democratic rights. This dual challenge has been mirrored in the efforts of elites, who have attempted to block (or reverse) the expansion of suffrage (to poor and working people, women, and people of color), and when they have

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failed in that effort, to render voting inconsequential and meaningless. As the historian Alexander Keyssar stated in his highly acclaimed study, *The Right to Vote*: “For more than two centuries, men and women who were committed to [the project of democracy in the US] have pressed it forward, despite ceaseless and sometimes forceful opposition. The history of the right to vote is a record of the slow and fitful progress of the project, progress that was hard won and often subject to reverses. The gains so far achieved need to be protected, while the vision of a more democratic society can continue to inspire our hopes and our actions.”

This dual challenge—the need to protect hard-won rights and the need for deeper democratic reforms—is more evident today than ever. On the one hand, the past two presidential elections have provided extensive evidence of a growing and systematic threat to existing voting rights, taking the form of voter intimidation, ballot tampering, suspect vote counting methods, and highly partisan election administration. The sense of threat is especially acute for people of color and African Americans in particular, not only because of their long historical struggle to win the right to vote, but also because of the precarious legal standing of that right and the decidedly racial pattern of recent abuses. Indeed, more than half of the ballots thrown out nationally in the 2000 presidential election were cast by African Americans,<sup>1</sup> and evidence from the 2004 election indicates that African Americans were once again the special target of voting rights abuses. Meanwhile, the official responses to these growing threats have been woefully inadequate. The Help America Vote Act of 2002 was unable to prevent the abuses documented in Ohio and elsewhere in 2004, and may even have contributed to them by helping to increase the use of questionable electronic vote counting methods, while the Carter-Baker Commission on Electoral Reform has served more to gloss over the abuses than to expose them or offer adequate remedies.

On the other hand, even in the absence of such abuses, the right to vote has been rendered increasingly meaningless by the institutional features of US elections. These include a campaign finance system that has narrowed the electoral field and made candidates and elected officials beholden to private big money interests; winner-take-all election rules and highly restrictive ballot access laws that have severely limited the choices of voters; corporate-dominated media and corporate-financed debates that have constricted the national political discourse; the abuse of incumbency and partisan gerrymandering that have transformed most electoral districts into uncompetitive and often uncontested single-party strongholds; and an electoral college that has eliminated most states from meaningful competition in presidential elections.

The result is a highly uncompetitive and undemocratic electoral system that has made the act of voting increasingly hollow and futile, and thus goes a long way toward explaining why the United States has one of the lowest voter turnouts in the world, why people of color, working people, and women are severely underrepresented, and why serious social problems that are successfully addressed elsewhere go unaddressed here. Indeed, because of restricted choice, rather than strengthening democracy, US elections have served to concentrate power in the hands of entrenched and unaccountable social and economic elites. They have also contributed to a political culture of cynical resignation, in which the majority of potential voters regard voting as completely irrelevant and most others believe that casting and counting ballots for lesser

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<sup>1</sup> Greg Palast, *Lost Votes* (June 20, 2004) (citing Philip Klinker, the statistician who worked with US Civil Rights Commissioner Christopher Edley’s team who investigated the 2000 election), available at <http://www.zmag.org/content/showarticle.cfm?ItemID=5744> (last visited May 25, 2006).

or greater evils is all there is—or can be—to democracy. Consequently, rather than motivating people to become politically engaged and empowering them with the capacity to influence the decisions that shape their lives, for many voting has become a politically disempowering and depoliticizing act.<sup>2</sup>

Today, Americans therefore face the same dual challenge: to reaffirm and protect the universal right to vote for which our predecessors fought and died; and to build on their accomplishments by fighting for reforms that expand voter choice, heighten electoral competition, strengthen the voice of marginalized groups, and thus increase the political power of voters. In response to this challenge, growing numbers of Americans are mobilizing and organizing on a broad and diverse front to protect and democratize elections in the United States, advancing such pragmatic and long overdue reforms as instant runoff or ranked-choice voting, public financing of elections, proportional representation, equal access to the ballot, tamper-proof voting machines, non-partisan election administration and debates, free access to commercial media, the elimination of the electoral college, the re-enfranchisement of ex-felons, and others. However, if this emerging “new generation” voting rights movement is to build on the accomplishments of the earlier voting rights, civil rights and racial justice movements, it will need to forge alliances with people and organizations engaged in day-to-day struggles in their communities. It will also need to coalesce into a more unified political force, and design a coherent political strategy capable not only of beating back the threats to hard-won historical gains, but also creating the political openings and generating the political capacity necessary for a sustained process of democratic transformation.

The myriad problems afflicting the electoral system suggest that no single reform will secure our democracy. But while many are necessary, some offer the possibility of opening the door for others, thereby increasing the prospects for an ongoing process of democratic change. Most importantly, as voters are presented with more meaningful options, the power in the electoral system will begin to shift into their hands and they will gain the capacity to win more far-reaching reforms. The remainder of this article discusses one especially promising reform designed to increase the choices—and thus the power—of voters. Specifically, we are referring to a change in the method for electing executive offices, such as mayors, governors (and other statewide offices), and the president. This is a promising area not only because its adoption would create a dramatic opening in our political process, but also because it is now being used in several jurisdictions and support for it is growing rapidly all across the country.

## II. A MORE DEMOCRATIC ELECTORAL METHOD

The most widely used electoral system in the United States, plurality voting, also known as first past the post (FPTP), is also the most archaic and least democratic. Voters choose one candidate, and the candidate with the most votes is elected, even if she receives less than a majority. Although the system is simple and it seems fair to elect the candidate with the most votes, it suffers from a variety of flaws. As a result of these flaws, most countries in the world have abandoned plurality voting. Among industrial democracies, only the US, Canada and the UK still use plurality voting for national elections.<sup>3</sup>

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<sup>2</sup> See FRANCES FOX PIVEN & RICHARD A. CLOWARD, *WHY AMERICANS STILL DON'T VOTE: AND WHY POLITICIANS WANT IT THAT WAY* (Boston: Beacon Press, 2000).

<sup>3</sup> The UK also uses forms of proportional representation for elections to the European parliament and the parliaments of Scotland and Wales.

#### A. WHAT IS WRONG WITH PLURALITY ELECTIONS?

The flaws of plurality elections stem from the possibility of electing a candidate that a majority of voters oppose, thereby violating the principle of majority rule and leaving most people without representation. This occurs when the majority splits its votes between two candidates, allowing a third candidate with less overall support (and often strongly disliked by the majority) to win. Typically, this happens when a strong third party or independent runs in a race in which the Democratic and Republican candidates are competitive, but it also happens in primaries when multiple candidates target the same voters. The most notable recent example of this is the 2000 Florida presidential election, in which Bush edged out Gore by 537 votes. In that election, three third party candidates (Green, Libertarian and Reform) received more than ten times as many votes as the Bush-Gore difference. That same year, a Democrat was elected to the U.S. Senate from Washington State by just over 2,200 votes out of 2.4 million cast in an election in which a Libertarian received over 64,000 votes. That victory enabled Democrats to gain control of the Senate when Vermont Senator James Jeffords left the Republican Party and began supporting the Democratic leadership in mid-2001.

Furthermore, when a candidate wins office with less than a majority of the vote, even if that candidate is preferred by an actual majority, that candidate is likely to enter office with a weak or unclear mandate. For example, when Bill Clinton won office in 1992 with 43% of the vote, Senate Majority Leader Bob Dole vowed to represent the majority of Americans who did not vote for Clinton by filibustering Clinton's policy proposals and forcing Clinton to gain 60 senate votes to override the filibuster.

In addition, plurality elections are unrepresentative and in fact create disincentives for voters to vote for their favorite candidate. If your favorite candidate is not among the frontrunners, your options are not great. You can cast a symbolic vote for a loser who will likely be ignored by the media or blamed as a spoiler who caused the election of her supporters' least favorite candidate. Or you can hold your nose and settle for a lesser evil to avoid a greater evil. Or you can choose not to vote at all, which has become the option of the majority. The problem is that plurality elections give many voters an incentive not to vote for their favorite candidate, which means that the election is not an accurate measure of whom the people want in office and thus leaves many if not most of them unrepresented and turned off to the electoral process.

A closely related problem is that plurality voting leads to the suppression of candidacies. This can take obvious forms such as Bill Maher and Michael Moore on their knees begging Ralph Nader on live television not to run in 2004, and others engaging in character assassination simply because he dared to run for office. It can also include political operatives contacting donors of campaigns and encouraging them to ask for their money back. And when a candidate withstands the pressure and runs, that candidate may find that both public and private funding sources for organizations they are involved with dry up, and that doors once open to public officials slam shut.

This phenomenon is especially significant in primary election for open legislative seats. Since the vast majority of races for the state legislature and U.S. Congress are uncompetitive, the winner of the primary of the dominant party is virtually assured election. In an open seat, if several contenders jump into the race, candidates appealing to similar constituencies may split the vote and elect a candidate with less overall support or support from party leaders. As a result, party leaders often try to clear the

field and frontrunners try to build up huge war chests early on so that no other candidate can compete.<sup>4</sup>

The suppression of candidacies falls hardest on first-time candidates, especially young candidates, candidates of color, and low-income candidates, since they are least likely to have strong party and financial backing. Since new candidates are often driven by a feeling that important issues and perspectives are not being discussed, the suppression of these candidates deprives the public of the very issues that might inspire them to participate.

Finally, plurality voting skews media coverage and encourages negative campaigning. Because voters have an incentive not to consider third party and independent candidates, media outlets tend to ignore them and the issues they are trying to raise. Instead, media focus on polling results, fundraising and personalities rather than substantive policy issues. Mudslinging is not very effective when voters can support a candidate other than the slinger and the target of the mud. Since plurality voting marginalizes independent and third party candidates as irrelevant or spoilers, negative campaigning is more widespread under plurality rather than other voting methods.

