SYMPOSIUM

Justice Blackmun and Judicial Biography: A Conversation with Linda Greenhouse

CONSTITUTIONAL INTERPRETATION AND THE “WORLD OUT THERE”: AN INTRODUCTION TO THE SYMPOSIUM

Heidi Kitrosser

This issue and the symposium on which it is based were inspired by Linda Greenhouse’s wonderful and much-praised book,1 Becoming Justice Blackmun: Harry Blackmun’s Supreme Court Journey.2 Greenhouse, the New York Times’ Pulitzer Prize-winning Supreme Court reporter,3 was one of two journalists4 granted early access to a treasure trove of personal and official papers left to the Library of Congress by the late Justice Harry Blackmun.5 Her book is based on Blackmun’s papers.6

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1 This title is based on the title of Harold Hongju Koh’s 1994 tribute to Justice Blackmun: Justice Blackmun and the “World Out There,” which itself borrowed a phrase from a dissenting opinion by Justice Blackmun. For full citation information see infra note 9.
3 See Kalman, supra note 1.
4 The other journalist was Nina Totenberg of National Public Radio. See Garrow, supra note 1, at 37.
5 Id.; see also Harold Hongju Koh, Unveiling Justice Blackmun, 72 BROOK. L. REV. 9, 11-16 (2006).
6 Garrow, supra note 1, at 37.
Justice Blackmun was both widely revered and widely criticized for emphasizing the real world ramifications of Court decisions and for acknowledging his own struggles in resolving some cases. It is fitting that a Justice so known for tying constitutional decision-making to its human genoses and consequences would leave to the public so extensive a record of the Justices’ decision-making processes and of his own experiences during his years on the Court.

Becoming Justice Blackmun—the literary fruit of Linda Greenhouse’s access to this archive—very much reflects the connection that Justice Blackmun perceived between constitutional decision-making and the “world out there.” Greenhouse elegantly weaves biographic stories with details of the Justices’ deliberations on cases and with doctrinal background on the areas of case law cited. For example, in discussing Roe v. Wade—the case for which Justice Blackmun, its author, is most famous—Greenhouse explains the doctrinal line of which Roe became a part and subsequent developments in the case law, the significance of Justice Blackmun’s past role as a lawyer for the medical profession, and the personal and jurisprudential impact of public reactions to Roe on Justice Blackmun.

Becoming Justice Blackmun, the Blackmun papers, and Justice Blackmun’s life itself raise three important lines of inquiry. First, they raise descriptive questions about the relationship between jurisprudence and judicial biography. That is, how do judges’ experiences impact their jurisprudence? Second, they raise normative questions as to how much the public should know about the human story behind judicial decision-making. As historian Laura Kalman notes, “Some justices destroy their papers. They believe the less the public knows about the Supreme Court, the more easily the illusion is

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7 See, e.g., GREENHOUSE, supra note 2, at 114, 207-11, 222-24, 231-32; Garrow, supra note 1, at 41; Kalman, supra note 1; Rosen, supra note 1.
8 For discussion of the unprecedented breadth and depth of the Blackmun papers, see, for example, Kalman, supra note 1; Koh, supra note 5, at 11-16.
10 410 U.S. 113 (1973).
12 Id. at 74, 82-83, 90-92, 99.
13 Id. at 134-39, 206.
preserved that our system is based on rule of law, rather than men and women."

Third, they raise normative questions about the impact that judges’ understandings of the “world out there” should have on jurisprudence, particularly on constitutional jurisprudence. Some argue that social and cultural change should have no bearing on constitutional interpretation. Justice Scalia, for example, famously argues that judges should adhere to the “original meaning” of the Constitution’s text, by which he means each provision’s original expected application. For instance, in discussing the Eighth Amendment’s prohibition against cruel and unusual punishment, Justice Scalia argues that the death penalty cannot legitimately be deemed “cruel and unusual,” regardless of that term’s evolving social meaning or of changing knowledge about the penalty’s application. This is because the Constitution explicitly assumes the existence of the death penalty in provisions such as the protection against deprivation of life without due process of law. Others counter, however, that the content of the Constitution’s sweeping clauses are designed to evolve with social and cultural change.

For example, Ronald Dworkin argues:

[K]ey constitutional provisions, as a matter of their original meaning, set out abstract principles rather than concrete or dated rules . . . . [T]he application of these abstract principles to particular cases . . . [thus] must be continually reviewed, not in an attempt to find substitutes for what the Constitution says, but out of respect for what it says.

With respect to the death penalty and the Eighth Amendment, Dworkin argues:

The framers of the Eighth Amendment laid down a principle forbidding whatever punishments are cruel and unusual. They did

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14 Kalman, supra note 1.
15 See supra note 9.
16 See Jill Hasday, Conscription, Combat, and Constitutional Change Outside the Courts (draft article, on file with author) (citing prevalence of this view).
17 See ANTONIN SCALIA, A MATTER OF INTERPRETATION: FEDERAL COURTS AND THE LAW 37-41, 45-46 (1997); see also Ronald Dworkin, Comment, in id. at 115, 119 (referring to “expectation’ originalism, which holds that these clauses should be understood to have the consequences that those who made them expected them to have”).
18 SCALIA, supra note 17, at 46.
19 See, e.g., Dworkin, supra note 17, at 119-27.
20 Id. at 122.
not themselves expect or intend that [the] principle would abolish the death penalty, so they provided that death could be inflicted only after due process. But it does not follow that the abstract principle they stated does not, contrary to their own expectation, forbid capital punishment.21

Each article in this issue tackles one or more of these important questions. That is, each paper grapples with one or more of the following: the descriptive relationship between jurisprudence and judicial biography, the extent to which the public should be privy to this relationship, and the relationship between constitutional decision-making and the “world out there.”22

Dean Harold Koh’s article straddles all three questions. Dean Koh considers how to strike “the right balance between disclosure and nondisclosure” of Supreme Court deliberations,23 and situates the history of the Blackmun papers and their release within this analysis.24 Drawing upon the papers and upon Linda Greenhouse’s book, he goes on to discuss aspects of Justice Blackmun’s life history, including Justice Blackmun’s evolving view of the relationship between government and individuals and parallel changes in his constitutional jurisprudence.25

Professors Earl Maltz, Nan Hunter and Dena Davis each focus on the descriptive relationship between jurisprudence and judicial biography. Professor Maltz explains that “[e]ach [Justice’s interpretive] position reflects a unique set of influences and experiences. Judicial biographies provide detailed accounts of these influences and experiences, thereby deepening our knowledge of the forces that ultimately shape Supreme Court jurisprudence.”26 Professor Maltz discusses the interplay of biography and jurisprudence through the example of Justice Peter V. Daniel.27

Professor Hunter reminds us of the importance of both recognizing the personal histories that color Justices’ jurisprudence, and not overstating the influence of particular biographical factors. Professor Hunter focuses on Justice

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21 Id. at 120-21.
22 See supra note 9.
23 Koh, supra note 5, at 10.
24 Id. at 10-12, 19-23.
25 Id. at 24-34.
27 Id. at 200-09.
Blackmun's background as a lawyer for the Mayo Clinic and as an admirer of the medical profession.\textsuperscript{28} She argues:

\begin{quote}
[T]he longstanding “Mayo made him do it” explanation of \textit{Roe} is wrong and should be jettisoned. . . . Blackmun’s experiences as counsel for Mayo left him more pragmatic than starry-eyed about medical authority . . . . His papers indicate that he was concerned about what he feared might be careless treatment of physicians’ interests, but he was not blind to medical parochialism nor engaged in a mission to expand the authority of doctors.\textsuperscript{29}
\end{quote}

Professor Hunter elaborates on the respects in which Justice Blackmun’s background did and did not impact his views in \textit{Roe v. Wade} and other abortion cases.\textsuperscript{30}

Professor Davis discusses Justice Blackmun’s involvement with his church and its relationship to his jurisprudence.\textsuperscript{31} Focusing on two sermons that Justice Blackmun delivered to his church, Professor Davis identifies multiple themes of compassion.\textsuperscript{32} Similarly, says Professor Davis, much of Justice Blackmun’s constitutional jurisprudence was grounded in compassion as a guiding principle.\textsuperscript{33} Professor Davis cites Justice Blackmun’s acknowledgment of the uncertainty of much constitutional interpretation, coupled with his observation that “we will grope, we will struggle, and our compassion may be our only guide and comfort.”\textsuperscript{34}

The articles by Professors Jason Mazzone, Chai Feldblum and Andrew Koppelman move the discussion from the interaction between judicial biography and jurisprudence to the interpretation of particular constitutional provisions. This raises the “relationship between constitutional decision-making and the ‘world out there.’”\textsuperscript{35}

Professor Mazzone concludes that Justice Blackmun

\textsuperscript{29} \textit{Id.} at 149-50.
\textsuperscript{30} \textit{Id.} at 162-66, 170-78, 192-93.
\textsuperscript{32} \textit{Id.} at 216-30.
\textsuperscript{33} \textit{Id.} at 229-34.
\textsuperscript{35} See supra text accompanying note 22.
largely rejected conventional views of juries as “accurate fact finders, guardians of liberty, and a source of legitimacy.” Instead, Justice Blackmun valued juries as democratic bodies in which citizens have the “opportunity . . . to participate in the workings of government.” This view manifests itself in Justice Blackmun’s opinions upholding—and dissenting from refusals to uphold—challenges to juror exclusions based on race and gender. From Justice Blackmun’s democracy-based perspective, it was crucial “to ensure at least that juries were open to all citizens.” Justice Blackmun’s approach to juries reflects his view of constitutional interpretation as an effort to inform constitutional principles with insights from the real world, including evolving social and cultural norms. In this sense, Justice Blackmun’s approach to juries, as interpreted by Professor Mazzone, parallels Ronald Dworkin’s discussion of the Eighth Amendment. As with the Eighth Amendment and capital punishment, the framers of the Sixth and Fourteenth Amendments surely did not expect the right to a jury trial or the concept of equal protection to encompass the right of women to sit on juries. “But it does not follow that the abstract principle[s] they stated do[] not, contrary to their own expectation, forbid” gender-based exclusions.

Professor Feldblum addresses the tension between the right to act in accordance with one’s core belief system, a concept that Professor Feldblum calls “belief liberty,” and the statutory equality rights of gays and lesbians. She considers how judges should handle belief liberty claims brought by those who wish not to comply with equal rights laws. Professor Feldblum would balance the interests at stake on a case-by-case basis. The bulk of her article explains the grounding of her balancing test, and the importance of grounding any case-by-case balancing, in a real world understanding of the magnitude of interests on both sides of the scale. With respect

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37 Id. at 47.
38 Id.
39 Id. at 48-55.
40 Id. at 38.
41 See Dworkin, supra note 17, at 121.
42 Chai R. Feldblum, Moral Conflict and Liberty: Gay Rights and Religion, 72 BROOK. L. REV. 61 (2006). Feldblum would protect belief liberty under the due process clauses. See id. at 63. She would include within the scope of protection those beliefs that “form a core aspect of the individual.” Id. at 83.
43 Id. at 115-22.
44 Id.
to belief liberty, for example, she argues that judges often “downplay the burden on religious people” forced to accommodate gays and lesbians. Professor Feldblum, a former law clerk to Justice Blackmun who came out to him as a lesbian, also ties her analysis to her understanding of Justice Blackmun’s evolving views on gays and lesbians.

In response, Professor Koppelman’s article critiques Professor Feldblum’s article on two main grounds. First, he would limit the constitutional protection of belief liberty to the First Amendment’s protection of religious free exercise. Professor Feldblum’s concept of belief liberty, he says, would “create a presumptive right to disobey any law you dislike intensely.” Second, he argues that Professor Feldblum underestimates the burden on conservative Christians who wish to avoid equal protection laws when she conducts case-by-case balancing toward the end of her article. He concludes that courts typically should allow religious exemptions from antidiscrimination statutes to stand (or should impose such exemptions themselves under the First Amendment), while barring on equal protection grounds only those laws that “reflect[] a bare desire to harm an unpopular group.”

Professor Koppelman’s approach takes evolving public standards into account in a very direct way. His approach would leave breathing room for community standards to evolve at their own pace, while maintaining some minimum equality-based protection for gays and lesbians. Koppelman concludes, in short, that courts “can’t hurry love”—or tolerance—through constitutional interpretation.

In Becoming Justice Blackmun, Linda Greenhouse writes that the waters of Justice Blackmun’s life “carried him to places he had never expected to go. And once having arrived at the destination, he stepped onto dry land and performed in ways that neither he nor others would have predicted.”

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45 Id. at 110.
46 See id. at 65-69.
48 Id. at 126.
49 Id.
50 Id. at 131-37.
51 Id. at 141.
52 See id. at 142.
53 GREENHOUSE, supra note 2, at 250.
is a fitting metaphor not only for Justice Blackmun’s life, but for the view of the Constitution arguably implicit in his jurisprudence and championed by Ronald Dworkin among others. Under this view, the Constitution outlines broad principles and aspirations that gain content through the lessons and developments of time. The “world out there” does not write the Constitution, but it informs it deeply. In analyzing constitutional doctrine, the articles in this symposium issue shed light on the application and desirability of this interpretive approach. In analyzing the connection between jurisprudence and judicial biography, the articles connect doctrine to experience at a personal level. Such emphasis on the relationship between the Constitution and lived experience befits Justice Blackmun, a man who, according to his successor Justice Stephen Breyer, managed to find in his “cloistered [Supreme Court] office . . . not a narrowing, but a broadening of mind, of outlook, and of spirit.”

54 See supra text accompanying notes 20-21.
55 GREENHOUSE, supra note 2, at 249-50.
Unveiling Justice Blackmun

Harold Hongju Koh†

I am delighted to have attended this illuminating symposium about Linda Greenhouse’s wonderful book, *Becoming Justice Blackmun*.¹ The symposium covered two distinct subjects. The first is the story of Justice Blackmun, the Justice he became, and how we came to understand him. The second is the story of how the public learns about our Constitution and the Supreme Court Justices who interpret it. This Article focuses on the relationship between those subjects: how the process of unveiling Justice Blackmun and his work can help us as Americans to understand better our own Supreme Court.

One could imagine at least three different attitudes toward how the public should learn about its Supreme Court. First, one could envision the mindset that the Court should be a total black box before, during and after the time a case is decided. Imagine a scenario where no Justices reveal how they might vote on a case before they vote, where none of their discussions are ever revealed while they are still on the bench, and where afterwards all their papers are burned. All we would ever know about the case would have to be gleaned from the public documents and argumentation. Like the parol evidence rule, this approach would prevent observers from looking outside the four corners of the document (in this case, the published opinion) to determine its meaning. The advantage of this scheme would be clarity; the disadvantage

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would be limiting our understanding of the Court’s workings to a small fraction of the available evidence.

In contrast, a second mindset might take the opposite approach—total disclosure—whereby reporters might quiz Justices intensively and expect them to answer substantive questions about a case well in advance of its argument, where all deliberations would be made transparent, and where after the fact, as soon as a decision came down, the entire file and all the correspondence would be released immediately for public examination. Such a total disclosure regime would almost surely have a chilling effect on the Court’s deliberative decision making, by likely diminishing robust and honest discussion of a case while it was still pending.

So instead, imagine a third approach, a compromise between regimes of total nondisclosure and total disclosure, which would counsel a policy of nondisclosure about deliberations before a case is argued and during the decision making process, but permit some disclosure about internal decision making processes at some point after the decision is handed down. Handled properly, such a third approach might well strike the best balance between protecting the Court’s deliberations and allowing the Court’s workings to be more comprehensible to the American people. Finding the right balance raises the questions of how much disclosure after the fact would be the right amount, and at what point in time that post hoc disclosure should be made.

Seeking to strike the right balance between disclosure and nondisclosure is where the fascinating story of Justice Blackmun’s papers comes in. Through an accident of history, I was privileged to become part of the deliberative process regarding the unveiling of Justice Blackmun’s papers. After he, his family, and a number of his former law clerks discussed the process of disclosure over a number of months, he made two important decisions. First, he agreed to what eventually became thirty-eight hours of videotaped interviews, The Harry A. Blackmun Supreme Court Oral History Project, which we conducted from July 6, 1994—the day he stepped off the bench—until December 13, 1995. Second, in his retirement, he executed a deed of gift that delivered all of his papers,

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including the Oral History transcripts and all of the videotapes, to the Library of Congress as of the fifth anniversary of his death, a date that turned out to be March 4, 2004.

How, precisely, did Justice Blackmun’s papers end up getting to the Library of Congress? How were these decisions about disclosure and public access made, and were the right decisions made at the right time? These are the questions this Article will address.

I. THE MAKING OF THE BLACKMUN ORAL HISTORY

As our ninety-ninth Supreme Court Justice, Harry Blackmun sat on 3,875 cases in the seat occupied by Justices Story, Holmes, Cardozo, Frankfurter, Goldberg, Fortas, and now Breyer. His personal papers now number some half million items, including thirty-eight hours of Oral History, which now sit in some 1,600 boxes on more than 600 feet of shelf space in the Library of Congress. As a whole, the Blackmun papers really tell not one, but three, distinct stories.

The first is the story of the workings of the United States Supreme Court during the last quarter of the twentieth century. Justice Blackmun not only maintained every scrap of paper relevant to the Court’s decision making, he also maintained them—with the help of his brilliant and devoted assistant Wanda Martinson—in utterly meticulous order, thus creating the authoritative paper archive of the Court’s inner workings during this period. Linda’s book graphically demonstrates what a very able journalist and historian can do by working assiduously with these materials. There is no case decided during this period that cannot be reconstructed or understood in a different light, so long as one is willing to put in the time. For Supreme Court lawyers, the Blackmun papers represent a treasure trove, the ultimate legal archaeological dig.

The second story the papers tell is of one man’s journey through twenty-four testing years on the Court. The papers describe, in Justice Blackmun’s own words, how he experienced and understood the transformational process of moving from one political wing of the Court to the other—or, as he preferred to say, “the Court shifting beneath him”\(^3\)—a path followed in subsequent years, to greater and lesser extents, by such

colleagues and successors as Justices John Paul Stevens, David Souter, and Anthony Kennedy.

The third and final story found in these papers tracks how one individual Justice’s life journey contributed to the parallel journey of the Court and the Constitution as pivotal institutions in American political and social life. Often, these three narratives intertwine in unexpected ways. For me, one of the most enjoyable and exciting elements of conducting the Oral History was hearing how Justice Blackmun’s own memory tied together historical events whose connection I had previously never understood.

How many of us knew, for example, that Chief Justice Burger delayed the release of the decision in *Roe v. Wade* \(^4\) until January 1973 so it would not come down until after President Richard Nixon’s second inauguration? Or that when *Roe* actually came down, it happened to fall on the day that former President Lyndon B. Johnson died, so the case got virtually no press attention that day? The newspapers did not begin to comprehend the significance of the ruling until many weeks later. These are not the kind of connections between public events that one usually makes when one reads these landmark Supreme Court cases in a law school casebook.

Or, to take one of my favorite Oral History moments: one reason that the announcement of Justice Blackmun’s nomination to the Supreme Court was delayed was that at the same moment the nomination was being considered, Apollo 13 was caught on the other side of the moon, a story beautifully told in Ron Howard’s later movie of the same name. So President Nixon told Justice Blackmun that he would not be able to announce the nomination until Apollo 13 was either lost or came back safely, and advised him to keep his pending nomination quiet until then. In the Oral History, Justice Blackmun tells the hilarious story of boarding his flight back from Washington to Minnesota, after having received President Nixon’s admonition of secrecy. As the Justice tells it:

> I got to the airport just in time, and went in, sat on an aisle seat back in the steerage. Pretty soon I was putting my bag underneath the seat in front of me, and a couple of feet came up, stomped right by me and looked to the other side. The occupant of the seat on the other side said to the man standing there, “Who is this guy, Blackmun, whose photograph is in today’s paper?”

\(^{4}\) 410 U.S. 113 (1973).
And the answer was, “Oh, he’s just another old conservative.” And here I was underneath. I could tell who it was. What do I do? Do I stay underneath, or do I make my presence known? I finally pulled on his trouser leg, and said,

“Walter, I’m here.” It happened to be Senator [Walter F.] Mondale [of Minnesota, later Vice President of the United States].

Then the hostess said, “Will everyone please take his or her seat? Senator Mondale, will you please return to your seat?”

He said, “Harry, I’ll be right back.” Sure enough, as soon as we were airborne he came back. . . . [T]he senator came back and said, “I want you to know that I’m all for you, but I can’t always say so in public.”

I said, “Walter, I understand perfectly well.” So it worked.5

Exactly how did Justice Blackmun decide to engage in this exercise of disclosure? He started thinking about this toward the end of his active time on the Court, around 1993, after a number of authors had contacted him asking to write his authorized biography. In trying to decide what to do, he asked a number of his former clerks, including myself, for counsel. At one point he asked me, “Do you think any of my law clerks would want to write my biography?” This was around the time when Professor John Jeffries came out with his biography of Lewis Powell, for whom he had clerked,6 and Gerry Gunther of Stanford had recently published his magisterial biography of the judge for whom he had clerked, Learned Hand.7 Despite the excellence of these two volumes, I said to the Justice something that I believed then and now: that, as a clerk, it is hard to write a credible and objective biography, because you simply cannot be objective about your boss. If, for example, you say that your Justice is wonderful, everybody will think that you have whitewashed his life and career. But if you say that your Justice was a jurist with the inevitable human warts and flaws, you look like an ingrate. It is hard for any clerk to win under these circumstances. And so I told him that I did not believe it was wise for him to ask any clerk, even those who were law professors, or historically minded, to take up this project.

5 Oral History, supra note 2, at 173.
Instead, we turned to a different idea: doing an oral history. We learned that the Federal Judicial Center and the Supreme Court Historical Society have a policy of financially supporting an oral history for any Supreme Court Justice willing to have one done, but that very few Justices actually take advantage of this offer. Justice Thurgood Marshall had one done, with his former clerk, my Yale Law School colleague Stephen Carter, serving as interviewer, but it lasts only about eight hours and ended up focusing far more on Justice Marshall’s time as a litigator and Solicitor General than on his time on the Supreme Court. Justice Lewis Powell gave a brief oral history to Professor John Jeffries, but then Jeffries’s own biography overtook the oral history in scope and magnitude. Justice William Brennan also apparently gave a very brief oral history, which has become part of a much larger authorized biography project being conducted by Stephen Wermiel.

Against this background, I suggested to Justice Blackmun that he consider doing an oral history, rather than a biography, as a way of telling his own story in his own words. Characteristically, he responded that he had to think on it, and that he was reluctant to have anyone “go to all that trouble.” While we were having this discussion in the fall of 1993, unbeknownst to me, he was also thinking about his own retirement, which he finally announced the following spring. His decision to retire, I think, finally moved him to begin the Oral History. He knew that he would be moving his chambers and organizing his files for posterity, and conducting the Oral History made good sense as a way of ordering that process.

One of the first questions that arose was whether we should use audiotape or videotape to record the Oral History. All previous Supreme Court oral histories had been recorded on audiotape, some long before adequate videotape technology had even been developed. Justice Blackmun, however, was an excellent candidate for videotaping, because he had already done a number of video interviews on national news programs such as ABC’s Nightline, in which he came across as the humane and kindly person he was. Once again, the frugal Justice Blackmun initially hesitated, fearing that “videotape would be too expensive, and I don’t want to create a bother.” But we soon learned that there was an excellent videotape facility right in the new Federal Judicial Center building, just a few minutes’ walk from his new office, where we could record with little fuss, and in the same setting for all interviews. What finally sealed the decision in favor of videotape was the
fortuity of my watching the Disney animated movie *The Little Mermaid* one weekend with my daughter. During the trailer for the movie, the announcer said that “videotaped movies are evergreen.” When I related this to Justice Blackmun the next week, he smiled and—perhaps thinking of Minnesota forests—said: “Evergreen. I like that.” And with that, the decision in favor of videotaping was made.

This decision, I think, turned out to be a happy one. During the taping, things that the Justice said with a visual attached came across as more heartfelt, more profound and simply more human than they could ever have with simple audio or a written transcript. After thirty-eight hours, we even closed the Oral History with this winsome colloquy, which could never have been fully captured on audio:

H[arold] K[oh]: Thank you very much, Mr. Justice [for these interviews].

H[arry] A[.] B[ackmun]: You didn’t ask me to wiggle my ears.

HK: Will you do it?

HAB: I can.

HK: Okay.

HAB: And that has been a great attribute for little children, because if they come to visit the chambers, and I wiggle my ears at them, they’re much more fascinated with that than they are with what’s hanging on the wall or the history of the Court or all those things. So I wiggle my ears in farewell.

HK: Mr. Justice, had this not been on videotape, we could never have captured you wiggling your ears. Thank you so much, Mr. Justice. It’s been great.8

In hindsight, it is even more fortunate that we chose to record Justice Blackmun’s Oral History on video because those tapes have now been digitized and are publicly available on the Internet. And so, for generations to come, the man I remember as Justice Blackmun will be “evergreen” to any student who wants to see what the Justice was really like at the end of his career.

Unexpectedly, the decision to videotape also jump-started the beginning of the Oral History tapings. Upon retiring, Justice Byron White had dismantled his chambers

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and moved out of the Supreme Court building and into the new Federal Judicial Center building next to Union Station in Washington, D.C. It soon became clear that upon retiring, Justice Blackmun would be obliged to do the same. I told him that I thought it was a shame that nobody would ever see his judicial chambers as they were arranged during his twenty-four years on the Court as an active Justice. He quickly decided to start the Oral History sooner rather than later, so that we could capture his office on video. And so, on July 6, 1994, just one week after his last active term on the Court ended, we taped the first few Oral History sessions in the Justice’s chambers, the Supreme Court courtroom, and in the Justices’ library where he often worked. We began filming on the day before his active chambers were broken down, and we filmed him in the courtroom, talking about his experiences while sitting there.

During the taping he filled with emotion, recalling all of the years that he had sat on the bench in that courtroom. Deliberately, the camera focused entirely on Justice Blackmun during the interview; as interviewer, I am heard only as a voice asking him the questions. Once we began taping, a number of people, including his secretary Wanda Martinson and his family, encouraged us to complete the project quickly on the theory that his memory might fade rapidly as time passed. And so we taped as often as our schedules could bear, and finished the thirty-eight hours in seventeen months.

II. THE MISUNDERSTOOD ROLE OF THE BLACKMUN LAW CLERKS

In conducting the Oral History interviews, former law clerks played an invaluable role. At the outset of the project, I sent a letter to each of the other Blackmun law clerks, asking them for remembrances of memorable cases and events from each of their terms. That request triggered a flurry of touching and evocative letters, which refreshed the Justice’s memory and directed me to myriad, otherwise hidden, nuggets in the case files. In recounting these memories, the clerks

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9 Justice Blackmun was served during his career by 103 extraordinarily able law clerks, a number that now includes five judges, thirty-one law professors or deans, thirty private practitioners, twelve in government, six in business, six in public interest law, and the rest in related professions.
showed discretion, affection, and touching loyalty for the Justice.

My own belief is that when you become a law clerk, you essentially give up your right to be a journalist, to report on the year in which you are given an insider’s access. When I was clerking, someone said to me that reading a book about the Supreme Court written by a law clerk to a Justice is a bit like watching the World Series from the perspective of the batboy. To be sure, you are close to the center of the action, but often your sense of the importance of your own role vis-à-vis the real players in the game can be vastly inflated. This observation may sound demeaning to the clerks, who are as talented and able lawyers as one can find, but as time has gone on, I believe that it is in fact close to the truth, for a few simple reasons.

First, every clerk tends to believe that the year that he or she serves as a law clerk is the most important year of the Justice’s career, because it is the only year in which that individual clerk happens to be there. But in fact, what is most humbling is just how fungible clerks really are. In the grand scheme of things, over twenty-four years, the Justice may not even remember if it was one or another law clerk who worked on a particular case. The way one understands things as a law clerk is likely to be quite different from the way one’s Justice actually remembers them in the broader context of an entire judicial career.

Second, as a law clerk one tends to be utterly obsessed with one’s own relationship with the Justice. It is hard to develop meaningful perspective on that relationship. Little things he says are taken as huge praise; moments of silence are taken as great insults. One of the great joys for me in conducting the interviews was the rare chance to return to see Justice Blackmun on an almost weekly basis for seventeen months when I was a mature lawyer—no longer working for him. It was really then—not as a clerk, but later—that I felt that I finally developed a real friendship with him, and could see him in a more balanced and objective light.

Third, we clerks often forget that the Justices themselves sometimes change their views about controversial cases over time. I remember asking Justice Blackmun in the Oral History about cases in which I personally remember him being furious at one or more of his colleagues. But when he discussed the same cases many years later, that fury was nowhere to be seen; he had forgotten his pique about a particular case, and had with time set that case within the
broader scheme of his relationship with the other Justice, a relationship which spanned many more years and encounters than I as a law clerk could ever have witnessed in a single year. And since he agreed with most of the other Justices about seventy or eighty percent of the time, it distorted history to focus obsessively on one or two cases in which they may have strongly disagreed, and to draw broad general conclusions about their entire relationship from those few isolated instances.

Finally, and I believe this very strongly, clerks rarely appreciate until much later in life just how much a Justice really set the tone for his or her chambers. The clerks operate within that atmosphere, and adopt that tone, and therefore every law clerk’s work product strongly takes on the Justice’s voice. To me, the best image is the School of Michelangelo. As we all know, the myriad students in Michelangelo’s school of painting produced marvelous works of Renaissance art, many of which can barely be distinguished from the master’s own work. Michelangelo himself did not personally put paintbrush to canvas on all of these works, but they nevertheless all look like the work of Michelangelo for the simple reason that he set the tone; he was the guiding intelligence behind the work of the entire school.

In the same way, I look now at opinions published in the U.S. Reports where I can remember typing many of the words myself, but now they do not seem like my words at all. They were ideas that I got from Justice Blackmun, the result of conversations we had within the chambers. For a year, I was under the influence of Justice Blackmun, I was doing what I was directed to do, and so what I produced was much more a part of his jurisprudence than it was any part of mine. I was not a free agent; I worked as a student in his School, and like the many students of Michelangelo, there is now no meaningful way for me to extricate my own contribution from Justice Blackmun’s pervasive influence.

On this score, Professor David Garrow’s recent overblown claim that the law clerks were really “the brains behind Blackmun” operates under quite a significant and serious misunderstanding.10 What Professor Garrow simply misses is that Justice Blackmun always communicated with

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his clerks orally, while the clerks always replied in writing. In going through a tiny portion of the Blackmun papers, Professor Garrow read only what the clerks wrote and erroneously assumed that he was seeing the entire conversation, rather than only half of it. In fact, however, he never heard all of the instructions, all of the oral messages from Justice Blackmun, all of the ways in which he guided his law clerks and inspired their responses. At the end of the day, in virtually every case, Justice Blackmun wrote notes to himself, or came to pivotal decisions without any help from the clerks at all. As Linda Greenhouse’s book chronicles, there are large areas of his jurisprudence where the Justice consistently disagreed with or did not accept the clerks’ recommendations at all, particularly in the area of criminal law and procedure.

III. THE RELEASE OF THE BLACKMUN PAPERS

Let me turn to the next question: how did we decide to release the Justice’s papers? As we were getting to the end of the Oral History tapings, I asked the Justice, “What are you going to do with all your papers?” At the time, the Thurgood Marshall papers, which had been released upon Justice Marshall’s death based on a tersely worded deed of gift, had created a lot of public controversy. Justice Blackmun told me that he could release the papers on his death, as Justice Marshall had done, but he felt that that timing would be too soon. At the opposite extreme, he could wait and release them at the point when the last Justice with whom he served retired from the Court. But since that Justice, presumably Justice Thomas, could continue on the Court for decades to come, that date could conceivably be many, many years into the future. So as a compromise, the Justice decided simply to pick a bright-line date: he chose five years from the date of his death as the official release date for all of his papers.

In picking the five-year release date, the Justice consulted first and foremost Sally Blackmun, his second daughter, an able lawyer who also served as his literary executor. Justice Blackmun also wanted a number of former law clerks—who were familiar with exactly what documents were actually in particular case files—to advise him on this

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11 See, e.g., GREENHOUSE, supra note 1, at 221-22.
12 In his years on the Court, Justice Blackmun sat with seventeen other Justices, running from William O. Douglas to Ruth Bader Ginsburg.
decision. One day, not long after the Marshall Papers were released, at the Justice's request, Dick Meserve—a former law clerk who acted as the Justice's lawyer for the deed of gift—and I went over to the Library of Congress to look at Justice Marshall's file on *Roe v. Wade*. We realized with a shock that the Marshall file was only a quarter to one-half of the size of Justice Blackmun's own file on the same case! One reason was that Thurgood Marshall's clerks, and not his permanent secretary, maintained his files, and because the clerks changed from year to year, the Marshall organizational system was not nearly as inclusive or systematically maintained as the Blackmun system. Thus, the facts that *Roe v. Wade* was re-argued and that there was a prior draft opinion in the casefile were not obvious from perusing the Marshall file on *Roe*. With a start, Dick and I realized that Justice Blackmun's files were authoritative in a way that the other Justices' files simply were not. When we went back and explained this to the Justice, we soon all agreed that we would not well serve the public interest by releasing fragments of the collection. To allow an honest assessment of particular cases, the cleanest decision was to release the entire collection in one fell swoop.

With the blessings of the Blackmun family, we created an informal advisory group of former Blackmun clerks to implement the Justice's will with regard to the release of his papers. On the committee were myself; Dick Meserve; Wanda Martinson, Justice Blackmun's longtime secretary and a de facto member of his family; Pam Karlan, a professor at Stanford Law School; and Bill McDaniel, a criminal defense lawyer in Washington who also serves as founder and president of the Justice's Scholarship Fund.

Justice Blackmun eventually passed away on March 4, 1999. Faster than any of us could have imagined, five years flew by, during which time each of us focused our attention on other things. But in the fall of 2003, with the March 2004 release date fast approaching, we decided collectively that the best way for us to serve the Justice's donative intent was to make a plan to implement the impending release of these documents. We knew how big the collection was, we sensed how great its magnitude was, and we decided that if we did not

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13 Dick was then a partner at the Washington office of Covington & Burling; he is now president of the Carnegie Institution.
make a plan for the papers’ orderly release, we would engender havoc and confusion, the last thing our former boss would have wanted.

After some discussion, the committee decided that we did not want to release the papers only to have them mined selectively for gossip, or for journalists to make sensationalist headlines by plucking and publishing one isolated memo out of more than a million pieces of paper. And so what we began looking for were journalistic intermediaries who could provide the public with a “reader’s guide” to these papers: persons with a well-established understanding of the Court as an institution, and of the Justice as a public person, to whom reading these papers would add an additional layer to an already nuanced historical understanding. Over the months of Oral History taping, this was something that I had discussed on and off with Justice Blackmun, and in various ways he had expressed to me his particularly high admiration for two journalists. One was Linda Greenhouse of the New York Times, who is by acclamation the authoritative Supreme Court reporter of our day. The other was Nina Totenberg, the longtime Supreme Court reporter for National Public Radio (NPR), whom the Justice had known from Minnesota from the time of his initial confirmation to the Supreme Court decades earlier. And so the idea arose of giving some journalists—perhaps Linda Greenhouse and Nina Totenberg—early access to the papers, as the Justice’s will permitted.

At that point, the question arose: why should we give some journalists early access and not others? In thinking this question through, we were driven entirely by the notion that Justice Blackmun revered the public. He thought the Court belonged to the people, and he wanted to advance their understanding of that institution. One metaphor I found useful in thinking the issue through was a hypothetical: suppose that suddenly, one hundred previously undiscovered Rembrandts were discovered in a warehouse in Europe. Should the curator of this historical find simply open the doors and let every journalist in the world run in, taking pictures of whichever “new” Rembrandt he or she happened to see? Would such an approach responsibly educate the public about the real historical significance of the entire collection? Clearly, a far more orderly process would be to have one or two talented art historians of unimpeachable reputation go in first, survey the paintings, determine which paintings were more artistically significant than others, and write an introductory story giving
the public an overview of the collection in light of the painter's entire career. Then, when the new treasure trove of paintings was finally opened to the public, these chosen historians' head start would disappear, and everybody else would gain equal access—but with the benefit of the historians' early spadework to guide their own explorations.

While we were discussing this idea among ourselves, we decided to make contact with Linda, Nina, and representatives of both NPR and The Newshour with Jim Lehrer to see whether this idea might be of interest to them. Both NPR and The Newshour ended up turning to the same person, Nina Totenberg, for their presentations. Let me caution that although we made an initial approach to Linda and Nina, we did not make a final decision to give them early access for some time. Before we committed early access to them, we wanted to ensure that they and their news organizations were ready to make the commitment of resources necessary to give Justice Blackmun and his papers their due.

Before we had reached a final decision on access, several other journalistic organizations—including, most prominently, the Washington Post—contacted us seeking early access to the Blackmun Papers. We did not tell them we were having preliminary discussions with Linda and Nina; we simply invited them—as we had previously invited Linda and Nina—to submit proposals describing how they planned to use any early access to the papers. Some of the organizations responded promptly with proposals; others did not, but none of the competing proposals were nearly as careful or as well thought-through as those ultimately presented to us by Linda and Nina.

Linda, for example, came back to us with an extraordinarily well thought-out idea of how to explore the archive with the research support of Francis J. (Frank) Lorson, known to generations of Supreme Court advocates as the uniquely able Chief Deputy Clerk of the Supreme Court. To us, his participation ensured the accuracy of the Greenhouse proposal. We on the Clerks Committee were comfortable that with Frank Lorson on board, there was no chance that the New York Times would misunderstand the significance of an internal Court document, or misread the paper flow that may have led to a decision in a particular case.

Based on Linda's and Nina's proposals, we commissioned them to go forward, and we granted them early access to the papers as of January 1, 2004, only two months
before the eventual release of the entire collection. Once we gave them early access, we did not attempt to influence the stories they produced in any way. Linda Greenhouse and I did not speak from the moment that we formally agreed that she and Frank Lorson should have early access to the papers until she had essentially finished with the introductory articles that were to come out in March 2004, when all of the papers were finally opened to the public. Let me also say, for the record, that none of the clerks on the advisory committee, or even the literary executor Sally Blackmun herself, had access to the Blackmun papers before the formal date of release. The access given to Linda Greenhouse, Frank Lorson, and Nina Totenberg during January and February of 2004 was superior to our own. So, even though I conducted the Oral History, I have still never looked at more than ninety percent of the documents in the collection. We quite literally did not know what Linda was going to find. The diaries, the memos that the Justice wrote to himself, and myriad other documents uncovered through Linda's painstaking research were all news to us, as well as to the rest of the world.

The final question, then, is: did we make the right decision in granting early access to Linda Greenhouse and Nina Totenberg? Of course, that is a judgment that history should make, and I am sure that reasonable observers will have different opinions. My own view at the end of the day is that we served the Justice's goal. He thought the Court belonged to the people, and that the papers should belong to the public. He thought that transparency was a good thing. He firmly believed that the Supreme Court would be more respected by the people if they saw that it was not a black box. Justice Blackmun understood that the Court was a human enterprise carried out by fallible people, who nevertheless were utterly dedicated to doing justice, each in his or her way, working as hard as they could to interpret the Constitution faithfully. Anyone who goes through the papers carefully soon concludes that if all the instruments of our government functioned as well and diligently as the Supreme Court, and if every one of our government officials took his or her duties as seriously as Harry Blackmun and his colleagues did, we would be a much, much better country, indeed.
IV. EXPLAINING JUSTICE BLACKMUN’S EVOLUTION

Reading the Blackmun papers, one gains an overwhelming sense of how much of a burden we, as a nation, place upon mere mortals when we place them on the Supreme Court. This point was driven home to me during the term when I was clerking, when there was a case in which the vote at conference was tentatively five to four. The opinion was assigned to Justice Blackmun and he assigned it to me, as the responsible law clerk. We drafted a majority opinion and circulated it in November. Immediately, three Justices joined our opinion. But the dissent circulated its opinion almost immediately thereafter, and three Justices joined that dissent. So it was four to four on November 15.

For the next five months, until April 15, we did not know the outcome of the case, because the ninth Justice would not cast his vote. And every day, as that ninth Justice would walk by our office, my co-clerk, Frank Holleman, would say, “Harold, there goes a walking constitutional amendment!”

All of this was happening in the wake of the failure of the Equal Rights Amendment, which had of course secured majorities in large parts of the country, but nevertheless did not secure the requisite support among the states. As Frank’s observation made clear, while even a broad social movement with the backing of a large segment of the population could not amend the Constitution by ordinary means, the vote of a single Justice could redetermine the meaning of a constitutional provision.

One morning in April, while we clerks were sitting at breakfast with Justice Blackmun, the undecided Justice came in to get a cup of coffee. As usual, Frank, my co-clerk, said, “Why Mr. Justice, there goes that walking constitutional amendment.” Justice Blackmun turned to us, and with a winsome look, asked, “Do you think that’s fun?” For the first time, it really dawned on us what magnitude of personal responsibility we place upon these able, devoted, but painfully human individuals.

How did this great responsibility affect Justice Blackmun? Did his experience on the Court change him, and if so, how? Does the fact that Justice Blackmun changed suggest that our new Chief Justice, John Roberts, will also change with the years, and if so, what can we predict about the likely evolution of Chief Justice Roberts from Harry Blackmun’s story? The excellent papers presented at this symposium have
unearthed no fewer than seven explanations for Justice Blackmun’s judicial evolution. Let me briefly review these explanations, which I will call for shorthand purposes: (1) the Roe explanation; (2) the Warren Burger explanation; (3) the “personal qualities of Justice Blackmun” explanation; (4) the law clerk explanation; (5) the Aspen explanation; (6) the “changing Court” explanation; and (7) finally, the “changing world” explanation.

Each of these explanations has some credibility, and of course everyone has an interest in promoting his or her own particular view of which was really the most critical factor. The most plausible answer, as always, is that all of these factors collectively played a role in bringing about the change in Justice Blackmun.

Linda Greenhouse deserves enormous credit for isolating and connecting factors one and two—Roe v. Wade and Warren Burger—and even positing an academic explanation for the change: path dependence.14 It seems pretty clear that Justice Blackmun was headed in a certain direction as a Supreme Court Justice when Roe came before the Court: the favored approach based on modest incrementalism and moderate conservatism. But once Chief Justice Burger assigned that opinion to him, that fateful decision pushed Justice Blackmun in a different direction. In the beautiful closing of her book, Linda Greenhouse puts it this way:

[In so many ways Roe v. Wade was not just another case. The world attached [Roe] to Blackmun in a manner that few Supreme Court decisions are ever linked to their authors..... Eventually, he locked Roe in a tight embrace and never let it go. Its defense carried him in new directions: to commercial speech in...the abortion advertising case; to the other world “out there” of poverty and need in the abortion-funding cases; and, most significant, to his eventual commitment to the struggle for women’s equality in the sex discrimination cases. Warren Burger could never have suspected that in turning to his reliable friend for one unwelcome assignment, he was launching Blackmun on a journey that would open him to new ideas and take him far from their common shore of shared assumptions. Burger sent Blackmun into dangerous waters without

a life preserver, and then turned aside. But Blackmun kept swimming. In defending his legacy, he created his legacy. He became Justice Harry Blackmun.¹⁵

As Linda correctly intuits, the relationship between Justices Burger and Blackmun was far more complex than anyone had previously understood. Two days after Warren Burger died, Justice Blackmun and I had an Oral History session. I asked him about Warren Burger, expecting to hear some negative things. Instead, Justice Blackmun happily recalled their early days together and said, “[T]here was a lot of good in Warren Burger.”¹⁶ The long and the short of it was that the twenty-four years they spent together on the Supreme Court formed only part of a much fuller eighty-five-year-long relationship. Although Justice Blackmun ended up feeling that he and Burger followed very different judicial philosophies, at the end what he remembered was not their conflict or their differences, but their lifelong personal friendship.

This brings me to Justice Blackmun’s personal qualities, which were so important in guiding his judicial transformation. A legendary workaholic, Harry Blackmun was an absolute glutton for information. When he came to the Court, his passion for work exposed him vicariously to a picture of America that he could never have known from his relatively comfortable adult life in Minnesota. Unlike some Justices, he came to see a much deeper and richer slice of American life, because he was actually reading all the certiorari petitions and briefs. Always a compassionate person, before he went on the Supreme Court, he had developed great faith in mainstream

¹⁵ GREENHOUSE, supra note 1, at 250-51.
¹⁶ I began by asking:

“Mr. Justice, on a personal level, [Chief Justice Burger] was one of your oldest friends. On the other hand, as your time on the Court went on, you moved apart from one another. What were the best parts of your friendship with the chief?”

Justice Blackmun answered:

“Of course, I knew Warren Burger since we were four or five years old. We both grew up on the East Side of St. Paul, and that translates into the fact that I knew him for over eighty years, and that indeed is a lifetime. We went to the same elementary school, not the same high school, and then I went off to college, so our lives were separated during those seven college and law school years, but it didn’t affect our friendship basically. I think I knew Warren Burger intimately, maybe in some ways better than he knew himself, but there was a lot of good in Warren Burger.”

Oral History, supra note 2, at 243.
institutions. Here was someone who had been to Harvard College and Harvard Law School, who worked for the best law firm in Minnesota, who then worked for the Mayo Clinic, as fine a medical institution as exists, and who both clerked for and sat on the Eighth Circuit, one of the most collegial courts in America. These experiences persuaded Justice Blackmun early on of the simple faith that institutions work. Understandably, he considered it to be the duty of judges to defer to those institutions, a theme that resounds throughout his early, naïve Supreme Court opinions.17

But the more he read, the more he focused, the more problems were brought to his attention, and the more pain that he felt, the more he came to appreciate how often institutions do not do their job. His lament in DeShaney v. Winnebago Department of Social Services—“Poor Joshua!”18—makes about as clear a statement of this realization as you can find. You see it first and most profoundly in Beal v. Doe, where Blackmun writes,

For the individual woman concerned, indigent and financially helpless, . . . the result is punitive and tragic. Implicit in the Court’s holdings is the condescension that she may go elsewhere for her abortion. I find that disingenuous and alarming, almost reminiscent of: “Let them eat cake.” . . . There is another world “out there,” the existence of which the Court, I suspect, either chooses to ignore or fears to recognize. And so the cancer of poverty will continue to grow. This is a sad day for those who regard the Constitution as a force that would serve justice to all evenhandedly and, in so doing, would better the lot of the poorest among us.19

So Justice Blackmun decided at a certain point—and surely, Roe was the turning point—that the job of a judge was not simply to defer to imperfect institutions, but to use the institution of judicial oversight to force them to be better.

Another of Justice Blackmun’s distinctive personal qualities was his status as an insider-outsider: someone from a very poor family, who eventually entered into the elite and lived there, but never really felt a part of an elite social

structure. In any situation, he instinctively related to the underdogs, the people who were being hurt by the system. Justice Blackmun, in his Supreme Court confirmation hearing, said, “[M]y record and the opinions that I have written . . . will show, particularly in . . . the treatment of little people, what I hope is a sensitivity to their problems.”

Compare this with the statement made by John Roberts, in his confirmation hearing to be Chief Justice: “[I]f the Constitution says that the little guy should win, the little guy is going to win in court before me. But if the Constitution says the big guy wins, then the big guy wins.” In these two worldviews lies the possibility of a real difference of opinion over time.

A third notable personal quality of Justice Blackmun was his profound sense of duty. Hanging on Justice Blackmun’s wall was a quotation entitled “Duty as Seen by Lincoln,” which read:

If I were to try to read, much less answer, all the attacks made on me, this shop might as well be closed for any other business. I do the very best I know how—the very best I can; and I mean to keep doing so until the end. If the end brings me out all right, what is said against me won’t amount to anything. If the end brings me out wrong, ten angels swearing I was right would make no difference.

Justice Blackmun assiduously followed his notion of duty. In the early 1970s, Justice Blackmun realized soberly that he would be on the Supreme Court for most of the rest of his life. In my experience, Justice Blackmun was never, as some commentators have falsely suggested, a weak, painfully emotionally insecure, indecisive person. By the end of his life, he was very confident, he knew what to do, he was extremely well organized, he was politically savvy, and he was strong. The clerks arrived each year and left exhausted, but Justice Blackmun kept going. That is the mark of an extremely strong man.


22 Lincoln is said to have made these remarks at a time the Committee on the Conduct of War had recently criticized him as president. LINCOLN’S OWN STORIES 182-83 (Anthony Gross, ed., Harper & Brothers Publishers 1912).
Some commentators depict Justice Blackmun as a kind of willow in the wind, being pushed around by a range of extraneous factors. What they fail to recognize is that you do not succeed your whole life, and then arrive at the Supreme Court, without being a person of considerable moral compass and direction. And it was that moral compass, coupled with a sense of duty and love of his family, that sustained him.

At the same time, Justice Blackmun was unusually honest. While on the Eighth Circuit, he wrote an opinion in a death penalty case in which he expressed his moral opposition to the death penalty, but nevertheless upheld it as a matter of law. At the Supreme Court, Hugo Black urged him never to let his anguish show when deciding a case. For a few years, he proceeded to “edit his anguish out.” But, as Linda’s book shows, he later decided that was a mistake; if it was difficult, he was determined to let the anguish show, and never to hide it again.

This decision showed his deep commitment to transparency. For if there was a hard decision, he wanted people to see that it was hard; he did not want to pretend that all decisions were easy. His openness earned him ample criticism for sentimentalism, for being overly compassionate. But at the end of the day, there is something refreshing about our highest government officials actually acknowledging that

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23 Maxwell v. Bishop, 398 F.2d 138, 153-54 (8th Cir. 1968) (noting that the fact that this case involves the death penalty “makes the decisional process . . . particularly excruciating for the author of this opinion who is not personally convinced of the rightness of capital punishment and who questions it as an effective deterrent. But the advisability of capital punishment is a policy matter ordinarily to be resolved by the legislature or through executive clemency and not by the judiciary.” (footnote omitted)), vacated, 398 U.S. 262 (1970).

24 Justice Black advised him:

“[W]hat I don't like about it is that you talk about how difficult the case is, you agonize. Never agonize in an opinion. Make it sound clear as crystal and we'll get along better.” Well, I took his advise [sic] and took the expression I had in that opinion about how hard it was and how we agonized over it, took it out. But I broke that advice in Roe against Wade. Paragraphs two and three, I think, I set forth that it was an agonizing opinion. I'm glad I did.

Oral History, supra note 2, at 126.

25 See Furman v. Georgia, 408 U.S. 238, 405 (1972) (Blackmun, J., dissenting) (confessing that “[c]ases such as these provide for me an excruciating agony of the spirit. I yield to no one in the depth of my distaste, antipathy, and, indeed, abhorrence, for the death penalty, with all its aspects of physical distress and fear and of moral judgment exercised by finite minds.”).

they are making difficult decisions, and that they are doing their best to make sure that those hard decisions are ones we can live by.

Other explanations that have been offered about the role of Justice Blackmun’s law clerks and the Aspen Institute in promoting his evolution strike me as quite overstated. But taken together, they do add up to a “social network” explanation, which is that over time, Justice Blackmun’s “epistemic community” significantly changed.27 A Justice of the Supreme Court has unusual freedom to choose the people with whom he spends time. Over the course of his career, Justice Blackmun clearly changed the kinds of people with whom he spent time and the kind of people whose approval he sought. For all the talk of the role his law clerks played in changing his philosophy, we must remember that it is Justice Blackmun who selected those law clerks, and that over time, he clearly began to choose clerks who were more and more like-minded in his direction. Aspen may also have been part of the change, as Dennis Hutchinson has pointed out,28 but we should recall that Justice Blackmun only went there a few weeks out of each year—many fewer weeks than he spent each year with, for example, Justice Scalia and Chief Justice Rehnquist, whose exposure to him clearly did not transform his views. So while Aspen clearly became an important event in his life, Aspen did not so much change him, as it became a safe place where he could voice ideas and concerns that he already had.

Unlike some Supreme Court Justices, Justice Blackmun went out to listen to the people whom his opinions were affecting, and he became deeply moved personally by their plight. I was at a talk at Yale Medical School that Justice Blackmun gave shortly after Bowers v. Hardwick29 came down in 1986, and I watched a woman race up to him. She identified herself to him as a lesbian, and thanked him profusely for his dissenting opinion in Bowers. I could tell that he was

27 One commentator has defined an epistemic community as “a network of professionals with recognized expertise and competence in a particular domain and an authoritative claim to policy-relevant knowledge within that domain or issue-area.” Peter M. Haas, Introduction: Epistemic Communities and International Policy Coordination, 46 INT’L ORG. 1, 3 (1992). Haas’s introduction leads off a volume of ten articles that explore the role that various epistemic communities play in the making and coordination of international policy.
uncomfortable with her openness, and a bit uncomfortable with being publicly aligned with her position. Yet only a few years later, I sat with him in another setting in which a number of gays and lesbians came up to him and thanked him for his Bowers dissent, and he responded to them warmly and comfortably. Clearly over time, he had come to understand his role in the debate in a different way.

Much the same could be said about how women were affected by Roe v. Wade. As I have noted elsewhere, he did understand Roe initially to be a case about the discretion of doctors. But by the end of his career he had fully come to understand it as an important step down the road to the full emancipation of women, in no small part because he listened to women who told him that that is how they view the case.

Two final explanations for Justice Blackmun’s evolution are the changing Court and the changing world. During his years on the bench, the Court plainly did move to the right underneath him. A majority of the Justices who were appointed after him—Chief Justice Rehnquist, and Justices Powell, O’Connor, Kennedy, Scalia, and Thomas—were all clearly to his ideological right.

Moreover, the changing world deeply affected Justice Blackmun, because of his adaptability and interest in emerging issues such as globalization, gay rights, abortion, and technological change. Justice Blackmun was nothing if not flexible and open-minded, and he wanted the Court to adopt a flexible approach to novel issues. Dissenting in Loretto v. Teleprompter, for example, he wrote: “In the end, what troubles me most about today’s decision is that it represents an archaic judicial response to a modern social problem.”

Justice Blackmun’s jurisprudence reflects his foresight about the need to adjust to a changing world. In the affirmative action case Bakke, he recognized that “[i]n order to

31 Statements on Retirement of Blackmun from Court, N.Y. TIMES, Apr. 7, 1994, at A24 (“I think [Roe] was right in 1973, and I think it was right today. I think it’s a step that had to be taken as we go down the road toward the full emancipation of women.”).
32 See Barbash & Kamen, supra note 3.
get beyond racism, we must first take account of race.”34 His foresighted dissent in *Bowers*35 led directly to the opinion in *Lawrence*, which later recognized that *Bowers* had been wrongly decided from the start.36 In each of a broad array of doctrinal areas—separation of powers,37 federalism,38 the Commerce Clause and taxation,39 international law,40 empirical methods and juries,41 and commercial speech42—his decisions signaled a direction that the Court would later follow.

The ultimate question, of course, is whether Justice Blackmun really held a constitutional theory. One can imagine two models of constitutional adjudication: a narrow image of the Justice as an umpire deciding claims of private right, put forward in his confirmation hearing by Chief Justice Roberts; and a broader, more contextualized version of adjudication,

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38 *See, e.g.*, *Garcia v. San Antonio Metro. Transit Auth.*, 469 U.S. 528, 531 (1985) (overruling *National League of Cities v. Usery*’s “traditional governmental functions” test as “not only unworkable but . . . inconsistent with established principles of federalism”).
41 *See, e.g.*, *Callins v. Collins*, 510 U.S. 1141, 1153-55 (1994) (Blackmun, J., dissenting) (referring to a statistical study showing that juries are more likely to sentence an accused to death if he or she is black, at issue in *McKleskey v. Kemp*, 481 U.S. 279 (1987), and declaring that, given this fact of pervasive racism among jurors, there is no way for the Court to administer the death penalty in a way that is both consistent and fair); *Ballew v. Georgia*, 435 U.S. 223 (1978) (relying upon statistical data to show that smaller juries are more prone to error).
which envisions the role of the Justice as reaffirming the public rights that are at the center of our Constitution. Over the course of his career, Justice Blackmun shifted from the narrower model of the passive adjudicator of private rights, to the more activist model of the public rights adjudicator, inspired by such cases as *Roe*, among others.

In the end, John Hart Ely best described the kind of Justice that Justice Blackmun finally became: a *Carolene Products* Justice. The posture that he took resembled the role for judges described in footnote four of the famous *Carolene Products* case: defending discrete and insular minorities and clearing channels for political change. Indeed, during his career Justice Blackmun cited *Carolene Products*, footnote four, three times in the context of protecting aliens, who are excluded from the political process.

At the end of the day, we must give Justice Blackmun credit for this: he arrived at the Supreme Court when he was sixty-one years old. Only then did he start to grow and change. How many of us, starting an around-the-clock job at that age, under constant stress and national examination, could work extraordinarily hard, pay attention, absorb new inputs, travel internationally, meet new people, deal with conflict on the Court, and still change and grow? Justice Blackmun not only did all of those things, he did them in a way that will leave him remembered as the conscience of the Supreme Court in the late twentieth century. For nearly a quarter of a century, in a testing time, he gave the Court its human face.

Let me illustrate with this closing story. Justice Blackmun liked to read his mail to his law clerks. One letter he particularly liked arrived in 1995. It read:

Dear Mr. Blackman [sic],

What is it like being a judge? Are you the boss of anyone? How did you become a judge? Do you ever get nervous?

From, Patrick Jackson

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Now how many of us, if we got that letter today, would simply throw it in the wastebasket? Here, instead, is what Harry Blackmun wrote back:

Dear Patrick,

Thank you for your nice letter of July 7. You asked what it is like being a judge. It is like anything else, I guess, but not too much fun. I am not boss of anyone. Everyone bosses me. And you ask whether I ever get nervous. I am nervous most of the time. Are you? I hope you are doing well at school.47

Those are the words of a humble man, a man who believed that those who write to their government officials deserve a respectful answer. It is the voice of a man who believed that the Court belongs to the people. What Justice Blackmun was saying is that the Court is not above you. It speaks to you. “In my world,” he was telling Patrick and others like him, “the job of the Court is to speak to you.” For if the Court can speak to you, Justice Blackmun believed, it will do a much better job speaking for you. And that, I think, is how all of us should remember Justice Harry Blackmun.

47 Id. at 453-54.
The Justice and the Jury

Jason Mazzone†

I. INTRODUCTION

Judges who work with juries—trial judges—tend to think very highly of them.1 Studies show that trial judges almost unanimously believe that juries reach fair verdicts; most trial judges report that if they personally were involved in a criminal or civil case they would want it to be decided by a jury.2 Judge William L. Dwyer, a judge for fifteen years on the United States District Court for the Western District of Washington in Seattle, considered jurors his “courtroom companions” who routinely produced “fair and honest verdicts.”3 Chief Judge Mark W. Bennett of the United States District Court for the Northern District of Iowa states that it

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1 The favorable views held by trial judges contrast with commentators’ frequent criticisms of juries. See, e.g., HARRY KALVEN, JR. & HANS ZEISEL, THE AMERICAN JURY 5 (1966) (“The jury trial at best is the apotheosis of the amateur. Why should anyone think that 12 persons brought in from the street, selected in various ways, for their lack of general ability, should have any special capacity for deciding controversies between persons?”) (quoting Erwin Griswold, Dean’s Report 5-6 (1963) (on file with Harvard Law School Library Special Collections)); Steven I. Friedland, The Competency and Responsibility of Jurors in Deciding Cases, 85 NW. U. L. REV. 190, 190 (1990) (“Numerous examples support the contention that a jury selected at random sometimes serves as an incompetent decisionmaker.”); Richard A. Posner, An Economic Approach to the Law of Evidence, 51 STAN. L. REV. 1477, 1497 (1999) (“Well-publicized instances of crazy jury trials—interminable, uncivil, lawless, resulting in outlandish verdicts and other egregious miscarriages of justice, or all these things at once—have convinced some observers that the American system is grossly inefficient.”). But see VALERIE P. HANS & NEIL VIDMAR, JUDGING THE JURY 163 (1986) (“The hard facts indicate that on the whole the jury behaves responsibly and rationally.”); William Glaberson, A Study's Verdict: Jury Awards Are Not Out of Control, N.Y. TIMES, Aug. 6, 2001, at A9 (reporting from a study of nearly 9,000 trials that judges award punitive damages about as often and in the same proportion as do juries).


would be “catastrophic for the nation” if civil juries were to disappear.⁴ According to Nebraska trial judge Lyle Strom: “Out of hundreds of jury trials, I can count on fewer than the fingers of one hand the verdicts that I thought made no sense.”⁵ How many of us would say the same about the decisions of the U.S. Supreme Court or other appellate courts?

The justices of the Supreme Court do not sit with juries and therefore observe their work only by reading trial transcripts—transcripts in cases in which the losing party is arguing that the outcome of the case was flawed. Yet Supreme Court decisions heavily influence the work of juries: the tasks juries will be called upon to perform⁶ and how labor will be divided up between judges and juries;⁷ how jurors are selected;⁸ the evidence juries see and the arguments they hear;⁹ the

⁵ Quoted in Dwyer, supra note 3, at 137.
⁶ For example, in the modern era at least, “in the absence of express or implied consent to the contrary, issues of law are to be resolved by the court and issues of fact are to be determined by the jury under appropriate instructions by the court.” Baltimore & Carolina Line, Inc. v. Redman, 295 U.S. 654, 657 (1935).
⁷ For example, in the criminal context, the Court has held that defendants have a right to have a jury decide every element of the crime. See United States v. Gaudin, 515 U.S. 506, 510 (1995) (“We have held that [the Fifth and Sixth Amendments] require criminal convictions to rest upon a jury determination that the defendant is guilty of every element of the crime with which he is charged, beyond a reasonable doubt.” (emphasis added)). A series of recent cases limit the ability of judges to make their own factual findings at sentencing. See United States v. Booker, 543 U.S. 220, 230-32, 34 (2005) (holding that Sixth Amendment was violated by imposition of an enhanced sentence under the United States Sentencing Guidelines based on the sentencing judge’s determination of facts other than a prior conviction that were not found by the jury or admitted by the defendant); Blakely v. Washington, 542 U.S. 296, 313-14 (2004) (invalidating state sentencing law that allowed judge to impose sentence beyond standard range upon finding aggravating factors, in this case that the defendant acted with deliberate cruelty); Ring v. Arizona, 536 U.S. 584, 588-89 (2002) (holding unconstitutional state statute that allowed the trial judge sitting alone to decide whether there existed aggravating factors to warrant the imposition of the death penalty); Apprendi v. New Jersey, 530 U.S. 466, 490 (2000) (holding that “[o]ther than the fact of a prior conviction, any fact that increases the penalty for a crime beyond the prescribed statutory maximum must be submitted to a jury, and proved beyond a reasonable doubt”). See generally Suja A. Thomas, Judicial Modesty and the Jury, 76 U. COLO. L. REV. 767, 795 (2005) (concluding that “the [Supreme] Court has been more generous in its allocation of power to the criminal jury under the Sixth Amendment as compared to its allocation of power to the civil jury under the Seventh Amendment”).
⁸ See, e.g., Batson v. Kentucky, 476 U.S. 79, 89 (1986) (holding that prosecutor’s use of peremptory challenges to remove potential jurors solely on the basis of their race violates equal protection).
⁹ See, e.g., Daubert v. Merrell Dow Pharm., Inc., 509 U.S. 579, 595-97 (1993) (holding that Federal Rule of Evidence 702 requires trial judges to act as gatekeepers to ensure that scientific expert testimony presented to a jury is both reliable and relevant).
consequences of jury deadlock;\textsuperscript{10} and, of course, whether jury verdicts will be overturned or left in tact.\textsuperscript{11} What the justices think of juries, then, is a matter of importance.

This Article examines Justice Harry A. Blackmun’s view of juries. A close reading of Blackmun’s opinions and of opinions by other justices that Blackmun joined demonstrates that Blackmun had a view of juries that, at least in modern times, is unusual. Blackmun saw juries as important but not for the typical reasons. He did not think juries were especially remarkable as fact-finding bodies: juries, in his view, were not needed to find facts accurately and, worse, they could easily get facts wrong. Blackmun also did not think of juries in terms of individual rights: he placed little emphasis on the criminal jury trial as a right of defendants and he did not consider juries to be in court principally to protect the defendant’s interests.

Instead, Blackmun saw juries primarily as an element of democratic government. Here, too, Blackmun’s view was unusual. Blackmun placed some stock—though not as much as some of his other colleagues on the Court—in juries’ serving democracy by preventing government overreaching and protecting liberty.\textsuperscript{12} But for Blackmun, the main democratic

\textsuperscript{10} See, e.g., Allen v. United States, 164 U.S. 492, 501-02 (1896) (holding that there was no error when a criminal jury returned for further instructions and the trial court judge instructed the jurors that "if much the larger number were for conviction, a dissenting juror should consider whether his doubt was a reasonable one which made no impression upon the minds of so many men, equally honest, equally intelligent with himself," and "[i]f . . . the majority were for acquittal, the minority ought to ask themselves whether they might not reasonably doubt the correctness of a judgment which was not concurred in by the majority"). The Court has stated that the propriety of administering an Allen charge to a deadlocked jury is "beyond dispute." Lowenfield v. Phelps, 484 U.S. 231, 237 (1988).

\textsuperscript{11} See, e.g., Honda Motor Co. v. Oberg, 512 U.S. 415, 434-35 (1994) (holding that in the absence of sufficient alternative due process safeguards, state constitutional provision preventing judicial review of the amount of punitive damages imposed by a civil jury violated the Fourteenth Amendment unless the reviewing court could affirmatively say there was no evidence to support the verdict); Sullivan v. Louisiana, 508 U.S. 275, 277 (1993) ("[A]lthough a judge may direct a verdict for the defendant [in a criminal case] if the evidence is legally insufficient to establish guilt, he may not direct a verdict for the State, no matter how overwhelming the evidence"); Jackson v. Virginia, 443 U.S. 307, 318-19 (1979) ("[T]he critical inquiry on [appellate] review of the sufficiency of the evidence to support a criminal conviction . . . is whether, after viewing the evidence in the light most favorable to the prosecution, any rational trier of fact could have found the essential elements of the crime beyond a reasonable doubt."); McCaughn v. Real Estate Land Title & Trust Co., 297 U.S. 606, 608 (1936) (stating that in reviewing a civil jury’s verdict "[t]he appellate court cannot pass upon the weight of [the] evidence" (citations omitted)); Hansen v. Boyd, 161 U.S. 397, 402 (1896) (noting that an alleged assignment of error that "ask[ed the Court] to determine the weight of proof . . . usurp[ed] the province of the [civil] jury").

\textsuperscript{12} See infra notes 41-45 and accompanying text.
benefit of the jury was as a participatory institution. Like voting, Blackman viewed serving on a jury as a right and a responsibility of citizenship. Blackmun therefore saw it as his job, as a justice on the Supreme Court, to make sure that the jury operated properly as a participatory democratic institution. In particular, whatever other rules the Supreme Court might make about juries, it had to ensure at least that juries were open to all citizens.

Parts II and III of the Article explore Blackmun’s democratic view of juries. Part II traces Blackmun’s disagreement, expressed in a series of cases, with conventional accounts of why juries are valuable. Part III examines Blackmun’s own view of juries as robust sites of democratic participation.

Understanding how Blackmun viewed juries does more than shed light on the jurisprudence of a former member of the Supreme Court. Taken seriously, Blackmun’s insights about juries have important, and troubling, implications for the present state of American democracy, the subject of Part IV. In addition to pointing to some needed reforms in jury practices, Blackmun’s approach suggests that the recent phenomenon of the vanishing jury trial represents a disappearance of democracy itself.

II. THE VALUES OF JURIES

Why juries? Three reasons are commonly offered for why juries are valuable. First, juries are good at finding facts: twelve people who listen to evidence and then deliberate together over what they have heard are more likely to get things right than is a single fact-finder deciding an issue alone. Second, juries, particularly in criminal cases, serve as

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13 See infra Part III.
14 See id.
15 See id.
16 See infra notes 85-147 and accompanying text.
17 See, e.g., Chris Guthrie et al., Inside the Judicial Mind, 86 CORNELL L. REV. 777, 827 (2001) (“Juries consist of groups, and group deliberation might reduce some illusions of judgment. . . . [For example, b]ecause groups usually remember more of the relevant facts than individuals, group decision making can mitigate some of the hindsight bias’s influence, suggesting that juries might more successfully avoid the hindsight bias than judges.” (footnote omitted)); Saul Levmore, From Cynicism to Positive Theory in Public Choice, 87 CORNELL L. REV. 375, 375 & n.1 (2002) (describing the Condorcet Jury Theorem as stating that “a large number of observers will do better than any non-expert individuals, so that it is comforting to be part of a group because
a check on the government: criminal juries watch out for the rights and interests of the individual defendant, and, as a result, safeguard liberty more generally by shielding other people from future government abuses. Third, juries legitimize outcomes: the general public is more likely to respect decisions reached by ordinary citizens. In civil cases, verdicts reflect the views of the community; a jury verdict in a criminal case is fair because it is the decision of the defendant’s peers.

Consider, then, what Justice Blackmun thought of these three rationales. Justice Blackmun clearly did not think the reason for having juries was that they accurately find facts. Three important cases illustrate Blackmun’s view on this issue: *McKeiver v. Pennsylvania* (1971), *Codispoti v. Pennsylvania* (1974), and *Ludwig v. Massachusetts* (1976).

In *McKeiver*, the Supreme Court held that there is no right under the Due Process Clause of the Fourteenth Amendment to a jury trial in a state court juvenile delinquency proceeding. Writing for a plurality, Justice Blackmun avoided the question of whether a juvenile proceeding is a...
criminal proceeding for purposes of the Sixth Amendment right to a jury trial and he wrote instead that while juveniles are entitled to a fact-finding process that comports with due process, due process itself does not require fact-finding to be conducted by a jury. 24 “[O]ne cannot say,” Blackmun explained, “that in our legal system the jury is a necessary component of accurate factfinding. There is much to be said for it, to be sure, but we . . . [are] content to pursue other ways for determining facts.” 25 Elsewhere, Blackmun noted that the jury performs “no particular magic.” 26 In other words, a process can be a fair process, and produce accurate results, even when a jury is not a part of the proceeding. 27

Moreover, Blackmun reasoned, in juvenile proceedings, not only will a jury be unnecessary to accurately find facts, something that can be done perfectly well by a judge, a jury in such cases will have a negative effect: the jury will turn the juvenile court into a full-blown adversarial proceeding, undermining the role of the juvenile court in protecting and nurturing young people. 28 The jury, then, is not needed to find facts and will likely only get in the way.

In Codispoti, the Court, in a majority opinion by Justice White, held that following the verdict, a criminal defendant facing contempt charges for conduct during the course of a trial is entitled to a jury under the Sixth Amendment if the aggregate sentence for the contempt charges exceeds six months. 29 Dissenting from the majority’s extension of the Sixth

24 Id. at 543-45. The case involved two juveniles from Pennsylvania: Joseph McKeiver, aged sixteen, was charged in family court with robbery, larceny, and receiving stolen goods. Id. at 534-35. Rejecting his request for a jury trial, the judge found him to be a juvenile delinquent and ordered probation. Id. at 535 & 558 (Douglas, J., dissenting). Fifteen-year old Edward Terry, charged with assault and battery on a police officer and conspiracy, also sought a jury trial. Id. at 535 (majority opinion). Again denying the request, the judge determined Terry was a delinquent and ordered him committed to a home for youths. Id. A companion case decided from North Carolina heard along with McKeiver involved a group of Black children charged with disorderly conduct for protesting schooling conditions—also adjudged delinquents without the benefit of a jury trial. Id. at 536-38. The state judge in that case ordered the children in the custody of the state Department of Welfare but suspended the order on the condition that the children refrain from further infractions, report monthly to a welfare officer, and attend school without further disruption. Id. at 537-38.

25 Id. at 543. Blackmun explained: “Juries are not required, and have not been, for example, in equity cases, in workmen’s compensation, in probate, or in deportation cases. Neither have they been generally used in military trials.” Id.

26 Id.

27 Id.

28 Id. at 547.

29 418 U.S. at 514-18.
Amendment jury right, Blackmun saw no reason why a judge, acting alone, cannot determine whether the defendant is guilty of contempt as a result of conduct during the course of the trial. Blackmun wrote: “the contempt [takes] place in open court and the incident and all its details are fully preserved on the trial record.” A judge, then, can review the record and make appropriate findings of fact. Blackmun reasoned that any bias on the part of the trial judge could be dealt with by assigning the contempt case to a new judge. Blackmun therefore stated that he was “at a loss . . . to see the role a jury is to perform.” More generally, Blackmun urged, “[t]he determination of whether basically undisputed facts constitute a direct criminal contempt is a particularly inappropriate task for the jury,” and the job should instead be “the exclusive province of the court.” Blackmun reasoned that since the jury would not be responsible for determining the sentence on the contempt charges, there was nothing it could ever do to “mitigat[e] an excessive punishment.” Hence, the jury was not needed.

Even in a straight-up criminal trial, Blackmun did not consider a jury essential to accurate fact-finding. In our third case, *Ludwig v. Massachusetts*, decided in 1976, Blackmun stated in his majority opinion that “[t]here is no question . . . that a person who is accused of crime may receive a fair trial before a magistrate or a judge.” Accordingly, in *Ludwig*, Blackmun held constitutional a two-tier criminal system in Massachusetts in which a defendant is tried in the first tier before a judge, but is entitled to appeal a conviction to the second tier and be tried there *de novo* by a jury. Brushing

\[\text{References}\]

30 Id. at 522 (Blackmun, J., dissenting).
31 Id.
32 Id.
33 Id. at 522-23.
34 Id. at 522.
35 Codispoti, 418 U.S. at 523.
36 Id. at 523.
37 By contrast, twenty years later, Blackmun held for a unanimous court that a union could not be held in contempt for violating a labor injunction and fined in the amount of $52 million without the benefit of a jury trial. *International Union, United Mine Workers v. Bagwell*, 512 U.S. 821, 839 (1994). The fine, Blackmun reasoned (in part of his opinion joined by six other justices), was punitive rather than compensatory and while not all criminal contempt fines require a jury trial, here the magnitude of the amount made it a serious criminal sanction and triggered the Sixth Amendment. *Id.* at 837-38 & n.5.
38 427 U.S. at 627 n.3.
39 Id. at 631-32.
aside the petitioner’s arguments—that the Massachusetts system burdens the defendant with delay, expense and inconvenience; subjects the defendant to the risk of a harsher sentence if tried a second time and convicted at the second tier; and is a form of double jeopardy—Blackmun reasoned that the availability of a jury, even if only after the first trial ran its course, satisfied the Constitution’s requirements.  

Justice Blackmun, thus, did not place much stock in the commonly held view that juries are valuable because they are good at finding facts. How about the second reason frequently offered in support of juries—their value in keeping government in check and protecting liberty? Blackmun’s colleague, Byron White, was enthusiastic about juries as a curb on government power, and Blackmun joined opinions by White explaining how juries exist as a safeguard against arbitrary government action. For example, in 1972, in *Apodaca v. Oregon*, the Court affirmed three defendants’ state felony convictions following non-unanimous verdicts (as permitted under state law)—eleven-to-one verdicts in the cases of two of the defendants and a ten-to-two verdict in the other. Blackmun joined White’s plurality opinion in *Apodaca* concluding that the Sixth Amendment does not require a unanimous twelve-person jury verdict because unanimity does not “materially contribute” to the “purpose of trial by jury . . . to prevent oppression by the Government” by “interpos[ing] between the accused and his accuser . . . the commonsense judgment of a group of laymen.”  

Ten jurors agreeing on an outcome, held the plurality, is enough commonsense to protect liberty.

Yet, despite *Apodaca*, Blackmun placed less importance than did White on the role of juries in curbing government overreaching. In *Codispoti*, White understood that the arbitrary exercise of government power, the thing the jury exists to prevent, might be the exercise of power by the trial judge—who is, of course, a government employee. Giving the case to the jury, White stated, reduces “the likelihood of arbitrary action” that exists when the judge, after the trial is

40 Id. at 624-32. In other cases, Blackmun also pointed out that juries were prone to make mistakes. See, e.g., Barefoot v. Estelle, 463 U.S. 880, 926-27 (1983) (Blackmun, J., dissenting) (discussing how jurors are easily misled by scientific evidence).


42 Id. at 405-06, 414.

43 Id. at 410.

44 Id. at 411.
over, is able to file a series of contempt charges and that same judge, or another judge in the same building, determines guilt or innocence on those contempt charges and imposes a sentence that might run several years."

Indeed, by dissenting from White’s opinion, Blackmun did not appear to recognize the general resemblance Codispoti bore to the most famous instance of juries protecting liberties: the prosecution of John Peter Zenger in New York in 1735 on charges of seditious libel for having published in his newspaper criticisms of corrupt New York Governor William Cosby. In the Zenger trial, the court instructed the jury that the only thing for it to do was to decide, as a factual matter, whether the defendant published the newspapers in question and, if so, return a verdict of guilty.

Rejecting the argument of Andrew Hamilton, Zenger’s Philadelphia lawyer, that the jury should also decide whether the offending newspapers were libelous and whether the defense of truth applied, the court stated that it would determine—if the jury found Zenger published the materials—whether they were libelous, and, if they were, impose an appropriate sentence. Zenger had admitted he published the newspapers and so a guilty verdict seemed inevitable in the case. Yet the jury, present in the courtroom throughout the exchanges between the judge and Hamilton, returned an acquittal. Despite its limited mandate, the Zenger jury protected the right to publish from an abusive government.

So too in Codispoti (and other cases involving charges of criminal contempt) the jury might serve to protect liberty. Though the jury would see the defendant’s misconduct on the record, and though the evidence of criminal contempt might be overwhelmingly clear, the jury might nonetheless acquit. It might conclude, for example, that the government—in the form of the angry trial judge—had gone too far in seeking contempt sanctions. It might decide that a finding of contempt would be unfair. It might oppose the government having a second chance to incarcerate a defendant. Viewed from the

47 Id. at 29.
48 Id. at 18-19.
49 Id. at 12.
50 Id. at 30.
perspective of the Zenger case, Blackmun overlooked the important safeguard to liberty juries might offer in these circumstances.

A third common rationale for the jury system is that juries lend legitimacy to verdicts. Blackmun also did not seem to consider this to be the importance of the jury. For one, Blackmun plainly saw a significant role for the judge in keeping the jury in check. Blackmun wrote the majority opinion in *Smith v. United States*,\(^{51}\) holding that under the provision of federal law prohibiting the mailing of obscene materials,\(^{52}\) and in accordance with *Miller v. California*,\(^{53}\) it is the job of the jury to apply the standards of its own community to determine whether material is obscene.\(^{54}\) At the same time, Blackmun emphasized in *Smith*, judges had an important role in monitoring the jury's work. The trial judge should ensure that jurors are “instructed properly, so that they consider the entire community and not simply their own subjective reactions, or the reactions of a sensitive or of a callous minority.”\(^{55}\) Blackmun further instructed that judges also should determine if the material falls within the substantive limits of *Miller*\(^{56}\) and noted that an issue “particularly amenable to appellate review” in obscenity cases was the *Miller* prong that asks whether the material had redeeming literary, artistic, political, or scientific value.\(^{57}\) More generally, Blackmun wrote, “it is always appropriate for the appellate court to review the sufficiency of the evidence.”\(^{58}\) Hence, juries bring the voice of the community to the courtroom—but the judge decides how strong that voice will be.

It comes, then, as no surprise that Blackmun was the author of the Court's *Daubert* opinion, holding that under the


\(^{53}\) 413 U.S. 15 (1973). *Miller* held that material can be obscene only if:

(a) the average person, applying contemporary community standards, would find that the work, taken as a whole, appeals to the prurient interest; (b) the work depicts or describes, in a patently offensive way, sexual conduct specifically defined by the applicable state law; and (c) the work, taken as a whole, lacks serious literary, artistic, political, or scientific value.

*Id.* at 25.

\(^{54}\) *Smith*, 431 U.S. at 304-05.

\(^{55}\) *Id.* at 305.

\(^{56}\) *Id.*

\(^{57}\) *Id.*

\(^{58}\) *Id.* at 305-06.
Federal Rules of Evidence, before expert scientific testimony is presented to a jury the trial judge must make a preliminary assessment of whether the reasoning or methodology underlying the testimony is scientifically valid and can be applied to the facts at issue in the case.\(^{59}\) While recognizing that this gatekeeping role of judges “inevitably on occasion will prevent the jury from learning of authentic insights and innovations,” Blackmun explained that evidentiary rules are “designed not for the exhaustive search for cosmic understanding but for the particularized resolution of legal disputes.”\(^{60}\)

Blackmun’s skepticism towards the value that juries hold in lending legitimacy to verdicts can also be seen in his death penalty jurisprudence. Every death penalty case receives enormous public attention and presents an especially strong risk that its outcome will be perceived as illegitimate, particularly because the cost of error is so high. While Blackmun would ultimately conclude capital punishment was unconstitutional,\(^{61}\) in the earlier cases in which he voted to uphold a capital sentence, he did not think that a jury had to be entrusted with the task of deciding whether death was an appropriate penalty. In 1984, in \textit{Spaziano v. Florida},\(^{62}\) Justice Blackmun wrote the majority opinion holding that no constitutional violation occurs if, in accordance with state law, the trial judge in a first-degree murder case overrides the jury’s recommendation of life imprisonment and imposes a death sentence.\(^{63}\) In \textit{Spaziano}, the judge, as required under the Florida statute, independently found that there existed aggravating circumstances—the murder was heinous and atrocious and the defendant had committed a prior violent felony—that justified ignoring the jury’s decision and imposing a capital sentence.\(^{64}\) Blackmun saw no problem with judges ignoring a jury’s decision in these circumstances. He explained that “a capital sentencing proceeding involves the same fundamental issue involved in any other sentencing proceeding—a determination of the appropriate punishment to

\(^{60}\) Id. at 597.
\(^{61}\) See Callins v. Collins, 510 U.S. 1141, 1145 (1994) (Blackmun, J., dissenting) (“From this day forward, I no longer shall tinker with the machinery of death.”).
\(^{63}\) Id. at 449.
\(^{64}\) Id. at 451-52.
be imposed on an individual,” and that this was an issue to
which the Sixth Amendment jury right simply does not apply.\(^65\) The Constitution, Blackmun reasoned, mandates only that a
capital sentencing scheme be generally in accordance with the
“twin objectives” of “measured, consistent application and
fairness to the accused.”\(^66\) A judge having the final word
comports with those requirements: “Nothing in those twin
objectives suggests that the sentence must or should be
imposed by a jury.”\(^67\)

Blackmun was not persuaded by the petitioner’s
arguments that the “[t]he imposition of the death penalty . . . is
an expression of community outrage,” that jurors are “in the
best position to decide whether a particular crime is so heinous
that the community’s response must be death,” and that the
decision of the jury should therefore be final,\(^68\) points pressed
by Justice Stevens.\(^69\) Instead, Blackmun reasoned, the state
legislature, in creating the particular death penalty scheme in
the first place, had already given voice to the concerns of the
community.\(^70\) Legitimacy, in other words, derived from the
statute itself. Though assuring readers that his opinion “do[es]
not denigrate the significance of the jury’s role as a link
between the community and the penal system and as a
bulwark between the accused and the State,”\(^71\) Blackmun
concluded that the Constitution permits judges, in accordance
with the state’s own laws, to ignore the jury’s recommendation:
“advice,” he wrote, “does not become a judgment simply
because it comes from the jury.”\(^72\) Moreover, if the sentencing
judge’s determination is irrational or arbitrary, there remains
the possibility of correction on appeal.\(^73\) Blackmun believed
that even in capital cases, in which legitimacy seems most
crucial, juries could be displaced.

\(^{65}\) Id. at 459.
\(^{66}\) Id. (quoting Eddings v. Oklahoma, 455 U.S. 104, 110-11 (1982)).
\(^{67}\) Id. at 460.
\(^{68}\) Spaziano, 468 U.S. at 461.
\(^{69}\) Id. at 481-90 (Stevens, J., concurring in part and dissenting in part).
\(^{70}\) Id. at 462 (majority opinion).
\(^{71}\) Id. at 462.
\(^{72}\) Id. at 465.
\(^{73}\) Id. at 466-67.
III. THE JURY AND DEMOCRACY

Though Justice Blackmun placed little emphasis on juries as accurate fact finders, guardians of liberty, and a source of legitimacy, he nonetheless valued juries—for a different reason. Blackmun considered juries an important component of democracy. In this view, juries matter because they represent an opportunity for citizens to participate in the workings of government. Like voting, jury service is a right and obligation of citizenship. Juries in this sense promote liberty, but not so much because any particular jury keeps the government in check or a jury watches out for the interests of a particular defendant. Rather, juries safeguard liberty because they are an aspect of a functioning democracy. The job of the Supreme Court, then, is to ensure juries are open for and conducive to participation—just as the Court safeguards the ability of citizens to vote.

Under this approach, juries must function as participatory bodies. A series of Supreme Court cases considered how the numerical composition of a jury affects its ability to function. In 1978, in *Ballew v. Georgia*, Blackmun wrote for the Court in holding that a five-member jury in a criminal case violated the Sixth Amendment. The jury’s democratic purpose, Blackmun wrote, is only achieved by “the participation of the community in determinations of guilt and . . . the application of the common sense of laymen.” In 1970 (before Justice Blackmun’s tenure) the Court had held in *Williams v. Florida* that a jury comprised of six citizens is constitutional. Why then, were six jurors permissible in *Williams* while in *Ballew* five jurors were not? Citing a vast body of scholarly work on jury size prepared in the wake of *Williams*, Blackmun concluded that a series of problems emerge if the number of jurors drops below six. Small-sized groups do not function well as deliberative bodies, Blackmun concluded. Collectively, the members of very small groups have less reliable recall of evidence compared to larger groups; very small groups do not effectively solve problems; biases of

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75 Id. at 245.
76 Id. at 229 (emphasis added).
78 *Ballew*, 435 U.S. at 231 n.10.
79 Id. at 232.
individuals are not tempered in small groups; minority viewpoints are also less likely to be asserted because individuals are reluctant to articulate views if nobody else in the group shares the view; and very small groups of decision-makers produce inaccurate results. Moreover, Blackmun emphasized, as the size of the jury decreases, its benefit as a site of community participation naturally declines in that the “opportunity for meaningful and appropriate representation . . . decrease[s] with the size of the panel[].”

Consistent with his approach to jury size and deliberation in Ballew, in 1979, Blackmun joined Rehnquist’s opinion in Burch v. Louisiana, holding that a non-unanimous six-person jury was unconstitutional. In 1980, in Brown v. Louisiana, Blackmun also joined Brennan’s opinion—which itself drew heavily on Ballew—in holding that the Burch rule applied retroactively.

Because juries are sites of democratic participation, Blackmun further saw his job as ensuring that jury participation is available to all citizens. As a judge on the Court of Appeals for the Eighth Circuit, Blackmun had already issued an important ruling on the unconstitutionality of excluding Black citizens from juries. In 1961, in Bailey v. Henslee, Circuit Judge Blackmun held that the Equal Protection Clause required granting a habeas petitioner from Arkansas a new trial following his conviction by an all-White jury, and death sentence, when the method for selecting jurors involved jury commissioners who handpicked the jurors; the jurors’ race was notated in the records; Black jurors rarely served; and there was a recurrence in jury pools of the same few Black citizens who would likely be disqualified. “When a right to a jury trial exists,” Circuit Judge Blackmun wrote, “a jury’s proper composition is fundamental.”

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80 Id. at 232-37.
81 Id. at 236-37.
82 Id. at 237.
84 447 U.S. 323, 330 (1980).  Note that in Apodaca, Justice White, in an opinion joined by Blackmun holding that the state can permit a verdict upon the vote of ten or eleven out of twelve jurors, explained also that the participatory aspect of juries is not undermined because the jury began as twelve citizens, selected from a representative pool. Apodaca, 406 U.S. at 412-14.
85 287 F.2d 936 (8th Cir. 1961).
86 Id. at 947-48.
87 Id. at 941 (footnote omitted).
At the Supreme Court, in *Taylor v. Louisiana*, Blackmun joined White’s opinion holding that a male criminal defendant’s Sixth Amendment right is violated when, in accordance with state law, women were called for jury service only if they have previously filed a declaration indicating they want to serve—a system that resulted in a very small number of women in the jury pool. If juries are to protect against arbitrary governmental power, White reasoned, the jury pool must reflect a fair cross-section of the population.

White noted also in *Taylor* that “[c]ommunity participation in the administration of the criminal law” is part of “our democratic heritage.”

A jury representative of the community, White stated, ensures “diffused impartiality,” and that the “civic responsibility” of “administ[ering] . . . justice” is “shar[ed].”

Solidifying this approach, in 1977, Blackmun wrote the majority opinion in *Castaneda v. Partida*, a habeas case, in which the Court found a Fourteenth Amendment equal protection violation when a defendant had been indicted by a Texas grand jury selected through an exclusionary process.

Under the key-man system in place in Texas, a state judge appointed three to five persons to serve as jury commissioners; they in turn selected fifteen to twenty individuals from the county to make up the list from which the grand jury was drawn. Blackmun held that the petitioner had made out a prima facie case of intentional discrimination in the grand jury selection by showing that in a county in which 79.1% of the population was Mexican-American, only 39% of people summoned for grand jury service over an 11-year period were Mexican-American.

Blackmun also held that the state’s claim that Mexican-Americans constituted a majority of elected officials in the county was insufficient evidence to rebut the prima facie showing. Equal protection requires inclusiveness in choosing grand juries as well as petit juries.

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89 Id. at 525-26, 533.
90 Id. at 530.
91 Id.
92 Id. at 530-31 (citation omitted).
94 Id. at 501.
95 Id. at 484.
96 Id. at 486-91, 494-96.
97 Id. at 499-501.
Two cases decided in 1979 further demonstrate Blackmun's commitment toward ensuring jury inclusiveness. In *Duren v. Missouri*, Blackmun joined White again to hold that a Missouri statute that granted women automatic exemption from jury service, thereby producing under-representation of women on jury venires, violated the defendant's Sixth Amendment rights.\(^98\) That same year, Blackmun wrote for a majority in *Rose v. Mitchell*,\(^99\) holding that racial discrimination in violation of the Equal Protection Clause in the selection of a grand jury is a basis for setting aside a criminal conviction, even when the verdict is reached by a properly constituted petit jury, and, further, that the issue can be raised in a federal habeas petition.\(^100\) The case involved two Black defendants convicted in Tennessee of murder who claimed in their habeas petitions that the grand jury array, appointed through a key-man system in which three jury commissioners compiled a list of potential jurors, and the grand jury foreperson, appointed by the county court, had been selected in a racially discriminatory manner.\(^101\) After an evidentiary hearing, the federal district court dismissed the petitions on the ground that no showing of discrimination had been made.\(^102\) The Court of Appeals reversed on the issue of the selection of the jury foreperson, and vacated the convictions, and the Supreme Court granted review on that same issue.\(^103\)

In his opinion in *Rose*, Blackmun wrote that "[f]or nearly a century, this Court in an unbroken line of cases has held that 'a criminal conviction of a [Black defendant] cannot stand under the Equal Protection Clause if it is based on an indictment of a grand jury from which [Blacks] were excluded by reason of their race.'"\(^104\) Shoring up this precedent, Blackmun located inclusiveness in grand juries at the heart of the Fourteenth Amendment's guarantee of equal protection: "Discrimination on account of race . . . [is] the primary evil at which the . . . Fourteenth Amendment . . . [is] aimed," and such discrimination is "especially pernicious in the administration of

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\(^{100}\) *Id.* at 560-61, 564.
\(^{101}\) *Id.* at 547-48 & n.2.
\(^{102}\) *Id.* at 549-50.
\(^{103}\) *Id.* at 550.
\(^{104}\) *Id.* at 551 (citing, *inter alia*, *Neal v. Delaware*, 103 U.S. 370, 394 (1881)).
justice.” Grand jury participation was, in Blackmun’s view, an element of democracy: “[t]he harm [of discrimination] is not only to the accused, indicted as he is by a jury from which a segment of the community has been excluded. It is to society as a whole.” Such discrimination, Blackmun reasoned, is “at war with our basic concepts of a democratic society and a representative government” and it causes injury to “the law as an institution . . . and to the democratic ideal reflected in the processes of our courts.” To Blackmun, exclusion from a grand jury cut so deeply into the democratic fabric that it was a denial of equal protection in the plainest sense.

Precisely because the problem of exclusion lay at the core of equal protection and of democracy itself, Blackmun rejected the argument, one first advanced by Justice Jackson in a 1950 dissent and urged in Rose by Justice Stewart, that so long as the trial itself was not defective, an improperly constituted grand jury could not be a basis for invalidating a conviction. Blackmun also rejected the state’s argument in Rose that, following Stone v. Powell—in which the Court, with Blackmun in the majority, had held that where the state has provided an opportunity for full and fair litigation of a Fourth Amendment claim, a state prisoner can not be granted habeas corpus relief on the ground that evidence obtained through an unconstitutional search and seizure was introduced at trial—because the trial itself was not defective, there should exist no habeas relief. Blackmun wrote in Rose that “a claim of discrimination . . . differs . . . fundamentally” from a claimed violation of the Fourth Amendment because “[a]llegations of grand jury discrimination involve charges that state officials are violating the direct command of the Fourteenth Amendment.” Hence, Blackmun stated, the claim is properly presented in a habeas petition. The individual defendants in

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105 Rose, 443 U.S. at 554-55.
106 Id. at 556.
107 Id.
108 Id. at 552 (citing Cassell v. Texas, 339 U.S. 282, 298 (1950) (Jackson, J., dissenting)).
109 Id. at 551-54.
111 443 U.S. at 559-64.
112 Id. at 560-61. “This contrasts with the situation in Stone, where the Court considered application of ‘a judicially created remedy rather than a personal constitutional right.’” Id. at 561-62 (quoting Stone v. Powell, 428 U.S. 465, 495 n.37 (1976)).
113 Id. at 564.
Rose were not, however, home free. Reviewing the evidentiary record generated below, Blackmun disagreed with the Court of Appeals that the grand jury selection was defective and he concluded that there was insufficient evidence to make out a prima facie case of discrimination. The habeas petition therefore had to be denied.

In the ensuing years, Blackmun’s view of juries as participatory institutions important to democracy strengthened. In 1986, in *Batson v. Kentucky*, Blackmun was in the majority holding that in a criminal trial the Equal Protection Clause prohibits the prosecutor from using peremptory challenges to remove panelists on the basis of their race, and that the defendant may establish a prima facie case of discrimination based on the prosecutor’s use of peremptory challenges. Blackmun also dissented in two significant cases in which the majority refused to extend *Batson*. In 1990, Blackmun dissented in *Holland v. Illinois*, in which the majority held that while the use of peremptory challenges to exclude potential jurors on the basis of their race violates the Equal Protection Clause, it does not violate the Sixth Amendment’s right to an impartial jury (the only argument the defendant in the case had raised at trial). In 1991, Blackmun dissented in *Hernandez v. New York*, in which the majority found no *Batson* violation in excluding Latino jurors on the ground that they might not accept the translator’s version of Spanish-language testimony. So too, in 1991, Blackmun joined Justice Kennedy’s majority opinion in *Powers v. Ohio*, holding that the *Batson* equal protection principle applies whether or not the defendant and the excluded juror are of the same race, so that in the trial of a White criminal defendant the prosecutor is prohibited from excluding Black jurors on the basis of their race. Blackmun also joined Kennedy’s majority

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114 *Id.* at 564-74.
115 *Id.* at 574.
117 *Id.* at 89.
118 *Id.* at 93-95.
120 *Id.* at 486-88; *see id.* at 490 (Marshall, J. with Brennan, J. & Blackmun, J., dissenting).
122 *Id.* at 375 (Blackmun, J., dissenting).
opinion in *Edmonson v. Leesville Concrete Co.*,\(^{124}\) holding that equal protection also prohibits the use of peremptory challenges in a racially discriminatory manner in civil trials.\(^ {125}\) When civil parties in court exercise peremptory challenges, Kennedy held, they engage in state action: “If a government confers on a private body the power to choose the government’s employees or officials, the private body will be bound by the constitutional mandate of race neutrality.”\(^ {126}\) On this view, race-based exclusion violates the equal protection rights of the excluded juror and the opposing party in the case has standing to challenge the exclusion.\(^ {127}\)

In 1992, in *Georgia v. McCollum*,\(^ {128}\) Blackmun, writing for a majority, extended the principle to the defendants in criminal trials, holding that they too are prohibited from exercising racially discriminatory peremptory challenges,\(^ {129}\) and that the prosecutor is entitled to assert the equal protection rights of the excluded juror to challenge a defendant’s decision.\(^ {130}\) Whether a potential juror is excluded by the state or by the defendant, Blackmun reasoned, “the harm is the same—in . . . [each] case[] the juror is subjected to open and public racial discrimination,”\(^ {131}\) and the racially discriminatory selection procedure “undermine[s] . . . public confidence” in the judicial process.\(^ {132}\) Blackmun held that a criminal defendant’s use of peremptory challenges is, like the prosecutor’s, state action.\(^ {133}\) He reasoned that state action exists because the peremptory challenge is a right established by state law;\(^ {134}\) the jury process in general is a function of the government, which summons prospective jurors, administers to them an oath, and pays them a stipend;\(^ {135}\) the jury in a criminal case performs a function—trial by jury—required by the Constitution;\(^ {136}\) and the public views the jury process as a

\(^{125}\) Id. at 628.
\(^{126}\) Id. at 625.
\(^{127}\) Id. at 628-31.
\(^{129}\) Id. at 50-55.
\(^{130}\) Id. at 56.
\(^{131}\) Id. at 49.
\(^{132}\) Id.
\(^{133}\) Id. at 51-56.
\(^{134}\) *McCollum*, 505 U.S. at 51.
\(^{135}\) Id. at 51-52.
\(^{136}\) Id. at 52.
The fact that the defendant is on trial by the government does not undermine the conclusion that the defendant is the government when it comes to picking jurors. Further, Blackmun found, applying the Equal Protection Clause to constrain the defendant’s exercise of peremptory challenges does not interfere with the defendant’s own right to a jury trial because all that the Sixth Amendment guarantees is the right to “trial by an impartial jury.”

The holding seems astonishing: the criminal defendant, the individual experiencing the fullest power of the state and mustering every resource to prevent what the state seeks to do, is, according to Blackmun, an agent of the government itself. Justice O’Connor, in dissent, calls the result “perverse.” And yet if the jury is a site of democracy, the holding makes perfect sense. The jury does not exist for the benefit of the defendant but, rather, as an opportunity for citizen participation. Democracy therefore requires a response to efforts, including those by the defendant, to prevent citizens from participating fully.

Democracy does not only mean equal participation on juries regardless of race. In 1994, Blackmun also wrote the majority opinion in *J.E.B. v. Alabama ex rel. T.B.*, holding that equal protection rules likewise apply to prohibit the use of peremptory challenges on the basis of gender. “[W]hether the trial is criminal or civil,” Blackmun wrote, “potential jurors, as well as litigants, have an equal protection right to jury selection procedures that are free from state-sponsored group stereotypes rooted in, and reflective of, historical prejudice.”

Treating the exclusion of women from juries as inconsistent with their right to vote, and at odds with “the value of women’s contribution to civic life,” Blackmun explained that women have suffered a similar plight as Blacks because, “with

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137 *Id.* at 53.
138 *Id.* at 53-54 (noting that “[t]he exercise of a peremptory challenge differs significantly from other actions taken in support of a defendant’s defense”).
139 *Id.* at 58.
140 *McCollum*, 505 U.S. at 64 (O’Connor, J., dissenting).
142 *Id.* at 128-29.
143 *Id.* at 128.
144 *Id.* at 131 (writing that “[m]any States continued to exclude women from jury service well into the present century, despite the fact that women attained suffrage upon ratification of the Nineteenth Amendment in 1920”).
145 *Id.* at 134.
respect to jury service . . . [both groups] share a history of total exclusion.\textsuperscript{146} Using peremptory challenges to deny women an equal opportunity to serve on juries undermines their full participation in political life and renders them unequal citizens. Blackmun wrote:

Equal opportunity to participate in the fair administration of justice is fundamental to our democratic system. . . . It reaffirms the promise of equality under the law—that all citizens, regardless of race, ethnicity, or gender, have the chance to take part directly in our democracy. . . . When persons are excluded from participation in our democratic processes solely because of race or gender, this promise of equality dims, and the integrity of our judicial system is jeopardized.\textsuperscript{147}

Exclusion of citizens from juries represents a defect in the very operations of democracy.

IV. CONCLUSION: MODERN LESSONS

Blackmun’s understanding of juries as sites of political participation, though perhaps unusual in modern times,\textsuperscript{148} turns out to be an old idea. Blackmun’s view would be familiar to eighteenth-century Americans. Alexander Hamilton in The Federalist identified the need to protect juries as an important component of American democracy and the single point of agreement among the diverse delegates to the Constitutional Convention: all of the convention delegates, Hamilton says, understood juries to be the “very palladium of free government.”\textsuperscript{149} The anti-federalist author of the 1788 Essays by a Farmer identified juries as “the democratic branch of the judiciary power.”\textsuperscript{150} Thomas Jefferson thought juries were more central to democracy than was the legislature, writing in 1789 that “[w]ere I called upon to decide whether the people

\textsuperscript{146} Id. at 136.
\textsuperscript{147} J.E.B., 511 U.S. at 145-46 (footnote omitted).
\textsuperscript{148} Though it resonates broadly with the view of Justice Breyer—who replaced Blackmun in 1994—of the need in constitutional interpretation to consider the value of “active liberty,” by recognizing that “the people themselves should participate in government.” \textit{Step}hen \textit{Breyer}, \textit{Active Liberty: Interpreting Our Democratic Constitution} 5, 15 (2005).
\textsuperscript{149} \textit{The Federalist} No. 83, at 498 (Alexander Hamilton) (Clinton Rossiter ed., 1961).
had best be omitted in the Legislative or Judiciary department, I would say it is better to leave them out of the Legislative.”

Alexis de Tocqueville also understood the participatory benefits of juries when he observed in the 1830s that “[t]he jury is both the most effective way of establishing the people’s rule and the most efficient way of teaching them how to rule.” According to Tocqueville, “juries . . . instill some of the habits of the judicial mind into every citizen, and just those habits are the very best way of preparing people to be free.” Indeed, consistent with this view of juries as sites of democracy, in the early years of the Republic, instead of simply deciding well-defined issues of fact, jurors also interpreted and applied the law.

What might it mean to take seriously today the idea that juries are important because they are sites of democratic participation? One implication is that the recent phenomenon, demonstrated by Marc Galanter and others, of the “vanishing” jury trial represents a significant erosion of democracy itself. In twenty-two state courts for which reliable data are available, between 1976 and 2002, the number of criminal cases decided by juries dropped from 42,000 cases out of 1.22 million cases, to fewer than 36,000 out of 2.78 million cases; in other words, a decline of juries in 3.4% of criminal cases in 1976 to 1.3% of criminal cases in 2002. In federal court today, juries resolve fewer than 3,000 cases out of the more than 75,000 criminal cases filed, about 4%. Civil juries are also disappearing. While the civil-case load of the federal courts increased five-fold between 1962 and 2004, the number

153 Id. at 274.
of civil jury trials increased only modestly, from 2,765 to 3,006 trials over the same period.\textsuperscript{157} In state courts, the absolute number of civil jury trials was one-third less in 2002 than it was in 1976.\textsuperscript{158} Each of these developments means that fewer and fewer Americans today have opportunities to participate on juries.

Whatever the efficiencies of deciding cases without them going to jury trial, the decline of juries is a startling development. Eighteenth-century Americans would consider a criminal jury trial rate of 4\% as bizarre as Americans today would view a proposal to select just four United States senators through elections and the remaining 96 by, say, a Senatorial Selection Committee appointed by the President. Or, put it this way: fewer than 40,000 juries deciding criminal matters today is equivalent—at a rate of twelve jurors per trial—to fewer than a half million citizens voting in national elections. If Blackmun is right about the participatory value of juries, it is democracy itself that is vanishing.

A second implication, suggested by Blackmun’s opinion in \textit{Ballew}, is the need for greater attention to the size of juries, and how size promotes or undermines participatory opportunities. \textit{Ballew}, citing social science research on group dynamics, tell us that juries comprised of fewer than six jurors do not work well as deliberative bodies.\textsuperscript{159} If six is the smallest size that does not lose participatory benefits, what is the largest sized jury that still works properly as a site of democracy? Are twelve jurors—an accident of history—the right number? Are there possibilities for increasing juries beyond twelve without undermining their benefits? The issue matters for purposes of securing and increasing opportunities for jury service today. When the number of juries called into action drops, making juries bigger may be one way to increase participation.

In this same vein, Blackmun’s participatory theory of juries suggests that recent work by Robert Putnam and others tracking the disengagement of Americans, over the course of the past generation, from politics and other aspects of civic life

\textsuperscript{157} Galanter, \textit{supra} note 155, at 462-63.
may be incomplete. Putnam presents a supply-side account of civic decline: Americans, increasingly consumed with private pursuits, have retreated from various forms of public participation. The evidence on juries suggests demand-side explanations may be more salient. On this account, Americans do not participate in an important democratic institution, the jury, because with judges, lawyers and other professionals taking over their work, the services of ordinary people in the judicial system are no longer needed.

Third, the democratic account of the jury suggests the need to think more broadly and creatively about the things juries might be entrusted to do—particularly in an age in which we do not ask them very frequently to decide cases at trial. Juries might continue to contribute to democracy by playing a role in sentencing proceedings, in mediation and settlement, in discovery and other pre-trial disputes, and in the examination and acceptance of guilty pleas. So, too, jury-like panels outside of traditional courts—for example, community courts, drug courts, youth courts—represent additional participatory opportunities for citizens.

Fourth, a participatory account of juries suggests, as Blackmun recognizes in *McKeiver, Ludwig, and McCollum*, that, in considering the uses, operations, and arrangements of juries, we, as a society, should focus less on how litigants want juries to look and function. Our present system allows litigants in civil and criminal cases to forego jury trial altogether. When juries are used, litigants, along with the judge, also exercise considerable control over them: deciding what they will hear, whether they can take notes, when they can come and go, what issues they will decide, and even when they can go to lunch or take a bathroom break. A participatory account of juries suggests the need to align juries less with the demands and wishes of litigants and focus instead on ensuring juries enhance democracy.

On that score, the jury as democracy suggests the need to end the practice of peremptory challenges—a point Justice

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161 Id. at 27.

162 See Mazzone, *supra* note 156, at 872-78 (proposing the use of juries to oversee the plea process).
Marshall had suggested in *Batson*,\(^{163}\) and Justice O'Connor also raised in the *J.E.B.* case.\(^{164}\) There are, after all, no peremptory challenges at the ballot box so it is reasonable to ask why, if jurors are like voters, we tolerate peremptory strikes in the jury box. Challenges for cause make sense: even some citizens are not permitted to vote (denying the vote to felons, for example, can be seen as a for-cause exclusion). However, when juries are meant to be open for all citizens to participate, litigants should not be permitted to decide that some citizens should not play a role.

Fifth, the participatory account of juries suggests also that the measure of successful jury performance should not be the accuracy of verdicts. Again, a comparison to voting is instructive. When elections are over, we may, and often do, wonder whether the voters have made wise choices. But nobody asks whether voters in an election have made “accurate” choices. So, too, we should be less obsessed with juror accuracy, and more appreciative of juries for their contributions to democracy.

Finally, the participatory theory of juries suggests, as Blackmun understood, an important role for judges to ensure juries properly fulfill their democratic function. In many ways, judges can and should monitor and structure the jury process—ensuring juries are open, making sure jurors understand their task, even reviewing their work. Just as judges have long played a role in correcting the undemocratic features of election, so too, judges can make sure democracy is served when citizens cast their votes in the jury room.

\(^{163}\) *Batson v. Kentucky*, 476 U.S. 79, 107 (1986) (Marshall, J., concurring) (“The inherent potential of peremptory challenges to distort the jury process by permitting the exclusion of jurors on racial grounds should ideally lead the Court to ban them entirely from the criminal justice system.”).

Moral Conflict and Liberty:
Gay Rights and Religion

Chai R. Feldblum†

I. INTRODUCTION

Imagine that you and your same-sex male partner got married last year in Massachusetts and are now planning a delayed honeymoon in Tennessee. You search the Web and find a lovely guesthouse in your price range. Nothing about the guesthouse’s description on the Web site makes you think you will not be welcome there. You make reservations through the Web site.

The two of you arrive at the guesthouse, sporting your wedding rings and calling each other “honey.” The owner of the guesthouse asks if you are gay. You answer that you are and explain that this is your delayed honeymoon. The owner is very gracious and courteous, but explains that you cannot stay in his guesthouse unless you agree to sleep in separate rooms and also agree not to engage in any sexual activity during your stay. He explains that his religion requires that he “love the sinner, but hate the sin.” For this reason, you are welcome to stay at his guesthouse, but only if you do not use his facilities to carry out sinful activities.

The owner also gives you a list of guesthouses in town that do allow gay couples to stay in the same room. And, he

† Professor of Law, Georgetown University Law Center. A version of this paper was first delivered at Brooklyn Law School as part of the Symposium on Justice Blackmun and Judicial Biography in September 2005. A subsequent version of the paper was presented during a meeting hosted by the Becket Fund in December 2005. The Becket Fund meeting was expressly designed to consider the impact that legal recognition of civil marriage for same-sex couples might have on religious people. See Scholars’ Conference on Same-Sex Marriage and Religious Liberty, http://www.becketfund.org/index.php/article/494.html (last visited Sept. 27, 2006). Preparing a paper for that meeting both gave me an opportunity, and forced me, to engage with an issue that I had considered only briefly in previous scholarship. I benefited greatly from questions and comments in both venues. This article appears in this law review and, with some revisions, it will appear in a book of the various papers delivered at the Becket Fund meeting. I am indebted to the research assistance of Amy Simmerman and Alyssa Rayman-Read.
quickly assures you, he has checked and there is no law that prohibits him from treating you in this way.

Let us assume that all the other guesthouses are full, so you decide to stay at the original guesthouse, under the owner’s rules. No one can claim that the guesthouse’s rules prohibit you from “being gay.” Your identity as a gay person does not disappear simply because you have not been able to engage in the conduct of having sex with your same-sex partner over one weekend. But it would be foolish to imagine that one’s identity as a gay person would have any real meaning if one was consistently precluded from having sex with one’s same-sex partner. This identity—this identity liberty, as I hope to explain below—is necessarily curtailed by the absence of a law that prohibits public accommodations from discriminating against you on the basis of sexual orientation.

Now imagine that you and your opposite-sex wife have decided to open a Christian bed and breakfast. You view your guesthouse as a haven for God-fearing, evangelical Christians. You do not advertise generally on the Web, only on Christian sites. You make it very clear in all your advertisements that you run a Christian business and that you will not rent rooms to cohabiting, homosexual couples (married or not) or to cohabiting, heterosexual couples who are not married. One day you are sued because your state has a law prohibiting discrimination based on marital status and sexual orientation. The court rules that the law places no burden on your religious beliefs because your religion does not require you to operate a guesthouse. You are ordered to change your guesthouse’s rules.

No one can claim that the court order prohibits you from “being religious.” The court has explained that you may continue to hold whatever beliefs you want about sexual practices. You simply may not impose your beliefs on others. However, you feel it is foolish to imagine that your beliefs and identity as a religious person can be disaggregated from your conduct. Your religious belief—your belief liberty interest, as I hope to explain below—is necessarily curtailed by the existence of a law that prohibits you from discriminating on the basis of sexual orientation or marital status.

We tend not to think of these conflict situations in the language of conflicting liberties, and certainly not in the language of liberties that have something in common, even as they conflict. Those who advocate for laws prohibiting discrimination on the basis of sexual orientation tend to talk
simply about “equality.” Those who seek to stop such laws from coming into existence, or who seek religious exemptions from these laws, tend to talk about “morality” and/or “religious freedom.” These groups tend to talk past each other, rather than with each other.

My goal in this piece is to surface some of the commonalities between religious belief liberty and sexual orientation identity liberty and to offer some public policy suggestions for what to do when these liberties conflict. I first want to make transparent the conflict that I believe exists between laws intended to protect the liberty of lesbian, gay, bisexual and transgender (“LGBT”) people so that they may live lives of dignity and integrity and the religious beliefs of some individuals whose conduct is regulated by such laws. I believe those who advocate for LGBT equality have downplayed the impact of such laws on some people’s religious beliefs and, equally, I believe those who have sought religious exemptions from such civil rights laws have downplayed the impact that such exemptions would have on LGBT people.

Second, I want to suggest that the best framework for dealing with the conflict between some people’s religious beliefs and LGBT people’s identity liberty is to analyze religious people’s claims as belief liberty interests under the Due Process Clauses of the Fifth and Fourteenth Amendments, rather than as free exercise claims under the First Amendment. There were important historical reasons for including the First Amendment in our Constitution, with its dual Free Exercise and Establishment Clauses.¹ But the First Amendment need not be understood as the sole source of protection for religious people when the claims they raise also implicate the type of liberty interests that can legitimately be considered under the Due Process Clauses of our Constitution.²

¹ See, e.g., Everson v. Bd. of Educ., 330 U.S. 1, 8-14 (1947) (discussing these historical reasons, including the early Americans’ desire to escape the “bondage” of European laws that compelled citizens to attend and support government-favored religions, and the colonial governments’ practice of taxing citizens to pay for, among other things, ministers’ salaries and the construction of churches).

² As a practical matter, of course, current constitutional doctrine would provide minimal protection to any individual who experienced a civil rights law as burdening his or her religious beliefs or practices. Under the Supreme Court’s decision in Employment Division v. Smith, 494 U.S. 872 (1990), a neutral law that burdens religious beliefs will be sustained as long as it is rationally related to a legitimate governmental purpose. But the catalyst for my argument is not the strategic one of offering religious people a “second bite at the apple” post-Smith. Rather, as I hope to make clear in this article, I believe it is simply more appropriate to analyze religious
My argument in this article is that intellectual coherence and ethical integrity demand that we acknowledge that civil rights laws can burden an individual’s belief liberty interest when the conduct demanded by these laws burdens an individual’s core beliefs, whether these beliefs are religiously based or secularly based. Acknowledging such a liberty interest will not necessarily result in the invalidation of the law or the granting of an exemption for the religious individual. Rather, as I hope to demonstrate below, Justice Souter’s concurrence in Washington v. Glucksberg\(^3\) offers us a useful approach for engaging in the required substantive due process analysis, in a manner that provides us with a means of seriously considering the liberty interest at stake without necessarily invalidating the law burdening that interest.

Finally, I offer my own assessment of how these conflicts might be resolved in our democratic system. I have no illusions that either LGBT rights advocates or religious freedom advocates will decide I have offered the correct resolution. But my primary goal in this piece is simply to argue that this conflict needs to be acknowledged in a respectful manner by both sides, and then addressed through the legislative processes of our democratic system. Whether my particular resolution is ultimately accepted feels less important to me than helping to foster a fruitful conversation about possible resolutions.\(^4\)

\(^3\) 521 U.S. 702, 752-89 (1997) (Souter, J., concurring).

\(^4\) Among the law review articles and notes that have been written on this issue (all from the perspective of free exercise claims), some have suggested a balancing of interests, while others have focused on justifying either the religious interest or the non-discrimination perspective. Surprisingly to me, I found a limited number of articles on the subject overall. See, e.g., Richard F. Duncan, Who Wants to Stop the Church: Homosexual Rights Legislation, Public Policy, and Religious Freedom, 69 NOTRE DAME L. REV. 393, 438, 444 (1994) (arguing that anti-discrimination legislation based on sexual orientation is not a compelling interest like gender or race because homosexuality is still “morally controversial” and government should not legislate a particular view of sexual morality); Marie A. Failinger, Remembering Mrs. Murphy: A Remedies Approach to the Conflict Between Gay/Lesbian Renters and Religious Landlords, 29 CAP. U. L. REV. 383, 425-28 (2001) (proposing a remedies approach under which a landlord would be held liable for discrimination based on religious beliefs, but under which damages would be limited, so as to recognize and honor the landlord’s religious beliefs, discourage frivolous claims challenging those religious beliefs, and strike a balance between the parties’ “consciences”); Harlan Loeb & David Rosenberg, Fundamental Rights in Conflict: The Price of a Maturing Democracy, 77 N.D. L. REV. 27, 49 (2001) (suggesting individual religious-based exemptions that could be overridden by a state’s compelling interest in limited circumstances); Maureen E. Markey, The Landlord/Tenant Free Exercise Conflict in a Post-RFRA World, 29
II. A JUSTICE BLACKMUN STORY

A. We Love You Anyway / We Love You

When I delivered this paper as a talk during the symposium on the judicial biography of Justice Harry A. Blackmun, I titled it: We Love You Anyway / We Love You: Justice Blackmun, Gay Rights and Religion. The phrase “We love you anyway/We love you” came from Justice Blackmun’s response to me when I informed him I was a lesbian. As I explain below, the difference in meaning between those two responses can help illuminate the conflict that arises between some people’s religious liberty and LGBT people’s full liberty rights.

But to begin in the spirit of judicial biography, I want to consider Justice Blackmun’s dissent in Bowers v. Hardwick and, in particular, his reaction to the responses he received to that dissent. In her book Becoming Justice Blackmun, Linda Greenhouse eloquently documents how the public response to Roe v. Wade impacted Justice Blackmun’s views on women’s rights. I believe the responses the Justice received to his dissent in Hardwick had a similar impact on his subsequent views on gay rights.


6 410 U.S. 113 (1973).

In *Hardwick*, a 5-4 decision written by Justice Byron White, the Court ruled that the federal constitutional right of privacy did not prohibit the State of Georgia from criminalizing the sexual act of sodomy. As Justice White described the case:

This case does not require a judgment on whether laws against sodomy between consenting adults in general, or between homosexuals in particular, are wise or desirable. It raises no question about the right or propriety of state legislative decisions to repeal their laws that criminalize homosexual sodomy, or of state-court decisions invalidating those laws on state constitutional grounds. The issue presented is whether the Federal Constitution confers a fundamental right upon homosexuals to engage in sodomy and hence invalidates the laws of the many States that still make such conduct illegal and have done so for a very long time.

*Id.* at 190.

8 478 U.S. at 189. As Justice White described the case:

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*Id.* at 190.

9 Larry Rohter, *Friend and Foe See Homosexual Defeat*, N.Y. Times, July 1, 1986, at A19 ("It's a major disaster from our point of view," said Thomas Stoddard, executive director of the Lambda Legal Defense and Education Fund, a leading homosexual advocacy group, 'For the gay rights movement, this is our Dred Scott case,' he said referring to the 1857 Supreme Court ruling upholding slavery in which blacks were held not to be citizens."); Ruth Marcus, *Sodomy Ruling's Implications Extend Far Beyond Bedroom*, WASH. POST, July 2, 1986, at A1 ("The court's decision 'will not doom every gay-rights case in every context in the future,' said Nan Hunter of the American Civil Liberties Union. But, she said, 'the preservation of the sodomy laws provides an excuse for the courts to invoke when we have successfully proved that there is no nexus between homosexuality and job performance, or between homosexuality and parenting ability . . . . Even though there is little criminal prosecution, the sodomy laws are invoked frequently." (alteration in original)).
the outcome. But I was elated that the Justice I was to work for had dissented. And not only had he dissented, but as I read the opinion a few days later, he had authored what I viewed as a ringing endorsement of equality and protection for gay people. I was off to work for my champion!

I began work at the Supreme Court in July 1986. Although I had self-identified as a bisexual for the previous six years (and had been open about my sexual orientation with Judge Coffin and my co-clerks in that chambers), I held off saying anything about my sexual orientation for the first few weeks. And as July and August progressed, I became even more reticent.

My hesitation had everything to do with my observation of the way Justice Blackmun reacted to the reactions to his dissent.

The Justice's dissent in *Hardwick* had included several eloquent and thoughtful statements about gay people. For example:

> Only the most willful blindness could obscure the fact that sexual intimacy is “a sensitive, key relationship of human existence, central to family life, community welfare, and the development of human personality.” The fact that individuals define themselves in a significant way through their intimate sexual relationships with others suggests, in a Nation as diverse as ours, that there may be many “right” ways of conducting those relationships, and that much of the richness of a relationship will come from the freedom an individual has to choose the form and nature of these intensely personal bonds.  

Reading an affirming statement such as this, in a Supreme Court opinion no less, was an incredible experience for many gay people. In reaction, gay men and lesbians across the country poured out their gratitude, and often their stories, in letters to the Justice. Justice Blackmun read every piece of mail he received and he responded to a fair percentage of that mail. He also reported on many of these letters during his daily breakfasts with us, his four new clerks.

Watching Justice Blackmun respond to these letters was a fascinating, and yet sobering, experience for me. I realized that while the Justice had put his name on eloquent statements about gay people that had warmed my heart (and the hearts of so many others), he had not necessarily experienced those same statements on an emotional plane. For

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10 *Hardwick*, 478 U.S. at 205 (Blackmun, J., dissenting) (citations omitted).
that reason, the stark (and sometimes heart-wrenching) emotion that came through these letters sometimes, I think, simply bemused the Justice.

Ultimately, I believe the honesty and intense emotion of these letters opened Justice Blackmun's eyes to the daily injustices faced by gay people across the country and radicalized him in a way that simply thinking about the legal question of the scope of privacy for sodomy could not. But Justice Blackmun's initial reaction to the deluge of letters was mostly to marvel at how many gay people there seemed to be out there. He was even more amazed when he found out that he actually knew some of them. I vividly remember one breakfast at which Justice Blackmun reported receiving a letter the previous day from the son of a close friend. In the letter, the young man told him he was gay and went on at length to explain how personally important Justice Blackmun's dissent in *Hardwick* had been for him. Although the Justice was clearly moved by this letter, he was also clearly astonished that this "lovely young man" was "a homosexual." Indeed, he confided in us, he wasn't sure the young man's *father* knew yet that his son was a homosexual.

Listening to Justice Blackmun during those first few months made me decide to closet my own sexual orientation. It was not that I feared overt discrimination by the Justice. I did not. But I did fear and shrink from his overt discomfort. It was clear to me that the Justice was not comfortable with "homosexuals" (as he called them), despite his strong support for their right of privacy. And, indeed, as I would come to see when I taught Justice Blackmun's *Hardwick* dissent in my Sexual Orientation and the Law class several years later, some of that discomfort is evident in the opinion itself.\(^{11}\)

So I chose the comfort and ease of the closet, as so many of us who do not otherwise defy gender stereotypes are able to do. I did not feel particularly good about it, but I also did not feel that I needed to "educate" my Justice any further by coming out.\(^{12}\)

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\(^{11}\) See infra notes 16-20 and accompanying text.

\(^{12}\) The irony of my closeting myself was, nevertheless, apparent to me each time Justice Blackmun told us how astonishing it was that Justice Powell had confided in him the previous term that he (Justice Powell) had "never met a homosexual." Justice Blackmun found this statement to be particularly bizarre because had heard from his own clerks that one of Justice Powell's clerks the previous year was gay. I think Justice Blackmun often wondered whether Justice Powell would have joined Justice Blackmun's opinion (turning it from a dissent into a majority) had he realized
In 1991, four years following my clerkship, I finally told Justice Blackmun that I was a lesbian. I was nervous about doing so, remembering the Justice’s discomfort with homosexuality. I believe the Justice’s residual discomfort with homosexuals was still there when I told him. Yet his reaction was telling and moving—encapsulating the nugget of resistance to full equality for gay people that continues to exist in our country, while still suggesting future possibilities for real equality.

Here was my exchange with the Justice (as best as I can remember it fifteen years later):

Chai: “Mr. Justice, I have something important to tell you. I want to let you know that I’ve finally met someone and I’m really happy and I’m really in love and we’re living together and . . . she’s a woman.”

Short pause.

Justice Blackmun: “Well, Chai . . . you know we want you to be happy . . . and we care about you . . . and we love you anyway.”

Half beat of silence; Chai looks at the Justice.

Justice Blackmun: “You know, we love you.”

I believe there is a world of difference and a depth of meaning between “We love you anyway” and “We love you.” Let me explicate that difference by considering three possible views that one might hold about gay people and gay sex. Each of these views, I believe, holds sway in some segment of our society today.

B. Three Views of Gay Sex

One possible view of gay sex is that it is morally harmful (and/or sinful) to the individual and to the community. Therefore, it must be discouraged to the greatest extent possible in order to advance the moral health of these individuals and of the communities in which they reside. The second view is that gay sexual activity is not good, but it is not inherently harmful; it is more akin to an unfortunate, abnormal health condition that one does not wish for oneself (or for one’s children or law clerks), but it is not a harmful

that he did know a “lovely young man” who was a homosexual. As has since been reported, that clerk anguished about whether to come out to Justice Powell, but ultimately chose not to. See John C. Jeffries, Jr., Justice Lewis F. Powell, Jr. 521-22 (1994).
element that must be actively purged from society. The third view is that gay sexual activity has the same moral valence as heterosexual activity and gay people are basically similar to straight people.

The first view of gay sex is the one underlying Justice White’s majority decision in *Hardwick* and Justice Burger’s concurrence in that case. It is this view that best explains the (in)famous sentence in Justice White’s opinion: “No connection between family, marriage, or procreation on the one hand and homosexual activity on the other has been demonstrated, either by the Court of Appeals or by respondent.”

This simple, conclusory statement that homosexual sex has *nothing* to do with marriage and family, while heterosexual sex presumably has something or a great deal to do with such matters, will come as a great surprise to the many gay couples who feel their sexual activity cements their personal intimacy and perhaps their marital relationships. But Justice White’s conclusory statement is valid if one assumes that homosexual sex is immoral, wrong, harmful and sinful, and hence necessarily antithetical to such moral goods as marriage and family.

Indeed, this assumption is also what gives logical force to Justice White’s statement that if the Court were to accept Hardwick’s argument, “[I]t would be difficult, except by fiat, to limit the claimed right to homosexual conduct while leaving exposed to prosecution adultery, incest, and other sexual crimes even though they are committed in the home.”

Why would a court need to resort to “fiat” to find a distinction between homosexual conduct and incest, and not similarly have been required over the years to have resorted to “fiat” to find a distinction between heterosexual conduct and incest? Only if homosexual sex is as harmful and immoral as incest and other sexual crimes and thus logically offers no coherent manner of providing a distinction. According to the first view of gay sex, this is indeed the case. Under that view, the *only* way a court can possibly distinguish between the harm of homosexual conduct and the harm of these other sexual crimes is “by fiat.”

A second possible view of gay sex is that while it is not good, it is also not inherently harmful. A person holding this

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13 *Hardwick*, 478 U.S. at 191.
14 *Id.* at 195-96 (emphasis added).
view might believe that a desire for gay sex is abnormal and that being gay is not a preferred sexual orientation (he/she would certainly not want his/her own child to be gay). But, nevertheless, this person might believe that gay sexual activity is not inherently harmful to the individual and is not a moral stain on society; it is simply an “unfortunate condition” with which some people are born. Someone with this view might believe that individuals who are born with this unfortunate or aberrant condition should be tolerated by society and not penalized for their sexual orientation. At the same time, a person with such a view would be quite comfortable with societal rules that demonstrate a preference for the more normal and natural condition of heterosexual orientation—for example, a societal rule that restricts civil marriage benefits to heterosexual couples without extending similar societal affirmation to gay couples.

Although it is hard to know for sure, my instinct is that this second view reflects Justice Blackmun’s beliefs in 1991. I think this is the view that is captured by the phrase: “We love you anyway.” What I heard in that phrase was: “We are really sorry you have been afflicted with this condition; we are so glad to see that you are dealing with it so well, and we love you despite this condition.”

I think one can also discern aspects of this view in selected statements in Justice Blackmun’s *Hardwick* dissent. For example, shortly following the eloquent statement about personal intimacy that I quoted above, Justice Blackmun goes on to observe the following:

> In a variety of circumstances we have recognized that a necessary corollary of giving individuals freedom to choose how to conduct their lives is acceptance of the fact that different individuals will make different choices. For example, in holding that the clearly important state interest in public education should give way to a competing claim by the Amish to the effect that extended formal schooling threatened their way of life, the Court declared: “There can be no assumption that today’s majority is ‘right’ and the Amish and others like them are ‘wrong.’ A way of life that is odd or even erratic but

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15 It was also interesting to me that Justice Blackmun used the phrase “we” in his response. That was so striking that I remember it these many years later. I think Justice Blackmun might have explained the use of “we” as intending to encompass himself, Dottie (his wife), Wanda and Wannett (the two secretaries), i.e., the “family” of the Blackmun Chambers. But I think it was also a use of a term that was intentionally distancing, and less personal, than “I feel / I think.” It is also, as Alyssa Rayman-Read points out, a term that placed me as the “other,” and all the normal heterosexuals as the “we.”
interferes with no rights or interests of others is not to be condemned because it is different.” Wisconsin v. Yoder, 406 U.S. 205, 223-224 (1972). The Court claims that its decision today merely refuses to recognize a fundamental right to engage in homosexual sodomy; what the Court really has refused to recognize is the fundamental interest all individuals have in controlling the nature of their intimate associations with others.¹⁶

And although the paragraph ends there, one has the sense that the author is saying to himself, “Even if that intimate association is sort of ‘odd or even erratic,’ or maybe just a bit unfortunate—like a bad medical condition.” The type of condition that might make you love your law clerk “anyway.”

A third possible view of gay sex is that it has the same moral valence as heterosexual sex. Both types of sex are equally normal (or equally bizarre, as sex often is); both types of sex partake of the same moral value when used to enhance personal intimacy or to bring pleasure in a consensual relationship; and both types of sex are morally bad when used to subjugate or harm one of the parties.

Consistent with this view (and depending on one’s view of the role of government), one can easily believe that government has a role, for example, in creating a civil marriage structure to support heterosexual and homosexual activity designed to further personal intimacy and perhaps to include the raising of children. Under this view, it would certainly be irrational for the government to exclude couples that use gay sex to create the same personal intimacy structure for which other couples use heterosexual sex.¹⁷

As Michael Sandel pointed out in an early article analyzing Hardwick and Roe v. Wade, if Justice Blackmun had believed that homosexual and heterosexual sex were morally equivalent, his dissent could have been written quite differently.¹⁸ That is, instead of basing Michael Hardwick’s right to engage in homosexual sodomy on the line of privacy

¹⁶ Hardwick, 478 U.S. at 205-06 (Blackmun, J., dissenting) (emphasis added) (citation omitted).

¹⁷ Even under this view, it is not clear why government should be supporting only couples who are using sexual intimacy to cement their personal intimacy, as opposed to relationships that use other forms of connections to cement similar, socially useful bonds. See generally Chai R. Feldblum, Gay Is Good: The Moral Case for Marriage Equality and More, 17 YALE J.L. & FEMINISM 139 (2005) [hereinafter Feldblum, Gay Is Good] (making the case for societal support of non-sexual domestic partners).

cases that protected one’s “right to be let alone,” Justice Blackmun could have rested his analysis directly on the line of cases affirming an individual’s privacy right to enjoy intimate relationships within families and among those rearing children. That is, following Justice White’s statement that he could perceive no connection between “family, marriage, or procreation on the one hand and homosexual activity on the other,” Justice Blackmun could have responded: “Of course there is a connection. Homosexual activity and heterosexual activity are equivalent—and both are used to facilitate important moral goods such as family and marriage.”

But I do not think Justice Blackmun, in 1986, would have been comfortable making such a claim of moral equivalency between heterosexual and homosexual sex. Nor do I believe he accepted such an equivalency in 1991, leading to this reaction when finding out I was a lesbian: “We love you anyway.”

I think Justice Blackmun stretched himself to perceive the contours of the third view of gay sex (and, by extension, gay people) in his amended statement of “We love you.” My guess is that he truly felt: “It must be terrible to have this horrible condition, Chai, but we love you anyway.” But he must have quickly gathered that I did not experience that reaction as positive. I think he suddenly realized that I did not think I had a horrible condition and so I was not asking for tolerance or sympathy. I was actually asking him to be happy for me because I had finally found someone I loved. I was asking to be treated in the same way he would have treated any other clerk who had just said to him, “I am so happy. I have found the person I want to marry!”

I think that realization is what prompted Justice Blackmun to say “We love you,” and to take away the “anyway.” I do not think he was as happy for me as he would have been had I said, “I’m getting married to a man.” But he did discern that I was happy and that I did not experience

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19 In the first paragraph of his dissent, Justice Blackmun announces that “this case is about ‘the most comprehensive of rights and the right most valued by civilized men,’ namely, ‘the right to be let alone.’” Hardwick, 478 U.S. at 199 (quoting Olmstead v. United States, 277 U.S. 438, 478 (1928) (Brandeis, J., dissenting)).


21 Hardwick, 478 U.S. at 191.
myself as afflicted with an unfortunate social, physical or mental condition. And so he stretched himself to acknowledge that fact.

These alternative views of gay sex and gay people can be directly correlated with a range of governmental policies. The first view is the one that criminalizes homosexual sodomy and removes children from parents who are gay.\textsuperscript{22} The second view is what permits legislators to vote for a bill that prohibits discrimination in employment on the basis of sexual orientation and to vote (on the same day) for a bill that prohibits the federal government from recognizing state civil marriages between same-sex couples.\textsuperscript{23} The third view is what would ensure complete and total equality for gay people, without apologetics or qualifications.

But even the second view (which is probably the predominant view in this country today)\textsuperscript{24} poses challenges to those individuals who adhere to the first view of gay sex. There is a significant difference between a belief that a characteristic is morally problematic and is best expunged or repressed and a belief that a characteristic is unfortunate but should be tolerated by society to some minimal extent. While,

\textsuperscript{22} For example, in 1885, Oscar Wilde was imprisoned under Section 11 of the 1885 Criminal Law Amendment Act for his relationship with the Marquess of Queensbury. Judith Fingard, Book Review, 43 AM. J. LEGAL HIST. 83, 83 (1999) (reviewing MICHAEL S. FOLDY, THE TRIALS OF OSCAR WILDE: DEVIANCE, MORALITY, AND LATE-VICTORIAN SOCIETY (1997)). The court sentenced Wilde to two years of hard labor for “gross indecency” and “extensive corruption of the most hideous kind.” Id. See, e.g., \textit{Ex Parte H.H.}, 830 So. 2d 21, 26 ( Ala. 2002) ( Moore, C.J., concurring) (supporting denial of child custody to lesbian mother and stating that “Homosexual conduct is, and has been, considered abhorrent, immoral, detestable, a crime against nature, and a violation of the laws of nature and of nature’s God upon which this Nation and our laws are predicated. Such conduct violates both the criminal and civil laws of this State and is destructive to a basic building block of society—the family. The law of Alabama is not only clear in its condemning such conduct, but the courts of this State have consistently held that exposing a child to such behavior has a destructive and seriously detrimental effect on the children. It is an inherent evil against which children must be protected.”); Roe v. Roe, 324 S.E.2d 691, 692, 694 (Va. 1985) (denying child custody and visitation rights to gay father because he shares a “bed and bedroom” with his male lover and stating that “[t]he father’s continuous exposure of the child to his immoral and illicit relationship renders him an unfit and improper custodian as a matter of law”).


\textsuperscript{24} See \textit{infra} notes 42-48 and accompanying text.
obviously, there is even more of a significant difference between the first view of gay sex and the third view, even governmental policies premised on the second view can cause conflict for those who adhere to the first view.

My guess is that Justice Blackmun continued to evolve in his views about gay people, particularly as he worked with clerks who were openly gay during their entire tenure with the Justice. I doubt he ever became a full adherent of the third view of gay sex (“Gay sex is morally equivalent to straight sex”), but I think he might have been inching towards that resolution.

And as I write this article, I wonder how Justice Blackmun would have addressed and resolved the conflict I explore in this piece. Based on my experience working with him and my knowledge of him as a human being, I feel the Justice would have seen and acknowledged the conflict and not brushed it under the rug. As to whether he would have resolved the conflict in the manner I recommend in this piece, we will never know; some things are simply unfinished sagas.

III. IMPACT ON BELIEF LIBERTY WHEN PROTECTING LGBT LIBERTY

A. Postulating an Age of LGBT Liberty

In 2006, the most pressing question for LGBT people probably is not, “How can we be sure that we adequately consider and take into account the beliefs of those who believe we are immoral and sinful?” At the moment, it seems that people who hold that point of view are prevailing in any number of states, at the direct expense of LGBT people’s liberty. Over the past decade, forty-one states have passed statutory Defense of Marriage Acts, defining marriage as solely between a man and a woman. Twenty states have amended their constitutions to restrict marriage in a similar fashion, and eight more states had constitutional amendments on their 2006 ballots to do the same. In thirty-three states, a person can be fired from a job, thrown out of his or her apartment or

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26 Id. Seven out of those eight ballot initiatives passed in November 2006. See Monica Davey, Liberals Find Rays of Hope on Ballot Measures, N.Y. TIMES, Nov. 9, 2006, at P16.
refused service in a restaurant simply because he or she is gay, lesbian or bisexual.\textsuperscript{27}

Given the current state of affairs, I do not disagree that the primary focus and energy of the LGBT movement must be directed at resisting efforts to deny LGBT people liberty and fighting for legislation and judicial outcomes that will allow LGBT people to live lives of honesty and safety in today's society. Indeed, I have spent a fair portion of the last twenty years of my professional life engaged in that precise struggle and I expect to do more of the same in the future.\textsuperscript{28}

But I also believe it is only a matter of time before the world around us changes significantly. In some number of years (I do not know how many), I believe a majority of jurisdictions in this country will have modified their laws so that LGBT people will have full equality in our society, including access to civil marriage or civil unions that carry the same legal effect as civil marriage. Or perhaps federal statutory changes, together with federal constitutional decisions, may result in LGBT people achieving full liberty across all states. At the very least, I believe it is worth postulating this outcome and considering now, rather than later, the impact that the achievement of such liberty might have on employers, landlords and others whose moral values (derived from religious sources or secular sources) teach them


\textsuperscript{28} From 1988 to 1990, I was a staff attorney with the ACLU AIDS Project and the ACLU Lesbian & Gay Rights Project. In 1993, I was the Legal Director of the Campaign for Military Service, an enterprise to help lift the ban on the service of gay people in the military. From 1993 to 1998, I worked as a consultant to the Human Rights Campaign, a political organization dedicated to advancing gay rights. In that capacity, I wrote innumerable drafts of a federal bill to establish non-discrimination in employment on the basis of sexual orientation and negotiated with groups to bring them on to support the bill. From 1999 to 2006, I was an advisor and consultant to the National Gay & Lesbian Task Force, another political organization dedicated to advancing lesbian, gay, bisexual and transgender equality. I have written amicus briefs on behalf of civil rights organizations, religious organizations, and gay rights organizations in constitutional cases seeking to establish equality for gay people, including the Supreme Courts cases of \textit{Romer v. Evans}, 517 U.S. 620 (1996), and \textit{Lawrence v. Texas}, 539 U.S. 558 (2003), and in several lower court cases challenging the military's ban on gay servicemembers. Since 2002, I have run a Web site designed to help law schools respond to the presence of military recruiters that discriminate against openly gay law students. See SolomonResponse.org, http://www.solomonresponse.org (last visited Sept. 27, 2006). And in 2005, I began the Moral Values Project, http://www.moralvaluesproject.org (last visited Sept. 27, 2006), an enterprise dedicated to bringing a progressive moral voice to issues of sexuality, sexual orientation, and gender in the public arena.
to hold the first view of gay sex—that is, that same-sex sexual conduct is sinful for the individual and harmful to society.

Why do I believe an era of full LGBT liberty is simply a matter of time? A large part, I am sure, is due to my being an optimist who believes that simple truth and justice usually win out in the long run and that truth and justice demand full liberty for LGBT people.

But my conviction also comes from observing changes in our society over the past twenty years and from reading opinion polls. The polling numbers indicate that an increasing number of people in this country simply do not believe homosexual orientation and conduct are as “big a deal” as they once were. These individuals may not particularly like homosexuality, nor do they believe that homosexuality is morally equivalent to heterosexuality. But they do not seem as agitated about homosexuality as they have been in past decades.

No poll that I have seen asks the question directly: “Do you think homosexuality is a big deal?” But a reduced anxiety about homosexuality is the overall gestalt that emerges upon reviewing the myriad polls that have asked members of the American public about their views on homosexuality over the past thirty years. Karlyn Bowman, a resident scholar at the American Enterprise Institute (“AEI”) who specializes in polling data, has done a Herculean task of reviewing and compiling information from over 200 polls, conducted from 1972 to 2006, that have asked questions about the American public’s attitudes towards homosexuality. Bowman’s report is both illuminating and intriguing.

Bowman begins her report with a section called Acceptance and notes the following:

In 1973, when the National Opinion Research Center at the University of Chicago (“NORC”) first asked people about sexual relations between two adults of the same sex, 73 percent described

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29 See Karlyn Bowman & Adam Foster, Amer. Enter. Inst., Attitudes About Homosexuality and Gay Marriage, http://www.aei.org/publications/filter.all,pubID.14882/pub_detail.asp (last visited Sept. 27, 2006). I do not purport to be an expert in polling data nor do I assert that every survey I cite in the following paragraphs and footnotes is necessarily free from methodological errors. My sole assertion is that I believe Bowman’s compilation indicates a trend towards the public caring less about homosexuality as a morally problematic issue. That trend is sufficient to make me think it is at least probable that civil rights laws protecting the liberty of LGBT people might be enacted over the coming decades and that the passage of such laws might then burden the liberty of those who believe that homosexuality is morally problematic.
them as “always wrong” and another 7 percent as “almost always wrong.” When the organization last asked the question in 2004, 58 percent called them always wrong and 5 percent almost always wrong. NORC interviewers have asked the same question about extramarital sexual relations over the period, and they find no liberalization in attitudes.\(^{30}\)

The Roper Center at the University of Connecticut, together with AEI, did a subgroup analysis of the NORC cohort data. Their analysis showed that in the age cohort of 30-44, there was an even more significant reduction in the percentage of respondents who believed homosexual relations were “always wrong.” In 1973, 74% of respondents in that age cohort believed homosexual sexual relations were “always wrong.”\(^{31}\) In 2002, only 48% of respondents in that age cohort answered that homosexual sexual relations were “always wrong”—a reduction of 26%.\(^{32}\)

Bowman’s compilation also indicates that an enduring half of the American public continues to believe that homosexuality is not morally acceptable, although that number appears to decrease slightly if respondents are asked about “homosexual relationships” or homosexuality as an “acceptable alternative lifestyle,” rather than about “homosexual behavior.”\(^{33}\) The number of people who say they personally

\(^{30}\) Id. at 2. The NORC survey found that 70% of respondents in 1973 thought that a married person having sex outside of his or her marriage was “always wrong.” Id. at 47. That number stayed consistently in the 70% range every year the survey was conducted until 2004, when 80% of respondents thought extramarital sex was “always wrong.” Id. at 47-48.

\(^{31}\) Id. at 3.

\(^{32}\) Id. The subgroup analysis also looked at sex, race, education, church attendance, region, party, ideology and family income. Id. The significant changes among younger people are apparent in other surveys as well. In a University of California at Los Angeles Cooperative Institutional Research Program survey of college freshman, 47% of respondents in 1976 answered that “[i]t is important to have laws prohibiting homosexual relationships.” Id. at 6. By 2005, that number had decreased to 25%. Id.

\(^{33}\) For example, a February 2006 survey by Princeton Survey Research Associates (“PSRA”)/Pew Research Center found that 50% of respondents believe that “homosexual behavior” is “wrong,” and a May 2006 Gallup poll found that 51% of respondents believe that “homosexual behavior” is “morally wrong.” Id. at 4. A Los Angeles Times survey in 2000 found that 51% of respondents believed that “sexual relations between adults of the same gender” is “always wrong.” Id. By contrast, a February 2004 Harris/CNN/Time poll found that only 38% of respondents considered “homosexual relationships” to be “not acceptable,” while 49% considered them acceptable for others but not themselves, and 11% considered them acceptable both for others and for themselves. Id. at 5. A May 2006 Gallup poll found that 54% of respondents felt that “homosexuality should be considered an acceptable alternative lifestyle,” while 41% felt it should not. Id. at 6. And the percentage of people who believe that “homosexuality is a way of life that should be discouraged by society” has
know a gay person, however, or who say they have become more accepting of gays and lesbians over the past few years, has increased significantly over the past fifteen years. 34

Of particular note is the number of people who seem to have discovered gay people in their own families. In a 1992 Princeton Survey Research Associates (“PSRA”)/Newsweek poll, 9% of respondents said that someone in their family was gay or lesbian, while 90% reported that there was no one in their family who was gay or lesbian. 35 In 2000, 23% of respondents said that someone in their family was gay or lesbian, while only 75% reported there was no one in their family who was gay or lesbian. 36 Given that the number of gay people probably did not increase 14% between 1992 and 2000, one must presume that more gay people told their families about their sexual orientation during that time period. 37

Perhaps because of the greater familiarity that members of the American public are beginning to have with gay people (including their own family members), purging homosexuality from our society does not appear to be a huge priority for a significant segment of our public. What is particularly interesting about Bowman’s polling compilation is the number of people who do not think homosexuality is a moral issue at all, 38 and the significant percentage who do not remained below 50% (ranging from 41% to 45%) in responses to a PSRA/Pew Research Center survey in 1999, 2000, 2003 and 2004. Id. at 8.

34 In a PSRA/Newsweek poll in 1985, only 22% of respondents said they had a “friend or close acquaintance” who was gay or lesbian. Id. at 16. In a 2000 PSRA/Newsweek poll, 56% of respondents said they had a “friend or close acquaintance” who was gay or lesbian. Id. In a July 2003 Gallup poll, 32% of respondents indicated they had “become more accepting of gays and lesbians” over the past few years, 59% said their attitudes had not changed, and 8% said they had become less accepting. Id. at 10.

35 Bowman & Foster, supra note 29, at 16.

36 Id.

37 Along the lines of increasing knowledge about gay family members, I have always appreciated Professor Nan Hunter’s idea of a “Thanksgiving Family Coming Out Day.” Every Thanksgiving, every family with a gay member should tell another family about the gay family member. If all families with a known gay member would adopt this tradition, my guess is that almost every person in America would end up knowing (or knowing of) one gay person within some number of years.

38 For example, in a February 2006 survey by PSRA/Pew Research Center, 33% of respondents stated that “homosexual behavior” was “not a moral issue,” while 12% called such behavior “acceptable.” Bowman & Foster, supra note 29, at 4. In the May 2006 Gallup question, in which respondents were given only the options of “homosexual behavior” being “morally wrong” or “morally acceptable,” 44% of respondents said it was morally acceptable. Id. It seems likely to me that the Pew data are more consistent with a significant segment of the public’s view—i.e., that homosexuality is not something to be agitated about (the second view of gay sex), but is also not something they would call “morally acceptable” (the third view of gay sex).
think it would matter that much if there was greater acceptance of gay people in society. For example, in a 2003 PSRA/Pew Research Center survey, respondents were asked the following question: “Do you think more acceptance of gays and lesbians would be a good thing or a bad thing for the country—or that it would not make much difference either way?” Only 31% of respondents said that more acceptance of gay people would be bad for the country. Twenty-three percent thought it would be good for the country and 42% felt it would not make much difference.

To me, these various polls taken together indicate that there is a significant number of people (but substantially less than a strong majority of people) in this country who believe that homosexuality is morally problematic and that society must therefore do what it can to discourage, disapprove of and reduce the incidence of homosexual behavior. These are the individuals whom I would consider to hold the first view of gay sex I describe above. There is also a much smaller group of people who believe that homosexuality is as morally acceptable as heterosexuality. These are the individuals whom I would consider to hold the third view of gay sex I describe above.

And, finally, there is a significant group of people in the middle. These people adhere to the second view of gay sex and therefore hold conflicting views about public policy and homosexuality. They do not feel homosexuality is morally equivalent to heterosexuality and so they are not interested in conferring civil marriage on gay couples. But they also do not believe it would be terribly harmful for society if gay couples were acknowledged and permitted to have equal rights.

39 Id. at 7.
40 Id.
41 Id. A 2004 Harris/CNN/Time poll reflects similar indifference. In that poll, respondents were asked whether they would be more or less likely to vote for a candidate who favored legalizing gay marriage, or whether it would make no difference. Id. at 15. Forty-eight percent of respondents said they would be less likely to vote for such a candidate, 10% said they would be more likely to vote for such a candidate, and 39% said it would make no difference to them. Id.
42 Id. at 21-24 (noting various polls showing consistent 50% to 65% disapproval of marriage for same-sex couples when respondents are given the opportunity to note solely their approval or disapproval of marriage for same-sex couples).
43 For example, in a 2003 Gallup/CNN/USA Today poll, respondents were asked whether “allowing two people of the same sex to legally marry will change our society for the better, will it have no effect, or will it change our society for the worse?” Forty-eight percent thought it would change our society for the worse, 10% thought it
Thus, when given the choice between marriage or civil unions for same-sex couples, and no legal recognition for same-sex couples at all, support for “no legal recognition” never goes above 50% and, in most cases, hovers between 35% and 40%. Conversely, when one combines the small public support for gay marriage with the more substantial support for civil unions, there is consistently a majority of support for some legal recognition of gay couples.

What this means to me is that the second view of gay sex holds significant sway in our society today. As I note above, I presume most parents today would prefer their child not be gay. But if their child was gay, these parents may no longer believe they must desperately seek out professional “help” for the child. The large number of well-adjusted, happy and successful gay people living openly and honestly in today’s society reinforces the medical profession’s current judgment that there is nothing psychologically wrong with being gay.

would change our society for the better, and 40% thought it would have no effect on our society. Id. at 25.

44 BOWMAN & FOSTER, supra note 29, at 27-28 (reviewing one poll from 2000, and fifteen polls from 2004, that gave respondents the option between marriage, civil unions, and no legal recognition for same-sex couples).

45 Id. What is particularly fascinating is that people report more moral disapproval of homosexuality among the American public than the polls indicate there actually is. A 2001 Gallup poll asked, “What is your impression of how most Americans feel about homosexual behavior—do most Americans think it is acceptable or not acceptable?” Seventy-four percent responded that most Americans believe homosexual behavior is not acceptable, while 21% responded that most Americans believe homosexual behavior is acceptable. Id. at 7. In fact, a May 2001 Gallup poll found that 40% of respondents considered “homosexual behavior” to be “morally acceptable,” while 53% found it to be “morally wrong.” Id. at 4. And in the NORC survey of 2002, 55% said homosexual behavior was “always wrong” and 5% said it was “almost always” wrong; 33% said it was “not wrong” and 7% said it was “only sometimes” wrong. Id. at 2.

And more and more people are beginning to accept that individuals do not “choose” homosexuality; they are simply emotionally and physically happier with an individual of the same sex.\footnote{See, e.g., BOWMAN & FOSTER, supra note 29, at 19 (surveying relevant polls and concluding that “[o]ne of the most dramatic changes in attitudes about homosexuality appears to be about its cause. More people than in the past say that people are born homosexual or that it is an orientation that they cannot change. In a Gallup question from 1977, 12% said homosexuality was something a person was born with; in 2003, 38% gave that response.”).} It is also possible that the horror value of discovering one’s child is gay has subsided. Although the majority of parents today may not want their child to be gay, they are probably less horrified to find out their child is gay than they would be if they discovered their child was having sex with his or her sibling, having sex with a child or having sex in public.

And, at bottom, these parents do not want their children discriminated against “just because they are gay.” Parents may not like the fact that their child is gay, but they also do not want American society to penalize their child unduly for that fact.\footnote{What many of these people and their friends do, with regard to public policies, is engage in “moral bracketing.” Moral bracketing, a basic component of liberal political theory, allows people to say both that homosexuality is wrong and that antigay discrimination is wrong. Under this liberal view, as long as gay people do not harm anyone else, the State should be tolerant of them. See Feldblum, Gay Is Good, supra note 17 at 147-50 (describing moral bracketing). The advantages and disadvantages of moral bracketing have intrigued me for over a decade. See generally Chai R. Feldblum, The Federal Gay Rights Bill: From Bella to ENDA, in CREATING CHANGE: SEXUALITY, PUBLIC POLICY, AND CIVIL RIGHTS 149 (John D’Emilio et al. eds., 2000) [hereinafter Feldblum, Federal Gay Rights]; Chai R. Feldblum, The Limitations of Liberal Neutrality Arguments in Favour of Same-Sex Marriage, in LEGAL RECOGNITION OF SAME-SEX PARTNERSHIPS: A STUDY OF NATIONAL, EUROPEAN AND INTERNATIONAL LAW 55 (Robert Wintemute & Mads Andnæs eds., 2001); Feldblum, Moral Rhetoric, supra note 23; Chai R. Feldblum, A Progressive Moral Case for Same-Sex Marriage, 7 TEMP. POL. & CIV. RTS. L. REV. 485 (1998); Feldblum, Sexual Orientation, supra note 20. My personal belief is that we will be able to achieve full liberty for LGBT people only if we directly engage in a moral discourse about sexuality, sexual orientation, and gender in the public domain. The Moral Values Project, an enterprise I began working on in 2005, is designed to reach people who believe homosexuality is immoral but who also believe gay people should not be discriminated against. One goal of the Moral Values Project is to move people from the “I love you anyway” stance to the “I love you” stance—that is, from the second view of gay sex I describe above to the third view of gay sex. For purposes of this article, however, I am postulating a trend towards more legal protection and equality for LGBT people, whether it is achieved through a continuation of moral bracketing (as some people believe it can be) or through a new engagement with moral discourse (as I believe is necessary).}
For purposes of this article, therefore, I would like to postulate that the coming decades will see a rise in legislation and judicial opinions favoring full liberty for LGBT people. Assuming that is the case, how should the LGBT movement think about the fact that granting liberty to gay people might put a burden on people holding the first view of gay sex—people who feel that if they rent an apartment to a gay couple, allow a gay couple to eat at their restaurant or provide health benefits to a same-sex spouse, it is tantamount to aiding and abetting sinful or immoral behavior?

B. Impact of LGBT Liberty on Belief Liberty

To consider the question I pose above as relevant at all, one has to believe that a civil rights law that protects the liberty of LGBT people by prohibiting discrimination based on sexual orientation or gender identity (or by conferring civil union or marriage status on same-sex couples) places a burden on the liberty of some people regulated by the law. This is not self-evident. Many people believe these laws merely regulate the “conduct” of such individuals and have little or no impact on such individuals’ beliefs, identities or practices.

The liberty I believe such laws might, in certain circumstances, burden is what I call “belief liberty.” What I mean by “burden” is that the law requires an individual to engage in conduct that requires him or her to act in a manner inconsistent with his or her deepest held beliefs. From a liberty perspective, whether these beliefs stem from a religious source or from a secular source is irrelevant. What is common among these belief systems, and what should be relevant for the liberty analysis, is that these beliefs form a core aspect of the individual’s sense of self and purpose in the world.

Certainly, in America today, religious people of certain denominations are likely to be disproportionately burdened by laws that regulate their conduct with regard to gay people. For example, current polling data shows that, while the majority of Americans (58%) say marriage for same-sex couples should not be permitted, a much larger 85% of self-identified conservative Republicans and evangelical, white Protestants say that gay

49 I explain what I mean by “belief liberty,” as well as what I consider “identity liberty” and “bodily liberty” infra Part B.2.a.
marriage should be illegal.\textsuperscript{50} But we miss the mark, I think, if we analyze this burden solely as a burden on religious liberty, writ narrow, rather than as a burden on belief liberty, writ large. Obviously, as I note in the introduction to this article, the Supreme Court’s decision in Employment Division v. Smith\textsuperscript{51} limits the reach of the Free Exercise Clause as a practical matter. But, as a theoretical matter, I believe it is more appropriate to analyze these belief claims as liberty claims and not to elevate religious beliefs over other deeply held beliefs derived from non-religious sources. From the perspective of a person holding a particular belief, the intensity of that belief may be as strong regardless of whether it derives from a religious or a non-religious source.

Fully recognizing the existence of this type of burden requires two steps. First, we must consider what moral values are inherent in civil rights laws and whether these values might conflict with the deeply held beliefs of some individuals who are regulated by the law. Second, we must consider whether forcing someone to act (or not to act) in a certain way can burden a liberty interest that should be protected under the Due Process Clause.

1. The Moral Values in Civil Rights Laws

A major strand of liberal political theory postulates that “morality”—in the sense of a moral, normative view of “the good”—is not the proper object of governmental action. According to this view, individuals living in a pluralist society will inevitably hold divergent normative and moral beliefs, and the role of law and government is to adequately safeguard the rights necessary for each individual to pursue his or her own normative view of “the good life”—not to affirmatively advance one moral view of “the good” over others.\textsuperscript{52}


\textsuperscript{51} 494 U.S. 872, 879 (1990) (holding that “the right of free exercise does not relieve an individual of the obligation to comply with a ‘valid and neutral law of general applicability on the ground that the law prescribes (or prescribes) conduct that his religion prescribes (or prescribes)’” (quoting United States v. Lee, 455 U.S. 252, 263 n.3 (1982) (Stevens, J., concurring))).

\textsuperscript{52} See Bruce A. Ackerman, Social Justice in the Liberal State 349-78 (1980); Ronald Dworkin, Taking Rights Seriously 90-100 (1977); John Rawls, The Priority of Right and Ideas of the Good, in Political Liberalism 173, 173-211 (1996). See generally Feldblum, Gay Is Good, supra note 17, at 143-50 (describing liberal
In a recent short comment on why government should not be involved in recognizing any marriages (for either same-sex couples or opposite-sex couples), Tamara Metz nicely captures this viewpoint. Metz posits that the goal of marriage as an institution is to have a couple’s relationship supported by an ethical authority outside the couple itself. And the “liberal state,” argues Metz, is “ill suited to serve as an ethical authority.”

Why? As Metz explains: “Ideally, the liberal state is relatively distant, more legal than moral, and more neutral than not among competing worldviews so as to protect individual freedom and diversity.”

I do not disagree that a liberal state must have, as its highest priority, the protection of pluralist ways of living among its citizens, subject to such ways of living not harming others in society. My argument is simply that when government decides, through the enactment of its laws, that a certain way of life does not harm those living that life and does not harm others exposed to such individuals, the government is necessarily staking out a position of moral neutrality with regard to that way of living. And that position of moral neutrality may stand in stark contrast to those who believe that the particular way of living at issue is morally laden and problematic.

I have both documented and personally watched as supporters of a gay civil rights bill have gone to great lengths to argue that they are not taking a position on the morality of homosexuality or bisexuality by supporting such a law. I agree that supporting such a law does not necessarily convey a message that “gay is good.” But it is disingenuous to say that voting for a law of this kind conveys no message about morality at all. The only way to justify prohibiting private employers, landlords and business owners from discriminating against gay people is to make the prior moral assessment that acting on one’s homosexual orientation is not so morally problematic as

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53 Tamara Metz, Why We Should Disestablish Marriage, in MARY LYNDON SHANLEY, JUST MARRIAGE 99, 101 (Joshua Cohen & Deborah Chasman eds., 2004).
54 Id. at 102.
55 See, e.g., Feldblum, Federal Gay Rights, supra note 48 (documenting moral bracketing throughout introduction of recurring gay rights bills); Feldblum, Moral Rhetoric, supra note 23, at 996-1004 (deconstructing moral bracketing done by various Members of Congress during a hearing on ENDA).
to justify private parties discriminating against such individuals in the public domain. To return to the three possible views of gay sex, supporting a law that prohibits discrimination based on sexual orientation requires that the supporter hold, at a minimum, the second view of gay sex—even though it does not require that the supporter hold the third view.

For example, we do not have laws today that protect those who engage in pedophilia or domestic violence from employment, housing or public accommodation discrimination. We do not ask about these groups of individuals: “Well, but can they type? Can they do the job?” I do not believe the lack of such laws is due solely to the lack of an adequate “pedophile lobby” or “domestic violence abuser lobby.” Rather, I believe society (as reflected in its government’s public policy) has determined that actions of this kind hurt others and are thus morally problematic. For that reason, a private actor who uses the fact that an individual has engaged in these actions as grounds for exclusion is not viewed as engaging in unjustified discrimination.

This analysis works equally well to explain and describe the status quo in which LGBT people currently remain vulnerable to private and public discrimination. When the government fails to pass a law prohibiting non-discrimination on the basis of sexual orientation, in the face of documentation that such discrimination occurs on a regular basis, or fails to allow same-sex couples access to civil marriage when the practical need for that access has been documented for scores of families, the government is similarly taking a position on a moral question. The State has decided that a homosexual or bisexual orientation is not morally neutral, but rather may legitimately be viewed by some as morally problematic. It is precisely that determination which permits legislators to continue denying full liberty to those who act on their homosexual or bisexual orientations and who are open and honest about their actions.

In these cases, the issue is often framed as a question of “equality.” That is certainly true. The existence of civil rights laws, as well as the absence of such laws, will determine how much equality LGBT people enjoy in our society. But let us be clear: the fact that this is a question of equality should not obscure the fact that this is also a question of morality. And that is because moral beliefs necessarily underlie the
assessment of whether such equality is justifiably granted or denied.

Once we acknowledge these moral assessments, it becomes easier to understand that a civil rights law prohibiting discrimination based on sexual orientation might be shocking for some members of society. For those who believe that a homosexual or bisexual orientation is not morally neutral, and that an individual who acts on his or her homosexual orientation acts in a sinful or harmful manner (to himself or herself and to others), it is problematic when the government passes a law that gives such individuals equal access to all societal institutions. Such a law rests on a moral assessment of homosexuality and bisexuality that is radically different from their own. Such a law presumes the moral neutrality of homosexuality and bisexuality, while those who oppose the law believe homosexuality and bisexuality are morally problematic.

Conversely, for those who believe that any sexual orientation, including a homosexual or bisexual orientation, is morally neutral, and that an individual who acts on his or her homosexual or bisexual orientation acts in an honest and good manner, it is problematic when the government fails to pass laws providing equality to such individuals. The failure to pass such a law rests on a moral assessment of homosexuality and bisexuality that is radically different from their own. Such failure presumes homosexuality and bisexuality are morally problematic, while those who desire the law believe homosexuality and bisexuality are morally neutral.

Given this reality, we are in a zero-sum game: a gain for one side necessarily entails a corresponding loss for the other side.

This is why then-Professor (now Judge) Michael McConnell is correct to observe that disputes surrounding sexual orientation “feature a seemingly irreconcilable clash between those who believe that homosexual conduct is immoral and those who believe that it is a natural and morally unobjectionable manifestation of human sexuality.”\(^{56}\) McConnell believes that the debate over sexual orientation is best approached by the government extending respect to both of these positions, without taking sides on either position.

Thus, using an analogy to the respect people seek from government for their religious beliefs, he urges the following:

The starting point would be to extend respect to both sides in the conflict of opinion, to treat both the view that homosexuality is a healthy and normal manifestation of human sexuality and the view that homosexuality is unnatural and immoral as conscientious positions, worthy of respect, much as we treat both atheism and faith as worthy of respect. In using the term “respect,” I do not mean agreement. Rather, I mean the civil toleration we extend to fellow citizens and fellow human beings even when we disagree with their views. We should recognize that the “Civil Magistrate” is no more “competent a Judge” of the “Truth” about human sexuality than about religion.57

But what McConnell fails to appreciate in his analysis is the zero-sum nature of the game. That is, he fails to recognize that the government is necessarily taking a stance on the moral question every time it fails to affirmatively ensure that gay people can live openly, safely and honestly in society.

Note, for example, how McConnell characterizes possible governmental actions (and inactions) under his recommended approach:

Under this approach, the state should not impose a penalty on practices associated with or compelled by any of the various views of homosexuality, and should refrain from using its power to favor, promote, or advance one position over the other. The difference between a “gay rights” position and a “First Amendment” approach is that the former adopts as its governing principle the idea that homosexuality is normal, natural, and morally unobjectionable, while the latter takes the view that the moral issue is not for the government to decide. Thus, the government would not punish sexual acts by consenting gay individuals, nor would it use sexual orientation as a basis for classification or discrimination, without powerful reasons, not grounded in moral objections, for taking such action. On the other hand, the government would not attempt to project this posture of moral neutrality onto the private sphere, but would allow private forces in the culture to determine the ultimate social response.58

57 Id. at 44.
58 Id. (emphasis added). As McConnell concludes:

Such an approach would produce many of the same advantages for this cultural conflict that the First Amendment produces for religious conflict. This approach would provide the basis for civic peace on an issue where the nation is dangerously divided, it would provide maximum respect for individual conscience, it would depoliticize an issue that many of us believe is private and not political in character, and it would help to restore the public-private distinction.
It seems apparent from McConnell’s writing (although, for some reason, he fails to state so explicitly) that the “gay rights” position is one that calls for government intervention in the private sector through laws that make discrimination on the basis of sexual orientation illegal or that make civil marriage available to same-sex couples. I gather that is what McConnell is referring to by the government “project[ing] this posture of moral neutrality onto the private sphere.”

But if that is the case, McConnell is simply wrong to assume that a government’s failure to pass such laws rests on the view “that the moral issue is not for the government to decide.” The government is taking a position on the moral question when it fails to extend access to civil marriage to same-sex couples. It is precisely because some people hold the view that homosexuality is immoral that gay people have been denied equal protection under the law up until this point. Government has not simply been sitting on the sidelines of these moral questions during all the time it has failed to pass laws protecting the liberty of LGBT people. Government has quite clearly been taking a side—and it has not been taking the side that helps gay people.

McConnell correctly diagnoses the opposing moral viewpoints, but his proposed solution is no more satisfying than the solutions proposed by gay rights leaders who characterize gay civil rights laws as simple “neutral” prescriptions of equality that have no impact on a person’s religious or moral beliefs. Both McConnell and these gay rights leaders are trying to deal with the conflict by simply wishing it away. That is neither possible nor intellectually honest.

2. The Burden on Liberty

Passage of a law based on a moral assessment different from one’s own can certainly make an individual feel alienated from his or her government and fellow citizens. But that is a far cry from accepting that such a law burdens one’s liberty in a way that might require further justification by the State. I might disagree with my government’s foreign policy or economic policy and think on some days that I would be happier living in some other country. But without something

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Id. at 44-45.

59 Id. at 44.
more, it is hard to argue that my liberty—even something as broad as my “belief liberty”—has been burdened.

The “something more,” from my perspective, is a legal requirement that an individual act, or refrain from acting, in a manner that the individual can credibly claim undermines his or her core beliefs and sense of self. Without such a trigger, a claim that one’s liberty has been burdened cannot legitimately be maintained. Explicating this point requires a discussion of both belief liberty and the interaction between conduct and belief.

a. Three Forms of Liberty

It is way past time to get over the Lochner era’s baggage and embrace the full scope of our Due Process Clause’s liberty interest. Numerous scholars over the past thirty years have produced compelling and thoughtful analyses of the liberty interest embodied in the Fifth and Fourteenth Amendments. My goal in this section is more limited. I want to focus on Justice David Souter’s comprehensive and historically far-reaching concurrence in Washington v. Glucksberg and suggest that we apply the lessons of that concurrence to thinking about belief liberty more generally.

In his Glucksberg concurrence, Justice Souter is clear that he believes the Lochner line of cases was incorrectly decided. But that is not because a person’s “right to choose a calling” is not an essential “element of liberty.” Rather, it is because the Court’s decisions in the Lochner line of cases “harbored the spirit of Dred Scott in their absolutist

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60 The era was named after the substantive due process case of Lochner v. New York, 198 U.S. 45 (1905).
63 Id. at 759 (noting that the standard of reasonableness or arbitrariness under the Due Process Clause is “fairly traceable to Justice Bradley’s dissent in the Slaughter-House Cases, in which he said that a person’s right to choose a calling was an element of liberty . . . and declared that the liberty and property protected by due process are not truly recognized if such rights may be ‘arbitrarily assailed’” (citation omitted)).
implementation of the standard they espoused.” In other words, it is not that living and working where one wills is not an essential part of liberty. But the government must have the ability to regulate that liberty in a reasonable manner in order to carry out its important interests. The Court’s failure in the *Lochner* line of cases was its failure to properly judge and apply the government’s important interest in protecting the social and economic welfare of its citizens. It was not a failure in judging the importance of work as an element of liberty.

Justice Souter’s main priority in his *Glucksberg* concurrence, however, is not to revive the importance of contract as a liberty interest. His main objective is to attack the Court’s approach, over the past fifty years, of focusing almost exclusively on whether a proclaimed liberty interest is a “fundamental right,” and then almost invariably invalidating any legislation burdening such a right. To Justice Souter, this approach not only represents a wrong turn from earlier substantive due process jurisprudence, but it also elides the key point that liberty interests naturally fall across a spectrum. Thus, many interests can be “liberty” interests and still be justifiably burdened by the government because of the needs of society.

64 *Id.* at 761. Justice Souter begins his historical overview by reminding us that one of the first instances in which the Court applied the Due Process Clause was “the case that the [Fourteenth] Amendment would in due course overturn, *Dred Scott v. Sandford.*” *Id.* at 758 (citation omitted).

65 In *Allgeyer v. Louisiana*, 165 U.S. 578 (1897), the Court said that Fourteenth Amendment liberty includes the right of the citizen to be free in the enjoyment of all his faculties, to be free to use them in all lawful ways, to live and work where he will, to earn his livelihood by any lawful calling, to pursue any livelihood or avocation, and for that purpose to enter into all contracts which may be proper, necessary and essential to his carrying out to a successful conclusion the purposes above mentioned.

*Id.* at 589. Justice Souter’s observation of *Allgeyer* is the following: “Although this principle was unobjectionable, what followed for a season was, in the realm of economic legislation, the echo of *Dred Scott.*” *Glucksberg*, 521 U.S. at 760 (Souter, J., concurring).

66 While the ability to pursue one’s calling can fall within the identity liberty I describe below, one must admit that the Court’s assessment that one needs perfect economic freedom in doing so (including the freedom to agree to wretched work conditions), see, e.g., *Lochner v. New York*, 198 U.S. 45, 59-61 (1905), was yet another failing of reasoning in many of the *Lochner*-era cases.

Justice Souter finds guidance for this approach in Justice Harlan’s dissent from dismissal on jurisdictional grounds in *Poe v. Ullman*:

[T]he full scope of the liberty guaranteed by the Due Process Clause cannot be found in or limited by the precise terms of the specific guarantees elsewhere provided in the Constitution. This “liberty” is not a series of isolated points pricked out in terms of the taking of property; the freedom of speech, press, and religion; the right to keep and bear arms; the freedom from unreasonable searches and seizures; and so on. It is a rational continuum which, broadly speaking, includes a freedom from all substantial arbitrary impositions and purposeless restraints, and which also recognizes, what a reasonable and sensitive judgment must, that certain interests require particularly careful scrutiny of the state needs asserted to justify their abridgment.  

For Justice Souter, the type of interests that would require particularly careful scrutiny would presumably be those described in *Planned Parenthood of Southeastern Pennsylvania v. Casey*, an opinion written jointly by Justices O’Connor, Kennedy and Souter:

These matters [personal decisions relating to marriage, procreation, contraception, family relationships, child rearing, and education], involving the most intimate and personal choices a person may make in a lifetime, choices central to personal dignity and autonomy, are central to the liberty protected by the Fourteenth Amendment. At the heart of liberty is the right to define one’s own concept of existence, of meaning, of the universe, and of the mystery of human life.

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*Casey* is commonly attributed to Justice Kennedy. *Id.* Assuming that is true, there are two Justices on the current court, Justices Kennedy and Souter, who appear to be deeply invested in a flexible liberty analysis. See Post, *supra* note 61, at 85-96 (noting flexibility in the early evolution of modern substantive due process and describing the rigidity articulated by the *Glucksberg* majority).  

68 *Poe v. Ullman*, 367 U.S. 497, 543 (1961) (Harlan, J., dissenting) (citations omitted). Justice Souter begins his substantive analysis in his *Glucksberg* concurrence as follows:

My understanding of unenumerated rights in the wake of the *Poe* dissent and subsequent cases avoids the absolutist failing of many older cases without embracing the opposite pole of equating reasonableness with past practice described at a very specific level. That understanding begins with a concept of “ordered liberty,” comprising a continuum of rights to be free from “arbitrary impositions and purposeless restraints.”

*Glucksberg*, 521 U.S. at 765 (Souter, J., concurring) (citations omitted) (quoting *Poe*, 367 U.S. at 543, 549).

69 *Casey*, 505 U.S. at 851.
Drawing from a historical overview of substantive due process cases and Justice Harlan’s dissent in *Poe*, Justice Souter articulates two basic guidelines for courts engaging in a substantive due process analysis. First, a court “is bound to confine the values that it recognizes to those truly deserving constitutional stature”—an approach that enables a court to avoid engaging in piercing scrutiny of every conceivable burden on liberty that may arise across the spectrum. Second, a court may not intervene “merely to identify a reasonable resolution of contending values that differs from the terms of the legislation under review.” As Justice Souter articulates the standard,

> It is only when the legislation’s justifying principle, critically valued, is so far from being commensurate with the individual interest as to be arbitrarily or pointlessly applied that the statute must give way. Only if this standard points against the statute can the individual claimant be said to have a constitutional right.

In an interesting (strategic?) move, Justice Souter never directly repudiates the strict scrutiny standard requiring that governmental restrictions on fundamental rights be narrowly tailored to fit a compelling government interest. Indeed, he repeats that standard in various citations in his concurrence.

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70 Glucksberg, 521 U.S. at 767 (Souter, J., concurring).

71 As Justice Souter put it:

> Justice Harlan thus recognized just what the Court today assumes, that by insisting on a threshold requirement that the interest (or, as the Court puts it, the right) be fundamental before anything more than rational basis justification is required, the Court ensures that not every case will require the “complex balancing” that heightened scrutiny entails.

72 Id. at 767 n.9.

73 Id. at 768.

74 Justice Souter wrote:

> The claims of arbitrariness that mark almost all instances of unenumerated substantive rights are those resting on “certain interests requir[ing] particularly careful scrutiny of the state needs asserted to justify their abridgment[,]” *cf.* *Skinner v. Oklahoma (ex rel. Williamson*, 316 U.S. 535...
But his emphasis that a court must consider whether a “legislation’s justifying principle, critically valued” is “commensurate with the individual interest”\(^\text{75}\) appears clearly designed to argue that a court has flexibility in its substantive due process analysis. That is, in order to be true to what Justice Souter sees as the spirit and design of the constitutional protection of liberty, while at the same time ensuring that government is able to regulate effectively in a complex world, he calls for an almost dialectical valuation of the government’s interest against the particular liberty interest at stake.\(^\text{76}\)

Of course, Justice Souter’s opinion in *Glucksberg* was a concurrence, and Justice Rehnquist’s majority opinion offers a very different view of substantive due process. Under the majority approach in *Glucksberg*, there are a limited number of “fundamental rights” that can be clearly named and found, based on objective, historical facts, to be rooted in our nation’s tradition.\(^\text{77}\) With regard to legislative burdens on this very limited set of “fundamental rights,” courts will apply strict

\[^{(1942)}; \text{Bolling v. Sharpe, [347 U.S. 497 (1954)]},\]  \[^{(1961)}; \text{Harlan, J., dissenting}]; \text{that is, interests in liberty sufficiently important to be judged ‘fundamental,’ \textit{id.}, at 548; see also \textit{id.}, at 541 (citing Corfield v. Coryell, 4 Wash. C. C. 371, 380 (CC ED Pa. 1825)). \text{In the face of an interest this powerful a State may not rest on threshold rationality or a presumption of constitutionality, but may prevail only on the ground of an interest sufficiently compelling to place within the realm of the reasonable a refusal to recognize the individual right asserted. } \textit{Poe, supra, at 548 (Harlan, J., dissenting)) (an ‘enactment involv[ing] . . . a most fundamental aspect of ‘liberty’ . . . [is] subject[ to ‘strict scrutiny’]) (quoting Skinner v. Oklahoma ex rel. Williamson, 316 U.S., at 541); Reno v. Flores, 507 U.S. 292, 301-02 (1993) (reaffirming that due process ‘forbids the government to infringe certain ‘fundamental’ liberty interests . . . unless the infringement is narrowly tailored to serve a compelling state interest’). \text{Id. at 766-67 (alterations in original) (footnote omitted).}\]  

\[^{75}\text{Id. at 768 (emphasis added).}\]  

\[^{76}\text{As Justice Souter put it:}\]

\[^{Skinner, that is, added decisions regarding procreation to the list of liberties recognized in Meyer and Pierce and loosely suggested, as a gloss on their standard of arbitrariness, a judicial obligation to scrutinize any impingement on such an important interest with heightened care. In so doing, it suggested a point that Justice Harlan would develop, that the kind and degree of justification that a sensitive judge would demand of a State would depend on the importance of the interest being asserted by the individual.}\]

\[^{Glucksberg, 521 U.S. at 762 (Souter, J., concurring) (citing Poe, 367 U.S. at 543). \text{See also \textit{id.} at 767 (stating that a court is ‘to assess the relative ‘weights’ or dignities of the contending interests’).}\]  

\[^{77}\text{See \textit{id.} at 719-28 (majority opinion).}\]
scrutiny (not dialectical balancing) and will almost invariably invalidate the legislative burden.\textsuperscript{78}

But the Supreme Court’s deployment of a liberty analysis to invalidate Texas’ sodomy law in \textit{Lawrence v. Texas}\textsuperscript{79} opened the door to a revival of Justice Souter’s more capacious understanding of substantive due process. Professor Robert Post observes that Justice Kennedy’s “extravagant and passionate” opinion in \textit{Lawrence} “simply shatters, with all the heartfelt urgency of deep conviction, the paralyzing carapace in which \textit{Glucksberg} had sought to encase substantive due process.”\textsuperscript{80} And Professor Larry Tribe notes that the “\textit{Glucksberg} gambit” to “collapse claims of liberty into the unidimensional and binary business of determining which personal activities belong to the historically venerated catalogue of privileged acts and which do not” could well have succeeded, had future cases followed its trajectory.\textsuperscript{81} Instead, as Tribe notes, even the briefest examination of the \textit{Lawrence} opinion makes plain that the Court steadfastly resisted a “reductionist procedure” that reduces the liberty interest to “flattened-out collections of private acts.”\textsuperscript{82}

Indeed, the Supreme Court’s opinion in \textit{Lawrence} triggered a revival of writing on liberty, some of it from people who had been writing and thinking about liberty for a long time. In a sweeping and eloquent article, Professor Larry Tribe revives his theory that the “essence of freedom” is “the self-governing experience of making, expressing, and renewing one’s commitments, all the way from one’s choices with respect to intimate relationships to one’s choices as a participating member of a self-governing polity.”\textsuperscript{83} Tribe’s theory is premised on an “understanding of self-government and relational rights as defining the core of liberty,” and on the “recognition of coercion, and of using others as mere means to the

\textsuperscript{78} Id. For fascinating and excellent analyses of the development of substantive due process, and the effort by the \textit{Glucksberg} majority to radically change the trajectory of that development, see Post, \textit{supra} note 61, at 86-96 and Tribe, \textit{Lawrence}, \textit{supra} note 61, at 1921-25.
\textsuperscript{79} 539 U.S. 558 (2003).
\textsuperscript{80} Post, \textit{supra} note 61, at 96.
\textsuperscript{81} Tribe, \textit{Lawrence}, \textit{supra} note 61, at 1924-25.
\textsuperscript{82} Id. at 1931-32.
\textsuperscript{83} Id. at 1941.
maximization of one’s own ends, as setting the limit to liberty’s reach.”

Professor Robert Post, who explored pre-New Deal substantive due process in several articles, argues that the “[t]hemes of respect and stigma . . . at the moral center of the Lawrence opinion” offer an entirely new dimension to substantive due process analysis. Post speculates that this new approach may result in courts using the power of the Due Process Clause to “prohibit[] the state from stigmatizing or demeaning the private lives of persons.” And Professor Randy Barnett argues that the Lawrence opinion finally breaks the post-New Deal presumption of constitutionality for any government regulation other than that of a “fundamental right,” and substitutes a “presumption of liberty,” which requires some justification by the government for any restriction it places on liberty.

Professor Nan Hunter was one of the first scholars to explicitly connect the Court’s analysis in Lawrence with Justice Souter’s concurrence in Glucksberg, and to suggest that Lawrence may “mark[] the beginning of a substantive due process jurisprudence that examines negative liberty limits on state power before, or instead of, articulating a specific standard of review.” In her analysis, Hunter does not speculate on whether she thinks this is a positive development for liberty jurisprudence; she is agnostic on that question. I have noted elsewhere that I believe Hunter is correct with

\[84\] Id. at 1943. Tribe describes how, in a series of articles written in the 1970s, he sketched a theory of why human relationships beyond the purely instrumental—and the expressive dimensions and mutual commitments they entail—are indispensable to the process of transmitting and transmuting values in an intergenerational, cross-social progression that keeps faith with a starting set of basic democratic undertakings while remaining open to evolution in the direction of greater empathy, inclusion, and respect.


\[86\] Id. at 1940-41.

\[87\] Post, supra note 61, at 97-98.

\[88\] Id. at 98.

\[89\] Barnett, supra note 67, at 35-36 (citation omitted). Barnett carefully distinguishes between “liberty,” which he defines as “the properly defined exercise of freedom” which “is and always has been constrained by the rights of others” and “license,” which is not limited by the rights of others and is therefore not a right at all. Id. at 37.

\[89\] Nan D. Hunter, Living with Lawrence, 88 MINN. L. REV. 1103, 1117 (2004).
regard to her prediction of how the Court may proceed with substantive due process analyses in the future. But my point here is to argue that Justice Souter’s approach is also the appropriate one for the Court to adopt.