#### B. HOW ABOUT RUNOFF ELECTIONS?

Runoffs represent a real improvement over plurality elections, but they do not entirely overcome the shortcomings of plurality elections, and they have problems of their own. Runoff elections ensure majority rule of those who participate in the runoff, but turnout varies greatly between the two rounds. For example, turnout dropped in 98% of all federal runoffs between 1994 and 2004<sup>5</sup>. Aggregate turnout in all of these runoffs was 36% lower than in the first round. This drop in turnout undermines majority rule. Also, the two candidates advancing to a runoff can receive together less than 50% of the vote, meaning that a majority of voters did not vote for someone in the runoff. In addition, runoffs reduce but do not eliminate the spoiler problem, especially when several similar candidates are competing for the same runoff spot, perhaps against an incumbent. Those candidates can split the vote, allowing another candidate with less overall support to gain a spot in the runoff.

But perhaps the biggest downside of a runoff is the burden of holding a second election. This burden falls mainly on taxpayers, who pay for the election, and on election officials and poll workers, but it also falls on candidates, campaign workers, and, importantly, campaign contributors. Since runoffs generally occur soon after the initial election, they give advantages to candidates who can raise money quickly from large donors, further exacerbating disparities in campaign finance between candidates. Lastly, for those who participate in an election, it takes time away from work and family and forces people to sift through campaign mailers, phone calls and advertisements.

Head-to-head runoffs also encourage vicious negative campaigning since voters cannot escape from the two candidates slinging mud to support another one. This is one reason that voter turnout generally drops in a runoff.

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<sup>4</sup> For example, in the open-seat race for New York's Eleventh Congressional District, multiple black candidates are competing for the Democratic nomination against a single white candidate. Community leaders in Brooklyn, where the district is located, have attacked the white candidate for taking advantage of the deluge of black candidates. One leading black candidate withdrew from the race to increase the remaining black candidates' prospects. Jonathan Hicks, *House Candidate Withdraws, Afraid of Splitting Black Vote*, N.Y. TIMES, May 24, 2006, at B4.

<sup>5</sup> See Federal Primary Election Runoffs and Voter Turnout Decline, FairVote—the Center for Voting and Democracy, available at <http://www.fairvote.org/?page=1489> (last visited May 25, 2006).

### C. A SOLUTION TO THE PROBLEMS OF PLURALITY AND RUNOFF ELECTIONS

There is a tested and proven solution to these problems. It was developed in the United States by Professor William Robert Ware of the Massachusetts Institute of Technology around 1870 based on the single transferable vote form of proportional representation developed independently by Carl Andrae in Denmark and Thomas Hare in England. It was used in public elections as early as 1897 in Australia, in state-wide primaries in the United States in the teens and 20s of the last century, in local elections from the 1930s to the 1950s, for all local elections in San Francisco since 2004, for mayor of Burlington, Vermont since 2006, and for overseas military voters in Arkansas, Louisiana and South Carolina. In recent years, legislation requiring or allowing this method has been adopted in Takoma Park, MD; Ferndale, MI; Santa Clara County, CA; Oakland, CA; Berkeley, CA; and Vancouver, WA, and it is likely to be on the ballot in Minneapolis, MN in November 2006.

It depends on a simple but powerful idea: allow voters to rank candidates in order of choice and then use those rankings to elect the candidates preferred by a majority of voters. In essence, by allowing voters to rank candidates, it allows voters to simultaneously participate in an election and a runoff. The system is called instant runoff voting (IRV) or ranked-choice voting (RCV).<sup>6</sup>

Unlike plurality voting, which pressures voters to reject their preferred candidate in favor of a “lesser evil” who *may* have a better chance of defeating the candidate they most fear, IRV allows them to choose both. In this way, it eliminates the so-called “spoiler effect” and “wasted vote” phenomenon and gives voters a more democratic set of choices. Under IRV, voters simply rank candidates in order of their preference (first, second, etc.). If a candidate wins a majority of first choice votes, that candidate is the winner. If no candidate gets a majority of first choices, the rankings are used to perform a series of runoff rounds. In each round, the lowest vote-getting candidate is eliminated, and each ballot is recounted for the voter’s most preferred candidate who is still in the race. Candidates are successively eliminated until one candidate receives a majority. IRV therefore not only allows voters to voice their real preferences; it also ensures that the will of the true majority, not a mere plurality, produces the winner of each election.

By ranking candidates, the voter is saying, “I want to vote for my first choice candidate, and if she/he makes the runoff, I want my vote to stay with my favorite candidate. But if my favorite candidate doesn’t make the runoff, I want my vote to go to someone who has a chance of defeating the candidate I most fear and oppose.”

IRV is much like convention style voting, which is recommended in Robert’s Rules: everyone votes for a candidate, the candidate with the fewest votes is eliminated, and everyone votes again for a candidate. With IRV, you declare your vote in every round by simply ranking the candidates. Your ballot will support in every round your favorite candidate who is still in the race.

### D. IMPLICATIONS OF IRV: IMPROVEMENT, NOT PANACEA

In the short-term, IRV would have several beneficial effects on the electoral process. It would give voters more choice, both in terms of an ability to express themselves and in terms of the menu of candidates to choose from. It would free major party candidates from the fear that an independent or third party candidate would

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<sup>6</sup> In some places, it is also known as the alternative vote, the supplemental vote, preferential or preference voting, or the single-transferable vote.

spoil their election, which means that major parties could work constructively with minor parties on the issues they agree on. IRV would ensure that the will of the majority is respected, which would strengthen the mandate of candidates winning office.

IRV would also have positive effects on candidates and campaigns. A wider range of candidates would be freed to compete in both primary and general elections, and this would encourage new candidates to enter the ring. This would likely increase the diversity of candidates, especially bringing more young people, working class people, women, and people of color into the process. These candidates may well appeal to groups of voters who are increasingly dropping out of the process, and over time, this would likely slow or reverse the trend of declining participation. It would also increase the competition among candidates and elected officials and thereby increase the power of voters to hold them accountable.

Finally, in a multi-candidate race, there is less incentive to use negative campaigning. Most instant runoff elections would still boil down to a race between a Democrat and a Republican, at least in partisan races, so those candidates will have to continue to differentiate themselves and even attack each other, but they will not feel the pressure to bash the independent and minor party candidates with whom they have the most agreement.

This wider diversity of candidates would raise a wider diversity of issues, and since these candidates would no longer play a negative, spoiler role, the media would be more likely to cover these issues rather than personalities and horse races.

#### E. BROADER IMPLICATIONS FOR POLITICAL POWER AND THE IDEA OF TRANSFORMATION OF OUR POLITICAL CULTURE

While support for the two major parties has been plummeting for decades, we nonetheless have an effective political duopoly in the United States. Indeed, third party candidates play essentially no role in governing at the federal level, less than 0.1% at the state level (all in state house, none in state senate or executive office), and a trivial, though larger role at the local level (a few hundred out of 50,000 office holders). Even their influence on most campaigns is minor, with the occasional exception of an independently wealthy national candidate like Ross Perot. Most electoral districts in the United States are uncompetitive, and many are uncontested single party fiefdoms. In the 2002 and 2004 House elections, only eleven of more than 800 incumbents were defeated, an incumbent re-election rate of nearly 99%. Moreover, in 2002, 36.9% of state legislative races were *uncontested* by both major parties, a figure that rose to 38.7% in 2004.<sup>7</sup>

The two big parties use their monopoly on political power to erect and maintain barriers to participation by others. Perhaps the most obvious examples of this are draconian ballot access laws that make it difficult for third party and independent candidates even to get on the ballot. For example, according to the *Ballot Access News*, “The Georgia ballot access laws are so severe, that in their entire 57-year history, no minor party candidate for the U.S. House has ever appeared on the ballot.” But these barriers also include debates, when major party candidates refuse to appear if the hosts of the debates invite third party and independent candidates. The Democratic and Republican Parties actually created a private organization, the Commission on Presidential Debates, to run presidential debates, and not surprisingly, it is nearly impossible for a non-major party to get into these debates.

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<sup>7</sup> See Uncontested state legislative races, 2002-2004. FairVote—the Center for Voting and Democracy, available at <http://fairvote.org/reports/uncontestedraces.htm> (last visited May 25, 2006) (using data from *Ballot Access News*, edited by Richard Winger, available at <http://www.ballotaccess.org>).

Campaign finance law often discriminates against third-party and independent candidates. For example, Connecticut recently passed a landmark public financing bill, but it includes nearly insurmountable signature requirements for third party candidates that major party candidates do not have to meet.

All of this means that voters who are dissatisfied with the current behavior of the two big parties have no way of exiting from their dilemma, other than to drop out of the electoral process altogether. In most cases, there are no third party or independent candidates on the ballot. Even when they appear on the ballot, the media coverage is so minimal that most voters do not know anything about them, except perhaps that they are potential spoilers.

Instant runoff voting would correct these problems by providing voters with a positive exit option without fear. It would allow them to express themselves electorally without risking the election of the candidate they most dislike. This would bring relevance and viability to independent candidates and third parties and force the major parties to adapt or lose electoral support. This would in turn increase the leverage and power of voters in general over candidates and elected officials and third parties within the party system as a whole. It would also lower barriers to the participation of women, people of color, young people, working class people, and poor people.

Instant runoff voting would create a more level playing field that allows all candidates and parties to participate equally, to raise the issues they consider important, not to be ignored or mocked by the media, and to receive the votes of people who actually support them. This would cause a gradual but potentially very significant shift in the entire party system, as well as the national debate, because it would become harder for the two major parties and the media to disregard issues being raised only by third parties. The big parties would have to reposition themselves closer to the people on a variety of important issues, or they would lose votes, and eventually elections, to growing, new parties. This would, in sum, make our entire electoral system more responsive to the public.

In addition to the effects of instant runoff voting, there are benefits of the fight itself. The national struggle for instant runoff voting is contributing to a movement that can use the political opening it creates to struggle for other reforms. As the public sees the electoral system becoming more responsive, their expectations of the electoral process and their demand for improvements will grow.

Over time, ranked-choice voting will likely contribute to increasing, or at least slowing the decline in, voter turnout. Empirical data make clear that voter turnout rises when there are more choices. When more people recognize that their votes may actually help to elect someone they like, they will have more incentive to participate.

Finally, ranked-choice voting would reduce but not eliminate the influence of big money in political campaigns. A two-choice election exacerbates the influence of money because both candidates target the same voters, the so-called swing voters, and these voters are expensive to persuade precisely because they don't have strong views. In a ranked-choice election, if 10% of the voters support a candidate based on their ideology and positions, those voters will mobilize themselves even without much campaign spending especially if they know they can cast a potentially decisive second choice for a frontrunner. In the long-term, we would expect that the major parties would be forced to adopt positions closer to where the bulk of the voters are, in spite of the influence of big money, because minor parties could capture market share if the big ones remain distant from the wishes of the public.

#### F. PRINCIPLED AND PRAGMATIC REASONS TO PROMOTE RANKED-CHOICE VOTING

The principled reason that any political party and candidate should promote ranked-choice voting is that it is simply more democratic than plurality or runoff elections. Americans often express contradictory views about democracy, strongly supporting the concept in general, but opposing specific steps that bring more people into the voting process, such as same-day registration or the enfranchisement of ex-felons. Few Americans would expect, therefore, that the major parties would embrace this reform purely out of principle.

But there is a very pragmatic reason that both major parties might support it: to the extent they believe their views are more representative of the majority than the other party, they may believe that they are more likely to suffer the consequences of non-majority winners than the other party. Indeed, it is no coincidence that IRV has gained the greatest support in those states where a strong third party has emerged and has at least raised the specter of spoiling the incumbent party. At a national level, it may seem that the Democrats face a bigger challenge from left-of-center parties than the Republicans do from right-of-center challengers, but in the state of Washington, for example, the Republicans have lost two US Senate races, a governor's race, and a key state senate race in very close elections in which Libertarians received many times more votes than the margin of victory. The losses in 2000 of a state senate race and a US senate race cost the GOP the control of both of those bodies. At some point, the Washington State Republican Party may decide that instant runoff voting is in its best interest. In Alaska, until the recent election of former Senator Frank Murkowski as governor, the GOP had failed to elect a governor for 20 years because of split votes on the right.

The flip side to this pragmatic consideration is that both of the major parties often respond to IRV as though they would rather lose election under the current system than risk a new system in which other parties could participate *even if those candidates would win elections no more frequently than in the current system*. It is as if the major parties would rather lose elections than compete against minor parties, even though minor parties do not win elections under IRV. This means that both of the major parties often stand as obstacles to this reform, but many prominent major party politicians, including Senator John McCain (R-AZ) and Democratic National Chair Howard Dean strongly support ranked-choice voting.

#### G. OTHER OBSTACLES TO ADOPTION

Over the past ten years, one source of opposition to reform has often proven disproportional and decisive: election administrators. This opposition stems from a variety of motivations, including legitimate concerns about the burden on election officials, the cost of replacing incompatible voting equipment, lack of understanding of the administrative implications of ranked-choice voting, antagonism toward third parties, and simply political opposition to the idea.

Because elected officials are often unsure of the implications of ranked-choice voting, they often leap at the opportunity to hide their position behind an election administrator who says that they can implement it, but it would cost too much or cause massive confusion among the voters.

Much of the older voting equipment in the country is not compatible with ranked-choice voting. During the purchase of new voting equipment using funds from the federal Help American Vote Act (HAVA), proponents of ranked-choice voting lobbied

in many places for requirements that future equipment be compatible or be made compatible. In many places, a combination of election officials and elected officials blocked such requirements, which would not have cost anything. These players misused their official positions to block voting options that the public may wish to exercise in the future. So in many places, voting equipment continues to pose a difficult obstacle to the implementation of ranked-choice voting.

The remaining obstacles are more political in nature. The first is inertia and support for the status quo. This comes in many forms: the belief that the American two-party system is best, a belief drummed into our heads throughout the educational system; the adage, “If it ain’t broke, don’t fix it;” and the idea that voting for one is our tradition. It also includes many false, knee-jerk reactions, such as that it is too confusing for voters, that it violates the principle of one person-one vote, or that it would put an end to the two-party system.

Elites often oppose ranked-choice voting, probably for pragmatic reasons—their position is strongest with the two current parties and voters’ having no exit options—but often by posing bogus arguments, the most common of which is that it is too complicated for voters.

The second party in one-party jurisdictions may view plurality elections as their only hope for winning elections. For example, the Republican Party opposed ranked-choice voting in San Francisco, and the Democratic Party opposed it in Alaska.

A final group of opponents may seem counter-intuitive: some leaders of minority communities have opposed ranked-choice voting out of a genuine belief that the system would harm the interests of people of color, either because it is too confusing to be properly implemented or their candidates are more likely to win under plurality or runoff elections. The historical use of ranked-choice voting in places like Cincinnati, Ohio, New York, New York and Ann Arbor, Michigan, as well as the current use in San Francisco, clearly shows that minority voters are perfectly capable of using the system effectively. And if one examines the impact of plurality elections on any numerical minorities and voter turnout patterns in runoff elections, one sees that the current systems are disadvantageous to people of color.

The bottom line, then, is that those who benefit from the status quo, even if they are not the ruling party, are threatened by democratic reforms that would reduce their share of power and increase that of voters.

#### H. THE WAY FORWARD

The most likely path will involve several components. The first is the continued and expanded use of ranked-choice voting in local elections. San Francisco and Burlington have run very successful ranked-choice elections, and there seems to be no support for returning to plurality or runoff elections in either place. Takoma Park, Maryland will use instant runoff voting in its next municipal election, and the cities and counties of Ferndale, Michigan; Vancouver, Washington; Santa Clara County, California; Berkeley, California; and Oakland, California all have authorizing statutes on the books. Minneapolis, MN will vote on ranked-choice measures this November. Each successful election introduces voters to the benefits of ranking candidates and raises their expectations for other elections. It also elects candidates who go on to serve in state legislatures and the Congress. Successful elections also provide the evidence for refuting the knee-jerk objections to ranked-choice voting, and they demonstrate that the administrative burdens are manageable.

Overcoming the obstacle of voting equipment is critical. A truly minimal step forward is for future voting equipment to allow the option of ranked-choice voting. To that end, supporters of ranked-choice voting should work to ensure that all Requests for Proposals and state and local appropriations include a line such as:

All voting systems used or purchased by the jurisdiction shall be capable of conducting a ranked-choice voting election in the first election in which they are used, or if not, within a reasonable time frame and at no additional cost once the capability is requested by the jurisdiction.

Several opportunities exist for legislation at state and federal levels. In Vermont, because of a state constitutional requirement that a majority candidate wins or the legislature chooses the governor, and the existence of a strong third party, legislation to institute ranked-choice voting for all statewide offices continues to gather support. In 2006, the governor signed a bill requiring the Secretary of State to develop all needed guidelines for implementing instant runoff voting.

Short of a state's adopting ranked-choice voting for general elections, special elections to fill vacancies may pose a likely first step, especially when the current system requires two or more special elections. The states of Arkansas, Louisiana and South Carolina already use ranked ballots for overseas military ballots in their elections that use runoffs. This practice could spread to other states, to all absentee voters and to both general and primary elections.

Political openings at the state and federal level may appear in states where one party controls both houses of the state legislature and where third parties at least potentially threaten to split the vote. These could include states such as Connecticut and California, but also North Carolina, Illinois and others. In such states, the legislature could certainly adopt ranked-choice voting for primaries, which would ensure that nominees enter the general election with strong support from the party and that candidates appealing to similar constituencies do not knock each other out. This could help in majority-minority districts where multiple candidates of color run against a single white candidate.

Taking advantage of these openings may well require two particular types of political pressure. The first is electoral pressure from both right and left, meaning serious candidates and parties who strategically spoil or threaten to spoil. This requires fortitude, both because the voters who support such candidates generally have second thoughts when they see the effects of spoiling and because state legislatures can react by clamping down on ballot access. But a sustained presence of third parties seems to be critical to the adoption of reforms such as ranked-choice voting.

The other type of pressure is a broad-based, next generation voting rights movement with a comprehensive political strategy that unites the currently disparate electoral reform advocates. Most electoral reforms, such as ranked-choice voting, campaign finance reform, paper trails, non-partisan election administration and so on, are necessary but not sufficient for fulfilling democracy's promise. These disparate, generally single-issue movements, need to coalesce into an agile coalition that can recognize political openings, focus resources on the problem, score a victory, and then take advantage of the opening to build political power and push for additional reforms. They also need to connect with grass roots organizations engaged in community struggles—getting beyond the vote, by viewing it not as an end-in-itself, but rather as a means to an end—empowering people to make change in their lives.

### III. CONCLUSION AND CLARION CALL

This is a call for an ambitious reform of our democracy, but the condition of American democracy and the problems facing our great nation call for nothing less.

This article has described the historical roots of the current need to preserve and expand the right to vote, and it has described a promising reform that will both improve our electoral system and create political space for further reforms. We have focused on reforming the way we elect inherently single-winner offices, such as mayors, county executives, governors, and the president.

Representative bodies, such as city councils, county commissions, state legislatures and the Congress, suffer from all of the problems that plague single winner plurality elections as well as other, even more profound ones. They can leave large blocs of voters unrepresented, and they can allow a minority to win a majority of seats or a majority to win all of the seats. To address these problems, we need another solution, proportional representation, which we hope to discuss in a future article.