I recognize that some might view Justice Souter’s approach as a death knell for important fundamental rights, while others may view it simply as a necessary correction to earlier substantive due process jurisprudence. But on its merits, Justice Souter’s approach seems to me to properly reflect the reality of our complex society while staying consistent with the plain meaning of the Fifth and Fourteenth Amendments. Governmental laws constantly burden liberty, and to decide that only ones that cross a magic line called “fundamental rights” should ever gain redress seems rigid and inappropriate. Justice Souter’s approach permits courts to recognize realistically and honestly the myriad ways in which laws might burden the liberty interests of those subject to the laws, while not necessarily invalidating the laws.

In 2002, Professor Rebecca Brown offered a comprehensive and sophisticated analysis of the liberty interest embodied in the Fifth and Fourteenth Amendments, complete with a vigorous defense of the courts’ responsibility to protect such liberty, an explanation of how such judicial review is consistent with, not destructive of, democracy and a framework for considering liberty claims. In explaining why protecting liberty interests is as important a constitutional goal as protecting equality interests, Brown observed:

>[In a world of increasingly diverse personal and moral values, supporting very different notions of the good life, the communion of interests between representatives and represented can degrade even when laws nominally operate evenhandedly. For example, laws that provide that “no one may [blank]” can exploit difference as effectively as a classification, when the blank is an activity that “we,” the


political ins, have no wish to do, but that “they,” the outs, claim a profound need to do in pursuit of personal fulfillment.92

Brown uses laws prohibiting sodomy or assisted suicide as principal examples of the need to question a legislature’s reasons for burdening liberty.93 But the same framework that Brown proffers to scrutinize such prohibitions should apply as well to a legislature’s prohibition of discriminatory conduct that might adversely impact a regulated person’s liberty. The fact that we might need to be concerned in the coming decades with the potential liberty burdens imposed by a sexual orientation anti-discrimination law or a marriage equality law (rather than with the liberty burdens posed by a criminal sodomy law or a law that excludes same-sex couples from civil marriage) simply reflects the reality that moral values are beginning to shift in this country—as I believe they should.

Finally, in thinking about the type of liberties that rise to the level of requiring more searching government justification, I believe it is helpful to group the spectrum of liberty interests into three broad categories: bodily liberty, identity liberty and belief liberty. There is nothing magical about these categories, and I do not contend they are the only ones that make sense. But I believe this three-part categorization is an intellectually coherent manner in which to think about the spectrum of liberty interests that the Supreme Court has protected over the decades.94

Bodily liberty is the easiest one to describe: the State should not invade the integrity of our bodies without a good

92 Id. at 1498.
93 Id. at 1545-49.
94 This categorization also permits us to think more logically about whether such liberties are inherently and solely negative liberties that prohibit the government from restraining some action on our parts, or whether they are also inherently positive liberties that require some affirmative action on the part of the government to allow for their full expression. Obviously, the Supreme Court, for the moment, has come down clearly on the side that the liberty protected by the substantive Due Process Clause is solely a negative liberty. See, e.g., DeShaney v. Winnebago County Dep’t of Soc. Servs., 489 U.S. 189, 195 (1989). But in many circumstances, the only way to achieve real liberty for some individuals will be for the government to take affirmative steps to bring about that liberty—even if such steps might then interfere with the liberty of others. See, e.g., ROBIN L. WEST, RE-IMAGINING JUSTICE: PROGRESSIVE INTERPRETATIONS OF FORMAL EQUALITY, RIGHTS, AND THE RULE OF LAW 6-7 (2003) (describing the need for government to affirmatively support the ability of individuals to give and receive care and to feel safe); Feldblum, Right to Define, supra note 90, at 127-39 (noting affirmative steps government should take to protect the liberty of intersex and transgender people); West, supra note 61, passim (describing affirmative steps to be taken by government to ensure the liberty of women).
reason for doing so. Protecting members of the public from contagious diseases is a good reason to force someone to have his body invaded through a vaccination; fighting drug crime is not a good enough reason to force someone to vomit by pumping an emetic solution through a tube into his stomach.

Identity liberty is the term I would use to describe the liberty that the Casey plurality sought to capture in its “mystery of human life” description, a description repeated by Justice Kennedy in the Lawrence majority:

These matters [personal decisions relating to marriage, procreation, contraception, family relationships, child rearing, and education], involving the most intimate and personal choices a person may make in a lifetime, choices central to personal dignity and autonomy, are central to the liberty protected by the Fourteenth Amendment. At the heart of liberty is the right to define one's own concept of existence, of meaning, of the universe, and of the mystery of human life.

Despite Justice Scalia’s scoffing at this description as meaningless for purposes of law, I think it accurately captures a set of liberty interests that go to the core of a person’s identity. This may be a person’s identity as a parent (including the decisions whether to have a child and how to raise the child), a person’s identity as a spouse or a lover (deciding what form of sexual intimacy one wishes to engage in), a person’s racial, ethnic, or religious identity or a person’s gender identity. As I have previously observed:

Not that many personal decisions rise to the level of “defin[ing] one’s own concept of existence, of meaning, of the universe, and of the

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96 Compare Jacobson, 197 U.S. at 26-27 (holding compulsory vaccination within police powers), with Rochin, 342 U.S. at 172-74 (holding unconstitutional the forcible administration of emetic solution to induce vomiting in course of drug investigation).
98 See Lawrence, 539 U.S. at 588 (Scalia, J., dissenting) (“And if the Court is referring not to the holding of Casey, but to the dictum of its famed sweet-mystery-of-life passage (‘At the heart of liberty is the right to define one’s own concept of existence, of meaning, of the universe, and of the mystery of human life’); That ‘casts some doubt’ upon either the totality of our jurisprudence or else (presumably the right answer) nothing at all. I have never heard of a law that attempted to restrict one’s ‘right to define’ certain concepts; and if the passage calls into question the government’s power to regulate actions based on one’s self-defined ‘concept of existence, etc.,’ it is the passage that ate the rule of law.”).
mystery of human life.” We should not let the lofty rhetoric mislead us to the conclusion that these words can mean everything and anything. They do not. The examples provided by the Lawrence majority give meaning to the type of personal decisions at play here—the choice to marry, the choice to have a child (or not have a child), the choice to have sexual intimacy with a partner, the choice to raise a child in a certain fashion. These are not small decisions. These are those big decisions in life that go to the core, essential aspects of our selves.99

Moreover, while the phrasing of the “mystery of human life” sentence reflects a twenty-first century language of human self-awareness, a similar sentiment regarding the importance of self-identity seems to underlie one of the Court’s earliest descriptions of the liberty interest, in *Meyer v. Nebraska*:

> While this court has not attempted to define with exactness the liberty thus guaranteed, the term has received much consideration and some of the included things have been definitely stated. Without doubt, it denotes not merely freedom from bodily restraint but also the right of the individual to contract, to engage in any of the common occupations of life, to acquire useful knowledge, to marry, establish a home and bring up children, to worship God according to the dictates of his own conscience, and generally to enjoy those privileges long recognized at common law as essential to the orderly pursuit of happiness by free men.100

What was recognized at common law as essential to the “orderly pursuit of happiness by free men”101 is no doubt different from what would be recognized as such today. But the underlying objective of the standard is the same—identifying an area of core identity liberty for which the government needs a good reason if it is going to infringe on such identity.

Finally, I use the category belief liberty to refer to one’s liberty to possess deeply held personal beliefs without coercion or penalty by the State. Belief liberty presumably could be subsumed under identity liberty, since our beliefs are very often constitutive of our identities. But I believe it is worth identifying this type of liberty separately because it is so often conflated with First Amendment rights to free speech, free expression and free exercise of religion. That conflation is

99 Feldblum, *Right to Define*, supra note 90, at 139. Larry Tribe’s project on liberty, with its focus on self-government and relational rights, captures incredibly well what I call identity liberty. Tribe, *Lawrence*, supra note 61, at 1941-44.

100 262 U.S. 390, 399 (1923) (emphasis added).

101 *Id.*
understandable; most cases dealing with “beliefs” naturally arise under the First Amendment. But is it necessary that such beliefs be protected solely under the First Amendment? Certainly, the ability to believe what one will seems “essential to the orderly pursuit of happiness by free men [and women].”\(^{102}\)

The First Amendment right to free speech necessarily protects any speech, no matter how trivial. The First Amendment right to free exercise necessarily protects (within the limits of current Supreme Court doctrine) any religious belief, no matter how trivial. By contrast, I believe it is appropriate that the belief liberty protected under the Due Process Clause be limited to those beliefs that occupy a position of significant importance to the individual. Even if those beliefs are not so constitutive of the person’s identity as to be protected under “identity liberty,” the “mystery of human life” description of identity liberty can offer us guidance regarding what type of beliefs demand more searching scrutiny when a burden on such beliefs is alleged.

Obviously, we all have many beliefs. If the government had to justify every burden on every belief caused by every law, it would presumably have little time to do anything else. But, certainly, we are capable of placing these beliefs in some sort of hierarchy. For example, I believe that heterosexuality and homosexuality are morally neutral characteristics (similar to having red hair or brown hair), and I believe that acting consistently with one’s sexual orientation is a morally good act. I also believe that flowers are necessary to happiness and that Star Trek is a great contribution to our culture. But I would rank my beliefs regarding sexuality as much more significant to my sense of self than my beliefs regarding flowers or Star Trek. Thus, in order for belief liberty to be situated at a point in the spectrum that requires greater government justification for infringement, such beliefs must constitute an important core aspect of the individual.\(^{103}\)

\(^{102}\) Id.

\(^{103}\) As Justice Souter was at pains to argue in his concurrence, “the kind and degree of justification that a sensitive judge would demand of a State would depend on the importance of the interest being asserted by the individual.” Washington v. Glucksberg, 521 U.S. 702, 762 (1997) (Souter, J., concurring) (citing Poe v. Ullman, 367 U.S. 497, 543 (1961) (Harlan, J., dissenting)). See also id. at 767 (“[A] court [is] to assess the relative ‘weights’ or dignities of the contending interests . . . .”). There is no reason to presume that this same analysis could not be applied to the relative weights
Analyzing belief liberty under the Due Process Clause (and not simply under the First Amendment) serves an additional useful purpose. An individual’s deeply held beliefs may derive from religious sources, from purely secular sources or from spiritual sources that are not traditionally viewed as religious. If these beliefs are an integral part of the person’s sense of self, my argument is that they constitute belief liberty. The particular source of the individual’s beliefs is not the barometer of their importance for due process purposes. For belief liberty, the source of the beliefs (be it faith in God, belief in spiritual energy or a conviction of the rational five senses) has no relevance. A belief derived from a religious faith should be accorded no more weight—and no less weight—than a belief derived from a non-religious source.

As the Supreme Court reflected on a somewhat related question in 1944:

If by this position appellant seeks for freedom of conscience a broader protection than for freedom of the mind, it may be doubted that any of the great liberties insured by the First Article can be given higher place than the others. All have preferred position in our basic scheme. All are interwoven there together. Differences there are, in them and in the modes appropriate for their exercise. But they have unity in the charter’s prime place because they have unity in their human sources and functionings. Heart and mind are not identical. Intuitive faith and reasoned judgment are not the same. Spirit is not always thought. But in the everyday business of living, secular or otherwise, these variant aspects of personality find inseparable expression in a thousand ways. They cannot be altogether parted in law more than in life.104

b. Burdening Belief by Regulating Conduct

To understand the burden that an LGBT equality law might place on some people’s belief liberty, one must start by acknowledging that a State necessarily takes a position of moral neutrality on sexual orientation when it passes such a law. For that reason, the logical underpinning of such a law will be at odds with the belief systems of some individuals who are subject to the law.

of beliefs. Thus, although Justice Souter makes no claim regarding belief liberty in his concurrence, I believe my approach is consonant with his analysis.

104 Prince v. Massachusetts, 321 U.S. 158, 164-65 (1944) (citations omitted). In Prince, the appellant was seeking a higher degree of protection for her religious beliefs than would have been accorded secular beliefs under the First Amendment. See id. at 164.
But, obviously, such a law does not require individuals subject to the law to *change* their beliefs. An employer who is required to hire a gay person or a hotel owner who is required to rent to a gay couple may continue to believe whatever he or she wishes about the immorality or sinfulness of homosexuality. To grasp the full impact of such laws, therefore, it is necessary to explicate and acknowledge the logical intertwining that many people (including religious people) experience between their conduct and their beliefs such that compliance with a neutral civil rights law may burden their belief liberty.

Obviously, in a complex society, conduct must be regulated in a way that belief need not be. That is a truism. From the Supreme Court's ringing protection of belief in *West Virginia v. Barnette*105 to its consistent refrain that religious beliefs will be protected in a manner that religious conduct will not be,106 the logical distinction between conduct and belief has been clear.

But it does not follow from that truism that conduct should always be viewed as completely apart and distinct from belief. Certainly, courts have recognized that particular conduct may be used to communicate an expressive belief.107 Why should it be so difficult to accept that engaging in certain conduct (or being precluded from engaging in certain conduct) will undermine an individual’s strongly held beliefs?

Indeed, I would argue that gay people—of all individuals—should recognize the injustice of forcing a person to disaggregate belief or identity from practice. For years, gay people have been told by some entities that they should separate their status from their conduct. In the religious arena, this is framed as “loving the sinner, but hating the sin.”

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105 319 U.S. 624, 642 (1943) (“If there is any fixed star in our constitutional constellation, it is that no official, high or petty, can prescribe what shall be orthodox in politics, nationalism, religion, or other matters of opinion or force citizens to confess by word or act their faith therein. If there are any circumstances which permit an exception, they do not now occur to us.”).

106 The Supreme Court has often observed that while there is an absolute right to hold religious beliefs, see, e.g., *Wisconsin v. Yoder*, 406 U.S. 205, 214, 219 (1972); *Cantwell v. Connecticut*, 310 U.S. 296, 303 (1940), religiously grounded conduct is not absolutely protected, see, e.g., *Bowen v. Roy*, 476 U.S. 693, 699 (1986); *Yoder*, 406 U.S. at 220; *Braunfeld v. Brown*, 366 U.S. 599, 603 (1961).

That is, gay people have been told that their status as individuals with homosexual orientation is not inherently sinful—but that if they act in a way consistent with that orientation, then they are engaging in sin.

In the legal arena, this approach to a gay person’s identity and being has been framed as the “status/conduct” distinction. Particularly as a means of dealing with the holding in *Hardwick*, some legal advocates have argued that their clients should not be discriminated against for the status of being gay, although they have deliberately failed to claim equal non-discrimination rights for their clients’ rights to engage in gay conduct. From the moment I became aware of this legal approach, I have detested it and argued against it. It seemed to me the height of disingenuousness, absurdity and indeed disrespect, to tell someone it is permissible to “be” gay, but not permissible to engage in gay sex. What do they think being gay means? I have the same reaction to those who blithely assume a religious person can easily disengage her religious belief and self-identity from her religious practice and religious behavior. What do they think being religious means? Of course, at some basic level, religion is about a set of beliefs. But for many religious people across many religious denominations (Catholic, Protestant, Jewish and Muslim—to note just the ones I have some personal understanding of), the day-to-day practice of one’s religion is an essential way of bringing meaning to such beliefs. And while religious beliefs on homosexuality may seem the most familiar to us, there may be people with strongly held secular beliefs who feel just as strongly on the issue.

108 See Feldblum, *Sexual Orientation*, supra note 20, at 290-96 (detailing cases in which the “status-conduct” distinction has been used). As I noted in that article:

Instead of countering the ramifications of *Hardwick* by decoupling sodomy and homosexual conduct, many gay rights attorneys have implicitly accepted the equivalence between homosexual conduct and homosexual sodomy and have instead sought to decouple homosexual orientation from homosexual conduct. This approach has produced victories in court for a few individual gay and lesbian plaintiffs, but at a cost to equal protection for gay people generally, and at a potential cost to the development of a more effective paradigm for equal rights for gay people.

Id. at 290.

Given this perspective, it makes sense to me that three born-again Christians who run a chain of sports and health clubs would feel that “[t]heir fundamentalist religious convictions require them to act in accordance with the teachings of Jesus Christ and the will of God in their business as well as in their personal lives,” and hence mandate them to hire only employees who conform to their views about proper sexual behavior. It also makes sense to me that these same owners would feel their religion compels them to have these employees “talk[] to homosexuals about their religious views and sexual preference and [tell] them homosexuality [is] wrong.” And I can well understand the elderly Christian woman who believes “God will judge her if she permits people to engage in sex outside of marriage in her rental units and that if she does so, she will be prevented from meeting her deceased husband in the hereafter.”

Whether such conduct should legitimately be permitted in a workplace or a public accommodation is a separate question. But at this stage of the analysis, we should be concerned solely with whether a burden on belief liberty exists, not whether the burden is justified. The relevant question at this stage is how a court or a legislature should respond to an allegation that engaging in certain conduct, in compliance with a neutral law, burdens an individual’s beliefs that constitute a core aspect of that individual’s sense of self.

My argument is that we should err on the side of accepting the person’s allegation for purposes of deciding whether a burden on liberty exists. (Again, this is different from the subsequent step of deciding whether the burden on liberty is ultimately justified.) In erring on the side of the person making the allegation, there must of course be some basis to the person’s claim that will situate the belief liberty interest on the upper end of the liberty spectrum. That is, the person must demonstrate that he or she holds a particular belief that is core to his or her sense of self and must make a credible claim that engaging in certain conduct would be inconsistent with that belief. But beyond that, I do not believe

the government acts appropriately when it second-guesses the individual and concludes, for example, “Really, this isn’t such a burden on your belief.”

Many judges have been unsympathetic to religious individuals’ claims that a neutral law burdens their religious beliefs. As I describe below, sometimes judges wrap the justification for the burden into the analysis of whether a burden exists in the first place. Sometimes judges creatively construe a law so as to result in the absence of a burden and sometimes judges simply dismiss the religious person’s allegation that a burden exists.

For example, in *Smith v. Fair Employment & Housing Commission*, the Supreme Court of California considered whether a housing law that prohibited discrimination based on marital status imposed a “significant burden” on a religious landlady who did not wish to rent to an unmarried, heterosexual couple. The court concluded that no such significant burden existed because the landlady could invest her capital in an enterprise other than housing. The court also noted that the landlady’s religious beliefs did not “require her to rent apartments; the religious injunction is simply that she not rent to unmarried couples.” In light of that fact, the court concluded: “No religious exercise is burdened if she follows the alternative course of placing her capital in another investment.”

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113 *Id.* at 918-19. As I note in the text, the woman in this case was afraid she would not see her husband in the hereafter if she rented to the unmarried couple. See *supra* note 112. The court used the formulation of a “significant burden” because it was applying the standard set forth in the Religious Freedom Restoration Act. *Smith*, 913 P.2d at 919.

114 *Id.* at 926. The court was contrasting the burden on a religious person who lost his or her job because of a refusal to work on the Sabbath and who then sought unemployment compensation:

[The degree of compulsion involved is markedly greater in the unemployment-compensation cases than in the case before us. In the former instance, one can avoid the conflict between the law and one’s beliefs about the Sabbath only by quitting work and foregoing compensation. To do so, however, is not a realistic solution for someone who lives on the wages earned through personal labor. In contrast, one who earns a living through the return on capital invested in rental properties can, if she does not wish to comply with an antidiscrimination law that conflicts with her religious beliefs, avoid the conflict, without threatening her livelihood, by selling her units and redeploying the capital in other investments.]

*Id.*

115 *Id.* at 926.

116 *Id.*
A similar analysis was advanced by a dissenting judge in Donahue v. Fair Employment & Housing Commission, a state court ruling in California that also concerned a religious couple who did not wish to rent to unmarried, cohabiting heterosexual couples. In concluding that the burden on the couple's religious conduct was slight, the dissenting judge first observed that the couple “d[id] not contend that refusing to rent to unmarried cohabitants is a central tenet of their religious belief,” nor did they “contend that the burden imposed by the statute prohibits them from practicing their religion.” Rather, the couple's only contention, observed the dissenting judge, was that “if they are compelled to rent to unmarried cohabitants, they would be—in effect—aiders and abettors in the commission of sin by others in violation of their own religious beliefs.”

The dissenting judge was unsympathetic to this concern. As the judge concluded:

The Donahues are the owners of a five-unit apartment building which they rent to members of the general public. They are engaged in secular commercial conduct performed for profit. There are no religious motivations for their conduct. The statute does not require the Donahues to aid and abet “sinners,” it merely requires them “to act in a nondiscriminatory manner toward all prospective [tenants]. A legal compulsion . . . to refrain from discriminating against [prospective tenants] on the basis of [marital status] can hardly be characterized as an endorsement” or the aiding or abetting of sin.

In the case involving born-again Christians who owned and operated a chain of sports and health clubs in Minneapolis, a Minnesota court found no burden on the owners’ religious beliefs by offering a creative interpretation of the State’s gay civil rights law. The court observed that “based on his understanding of the Bible, Owens [the owner of the clubs] (the

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117 2 Cal. Rptr. 2d 32 (Cal. Ct. App. 1991). For subsequent appellate history of this case, see infra note 120.
118 Donahue, 2 Cal. Rptr. 2d at 49 (Grignon, J., dissenting).
119 Id.
120 Id. (quoting Pines v. Tomson, 160 Cal. App. 3d 370, 389 (Cal. Ct. App. 1984)) (alterations in original) (citations omitted). The Donahue majority found a burden on the couple's free exercise of religion, as prohibited by the state constitution, and that the State did not have a sufficiently compelling interest in prohibiting marital status discrimination to override that exercise of religion. Id. at 46 (majority opinion). The opinion in Donahue was superseded by an order granting review, 825 P.2d 766 (Cal. 1992); the review was then dismissed and the case remanded, 859 P.2d 671 (Cal. 1993). The case of Smith v. Fair Employment & Hous. Comm'n, 913 P.2d 909, 912 (Cal. 1996), discussed supra notes 112-17 and accompanying text, was decided three years after Donahue was remanded.
other principals agree with him) clearly is opposed to homosexual acts.” For example, quoting from the trial transcript, the court noted that Owens had emphasized that, with regard to homosexuals, he has “a love, a heartfelt love for them, but not for the activity. The same way I would have a heartfelt love for anybody; but as God says in his word, we can hate the sin but we love the sinner.”

But, the court observed, the Minneapolis ordinance prohibited discrimination “based on affectional preference, not acts.” Thus, the court concluded: “From [Owens’] words it would be difficult to conclude that his Christianity supports discrimination based on preference rather than acts. Thus, the Minneapolis ordinance as applied in this case does not impose a burden upon Owens’ free exercise of religion.”

In other words, because the State’s civil rights law prohibited discrimination solely on gay “status,” and not on gay “conduct,” the obligation on the owners not to discriminate on the basis of “affectional preference” could logically have no impact on their belief that homosexual conduct was immoral. In fact, the State’s law seemed perfectly matched to the owners’ beliefs in loving the sinner, but hating the sin.

Of course, the fact that most of the gay men frequenting the sports and health club were presumably also having gay sex at some point was ignored by the court. Thus, the court’s analysis, while offering an ironic twist on the status-conduct distinction, seems as riddled with illogic as when the distinction is applied in gay rights cases.

Some of the more sophisticated judicial analyses of the possible burden that civil rights laws place on religious beliefs are represented in the various opinions issued in Gay Rights Coalition of Georgetown University Law Center v. Georgetown University. This case concerned the refusal of Georgetown University, a Jesuit school, to recognize gay student groups that had organized at the University and the Law School. The university administration permitted the gay student

\[\text{References:}\]

\[\text{121} \quad \text{Blanding v. Sports & Health Club, 373 N.W.2d 784, 791 (Minn. Ct. App. 1985), aff'd, 389 N.W.2d 206 (Minn. 1986).}\]
\[\text{122} \quad \text{Id.}\]
\[\text{123} \quad \text{Id.}\]
\[\text{124} \quad \text{Id.}\]
\[\text{125} \quad \text{536 A.2d 1 (D.C. 1987).}\]
\[\text{126} \quad \text{Id. at 8-14.}\]
groups to exist and to use various school facilities. However, the administration drew the line at “endorsing” the student groups. If it allowed the groups to use the Georgetown name, receive university funds and have access to subsidized office space, telephone service, office supplies and equipment, the administration felt it would be connoting its endorsement of the groups. As the administration explained:

This situation involves a controversial matter of faith and the moral teachings of the Catholic Church. “Official” subsidy and support of a gay student organization would be interpreted by many as endorsement of the positions taken by the gay movement on a full range of issues. While the University supports and cherishes the individual lives and rights of its students it will not subsidize this cause. Such an endorsement would be inappropriate for a Catholic University.

Judge Pryor’s concurrence provides a good example of a judge simply not accepting the allegations of a religious person (or, in this case, a religious institution):

I do not understand Georgetown to argue that discrimination against any persons or groups is a tenet of its faith. Rather, it claims that providing the disputed facilities and services to the gay student organizations infringes the University’s religious interest in embracing a particular doctrine of sexual ethics. Therefore, to require the University to make available its facilities and services in an even-handed manner works, at most, an indirect infringement of its religious interest. For just as enforcement of the prohibition against discrimination on the basis of political affiliation does not signify endorsement of any particular political party, enforcement of the Human Rights Act’s ban on discrimination on the basis of sexual orientation does not signify endorsement by the government or by the covered entity of any particular doctrine of sexual ethics.

In contrast to Judge Pryor’s concurrence, the plurality opinion in the *Georgetown* case parsed the situation somewhat differently—acknowledging that D.C.’s law did place some burden on the University, but nevertheless refusing to accept fully the University’s allegations with regard to that burden. The plurality first interpreted the D.C. Human Rights Act (which prohibited discrimination based on sexual orientation)

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127 See id. at 10.
128 Id. at 11-12.
129 Id. (quoting Memorandum from Dean W. Schuerman, Georgetown Univ., to the Student Government, Georgetown Univ. (Feb. 6, 1979) (emphasis added by the Court)).
130 Id. at 45 (Pryor, J., concurring) (footnote omitted).
as not requiring that any covered entity, including Georgetown University, endorse a gay group.\textsuperscript{131} The plurality concluded: 

"[T]he Human Rights Act does not require one private actor to ‘endorse’ the ideas or conduct of another."\textsuperscript{132}

Instead, the plurality focused on the “mere” conduct required by the law:

While the Human Rights Act does not seek to compel uniformity in philosophical attitudes by force of law, it does require equal treatment. Equality of treatment in educational institutions is concretely measured by nondiscriminatory provision of access to “facilities and services.” . . . Georgetown’s refusal to provide tangible benefits without regard to sexual orientation violated the Human Rights Act. To that extent only, we consider the merits of Georgetown’s free exercise defense.\textsuperscript{133}

Thus, the plurality held that the D.C. law required that the University simply engage in the conduct of providing funds, facilities and services in an even-handed manner to the gay student groups. The plurality then simply asserted that providing such funds, facilities and services did not translate into an endorsement of the groups’ beliefs on sexual ethics, despite the University’s clear statement that it viewed precisely such actions as connoting endorsement.\textsuperscript{134}

A classic mark of judges who downplay the burden on religious people who are forced to engage in certain conduct is an unwillingness to err on the side of accepting the allegation that conduct can impair belief. For those of us who believe that government should err on the side of accepting such allegations (whether the allegation is that engaging in certain conduct will impair a person’s religiously based belief or secularly based belief), the Court’s decision in \textit{Rumsfeld v. Forum for Academic & Institutional Rights, Inc.} (“FAIR”)\textsuperscript{135} was particularly troubling.

The core argument of the law schools and law faculty in \textit{Rumsfeld v. FAIR} was that forcing the schools to act in a

\textsuperscript{131} Gay Rights Coal. of Georgetown Univ. Law Ctr., 536 A.2d at 16 (plurality opinion).

\textsuperscript{132} Id. at 17.

\textsuperscript{133} Id. at 5 (quoting D.C. CODE § 1-2520 (1987)).

\textsuperscript{134} The plurality, unlike Judge Pryor, then accepted that there was a burden on the school in forcing the University to provide tangible benefits to the student groups (albeit a less minor burden than an forced endorsement would have been), and that the burden was outweighed by the State’s compelling interest in prohibiting discrimination based on sexual orientation. \textit{Id.} at 38.

\textsuperscript{135} ___ U.S. ___, 126 S. Ct. 1297 (2006).
certain way burdened their freedom of speech and freedom of expressive association.\textsuperscript{136} The cavalier manner in which the Court treated FAIR’s allegations does not bode well for future claims made by those who feel their religious or secular beliefs are being burdened when they are forced to comply with neutral civil rights laws.\textsuperscript{137}

In \textit{FAIR}, the law schools and law faculty claimed that the government burdened their freedom of speech and their freedom of expressive association\textsuperscript{138} by requiring that they treat military recruiters better than other recruiters who discriminate based on sexual orientation.\textsuperscript{139} The schools and faculty argued that while military recruitment was a compelling government interest, forcing the schools to treat military recruiters similarly to other recruiters (with no symbolic or logistical differences to convey the schools’

\textsuperscript{136} \textit{Id.} at ___, 126 S. Ct. at 1303.

\textsuperscript{137} Indeed, it was precisely the fear that people who wished to discriminate on the basis of sexual orientation or gender or race would use the argument that complying with a civil rights law burdened their freedom of expression that made so many gay rights and civil rights advocates welcome the result in the \textit{FAIR} decision. \textit{See}, e.g., Brief of Prof. William Alford et al. as Amici Curiae Supporting Respondents at 21-22, \textit{FAIR}, ___ U.S. ___, 126 S. Ct. 1297 (No. 04-1152), \textit{available at} http://www.law.georgetown.edu/solomon/documents/FAIRamicusHarvard.pdf (urging the Court to decide the case on statutory rather than constitutional grounds, to avoid providing constitutional shelter to those seeking to evade anti-discrimination laws); Jack Balkin, \textit{All's FAIR in Law and War}, \textit{BALKINIZATION}, Mar. 15, 2006, http://balkin.blogspot.com/2006/03/allsfair-in-law-and-war.html (discussing the problems the law schools’ possible success in \textit{FAIR} would pose for the enforceability of anti-discrimination laws); Dale Carpenter, \textit{Balkin on Solomon}, \textit{THE VOLOKH CONSPIRACY}, Mar. 15, 2006, http://www.volokh.com/posts/1142448786.shtml (same). As I explain further infra, I believe the result in \textit{FAIR} was both wrong and unfortunate. Moreover, I do not believe a contrary result would have given \textit{carte blanche} to those who wish to discriminate on the basis of sexual orientation, gender, race, or any other ground. It would, however, have ensured that the burdens that neutral civil rights laws place on those who disagree with the premises of such laws would have been made more transparent, would have been accorded some recognition, and would have been justified in the legal process.

\textsuperscript{138} \textit{See} Brief for the Respondents at 16-33, \textit{FAIR}, ___ U.S. ___, 126 S. Ct. 1297 (No. 04-1152).

\textsuperscript{139} As a general matter, law firms and law organizations that do not attest to the fact that they do not discriminate on the basis of sex, race, religion, national origin, disability, or sexual orientation are not provided assistance by law schools in the recruitment process. \textit{See} Assoc. of Am. Law Sch., Executive Comm. Regulations, Reg. 6-3.1, http://www.aals.org/about_handbook_regulations.php#6 (last visited Oct. 4, 2006) (requiring, in order to enforce the Association of American Law Schools’ (“AALS”) anti-discrimination by-laws, employers who recruit at law schools to provide written assurance that they do not discriminate on any of the grounds prohibited in AALS’ by-laws); \textit{see also} Brief of Nat’l Ass’n for Law Placement et al. as Amici Curiae Supporting Respondents at 2, 5, \textit{FAIR}, ___ U.S. ___, 126 S. Ct. 1297 (No. 04-1152), \textit{available at} http://www.law.georgetown.edu/solomon/documents/FAIRamicusNALP.pdf (discussing same policy).
disapproval of the military’s recruitment policy) was not narrowly tailored to fit the compelling government interest of military recruitment.\textsuperscript{140}

What exactly was the burden about which the schools and faculty were complaining? Obviously, the government was not requiring that the law schools pronounce their support for the statutory policy of “Don’t Ask, Don’t Tell,” which set the parameters of military recruitment and which prohibited the recruitment of openly gay law students as JAG Corps officers. No such speech was being coerced. Nor was the government prohibiting schools from loudly expressing their belief that appropriate legal recruitment would place no weight on the sexual orientation of law students. To the extent that a school viewed itself as creating an expressive community based on such a view of justice, the government was not standing in its way.

The “only” thing the government was requiring from the law schools was a simple act of conduct: it was requiring that schools treat military recruiters equally to all other recruiters, even though the law schools viewed the military recruiters as advancing, and possibly embodying, an unjust and perhaps immoral position. Where was the burden in requiring such conduct?\textsuperscript{141}

As with some religious people’s claims that the act of complying with a neutral civil rights law burdens their religious beliefs, the answer lies in the inherent entangling between conduct and practice in some situations.

In most situations, of course, conduct is not intended to convey expression. For that reason, one does not ordinarily feel

\textsuperscript{140} Brief for the Respondents, supra note 138, at 18, 44-48.

\textsuperscript{141} As the Supreme Court put it: “The Solomon Amendment neither limits what law schools may say nor requires them to say anything. . . . As a general matter, the Solomon Amendment regulates conduct, not speech. It affects what law schools must do—afford equal access to military recruiters—not what they may or may not say.” \textit{FAIR}, ___ U.S. at ___, 126 S. Ct. at 1307. Although the manner in which the government obtained compliance from the law schools was via the threat of withholding funds, the Supreme Court concluded that the government could have demanded such compliance directly without violating the Federal Constitution. \textit{Id.} For that reason, it was irrelevant that the government used the method of conditioning conduct on the receipt of spending. \textit{Id.} (“This case does not require us to determine when a condition placed on university funding goes beyond the ‘reasonable’ choice offered in \textit{Grove City \textit{College v. Bell} and becomes an unconstitutional condition. It is clear that a funding condition cannot be unconstitutional if it could be constitutionally imposed directly. Because the First Amendment would not prevent Congress from directly imposing the Solomon Amendment’s access requirement, the statute does not place an unconstitutional condition on the receipt of federal funds.” (citation omitted)).
that a requirement to engage in certain conduct (or not to engage in certain conduct) necessarily undermines one's identity or beliefs. We engage in innumerable acts throughout the day. We might get on the subway in the morning, buy a newspaper, order lunch, give an exam or take an exam, fix a car, buy stock or feed a baby. We rarely experience ourselves as expressing a belief system when we engage in these forms of conduct. Beliefs may underlie our actions (for example, public transportation is good; newspapers should be supported; babies should be cared for); but it is rare that we experience our conduct (or our lack of engaging in certain conduct) as inherently intertwined with our beliefs and identities.

But that is not always the case. Sometimes being forced to engage in certain conduct—or being precluded from engaging in certain conduct—will impinge on our beliefs or identities. This is not an overly difficult situation to perceive. It is certainly not beyond the sophistication of a legislature or a court to ascertain. It requires that an individual articulate a particular belief or identity, and then articulate how being forced to engage in an act (or how being prohibited from engaging in an act) will interfere with, or will undermine, that belief or identity.

This is precisely the situation that the law schools and law faculty faced in FAIR. The schools and faculty experienced the “mere” conduct of assisting military recruiters as undermining their expressive beliefs. The members of FAIR held two expressive beliefs: first, that law students should be hired without regard to their sexual orientation, and second, that aiding and abetting any recruiter who took sexual orientation into account in hiring was unjust. Thus, a mandate by the government that the schools assist military recruiters who did not hire openly gay law students was experienced by the schools as burdening that second belief. Because the belief itself related to conduct (i.e., it is unjust to aid and abet a discriminatory recruiter), the mandate to engage in certain conduct (i.e., treat military recruiters the same as other recruiters) necessarily burdened that belief.

The Supreme Court got around this difficulty by simply refusing to accept that the government’s requirement that the law schools engage in certain conduct burdened their expressive beliefs—much as some judges simply refuse to accept that a requirement to engage in certain conduct burdens the religious beliefs of an individual or an institution. The Court first recast the schools’ argument as a concern that
assisting military recruiters would mean that students would get confused and would not be able to differentiate the military recruiters’ message from the schools’ message. To that contrived concern, the Court wryly responded: “We have held that high school students can appreciate the difference between speech a school sponsors and speech the school permits because legally required to do so, pursuant to an equal access policy. Surely students have not lost that ability by the time they get to law school.”

The schools’ actual concern—that simply engaging in the conduct of hosting the military recruiters undermines the schools’ expressive belief in non-discrimination—was simply dismissed by the Court in a conclusory manner:

To comply with the [Solomon Amendment], law schools must allow military recruiters on campus and assist them in whatever way the school chooses to assist other employers. Law schools therefore “associate” with military recruiters in the sense that they interact with them. But recruiters are not part of the law school. Recruiters are, by definition, outsiders who come onto campus for the limited purpose of trying to hire students—not to become members of the school’s expressive association. This distinction is critical. Unlike the public accommodations law in Dale, the Solomon Amendment does not force a law school “to accept members it does not desire.”

Thus, the Court asserted that the conduct of associating with military recruiters who are not members of the school did not undermine the law schools’ expressive beliefs. The fact that the law schools experienced the association as causing precisely that result was simply ignored by the Court and dismissed.

Religious employers who do not want to provide health benefits to same-sex couples and religious schools who do not want to provide funding for gay rights groups might view themselves as far removed from law schools that do not wish to assist military recruiters who discriminate against gay law students. But the parallels between the two groups are stark: In each case, an individual or an institution experiences the coerced conduct (the “equality mandate”) as burdening its beliefs. And in each case, the individual or institution runs the risk that the State and the courts will simply dismiss its experience of burden as not real.

142 Id. at __, 126 S. Ct. at 1310 (citations omitted).
143 Id. at __, 126 S. Ct. at 1312 (quoting Boy Scouts of Am. v. Dale, 530 U.S. 640, 648 (2000)) (internal quotation marks omitted).
C. Justifying the Burden on Belief Liberty

It may be cold comfort to those with strongly held beliefs regarding the immorality and sinfulness of homosexuality that I argue that the burden on their belief liberty should be acknowledged. After all, as I note in the beginning of this article and as I hope to make clear in this section, I believe it will rarely be the case that a court should use the Due Process Clause to insert an exemption to an LGBT equality law in order to accommodate the belief liberty of those who are regulated by the law.  

As Justice Souter contended in his Glucksberg concurrence, a court should not intervene “merely to identify a reasonable resolution of contending values that differs from the terms of the legislation under review.” Rather, “[i]t is only when the legislation’s justifying principle, critically valued, is so far from being commensurate with the individual interest as to be arbitrarily or pointlessly applied that the statute must give way.”

Under this approach, I find it difficult to envision any circumstance in which a court could legitimately conclude that a legislature that has passed a LGBT equality law, with no exceptions for individual religious people based on belief liberty, has acted arbitrarily or pointlessly. If the “justifying principle” of the legislation is to protect the liberty of LGBT people to live freely and safely in all parts of society, it is perfectly reasonable for a legislature not to provide any exemption that will cordon off a significant segment of society from the anti-discrimination prohibition. This may not be the result a particular judge might have reached were she in the legislature, but it is certainly a “reasonable resolution of contending values” for a legislature to have reached.

Nevertheless, I believe explicating the burden that such civil rights laws may place on some individuals’ belief liberty is still worthwhile. While a court should not be permitted to re-strike a balance between competing liberties when the balance already struck by the legislature is reasonable, that does not
mean the *legislature* should not choose to place certain exemptions in the law at the outset. The utility in acknowledging the burdens on belief liberty that might arise from the application of civil rights laws is that advocates of such laws might see their way to deciding that the legislature should protect belief liberty in a limited set of circumstances. Indeed, the best outcome would be for such decisions to be made in a negotiated setting with those whose beliefs will be adversely impacted by the law.

It probably seems dangerous to advocates of LGBT equality to acknowledge that a civil rights law might burden the liberty of those who are regulated by the law. This is because laws prohibiting discrimination based on sexual orientation that have been held to burden a constitutionally protected right have not fared well in Supreme Court jurisprudence thus far.147 The Supreme Court’s opinion in *Boy Scouts of America v. Dale*,148 creating an exemption for the Boy Scouts of America to New Jersey’s law prohibiting discrimination based on sexual orientation, is the classic example.

In *Dale*, the Court spent the bulk of its opinion explaining why it agreed with the Boy Scouts that forcing the organization to retain James Dale as an assistant scoutmaster, after Dale had acknowledged he was gay, would “significantly burden”149 the Boy Scouts’ desire “to not promote homosexual conduct as a legitimate form of behavior.”150

As can be deduced from what I have written thus far, I have only a small quarrel with the Court’s analysis in that regard. It seems eminently reasonable to me that a group that wishes to convey the message that homosexual behavior is immoral, wrong and unacceptable would not want one of its leaders to be a happy, well-adjusted and ordinary-seeming gay person. My small quarrel with the Court’s analysis is that the Boy Scouts failed to consistently and clearly convey such a

147 Indeed, I believe it is precisely because this argument has so consistently failed that proponents of LGBT equality believe they must retreat to the position of denying the existence of any burden on a possible constitutional right to begin with. However, the same optimism that fuels my belief that the legal landscape will ultimately change for LGBT people also makes me believe that courts will begin to accept the compelling interest that government has in ensuring that LGBT people can live lives of honesty and safety.


149 *Id.* at 659.

150 *Id.* at 653 (internal quotation marks omitted).
message about homosexuality to its members. I have no difficulty accepting an organization’s statement of its beliefs and then deferring to that organization’s allegation that engaging in certain conduct will undermine those beliefs. Nevertheless, it does seem to me that the organization must clearly state its beliefs and then conform its actions to those beliefs in a logical fashion. The Boy Scouts’ position was problematic on both fronts: first, the organization’s public membership documents did not clearly state that homosexuality was inconsistent with the Boy Scouts’ oath, and second, the organization did not consistently remove heterosexual scoutmasters who publicly stated that homosexuality was acceptable.\footnote{On the importance of the latter point, see Nan D. Hunter, \textit{Accommodating the Public Sphere: Beyond the Market Model}, 85 MINN. L. REV. 1591, 1611-13 (2001).}

But the fatal flaw in the Court’s \textit{Dale} opinion, from my perspective, is its failure to truly examine whether the burden on the Boy Scouts was justified. This would have required, first, a careful analysis of the State’s interest in prohibiting discrimination based on sexual orientation in order to determine the importance of that interest. Next, it would have required an analysis of whether refusing to include an exemption in the law for entities whose expressive association beliefs would thereby be burdened was “so far from being commensurate with the individual interest as to be arbitrarily or pointlessly applied.”\footnote{\textit{Glucksberg}, 521 U.S. at 768 (Souter, J., concurring).}

If that analysis had been done, and if the Court had taken seriously the adverse impact on the identity liberty of gay people when a government fails to protect them from private discrimination, I believe the Court would have appropriately determined that a group as large and as broad-based as the Boy Scouts should not have been granted an exemption from the state law.

But the Court’s analysis in \textit{Dale} regarding whether New Jersey’s interests in protecting gay people justified its burdening of the Boy Scouts’ expressive association rights was neither thorough nor thoughtful. The Court’s “analysis” consisted of the following three sentences:

\begin{quote}
We have already concluded that a state requirement that the Boy Scouts retain Dale as an assistant scoutmaster would significantly burden the organization’s right to oppose or disfavor homosexual conduct. The state interests embodied in New Jersey’s public
\end{quote}
accommodations law do not justify such a severe intrusion on the Boy Scouts’ rights to freedom of expressive association. That being the case, we hold that the First Amendment prohibits the State from imposing such a requirement through the application of its public accommodations law.153

“That being the case?” The very lack of analysis in the Court’s opinion—the simple reliance on these conclusory words—was a slap in the face of gay people.154

The plurality in the Georgetown case did a better job of analyzing the compelling interest a government might have in prohibiting discrimination on the basis of sexual orientation. After delving extensively into the literature regarding sexual orientation, as well as exploring the legislative history of the D.C. Council’s ordinance, the plurality noted the following:

The Council determined that a person’s sexual orientation, like a person’s race and sex, for example, tells nothing of value about his or her attitudes, characteristics, abilities or limitations. It is a false measure of individual worth, one unfair and oppressive to the person concerned, one harmful to others because discrimination inflicts a grave and recurring injury upon society as a whole. To put an end to this evil, the Council outlawed sexual orientation discrimination in employment, in real estate transactions, in public accommodations, in educational institutions, and elsewhere. Such comprehensive measures were necessary to ensure that “[e]very individual shall have an equal opportunity to participate fully in the economic, cultural and intellectual life of the District, and to have an equal opportunity to participate in all aspects of life . . . .”155

The plurality also invoked the majestic sweep of the federal constitutional liberty interest in underscoring the importance of a State interest in prohibiting discrimination based on sexual orientation:

The compelling interests, therefore, that any state has in eradicating discrimination against the homosexually or bisexually oriented include the fostering of individual dignity, the creation of a climate and environment in which each individual can utilize his or her

153 Boy Scouts of Am., 530 U.S. at 659 (emphasis added).
154 For additional cases finding that a civil rights law may not be applied in a manner that burdens the religious beliefs of an individual or organization because of the lack of a compelling state interest, see Thomas v. Anchorage Equal Rights Comm’n, 165 F.3d 692, 716 (9th Cir. 1999), vacated, 220 F.3d 1134 (9th Cir. 2000) (no compelling government interest in protecting unmarried, cohabiting heterosexual couples); Walker v. First Orthodox Presbyterian Church of San Francisco, No. 760-028, 1980 WL 4657, at *1 (Cal. Super. Ct. Apr. 3, 1980) (interest of city of San Francisco in its gay rights ordinance was not compelling).
potential to contribute to and benefit from society, and equal protection of the life, liberty and property that the Founding Fathers guaranteed to us all.\footnote{Id. at 37.}

Ensuring that LGBT people can live honestly and safely in all aspects of their social lives requires that society set a baseline of non-discrimination on the grounds of sexual orientation and gender identity. If individual business owners, service providers and employers could easily exempt themselves from such laws by making credible claims that their belief liberty is burdened by the law, LGBT people would remain constantly vulnerable to surprise discrimination. If I am denied a job, an apartment, a room at a hotel, a table at a restaurant or a procedure by a doctor because I am a lesbian, that is a deep, intense and tangible hurt. That hurt is not alleviated because I might be able to go down the street and get a job, an apartment, a hotel room, a restaurant table or a medical procedure from someone else. The assault to my dignity and my sense of safety in the world occurs when the initial denial happens. That assault is not mitigated by the fact that others might not treat me in the same way.\footnote{As the court observed in \textit{Smith v. Fair Employment Housing Commission}, “[T]o permit Smith to discriminate would sacrifice the rights of her prospective tenants to have equal access to public accommodations and their legal and dignity interests in freedom from discrimination based on personal characteristics.” 913 P.2d 909, 925 (Cal. 1996). \textit{Cf.} \textit{Heart of Atlanta Motel, Inc. v. United States} 379 U.S. 241, 250 (1964) (“the fundamental object of [federal civil rights legislation] was to vindicate ‘the deprivation of personal dignity that surely accompanies denials of equal access to public establishments.’” (quoting S. REP. NO. 87-2, at 16-17 (1964))).}

Thus, for all my sympathy for the evangelical Christian couple who may wish to run a bed and breakfast from which they can exclude unmarried, straight couples and all gay couples, this is a point where I believe the “zero-sum” nature of the game inevitably comes into play. And, in making the decision in this zero-sum game, I am convinced society should come down on the side of protecting the liberty of LGBT people. Once individuals choose to enter the stream of economic commerce by opening commercial establishments, I believe it is legitimate to require that they play by certain rules.\footnote{A number of writers have made the argument that entering the stream of commerce should legitimately subject an enterprise to civil rights laws. \textit{See}, e.g., Mark Hager, \textit{Freedom of Solidarity: Why the Boy Scout Case Was Rightly (But Wrongly) Decided}, 35 CONN L. REV. 129, 157 (2002) (contending that “[o]rganizations engaged in commerce should not be cloaked with fundamental or First Amendment freedom to exclude members on any bases they see fit”); Maureen E. Markey, \textit{The Landlord/Tenant Free Exercise Conflict in a Post-RFRA World}, 29 RUTGERS L.J. 487, 499 (1998).} If the
government tolerated the private exclusionary policies of such individuals in the commercial sector, such toleration would necessarily come at the cost of gay people’s sense of belonging and safety in society. Just as we do not tolerate private racial beliefs that adversely affect African-Americans in the commercial arena, even if such beliefs are based on religious views, we should similarly not tolerate private beliefs about sexual orientation and gender identity that adversely affect LGBT people.\textsuperscript{159}

But that is not to say that we should not acknowledge that this zero-sum game \textit{has} resulted in a burden on some individuals’ belief liberty and that we not be forced to articulate why such a burden is appropriate. A government’s reasons for burdening liberty should be, as Professor Rebecca Brown argues, “accessible to all in a meaningful sense.”\textsuperscript{160} Brown defines these as reasons that “have some public and secular component to them and [do] not rest entirely on personal moral belief systems not universally shared.”\textsuperscript{161} While I am not sure I would use Brown’s formulation of a “personal moral belief system[] not universally shared,” I do believe that the reasons given by the State must “reflect the public good.”\textsuperscript{162} And ensuring that members of the public who have a morally neutral characteristic are able to live without fear or vulnerability of discrimination based on that characteristic certainly seems to be a reason that reflects the public good.

The question remains, however, whether there are limited situations in which a \textit{legislature} should choose to protect the belief liberty of individuals or institutions over the

\textsuperscript{159} For cases finding that the government interest in prohibiting racial discrimination was sufficiently compelling to justify a burden on religious beliefs, see Bob Jones Univ. v. United States, 461 U.S. 574 (1983); Newman v. Piggie Park Enters., 256 F. Supp. 941 (D.S.C. 1966), \textit{rev’d}, 377 F.2d 433 (4th Cir. 1967), \textit{aff’d}, 390 U.S. 400 (1968).

\textsuperscript{160} Brown, \textit{supra} note 61, at 1547.

\textsuperscript{161} \textit{Id.}

\textsuperscript{162} \textit{Id.} Brown draws significantly on the work of political theorists to argue that “[a] major contribution of deliberative democracy theory to constitutional theory is its insight that a commitment to equality of all citizens gives rise to an obligation to justify laws with reasons that are accessible to all.” \textit{Id.} at 1548 (citing LAWRENCE C. BECKER, \textsc{Reciprocity} 73-144 (1986); AMY GUTMANN & DENNIS THOMPSON, \textsc{Democracy and Disagreement} 55-59, 65, 84-85 & 377 n.43 (1996)).
interest in protecting the safety and dignity of LGBT people. I believe there are two situations that are worth exploring.

As a general matter, once a religious person or institution enters the stream of commerce by operating an enterprise such as a doctor’s office, hospital, bookstore, hotel, treatment center and so on, I believe the enterprise must adhere to a norm of non-discrimination on the basis of sexual orientation and gender identity. This is essential so that an individual who happens upon the enterprise is not surprised by a denial of service and/or a directive to go down the street to a different provider. While I was initially drawn to the idea of providing an exemption to those enterprises that advertise solely in very limited milieus (such as the bed and breakfast that advertises only on Christian Web sites), I became wary of such an approach as a practical matter. The touchstone needs to be, I believe, whether LGBT people would be made vulnerable in too many locations across society. An “advertising exception” seemed potentially subject to significant abuse.

Nevertheless, I believe there might be a more limited exception that would be justified. There are enterprises that are engaged in by belief communities (almost always religious belief communities) that are specifically designed to inculcate values in the next generation. These may include schools, day care centers, summer camps and tours. These enterprises are sometimes for-profit and sometimes not-for-profit. They are within the general stream of commerce, together with many other schools, day care centers, summer camps and tours.

I believe a subset of these enterprises present a compelling case for the legislature to provide an exemption in a law mandating non-discrimination based on sexual orientation. The criteria for an exemption should be as follows: the enterprise must present itself clearly and explicitly as designed to inculcate a set of beliefs; the beliefs of the enterprise must be clearly set forth as being inconsistent with a belief that homosexuality is morally neutral and the enterprise must seek to enroll only individuals who wish to be inculcated with such beliefs.

The dignity of LGBT individuals would still be harmed by excluding such enterprises from the purview of an anti-discrimination law. But in weighing the interests between the groups, I believe the harm to the enterprise in having its inculcation of values to its members significantly hampered (as
I believe it would be if it was forced to comply with such a law) outweighs the harm to the excluded LGBT members.

I am more hesitant regarding the second limited circumstance, but I offer it for analysis and criticism.\(^{163}\) I believe there may be a legitimate exemption that should be provided with regard to leadership positions in enterprises that are more broadly represented in commerce. Many religious institutions operate the gamut of social services in the community, such as hospitals, gyms, adoption agencies and drug treatment centers. These enterprises are open and marketed to the general public and often receive governmental funds. It seems quite appropriate to require that the enterprises’ services be delivered without regard to sexual orientation and that most employment positions in these enterprises be available without regard to sexual orientation.

But the balance of interests, it seems to me, shifts with regard to the leadership positions in such enterprises. Particularly for religiously-affiliated institutions, I believe it is important that people in leadership positions be able to articulate the beliefs and values of the enterprise. If the identity and practice of an openly gay person will stand in direct contradiction to those beliefs and values, it seems to me that the enterprise suffers a significant harm. Thus, in this limited circumstance, a legislature may perhaps legitimately conclude that the harm to the enterprise will be greater than the harm to the particular individuals excluded from such positions and provide a narrow exemption from a non-discrimination mandate in employment.

IV. CONCLUSION

In his response to my article, Andy Koppelman correctly observes that my suggestions are radical.\(^{164}\) Calling for judicial and legislative acknowledgment of a “belief liberty” that encompasses any sincerely held core belief can indeed be

\(^{163}\) My thoughts in this area are shaped by the thirteen years that I represented Catholic Charities USA (from 1993 through 2006) in the federal legislative arena as Director of the Federal Legislation Clinic at Georgetown University Law Center.

viewed as a radical departure from the more traditional focus on just religiously based beliefs.\textsuperscript{165}

As I hope my analysis has made clear, however, such an acknowledgement need not bring the mechanisms of our complex society to a screeching halt. For a court to invalidate a law based on its burdening of belief liberty, the court must first find that the legislature could not have legitimately enacted the law as a “reasonable resolution of contending values.”\textsuperscript{166} By contrast, a legislature is permitted greater latitude and greater responsibility to consider and weigh these contending values when it enacts legislation in the first place—exactly as it should be in a democratic process.

My primary argument is that we gain something as a society if we acknowledge that a law requiring individuals to act in a certain way might burden some individuals’ belief liberty. Such an acknowledgement is necessary if we wish to be respectful of the whole person. Protecting one group’s identity liberty may, at times, require that we burden others’ belief liberty. This is an inherent and irreconcilable reality of our complex society. But I would rather live in a society where we acknowledge that conflict openly, and where we engage in an honest dialogue about what accommodations might be possible given that reality, than to live in a society where we pretend the conflict does not exist in the first place.

But in dealing with this conflict, I believe it is essential that we not privilege moral beliefs that are religiously based over other sincerely held core, moral beliefs. Laws passed pursuant to public policies may burden the belief liberty of those who adhere to either religious or secular beliefs. What seems of paramount importance to me is that we respect these core beliefs and do the best we can in this imperfect world of ours to protect both identity liberty and belief liberty to the greatest extent possible.

\textsuperscript{165} As Koppelman observes, however, some members of the Supreme Court have, at times, been quite expansive with what they consider to be a “religiously based” belief. See Welsh v. United States, 398 U.S. 333, 340 (1970).

\textsuperscript{166} Glucksberg, 521 U.S. at 768 (Souter, J., concurring).
You Can’t Hurry Love

WHY ANTIDISCRIMINATION PROTECTIONS FOR
GAY PEOPLE SHOULD HAVE RELIGIOUS
EXEMPTIONS

Andrew Koppelman†

Should those who have religious objections to employing gay people or renting them housing be allowed to discriminate? There has been a lot of talk lately about a possible conflict between gay rights and religious liberty.¹ Must there be such a conflict?

Chai Feldblum’s article admirably delineates the high moral stakes on both sides.² As she lucidly shows, many courts and commentators have gotten undeserved comfort by occluding one horn of the dilemma, and thus making the accommodation problem seem easier than it is. By showing the similarities between the felt situation of both sides, Feldblum has shown keener perception than most courts that have addressed the problem.

I propose two friendly amendments to Feldblum’s analysis.

First, although Feldblum is correct to stress the burden that antidiscrimination laws can place on religious persons who object to facilitating homosexual conduct, she is mistaken in her legal analysis of this burden. Under present law, the burden does not have constitutional status. Courts are obligated, under the law of some states, to weigh that burden

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against the purposes of an antidiscrimination law. But that obligation is not grounded in her novel concept of “belief liberty.” Rather, it rests on a specific obligation to accommodate religion. Feldblum is evidently uncomfortable with the decision of so many legislatures and courts to single out religion for special treatment. But her broader concept of “belief liberty” is an invitation to chaos, because it would create a presumptive right to disobey any law you dislike intensely.

Second, when she finally performs the actual weighing of interests at the end of her article, she is surprisingly conclusory. She argues that religious claims to exemption from antidiscrimination laws should almost always be rejected, because any act of discrimination is “a deep, intense and tangible hurt” that the state has a compelling interest in preventing. She loses sight, however, of comparable intangible burdens felt by conservative Christians. A more precise account of the balance suggests that religious objectors should usually be accommodated.

Part I of this Comment considers the constitutional significance of the burden that antidiscrimination laws impose on religious objectors. Part II explains why religious exemptions are a sensible way to address America’s cultural division over the moral status of homosexuality. Part III examines Harry Blackmun’s ambivalent attitudes toward homosexuality, which are described so well by Feldblum, and shows why his somewhat equivocal defense of gay rights was politically and even normatively appealing because it was responsive to that division. Part IV takes up the problem of coexistence within a culture in which citizens have such dramatically differing views of sexual ethics. It concludes that Feldblum’s aspiration to create a world in which gay people need never fear insult is not an aspiration that law should try to enforce, because enforcement would require silencing conservative Christians who, like gay people, should be able to say what they believe, however distressing that may be to their fellow citizens.

\[^{3}\text{Id. at 119.}\]
I. THE NATURE AND SIGNIFICANCE OF THE BURDEN

Proposing an elaboration of Justice Souter’s concurrence in Washington v. Glucksberg, Feldblum argues that there should be a presumptive immunity, under substantive due process, from having to engage in conduct “(or being precluded from engaging in certain conduct) [when such compulsion] will undermine an individual’s strongly held beliefs.” When an individual alleges that obeying a given law will “burden[] an individual’s beliefs that constitute a core aspect of that individual’s sense of self,” the courts “should err on the side of accepting the person’s allegation.” Although all of the claims in the cases she discusses were based on religious belief, Feldblum is not inclined to single out religion for special treatment. She indicates that she would extend accommodation “whether these beliefs are religiously based or secularly based.”

The rule proposed by Feldblum—nowhere stated by Souter—is breathtakingly broad. It is often the case that persons who disobey laws disagree with those laws, and sometimes they feel those disagreements intensely. Consider John Rapanos, who was so unhappy with environmental regulations that prevented him from filling in his wetlands that he ultimately defied the law, went to prison, and litigated his fines all the way to the Supreme Court. Was the state constitutionally required to accommodate him, solely on the basis of how strongly he felt about it? There is a virtually infinite universe of possible exemption claims here. Under Feldblum’s test, the entire population of Southern white racists in 1964, who had strong identity-based objections to civil rights laws, would have had a presumptive claim to accommodation. Unsurprisingly, courts have never adopted a broad exemption rule of the kind that Feldblum contemplates.

She evidently is driven to this extreme position by pressure from two sides, her sympathy with some religious accommodations and her discomfort with the law’s singling out

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4 Id. at 101 & n.102 (citing Washington v. Glucksberg, 521 U.S. 702, 762 (1997) (Souter, J., concurring)).
5 Id. at 103.
6 Id. at 105.
7 Id.
8 Feldblum, supra note 2, at 64; see also id. at 84.
of religion. In this she is not alone. She is only the latest of a long series of efforts to salvage religious accommodation under some description of what is being accommodated that is broader than “religion,” because it seems unfair to single out religion for special treatment.

Her basic approach appears to be to accommodate objections to a law when they are felt with particular intensity by the objector. The classic statement of this position is Justice Harlan’s concurrence in Welsh v. United States, which involved a draftee who petitioned for conscientious objector status and who conscientiously objected to participation in any war, but who stated that he did not believe in God and that his beliefs were not religious. A four-judge plurality in the Supreme Court concluded that Welsh’s beliefs were “religious” as that term was defined in the pertinent statute. What was necessary was “that this opposition to war stem from the registrant’s moral, ethical, or religious beliefs about what is right and wrong and that these beliefs be held with the strength of traditional religious convictions.” Justice Harlan, concurring in the result, thought that the Court’s removal of the statute’s theistic requirement was “a remarkable feat of judicial surgery” that was inconsistent with the clear intentions of Congress. But he joined the result, because he thought, as the Court of Appeals had thought in Seeger, that the law impermissibly discriminated on the basis of religion. If Congress was going to create exemptions, Harlan thought, it was constitutionally required to show “equal regard for men of nonreligious conscience.” “The common denominator must be the intensity of moral conviction with which a belief is held.” A dissenting judge in the Court of Appeals below had come to the same conclusion, noting that Welsh was “willing to go to jail rather than do violence to his beliefs, which is more than

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11 Id. at 343-44.
12 Id. at 340.
13 Id. at 351 (Harlan, J., concurring).
15 Welsh, 398 U.S. at 362 (Harlan, J., concurring).
16 Id. at 360 n.12.
17 Id. at 358; see also id. at 366 (speculating that the policy of granting exemptions is based on “the assumption that beliefs emanating from a religious source are probably held with great intensity”).
can be said for many who profess a belief in a Supreme Being.”

The problem with the focus on intensity is that it is both overinclusive and underinclusive. It is overinclusive because the fact that I am experiencing some intense desire, without more, does not state a claim that other people are obligated to honor. It is underinclusive because some religious claims are not based on core aspects of a person’s sense of self. The interpretation of the free exercise clause that now prevails does not require the state to accommodate religion, but it permits such accommodation, and the federal government and numerous states have accepted the invitation with laws that mandate religious accommodation whenever this does not conflict with a compelling state interest. When religion is accommodated, it is accommodated whether or not the objector’s core sense of self is implicated. Whether Feldblum likes it or not, the law presently singles out religion for special treatment.

The potentially breathtaking scope of Feldblum’s proposed rule is apparent when one considers her critique of Rumsfeld v. Forum for Academic & Institutional Rights, Inc. (“FAIR”), the case in which the Court rejected the First Amendment claims of law schools that wanted to exclude military recruiters. The schools were doing this because the military’s ban on openly gay personnel violated the schools’ nondiscrimination policies. Feldblum argues that the schools (which, incidentally, are not natural persons; it is not apparent how an institution can have a core sense of self) thought “that law students should be hired without regard to their sexual orientation” and that “aiding and abetting any recruiter who

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20 For a survey, see Douglas Laycock, Comment, Theology Scholarships, the Pledge of Allegiance, and Religious Liberty: Avoiding the Extremes but Missing the Liberty, 118 HARV. L. REV. 155, 210-12 & nn.388-73 (2004).
22 For an argument that this is not as unfair as Feldblum appears to think, see Andrew Koppelman, Is It Fair to Give Religion Special Treatment?, 2006 U. ILL. L. REV. 571.
24 Id. at 1302.
took sexual orientation into account in hiring was unjust."\textsuperscript{25}
This, Feldblum thinks, made out a powerful claim: "Because
the belief itself related to conduct (i.e., it is unjust to aid and
abet a discriminatory recruiter), the mandate to engage in
certain conduct (i.e., treat military recruiters the same as other
recruiters) necessarily burdened that belief."\textsuperscript{26}
Feldblum thinks that the Court simply refused to accept
that the required admission of military recruiters burdened the
law schools’ expressive beliefs. But the Court’s opinion took no
view about whether the schools’ beliefs were burdened. The
Court just did not care about that. It did not suggest that an
objector to a law ever stated a claim by showing that obedience
burdened his beliefs.
Consider the implications of the opposite view. Federal
regulations now require cars to have airbags.\textsuperscript{27} These
regulations were adopted despite the resistance of automobile
manufacturers.\textsuperscript{28} When new cars conspicuously have airbags,
this is reasonably understood as sending a message that
(1) airbags are necessary to make cars safe, and (2) their
inclusion is cost-justified—both propositions from which the
manufacturer may dissent. Depending on how strongly the
manufacturer feels about the matter (and let’s assume a sole
proprietor, to avoid the problem of corporations having beliefs),
does the manufacturer not have a powerful argument that his
expressive beliefs are being burdened?\textsuperscript{29}

The intense preferences of persons are, of course,
relevant to policymaking. One ought to accommodate them if
possible. But they do not rise to the level of constitutional
claims.

One advantage to singling out religion as a basis for
exemptions is that religious claims are, in their nature,
available only to those claimants who have a specifically
religious basis for objecting to obeying a law. It is a matter of

\textsuperscript{25} Feldblum, \textit{supra} note 2, at 113.
\textsuperscript{26} \textit{Id.}
\textsuperscript{28} See \textit{Motor Vehicle Mfrs. Ass'n of the United States, Inc. v. State Farm Mut.
\textsuperscript{29} Feldblum’s proposal, and more generally the constitutional claim of the law
schools in \textit{FAIR}, is thus open to the same objections I have made against a broad
freedom of expressive liberty. \textit{See Andrew Koppelman, Signs of the Times: Dale v. Boy
Scouts of America and the Changing Meaning of Nondiscrimination}, 23 \textit{Cardozo L.
Rev.} 1819 (2002); \textit{see also Andrew Koppelman and Tobias Barrington Wolff, The
record that such claims have not arrived in an unmanageable flood.\textsuperscript{30} This does not resolve the question of what to do with those claims. They will be more or less persuasive in a vast array of possible situations.\textsuperscript{31} But at least they will be unusual and idiosyncratic, and that fact alone may be relevant to the weighing of the accommodation claim. It is, in fact, relevant to the specific question of religious exemptions from discrimination laws.

II. SHOULD THERE BE RELIGIOUS EXEMPTIONS FROM ANTIDISCRIMINATION PROTECTION OF GAY PEOPLE?

In order to decide whether religious objectors ought to be excused from compliance with a law protecting gay people from discrimination, we need to consider why there are such laws in the first place.

The general rule, in employment decisions, is that of employment at will. An employer normally has the privilege of refusing to hire, or of firing, employees for any reason or no reason. He need not justify these actions to any official. Antidiscrimination laws, such as the Civil Rights Act of 1964, are exceptions to this general rule. So long as an employer does not engage in the enumerated types of discrimination, she has the privilege of being as arbitrary as she likes in her hiring. I can, for example, absolutely refuse to hire anyone whose eyebrows are not at least three inches long.

It is important to understand the reasons for the rule of employment at will, so that we can understand what we are doing when we depart from that rule. One traditional justification is rights-based: people have a right, it is sometimes said, to do what they like with their private

\textsuperscript{30} See Amy Adamczyk, John Wybraniec, & Roger Finke, Religious Regulation and the Courts: Documenting the Effects of Smith and RFRA, 46 J. CHURCH & ST. 237, 250 tbl.1 (2004). In the nine and one-quarter years before Employment Division v. Smith, 494 U.S. 872 (1990), held that there is no right to religious exemptions from laws of general applicability, there were 310 free exercise claims reported, with a success rate of 39.5%. Id. In the next three and one-half years, the number of filed claims plunged to thirty-eight, and the success rate dropped to 28.4%. Id. Under the Religious Freedom Restoration Act of 1993, 42 U.S.C. § 2000bb, which temporarily restored the “compelling interest” test (until the Supreme Court struck it down in City of Boerne v. Flores, 521 U.S. 507, 511 (1997)), success rates rose to 45.2% and the number of filed claims in that three-year period rose to 114, perhaps in response to the strong legislative signal that courts should take religious impact very seriously. Id. Even at its peak, this is hardly an overwhelming volume of claims.

property. The bankruptcy of this justification became clear during the debate over the Civil Rights Act of 1964, which then-presidential candidate Barry Goldwater opposed on libertarian grounds. The Civil Rights Act is not an invasion of our precious liberties. On the contrary, it diminishes the amount of oppression in the world. The idea of private property is not as sacrosanct as it once was, because the uses of that property can have public effects that are legitimate objects of legislative concern. Even Goldwater eventually abandoned the libertarian argument and supported antidiscrimination protection for gay people.

The more persuasive justification for the rule of employment at will is efficiency-based. It would be a terrible burden on the economy for government officials to have to approve every firing, much more every refusal to hire, that takes place in the private sector. Moreover, there is little reason to think that most types of arbitrary refusal to hire are likely to have much effect on anyone’s opportunities. Although I may refuse to hire anyone whose eyebrows are less than three inches long, other employers will compete for the services of the short-eyebrowed, and so will bid their wages up to pretty much the same level that they would have been if I had been willing to hire them. And the market will also punish me for my foolishly discriminatory hiring practices, since competent short-eyebrowed workers will go to work for my competitors. My tendency to discriminate means that I am turning away better workers and hiring worse ones. The overall tendency is for people like me to be driven out of the market.

Considerations of this sort led Richard Epstein to argue that the Civil Rights Act ought to be repealed, because it interfered with freedom of contract for no good reason. In a free market, he argued, we can expect that blacks’ wages (for instance) will be as high as they can be. Epstein did not

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32 For arguments of this sort, see AYN RAND, THE VIRTUE OF SELFISHNESS: A NEW CONCEPT OF EGOISM 126-34 (1964); Michael Levin, Negative Liberty, 2 SOC. PHIL. & POLY 84, 98-100 (1984).
33 See RICK PERLSTEIN, BEFORE THE STORM: BARRY GOLDBERG AND THE UNMAKING OF THE AMERICAN CONSENSUS 363-64 (2001); see also id. at 462 (quoting Goldwater speech, co-authored by William Rehnquist, declaring that “the freedom to associate means the same thing as the freedom not to associate”).
36 Id. at 28-58.
persuade many people. The point most commonly made by his critics was that he had left culture out of his model. Some groups are subject to pervasive discrimination. At least when the Civil Rights Act was enacted, his critics argued, racism was sufficiently pervasive to withstand the egalitarian tendencies of a well-functioning free market.\(^37\) Antidiscrimination law can have a powerful effect on economic opportunity. We know that black wages, for instance, went up dramatically after the act was passed. In 1964, the median income of nonwhite males was 57% of median white male income.\(^38\) By 1985, that ratio had risen to 66%.\(^39\) The proportion of black men working as professionals or managers relative to whites rose from 32% to 64%.\(^40\) And the most dramatic progress came in the first ten years after the Act.

Epstein does not succeed in showing that antidiscrimination law should not exist, but he does show why the burden is on those who want antidiscrimination law to be extended to new classes, and what it is that they need to show. Anyone who wants to extend antidiscrimination protection to a new class needs to show that the class is subject to discrimination that is so pervasive that markets will not solve the problem.

This is not hard to show in the case of lesbians and gay men. The intensity with which gay people have been despised in American culture is well documented,\(^41\) and good scholarship, some of it by Feldblum herself, has now dispelled Antonin Scalia’s ignorant claim that all gays “have high


\(^{39}\) Id.

\(^{40}\) Id.

There is plenty of reason to think that antigay discrimination is pervasive enough, and has a sufficiently severe effect on the economic opportunities of gay people, to warrant protection.

A lot of legislatures have been persuaded by these arguments. In twenty-two states as well as the District of Columbia and many municipalities, discrimination against gay people is prohibited. If these statutes are enforced, then in those jurisdictions, overt discrimination against gays will become like discrimination against the long-eyed: if it happens once in a while, it will not make any economic difference. The preconditions for Epstein’s economic defense of a right to discriminate are not always present—that is why his general argument against antidiscrimination law is wrong—but they will be present here.

And there is every reason to think that religious exemptions will not often be sought. Antigay discrimination is now sufficiently stigmatized that a business that openly discriminates is likely to pay an economic price for doing so. When religious exemptions are available, they are an affirmative defense against the enforcement of the law. The defendant charged with discrimination carries the burden of pleading, the burden of producing evidence showing that the exemption is applicable, and the burden of persuasion. An antidiscrimination law with a religious exemption is nothing at all like a regime with no such law. The difficulties should not be exaggerated; conspicuously religious discriminators are so likely to prevail in their defenses that they are unlikely to be sued in the first place. But there are unlikely to be huge

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44 This was emphasized in an amicus brief by the Christian Legal Society in Romer v. Evans, which argued that this burden on the religious constituted a compelling reason to abolish all antidiscrimination protection for gay people. Brief for Christian Legal Society as Amici Curiae Supporting Petitioners, Romer v. Evans, 517 U.S. 620 (1996) (No. 94-1039), 1995 WL 17008428. This argument proves far too much. It would argue for the abolishment of all laws to which some religious persons have objections (which probably means, all laws).
numbers of them, at least in most parts of most jurisdictions that protect gay people from discrimination.

This is perhaps why Feldblum ignores the economic rationale for antidiscrimination protection. Her concern about antigay discrimination is not, ultimately, economic. It is more precisely dignitary.

Ensuring that LGBT people can live lives of honesty and safety in all aspects of their social lives requires that society set a baseline of non-discrimination on the grounds of sexual orientation and gender identity. If individual business owners, service providers and employers could easily exempt themselves from such laws by making credible claims that their belief liberty is burdened by the law, LGBT people would remain constantly vulnerable to surprise discrimination. If I am denied a job, an apartment, a room at a hotel, a table at a restaurant or a procedure by a doctor because I am a lesbian, that is a deep, intense and tangible hurt. That hurt is not alleviated because I might be able to go down the street and get a job, an apartment, a hotel room, a restaurant table or a medical procedure from someone else. The assault to my dignity and my sense of safety in the world occurs when the initial denial happens. That assault is not mitigated by the fact that others might not treat me in the same way.\textsuperscript{45}

There is something odd about this passage. The parallels between the burden on gay people and the burden on Christians, so nicely drawn at the beginning of the article, have entirely disappeared. What about the right of conservative Christians to “live lives of honesty?” If they are “constantly vulnerable” to forced association with gay people, will this not be “a deep, intense and tangible hurt” to them?

The great attraction of regulation-plus-exemptions is that it lowers the stakes and makes possible a legislative compromise that does not threaten the deepest interests on either side. Feldblum even acknowledges this; she is willing to consider exemptions as part of a legislative compromise “in a negotiated setting with those whose beliefs will be adversely impacted by the law.”\textsuperscript{46} But put that way, it appears simply as a tactical concession, with no principled underpinning. The case for exemptions is stronger than that.

The burden of complying with antidiscrimination rules has become one of the premier concerns of conservative Christians, who tend to understand their opposition to gay rights to be defensive in nature. They have been collecting

\textsuperscript{45} Feldblum, \textit{supra} note 2, at 119.

\textsuperscript{46} \textit{Id.} at 116.
horror stories which, they argue, show that gay rights are a threat to religious liberty.\footnote{See, e.g., JANET L. FOLGER, THE CRIMINALIZATION OF CHRISTIANITY (2005); ALAN SEARS & CRAIG OSTEN, THE HOMOSEXUAL AGENDA: EXPOSING THE PRINCIPAL THREAT TO RELIGIOUS FREEDOM TODAY (2003); Robert H. Knight, The Corporate Curtain: How Companies Are Using Views on Homosexuality to Punish their Christian Employees, Concerned Women for America, Jan. 20, 2006, http://www.cwfa.org/articledisplay.asp?id=9808&department=CFI&categoryid=papers; Douglas W. Kmiec, Same-Sex Marriage and the Coming Anti-Discrimination Campaigns Against Religion, Mar. 8, 2006, http://www.becketfund.org/files/3edbb.pdf.} Reasonable gay rights proponents should take these concerns seriously and seek to accommodate them where this is possible—not just because it is politically sensible (though it is), but because it is the right thing to do.

Feldblum claims that gay people are hurt by even one instance of discrimination. They are entitled never to have that happen to them, ever. But this is not precisely an argument. It is an assertion. Just why should this right be construed in this way, rather than more modestly?

Feldblum here does not seem quite to have the courage of her convictions, because she silently puts her thumb on the nondiscrimination side of the scales. Just how is the ability of gay people “to live lives of honesty and safety”\footnote{Feldblum, supra note 2, at 76.} jeopardized by the occasional discriminator? There has, of course, been ubiquitous violence against gays and the law needs to suppress that,\footnote{See Kendall Thomas, Beyond the Privacy Principle, 92 COLUM. L. REV. 1431, 1462-70 (1992).} but the discriminator proposes to exclude gay people, not beat them up. In the story with which her paper begins, a guesthouse owner unfairly surprises a gay wedded couple by forbidding them to sleep together.\footnote{Feldblum, supra note 2, at 61-62.} But, of course, discrimination is one thing and unfair surprise is another.\footnote{In her hypothetical, Feldblum states that the gay couple made a reservation. It is an interesting question whether the guesthouse owner is liable for breach of contract. Courts normally fill in unspecified contract terms by reference to ordinary usage and reasonable expectations. In a state where there is an antidiscrimination statute, from which the owner claims a religious exemption, the burden is likely to be on the owner to tell those making reservations that, unlike almost all other hoteliers in the state, he deviates from the ordinary usage and custom. See E. ALLAN FARNSWORTH, CONTRACTS § 7.13, at 483-86 (3d ed. 1999). An owner who waits to state his objections until after travelers have arrived is not likely to get much sympathy from the courts, even if the law allows a religious exemption. Thanks to Richard Speidel for helpful discussion of this example.} The unfair surprise is a cheat. It has nothing to do with the discrimination question.

Feldblum’s position becomes even more puzzling when she concedes that she can tolerate discrimination in a very
narrow set of cases: “enterprises that are engaged in by communities of faith (almost always religious communities) that are specifically designed to inculcate values in the next generation” and that “seek to enroll only individuals who wish to be inculcated with such beliefs.”

Gay people (with the important exception of adolescents in conservative Christian families) are unlikely ever to encounter such enterprises. Apparently, antigay beliefs, and actions based on those beliefs, are acceptable so long as they remain deeply closeted.

What Feldblum really wants is full social acceptance for gay people. She wants them to be free from a certain kind of insult. There can be discriminatory entities out there, but she does not want to hear about them. In the hypothetical with which she begins, her wedded couple would be unjustly injured even if the guesthouse’s web homepage clearly indicated that it turns away unmarried and gay couples.

Now, it is possible to bring that about in the long run. Social change can sometimes be as complete as that. My father told me about getting beaten up on the way to school because he was Jewish. The last time I was so much as subjected to an anti-Semitic remark was decades ago.

But that is not the state of contemporary American society with respect to homosexuality. Many Americans continue to hold the second of the three views Feldblum describes, that gay sexuality is not good, but not intrinsically evil either. Their reaction to homosexuality is not the “we love you” that she eventually elicited from Justice Blackmun. It is “we love you anyway.” Though Feldblum does not disaggregate further, this second view comes in different varieties. Some people regard homosexuality as a kind of handicap, morally neutral but unfortunate inasmuch as it makes it impossible to create children through ordinary (and relatively inexpensive!) biological processes. Others regard it as a moral failing, but a venial one. And of course all of these views frequently coexist in the same people, in an incoherent bricolage. Justice Blackmun’s ambivalence, which Feldblum describes so tellingly, is not atypical.

52 Feldblum, supra note 2, at 121.
53 Those who think so include some gay people. See, e.g., Stephen Macedo, *Homosexuality and the Conservative Mind*, 84 GEO. L.J. 261, 269-70 (1995). On the other hand, for many, the ability to have sex without worrying about pregnancy is a positive good.
For just that reason, however, Blackmun’s ambivalent response may have been just what was needed in Blackmun’s time.

III. THE VIRTUES OF JUSTICE BLACKMUN’S AMBIVALENCE

As Feldblum emphasizes, Blackmun’s dissent in *Bowers v. Hardwick* says “there may be many ‘right’ ways of conducting [intimate sexual] relationships.” But Blackmun puts “right” in scare quotes (and says “may be” not “are”), and so ends up being agnostic as between the love you/love you anyway positions. Feldblum in effect proposes to take off the scare quotes, as Blackmun himself did (or at least tried to do) in their conversation.

She has argued elsewhere that we ought to reject liberal neutrality and make our moral judgments about homosexual conduct clear on their face. The basis of gay rights should not be “we love you anyway”; it should be “we love you.” Others have criticized the kind of approach Blackmun makes in *Hardwick* on similar grounds. Thus, for example, Michael Sandel objects that “the toleration [Blackmun’s dissent] defended was wholly independent of the value or importance of the thing being tolerated.”

But there is reason to leave the law ambiguous on certain issues. The law must sometimes reckon with the

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55 The scare quotes are, of course, borrowed from Burger’s *Yoder* opinion, which Blackmun quotes. *Hardwick*, 478 U.S. at 206 (citing *Wisconsin v. Yoder*, 406 U.S. 205, 223-24 (1972)). But Burger does not really mean to be agnostic. It’s clear that he loves the Amish and wishes that more Americans were like them: hardworking, abstemious, and deferential to authority.


problem posed by John Rawls: “[H]ow is it possible for there to exist over time a just and stable society of free and equal citizens, who remain profoundly divided by reasonable religious, philosophical, and moral doctrines?” Rawls thinks that the answer has to be an idea of public reason that can be the basis for an overlapping consensus. As the poll data that Feldblum cites indicates, homosexuality is one of those issues about which we are likely to remain profoundly divided for some time to come.

Two bits of data suggest the wisdom of the kind of bracketing of moral issues that Blackmun’s dissent undertook. A Gallup poll conducted a few days after Hardwick came down found that, by 57% to 34%, Americans thought states should not “have the right to prohibit particular sexual practices conducted in private between consenting adult homosexuals.” On the other hand, in 1986, more than 70% of Americans thought that homosexual sex was always wrong (The number remains a bit above 50%).

Blackmun’s take in Hardwick is theoretically messy for all the reasons rehearsed most prominently by Robert Bork. In a well-known article published in 1971, Bork objects that the Court’s choice of the level at which to define the right to privacy was necessarily arbitrary. Griswold v. Connecticut certainly did not adopt the very broad principle that “government may not interfere with any acts done in private,” but it is hard to explain why the principle should be defined narrowly, as “government may not prohibit the use of contraceptives by married couples.”

Why does the principle extend only to married couples? Why, out of all forms of sexual behavior, only to the use of contraceptives? Why, out of all forms of behavior, only to sex? . . .

To put the matter another way, if a neutral judge must demonstrate why principle X applies to cases A and B but not to case C . . ., he must, by the same token, also explain why the principle is defined as

61 381 U.S. 479 (1965).
Thus, Bork argues, there is no principled way to distinguish the economic liberty at issue in Lochner from the sexual liberty at issue in Griswold. In each case, those whose conduct is restricted by the law would prefer to be unburdened by the restriction, while the majority has a different preference.

Bork's critique is theoretically powerful. No particular privacy interest is derivable from first principles, because those principles do not entail any particular public/private line. The vagueness of the privacy right opens the door for arbitrary and idiosyncratic line-drawing, such as Blackmun's strange fixation on the rights of doctors in Roe v. Wade.

And Blackmun does not really answer Bork, either in Roe or in Hardwick. His defense of decisional privacy does not satisfactorily distinguish abortion and fornication. His idea of spatial privacy, based on the Stanley v. Georgia principle protecting private possession of obscenity, does not explain why illegal drugs and prostitution are not likewise protected. All Blackmun has to go on is an intuition that noncommercial, consensual sexual conduct in the home should be outside the state's power.

Happily for Blackmun, though, that intuition is very widely shared. The virtue of the intuition is that it abstracts away from the evaluative question, where many people's views are much less friendly to gay people. Its vice is precisely the same. Sandel complains that "the analogy with Stanley tolerates homosexuality at the price of demeaning it; it puts homosexual intimacy on a par with obscenity—a base thing that should nonetheless be tolerated so long as it takes place in private." But it is precisely this neutrality that made it possible for Blackmun's reasoning to have such broad appeal.

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63 Id.
64 Id. at 11-12 (citing Griswold v. Connecticut, 381 U.S. 479 (1965) and Lochner v. New York, 198 U.S. 45 (1905)).
65 See KOPPELMAN, THE GAY RIGHTS QUESTION, supra note 41, at 35-52.
67 He did better in his later abortion opinions, where he placed less weight on the substantive due process argument and placed more emphasis on women's equality. See LINDA GREENHOUSE, BECOMING JUSTICE BLACKMUN: HARRY BLACKMUN'S SUPREME COURT JOURNEY 222-27 (2005).
69 SANDEL, supra note 57, at 107.
Feldblum is skeptical of neutrality. But neutrality takes many forms. The political ideal of neutrality toward conceptions of the good is unsustainable at the extremely abstract level proposed by some liberal theorists: the state cannot really be neutral toward all controversial conceptions of the good. Neutrality is nonetheless a valuable political ideal. One of the many ways that government can go wrong is to take a position on some question that it would, all things considered, be better for it to abstain from deciding. The classic example is the question of which (if any) religion is true. The idea of neutrality holds that government ought to avoid this pathology. There is probably an infinite number of ways in which the field of abstinence might be specified, and so there is a lush profusion of possible neutralities. With any particular issue, the question is whether government ought to be neutral with respect to that question.70

With the “we love you/we love you anyway” problem, there is some value in the Court not taking sides, because it has no special expertise in deciding the intrinsic value or lack thereof of homosexual relationships. This is not a question of law at all. It is not the job of a court to tell the rest of us what to value. Imagine a court deciding whether the extinction of endangered species is really something that should bother us.71

What courts can and should do is enforce the Equal Protection Clause. Blackmun did not reach the Equal Protection issue in Hardwick, but, as Linda Greenhouse shows, his understanding of privacy, at least with respect to the core issue (for him) of abortion, became increasingly inflected with equality concerns.72 Blackmun was no longer on the Court when it decided Romer v. Evans,73 but it follows his lead in avoiding any resolution of moral questions.

The question after Romer that a court must decide in any particular case of antigay discrimination is whether a law reflects a bare desire to harm an unpopular group. This is Ely’s notion of prejudice. As John Hart Ely pointed out long ago, “a sincerely held moral objection to the act” of homosexual

70 The argument of this paragraph is developed in detail in Andrew Koppelman, The Fluidity of Neutrality, 66 REV. OF POL. 633 (2004).
71 But for an argument that the Court is coming dangerously close to doing this, see Andrew Koppelman and David Dana, Clean Water is Symbol of the Power of the People, S.F. CHRON., July 23, 2006, at E-3.
72 See GREENHOUSE, supra note 67.
sex is not per se the same thing as “a simple desire to injure the parties involved.”74 Romer asks whether any particular law reflects a bare desire to harm an unpopular group.75

Lawrence v. Texas takes no position on the morality of homosexual conduct when it holds that gay people “are entitled to respect for their private lives.”76 This is just Stanley again. What modern doctrine asks courts to do is to try to decide which is doing the work in any particular statute that burdens gay people. It does not deem moral objections illegitimate. It simply holds that, if a state singles out gays for unprecedentedly harsh treatment, the Court will presume that what is going on is a bare desire to harm, rather than mere moral disapproval.77

The Romer/Lawrence approach shares the virtue of Blackmun’s Hardwick dissent in that it abstracts away from the precise questions that Feldblum would like the courts to take a stand on. So it avoids the messiness of substantive due process, but it preserves the value of abstraction that Blackmun wanted to pursue. That is a virtue. Blackmun is to be praised for doing the precise thing that troubles Feldblum.

IV. INTENDED TO BE HURTFUL

Let us return to the question of religious exemptions. How should that question be resolved if the state is not going to take sides on the moral value of homosexuality?

It is possible for gay people and conservative Christians to live together, each following their own deepest allegiances. But the coexistence that this entails will necessarily be painful for both. The only way to achieve comfort for either would be to make the other disappear or pretend to disappear. Because that is not appropriate, there is no good way to prevent the kind of hurt that Feldblum wants to prevent.

There will be times when it is indeed necessary to silence one of the parties to this dispute: when there is a

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75 See 517 U.S. at 634-35 (“[I]f the constitutional conception of ‘equal protection of the laws’ means anything, it must at the very least mean that a bare . . . desire to harm a politically unpopular group cannot constitute a legitimate governmental interest.” (quoting Department of Agriculture v. Moreno, 413 U.S. 528, 534 (1973))).
77 This interpretation of Lawrence is elaborated and defended in Andrew Koppelman, Lawrence’s Penumbra, 88 Minn. L. Rev. 1171 (2004). For a state Supreme Court decision adopting a similar reading of Lawrence, see Kansas v. Limon, 122 P.3d 22 (Kan. 2005).
likelihood that the speech will involve an abuse of power, or when there is an unusually vulnerable audience. But when neither of these is present, the law, and more generally those wielding power in our society, should try to contain the tension between the two views, rather than trying to silence either.

The difficulty of achieving such coexistence is starkly presented in *Peterson v. Hewlett-Packard Co.*, in which the Ninth Circuit Court of Appeals upheld the dismissal of a claim of religious discrimination. Richard Peterson had been an employee of Hewlett-Packard's office in Boise, Idaho for more than twenty years when his dispute with his employer arose. The company, as part of a workplace diversity campaign, began displaying “diversity posters” that included supportive descriptions of the company’s gay workers. Peterson, who described himself as a “devout Christian,” thought that he had a duty “to expose evil when confronted with sin.” He responded to the posters by placing biblical verses on an overhead bin in his work cubicle, in type large enough to be visible to passersby, which included coworkers and customers. Among these was the following passage from Leviticus 20:13: “If a man also lie with mankind, as he lieth with a woman, both of them have committed an abomination; they shall surely be put to death; their blood shall be put upon them.”

Hewlett-Packard had an anti-harassment policy that prohibited “[a]ny comments or conduct relating to a person’s . . . sexual orientation . . . that fail to respect the dignity and feeling [sic] of the individual.” Peterson’s supervisor removed the materials from his cubicle, and in the next several days he attended a series of meetings with

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78 See, e.g., Bodett v. Coxcom, Inc., 366 F.3d 736 (9th Cir. 2004) (denying religious discrimination claim of conservative Christian supervisor fired after harassing and intimidating openly gay subordinate).
80 Peterson v. Hewlett-Packard Co., 358 F.3d 599 (9th Cir. 2004).
81 Id. at 601.
82 Id.
83 Id.
84 Id. at 601-02.
85 Id. (quoting Leviticus 20:13).
86 Peterson, 358 F.3d at 602.
managers.\textsuperscript{87} The Biblical passages, he explained, were “intended to be hurtful. And the reason [they were] intended to be hurtful is you cannot have correction unless people are faced with truth.”\textsuperscript{88} He expressed his hope that gay co-workers who read the passages “would repent (change their actions) and experience the joys of being saved.”\textsuperscript{89}

Peterson refused to take down his Bible verses unless Hewlett-Packard took down its posters.\textsuperscript{90} Hewlett-Packard gave him time off with pay to reconsider his position, but when he returned to work, he posted the verses again and refused to remove them.\textsuperscript{91} He was fired for insubordination.\textsuperscript{92} His suit for religious discrimination was rejected on summary judgment in federal district court.\textsuperscript{93} The Ninth Circuit affirmed.\textsuperscript{94}

As a legal matter, the courts certainly got it right: Peterson was not subjected to discrimination on the basis of religion, and Hewlett-Packard had the right to fire him. And yet, I wonder whether firing him was the most appropriate course of action for Hewlett-Packard. In light of its diversity campaign, Peterson was obviously an outlier, someone whose views did not represent those of the company. Judge Reinhardt, writing for the Ninth Circuit, placed considerable weight on “Peterson’s intention that his postings be ‘hurtful,’”\textsuperscript{95} and concluded that an employer need not “permit an employee to post messages intended to demean and harass his co-workers.”\textsuperscript{96}

Circuit Judge Reinhardt’s view is far too conclusory. He presumes that it is never appropriate, in civil society, for someone to say things that he knows to be hurtful to others.\textsuperscript{97} But this conclusion is morally and politically loaded. It

\textsuperscript{87} Id.
\textsuperscript{88} Id.
\textsuperscript{89} Id. at 604.
\textsuperscript{90} Id. at 602.
\textsuperscript{91} Id.
\textsuperscript{92} Peterson, 358 F.3d at 602.
\textsuperscript{93} Id.
\textsuperscript{94} Id. at 608.
\textsuperscript{95} Id. at 604 n.3.
\textsuperscript{96} Id. at 607.
\textsuperscript{97} And on this basis, he suggests that Hewlett-Packard may have had an obligation, under the law of workplace harassment, to silence Peterson. This surely goes too far. Harassment law, thus broadly construed, would run afoul of the First Amendment. See Andrew Koppelman, Antidiscrimination Law and Social Equality 245-55 (1996).
presumes that none of us need to hear things that will hurt us.  

Reinhart’s argument draws its power from the analogy with racism: people should not be subjected to ideologies that demean them. In the same way that racism has no legitimate place in the public sphere, one might think that heterosexism should be eradicated. There is a powerful case to be made for the eradication of racism, to the extent that this can be done consistently with free speech guarantees—and of course such guarantees do not apply in the workplace. The First Amendment does not protect you from being fired for your opinions. But the gay rights issue is different. The racism analogy has some power; much of the antigay animus that exists in the United States is just like racism, in the virulence of the rage it bespeaks and the hatred that it directs toward those who are its objects. Not all antigay views, however, deny the personhood and equal citizenship of gay people. Certainly Peterson’s views did not do that. There is a serious discussion to be had here about sexuality and morality. Peterson’s views do not place him beyond the pale of civilized discussion.

It is a disputed question whether the specific hurtful things that Peterson had to say were sound enough to be worth hearing. It is a question about which the state properly ought to be agnostic. Our society’s most basic moral traditions are deeply divided about the proper answer to that question. We need to keep talking about it. The conversation is not always a pleasant experience. And it is fragile. It will shut down if either side uses its power to coerce the other to shut up. Gay people have been for a long time, and sometimes still are, subjected to just this kind of silencing.

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99 He presses the analogy in his majority opinion in Harper, 445 F.3d at 1181.

100 I made this claim in Antidiscrimination Law and Social Equality, supra note 97, but I now think that I did not adequately deal with the complication that I am describing here.

101 This case is made at length in Antidiscrimination Law and Social Equality, supra note 97.

102 See KOPPELMAN, THE GAY RIGHTS QUESTION, supra note 41, at 17-19; KOPPELMAN, SAME SEX, DIFFERENT STATES, supra note 41, at 53-68.
Hewlett-Packard had enormous leverage over Peterson. It is not a light thing to fire someone from a job he has held for 20 years. This is the kind of sanction that is likely to drive dissenters into the closet. And, as gay people know so well, the closet is not a healthy place to be.

CONCLUSION

Feldblum is correct that we should directly engage in moral argumentation about the gay rights question. There is a correct answer to the question of how gay relationships ought to be valued, and she and I agree about what that answer is. But our conclusion should not be imposed on everyone else by the courts. Slower and more cumbersome processes are needed. You can’t hurry love.


104 See THE SUPREMES, You Can’t Hurry Love, on SUPREMES A’ GO-GO (Motown Records 1966).
Justice Blackmun, Abortion, and the Myth of Medical Independence

Nan D. Hunter†

The social power and magnitude of abortion as a political issue have long stood in almost comic contrast to the quiet personality of the author of Roe v. Wade.¹ Justice Harry A. Blackmun—once described as “the shy person’s justice”²—wrote one of the most dramatic and far-reaching decisions in American constitutional history. Few other Supreme Court opinions have so dominated political culture for so long, yet its author did not come even close to dominating the Court. Nonetheless, both the fury and the celebration that Roe engendered have attached themselves indelibly and improbably to Harry Blackmun.

The most common explanation of how this modest man came to produce such an immodest decision draws on Blackmun’s background as resident counsel for the Mayo Clinic and his admiration of the medical profession. Justice Blackmun had wanted to become a doctor;³ later in life he became a lawyer for doctors,⁴ and he brought to the Court a deep attitude of protectiveness toward physicians.⁵ Passages in Roe frame the abortion right as one to be shared by doctor

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¹ 410 U.S. 113 (1973). In fact, there were two abortion decisions announced the same day. The companion case was Doe v. Bolton, 410 U.S. 179 (1973). In this article, I will often use what has become the customary shorthand of referring only to Roe, although many of the points apply to both opinions. When I intend to refer specifically to Doe, there will be a citation to that case.


⁴ See infra text accompanying notes 40-42.

⁵ See infra text accompanying notes 56-63.
and patient and as contingent on medical approval by the treating physician. For all these reasons, conventional wisdom has become that Justice Blackmun was a man smitten with medicine, who wrote Roe to center on the best interests of physicians.

In this article I test this conventional wisdom by explicitly placing medicine at the center of the analysis of Justice Blackmun’s opinions on abortion, and then interrogating the connection between law and medicine. Using the Blackmun papers opened to the public in 2004 and augmented by other documents and sources, I examine four critical periods in Blackmun’s life: his years at Mayo; his participation in a series of medicine-related cases prior to Roe; the period of intra-Court dynamics in Roe; and the post-Roe period in which a split developed between Blackmun and Roe’s critics over the use of medical rhetoric. My first conclusion is

6 As Justice Blackmun wrote in Roe v. Wade:

[F]or the period of pregnancy prior to this “compelling” point, the attending physician, in consultation with his patient, is free to determine, without regulation by the State, that, in his medical judgment, the patient’s pregnancy should be terminated. If that decision is reached, the judgment may be effectuated by an abortion free of interference by the State.

Roe, 410 U.S. at 163. “The decision vindicates the right of the physician to administer medical treatment according to his professional judgment up to the points where important state interests provide compelling justifications for intervention.” Id. at 165-66.

7 Continuing from Roe:

For the stage prior to approximately the end of the first trimester, the abortion decision and its effectuation must be left to the medical judgment of the pregnant woman’s attending physician.

... . . .

...The decision vindicates the right of the physician to administer medical treatment according to his professional judgment up to the points where important state interests provide compelling justifications for intervention. Up to those points, the abortion decision in all its aspects is inherently, and primarily, a medical decision, and basic responsibility for it must rest with the physician.

Id. at 164-66. See also Doe v. Bolton, 410 U.S. 179, 183 (1973).


that the long-standing “Mayo made him do it” explanation of Roe is wrong and should be jettisoned.

Beyond debunking this common claim, I investigate what effects were produced on the early abortion cases by the law-medicine relationship. Fuller knowledge of the Court’s deliberations makes clear that the judicial politics embodied in Roe can be understood only if it is read as a cobbled together Blackmun-Brennan-Douglas-Powell decision. More than any deference to or identification with physicians, the Justices who decided Roe shared a liberal belief in the value of medical authority because they assumed it to be a sphere which could operate independently of the state.

Blackmun was no more naïve than the other Justices in this respect; perhaps he was less so, given his detailed knowledge of how interwoven government and medicine were in the management of a large hospital.10 His first impulses in Roe and Doe were to uphold the Georgia abortion statute at issue in Doe and to declare the Texas law under consideration in Roe unconstitutional on the limited ground of vagueness.11 Blackmun’s experiences as counsel for Mayo left him more pragmatic than starry-eyed about medical authority, notwithstanding his affection for the institution.

In the years after Roe, one component in the arguments for its reversal was an attack on the legitimacy of physician autonomy and authority.12 The salvaging of Roe in Casey v. Planned Parenthood of Southeastern Pennsylvania13 derived not from the strength of medical authority, but from the reconfiguration of Roe into a decision necessary for the full equality and citizenship of women.14 The biography of Blackmun that Linda Greenhouse crafted from his papers demonstrates that he too shifted the central basis for his defense of Roe to an equality frame.15

This article begins with a narrative of Blackmun’s experiences at Mayo, when he was on the leading edge of the

10 Blackmun expressed skepticism toward some medical claims as well as protectiveness. See infra text accompanying notes 112, 118.
11 See infra text accompanying notes 175, 178.
12 See infra text accompanying notes 320-23.
14 Id. at 852 (“[T]he liberty of the woman is at stake in a sense unique to the human condition and so unique to law.”).
transformation of a legal field centered on the individual
doctor-patient relationship into one of much broader scope,
centered on large, complex health care institutions. Part I
excavates from his papers a richer sense of the nature of his
practice at Mayo. Although Mayo provided Blackmun with
proximity to superior and sometimes exciting medicine, most of
his time was spent on the normal aspects of a corporate
counsel’s job.16

Part II analyzes Blackmun’s role in cases associated
with medicine that preceded Roe. The pre-Roe cases provide us
with a fuller picture of how Blackmun sought to incorporate
insights from his Mayo experiences into high court
jurisprudence, and reveal the perspectives that Blackmun did
and did not bring to the Court. His papers indicate that he was
concerned about what he feared might be careless treatment of
physicians’ interests, but he was not blind to medical
parochialism nor engaged in a mission to expand the authority
of doctors. The details of this story cumulate into a picture of
Blackmun as a judge whose primary reliance was on his
instincts as a realist.

Part III reconstructs the intra-Court dynamics in Roe. I
argue that Blackmun’s reluctance to issue a broad ruling was
overcome by lobbying by Justices Douglas and Brennan. Although there are other accounts of the exchanges among
Justices, they have overlooked one factor that is highlighted in
this section: the emphasis on medical authority that Justice
Douglas developed. It is in Douglas’s writing, not in
Blackmun’s, that one finds arguments for a “right to health.”17

Other Justices provided the contours for Roe’s
framework. Justice Brennan framed privacy so that it might
include abortion in his opinion in Eisenstadt v. Baird,18 and
pressed Blackmun in that direction in Roe.19 Powell, who
joined the Court shortly after Blackmun, became an
unexpected adamant voice for providing maximum leeway to
physicians.20 In his workmanlike fashion, Blackmun stitched
together the result.

Part IV analyzes the complex role that medical rhetoric
played in post-Roe discourse on the regulation of abortion. For

16 See infra text accompanying notes 64-94.
17 See infra text accompanying notes 232, 235, 239.
19 See infra text accompanying notes 160, 179, 258.
20 See infra text accompanying notes 261.
Blackmun himself, it offered a vocabulary that he could deploy in justifying the shift in the political valence of his judicial philosophy, which itself was a reaction to the attacks on his abortion opinions. For conservatives on the Court, criticisms of medical authority as excessive became part of the analytic structure supporting efforts to diminish the scope of Roe.

Part V argues that beyond any factors particular to Blackmun, we should read Roe as a cultural text explaining how late twentieth-century liberals constructed medicine as a mythically independent, parallel realm to the state. What the Court sought to do in essence, even if unknowingly, was to delegate its juridical authority over this procreative question to physicians. The effort failed. An elite consensus as to the correctness of professional control split into two competing paradigms: one, a women’s rights discourse, and the other, a claim for the sanctity of fetal life. Governance by medical authority could not in the end withstand the politics of passion and fear.

I. HEALTH LAW PRACTICE IN THE 1950S

Harry Blackmun’s admiration of physicians was certainly real. He “always had a sympathetic attitude toward the medical profession and for the medical mind.” Justice Blackmun repeatedly stated that the decade he spent as general counsel at the Mayo Clinic from 1950 to 1959 was the happiest period of his professional life. It was a decade in which “health law” as we know it today—with its focus not solely on the doctor-patient relationship, but also on large-scale medical institutions—was just beginning.

Blackmun’s experiences at Mayo provide a window into the nature of health law practice when the field was in its

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22 Id.; John A. Jenkins, A Candid Talk with Justice Blackmun, N.Y. Times, Feb. 20, 1983, § 6 (Magazine), at 20; Oral History, supra note 3, at 109. A “Friends of Mayo” letter, drafted for Blackmun’s signature by the Mayo Department of Development soon after he retired from the Court, begins: “The ten years I spent in Rochester were the happiest years in my professional life.” A remarkable statement—coming as it does from a man who has spent more than two decades on the highest court in the land.” Draft Letter from Justice Harry A. Blackmun to the Friends of the Mayo Clinic (Mar. 10, 1994) (on file with the Library of Congress, Manuscript Division, The Harry A. Blackmun Papers, Box 14, Folder 8 (hereinafter Blackmun Papers)).
infancy. When Blackmun began working at Mayo, practitioners and scholars understood the field as “law and medicine.”24 Its primary focus was on liability and regulation issues directly related to physicians’ provision of care, including licensure, malpractice, and forensic or courtroom medicine, such as evidence law.25 The professional authority paradigm dominated law and medicine, with its emphasis on “providing doctors with sweeping control over health care.”26 The American Academy of Hospital Attorneys did not begin until nine years after Blackmun left Mayo; the National Health Lawyers Association formed three years after that.27

Blackmun’s experiences presaged these developments in the field, when hospital attorneys became counselors for complex business transactions, including acquisitions of other care providers.28 As hospitals grew in size and importance, the legal arena expanded to include institutional issues such as organizational status, corporate tax, staff-hospital relationships, institutional liability and licensure, and legal issues generated by medical discoveries.29 The field became more commonly known as “health law” rather than as “law and medicine,” to signal its broader scope.30

By the time Justice Blackmun retired from the Supreme Court in 1994, the conceptualization of health law had changed significantly. Bioethics and financing issues had mushroomed into substantial specialties of their own. In *Cruzan v. Director, Missouri Department of Health,*31 the Court entered the debate

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28 One of Blackmun’s major accomplishments while at Mayo was handling the incorporation and tax issues related to the takeover of the Rochester Methodist Hospital as a Mayo affiliate. Clark W. Nelson, *Historical Profiles of Mayo: Harry A. Blackmun and Mayo,* 74 Mayo Clinic Proc. 442, 442 (1999). Blackmun’s knowledge of hospital operations and systems is evident in his opinion in *Abbott Laboratories v. Portland Retail Druggists Ass’n, Inc.*, 425 U.S. 1, 8-11, 14-17 (1976).  
over autonomy issues in death and dying, an area which has grown and is likely to continue growing.\footnote{See Gonzales v. Oregon, ___ U.S. ___, 126 S. Ct. 904, 925 (2006) (holding that the Controlled Substance Act does not permit the Attorney General to prohibit doctors from prescribing drugs for use in physician-assisted suicide when the procedure is allowed under state law); Vacco v. Quill, 521 U.S. 793, 808-09 (1997) (upholding New York’s ban on assisted suicide by declining to find a violation of the equal protection clause of the Fourteenth Amendment); Washington v. Glucksberg, 521 U.S. 702, 728 (1997) (upholding Washington’s ban on assisted suicide by declining to find a fundamental right to assistance in suicide under the due process clause).} Three federal statutes enacted between Blackmun’s years at Mayo and when he joined the Court—Medicare,\footnote{Health Insurance for the Aged Act (Medicare Act), 42 U.S.C. §§ 426, 1395-1396d (2000).} Medicaid,\footnote{Medicaid Act, 42 U.S.C. § 1396 (2000).} and ERISA\footnote{Employee Retirement Income Security Act of 1974, 29 U.S.C. § 1001 (2000).}—revolutionized the financial aspects of health care delivery and payment.

Examining Justice Blackmun’s Mayo experiences more closely than has been done before provides ground for caution in extrapolating their likely effect on his adjudication of abortion issues. Mayo was a rarefied environment, an elite institution which presented itself as providing last chance medical expertise when lesser providers had failed.\footnote{Clinics: The Court of Last Resort, TIME, Oct. 23, 1964, at 96.} Although it is impossible to know about conversations there which may have touched on abortion, or what Blackmun observed or absorbed of staff attitudes about the procedure,\footnote{When asked in his Oral History interview about whether Mayo doctors had a view as to abortion, Blackmun replied, “Well, if they did, it was certainly not uniform, and they divided, just as everybody did. As a matter of fact, some of the nastiest letters I received after Roe against Wade . . . were from Mayo Clinic physicians. Nearly all of them approved of Roe against Wade, but not all of them by any means.” Oral History, supra note 3, at 192.} normal abortions—those not involving situations of extreme medical urgency—were not performed at Mayo.\footnote{See infra text accompanying notes 52-55.} As Blackmun himself put it, “The clinic . . . was not, and did not wish to be, an abortion mill of any kind . . . .”\footnote{Oral History, supra note 3, at 192.} There is no clear link to the outcome in Roe from his experiences at Mayo.
A. Justice Blackmun’s Connections with Physicians at the Mayo Clinic

Blackmun began representing the Mayo Clinic and some of its physicians in the 1940s, while he was an associate at a Minneapolis firm. He attributed Mayo’s interest in hiring him as its first resident counsel to a managerial realization that continuing to have only a local firm lawyer was insufficient. The administrative head of Mayo “sensed a changing political situation, changing legal situation and thought that maybe the Mayos should have representation by a larger firm that had a rather broad client base, particularly in Washington.” In 1950, Blackmun took the Mayo job and remained in that position until 1959, when he was appointed to the United States Court of Appeals for the Eighth Circuit.

Mayo was a leader in world-class health care, attracting 160,000 patients a year by the late 1950s. Blackmun saw himself as part of the support team for eminent physicians whose work produced breakthroughs in such fields as heart surgery and rheumatology. His time there included “the dawn of the heart-lung bypass procedure.” He greatly admired the work of the physicians and researchers, retaining a newspaper clipping that catalogued breakthroughs achieved

40 GREENHOUSE, supra note 15, at 18.
42 GREENHOUSE, supra note 15, at 18, 28.
43 Letter from Leland W. Scott to David A. Lindsay, General Counsel of the Treasury 3 (Apr. 2, 1960) [hereinafter Scott Letter] (Blackmun Papers, Box 14, Folder 1). For historical background on the Mayo Clinic’s founding, see Paul Starr, The Social Transformation of American Medicine 210-11 (1982).
44 Harry A. Blackmun, Remarks at the Commencement Exercises of Mayo Medical School, 55 Mayo Clinic Proc. 573, 576 (1980) [hereinafter Blackmun, Remarks at Commencement] (“I was also privileged to be here when the Mayo team, in the early 1950’s, developed their own method of [open-heart] surgery . . . . I shall not forget the last experimental operation performed the day before the first human patient was subjected to open-heart surgery. And I shall not forget the early weeks of procedures here on the human heart, the successes and the failures.”); Richard C. Daly et al., Fifty Years of Open Heart Surgery at the Mayo Clinic, 80 Mayo Clinic Proc. 636 (2005).
46 Oral History, supra note 3, at 111.
at Mayo: cortisone, a heart-lung machine, open-heart surgery, deep-chilled brain surgery, and the first post-operative recovery room.\textsuperscript{47}

Blackmun made a point of observing medical procedures and attending the surgeons’ biweekly discussions of recent cases and the monthly clinical staff meetings.\textsuperscript{48} “I felt the more I could learn about how medicine was practiced there, the better off I would be in advising the physicians.”\textsuperscript{49} On occasion, he dealt with end-of-life issues presented by patients in a persistent vegetative state,\textsuperscript{50} and provided legal advice as to standards for brain death and do not resuscitate orders.\textsuperscript{51}

Abortion was rarely performed at the Mayo Clinic for any reason, which is not surprising for a tertiary care center. Only about one hundred abortions were performed there in the twenty years from 1945 to 1965, almost all because of serious somatic disease.\textsuperscript{52} When asked in his oral history interview what Minnesota’s law on abortion was while he was at Mayo, Blackmun responded, “I don’t remember any abortion problems at the time.”\textsuperscript{53} Dr. Jane Hodgson, who trained there in obstetrics and gynecology in the early 1940s, recalled that “even at Mayo, we were never taught how to do a therapeutic abortion.”\textsuperscript{54} While Blackmun was at Mayo in the 1950s, organized medicine viewed even legal abortions as distasteful and morally problematic.\textsuperscript{55}

During his time at Mayo, Blackmun developed a lawyer’s protective stance for his clients. In 1959, while being considered for the appointment that he ultimately received to the Eighth Circuit, he heatedly criticized a recent malpractice

\textsuperscript{47} Mayo Clinic Offers Patients a Superb System, MINN. SUNDAY TRIB., Sept. 13, 1964, (Magazine), at 10 (Blackmun Papers, Box 14, Folder 3).

\textsuperscript{48} Oral History, supra note 3, at 111.

\textsuperscript{49} Id.

\textsuperscript{50} Id. at 112, 405-06, 410-11.

\textsuperscript{51} Id. at 112.

\textsuperscript{52} Richard S. Sheldon & David G. Decker, Therapeutic Abortion at the Mayo Clinic 1945-1965, 50 MINN. MED. 1283, 1284 (1967).

\textsuperscript{53} Oral History, supra note 3, at 112. At a later point in the interview, he was asked again about abortion at Mayo and responded to the same effect: “I do not recall the raising of any legal issue about abortion in the decade I was there at all.” Id. at 192.

\textsuperscript{54} Quoted in Carole Joffe, Doctors of Conscience: The Struggle to Provide Abortion Before and After Roe v. Wade 9 (1995). In fact, under the Minnesota statute in effect during 1950s, performing an abortion was punishable by up to four years imprisonment. MINN. STAT. § 617.18 (repealed 1974).

decision of that court, involving a surgeon who had mistakenly left an object in the patient’s body. The court had opined that “[e]verybody knows, without being told by an expert, that it is not approved surgical practice to leave in a patient’s body . . . any . . . foreign nonabsorbable substance.” Blackmun pointed out in his letter that many reasons existed for a good surgeon to leave nonabsorbable medical devices or tools, such as mesh or wire, in the body.

In his later roles, first as a judge and then as a Justice, Blackmun took it upon himself to speak for the medical profession among fellow jurists. He chided Justice Black for referring to licensed physicians as “competent,” arguing that “competent” was redundant unless malpractice was asserted. Blackmun expressed this concern about judges’ lack of sympathy for the medical profession throughout his life. “I have always been surprised and disturbed by the lack of sympathy that judges often have for the problems that confront the medical profession . . . . I have noticed this even at conferences of our Court. I have done my best to alleviate that feeling . . . .” He wrote in a similar vein to an oncologist at Mayo who was distressed at the continuing use of Laetrile, a hazardous drug being sold illegally to cancer patients, despite a protective Supreme Court opinion: “Federal judges, I have learned, do not understand medical problems very well.” In a 1994 lecture on psychiatry and law, he noted that “[t]he judiciary is somewhat intolerant of medical personnel.”

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56 Letter from Harry A. Blackmun to Warren E. Burger (May 18, 1959) [hereinafter Blackmun Letter to Burger] (Blackmun Papers, Box 12, Folder 13). He reiterated this point thirty-five years later in his oral history interview. Oral History, supra note 3, at 113.
58 Blackmun Letter to Burger, supra note 56.
60 Blackmun, Remarks, supra note 21, at 176.
61 United States v. Rutherford, 442 U.S. 544, 551-59 (1979) (holding that there is no express or implied exemption for terminally ill patients from the Federal Food, Drug, and Cosmetic Act requirement that a new drug be recognized as “safe and effective” before distribution).
62 Letter from Justice Harry A. Blackmun to Dr. Charles G. Moertel, Mayo Clinic (Mar. 16, 1982) (Blackmun Papers, Box 14, Folder 8).
B. Health Law as Business Law

As general counsel at the Mayo Clinic, most of Blackmun’s practice dealt with a broad range of business, tax, and litigation-related issues. The series of memoranda that he left for his successor, in which he described his major concerns in some detail, provide what is probably the best indicator of the nature of his work. He was responsible for administering trusts set up by donors as well as for drafting certain trust instruments. He handled real estate and corporate matters for Mayo and various entities which it owned, such as the local airport. On the litigation front, he closely monitored malpractice claims and potential claims, and represented Mayo doctors who were called as witnesses for depositions or trials. His practice also included licensure issues and miscellaneous private legal problems of the staff.

One of Blackmun’s major achievements was handling the incorporation and tax issues necessary to found the Rochester Methodist Hospital as a Mayo affiliate in 1955. The hospital had been owned and operated by the Kahler Corporation, which decided to sell off its hospital unit. When leaders at Mayo sought to arrange for a religious organization


65 See General Memorandum from H.A. Blackmun (Oct. 29, 1959) [hereinafter General Memorandum] (Blackmun Papers, Box 14, Folder 1); Memorandum from H.A. Blackmun 2-3 (Oct. 29, 1959) (Blackmun Papers, Box 13, Folder 20).

66 General Memorandum, supra note 65, at 3, 6; Memorandum from H.A. Blackmun to Mr. G.S. Schuster and Mr. J.W. Harwick, Re: Mayo Association (Oct. 23, 1959) (Blackmun Papers Box 13, Folder 20).

67 General Memorandum, supra note 65, at 5-6; Memorandum on Malpractice from H.A. Blackmun (Oct. 30, 1959) (Blackmun Papers, Folder 13, Box 20); Memorandum: Pending (Oct. 30, 1959) (Blackmun Papers, Folder 13, Box 20). Six of the ten open cases listed were malpractice matters.

68 General Memorandum, supra note 65, at 3-5.

69 General Memorandum, supra note 65, at 1-2. Blackmun described the licensure problems of doctors at Mayo on fellowships, some from outside the United States, as a “vexing little problem with which I have struggled.” Id. at 1.

70 Blackmun’s papers contain a 1953 speech that he gave to the Minnesota State Medical Association entitled “The Physician and His Estate,” consisting of tax and estate planning advice. Harry A. Blackmun, Address at the Centennial Meeting of the Minnesota State Medical Association (May 20, 1953) (Blackmun Papers, Box 14, Folder 19), reprinted in 36 Minn. Med. 1033 (1953). His first Mayo-related legal matter, while still in private practice, was a gift tax question from one of the surgeons. Oral History, supra note 3, at 107.

71 Nelson, supra note 28.

to operate the hospital, which would be affiliated with Mayo, Blackmun, as “a prominent lay Methodist,” played a key role in arranging for the Methodist church to take over operations.\(^{73}\)

He then led the effort “to lay the legal/financial substructure” for the hospital.\(^{74}\) He continued to serve as a director and executive committee member for Rochester Methodist Hospital until he joined the Supreme Court in 1970.\(^{75}\)

Apparently the most significant corporate and tax dispute that arose at Mayo was a long-running battle with the Internal Revenue Service (I.R.S.). Organizationally, “the Mayos” consisted of three separate entities: a nonprofit corporation (the Mayo Association), an association of physicians and others engaged in the practice of medicine (the Mayo Clinic), and a research fund that sponsored fellowships for graduate medical education (the Mayo Foundation).\(^ {76}\)

The I.R.S had long treated the second entity, the Mayo Clinic, as a corporation for purposes of tax law, but began to question whether it should be classified as a partnership.\(^ {77}\) The I.R.S. audited the Mayo returns from 1951 to 1955.\(^ {78}\)

Blackmun represented the Mayos in dealings with the I.R.S. until he was appointed to the Eighth Circuit. The Clinic paid several million dollars a year in rent to the Mayo Association and could deduct the rental payments as business expenses, leaving very little net income upon which to be taxed.\(^ {79}\) Because it was treated as a corporation, the Clinic could also deduct group insurance premiums and retirement plan contributions and provide Social Security coverage on more favorable terms than those applying to a partnership.\(^ {80}\)

Blackmun realized that other medical groups were clamoring for corporate status, seeking the pre-tax benefits

\(^{73}\) Bill Holmes, Comments on the Occasion of the 30th Anniversary of Rochester Memorial Hospital 2 (Jan. 16, 1984) (Blackmun Papers, Box 1549, Folder 1).

\(^{74}\) Id.

\(^{75}\) Id. at 3.

\(^{76}\) Scott Letter, supra note 43. From a counsel’s point of view, these three entities were cursed with confusing names. Mayo Association was in fact a corporation. Mayo Clinic was treated as an association, as federal tax law defined that term. The Mayo Foundation was a fund that had been transferred to the state of Minnesota; it had no distinct legal existence. Harry A. Blackmun, Notes, at 1-b (Aug. 2, 1960) [hereinafter Notes, Aug. 2, 1960] (Blackmun Papers, Box 14, Folder 1); Scott Letter, supra note 43, at 1-6.

\(^{77}\) Notes, Aug. 2, 1960, supra note 76, at 1-a; Scott Letter, supra note 43, at 1-4.

\(^{78}\) Scott Letter, supra note 43, at 1.

\(^{79}\) Notes, Aug. 2, 1960, supra note 76, at 8; Scott Letter, supra note 43, at 6.

\(^{80}\) Notes, Aug. 2, 1960, supra note 76, at 8, 10.
structure enjoyed by the Mayo staff. He fought to preserve the Clinic’s status as a membership association. Mayo’s advantage was that its organization pre-dated the relevant federal tax laws and thus could not be seen as motivated by tax avoidance. Blackmun was insistent that no meaningful changes in this corporate structure should occur, such that would give the I.R.S. an opening to re-classify the Clinic as a partnership.

This is a matter of vital concern to each member of the staff. Personal financial consequences and family well-being are at issue. . . . [I]f the Association status is lost and the partnership status is gained, each of you would have Federal and Minnesota income taxes in the aggregate more than double the amount you now pay. . . .

Lurking in the background was the risk that the Mayo Association could lose its tax exemption. The exemption for past and future contributions was essential to the financial base upon which the Mayos’ pre-eminence rested. “Without [the tax exemption],” he said, “the Mayo Clinic as we know it cannot exist.”

Nor was Blackmun unaware of less official relationships between Mayo and the I.R.S. He advised his successor that “[i]f you wish to be advised whenever a tax man registers as a patient at the Mayo Clinic, arrangements can be made for this.” Apparently these efforts succeeded; his papers indicate that the I.R.S. allowed the Clinic to retain its corporate status.

Another of Blackmun’s long-term projects as general counsel involved lobbying federal officials for funding and other support for Mayo. In 1953, his close friend and then Assistant Attorney General Warren Burger suggested that Blackmun visit Washington to meet with officials at the Department of

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82 Notes, Aug. 2, 1960, supra note 76, at 11.
83 Id. at 11-12.
84 Id.
85 Id. at 9.
86 General Memorandum, supra note 65, at 3.
87 Notes, Aug. 2, 1960, supra note 76, at 1-a.
Health, Education and Welfare ("HEW"). Two years later he suggested that Blackmun "browse around the Public Health Institute and warm up some of your friendships with miscellaneous people having common interests" with Mayo. Drawing on Burger's assistance to arrange participation by federal health officials, Blackmun organized "an exploratory trip" to Washington in 1956 for several Mayo Clinic management staff to further "the development of Washington contacts...[which are], I think, long overdue." In January 1959, Blackmun consulted Burger about the possibilities for approaching HEW officials to support an amendment to the Hill-Burton Act to secure funding for one of the hospitals owned by Mayo, which Blackmun described as "desperately in need of a new physical plant." Blackmun also sought funds for the hospital from the Rockefeller Foundation.

Blackmun genuinely enjoyed the business law aspects of his work. When asked what his memories were of "the happy events" at Mayo, he recalled "the reorganization of the Mayo Foundation, the transformation of the downtown hospitals, which had been run by the Kahler Corporation, into an

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88 Letter from Warren E. Burger to Harry A. Blackmun (Oct. 12, 1953) (Blackmun Papers, Box 12, Folder 6). The Department of Health Education and Welfare was later renamed the Department of Health and Human Services.
89 Letter from Warren E. Burger to Harry A. Blackmun (May 12, 1955) (Blackmun Papers, Box 12, Folder 8).
90 Letter from Harry A. Blackmun to Warren E. Burger (Mar. 8, 1956) (Blackmun Papers, Box 12, Folder 9). Drawing on the contacts of his old friend Warren Burger, then on the United States Court of Appeals for the D.C. Circuit, Blackmun arranged for a luncheon meeting that included Assistant Secretaries from the Departments of Health, Education and Welfare and Defense, as well as high-ranking staff from the National Institutes of Health, the Veterans Administration, and Capitol Hill. See Harry A. Blackmun, Guest List Luncheon—April 12, 1956 (Blackmun Papers, Box 12, Folder 9).
92 Letter from Harry A. Blackmun to Warren E. Burger (Jan. 29, 1959) (Blackmun Papers, Box 12, Folder 13). At this point, Burger was a judge on the United States Court of Appeals for the D.C. Circuit. It appears from the correspondence that Burger had lunch with the HEW Secretary and that Mayo invited the Secretary to visit the facility, but the documents do not indicate whether anything came from the effort.
93 Letter from Harry A. Blackmun to Warren E. Burger (Mar. 24, 1959) (Blackmun Papers, Box 12, Folder 13).
eleemosynary setup[, and the building of an experimental hospital in Rochester, which was my responsibility . . . in part . . . .” \[94\]

C. Justice Blackmun’s Departure from and Lasting Ties to the Mayo Clinic

After spending almost a decade at Mayo, Blackmun grew restless. In a 1957 letter to Burger, he wrote: “I feel like going back into private practice.” \[95\] His ambivalence about leaving Mayo was apparent in the list of pros and cons that he made for himself when offered the judicial appointment: the pros included “away from trivia” and “better use of my talents,” while the cons included “loss of excitement” and “loss of contact with important people.” \[96\]

Despite his desire to leave, Justice Blackmun continued a rich association with the institution for the rest of his life. Almost a year after leaving his position at Mayo, he spoke to the staff about the importance of the dispute with the I.R.S. \[97\] His notes for the speech indicate that he began by identifying himself as “one who retains his admiration and devotion for the institution and who knows it to be an institution for good, deserving preservation and worthy of all possible protection.” \[98\]

Blackmun continued returning to Mayo to give speeches or to visit friends, \[99\] and he kept an active interest in the institution for the remainder of his life. More than thirty years after leaving Mayo, when President-elect Clinton began to formulate a health reform proposal, Justice Blackmun arranged for Mayo officials to attend a forum for health care experts at the Aspen Institute. \[100\] During the taping of his oral history in 1994, soon after his retirement, he told interviewer

\[94\] Oral History, supra note 3, at 109.
\[95\] Letter from Harry A. Blackmun to Warren E. Burger (Oct. 24, 1957) (Blackmun Papers, Box 12, Folder 11).
\[96\] GREENHOUSE, supra note 15, at 27.
\[97\] Notes, Aug. 2, 1960, supra note 76.
\[98\] Id. at 1.
\[99\] His speeches included the 1980 commencement address at the medical school, a speech on pediatrics and law and a speech on the goals of longevity. See, e.g., Harry A. Blackmun, Draft of Speech for Mayo Clinic Pediatric Days (Sept. 28, 1995) [hereinafter Mayo Clinic Pediatric Days Speech] (Blackmun Papers, Box 14, Folder 8).
\[100\] Letter from Harry A. Blackmun to Dr. James R. McPherson, Mayo Clinic (Nov. 27, 1992) (Blackmun Papers, Box 14, Folder 8). In his November 27 letter, Blackmun wrote: “I just feel that Mayo should be in the forefront of health care plan discussions and decisions and not have someone else take over the lead.” Id.
Harold Koh that “Dottie and I still have that feeling of reverence for Mayos.”\textsuperscript{101} After his death, at his request, a portion of his ashes were scattered on the grounds of the Mayo Clinic.\textsuperscript{102}

Blackmun surely treasured the opportunity that he had while at Mayo to be part of an extraordinary institution and to develop front-row knowledge of medical breakthroughs and superior clinical care. His practice, however, centered on corporate, tax, and litigation matters. This fuller understanding of Blackmun’s responsibilities there should make plain that, whatever the impact of his time at Mayo, he was not following a Mayo script in writing \textit{Roe}.

\section*{II. PRAGMATIC JUDGING}

Blackmun was sworn in as an Associate Justice of the Supreme Court on June 9, 1970.\textsuperscript{103} Opportunities to undertake the role of protector of medicine in the halls of law arose in his first term on the Court, in three health-related cases: \textit{United States v. Vuitch},\textsuperscript{104} the first abortion case to reach the Supreme Court; \textit{Richardson v. Perales},\textsuperscript{105} an appeal from a denial of disability benefits; and \textit{Eisenstadt v. Baird},\textsuperscript{106} a challenge to a Massachusetts law prohibiting the distribution of contraceptives to unmarried persons. These cases afforded Justice Blackmun the opportunity to proffer his Mayo background as a source of expertise among his colleagues, a capacity that must have been all the more welcome in the wake of press derision of him as Chief Justice Burger’s “Minnesota twin.”\textsuperscript{107} Blackmun’s papers from these early cases indicate that he asserted himself on the Court as someone with special ties to medicine, but the attitudes that he brought to evaluating cases involving physicians were on the whole more pragmatic than idealizing.

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\textsuperscript{101} Oral History, \textit{supra} note 3, at 113.
\textsuperscript{102} \textit{GREENHOUSE}, \textit{supra} note 15, at 248.
\textsuperscript{103} \textit{Id.} at 53.
\textsuperscript{104} 402 U.S. 62 (1971).
\textsuperscript{105} 402 U.S. 389 (1972).
\textsuperscript{106} 405 U.S. 438 (1972).
\textsuperscript{107} Jenkins, \textit{supra} note 22, at 22.
\end{flushright}
A. United States v. Vuitch

In Vuitch, a D.C. physician won dismissal of an indictment for performing an abortion on the ground that the statute was impermissibly vague. The D.C. law prohibited abortion “unless . . . necessary for the preservation of the mother’s life or health.” The district court had found the statute defective based on the uncertain meaning of “health.” That court ruled that the statute’s failure to define “health” left “no clear standard” for the defendant or the jury to determine “what degree of mental or physical health or combination of the two” was necessary to avoid prosecution.

When the case got to the Supreme Court, Justice Blackmun took a pragmatic view of the physician’s predicament. He noted that:

[T]he vagueness exists in the . . . justification clause. Thus, the more vague the statute, the better it is really for the defendant. If [it] is broad, then the umbrella of justification is a large one. I, for one, could pump a lot of area into the exception. This . . . rather inclines me not to be too concerned about vagueness, and . . . to uphold the statute and let the defendant . . . physician[] roam at large in an attempt to prove justification.

Based on Griswold v. Connecticut, counsel for Vuitch also argued for an extension of the privacy right along the lines suggested by Thomas Emerson, who had written that the privacy right which had been articulated in Griswold could “consist[] primarily in the right to have or not have children, and to plan a family . . . On the same view of the scope of the right to privacy, the way would be open for an attack upon significant aspects of the abortion laws.” Blackmun’s private notes to himself when he first read the briefs in the case indicated that he was not closed to the privacy claim:

109 Vuitch, 402 U.S. at 67-68 (quoting D.C. CODE ANN. § 22-201 (1967)).
110 Vuitch, 305 F. Supp. at 1034.
111 Id.
112 Harry A. Blackmun, Undated Notes on United States v. Vuitch 3 [hereinafter Vuitch Notes] (Blackmun Papers, Box 123, Folder 9).
113 381 U.S. 479 (1965).
114 Vuitch, 402 U.S. at 72-73.
I may have to push myself a bit, but I would not be offended by the extension of privacy concepts to the point presented by the present case . . . [if the majority reached this issue] I could go along with any reasonable interpretation of the problem on principles of privacy.\footnote{116}

Blackmun’s notes to himself also indicated his recognition of the unfairness of laws that disadvantaged poor women.\footnote{117}

At oral argument, Blackmun expressed skepticism about the vagueness claim. When Vuitch’s lawyer asserted at oral argument that only the individual doctor’s judgment could be the basis for a definition of health, Blackmun responded,

It’s difficult for me to accept your explanation because, and I shouldn’t go on my own experience, but I have seen physician after physician say the same thing about malpractice . . . [and] I have known many physicians who are not concerned about [the chilling effect of the law] in this decision-making and who are courageous and make the decisions if they have to.\footnote{118}

The government’s theory was that “health” should be construed broadly, so that a physician would be protected unless he was performing abortions on demand, that is, performing the procedure without a determination of any physical or mental health-related need for it.\footnote{119} The Supreme Court adopted that interpretation of the statute and reversed the district court.\footnote{120} Thus, the end result, as Justice White reiterated in his concurrence, was that physicians would be protected only if an abortion was “dictated by health considerations.”\footnote{121} Counsel for the government had asserted at oral argument that prosecution of a doctor would go forward if there was proof that “in every single case where a woman requested an abortion he performed it.”\footnote{122}

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\footnotetext{116}{Vuitch Notes, supra note 112, at 3.}
\footnotetext{117}{Blackmun’s private notes on Vuitch include as one of his questions about the case, “Does inability to go elsewhere for an abortion, because of lack of finances, constitute a denial of equal protection?” Harry A. Blackmun, Private Notes on United States v. Vuitch (Dec. 28, 1970) (Blackmun Papers, Box 123, Folder 8).}
\footnotetext{118}{Transcript of Oral Argument at 47, United States v. Vuitch, 402 U.S. 62 (1971) (No. 84).}
\footnotetext{119}{Id. at 17-18, 63.}
\footnotetext{120}{Vuitch, 402 U.S. at 72. The Court also held that the prosecution had the burden to prove that an abortion was not necessary for the woman’s life or health. Id. at 71.}
\footnotetext{121}{Id. at 73 (White, J., concurring).}
\footnotetext{122}{Transcript of Oral Argument, supra note 118, at 64.}
\end{footnotes}
Blackmun would not have reached the merits at all; he concluded that the Supreme Court lacked jurisdiction. Ultimately, he concurred in the majority’s decision as to vagueness in order to create a majority of a badly splintered court, and thereby resolve the case. Vuitch presented the first opportunity for Blackmun to seize if his overriding concern had been to protect physicians from criminal prosecutions, but he let it pass. It is particularly telling that he did not join the concurring opinion of either Justice Douglas, who expressed his desire to “leave to the experts the drafting of abortion laws that protect good-faith medical practitioners[;]” or of Justice Stewart, who believed that a good faith determination of health needs by a physician provided full immunity from prosecution under the D.C. law.

B. Richardson v. Perales

In Perales, which was argued the day after Vuitch, Blackmun wrote one of his first opinions for the Court. The case turned on the question of whether a doctor’s written report could be admitted into evidence or should be excluded as hearsay. His initial thoughts on the case reflect his identification with physicians: “I have always felt that written medical records qualify as business records and, hence, are an exception to the ordinary hearsay rules. I also get the feeling that if records of this kind cannot be introduced into evidence, the resulting burden on the medical profession... will be phenomenal.”

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123 Vuitch, 402 U.S. at 81 (Harlan, J., dissenting). The Criminal Appeals Act granted the Court jurisdiction in criminal cases over direct appeals from district court judgments dismissing an indictment due to the invalidity of the statute on which the indictment was founded. Id. at 64 (majority opinion) (quoting 18 U.S.C. § 3731). The majority found that this Act applied to such appeals from the United States District Court for the District of Columbia concerning an abortion statute that applied only to the District. Id. at 64-66. Blackmun joined Harlan's opinion dissenting as to jurisdiction. Id. at 81 (Harlan, J., dissenting).
124 Vuitch, 402 U.S. at 97-98 (Blackmun, J., concurring).
125 Id. at 80 (Douglas, J., dissenting in part).
126 Id. at 97 (Stewart, J., dissenting in part).
128 Perales, 402 U.S. at 402.
129 Harry A. Blackmun, Undated Notes on Richardson v. Perales 1 (Blackmun Papers, Box 125, Folder 2).
The notes Blackmun took during oral argument predicted that “I should catch this if I am in majority.” He did “catch it,” and ruled on behalf of the Court that a written report by a doctor who had examined the patient should be admitted, despite the doctor’s absence from the hearing and the inability of the claimant to cross-examine. This opinion strikes an almost mawkish note: “We cannot, and do not, ascribe bias to the work of these independent physicians, or any interest on their part in the outcome of the administrative proceeding beyond the professional curiosity a dedicated medical man possesses.”

During this case, Blackmun succeeded in winning recognition for the value of his experience at the Mayo Clinic. Justice John Harlan, in communicating that he would join the draft opinion that Blackmun had circulated in *Perales*, told him: “I am consumed with admiration for your mastery of the medical lexicon, and, although I feel beyond my depth in this field, I am perfectly content to leave my legal conscience in your careful hands on this score.” Harlan’s personal note must have been a welcome expression of esteem for Blackmun in his first year on the Court and may have reinforced the value he placed on his Mayo background.

C. Eisenstadt v. Baird

In *Eisenstadt v. Baird*, the Court struck down a Massachusetts statute that prohibited the distribution of contraceptives to unmarried persons. The Court’s analysis was grounded in the recognition of a right of marital privacy, including the right to use contraceptives in *Griswold v.*

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130 Justice Harry A. Blackmun, Handwritten Notes on Argument in *Richardson v. Perales* (Jan. 13, 1971) (Blackmun Papers, Box 125, Folder 2).

131 *Perales*, 402 U.S. at 402. Blackmun’s opinion drew a spirited dissent from Justice Douglas, joined by Justices Black and Brennan, who castigated the agency for using a “stable of defense doctors without submitting them to cross-examination.” *Id.* at 414 (Douglas, J., dissenting).

132 *Id.* at 403 (majority opinion). Blackmun also cited a case striking a similar tone in which the court of appeals ruled admissible the written report of an examining physician: the report is made “as a professional matter by a member of a learned and honorable profession in whom the sense of professional pride, as well as the sense of official duty, is conducive to truth and accuracy.” *Long v. United States*, 59 F.2d 602, 603 (4th Cir. 1932).

133 Letter from Justice John M. Harlan to Justice Harry A. Blackmun (Apr. 21, 1971) (Blackmun Papers, Box 125, Folder 2).

Justice Brennan’s opinion famously declared that “[i]f the right of privacy means anything, it is the right of the individual, married or single, to be free of unwarranted governmental intrusion into . . . the decision whether to bear or beget a child.”

\textit{Eisenstadt} was pending before the Court while Blackmun was struggling to produce his first drafts in \textit{Roe} and \textit{Doe}. Justice Brennan used the opportunity of his assignment in \textit{Eisenstadt} to build a doctrinal bridge between \textit{Griswold’s} right of marital privacy and the application of privacy outside of marriage, as would also be required in the abortion cases.

Blackmun did not join Brennan’s opinion. He opted instead to concur in the result by joining the separate opinion of Justice White, who ironically became his primary nemesis in the abortion cases. White and Blackmun focused on the fact that Baird had been prosecuted on the ground that he was neither a physician nor a pharmacist, and therefore was barred under the statute from distributing contraceptives to anyone, regardless of marital status. White and Blackmun’s opinion further noted that there was no record evidence of the marital status of those to whom Baird had in fact distributed the vaginal foam contraceptive.

The White-Blackmun concurrence drew from \textit{Griswold} the principle that restrictions burdening a married person’s use of contraceptives—as the Massachusetts statute did by its limitation of distribution to physicians or pharmacists—must be supported by evidence demonstrating the necessity of the burden to the achievement of the statutory purpose of protecting health. Because the statute before the Court lacked any such justification and because foam was not a prescription drug, they reasoned that the law had to fail, regardless of the marital status of the distributee in the particular case: “Nothing in the record even suggests that the

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\textsuperscript{135} 381 U.S. 479, 485 (1965).
\textsuperscript{136} \textit{Eisenstadt}, 405 U.S. at 453.
\textsuperscript{137} \textit{Id.} at 438.
\textsuperscript{139} \textit{Eisenstadt}, 405 U.S. at 460.
\textsuperscript{140} \textit{Id.} at 462 (White, J., concurring) (“The gravamen of the offense charged was that Baird had no license and therefore no authority to distribute to anyone.”).
\textsuperscript{141} \textit{Id.} at 464.
\textsuperscript{142} \textit{Id.} at 463.
distribution of vaginal foam should be accompanied by medical advice in order to protect the user’s health.”

Blackmun’s position in Eisenstadt offers another indication that however strong his concern for medical practice, he could recognize when a purported protection of it was a pretext for other goals. The distinction in Eisenstadt may seem obvious, but deference to the state’s authority to restrict distribution of health-related products to health professionals was precisely the basis for Chief Justice Burger’s dissent. Burger spent the bulk of his dissenting opinion attacking the White-Blackmun concurrence, declaring that there is “nothing arbitrary in a requirement of medical supervision.” Burger argued that there was no constitutional basis for holding “that a State must allow someone without medical training the same power to distribute this medicinal substance as is enjoyed by a physician.”

Of course one cannot know whether Burger may have stressed this point in an attempt to persuade Blackmun to join him, but if he did, the gambit failed. Blackmun was coming to his own conclusions in Eisenstadt at precisely the same time that he was struggling with the abortion issue.

D. Rights Talk

Blackmun did not arrive on the Court with a closed mind as to possible expansion of individual rights doctrine, but neither was he eager to engage those issues. During his second term, the Supreme Court ruled for the first time that a statutory distinction between men and women violated the Equal Protection Clause. In Reed v. Reed, ACLU lawyers led by Ruth Bader Ginsburg challenged an Idaho law that required appointment of a male rather than a female if both were equally entitled by consanguinity to administer a decedent’s estate.

Blackmun’s private notes on the case describe it as “a very simple little case” which had generated “a very lengthy brief [from the ACLU] filled with emotion and historical

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143 Id. at 464 (1972).
144 Id. at 467-70 (Burger, C.J., dissenting).
145 Eisenstadt, 405 U.S. at 470.
146 Id. at 471.
147 404 U.S. 71 (1971).
148 Id. at 73-74.
context about the inferior status of women.” 149 Blackmun found the brief “mildly offensive and arrogant, but . . . it has the better side of the case.” 150 He expressed hope that the Court would strike down the statute in “a fairly brief and simple opinion,” 151 which it did, without specifying the level of review being utilized. 152

Intriguingly, though, Blackmun also described himself as “inclined to feel that sex can be considered a suspect classification just as race . . . .” 153 He was troubled by the argument that the Fourteenth Amendment clearly had not been intended to reach sex-based discrimination when it was adopted, but concluded that “my own feeling is that these constitutional provisions must have some flexibility and expansiveness in them as, in theory, we ourselves progress and expand in our concepts of equality.” 154

The understanding of sex discrimination that he brought to the Court did not encompass pregnancy, however. In Phillips v. Martin Marietta Corp., 155 the court below had upheld a hiring policy which discriminated against women with small children, concluding that it did not violate the federal statutory ban against sex discrimination. 156 Blackmun’s private notes indicate that he agreed with this perspective:

At this point, my inclination is in favor of affirmance . . . . [T]he policy, if there was a policy, was not based on sex, and . . . disinclination to hire a woman with pre-school children has

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149 Harry A. Blackmun, Notes on Reed v. Reed 1 (Oct. 18, 1971) [hereinafter Reed Notes] (Blackmun Papers, Box 135, Folder 10).
150 Id. at 2.
151 Id. at 4.
152 Reed, 404 U.S. at 76 (“A classification ‘must be reasonable, not arbitrary, and must rest upon some ground of difference having a fair and substantial relation to the object of the legislation, so that all persons similarly circumstanced shall be treated alike.’” (quoting Royster Guano Co. v. Virginia, 253 U.S. 412, 415 (1920))).
153 Reed Notes, supra note 149, at 2. Three years later, Blackmun joined an opinion specifically rejecting strict scrutiny for sex-based discrimination on the ground that the Court should exercise restraint in light of the debates then underway about adoption of the Equal Rights Amendment. Frontiero v. Richardson, 411 U.S. 677, 692 (1973) (Powell, J., concurring). In 1976, he joined a majority opinion finding that sex-based classifications should be subjected to an intermediate level of scrutiny under the Equal Protection Clause. Craig v. Boren, 429 U.S. 190, 197-99 (1976).
154 Reed Notes, supra note 149, at 3.
155 400 U.S. 542 (1971).
some rationality behind it. I do not think it is the kind of thing which the statute was intended to reach.\textsuperscript{157}

The full Court ultimately vacated the summary judgment for defendant and remanded, holding that a blanket difference in hiring policies for men and women with school-age children was unlawful unless it could be justified as a bona fide occupational qualification.\textsuperscript{158} Only by understanding this history is it not surprising that Blackmun joined a majority opinion the year after he wrote \textit{Roe} in which the Court held pregnancy not to be a sex-based classification under the Equal Protection Clause.\textsuperscript{159}

In sum, these early cases provide a window into Blackmun's approach to issues involving both law and medicine at a uniquely revealing time. At this point, Blackmun's reasoning was not affected by whatever caution or self-censorship followed the eruption of controversy after \textit{Roe}. His actions suggest that although he enjoyed his quasi-insider status vis-à-vis medicine, he also used this knowledge base to resist what he found to be loose reasoning about how law affected medical practice.

\textbf{III. THE CRUCIBLE OF ROE V. WADE}

One of the most significant aspects of the Blackmun papers is what they do not contain. Debates over abortion both triggered and epitomized social ruptures that left deep, sharp cuts in the body politic, along vectors of religion, sexuality and political philosophy. Yet it is apparent from his papers that Justice Blackmun brought no conscious agenda to this issue; indeed, he seems to have given it very little thought prior to joining the Court.\textsuperscript{160}

\textbf{A. A Chronology}

When the Supreme Court first focused on \textit{Roe v. Wade}, Justices Black and Harlan had recently died, and the Court

\textsuperscript{157} Harry A. Blackmun, Notes on \textit{Phillips v. Martin Marietta Corp.} 2 (Dec. 7, 1970) (Blackmun Papers, Box 122, Folder 8).
\textsuperscript{158} \textit{Phillips}, 400 U.S. at 544.
\textsuperscript{160} Referring to the lack of contact that he had with abortion issues while at Mayo, Blackmun said that "[a]ll of that developed later with the cases preliminary to \textit{Roe against Wade.}" Oral History, \textit{supra} note 3, at 192.
began the 1971 term with only seven Justices. At Chief Justice Burger’s request, Blackmun, Potter Stewart, and Byron White served as a subcommittee to identify pending cases that the Court could proceed to consider with only seven Justices, on the expectation that none would raise especially difficult or important questions. They included Roe on that list. “[W]e didn’t think it was that important at that time,” Blackmun noted later. “How wrong we were.”

Roe v. Wade and Doe v. Bolton were first argued in December 1971 to a seven-justice Court. Roe involved a challenge to the Texas statute which prohibited all abortions except those necessary to save the woman’s life. Doe concerned the Georgia law adopted in 1968 based on recommendations from the American Law Institute. Georgia’s scheme required that three doctors independently examine the pregnant woman, that the abortion be performed in an accredited hospital, and that at least three members of the hospital staff approve the procedure.

The pro-choice advocates presented a mix of privacy and medical rights arguments to the Court. The birth control movement had been using arguments for physician control for several decades, which then migrated to abortion reform efforts. In a strange overlap, counsel for Roe and Doe included partially identical, lengthy descriptions of medical facts related to abortion in both the initial appellants’ brief and the amicus brief filed by the American College of Obstetricians and Gynecologists. The substantive argument in the

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161 Id. at 193.
162 Id.
163 Id.
164 Letter from Justice Harry A. Blackmun to Chief Justice William H. Rehnquist (July 20, 1987) (Blackmun Papers, Box 151, Folder 3).
165 Oral History, supra note 3, at 193.
167 Doe v. Bolton, 410 U.S. 179, 182 (1973) (citing GA. CODE ANN. §§ 26-1201-26-1203). The ALI had proposed a model statute requiring that two physicians certify that an abortion was necessary because of the physical or mental health of the pregnant woman or the risk of birth defects or that the pregnancy resulted from rape, incest or other violence. See id. at 205-06 (quoting MODEL PENAL CODE § 230.3(2)-(3) (Proposed Official Draft 1962)).
168 Id. at 203 (quoting GA. CODE ANN. § 26-1202(b)(3)-(5)).
170 Compare Brief for Appellants at 18-47, Roe v. Wade, 410 U.S. 113 (1973) (No. 70-18), 1971 WL 128054, with Motion for Leave to File a Brief and Brief as Amici
appellants’ brief began with an assertion of a right to seek and receive medical care,171 followed by a section outlining various aspects of a privacy right, including the right of physicians to administer health care without arbitrary state interference.172 Although some amici presented a sex discrimination argument,173 there is no indication in the papers of Justices Blackmun, Brennan, or Douglas that members of the Court ever discussed a women’s equality analysis.

At the conference following the argument, there appeared to be a majority for finding the Texas law unconstitutional, but no clear result as to the Georgia law.174 During the conference, Blackmun expressed his view that the Texas law was too restrictive, but the Georgia law was “pretty good and [struck] a good balance” of the competing interests.175

Chief Justice Burger assigned the cases to Blackmun, whose first step was to recommend re-argument before what had become a full nine-member Court with the confirmation of Justices Powell and Rehnquist.176 Apparently no other Justice supported the suggestion, and Blackmun completed drafts in both cases in May 1972.177 Justice Blackmun’s initial draft of an opinion in Roe rested on vagueness grounds, the argument that the Texas law gave too little guidance and clarity to enable physicians to exercise their best medical judgment.178 Justices Brennan and Douglas responded quickly and sharply that the

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171 Brief for Appellants, supra note 170, at 94-98.
172 Id. at 110.
174 Oral History, supra note 3, at 193 (“[I]t ended up with the Court members, nearly all of them, not being very firm in their conviction.”).
175 Justice Harry A. Blackmun, Undated Handwritten Notes on Doe v. Bolton (Blackmun Papers, Box 152, Folder 2).
177 Id. at XLIV.
178 Justice Harry A. Blackmun, Draft Opinion of Roe v. Wade (May 18, 1972) (Blackmun Papers, Box 141, Folder 4). Blackmun framed the constitutional question as implicating the Ninth Amendment, not the Due Process Clause: “There is no need . . . to pass upon [Roe’s] contention that under the Ninth Amendment a pregnant woman has an absolute right to an abortion, or even to consider the opposing rights of the embryo or fetus . . . .” Id. at 16.
case should be decided on “the core constitutional question.” Blackmun’s first draft in Doe relied on privacy to strike the Georgia statute. “This was not the easiest conclusion for me to reach,” Blackmun told his fellow Justices in the cover memorandum. His explanation conveys his hesitancy at using a rights approach to undercut self-regulation within the medical profession:

I have worked closely with supervisory hospital committees set up by the medical profession itself, and I have seen them operate over extensive periods. I can state with complete conviction that they serve a high purpose in maintaining standards and in keeping the overzealous surgeon’s knife sheathed... [I]ntraprofessional restraints of this kind have accomplished much that is unnoticed and certainly is unappreciated by people generally.

I have also seen abortion mills in operation and the general misery they have caused despite their being run by otherwise “competent” technicians.

Justices Brennan, Douglas, and Marshall quickly joined. With time running out in the term, Blackmun again suggested deferral until the next term of the Court, and Chief Justice Burger ordered re-argument in the fall.

During the summer of 1972, Blackmun spent ten days in the Mayo Clinic library doing additional research and reworking his draft opinions. The second set of arguments came in October 1972, after the two new Justices had joined the Court. The Chief Justice re-assigned the cases to

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180 Memorandum to the Conference from Justice Harry A. Blackmun 1-2 (May 31, 1972) (Brennan Papers, Box I-286, Folder 1). The “Notes” document from Justice Brennan’s chambers records that in conference, “Justice Blackmun urged that it would be politically unwise for the Court to strike down both the death penalty... and the abortion laws at the same time.” Hoeffner Notes, supra note 176, at LI.

181 Memorandum to the Conference from Justice Harry A. Blackmun 1 (May 25, 1972) (Brennan Papers, Box I-286, Folder 1).

182 Id. at 1-2.

183 GARROW, supra note 169, at 551.

184 Memorandum to the Conference from Justice Harry A. Blackmun, supra note 180, at 1.

185 Oral History, supra note 3, at 196-98. But, he later insisted, “I never discussed [the case] at all with any physician.” Id. at 201.

186 GARROW, supra note 169, at 534, 563.
Blackmun. The result in the abortion cases was sealed when, at the Court’s conference following the second argument, Justice Powell weighed in strongly on the side of striking down both statutes. Observers had speculated that the two new Nixon appointees might spell defeat for abortion rights advocates. Ironically, Justice Powell sealed the victory for the Brennan-Douglas-Marshall approach. His unexpected and unambivalent response was the single most dramatic turn during the Court’s internal deliberations.

Blackmun circulated a draft of Roe a month after the second oral argument, noting that it “has proved for me to be both difficult and elusive.” Although he adopted a privacy analysis in this draft, he also pointedly preserved the Vuitch outcome, to uphold a statute which required that a doctor determine that an abortion was necessary for a woman’s “health,” as construed in that case:

I have attempted to preserve Vuitch in its entirety. You will recall that the attack on the Vuitch statute was restricted to the issue of vagueness. I would dislike to have to undergo another [challenge] based, this time on privacy grounds. I, for one, am willing to continue the approval of the Vuitch-type statute on privacy as well as on vagueness.

At this point, Justices Powell, Brennan, and Marshall made important interventions in how the opinions were shaped, affecting the use and extent of privacy language and the concept of viability.

By the time the opinions were announced in January 1973, Roe held, as the lead opinion, that the liberty protected under the Fourteenth Amendment “encompass[ed] a woman’s decision whether or not to terminate her pregnancy,” but that the state’s interests in maternal health and fetal life justified restrictions on abortion after the first trimester. Georgia’s process-focused restrictions at issue in Doe intruded on the first

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187 GREENHOUSE, supra note 15, at 95.
188 See infra text accompanying notes 260-64, for explication of Powell’s position.
189 GARROW, supra note 169, at 521.
190 Memorandum to the Conference from Justice Harry A. Blackmun (Nov. 21, 1972) (Blackmun Papers Fox 151, Folder 6).
191 Id. (citation omitted).
192 See infra text accompanying notes 256-59, 261-64.
194 Id. at 163-64.
trimester's zone of privacy and thus also were found unconstitutional. 195

Although the Justices realized that "we had a bull by the tail" by the time of the second oral argument, 196 their correspondence throughout 1971 and 1972 did not evidence any special vehemence of views as to the issues it raised. Six weeks before the decision was announced, Blackmun noted to Lewis Powell that "I have not had any intimation of violent disagreement, but I am informed that Byron and Bill Rehnquist will dissent at least in part." 197 Justice Rehnquist had written that he would "probably still file a dissent, although more limited than I had contemplated after the Conference." 198 A note with a similar tone had also arrived later from Justice White: "I have been struggling with these cases. I shall probably end up concurring in part and dissenting in part." 199 When Justice White read his dissent from the bench, Blackmun thought that White "was rather emotional in delivering the dissent... It surprised me a little[.] I've never asked him [why]." 200 After all, as Blackmun said during a television interview, "[it] was not such a revolutionary opinion at the time." 201

B. The Hippocratic Oath

Alfred Hitchcock used the term "Macguffin" to signify a mysterious plot objective which appears initially to be determinative, but turns out in the end to be beside the point. 202 If there is a macguffin in the story of Justice Blackmun and the medicalized framing of the right to abortion, it is the Hippocratic Oath.

196 Oral History, supra note 3, at 200.
197 Letter from Justice Harry A. Blackmun to Justice Lewis F. Powell, Jr. 1 (Dec. 4, 1972) [hereinafter Blackmun-Powell Letter] (Blackmun Papers, Box 151, Folder 3).
198 Letter from Justice William H. Rehnquist to Justice Harry A. Blackmun (Nov. 24, 1972) (Blackmun Papers, Box 151, Folder 4).
199 Letter from Justice Byron R. White to Justice Harry A. Blackmun (Dec. 1, 1972) (Blackmun Papers, Box 151, Folder 4).
200 Oral History, supra note 3, at 492.
201 Garrow, supra note 169, at 599 (citing In Search of the Constitution: Mr. Justice Blackmun (PBS television broadcast Apr. 26, 1987)).
Blackmun’s concern with whether the Hippocratic Oath proscribed abortion arose in *Vuitch*. Among the documents that Justice Blackmun collected and saved in connection with that case, two concern the oath. One is a copy of its text. The other is an article by a Mayo Clinic physician arguing that while performing an abortion to save the pregnant woman’s life was within the spirit of the oath because its goal was to save life, an abortion based on less dire “health” reasons violated the oath.

Blackmun was dogged in researching its full meaning and impact. Conducting further research on the oath was a primary motivation for Justice Blackmun’s recommendation that the cases be put over to the next term and for the ten days he spent in the Mayo Clinic library in the summer of 1972. He “wanted to do a lot more work, including the research on the Hippocratic Oath, find out how important that was.” When asked what kind of books he sought at Mayo, Blackmun responded, “Anything that had to do with the Hippocratic Oath, mainly.” When asked about any surprising research discoveries, Blackmun identified the book by Ludwig Edelstein on the oath, which he cited in the opinion. “[I]t persuaded me that [the oath] was the product of a certain geographical area and of a certain group of medical specialists in that area. It fortified me and lessened the significance of the oath as a matter of general medical principle.”

Blackmun told Harold Koh that “having worked at a medical institution, I can remember that in a majority of the examining rooms, the Hippocratic Oath was on the wall.” He also recalled numerous medical school graduations at which

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203 *Hippocratic Oath* (Blackmun Papers, Box 123, Folder 8).
205 Blackmun requested historical material about abortion less than a month after the first argument. Letter from Justice Harry A. Blackmun to Thomas E. Keys, Mayo Clinic (Dec. 17, 1971) (Blackmun Papers, Box 152, Folder 2). In response, a librarian at the Mayo Clinic sent him an article arguing that the ban on abortion was not included in the original version of the oath. Letter from Thomas E. Keys to Justice Harry A. Blackmun (Dec. 23, 1971) (Blackmun Papers, Box 152, Folder 2).
207 *Id.* at 196.
208 *Id.* at 197.
209 *Id.*; see, *e.g.*, Roe v. Wade, 410 U.S. 113, 130 nn.10-12 (1973).
211 *Id.* at 194.
newly-minted physicians took the oath. The oath is still recited at almost all medical school commencements, although its wording has been revised from the traditional form. For physicians practicing during the 1950s, when Blackmun was at Mayo, its text contained the promise to do no harm in these or very similar terms:

I will use treatment to help the sick according to my ability and judgment, but never with a view to injury and wrong-doing. Neither will I administer a poison to anybody when asked to do so, nor will I suggest such a course. Similarly, I will not give a woman a pessary to cause abortion.

According to one doctor who advocated for liberalizing abortion laws, the oath had an impact on medical training: “[A]nti-abortion messages were given like a broken record—you can’t violate the Hippocratic Oath.”

Blackmun’s major annoyance with the second oral argument was the missing analysis of the oath: the re-argument “was extraordinarily unhelpful as far as the Hippocratic Oath was concerned.” He was especially irritated by Sarah Weddington, attorney for the plaintiffs in Roe. When he asked, “Do you have any comment about the Hippocratic Oath,” she responded by describing how many eminent physicians had signed an amicus brief supporting her clients. Blackmun cut her off, noting that equally eminent physicians had signed a brief for the other side, and directed her back to his query: “Tell me why you didn’t discuss the Hippocratic Oath.”

Weddington faced up to the question, which she obviously had not anticipated, and responded that the oath did not pertain either to the scope of a woman’s right under the Constitution, nor did it address whether the state had a compelling interest in restricting abortion. “[T]he fact that the medical profession at one time had adopted the Hippocratic

212 Id.
213 Ludwig Edelstein, The Hippocratic Oath: Text, Translation, and Interpretation 3 (1943).
214 Quoted in Knapp, supra note 204, at 297. The text of the Oath found in Blackmun’s papers in Vuitch varies slightly; the key sentence is, “Nor will I give a woman a pessary to procure abortion.” Hippocratic Oath, supra note 203.
215 Joffe, supra note 54, at 33.
216 Oral History, supra note 3, at 198.
218 Id.
[O]ath does not weigh upon the fundamental constitutional rights involved," she stated.219 Blackmun’s frustration is apparent in his reply: “Of course, it’s the only definitive statement of ethics of the medical profession. I take it from what you said that . . . you didn’t even footnote it, because it’s old? That’s about, really, what you’re saying?”220

Blackmun’s actual discussion of the oath, after all his concern with it, consumes only four paragraphs on three pages.221 He posits the apparent contradiction between its injunction against performing abortions and the frequency of abortion during the Greek and Roman empires.222 What resolved this conflict for him was a history of the oath that he discovered in the Mayo Clinic library, which described it as dogma, the manifesto of only one school of Greek philosophers, “and not the expression of an absolute standard of medical conduct.”223

Blackmun’s concern with the oath reflects the value he placed on professional self-regulation. Blackmun saw the oath as a particularly important text in the relationship between physician, patient, and the state. His impatience with Weddington’s legalistic response to his question during oral argument suggests that for him the oath embodied a command which stood outside of law; that its power lay in its quasi-juridical authority within the realm of medicine. Weddington was surely correct that its text did not speak to the questions raised by the conflicting claims of the pregnant woman and the state. But it did create a potential collision between professional self-regulation and judicial authority, a conflict that likely would have been excruciating for Blackmun.

C. Justice Douglas’s “Right to Health”

At the conference following the first round of abortion arguments, Blackmun’s notes indicate that Douglas argued that abortion was a “medical and psychiatric problem . . . Doctor acting in good faith [must have] absolute immunity when he seeks to protect the life or the health” of his

219 Id.
220 Id.
222 Id. at 130-31.
223 Id. at 132 (quoting Ludwig Edelstein, The Hippocratic Oath 63 (1943)).
patient. Justice Stewart agreed with Douglas on the merits, not surprisingly in light of his concurring opinion in *Vuitch.* Following the conference, Justice Douglas immediately began drafting.

The first opinion in the abortion cases was written by Justice Douglas. Before the end of December, Douglas drafted an opinion in *Doe* which he sent only to Brennan. The Douglas draft identified multiple defects in the Georgia statute, and prompted a response from Brennan which urged him to prioritize privacy in his analysis. Brennan argued that Douglas's draft section on “the right to care for one’s health” should be pegged to privacy rather than the First Amendment and that “the right of privacy in the matter of abortions means that the decision is that of the woman and her alone.” Justice Douglas adopted some but not all of Brennan's suggestions; from the perspective of the Brennan chambers, “he still seemed to want to give the physician-patient relationship constitutional significance rather than rest the case entirely on the woman's right of privacy.”

Douglas’s published concurrence argued that the term “liberty” in the Fourteenth Amendment included three of “the rights retained by the people” referenced in the Ninth Amendment. Among these was “the freedom to care for one’s health and person, freedom from bodily restraint or compulsion, freedom to walk, stroll or loaf.” Douglas also acknowledged that the state had legitimate interests in the woman’s health and in fetal life after quickening, which “justify the State in treating the procedure as a medical one.”

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224 Justice Harry A. Blackmun, Handwritten Notes 2 (Dec. 1971) (Blackmun Papers, Box 151, Folder 4).
225 Id. at 3. See text supra at note 126 regarding his opinion in *Vuitch.*
226 Hoeber Notes, supra note 176, at XLII.
227 Id.
229 Id. at 10.
230 Hoeber Notes, supra note 176, at XLIII.
232 Id. at 213 (emphasis omitted).
The Douglas concurrence rambles through various objections to the Georgia statute, but at the core of his complaints was its restriction of the scope of the physician’s decision-making authority. Although medical regulation by the state was proper, the statute did not “give full sweep to the ‘psychological as well as physical well-being’” that the Court established as the proper scope for consideration of the woman’s health in 

\[Vuitch, 234\] Even more fundamentally, Douglas believed in a constitutive relationship between medical care and privacy.

Douglas devoted Part III of his opinion to the medicine-privacy link. He framed the right of privacy as “the right to care for one’s health and person and to seek out a physician of one’s own choice.”

By allowing a committee of doctors not selected by the patient to override the treating physician’s good faith determination, the state caused “a total destruction of the right of privacy between physician and patient and the intimacy of relation which that entails.”

In terms no less doctor-centered than Blackmun’s opinion for the Court, Douglas declared that the “oversight imposed on the physician and patient . . . denies them their ‘liberty,’ viz., their right of privacy.”

In terms at least as bluntly reinforcing of medical authority as Blackmun’s language for the majority, Justice Douglas asserted recognition of the woman’s right of privacy required that “the [state’s] control must be through the physician of her choice.”

Douglas had been developing a right to health linked to physicians’ expression rights since at least his dissenting opinion in 

\[Poe v. Ullman, 239\] in which he wrote that “[t]he right of the doctor to advise his patients according to his best lights seems so obviously within First Amendment rights as to need no extended discussion.”

He had initially drafted 

\[Griswold\] also to encompass the physician’s role within the scope of the First Amendment. A paragraph in an early draft, later

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234. 


235. 

\[Id. at 219.\]

236. 

\[Id.\]

237. 

\[Id. at 220 (emphasis added).\]

238. 

\[Id.\]

239. 

\[367 U.S. 497, 513 (1961) (Douglas, J., dissenting) (arguing that the Connecticut statute prohibiting use of contraceptives was unconstitutional).\]
dropped, asserted that “the family, together with its physician, is an instructional unit as much as a school is.”

Justice Douglas retired from the Court in 1975, and his concurring opinion in *Doe* remains the fullest explication of his hoped-for “right to health.” There is no way to know the precise impact of his views about “control through the physician” on Blackmun’s framing of the abortion right as one jointly held by the doctor and the pregnant woman, but they surely reinforced Blackmun’s inclinations in that direction, at a minimum.

D. The Triumph of Justice Brennan

More than any other member of the Court, Justice Brennan shaped the creation of a right to privacy. Although the seminal articulation of the concept originated in Justice Harlan’s dissent in *Poe*, its positive framing as a right occurred in *Griswold*. Consistent with his focus on the First Amendment, Justice Douglas originally drafted *Griswold* as grounded primarily on the right to association. As in the abortion cases, he sent his first draft only to Justice Brennan, who “suggest[ed] a substantial change in emphasis for your consideration.” Brennan argued against bringing the husband-wife relationship within the First Amendment association right because “[a]ny language to the effect that the family unit is a sacred unit, that it is unreachable by the State because it is an instruction unit, may come back to haunt us just as *Lochner* did. . . . I would prefer a theory based on privacy. . . .”

Wary of creating a precedent for protecting association that any group could invoke to resist regulation, Brennan suggested that the right of privacy was “more closely tailored to the real interest at stake.” Douglas accepted the suggestion.

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241 *GREENHOUSE*, supra note 15, at 111.


244 *Id.* at 1.

245 *Id.*

246 *Id.* at 2.
A marked-up draft in his papers reveals that a key sentence in the opinion—“[w]e deal with a right of privacy older than the Bill of Rights”—originally read, “[w]e deal with a right of association older than the Bill of Rights.” When it was announced, Griswold reverberated through the reproductive rights advocacy community, leading lawyers in case after case to reconfigure their arguments to place privacy concepts at the center.

As described above, Justice Brennan’s letter to Douglas after the first arguments in Roe argued for a right that was more grounded in the individual patient, less tied to the physician, and less restrictive of the state’s role in promoting quality of health care. Like Blackmun, Brennan did not frame his analysis in terms of equality rights for women, but he sought a stronger and more unambiguous liberty right than Blackmun did, and this more robust concept of liberty included women.

Brennan pushed Blackmun in the same directions that he pushed Douglas. In the first round of drafting, Brennan called Blackmun to task for using vagueness as the basis for a ruling in Roe, and then quickly joined a privacy-centered draft for Doe. After the second oral argument, Blackmun’s November 1972 draft designated the first trimester as the cut-off point, beyond which state regulation was permissible. Brennan, with Powell and Marshall, again lobbied Blackmun for a new position.

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249 See supra text accompanying notes 227-30.
250 Basing a health approach on the right to privacy “identifies the right squarely as that of the individual, not that of the individual together with his doctor.” Letter from Justice William J. Brennan to Justice William O. Douglas, supra note 228, at 6.
251 The right of privacy “would seem to be broader than the right to consult with, and act on the advice of, the physician of one’s choice.” Id.
252 “[T]he First Amendment approach may make it difficult to sustain requirements for consultations with other doctors that should be upheld—as, for instance, measures to restrain over-eagerness in performing novel operations for the sake of research (or, worse, publicity) rather than for the sake of the patient’s health.” Id. at 7.
253 Id. at 10.
254 See supra text accompanying notes 179, 183.
255 Memorandum to the Conference from Justice Harry A. Blackmun, supra note 190.
Justice Marshall expressed concern that allowing restrictions after the end of the first trimester would harm women who had difficulty both believing they were pregnant and deciding to have an abortion.\textsuperscript{256} He suggested specifying that state regulations were permissible after the first trimester and before viability if “directed at health and safety alone.”\textsuperscript{257} Brennan argued that the timing of regulation should track its purpose, so that regulation designed to protect the woman’s health could attach “at that point in time where abortions become medically more complex” and regulation to protect fetal life would apply after viability.\textsuperscript{258} As obvious as it sounds, Brennan’s point that viability was “a concept that focuses upon the fetus rather than the woman”\textsuperscript{259} not only helped to untangle a difficult puzzle, but also drew a boundary that coincided logically with a grounding in autonomy for the still developing right of privacy.

\textbf{E. Justice Powell’s Eleventh-Hour Intervention}

At the Justices’ conference following the second argument, Justice Powell weighed in as “basically in accord” with Blackmun.\textsuperscript{260} Nonetheless, he urged that the Texas case not be decided on vagueness grounds, but on the central merits of the claims. Justice Powell also recommended that \textit{Roe} be made the lead case. Powell argued that “[a]bortion [is a] medical problem broadly defined.”\textsuperscript{261} Although until then Blackmun had continued to believe that vagueness should form

\textsuperscript{256} Letter from Justice Thurgood Marshall to Justice Harry A. Blackmun (Dec. 12, 1972) (Blackmun Papers, Fox 151, Folder 4).
\textsuperscript{257} Id.
\textsuperscript{258} Letter from Justice William J. Brennan to Justice Harry A. Blackmun 2-3 (Dec. 13, 1972) (Blackmun Papers, Box 151, Folder 8).
\textsuperscript{259} Id. at 1.
\textsuperscript{260} Justice Harry A. Blackmun, Handwritten Notes 2 (Oct. 13, 1972) (Blackmun Papers, Box 151, Folder 9). Powell’s position apparently stemmed from his experience when approached by a young lawyer at his Richmond firm. The associate’s girlfriend had become pregnant, and he sought Powell’s advice and assistance regarding an abortion. Oral History, \textit{supra} note 3, at 200; John C. Jeffries, Jr., \textit{Justice Lewis F. Powell, Jr.} 347 (2001).
\textsuperscript{261} Justice Harry A. Blackmun, Notes, \textit{supra} note 260, at 3. Powell also noted his resistance to equal protection arguments on behalf of indigent women: “Do not like economic questions unless related to health.” \textit{Id.} This presaged his opinion upholding restrictions on Medicaid funding of abortion coverage. Maher v. Roe, 432 U.S. 464 (1977).
one basis for the opinion in Roe, he now dropped it and rearranged the opinions as Powell suggested, making Roe the lead case, grounded on the privacy right.

Justice Powell was the first to question Blackmun’s initial line-drawing at the end of the first trimester. Blackmun’s November 27 draft had summarized the timing as follows:

For the stage subsequent to the first trimester, the State may, if it chooses, determine a point beyond which it restricts legal abortions to stated reasonable therapeutic categories that are articulated with sufficient clarity so that a physician is able to predict what conditions fall within the stated classifications.

Powell wrote privately to Blackmun that drawing the line at viability would be “more defensible in logic and biologically than perhaps any other single time.” Powell directed Blackmun’s attention to the opinion in Abele v. Markle, which suggested that the state’s interest in fetal life would be weightier after the fetus became capable of living outside the uterus. Blackmun requested feedback from the full Court, which elicited the Marshall and Brennan correspondence discussed above.

F. The Opinion Blackmun Intended

When he retired, Justice Blackmun characterized the abortion right as “a step that had to be taken as we go down the road toward the full emancipation of women.” Despite this adoption of an equal liberty analysis that he did not share at the time he wrote the opinion in Roe, he also never

262 Justice Harry A. Blackmun, Undated Notes 1 (“I wrote it before on vagueness. I feel this still is sound and as a complement to [the] Georgia [case].”) (Blackmun Papers, Box 151, Folder 8).
263 Justice Harry A. Blackmun, Draft Opinion of Roe v. Wade 48 (Nov. 21, 1972) (Blackmun Papers, Box 151, Folder 6).
264 Letter from Justice Lewis F. Powell to Justice Harry A. Blackmun 1 (Nov. 29, 1972) (Blackmun Papers, Box 151, Folder 4).
266 Id. at 232. At the conference following the second oral argument, Justice Stewart had also suggested following this decision.
267 Memorandum to the Conference from Justice Harry A. Blackmun (Dec. 11, 1972) (Blackmun Papers, Box 151, Folder 4).
268 See supra text accompanying notes 256-59.
269 Oral History, supra note 3, at 206.
270 Blackmun acknowledged that he did not hold that view at the time that he wrote Roe. “As the furor developed and its integrity was attacked and upheld, certainly I came to that conclusion, and I feel strongly about it today.” Id.
abandoned his view that the physician’s guidance was essential: “I think to this day there ought to be a physician’s advice in there. I don’t believe in abortion on demand.”271

Blackmun’s cry of misunderstanding—that he did not favor “abortion on demand”—was sincere. Fundamentally, Blackmun thought that he was writing an opinion that would reform abortion law, largely by protecting reputable physicians acting in good faith. Although the decisions in Roe and Doe accomplished that, they also ended state power to compel the completion of pregnancy based on absolutist notions of fetal life or traditional precepts about sexual morality. As a result, in cultural if not legal terms, to his own surprise and dismay, Blackmun wrote the repeal of abortion law.

Perhaps the most important misunderstanding of the Court’s opinions in Roe and Doe has been to treat them as solely Justice Blackmun’s analysis. Blackmun repeatedly stressed in the first years after the backlash began that he had been writing for a seven-Justice majority, but as his allies on the Court became less protective of Roe or were replaced by Justices hostile to the decision, he more aggressively took up the fight to protect it.272 These later actions helped secure identification of the abortion right as his legacy. In addition, the simplistic explanation that his Mayo experience generated a distorted emphasis on protecting physicians fueled the perception that the medical reasoning in the abortion cases was the idiosyncratic product of their author.

At every step in the consideration of Roe and Doe, Blackmun sought an analysis that would resolve the cases on narrower, rather than broader, grounds. He adhered to a vagueness rationale in Roe until Justice Powell joined the majority and called for a more substantive approach.273 He

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271 Oral History, supra note 3, at 206.


273 In sending his May 1972 draft of Roe to the other Justices, Blackmun said that the vagueness theory “would be all that is necessary for disposition of the case, and . . . we need not get into the more complex Ninth Amendment issue. . . . In any event, I am still flexible as to results, and I shall do my best to arrive at something which would command a court.” Memorandum to the Conference from Justice Harry A. Blackmun (May 18, 1972) (Blackmun Papers, Box 151, Folder 4).
relinquished his initial tendency to support the Georgia law and to preserve *Vuitch*-style statutes because he needed the votes of Justices Brennan and Douglas to command a court.\textsuperscript{274} He repeatedly advocated carrying the decision over until the next term,\textsuperscript{275} although Justice Douglas, especially, was livid that Chief Justice Burger was attempting to change the outcome through delay, by adding the votes of two new Nixon appointees.\textsuperscript{276} At that point, in the spring of 1972, Justice Brennan was “prepared to lay three-to-one odds that Justice Blackmun would eventually abandon the opinions he had written” in the two abortion cases.\textsuperscript{277} What comes across most clearly in this history is Blackmun’s pragmatism, his willingness to shift course on both vagueness and the appropriate timing for restrictions, in order to keep a majority. Blackmun repeatedly explained to his brethren that his flexibility grew out of his efforts to attract sufficient support for the opinion.\textsuperscript{278}

Against this backdrop, Blackmun’s research of medical history and ethics appears more like caution vis-a-vis his more gung-ho brethren than the construction of an illegitimate rationale for a course that he was unwilling to question or blindly determined to follow. The feedback that he received from the other Justices about the incorporation of this research into his opinion was uniformly positive, and it came not so much from the more liberal Justices as from Powell,\textsuperscript{279} Stewart,\textsuperscript{280} and Rehnquist.\textsuperscript{281}

\textsuperscript{274} See supra text accompanying notes 169, 183, 256-59.
\textsuperscript{275} See supra text accompanying note 176.
\textsuperscript{276} Garrow, supra note 169, at 553-55.
\textsuperscript{277} Hoeber Notes, supra note 176, at LI.
\textsuperscript{278} See, e.g., Memorandum to the Conference from Justice Harry A. Blackmun, supra note 273 (“I shall do my best to arrive at something which would command a court.”); Letter from Justice Harry A. Blackmun to Justice William H. Rehnquist (Nov. 27, 1972) [hereinafter Blackmun-Rehnquist Letter] (Blackmun Papers, Box 151, Folder 4) (“My vagueness approach, however, did not find favor. . . . Thus, this time around, I . . . did not reach the issue of vagueness.”); Blackmun-Powell letter, supra note 197, at 1 (“I could go along with viability if it could command a court.”).
\textsuperscript{279} “I am enthusiastic about your abortion opinions. They reflect impressive scholarship and analysis, and I have no doubt that they will command a court.” Letter from Justice Lewis F. Powell to Justice Harry A. Blackmun, supra note 264, at 1. On the day that the abortion decisions were announced, Dottie Blackmun, the Justice’s wife, attended the session. Powell had a handwritten note delivered to her which said, “Dottie—Harry has written an historic opinion, which I was proud to join.” Justice Lewis F. Powell, Handwritten Note to Dottie Blackmun (Jan. 22, 1973) (Blackmun Papers, Box 151, Folder 3).
\textsuperscript{280} “I think your most recent circulations are even better than the original ones, and I was again greatly impressed with the thoroughness and care with which
There are also signs in the documents that Blackmun was concerned about the proper role of state legislatures. His private notes prior to the second conference include options for smoothing the way for state legislatures to respond, including possible withholding of the mandate until April 1, by which time most would be in session.\textsuperscript{282} He expected states to adopt health-related requirements recommended by physicians for the period after the first trimester:

I have the impression that many physicians are concerned about facilities and, for example, the need of hospitalization, after the first trimester. I would like to leave the states free to draw their own medical conclusions with respect to the period after three months and until viability. The states’ judgment of the health needs of the mother, I feel, ought, on balance, to be honored.\textsuperscript{283}

He reassured Justice Rehnquist “that after the first trimester a state is entitled to more latitude procedurally as well as substantively.”\textsuperscript{284}

In short, Blackmun functioned as the broker of a decision that combined the elaboration of privacy rights sought by Brennan, Douglas, and Marshall with the insulation of medical authority which Blackmun himself certainly favored and which was also sought by Douglas, Powell, and Stewart.\textsuperscript{285}

\textit{Roe v. Wade} has become synonymous with “activist” judging, as contrasted to a jurisprudential ideal of incrementalism and

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\textsuperscript{281} “Although I am still in significant disagreement with parts of [your draft opinions], I have to take my hat off to you for marshalling as well as I think could be done the arguments on your side.” Letter from Justice William H. Rehnquist to Justice Harry A. Blackmun, \textit{supra} note 198. Rehnquist repeated this courtesy toward Blackmun in his dissent. \textit{Roe v. Wade}, 410 U.S. 113, 171 (1973) (Rehnquist, J., dissenting).

\textsuperscript{282} Justice Harry A. Blackmun, Undated Handwritten Notes (Blackmun Papers, Box 151, Folder 2). Blackmun also wanted the decisions to be announced by mid-January “to tie in with the convening of most state legislatures.” Memorandum to the Conference of from Justice Harry A. Blackmun (Dec. 15, 1972) (Blackmun Papers, Box 151, Folder 4).

\textsuperscript{283} Blackmun-Powell Letter, \textit{supra} note 197, at 1-2.

\textsuperscript{284} Blackmun-Rehnquist Letter, \textit{supra} note 278.

\textsuperscript{285} During his oral history interview, Blackmun declined to elaborate on why he grounded the analysis in substantive due process rather than another constitutional provision. “The main thing, of course, was to try to get the Court together, because it was in such a position of equivocacy among most of the justices.” Oral History, \textit{supra} note 3, at 201. David Garrow noted that “Blackmun’s colleagues appreciated that his revisions had fully—and sometimes quite precisely—responded to their suggestions.” \textit{GARROW, supra} note 169, at 586.
respect for the political branches. How ironic it is that searching for the narrowest ground for a decision was precisely how Blackmun approached his task of writing the opinions in *Roe* and *Doe*.

After *Roe*, Justice Blackmun smarted from criticism of the opinion’s focus on the rights of doctors. In the first several years after *Roe*, Blackmun wanted to distance himself from abortion and similar cases. In *Carey v. Population Services International*, involving minors’ access to contraceptives, his letter commenting on Justice Brennan’s draft of the opinion of the Court began by thanking Brennan for “taking it on, for I have been too much in evidence in this area in the past few years.” Two terms later, in *Beal v. Franklin*, he wrote to himself, “More abortion and more refinement of our theorizing . . . . I grow weary of these.” The following year, in *Bellotti v. Baird*, his notes on the case reflect the same theme: “Abortion again and Massachusetts again. . . . Perhaps they are tired, as I am, of all this fuss.”

IV. **REDEPLOYING MEDICAL RHETORIC**

After *Roe*, the framing of medical authority in abortion discourse fractured. Justice Blackmun embraced medicine even more tightly, at least rhetorically, invoking its quality of

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287 *WOODWARD & ARMSTRONG*, supra note 8, at 415.

288 431 U.S. 678, 686-91, 700-02 (1977) (holding unconstitutional under the First and Fourteenth Amendments a state law that criminalized the distribution of contraceptives to minors, or to adults by persons other than pharmacists, and prohibited any advertising or displaying of contraceptives).

289 Letter from Justice Harry A. Blackmun to Justice William J. Brennan (Mar. 8, 1977) (Blackmun Papers, Box 240, File 3).


291 Justice Harry A. Blackmun, Undated Handwritten Notes (Blackmun Papers, Box 281, Folder 9).

292 Bellotti v. Baird, 443 U.S. 622, 651 (1979) (holding that a Massachusetts law requiring a minor to obtain parental consent, or judicial approval after notification to her parents, before seeking an abortion, was an unconstitutional burden on the minor’s right to seek an abortion).

293 Justice Harry A. Blackmun, Handwritten Notes on *Bellotti v. Baird* (Feb. 25, 1979) (Blackmun Papers, Box 293, Folder 6).
compassion as superior to what he saw as the mean-spiritedness of fellow Justices who sought to overrule Roe. Implicitly, this rhetoric also served as an indirect way for him to describe himself in the same invidious terms. Anti-abortion conservatives, by contrast, used a rhetoric of de-legitimating medical authority as one path to undermining the logic of Roe.