# Health Care Provider Refusals to Treat, Prescribe, Refer or Inform: Professionalism and Conscience

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R. Alta Charo\*

## I. INTRODUCTION

A woman who has been raped is refused emergency contraception by a pharmacist. Another who wants a child is refused fertility services by a physician because she is gay. Another is refused a prescription for a drug needed for the aftermath of a miscarriage, because the pharmacist thinks it may be used for an abortion. A physician refuses to forward medical records for a patient who had an abortion after the fetus was diagnosed with severe deformities. Another physician refuses to perform a routine physical as part of an adoption procedure, because the woman is single.<sup>1</sup>

Largely as artifacts of the abortion wars, almost every state has some form of a “conscience clause” on its books—laws that seek to balance a health care provider’s conscientious objection to performing an abortion with the profession’s obligation to afford all patients nondiscriminatory access to services. Traditionally, these laws referred to physician obligations to provide abortion services and, in most cases, the provision of a referral satisfied one’s professional obligations. But in recent years, with the abortion debate increasingly at the center of wider discussions about contraception, end of life care, assisted suicide, genetic screening, reproductive technologies, and embryonic stem-cell research, nurses and pharmacists have begun demanding the same right of refusal. Even more expansively, some professionals are claiming that even a referral or the provision of information makes one complicit in the objectionable act, and therefore are asserting a much broader freedom to avoid facilitating a patient’s health care needs.

The debate surrounding health care provider (“HCP”) right of conscience has emerged with fresh force in the last few years, embedded in a larger national debate about the role of religion in public and professional lives. This debate, which ranges from displays of religious symbols on public property to public acts of religious conviction during public events, is implicated in the discussion of private acts of personal religious conviction in the course of providing professional services to the general public.

This paper describes early refusal clauses and more recent efforts to expand them to allow more HCPs to refuse to provide more kinds of services, as well as some legislative and regulatory actions pushing back in the other direction by limiting pharmacist refusals to fill prescriptions. The ethical arguments for provider refusals to

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<sup>1</sup> Rob Stein, *Seeking Care, and Refused*, WASH. POST, July 16, 2006, at A06.

perform services are briefly summarized, along with rejoinders to them. The paper then discusses in more detail the duty of professionals to provide services, based on the prevailing medical ethic of universal care, the principle of non-discrimination, and other considerations. Finally, several policy options are suggested, such as treating health care providers as public accommodations that may not discriminate based on sex, and requiring refusing providers to facilitate the referral of patients to other providers to ensure that every member of the public has access to needed products and services.

## II. REFUSAL LAWS FOR ABORTION

Shortly after the U.S. Supreme Court's decision in *Roe v. Wade* in 1973, Congress passed legislation to protect institutions' ability to refuse to offer abortion services.<sup>2</sup> The federal abortion conscience clause, called the Church Amendment, amended the Public Health and Welfare Act and protects federally funded individuals and entities that refuse to provide sterilization or abortion services when those individuals and entities declare the services to be "contrary to [their] religious beliefs or moral convictions."<sup>3</sup> The protection takes two forms—institutions may not be denied eligibility for federal grants, and they are prohibited from taking action against personnel because of their participation, nonparticipation or beliefs about abortion and sterilization. The Church Amendment concerned provision of services only, and did not address refusals to make referrals or to provide information about legal options for care, as part of the informed consent process. Forty-five states followed suit and passed laws to allow certain healthcare providers to refuse to provide abortion services. According to the Guttmacher Institute:

Almost every state in the country also has decades-old policies allowing individual health care providers to refuse to participate in abortion; many of these laws also apply to sterilization, and in 10 states, to contraception more broadly... . Only a handful of these laws specifically provide an exception to refusal rights in emergency circumstances; most do not require health care providers to notify their employers if they intend to opt-out of certain services, and only three require any notice to patients; and about a dozen go so far as to allow providers to refuse to provide information, despite the broadly recognized obligations around obtaining patients' informed consent.<sup>4</sup>

In recent years, Congress has again demonstrated interest in facilitating HCP refusals to provide health care that, in the HCP's individual judgment, is contrary to religious or personal conviction. For example, Congress passed the Weldon Amendment, prohibiting state and local authorities from "discriminating" against any health care entity that will not "pay for, provide coverage for or refer for abortions." It also allows a hospital to refuse care to a woman who is in need of an emergency abortion, even if

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<sup>2</sup> Rachel Benson Gold & Adam Sonfield, *Refusing to Participate in Health Care: A Continuing Debate*, GUTTMACHER REP. ON PUB. POL'Y, 8 (Feb. 2000).

<sup>3</sup> 42 U.S.C. § 300a-7 (2000).

<sup>4</sup> Adam Sonfield, *Rights vs. Responsibilities: Professional Standards and Provider Refusals*, GUTTMACHER REP. ON PUB. POL'Y, 7 (Aug. 2005).

the state law requires abortion coverage in such an emergency situation.<sup>5</sup> Another effort, in the 109th Congress, was jointly sponsored by Senators Kerry and Santorum. Entitled the Workplace Religious Freedom Act of 2005, the bill went beyond the issue of abortion-related refusals, and would have required employers to accommodate employees who refuse to provide a wide range of health care services due to religious objection, albeit with a requirement that alternate arrangements be made available for the patient to receive the requested services.

### III. EXPANDING ALONG FOUR AXES: RANGE OF PROVIDERS, RANGE OF PROCEDURES, RANGE OF REFUSALS, RANGE OF PROTECTIONS

While conscience clauses originated with an emphasis on physicians, recent legislative efforts have broadened to include pharmacists, nurses or even all persons connected with health care delivery. Such efforts would encompass the growing trend toward pharmacist refusals to fill prescriptions for emergency contraception. (Although emergency contraception has recently been made available over-the-counter for adult women, teens still require prescriptions, and thus may continue to encounter pharmacist refusals.) The most expansive bills would also extend refusal privileges to ancillary personnel, theoretically encompassing medical assistants or even orderlies and clerical workers.

In addition, while earlier conscience clauses focused on abortion and sterilization, the newer proposals include other reproductive services, such as traditional contraception, emergency contraception, and IVF or other fertility services. They also include non-reproductive services, such as end of life care (i.e. withholding and withdrawing heroic measures) or any therapy derived from fetal tissue or embryonic stem cell research (including, for example, some childhood vaccinations).

Further, the range of refusals now includes not only a refusal to perform a procedure, but also the refusal to provide a referral, to offer information or counseling on the legality of options that might be elsewhere available, or to do anything that the HCP regards as “participating” in the service in any way.

Finally, protections in some of the newer proposals recite an expansive list of actions that can no longer be taken against professionals who refuse to provide health care services. These protections include immunity from medical or other professional malpractice liability; protection from state licensing board disciplinary action; and protection from employment practices that might put those who assert a right of conscience at a disadvantage in hiring, retention and promotion.

A law passed in Mississippi in 2004 is a good example of the expansive new breed of refusal clause. It allows almost anyone connected with the health care industry—from doctors, nurses and pharmacists to the clerical staff of hospitals, nursing homes and drug stores—to refuse to participate or assist in any type of health care service, including referral and counseling, without liability or consequence.<sup>6</sup>

Similarly, a bill passed by the Wisconsin legislature (albeit vetoed by the Governor) would have permitted health care professionals to abstain from “participating” in any number of activities, with “participating” defined broadly enough to include not only performance of a service, but also counseling patients about their choices or

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<sup>5</sup> Consolidated Appropriations Act, 2005, Pub. L. No. 108-447, §§ 508(a), 508(d)(1)-(2), 118 Stat. 2809, 3163 (2004).

<sup>6</sup> S.B. 2619, Reg. Sess. (Miss. 2004); Miss. Code Ann. § 41-41-215 (Enacted 1998; Last Amended 1999).

providing referrals to other providers.<sup>7</sup> The full range of refusal privileges would extend to such situations as emergency contraception for rape victims, in vitro fertilization for infertile couples, managing patients' requests that painful and futile treatments be withheld or withdrawn, and offering therapies developed with the use of fetal tissue or embryonic stem cells. This last provision could mean, for example, that pediatricians—without professional penalty or threat of malpractice claims—could refuse to tell parents about the availability of varicella (chicken pox) and rubella (German measles) vaccine for their children, because it was developed with the use of tissue from aborted fetuses. Indeed, the issue of vaccine origins in fetal tissue research also raised issues of schools and parents conscientiously objecting to provision of medical services.<sup>8</sup>

With respect to pharmacist refusals in particular, Arkansas, Georgia, Mississippi, and South Dakota have passed laws or adopted regulations explicitly allowing a pharmacist the right to refuse to fill prescriptions based on his or her religious, moral, or personal beliefs or protecting a pharmacist from adverse employment action for doing so. None of these legislative or administrative actions requires the pharmacists to serve the patients' interests by other means, such as referrals or prescription transfers to other pharmacies.<sup>9</sup>

But at the same time that proposals to expand the scope of permitted refusals are proliferating, some actions have been taken to limit refusals, especially by pharmacists. Policies by statute, regulation or administrative interpretation in a number of states attempt to ensure that patients have access to legally prescribed medications, often by requiring a pharmacy to meet this need even if an individual pharmacist it employs refuses. Several proposals forbid pharmacists from refusing to refer or transfer prescriptions, verbally abusing patients, and threatening to breach patients' confidentiality. Moreover, the AMA adopted a resolution supporting legislative efforts that require pharmacists and pharmacies to fill valid prescriptions or "provide immediate referral to an appropriate alternative dispensing pharmacy without interference."<sup>10</sup>

The North Carolina and Massachusetts pharmacy boards, for example, have issued statements indicating that pharmacists who impede patients' access to prescription medications will be met with disciplinary action under existing state laws and regulations.<sup>11</sup> According to the National Women's Law Center, pharmacy boards in Delaware, New York, Oregon and Texas have also issued policies so that when a

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<sup>7</sup> Assemb. B. 207, 2005-2006 Leg. (Wis. 2005) (available at <http://www.legis.state.wi.us/2005/data/AB-207.pdf>).