A. Blackmun’s Rhetorical Evolution

Blackmun’s life changed irrevocably with the issuance of Roe v. Wade. He found himself, almost overnight, both demonized and lionized.294 As he came to accept his role as chief defender of that decision, another side of medicine—its qualities as a profession of mercy—came into sharper focus in his philosophy. No documents indicate that this shift was conscious, but the trend is clear. Blackmun reconfigured his admiration of medicine, and deployed it rhetorically in a battle over politically-charged attacks against reproductive rights.295

Blackmun saw medicine not only as a source of authority and expertise, but also as a model of compassion, increasingly in a specifically political way. A recurring theme in biographical accounts of Blackmun is the question of how a small town Midwestern corporate lawyer turned judge became a champion for the concerns of minorities and the less powerful.296 He became an impatient critic of those who sought to undercut reproductive rights for women seeking care from public facilities, to the point of chastising his fellow Justices for their blindness to “another world ‘out there.’”297

295 See infra text accompanying notes 302-04, 309-12.
Part of the answer lies in his connection to medicine. Medicine provided a model of professionalism for the public good that Blackmun re-interpreted to encompass his changing political understandings and sensibilities. His admiration for medicine was a theme running through his entire professional life, but after *Roe* he deployed its rhetoric for new purposes.

In reading his papers and speeches and the oral history, one is struck by Blackmun’s admiration of what he saw as the more robust notion of compassion in medicine than in law. Blackmun believed that the key differences between law and medicine lay in the adversarial approach to dispute resolution characteristic of law as compared to the goal of service and healing that dominated medicine.\(^{298}\) The attribution of virtue may have originated in idealization, but it seems to have undergone a subtle evolution, such that it came to serve another function. The quality of mercy that Blackmun located in medicine but found often lacking in law provided a benchmark and a justification for his own attempts, with fewer allies among his fellow Justices as the years went on, to point constitutional law in the same direction.

Blackmun’s association of medicine with humaneness and not just skill began while he worked at Mayo. In a 1954 speech, he described the Mayo Clinic as “a place of humanitarianism where the guiding principle is that of responsibility to others.”\(^{299}\) He cited numerous institutional policies in support of that conclusion, such as never suing a patient for a medical fee, declining payment if the money resulted from the mortgaging of the patient’s home, providing equal treatment to patients regardless of race or financial status, and prioritizing the payment of salaries for the nursing staff.\(^{300}\) In 1958, on his personal copy of the American Medical Association’s Principles of Ethics, Blackmun noted that the ethical rule against disclosure of a patient’s confidences contained an exception for when “it becomes necessary in order

\(^{298}\) See *infra* text accompanying notes 302-04, 309-12.

\(^{299}\) Harry A. Blackmun, Speech Notes 14 (Mar. 6, 1954) (Blackmun Papers, Box 13, Folder 17).

\(^{300}\) *Id.* at 12-13; *Labor Leaders Attack Tax Reform Proposal*, Mar. 8, 1954 (publication unidentified; newspaper article describing meeting at which Blackmun presented his speech) (Blackmun Papers, Box 13, Folder 17).
to protect the welfare of the individual or of the community,” which could be “more broad than the law itself.”

After Roe and the backlash that it triggered, one finds Justice Blackmun not only lauding medicine, but also making pointed comparisons between it and law. Speaking at the 1980 commencement of the Mayo Medical School, he extended congratulations “as a member of the profession of controversy... to you, now members of the profession of mercy.” He repeated this point in his oral history interview in 1994, stating that lawyers worked to resolve controversies, while the goal of physicians was to work “for the common goal... of cure... and alleviation of pain.”

In his 1995 speech at Mayo on pediatric issues, Justice Blackmun described various categories of litigation affecting children, concluding with the advice that physicians should “rely on your good medical judgment rather than place too heavy a burden on what might be regarded as established law.” Specifically as to abused children, he cited DeShaney v. Winnebago County Social Services Department, holding that a brutally battered child had no right to relief based on the state’s failure to protect him after being notified of his father’s previous assaults. Blackmun noted that “[i]t is the case where, in solitary dissent, I spoke of ‘Poor Joshua.’”

A 1994 speech focused on law and psychiatry seems particularly revealing. Blackmun spoke on the occasion of having received the Isaac Ray Lectureship Award from the American Psychiatric Association. He began by describing Ray, one of the Association’s founders, in these terms:

Dr. Ray stressed human kindness. He believed that a psychiatrist must minister to all... not just to the patient and must endeavor to soften the ever-present human prejudice and cruelty toward the incompetent. So we have in Dr. Ray an example of... an individual who dared to inquire and to investigate the law insofar as it affected his patients directly or indirectly and an individual who would...
improve the lot of some of the least respected among us. That, indeed, is an example of magnitude of character and of endeavor.\textsuperscript{308}

In conclusion, Blackmun returned to this theme, describing psychiatrists as “an important part of the profession—indeed, of the ministry—of healing, which demands kindness, understanding, and sympathy.”\textsuperscript{309} He contrasted that with “[t]he current federal judiciary,” which he described as “tak[ing] a tough, narrow view of the defenses based on competence.”\textsuperscript{310}

Blackmun referred specifically to \textit{Godinez v. Moran}, in which he had dissented, and in which the Court set the standard for assessing competence for a guilty plea or waiver of counsel at the same relatively low level as that for standing trial: whether the individual could consult with a lawyer with a reasonable degree of rational understanding.\textsuperscript{311} “Can the recent \textit{Godinez} decision,” he asked rhetorically, “possibly be correct in the eyes of the practicing psychiatrist or, if I may be so bold, in the eyes of Isaac Ray?”\textsuperscript{312}

B. The Backlash

In the years after \textit{Roe}, as more conservative Justices joined the Court, the Court shifted to a more restrictive approach to abortion rights. In doing so, it used a counter-rhetoric of the unreliability of medical judgment as a primary discursive mechanism.

One example of how the Court constructed medical rhetoric in precisely the opposite way from what Blackmun was attempting is the application of abortion law to minors. In one of its first post-\textit{Roe} abortion decisions, the Court held that laws requiring parental consent before a minor could obtain an abortion were unconstitutional as applied to mature minors or to minors for whom an abortion would be in their best interests.\textsuperscript{313} This initial decision left the determination of the minor’s best interests, as well as the assessment of medical maturity, that is, whether an adolescent was sufficiently mature to consent to a medical procedure, up to physicians.

\begin{itemize}
\item \textsuperscript{308} \textit{Isaac Ray Lecture, supra} note 63, at 800.
\item \textsuperscript{309} \textit{Id.} at 804.
\item \textsuperscript{310} \textit{Id.}
\item \textsuperscript{311} \textit{Godinez v. Moran}, 509 U.S. 389, 398 (1993).
\item \textsuperscript{312} \textit{Isaac Ray Lecture, supra} note 63, at 804.
\item \textsuperscript{313} Planned Parenthood of Cent. Missouri v. Danforth, 428 U.S. 52, 74 (1976).
\end{itemize}
But the Court later changed course, and upheld state statutes which created a requirement that judges, not doctors, determine a minor’s best interests or maturity.\footnote{Bellotti v. Baird, 443 U.S. 622 (1979). The Court cited Justice Stewart’s concurring opinion in Danforth, which signaled the beginnings of skepticism as to medical deference: “It seems unlikely that [the pregnant teenager] will obtain adequate counsel and support from the attending physician at an abortion clinic.” \textit{Id.} at 641 (citing 428 U.S. at 91). The Court has reaffirmed its commitment to permitting a bypass of parental consent (and additionally notification) only by the judiciary. Hodgson v. Minnesota, 497 U.S. 417 (1990); H.L. v. Matheson, 450 U.S. 398 (1981).} On this issue, the Court insisted on evidentiary hearings rather than deference to doctors, despite substantial record evidence that the hearings were of little value.\footnote{Hodgson v. Minnesota, 648 F. Supp. 756, 766-67, 775 (D. Minn. 1986), rev’d, 497 U.S. 417 (1990).}

Similarly, post-\textit{Roe} anti-abortion laws such as the one challenged in \textit{City of Akron v. Akron Center for Reproductive Health}\footnote{462 U.S. 416 (1983).} frequently included a provision specifying a script that a doctor had to recite to the patient when obtaining her informed consent, much of it a thinly disguised polemic designed to persuade the woman to reconsider her decision to abort.\footnote{Id. at 423 n.5.} The Court found that such a requirement constituted an “intrusion upon the discretion of the pregnant woman’s physician.”\footnote{Id. at 445.} Nine years later, however, the Court reversed \textit{Akron’s} holding on informed consent in \textit{Planned Parenthood of Southeastern Pennsylvania v. Casey}.\footnote{505 U.S. 833, 884 (1992) (joint opinion of O’Connor, Kennedy, and Souter, JJ.).}

The tone of the Court’s opinions continued to change, with increasing frequency, to skepticism about the professional reliability of physicians who performed abortions. Justice Blackmun’s invocation of medical authority moved to the dissent.\footnote{See, e.g., Rust v. Sullivan, 500 U.S. 173, 218 (1991) (Blackmun, J., dissenting) (“In our society, the doctor-patient dialogue embodies a unique relationship of trust. The specialized nature of medical science and the emotional distress often attendant to health-related decisions requires that patients place their complete confidence, and often their very lives, in the hands of medical professionals.”).} Eight years after \textit{Casey}, the debate within the Court centered on whether the majority’s analysis in that case was a throwback to a “repudiated” model of deference to physicians.\footnote{Stenberg v. Carhart, 530 U.S. 914, 968-69 (2000) (Kennedy, J., dissenting). Justice Kennedy’s dissent, joined by Chief Justice Rehnquist, argued at length that the Court had ceded too much authority to physician judgment, in what he asserted was a misinterpretation of the more relaxed standard for review of state statutes established in \textit{Casey}. \textit{Id.} at 965-70.}
Even the vocabulary grew sharper. Justices hostile to *Roe* began to include “abortionist” in their opinions and to de-emphasize the more respectful terms “physician” and “doctor.” Justice White used the word “abortionist” seven times in his dissenting opinion in *Colautti v. Franklin*.\(^{322}\) Justice Blackmun noticed it in White’s draft, and commented in the margin, “the hateful word.”\(^{323}\) In *Stenberg v. Carhart*, three Justices who filed dissenting opinions used the word “abortionist[s]” thirteen times in their two opinions.\(^{324}\)

V. THE MYTH OF MEDICAL INDEPENDENCE

Considering the specifics of Harry Blackmun’s life, together with the broader dynamics of how the Supreme Court adjudicated the abortion cases, provides us one view of a fascinating and portentous constitutional debate. Consistent with the overarching theme of this article, one can also analyze it in the context of the relationship between the judiciary and medicine. In that frame, the same story operates as a particularly powerful episode in the social negotiation of the role of medicine as a disciplinary discourse.

*Roe* privileged medical authority, but not in the conventional sense of deference to expertise. What the Court sought to protect as the province of medicine was neither technical nor scientific. The abortion decisions cleared for physicians a sufficiently expansive legal and cultural space to insulate them as they resolved, patient by patient, the clash of incommensurate social values.

The Court in essence delegated juridical authority to physicians. What constituted a therapeutic abortion in the regime of first *Vuitch* and then *Roe* and *Doe* could not be derived solely from law and certainly not solely from science. The Court’s decisions revealed “therapeutic” as a social construct, a category with no enforceable meaning. To satisfy therapeutic criteria under the new rules, medical indicators for abortion could include a range of life situations. Regulation was replaced by diagnosis, which was itself regulation.


\(^{323}\) Justice Byron R. White, Draft of Dissenting Opinion in *Colautti v. Franklin* 2 (Dec. 29, 1978) (Blackmun Papers, Box 281, Folder 8).

Underlying this discursive move was the assumption that medicine constitutes a private realm apart from the state which can therefore function as a buffer between the individual and the state. In Douglas’ mind as well as Blackmun’s, medicine helped to define what was private, with doctors serving as border patrols. Douglas was less enamored of the profession than Blackmun, but his libertarianism could align with his concept of medical care as a core aspect of privacy only if and when he believed that physicians operated independently of the state. Both had an unspoken faith in medicine as a parallel and independent universe of power.

Physicians did legitimately present themselves as victims of an over-reaching state because usually only they (and not the women seeking abortions) were the actors at risk of prosecution. The Justices could easily see doctors as targets of state power. What the Court did not see, or at least acknowledge, was the role of physicians as partners in regulation and the power of medicine as social discipline. Whether seen or not, however, the import of the early abortion cases was to entrust physicians with even more regulatory authority than they had previously exercised, by seeming to remove the fear of hostile surveillance by the state.

Delegation to doctors of questions associated with the repercussions of sexual misconduct also resonated with a powerful construct of public-private divide. In a context of adjudicating issues of morality, the law/medicine framework aligned with the public/private dichotomy. The second realm in each dichotomy dealt with family and familial concerns, in ways that could shield the first realm from the messiness of competing moral arguments. Reassuringly, both halves operated under male supervision.

The Court’s delegation of power ultimately failed, however, because it occurred at the precise moment when the authority of medicine was itself under challenge. The same discourse of rights against which medical authority was thought to provide a sensible counterweight had invaded medicine itself, and the weight of professional opinion tipped to

325 GReenhouse, supra note 15, at 99.
326 The California Supreme Court explicitly recognized this move: “The problem caused by the vagueness of the statute is accentuated because under the statute the doctor is, in effect, delegated the duty to determine whether a pregnant woman has the right to an abortion . . . .” People v. Belous, 458 P.2d 194, 206 (Cal. 1969).
support for the right of the pregnant woman to decide whether to have an abortion just as the early cases were heading toward the Supreme Court.\textsuperscript{327} The social control that Blackmun and others on the Court anticipated did not prevail. This broader change is why the opinions in \textit{Roe} and \textit{Doe} said reform, but did repeal.

As the post-\textit{Roe} abortion story unfolded, an increasingly conservative Court realized that physicians as a class could not be trusted to police the border defining the allowable degree of state intrusion into sexual and moral decision-making. The doctor-patient relationship created a sequestered space which enabled resistance to and non-compliance with traditional norms. The Court sought to retrieve aspects of the power which it had delegated, by reinstating the state as ultimate authority.

Today, the many and continuing battles over abortion show us that medical authority can be deployed to enhance the power of the state and not just of the profession. What the Court did in \textit{Roe}—with whatever degree of consciousness—was command and de-control. \textit{Roe}'s invalidation of all extant abortion laws delegated responsibility to another center of power, at least as much as it protected the medical profession. When a critical mass of judges later found medicine to be institutionally unreliable in enforcing social norms, the Court retracted its deference. The expansion and contraction of deference to medicine in the abortion cases has been an epiphenomenon of ideological shifts.

The irony, especially for a classic liberal believer in public and private realms such as Blackmun, was that the 1973 Court's belief in medical authority as apolitical catalyzed the most massive politicization of medicine in American history. Abortion both revealed the extent to which medicine's apolitical status was mythic and drove the Court's own ever deeper politicization, reaching the level of partisan campaigns and litmus tests for judicial appointments.

Blackmun crafted a resolution in \textit{Roe} and \textit{Doe} that sidestepped one crisis of authority, over the intrusion of public power into intimate life, but exacerbated another, the crisis of the judiciary's role in a democratic republic. Medicine failed him and the Court as a mechanism of civic governance. Instead, abortion revealed medicine as a discursive system

\textsuperscript{327} Garrow, supra note 169, at 357-60.
whose meaning, like that of the law, was contingent on structures of power that it could not control.

VI. CONCLUSION

Justice Blackmun bears ultimate responsibility for the decisions that he wrote and whatever shortcomings they contained regardless of the pressures which he experienced. But the glib attribution of Roe’s reasoning to his decade at the Mayo Clinic is unfounded. The conventional view of Blackmun as a naïve defender of doctors is itself naïve and grossly inadequate to explain the medicalized framing of Roe and Doe.

This is not to deny that Roe was in part the product of a society-wide renegotiation of the role of medical authority. The Court sought to entrust medicine with decisions which required normative rather than scientific judgments, under a mask of professional expertise. Ultimately, the medical framing could not withstand political challenges from feminists on one side and moral conservatives on the other. Medicine was central, but it could not suffice as a civic or cultural center. It was a center that did not hold.
Biography Is Destiny: The Case of Justice Peter V. Daniel

Earl M. Maltz†

Judicial biographies are an indispensable resource for those of us seeking to understand the structure of constitutional law. The evolution of this structure is determined by the interacting views of the shifting groups of nine individuals serving on the Court over time. Each individual’s position reflects a unique set of influences and experiences. Judicial biographies provide detailed accounts of these influences and experiences, thereby deepening our knowledge of the forces that ultimately shape Supreme Court jurisprudence.

By contrast, more traditional modes of constitutional scholarship tend to focus only on certain parts of the Justices’ biographies to the exclusion of other significant influences on the development of their views. For example, purely doctrinal descriptions of Supreme Court opinions implicitly reflect the understanding that all of the Justices have graduated from law school and, as such, have internalized and are to a greater or lesser degree influenced by the distinctive conventions of legal analysis that are at the core of the law school curriculum. Other analyses emphasize the political backgrounds and views of the Justices as the primary determinants of judicial decisionmaking—once again, emphasizing only one part of the Justices’ biographies.

However, judicial decisions are often influenced by aspects of the Justices’ lives that are not easily assimilated into either doctrinal or political analysis. Justice Lewis F. Powell, Jr.’s approach to privacy issues provides an example of such influences. Powell’s approach to Roe v. Wade1 and its progeny was no doubt affected by his experience counseling a distraught

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1 410 U.S. 113 (1973).
young man who came to him for advice regarding an unplanned pregnancy at a time when abortion was illegal in Virginia. Conversely, Powell’s 1986 decision to provide the crucial fifth vote rejecting a challenge to a Texas anti-sodomy statute in *Bowers v. Hardwick* was likely influenced by his stated belief that he had never met a gay person—an assertion that, ironically, Powell made at a time when he employed a gay law clerk.

Analogous factors can play a role even in the most unlikely of circumstances. Consider the case of Justice Peter V. Daniel of Virginia. Although Daniel is the subject of a very fine biography by John P. Frank, those who are not deeply immersed in the constitutional law of slavery may never have even heard of him. In the literature on *Dred Scott v. Sandford*, he is typically dismissed as an almost cartoonish character, the very embodiment of Southern extremism. Daniel is variously described as “a brooding proslavery fanatic,” a “bigot” with a “fanatical temper,” and a “zealot who hoped that his fellow southerners would go to ‘any extremity’ to ensure that slave property received greater protection than any other form of property.” In some respects, by 1857, these characterizations were quite accurate. Closer examination, however, reveals that the forces that shaped Daniel’s views in *Dred Scott* were quite complex.

Peter Vivian Daniel was born on April 24, 1784, on a family farm in Stafford County, Virginia, an agricultural region located approximately fifty miles south of Washington, D.C. and sixty miles north of Richmond. He received his early education from private tutors, and in 1802, spent a few months at Princeton before returning to Stafford County. In 1805, Daniel moved to Richmond to study law in the offices of Edmund Randolph. Randolph, a former aide to George

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2 This incident is described in *John C. Jeffries, Justice Lewis F. Powell, Jr.* 347 (1994).
4 See Jeffries, *supra* note 2, at 521.
6 60 U.S. (19 How.) 393 (1856).
8 1 Allan Nevins, *The Emergence of Lincoln* 103 (1950).
10 The details of Daniel’s life are taken from Frank, *supra* note 5.
Washington, had served as both Attorney General and Governor of Virginia. In addition, he had represented Virginia in the Continental Congress and the Constitutional Convention. After being admitted to the bar in 1808, Daniel came back to Stafford County to practice. In 1809, he returned to Richmond as a representative to the state legislature, and in 1810, married Randolph’s younger daughter, Lucy. Thereafter Daniel permanently relocated to Richmond.

The Randolph connection did not translate into great financial prosperity for the Daniel family. Daniel was a committed Jeffersonian in a city whose business establishment was dominated by Federalists and later Whigs, men who tended to give their business to those who shared their political views. Thus, throughout his life, Daniel’s income was far less than that of the exalted company in which he found himself.

However, the son-in-law and protégé of Edmund Randolph did have immediate access to the highest circles in Virginia Democratic politics. He quickly became a prominent member of the so-called “Richmond Junto,” a network of influential Democrats that dominated Virginia politics for much of the early nineteenth century. Daniel’s formal base of power was his membership on the Virginia Council of State, a unique institution which shared executive power with the state governor. Daniel served on the Council almost continuously from 1812 to 1835, and for much of that period was its senior member and, as such, Lieutenant Governor of the state.

Beginning in the 1820s, Daniel also started taking an increasingly active role in national politics. In 1824, the Junto threw its support behind presidential candidate William H. Crawford of Georgia. The election was ultimately decided by the House of Representatives, with John Quincy Adams defeating both Crawford and Andrew Jackson. In 1828, Daniel vigorously supported the ticket of Jackson and John C. Calhoun of South Carolina, and was rewarded as the Jackson-Calhoun forces carried Virginia and thwarted Adams’ bid for reelection.

Daniel had great admiration for Jackson; however, he had a much closer personal relationship with Jackson’s trusted lieutenant Martin Van Buren, the New York politician largely responsible for reinvigorating the Democratic Party in the late 1820s. In the early 1820s, Van Buren had established a political alliance between his Albany Regency and the Richmond Junto. For more than two decades thereafter, Daniel maintained an active correspondence with the “Little
Magician," strongly supporting his campaigns for the vice presidency in 1832 and the presidency in 1836.

This personal relationship no doubt influenced Daniel’s thinking when Virginia Democrats split between supporters of Jackson and Calhoun during Jackson’s first term. The key issue dividing the two factions was the protective tariff which had been adopted with Jackson’s support. Daniel agreed with Calhoun on the substantive issue; nonetheless, he remained the titular leader of the Jackson Democrats in Virginia. Moreover, despite his lifelong commitment to states’ rights, Daniel continued to support the administration in its firm opposition to South Carolina’s claim that it had the right to nullify the tariff on constitutional grounds. At the same time, Daniel also consistently adhered to the view that a state had the right to secede from the Union in response to more severe provocation.

Daniel’s position on the tariff itself must have left him somewhat ambivalent in his support for Jackson against Calhoun and the State of South Carolina. However, he had no compunctions about rallying behind the administration in its war with the Bank of the United States. Daniel considered the Bank an abomination. When asked to evaluate the claims of an aspirant to political office, Daniel replied, “He has professed a belief in the constitutionality of a national bank, and that is an objection which with me would overrule any and every recommendation which could be urged for him or for any other person.”

11 Thus, Daniel enthusiastically supported Jackson’s decision to remove federal deposits and place them in state banks. When Roger Brooke Taney left his position as Attorney General to oversee this process as Secretary of the Treasury, Jackson chose Daniel to be Taney’s replacement. Daniel refused this appointment for financial reasons. However, in March, 1836, when Philip P. Barbour left the United States District Court for the Eastern District of Virginia to become an Associate Justice of the Supreme Court, Daniel accepted an appointment to be his successor.

Five years later, on February 25, 1841, Justice Barbour died in office. Martin Van Buren, who succeeded Jackson in 1836 but was defeated for reelection by Whig William Henry Harrison in 1840, had eight days left until his term expired. Seeking to deprive the Whigs of the opportunity to choose a

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11 Id. at 113 (quoting Justice Daniel).
Justice, Van Buren quickly appointed Daniel to succeed Barbour on the Court.

A brief but intense political struggle over the nomination soon followed. The dispute over slavery that would soon become so prominent played no role in this struggle; instead, the dispute was simply an incident in the ongoing battle for political power between the Democrats and the Whigs. Democrats in the Senate had enough votes for confirmation. Whigs, however, knew that if they could delay Senate action for just eight days, the nomination would automatically die and the seat would be filled by a Harrison nominee.

Daniel’s opponents pursued a two-pronged strategy in seeking to achieve this objective. They first sought to take advantage of the fact that recently admitted southwestern states were not yet part of any circuit and had no representation on the Supreme Court. The Whigs introduced a bill that would have remedied this situation by abolishing the existing Fourth Circuit, merging Virginia and North Carolina into other existing circuits, and creating a new southwestern circuit in place of the Fourth. They hoped thereby to entice some southwestern Democrats to oppose Daniel in the hope of having a Justice appointed from their own region to service the new circuit.

This part of the strategy was a partial success. The circuit reorganization bill passed the Senate, and some southwestern Democrats abandoned the Daniel nomination. Nonetheless, after it became apparent that the Senate bill could not be acted upon in the House of Representatives, it also became clear that Daniel retained enough support to be confirmed if the matter came to a vote on the merits.

In their second attempt to defeat Daniel’s nomination, the Whigs tried to deprive the Senate of a quorum by abandoning the chamber en masse. This attempt failed by the narrowest of margins after the Democratic leadership scoured the city of Washington in a desperate effort to locate absent Democratic senators. Thus, shortly after midnight on March 2, 1841, Peter V. Daniel was confirmed as an Associate Justice of the Supreme Court.

Van Buren reported to Jackson that, in nominating Daniel, he had taken the opportunity “to put a man on the

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12 Id. at 155-60 (describing the struggle over Daniel’s confirmation).
bench of the Supreme Court . . . who will I am sure stick to the true principles of the constitution, and being a Democrat *ab ovo* [literally, from the egg] is not in so much danger of a falling off in the true spirit." In many respects, the tall, spare, dark-completed Daniel met or even exceeded Van Buren's expectations. A true agrarian conservative, Daniel was deeply committed to the constitutional theories embodied in the Virginia and Kentucky Resolutions and the work of John Taylor. He viewed the defense of these principles against the Whigs' nationalist, pro-business policies as an apocalyptic struggle between good and evil. Daniel's public comments on politics were notable for their forcefulness; he was described by one political opponent as "one of the most violent partisan writers in the state." Daniel was no less emphatic in private. In an 1832 letter to Van Buren, he described the forthcoming election as a "great struggle between democracy and the constitution on the one hand, and corruption and profligacy unexampled on the other." He declared, "The conflict we are now waging [is] against that worst of all influences; that which puts intelligence, probity, patriotism, falsehood, venality, vice in every form, all upon an equality, that is, values them merely as they can become means to be wielded to its purposes—the influence of money." Similarly, after meeting Daniel Webster, Daniel reported, "My hand was actually contaminated by contact with his." In short, as John P. Frank has aptly observed, "[T]he Daniel who came to the Court in 1841 . . . was a man of controversy, ferocious, unyielding, and utterly humorless in dispute."

These attitudes and personal characteristics shaped Daniel's treatment of the constitutional issues that came before the Taney Court. Not surprisingly, the Chief Justice was Daniel's closest friend and ideological ally on the Court; however, Daniel was considerably less compromising than Taney in his position on issues such as federalism and the rights of corporations. He dissented alone more than twice as often as any other Justice during his tenure, and more than

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13 Id. at 160-61 (quoting Martin Van Buren).
14 Id. at 88.
15 Id. at 87 (quoting Justice Daniel).
16 FRANK, supra note 5, at 87 (quoting Justice Daniel).
17 Id. at 88 (quoting Justice Daniel).
18 Id. at 166.
three times as often as Taney, John Catron, and John A. Campbell combined.\footnote{Id. at 237.}

One of the most notable features of Daniel’s jurisprudence was his opposition to the expansion of federal power. On a variety of issues ranging from the interpretation of the commerce power to questions of federal jurisdiction, Daniel consistently argued that the authority of the federal government should be circumscribed within narrow limits.\footnote{E.g., The Propeller Genessee Chief v. Fitzhugh, 53 U.S. (12 How.) 443, 463-65 (1851) (Daniel, J., dissenting); Searight v. Stokes, 44 U.S. (3 How.) 151, 180-81 (1845) (Daniel, J., dissenting).} However, he was apparently willing to subordinate this principle to the need to protect Southern interests. For example, in \textit{Prigg v. Pennsylvania},\footnote{41 U.S. (16 Pet.) 539, 650-57 (1842) (Daniel, J., concurring).} Daniel concurred in the view that Congress did not exceed its authority in passing the Fugitive Slave Act of 1793.

On the issue of federal exclusivity, however, Daniel’s position was far more consistent with the overall pattern of his jurisprudence. Throughout the 1840s, he joined Taney and Samuel Nelson in strenuously arguing that, in the absence of contrary federal legislation, the Commerce Clause by its terms did not divest the states of the power to regulate or tax interstate commerce. These Justices were, however, unable to attract majority support for a single opinion embodying this view. Thus, in 1851, both Taney and Nelson agreed to join a compromise majority opinion in \textit{Cooley v. Board of Wardens},\footnote{53 U.S. (12 How.) 299 (1851).} which proclaimed that federal power over matters of national concern was exclusive, but that the states retained concurrent authority to regulate interstate commerce in situations where local interest predominated. Among the previous advocates of nonexclusivity, Daniel stood alone in rejecting the compromise. Displaying what might be described as either an admirable devotion to principle or simple blind stubbornness, he continued to insist that only congressional action could deprive the states of their inherent authority to regulate commerce.\footnote{Id. at 325-26 (Daniel, J., concurring).}

This theme of concurrent state and federal jurisdiction also dominated Daniel’s opinion in \textit{Prigg}.\footnote{41 U.S. at 650-57 (Daniel, J., concurring).} The basic theme of his opinion is that, while Congress possessed authority to implement the Fugitive Slave Clause, states also retained
power to pass laws that would provide further aid to the slaveowner. Most of Daniel's opinion is devoted to a systematic canvass of authorities that, he contended, supported the theory of concurrent power in general terms. Daniel also emphasized the symbolic effect of a holding of federal exclusivity in the specific context of the Fugitive Slave Clause:

[S]uppose that a fugitive from service should have fled to a state where slavery does not exist, and in which the prevalent feeling is hostile to that institution; there might, nevertheless, in such a community, be a disposition to yield something to an acknowledged constitutional right—something to national comity too, in the preservation of that right; but let it once be proclaimed from this tribunal, that any concession by the states towards the maintenance of such a right, is a positive offence, the violation of a solemn duty, and I ask what pretext more plausible could be offered to those who are disposed to protect the fugitive, or to defeat the rights of the master? The Constitution and the act of Congress would thus be converted into instruments for the destruction of that which they were designed especially to protect.25

Finally, Daniel rejected the argument that states might, under the guise of legislation purportedly designed to protect the rights of slaveowners, actually impede the recovery of fugitives. He observed that analogous arguments might be made against the grant of enforcement power to the federal government, and that “should... abuses be attempted, the corrective may be found... in the controlling constitutional authority of this Court.”26

Daniel argued that states not only possessed the power to pass supplementary legislation, but that such legislation was, in fact, desirable. Seemingly accepting Justice Story’s conclusion that state officials could not be compelled to participate in the enforcement of the federal statute, Daniel observed that federal law enforcement officials were far less numerous than their state counterparts, and that state legislation might therefore be necessary to provide the slaveholder with any effective governmental assistance.27

Obviously, Daniel's opinion in *Prigg* reflects the views of a Southerner committed to the defense of slavery. His concurrence was clearly influenced by both ordinary political considerations and distinctively legal analysis. Daniel's

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25 *Id.* at 657.
26 *Id.*
27 *Id.* at 656-57.
endorsement of Story’s view that Congress had power to legislate in support of slaveowners’ rights was in some tension with Daniel’s position as the Taney era’s foremost advocate of limited federal power. However, his advocacy of the concurrent power doctrine was no more than a simple application of the principles that Daniel espoused in other contexts. In short, while clearly adopting a position that was more proslavery than that of Justice Story, Daniel’s opinion was no more intemperate in substance and tone than the analogous antislavery opinion of Justice McLean.

Yet despite his unyielding commitment to the defense of slavery, prior to 1847, Daniel would have been an unlikely candidate to produce the kind of inflammatory opinion that he produced in *Dred Scott*. Daniel’s political alliance with Martin Van Buren was a model of sectional cooperation, and his opinion in *Prigg*, while undoubtedly pro-Southern, was moderate in tone. Moreover, Daniel was one of the few Southerners who opposed the movement to annex Texas, viewing it as a Calhounite conspiracy.

At the same time, however, Daniel took offense to Northerners who opposed annexation because the addition of Texas would benefit the slave state. In 1844, he expressed this outrage to Van Buren in the strongest terms:

> Can anything be more galling to the spirit of honorable men than to be told that it is enough to justify the condemnation of any measure, that its effect may be the promotion of their peculiar interests and welfare: that it may prove advantageous to the holders of slave property? Are we to be placed under permanent and unrelenting ban of the Federal Government? To be held as less than the equals of our miscalled fellow citizens? To be regarded as the plague-spot upon our nation, and then required by our oppressors and revilers to shout for our blessed Union? A blessed Union indeed it would be upon such terms. No—No—The most temperate amongst us, would not hesitate to decide, if things have come or are to come to this complexion, to go with our imputed blemishes, our crimes and defilements, apart to ourselves; and leave these exclusively beautiful and moral and clean and immaculate, to their own purity.  

The dispute over the Wilmot Proviso crystallized Daniel’s outrage. As early as 1845, Daniel privately expressed the view that federal legislation explicitly limiting the right of slaveowners to bring slaves into the territories would be grounds for secession. Nonetheless, he expressed his

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willingness to accept the general idea of geographical division as a workable compromise. Two years later, the New York State Democratic Convention adopted a resolution supporting the position that slavery should be outlawed in all of the territory obtained from Mexico. Daniel wrote to Van Buren seeking clarification of his position on this issue. When Van Buren replied evasively, Daniel (whose wife had recently died from a stroke) responded that if Van Buren in fact supported the Wilmot Proviso,

I shall have lived to witness a development, that even the great overwhelming and stunning personal calamity which has come upon me cannot prevent me from contemplating with deep sorrow and alarm. I shall have been constrained to perceive on the part of those, on whom of all the public men in this nation I imposed the greatest trust, what my deliberate convictions compel me to view as the overthrow of the great national compact; as the extreme of injury and oppression; oppression in its most galling form, because it declares to me that I am not regarded as an equal.29

Daniel’s mortification could only have been magnified in 1848, when Van Buren became the presidential candidate of the Free Soil Party.

The impact of Daniel’s sense of personal betrayal on the subsequent evolution of his political thought cannot be reliably assessed. What is clear is that beginning in the late 1840s, Daniel associated all things Northern with the antislavery movement, and hated the North with an obsessive fury that he had hitherto reserved for his Whig political enemies. He refused to venture north of the Delaware River and became indifferent to the preservation of the Union itself. When Daniel’s great-nephew made a favorable comment regarding those who took antislavery positions, Daniel replied simply, “I fear those people are very wicked.”30

The language of Daniel’s concurring opinion in Dred Scott reveals the depth of his bitterness over what he saw as betrayal by his one-time friend and ally. Based upon what he believed were “truths which a knowledge of the history of the world, and particularly of that of our own country, compels us to know,”31 Daniel contended that:

29 Frank, supra note 5, at 245-46 (quoting Justice Daniel).
30 5 SWISHER, supra note 28, at 70 (quoting Justice Daniel).
31 Dred Scott, 60 U.S. at 475 (Daniel, J., concurring).
The African negro race never have been acknowledged as belonging to the family of nations; that as amongst them there never has been known or recognised by the inhabitants of other countries anything partaking of the character of nationality, or civil or political polity; that this race has been by all the nations of Europe regarded as subjects of capture or purchase; as subjects of commerce or traffic; and that the introduction of that race into every section of this country was not as members of civil or political society, but as slaves, as property in the strictest sense of the term.\footnote{Id.}

Later, addressing the claim that Congress could constitutionally bar slavery from the territories, Daniel argued:

Can there be imputed to the sages and patriots by whom the Constitution was framed, or can there be detected in the text of that Constitution, or in any rational construction or implication deducible therefrom, a contradiction so palpable as would exist between a pledge to the slaveholder of an equality with his fellow-citizens, and . . . a warrant given . . . to another, to rob him of that property, or to subject him to proscription and disfranchisement for possessing or for endeavoring to retain it? The injustice and extravagance necessarily implied in a supposition like this, cannot be rationally imputed to the patriotic or the honest, or to those who were merely sane.\footnote{Id. at 490.}

Of course, even if he had never broken with Van Buren, Daniel might well have reached the same conclusions in \textit{Dred Scott} (although he probably would have expressed his views in more temperate language). Nonetheless, the basic point remains. The views of judges are not shaped only by legal theory and political ideology, but by the totality of their life experiences. Thus, the work of biographers such as John P. Frank, Linda Greenhouse,\footnote{\textsc{Linda Greenhouse}, \textit{Becoming Justice Blackmun: Harry Blackmun's Supreme Court Journey} (2005).} and Dennis Hutchinson\footnote{\textsc{Dennis Hutchinson}, \textit{The Man Who Once Was Whizzer White: A Portrait of Justice Byron R. White} (1998).} is indispensable to those who hope to truly understand the judicial process.
Moral Ambition

THE SERMONS OF HARRY A. BLACKMUN

Dena S. Davis†

I. INTRODUCTION

Justice Harry A. Blackmun died on March 4, 1999 at the age of ninety. The public funeral was held on March 9, at the huge and impressive Metropolitan Memorial United Methodist Church, on Nebraska Avenue in Washington, D.C. Among the many speakers at this “Service of Death and Resurrection” was the Reverend Dr. William A. Holmes, senior pastor at the Church, speaking on “The Churchmanship of Harry Blackmun.” Dr. Holmes talked movingly of a man who was intimately involved in the affairs of his church. Among the Justice’s many contributions, Holmes noted a sermon that Blackmun had once preached on the Book of Ruth. Dr. Holmes concluded his eulogy by remarking that Justice Blackmun’s theory of Constitutional interpretation was the same as his theory of biblical interpretation: a theory grounded in compassion.

On March 4, 2004 the Justice’s papers became available to the public through the Library of Congress. In addition to the sermon on the Book of Ruth, preached in 1992, there was an earlier sermon, preached in 1987, on the bicentennial of the

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1 Funeral program: Harry Andrew Blackmun, Nov. 12, 1908-Mar. 4, 1999 (Metropolitan Memorial United Methodist Church, Washington D.C., Mar. 9, 1999) (on file with author).

Constitution. In this essay I will describe how these sermons connect to and illuminate the Justice’s jurisprudence. As I show below, recent scholarship has focused on the parallels and similarities between Constitutional and biblical interpretation. After exploring this relationship, I will describe Blackmun’s religious upbringing and interests. Next I will summarize the two sermons. Justice Blackmun’s sermon on the Book of Ruth will be more heavily discussed because of its prominent themes of love and compassion, and will be broken down into subsections relating to women and social justice. Then I will show how the sermons relate to each other, and to one of the Justice’s most famous opinions: his dissent in DeShaney v. Winnebago County Department of Social Services.

One might ask why the sermons of a sitting Justice would be thought to shed any light at all on his jurisprudence, especially in a Justice who, like Blackmun, was careful of the boundaries between church and state. In this essay, I take seriously Dr. Holmes’s closing comment and I ask: How similar was Blackmun’s interpretive approach to the Constitution and to the Bible?

II. CONSTITUTIONAL AND BIBLICAL INTERPRETATION

In the 1980s, scholars of constitutional interpretation rediscovered that the Constitution is indeed a text, and that they could learn from other scholars who engage in textual analysis and say something about the relation between text and reader. Originally, most of the excitement focused on literary criticism, but in fact the parallels between Constitutional and biblical interpretation are both more obvious and more interesting. To quote Michael Perry:

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3 This material is located in Container 1462, folders 2 & 3, Harry A. Blackmun Papers, Manuscript Division, Library of Congress (photocopies on file with author). There are two copies of “In Recognition of the Imperfect” and one of “Mother’s Day.” All three manuscripts have handwritten emendations, not all of which are legible. Some typewritten words are crossed out or bracketed, sometimes with handwritten changes. In all cases, I have gone with the most plausible final version.


[The sacred-text analogy is better than the literary-text one. The relationship between a political community (and tradition) and its foundational text is much more like the relationship between a religious community (and tradition) and its sacred text than the relationship between an “interpretive community”... and whatever literary texts happen to engage it. An interpretive community doesn’t often approach (read) a literary text with questions as to what the central aspirations of its tradition are or how to fulfill them... But, of course, both religious and political communities approach their foundational texts with questions of just that sort.]

In both the Constitution and the Bible, the text is a foundational document that fulfills both a real and a symbolic role in the society that forms around it; in both cases, members of that community identify themselves (although probably not exclusively) in terms of their relation to the text. “Bible-believing Christians” and “Four-Square Gospel Churches” base their claim to authenticity on their “pure” relation to the text, and even the most quiet and privately religious Jew or Christian must in some way claim an identity or sense of direction in which the Bible provides the compass. In the same way, to be an American citizen, even one who has spent one’s entire life abroad, is to agree to uphold the Constitution, and to imagine oneself as moving always under an invisible umbrella of rights that are guaranteed by it. Most importantly, both the Bible and the Constitution purport to give direction, to have something to say about the behavior of their communities of interpretation.

They are both very public documents, although they play a role in intensely private experiences. For example, a reader who discovers a new interpretation of some phrase in the Bible or the Constitution is prima facie impelled to change her behavior accordingly and to try to persuade others to do the same. Thus, there are important connections between biblical and Constitutional interpretation; connections that can be mined to further our understanding of Justice Blackmun’s thoughts.

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8 Garet, supra note 6, at 62. For the general idea of the authority of interpretive communities, see STANLEY FISH, IS THERE A TEXT IN THIS CLASS? (1980).
9 Perry, supra note 7, at 562.
III. JUSTICE BLACKMUN AND RELIGION

Harry Blackmun was raised in a Methodist family. His parents had met in a small Methodist college in Warrenton, Missouri.\textsuperscript{10} During an interview with Bill Moyers late in his life, Blackmun reminisced about growing up in “a very lower middle-class neighborhood in St. Paul, Minnesota. We didn’t have anything . . . I think those things tend to make one what he is in later life, to a degree.”\textsuperscript{11} He recalled his household as observing the Sabbath, but not in a strict fashion,\textsuperscript{12} and remembered that his first meeting with lifelong friend Warren Burger was at age five or six in Sunday School.\textsuperscript{13} Blackmun’s father taught adult education in the local church.\textsuperscript{14}

During his tenure as Supreme Court Justice, Blackmun was a committed member and regular churchgoer at Metropolitan Methodist United Church (MMUC) in Washington, D.C. He frequently served as a lay reader of the Scripture.\textsuperscript{15} He and Mrs. Blackmun usually arrived early, in time to take part in the coffee hour that preceded the service. Many young lawyers and law students attended MMUC and enjoyed the opportunity to chat with the Blackmun couple.\textsuperscript{16} The Justice also had a warm relationship with Wesley Theological Seminary in Washington, D.C. He occasionally gave talks there, and frequently played host in his chambers to visiting classes from the Seminary’s National Capital Semester,\textsuperscript{17} and to ethics classes taught by Professor Philip Wogamon.\textsuperscript{18} Wogamon, who attended MMUC from 1973 to

\textsuperscript{10} LINDA GREENHOUSE, BECOMING JUSTICE BLACKMUN: HARRY BLACKMUN’S SUPREME COURT JOURNEY 2 (2005).

\textsuperscript{11} In Search of the Constitution with Bill Moyers: Mr. Justice Blackmun (PBS television broadcast, 1987). It is interesting that the public did not always perceive the Justice in the same way. See Jon R. Waltz, The Burger/Blackmun Court, N.Y. TIMES, Dec. 6, 1970, (Magazine), at 61 (describing Blackmun as a “White Anglo-Saxon Protestant Republican Rotarian Harvard Man from the Suburbs”).


\textsuperscript{13} Id. at 49.

\textsuperscript{14} Id. at 53.

\textsuperscript{15} Telephone Interview with Alan Geyer (Aug. 9, 2005) [hereinafter Geyer Interview].

\textsuperscript{16} Telephone Interview with the Reverend Dr. William A. Holmes, pastor emeritus, Metropolitan Methodist United Church (Aug. 1, 2005) [hereinafter Holmes Interview].

\textsuperscript{17} Geyer Interview, supra note 15.

\textsuperscript{18} Telephone Interview with Philip Wogamon (Mar. 29, 2006).
1992, and was Dean at Wesley Theological Seminary from 1972 to 1983, described Blackmun as “quiet, never bombastic, the quintessential gentleman lawyer,” and said that Blackmun often expressed “hurt” about the abuse he experienced as a result of his opining in *Roe v. Wade*.19

Justice Blackmun’s interest in religion extended well beyond Christianity. At his funeral, Pamela Karlan recalled a Passover seder in 1985, the year she was Blackmun’s clerk. Blackmun, discovering that his clerks were practicing Jews, had “wistfully” mentioned how much he would like to go to a seder. Karlan and a co-clerk, realizing that everyone at the Court was too busy to go home for the holiday, invited other Jewish clerks, spouses and companions, and the Justice, who “seemed enchanted with the invitation.”20 As Karlan tells it, “[W]e were exhausted. But we were all looking forward to the typical ultra-casual, ultra-Reform Seder: the four questions, the four sons, the 10 plagues, some matzoh ball soup and a relaxing dinner.”21 However, when the Justice knocked on the door wearing a yarmulke and holding a Haggadah bristling with slips of paper and marginal notes, the young clerks resigned themselves to conducting the entire seder, with no shortcuts. “It was clear he was expecting a full-blown seder—complete with Hebrew. The only thing we managed to skip was the hand-washing. We certainly all finished every last required cup of wine.”22

In his September 20, 1987 sermon, Blackmun speaks movingly of having visited Israel and gone to the Western Wall, praying and leaving a note written by one of his law clerks whose mother had recently died.

It was an emotional moment, as we stood there, offered a short prayer, and saw others to the right and to the left of us, singly, in pairs, and in groups, from all over the world, doing much the same and participating in the inherent learning and inspiration and strength of the place. I realized then how massively meaningful it was for those people—and for me. And, in a way, I understood why they returned, for they gathered history in their minds, generation

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19 Id.
21 Id.
22 Id. The *seder* is the traditional dinner that forms the core of the Jewish celebration of Passover, which commemorates the Hebrews’ deliverance from slavery in Egypt. The *Haggadah* is the text that is read communally during the dinner.
upon generation, and they departed renewed in fortitude and outlook as well as in faith.\textsuperscript{23}

Thus, we see in Justice Blackmun a man deeply rooted in his own faith and emotionally open to the faith of others.

IV. THE SERMONS

A. “In Recognition of the Imperfect”

On September 20, 1987, Justice Blackmun preached a sermon on the occasion of the bicentennial of the Constitution. The sermon begins with Moses’s announcement of the Ten Commandments, followed immediately by Moses’s pointed reminder to the people that God was giving them cities which they did not build, houses which they did not fill, and olive trees which they did not plant.\textsuperscript{24} Blackmun piles on layered imagery from other parts of the Bible, including the \textit{Book of Joshua}, \textit{Ecclesiastes}, and the \textit{Gospel of John} (“one sows and another reaps”), all highlighting what the Justice perceives as three themes: “(1) our indebtedness to those who have gone before; (2) our being the beneficiaries of their, not our own, wisdom and efforts; and (3) our indebtedness to God, for wisdom itself is a part of God’s creation and beneficence.”\textsuperscript{25} The sermon continues by noting the anniversary of the signing of the Constitution, and then poses two questions: \textit{Why do we care about this anniversary?} and \textit{Why do we take time in a Sunday worship to note this secular event?}\textsuperscript{26}

Noting that “we still struggle to ascertain the depths of the instrument’s meaning,” Blackmun paraphrases Bill Moyers by saying that we are “constantly . . . ‘in Search of the Constitution.’”\textsuperscript{27} The sermon then focuses on the Constitution’s “defects,” as seen two hundred years later.\textsuperscript{28} According to the Justice, the primary defects are slavery, the “nomenfranchiseimento of women” and the exclusion of American Indians.\textsuperscript{29} He asks again, rephrasing his questions to take into

\begin{itemize}
\item \textsuperscript{24} Id. at 1.
\item \textsuperscript{25} Id. at 2-3.
\item \textsuperscript{26} Id. at 3.
\item \textsuperscript{27} Id. at 4.
\item \textsuperscript{28} Id.
\item \textsuperscript{29} 1987 Sermon, supra note 23, at 5-6.
\end{itemize}
account these Constitutional “defects”: Why are we so enthusiastic about a document with such obvious imperfections? and Why do we take time in “the only hour we set aside for formal worship,” to consider this secular document?30

The Justice suggests five responses to these questions. First, the Bible and the Constitution each provide “roots.” The Constitution provides “the roots for our living together and getting along together in a reasonably passable way in this Nation,” and “in a manner that . . . is fair, equitable [and] principled.”31 In other words, it provides the roots for “our day-to-day political existence.”32 The Bible, which Blackmun terms “this great Book,” provides the “worthwhile and living roots of our Judeo-Christian heritage and faith.”33

Second, Blackmun suggests, rather cautiously, that some of the “great truths” of Scripture, such as “freedom, equality, due process, [and] equal protection” appear to be reflected in the Constitution.34 “Do we presume too much when we suggest the one perhaps was partly inspired by the other?”35

Third, “[k]nowledge is power” and exposing and correcting the imperfections of the Constitution is neither “improper [n]or wrong.”36 Although no one can know definitively which Constitutional interpretation is correct, “we must try and try again in our attempts to guide constitutional law toward perfection.”37 Here Blackmun offers another parallel: even “the greater Book” is not perfect. The “eye-for-an-eye mentality,” he notes, is no longer considered “moral.”38

Fourth, from imperfection comes “tolerance and compassion” for different paths to seeking a way of life that benefits all.39

30 Id. at 6-7.
31 Id. at 11.
32 Id.
33 Id.
34 Id. at 11-12
35 1987 Sermon, supra note 23, at 12 (referring to a combination of the typescript and handwritten emendations). The typescript originally read: “Do we presume too much when we suggest the one was inspired by the other?” The word “one” is crossed out and a penciled emendation substitutes “perhaps was partly.”
36 Id.
37 Id. at 14
38 Id.
39 Id. at 15.
Finally, from imperfection comes the challenge to “strive for the better.”\textsuperscript{40} Justice Blackmun describes that striving as holding on to what has been achieved “on the way to equality and . . . true justice” and to accepting the challenge of eliminating “bias and prejudice and bigotry and selfishness and greed.”\textsuperscript{41} The struggle against the imperfect, he goes on, has not been won and will not be won in our lifetime. “But we \textit{can} press forward steadily, continuously, unceasingly, pushing back the frontiers of the imperfect and the unfair.”\textsuperscript{42} The sermon concludes by returning to the theme of the current generation as the beneficiaries of those who preceded us:

We drink of a well we did not dig. Our so-called “Founding Fathers” dug it for us, and they in turn rested on prior-established truths taught by the wisdom of centuries past. And we are justified in singing the praises of those famous personages who brought to us, in this brief document, a way of life that was untried, but so full of promise, a way of life that must have been inspired and of God’s creation.

Because that is so, something positive is expected of us as we stride confidently into the Third Century of the Constitution’s firm anchorage.\textsuperscript{43}

B. “Mother’s Day”

Dr. Holmes no longer remembers why he asked Justice Blackmun to preach on Mother’s Day, May 10, 1992.\textsuperscript{44} But having accepted the assignment, the Justice made some interesting choices.

The typewritten text of the speech is preceded by a handwritten page, presumably added in the week preceding the Sunday on which Blackmun was to preach. In this emendation, the Justice notes the “wretched events that took place in L.A. on April 29th,”\textsuperscript{45} an obvious reference to the acquittal of the men accused of beating Rodney King, and the

\begin{itemize}
  \item \textsuperscript{40} Id. at 16.
  \item \textsuperscript{41} 1987 Sermon, \textit{supra} note 23, at 16.
  \item \textsuperscript{42} Id. at 18 (emphasis added).
  \item \textsuperscript{43} Id. at 19.
  \item \textsuperscript{44} Holmes Interview, \textit{supra} note 16.
  \item \textsuperscript{45} Harry A. Blackmun, Sermon: “Mother’s Day” (May 10, 1992) [hereinafter 1992 Sermon] (unpublished sermon, transcript on file with the Library of Congress). Note that this is the unnumbered page of handwritten text that precedes the actual sermon.
\end{itemize}
subsequent riots. He comments that it seems as if “the entire world” is in turmoil, and asks if we can possibly rise above “man’s inherent cruelty to man.” He answers himself in the next paragraph, writing that “we must . . . see to it that the flowering of the new life somehow—somehow—will rise, as it always has, from the ashes of old disasters.”

The Justice begins, as “a preliminary but necessary comment,” by recalling the words of Jesus on the cross, as he commended his mother to the care of his disciple. He follows this with a general discussion of motherhood and with a short history of Mother’s Day in the United States. The next section deals with “womanhood generally,” in which he names some influential women throughout history and concludes that “[w]omen have been influential despite the odds.”

The sermon now turns more specifically to Scripture. Blackmun notes generally the importance of parents and the commandment to honor both the father and the mother. He then mentions two women, Mary the mother of Jesus, and Mary Magdalene, simply commenting that he will not discuss them “today.” With preliminaries over, he introduces the *Book of Ruth*, which he characterizes as “a classic example of loyalty and devotion of one person to another.” The next third of the text retells the story of the *Book of Ruth* in a straightforward manner, with no interpretation or commentary.

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47 1992 Sermon, supra note 45.

48 Id.

49 Id. at 1. Note that this is the first typed page, preceded by a title page and by an unnumbered page of handwritten text.

50 Id. at 1-5.

51 Id. at 6-7. Pamela Karlan notes that Blackmun was the first Justice to hire three female clerks in the same term (1985); by the time he had retired, Blackmun had hired more female clerks than any other Justice. Pamela S. Karlan, *A Tribute to Justice Harry A. Blackmun*, 108 HARV. L. REV. 13, 18-19 (1994).

52 1992 Sermon, supra note 45, at 8.

53 Id. at 9.

54 Id. at 9-15. The Justice’s one brief commentary explains the custom of Levirate marriage, wherein Boaz, as a kinsman of Naomi and therefore of Ruth’s dead husband, has the right to buy not only the family’s land, but also to marry Ruth and to raise up a child who will be considered a child of Elimeleh. *Id.* at 12.
The Book of Ruth is in the Hebrew Bible (or “Old Testament”) immediately after the Book of Judges. Naomi and Elimelech had left Judah because of a famine, going to Moab with their two sons.\footnote{Ruth 1:1-2.} Elimelech died in Moab, as did the sons, who had married alien Moabite women but without issue.\footnote{Id. at 1:4-5.} Naomi, destitute and bereft of family, decided to return to Judah.\footnote{Id. at 1:6-7.} She told her daughters-in-law, Orpah and Ruth, to remain in Moab and remarry.\footnote{Id. at 1:8-9.} Orpah obeyed her, but Ruth insisted on following Naomi, vowing that she would adopt Naomi’s life, land, religion, people, and fortunes.\footnote{Id. at 1:15-16.} They arrived in Judah in time for the harvest, and Ruth took advantage of the privilege of “gleaning” that the law granted to the poor.\footnote{Id. at 2:2.} She chose to glean in fields owned by Boaz, a rich kinsman of Naomi.\footnote{Ruth 2:2-3.} Urged on by Naomi, she brought herself to Boaz’s attention, laid down by his feet at night in the threshing barn, and caused him to propose marriage.\footnote{Id. at 3:1-4:12.}

After recounting the story of The Book of Ruth, this part of the sermon ends by pointing out that Ruth and Boaz’s son, Obed, became the father of Jesse, and therefore the grandfather of King David. “With this, a fact of interest emerges. For it is a foreigner, Ruth, who becomes an ancestor of David and through him, for Christians, of Joseph, the husband of Mary, the Mother of Christ.”\footnote{1992 Sermon, supra note 45, at 15.}

Blackmun notes that the “usual” focus of the Book is on Ruth’s loyalty, for which “[w]e naturally admire her.”\footnote{Id. at 16.} What, he asks, can we learn from this story for Mother’s Day?\footnote{Id.} He “venture[s] to suggest” eight points.\footnote{Id.}

The first point that teaches us about Mother’s Day focuses on Naomi, who symbolizes for Blackmun the “importance and strength” of the women in our lives.\footnote{Id.} Naomi was strong and triumphed despite being widowed and childless
in a strange land. The second point focuses on Ruth, and on her “tenacity” and courage in choosing to go with Naomi to a strange and hostile land. “The young woman from Moab shows us the way.”

In the third point, Blackmun moves from the individual women to the people of Judah, who did not cast out this strange woman who came from a different land, culture, and religion. In fact, with her marriage to Boaz, Ruth became one of them. The Justice asks, “Can we match this example of the welcoming arms?” and ties this question to the poem inscribed on the Statue of Liberty and to the current problem of illegal immigrants from Mexico.

The fourth point seems to stand in contradistinction or perhaps in balance to the third, as Blackmun extols what he terms “[t]he example of utter loyalty to one’s own.” What the Justice means by “one’s own” is not obvious here, as he immediately concedes that Naomi was neither Ruth’s mother nor her kin. Ruth, therefore, “provides us with an even harder example.” Perhaps the point is that, once having chosen Naomi as “her own,” Ruth’s loyalty was unswerving and unconditional.

The fifth point that teaches us about Mother’s Day is about “[a]cceptance and [i]nvolvement.” The Justice describes how Ruth, once she made her decision, plunged into her life in Judah and made the most of it. He inquires, “Do we participate in the several missions of life of the Church and do we do what we can to advance them?” The sixth point addresses “[t]he reordering of our priorities and the recognition of our real status.” Here, Blackmun quotes at length a poem

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68 Id.  
70 Id. at 17.  
71 Id.  
72 Id. at 17-18.  
73 Id. at 18.  
74 Id.  
75 Id.  
76 Id. at 19.  
77 Id.  
78 Id.  
79 Blackmun also writes that Ruth’s “complete loyalty” was based on a number of factors, including “tradition.” 1992 Sermon, supra note 45, at 18. In this he seems incorrect, as a recurring theme of the story, one Blackmun himself emphasizes, is that Ruth is making a nontraditional and therefore risky and courageous choice in following Naomi to a strange land.
attributed to a Confederate soldier, to the effect that God gives us not what we think we need, but what we really need.\textsuperscript{79}

The seventh point is “[t]he blight of continued racism and misery in our society.”\textsuperscript{80} Next to this paragraph the Justice has written a note, “L.A. cases,” in obvious reference to the Rodney King beating and subsequent disturbances. The eighth and final point concerns “[o]ur capability for a change in direction.”\textsuperscript{81} To illustrate this point, the Justice tells the inspiring story of John Newton, an English slave trader who “changed direction,” entered the ministry and became an abolitionist.\textsuperscript{82} Newton is the author of such “familiar” hymns as “Amazing Grace.”\textsuperscript{83}

Blackmun concludes by saying that “it all comes down finally to . . . Love.”\textsuperscript{84} He connects Mother’s Day, which honors the figure who “most represents” love, with the steadfast love exhibited by Ruth.\textsuperscript{85} If we try to show that same love in our lives, then perhaps we too “in our small way can be part of the lineage of David.”\textsuperscript{86} If our love is as loyal and active as Ruth’s, then we too, says Blackmun, can “mean more than seven sons,” as was said in the Bible about Ruth.\textsuperscript{87} Blackmun notes that “[i]n that day, 500 years before Christ, [being more than seven sons] was a mighty tribute.”\textsuperscript{88} The sermon ends by asking, “Are we up to it?”\textsuperscript{89}

1. \textit{Ruth} is About Women

The \textit{Book of Ruth} is an unusual choice for a Mother’s Day sermon. Even having decided not to “presume” to discuss Mary,\textsuperscript{90} the Justice had a choice of many women in the Bible who are strongly identified by their maternal role. One thinks of Sarah, who bore Isaac in her old age, or Rachel, who cried,
“Give me children or I will die!” Instead, Blackmun chose to focus on Ruth, whose maternal role was so spare that one commentator concluded that Ruth had no desire for children. Although the “punch line” of the story, as we saw, does depend on Ruth and Boaz having a child, Ruth was clearly identified as a daughter-in-law, not as a mother. Her primary relationship throughout the story was with her mother-in-law Naomi. When Obed was born, Ruth handed him over to Naomi, who nursed him. “And the women her neighbors gave it a name saying, There is a son born to Naomi!”

In this light, it is interesting to note that the list of “influential women” that Blackmun lists toward the beginning of the sermon are mostly not mothers (e.g., Elizabeth I, Cleopatra, Joan of Arc) or not known for their motherhood. However conventionally the Justice begins, with an evocation of our own childhood memories of mothers, the focus of his address is women, not mothers.

All the important actors in the Book of Ruth are women. Naomi’s husband and sons died in the first few paragraphs. Boaz’s role was primarily reactive, and one rabbinic midrash had Boaz die immediately after the conception of his son. Further, the crucial female relationship in the story is one of love, loyalty, and shared goals. This is in sharp contrast to the common depiction of intimate female relationships in the Bible, which are difficult and problematic, as “women (e.g., Sarah and Hagar, Rachel and Leah) . . . compete for the scarce prize of a relationship with a man.”

Ruth is “the women’s book of the Hebrew Bible,” written either by a woman herself, as some scholars have assayed, or, if not, certainly by “a man who saw women’s interests and took them seriously.” It is hard to think of a

91 Genesis 30:1.
92 Gail Twersky Reimer, Her Mother’s House, in READING RUTH: CONTEMPORARY WOMEN RECLAIM A SACRED STORY 97, 104 (Judith A. Kates & Gail Twersky Reimer eds., 1994) [hereinafter READING RUTH].
93 Ruth 4:13.
94 1992 Sermon, supra note 45, at 1-5.
95 A midrash is an exegetical commentary upon Hebrew scripture.
97 Id. at 199.
99 Id. at 34.
better description of Justice Blackmun himself. Ruth, after all, was someone who made a choice layered with meaning, a choice that would turn almost every compass point of her life upside down. She refused to do the conventional thing and return to her mother’s house, as Naomi urged her. She chose to follow her mother-in-law to a strange land, to adopt a strange God, to give up (as Naomi warned her) the likelihood of marriage and children. The choice Ruth faced when she stood with Naomi and Orpah at the crossroads was one only she could make for herself. Blackmun showed that he understood these kinds of choices when he wrote:

Our cases long have recognized that the Constitution embodies a promise that a certain private sphere of individual liberty will be kept largely beyond the reach of government. That promise extends to women as well as to men.  

2. *Ruth* is About Social Justice

The *Book of Ruth* is a favorite text of scholars arguing for social justice and equality. *Ruth* has been enlisted in many causes, including acceptance for lesbians and gays, guaranteed minimum health care, justice for foreign guest workers, and welfare reform.

More specifically, *Ruth* is about justice towards an alien, an outsider to the community. Not only was Ruth not from Judah, but worse than that—she was a Moabite! Moabites were considered the absolute other and were reviled by the Israelites for a number of reasons. First, their origin was considered disgusting and illicit: they are the descendents of the incestuous union of Lot and his daughters. Second, Moabite women, in the past, had seduced Hebrew men into worshipping idols. Ruth thus “signifies the enemy, the pagan, and the forbidden sexual liaison.” Finally, and perhaps most importantly, the Moabites were reviled for their refusal of

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102 *Zoloth*, supra note 96.
105 *Genesis* 19:30-38.
106 *Zoloth*, supra note 96, at 211.
compassion and charity. They exemplified complete lack of *chesed*—loving-kindness. Because “they did not meet you with food and water on your journey after you left Egypt, and because they hired Balaam . . . to curse you,” no Moabite had ever been admitted into the community. Cynthia Ozick comments, “An abyss of memory and hurt in that: to have passed through the furnace of the desert famished, parched, and to be chased after by a wonder-worker on an ass hurling the king’s maledictions, officially designed to wipe out the straggling mob of exhausted refugees!”

The *Book of Ruth*, however, completely upends the notion of who is alien and who belongs to the community. Even before we meet the heroine of the story, we are told that Elimelech, with his wife Naomi and his two sons, left Bethlehem-Judah in a time of famine, and went to Moab. The triple tragedy that befell them there—the deaths of all but Naomi—is usually understood to be a punishment. But punishment for what? Both rabbinic and contemporary commentators interpret Elimelech’s transgression to be his desertion of his community in time of need. A rabbinic source comments that Elimelech was “a great and noble man” who could have and should have fed the whole community. Instead, as soon as the famine began, he feared that everyone would come to him seeking help, so he left. In today’s nomenclature, Elimelech is characterized as “the prudent libertarian,” an example of “stinginess” and “sterile individualism.” Thus, the story began with someone who should have been a pillar of the community, but who voluntarily exiled himself, not only in the geographic sense, but in the sense of his refusal to exhibit the all-important quality of

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107 YITZHAK I. BROCH, THE BOOK OF RUTH: AS REFLECTED IN RABBINICAL LITERATURE (1975). “Ruth has traditionally been called the book of *chesed*, a word usually translated as lovingkindness or benevolence. It refers to acts of care and love that go beyond obligation and to a quality of generosity, of an abundance in giving. The Bible attributes this quality most particularly to God.” Judith A. Kates, *Women at the Center: Ruth and Shavuot*, in *READING RUTH*, supra note 92, at 187, 190.

108 Deuteronomy 23:4-5.


110 BROCH, supra note 107, at 11-12.

111 ZOLOT, supra note 96, at 204.

chesed. Ruth, by contrast, the despised alien, exhibited chesed in truly heroic proportions. She gave up everything to follow Naomi to a strange land (a land of her historic enemies, where she could hardly expect a warm welcome) and once there she took every effort in ensuring the older woman's survival. The result of her courage and loyalty was marriage into the community and a son who put her directly in the lineage of David (and, from a Christian perspective, of Jesus).

The point could not have been made stronger. Not only could a foreigner be assimilated into Judaism and prove a worthy addition to it, but the foreigner might be the source of the highest good. . . . To Christians, the importance went even further. Through David, Ruth was the ancestress of Jesus, and therefore the tale tends to reinforce the Christian view of the Messiah: that he is for all mankind and not for the Jews alone.  

A common interpretation of the Book of Ruth is that it is a story that decries the strictures against intermarriage with foreigners. Asimov, for example, noted that the book was written at the time when the Jews were returning from exile and were seeking to purify and reclaim the land that had been settled in their absence by foreigners. Thus, the leaders had instituted a “rigid and narrow racial policy” against marrying foreigners. Asimov claims that the author of Ruth was a Jew who was “appalled” at this “heartless[]” and “petty[]” policy. He or she wrote the Book of Ruth “as a clarion call for universality and for the recognition of the essential brotherhood of man.”

The Book of Ruth is widely known to both Jews and Christians and has “the cultural resonance” of the Good Samaritan story. In fact, Ruth’s story is akin to the story of the Good Samaritan, but told from the perspective of the man who was beset by thieves. In the Gospel of Luke, a lawyer

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113 But see Israel Bettan, The Jewish Commentary for Bible Readers: The Five Scrolls 57 (1950) (disagreeing with the view that Elimelech had erred by leaving Judah in a time of famine).
115 Id. at 265.
116 Id.
117 Id.
118 Id. But see Book of Ruth, in 14 Encyclopedia Judaica 519, 520 (1972) (asserting that “[t]he opinion that the book was written as a protest against the Ezra-Nehemiah attitude toward foreign women has no basis at all.” (citation omitted)).
119 Zoloth, supra note 96, at 198.
asked Jesus what he should do to inherit eternal life. Jesus responded with the basic Jewish dyad: love God and love your neighbor as yourself. But the lawyer, “seeking to justify himself,” (that is, seeking to show himself more clever and versed in the law than Jesus) asked, “Who is my neighbor?” Jesus responded with a parable. He told the story of a man, a traveler, who was beset by thieves; they robbed him, wounded him, stole his clothes and left him half dead. First a priest and then a Levite came down the road, saw the wounded man, and crossed to the other side. Finally, a Samaritan who was journeying on the road saw the man, had compassion on him, and took care of him. He not only bound up his wounds and conveyed him on the Samaritan’s own horse, but he settled him at an inn and guaranteed his expenses. Jesus then asked the lawyer which of these three was “the neighbor” to the unfortunate victim. The lawyer responded that it was “he who showed mercy on him.” To which Jesus said, “Go and do likewise.”

Ruth is like the wounded man in the parable. She is a hungry stranger who arrives in Bethlehem-Judah. “In Ruth,” says Justice Blackmun, “these people found in their midst a stranger . . . Yet the people did not cast her out.” The parallel goes deeper than that. As we saw, Ruth is not just any stranger; she is from the despised race of Moabites. In the Book of Ruth, she is relentlessly identified as “Ruth the Moabitess.” It is Ruth’s Moabite identity that gives real bite to the story. In the same fashion, the Samaritan is not just any stranger, to be contrasted with the priest and Levite (who would be in the innermost, holiest circles of Jewish society). He is a member of a group which, from the lawyer’s perspective, was both perverse and heretical. Jews hated and despised Samaritans because the latter accepted only the Pentateuch as canonical (and their own version at that), rejecting the later writings as well as the oral tradition. A negative view of Samaritans is found in the Hebrew Bible, the New Testament, the writings of historian Josephus, and

121 1992 Sermon, supra note 45, at 17.
123 The first five books of the Hebrew Bible, sometimes referred to as “Torah.”
rabbinitic writings. In short, Luke’s audience was well aware of the irony of the Samaritan being held up as the moral exemplar.

Ruth the stranger is both the victim in need of help, and—in her loyalty to Naomi—the despised alien who manifests the ethical ideal. Her story and that of the Samaritan both carry the same twinned message: first, that it is a mark of justice for a community to welcome the alien into their midst, and, second, that the alien herself may prove to be more filled with loving kindness than those who would look down on her. For the Methodist audience to which Blackmun preached, Ruth is a fresh way of ruminating upon some of the same themes that are perhaps overly familiar in the story of the Good Samaritan. The Justice asks, “Can we match this example of [open arms]? . . . What of the plight of today’s refugees from Haiti? What of the persons who persist in breaching our southern border?”

Commentators on the Book of Ruth rarely fail to address the interesting question of why Ruth is read aloud in synagogues on Shavuot, the festival that celebrates the giving of the Law at Sinai to the Jewish people. The answer is one that Justice Blackmun would have heartily endorsed: Ruth is read on Shavuot to show that love and compassion are inextricably entwined with the Law.

If we understand Torah, the gift of God “who brought you out of the land of Egypt,” as directed centrally to the sustenance and liberation from suffering of the ger, yatom, vealmanna—“the stranger, the orphan, and the widow”—then the Book of Ruth, the protagonists of which embody all those vulnerable figures, speaks to the essence of Torah. Its women characters challenge the Jewish world to live up to Torah ideals and, in so doing, make manifest to us what sort of society—what sort of people—Torah is supposed to create.

Not only are the protagonists exemplars of the most vulnerable, they are also exemplars of what it means to fulfill the commandments, to act in the spirit of the Law.

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126 E.g., Kates, supra note 107, at 188-98.
The Book of Ruth fully enacts the ideals of Torah. Its characters fulfill their legal and moral obligations under Torah . . . . Without Torah law, mere impulses of kindness or pleasure would offer only ephemeral help. But the ideal of Torah encompasses more than a minimal response to the law’s requirements. The rich development of the theme of chesed throughout the book embodies a vision of fulfillment of mitzvot (commandments) in a spirit of lovingkindness, of generosity, of actively reaching out to the most vulnerable and bereft. This ideal is finally enacted by means of the courage of two women, Ruth and Naomi.  

Protection of the rights of aliens and outsiders was a hallmark of Justice Blackmun’s career on the Court.  

Prisoners are perhaps the most isolated and extreme “outsiders” in our society. Ms. Karlan showed how Blackmun found within himself the capacity to empathize with prisoners, going so far as to subscribe to a prison newspaper, the Stillwater Minnesota Prison Mirror.  

Blackmun was no revolutionary. He did not wish to tear down all prisons, nor to demolish the nuclear family. But he did see that the real world often failed to conform to its idealized version, and he was scathing toward his fellow Justices who indulged in “pious pronouncements fit for an ideal world,” rather than facing up to the appalling conditions of many American prisons. Justice Blackmun was equally scathing toward his fellow Justices who made “placid reference” to ideal parents giving “compassionate”

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128 Kates, supra note 107, at 197.
131 Karlan, supra note 129, at 173.
133 Karlan, supra note 129, at 177.
advice to pregnant minors,\(^{135}\) rather than understanding that some of those minors may be more terrified of abusive parents than of the abortion procedure itself.

Another example of Blackmun’s jurisprudence of compassion was in cases addressing the rights of aliens in the United States. The first in the line of cases that articulated the equal protection analysis of the rights of resident aliens was *Graham v. Richardson*,\(^{136}\) in 1971. *Graham* involved lawfully admitted resident aliens who were barred from receiving welfare benefits in two states, either until they obtained American citizenship or until they fulfilled a burdensome residency requirement. Applying equal protection theory, Blackmun wrote for the Court that aliens were a suspect class entitled to heightened scrutiny, and that the states’ concerns for balancing their budgets and preserving welfare benefits for their citizens were not sufficiently compelling to justify discrimination against aliens.\(^{137}\)

It is hard to imagine a Court case more like the story of Ruth. Ruth the alien arrived in Bethlehem-Judah unknown and starving. To survive, she had to take advantage of the community’s law that farmers “not reap all the way to the edges of your field, or gather the gleanings of your harvest . . . you shall leave them for the poor and the stranger.”\(^{138}\) Had she been forced to wait until achieving the equivalent of citizenship (presumably by marrying Boaz) or required to fulfill a residency requirement, she quite probably would have died. Jeffrey Dekro comments, “When Ruth goes out to glean grain in the fields of her mother-in-law’s people, she does so with a sense of dignity and entitlement,” because of the biblical mandate.\(^{139}\)

In choosing to speak about the *Book of Ruth* in his sermon at MMUC, Justice Blackmun preached ideas that were utterly consistent with his jurisprudence. As Dr. Holmes said at the Justice’s funeral, Blackmun’s theory of Constitutional interpretation and his theory of biblical interpretation rested on the same foundation of “compassion.”


\(^{137}\) *Id.*

\(^{138}\) *Leviticus* 19:9-10 (emphasis added).

\(^{139}\) Dekro, *supra* note 104, at 80.
V. THE DeSHANEY CASE

How do these two sermons, “In Recognition of the Imperfect” and “Mother’s Day,” tie together and how do they express Justice Blackmun’s deepest jurisprudential commitments? A good way of answering that question is to look at one of the Justice’s most famous opinions, his dissent in DeShaney v. Winnebago County Department of Social Services.140

Joshua DeShaney, born 1979, lived with his father, who abused him repeatedly. When Joshua was four years old, his father beat him so badly that he ended up irrevocably brain-damaged and destined to live out his life in an institution.141 During this time, the Winnebago County Department of Social Services (“DSS”) in the State of Wisconsin had repeatedly been made aware of the danger to Joshua.142 For example, DeShaney’s second wife, on the occasion of their divorce, complained to police that her husband hit the boy. Furthermore, Joshua was three times admitted to a local hospital with suspicious injuries that caused the examining physician to notify DSS.143 Various plans were made with Joshua’s father to remedy the situation, but despite the fact that the plans were not carried out and that the home was visited nearly twenty times by DSS social workers, Joshua was never removed from the home.144 When Joshua’s social worker was informed of the boy’s final beating and resulting injuries, her reaction was: “I just knew the phone would ring someday and Joshua would be dead.”145

Joshua’s mother sued DSS under the Due Process Clause of the Fourteenth Amendment, claiming that the State had deprived Joshua of his liberty interest in freedom from unjustified intrusions on personal security by failing to protect him from his father’s violence.146 She argued that the State of Wisconsin had a “special relationship” with Joshua that obligated the state to protect him.147 The Supreme Court, in an

141 Id. at 193.
142 Id. at 192.
143 Id. at 192-93.
144 Id. at 209 (Brennan, J., dissenting).
145 Id. (citing DeShaney v. Winebago County Dep't of Soc. Servs., 812 F.2d 298, 300 (7th Cir. 1987)).
146 DeShaney, 489 U.S. at 196 (majority opinion).
147 Id. at 197.
opinion authored by Justice Rehnquist, declined to find that the State had a duty to Joshua. Noting that the facts were “undeniably tragic,” the majority pointed out that the harm inflicted on Joshua came not from the State of Wisconsin but from Mr. DeShaney. While the State “may have been aware” of the dangers Joshua faced, it did not create those dangers, nor did it act in any way that made Joshua more vulnerable to them. “The most that can be said of the state functionaries in this case is that they stood by and did nothing when suspicious circumstances dictated a more active role for them.”

Justice Blackmun, along with Justice Marshall, joined in Justice Brennan’s dissent. Brennan told the story in a different way, from a different perspective. His dissent focused on the actions that Wisconsin had taken with respect to Joshua, not on what it had omitted to do. From that perspective, it appeared to the dissent that Wisconsin had taken control of Joshua’s life in crucial ways that gave rise to a duty to protect him. Wisconsin law, for example, channels reports of child abuse to DSS, even if the report is received by the police. When physicians at Joshua’s local hospital first reported suspected child abuse, it was DSS that took the boy into temporary custody and DSS that decided to return him to his father. The dissent declared that “inaction can be every bit as abusive of power as action, . . . oppression can result when the State undertakes a vital duty and then ignores it.”

Justice Blackmun’s dissent in DeShaney is only four paragraphs long, and makes no legal argument not already expressed in Brennan’s dissent. However, Blackmun gave voice to a passionate and sympathetic cri de coeur. “Poor Joshua!,” Blackmun’s opening sentence, became one of his most famous lines. Blackmun accused the majority of “sterile
formalism,” which blinded it to both the facts of the case and the relevant legal norms.\textsuperscript{160} “[F]ormalistic reasoning has no place in the interpretation of the broad and stirring Clauses of the Fourteenth Amendment.”\textsuperscript{161} In fact, Blackmun argued that those Clauses were designed to combat the “formalistic legal reasoning that infected antebellum jurisprudence,” and went on to accuse the Court of behaving like the antebellum judges who denied relief to fugitive slaves.\textsuperscript{162} Blackmun insisted that the question in this case, far from being determined by existing legal doctrine, was in fact, open, and that the precedents may be read more or less broadly, as one chooses. “Faced with the choice, I would adopt a ‘sympathetic’ reading, one which comports with dictates of fundamental justice and recognizes that compassion need not be exiled from the province of judging.”\textsuperscript{163}

Justice Blackmun became known and sometimes criticized for the personal and emotional tone of some of his opinions, of which \textit{DeShaney} is perhaps the strongest.\textsuperscript{164} Twice in four paragraphs the opinion gave the child’s full name, Joshua DeShaney.\textsuperscript{165} It is interesting that the Justice used the term “exile” in the sentence quoted above. The notion of exile—of insiders and outsiders—is never far from the Justice’s thoughts. In his sermon on the bicentennial of the Constitution, he speaks of the imperfections of a social compact that excludes women, African-Americans, and Native Americans. In his sermon on \textit{Ruth}, he constantly plays with themes of exile and welcome; Naomi returns destitute from the exile imposed on her by her husband’s flight from Judah, and she brings with her the Moabitess, the ultimate outsider, who has exiled herself from Moab in order to cleave to Naomi. Everything in the \textit{Book of Ruth} depends on how the community deals with these two vulnerable and powerless outsiders. Little Joshua, too, is vulnerable and powerless, “abandoned” by the State of Wisconsin.\textsuperscript{166}

\textsuperscript{160} \textit{DeShaney}, 489 U.S. at 212 (Blackmun, J., dissenting).
\textsuperscript{161} \textit{Id.}
\textsuperscript{162} \textit{Id.}
\textsuperscript{163} \textit{Id.} at 213.
\textsuperscript{165} \textit{DeShaney}, 489 U.S. at 212-13 (Blackmun, J., dissenting).
\textsuperscript{166} \textit{Id.} at 213.
In 1995, as part of a series of interviews for the Library of Congress Oral History Project, Blackmun’s former law clerk, Harold Koh, asked the Justice about the sympathetic and compassionate reading of the law that he had advocated in DeShaney. Blackmun responded: “I have been criticized, of course, for allowing compassion to enter my decision-making more than it should. I think compassion has a role as a factor, not the fundamental factor. I do not withdraw my statements. I’ll stick by them.”\footnote{Oral History, supra note 12, at 397.}

Less noticed than “Poor Joshua!” or the “sympathetic reading” of the Fourteenth Amendment is a stirring quotation in Blackmun’s dissent from a book entitled Law, Psychiatry, and Morality:

> We will make mistakes if we go forward, but doing nothing can be the worst mistake. What is required of us is moral ambition. Until our composite sketch becomes a true portrait of humanity we must live with our uncertainty; we will grope, we will struggle, and our compassion may be our only guide and comfort.\footnote{DeShaney, 489 U.S. at 213 (Blackmun, J., dissenting) (quoting ALAN STONE, LAW, PSYCHIATRY AND MORALITY 262 (1984)).}

VI. CONCLUSION

“Moral ambition” is exactly the thrust of the 1987 sermon, “In Recognition of the Imperfect.” As stated above, the Constitutional imperfections about which the Justice is concerned are all exclusions of people who are powerless (slaves, Native Americans) or marginalized (women). Although some of those imperfections have been corrected, we must still acknowledge that, just as the Founding Fathers were not perfect, “[w]e are not perfect.”\footnote{1987 Sermon, supra note 23, at 12.} And who can be sure, he asks, whose interpretation is correct? Referencing the same Dred Scott Court that he mentioned in DeShaney, Blackmun points out that surely Chief Justice Taney and his Brethren thought their interpretation of the Fugitive Slave Act was correct.\footnote{Id.} However, he says, even in the face of this humbling uncertainty, we must “try and try again in our attempts to guide constitutional law toward perfection.”\footnote{Id. at 14.} Even the Bible
is “imperfect,” Blackmun says, and yet “[t]he imperfect surely gives promise for the perfect.”

Justice Blackmun clearly saw it as his job, within the confines of Constitutional jurisprudence, to help to make the Constitution “more perfect.” What that meant, among other things, was to interpret the document as compassionately as possible, and as inclusively as possible. Whether the petitioner was an alien lately come to America, as Ruth to Bethlehem-Judah, or a young child completely dependent on the state for the most basic protections, deciding cases in a way that made the Constitution more responsive to their moral claims was, in the Justice’s eyes, taking the Constitution and therefore our nation, a little further down the road toward perfection.

\footnote{172 Id. at 15.}
Terror, Tort, and the First Amendment

HATFILL V. NEW YORK TIMES AND MEDIA LIABILITY FOR INTENTIONAL INFLICTION OF EMOTIONAL DISTRESS

“Someone must have been telling lies about Joseph K., for without having done anything wrong he was arrested one fine morning.”

I. INTRODUCTION

On the morning of August 6, 2002, CBS's “The Early Show” and NBC’s “Today” broadcast a statement read by Attorney General John Ashcroft naming Dr. Steven Jay Hatfill a “person of interest” to the Department of Justice (“DOJ”) and the Federal Bureau of Investigation (“FBI”) in their investigation into the 2001 anthrax attacks. While Dr. Hatfill was never arrested in connection with the “Amerithrax” investigation, the accusations against him nevertheless drastically impacted his life. The federal government repeatedly interrogated, monitored, and searched Dr. Hatfill, the press made him the subject of numerous news stories, and the DOJ caused him to lose a lucrative and prominent position in the bio-defense field. In a public statement on August 25,
2002, Dr. Hatfill expressed his considerable frustration: “My life is being destroyed by arrogant government bureaucrats who are peddling groundless innuendo and half information about me to gullible reporters who, in turn, repeat this . . . under the guise of news.” One reporter in particular drew Dr. Hatfill’s wrath—Nicholas D. Kristof of the New York Times (“Times”). Kristof wrote a series of columns spanning from May to August 2002, harshly criticizing the FBI for, among other things, not thoroughly investigating Dr. Hatfill, whom he named “Mr. Z.” Dr. Hatfill blamed Kristof and his allegedly irresponsible reporting in large part for his ordeal, which he likened in its absurdity to that of “Joseph K.” in Kafka’s The Trial. Dr. Hatfill wholeheartedly maintained his innocence throughout and eventually turned to the courts to vindicate his name, filing two lawsuits—one against Kristof and the Times claiming defamation and intentional infliction of emotional distress (“IIED”), and another against John Ashcroft, the FBI, and the DOJ claiming violations of his rights under the First and Fifth Amendments and the Privacy Act. This Note focuses on the first suit, specifically the claim of IIED, the dismissal of that claim by the United States District Court for the Eastern District of Virginia, its reinstatement $150,000 per year. The Justice Department, however, funded this position and they, apparently, were reticent to continue lining the pockets of their “person of interest.” See Marilyn W. Thompson, The Pursuit [sic] of Steven Hatfill, WASH. POST, Sept. 14, 2003, at W6.

5 Late Edition with Wolf Blitzer, supra note 4.
6 Id. (“Why is it necessary, right or fair, Mr. Kristoff [sic], for you to write these things?”).
8 Late Edition with Wolf Blitzer, supra note 4. Dr. Hatfill even sarcastically suggested that The Trial was Kristof’s inspiration for dubbing him “Mr. Z.” Id.
10 Hatfill v. Ashcroft, 404 F. Supp. 2d 104, 106 (D.D.C. 2005). Hatfill also sued Vassar professor and handwriting expert Donald Foster because of an article written by Foster in Vanity Fair expressing the conclusion, based largely on his analysis of the handwriting on the anthrax letters, that the FBI should focus its investigation on Hatfill. See generally Hatfill v. Foster, 372 F. Supp. 2d 725 (S.D.N.Y. 2005).
and denial of rehearing by the United States Court of Appeals for the Fourth Circuit, and the implications presented by allowing such claims to proceed against the press pursuant to their coverage of the paramount issues of the day.

After developing the factual landscape that gave rise to the Times lawsuit in Part II, Part III discusses the procedural history of Hatfill v. New York Times. Part IV briefly surveys the development of the tort of IIED before focusing on the tort’s application against media defendants, paying special attention to the First Amendment problems that arise when plaintiffs use the tort to punish speech on matters of legitimate public concern. Part V maintains that these problems require courts to adopt a newsworthiness defense to IIED, applicable at the pleading stage, which would account for tort law’s remedial objectives in compensating emotional damages while ensuring that the press will be free to responsibly report on public issues without fear of reprisal. This Note concludes by demonstrating that the application of such a defense in Hatfill would have required the Fourth Circuit to affirm the district court’s dismissal.

II. FACTS

A. The Anthrax Attacks

In late 2001, while the nation was still reeling from the terrorist attacks in New York City and Washington D.C., a subtle but insidious threat revealed itself in South Florida. On October 4, the public learned that a photo editor named Robert Stevens lay dying in a West Palm Beach hospital from acute inhalational anthrax disease, caused by exposure to anthrax, one of the world’s deadliest known pathogens. Mr. Stevens died the following day, and within two days, his friend and co-worker Ernesto Blanco—a mailroom employee at the Boca

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13 Laurie Garrett, Questions Linger; Unknown Dominates Probe a Year After Deadly Anthrax Mailings, NEWSDAY, Oct. 7, 2002, at A7 [hereinafter Garrett, Questions Linger].
Raton headquarters of American Media, Inc.—fell ill from the same anthrax-induced affliction.\(^\text{15}\)

In the weeks that followed, a series of anthrax-laden letters surfaced in several conspicuous places in a manner clearly geared to garner public attention. The first such letter, addressed to broadcaster Tom Brokaw, was discovered in the office of his assistant at the Manhattan headquarters of NBC News.\(^\text{16}\) Shortly thereafter, two more contaminated envelopes appeared, one addressed to the “Editor” of the *New York Post*, and then on October 15, another addressed to Senator Tom Daschle at his Washington D.C. office.\(^\text{17}\) Following the discovery of the Daschle letter, the FBI placed a large quantity of mail from Capitol Hill in quarantine.\(^\text{18}\) Amongst this sequestered mail, agents discovered another letter teeming with anthrax spores and addressed to Senator Patrick Leahy on November 16, 2001.\(^\text{19}\)

\(^{14}\) American Media, Inc. publishes the *National Enquirer*. Thompson, *supra* note 4.

\(^{15}\) *Id.* The source of the anthrax that killed Mr. Stevens and sickened Mr. Blanco was never determined, although Mr. Stevens’ office mail slot and computer keyboard later tested positive for contamination. *Id.*; Garrett, *Questions Linger*, *supra* note 13.

\(^{16}\) Laurie Garrett, *The Anthrax Crisis; How a Suspected Case in NYC Threaded Its Way to Diagnosis Despite Initial CDC Uncertainty*, *NEWSDAY*, Oct. 8, 2002, at A37 [hereinafter Garrett, *The Anthrax Crisis*]. As the events in Florida unfolded, Tom Brokaw’s assistant, Erin O’Connor became certain that she had been exposed to anthrax. She recalled opening an envelope addressed to Mr. Brokaw on September 25 and noticing a white powder within. Several days later, she developed a painless, but unsightly sore on her collarbone. Initial testing of the suspected envelope and Ms. O’Connor’s skin tissue was negative, but a Center for Disease Control (CDC) lab in Atlanta eventually concluded that her sore was the result of anthrax exposure. On October 12, New York City Mayor Rudy Giuliani informed the city and nation of the CDC’s determination. Later that day, another envelope addressed to Mr. Brokaw was discovered in Ms. O’Connor’s desk and was delivered to a city health department lab by the NYPD where it not only tested positive for anthrax, but contaminated the entire lab, causing the lab to be sealed shut for months following the incident. *Id.*


\(^{18}\) Schmidt, *supra* note 17.

\(^{19}\) *Id.*; Opening of the Letter: An Interview with Van A. Harp, Asst. Dir. of the Washington field office, FBI, http://www.fbi.gov/anthrax/vanharp/transcript.htm [last visited Oct. 4, 2005] [hereinafter An Interview with Van A. Harp]. The letters to NBC and the New York Post were postmarked September 18, while the letters to the two Senators were postmarked October 9 and their return address indicated they were mailed by a fourth grader from a fictitious “Greendale School” in Franklin Park, New Jersey. Thompson, *supra* note 4; Schmidt, *supra* note 17; Press Release, *supra* note 17. The letter to Senator Daschle was dated “9-11-01” and contained a message scrawled in childish handwriting:
All four letters bore postmarks from Trenton, New Jersey. Before arriving at Capitol Hill, the letters addressed to the two Senators passed through the massive Brentwood postal distribution center in Northeast D.C. and, as a result, caused the deaths of two postal workers there—Joseph Curseen and Thomas Morris Jr. By the time the threat subsided, the anthrax attacks claimed the lives of five people and sickened seventeen others. Evidence of anthrax spores surfaced not only in New York, New Jersey, Washington D.C., and Florida, but also in places as seemingly far removed from the attacks as Kansas City, Missouri, and the United States Embassy in Vilnius, Lithuania.

B. The FBI’s Investigation, Nicholas Kristof’s Articles, and Dr. Steven Hatfill’s “Emergence” as a Person of Interest

Before the struggle in Florida for Robert Stevens’ life had ended, the FBI’s investigation into the source of his affliction had begun. After discovering the letters in New York City:...

YOU CAN NOT STOP US.
WE HAVE THIS ANTHRAX.
YOU DIE NOW.
ARE YOU AFRAID?
DEATH TO AMERICA.
DEATH TO ISRAEL.
ALLAH IS GREAT.

Press Release, supra note 17. Senator Leahy’s letter contained a nearly identical message. Opening of the Letter, Amerithrax: Seeking Information, FBI, http://www.fbi.gov/anthrax/vanharp/introleahy.htm (last visited Jan. 3, 2006). While the envelopes addressed to Mr. Brokaw and the New York Post were without a return address, the letters within were also dated “9-11-01” and their message, in the same handwriting, was similar:

THIS IS NEXT
TAKE PENACILIN [sic] NOW
DEATH TO AMERICA
DEATH TO ISRAEL
ALLAH IS GREAT.

Press Release, supra note 17.

20 Schmidt, supra note 4.
21 Thompson, supra note 4.
22 Shane, supra note 3. The deaths of an elderly Connecticut woman, Ottilie Lundgren, and a hospital worker from the Bronx, Kathy Nguyen, were also determined to have been caused by anthrax exposure, but how they came into contact with the pathogen remains a mystery. Garrett, The Anthrax Crisis, supra note 16.
23 Thompson, supra note 4.
24 Before he died, samples of Mr. Stevens’ blood were taken to a laboratory at Northern Arizona University in Flagstaff to be analyzed by Paul Keim, a specialist in bacterial evolution and caretaker of a collection of genetic variants of anthrax. Keim’s
York, the FBI revealed that a variant of anthrax known as the “Ames” strain was being used in the attacks. Although it was initially unclear where the Ames strain originated, the FBI knew that it resembled a strain of anthrax commonly used in American bio-defense research and held at several military facilities, including the U.S. Army Medical Research Institute for Infectious Diseases ("USAMRIID") at Fort Detrick, Maryland.

The USAMRIID facility quickly became an important base of operations in the FBI's investigation, dubbed “Amerithrax.” USAMRIID had long been a leader in the study of deadly biological agents; both defensively, in creating vaccines and treatments and also prior to 1969, offensively, in engineering military uses for them. Due to this amassed expertise, the FBI naturally turned to the facility to aid in its investigation and brought the letters addressed to Senators Daschle and Leahy there to be studied. As the Fort Detrick scientists opened and examined these letters, it became apparent that the anthrax mailer had used sophisticated methods to weaponize his anthrax and make it optimal for inhalation.

Based in part on these findings, the FBI offered a tentative outline of some of the characteristics they believed...
the suspect possessed in a January 29, 2002 letter to the Members of the American Society for Microbiology:

[A] single person is most likely responsible for these mailings. . . . Based on his or her selection of the Ames strain of Bacillus anthracis one would expect that this individual has or had legitimate access to select biological agents at some time. This person has the technical knowledge and/or expertise to produce a highly refined and deadly product.32

Because of USAMRIID’s expertise, history and inventory of Ames anthrax, some of its scientists clearly had the access and technical knowledge described in the FBI’s profile.33 These scientists seemed all the more suspicious because of Fort Detrick’s allegedly questionable security, specifically its reported loss of anthrax, ebola, and other pathogen samples during the early 1990’s.34 Thus, it was not surprising that the lab and its researchers, in addition to being a vital tool in the Amerithrax investigation, quickly became its prominent focus.35

It was this attention on Fort Detrick that first led investigators to Dr. Hatfill. Dr. Hatfill worked at USAMRIID from 1997 to 1999 on a fellowship studying Ebola and related viruses.36 Prior to that, he spent a good portion of his adult life in Africa pursuing various degrees and affiliating himself with the militaries of several countries.37 After his fellowship at USAMRIID expired, Hatfill landed a job at Science Applications International Corporation (“SAIC”), a huge government contractor that works closely with the CIA and other government agencies.38 In the summer of 2001, while working at SAIC, Hatfill applied for a heightened security clearance to work with the CIA, which required him to pass a
polygraph. Reportedly, the results of this polygraph were less than satisfactory and the CIA denied Hatfill’s application for upgraded clearance in August 2001. Shortly thereafter, the Department of Defense revoked his regular security clearance. Rightly or wrongly, Hatfill’s eccentric past, his connections to Fort Detrick, and the perception that he might be angry at the government over his security clearance placed him in the unenviable position of being on the FBI’s short list of possible suspects.

In the beginning of 2002, Barbara Hatch Rosenberg, a college professor and bio-defense expert, became frustrated at the pace of the FBI’s investigation and began collecting available evidence and posting her detailed analysis of it online. After earlier posting her belief that the anthrax killer was likely a USAMRIID scientist, she wrote on February 5, 2002, that “[f]or more than three months now the FBI has known that the perpetrator of the anthrax attacks is American. This conclusion must have been based on the perpetrator’s evident connection to the US biodefense program.” On February 25, 2002, White House Press Secretary Ari Fleischer addressed Ms. Rosenberg’s allegations in a press briefing when a reporter asked if there had been a suspect for three months and if it was an American scientist from Fort Detrick. After explaining that the FBI was still investigating several possible suspects, Mr. Fleischer responded, “[a]ll indications are that the source of the anthrax is domestic . . . [a]nd I just can’t go beyond that.”

On May 24, 2002, writing in his regular column on the Times’ editorial page, Nicholas Kristof did go beyond Mr.
Fleischer's description. With the stated goal of “light[ing] a fire under the F.B.I. in its investigation of the anthrax case,” Kristof wrote:

Experts in the bioterror field are already buzzing about a handful of individuals who had the ability, access and motive to send the anthrax. These experts point, for example, to one middle-aged American who has worked for the United States military bio-defense program and had access to the labs at Fort Detrick, Md. His anthrax vaccinations are up to date, he unquestionably had the ability to make first-rate anthrax, and he was upset at the United States government in the period preceding the anthrax attacks.46

One month later, on June 24, 2002, Barbara Rosenberg and several FBI officials attended a closed meeting before the Senate Judiciary Committee, which was then chaired by anthrax letter recipient Senator Patrick Leahy.47 The following day, federal agents sought and received permission from Dr. Hatfill to conduct the first of several searches of his Frederick, Maryland apartment.48

Shortly thereafter on July 2, 2002, the Times published another of Kristof’s columns criticizing the FBI's investigation and calling attention to the national security threats posed by the bureau’s “lackadaisical ineptitude in pursuing the anthrax killer.”49 The column read:

Almost everyone who has encountered the F.B.I. anthrax investigation is aghast at the bureau’s lethargy. Some in the biodefense community think they know a likely culprit, whom I'll call Mr. Z. Although the bureau has polygraphed Mr. Z, searched his home twice and interviewed him four times, it has not placed him under surveillance or asked its outside handwriting expert to compare his writing to that on the anthrax letters... He denies any wrongdoing, and his friends are heartsick at suspicions directed against a man they regard as a patriot. Some of his polygraphs show evasion, I hear, although that may be because of his temperament.

If Mr. Z were an Arab national, he would have been imprisoned long ago. But he is a true-blue American with close ties to the U.S. Defense Department, the C.I.A. and the American biodefense program. On the other hand, he was once caught with a girlfriend in a biohazard “hot suite” at Fort Detrick, surrounded only by blushing germs... (I)It's time for the F.B.I. to make a move: either it should

46 Kristof, Connecting Deadly Dots, supra note 7.
47 Thompson, supra note 4.
48 Id.
49 Kristof, The F.B.I. Yawns, supra note 7.
go after him more aggressively . . . or it should seek to exculpate him and remove this cloud of suspicion.  

Kristof then went on to pose a series of questions to the FBI:

Do you know how many identities and passports Mr. Z has and are you monitoring his international travel? . . . Why was his top security clearance suspended . . . less than a month before the anthrax attacks began? . . . Have you searched the isolated residence that he had access to last fall? The F.B.I. . . . knows that Mr. Z gave Cipro to people who visited it . . . Have you examined whether Mr. Z has connections to the biggest anthrax outbreak among humans ever recorded . . . in Zimbabwe in 1978-90? There is evidence that the anthrax was released by the white Rhodesian Army . . . Mr. Z has claimed that he participated in the white army's much feared Selous Scouts . . . Mr. Z's resume also claims involvement in the former South African Defense Force; all else aside, who knew that the U.S. Defense Department would pick an American who had served in the armed forces of two white-racist regimes to work . . . with some of the world's deadliest germs?  

Kristof's next column appeared on July 12 and it discussed the possibility that earlier anthrax hoaxes in 1997 and 1999 may have been connected to the 2001 attacks. Much of the column criticized the FBI's failure to look to these earlier incidents to aid in their current investigation. However, Kristof did mention Mr. Z again, this time in connection with a 1997 anthrax scare in Washington D.C. Kristof noted that the incident occurred on the same day as a terrorism seminar held in the D.C. area. According to Kristof, “Mr. Z seemed peeved that neither he nor any other bio-defense expert had been included as a speaker.” Kristof quoted a letter that Dr. Hatfill apparently sent to the organizer of the seminar in which he wrote that he was “rather concerned” at the omission. Without mentioning specifics, Kristof also wrote that Dr. Hatfill subsequently used the 1997 incident “to underscore the importance of his field and his own status within it,” and to demonstrate how future attacks might occur.

50 Id.
51 Id.
52 Id.
53 Id.
54 Id.
55 Id.
56 Id.
57 Id.
The column also explained that the 1997 hoax involved a fake anthrax gelatin, while a series of letters sent to a combination of media and government targets in 1999 had used fake anthrax powder. Kristof found this interesting because “Mr. Z apparently learned about powders during those two years. His 1999 resume adds something missing from the 1997 version: ‘working knowledge of wet and dry BW [biological warfare] agents . . . . ’” The column concluded by again chastising the FBI for failing to properly investigate these earlier incidents for links to the 2001 attacks.

The Times published Kristof’s next column dealing with the anthrax attacks one week later on July 19, but it was primarily limited to discussing the reported security breaches at the USAMRIID labs at Fort Detrick. Mr. Z was mentioned in passing, but only to explain “what piqued [Kristof’s] interest in U[USAMRIID] in the first place.” Kristof did not write of Mr. Z again until after the Attorney General identified Dr. Hatfill as a “person of interest” on August 6, 2002 and Dr. Hatfill himself held a press conference disavowing his guilt on August 11.

On August 13, 2002, when Kristof next wrote about the anthrax attacks, he focused exclusively on Dr. Hatfill. Kristof began the August 13 column by “com[ing] clean on ‘Mr. Z’” and identifying him as Dr. Hatfill, but urging his readers to maintain a presumption of innocence because “[i]t must be a genuine assumption that he is an innocent man caught in a nightmare. There is not a shred of traditional . . . evidence linking him to the attacks.” Much of the rest of the column reiterated the circumstantial evidence already compiled, however, Kristof did add several new bits of information. Among this was the only physical evidence against Hatfill—Kristof reported that specially trained bloodhounds, which had been given scent packets taken from the anthrax letters “responded strongly to Dr. Hatfill, to his apartment, to his girlfriend’s apartment and even to his former

58 Kristof, The Anthrax Files I, supra note 7.
59 Id.
60 Id.
61 Kristof, Case of the Missing Anthrax, supra note 7.
64 Id.
girlfriend’s apartment, as well as to restaurants that he had recently entered . . . . The dogs did not respond to other people, apartments or restaurants.”\textsuperscript{65}

Kristof went on to question why it took the FBI so long to bring in the bloodhounds, or to read Hatfill’s unpublished novel, “Emergence,” which depicts a biological attack on Congress.\textsuperscript{66} Kristof also called attention to several apparently false claims on Hatfill’s resume, namely, “a Ph.D. degree, work with the U.S. Special Forces [and] membership in Britain’s Royal Society of Medicine.”\textsuperscript{67} The column concluded by crediting the FBI for “pick[ing] up its pace” and noting that “[p]eople very close to Dr. Hatfill are now cooperating with the authorities, information has been presented to a grand jury, and there is reason to hope that the bureau may soon be able to end this unseemly limbo by either exculpating Dr. Hatfill or arresting him.”\textsuperscript{68} Despite Kristof’s optimistic prediction, the Amerithrax investigation remains unsolved and the FBI has yet to arrest Dr. Hatfill or anyone else in connection with it.\textsuperscript{69}

III. HISTORY OF HATFILL V. NEW YORK TIMES

On June 18, 2003, shortly before the statute of limitations was to run with respect to Kristof’s July 2002 columns, Dr. Hatfill filed a complaint in Virginia state court against Kristof and the \textit{Times} claiming that the four columns from July and August 2002 defamed him. Taking advantage of Virginia’s tolling statute, Dr. Hatfill preserved the viability of his claims but never proceeded with his state action, instead taking a voluntary non-suit in March 2004.\textsuperscript{70} He then commenced an action in the United States District Court for the Eastern District of Virginia on July 13, 2004.\textsuperscript{71}

\textsuperscript{65} \textit{Id.} The bloodhounds apparently made a positive identification of Dr. Hatfill’s scent after smelling the decontaminated anthrax letters. Dr. Hatfill explained that the only identification was a friendly reaction that one dog had when Dr. Hatfill reached down to pet him. Thompson, \textit{supra} note 4.


\textsuperscript{67} Kristof, \textit{The Anthrax Files II, supra note 7}.

\textsuperscript{68} \textit{Id.}

\textsuperscript{69} See Editorial, \textit{The Anthrax Metaphor, WASH. POST, Sept. 22, 2005, at A24.}


\textsuperscript{71} \textit{Id.}
A. Dismissal by the District Court

Dr. Hatfill’s federal complaint purported to state three causes of action against both Kristof individually and the Times. Count I claimed that Kristof’s five columns, taken as a whole, stated or implied that Dr. Hatfill was responsible for the anthrax mailings, thereby falsely imputing to him homicidal conduct, and that Kristof and the Times intended the columns to convey this message.\(^72\) Count II asserted an independent claim of libel based on a number of “discrete untruths” purportedly contained in Kristof’s columns.\(^73\) Count III of the complaint claimed IIED.\(^74\) After being served, Kristof and the Times moved the court, pursuant to Rule 12(b), to dismiss the complaint for failure to state a claim upon which relief can be granted, and as to Kristof, because the court lacked personal jurisdiction over him.\(^75\) As to Count I, the court framed the issue before it as:

> [W]hether the challenged columns reasonably can be read to accuse Hatfill of actually being the anthrax mailer, based upon consideration of the full content of the columns and upon the context in which they were published, i.e., as a series of opinion pieces appearing on the Op-Ed page of a national newspaper.\(^76\)

Despite the fact that Kristof’s columns raised a number of questions about Dr. Hatfill and accurately described him “as the overwhelming focus of the [FBI’s] investigation,” the court failed to find that they endorsed a belief in his guilt.\(^77\) Nor did it find that a reasonable reader would have viewed the columns as intending to defame Dr. Hatfill.\(^78\) “Because the columns specifically and repeatedly disavow[ed] any conclusion of guilt,” the court rejected Dr. Hatfill’s contention that they were written in such a manner as to impute his responsibility for the

\(^72\) Id.

\(^73\) Id.

\(^74\) Id.

\(^75\) Id. at 1130. Kristof argued that he had insufficient contacts with the state of Virginia to allow a court sitting in that state to exercise jurisdiction over him without violating his constitutional right of due process. Id. at 1137-38.

\(^76\) Hatfill, 33 Media L. Rep. (BNA) at 1133.

\(^77\) Id. at 1134.

\(^78\) Id. (citing White v. Fraternal Order of Police, 909 F.2d 512, 519 (D.C. Cir. 1990) (citations omitted)). The court required a finding of such intent because innuendo, rather than a direct accusation, supported the claim of defamation. Id. (citing Chapin v. Knight-Ridder, Inc., 893 F.2d 1087, 1110 (4th Cir. 1990)).
anthrax mailings in the minds of reasonable readers. Based on these findings, the court dismissed Count I of the complaint.

Having found that Kristof's columns collectively failed to be capable of defamatory meaning, the district court had little difficulty in ruling that each of the several “discrete untruths” alleged by Dr. Hatfill independently failed to convey such meaning. Since even according to the complaint, the allegedly false statements “simply reinforce[d] the purported inference that Hatfill is the anthrax mailer,” the court dismissed Count II, ruling as a matter of law that such statements could not independently support a separate claim for libel.

The court began its analysis of Count III by noting that Virginia law considered IIED to be a traditionally disfavored claim. Although the court did not elaborate on why this was so, it cited to Barret v. Applied Radiant Energy Corp., which explains that Virginia courts disfavor IIED and similar torts because of their speculative nature and tendency to presume harm. The court continued by explaining that in order to state a claim for IIED under Virginia law, a plaintiff must both plead and prove by clear and convincing evidence four distinct elements: (1) that the defendant acted intentionally or recklessly; (2) that the conduct complained of was outrageous and intolerable; (3) that such conduct caused plaintiff emotional distress; and (4) that the emotional distress suffered

79 Id. at 1134-35.
80 Id.
81 Hatfill, 33 Media L. Rep. at 1135-36. The allegedly false statements in question were that Hatfill had the “ability to access and motive to send the anthrax”; that he had access to an “isolated residence” around the time of the attacks and “gave Cipro . . . to people who visited the [residence]”; that he had “up to date” anthrax vaccinations; that he “failed 3 successive polygraph examinations”; that he was “upset with the United States Government for a period preceding the anthrax attack”; and that he “was once caught with a girlfriend in a biohazard ‘hot suite’ at Fort Detrick . . . surrounded only by blushing germs.” Id. at 1136.
82 Id. As an additional ground for dismissing Count II, the court held that the claim was barred by Virginia's one year statute of limitations. Noting that the second cause of action was not alleged in Dr. Hatfill's original state court complaint, the court determined that Dr. Hatfill was unable to take advantage of Virginia's tolling statute as to that claim, and was thus barred from bringing it in federal court after the one year statute of limitations had run. Id. at 1135.
83 Id. at 1136 (citing Ruth v. Fletcher, 377 S.E.2d 412, 415 (Va. 1989); Barrett v. Applied Radiant Energy Corp., 240 F.3d 262, 269 (4th Cir. 2001)).
84 240 F.3d at 269 (citing Ruth v. Fletcher, 377 S.E.2d 412, 415 (Va. 1989); Bowles v. May, 166 S.E. 550, 555 (Va. 1932)). See also infra Part IV.
Finding that Dr. Hatfill’s pleading failed to prove outrageous conduct and severity of harm, as well as that the IIED claim was duplicative of the defamation claim, the court dismissed Count III as well.\textsuperscript{86}

Hatfill’s complaint failed to satisfy the district court regarding two of the four elements required to state a claim for IIED. First, and most significantly, the court declined to find that the defendants’ conduct was outrageous and intolerable.\textsuperscript{87} Drawing on Virginia precedent, the court explained that for it to make such a finding, the conduct in question must be “so outrageous in character, and so extreme in degree, as to go beyond all possible bounds of decency, and to be regarded as atrocious, and utterly intolerable in a civilized community.”\textsuperscript{88}

The court held that the publication of news or commentary on important public matters, like the FBI’s investigation into the anthrax attacks, simply could not constitute the type of “outrageous and intolerable” conduct needed to support a claim for IIED.\textsuperscript{89} This conclusion finds support in a number of other decisions,\textsuperscript{90} despite the fact that IIED—unlike the overlapping

\textsuperscript{85} Hatfill, 33 Media L. Rep. (BNA) at 1136-37 (citing Russo v. White, 400 S.E.2d 160, 162 (Va. 1991); Womack v. Eldridge, 210 S.E.2d 145, 148 (Va. 1974)). Virginia’s is a common articulation of the tort, mirroring the Restatement version which provides: “One who by extreme and outrageous conduct intentionally or recklessly causes severe emotional distress to another is subject to liability for such emotional distress.”\textsuperscript{86} RESTATEMENT (SECOND) OF TORTS § 46(1) (1965). See infra Part IV.

\textsuperscript{86} Hatfill, 33 Media L. Rep. (BNA) at 1137.

\textsuperscript{87} Resolution of the “outrageousness” question is of such significance because of its tendency to overshadow all other elements of the tort. Finding that a defendant intentionally engaged in outrageous conduct will generally enable a reviewing court to presume the state-of-mind, severity of distress, and causation elements of the tort. Daniel Givelber, \textit{The Right to Minimum Social Decency and the Limits of Evenhandedness: Intentional Infliction of Emotional Distress by Outrageous Conduct}, 82 COLUM. L. REV. 42, 47-49 (1982). The Restatement itself suggests that “[s]evere distress must be proved; but in many cases the extreme and outrageous character of the defendant’s conduct is in itself important evidence that the distress has existed.” RESTATEMENT (SECOND) OF TORTS § 46 cmt. j (1965). See infra Part IV.

\textsuperscript{88} Hatfill, 33 Media L. Rep. (BNA) at 1137 (quoting Russo, 400 S.E.2d at 162 (citation omitted)). This language is taken from a comment to the Restatement. RESTATEMENT (SECOND) OF TORTS § 46 cmt. d (1965). See infra Part IV.

\textsuperscript{89} Hatfill, 33 Media L. Rep. (BNA) at 1137.

\textsuperscript{90} See Karen Markin, \textit{The Truth Hurts: Intentional Infliction of Emotional Distress as a Cause of Action Against the Media}, 5 COMM. L. & POL’Y 469, 491 (2000) (surveying cases from the 1990’s where media defendants were sued for IIED and noting that “[t]he tort . . . does not contain a newsworthiness or public interest defense, but when considering such claims . . . some courts seemed to create one”). See also infra Parts IV and V.
public disclosure of private facts tort—does not contain an inherent “newsworthiness” defense.  

Additionally, the court found that Dr. Hatfill only made “conclusory assertions” of suffering the requisite level of emotional distress and thus failed to sufficiently plead the fourth element of IIED. When a defendant’s conduct is sufficiently outrageous, courts tend to presume the requisite degree of harm. Given the district court’s failure to find the columns in question “outrageous and intolerable,” it is not surprising that it also failed to find that such columns caused Dr. Hatfill severe emotional distress.  

As the final ground for dismissing Count III, the court found it duplicative of Dr. Hatfill’s defamation claim, and that it amounted to an attempt to evade constitutional limits on damage awards stemming from a single act of publication. Noting that both Dr. Hatfill’s defamation and IIED claims were “expressly and solely based on . . . publication of the [same] series of columns,” the court found that the latter claim must be dismissed. Whether or not a claim for IIED may lie when the underlying facts form the basis for another tort is a matter in some dispute. A number of jurisdictions view IIED as a “gap-filler” tort that is only available to redress wrongs not covered by a traditional area of tort law. Others take a seemingly opposite view and only allow IIED claims to proceed where the elements of another tort are satisfied, thus
essentially relegating IIED to a “parasitic” role as an element of a traditional tort’s damages. Although Virginia law appears somewhat muddled on the issue, once the court dismissed Dr. Hatfill’s defamation claim, it could have proceeded under either of the aforementioned theories in order to dismiss the IIED claim. However, the court’s concern about multiple damage awards suggests it viewed the “gap-filler” approach as the more constitutionally sound. Following his resounding defeat in district court, Dr. Hatfill appealed all of his claims against the Times to the United States Court of Appeals for the Fourth Circuit.

B. Reinstatement by the Court of Appeals

Dr. Hatfill’s claims found a much more receptive audience when they were brought before a three-judge panel of the Fourth Circuit, a court notoriously unmoved by the familiar First Amendment pleas of media defendants. In an opinion written by Judge Dennis Shedd and issued on July 28, 2005, the court reinstated all three of Dr. Hatfill’s claims against the Times.

In its consideration of Count I, the court surveyed Virginia defamation law and came to the conclusion that

97 Harris v. City of Seattle, 32 Media L. Rep. 1279 (W.D. Wash. 2003) (Although IIED claims based on unsuccessful libel claims must be dismissed, it is improper to dismiss an IIED claim where an actionable tort that accounts for mental suffering, such as false light, survives the pleading stage. (citing Dworkin v. Hustler Magazine, 867 F.2d 1188, 1193 n.2 (9th Cir. 1989)); Leidholdt v. L.F.P., Inc., 860 F.2d 890, 893 n.4 (9th Cir. 1988)); Daly v. Viacom, Inc., 238 F. Supp. 2d 1118, 1125 n.4 (N.D. Cal. 2002) (Where libel and false light claims fail to state a cause of action, the underlying behavior likewise must fail to state a cause of action for IIED.).

98 Compare Smith, 14 Media L. Rep. (BNA) at 1881 (“[A] separate action for [IIED] which is based solely on allegedly slanderous or libelous words themselves, is . . . impermissibly duplicative,” because it would allow a plaintiff to circumvent “the strictures of modern defamation law.”), with Foretech v. Advance Magazine Publishers, Inc., 765 F. Supp. 1099, 1104-05 (D.D.C. 1991) (applying Virginia law and holding that although Hustler Magazine v. Falwell, 485 U.S. 46 (1988), alleviated some of Smith’s concerns, an IIED claim cannot stand where a libel claim based on the same statements fails “absent a specific factual showing that [a defendant] acted for the specific purpose of inflicting emotional distress”).


102 Chief Judge William Wilkins joined in the opinion, and Judge Paul Niemeyer dissented.

103 Hatfill, 416 F.3d 320.
Kristof's columns were capable of defamatory meaning in that they imputed to Hatfill the commission of a “criminal offense involving moral turpitude,” namely the murders of five people, for which, if true, Dr. Hatfill could be indicted and punished. Notwithstanding Kristof's cursory, but oft-repeated statements urging his readers to maintain a presumption of innocence as to Dr. Hatfill, the court found that “the unmistakable theme of Kristof’s columns [was] that the FBI should investigate Hatfill more vigorously because all of the evidence (known to Kristof) pointed to him,” and that a reasonable reader of the columns would likely conclude that Dr. Hatfill was, in fact, the anthrax killer. The court reinstated Count II as well, finding that the district court erred in concluding both that the claim was time-barred and that the “discrete false statements” were independently incapable of defamatory meaning.

The analysis of Count III began by rejecting as too broad the district court’s assertion that “[p]ublishing news or commentary on matters of public concern” can never be sufficiently extreme or outrageous to satisfy the elements of IIED. Reiterating its conclusion that Kristof’s columns are reasonably read as accusing Dr. Hatfill of being responsible for the anthrax attacks, the court found that such an accusation could constitute extreme and outrageous conduct. Specifically, if as Dr. Hatfill alleged, the Times intentionally published a false accusation of murder without regard for its veracity and without allowing for response, extreme and outrageous conduct could be found. Particularly important to the court’s determination was “the notoriety of the case, the charge of murder, and the refusal” of the Times to permit Dr. Hatfill’s lawyer an opportunity to respond.

104 Id. at 330-34 (citing Carwile v. Richmond Newspapers, Inc., 82 S.E.2d 588, 591 (Va. 1954)).
105 Id. at 333.
106 Id. at 334-35. The court also rejected the district court’s conclusion that the statute of limitations barred Count II. Id.
107 Id. at 336.
108 Hatfill, 416 F.3d at 336.
109 Id.
110 Id. The court’s treatment of the effects of “notoriety” poses an interesting First Amendment dilemma. Considering that the constitutional protections afforded the press are at their apex when commenting on matters of public concern, see Dun & Bradstreet, Inc. v. Greenmoss Builders, Inc., 472 U.S. 749, 758-59 (1985) (“It is speech on matters of public concern that is at the heart of the First Amendment’s protection.” (quoting First Nat’l Bank of Boston v. Bellotti, 435 U.S. 765, 776 (1978) (internal quotation marks omitted))), courts often privilege such activity, see Robert E. Dreschel, Intentional Infliction of Emotional Distress: New Tort Liability for Mass Media, 89
The court went on to discount the *Times*’ and the district court’s contentions that allowing the IIED claim to proceed would allow Dr. Hatfill to evade constitutional limitations on defamation actions. The court reasoned that if Dr. Hatfill was unable to meet the constitutional requirements for recovery on his defamation claim, he would likely also be unable to recover for IIED. However, no mention was made as to what the basis seemingly was for the district court’s concern, namely that the *Times* would be twice punished for a single act of publication. Instead the court saw their sole duty as determining whether Dr. Hatfill’s complaint alleged intentional and outrageous misconduct.

The court also found that Dr. Hatfill sufficiently pled severe emotional distress because the complaint alleged that the columns caused him to “suffer[] severe and ongoing loss of reputation and professional standing, loss of employment, past and ongoing financial injury, severe emotional distress and other injury,” as well as “grievous emotional distress.” Like the district court, the Fourth Circuit’s treatment of the severity of harm element of IIED was typical, in that it was overshadowed and seemingly determined by the outrageousness analysis. Sufficiently outrageous conduct...
generally leads courts to presume sufficiently severe harm.\textsuperscript{115} The court reversed the district court on each of Dr. Hatfill’s claims and remanded the case for further proceedings.\textsuperscript{116} In a brief one page dissent that relied largely on the reasoning of the district court, Judge Paul Niemeyer stated that the claims should be dismissed because he found “nothing in the letter or spirit of the columns” amounting to an accusation.\textsuperscript{117}

C. Denial of Rehearing En Banc

After the Fourth Circuit’s reversal, two out of the four judges who heard the case had voted to dismiss Dr. Hatfill’s claims against the \textit{Times}, yet all three counts of the complaint survived the 12(b)(6) motion. Hoping they would be able to tip the balance in their favor, the \textit{Times} petitioned the full Fourth Circuit for a rehearing en banc.\textsuperscript{118} Of the twelve judges weighing in on whether to grant the rehearing, only six voted in favor of doing so.\textsuperscript{119} Falling just short of producing the majority necessary to grant rehearing, the decision of the three-judge panel remained intact, as did Dr. Hatfill’s claims.\textsuperscript{120} However, the views of the \textit{Times}, and those of the press generally, did enjoy some measure of validation from the panel. In a rare move, Judge J. Harvie Wilkinson III, a former newspaper editorial page editor, issued a scathing ten page dissent from the denial of rehearing.\textsuperscript{121} The opinion, which sounded in clear First Amendment tones, began by stating:

The panel’s decision in this case will restrict speech on a matter of vital public concern. The columns at issue urged government action on a question of grave national import and life-or-death consequence. . . . It is worth remembering the context in which the columns at issue were published. In the aftermath of the September 11 attacks, the nation was alerted to the fact that someone was

\begin{itemize}
    \item \textsuperscript{115} See supra note 87.
    \item \textsuperscript{116} \textit{Hatfill}, 416 F.3d at 337.
    \item \textsuperscript{117} \textit{Id.} at 337-38 (Niemeyer, J., dissenting).
    \item \textsuperscript{119} \textit{Id.}
    \item \textsuperscript{120} \textit{Id.}
\end{itemize}
sending letters laced with anthrax through the mails. The letters were not simply directed at public officials but apparently at private individuals as well. Those who handled mail on a regular basis were concerned for their safety, and even ordinary residents were advised to take special precautions when opening their mail. At least five people died from anthrax exposure. There was, in addition, worry that law enforcement was ineffectual in locating the source of the anthrax production and distribution. In other words, both the problem and the steps necessary to resolve it were matters of public, indeed national, concern.\(^{122}\)

Judge Wilkinson clearly felt Dr. Hatfill’s complaint should have been dismissed and he went on to explain the threats posed by allowing these types of meritless claims to survive early dismissals. Acknowledging that the Times likely possessed the resources to defend its interests in lengthy court battles, Judge Wilkinson worried that many other smaller daily and weekly newspapers within the Fourth Circuit did not: “[t]he prospect of legal bills, court appearances, and settlement conferences means that all but the most fearless will pull their punches even where robust comment might check the worst impulses of government and serve the community well.”\(^{123}\) Judge Wilkinson’s concern was justified, as historically, plaintiffs have sued smaller news outlets quite frequently, despite their presumably shallow pockets.\(^{124}\)

Regarding the IIED claim, Judge Wilkinson was “quite at a loss” to see how publishing Kristof’s columns was utterly intolerable in a civilized community, since they reported on “matters of unquestioned public interest with urgent national security implications.”\(^{125}\) According to Wilkinson, “[t]he First Amendment expressly specifies that the ‘civilized community’ in which we live is one that encourages public commentary of this type.”\(^{126}\) The dissent went on to explain how the anthrax attacks and the government’s responses to them were “at the heart of a legitimate public inquiry” and how the Times, by publishing critical, albeit hard-hitting, columns regarding this inquiry was merely doing its job, “a job that the Constitution protects,” and that it was inappropriate for a federal court to

\(^{122}\) Hatfill, 427 F.3d at 253-54 (Wilkinson, J., dissenting).

\(^{123}\) Id. at 255.

\(^{124}\) See, e.g., Markin, supra note 90, at 501 (“One might anticipate that most [of the IIED] cases [from the 1990's] stemmed from the acts of the stereotypic aggressive network television news reporter. Such was not the case. More than half involved newspapers, some of them quite small.”).

\(^{125}\) Hatfill, 427 F.3d at 258 (Wilkinson, J., dissenting).

\(^{126}\) Id.
“construe gray areas of Virginia law to punish [that job] and deter others from performing it.”

Judge Wilkinson’s eloquent dissent, while no doubt appreciated by the Times, did not prevent their 12(b)(6) motion from ultimately failing and their case from being remanded back to the district court. While the Times may eventually prevail in its case, the decision of the Fourth Circuit remains. What precedential value it acquires remains to be seen, but as noted by Judge Wilkinson, the court’s readiness to accept that commentary “on a subject of unquestioned public interest” could support a claim for IIED constitutes a marked departure from the overwhelming trend of case law.

IV. INTENTIONAL INFLICTION OF EMOTIONAL DISTRESS

A detailed discussion of the development and implications of the tort of IIED is beyond the scope of this Note, and has already been ably undertaken in a number of works committed solely to that endeavor. Nevertheless, a brief history helps lay the foundation for what is this Note’s focus, namely, application of the tort against the media pursuant to their coverage of matters of public concern. The goal of this section is to demonstrate that IIED is an extraordinarily vague and undeveloped tort. Given the tort’s ambiguity, and the First Amendment’s need for clear principles by which to adjudicate disputes regarding protected speech, this section argues that this area of the law needs greater clarity. While the Supreme Court offered some clarification in Hustler Magazine v. Falwell, many questions remain unanswered.

A. The Rise of the Tort of Outrage

The general recognition of IIED as an independent cause of action, sometimes referred to as “prima facie tort” or “outrage,” is a relatively recent development in the law.
Legal scholarship, more than court action, spurred this development. It was a 1936 article written by Professor Calvin Magruder in the Harvard Law Review that first noted that courts had “in an ad hoc manner, and perhaps not very scientifically . . . in large measure afforded legal redress for mental or emotional distress in the more outrageous cases, without formulating too broad a general principle.” Magruder saw this judicial recognition as a preliminary stage in the evolution toward accepting the idea that:

[O]ne who, without just cause or excuse, and beyond all the bounds of decency, purposely causes a disturbance of another's mental and emotional tranquility of so acute a nature that harmful physical consequences might be not unlikely to result, is subject to liability in damages for such mental and emotional disturbance even though no demonstrable physical consequences actually ensue.

Shortly after the Magruder article, Professor William Prosser wrote that “[i]t is time to recognize that the courts have created established cause of action. 2 Q.B. 57 (1897). The court in that case, attempting to achieve a just result in the absence of precedent, awarded damages to a woman who suffered permanent physical harm as a result of an ill conceived prank, in which the defendant erroneously informed her that her husband had broken both his legs in a horrible accident. Id. at 58-61; see also WILLIAM K. JONES, INSULT TO INJURY: LIBEL, SLANDER, AND INVASIONS OF PRIVACY 19 (2003). In the following decades, recovery for emotional distress was occasionally allowed in other circumstances, but only when, like Mrs. Wilkinson, such distress was embodied by actual physical harm. See Magruder, supra note 130, at 1045-48 (surveying and discussing some of the more colorful early cases). The prevailing view regarding recovery of purely emotional damages was aptly summarized by Lord Wensleydale in a frequently repeated passage from Lynch v. Knight: “Mental pain or anxiety the law cannot value, and does not pretend to redress, when the unlawful act complained of causes that alone.” See id. at 1033 (citing Lynch v. Knight, Eng. Rep. 854, 863 (1861)). Yet, compensation for emotional distress unaccompanied by physical pain was allowed, if pled "parasitically" as an element of damages of another established cause of action. See id. at 1049 (The original Restatement provided that “emotional distress caused by the . . . tortious conduct which is the cause thereof is taken into account in assessing the damages recoverable by the other.” (citing RESTATEMENT OF THE LAW, TORTS § 47(b) (1934))); see also Terrance C. Mead, Suing Media for Emotional Distress: A Multi-Method Analysis of Tort Law Evolution, 23 WASHBURN L.J. 24, 28 & n.20 (1983) (listing authorities). However, this situation would not endure the test of time and reason, for as astute legal scholars of the day correctly observed, “[t]he treatment of any element of damage as a parasitic factor belongs essentially to a transitory stage of legal evolution. A factor which is today recognized as parasitic will, forsooth, to-morrow be recognized as an independent basis of liability.” See Magruder, supra note 130, at 1049 (quoting 1 STREET, THE FOUNDATIONS OF LEGAL LIABILITY 470 (1906)). Despite the fact that all jurisdictions now appear to technically recognize IIED as an independent tort, 2 ROBERT D. SACK, SACK ON DEFAMATION: LIBEL, SLANDER, AND RELATED PROBLEMS §13.6, at 13-45 (3d ed. 2005), many continue, in practice, to treat the tort parasitically, see supra text accompanying notes 96-98.

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132 Givelber, supra note 87, at 42.
133 Magruder, supra note 130, at 1035.
134 Id. at 1058.
a new tort. It appears... in more than a hundred decisions... It is something very like assault. It consists of the intentional, outrageous infliction of mental suffering in an extreme form.”\textsuperscript{135} While acknowledging that attempting to ascertain the ultimate limits of this evolving tort was doubtlessly a “matter of conjecture,” Prosser observed that when courts find liability in this area, it is because the defendant has intentionally sought to inflict emotional distress on a particularly vulnerable plaintiff.\textsuperscript{136}

Some years after Professor Magruder’s first tentative definition of the principle behind compensating emotional distress, the American Law Institute, in its \textit{Restatements}, developed what is now the commonly accepted articulation of the tort of IIED: “One who by extreme and outrageous conduct intentionally or recklessly causes severe emotional distress to another is subject to liability for such emotional distress, and if bodily harm to the other results from it, for such bodily harm.”\textsuperscript{137} IIED is now universally recognized as a cause of action by the states, and virtually all jurisdictions follow the \textit{Restatement}’s four element formulation.\textsuperscript{138}

\textsuperscript{135} Prosser, \textit{supra} note 130, at 874.

\textsuperscript{136} Id. at 888. In the early cases, successful plaintiffs were almost universally women, in part because of the then prevailing view that “[t]here is a difference between violent and vile profanity addressed to a lady, and the same language to a Butte miner and a United States marine.” Id. at 887. However, the noble protection of a lady’s sensibilities only extended so far, as the courts had proved unwilling “to compensate the silly, hysterical fright of a woman at the approach of a man dressed up in feminine clothing.” Id. at 888 (citing Nelson v. Crawford, 81 N.W. 335 (Mich. 1899)). Furthermore, claims seeking “damages for mental distress and humiliation on account of being addressed by a proposal of illicit intercourse” were also denied, “the view being, apparently, that there is no harm in asking.” Magruder, \textit{supra} note 130, at 1055. However, at the time “it [was] not altogether certain how long the chivalry of the southern courts [could] stand the strain” of allowing such propositions to go unpunished. Prosser, \textit{supra} note 130, at 889.

\textsuperscript{137} \textit{RESTATEMENT (SECOND) OF TORTS} § 46(1) (1965); Givelber, \textit{supra} note 87, at 42. The Institute first acknowledged the cause of action in its 1948 supplement to the original \textit{Restatement}, which provided that “[o]ne who, without a privilege to do so, intentionally causes severe emotional distress to another is liable (a) for such emotional distress, and (b) for bodily harm resulting from it.” Id. at 43 & n.7 (quoting \textit{RESTATMENT OF THE LAW, SUPPLEMENT, TORTS} § 46 (1948)).

\textsuperscript{138} These four elements are: (1) extreme or outrageous conduct, (2) conduct was intentional or reckless, (3) conduct caused emotional distress, (4) the emotional distress was severe. \textit{SACK, supra} note 131, at § 13.6. Rhode Island imposes the additional requirement that the conduct in question have caused some form of physical harm as well. \textit{See Clift v. Narragansett Television, L.P.}, 688 A.3d 805, 813 (R.I. 1996). For a comprehensive list of decisions recognizing the tort in various jurisdictions see \textit{SACK, supra} note 131, at § 13.6 at 13-45; \textit{Markin, supra} note 90, at 472 n.17.
As was the case in Hatfill, the question often centers around outrageousness, and whether “the conduct [was] so outrageous in character, and so extreme in degree, as to go beyond all possible bounds of decency, and to be regarded as atrocious, and utterly intolerable in a civilized community.” In a passage aptly characterized as a “strange description of a rule of law,” the Restatement explains that “[g]enerally, the case is one in which the recitation of the facts to an average member of the community would arouse his resentment against the actor, and lead him to exclaim, ‘Outrageous!’”

As a general matter, this passage is troubling because it appears to hinge civil liability on the “passion and prejudice of the moment,” thus frustrating a central goal of due process. Using the outrageousness standard to judge speech further compounds the problem, given the First Amendment’s doctrinal “hostility to overbreadth and vagueness,” and its requirement that courts “look beyond the case at hand to the effects that liability might have on other speakers.” Supreme Court jurisprudence makes clear the constitutional dilemmas provoked when unclear rules of state law restrict First Amendment freedoms.

This definitional vagueness combines with a general lack of judicially created limitations to make IIED potentially applicable in an extraordinarily broad range of settings. As Chief Judge Judith Kaye of the New York Court of Appeals

139 See supra note 87.
140 RESTATEMENT (SECOND) OF TORTS § 46 cmt. d (1965).
141 Givelber, supra note 87, at 52.
142 RESTATEMENT (SECOND) OF TORTS § 46 cmt. d (1965).
143 Givelber, supra note 87, at 52.
144 David A. Anderson, First Amendment Limitations on Tort Law, 69 BROOK. L. REV. 755, 771 (2004). See also Hustler Magazine v. Falwell, 485 U.S. 46, 55 (1988) (“Outrageousness’ in the area of political and social discourse has an inherent subjectiveness about it which would allow a jury to impose liability on the basis of the jurors’ tastes or views, or perhaps on the basis of their dislike of a particular expression.”).
145 See, e.g., Coates v. City of Cincinatti, 402 U.S. 611, 614 (1971). In Coates, the Court held that a city ordinance was “unconstitutionally vague because it subjects the exercise of the right of assembly to an unascertainable standard, and unconstitutionally broad because it authorizes the punishment of constitutionally protected conduct.” Id. The Court continued, “[c]onduct that annoys some people does not annoy others. Thus, the ordinance is vague . . . in the sense that no standard of conduct is specified at all. As a result, ‘men of common intelligence must necessarily guess at its meaning.’” Id. (citing Connally v. Gen. Constr. Co., 269 U.S. 385, 391 (1926)). IIED’s outrageousness standard seems equally vague, as the activity prohibited is “outrageous conduct [which the Restatement explains] is conduct that is outrageous.” See Givelber, supra note 87, at 53.
observed, “[t]he tort is as limitless as the human capacity for cruelty.”
However, protecting emotional tranquility must at times give way, when doing so would abridge another's constitutional rights. This situation can and frequently does arise when the otherwise-protected speech of one citizen disturbs the emotional tranquility of another. Given its wide dissemination and often controversial nature, the speech in such situations frequently belongs to members of the media.

The following sections discuss the interplay between tort law and the First Amendment when plaintiffs sue members of the media for IIED.

B. Outrageous Acts of the Media

Suits for IIED against media defendants, much to their dismay, have steadily increased in the past three decades. In 1985, Professor Robert E. Dreschel identified thirty-five cases in which plaintiffs alleged IIED as an independent cause of action against the media, and noted that all but six had been brought since 1978. Terrance C. Mead conducted a survey of cases reported in the Media Law Reporter between the years 1977 and 1981, and found eighteen involving claims of IIED. In 2000, using the same methodology, Dr. Karen Markin found ninety-four such cases reported between 1990 and 1999. Between 2000 and 2004 alone, the Media Law Reporter tells us that plaintiffs brought claims of IIED against media defendants at least fifty-nine times. Because of the tort's

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148 See infra Part IV.B.
149 Id.
151 Mead, supra note 131, at 32-33 & n.52.
152 Markin, supra note 90, at 478.
indeterminate scope, the increase in IIED suits justifiably creates worry amongst the press, who necessarily report on highly disturbing and controversial matters.\(^{154}\)

The cases in which members of the media have been sued for IIED can roughly be divided into two categories—those in which the allegedly outrageous conduct stemmed from actions taken in gathering, or in some instances, making the news, and those cases in which the allegedly outrageous

\(^{154}\)  Markin, supra note 90, at 473; Dreschel, supra note 150, at 361.
conduct was the publication or the broadcast itself. Often times these categories overlap, most typically when a journalist acts in a dubious manner while obtaining material that is later published. However, when courts find outrageous conduct in such situations it is generally based on the conduct of the journalists in obtaining the news, rather than the content of the news itself. This is largely because the First Amendment offers much less protection for the media when they are pursuing the news than it does when they are disseminating it. The press have “no special immunity from the application of general laws[, nor any] special privilege to invade the rights and liberties of others.” While the Supreme Court offered some protection to newsgathering by upholding the right of the press to publish information culled from public records and proceedings, “the First Amendment has never been construed to accord a newsman immunity from torts or crimes committed” while in pursuit of a story.

Constitutional concerns assume a much more prominent role when media defendants are sued for IIED based on the

155 See generally Markin, supra note 90, at 479-91 (dividing IIED claims brought against media defendants into those based on newsgathering activity and those based on the content of the publication or broadcast).
156 See Barrett v. Outlet Broad., Inc., 22 F. Supp. 2d 726 (S.D. Ohio 1997) (television journalists accompanied police to suicide scene, entered house while family was forced to wait outside and obtained footage of dead woman that was later broadcast on evening news); Miller v. Nat'l Broad. Co., 232 Cal. Rptr. 668 (Cal. Ct. App. 1986) (news crew accompanied paramedics into plaintiff's house and filmed her dying husband and broadcast footage without plaintiff's consent); Green v. Chicago Tribune Co., 675 N.E.2d 249 (Ill. App. Ct. 1997) (newspaper journalists photographed plaintiff's dying son and recorded plaintiff's last words to him, then published photo and last words without plaintiff's consent); Howell v. New York Post Co., Inc., 81 N.Y.2d 115, 122 (1993) (photographer trespassed on to psychiatric hospital's property to obtain photograph, later published, of plaintiff walking with famous crime victim); Dolcefino v. Randolph, 30 Media L. Rep. (BNA) 1161 (Tex. Ct. App. 2001) (reporter used hidden video camera to record segment that was later aired of city controller and staff member wasting city funds by not working on a work day).
157 Barrett, 22 F. Supp. 2d at 747; Miller, 232 Cal. Rptr. at 682; Green, 675 N.E.2d at 257. See also KOVR-TV, Inc. v. Superior Court, 37 Cal. Rptr.2d 431, 435 (Cal. Ct. of App. 1995) (although footage was never broadcast, reporter's conduct of approaching young children in their home and informing them that their neighbor had murdered her two children and committed suicide and then filming their reaction could reasonably be understood as outrageous enough to support claim of IIED).
161 Miller, 232 Cal. Rptr. at 685 (quoting Dietmann v. Time, Inc., 449 F.2d 245, 249 (9th Cir. 1971)).
content of their publications. Successful suits against the media in these situations are rare, especially when the subject matter in question rises above the level of mere ridicule. However, these suits, often pled side by side with actions for defamation and invasion of privacy, by far constitute the majority of IIED claims brought against the press. While the content of a disputed publication or broadcast is rarely adjudged outrageous, media defendants must nevertheless endure the costs and distractions of these increasingly common lawsuits, defending against claims overwhelmingly proven to be without merit. The burden of

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162 See Markin, supra note 90, at 491-92.
163 Sack, supra note 131, § 13.6, 13-50 to 13-51.
164 See Esposito-Hilder v. SFX Broad., Inc., 236 A.D.2d 186 (N.Y. App. Div. 1997) (radio show hosts held contest where plaintiff was named “ugliest bride”); Murray v. Schlosser, 574 A.2d 1339 (Conn. Super. Ct. 1990) (plaintiff, also a new bride, was declared “dog of the week” by DJs and won prize of dog food and collar); Kolegas v. Heftel Broad. Corp. (radio show hosts derided plaintiff for marrying wife that had “Elephant Man” disease, despite fact that plaintiff paid station to promote festival being held to raise awareness of the disease).
166 Of the cases surveyed, supra note 153, no final judgments were reported where plaintiffs prevailed on a content-based IIED claim, however, there were several plaintiff “victories” where such claims survived dismissal and summary judgment
defending these suits is heightened by the vague and unprincipled standards by which IIED claims are typically evaluated. The lack of clear standards evidences the Restatement's concession that the tort of IIED is "still in a stage of development." This immaturity becomes especially apparent when the tort is applied against speech alongside the ancient tort of defamation. Defamation, unlike IIED, is not only clearly articulated as a matter of tort law, but also has had its constitutional ramifications carefully examined, albeit with somewhat complicated results. Despite the complex constitutional guidelines associated with defamation, would-be speakers still know the standards by which their speech will be judged and thus the fear of self-censorship is thought to be alleviated. The same can not be said for IIED.

C. Preachers, Porn & Public Discourse: The Implications of Hustler Magazine v. Falwell

The constitutional considerations associated with defamation actions have, however, to a certain extent influenced courts' resolution of IIED claims. This influence achieved its most famous expression by the Supreme Court in Hustler Magazine v. Falwell. The dispute giving rise to that

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167 See supra notes 153-61 and accompanying text.  
168 Restatement (Second) of Torts § 46 cmt. c (1965).  
169 See Anderson, supra note 144, at 787-88 (listing cases and describing "the phalanx of constitutional rules limiting defamation").  
170 See Herbert v. Lando, 441 U.S. 153, 159 (1979) (explaining that the Court's defamation jurisprudence "rested primarily on the conviction that the common law of libel gave insufficient protection to the First Amendment guarantees . . . and that to avoid self-censorship it was essential that liability for damages be conditioned on the specified showing of culpable conduct by those who publish damaging falsehood").  
decision concerned a lewd ad parody of televangelist Reverend Jerry Falwell published in the pages of *Hustler*, a pornographic men’s magazine.\textsuperscript{172} Falwell, an admitted public figure, sued *Hustler* and its publisher, Larry Flynt,\textsuperscript{173} for invasion of privacy under Virginia statute, defamation, and IIED.\textsuperscript{174} When the case came before the Supreme Court on certiorari from the Fourth Circuit, only the IIED claim was at issue.\textsuperscript{175} The Court unanimously ruled that the parody was not actionable and found for Flynt and his magazine.\textsuperscript{176}

Observers see the *Falwell* decision primarily as the Court’s clarification and reiteration of the “actual malice” standard, and the reasons giving rise to that standard, pronounced in *New York Times v. Sullivan*.\textsuperscript{177} Rejecting the Fourth Circuit’s focus on outrageousness and Flynt’s stated

\begin{footnotesize}
\begin{enumerate}
\item \textsuperscript{172} *Id.* at 48. The parody contained a fictionalized interview where Falwell described his “first time” as a “drunken incestuous rendezvous with his mother in an outhouse.” *Id.* For a detailed discussion of the decision and its implications, see Robert C. Post, *The Constitutional Concept of Public Discourse: Outrageous Opinion, Democratic Deliberation, and Hustler Magazine v. Falwell*, 103 HARV. L. REV. 601 (1990); Rodney A. Smolla, *Emotional Distress and the First Amendment: An Analysis of Hustler v. Falwell*, 20 ARIZ. ST. L. J. 423 (1988). See also Catherine L. Amspacher & Randal Steven Springer, *Note, Humor, Defamation and Intentional Infliction of Emotional Distress: The Potential Predicament for Private Figure Plaintiffs*, 31 WM. & MARY L. REV. 701 (1990) (expressing concern over the ability of private figure plaintiffs to protect their emotional well being after *Falwell*).
\item \textsuperscript{173} For an interview with Larry Flynt regarding his First Amendment legacy, see Clay Calvert & Robert Richards, *Larry Flynt Uncensored: A Dialogue With the Most Controversial Figure in First Amendment Jurisprudence*, 9 COMMLAW CONSPECTUS 159 (2001). For an interview with Flynt’s attorney, see Clay Calvert & Robert D. Richards, *Alan Isaacman and the First Amendment: A Candid Interview with Larry Flynt’s Attorney*, 19 CARDOZO ARTS & ENT. L.J. 313 (2001).
\item \textsuperscript{174} *Falwell*, 485 U.S. at 47-48.
\item \textsuperscript{175} *Id.* at 48-49. The district court had dismissed the privacy claim, because although the *Hustler* parody had used Falwell’s name and likeness, it had not done so “for purposes of trade” within the meaning of the statute that Falwell sued under. *Falwell v. Flynt*, 797 F.2d 1270, 1273 (4th Cir. 1986), *overruled*, Hustler Magazine v. Falwell, 485 U.S. 45 (1988). The jury found for Flynt and *Hustler* on the defamation claim, “finding that no reasonable man would believe that the parody was describing actual facts about Falwell.” *Id.*
\item \textsuperscript{176} *Falwell*, 485 U.S. at 47, 57. Justice Kennedy took no part in the decision and Justice White filed a brief concurring opinion. *Id.*
\item \textsuperscript{177} 376 U.S. 254 (1964). See, e.g., *Post*, supra note 172, at 612; Smolla, *supra* note 172, at 435 (describing Chief Justice Rehnquist’s opinion in *Falwell*: “[I]n both letter and spirit, he was reaffirming *New York Times* with relish.”). *New York Times* held that a public official could not recover “damages for a defamatory falsehood relating to his official conduct unless he proves that the statement was made with ‘actual malice’—that is, with knowledge that it was false or with reckless disregard of whether it was false or not.” *New York Times Co. v. Sullivan*, 376 U.S. 254, 279-80 (1964). Subsequent cases extended the actual malice requirement to defamation claims brought by “public figures,” as opposed to just public officials. *Curtis Publ’g Co. v. Butts*, 388 U.S. 130 (1967); Associated Press v. Walker 389 U.S. 28 (1967).
\end{enumerate}
\end{footnotesize}
intent to “assassinate” Falwell’s integrity, the Court held that public figures and public officials could not recover for the tort of IIED stemming from publications such as the Falwell parody without additionally demonstrating that the publication contains a false statement of fact made with “actual malice, i.e., with knowledge that the statement was false or with reckless disregard as to whether it was true.” Because the statements at issue were not reasonably capable of being perceived as statements of fact, the Court reversed the jury verdict against Hustler and Flynt. Thus, the ultimate rule emerging from Falwell, the only instance in which the Supreme Court has attempted to reconcile the tort of IIED and the First Amendment, is a narrow one, and has been criticized as offering little guidance beyond the particular circumstances of the case. Nevertheless, the Court discussed the concept of “outrageousness,” found it an inappropriate standard to determine liability in the area of “political and social discourse,” and ultimately rejected it as a guide for judging speech about public persons.

The decisions of the lower courts over the past eighteen years, whether mentioning Falwell or not, seem largely in agreement that speech on matters of public concern should not give rise to liability for IIED. Despite the multitude of IIED claims challenging such speech during this period, successful plaintiffs are conspicuously lacking. The courts considering these claims utilized a variety of approaches but generally reached the same conclusion and found liability in such situations inappropriate. Some courts found reporting on newsworthy events simply unable to constitute outrageous conduct; others determined the plaintiff bringing the suit was

179 Falwell, 485 U.S. at 56. The court maintained that this holding was “not merely a ‘blind application’ of the New York Times standard,” but rather reflected their “considered judgment that such a standard is necessary to give adequate ‘breathing space’ to the freedoms protected by the First Amendment.” Id.
180 Id. at 57.
181 See Post, supra note 172, at 614-15 & n.66.
182 Falwell, 485 U.S. at 55.
183 See Hatfill v. New York Times Co., 427 F.3d at 253, 258 (4th Cir. 2005) (Wilkinson, J., dissenting) (“The panel offers no decision from Virginia or any other state that holds a news report on a subject of unquestioned public interest to be an intentional infliction of emotional distress.”).
184 Brown v. Hearst Corp., 54 F.3d 21, 27 (1st Cir. 1995) (news segment implying plaintiff murdered his missing wife was not outrageous because segment consisted of generally accurate coverage of a legitimate news story); Ross v. Burns, 612
a public figure unable to prove actual malice,\textsuperscript{185} while still others found the conduct in question possibly outrageous, but held the First Amendment nevertheless protected the defendant from liability.\textsuperscript{186} Many other courts considering IIED claims failed to undertake any real substantive analysis at all and instead merely reiterated the \textit{Restatement} test before concluding, without explanation, that the plaintiff failed to meet it.\textsuperscript{187}

In some respects, the current situation parallels the condition present when Professors Magruder and Prosser first noted that the courts, without clearly articulating their reasons, recognized that plaintiffs had an interest in their emotional wellbeing independent from any other interest.


\textsuperscript{186} See, e.g., Citizen Publ’g Co. v. Miller, 115 P.3d 107, 110, 115 (Ariz. 2005) (en banc) (conceding that letter to editor published in newspaper that called for readers to randomly execute local Muslims in order to win war in Iraq was outrageous, but finding it protected by the First Amendment as political speech).

\textsuperscript{187} The analysis of the Tenth Circuit in \textit{Hussain v. Palmer Commc’ns, Inc.} typifies this approach. 60 F. App’x 747 (10th Cir. 2003). In that case, plaintiff’s digitally altered photo was aired on defendant’s news program and plaintiff was falsely identified as being sought by authorities in connection with the 1995 Oklahoma City bombing. \textit{Id.} at 748-49. After explaining the \textit{Restatement} test, the court’s entire substantive analysis of the IIED claim consisted of the following:

After careful review, we find nothing in the record which indicates that the defendants behaved in such an extreme or outrageous manner towards Hussain as to impose liability for [IIED]. There is no evidence in the record to indicate that the plaintiff’s conduct qualified under any of these standards.

\textit{Id.} at 754.
Likewise courts considering IIED claims, aware of the time honored principle “that speech on public issues occupies the highest rung of the hierarchy of First Amendment values, and is entitled to special protection,” have found ways, “in an ad hoc manner, and perhaps not very scientifically” to protect the media from liability for IIED when they are fulfilling their constitutional role.

Despite this piecemeal recognition of a newsworthiness defense, absent binding precedent in a given jurisdiction, courts are under no obligation to shield speech on matters of public concern from liability for IIED. The Fourth Circuit’s decision in Hatfill evidences this. Furthermore, the variety of techniques being employed by the courts creates great uncertainty as to how any given claim will be adjudicated. Considering the widespread distribution of modern media product, this creates a significant impediment to effectively evaluating the potential liability of a given publication and can lead to self-censorship, a central fear of First Amendment doctrine. “Having to evaluate the liability schemes of fifty jurisdictions imposes a considerable burden on speech itself, quite apart from the actual effects of those schemes.” This situation is in need of remedy, and “[a]lthough there is little evidence that [IIED] will ever provide the basis for principled adjudication” as a matter of tort law, the First Amendment is capable of imposing requirements so that the principled adjudication of claims against protected speech is possible. Such constitutional requirements appear most clearly in the

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189 See supra note 133 and accompanying text.

190 A district court already relied upon this decision as grounds for refusing to dismiss an IIED claim, albeit in an almost factually identical case concerning a separate article written about Dr. Hatfill in Vanity Fair. See Hatfill v. Foster, 401 F. Supp. 2d 320, 335 (S.D.N.Y. 2005), rev’d on other grounds, 415 F. Supp. 2d 353 (S.D.N.Y. 2006).


192 Anderson, supra note 144, at 794.

193 See Givelber, supra note 88, at 75.
field of defamation law, but *Falwell* demonstrates the possibility that similar rules may be adopted and applied in other areas of tort law as well.

V. CONCLUSION

A. Proposed Newsworthiness Defense

In *Falwell*, the Supreme Court questioned the constitutionality of judging public discourse by an outrageousness standard. This inevitably casts doubt on using the accepted formulation of IIED to judge public discourse, as the Restatement’s four-element test, in practice, generally reduces the analysis to the single element of outrageousness. In order to reconcile IIED with the First Amendment, at least to the extent needed to decide *Falwell*, the Court engrafted the actual malice standard onto the Restatement test—thus assuring that the Court’s carefully crafted protections regarding speech on public figures would not be torn down by the emerging tort of IIED. Consequently, one element of public discourse was granted constitutional protection from emotional distress claims. The First Amendment’s conception of public discourse, however, encompasses more than simply speech about public figures, it “embraces at the least the liberty to discuss publicly . . . all matters of public concern.” The facts giving rise to *Hatfill* make clear the potential of important public matters to draw ostensibly private figures into their vortex. Yet, the current legal framework leaves it to the lower courts to determine for themselves how to treat these cases. While it is rare indeed that a court finds the content of a legitimate news story to be outrageous, the problem remains that outrageousness, with all its inherent vagueness and subjectivity, still governs the

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194 See supra note 183 and accompanying text.
195 See supra notes 181-82 and accompanying text. Commentators quickly echoed this concern. See, e.g., Smolla, supra note 172, at 446 (“[N]othing could be more antithetical to settled first amendment doctrine than the notion that speech may be penalized merely for being ‘outrageous’.”).
196 See supra notes 87, 140-45 and accompanying text.
197 See supra notes 177-79 and accompanying text.
199 See supra Part II.
200 See supra notes 184-87 and accompanying text.
201 Id.
In order to protect the important constitutional principles espoused in *Falwell*, courts considering IIED claims based on the content of speech should recognize a newsworthiness defense and dismiss plaintiffs’ claims when they seek to punish speech on matters of legitimate public concern.

The adoption of a newsworthiness defense to speech-based torts is by no means a novel idea; the common law embraces such a defense with respect to the privacy tort of public disclosure of private facts, and the Supreme Court seemingly accepted, then firmly rejected the defense as applied to defamation claims—at least insofar as asserting the defense required plaintiffs to prove actual malice, rather than mere negligence. Neither the common law nor the Court have definitively spoken on such a defense for IIED claims; the experience of the other speech torts, however, provides valuable insight regarding both the applicability and the constitutional necessity of such a defense in the IIED context.

The roots of the public disclosure tort’s newsworthiness defense can be traced back as far as 1890, when Samuel Warren and Louis Brandeis wrote in their seminal article, *The Right to Privacy*, that “[t]he right to privacy does not prohibit any publication of matter which is of public or general interest.”

The current formulation of the public disclosure tort, as embodied in the *Restatement*, provides for liability when a defendant publicizes private facts about a plaintiff that “would be highly offensive to a reasonable person,” and are “not of legitimate concern to the public.” Judge Richard Posner

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202 See supra notes 140-45 and accompanying text.

203 See *Restatement (Second) of Torts* § 652D (1965) (“One who gives publicity to a matter concerning the private life of another is subject to liability to the other for invasion of his privacy, if the matter publicized is of a kind that (a) would be highly offensive to a reasonable person, and (b) is not of legitimate concern to the public.” (emphasis added)).

204 The Court, in a plurality opinion written by Justice Brennan, seemingly extended the *New York Times* requirement—that a plaintiff prove actual malice—to cases brought by private individuals where the allegedly defamatory speech related to matters of public concern. *Rosenbloom v. Metromedia, Inc.* 402 U.S. 29, 52 (1971) (Brennan, J., plurality opinion). This state of the law was short-lived, however, for three years later, a majority of the Court rejected the proposed extension of the *New York Times* test and held that the Constitution only required a private libel plaintiff to prove that the defendant was negligent. *Gertz v. Robert Welch, Inc.* 418 U.S. 323, 346 (1974).


206 *Restatement (Second) of Torts* § 652D (1965) (emphasis added)
explained that these two elements of the tort are largely inseparable, as “[a]n individual, and more pertinently perhaps the community, is most offended by the publication of intimate personal facts when the community has no interest in them beyond the voyeuristic thrill of penetrating the wall of privacy that surrounds a stranger.”

Thus, one probably best understands the concept of newsworthiness in this context as a creature of tort law, mitigating the offensiveness of a given disclosure. While the First Amendment lurks in the background whenever tort law seeks to punish speech—public disclosure’s newsworthiness defense was conceived as one of the tort’s inherent elements, rather than as an explicit constitutional prohibition.

In contrast, the Supreme Court’s flirtation with a newsworthiness defense to defamation claims was born wholly of First Amendment concerns. In *Rosenbloom v. Metromedia, Inc.*, Justice Brennan, writing for a plurality, observed that the constitutional conceptions of free speech and free press embody more than simply the ability to comment upon the affairs of public persons. Brennan explained that the interest of the public centers around public events and a plaintiff’s participation in those events, not the plaintiff’s “prior anonymity or notoriety.” In order to “honor the [First Amendment’s] commitment to robust debate on public issues,” Brennan thought it necessary to extend constitutional protection to all speech on matters of public concern, regardless of whether the persons involved were public or private figures. Just three years later in *Gertz v. Robert Welch, Inc.*, however, a majority of the court rejected the *Rosenbloom* plurality’s extension of the *New York Times* test. Reasoning that private persons were more vulnerable to reputational

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207 Haynes v. Alfred A. Knopf, 8 F.3d 1222, 1232 (7th Cir. 1993).

208 In explaining the rationale for the defense, Warren and Brandeis discussed libel law and the notion of a qualified privilege to discuss matters of public concern, specifically topics concerning public figures. Warren & Brandeis, *supra* note 205, at 214-16. While this concept became a canon of First Amendment doctrine in *New York Times v. Sullivan*, at the time it was merely a concern of tort law. *See* 376 U.S. 254. Warren and Brandeis’s focus on tort remedies rather than First Amendment implications is further evidenced by the fact that they explained the importance of the newsworthiness defense by looking to French law, not the Constitution. Warren & Brandeis, *supra* note 205, at 214-16.


210 *Id.* at 43.

211 *Id.* at 41, 43-44.

injury and more deserving of recovery than public persons, the Court found the extension unacceptable.\textsuperscript{213} Justice Powell's majority opinion also expressed concern about forcing on the lower courts the task of determining, on a case-by-case basis, what publications concerned matters of legitimate public interest.\textsuperscript{214}

At first blush, one might see \textit{Gertz} as foreclosing the possibility of a constitutionally based newsworthiness defense for IIED claims. After all, \textit{Falwell} was based on \textit{New York Times}\textsuperscript{215} and \textit{Gertz} declined to extend \textit{New York Times} to situations involving private persons. While this argument contains a certain logical appeal, it leaves something important out of the equation—namely, that defamation and IIED are different torts. While they often apply to the same situation, they seek to redress different wrongs, and thus require plaintiffs to prove completely different elements.\textsuperscript{216} The First Amendment necessarily requires different things from each.\textsuperscript{217} \textit{Falwell} does not say otherwise, rather, the court explicitly noted that its holding was not a “blind application of the \textit{New York Times} standard,” but rather reflected that such a standard was needed in the IIED context to provide sufficient “breathing space” to First Amendment freedoms.\textsuperscript{218} The problem left unresolved by \textit{Falwell} and not answered by \textit{Gertz} is that, in IIED claims, publicly important speech involving private persons is still judged by an extremely subjective outrageousness standard. In the libel context, such speech cannot be the basis for liability, unless a court at the very least finds that defamatory statements were published with negligence as to their veracity.\textsuperscript{219} This is a factual finding properly left to the jury. In the IIED context, however, liability hinges on whether a given publication leads the jury, as representatives of community sentiment, to exclaim

\begin{footnotes}
\textsuperscript{213} Id. at 345-46.
\textsuperscript{214} Id. at 346.
\textsuperscript{215} See supra notes 177-82 and accompanying text.
\textsuperscript{216} See Smolla, supra note 172, at 439 (explaining why, because of the differing objectives of the two torts, it was “logically indefensible” to mechanically and literally apply \textit{New York Times} to IIED claims).
\textsuperscript{217} See Smolla, supra note 172, at 438 (“moving from one tort context to another changes not only the elements of the tort cause of action, but also the balance of first amendment interests”).
\textsuperscript{218} Hustler Magazine v. Falwell, 485 U.S. 46, 56 (1988).
\textsuperscript{219} \textit{Gertz}, 418 U.S. at 347.
\end{footnotes}
“Outrageous!” This latter test clearly poses different First Amendment problems than the former, thus, *Gertz*’s rejection of a newsworthiness defense to defamation claims fails to foreclose the possibility of adopting such a defense to IIED claims.

In the context of speech, the elements of IIED parallel those of the public disclosure tort to a far greater degree than they do those of defamation. In order for speech to be a tortious public disclosure, it must be “highly offensive to a reasonable person,” whereas in the IIED context tortious speech consists of that which is “extreme and outrageous” as determined by community sentiment. Assuming that the community’s sentiments are reasonable, it is difficult to differentiate between these two standards in any sort of principled manner. Because of this, commentators have noted the lack of any “logical reason” why a newsworthiness defense should apply to one tort action but not the other. While the newsworthiness defense to public disclosure claims was conceived in tort law, it suffices to protect defendants from being punished for exercising their First Amendment right to speak on public matters simply because one might find their speech “highly offensive.” Such a defense is likewise needed to prevent plaintiffs from using IIED claims to punish the press, or any other speaker, simply because their speech on public matters could be considered “outrageous” by some.

“[T]he world of debate about public affairs” occupies a preeminent role in our constitutional scheme. In order to adequately safeguard the right to freely engage in this debate,
courts considering IIED claims based on the content of speech should allow defendants to assert a newsworthiness defense. Where the contested speech unquestionably relates to a matter of legitimate public concern, the IIED claim should be dismissed. When a court “can determine from the pleadings a case-dispositive First Amendment defense,” dismissal is appropriate as it protects First Amendment rights and obviates the need for an extended, costly, and ultimately futile trial.\textsuperscript{228} Despite the concerns expressed by Justice Powell in \textit{Gertz}, the making of this determination seems well within the faculties of the judiciary.\textsuperscript{229} Courts have been undertaking this exact inquiry in the context of the public disclosure tort for years. As the Court in \textit{Falwell} saw the need to borrow a principle of defamation law to address the First Amendment threat presented by a public figure’s IIED claim, so too should courts today borrow a principle from the field of privacy law to address the threat presented by the burgeoning numbers of IIED claims being adjudicated under an unconstitutionally vague standard. Adopting a newsworthiness defense is not merely a “blind application” of a principle of privacy law; rather it is necessary to prevent constitutionally protected expression from being judged by an inherently subjective standard—thus providing adequate “breathing space” for First Amendment freedoms.\textsuperscript{230}

\textbf{B. Hatfill v. New York Times Revisited}

In \textit{Hatfill}, the newsworthiness of Kristof’s columns placed no formal obligation on the Fourth Circuit to dismiss Dr. Hatfill’s IIED claim. The public importance of Kristof’s subject matter was only relevant insofar as it factored into the court’s outrageousness analysis. While the district court believed that publishing news or commentary on a matter of legitimate concern could never be sufficiently outrageous, the Fourth Circuit disagreed.\textsuperscript{231} In holding that an op-ed piece on such an undeniably important item of news could be outrageous, the court single-handedly expanded the scope of IIED.\textsuperscript{232} While a

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  \item[\textsuperscript{228}] See \textit{Citizen Publ’g Co. v. Miller}, 115 P.3d 107 (Ariz. 2005).
  \item[\textsuperscript{229}] See supra note 214 and accompanying text.
  \item[\textsuperscript{230}] See supra note 217 and accompanying text.
  \item[\textsuperscript{231}] See supra note 107 and accompanying text.
  \item[\textsuperscript{232}] See Markin, supra note 90, at 488 (exhaustively surveying IIED claims against media defendants in the 1990’s and opining that “[a]t most one can conclude that the publication of editorial content, no matter how intrusive into a person’s
false accusation of murder is no trivial matter, the law of
defamation is far better suited to remedy the harm caused by
injurious falsehood than is the law of IIED.\textsuperscript{233} Application of a
newsworthiness defense to IIED claims would not deny remedy
to one falsely implicated in a crime, any more so than the
constitutional standards governing defamation already limit
remedies in such situations.\textsuperscript{234} Recognition of a
newsworthiness defense would instead merely prevent an
unhappy subject of a legitimate news story from punishing
constitutionally favored speech by suing under a vague and
ambiguous cause of action. Recognition of a newsworthiness
defense would require courts dismiss IIED claims such as Dr.
Hatfill’s, and would add much needed clarity to this neglected
area of the law. Failure to adopt the defense, on the other
hand, licenses IIED’s continued encroachment into the world of
public discourse. The Supreme Court noted in \textit{New York Times
v. Sullivan} that “[w]hatever is added to the field of libel is
taken from the field of free debate.”\textsuperscript{235} When other torts seek to
punish speech, the effect of their expansion is no different.

\textit{Ben Battles}\textsuperscript{\dagger}

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\textsuperscript{233} Injurious falsehood is, in fact, the harm libel law seeks to redress. \textit{See
Restatement (Second) of Torts} § 581A (1977) (“To create liability for defamation
there must be publication of a statement that is both defamatory and false.”).

\textsuperscript{234} \textit{See supra} notes 169, 209-14 and accompanying text.

\textit{Sweeney v. Patterson}, 128 F.2d 457, 458 (D.C. Cir. 1942)).

\textsuperscript{\dagger} J.D. candidate, 2007, Brooklyn Law School. B.A., University of Vermont. I
thank Professor Michael Madow, the editors and staff of the \textit{Brooklyn Law Review}, and
my family.
THE EFFECT OF CANINE SNIFF JURISPRUDENCE ON THE DEMAND FOR AND DEVELOPMENT OF SEARCH TECHNOLOGY

I. INTRODUCTION

The “legal fiction” of the canine sniff test’s infallibility jeopardizes the development and application of surveillance technologies that will allow law enforcement officers to better provide for public safety without running afoul of the Fourth Amendment’s proscription of unreasonable searches and seizures. In an era characterized by a continuing war on narcotics trafficking and overshadowed by a continuing fear of domestic terrorist attack, the importance of balancing privacy interests against realistic assessments of the intrusiveness of surveillance technologies is readily apparent. Law enforcement initiatives designed to curb the narcotics trade and reduce the risk of terrorist incidents have made the drug

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2 To date, only one commentator has noted that legal rules providing stringent protection for privacy rights create a corresponding demand on the part of law enforcement officers for technologies that identify only the presence or absence of illegal activity. Lee C. Milstein, Fortress of Solitude or Lair of Malevolence? Rethinking the Desirability of Bright-Line Protection of the Home, 78 N.Y.U. L. REV. 1789, 1816 (2003). While Milstein does not specifically address the effect that applying Fourth Amendment scrutiny to canine sniffs will visit on law-enforcement demand, another commentator has observed that “law enforcement agencies have too much invested in their dog-training programs to placidly accept” court rulings subjecting canine sniffs to Fourth Amendment scrutiny. Max A. Hansen, United States v. Solis: Have the Government’s Supersniffers Come Down with a Case of Constitutional Nasal Congestion?, 13 SAN DIEGO L. REV. 410, 411 (1976). Hansen’s claim provides strong support for the inference that the laxity with which federal courts approached the canine sniff prior to and after the Supreme Court’s ruling in Caballes provided strong incentives for law enforcement agencies to invest in canine sniff programs. Scholarship in the realms of economics and political science further supports this inference, noting that “a strong Fourth Amendment and strict police accountability are jointly sufficient for ongoing progress in search technology.” Hugo M. Mialon & Sue H. Mialon, The Economics of the Fourth Amendment: Crime, Search, and Anti-Utopia, ECONPAPERS, Sept. 2004, available at http://econpapers.repec.org/paper/emowp2003/0411.htm.
and bomb-sniffing dog a regular feature of American life.\textsuperscript{3} Such canines appear in our schools, at our major transportation hubs, at our major landmarks, and at our border patrol checkpoints.\textsuperscript{4} Following the Supreme Court’s ruling in \textit{Illinois v. Caballes},\textsuperscript{5} which unequivocally insulated the canine sniff test from Fourth Amendment scrutiny, there is a strong likelihood that the police dog will become an even more pervasive investigative device.\textsuperscript{6} By authorizing police officers to use the canine as an unrestricted tool capable of generating the probable cause necessary to conduct full-blown searches of random objects and individuals,\textsuperscript{7} the Court has decreased the likelihood that law enforcement agencies will demand the development of more accurate and less intrusive technologies.\textsuperscript{8}

The canine sniff was the first of only two investigative techniques that the Supreme Court recognized as revealing only the presence or absence of illegal activity.\textsuperscript{9} Insisting in \textit{United States v. Place} that it knew of “no other investigative procedure that is so limited both in the manner in which the information is obtained and in the content of the information revealed by the procedure,” the Court classed the canine sniff as \textit{sui generis} and resolved, albeit in dictum, that canine sniffs were not “searches” and were therefore not subject to Fourth Amendment scrutiny.\textsuperscript{10} A year later, the Court discovered another investigative procedure that was similarly limited, holding in \textit{United States v. Jacobsen}\textsuperscript{11} that “a chemical test that merely discloses whether or not a particular substance is cocaine does not compromise any legitimate interest in privacy”


\textsuperscript{4} See \textit{supra} note 3.

\textsuperscript{5} \textit{Caballes}, 543 U.S. at 409.

\textsuperscript{6} See id. at 410 (Souter, J., dissenting).

\textsuperscript{7} See id. at 417.

\textsuperscript{8} See \textit{infra} note 30 and accompanying text for authority illustrating that police alter their search and seizure behavior (including investigatory techniques) in response to judicial decrees.


\textsuperscript{10} Id.

and is therefore not a search within the meaning of the Fourth Amendment.\textsuperscript{12}

The Court reconsidered the Fourth Amendment implications of the canine sniff test in \textit{Illinois v. Caballes},\textsuperscript{13} where it decided that a defendant’s right against unreasonable searches and seizures had not been violated as a result of a canine sniff test conducted during a traffic stop for speeding.\textsuperscript{14} The \textit{Caballes} Court reiterated the \textit{Place} Court’s observation that a canine sniff reveals only the presence or absence of contraband and emphasized that investigative techniques bearing this characteristic do not constitute “searches” under the Fourth Amendment.\textsuperscript{15} In a strong dissent, Justice Souter noted that the court’s holding was based on the untenable premise that canines do not err.\textsuperscript{16} After offering considerable empirical support for the proposition that drug sniffing canines are in fact fallible, Justice Souter observed that the risk of false positives justified treating the canine sniff as “the search that it amounts to in practice.”\textsuperscript{17} Because canines alert falsely, Justice Souter reasoned, they run the risk of revealing more than the mere presence or absence of illegal activity.\textsuperscript{18} As Justice Souter observed:

An affirmative reaction . . . does not identify a substance the police already legitimately possess, but informs the police instead merely of a reasonable chance of finding contraband they have yet to put their hands on. The police will then open the container and discover whatever lies within, be it marijuana or the owner’s private papers.\textsuperscript{19}

Justice Souter’s dissent thus recognized, in substance, that because false canine alerts present the risk of unjustified governmental intrusions into the citizenry’s “persons, houses, papers, and effects,”\textsuperscript{20} they run the risk of compromising legitimate interests protected by the Fourth Amendment.\textsuperscript{21} Justice Souter therefore observed that, rather than giving law

\begin{footnotesize}
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  \item \textsuperscript{12} \textit{Id.} at 123.
  \item \textsuperscript{13} 543 U.S. 405, 407 (2005).
  \item \textsuperscript{14} \textit{Id.} at 408.
  \item \textsuperscript{15} \textit{Id.} at 409.
  \item \textsuperscript{16} \textit{Id.} at 410 (Souter, J., dissenting).
  \item \textsuperscript{17} \textit{Id.} at 414.
  \item \textsuperscript{18} \textit{Id.} at 410-13.
  \item \textsuperscript{19} \textit{Caballes}, 543 U.S. at 416.
  \item \textsuperscript{20} U.S. CONST. amend. IV.
  \item \textsuperscript{21} \textit{Caballes}, 543 U.S. at 415-17 (Souter, J., dissenting).
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enforcement agencies license to utilize the canine sniff indiscriminately, the Court should have required the search to be justified by at least a minimal level of reasonable suspicion.\(^22\)

Building upon Justice Souter’s implication that the risk of false positives justifies treating the canine sniff and the police conduct ensuing from it as a single investigatory process constituting a search, this Note will explore the merits and market implications of requiring heightened levels of suspicion for the use of canines as an investigatory tool. By challenging the Supreme Court’s rulings in *United States v. Place*, *Illinois v. Caballes*, and *Kyllo v. United States*,\(^23\) this Note will argue that a jurisprudence recognizing the fallibility of the canine sniff and requiring a heightened showing of suspicion on the part of law enforcement officers will secure privacy interests while incentivizing the development of surveillance technologies that do not intrude upon legitimate privacy interests. Part II of this Note will offer essential background information and analysis concerning the economic and social incentives that the Court’s Fourth Amendment jurisprudence creates for law enforcement agencies. Part III will examine and critique the development and current state of the law pertaining to canine sniffs in an effort to illustrate that 1) evidence coinciding with and post-dating *Place* indicates that canine sniffs are not infallible; 2) canine sniffs are therefore legible as the first step in a broader process enabling police officers to inspect personal property that implicates legitimate privacy interests; and 3) the use of drug sniffing canines as an investigatory tool should therefore require, at a bare minimum, reasonable articulable suspicion on the part of law enforcement officers. Part IV will explore the implications of requiring law enforcement officers to have reasonable articulable suspicion prior to the application of a canine sniff test and suggest that 1) the requirement of a showing of reasonable articulable suspicion is too subjective to provide sufficient protection for privacy interests; 2) a reasonable articulable suspicion standard will incentivize overreaching by street level law enforcement officers; and 3) the requirement of such a showing will therefore encourage the perpetuation of status quo investigatory techniques. Part V will argue that a requirement

\(^{22}\) *Id.* at 417.

of probable cause prior to the application of a canine sniff will best protect privacy and public safety interests by illustrating that 1) a probable cause regime places the greatest possible burden upon law enforcement agencies when they rely on the drug sniffing canine as an investigatory tool; 2) the rigors of complying with probable cause's burdensome guidelines will render status quo investigatory techniques unattractive to law enforcement officers; and 3) a requirement of probable cause will therefore incentivize the development and application of less invasive investigative techniques.

II. OVERVIEW OF INCENTIVES FOR LAW ENFORCEMENT AGENCIES CREATED BY THE FOURTH AMENDMENT'S EXCLUSIONARY RULE

The Fourth Amendment provides that “[t]he right of the people to be secure in their persons, houses, papers, and effects, against unreasonable searches and seizures, shall not be violated.” Over the course of its Fourth Amendment jurisprudence, the Supreme Court has sought to strike a balance between the individual right to privacy and the public interest in enabling law enforcement officials to investigate crimes, make arrests, and obtain convictions. The desire to balance these interests has led to the adoption of an evidentiary rule of exclusion (the “exclusionary rule”), which provides that all evidence obtained in violation of the Fourth Amendment will be inadmissible in a court of law. The Court has traditionally recognized that the exclusionary rule serves to “compel respect for the [Fourth Amendment] in the only effectively available way—by removing the incentive to disregard it.” As interpreted by the Courts of the United States, the Fourth Amendment is designed to create a structure of legal incentives to protect individuals against unwarranted police intrusion. It follows intuitively that this

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24 U.S. CONST. amend. IV.
25 See Boyd v. United States, 116 U.S. 616, 630, 635 (1886) (noting that the Fourth Amendment addresses “all invasions on the part of the government and its employ[ee]s of the sanctity of a man’s home and the privacies of life” and that Constitutional protections of privacy against government intrusion “should be liberally construed,” because “[i]t is the duty of courts to be watchful for the constitutional rights of the citizen, and against any stealthy encroachments thereon”).
26 The exclusionary rule was adopted at the federal level and made applicable to the states in Mapp v. Ohio, 367 U.S. 643 (1966).
27 Id. at 656 (quoting Elkins v. United States, 364 U.S. 206, 247 (1960)).
incentive structure affects law enforcement agencies’ market demand for technologies—such as thermal imaging devices, x-ray scanners, stationary radar detectors, and drug sniffing canines—that enhance police officers’ abilities to detect unlawful activity, make arrests, or issue citations.\(^{29}\)

Faced with the possibility that such technologies may enable police officers to invade the “privacies of life”\(^{31}\) that have traditionally been subject to the strong protection provided by the Fourth Amendment’s exclusionary rule, courts examining the Fourth Amendment implications of such technologies have embarked upon two related inquiries. Courts seek to determine, first, whether the use of an investigatory technology implicates the Fourth Amendment at all.\(^{32}\) In the course of this inquiry, courts will examine the privacy interests that the use of a particular technology may compromise.\(^{33}\) In the event that

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\(^{29}\) This Note will use the term “technology” in its broad, etymological sense to mean “the practical application of knowledge especially in a particular area,” “a capability given by the practical application of knowledge,” or “a manner of accomplishing a task especially using technical processes, methods, or knowledge.” Merriam-Webster Online Dictionary, http://www.m-w.com/dictionary/technology (last visited Oct. 4, 2006). While popular usage of the term “technology” might be limited to inanimate objects possessing circuitry, this Note will consider thermal imaging devices, x-ray scanners, stationary radar detectors, and drug sniffing canines under the rubric of “technology” as defined above. The Supreme Court lent legal credence to this view of “technology” when it recognized in United States v. Jacobsen that precedents it forged with respect to canine sniffs were applicable in cases involving other investigative techniques and technologies that revealed nothing other than the presence or absence of illegal activity. United States v. Jacobsen, 466 U.S. 109, 123-24 (1984). Moreover, numerous scholars have observed the similarities between drug sniffing canines and other forms of sense-enhancing technology, and have persuasively argued that legal precedents created in the context of canine sniff have implications for cases pertaining to other search technologies. See, e.g., Leading Cases, Fourth Amendment—Canine Sniff, 119 Harv. L. Rev. 179, 184 (2005); David A. Harris, Superman’s X-Ray Vision and the Fourth Amendment: The New Gun Detection Technology, 69 Temp. L. Rev. 1, 29-32 (1996).

\(^{30}\) Empirical studies of the effect of the exclusionary rule on the conduct of police officers and the procedures of law enforcement agencies further reinforces this proposition. See, Bradley C. Canon, Is the Exclusionary Rule Failing Health? Some New Data and a Plea Against a Precipitous Conclusion, 62 Ky. L.J. 681, 710 (1974) (noting that immediately following the Court’s recognition of the exclusionary rule in Mapp, police officers began to seek judicial search warrants more frequently than they had prior to Mapp). Canon’s statistical analysis suggests that police behavior in the context of search and seizure is responsive in the long term to judicial decrees heightening law enforcement agencies’ burden to demonstrate compliance with the Fourth Amendment. Id. See also Myron W. Orfield Jr., Note, The Exclusionary Rule and Deterrence: An Empirical Study of Chicago Narcotics Officers, 54 U. Chi. L. Rev. 1016, 1017 (1987) (noting that “[o]n an institutional level, the [exclusionary rule] has changed police, prosecutorial, and judicial procedures”).

\(^{31}\) Boyd v. United States, 116 U.S. 616, 630 (1886).

\(^{32}\) Horton v. Goose Creek Indep. Sch. Dist., 690 F.2d 470, 476 (5th Cir. 1982).

\(^{33}\) Id.
the use of an investigative technology has the propensity to compromise legitimate privacy interests, courts will hold that use of the technology constitutes a “search” and that the Fourth Amendment therefore applies. Upon reaching this threshold conclusion, courts will then seek to determine the circumstances under which the Fourth Amendment will permit the use of an investigatory technique that compromises legitimate interests in privacy. These determinations, in turn, affect the extent to which law enforcement agencies will demand search technologies. If a court should conclude that the use of a particular investigative technology constitutes a “search” for Fourth Amendment purposes, police will be less likely to invest in it, either out of fear that its use will give rise to the application of the exclusionary rule or out of certainty that using the technology in a manner compliant with the Fourth Amendment would be cost-prohibitive. If, on the other hand, a court rules that the use of a particular investigative technology does not constitute a search for Fourth Amendment purposes, police will be more likely to invest in it because it can be applied without fear that courts will suppress the evidence that it uncovers on Fourth Amendment grounds.

A. Incentives for Law Enforcement Agencies Under a Non-Search Regime

It is settled law that “the Fourth Amendment protects people, not places,” and that searches and seizures are to be struck down as contrary to the provisions of the Fourth

34 See id. (noting that “[t]he decision to characterize an action as a search is in essence a conclusion about whether the Fourth Amendment applies at all”).
36 See Canon, supra note 30, at 710 (noting that Supreme Court rulings are effective in altering police behavior, including search and seizure conduct). See also William J. Stuntz, The Distribution of Fourth Amendment Privacy, 67 GEO. WASH. L. REV. 1265, 1267 (noting that “[w]hen the Fourth Amendment limits the use of a police tactic like house searches, it does two things: it raises the cost of using that tactic, and it lowers the relative cost of using other tactics that might be substitutes”).
37 See Canon, supra note 30, at 710 (noting that immediately following the Court’s recognition of the exclusionary rule in Mapp, police officers began to seek judicial search warrants more frequently than they had prior to Mapp). Canon’s statistical analysis suggests that police behavior in the context of search and seizure is responsive in the long term to judicial decrees heightening law enforcement agencies’ burden to demonstrate compliance with the Fourth Amendment. Id. See also Orfield, supra note 30, at 1017 (noting that “[o]n an institutional level, the [exclusionary rule] has changed police, prosecutorial, and judicial procedures”).
38 See Stuntz, supra note 36.
Amendment whenever they unreasonably intrude upon an individual's reasonable “expectation[s] of privacy.” Building on the rule initially articulated in *Katz v. United States*, the Supreme Court resolved in *United States v. Jacobsen* that individuals can have no reasonable expectations of privacy pertaining to contraband or illegal activity. The *Jacobsen* court concluded that no invasion of privacy had taken place when federal agents conducted a chemical field test to determine whether a white, powdery substance seeping from a damaged air-freight parcel was in fact cocaine. As the court observed:

>a chemical test that merely discloses whether or not a particular substance is cocaine does not compromise any legitimate interest in privacy. This conclusion is not dependent on the result of any particular test. It is probably safe to assume that virtually all of the tests conducted under circumstances comparable to those disclosed by this record would result in a positive finding; in such cases, no legitimate interest has been compromised. But even if the results are negative—merely disclosing that the substance is something other than cocaine—such a result reveals nothing of special interest. Congress has decided—and there is no question about its power to do so—to treat the interest in “privately” possessing cocaine as illegitimate; thus governmental conduct that can reveal whether a substance is cocaine, and no other arguably “private” fact, compromises no legitimate privacy interest.