<sup>8</sup> See *Vatican Condemns Vaccines Using Fetal Tissues*, Jul. 22, 2005, available at <http://www.cwnews.com/news/viewstory.cfm?recnum=38498> (last visited Feb. 20, 2007); *Medical Cannibals: The Moral Implications of Fetal Tissue Vaccines*, American Life League, available at <http://www.all.org/article.php?id=10169> (last visited Feb. 20, 2007); Louis J. Salome, *Shot Down: Prep School Rejects Rubella Vaccine Catholic Headmaster Cites Link to Abortion*, ATLANTA JOURNAL-CONST., Nov. 20, 1994, at A16.

<sup>9</sup> Jill Morrison & Gretchen Borchelt, *Don't Take "No" for an Answer, A Guide to Pharmacy Refusal Laws, Policies and Practices*, 5 (2007) (available at <http://nwlc.org/pdf/donttakeno2007.pdf>) (citing Ark. Ann. § 20-16-304 (1973); Ga. Comp. R. & Regs. r. 480-5-.03 (2001); Miss. Ann. § 41-107-1 (2004); S.D. Codified Laws § 36-11-70 (1998)).

<sup>10</sup> Sonfield, *supra* note 4.

<sup>11</sup> Morrison & Borchelt, *supra* note 9 (citing Letter from President James T. DeVita, The Commonwealth of Massachusetts Board of Registration in Pharmacy, to Dianne Luby, President/CEO, Planned Parenthood League of Massachusetts, Inc. (May 6, 2004); North Carolina Board of Pharmacy, Pharmacist FAQs: Frequently Asked Questions for Pharmacists on Conscience Clause, available at [http://www.ncbop.org/faqs/Pharmacist/faq\\_ConscienceClause.htm](http://www.ncbop.org/faqs/Pharmacist/faq_ConscienceClause.htm) (last visited Nov. 20, 2006)).

pharmacist refuses to fill a prescription or provide medication, the pharmacy nonetheless ensures delivery of services to the patient.<sup>12</sup>

And state professional licensing boards have on occasion proceeded to discipline their members for failure to provide services. For example, in one of the country's most egregious cases, a Wisconsin pharmacist not only refused to fill a prescription for birth control, but also refused to transfer it to another pharmacy or to return it to the patient, thus leaving her unable to seek services elsewhere. The pharmacist was eventually disciplined by the state licensing board, although the case turned in large part upon his untruthful claims to his employer that he was prepared to provide a full range of services, rather than upon a finding that such actions are impermissible as a matter of professional obligation and the terms of the license to be a pharmacist.<sup>13</sup>

In June 2006, California's Board of Pharmacy went further, and disciplined a pharmacist who both refused to fill a prescription for emergency contraception and refused to enter it into the necessary database for it to be transferred. Based on California state law, the Board of Pharmacy was able to fine the pharmacist \$750, in this case for the refusal to fill the prescription, and not merely (as in Wisconsin) for failing to transfer it.<sup>14</sup>

In the realm of state administrative action, the Nevada pharmacy board now limits pharmacist refusals to those based on professional, not religious, reasons. A similar rule is pending in Washington State.<sup>15</sup> And in April 2005 the Governor of Illinois issued an emergency rule that required pharmacists in that state to fill prescriptions for contraception "without delay."<sup>16</sup> Several pharmacists sued the Governor and other state officials, alleging that an administrative rule requiring them to dispense emergency contraception violated their First Amendment rights to freely exercise their religious beliefs, and also Title VII of the Civil Rights Act of 1964, because it required employers

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<sup>12</sup> *Id.* (citing Considering Moral and Ethical Objections, Delaware State Board of Pharmacy News (Delaware State Board of Pharmacy, Dover, Del.), Mar. 2006, at 4; Letter from Lawrence H. Mokhiber, Executive Secretary, New York State Board of Pharmacy, to Supervising Pharmacists, Re: Policy Guideline Concerning Matters of Conscience (Nov. 18, 2005), available at <http://www.op.nysed.gov/pharmconscienceguideline.htm>; Oregon Board of Pharmacy, Position Statement: Considering Moral and Ethical Objections (June 7, 2006), available at [http://www.oregon.gov/Pharmacy/M\\_and\\_E\\_Objections\\_6-06.pdf](http://www.oregon.gov/Pharmacy/M_and_E_Objections_6-06.pdf); Texas State Board of Pharmacy, Plan B, available at <http://www.tsbp.state.tx.us/planb.htm> (last visited Dec. 13, 2006)).

<sup>13</sup> *Wisconsin Judge Upholds Pharmacy Board's Punishment of Pharmacist Who Refused to Refill Oral Contraceptive Prescription*, MEDICAL NEWS TODAY, available at <http://www.medicalnewstoday.com/medicalnews.php?newsid=37525>.

<sup>14</sup> Morrison & Borchelt, *supra* note 9, at 6 (citing *In re Becker-Ellison*, Citation No. CI 2005 31291 (Cal. Bd. of Pharmacy, Dep't of Consumer Affairs, June 30, 2006) (citation and fine) (on file with the National Women's Law Center)).

<sup>15</sup> *Id.* at 4-5 (citing Adopted Regulation of the Nevada State Board of Pharmacy, LCB File No. R036-06 (effective May 4, 2006); Cy Ryan, *Pharmacy Asked to Withhold Judgment*, LAS VEGAS SUN, May 6, 2006, available at <http://www.lasvegassun.com/sunbin/stories/sun/2006/may/06/566613322.html>; Draft Text WAC 246-869-010 Pharmacies' Responsibilities, available at <http://www3.doh.wa.gov/policyreview/> (last visited Dec. 12, 2006)).

In 1997, the pharmacy manager of a California drug store was reprimanded by his employer for refusing to fill a woman's prescription for emergency contraception. The woman, who had medical reasons for preventing pregnancy, did get her prescription filled elsewhere, but she also pressed complaints with the pharmacy management and the licensing officials. The state pharmacy board declined to take action, however, as no state law or regulation at the time required pharmacists to fill the prescriptions presented to them. Brian P. Knestout, *An Essential Prescription*, 22 J. CONTEMP. HEALTH L. & POL'Y 349 (Spring 2006).

<sup>16</sup> Emergency Amendment to 68 Ill. Admin. Code § 1330.91. (enacted as 68 Ill. Admin. Code § 1330.91(j) on August 25, 2005).

to discriminate against them based on their religious beliefs. Although the state officials filed a motion to dismiss, the federal court ruled that the case may proceed to full consideration. Key to the court's decision was the assertion that the Governor's actions were intended to discriminate on the basis of religious affiliation.<sup>17</sup>

While not addressing the broader class of health care providers, nor the broader range of services now being refused, in recent years a number of states have passed legislation or issued regulations to ensure that women seeking medications are not disadvantaged by pharmacists who refuse to fill their prescriptions. As of early 2007, five states explicitly require pharmacists or pharmacies to ensure that valid prescriptions are filled: California, Illinois, Massachusetts, Maine, and Nevada. California's law prohibits pharmacist refusals except when the patient can nonetheless receive her services in a timely manner, the employer has been notified in writing, and the employer can make an accommodation without hardship.<sup>18</sup> Maine pharmacy law and regulations restrict pharmacist refusals to professional and medical reasons. Religious or personal convictions do not justify refusals.<sup>19</sup>

Despite these changes in state law, refusals continue to be a problem in states without applicable legislation or regulation, even if pharmacy policies require that patients be given service. In Ohio, for example, a woman and her boyfriend requested Plan B, a form of emergency contraception, but the pharmacist "shook his head and laughed," according to the woman. The pharmacist, she reports, told her that he stocked Plan B but would not sell it to her because he believed it to be a form of abortion.<sup>20</sup> Wal-Mart, in whose pharmacy this occurred, has a corporate policy to stock Plan B, and allows any Wal-Mart worker who does not feel comfortable dispensing a product to refuse service, but also directs such employees to refer customers to another pharmacist, pharmacy worker or sales associate.<sup>21</sup>

At the federal level, a number of bills have been introduced to limit HCP refusals, at least in the context of pharmacies. For example, Senator Barbara Boxer introduced the Pharmacy Consumer Protection Act of 2005, which would require pharmacies to fill all valid prescriptions in a timely manner. If the medication is not in stock, the pharmacy would be required to order the medication, transfer the prescription or return the prescription to the patient, depending on the patient's preference. Senator Frank Lautenberg introduced the Access to Legal Pharmaceuticals Act of 2005, which would require pharmacies to dispense all valid prescriptions even if their individual pharmacists refuse to participate. The bill also seeks to ensure that pharmacies avoid hiring pharmacists who refuse to return a patient's prescription, refuse to transfer a prescription, subject a patient to humiliation or harassment, or fail to keep a patient's records confidential.<sup>22</sup>

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<sup>17</sup> *Menges v. Blagojevich*, 451 F. Supp. 2d 992, 999-1002 (C.D. Ill. 2006).

<sup>18</sup> Morrison & Borchelt, *supra* note 9, at 4 (citing CAL. BUS. & PROF. CODE §§ 4314, 4315, 733 (2005)).

<sup>19</sup> *Id.* (citing Me. R. 02-392 ch. 19, § 11 (citing Me. Rev. Stat. Ann. tit. 32 § 13795(2))).

<sup>20</sup> Associated Press, *Wal-Mart Pharmacist Denies Couple Morning-after Pill*, Jan. 16, 2007.

<sup>21</sup> Misti Crane, *Some Still Refuse to Dispense Plan B*, COLUMBUS DISPATCH, Jan. 15, 2007, at 01A.