Relying on the observation that the chemical field test at issue revealed only the presence or absence of criminal activity, the *Jacobsen* court drew a comparison between the chemical field test and the canine sniff test—an investigative technique that it had classed as *sui generis* in *United States v. Place*. The *Place* court concluded that the canine sniff was in a class unto itself because it revealed nothing more than the presence or absence of illegal activity and therefore ensured that the “owner of the property is not subjected to the embarrassment and inconvenience entailed in less discriminate and more intrusive investigative methods.” Because the Court did not view the canine sniff as compromising any legitimate interest

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40 Id. at 361.
41 *Katz*, 389 U.S. 347.
43 Id. at 123.
44 Id. at 125.
45 Id. at 123.
47 Id.
in privacy, it concluded that canine sniffs were not searches within the meaning of the Fourth Amendment.\textsuperscript{48}

The Court’s ruling in \textit{Jacobsen} went a step further and lent credence to the view that any investigative technique revealing only the presence or absence of illegal activity would not give rise to Fourth Amendment scrutiny.\textsuperscript{49} Because such techniques do not constitute “searches” within the meaning of the Fourth Amendment, they do not give rise to Fourth Amendment inquiries pertaining to reasonableness or probable cause.\textsuperscript{50} Because courts have held that investigative techniques such as canine sniffs and chemical field tests do not implicate Fourth Amendment concerns, numerous commentators have noted that courts treat them as “non-searches.”\textsuperscript{51} As the Fifth Circuit aptly put it, “the decision to characterize an action as a search is in essence a conclusion about whether the fourth amendment applies at all.”\textsuperscript{52} As such, courts have traditionally dispensed with reasonableness and probable cause inquiries in cases involving so-called “binary searches”—that is, investigative techniques revealing only the presence or absence of illegal activity.\textsuperscript{53}

Binary search technologies are therefore attractive investments to law enforcement agencies. A number of studies have shown that the Court’s Fourth Amendment rulings—in

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\textsuperscript{48} Id.

\textsuperscript{49} Jacobsen, 466 U.S. at 124.

\textsuperscript{50} See also Illinois v. Caballes, 543 U.S. 405, 407 (2005) (canine sniff revealing only presence or absence of narcotics did not give rise to Fourth Amendment inquiry). City of Indianapolis v. Edmond, 531 U.S. 32, 40 (2000) (vehicle checkpoints with narcotics-detection dogs did not require reasonable suspicion or probable cause because they revealed only the presence or absence of contraband); \textit{Place}, 462 U.S. at 707 (canine sniff held \textit{sui generis} because it was deemed “less intrusive” than other investigative techniques and revealed only the presence or absence of illegal activity).


\textsuperscript{52} Horton v. Goose Creek Indep. Sch. Dist., 690 F.2d 470, 476 (5th Cir. 1982).

\textsuperscript{53} See supra note 50. The phrase “binary search” provides a useful shorthand for “investigative techniques revealing merely the presence or absence of illegal activity.” The phrase is scholarly in origin, and appears to have been coined by Ric Simmons in \textit{From Katz to Kyllo: A Blueprint for Adapting the Fourth Amendment to Twenty-First Century Technologies}, 53 HASTINGS L.J. 1303, 1306 (2002). At the time of Simmons’ writing, the Supreme Court had decided only two “binary search” cases: \textit{Place}, 462 U.S. 696 (involving canine sniff tests) and \textit{Jacobsen}, 466 U.S. 109 (involving chemical field tests purported to reveal only the presence or absence of narcotics). The Court’s binary search jurisprudence has since been supplemented by \textit{Caballes} and, arguably, \textit{Kyllo}.
particular, the advent of the exclusionary rule in Mapp—cause law enforcement institutions and individual police officers to alter their search and seizure behavior.\textsuperscript{54} Moreover, scholars have noted that the exclusionary rule encourages law enforcement agencies that fear the deterrent remedies of suppression and dismissal to “find a legal way to obtain . . . evidence” rather than “waste their time in activities made unproductive by the exclusionary rule.”\textsuperscript{55} As such, binary search technologies present police agencies with compelling alternatives to more intrusive technologies. Furthermore, because binary search technologies do not require law enforcement institutions to incur the social, institutional, and economic costs associated with proving that an investigatory activity was supported by probable cause or reasonable articulable suspicion, law enforcement agencies are likely to maximize their use of investigative techniques that do not give rise to Fourth Amendment scrutiny.\textsuperscript{56} As one commentator has noted, court-imposed search and seizure obligations operate as a kind of “tax” on law enforcement agencies’ search and seizure behavior.\textsuperscript{57} Because the rigors of complying with the Fourth Amendment impose considerable institutional costs on police, it follows that they will seek to minimize this “tax” burden by using investigatory techniques that do not trigger Fourth Amendment scrutiny.\textsuperscript{58}

B. Incentives for Law Enforcement Agencies Under Reasonable Articulable Suspicion and Probable Cause Regimes

1. Reasonable Articulable Suspicion

A court will “tax” investigative techniques by applying Fourth Amendment scrutiny when those techniques risk allowing police officers to detect more than the mere presence

\textsuperscript{54} See supra note 37.


\textsuperscript{56} See Stuntz, supra note 36 (noting that “[w]hen the Fourth Amendment limits the use of a police tactic like house searches, it does two things: it raises the cost of using that tactic, and it lowers the relative cost of using other tactics that might be substitutes”).

\textsuperscript{57} Id. at 1275.

\textsuperscript{58} Id. (noting that “here as elsewhere, if you tax a given kind of behavior, you will probably see less of it”).
or absence of illegal activity.\textsuperscript{59} When applying Fourth Amendment scrutiny, courts will determine whether a search was supported by one of two possible investigatory prerequisites: reasonable articulable suspicion or probable cause.\textsuperscript{60} The Fourth Amendment requires, at a minimum, that officers be able to justify a search or seizure by pointing to specific articulable facts that generated suspicion.\textsuperscript{61} This investigatory prerequisite, which courts refer to as either “reasonable suspicion” or “reasonable articulable suspicion,” has been held to require police officers to show something more than an arbitrary justification for a search or seizure, but something less than full-blown probable cause.\textsuperscript{62} Because the quantum of evidence required under a reasonable articulable suspicion regime is considerably less\textsuperscript{63} than that required by probable cause, courts usually apply the reasonable suspicion standard where searches involve only minimal intrusions that are limited in scope to the situation that gave rise to the search in the first place.\textsuperscript{64} Because the nature of the intrusion is minimal in such cases, the “tax” that law enforcement agencies incur in the course of justifying the intrusion is likewise minimal, requiring only that police officers form impressions on the basis of articulable facts and be able to recount and justify those impressions in a court of law.\textsuperscript{65}


\textsuperscript{60} See generally United States v. Sokolow, 490 U.S. 1 (1989).

\textsuperscript{61} See Terry v. Ohio, 392 U.S. 1, 21 (1968) (holding that a limited search in the context of a traffic stop may be justified when a “police officer [is] able to point to specific and articulable facts which, taken together with rational inferences from those facts, reasonably warrant that intrusion”). To date, only the Ninth Circuit has held that the application of a sense-enhancing technology requires reasonable articulable suspicion, holding in United States v. Beale, 731 F.2d 590 (9th Cir. 1983), that canine sniffs required “some articulable reason” as a prerequisite to their use. This holding was later overruled by an en banc rehearing. See United States v. Beale, 736 F.2d 1289 (9th Cir. 1984) (en banc). In all other cases involving sense-enhancing technologies, courts have either ruled that the technologies at issue were of a binary character, and therefore not subject to Fourth Amendment scrutiny or that such technologies were intrusive, and therefore required probable cause. See supra notes 50, 59 and accompanying text.

\textsuperscript{62} See Sokolow, 490 U.S. at 7 (noting that the standard required for validating searches under a reasonable articulable suspicion regime is “obviously less demanding than that [required] for probable cause”).

\textsuperscript{63} Id.

\textsuperscript{64} See Terry, 392 U.S. at 21.

\textsuperscript{65} See Erica Flores, Case Comment, “People, Not Places”: The Fiction of Consent, the Force of the Public Interest, and the Fallacy of Objectivity in Police Encounters with Passengers During Traffic Stops, 7 U. PA. J. CONST. L. 1071, 1091 (2006) (noting that the reasonable articulable suspicion standard is flawed because of
The Supreme Court first articulated the contours of the reasonable suspicion standard in *Terry v. Ohio*.\(^{66}\) In *Terry*, a police officer stopped and frisked three individuals who he suspected were planning a robbery.\(^{67}\) The officer witnessed two of the individuals pacing back and forth between a street corner and a store window.\(^{68}\) The third individual approached them and, after conferring with them briefly, left the scene.\(^{69}\) After this occurred, the two individuals lingered for a while before walking off in the same direction as the third man.\(^{70}\) The officer followed the two individuals who had lingered on the street corner and approached them when they caught up to the third individual.\(^{71}\) Fearing that at least one of the individuals was armed, the officer frisked all three of them and recovered firearms from two of the individuals.\(^{72}\) The officer admitted that he had no prior information regarding the three individuals and that his suspicion that they were “casing a job, a stick up” proceeded solely from what he had observed.\(^{73}\) The officer justified the frisks on the ground that he feared for his own safety.\(^{74}\) After refusing to suppress the weapons on Fourth Amendment grounds, the trial court convicted the two individuals from whom the officer recovered firearms on charges of carrying concealed weapons.\(^{75}\)

Throughout all stages of *Terry*’s procedural history, courts conceded that the searches were not supported by probable cause, but nevertheless affirmed the trial court’s refusal to suppress the weapons that the officer recovered from the suspects.\(^{76}\) Hearing the case after grant of certiorari, the Supreme Court held that even where a search is not supported by probable cause, it may nevertheless be reasonable when a police officer’s action is “justified at its inception” and is “reasonably related in scope to the circumstances which

\(^{67}\) *Id.* at 6-7.
\(^{68}\) *Id.* at 6.
\(^{69}\) *Id.*
\(^{70}\) *Id.* at 6-7.
\(^{71}\) *Id.* at 6-7.
\(^{72}\) *Terry*, 392 U.S. at 6.
\(^{73}\) *Id.* at 6-7.
\(^{74}\) *Id.* at 30.
\(^{75}\) *Id.* at 7-8.
\(^{76}\) *Id.* at 8.
justified the interference in the first place.”\textsuperscript{77} The Court observed that the officer’s actions were justified at their inception because he had witnessed the defendants “go through a series of acts, each of them perhaps innocent in itself, but which taken together warranted further investigation.”\textsuperscript{78} Moreover, the Court noted that the search was reasonably related in scope to the circumstances that gave rise to the intrusion because the officer’s fear that the individuals were contemplating a daytime robbery lent reasonable support to his suspicion that they were armed.\textsuperscript{79} However, the Court emphasized that the reasonableness of the search turned rather significantly on the manner in which it was conducted.\textsuperscript{80} Because the officer only patted down the surface of the suspects’ clothing and did not intrude further until he felt the guns underneath the surface, the Court held that the search was “limited” and that it therefore complied with the Fourth Amendment even in the absence of full-blown probable cause.\textsuperscript{81}

The \textit{Terry} Court thus announced that a search may be constitutionally permissible even in the absence of probable cause in cases where an officer can point to specific articulable facts to justify the intrusion and tailors the intrusion to both the scope of those facts and the inferences that he draws from them.\textsuperscript{82} To the extent that this reasonable articulable suspicion standard may be said to “tax” law enforcement agencies by imposing Fourth Amendment obligations, it appears to impose only a minimal burden. Because the impressions that a single police officer forms over a brief period of time are sufficient to generate reasonable articulable suspicion, law enforcement agencies are not required to conduct the lengthy investigative processes necessary to justify searches under a probable cause regime.\textsuperscript{83} Moreover, because courts rely on the interpretations of individual police officers in the course of determining whether a limited search was supported by reasonable articulable suspicion, the sole institutional obligation that a

\textsuperscript{77} Id. at 20.  
\textsuperscript{78} \textit{Terry}, 392 U.S. at 22.  
\textsuperscript{79} Id. at 28.  
\textsuperscript{80} Id.  
\textsuperscript{81} Id. at 28-30.  
\textsuperscript{82} Id. at 20-21.  
\textsuperscript{83} See United States v. Sokolow, 490 U.S. 1, 7 (1985) (noting that the proof required to justify a search under a reasonable articulable suspicion regime is “considerably less” than that required under a preponderance of the evidence standard).
reasonable suspicion regime imposes upon law enforcement agencies is the duty of individual officers to testify as to specific, articulable facts that warranted the intrusion.\textsuperscript{84} Finally, as explained at greater length below, courts typically defer to such testimony, which means that evidence is rarely suppressed in situations where a “limited” search requires only reasonable articulable suspicion.\textsuperscript{85} As such, while the institutional costs imposed by a reasonable articulable suspicion regime appear to be minimally higher than those associated with investigative techniques to which the Fourth Amendment does not apply, they are nevertheless far lower than the institutional costs associated with a requirement of probable cause. It follows from these observations that an investigative technology would remain at least somewhat attractive to law enforcement agencies if a court was to rule that its use constituted only a minimal intrusion that must be supported by specific, articulable facts.

2. Probable Cause

Courts impose the maximum “tax” of probable cause in situations where police officers seek to intrude more significantly upon an individual’s private affairs.\textsuperscript{86} The “tax” imposed on law enforcement agencies and individual police officers is greater in such instances, because probable cause requires a quantum of evidence sufficient to merit the issuance of a warrant.\textsuperscript{87} While searches conducted under the auspices of probable cause are generally supported by a judicial warrant, even warrantless searches conducted in the field must be supported by probable cause when they involve more than “limited” intrusions into the public’s “person, houses, papers, papers, etc.”\textsuperscript{88}

\textsuperscript{84} See Flores, supra note 65, at 1091 (noting that the reasonable articulable suspicion standard is flawed because of “the judiciary’s almost unwavering deference to police determinations of whether it has been satisfied”).

\textsuperscript{85} See id.

\textsuperscript{86} Both reasonable articulable suspicion and probable cause are determined according to reasonableness under the totality of the circumstances. See Sokolow, 490 U.S. at 7-8. Nevertheless, the Supreme Court has endorsed the view that probable cause requires considerably more proof of wrongdoing than reasonable articulable suspicion. See id. at 7. As the Court held in Terry v. Ohio, reasonable suspicion may justify a search pursuant to a lesser quantum of evidence than that required for probable cause only when the nature of the intrusion is limited. 392 U.S. at 28-30. As such, it follows that probable cause is required where the nature of the intrusion is greater. See infra notes 98-103 and accompanying text.

\textsuperscript{87} See United States v. Ventresca, 380 U.S. 102, 109 (1965).
and effects.” Indeed, fear of incurring the judicial penalties of suppression or dismissal has led police officers to seek warrants with greater frequency in the years following the establishment of the exclusionary rule. In cases where police seek warrants, the cost of engaging in investigative activity naturally increases due to the exigencies of gathering evidence, presenting it to a magistrate, filing a sworn affidavit affirming the existence of probable cause, and persuading the magistrate that probable cause exists.

Even in cases where police conduct searches without judicially granted warrants, a court will conduct a de novo review of the facts to determine whether the quantum of evidence available to the officer was sufficient to merit the issuance of a warrant on the ground of probable cause. In order for suspicion to rise to a level sufficient to merit a judicial warrant, a court must find that the information justifying the warrant request is sufficiently trustworthy to be considered and that the amount of evidence offered is sufficient to constitute probable cause. A court will require a greater showing as to the “trustworthiness” of evidence under a probable cause regime than it will under a reasonable articulable suspicion regime, and the quantum of evidence that is required for a search to be supported by probable cause is likewise much greater. As such, a probable cause regime “taxes” law enforcement agencies more than a reasonable articulable suspicion regime, requiring them to produce a quantum of evidence far exceeding the subjective impressions required by reasonable suspicion. Because producing such

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88 U.S. Const. amend. IV.
89 See Orfield, supra note 30, at 1017-18.
91 See Ornelas v. United States, 517 U.S. 690, 690 (1996) (holding that appellate courts should conduct de novo review of warrantless searches to determine whether probable cause actually existed).
93 See Ornelas, 517 U.S. at 695 (treating probable cause and reasonable suspicion as similarly fluid inquiries involving inquiry into the totality of the circumstances).
94 See Sokolow, 490 U.S. at 7 (noting that the quantum of evidence required under a reasonable articulable suspicion regime is less than that required by probable cause).
95 Id.
evidence imposes pervasive procedural and institutional costs on law enforcement agencies, it follows that police officers are least likely to prefer investigative techniques that require a showing of probable cause to justify their use.96

In cases involving investigatory technologies, courts are particularly likely to require probable cause when law enforcement agencies employ technologies not in public use.97 In Kyllo v. United States, the Court considered the use of thermal imaging devices to detect the growth of marijuana inside homes.98 The technology at issue in Kyllo enabled police officers to determine whether the levels of heat emanating from a home were consistent with the use of high intensity lamps typically used in the process of indoor marijuana growth.99 The thermal imaging device used by the police officers converted radiation into images on the basis of relative warmth, producing only a “crude visual image” of infrared radiation emanating from the home.100 The Kyllo court held that the use of the thermal imaging device was subject to Fourth Amendment scrutiny because the device was not in public use and enabled law enforcement officers to obtain “information regarding the interior of the home” that could not otherwise have been obtained without physical intrusion.101 Although the Court offered sparse justification for hinging the probable cause requirement on whether or not a technology is in general public use, the requirement is in all likelihood based on the notion that an individual cannot have reasonable expectations of privacy pertaining to activities that a member of the general public could become privy to by use of widely available technology.102 As such, the Court ultimately concluded that the use of thermal imaging devices to obtain information regarding the interior of the home was presumptively unreasonable.

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96 See Stuntz, supra note 36, at 1284.
97 See Kyllo v. United States, 533 U.S. 27, 40 (2001). Read side by side with the Court’s holdings in Caballes and Place, the Kyllo Court’s conclusion that the use of search technologies not in general public use must be supported by probable cause begs the obvious question of whether the drug sniffing canine may be deemed to be “in general public use.” See id.
98 Id.
99 Id. at 29.
100 Id. at 30.
101 Id. at 34.
102 Id. (presumably referring to reasonable expectations of privacy when justifying the “general public use” requirement by stating that the rule “assures preservation of that degree of privacy against government that existed when the Fourth Amendment was adopted”).
unless conducted under the auspices of probable cause, pursuant to a judicially granted warrant.103

The *Kyllo* rule is likely to place a strong burden on law enforcement agencies seeking to use surveillance technologies that courts deem to compromise legitimate privacy interests. Although the *Kyllo* decision turned rather significantly on the fact that a new technology was used to glean information regarding the home, dictum concerning the thermal imaging device’s ability to reveal purely innocent behavior—such as the time of day that the “lady of the house takes her daily sauna”—at least suggests that the decision turned, in part, on the ability of the emergent surveillance technology to disclose more than the presence or absence of illegal activity.104 When analyzed in conjunction with the holdings of *Place*, *Caballes*, and *Jacobsen*, this dictum lends credence to the view that surveillance technologies will trigger at least a minimal level of Fourth Amendment scrutiny whenever they reveal more than the presence or absence of illegal activity. Although the Court has yet to examine devices such as the thermal imager outside the context of home surveillance, *Kyllo*’s observation that thermal imaging devices reveal “intimate” details suggests that such devices would implicate Fourth Amendment concerns regardless of the context in which they are used.105

Since the Court held that the application of technologies not in general public use requires probable cause in the context of home surveillance, it created a disincentive for law enforcement agencies to invest in emerging search technologies that might be used to scrutinize the home.106 Since such technologies, by virtue of the mere fact that they are “new,” generally tend not to be in public use, it follows that the *Kyllo* rule provides a strong incentive for law enforcement agencies to maintain status quo investigatory techniques. As a result of *Kyllo*, it appears likely that law enforcement agencies will continue to invest in canine detection107 and forgo investment

103 *Kyllo*, 533 U.S. at 40.
104 Id. at 38.
105 Id.
106 See Stuntz, supra note 36.
in emerging technologies regardless of whether those technologies are more accurate and less invasive.\(^{108}\)

III. ANALYSIS AND CRITICISM OF CANINE SNIFFS UNDER THE CURRENT NON-SEARCH REGIME

As noted above, investigative techniques that do not interfere with an individual’s reasonable expectations of privacy are considered “non-searches” for the purpose of Fourth Amendment inquiry and do not require courts to apply either reasonable suspicion or probable cause standards.\(^{109}\) Because so-called binary searches are thought to reveal only the presence or absence of illegal activity, these investigative techniques fall outside the scope of the Fourth Amendment.\(^{110}\) Of the two investigative technologies that the Court has exempted from Fourth Amendment scrutiny, the canine sniff test was reconsidered most recently in *Illinois v. Caballes*.\(^ {111}\) In *Caballes*, the Court reiterated its decades-old position that canine sniff tests are not subject to the Fourth Amendment because they are limited intrusions that reveal only the presence or absence of contraband.\(^ {112}\) *Caballes* involved a drug conviction resulting from a canine sniff conducted during a routine traffic stop.\(^ {113}\) An Illinois state trooper stopped Roy I. Caballes for speeding on the highway and radioed his police dispatcher to report the stop.\(^ {114}\) Overhearing this transmission, a second trooper drove to the location of the stop with a drug-detecting canine.\(^ {115}\) While the first trooper was writing out a citation for Caballes’ speeding, the second trooper walked his dog around the car.\(^ {116}\) The dog alerted to Caballes’ trunk, and a subsequent search revealed marijuana.\(^ {117}\)

In a brief opinion that insulated the canine sniff test from Fourth Amendment scrutiny, the *Caballes* majority was careful to cite *United States v. Jacobsen*, where the Court observed that chemical field tests for the presence of narcotics

\(^{108}\) See supra note 36.

\(^{109}\) See supra note 53 and accompanying text.

\(^{110}\) See supra notes 49-53 and accompanying text.

\(^{111}\) 543 U.S. 405 (2005).

\(^{112}\) Id. at 408.

\(^{113}\) Id. at 406.

\(^{114}\) Id.

\(^{115}\) Id.

\(^{116}\) Id. at 406.

\(^{117}\) *Caballes*, 543 U.S. at 408.
were not searches because, like the canine sniff test, they reveal only the presence or absence of illegal activity.\textsuperscript{118} The fact that the Supreme Court grouped the canine sniff and the chemical field test together under the “binary search” rubric illustrates not only the fictitious quality of the Court’s canine sniff jurisprudence, but also the specious reasoning underlying the formation of the category itself.\textsuperscript{119} The reliability of the chemical field test has been called into question.\textsuperscript{120} Likewise, federal case law and private research have shown that canine sniffs are not as reliable as the Court would like to believe.\textsuperscript{121} While the inherent unreliability of both investigative procedures raises the specter of unwarranted intrusions upon innocent individuals’ reasonable expectations of privacy, the fact that chemical field tests are invariably performed upon substances lawfully within police custody establishes that the intrusion of the chemical field test does not rise to the same level of invasiveness as the intrusion enabled by a false canine alert.\textsuperscript{122} Unlike the chemical field test, which is immune from Fourth Amendment scrutiny when performed upon substances lying in plain view, the canine sniff test is applied for the purpose of locating concealed substances.\textsuperscript{123} Moreover, chemical field tests arguably do not involve the same level of intrusion and intimidation that may arise in the context of a canine-wielding police officer approaching an individual or that individual’s property.\textsuperscript{124}

Despite the obvious disparities between canine sniffs and chemical field tests, the \textit{Caballes} Court nevertheless observed that both investigative techniques are not searches because they reveal only the presence or absence of contraband.\textsuperscript{125} In so holding, the Court at long last gave precedential force to decades-old dictum from \textit{United States v. Place}, in which the Court observed that canine sniffs “[do] not

\begin{thebibliography}{9}
\bibitem{id} Id. at 408.
\bibitem{see} See Blanchard & Chin, \textit{Identifying the Enemy in the War on Drugs}, 47 Am. U. L. Rev. 557, 583 n.160 (1998) (noting that “typically, field tests used by officers are merely indicative and not conclusive of the presence of a narcotic substance”).
\bibitem{see} See \textit{Caballes}, 543 U.S. at 412 (Souter, J., dissenting) (citing K. Garner et al., \textit{Duty Cycle of the Detector Dog: A Baseline Study} (Apr. 2001) (prepared under Federal Aviation Administration grant by the Institute for Biological Detection Systems of Auburn University)).
\bibitem{see} See \textit{id.} at 415.
\bibitem{id} Id. at 416.
\bibitem{id} \textit{id.} at 417-25 (Ginsburg, J., dissenting).
\bibitem{id} \textit{id.} at 409-10.
\end{thebibliography}
constitute [searches] within the meaning of the Fourth Amendment" because the limited disclosures afforded by dog sniffs “ensure[] that the owner of . . . property is not subjected to the embarrassment and inconvenience entailed in less discriminate and more intrusive investigative methods.”\textsuperscript{126} The Place Court offered no empirical justification for its dictum that canine sniffs reveal only the presence or absence of contraband, and the fact that the observation was inessential to the Court’s holding is underscored by the Court’s failure to ask the parties to brief the issue.\textsuperscript{127} Nevertheless, the Caballes Court seized upon the Place Court’s dictum in concluding that because canine sniffs are not searches, they do not implicate the Fourth Amendment and, therefore, do not require a showing of probable cause or reasonable articulable suspicion prior to their application.\textsuperscript{128}

The dubious validity of the Place Court’s dictum notwithstanding, the Caballes Court used this analysis to distinguish its ruling from Kyllo v. United States,\textsuperscript{129} where a divided Court held that the warrantless use of a thermal imaging device to detect the growth of marijuana in a home was impermissible under the Fourth Amendment because the device was not in public use and had the potential to reveal more information than the presence or absence of criminal activity.\textsuperscript{130} The Caballes Court’s insistence that a canine sniff “only reveals the presence of contraband” and therefore “compromises no legitimate privacy interest” is specious, however, insofar as it fails to adequately address petitioner’s argument that “error rates, particularly the existence of false positives, call into question the premise that drug-detection dogs alert only to contraband.”\textsuperscript{131} Noting that “the record contains no evidence or findings that support [petitioner’s] argument,” the Court went on to suggest that since “an erroneous alert, in and of itself, reveals . . . [no] legitimate private information” it may be found “sufficiently reliable to establish probable cause to conduct a full-blown search.”\textsuperscript{132}

\textsuperscript{126} 462 U.S. 696, 707 (1983).
\textsuperscript{128} Place, 462 U.S. at 707.
\textsuperscript{129} 533 U.S. 27 (2001).
\textsuperscript{130} Id. at 40.
\textsuperscript{131} Caballes, 543 U.S. at 405.
\textsuperscript{132} Id. at 409.
In so holding, the Court failed to acknowledge the reality, observed by Justice Souter in his dissent, that a “dog who alerts hundreds of times will be wrong dozens of times.”

Justice Souter’s observation narrows the alleged gulf between *Kyllo* and *Caballes*, suggesting that a canine sniff test may amount, in some cases, to the functional equivalent of other investigatory techniques that are subject to Fourth Amendment scrutiny due to the fact that they disclose more than the presence or absence of contraband. While it is true that an erroneous canine sniff “in and of itself” discloses no concrete facts about the contents of the object or individual being subjected to the investigation, such a procedure, when combined with the ensuing police inspection that it authorizes, carries with it the same potential for embarrassment and invasion at stake in the case of a thermal imaging device. In fact, the possibility of false positives may implicate stronger privacy interests than those compromised by a thermal imaging device. Whereas the thermal imaging device at issue in *Kyllo* was capable only of exposing “a crude image” of heat emanating from a home and did not enable police officers to discern persons or objects inside the domicile, a false canine alert enables a police officer to conduct a full-blown physical search of the contents of a container. As such, Justice Souter was correct to observe that “it makes sense . . . to treat a sniff as the search that it amounts to in practice, and to rely on the body of our Fourth Amendment cases, including *Kyllo*, in deciding whether such a search is reasonable.”

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133 *Id.* at 412 (Souter, J., dissenting).
134 *Id.* at 409 (majority opinion).
135 *Id.* at 412 (Souter, J., dissenting).
136 This claim assumes that “intimate details” disclosed as the outcome of a search carry with them stronger privacy interests than so-called “insignificant” details. While the *Kyllo* decision hinged, in part, on the proposition that all details disclosed during surveillance of the home are “intimate,” nothing in the *Caballes* decision indicates that a dog sniff would be an impermissible search if performed outside the door of a home or apartment. As such, it may be the case that the rulings of *Kyllo* and *Caballes* are on a collision course with one another.
137 *Caballes*, 543 U.S. at 413 (Souter, J., dissenting).
138 *Id.* at 413. The failure to harmonize *Kyllo* is not the sole problem with the *Caballes* Court’s reasoning. As Justice Ginsburg persuasively observed in her own *Caballes* dissent, the canine sniff at issue was also contrary to the Court’s ruling in *Terry v. Ohio*, where it held that the investigative techniques employed by police officers must be “reasonably related in scope to the circumstances which justified the interference in the first place.” *See id.* at 418 (Ginsburg, J., dissenting) (citing *Terry v. Ohio*, 392 U.S. 1, 20 (1968)). While the Court’s failure to consider *Terry* may be indicative of a broad desire to uphold canine sniffs in all circumstances, for the purposes of this Note it is sufficient to observe that error rates provide sufficient
The history of federal canine sniff jurisprudence is replete with evidence of the method’s unreliability.\textsuperscript{139} While the lion’s share of cases casting doubt on the technique’s infallibility predate the Supreme Court’s controlling rulings in \textit{Place} and \textit{Caballes}, their unique facts nevertheless indicate that dogs are far from one hundred percent accurate. In \textit{United States v. Sullivan},\textsuperscript{140} the Fourth Circuit concluded that a canine sniff was not a search despite the fact that law enforcement officers relied on less than a “full alert” to generate the probable cause necessary to conduct a full-blown search of the defendant’s luggage.\textsuperscript{141} As the Court put it, the dog did not “give signs of sensing drugs by pawing at the luggage excitedly, but he did show \textit{an interest} in one blue bag.”\textsuperscript{142} The Court’s anthropomorphic treatment of the canine may strike some as humorous, but the very notion that a well-trained canine engaged in a police investigation can show less than “full alert” also casts significant doubt on the binary character of the sniff test. The facts in \textit{Sullivan} illustrate that, rather than alerting to the presence of contraband, canines may also indicate the mere possibility of such a presence.\textsuperscript{143} While it is true that the investigation in \textit{Sullivan} resulted in a seizure of narcotics, this seizure was the outcome of a less than reliable application of the dog sniff technique.\textsuperscript{144} Although the \textit{Sullivan} ruling predates \textit{Caballes}, nothing in the controlling case indicated that the course of action undertaken by police officers in \textit{Sullivan} ran afoul of the Fourth Amendment. Because the \textit{Caballes} majority failed to analyze the sniff test as a single investigatory process comprised of the activities of a canine and his police handlers, it provided no mechanism for distinguishing between an alert and a mere indication of interest.\textsuperscript{145} In essence, the \textit{Caballes} rule permits dogs to sniff

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\item \textsuperscript{139} See generally Merrett v. Moore, 58 F.3d 1547 (11th Cir. 1995); United States v. Sullivan, 625 F.2d 9 (4th Cir. 1980); Doe v. Renfrow, 475 F. Supp. 1012 (N.D. Ind. 1979).
\item \textsuperscript{140} 625 F.2d 9 (4th Cir. 1980).
\item \textsuperscript{141} \textit{Id.} at 12-13.
\item \textsuperscript{142} \textit{Id.} at 12 (emphasis added).
\item \textsuperscript{143} This possibility also arose in \textit{United States v. Guzman}, 75 F.3d 1090, 1091-92 (6th Cir. 1996), where a handler also distinguished between a dog’s “interest” and full alert.
\item \textsuperscript{144} See \textit{id.} at 1096 (acknowledging prior to \textit{Caballes} that a dog’s “interest” in a bag alone would not constitute probable cause).
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persons and objects indiscriminately\textsuperscript{146} and allows law enforcement officers to interpret a dog’s behavior in whatever manner they wish.\textsuperscript{147} This concern is all the more prevalent insofar as the conclusiveness of canine sniffs is so often predicated on the subjective impressions of dog handlers.\textsuperscript{148} As one commentator has noted, “[c]anines often have their own particular pattern for communicating an alert. If a handler is not aware of a dog’s particular behavior, she may mistake an indication of narcotics for a reaction to food, another animal, or other distraction.”\textsuperscript{149}

To the extent that \textit{Caballes} can be read as authorizing the investigative process at issue in \textit{Sullivan}, it is clear that current law permits a less than full canine alert to justify a full-blown search, particularly when a canine’s “interest” is accompanied by individualized suspicion.\textsuperscript{150} This observation once again suggests a closer parallel between canine sniffs and the surveillance technology at issue in \textit{Kyllo} than the \textit{Caballes} majority was willing to admit. As one commentator has noted, a canine “interest” in an object or person may proceed from nothing other than innocent factors such as the scent of food, perfume, or another animal.\textsuperscript{151} Similarly, in \textit{Kyllo}, the thermal imaging device at issue had the ability to detect heat signatures that might have been owing to any number of innocent factors.\textsuperscript{152} As such, \textit{Sullivan}’s fact pattern supports the revision of the \textit{Caballes} rule to reflect the fact that canines may alert to the possibility rather than the certainty of the presence of contraband.

\textsuperscript{146} See id. at 422-23 (Ginsburg, J., dissenting).
\textsuperscript{147} See Robert C. Bird, \textit{An Examination of the Training and Reliability of the Narcotics Detecting Dog}, 85 Ky. L. J. 405, 424-35 (1997) (noting that false positives typically result from subjective error on the part of canine handlers). The analysis above presumes that misinterpretations may also be willful.
\textsuperscript{148} Id.
\textsuperscript{149} Id. at 423 (citation omitted).
\textsuperscript{150} See \textit{United States v. Guzman}, 75 F.3d 1090, 1091-92 (6th Cir. 1996); \textit{United States v. Jacobs}, 986 F.2d 1231, 1235 (8th Cir. 1993). It is worth noting that neither of these cases requires individualized suspicion as a precondition for the application of a canine sniff. They merely note that a canine “interest” in a person or receptacle is only sufficient to generate probable cause when accompanied by independent observations tending to arouse articulable suspicion. \textit{Guzman}, 75 F.3d at 1096; \textit{Jacobs}, 986 F.2d at 1235.
\textsuperscript{151} Bird, supra note 147, at 423.
\textsuperscript{152} \textit{Kyllo v. United States}, 533 U.S. 27, 38 (2001) (observing that heat signatures might be generated by “the lady of the house tak[ing] her daily sauna and bath”).
Where Sullivan suggests that canine behavior may be less than certain in a given investigatory situation, the notorious case of Doe v. Renfrow illustrates that canines are downright incorrect in many cases. In Doe, a dog alerted when it sniffed a thirteen-year-old girl during the course of a warrantless dragnet inspection at an Indiana junior high school. When a superficial search of the student’s person failed to uncover contraband, she was subjected to an equally fruitless strip search. It was later discovered that the student had been playing with her own dog, which was in heat, on the morning of the search. The false alerts at issue in Doe were not limited to this one individual. Although police dogs alerted to more than fifty students during the course of the dragnet inspection, contraband was recovered from only seventeen students. As such, Doe strongly subverts the judicial myth that canine sniffs are one hundred percent accurate and supports a more realistic classification of the canine sniff as a search subject to Fourth Amendment scrutiny. While it is perhaps the case that the mere application of canine sniffs did not impinge upon the students’ reasonable expectations of privacy, the Court did not hesitate to conclude that the subsequent strip search prompted by a false alert deprived the student of her Fourth Amendment rights. As the above analysis has shown, there is no rational basis for distinguishing between the sniff and the conduct of a police officer, because handlers may erroneously interpret canine behavior as an alert. As such, it makes sense to treat the canine sniff as the first step in an investigatory procedure implicating the Fourth Amendment.

The Supreme Court’s broad ruling in Place that canine sniffs reveal only the presence or absence of criminal activity placed the Court’s canine sniff jurisprudence on a collision course with the factual scenario that the Eleventh Circuit considered in Merrett v. Moore. In Merrett, the Eleventh Circuit ruled on the constitutionality of a dragnet procedure in

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154 Id. at 1017.
155 Id. at 1016-17, 1019.
156 Id. at 1017.
157 Id.
158 Id. at 1028.
159 Doe, 475 F. Supp. at 1017.
160 See supra notes 147-49 and accompanying text.
161 58 F.3d 1547, 1553 (11th Cir. 1995).
which police officers conducted a series of canine sniff tests on automobiles stopped at a highway roadblock.\footnote{162} Although the procedure generated twenty-eight canine alerts, only one person was arrested for possession of narcotics.\footnote{163} Despite recounting evidence of false positives in its own recitation of the facts, the Court nevertheless relied on \textit{Place} in holding that canine sniffs are not searches under the Fourth Amendment.\footnote{164} As if aware of the inherent inconsistency between the facts before it and the Supreme Court’s classification of the canine sniff as a binary search, the Court declined to quote the \textit{Place} rationale that canine sniffs disclose only the presence or absence of illegal activity.\footnote{165} Considered in this light, \textit{Merrett} provides what is perhaps the best rationale for revising the rule articulated in \textit{Caballes} and \textit{Place}. By forging a rule based on the proposition that canines do not err, the Supreme Court has doomed district and circuit courts considering cases involving false positives to contradict themselves in the sheer act of adhering to controlling authority. As such, the interest of judicial consistency mandates that the rule be altered to require either reasonable suspicion or probable cause.

The circuit courts’ rulings in each of the cases discussed above are consistent with the rule articulated by the Supreme Court in \textit{Caballes}. Before \textit{Caballes}, only a minority of circuit courts were willing to subject canine sniffs to Fourth Amendment scrutiny, and then only in special cases.\footnote{166} These limitations on the canine sniff have been swept away in favor of an authoritative ruling that enables law enforcement officers to conduct canine sniffs at random without need for probable cause or reasonable suspicion.\footnote{167} In an era when law enforcement agencies increasingly seek to maximize the use of surveillance technologies in the service of public safety, it is a matter of common sense that legal rules insulating police canine usage from Fourth Amendment scrutiny will incentivize continued police reliance on the canine as an investigatory tool. It follows from this observation that the use of canines will increase, perhaps even to the point of constituting random,

\footnotesize\textsuperscript{162} \textit{Id.}  
\footnotesize\textsuperscript{163} \textit{Id.} at 1549.  
\footnotesize\textsuperscript{164} \textit{Id.} at 1553.  
\footnotesize\textsuperscript{166} See generally United States v. \textit{Beale}, 674 F.2d 1327 (9th Cir. 1982); United States v. \textit{Klein}, 626 F.2d 22 (7th Cir. 1980).  
\footnotesize\textsuperscript{167} See \textit{Illinois v. Caballes}, 543 U.S. 405, 422 (Ginsburg, J., dissenting).
dragnet-type searching.\textsuperscript{168} Ironically, the incentive for police officers to increase their usage of canine detection may ultimately decrease the net effectiveness of canine sniffs due to the fact that “dog sniffs are most effective when implemented in tandem with law enforcement expertise and least effective when conducting random searches.”\textsuperscript{169}

This final observation suggests that the incentives created for law enforcement officers under a non-search regime endanger not only individual rights to privacy, but also public safety. Because canines err, a false alert may enable law enforcement officers to intrude upon the “privacies of life”\textsuperscript{170} that should be protected by the Fourth Amendment’s exclusionary rule.\textsuperscript{171} Moreover, the “legal fiction” that canine sniffs are one hundred percent accurate authorizes police officers to use canines indiscriminately and thereby reduces the net effectiveness of the canine as an investigatory tool.\textsuperscript{172} Finally, because the Court’s ruling in \textit{Kyllo} would subject possible alternatives to the canine sniff test to a higher Fourth Amendment burden by requiring a showing of probable cause,\textsuperscript{173} it follows that law enforcement agencies have little incentive to seek more accurate and less intrusive investigatory technologies. The current non-search regime thus creates a situation in which police officers would rather maintain the status quo than embrace technologies that require showings of reasonable suspicion or probable cause.

IV. \textbf{ANALYSIS AND CRITICISM OF CANINE SNIFFS UNDER A REASONABLE ARTICULABLE SUSPICION REGIME}

The insufficiencies of the Supreme Court’s empirical assumptions highlighted in the above analysis of \textit{Caballes} and \textit{Place} suggest that the canine sniff’s unreliability requires some level of Fourth Amendment scrutiny. Numerous scholars have suggested that the low-level intrusiveness of canine sniffs merits the requirement of a level of suspicion rising above arbitrariness but falling short of full-blown probable cause.\textsuperscript{174}

\begin{itemize}
  \item[\textsuperscript{168}] Id.
  \item[\textsuperscript{169}] Bird, supra note 147, at 426-27.
  \item[\textsuperscript{170}] Boyd v. United States, 116 U.S. 616, 630 (1886).
  \item[\textsuperscript{171}] Mapp v. Ohio, 367 U.S. 643, 655 (1966).
  \item[\textsuperscript{172}] Bird, supra note 147.
  \item[\textsuperscript{173}] Kyllo v. United States, 533 U.S. 27, 40 (2001).
  \item[\textsuperscript{174}] See, e.g., Honsinger, supra note 127, at 1106-07.
\end{itemize}
While the assumption that canine sniffs are relatively unintrusive when compared with other investigative techniques will be subject to interrogation in the portion of this Note dealing with the implications of a probable cause regime, the analysis that follows will examine the policy implications of requiring only a showing of reasonable articulable suspicion rather than the full-blown probable cause required by more intrusive investigative methods. Viewing reasonable articulable suspicion from the standpoint of economic incentive, this analysis will show not only that the deference with which courts have treated the reasonable articulable suspicion test is likely to result in the perpetuation of status quo investigatory techniques, but also that deference to the judgment of police officers under a reasonable suspicion regime will result in a standard that differs from arbitrariness in name alone.

The Supreme Court has held that reasonable articulable suspicion “is a less demanding standard than probable cause not only in the sense that reasonable suspicion can be established with information that is different in quantity or content than that required to establish probable cause, but also in the sense that reasonable suspicion can arise from information that is less reliable than that required to show probable cause.”175 In Terry v. Ohio, the Supreme Court held that a “limited” search can be justified on the basis of reasonable suspicion when a “police officer [is] able to point to specific and articulable facts which, taken together with rational inferences from those facts, reasonably warrant that intrusion.”176 In order to determine whether a search is reasonable, courts should balance the “nature and extent of the governmental interests involved” against the searched individual's expectations of freedom from interference by law enforcement officers.177 When considering the quantum of evidence necessary to generate reasonable suspicion, the Supreme Court has never provided a hard and fast rule, holding instead that the standard is “obviously less demanding than that required for probable cause”178 and requires “considerably less”179 proof of wrongdoing than a preponderance of the evidence standard would necessitate. The nebulosity of

176 Terry v. Ohio, 392 U.S. 1, 21, 30-31 (1968).
177 Id. at 22.
179 Id.
these principles has resulted in a standard that is so deferential to the judgment of police officers that practically any articulated justification is sufficient to withstand Fourth Amendment scrutiny.\footnote{See, e.g., United States v. Givan, 320 F.3d 452, 458-59 (3d Cir. 2003) (finding that police had reasonable suspicion for expanding the scope of a routine traffic stop when the driver of a car rented a day before the stop appeared “nervous and fidgety”).}

To determine whether a search or seizure is supported by “reasonable suspicion,” a court will evaluate the totality of the circumstances of each case to ascertain whether a law enforcement officer had a “particularized and objective basis” for suspecting that criminal activity was afoot.\footnote{United States v. Arvizu, 534 U.S. 266, 273 (2002).} While nominally “objective,” the reasonable suspicion test nevertheless permits police officers to rely on “their own experience and specialized training to make inferences from and deductions about the cumulative information available to them that ‘might well elude an untrained person.’”\footnote{Id. (quoting United States v. Cortez, 449 U.S. 411, 418 (1981)).} The standard for evaluating the propriety of investigatory conduct supported by reasonable suspicion is therefore not that of a reasonable individual, but rather an individual “versed in the field of law enforcement.”\footnote{Cortez, 449 U.S. at 418.} While the Supreme Court has gone to great lengths to characterize the reasonable articulable suspicion test as objective,\footnote{See Sokolow, 490 U.S. at 7 (noting that the reasonable suspicion test requires police to proffer “some minimal level of objective justification for the stop” (emphasis added) (quoting INS v. Delgado, 466 U.S. 210, 217 (1984))).} the emphasis that the Court has placed upon police officers’ particularized experience and training nevertheless reveals that the test is applied with deference to the subjective judgments of individual law enforcement officers.\footnote{See Flores, supra note 65, at 1091 (noting that the reasonable articulable suspicion standard is flawed because of “the judiciary’s almost unwavering deference to police determinations of whether it has been satisfied”).}

As one commentator has noted, the deference with which courts approach the reasonable suspicion test is in fact so expansive as to swallow up the requirement that a police officer be able to point to particularized facts to justify an intrusion.\footnote{Id.} Because the Supreme Court has explicitly authorized courts to determine the reasonableness of an investigatory procedure with reference to the experience and
training of a particular officer, the Court has introduced a large element of subjectivity into a test that it alleges to be “objective.”\textsuperscript{187} Even if the Court’s rulings fall short of endorsing searches made pursuant to full-blown, individualized subjectivity, the standard nevertheless embraces the subjective wiles of law enforcement as an institution by constraining its analysis to reasonable inferences drawn by an individual “versed in the field of law enforcement.”\textsuperscript{188} In light of law enforcement institutions’ profoundly self-interested concern with making arrests and obtaining convictions, Erica Flores had noted that such a rule is tantamount to “trusting the pope to uphold the Free Exercise Clause of the Constitution.”\textsuperscript{189}

The legal mechanics of applying a reasonable suspicion regime to canine sniff tests are inferable from Federal case law predating \textit{Place}. While circuit court cases decided before \textit{Place} almost uniformly concluded that canine sniffs, whether conducted in schools, at airports, or during traffic stops, did not constitute searches for the purposes of Fourth Amendment inquiry, the lion’s share of these decisions nevertheless addressed the question of “cause” in dictum.\textsuperscript{190} Even where the circuit courts did not address the question of cause overtly, many nevertheless recounted narratives of events that generated police suspicion.

In \textit{United States v. Fulero}, the court held that a canine sniff was not an unreasonable search when a police dog alerted at footlockers owned by “three hippies,” one of whom the arresting officer recognized as “probably involved in the narcotics traffic.”\textsuperscript{191} Although the court dismissed the petitioner’s assertion that the canine sniff was a search as “frivolous,” the Court’s decision to recount the factors that gave rise to the officer’s suspicion prior to the application of the sniff tacitly implicated the Fourth Amendment.\textsuperscript{192} Likewise, in \textit{United States v. Bronstein}, the Second Circuit held that a canine sniff was not a search, but nevertheless observed that tips received from airline personnel had provided law enforcement officers with “ample cause” to investigate the

\textsuperscript{187} \textit{Arvizu}, 534 U.S. at 273; \textit{Cortez}, 449 U.S. at 417-18.
\textsuperscript{188} \textit{Cortez}, 449 U.S. at 418.
\textsuperscript{189} Flores, supra note 65, at 294.
\textsuperscript{190} See, e.g., \textit{United States v. Klein}, 626 F.2d 22, 24-25 (7th Cir. 1980); \textit{United States v. Bronstein}, 521 F.2d 459, 461 (2d Cir. 1975); \textit{United States v. Fulero}, 498 F.2d 748, 749 (D.C. Cir. 1974).
\textsuperscript{191} 498 F.2d at 748.
\textsuperscript{192} Id. at 748-49.
petitioners. Finally, in United States v. Klein, the Seventh Circuit held that canine sniffs were not searches, but noted that “authorities already had reasonable suspicion to believe that the luggage contained contraband and used a dog as a further investigatory device.” In reaching this decision, the Court declined to decide whether the use of canine sniffs would be constitutional in sweeping, “dragnet-type sniffing expedition[s].” The Klein court’s final observation is in clear tension with its ruling that canine sniffs do not implicate the Fourth Amendment insofar as “the scope of an activity is [only] relevant . . . as to its reasonableness once it has been characterized as a search.”

One commentator has noted, more generally, that the tendency of the Fulero, Bronstein, and Klein courts to recount narratives of “cause” leading up to the application of canine sniffs is in tension with their underlying conclusion that canine sniffs, when considered alone, are not subject to Fourth Amendment scrutiny. Writing shortly after the Supreme Court’s decision in Place, Professor Honsinger observed that “if a sniff is not a search, it should be subject to no restrictions as to reasonableness, and there is no valid constitutional basis for subjecting it to a suspicion requirement.” Endorsing the Ninth Circuit’s view of the issue in United States v. Beale, Honsinger went on to suggest that a canine sniff should be considered a “subsearch” requiring a showing of at least some level of suspicion rising above arbitrariness but falling short of probable cause.

The Ninth Circuit’s treatment of the canine sniff issue provides a compelling lens through which to view the implications of a reasonable articulable suspicion regime. In Beale I, a police officer observed two male Caucasians exit a taxi cab in front of an airport. After checking three pieces of luggage, one of which bore an identification tag indicating a New Jersey address, the two individuals parted company and

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193 521 F.2d at 461.
194 626 F.2d 22, 27 (7th Cir. 1980).
195 Id.
196 See Honsinger, supra note 127, at 1095.
197 Id. at 1096.
198 Id.
199 United States v. Beale (Beale I), 674 F.2d 1327 (9th Cir. 1982), vacated, 463 U.S. 1202 (1983).
200 See Honsinger, supra note 127, at 1097.
201 Beale I, 674 F.2d at 1328.
obtained their airplane seating assignments from the ticket counter. The men shared the same flight itinerary, having purchased first class tickets to San Diego with a stopover in Houston. After leaving the ticket counter separately, the two men rejoined when they entered the boarding area. Observing that their behavior was consistent with a general drug courier profile, the officer approached the two gentlemen and identified himself. The officer asked the men for identification and whether they had ever been arrested. One of the men, who appeared nervous, answered that he had been arrested on a narcotics charge six years ago. The officer subsequently ordered that the bags that the two men checked be subjected to a canine sniff test. Upon sniffing the men’s bags, the dog alerted, and the officer found narcotics.

The Court expressed no opinion as to whether these facts were sufficient to generate reasonable articulable suspicion, but nevertheless observed that the trial court had erred in failing to conduct a Fourth Amendment inquiry. Because the Ninth Circuit found that a canine sniff test was “a Fourth Amendment intrusion, albeit a limited one,” it vacated the trial court’s ruling and remanded the case for further proceedings. The Supreme Court subsequently vacated and remanded the Ninth Circuit’s holding for reconsideration in light of the Supreme Court’s classification of canine sniffs as sui generis in United States v. Place. Rehearing the case, the Court resolved somewhat defiantly that a requirement of reasonable articulable suspicion was consistent with the Supreme Court’s holding in Place. Although this holding was subsequently reversed following an en banc rehearing, the court nevertheless observed that the

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202 Id.
203 Id.
204 Id.
205 Id. at 1328 n.1.
206 Id. at 1328-29.
207 Beale I, 674 F.2d at 1329.
208 Id.
209 Id.
210 Id. at 1335-36.
211 Id.
213 United States v. Beale (Beale II), 731 F.2d 590 (9th Cir. 1983), rehearing granted, 736 F.2d 1289 (9th Cir. 1983).
214 Id. at 593-94.
history of federal canine sniff jurisprudence in sister circuits tacitly suggested that canine sniffs should be subjected to a reasonable articulable suspicion standard:

Despite the general proffer of arguments tending to exclude canine investigations from Fourth Amendment control, no federal court has yet upheld a canine investigation in the face of a record demonstrating a lack of prior individualized suspicion. Several courts have expressly noted the existence of prior suspicion in affirming the validity of the sniff, and some have stressed that the court was not confronted with an indiscriminate “dragnet” type of investigation.216

In the course of reaching this conclusion, the Beale II Court cited the aforementioned cases of Klein and Bronstein, suggesting that a reasonable articulable suspicion regime would validate canine sniffs conducted under conditions resembling the facts of those cases. Moreover, although the Beale II Court failed to cite United States v. Fulero, its recognition that “no federal court has yet upheld a canine investigation in the face of a record demonstrating a lack of prior individualized suspicion” tacitly suggests the Court’s approval of the result in Fulero.217

Viewed through the lens of the Ninth Circuit’s holding in Beale II, the impact of a reasonable articulable suspicion regime on the surveillance technology market becomes clear. Such a regime would authorize canine sniff tests under circumstances falling far short of the requirements of probable cause. As in Fulero, such a regime would permit canine sniffs in instances where police suspicion is predicated on little more than amorphous social impressions (such as one or more suspects being a “hippy”) and uncorroborated personal recollections (such as one or more suspects being recognized as “involved in the drug trade”). The Ninth Circuit’s observation thus gives rise to the conclusion that imposing a reasonable articulable suspicion regime for canine sniffs would result in nothing more than a perpetuation of the post-Place status quo. The history of “reasonable suspicion” as a prerequisite for investigatory procedures is rife with evidence of the potential for police overreaching. Outside of the canine sniff context, the reasonableness regime has permitted police to expand the scope of investigations for reasons amounting to little more

216 731 F.2d at 595.
217 Id. at 594.
than the fact that an individual appeared “nervous and fidgety.” Because of the considerable deference accorded to police officers in the adjudication of whether or not a search was conducted pursuant to reasonable articulable suspicion, it appears that such a regime would provide law enforcement agencies with little incentive to invest in more accurate and less intrusive alternatives to the canine sniff test.

V. Analysis of Canine Sniffs Under a Probable Cause Regime

The preceding analysis illustrates that imposing a reasonable suspicion regime on the canine sniff test would give police officers incentives to maintain status quo procedures. Absent some meaningful reconfiguration of the reasonable articulable suspicion standard, self-interest will lead law enforcement officers to proffer minimal justifications for disproportionately invasive searches and seizures. Judicial deference to police justifications will in turn create a situation in which law enforcement agencies do not experience the costs of the exclusionary rule. As such, it appears unlikely that a reasonable suspicion regime would lead law enforcement officers to divert resources to less intrusive and more effective technologies. Imposing a probable cause regime may therefore be the best way to maximize market incentives for the development of investigatory alternatives that more closely resemble binary technologies. The remainder of this Note will set forth the legal principles by which a court might subject the canine sniff test to probable cause requirements and examine the effects of such a regime upon the surveillance technology market.

As noted above, the Place court based its classification of canine sniffs as “non-searches,” in part, on the observation that canine sniffs are non-intrusive. As Justice Ginsburg noted in her Caballes dissent, however, the imposition of a drug sniffing canine onto an individual’s person or property can

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219 Erica Flores persuasively demonstrates that a judicial presumption of unreasonability in all cases involving police search and seizure behavior would remedy the potential for overreaching. See, Flores, supra note 65.
220 Id.
221 Id.
222 See Stuntz, supra note 36, at 1275.
be quite intimidating.\footnote{224} As a dissenting Tenth Circuit judge noted in United States v. Williams, “These drug dogs are not lap dogs.”\footnote{225} Coupled with the fact that canines and their handlers are error prone,\footnote{226} the Justices’ observations suggest that the nature of the canine sniff intrusion merits some heightened degree of Fourth Amendment scrutiny. Although Justices Souter and Ginsburg ultimately conclude that reasonable articulable suspicion would be the most appropriate standard,\footnote{227} their analysis does not account for the fact, elaborated upon at length above, that reasonable articulable suspicion requirements have a minimal effect, if any at all, on police conduct.\footnote{228} Because a reasonable articulable suspicion regime would not accomplish the deterrent objectives of the exclusionary rule, Justice Ginsburg’s suggestion that canine sniffs should be controlled by Terry appears to run afoul of the Supreme Court’s avowed objective “to compel respect for the [Fourth Amendment] in the only effectively available way—by removing the incentive to disregard it.”\footnote{229}

A probable cause regime would accomplish this objective most effectively. While the notion that a reasonable articulable suspicion regime fails to deter unconstitutional police conduct would be sufficient, in and of itself, to justify a requirement of probable cause under the deterrence rule articulated in Mapp, such a conclusion is equally supported by the Court’s holding in Kyllo v. United States. Insofar as the Kyllo ruling proscribes the warrantless application of technologies not in general public use,\footnote{230} the Court’s holding appears to endorse the notion that drug sniffing canines should be subjected to a probable cause regime. Like thermal imaging devices, drug sniffing canines are not readily available to individual consumers.\footnote{231} Since drug sniffing canines are not in general public use, their use implicates legitimate privacy interests that should be

\begin{footnotesize}
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  \item \footnote{224} Illinois v. Caballes 543 U.S. 405, 421 (Ginsburg, J., dissenting).
  \item \footnote{225} 356 F.3d 1268, 1276 (10th Cir. 2004).
  \item \footnote{226} Caballes, 543 U.S. at 411-12 (Souter, J., dissenting).
  \item \footnote{227} Id. at 420 (Ginsburg, J., dissenting).
  \item \footnote{228} See supra notes 186-190 and accompanying text.
  \item \footnote{229} Mapp v. Ohio, 367 U.S. 643, 656 (1966) (quoting Elkins v. United States, 364 U.S. 206, 217 (1960)).
  \item \footnote{230} Kyllo v. United States, 533 U.S. 27, 40 (2001).
\end{itemize}
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subject to the strong protection of the Court’s exclusionary rule.\textsuperscript{232} Indeed, as noted above, canine sniffs may implicate even stronger privacy interests than thermal imaging devices.\textsuperscript{233} Whereas thermal imaging devices enable police to detect only a “crude visual, or . . . image” of heat radiating from a house,\textsuperscript{234} canine alerts permit intimate inspection of an individual’s “persons, houses, papers, and effects.”\textsuperscript{235}

Although \textit{Kyllo}’s “general public use” test arguably provides the strongest existing judicial justification for subjecting canine sniffs to a probable cause regime, it is nevertheless an undesirable rationale for imposing a probable cause requirement. As noted above, the \textit{Kyllo} rule imposes a Fourth Amendment stigma upon emerging technologies, requiring that they be subject to probable cause requirements until they come into general public use. If this rule is allowed a broad application, law enforcement agencies will have no incentive to forgo the demonstrably inaccurate and invasive canine sniff test in favor of more reliable and less intrusive technologies. As such, the court’s ruling in \textit{Kyllo} has a chilling effect on the development of technologies such as the nascent “Dog-on-a-Chip”—a handheld sensing device designed to mimic (and even improve upon) the capabilities of a drug sniffing canine.\textsuperscript{236} Under the \textit{Kyllo} rule, this technology would be subject to Fourth Amendment scrutiny even though its compactness and accuracy assures that it is less invasive than the canine sniff test.\textsuperscript{237} Moreover, since the device promises to greatly reduce law enforcement agencies’ expenditures in the course of providing food and general care for their canine detection units, applying the \textit{Kyllo} rule would detract from the significant savings that this device promises for law enforcement agencies.\textsuperscript{238} Therefore, the \textit{Kyllo} rule would result in a net loss in the realm of public safety by requiring that resources that would otherwise be freed for other law

\begin{footnotes}
\item 232 See generally \textit{Mapp}, 367 U.S. at 646-57.
\item 233 See supra note 135 and accompanying text.
\item 234 \textit{Kyllo}, 533 U.S. at 30.
\item 235 U.S. CONST. amend. IV.
\item 238 \textit{Id}.
\end{footnotes}
enforcement activities continue to be expended in the service of an antiquated canine program.

It follows from this analysis that a probable cause regime is most likely to encourage law enforcement agencies to divert resources from canine detection programs to technologies that are more accurate and less invasive. In order for such a regime to be effective, a court subjecting the canine sniff test to a probable cause requirement would need to carefully distinguish *Kyllo* on the ground that *Kyllo* involved a bright line protection of the home—an environment in which the court concluded that all details are “intimate.” Such a ruling would have the twin virtues of remedying the negative consequences of the *Caballes* Court’s holding that canine sniffs are not searches for the purposes of the Fourth Amendment and freeing police officers to pursue new search technologies for purposes other than home surveillance.

VI. CONCLUSION

This Note has shown that the *Caballes* Court’s classification of the canine sniff as a non-search provides incentives for law enforcement agencies to maintain their use of canines as an investigatory device. This consequence is undesirable from a policy perspective in light of pervasive evidence indicating that canines, contrary to the prevailing legal wisdom, are not one hundred percent accurate. Because canines err, false alerts enable police officers to conduct full-blown searches of people and objects that implicate legitimate privacy interests. This empirical fact lends support to the argument that canine sniffs should be subject to some level of Fourth Amendment scrutiny. Reasonable articulable suspicion will not suffice, however, to accomplish the deterrent objective of the exclusionary rule. Because courts determine whether or not a search was supported by reasonable articulable suspicion with undue deference to the subjective impressions of police officers, incentive remains for law enforcement agencies to maintain their investments in the inaccurate and invasive drug sniffing canine.

By requiring that police officers conduct investigations and uncover facts sufficient to merit the issuance of a judicial warrant, a requirement of probable cause will provide the

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239 *Kyllo*, 533 U.S. at 301.
greatest incentive for law enforcement agencies to seek more accurate and less invasive technologies. Law enforcement demand will, in turn, foster development of such technologies in the market, provided that courts considering such technologies are careful to distinguish the use of these technologies in the field from the facts at issue in Kyllo v. United States. Because Kyllo's holding can be limited to the use of emerging technologies for the purpose of home surveillance, requiring police officers to have probable cause prior to the use of a drug sniffing canine will enable law enforcement agencies to better provide for public safety without running afoul of the Fourth Amendment’s proscription of unreasonable searches and seizures.

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Enhancing Creditor Recovery

SHOULD SERVICES BE DEEMED “PROPERTY” FOR THE PURPOSE OF FRAUDULENT TRANSFER LAW?

INTRODUCTION

On the eve of his bankruptcy filing, Warren Ruffet, who has recently found himself in financial turmoil, gives his neighbor some valuable investment advice. Several months later, the lucky neighbor quadruples her wealth, cashing in five million dollars from the sale of Warren’s stock pick. Meanwhile, on the other side of town, Tom Jones, an established plastic surgeon operates on a patient, who has been badly scarred in a car accident. For personal reasons, Jones charges the patient only ten percent of what would have been a very expensive procedure. The operation turns out to be a success. Some months later, Jones, burdened by several ongoing malpractice lawsuits and rising insurance costs, files for bankruptcy.

While factually different, the above scenarios have one thing in common: both debtors provided services just before their bankruptcy filings. Considering that Ruffet and Jones are now in bankruptcy, their creditors can no longer engage in individual collection efforts. The filing of a bankruptcy petition operates as a temporary injunction against all collection activities. Because the bankruptcy laws prevent creditors from pursuing individual collection efforts, as a quid pro quo, a debtor cannot engage in creditor-harmful behavior by hiding his assets. Fraudulent transfer laws protect creditors from

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2 For example, without fraudulent transfer laws, a debtor could simply have a friend hold on to the debtor’s valuable personal property on the eve of bankruptcy so that the creditors do not get it. Likewise, the debtor could transfer the title to his
such a manipulation of assets by reversing any property transfer made by a debtor on the eve of bankruptcy that diminishes or depletes the debtor's estate.³

In our hypotheticals, although Ruffet and Jones have made their creditors worse off by providing uncompensated services, their actions appear to be legitimate from a fraudulent transfer law perspective.⁴ This is so because generally, the prototypical debtor defrauds his creditors by transferring property, and not services, on the eve of bankruptcy.⁵ Section 548 of the Bankruptcy Code explicitly prohibits such kind of transfers.⁶ The boundaries of fraudulent transfer law, however, become less clear when an insolvent debtor does not transfer any property but simply performs uncompensated services, as Ruffet and Jones did in the above examples.⁷

Currently, under the Bankruptcy Code and existing case law, it is unclear whether Ruffet's or Jones' creditors can recover the fair market value of their services from their third party recipients.⁸ This lack of clarity stems from the fact that fraudulent transfer law deals only with transfers of property and not transfers of services.⁹ Indeed, section 548 of the Bankruptcy Code speaks of liability in the context of transfers...
of property, not services. However, if bankruptcy courts were to classify services as property for the purposes of fraudulent transfer law, then creditors would have the power to collect the value of such services from third party recipients. Thus, the determination of whether services should be deemed property tests the limits of fraudulent transfer law and weighs directly on one of the major bankruptcy policies—the maximization of debtors’ assets for the benefit of creditors.

This Note addresses the question of whether services provided by a debtor to a third party should be deemed a transfer of property for the purpose of valuing the debtor’s estate. As it now stands, services are not property under the traditional definition of the term. Nonetheless, ending the inquiry here seems premature. In a bankruptcy context, courts can expand the concept of property to include services. Yet, endorsing the blanket statement that services are always property seems equally unsound. Considering the already-prevalent pro-creditor sentiment of the Bankruptcy Code, such an approach would not only forestall the debtor’s recuperation efforts in bankruptcy, but also would interfere with the rights of third parties and cause them undue hardship despite their lack of privity with creditors.

Part I of this Note provides an overview of fraudulent transfer theory under federal and state law. Part II examines the question of whether services should be deemed “property” for the purposes of fraudulent transfer law. It provides an overview of section 548 of the Bankruptcy Code, which specifically authorizes the trustee to challenge certain transfers deemed fraudulent. Also, it explains the concept of property as it is currently viewed under the fraudulent transfer scheme and draws parallels to cases dealing with marital division of assets on divorce. The marital cases provide a good reference in this context because divorce proceedings usually require courts to determine the value of a spouse’s services for the purpose of dividing marital assets. Part III describes the equitable approach used by marital courts and its application.

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10 See 1 GARRARD GLENN, FRAUDULENT CONVEYANCES AND PREFERENCE § 212 (1940) [hereinafter GLENN, FRAUDULENT CONVEYANCES].
11 See infra discussion and accompanying notes in Part I.A.
12 The commencement of a bankruptcy case creates an “estate.” The bankruptcy estate is comprised initially of all of the debtor's interests in property at the time the case begins. 11 U.S.C.S. § 541.
13 See supra notes 9-10 and accompanying text.
in the fraudulent transfer context. As an alternative, it then introduces the selective approach to services under the “underlying chattel” theory. The “underlying chattel” theory argues that services should not be deemed property unless they “culminate in transferable property.” In other words, if the performance of an uncompensated service confers a transferable asset on its recipient, then the bankruptcy courts should construe it as a transfer of property. In contrast, if an uncompensated service confers an intangible inalienable benefit, then the courts should not classify such services as a transfer of property. Part III also advances arguments for and against considering services “property” in the fraudulent transfer context from the debtor, creditor and third party perspectives.

I. OVERVIEW OF FRAUDULENT TRANSFER LAW

The modern fraudulent transfer law originated from England’s Statute of 13 Elizabeth, passed in 1571. Later, the law continued to evolve in the Uniform Fraudulent Conveyance Act (“UFCA”), the Bankruptcy Act of 1978, and most recently, the Uniform Fraudulent Transfer Act (“UFTA”). Although fraudulent transfer law has evolved, its application to modern transactions has remained difficult due to various evidentiary challenges.

15 This approach comes from the Alabama Supreme Court’s opinion in American National Red Cross v. ASD Specialty Healthcare, 888 So. 2d 464, 466 (Ala. 2003). In addition, the notion of services “culminating in transferable property” has been articulated in the context of federal estate and gift taxation. See, e.g., Comm’r v. Hogle, 165 F.2d 352 (10th Cir. 1947); Boris I. Bitker et al., Federal Estate and Gift Taxation 79-81 (8th ed. 2000).

16 See supra note 15 and accompanying text.

17 For example, a debtor’s rendition of a service or advice to a third party may result in the creation of a tangible asset in the hands of that party such as cash, securities, works of art, and the like. See, e.g., Comm’r v. Hogle, 165 F.2d 352 (10th Cir. 1947); Federal Estate and Gift Taxation, supra note 15, at 79 and accompanying notes.

18 Peter A. Alces, The Law of Fraudulent Transactions ¶ 5.01[2][a], at 5-11 (1989) “[T]he first fraudulent disposition statute in the English legal system; it provided the model for fraudulent conveyance law in the United States and continues to have an influence on fraudulent disposition jurisprudence.” Id. ¶ 5.01[4][d][i], at 5-21.

19 Id. ¶ 5.01[2][a], at 5-11.

produced a pro-creditor shift in the way courts and legislatures think about fraudulent transfer law.\textsuperscript{21}

Part I explores these changes, first by providing background information on the bankruptcy process. Then, it discusses the evolution and purpose of fraudulent transfer law and briefly looks at two main types of fraud: actual and constructive. Finally, it provides an overview of fraudulent transfer law in the context of the Bankruptcy Code\textsuperscript{22} as well as state law models—the UFTA and the UFCA.

A. Background and Purpose of Fraudulent Transfer Law

From the beginning, the Statute of 13 Elizabeth condemned property transfers by the debtor who had an actual intent “to hinder, delay, or defraud” his creditors.\textsuperscript{23} Subsequently, the drafters of the Bankruptcy Code expanded fraudulent transfer law to include constructively fraudulent transfers.\textsuperscript{24} This expansion allowed for automatic application of fraudulent transfer law whenever an insolvent debtor transferred property for inadequate consideration.\textsuperscript{25} Later, the legislature further broadened the scope of the law by making various amendments to the Bankruptcy Code.\textsuperscript{26} The most recent of these amendments went into effect on October 17, 2005.\textsuperscript{27} The 2005 amendments exhibit a pro-creditor sentiment


\textsuperscript{21} Williams, \textit{supra} note 20, at 60, 66.
\textsuperscript{23} ALCES, \textit{supra} note 18, ¶ 5.01[4][d], at 5-21.
\textsuperscript{24} See id. ¶ 5.01[2][d], at 5-14.
\textsuperscript{25} Baird & Jackson, \textit{supra} note 20, at 830.
\textsuperscript{26} See Bankruptcy Abuse Prevention and Consumer Protection Act of 2005 (BAPCPA), \textit{available at} http://www.usdoj.gov/ust/eo/bapepa/index.htm [hereinafter BAPCPA].
\textsuperscript{27} SHEILA M. WILLIAMS ET AL., BANKRUPTCY ABUSE PREVENTION AND CONSUMER PROTECTION ACT OF 2005, at 3 (2005).

Signed into law by President Bush on April 20, 2005, the Bankruptcy Prevention and Consumer Protection Act of 2005 represents the largest overhaul of the Bankruptcy Code since its enactment in 1978. The Act seeks to “improve bankruptcy law and practice by restoring personal responsibility and integrity in the bankruptcy system and ensure that the system is fair for both debtors and creditors.”\textsuperscript{31}

The heart of the Act's consumer bankruptcy reforms consists of the implementation of a “means testing” mechanism that is intended to ensure
by focusing on protecting creditors from debtors’ abusive filing practices and discouraging debtors’ use of bankruptcy as a means of avoiding their obligations to creditors. For example, as of October 17, 2005, creditors can recover not only pre-bankruptcy assets of a Chapter 11 individual debtor but also the assets that the individual debtor acquired after the bankruptcy filing. In contrast, before the 2005 amendments, the debtor’s property acquired post-petition was not a part of his bankruptcy estate and thus was not available for distribution to his creditors. Separately, the new amendments have also lengthened the time period for an individual debtor to obtain a bankruptcy discharge from six to eight years. In sum, the recent changes to the Bankruptcy Code have strengthened the creditors’ power in relation to the debtor’s bankruptcy options.

With respect to a typical bankruptcy case, when a debtor files for bankruptcy several interesting things occur. First, commencement of the bankruptcy case creates a bankruptcy “estate” comprised of all of the debtor’s property at the time of the filing. The instant a debtor files a bankruptcy petition, the debtor’s property becomes the property of the estate, which means it no longer belongs to the debtor. Property of the estate is an important concept in bankruptcy because it allows the bankruptcy trustee to liquidate the debtor’s nonexempt assets and to distribute those assets to

that debtors repay creditors the maximum debtors can afford. The Act also includes provisions intended to deter serial and abusive bankruptcy filings. 


28 WILLIAMS, supra note 27, at 54.
29 BAPCPA § 321(a)(1) (codified at 1 U.S.C.S. § 1115 (LexisNexis Supp. 2006)). Section 1115 of the Bankruptcy Code is a new Chapter 11 business reorganization section for cases filed by individual debtors. See WILLIAMS, supra note 27, at 107 (“The provision [§ 1115] also subjects a Chapter 11 discharge for an individual debtor to the same exceptions from discharge that apply to Chapter 7 and Chapter 13 cases.”). 

30 WILLIAMS, supra note 27, at 107.
32 Id. § 541(a) (LexisNexis 1997).
33 See id. Some estate property may be later returned to the debtor as exempt property under section 522 (LexisNexis 2004 & Supp. 2005) or by abandonment under section 554 (LexisNexis 2004 & Supp. 2005).
creditors in an organized manner.\textsuperscript{34} Another important consequence of the bankruptcy filing is that it creates an “automatic stay” that stops all individual creditor collection efforts.\textsuperscript{35} The automatic stay functions as an injunction that temporarily protects the debtor from all creditor actions to collect pre-petition debts.\textsuperscript{36} The underlying goal of this process is to get an “honest but unfortunate debtor” back on his feet.\textsuperscript{37}

The trustee’s role in the bankruptcy proceeding is manifold. It includes protecting the property of the estate that has been collected for the benefit of creditors.\textsuperscript{38} In addition, aside from determining whether any property should be removed from the estate and returned to the debtor as exempt property, a trustee may avoid certain property transfers made by the debtor in order to maximize the value of the estate available for distribution to creditors.\textsuperscript{39} Sections 544 through 551 of the Code provide the bankruptcy trustee with such “avoiding powers,”\textsuperscript{40} including the power to set aside fraudulent transfers.\textsuperscript{41}

To understand the purposes of fraudulent transfer law, one must look at the underlying policies of bankruptcy. As a collective proceeding, bankruptcy enhances creditor recovery using a presumption of equality among same-situated creditors.

\textsuperscript{34} The trustee is a representative of the bankruptcy estate, \textit{id.} § 323(a) (LexisNexis 2004 & Supp. 2005). \textit{See} \textit{BANKRUPTCY LAW MANUAL}, ¶ 6.08, at 6-48 (Benjamin Weintraub and Alan N. Resnick eds., Warren, Forham & Lamont 1992). There are several different types of trustees depending on which bankruptcy chapter the case is filed under. \textit{See id.} ¶ 6.08, at 6-49.


\textsuperscript{36} \textit{BANKRUPTCY LAW MANUAL}, supra note 34, ¶ 1.09[1], at 1-35.

\textsuperscript{37} \textit{Local Loan Co. v. Hunt}, 292 U.S. 234, 244 (1934).

\textsuperscript{38} \textit{BANKRUPTCY LAW MANUAL}, supra note 34, ¶ 6.08, at 6-48.

\textsuperscript{39} \textit{Id.} ¶ 7, at 7-3.

\textsuperscript{40} 11 U.S.C.S. §§ 544-51 (LexisNexis 1997, Supp. 2005 & Supp. 2006). Avoiding powers are powers given to a trustee in bankruptcy to recover property interests for the benefit of all of the debtor’s creditors. \textit{BANKRUPTCY LAW MANUAL}, supra note 34, ¶ 7, at 7-3. After the trustee has avoided a property interest, 11 U.S.C.S § 550, the transfer that created that property interest is “preserved for the benefit of the estate,” \textit{id.} § 551, and any interest in property so recovered becomes the property of the estate, \textit{id.} § 541(a)(3).

\textsuperscript{41} 11 U.S.C.S. § 548. While this Note focuses on section 548, the analysis similarly would apply to section 547, which allows the trustee to avoid preferential transfers made shortly before the commencement of the bankruptcy case that otherwise would allow one creditor to claim more than its fair share of the debtor’s assets. \textit{Id.} § 547. Section 547 is intended to assure equality of distribution among same-situated creditors. \textit{BANKRUPTCY LAW MANUAL}, supra note 34, ¶ 7.05, at 7-18. \textit{See also} Thomas H. Jackson, \textit{Avoiding Powers in Bankruptcy}, 36 \textit{Stan. L. Rev.} 725, 757 (1984) (“[P]references differ from fraudulent conveyances precisely because preference law focuses on relationships among creditors in light of the advantages of a collective proceeding, not on relationships between creditors and their debtor.”).
as a starting point.\textsuperscript{42} From a creditor's standpoint, the underlying goals of bankruptcy are to deal with the universe of creditors as a whole on an equitable basis and to maximize the value of the estate available for distribution to all creditors.\textsuperscript{43} In contrast to bankruptcy, state collection law focuses on the rights of an individual creditor whose motivation is to get to the debtor's assets before any other creditor.\textsuperscript{44}

In bankruptcy, fraudulent transfer laws allow creditors to set aside certain transfers by debtors that undermine creditors' collection efforts and unfairly diminish the debtor's estate.\textsuperscript{45} A debtor facing imminent economic downfall is more likely to conceal property in an effort to defraud his creditors. The law of fraudulent transfers seeks to prevent precisely these types of actions.\textsuperscript{46}

\textbf{B. Actual and Constructive Fraud}

There are two major types of fraudulent transfers: actual and constructive.\textsuperscript{47} Classic fraudulent transfer law only dealt with the debtor who intentionally manipulated his assets in order to keep them away from his creditors.\textsuperscript{48} Today, actual fraud remains the basis for avoidance of transfers under section 548(a)(1) of the Bankruptcy Code and requires proof of the subjective intention of the debtor in making a transfer.\textsuperscript{49} For example, a debtor who gives his valuable personal property to a friend on the eve of bankruptcy, so that the creditors do not get it, has made an actual transfer with the "intent to hinder, delay, or defraud [his creditors]."\textsuperscript{50} Constructive fraud, on the other hand, manifests itself through the presence of certain specified facts irrespective of the actual subjective

\begin{footnotesize}
\item[42] \textit{Bankruptcy Law Manual}, suprano note 34, ¶ 7.05, at 7-18.
\item[43] Jackson, \textit{supra} note 41, at 728-29.
\item[44] \textit{Bankruptcy Law Manual}, suprano note 34, ¶ 2.02, at 2-4 ("In addition, our system of debt collection is based on "grab law" pursuant to which the first creditors to acquire liens on the debtor's property succeed to the detriment of the remaining creditors who are left empty-handed.").
\item[46] Alces, \textit{supra} note 18, ¶ 5.01[1].
\item[47] 11 U.S.C.S. § 548; see infra notes 48, 51 and accompanying text.
\item[48] Jackson, \textit{supra} note 41, at 778 (citing Clark, \textit{supra} note 20).
\item[49] \textit{Bankruptcy Law Manual}, suprano note 34, ¶ 7.06[1], at 7-58 ("The state of mind of the debtor must be examined in order to determine whether this type of fraud [referring to actual fraud] took place.").
\end{footnotesize}
intention of the debtor. As a result, constructive fraud serves as “a per se rule” of avoidance in cases of alleged fraud where there is little to no apparent evidence of actual wrongdoing. Even if there is no evidence of a debtor’s misbehavior, some transfers by their very nature make creditors worse off and are thus facially suspect. Under this rationale, constructive fraud becomes a creditor’s remedy against the debtor.

C. Current Fraudulent Transfer Laws

Today, fraudulent transfer laws are incorporated in the Bankruptcy Code and the law of every state. These laws are not identical but they overlap in many respects. Section 548 of the Bankruptcy Code governs avoidance of fraudulent transfers. State fraudulent law can be invoked under section 544(b) of the Bankruptcy Code. In addition, individual states follow the UFTA or the UFCA. Several states, however, have not adopted uniform or even statutory fraud laws and instead deal with fraudulent transfer law as a matter of case law.

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51 Id. § 548(a)(1)(B); see also GLENN, FRAUDULENT CONVEYANCES, supra note 10, § 275, at 471; § 294, at 510-11; & § 298, at 518.
52 Baird & Jackson, supra note 20, at 831; see, e.g., Philco Fin. Corp. v. Pearson, 335 F. Supp. 33, 40-41 (N.D. Miss. 1971): “Courts often infer a fraudulent intention from circumstances attending a transaction from the presence of certain well-known labels or badges of fraud. These badges of fraud are suspicious circumstances which, if unexplained, warrant an inference of fraud, and the more common badges of fraud were thus enumerated in Reed v. Lavecchia, 187 Miss. 413, 193 So. 439 (1940):...” Philco Fin. Corp., 335 F. Supp. at 40-41 (quoting Lavecchia, 187 Miss. at 424-25).
53 Baird & Jackson, supra note 20, at 831-32.
54 See id. at 831.
55 WM. MILLER COLLIER ET AL., COLLIER ON BANKRUPTCY ¶ 548.01[4], at 548-12 (Alan N. Resnick and Henry J. Sommer, eds., 15th ed. 2006).
57 Id. § 544(b)(1) (LexisNexis Supp. 2005).
58 COLLIER ON BANKRUPTCY, supra note 55, ¶ 548.01[3], at 548-611.
59 See ALCES, supra note 18, ¶ 1.02[1][b][i] (“Those states are in the minority, and, in fact, will occasionally refer to the UFCA and cases decided thereunder to resolve fraudulent disposition issues.”).
The UFTA is in many respects similar to section 548 of the Code. While the legislature originally wanted to replace the UFCA with the UFTA, some states, such as New York, still use the UFCA. For the most part, the drafters of the UFTA tried to provide guidance for potential fraudulent transfer problems in complex transactions. The UFTA maintained the original definition of an actual fraudulent transfer. However, in deciding whether a transferor received value, the UFTA, unlike the UFCA, let go of the “good faith requirement.” Furthermore, in an effort to make it more difficult to defraud creditors, the UFTA allowed creditors extra relief against recipients of fraudulent transfers.

With respect to the Bankruptcy Code, section 548 is one of the most powerful tools available to a bankruptcy trustee who believes that the debtor made a fraudulent transfer; the trustee may also utilize applicable state law under the “‘strong-arm’ power” of section 544. Section 548 is a mechanism to police “fraud and self-dealing by a debtor at the expense of the debtor’s creditors.” Section 548(a) authorizes the trustee to challenge fraudulent transfers made within two years before the filing of the bankruptcy case. In part, it provides:

(a) (1) The trustee may avoid any transfer . . . of an interest of the debtor in property, or any obligation . . . incurred by the debtor, that was made or incurred on or within 2 years before the date of the filing of the petition, if the debtor voluntarily or involuntarily—

(A) made such transfer or incurred such obligation with actual intent to hinder, delay, or defraud any entity to which the debtor was or became, on or after the date that such transfer was made or such obligation was incurred, indebted; or

(B) (i) received less than a reasonably equivalent value in exchange for such transfer or obligation; and

60 COLLIER ON BANKRUPTCY, supra note 55, ¶ 548.01[3], at 548-611.
62 ALCES, supra note 18, ¶ 1.02 [1][b][iii].
63 Id.
64 COLLIER ON BANKRUPTCY, supra note 55, ¶ 548.01[3], at 548-611.
65 Id.
66 Jackson, supra note 41, at 732.
67 “The trustee may avoid any transfer of an interest of the debtor in property or any obligation incurred by the debtor that is voidable under applicable law by a creditor holding an unsecured claim . . . .” 11 U.S.C.S. § 544(b)(1) (LexisNexis Supp. 2005).
68 In re Feiler, 218 F.3d 948, 955 (9th Cir. 2000).
(ii)(I) was insolvent on the date that such transfer was made or such obligation was incurred, or became insolvent as a result of such transfer or obligation. . . .

On its face, the Bankruptcy Code restricts fraudulent transfer law to a transfer of an interest in property. Thus, a creditor seeking to avoid any type of fraudulent transfer, actual or constructive, must show that a debtor made a transfer of property and not merely a transfer of services. Black's Law Dictionary defines property as “the right of ownership” and defines services as “[a]n intangible commodity in the form of human effort, such as labor, skill, or advice.” Accordingly, when a reasonable person thinks about property, he or she considers “whether it can be assigned, sold, transferred, conveyed, or pledged, or whether it terminates on the death of the owner.” If services are something “personal to the holder,” which terminate at death and are not inheritable, then those services have no proprietal attributes in the traditional sense of the term. Unlike Black's Law Dictionary, the Bankruptcy Code does not define the term property or services. As a result, this lack of definition leaves ample room for further expansion of fraudulent transfer law. In fact, it allows courts to maneuver on a case-by-case basis to determine whether services should be deemed property in the fraudulent transfer context.

II. SHOULD SERVICES BE DEEMED PROPERTY?

Under the current Bankruptcy Code and existing case law, it is unclear whether a debtor's creditors can recover the

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70 Id.
71 Id.
72 Id.
73 BLACK'S LAW DICTIONARY, supra note 7, at 1232.
74 Id. at 1372.
76 Id.
77 Id. (deciding that an M.B.A. was not “property” for purposes of dissolution of a marriage).
78 The UFTA defines “property” as “anything that may be the subject of ownership.” UFTA § 1(10) (1984). The comment to the UFTA further explains that “property includes both real and personal property, whether tangible or intangible, and any interest in property, whether legal or equitable.” Id. § 1, cmt. (10).
fair market value of the debtor's services provided to a third party. If courts were to classify services as property for the purpose of fraudulent transfer law, then creditors could recover the fair market value of such services from third party recipients. However, if courts were to leave property and services to their traditional definitions, then the value of such services would be out of creditors' reach. Part II addresses central considerations that must be taken into account when deciding whether services should be deemed property. First, it discusses the intricacies of fraudulent transfer law under section 548 of the Bankruptcy Code. Then, it describes how the concept of property has been applied in a bankruptcy setting. Finally, it examines the concept of property in other contexts and considers the implications of reclassifying services as property in the context of fraudulent transfer law.

A. Fraudulent Transfers: An Overview of Section 548

The bankruptcy law balances debtor and creditor rights with the goal of accomplishing an equitable allocation of assets. Under section 548 of the Bankruptcy Code, a bankruptcy trustee may recover property for the bankruptcy estate if (1) there was a transfer, (2) of a debtor's interest in property, (3) made on or within two years before the debtor's bankruptcy petition. One of the essential elements for setting a transfer aside under section 548(a)(1)(A) is the debtor's subjective fraudulent intent which can be established by circumstantial acts. On the other hand, section 548(a)(1)(B) deals with constructively fraudulent transfers, thereby asserting that a transfer is not constructively fraudulent if the debtor received adequate consideration.

79 ALCES, supra note 18, ¶ 1.03[2].
81 COLLIER ON BANKRUPTCY, supra note 55, ¶ 548.04[1], at 548-22.3; see also 11 U.S.C.S. § 548(a)(1)(A).
82 11 U.S.C.S. § 548(a)(1)(B). Unlike the UFCA, the Code's adequate consideration requirement does not contain a good faith component. COLLIER ON BANKRUPTCY, supra note 55, ¶ 548.05[1][b]. However, “although good faith is not an element of the [Bankruptcy Code's] section 548(d)(2) definition of ‘value’, the bad faith of a transferee may still result in the setting aside of a transfer if the transferee's bad faith can be imputed to the transferor so that the transferor actually intended "to hinder, delay, or defraud" creditors.” Id. For the purposes of section 548, “value” means property, or satisfaction or securing of a present or antecedent debt of the debtor, but does not include an unperformed promise to furnish support to the debtor or to a relative of the debtor.” 11 U.S.C.S. § 548(d)(2)(A).
Thus, to determine whether a fraudulent transfer has occurred, courts must address several issues. First, a bankruptcy trustee who is seeking to avoid any type of fraudulent transfer must prove that a “transfer” has occurred. The Bankruptcy Code defines “transfer” in section 101(54) as “each mode, direct or indirect, absolute or conditional, voluntary or involuntary, of disposing of or parting with (i) property, or (ii) an interest in property.”\textsuperscript{83} The court must also determine the time of the transfer since a fraudulent transfer may only be set aside if it “was made or incurred on or within 2 years before the date of the filing of the petition.”\textsuperscript{84} Once a party seeking to invalidate the transfer proves that a “transfer” was made, it also has to show that the transfer involved the debtor’s “property.”\textsuperscript{85} However, unlike the term “transfer,” bankruptcy law does not provide for an exhaustive or uniform understanding of the term “property.”\textsuperscript{86} In searching for the meaning of this term, courts often refer to “commercial sense and pertinent state law property concepts.”\textsuperscript{87}

B. The Concept of Property in Bankruptcy

The Statute of Elizabeth limited the concept of property to tangible assets.\textsuperscript{88} Today, however, creditors can recover tangible or intangible property.\textsuperscript{89} In order to maximize creditors’ remedies, the courts have breathed elasticity into the term “property.”\textsuperscript{90} Generally, it includes “anything of value, anything which has debt paying or debt securing power.”\textsuperscript{91} In \textit{Segal v. Rochelle}, the Supreme Court explained that the purpose of construing the term “property” broadly is to secure for creditors everything of value the [debtor] may possess in alienable or leviable form when he files his petition. To this end, the term ‘property’ has been construed most generously and an

\textsuperscript{83} 11 U.S.C.S. § 101(54).
\textsuperscript{84} \textit{Id.} § 548(a)(1). But see the new § 548(e)(1), which provides a trustee with a ten year limitation period to avoid a debtor’s transfer made “to a self-settled trust or similar device.” \textit{Id.}
\textsuperscript{85} \textit{Id.}
\textsuperscript{86} See discussion infra Part II.B. and accompanying notes.
\textsuperscript{87} ALCES, supra note 18, ¶ 6.02[1][b].
\textsuperscript{88} GLENN, FRAUDULENT CONVEYANCES, supra note 10, § 135.
\textsuperscript{89} \textit{Id.} § 138.
\textsuperscript{90} Segal v. Rochelle, 382 U.S. 375, 379 (1966); \textit{In re Lewis W. Shurtleff, Inc.}, 778 F.2d 1416, 1419 (9th Cir. 1985).
\textsuperscript{91} Pirie v. Chicago Title & Trust Co., 182 U.S. 438, 443 (1901).
interest is not outside creditors' reach just because it is novel or contingent or because enjoyment must be postponed.\textsuperscript{92}

While the Bankruptcy Code does not contain a definition of property, it also does not explicitly exclude services from being classified as property. Although this decision is ultimately left to judicial analysis and interpretation, the lack of any definition leaves courts to many interpretive possibilities. The very fact that the traditional concepts of property and services are dissimilar at first glance may allow courts to recognize overarching interpretations when analyzing these concepts. Currently, however, there is little case law dealing with the question of whether services could be considered property in the fraudulent transfer context. Accordingly, marital law cases offer some relevant examples.

C. Property in Other Contexts: Learning From Marital Law Cases

In marital cases, courts have often crossed the bridge from the traditional definition of property to a more liberal construction of an asset in question in order to achieve an equitable result.\textsuperscript{93} For example, courts have viewed a medical degree or a celebrity's career as property eligible for equitable distribution.\textsuperscript{94} In the decisions that follow, the judicial perception of marital property invariably stems from the view that the institution of marriage is "an economic partnership."\textsuperscript{95} As such, it involves a specific exchange of tangible and intangible resources, which must be accounted for upon divorce.\textsuperscript{96} In adopting an equitable approach to such an analysis, the courts ultimately move away from formal or traditional definitions of property in order to include such

\textsuperscript{92} Segal, 382 U.S. at 379.
\textsuperscript{93} Archer v. Archer, 493 A.2d 1074, 1077-78 (Md. 1985).
\textsuperscript{94} See discussion infra notes 97-130 and accompanying text. Marital property is defined broadly as "all property acquired by either or both spouses during the marriage and before the execution of a separation agreement or the commencement of a matrimonial action, regardless of the form in which title is held." O'Brien v. O'Brien, 489 N.E.2d 712, 715 (N.Y. 1985).
\textsuperscript{95} Forcucci v. Forcucci, 443 N.Y.S.2d 1013, 1015 (App. Div. 1981) ("The Equitable Distribution Law was enacted as the result of a growing realization that the marriage relationship is also an economic partnership and that when a marriage ends there should be some comprehensive and fair approach to the economic incidents of divorce.").
\textsuperscript{96} Id.
intangible assets like professional degrees and careers under the property umbrella.