<sup>22</sup> Morrison & Borchelt, *supra* note 9, at 4 (citing Access to Legal Pharmaceuticals Act, S. 809, 109th Cong. (2005) (introduced Apr. 14, 2005, by Sen. Frank Lautenberg); Pharmacy Consumer Protection Act of 2005, S. 778, 109th Cong. (2005) (introduced Apr. 13, 2005, by Sen. Barbara Boxer); An Act to Amend the Public Health Service Act with Respect to the Responsibilities of a Pharmacy When a Pharmacist Employed by the Pharmacy Refuses to Fill a Valid Prescription for a Drug on the Basis of Religious Beliefs or Moral Convictions, and for Other Purposes, H.R. 1539, 109th Cong. (2005) (introduced Apr. 8, 2005, by Rep. Carolyn McCarthy)).

Overall, according to the The Guttmacher Institute, as of 2006:

- 46 states allow individual HCPs to refuse to provide abortion services;
- 43 states allow institutions to refuse to provide abortion services (15 limiting the privilege of refusal to private institutions and one to religiously-affiliated institutions);
- 13 states allow some HCPs to refuse services related to contraception (four of them specifically mentioning pharmacists, and another four with refusal clauses broad enough to encompass pharmacies);
- 9 states allow institutions to refuse to provide services related to contraception (six of them limited to private institutions); and
- 17 states allow some individual HCPs and institutions to refuse to provide sterilization services.<sup>23</sup>

#### IV. ETHICAL ARGUMENTS FOR AND AGAINST THE PERMISSIBILITY OF PROVIDER REFUSALS TO PROVIDE SERVICES

In a 2005 article entitled “Dispensing With Liberty,” philosophers Elizabeth Fenton and Loran Lomasky delineate the major lines of traditional argumentation concerning provider refusals on the grounds of religious belief or personal conscience.<sup>24</sup> Their conclusion, which paralleled that presented in a 2005 *New England Journal of Medicine* piece by this author,<sup>25</sup> is that traditional arguments are undermined by their primary focus on a contest between the moral claims of individual patients and providers. Both articles conclude that attention to the power imbalance between the parties, and the special obligations placed upon professionals as a group due to their privileged, quasi-monopoly status as health care providers, form the basis for what is arguably a collective obligation of the profession to provide non-discriminatory access to all lawful services.

Fenton and Lomasky begin by noting that “obligations to perform typically have to meet a higher burden of justification than do obligations to desist.”<sup>26</sup> In other words, an analysis of traditional arguments about the conflict between individual providers and individual patients must begin with the acknowledgment that an obligation to perform an act requires more justification than a mere obligation to avoid thwarting someone else’s actions. And it is true that the law rarely requires individuals to rescue or otherwise take action on behalf of another, absent special justification, such as having put the other person in danger or having previously taken on custodial or other responsibilities that engender a special duty of care.

Following this line of analysis, one can argue that failure to perform a service, whether performing an abortion, filling a contraceptive prescription, or informing a parent of the timeliness of a childhood varicella vaccine, simply constitutes a refusal to act, and that forcing a professional to act in such circumstances requires a high level of justification. As Fenton and Lomasky argue, “By refusing to enter into a

<sup>23</sup> Guttmacher Institute, *State Policies in Brief: Refusing to Provide Health Services*, Feb. 1, 2007, available at [http://www.guttmacher.org/statecenter/spibs/spib\\_RPHS.pdf](http://www.guttmacher.org/statecenter/spibs/spib_RPHS.pdf) (last visited Feb. 27, 2007); National Conference of State Legislatures, *Pharmacist Conscience Clauses: Laws and Legislation*, Oct. 2006, available at <http://www.ncsl.org/programs/health/ConscienceClauses.htm> (last visited Feb. 27, 2007).

<sup>24</sup> Elizabeth Fenton & Loren Lomasky, *Dispensing with Liberty: Conscientious Refusal and the “Morning After Pill,”* 30 *J. Med. & Phil* 579 (2005).

<sup>25</sup> R. Alta Charo, *The Celestial Fire of Conscience*, 352 *NEW ENGLAND J. MED.* 2471 (2005).

<sup>26</sup> Fenton & Lomasky, *supra* note 24, at 581.

transaction that the other party desires, one thereby *fails to provide a benefit* but not to *inflict a liability*. If that were not so, then anyone who turns down an offer from a prospective buyer, seller, employer, or suitor is guilty of inflicting a harm on the disappointed party. This would be to expand the notion of harm beyond usability.<sup>27</sup>

Responses to this argument are several-fold. First, it clearly separates out the calls for right to conscience that encompass forcibly imposing unwanted medical interventions, such as ventilators or feeding tubes, on competent patients who have refused further treatment. Given the recent bills attempting to extend refusal clauses to a refusal to abide by patient wishes in this regard, it is important to note that in this case, at least, it is a provider's actions, not inactions, that are at issue. And of course, such actions would also constitute a common-law battery. Further, state legislation protecting HCPs who inflict such unwanted care on competent patients would run afoul of constitutional protections for patient autonomy.

Second, and perhaps most interestingly, it is suggestive of an as-yet undiscussed aspect of the refusal clause debate. Specifically, the so-called "right of conscience" may be far easier to defend in the case of the non-professional than in the case of the professional. A clothing store salesperson who refuses to assist a single woman shopping for maternity clothes may indeed be leaving her no better or worse off than before she entered the store, and be under no ethical duty to do more than this. But where an affirmative duty to provide a service does exist, then failure to act is not merely nonfeasance, but rather is an active form of misfeasance. Thus, refusal by a licensed taxi driver to pick up an African-American man is more than nonfeasance; due to legal obligations to provide non-discriminatory service, this failure to act is a form of active misfeasance.

Thus, whether the refusal to provide a service should be regarded as mere nonfeasance or as a more serious problem of misfeasance turns, somewhat tautologically, on whether there is a duty to provide service. But on this, there is indeed some guidance, as the statements of the relevant professional societies suggest that just such a duty does indeed exist:

"The physician may not discontinue treatment of a patient as long as further treatment is medically indicated, without giving the patient reasonable assistance and sufficient opportunity to make alternative arrangements for care." —*World Medical Association, Declaration on the Rights of the Patient*

"The physician has an ethical obligation to help the patient make choices from among the therapeutic alternatives consistent with good medical practice." —*American Medical Association*

"Where a particular treatment, intervention, activity, or practice is morally objectionable to the nurse....the nurse is justified in refusing to participate on moral grounds....The nurse is obliged to provide for the patient's safety, to avoid patient abandonment, and to withdraw only when assured that alternative sources of nursing care are available to the patient."—*American Nurses Association, Code of Ethics*

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<sup>27</sup> *Id* at 583 (emphasis in original).

"A [physician assistant] has an ethical duty to offer each patient the full range of information on relevant options for their health care. If personal moral, religious, or ethical beliefs prevent a PA from offering the full range of treatments available or care the patient desires, the PA has an ethical duty to refer an established patient to another qualified provider. PAs are obligated to care for patients in emergency situations and to responsibly transfer established patients if they cannot care for them."—*American Academy of Physician Assistants, Guidelines for Ethical Conduct for the Physician Assistant Profession*

"[P]harmacists [should] be allowed to excuse themselves from dispensing situations which they find morally objectionable, but that removal from participation must be accompanied by responsibility to the patient and performance of certain professional duties which accompany the refusal....ensuring that the patient will be referred to another pharmacist or be channeled into another available health system...."—*American Pharmacists Association, 1997-98 policy committee report on pharmacist refusal clause*

"Pediatricians should not impose their values on the decision-making process and should be prepared to support the adolescent in her decision or refer her to a physician who can.... Should a pediatrician choose not to counsel the adolescent patient about sexual matters such as pregnancy and abortion, the patient should be referred to other experienced professionals."—*American Academy of Pediatrics, position statement on counseling the adolescent about pregnancy options*

"Nurses have the right, under responsible procedures, to refuse to assist in the performance of abortion and/or sterilization procedures.... Nurses have the professional responsibility to provide high quality, impartial nursing care to all patients in emergency situations ... to provide nonjudgmental nursing care to all patients, either directly or through appropriate and timely referral ... [And] to inform their employers, at the time of employment, of any attitudes and beliefs that may interfere with essential job functions."—*Association of Women's Health, Obstetric and Neonatal Nurses, position statement on nurses' rights and responsibilities related to abortion and sterilization*

By failing to abide by the standards set by their own professions, those practicing refusal without informing patients of their options and providing referrals or other alternatives are not merely denying a discretionary benefit to the consumer but rather are affirmatively violating a duty to their patients.

A rejoinder might be that these professional standards are wrongheaded, because they deny to HCPs the opportunity to avoid being transformed into mere purveyors of goods and services. The essence of professionalism, the argument goes, involves discretion and judgment, which is why the physician ought to have more authority over

patient choices than a candy seller has over consumer purchases. To do otherwise is to render medical services no different than gumballs. As Fenton and Lomasky present this argument:

“Just as physicians or lawyers or accountants enjoy a liberty to decline to transact with those who seek their services, so too do pharmacists.... [O]ther professionals also turn down potential clients with whom they feel uncomfortable working either for moral or other reasons. It is not inconsistent with professional practice to limit one’s clientele. Indeed, just the reverse; one attribute of professionalism is an entitlement to employ one’s own judgment concerning which associations to enter.”<sup>28</sup>

Two responses to this argument are in order. First, in the context of health care, refusals have most traditionally been based on medical inappropriateness. That is, an internist can refuse to do surgeries due to lack of qualification or a pediatrician can refuse to provide a drug to a teenager because its risks are poorly understood in younger patients. Refusals based on moral disapprobation, however, are not typical of medical ethics. Thus, the physician is trained to heal the criminal, regardless of personal feelings about the criminal’s moral culpability, and leaves to the criminal justice system the task of working to ensure that the now-healed criminal will not use his good health to engage in further criminal acts. This is as true of the thief shot by the homeowner as it is of the battering spouse who presents for repair of his broken knuckles. Even knowing that the act of healing may result in further abusive and criminal acts does not yield a medical ethic that calls for refusing care lest one become complicit in those acts. Instead, the prevailing medical ethic is one of universal care.

Second, the choice of refusals follows a pattern that suggests a discriminatory effect, whether direct or indirect. The argument from complicity, that is, the argument that one ought not be forced to become complicit in an immoral act, is not frequently raised in the context of setting the broken hand bones of the wife-beating husband who might then batter again. Instead, it is raised most frequently in the context of refusing to be complicit with acts that form families with single or gay mothers or with acts that prevent conception or gestation of a child. These are settings in which the parties most frequently affected are women. And while the recent expansion of refusal clause legislation to include a competent patient’s request to withhold or withdraw unwanted heroic measures, and the occasional report of refusals to fill erectile dysfunction prescriptions for single or gay men may ultimately undercut this point, for the moment the focus of most refusals has been on actions associated with sexual or reproductive decisions of women.

Actions that have a disparate impact on one class of persons—here, on women—are not necessarily unethically or illegally discriminatory (although they may be in some circumstances). But the disparate impact does raise legitimate questions about the underlying motivations of the actors, and the sufficiency of their justifications. This is especially true when those actions impinge upon protected classes of persons, that is, those whom we have historically disadvantaged in law and practice and for whom court now offer more protection from discriminatory state action. It is also true when those actions impinge upon protected classes of rights, of which reproductive

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<sup>28</sup> Fenton & Lomasky, *supra* note 24, at 582.

choice is one. Some protections are offered by the courts only in the context of state action, but it is illuminating even in a non-legal and purely ethical context to note the intersection of protected class and protected rights at the center of the category of people and services most typically denied on the basis of a right of conscience. One might ask whether the current debate over refusal clauses would sound any different if it were more baldly framed as the asserted right of health care providers to refuse service to “bad women.”

A last major source of argument in favor of the right to exercise conscientious objection is the assertion that in most cases the services requested are not really medical services. Even if there is a duty to provide emergency medical care (and arguably all medical care), services such as abortion, contraception, IVF and sterilization can be viewed as lifestyle services rather than medical services. They do not cure a disease, the argument goes, but rather use drugs and medical techniques to accomplish a lifestyle goal.

Again, the argument has multiple responses. First, medical professionals consider these services, at least in most circumstances, to be an important part of good health care. For example, given that pregnancy is a condition with significant medical consequences and a risk of both morbidity and mortality, contraception constitutes preventive health care. To trivialize these services as “lifestyle” issues is to ignore women’s health care needs.

Second, to the extent these may in some circumstances be viewed as choices dictated more by lifestyle than by medical necessity, they are nonetheless choices that are constrained by the state-created limits on consumer access to the products and services needed to accomplish these goals. The situation is not one in which a free market of products, suppliers and buyers seek one another out without constraint. Even beyond the practical constraints of insurance coverage (which often directs patients to a limited range of physicians and pharmacies lest coverage be denied), the very products and services themselves cannot be sold except by those who are members of a special collective, that is, licensed health care providers. To practice medicine or sell prescription drugs without a license is a criminal act throughout the country. If these professionals, who have a state-created and state-maintained collective monopoly on these products and services, will not provide service, the patients have nowhere to turn. Thus, what might otherwise be an issue of lifestyle choices is transformed by state action into an issue of medical choice, in which patient and provider stand not as equals with competing moral compasses but rather as petitioner and grantor in a regulated relationship.

## V. AN ALTERNATIVE VIEW OF THE REFUSAL CLAUSE DEBATE: COLLECTIVE DUTIES OF THE PROFESSIONAL COMMUNITY

There is ample precedent for limiting the range of conscientious objection for professionals who operate as state actors. The question arises, then, whether such limitations might appropriately be extended to those who, although private actors, are nonetheless in possession of unique privileges by virtue of state licensing schemes that grant them, as a professional group, a monopoly on a public service.

In *Endres v. Indiana State Police*, for example, the 7th Circuit considered a case arising from a religious objection on the part of a state trooper who claimed that his assignment to work as a Gaming Commission agent—an assignment that would require him to assist in the management of the casino industry—would violate his religious beliefs concerning the immorality of gambling. When his request for

reassignment was refused, he filed an employment discrimination action under Title VII of the Civil Rights Act of 1964, claiming that the state could refuse his request only if it could show that accommodation of his religious practice posed an undue burden on the state police, his employer.<sup>29</sup>

Judge Easterbrook, writing for court, held that the relevant provision of Title VII did not oblige states "to afford the sort of accommodation that Endres requested..." as, otherwise, "law enforcement personnel [would have] a right to choose which laws they will enforce, and whom they will protect from crime."<sup>30</sup> He further wrote:

Many officers have religious scruples about particular activities: to give just a few examples, Baptists oppose liquor as well as gambling, Roman Catholics oppose abortion, Jews and Muslims oppose the consumption of pork, and a few faiths ... include hallucinogenic drugs in their worship and thus oppose legal prohibitions of those drugs. If Endres is right, all of these faiths, and more, must be accommodated by assigning believers to duties compatible with their principles. Does [the Civil Rights Act] require the State Police to assign Unitarians to guard the abortion clinic, Catholics to prevent thefts from liquor stores, and Baptists to investigate claims that supermarkets misweigh bacon and shellfish? Must prostitutes be left exposed to slavery or murder at the hands of pimps because protecting them from crime would encourage them to ply their trade and thus offend almost every religious faith?<sup>31</sup>

This might seem, then, to be limited to a concern about the hardship that accommodations would place upon state agencies. Such a concern would be entirely in keeping with existing federal precedent, such as the 2000 decision in *Shelton v. Univ. of Medicine & Dentistry of N.J.*, where the court found that the civil rights of an employee were not violated when a reasonable accommodation, in the form of a lateral transfer, was effectuated in response to her refusal to participate in providing emergency abortion services in life-threatening situations.<sup>32</sup> But the *Endres* opinion went further, stating that accommodation would be unreasonable even in the absence of hardship. Agencies "designed to protect the public from danger may insist that all of their personnel protect all members of the public - that they leave their religious (and other) views behind so that they may serve all without favor on religious grounds."

Of course, the *Endres* case concerned agents of the state, and of what one commentator has called a "paramilitary organization" in need of special restrictions on professional autonomy.<sup>33</sup> But, one commentator notes:

Endres's claim ... reflects currently prevailing views as to the importance of self-realization, the role of religion in self-realization, and the degree to which religious values are commonly thought to be privileged as against other values. Obviously, we are far removed

<sup>29</sup> *Endres v. Indiana State Police*, 349 F.3d 922 (7th Cir. 2003) (cert. denied, 541 U.S. 989 (2004)).

<sup>30</sup> *Id.* at 925.

<sup>31</sup> *Id.* at 925.

<sup>32</sup> *Shelton v. Univ. of Medicine & Dentistry of N.J.*, 223 F.3d 220 (3d Cir. 2000).

<sup>33</sup> See Barry Sullivan, *Naked Fitzies and Iron Cages: Individual Values, Professional Virtues, and the Struggle for Public Space*, 78 Tul. L. Rev. 1687, 1709 (2004).

from the time when Justice Holmes could dispose of an analogous claim with the aphorism that someone "may have a constitutional right to talk politics, but [not] to be a policeman," as he did in *McAuliffe v. Mayor of New Bedford*. On the other hand, I would submit that only thirty or forty years ago, most policemen assigned to protect a casino or a barroom would have accepted that as part of their jobs; they would have done it, regardless of their personal, religious views. This is not to say that they took their religious beliefs less seriously, but that they did not think that it was the state's job to design their public responsibilities in a way that accommodated or complemented their personal religious views.<sup>34</sup>

It is this emerging norm of "self realization" in the professions that is in tension with the fact that some professions operate in a restricted market. The restricted nature of the medical products and services markets functions to create a new relationship between provider and patient. As Fenton and Lomasky put it, in their discussion specifically of pharmacist refusals:

"[T]he salient point is that pharmacist and prospective client do not stand to each other as any two random agents endeavoring to secure their various ends as they make their way through the world. With regard specifically to the liberty to transact in the distribution/procurement of regulated drugs, they do not stand as moral equals. The institutional structure within which pharmacy is practiced has advantaged one party, and that advantage is secured to some extent at the expense of the other. It cannot, therefore, be presumed that the general principle of rejecting coerced cooperation with other persons' endeavors continues to hold. Specifically, ... some limitation of pharmacists' right to choose their clients is justifiable compensation to that clientele for having their own domain of choice limited."<sup>35</sup>

By analogy, other state-created limitations on product and service sales are accompanied by a restriction on the liberty of the providers. The public utility that sells electricity is not permitted to refuse service to the KKK or to the Planned Parenthood clinic, regardless of the moral and religious views of the management or shareholders. The medallion cabs (that is, the taxis with the exclusive right to pick up hailing passengers from the street) are not permitted to refuse service to women immodestly dressed or men whose clothes denote a particular religious affiliation. (Indeed, in reaction to a growing number of Muslim taxi drivers at the Minneapolis airport refusing to pick up passengers carrying duty-free bags with alcoholic beverages, a new directive was issued forcing them to serve these passengers or pay a fine.<sup>36</sup>) The prison official who denies emergency contraception to an inmate who was raped is denounced.<sup>37</sup> And while the federal public accommodations law, which prohibits discrimination "of

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<sup>34</sup> *Id.* at 1709-10.

<sup>35</sup> Fenton & Lomasky, *supra* note 24, at 585.

<sup>36</sup> David Van Biema, *Minnesota's Teetotal Taxis*, TIME MAGAZINE, Jan. 29, 2007, at 30.

<sup>37</sup> Editorial, *Jailing Victim is Outrageous*, ST. PETERSBURG TIMES, Jan. 31, 2007, at 10A.

the goods, services, facilities, privileges, advantages and accommodations of any place of public accommodation ... without discrimination or segregation on the ground of race, color, religion, or national origin," does not list "sex" as an impermissible basis for exclusion, it might be argued that it is time to enshrine in law the notion that health care provider institutions should be treated as public accommodations that, at a minimum, do not discriminate directly or indirectly on the basis of sex.

A natural result of such an analysis might well be that, at the very least, a profession in possession of a state-created right to be the sole purveyor of products and services must ensure that every member of the public have non-discriminatory access to its products and services. That is, the profession as a collective unit takes upon itself a collective obligation to the patients it serves. How that obligation is fulfilled may vary from state to state, or profession to profession, provided that the collective obligation is met. In the early era of the AIDS crisis, for example, some HCPs resisted treating HIV-positive patients for fear of becoming infected themselves. Yet as professional groups, HCPs recognized the obligation to provide care. In some settings, the obligation was fulfilled by having only volunteer HCPs treat the infected patients, while other HCPs opted out. In other settings, the obligation to treat was shared by every member of the profession and no opt-out provisions were made. In all cases, though, there was a shared agreement that there was indeed an obligation to provide care, because no other market for care existed outside the profession.

In the context of today's debates, one means of meeting a collective obligation is to require every individual HCP to provide all products and services, thus denying the legitimacy of even the narrowest conscientious refusal laws of the 1970s, which focused almost exclusively on the actual performance of abortions and sterilizations. This could be accomplished at the state level either by establishing such a duty as a condition of licensing, or by enshrining such a duty in state law such that violation rendered the HCP vulnerable to medical malpractice litigation. Another approach would be to modify employment discrimination laws to make it more difficult for employees in health care professions to sustain religious discrimination claims when they are penalized for failing to perform their duties to their patients. Outside of state measures, professional societies can continue to articulate their own ethical standards, and in this way lay the groundwork both for individual HCPs to see their way clear to serving patients even in ways that violate their own preferences and beliefs, as well as to assist courts in determining the customary and standard practice in medical malpractice cases based on refusal of service or medical abandonment.

A less extreme means for achieving a reasonable result for patients is to accept a collective responsibility to make all legal products and services reasonably available. This is the tactic taken by those laws that focus on establishments rather than individual professionals. Thus, such laws may require that all licensed pharmacies have at least one pharmacist on hand during business hours who can fill all prescriptions, without requiring that each and every pharmacist at the establishment actually fill the prescriptions. While potentially burdensome for small pharmacy practices, it is manageable for larger establishments and most chains. (And indeed, many public accommodation laws make some exception for small family-owned businesses where compliance would be unusually burdensome.)

This approach still requires the refusing provider to inform patients of their legal options and to make a referral (or pass along a prescription) where necessary to facilitate the patient's request. For many who assert a right of refusal, such a solution still fails to meet their objection to being made complicit in the patient's choices. This

expanded notion of complicity is consistent with other areas of public discourse, such as bans on federal funding for embryo research or abortion services, in which taxpayers claim a right to avoid supporting objectionable practices. In the debate on refusal clauses, some professionals are now arguing that the right to practice their religion requires that they not be made complicit in any practice to which they object on religious or moral grounds, even if their concerns about complicity do not extend to the situations of criminals (discussed above) nor comport with modern notions of non-discrimination against women.

A less discussed and potentially more thorough alternative is to alter licensing laws in a fashion that would permit pharmacies to join different kinds of guilds, one of which offers all legal services but others of which offer only those services that are consonant with their own particular religious or moral vision. Such a parallel system exists in the world of hospital care, in which Catholic hospitals refuse to provide contraception, sterilization, abortion or in vitro fertilization services. This compromise is highly imperfect—where such hospitals are the only available health care centers in a community, or where hospital and HMO mergers have resulted in extension of such doctrinal restrictions to the secular facilities in the area, the practical result is indistinguishable from a legal prohibition on obtaining these services. Further, as the market for medical care is distinctly different than markets for consumer goods, such market system solutions may leave patients without viable alternatives. For example, even where full-service providers exist in a patient's area, the patient's insurance may restrict coverage in a manner that limits reimbursements to those services offered at the covered institution, thus preventing patients from acting as autonomous agents in a purer market. Nonetheless, such a balkanized version of the health care system could at least provide notice to prospective patients (assuming the notice is prominent and effective), and avoid the creation of reliance interests—a reliance on the pharmacy or health care center to provide requested services—in such a way that at least affords a theoretical possibility that patients could protect themselves by knowing ahead of time that they will need to search farther afield.

More ominously, some establishments are seeking to avoid these battles entirely by simply choosing not to stock the products that are the most contentious. In the most well-known example of this tactic, Wal-Mart made the decision to avoid stocking emergency contraception, thus eliminating the problem of managing individual pharmacist refusals, either by hiring additional pharmacists to provide the service or by forcing all employees to respect patient requests. As described in a 2005 piece from The Guttmacher Report:

The potential reach of this policy, and its impact on women's ability to access emergency contraception in a timely manner, should not be underestimated. For women living in rural areas, Wal-Mart may be the only pharmacy within miles. Moreover, with almost 4,000 locations nationwide, the retailer is a behemoth by industry standards and still growing: A 2003 projection estimated that it would control 25% of the drug store industry by 2007.<sup>38</sup>

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<sup>38</sup> Cynthia Dailard, *Beyond the Issue of Pharmacist Refusals: Pharmacies That Won't Sell Emergency Contraception*, GUTTMACHER REP. ON PUB. POL'Y, Aug 2005, at 10.

While Wal-Mart subsequently reversed this policy, it was an object lesson for other businesses that may be considering a wholesale withdrawal from the field of selling contraceptives or providing reproductive care. The reversal of the Wal-Mart policy followed a very vocal public campaign, but smaller businesses—which may nonetheless be significant factors in their local markets—may choose the same strategy, with little risk of generating a national outcry sufficient to trigger a reversal of their policy.

## VI. CONCLUSION

The problem of access due to a combination of refusals or the decision not to stock certain products is poorly documented, but reports are slowly emerging. The Washington Post ran a series of articles in July 2006 with personal stories of refusals for services ranging from contraception to artificial insemination. In August 2006, the Associated Press ran a story that read in part:

In complaints filed Monday with the Washington State Board of Pharmacy, the women said they were unable to get a total of 17 prescriptions for Plan B filled in June and July at four stores in the state capital and neighboring Lacey.

One, Stephanie Conrad, said she filed her complaint because of an experience weeks earlier after a condom broke.

"I couldn't find a Plan B pill for 45 hours after. I ended up getting pregnant. Then I had a miscarriage," Conrad said. "It was very painful emotionally and physically. I just wish it could have been avoided."

The complaints show "that there are major access problems in this community," said Janet Blanding, a medical transcriptionist. "These were legal prescriptions given to women of childbearing age."

Samantha Lee Margerum, one of the women, said she was sent from one store to another to another until, nearly an hour after beginning her quest, she was able to get a prescription filled at the fourth store, a Walgreens in west Olympia.<sup>39</sup>

At the heart of this debate and the growing trend toward countenancing service refusals are several intersecting forces. One is the emerging norm of patient autonomy, which has contributed to the erosion of the professional stature of medicine. Insofar as they are reduced to mere purveyors of medical technology, doctors no longer have extraordinary privileges, and so their notions of extraordinary duty—house calls, midnight duties, and charity care—deteriorate as well. In addition, an emphasis on mutual responsibilities has been gradually supplanted by an emphasis on individual rights. With autonomy and rights as the preeminent social values comes a devaluing of relationships and a diminution of the difference between our personal lives and our professional duties.

Second, there is the ever expanding range of topics linked to the core debate concerning female sexuality and the right to obtain an abortion. Cast as an issue of "right

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<sup>39</sup> Associated Press, *9 Women Complain Plan B Not at Pharmacies*, Aug. 1, 2006.

to life” rather than equality for women, opposition to abortion has now been linked to topics such as emergency contraception, research involving human embryos, the donation of organs from anencephalic neonates, and the right of persons in a persistent vegetative state to die. While abortion draws the most public attention, the battleground is in fact much larger.

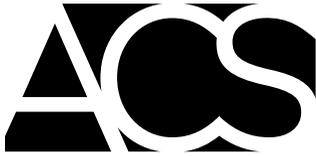
Most profoundly, however, the surge in legislative activity surrounding refusal clauses represents the latest struggle with regard to religion in America. Should the health care marketplace—a part of the public square—be a place for the unfettered expression of religious beliefs, even when such expression causes injury to others, such as patients? Or should it be a place for religious expression only if and when that does not in any way impinge on others? The debate here is part of the debate that has been played out with respect to blue laws, school prayer, Christmas creche scenes, and workplace dress codes. It is, at core, a debate about whether tolerance of individual patients’ choices and enhancing a duty of public obligation when engaging in public, professional activities, constitutes an advance in civil society or an unacceptable secularization of what, for many, is or ought to be a religious country.

Conscience is a tricky business. Some interpret its personal beacon as the guide to universal truth and undoubtedly many of the health care providers who refuse to treat or refer or inform their patients do so in the sincere belief that it is in the patients’ own interests, regardless of how those patients might view the matter themselves. But the assumption that one’s own conscience is the conscience of the world is fraught with dangers. As C.S. Lewis wrote, “Of all tyrannies, a tyranny sincerely exercised for the good of its victims may be the most oppressive. It would be better to live under robber barons than under omnipotent moral busybodies. The robber baron’s cruelty may sometimes sleep, his cupidity may at some point be satiated; but those who torment us for our own good will torment us without end for they do so with the approval of their own conscience.”<sup>40</sup>

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<sup>40</sup> C. S. Lewis, *GOD IN THE DOCK: ESSAYS ON THEOLOGY AND ETHICS*, 292 (Walter Hooper ed., Wm. B. Eerdmans Publishing Co., 1994) (1970).





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