To begin, in *O’Brien v. O’Brien*, the New York Court of Appeals held that a husband’s medical degree obtained during his marriage could be marital property subject to equitable distribution upon divorce. In that case, the parties were married for almost ten years. During that period, the couple’s efforts were primarily focused on obtaining the husband’s medical degree. In fact, while the husband was in the process of obtaining his medical degree, the wife worked to support both of them instead of pursuing her permanent teaching certification. After completing his undergraduate degree and premedical requirements, the O’Briens relocated to Guadalajara, Mexico, where Mr. O’Brien attended medical school. During this time, Mrs. O’Brien continued to work to support them financially. The parties later returned to New York so that Mr. O’Brien could complete his degree program and internship. Two months after Mr. O’Brien received his license to practice medicine, he filed for divorce.

At the divorce proceeding, Mr. O’Brien argued that his medical degree was not property but rather a “personal attainment in acquiring knowledge.” The Court of Appeals disagreed explaining that traditional common law property doctrine does not constrain the definition of marital property. Indeed, the court reasoned that although a degree does not render itself to “sale, assignment or transfer,” it still might be “property” under the New York divorce statute. In the court’s opinion, the New York statutory law with respect to marital property easily accommodated inclusion of a medical degree. Further, the court noted that the statute’s economic partnership theory required classification of career assets as

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98 Id. at 713.
99 See id. at 713-14.
100 Id.
101 Id.
102 Id. at 714.
103 O’Brien, 489 N.E.2d at 714.
104 Id.
105 Id.
106 Id. at 715.
107 Id.
108 Id. at 717 (“That a professional license has no market value is irrelevant.”).
109 O’Brien, 489 N.E.2d at 715.
marital property subject to equitable distribution. In sum, the *O'Brien* court, through the use of equity and with the goal of doing justice for the suffering spouse, went beyond the traditional definition of property in order to enlarge the marital estate.

Hence, in *Golub v. Golub*, a New York trial court held that a spouse’s celebrity career, similar to a professional degree, represents marital property upon divorce. In *Golub*, a famous actress and model, Marisa Berenson, married an established attorney. After four and a half years of marriage, the couple divorced. Throughout the marriage, Ms. Berenson was focused on advancing her career. She spent a lot of time abroad, during which time Mr. Golub took care of their home. At the divorce proceeding, Mr. Golub argued that the increase in value of his spouse’s acting and modeling career was marital property, subject to equitable distribution upon divorce. The court sided with Mr. Golub, rejecting Ms. Berenson’s arguments “that her celebrity status is neither ‘professional’ nor a ‘license’ and hence not an ‘investment in human capital subject to equitable distribution.’” In deciding the issue, the court referred to *O'Brien v. O'Brien*, in which the Court of Appeals held that a professional license constituted marital property. The *Golub* court concluded that “[t]he *O'Brien* remedy should be applied evenhandedly to all spouses,” professional and nonprofessional alike, justifying its decision by the need to avoid “an economic windfall to some and an

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110 Id. at 716. The court stated:

The Legislature has decided, by its explicit reference in the statute to the contributions of one spouse to the other’s profession or career, that these contributions represent investment in the economic partnership of the marriage and that the product of the parties’ joint efforts, the professional license, should be considered marital property.

112 Id. at 950.
113 Id. at 947.
114 Id.
115 Id. at 948.
116 Id.
117 *Golub*, 527 N.Y.S.2d at 949.
118 Id. at 949.
120 *Golub*, 527 N.Y.S.2d at 950.
unfair deprivation to others.” 121 The court noted that marital property should not be constrained to “licenses enumerated in the Education Law.” 122 It further held that “the skills of an artisan, actor, professional athlete or any person whose expertise in his or her career has enabled him or her to become an exceptional wage earner should be valued as marital property subject to equitable distribution.” 123

In another case, Elkus v. Elkus, a famous opera singer, Frederica von Stade, filed for divorce after a seventeen-year marriage. 124 During the course of the marriage, Ms. von Stade reached the apex of her career. 125 Her husband alleged that he contributed to his wife’s success, and therefore, her career should be shared as marital property. 126 The appellate court agreed with Mr. Elkus, holding that under the New York definition, “things of value acquired during marriage are marital property even though they may fall outside the scope of traditional property concepts.” 127 The court further stated that “[t]he statutory definition of marital property does not mandate that it be an asset with an exchange value or be salable, assignable or transferable.” 128 Thus, the court found no reason why it could not extend the O’Brien rule to a celebrity career. The Elkus court followed Golub’s reasoning, noting that “[t]here is no rational basis upon which to distinguish between a degree, a license, or any other special skill that generates a substantial income.” 129 Therefore, because defendant contributed to the advancement of Ms. von Stade’s career, such advancement constituted marital property. 130

In the marital context, because courts recognize that the supporting spouse suffers inequity and unfairness upon divorce, the courts choose to even the score between the spouses by declaring intangible assets such as professional degrees and celebrity careers to be marital property. 131 This

121 Id.
122 Id. at 949.
123 Id. at 950.
125 Id. at 902.
126 Id.
127 Id. (citing O’Brien v. O’Brien, 489 N.E.2d 712 (N.Y. 1985)).
128 Id. at 902.
129 Id. at 904.
130 Elkus, 572 N.Y.S.2d at 904.
131 See, e.g., O’Brien, 489 N.E.2d at 716-17 (noting that it is “unfair not to consider the license a marital asset” in light of the fact that “[w]orking spouses are
inequity is especially acute where the supporting spouse purposely puts the development of his or her own career on hold. By analogy, a creditor, like a supporting spouse, also suffers inequity and unfairness when a debtor breaks his contractual obligations and leaves his creditor empty-handed. In the fraudulent transfer context, this inequity manifests itself where the debtor purposely transfers assets on the eve of bankruptcy so that his creditors get nothing. Thus, the equitable analysis employed by the marital courts may also be applied to the concept of services in the bankruptcy context. Specifically, instead of being bound by the traditional concepts of property, bankruptcy courts can choose to construe the term “property” in such a way as to include services under its umbrella. This approach would maximize the value of the debtor’s estate, thus providing a powerful remedy to the debtor’s creditors. Otherwise, if services cannot be considered property, it might allow disinterested debtors to manipulate the bankruptcy process in order to deprive creditors of a valuable asset.

As the above examples demonstrate, from time to time, courts do assign property-like characteristics to services.\textsuperscript{132} And if disputes are to be resolved with respect to services, reference to property law second to contract law\textsuperscript{133} would probably be most helpful. However, not every fraudulent transfer case involving services should be subject to propertization. Instead, bankruptcy courts should selectively recognize only certain attributes of services as property. Through this selective approach, courts can achieve the underlying bankruptcy goals without infringing on the debtor’s rights or the rights of third parties.

III. A SELECTIVE APPROACH TO THE UNION OF SERVICES AND PROPERTY

Services should not be deemed property in the fraudulent transfer context unless such services “culminate in

\textsuperscript{132} See supra Part II.C.
\textsuperscript{133} Baird & Jackson, supra note 20, at 835-36.
transferable property.” Accordingly, the equitable approach to defining property used by marital courts, as illustrated in Part II.C., may not be appropriate in all fraudulent transfer situations. Considering that there is no real check on overexpansion of what is to be considered property due to lack of precise definitions, any attempt to liberally apply fraudulent transfer law to services can create a dangerous precedent. For example, application of the equitable approach would be inappropriate in our Jones hypothetical because the “asset” at issue, i.e., the health benefit to the patient, is unquantifiable. Therefore, courts should be selective in classifying services as property in the fraudulent transfer context.

Part III discusses specific fraudulent transfer situations where the equitable approach may be appropriate for resolving fraudulent transfers. In addition, it explains the “underlying chattel” theory through case law and contrasts it with the equitable approach. Finally, it concludes that all services cannot be simply classified as property and argues for an application of a selective approach to services in the fraudulent transfer context.

A. The Union of Services and Property

Expanding the formal definition of property to services under the equitable approach may be justified in transfers made with actual fraudulent intent, as opposed to constructive intent. Indeed, where a debtor is intentionally trying to delay or hinder his creditors’ ability to collect on the owed debt, the chances are that the debtor and the third party are not entirely blameless. For example, Picasso may agree to paint the neighbor’s picture on the eve of bankruptcy with the understanding that the neighbor will pay Picasso for the portrait once Picasso is out of bankruptcy. In such a case, the court should be able to view Picasso’s services as property regardless of whether a contractual agreement can be proven, and recover the painting from the neighbor for the benefit of creditors. However, in a constructively fraudulent scenario,
where a debtor provides uncompensated services without any intent to defraud his creditors, the use of the equitable approach is too overreaching and may allow creditors to get a windfall at the expense of an innocent third party.

Therefore, as an alternative to the equitable approach, bankruptcy courts should include services under the property umbrella only if the services “culminate in transferable property.” In instructive on this point is *American National Red Cross v. ASD Specialty Healthcare*, in which the Supreme Court of Alabama looked to the underlying nature of the service—as chattel—to conclude that it constituted property for the purpose of fraudulent transfer law. In that case, the court held that blood products qualify as “property” under the Alabama Uniform Fraudulent Transfer Act (AUFTA), even though the Alabama’s Uniform Commercial Code specifically termed “the act of procuring and furnishing the blood products” to be a service. In *ASD Specialty Healthcare*, the plaintiff’s cause of action arose from a contract it had with the defendants. This contract concerned sale of blood products. As one of its allegations, the plaintiff contended that one of the defendants engaged in conduct which violated AUFTA. Specifically, the conduct involved transfer of blood products. In rebuttal, the defendants argued that the statute was not applicable since “the blood products in question are considered, for all purposes, to be a ‘service’ under the [Alabama’s Commercial Code] and, therefore, not ‘property’ under the AUFTA.” Indeed, Alabama’s Uniform Commercial Code provided in part that:

> Procuring, furnishing, donating, processing, distributing, or using human whole blood, plasma, blood products, blood derivatives, and other human tissues such as corneas, bones or organs for the purpose of injecting, transfusing, or transplanting any of them in the

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137 888 So. 2d 464 (Ala. 2004).

138 *Id.* at 466.

139 *Id.*

140 *Id.* at 465.

141 *Id.*

142 *Id.* “A default judgment has previously been entered against LA Pharmaceutical and Peter Woolley, neither of which are defendants in this current action.” *Id.*

143 *ASD Specialty Healthcare*, 888 So. 2d at 465.
human body is declared for all purposes to be the rendition of a service by every person participating therein and whether any remuneration is paid therefore is declared not to be a sale of such whole blood, plasma, blood products, blood derivatives, or other human tissues.\textsuperscript{144}

Referencing the statute, the Alabama Supreme Court agreed with the plaintiff that blood products were property for purposes of AUFTA, explaining that “the act of procuring and furnishing the blood products—not the blood products themselves”—constituted a service in this instance.\textsuperscript{145} The court distinguished between “the act of procuring and furnishing blood products” and the underlying blood products themselves, thereby concluding that since blood products can be owned, they are property for purposes of AUFTA.\textsuperscript{146}

Although the state statute in \textit{ASD Specialty Healthcare} defined furnishing of blood as a service, the court looked to the “underlying chattel” nature of this service in order to conclude that the transfer was, after all, the transfer of property and thus subject to fraudulent transfer law.\textsuperscript{147} Just like the \textit{ASD Specialty Healthcare} case, our earlier hypotheticals illustrate the “underlying chattel” approach. Recall that Warren Ruffet’s neighbor quadrupled her wealth as a result of Ruffet’s free investment advice. Hence, Ruffet’s uncompensated services should justifiably become property of his bankruptcy estate available for distribution to creditors; since the service itself cannot be recovered from a practical standpoint, a creditor can recover the underlying property of that service or the money from the sale of stock. Similarly, and even more to the point, Picasso, who paints a portrait for his neighbor for free, has given his neighbor a wealth-producing piece of property, while depriving his own creditors of a valuable asset. Although the act of painting constituted a service, the painting itself is

\textsuperscript{144} ALA. CODE § 7-2-314(4) (LexisNexis 2002).
\textsuperscript{145} \textit{ASD Specialty Healthcare}, 888 So. 2d at 466.
\textsuperscript{146} Id. at 466. However, the dissenting Justices noted that the transaction at issue should not be considered “property” under AUFTA for several reasons. First, Justice Lyons refused to focus exclusively on the nature of the blood products apart from the acts of procuring or furnishing blood products in light of the “all purposes” language of the statute. \textit{Id.} at 467 (Lyons, J., dissenting). Second, Justice Houston distinguished between the actual rendition of a service, which cannot be the subject of ownership and service contracts, which like property, can be owned. \textit{Id.} at 470 (Houston, J., dissenting from denial of application for rehearing). Third, Justice Houston also argued that once Woolley had distributed the blood products to the defendants, the service was complete and could not be transferred or be the subject of ownership. \textit{Id.}
\textsuperscript{147} Id. at 466 (majority opinion).
property. Thus, even if the neighbor subsequently sold the painting to someone else, creditors should be able to recover the full value of the painting from the neighbor.

In both of these instances, the “underlying chattel” theory would force the neighbors to disgorge to the bankruptcy trustee the fair market value of services that they have received. This conclusion springs from the well-established rationale behind constructively fraudulent transfers for inadequate consideration: that the debtor has a moral duty to give priority to his legal obligations, i.e., his creditors, before attending to his own or anyone else’s interests. In short, a fraudulent transfer is a “wrong” against creditors.

In contrast to the Ruffet and Picasso hypotheticals, however, it is difficult to imagine how Tom Jones’ services could be deemed property for the purposes of fraudulent transfer law. This is because Jones’ services lack the “underlying chattel” quality in the sense that they did not result in transferable property. Indeed, Jones simply restored his patient’s physical appearance and well-being. Hence, while Ruffet’s business acumen and Picasso’s skill “culminated in transferable property” that can be valued, Jones’ services resulted in a health benefit, which is impossible to quantify. The conventional wisdom regards a person’s health as priceless. Moreover, while Ruffet and Picasso can actually retrieve the product or the proceeds of their services from their neighbors, Jones cannot go back and demand the return of the patient’s restored physical appearance and well-being.

As the above examples illustrate, the line between services and property gets more distorted as one distinguishes between tangible and intangible benefits. Generally, a person’s uncompensated services may “culminate” in significant economic advantage to the recipient, a valuable non-economic benefit, or even both. But why should a recipient of a wealth-producing service be forced to disgorge the fair market value of the benefit received, while the recipient of a non-economic benefit should not? Perhaps the chances of fraud are higher

\[148\] Clark, supra note 20, at 510-11. “The ideal can be captured by a cliché: be just before you are generous.” Id. at 510.

\[149\] Id.; see also John C. McCoid II, Constructively Fraudulent Conveyances: Transfers for Inadequate Consideration, 62 Tex. L. Rev. 639, 656 (1983).

\[150\] See supra note 15 and accompanying text.

\[151\] Here, we are not concerned with other means of collecting from the patient, i.e., recovery of fair market value of the surgery performed.
where a debtor has wealth-producing abilities but directs such ability toward third parties instead of his creditors. In bankruptcy, creditors should take priority over the residue of the debtor’s assets because it is only fair that they get something back for what they originally gave to the debtor.152 Thus, the contractual nature of the debtor-creditor relationship justifies the conclusion that a recipient of services which “culminate in transferable property” should be forced to disgorge the benefit for the sake of the debtor’s creditors.

B. A Selective Approach: The “Underlying Chattel” Theory

The “underlying chattel” approach supports our Ruffet and Picasso hypotheticals without posing any subjective inquiry difficulties or valuation problems in the fraudulent transfer context. Surely, so long as services “culminate in transferable property,” such property can be fairly valued and the transfer can be avoided under fraudulent transfer law.153 Without question, most creditors would welcome the “underlying chattel” theory in the fraudulent transfer context, especially because an insolvent debtor is often uninterested in maximizing assets for his creditors’ benefit. In fact, “after a debtor has borrowed money, his interests conflict with those of his creditors.”154 Therefore, the “underlying chattel” approach may provide creditors with assurance that they would get what they bargained for with the debtor.

At the same time, courts should not include services that do not “culminate in transferable property” under a “broad” definition of property.155 For one, from a debtor’s perspective, equating services with property may have drastic implications. Current fraudulent transfer law is designed to be pro-creditor.156 Thus, in a case of an innocent debtor, fraudulent transfer law opens itself up to the possibility of

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152 Garrard Glenn, The Diversities of the Preferential Transfer: A Study in Bankruptcy History, 15 CORNELL L.Q. 521, 525 (“The whole presupposition of the rules against fraudulent conveyances is that from the time a debtor knows that he is insolvent he holds all his property subject to the interests of his creditors.” (quoting In re Salmon, 239 Fed. 413, 415 (S.D.N.Y. 1916) (Hand, J.))).
153 See supra note 15 and accompanying text.
154 Baird & Jackson, supra note 20, at 833.
155 See supra note 15 and accompanying text.
156 Jackson, supra note 41, at 783. “[T]he [existing fraudulent] conveyance statutes generally focus on conveyances by the debtor, not on unilateral actions taken by creditors (such as foreclosure sales).” Id. at 783 n.184.
abuse by creditors.\textsuperscript{157} Even though the main purpose of fraudulent transfer law is to prevent a debtor from defrauding his or her creditors, it is possible for creditors to enrich themselves through the machinery of fraudulent transfer law.\textsuperscript{158} Sewer service\textsuperscript{159} is just one of many examples of creditors’ unethical behavior. Thus, if courts were to start equating services with property in fraudulent transfer cases, an already vulnerable debtor would be placed at a disadvantage. Specifically, a debtor’s ability to find or maintain a job may be impaired as a result. For example, an employer, upon checking a potential employee’s credit and finding that it is less than perfect, may be hesitant to extend an employment offer to the debtor. Indeed, the employer may be wary of potential liability for additional payments to employee’s creditors for the services provided, if the debtor files for bankruptcy. Moreover, an employee debtor may have less negotiating power with respect to his job. For example, if the debtor prefers to take a smaller pay in exchange for other benefits like a reduced hour schedule or a chance to work from home, the debtor’s inability to do so may lead to issues of indentured servitude for the sake of creditors.\textsuperscript{160} The employer may refuse to honor the employee’s request simply because a bankruptcy trustee may later come after the employer for the full payment of the employee’s services. Alternatively, it may discourage debtors from being productive in society upon realization that performance of uncompensated services may actually cost money to their service recipients.

Another reason for services not to be classified as property is that, if services are considered property, creditors may get more than they are entitled to at the expense of third party recipients. The basic principle behind fraudulent conveyance law is that creditors are prejudiced only by a transfer of an interest in property that actually belonged to the debtor and which would have been available to creditors

\textsuperscript{157} Id. at 783-84.
\textsuperscript{158} Id. at 780.
\textsuperscript{159} Sewer service is defined as “[t]he fraudulent service of process on a debtor by a creditor seeking to obtain a default judgment.” BLACK’S LAW DICTIONARY, supra note 7, at 1372.
\textsuperscript{160} GLENN, FRAUDULENT CONVEYANCES, supra note 10, § 212. “We have seen that the debtor’s labour is not an asset for his creditors, since otherwise our law would sanction slavery.” Id.
outside of bankruptcy.\textsuperscript{161} If the debtor chose to provide uncompensated services that is the debtor’s choice, and the extra money that the debtor chose not to receive should not be available for creditors since the debtor would have never had that money to begin with. Surely, performance of services by the debtor is generally not a transfer of the debtor’s interest in property because the resulting benefit to the third party typically would not become an estate asset and thus would not be available for distribution to creditors.\textsuperscript{162} Furthermore, creditors are often sophisticated parties who can protect themselves by either not lending or in the alternative, charging an even higher interest rate. Thus, fraudulent transfer law should not give creditors an additional advantage, especially when the debtor is already in a vulnerable situation.

Aside from a debtor perspective, there are significant third party issues here as well. For example, a third party recipient may not even know that the debtor is about to file bankruptcy; yet, by simply accepting the service, the third party recipient subjects itself to the bankruptcy court’s discretion. How much emphasis should a court place on the actual prejudicial effect of the transaction on a third party-transferee? Perhaps one can accept that Ruffet’s and Picasso’s neighbors would have to disgorge the benefit received, especially since they have paid very little for it. In that respect, Ruffet’s and Picasso’s creditors may be able to use a constructive trust remedy to cure the unjust enrichment.\textsuperscript{163} Indeed, whenever one, innocently or not, obtains title to property that results in unjust enrichment, courts may declare that such a title-holder is the trustee of a trust, whose sole duty is to transfer the title and possession to the beneficiary.\textsuperscript{164} Here, Ruffet’s and Picasso’s neighbors did not pay for the property which they acquired through these services. In this

\textsuperscript{161} See ALCES, supra note 18, ¶ 6.02[1][b], at 6-4 to -5. “Equitable distribution of a debtor’s estate is compromised by transactions that divest the debtor of property that would otherwise be available to satisfy the claims of the debtor’s general creditors.” Id.

\textsuperscript{162} GLENN, FRAUDULENT CONVEYANCES, supra note 10, § 212.

\textsuperscript{163} “Constructive trusts are created by courts of equity whenever title to property is found in one who in fairness should not to be allowed to retain it.” GEORGE T. BOGERT, TRUSTS, § 77, at 286 (6th ed. 1987). Constructive trust is not an express trust but a judicial fiction created to rectify fraud. Id. § 77, at 287. In that respect, “[i]t is not a trust in which the trustee . . . ha[s] duties of administration . . . , but rather [the trust is] a passive, temporary trust, in which the trustee’s sole duty is to transfer the title and possession [of property] to the beneficiary.” Id.

\textsuperscript{164} Id. § 77, at 286.
instance, courts can force them to disgorge the benefits in favor of the debtors’ creditors. Under the constructive trust remedy, courts would consider third party recipients to be trustees and order them to transfer title and possession to the beneficiaries, i.e., the debtors’ creditors.\footnote{Id.} The reason the constructive trust remedy is available to creditors here is because Ruffet’s and Picasso’s services created tangible property. Generally, “[a] constructive trust must have definite subject matter, just as an express trust must meet this requirement.”\footnote{Id. at 288.}

However, creditors cannot use the constructive trust remedy with respect to Jones’ patient. Recall that Jones conferred a health benefit on his patient as opposed to property. Without question, it is difficult to accept that Jones’ patient, who now may have a chance to lead a normal life, should be liable to Jones’ creditors. Not only is it illogical to conclude that Jones unjustly enriched his patient, but it is also impractical to demand disgorgement of this benefit. If an innocent third party can be made to pay to the debtor’s creditors for such an unquantifiable benefit, it is then the third party, not the debtor, who would feel the wrench of bankruptcy.\footnote{McCoid, supra note 149, at 657-58. “[T]ransferees, not debtors, bear the brunt of invalidation of fraudulent conveyances.” Id. at 658.} Surely, Jones’ patient did not bargain for such an outcome.

Separately, while the debtor-creditor relationship is typically based on contract, the contractual nature is not present between creditors and third party recipients.\footnote{Glenn, Fraudulent Conveyances, supra note 10, § 140. In his discussion of creditor rights with respect to debtor’s services, Glenn points out:}

True, the person for whom the debtor gratuitously laboured has been enriched, as may be seen in the enhanced value of the property upon which the efforts were expended. But the legislation in which we are interested was never intended to bring creditor and third party into a quasi-contractual relation generally. The inquiry is, what asset, if any, has the debtor transferred to the third party? In the case of gratuitous labor, the answer must be that no asset has passed; hence the creditor cannot subject the third party to any claim under the statutes.

\footnote{Id.}
transfer claim.\textsuperscript{169} From a practical standpoint, analyzing third party transactions would probably require courts to return to subjective intent considerations. For example, courts may have to analyze whether the third party was “innocent” or whether he or she knew exactly what was going on when he or she accepted the services from the debtor. However, under the selective approach, the inquiries into the third party’s psyche are unnecessary. Regardless of whether the third party knew of the debtor’s motivations to file for bankruptcy, it would have to disgorge the value of the services received if the services “culminated into transferable property.”\textsuperscript{170} Under this approach, because tangible benefits have clearly assignable values, creditors can easily recover assets under the constructive trust remedy, without any practical difficulties.

Considering that the historical progression of fraudulent transfer law has been toward development of objective criteria,\textsuperscript{171} courts should be disinclined to classify all services as property for the sake of judicial efficiency. In that respect, the selective approach to the joinder of services and property limits the potential abuse and misapplication of fraudulent transfer law, while providing creditors with a workable remedy.

CONCLUSION

The concept of fraud is difficult to pigeonhole into one set of rules. On the one hand, leaving the term property to its traditional meaning undermines the Code’s underlying policy of enhancing creditors’ recovery. On the other hand, classifying all services as property expands a creditor’s advantage at the debtor’s and third party’s expense. As this Note demonstrates, however, a selective approach to this inquiry could still fulfill bankruptcy goals without sacrificing judicial efficiency and equitable treatment of the parties involved.

Through the selective approach, bankruptcy courts can achieve the mission of protecting the debtor’s assets for creditors without reducing fraudulent transfer law to a profit-generating tool. Indeed, if a debtor possesses skills that can

\textsuperscript{169} Baird & Jackson, supra note 20, at 835-36.

\textsuperscript{170} See supra note 15 and accompanying text.

\textsuperscript{171} ALCES, supra note 18, ¶ 5.02 (stating that “[c]ourts have trouble reaching reliable conclusions regarding subjective matters; therefore there was a need to objectify fraudulent disposition law”).
produce an economic benefit, he should direct his efforts to using those skills to pay off his creditors, as opposed to rendering potential economic benefit on third parties. Such debt collection is fair in light of the fact that the debtor did not live up to his debtor-creditor bargain. But at the same time, courts should not allow creditors to reap profits from all third party recipients. Hence, if a debtor applies his skill to confer a non-economic benefit, creditors should not use such a third party recipient as an outlet to fulfill the debtor's bankruptcy obligations. After all, fraudulent transfer laws are implemented to promote not just honesty in the debtor's dealings with creditors but also to promote honesty among creditors.

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Faxing It In

HOW CONGRESS FAILED CONSUMERS WITH THE JUNK FAX PREVENTION ACT OF 2005

I. INTRODUCTION

During the past few years, the federal government’s regulation of telemarketing practices has enjoyed a front-and-center position in the political spotlight.\(^1\) In 2003, consumers eagerly embraced the establishment of a national do-not-call registry,\(^2\) and in the same year, Congress enacted legislation to curb abusive email marketing practices.\(^3\) Both events exemplified an admirable\(^4\) commitment to furthering consumer protection. 

\(^1\) See, e.g., Consumers Served by Blocking Ads, CONN. L. TRIB., Aug. 25, 2003, at 19 (“Responding to overwhelming public demand, our federal and state governments have recently enacted laudable new consumer protections against the frequent onslaught of unwanted direct marketing solicitations.”). Such an increase in federal telemarketing regulation has even inspired new compliance technology. William C. Smith, Ensuring a Peaceful Dinner, NAT'L L.J., Nov. 10, 2003, at 8 (discussing one company's product that automatically blocks telemarketers from connecting to numbers currently listed on federal and state do-not-call registries).


\(^4\) Although the email spam legislation may have been an admirable first step, it has continued to receive much criticism. See, e.g., Verne Kopytoff, Spam Mushrooms, S.F. CHRON., Sept. 2, 2004, at C1 (noting new research showed spam on the rise eight months after Can-Spam Act’s enactment); David McGuire, New Law Won’t Can Spam, Critics Say, WASH. POST, Dec. 17, 2003, http://www.washingtonpost.com/wp-dyn/articles/A5943-2003Dec16.html (“Detractors say the Can-Spam Act will create a safe haven for e-mail marketers willing to follow certain rules for spamming.”). The point here, however, is that Congress was at least making a good faith first step to appease consumers by creating an initial national regulation of email.
protection against unsavory, invasive marketing tactics that flourished thanks to cheap, easy-to-use technology. In 2005, however, Congress strayed considerably from this apparent trend of pro-consumer commitment when it enacted the Junk Fax Prevention Act of 2005 (“Junk Fax Prevention Act”). The Junk Fax Prevention Act, an amendment to a previous federal law prohibiting unsolicited marketing via facsimile machines, exposes fax machine owners to more unsolicited advertisements than allowed under the previous federal law.

Congress first addressed unsolicited faxed advertisements fifteen years ago as part of the Telephone Consumer Protection Act of 1991 (“TCPA”). Among other provisions, the TCPA instituted a complete ban on unsolicited faxed advertisements sent without the “prior express invitation or permission” of the recipient. Such a strict prohibition against fax marketing differed from the TCPA’s more flexible regulation of telephone marketing. The justification behind the differential treatment between the telephone and the facsimile machine lay in the latter’s technological architecture. It simply was not fair to require consumers to swallow the costs—paper, ink, wear-and-tear on the machine—of automatically-received, unwanted faxes promising great hotel deals or special car wash discounts. Congress reasoned that the consumer protection rights of the fax recipient—who must unfairly waste time waiting while a machine receives and

6 See infra discussion in Part V.
8 47 U.S.C. § 227(a)(4) (2000). The statute defines unsolicited advertisement as “any material advertising the commercial availability or quality of any property, goods, or services which is transmitted to any person without that person’s prior express invitation or permission.” Id. The TCPA fax provision states that “[i]t shall be unlawful for any person within the United States . . . to use any telephone facsimile machine, computer, or other device to send an unsolicited advertisement to a telephone facsimile machine[,]” Id. § 227(b)(1)(C). Thus, the prohibition does not apply to (1) faxed advertisements sent to recipients who have invited or permitted the sender to fax an ad or (2) faxes that do not include an ad.
9 See id. § 227(a)(3)(A)-(C). The definition of telephone solicitation expressly offers three major classes of exemptions for calls and messages. Id. In contrast, the TCPA, as originally enacted, banned the faxing of all unsolicited advertisements. Id. § 227(b)(1)(C).
10 See H.R. REP. NO. 102-317, at *10 (1991) (noting that fax machines “are designed to accept, process, and print all messages which arrive over their dedicated lines” (emphasis added)). See also infra discussion in Part V.B.
prints out an unwanted transmission, all at the recipient’s cost—trumped any commercial speech rights of the marketers.\(^{11}\)

Almost fifteen years after the TCPA’s enactment, Congress decided to revisit the TCPA fax provisions. By then, fax machines had survived and surpassed their ‘80s business stereotype and found a place in the home, in addition to the office.\(^{12}\) Soon, faxing technology became a standard feature of personal computers and printers.\(^{13}\) Congress’s reexamination of fax marketing regulations resulted in the TCPA amendment, The Junk Fax Prevention Act.\(^{14}\) The amendment passed quickly and quietly compared with previous telemarketing laws,\(^{15}\) and unlike other consumer protection laws, the Junk Fax Prevention Act blossomed from the worries and needs of the business community instead of consumers.\(^{16}\)

The Junk Fax Prevention Act essentially codifies an “established business relationship” (“EBR”) exception to the

\(^{11}\) See TCPA, supra note 7, § 2(8) (“The Constitution does not prohibit restrictions on commercial telemarketing solicitations.”); S. REP. No. 102-178, at *1971 (1991) (“The [Senate] Committee on Commerce, Science and Transportation believes that [the reported bill] is an example of a reasonable time, place, and manner restriction on speech, which is constitutional. . . . The Supreme Court has recognized the legitimacy of reasonable time, place, and manner restrictions on speech when the restrictions are not based on the content of the message being conveyed.”). For the view that government regulation of advertising inhibits freedom of speech, see RICHARD T. KAPLAR, ADVERTISING RIGHTS: THE NEGLECTED FREEDOM (The Media Institute 1991) and MICHAEL G. GARTNER, ADVERTISING AND THE FIRST AMENDMENT 57-60 (Twentieth Century Fund 1989).

\(^{12}\) See, e.g., Judy Stark, The New Condo Amenities Are Towering Ideas, ST. PETERSBURG TIMES, July 2, 2005, at 6F (noting that condo business centers are no longer considered amenities to buyers because “[n]ow almost everyone owns a computer and a printer/scanner/fax”); Leslie Berkman & Paul Herrera, Energy: Bigger Homes, Lifestyles Overshadow Conservation, THE PRESS-ENTERPRISE, Oct. 23, 2005, at A1 (noting energy consumption in homes is increasing due in part to “home offices equipped with computers, printers and fax machines” (emphasis added)).


\(^{15}\) See infra discussion in Part IV.A on how quickly the bill passed. Nearly nine months passed between the House’s introduction of its version of the TCPA and the signing of the TCPA into law. The Can-Spam Act took eight months to pass after its introduction. The Junk Fax Prevention Act took three months.

\(^{16}\) S. REP. No. 109-76, at 6 (explaining that legislation is needed to prevent “businesses [from being] subject to unforeseen and costly litigation unrelated to legitimate consumer protection aims” and citing “costs of training, making multiple contracts to obtain signatures providing consent, and obtaining permission for each fax machine when the recipients change location” as examples of business harms).
TCPA’s blanket ban on faxed advertisements sent without permission. A recipient has an EBR with a sender if the recipient currently interacts with or had previously interacted with the sender. Based on this past or present interaction, it is inferred that the recipient has given the sender, as well as the sender’s affiliates, permission to send faxed advertisements. Congress, as part of the TCPA, originally created the exception to apply only to telephone solicitations. The Federal Communications Commission (FCC) later imputed the exception onto fax solicitations as part of its implementation of TCPA rules.

The EBR exception thrived for more than a decade despite the fact that the exception as applied to faxes contravened Congress’s intent for, and the express language of, the TCPA’s fax provision. In 2003, the FCC, recognizing this, planned to eliminate the exception it had erroneously created and announced new written consent requirements for unsolicited faxed advertisements. Businesses balked at the elimination of the exception and heavily lobbied Congress, which reversed the FCC’s decision to eliminate the EBR by

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17 Id. at 10.
18 See 47 C.F.R. § 64.1200(f)(4) (2002) for definition of “established business relationship.” It should be noted that the definition’s use of “inquiry” and “application” are broad enough to include almost any interaction between a business and a consumer, regardless of whether money ever exchanges hands. For example, a consumer who calls to ask a question, and who does not ever purchase or transact business with the company, now has an established business relationship with the company, and the company may begin sending unsolicited faxed advertisements.
19 See infra discussion in Part III.A.
21 See infra discussion in Part III.B.
changing the EBR exception for faxed advertisements from an administrative ruling to statutory law.\footnote{S. Rep. No. 109-76, at 6 (2005) ("[T]he ‘Junk Fax Prevention Act of 2005’ specifically creates a statutory exception from the general prohibition on sending unsolicited advertisements if the fax is sent based on an EBR.")}. This Note argues that the Junk Fax Prevention Act fails in exactly what its title promises—namely, the prevention of junk faxes—by gravely undermining the strict prohibition against unsolicited fax marketing set out in its parent legislation, the TCPA.\footnote{The “parent” aspect of the legislation takes on a double meaning when one considers that the Junk Fax Prevention Act, signed into law by President George W. Bush on July 9, 2005, has severely weakened the TCPA, signed into law by his father, President George H.W. Bush, on December 20, 1991. See Law to Stop Junk Calls, Newsday, Dec. 21, 1991, at 9 (noting President George W. Bush signed new telemarketing law).} Part II of this Note discusses the legislative background and purpose of the TCPA fax regulations. Part III details the creation of the TCPA’s various EBR exemptions and explains why the EBR exception for faxed advertisements (“Fax EBR”) should never have existed. Part IV examines the FCC’s decision to eliminate the Fax EBR and Congress’s response to this elimination by way of the Junk Fax Prevention Act. Part V argues that the Junk Fax Prevention Act fails to preserve the strong consumer protection set out in the TCPA, that modern faxing technology requires stricter telemarketing prohibitions, and that Congress should have given greater deference to the FCC’s decision to eliminate the Fax EBR. Part V further posits that an inadequate federal law will effectively weaken current state laws that implement a strict prohibition against sending unsolicited advertisements via fax, similar to the TCPA as originally implemented.\footnote{The TCPA, and by extension, the Junk Fax Prevention Act, has no preemptive effect on state junk fax laws already in place that offer more protection than the TCPA, except the TCPA preempts certain technological requirements on telemarketing equipment. 47 U.S.C. § 227(e)(1) (“State law not preempted... [N]othing in this section or in the regulations prescribed under this section shall preempt any State law that imposes more restrictive intrastate requirements or regulations."). By contrast, the Can-Spam Act explicitly preempted all state email spam laws. Can-Spam Act, supra note 3, § 8 (“This Act supersedes any statute, regulation or rule of a State... that expressly regulates the use of electronic mail to send commercial messages...”). See infra discussion in Part V.C on how a weaker interstate fax rule effectively weakens stronger intrastate fax laws.}

Finally, Part VI explains that Congress should reinstate the strict ban on junk faxes because other avenues of law, including future Congressional review, a national do-not-fax
registry and state legislature response, would provide ineffective protection against consumer costs.

II. THE TELEPHONE CONSUMER PROTECTION ACT OF 1991

A. Brief History of the TCPA

The TCPA was an extensive, ambitious amendment to the Communications Act of 1934\(^{27}\) that regulated the rapidly expanding and increasingly automated telemarketing industry.\(^{28}\) The Senate and House Reports addressing the TCPA\(^{29}\) emphasized the need to “protect the privacy interest of residential telephone subscribers,” as well as to facilitate interstate commerce.\(^{30}\) Congress also acknowledged its duty to consider the telemarketers’ interest in freedom of commercial speech.\(^{31}\)

What troubled Congress was not limited to the nuisances of a solicitor phoning too late in the evening or interrupting dinner with tempting offers of magazine discounts. In fact, Congress reserved the strictest provisions for those types of human-less telemarketing practices that made it difficult for consumers to protest, such as automated dialing systems, pre-recorded messages and facsimile transmissions.\(^{32}\) The TCPA’s legislative history makes a clear


\(^{28}\) S. REP. NO. 102-178, at 1969 (1991) (noting an increasing number of consumer telemarketing complaints due to “the increasing number of telemarketing firms in the business of placing telephone calls, and the advance of technology which makes automated phone calls more cost-effective”).

\(^{29}\) The finished TCPA was a combination of several bills introduced into Congress, including S. 1462 (Automated Telephone Consumer Protection Act), S. 1410 (Telephone Advertising Consumer Rights Act) and H.R. 1304 (Telephone Advertising Consumer Rights Act). S. REP. NO. 102-178, at 1968. Specifically, residential and business subscribers were concerned about automatic dialers tying up lines and preventing any outgoing calls, as well as automated calls that did not disconnect from the line even after the called party hung up the phone. Id.

\(^{30}\) See id. at 1973 (“These regulations are consistent with the constitutional guarantee of free speech.”). See also “Findings” in H.R. REP. No. 102-317, at *2 (1991) (“Individuals’ privacy rights, public safety interests, and commercial freedoms of speech and trade must be balanced in a way that protects the privacy of individuals and permits legitimate telemarketing practices.”).

\(^{31}\) See S. REP. NO. 102-178, at 1972 (“In addition, it is clear that automated telephone calls that deliver an artificial or prerecorded voice message are more of a nuisance and a greater invasion of privacy than calls placed by ‘live’ persons.”). In fact, an earlier version of the TCPA was titled “Automated Telephone Consumer Protection Act.” Id. at 1970. This distinction between these two types of telemarketing can be further inferred from that fact that the Direct Marketing Association and other groups
distinction between live in-person calls and new technologies that rendered human solicitors unnecessary.\textsuperscript{33}

At the time of the TCPA's enactment, more than forty states had implemented or were in the process of implementing legislation restricting or flat-out prohibiting telemarketing activity within the state, but these laws could not reach interstate telephone calls or faxes.\textsuperscript{34} The TCPA was created in part to address this gap in jurisdiction.\textsuperscript{35} In the case of a TCPA provision conflicting with a state telemarketing law, the stricter law would prevail.\textsuperscript{36}

The FCC opposed the TCPA, seeing no need for sweeping federal legislation regulating telemarketing activity.\textsuperscript{37} The agency argued that it preferred handling unsolicited marketing calls with “continued regulatory scrutiny and monitoring” without legislation.\textsuperscript{38} Congress, possibly skeptical of this contention because the FCC had previously declined to regulate unsolicited calls in 1980 and 1986,\textsuperscript{39} ultimately passed the TCPA. In the final bill, Congress included a provision that designated the FCC as a major interpreter of the TCPA.\textsuperscript{40} In this role, the FCC would later representing telemarketing companies that did not use automatic dialers or other equipment to make automated phone calls did not object to legislation targeting only the automated telemarketing industry. \textit{Id.} at 1971.

\textsuperscript{33} See H.R. REP. NO. 102-317, at *10. There was a special concern that certain automated systems endangered public safety by tying up phone lines of hospitals, emergency responders, and law enforcement agencies. \textit{Id.} See also S. REP. No. 102-178, at 1972 (“[I]t is legitimate and consistent with the constitution to impose greater restrictions on automated calls than on calls placed by ‘live’ persons.”).

\textsuperscript{34} S. REP. NO. 102-178, at 1970.

\textsuperscript{35} \textit{Id.} at 1970 (“These [state] measures have had limited effect, however, because States do not have jurisdiction over interstate calls. Many States have expressed a desire for Federal legislation to regulate interstate telemarketing calls to supplement their restrictions on intrastate calls.”).

\textsuperscript{36} 47 U.S.C. § 227(e) (2000). Although the language of the preemption provision addresses only preemption of state laws affecting intrastate faxes that are less restrictive than the TCPA, the question has recently been raised whether states would have the ability to create a state law affecting both intrastate faxes and interstate faxes that cross their state lines. \textit{See infra} Part VI for discussion of California’s attempt to create a more restrictive junk fax law than the Junk Fax Prevention Act that would affect faxes entering or leaving California.

\textsuperscript{37} S. REP. NO. 102-178, at 1970 (quoting then-FCC Chairman Alfred C. Sikes).

\textsuperscript{38} \textit{Id.}

\textsuperscript{39} \textit{Id.}

\textsuperscript{40} 47 U.S.C. § 227(b)(2) (ordering the FCC “to prescribe regulations to implement the requirements of” TCPA provisions).
cause great controversy over its interpretation of the TCPA fax provision.\footnote{See infra discussion in Part III-IV.}

\section*{B. The TCPA Fax Provision}

While the majority of the TCPA addressed the restriction of certain telephone marketing activities, the TCPA also prohibited the faxing of any unsolicited advertisements without “prior express invitation or permission.”\footnote{47 U.S.C. § 227(a)(4).} The statute provided no definition of prior express invitation or permission, but the Congressional reports put the responsibility of determining the definition of the phrase “invited or given permission” on the telemarketers.\footnote{S. REP. NO. 102-178, at 1975-76 (“While telemarketers will be responsible for determining whether a potential recipient of an advertisement, in fact, has invited or given permission to receive such fax messages, such a responsibility, is the minimum necessary to protect unwilling recipients from receiving fax messages that are detrimental to the owner’s uses of his or her fax machine.”). Additionally, 47 U.S.C. § 227(d) creates minimum technical identification standards for fax machines, including fax number identification and date/time stamps, but these standards are not relevant to this Note because they affect manufacturers of the machines, not advertisers who use the machines.} No exceptions were carved out for unsolicited faxed advertisements in the statutory language—prior invitation or permission was a must.\footnote{See generally 47 U.S.C. § 227.}

The law allowed\footnote{Although this section incorporates past tense language because it is describing the TCPA at the time of enactment, the Junk Fax Prevention Act had no effect on the penalty and cause of action provisions, which remain effective today. See generally Junk Fax Prevention Act, supra note 5.} consumers to bring a private action in state court against violators of the TCPA fax provision, provided state laws or rules did not contradict such a right of action.\footnote{47 U.S.C. § 227(b)(3) (allowing for an action “if otherwise permitted by the laws or rules of court of a State”). There have been many battles over the permission provision as to whether it meant states had to officially opt-in legislation recognizing the TCPA’s authority through an affirmative action, whether states had to officially opt-out to reject the TCPA, or whether the language was merely an acknowledgement of the states’ ability to decide how their courts would handle TCPA claims. Courts in early cases chose to adopt an “opt-out” approach, interpreting a state legislature’s silence on the TCPA as acceptance, while courts in more recent cases have embraced the “acknowledgement” meaning, arguing that such a meaning is the only way to maintain the balance between federal and state government. For in-depth summaries of the three interpretations, see Accounting Outsourcing, L.L.C. v. Verizon Wireless Pers. Commc’n’s, 329 F. Supp. 2d 789, 795-99 (M.D. La. 2004) and Chair King, Inc. v. GTE Mobilnet of Houston, 135 S.W.3d 365, 374-76 (Tex. App. 2004).} State officials had the option to bring civil actions in federal court in the name of their citizens.\footnote{47 U.S.C. § 227(f)(1).} If the recipient of

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\item 41 See infra discussion in Part III-IV.
\item 42 47 U.S.C. § 227(a)(4).
\item 43 S. REP. NO. 102-178, at 1975-76 (“While telemarketers will be responsible for determining whether a potential recipient of an advertisement, in fact, has invited or given permission to receive such fax messages, such a responsibility, is the minimum necessary to protect unwilling recipients from receiving fax messages that are detrimental to the owner’s uses of his or her fax machine.”). Additionally, 47 U.S.C. § 227(d) creates minimum technical identification standards for fax machines, including fax number identification and date/time stamps, but these standards are not relevant to this Note because they affect manufacturers of the machines, not advertisers who use the machines.
\item 44 See generally 47 U.S.C. § 227.
\item 45 Although this section incorporates past tense language because it is describing the TCPA at the time of enactment, the Junk Fax Prevention Act had no effect on the penalty and cause of action provisions, which remain effective today. See generally Junk Fax Prevention Act, supra note 5.
\item 46 47 U.S.C. § 227(b)(3) (allowing for an action “if otherwise permitted by the laws or rules of court of a State”). There have been many battles over the permission provision as to whether it meant states had to officially opt-in legislation recognizing the TCPA’s authority through an affirmative action, whether states had to officially opt-out to reject the TCPA, or whether the language was merely an acknowledgement of the states’ ability to decide how their courts would handle TCPA claims. Courts in early cases chose to adopt an “opt-out” approach, interpreting a state legislature’s silence on the TCPA as acceptance, while courts in more recent cases have embraced the “acknowledgement” meaning, arguing that such a meaning is the only way to maintain the balance between federal and state government. For in-depth summaries of the three interpretations, see Accounting Outsourcing, L.L.C. v. Verizon Wireless Pers. Commc’n’s, 329 F. Supp. 2d 789, 795-99 (M.D. La. 2004) and Chair King, Inc. v. GTE Mobilnet of Houston, 135 S.W.3d 365, 374-76 (Tex. App. 2004).
\item 47 47 U.S.C. § 227(f)(1).
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an unsolicited faxed advertisement succeeded in showing a TCPA violation, the sender of the advertisement paid statutory damages: actual damages or $500 per fax.\(^{48}\) The penalty increased to $1500 per fax for those individuals or businesses willfully or knowingly sending unsolicited advertisements.\(^{49}\) Again, at the time of enactment, there were no exceptions for the fax provision, so, theoretically, if a marketer mistakenly dialed the wrong fax number and transmitted an advertisement to an unintended consumer, the consumer could bring an action for $500.\(^{50}\)

The two main reasons set out in the Congressional reports for such a strict prohibition against fax marketing\(^{51}\)

\(^{48}\) Id. § 227(b)(3)(A)-(C).

\(^{49}\) Id. § 227(b)(3). This statutory per-fax fine for willful violations can compound into an extremely expensive judgment if a company knowingly initiates risky advertising methods. For example, a Georgia judge recently entered a $12 million verdict against a Hooters restaurant for unsolicited faxes. Eric Williamson, *Hooters Hit with $11.9 Million Fee*, AUGUSTA CHRON., May 1, 2001, at A07. Hooters reportedly settled the case for $9 million. Jeremiah Marquez, *Court Rulings, Lawsuits Threaten to Unplug Junk Fax Industry*, DETROIT NEWS/ASSOCIATED PRESS, Sept. 6, 2003 (noting that the Hooters award “was later reduced to about $9 million through a settlement”). Fax.com, a third-party fax blasting company that sent huge volumes of faxed advertisements on behalf of companies, received the largest FCC-proposed fine in TCPA history—$5.37 million, or $11,000 for each of the 489 fax violations. *In re Fax.com, Inc.*, File No. EB-02-TC-120 (FCC 2002) (notice of apparent liability for forfeiture).

\(^{50}\) As consumer knowledge spread of the TCPA fax provision throughout the late ‘90s, there were a significant number of class action suits. See Craig Anderson, *Executive Fights Faxes, One at a Time*, L.A. DAILY J., June 6, 2005, at 3; Lisa Napoli, *Crusaders Against Junk Faxes Brandish Lawsuits*, N.Y. TIMES, Dec. 16, 2003, at C1. See also http://www.junkfaxorg.com for information on recent and current class action cases. As a result of the possible immense fines, there have been many challenges by defendants over the eligibility of class action suits for TCPA violations. Compare *Kaufman v. ACS Sys.*, 2 Cal. Rptr. 3d 296, 327 (Ct. App. 2003) (holding class action for TCPA fax violation permissible), and *Hooters of Augusta, Inc. v. Nicholson*, 537 S.E.2d 468, 472 (Ga. Ct. App. 2000) (holding that class certification for a TCPA violation was proper), with *Carnett’s Inc. v. Hammond*, 610 S.E.2d 529, 532 (Ga. 2005) (denying class certification for lack of commonality).

\(^{51}\) Most of the TCPA congressional reports are dedicated to telephone issues. Very little space or emphasis is given to the fax provisions. In the official findings of the TCPA, “faxes” are not specifically mentioned. See TCPA, *supra* note 7, § 2. Although not acknowledging faxes in the opening findings, the TCPA drafters noted in a legislative report that there were “tens of thousands of unsolicited messages per week” being sent to “facsimile machines across the country.” H.R. REP. NO. 102-317, at *6-7 (1991). This is not exactly a compelling number when compared with the fact that nearly 30 billion pages of faxes were being sent at the time of enactment. *Id.* at *8. It may be the case, however, that unsolicited advertisement statistics were not yet compelling because fax marketing was still a new business. See *Destination Ventures, LTD v. FCC*, 844 F. Supp. 632, 635 (D. Or. 1994), aff’d, 46 F.3d 54, 57 (9th Cir. 1995) (noting that the lack of “specific congressional concern for unsolicited fax advertising . . . may have more to do with the unprecedented medium of the facsimile rather than any lack of a substantial interest in the exploitation of that medium”). Clearly the explosive growth of third-party fax blasting companies in the mid-’90s
were the prevention of cost-shifting and invasion of privacy.\textsuperscript{52} The cost-shifting theory is by far the strongest argument for a complete ban on unsolicited faxed advertisements.\textsuperscript{53} Every time an unsolicited faxed advertisement is sent to a recipient, the recipient's machine suffers wear and tear, and the recipient is left footing the bill for paper and ink.\textsuperscript{54} The cost-shifting justification for the fax provision is sound due to the unique architecture of faxing technology, of which paper and ink are essential components.\textsuperscript{55}

In contrast, the invasion of privacy reasoning applies to all types of telemarketing, no matter the specific technological

\textsuperscript{52} See H.R. REP. NO. 102-317, at *10.

\textsuperscript{53} Courts also supported the view that the cost-shifting feature of fax technology allowed for a complete ban on faxed advertisements sent without permission, even in light of the limited First Amendment protection allowed for commercial speech. The complete ban on unsolicited fax advertisements, as opposed to the time, place, and manner regulation on telephone solicitations, led to many First Amendment challenges in courts. See, e.g., Mo. ex rel. Nixon v. Am. Blast Fax, Inc., 323 F.3d 649, 659 (8th Cir. 2003) (finding a substantial government interest in preventing cost-shifting even if it means “some consumers will not receive unsolicited advertisements they might have appreciated”); Kaufman, 2 Cal. Rptr. 3d at 317 (finding the government's substantial interest in prevention of cost-shifting and allowing fax machine owners to control their equipment justified the commercial speech regulations); Destination Ventures Ltd. v. FCC, 46 F.3d 54, 56 (9th Cir. 1995) (no violation of First Amendment); Kenro, Inc. v. Fax Daily, Inc., 962 F. Supp. 1162, 1169 (S.D. Ind. 1997) (same). Courts also noted other avenues were open to advertisers other than faxes sent without consent. See, e.g., Kaufman, 2 Cal. Rptr. 3d at 317 (“[T]he TCPA does not prevent advertisers from marketing their goods and services in a myriad of ways: television, radio, newspapers, magazines, billboards, mailings, the Yellow Pages, the Internet, and telephone calls as permitted by law, and faxes to consenting consumers.”).

There were other unsuccessful constitutional challenges, including the Tenth Amendment, the Commerce Clause, the Fourteenth Amendment’s Equal Protection Clause and the Fifth Amendment’s Due Process. See, e.g., Int'l Sci. & Tech. Inst. v. Inacom Comm'n's, Inc., 106 F.3d 1146, 1156-58 (4th Cir. 1997) (holding that the TCPA's exclusive state court jurisdiction violated neither the Tenth Amendment nor the “equal protection component of the Fifth Amendment’s Due Process Clause”); Kenro, Inc., 92 F. Supp. at 1166 (holding that the $500 per fax statutory fine is not severe or oppressive enough to violate Due Process); Chair King, Inc. v. GTE Mobilnet of Houston, Inc., 135 S.W.3d 365, 385 (Tex. App. 2004) (holding the TCPA did not exceed Congress’s Commerce Clause power); Kaufman, 2 Cal. Rptr. 3d at 325 (rejecting advertiser defendants’ “void-for-vagueness” arguments).

\textsuperscript{54} See H.R. REP. NO. 102-317, at *10. See also infra discussion in Part V.B.

\textsuperscript{55} There has been an argument that modern fax computer programs which allow for faxes to arrive directly to a computer desktop instead of printing automatically at a fax machine weaken the cost-shifting theory. See infra discussion in Part V.B.
features, and thus, is Congress’s threshold argument for the TCPA’s enactment as a whole.\textsuperscript{56} When considering the TCPA as a whole, Congress seemed to view the telemarketing industry’s invasion of privacy as an attack of a fundamental right—the right not to receive unexpected, intrusive phone calls from solicitors.\textsuperscript{57} When presenting the invasion of privacy issue as it applied specifically to the fax provision, however, Congress viewed the invasion of privacy in a slightly different sense. The privacy right thought to be infringed by unsolicited junk faxes was that of the recipient to use and control his or her own machine. By protecting this right, Congress sought to prevent junk faxes from impeding or prohibiting the transmission of consumers’ legitimate business faxes.\textsuperscript{58} Hence, even the invasion of privacy argument for prohibiting unsolicited faxed advertisements had an underlying economic theme.

That is not to say the “fundamental right” privacy interest would not apply to the fax provisions, even if Congress did not specifically address them as such in the legislative history. The same fundamental right to privacy interest Congress attaches in its report to automated telephone calls—not being able to interact with the caller or not allowing the caller to feel the frustration of the called party\textsuperscript{59}—can be easily applied to unsolicited faxed advertisements.\textsuperscript{60} Further, several courts later interpreting the policies behind the fax provisions of the TCPA supported the idea that unsolicited faxes were invasions of privacy, apart from impeding commerce.\textsuperscript{61}

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\item \textsuperscript{56} S. Rep. No. 102-178, at 1969 (1991) (citing the first purpose of the bill is to “protect the privacy interests”).
\item \textsuperscript{57} Id. at 1977 (“The Supreme Court has recognized explicitly that the right to privacy is founded in the Constitution, and telemarketers who place telephone calls to the home can be considered ‘intruders’ upon that privacy.”).
\item \textsuperscript{58} H.R. Rep. No. 102-317, at *10 (noting that an unsolicited faxed advertisement “occupies the recipient’s [sic] facsimile machine so that it is unavailable for legitimate business messages while processing and printing the junk fax”).
\item \textsuperscript{59} S. Rep. No. 102-178, at 1972 n.3 (citing comments from a consumer advocate that “slamming a phone down on a computer just does not have the same sense of release” compared to hanging up on a live in-person operator).
\item \textsuperscript{60} See Mo. ex rel. Nixon v. Am. Blast Fax, Inc., 323 F.3d 649, 657 n.5 (8th Cir. 2003) (“Artificial or prerecorded messages, like a faxed advertisement, were believed to have heightened intrusiveness because they are unable to interact with the customer except in preprogrammed ways.”) (emphasis added) (internal citations omitted).
\item \textsuperscript{61} See, e.g., Universal Underwriters Ins. Co. v. Lou Fusz Auto. Network, 401 F.3d 876, 881-82 (8th Cir. 2005) (holding unsolicited faxes were an “injury” within the meaning of an insurance contract because they invaded insured’s privacy); Adler v. Vision Lab Telecomms., Inc., 393 F. Supp. 2d 35, 41-42 (D.D.C. 2005) (suggesting that a recipient who continually sends unsolicited faxes might be subject to a tort invasion of
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Thus, Congress had two distinct policy reasons supporting the strict anti-junk fax provisions: preventing unfair cost-shifting from businesses to consumers and limiting invasion of consumer privacy. As this Note discusses in Part V, these two goals complement the history and modern development of consumer protection law.

III. THE ESTABLISHED BUSINESS RELATIONSHIP EXCEPTIONS

A. Creation of the EBR Exception

There are three “established business relationship” (“EBR”) exceptions related to the TCPA, each with its own distinct origin. There is the telephone solicitation EBR exception (“Telephone EBR”) that originates from the TCPA statute language,\(^6\) the artificial and pre-recorded telephone solicitation EBR exception (“Artificial/Pre-Recorded EBR”) that derives from an FCC memo,\(^6\) and the Fax EBR that derives from a brief footnote in an FCC memo.\(^6\) Each will be discussed in turn.

The “established business relationship” made its initial appearance in an early House of Representatives version of the TCPA as part of the definition of “unsolicited advertisement.” If that version had passed, the EBR would have been an exception for advertisements made via telephone and fax.\(^6\) The finished version of the TCPA, however, explicitly limited the EBR exception to telephone solicitations only:

The term “telephone solicitation” means the initiation of a telephone call or message for the purpose of encouraging the purchase or rental of, or investment in, property, goods, or services, which is transmitted to any person, but such terms do not include a call or message

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\(^6\) This is because “unsolicited advertisement” was a term that appeared in the fax provision. As originally enacted, the fax provision did not prohibit all faxed advertisements from being sent; it prohibited the sending of an unsolicited advertisement without prior express invitation or permission. See supra note 8 and accompanying text.
(A) to any person with that person’s prior express invitation or permission,

(B) to any person with whom the caller has an established business relationship, or

(C) by a tax exempt nonprofit organization.\textsuperscript{66}

Congress did not define “established business relationship” in the statute.\textsuperscript{67} The FCC subsequently created a definition of “established business relationship” in its initial 1992 rulemaking memo:

The term “established business relationship” means a prior or existing relationship formed by a voluntary two-way communication between a person or entity and a residential subscriber with or without an exchange of consideration, on the basis of an inquiry, application, purchase, or transaction by the residential subscriber regarding products or services offered by such person or entity, and relationship has not been previously terminated by either party.\textsuperscript{68}

The Telephone EBR was the only reference to an established business relationship in the TCPA when it was signed into law.\textsuperscript{69}

By contrast, the Artificial/Pre-Recorded EBR did not originate in the TCPA language.\textsuperscript{70} The TCPA language did, however, order the FCC to implement rules in conjunction with the TCPA provisions on calls using artificial or pre-recorded voices.\textsuperscript{71} Specifically, the FCC had to consider two possible exemption groups to the prohibition against pre-recorded calls: (1) calls that were not made for a commercial purpose and (2) calls that were made for a commercial purpose but that did not adversely affect the privacy rights the TCPA was intended to protect and did not include the transmission of any unsolicited

\textsuperscript{66} 47 U.S.C. § 227(a)(3).


\textsuperscript{68} 1992 FCC Memo, supra note 20, at 42. The FCC specifically rejected a company-specific list as part of the EBR definition (such as allowing “public utilities” to be automatically exempted) and rather adopted a broad enough definition to include most businesses. \textit{Id.} at 19-20. The FCC also decided not to include a time limit for the expiration of an EBR. \textit{Id.} at 20. Further, the FCC rejected narrowing the EBR to a current business relationship, thereby making a prior business relationship a qualifying EBR. \textit{Id.} at 20. An EBR, however, ceased to exist at the request of the consumer. \textit{Id.} at 20. The broad language of this definition is further discussed \textit{infra} in Part V.

\textsuperscript{69} See generally TCPA, supra note 7.

\textsuperscript{70} 1992 FCC Memo, supra note 20, at 18-20.

\textsuperscript{71} 47 U.S.C. § 227(b)(2).
advertisement.\textsuperscript{72} Based on these orders, in its initial 1992 rule-making TCPA memo, the FCC determined that it was feasible to extend the established business relationship exemption to pre-recorded commercial calls because the exemption met Congress’s necessary criteria.\textsuperscript{73} According to the FCC’s analysis, using pre-recorded calls to solicit someone with whom one has a prior or existing business relationship does not adversely affect privacy interests of the called party.\textsuperscript{74} The FCC further determined pre-recorded commercial calls based on an established business relationship could not include an \textit{unsolicited} advertisement because the advertisement “can be deemed to be invited or permitted by a subscriber in light of the business relationship.”\textsuperscript{75} Equating an established business relationship with permission to send advertisements seems a wrong conclusion, however, given that the statutory provision defining telephone solicitation presents an established business relationship and prior express permission as two distinct exemptions.\textsuperscript{76}

The Fax EBR’s origin is much humbler by comparison; it came to life in a footnote of the same 1992 FCC memo.\textsuperscript{77} The only explanation for the FCC extending its already extended exception to include unsolicited faxed advertisements is a reference to its previous—and, arguably, erroneous—discussion involving pre-recorded phone calls.\textsuperscript{78} Ironically, in the same footnote, the sentence before the one announcing the Fax EBR states, “In banning telephone facsimile advertisements, the TCPA leaves the Commission \textit{without discretion} to create exemptions from or limit the effects of the prohibition . . . .”\textsuperscript{79} Nevertheless, for almost a decade, the courts fully embraced

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\item \textsuperscript{72} Id. § 227(b)(2)(B)(i)-(ii).
\item \textsuperscript{73} 1992 FCC Memo, supra note 20, at 19.
\item \textsuperscript{74} Id. The FCC memo makes no further explanation of exactly how this does not constitute an invasion of privacy. \textit{Id}.
\item \textsuperscript{75} \textit{Id}.
\item \textsuperscript{76} 47 U.S.C. § 227(a)(3)(A)-(B) (“Telephone solicitation . . . does not include a call or message . . . to any person with that person’s prior express invitation or permission” or “to any person with whom the caller has an established business relationship . . . .”).
\item \textsuperscript{77} 1992 FCC Memo, supra note 20, at 28 n.87 (“We note, however, that facsimile transmission from persons or entities who have an established business relationship with the recipient can be deemed to be invited or permitted by the recipient.”).
\item \textsuperscript{78} \textit{Id}.
\item \textsuperscript{79} \textit{Id} (emphasis added).
\end{itemize}
the FCC-created Fax EBR as a legitimate exception to the TCPA’s ban on unsolicited faxed advertisements.\[80\]

B. **Why the Fax EBR Should Have Never Existed**

The FCC should have never created the Fax EBR because it was never Congress’s intent to include one. This is clear for two reasons. First, the TCPA legislative history explicitly rejected a Fax EBR.\[81\] Second, the FCC-created Fax EBR is contrary to the language of the TCPA.\[82\]

The legislative history supports the argument that Congress never intended to create a Fax EBR. Congress specifically rejected adopting an EBR exception as part of the definition of unsolicited advertisement, which would affect both telephones and faxes, and, instead, chose to limit its use to telephone solicitations only.\[83\]

Second, the Fax EBR is contrary to the language of the TCPA. The TCPA prohibits using a fax machine to send an unsolicited advertisement.\[84\] The definition of unsolicited advertisement is one that is “without that person’s prior *express* invitation or permission.”\[85\] Therefore, the FCC’s conclusion that the Fax EBR is sufficient because it indicates an inferred or implied permission contradicts Congress’s requirement that the permission be “express.” Further evidence of Congress’s intent not to create any exemptions for its strict prohibition against unsolicited faxed advertisements is the fact that it did not include language asking the Commission to consider implementing rules regarding one, as it had for pre-recorded calls.\[86\]

Two recent court cases raised this express-inferred issue as well. In *Carnett’s, Inc. v. Hammond*,\[87\] plaintiff Michelle Hammond brought a class action suit in Georgia against a car wash company, which had hired an ad agent to fax 73,500

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\[81\] See supra notes 65-69 and accompanying text.

\[82\] See infra notes 86-101 and accompanying text.

\[83\] See supra notes 65-69 and accompanying text.


\[85\] Id. § 227(a)(1)(4) (emphasis added).

\[86\] See supra notes 70-76 and accompanying text.

\[87\] 610 S.E.2d 529 (Ga. 2005).
unsolicited advertisements to Atlanta-area residents, including Hammond. The Georgia Supreme Court reversed the appellate court’s finding that there was no evidence that the car wash company had express permission to fax the recipients. The Georgia Supreme Court disagreed regarding the lack of permission, citing the possibility that some of the recipients had an “established business relationship” with the local car wash. Hammond argued that the established business relationship exemption did not exist because it was “contrary to the clear statutory language of the TCPA.” The court, however, said it had an obligation to accept FCC regulations as valid.

In Chair King, Inc. v. GTE Mobilnet of Houston, Inc., a Texas appellate court appeared more open to the language argument against allowing a Fax EBR exemption. In Chair King, the plaintiff was a customer of the defendant, who had sent unsolicited faxes to the plaintiff. The court openly questioned the soundness of the FCC’s established business relationship. It noted that deeming permission on an inference seemed to conflict with the TCPA’s requirement of express permission. The court continued by forcefully stating that “[c]haracterizing permission granted by implication as ‘express’ runs afoul of the plain meaning of the word.” Ultimately, the court determined plaintiff had raised a genuine issue of material fact as to whether he gave prior express invitation or permission.

Finally, the TCPA definition of telephone solicitation offers a choice between an established business relationship and express permission. This statutory distinction shows that Congress did not see an established business relationship and permission as interrelated options. Thus, the legislative

[88] Id. at 529-30.  
[89] Id. at 531.  
[90] Id. at 532.  
[91] Id. at 531.  
[92] Carnett’s, Inc., 610 S.E.2d at 531.  
[94] Id. at 370.  
[95] Id. at 394.  
[96] Id.  
[97] Id.  
[98] Id.  
[100] Id. See supra discussion in Part III.A.
history and language of the TCPA support the argument that the FCC erroneously created the Fax EBR. It was the distinction between express and inferred permission, coupled with continuing consumer complaints about cost and privacy, that persuaded the FCC to eliminate the Fax EBR more than a decade after the agency had created it in a memo footnote.\(^{101}\)

IV. THE JUNK FAX PREVENTION ACT OF 2005 LEGITIMIZES THE FAX EBR EXCEPTION

A. History and Passing of the Junk Fax Prevention Act of 2005

In July 2003, the FCC released a sweeping 164-page study on the TCPA rules it had enacted during the past decade.\(^{102}\) As part of this overhaul, in addition to announcing plans to implement a national do-not-call registry, the FCC reversed its stance on the Fax EBR it created in its 1992 initial rule-making memo.\(^{103}\) In making this decision, the FCC emphasized that it wished to prohibit cost-shifting from the advertiser to the consumer, as well as to limit the intrusiveness of unsolicited faxed advertisements.\(^{104}\) In particular, the FCC found that consumers paid out of pocket not only for wasted ink and paper but also for lost labor costs.\(^{105}\) In this same memo, the FCC maintained the Telephone EBR because it did not impose the same type of costs as faxing technology. The FCC, however, decided to put a time limit on the Telephone EBR, ruling that a Telephone EBR expires eighteen months after the last purchase or three months after a consumer’s last inquiry about a product.\(^{106}\) In support of narrowing the Telephone EBR definition, the FCC cited “confused and even frustrated”

\(^{101}\) 2003 FCC Memo, supra note 2, at 112-15.
\(^{102}\) See generally 2003 FCC Memo, supra note 2.
\(^{103}\) Id. at 4.
\(^{104}\) Id. at 111-12 (noting consumers’ additional burden of “time spent reading and disposing of faxes, the time the machine is printing an advertisement and is not operational for other purposes, and the intrusiveness of faxes transmitted at inconvenient times, including in the middle of the night”). One court rejected a defendant’s argument that plaintiff's invasion of privacy claim should fail because plaintiff should have turned his fax machine off at night to avoid interruptions. Adler v. Vision Lab Telecomms., Inc., 393 F. Supp. 2d 35, 42 n.11 (D.D.C. 2005).
\(^{105}\) 2003 FCC Memo, supra note 2, at 111-12 (noting time spent collecting and sorting faxes increases labor costs).
\(^{106}\) Id. at 65.
consumers who receive phone calls from companies they have not contacted or done business with for many years. 107

When the FCC reported the elimination of the Fax EBR, it announced that “prior express invitation or permission” must be shown through a written, signed statement that lists the fax number to which the consent refers. 108 In other words, every business that wanted to engage in sending unsolicited faxed advertisements would need to collect signed, written consent before beginning any fax marketing campaign. The elimination of the Fax EBR exemption was set to take effect on August 25, 2003—just thirty days after the FCC’s rules first appeared in the Federal Register. 109

Understandably, members of the business community were concerned about the cost and time it would take to collect signed, written consent. In response, the FCC delayed the implementation of the Fax EBR elimination until January 1, 2005 to allow businesses ample time to adjust to the new regulations. 110 By the time January 1, 2005 arrived, trade organizations had begun to lobby Congress, which started work on what would later pass as the Junk Fax Prevention Act. 111 In light of this impending legislation, the FCC agreed, once more, to extend the Fax EBR elimination to July 1, 2005. 112

In early April 2005, Representative Gordon Smith (D-OR) introduced the Junk Fax Prevention Act to the Senate, and the Senate then referred the bill to the Committee on Commerce, Science, and Transportation. 113 With the FCC’s elimination of the Fax EBR and its rule of signed, written consent set to take effect on July 1, 2005, the Junk Fax Prevention Act earned Senate and House approval at lightning

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107 Id.
108 Id. at 112. Interestingly, Congress specifically rejected a written consent requirement for “prior express consent” in relation to automated telephone calls in the TCPA legislative history. S. Rep. No. 102-178, at 1971 (1991) (“[T]he reported bill does not include the requirement included in the bill as introduced the requirement that any consent to receiving an automated call be in writing.”).
112 Id. (“[W]e believe the public interest would best be served by delaying the effective date of the written consent requirement for six months to allow Congress to act.”).
speed. In fact, the House—which had a heavy hand in shaping the original TCPA legislation—did not meaningfully debate any aspect of the Junk Fax Prevention Act. The House introduced and passed the bill by voice vote in less than a half-hour. Despite the House’s hurried efforts to meet the FCC’s July 1 deadline, the bill had yet to be signed by President George W. Bush (and thus was still not law), so the FCC delayed the effective date—again—from July 1, 2005 until January 9, 2006. Finally, President George W. Bush signed the Junk Fax Prevention Act on July 9, 2005, thus amending and undermining the extensive consumer protection legislation signed by his father, George H.W. Bush.


The Junk Fax Prevention Act’s main effect is to make the Fax EBR a statutory exemption against the sending of unsolicited faxed advertisements. The Junk Fax Prevention Act’s statutory definition of Fax EBR reverts to the broad definition found in the 1992 FCC memo. Congress explicitly did not adopt the 2003 revised Telephone EBR, which included a time limit on the established business relationship. But

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114 For a summary of the bill’s history on the Library of Congress’s website, visit http://thomas.loc.gov/cgi-bin/bdquery/z?d109:SN00714:@@@X.
115 The House had introduced one of the bills incorporated into the final TCPA. See supra note 29 and accompanying text.
116 See generally 151 CONG. REC. H5262-65 (daily ed. June 28, 2005). Only the bill’s three co-sponsors spoke about the Junk Fax Prevention Act. No senator expressed dissenting or critical opinions. Id. The House did have a more active role in a previous Fax EBR bill in 2004 that failed to become law. Id. at H5264.
117 Id. at H5261-67 (recording the bill’s passing between 10:30 a.m. and 11:00 a.m. on June 28, 2005). This was just two days before the effective date of the FCC’s elimination of the Fax EBR. See supra notes 111-12.
118 Effective Date Delayed, 70 Fed. Reg. 37,705 (June 30, 2005). The Junk Fax Prevention Act of 2005 would pass just nine days after this announcement.
120 S. REP. No. 109-76, at 1 (2005) (citing its first purpose as to “[c]reate a limited statutory exception” for Fax EBRs).
121 Junk Fax Prevention Act, supra note 5, § 2(b) (ordering the definition of established business relationship to revert back to the meaning before the one enacted by the 2003 FCC Memo).
122 S. REP. No. 109-76, at 10 (“[T]his provision would specifically exclude the 18/3 time limits that are in the current definition of ‘established business relationship’ in the C.F.R. . . . Therefore, the effect would be to reinstate the junk fax rules back to the FCC’s original interpretation established in 1992.”).
the Junk Fax Prevention Act adds additional limitations to the EBR exception, including the method in which the sender obtained the recipient’s fax number. The Junk Fax Prevention Act requires that the fax number be obtained either through

(I) the voluntary communication of such number, within the context of such established business relationship, from the recipient of the unsolicited advertisement, or

(II) a directory, advertisement, or site on the Internet to which the recipient voluntarily agreed to make available its facsimile number for public distribution [except that this clause does not apply to numbers collected as part of an EBR before the Junk Fax Prevention Act enactment.]124

Thus, if a fax sender and recipient fall within the broad, no-time limit Fax EBR definition, the sender may fax unsolicited advertisements if the recipient gave the sender the fax number pursuant to a business inquiry or transaction or if the fax number is otherwise made public.125

As part of the statutory Fax EBR exemption, the Junk Fax Prevention Act sets out several compliance requirements. In an attempt to balance the needs of consumers and businesses, the Junk Fax Prevention Act now requires advertisers wishing to send an unsolicited faxed advertisement based on an EBR between sender and recipient to include identification information on the front page of a fax, including name of sender and telephone or fax information for consumers to opt out of future unsolicited faxes. Specifically, senders must offer at least one cost-free mechanism available twenty-four hours a day, seven days a week for consumers to make opt-out requests.127 The opt-out notice also must include a

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123 Junk Fax Prevention Act, supra note 5, § 2(a).
124 Id.
125 See infra discussion in Part V.A on why this “public distribution” fax number provision weakens consumer protection.
126 Junk Fax Prevention Act, supra note 5, § 2(c). For a discussion on why this unfairly puts the burden on consumers, see infra Part V.
127 It is unclear from the statutory language whether an email address or website would constitute a cost-free mechanism. As part of its rules implementing the Junk Fax Prevention Act, the FCC stated that an email address or website would satisfy the cost-free requirement. Federal Communications Commission FCC-06-42, Rules and Regulations Implementing the Telephone Consumer Protection Act of 1991 15-16 (2006), reprinted in 71 Fed. Reg. 967 (May 3, 2006), available at http://www.fcc.gov/cgb/policyfaxadvertising.html. Also, the Junk Fax Prevention Act orders the FCC to determine whether small businesses should be able to forgo the cost-free mechanism requirement due to small businesses’ heavy reliance on faxed
statement telling the recipient that consumers may opt out of future unsolicited advertisements and that it is unlawful for fax senders to not timely comply with opt-out requests.128

Another change in consent that the Junk Fax Prevention Act makes is a small but telling one. Now, the definition of unsolicited advertisement refers to an ad transmitted without the recipient’s “prior express invitation or permission, in writing or otherwise.”129 The addition of “in writing or otherwise” shows Congress deemed verbal consent sufficient. Therefore, Congress rejected the FCC’s written, signed consent rule.130

Thus, Congress’s Fax EBR is a slightly more specific exemption than the FCC’s 1992 Fax EBR in that Congress attempted to narrow the Fax EBR’s definition by limiting the source of fax numbers senders may use pursuant to a Fax EBR.131 In a seemingly contradictory move to narrowing the definition, however, Congress refused to adopt an expiration date for the Fax EBR.132 Another difference from the FCC’s Fax EBR is Congress’s notice requirements to educate consumers about their right to refuse future junk faxes using cost-free mechanisms.133 Despite the consumer-friendly opt-out notices, however, Congress’s version of the Fax EBR does little to protect consumers from cost-shifting and invasions of privacy.134

advertisements. S. Rep. No. 109-76, at 10. The “cost-free” mechanism is arguably the only consumer-friendly part of the legislation. To allow small businesses to be exempt from the cost-free mechanism would undermine consumer protection even more than the Junk Fax Prevention Act does as it passed because small businesses are likely to rely on junk fax as the preferred advertising method of choice because it is more cost-effective. Id. at 3 (“Industry comments maintained that ‘faxing is a cost-effective way to reach customers’ particularly for small business from whom faxing is a cheaper way to advertise.”).

128 Junk Fax Prevention Act, supra note 5, § 2(c) (“[T]he notice states that the recipient may make a request to the sender of the unsolicited advertisement not to send any future unsolicited advertisements to a telephone facsimile machine or machines and that failure to comply, within the shortest reasonable time, as determined by the Commission, with such a request . . . is unlawful.”).

129 Junk Fax Prevention Act, supra note 5, § 2(g) (emphasis added).

130 See infra discussion in Part V.

131 See infra text accompanying notes 161-63 for why the “limit” on source of fax numbers is not an effective limit.

132 See supra note 122.

133 Junk Fax Prevention Act, supra note 5, § 2(c)

134 See infra discussion in Part V.
V. DISCUSSION—WHY THE JUNK FAX PREVENTION ACT FAILS AS AN AMENDMENT TO THE TCPA

Consumers should not be misled by the cleverly titled amendment. The Junk Fax Prevention Act does little to prevent the junk faxes that the TCPA strictly prohibited. This is due to Congress’s broad, no-expiration definition of Fax EBR, its reliance on a company-specific opt-out provision that continues to shift costs to consumers, and its decision to allow for the collection of numbers based on a Fax EBR from public databases. Additionally, the cost-shifting effects of a facsimile machine’s unique technology remain today, even in light of new, computer-based faxing capabilities. This new federal law also puts state laws offering stronger protection against junk faxing in jeopardy. Finally, Congress could have struck a better balance between consumer and business needs by showing more deference to the FCC and its decision to eliminate an exception of its own creation because the FCC had more first-hand experience dealing with and spent more time studying the issue.

A. Congress’s Broad, No-Expiration Fax EBR Weakens The Strong Consumer Protection Set Out In The TCPA

The history of modern state and federal consumer protection law stems from the desire to shield consumers from economic loss as a result of deception, fraud or other abuses in commerce. For example, consumer protection law guards against a used car salesman who turns the odometer back to make an auto seem to have less wear-and-tear. Gradually,

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135 See infra discussion in Part V.A.
136 See infra discussion in Part V.B.
137 See infra discussion in Part V.C.
138 See infra discussion in Part V.D.
the doctrine of consumer protection law expanded from solely economic protection to protections against business methods that constituted nuisance and threatened privacy, including marketing techniques. For example, in Breard v. Alexander, the Supreme Court upheld a city ordinance that prohibited door-to-door commercial solicitation without prior consent. The ordinance originated from unhappy citizens who deemed such commercial visits an “uninvited intrusion into the privacy of their home.” While the Court decided this case before commercial speech received First Amendment protection in Virginia State Board of Pharmacy v. Virginia Citizens Consumer Counsel, Inc., the Court never shied away from the idea that a citizen’s privacy is a valid interest for

141 Larson v. State, 97 So. 2d 776, 786, 789-91 (Ala. 1957) (upholding an injunction against loan creditors’ business practice deemed to be a public nuisance).
142 Lehman v. Shaker Heights, 418 U.S. 298, 307 (1974) (Douglas, J., concurring) (arguing that city transit system policy of forbidding political advertisements on city buses should be upheld because “the right of the commuters to be free from forced intrusions on their privacy precludes the city from transforming its vehicles of public transportation into forums for the dissemination of ideas upon this captive audience”). In 1890, Samuel Warren and Louis Brandeis’ Harvard Law Review article famously drew early attention to the issue of privacy by calling for a new tort action for invasion of privacy. Samuel D. Warren & Louis D. Brandeis, The Right to Privacy, 4 HARV. L. REV. 193, 195 (1890) (“Recent inventions and business methods call attention to the next step that must be taken for the protection of the person, and for securing the individual what Judge Cooley calls the right ‘to be let alone.’”). For historical significance of this article, see Daniel J. Solove, The Origins and Growth of Information Privacy, 838 PLI/Pat 23, 34-35 (May-June 2005).
144 Breard, 341 U.S. at 625.
145 Id. The Court noted that, “[t]here is equal unanimity that opportunists, for private gain, cannot be permitted to arm themselves with an acceptable principle, such as that of a right to work, a privilege to engage in interstate commerce, or a free press, and proceed to use it as an iron standard to smooth their path by crushing the living rights of others to privacy and repose.” Id. at 625-26.
146 The Court refused to hear a First Amendment argument against the city ordinance, saying “[o]nly the press and oral advocates of ideas could urge this point. It was not open to solicitors of gadgets and brushes.” Id. at 641.
147 425 U.S. 748, 770 (1976) (holding a consumer’s interest in the free flow of commercial information was entitled to First Amendment protection). The Court later clarified that commercial speech receives a limited First Amendment protection that must only pass intermediate scrutiny. Cent. Hudson Gas & Elec. Corp. v. Pub. Serv. Comm’n of New York, 447 U.S. 557, 562-63 (1980). Recent members of the Court have questioned the logic in offering less protection based on the commercial content of speech, suggesting that it receive full First Amendment protection. See Adam Zitter, Note, Good Laws for Junk Fax? Government Regulation of Unsolicited Solicitations, 72 FORDHAM L. REV. 2767, 2794-96 (2004) (discussing recent Supreme Court commercial speech cases).
states to protect through legislation\textsuperscript{148} or that commercial speech is subject to privacy limitations.\textsuperscript{149} Thus, the two main policies behind the TCPA fax regulations—cost-shifting and privacy—complemented the development of consumer protection law.\textsuperscript{150} The drafters of the Junk Fax Prevention Act should not have blatantly brushed off such well-established policies in favor of making it easier for businesses to market their products through a particular method.

There are several ways Congress brushed off consumer protection policies. First, the drafters refused to adopt a time limit for the Fax EBR. Congress chose to keep its Fax EBR similar to the original 1992 FCC definition.\textsuperscript{151} This language—“interaction” or “application”—is broad enough to encompass almost any consumer interaction, past or present, with a business.\textsuperscript{152} When coupled with the fact that this interaction or application could have conceivably happened twenty years ago and still count as a Fax EBR, it severely cuts against any consumer protection rhetoric in the law’s title. Not having any time limit on a broad definition clearly did not suit the Telephone EBR, which is why the FCC chose in 2003 to limit the Telephone EBR to eighteen months from last purchase or three months from the last consumer inquiry.\textsuperscript{153} Again,

\textsuperscript{148} See, e.g., Carey v. Brown, 447 U.S. 455, 471 (1980) (“The State’s interest in protecting the well-being, tranquility and privacy of the home is certainly of the highest order in a free and civilized society.”). For purposes of this footnote, the term “privacy” refers to privacy as a fundamental right that emerged through Constitutional doctrine and not to the tort of intrusion against seclusion.

\textsuperscript{149} These privacy limitations on commercial speech are usually referred to as “time, place, and manner” restrictions. See, e.g., Virginia State Bd. of Pharmacy v. Virginia Citizens Consumer Council, Inc., 425 U.S. 748:

In concluding that commercial speech, like other varieties, is protected, we of course do not hold that it can never be regulated in any way. Some forms of commercial speech regulation are surely permissible . . . . There is no claim, for example, that the prohibition on prescription drug price advertising is a mere time, place, and manner restriction. We have often approved restrictions of that kind provided that they are justified without reference to the content of the regulated speech, that they serve a significant governmental interest, and that in so doing they leave open ample alternative channels for communication of the information.

\textsuperscript{150} See supra text accompanying notes 51-62.

\textsuperscript{151} S. Rep. No. 109-76, at 10 (“[T]he effect would be to reinstate the junk fax rules back to the FCC’s original interpretation established in 1992. . ..”).

\textsuperscript{152} See supra note 18 and accompanying text.

Congress explicitly rejected adopting the time limit for the Fax EBR.  

A second example of how Congress ignored consumer protection policies is its choice to include a company-specific opt-out mechanism.  

Supporters of the Junk Fax Prevention Act are likely point to the opt-out provision and its required cost-free mechanism as an indication of Congress's desire to protect consumers.  

While it is true that giving consumers the power to more effectively identify their purported unsolicited fax origins is consumer friendly, allowing company-specific opt-out lists still unfairly shifts costs to consumers because it allows for that first fax to clog up their machines and to waste their ink and paper.  

This is in addition to the labor costs and nuisances involved in contacting each sender to be removed from lists.  

Ironically, Congress found that allowing company-specific do-not-call lists failed to protect consumers from invasive telemarketing calls and enacted a law to create a national do-not-call registry.  

It is unclear why Congress thought a company-specific list would be effective for faxes.

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154 S. REP. NO. 109-76, at 10. But Congress did give the FCC the authority to examine at a later date whether a time limit would be appropriate. Junk Fax Prevention Act, supra note 5, § 2(f).

155 See Junk Fax Prevention Act, supra note 5, § 2(c).

156 S. REP. NO. 109-76, at 7 (noting the new law provides a cost-free mechanism so recipients would be able "to stop future unwanted faxes sent pursuant to [a Fax EBR]"").

157 See Covington & Burling v. Int'l Mktg. & Research, Inc., No. 01-0004360, 2003 LEXIS 29, *11 (D.C. Super. Apr. 17, 2003) (rejecting a company-specific do-not-fax approach because it would "still allow a fax advertiser to send one fax to every fax number for which the recipient would have to bear the cost. Moreover, the consumer would still have to bear the cost and the burden of receiving at least one fax and then contacting the sender of the unsolicited fax to be removed from the database. As we have seen from this case, this may still not immediately stop the unwanted faxes").

158 This is because the Junk Fax Prevention Act opt-out provision is company-specific, not a national registry. Junk fax recipients must contact each Fax EBR sender individually. See Junk Fax Prevention Act, supra note 5, § 2(c).


160 One recent case pointedly shows such company-specific do-not-fax lists are not effective. Covington & Burling, 2003 LEXIS 29, at *2 (noting that, after plaintiff asked to be removed from defendant's lists, plaintiff "received 172 fax advertisements for vacation packages . . . and 104 fax advertisements for laser printer supplies. . . . [The next day plaintiff] received 147 more fax advertisements for vacation packages").

Ironically, the government—as an intervener in a TCPA fax case—has made this exact argument against company-specific fax lists. See Accounting Outsourcing, L.L.C. v. Verizon Wireless Pers. Comm'nrs, 329 F. Supp. 2d 789, 817 (M.D. La. 2004) (explaining government's contention that do-not-fax lists would not eliminate cost-shifting of unwanted faxes, would unfairly burden the consumer to contact each fax advertiser and would put the burden on consumers to prove they had requested to be removed from a company's fax marketing list). In addition to shifting ink and paper costs to
Finally, Congress’s “limit” on sources of fax numbers contradicts any notion of consumer protection. Congress’s new definition of EBR limits how an EBR sender can collect the fax number of a recipient. It gives senders two options: either collect the number from the recipient within the context of the established business relationship or find the number in a directory, on a website or any other public place. Thus, according to the second option, a business which publishes its fax number on a website for the purposes of legitimate business exposes itself to more unwanted faxes. This is in direct contrast to the TCPA’s purpose of facilitating interstate commerce by prohibiting unsolicited faxed advertisements from interfering with “legitimate business messages.” By allowing senders to collect fax numbers outside of the context of the established business relationship, Congress has helped make it easier for businesses to send unsolicited faxes. Thus, Congress’s version of the Fax EBR in the Junk Fax Prevention Act weakens consumer protection instead of enhancing it.

B. Faxing Deserves Stricter Telemarketing Policies Due to Its Unique Technological Features

As made clear in the legislative history of the TCPA, faxing technology deserves a broader ban on marketing than other methods due to the technology that sends and receives faxes. Proponents of the Junk Fax Prevention Act argue that the cost-shifting policy is outdated due to improvements in faxing technology, but this technology remains largely unchanged today in the sense that a fax must still be printed.

recipients, do-not-fax lists do not completely prevent unwanted faxes from interrupting legitimate messages. See Minn. v. Sunbelt Commc’ns & Mktg., 282 F. Supp. 2d 976, 984 (D. Minn. 2002) (rejecting the creation of a do-not-fax list due to the fact that even one unwanted fax “can prevent the receipt of wanted faxes”).

161 Junk Fax Prevention Act, supra note 5, § 2(a).
162 Id.
164 See supra text accompanying notes 10, 53 and 58. Other methods such as telephone and email do not present as strong of a case for cost-shifting as faxing. For example, marketing via telephone does not cause paper or ink costs to the called party. It is for cost-shifting reasons that cell phones are explicitly banned from calls made with autodialing systems or artificial or prerecorded voice programs. See 47 U.S.C. § 227 (b)(1)(A)(iii) (2000). For email, a recipient of unwanted email spam controls which message to print. Spam, however, can raise cost-shifting concerns for corporations or server owners when the totality of spam overwhelms computer systems. Adam Zitter, Note, Good Laws for Junk Fax? Government Regulation of Unsolicited Solicitations, 72 FORDHAM L. REV. 2767, 2777 (2004) (noting one recent study reported U.S. corporations spend $8.9 billion a year fighting spam).
out at a cost—in terms of paper, ink and time—to the recipient.\textsuperscript{165} Defenders of maintaining the Fax EBR also point to the fact that modern fax machines are capable of receiving and storing in the machine’s memory more than one message, and thus there is no interruption of legitimate business faxes while an unsolicited faxed advertisement prints.\textsuperscript{166} This theory fails, however, in every-day application due to the disruption that occurs as a result of server delays caused by overfilled memory.\textsuperscript{167}

This is not to suggest that there has been no advancement in terms of faxing technology. Today, faxes can be sent as either an attachment to emails or transmitted to fax servers\textsuperscript{168} or personal computers equipped with modems. A fax sent as an email attachment instead of directly to a fax

\textsuperscript{165} The FCC as late as 2003 found that fax machines, although faster in terms of processing messages, still required paper to be printed for each message. 2003 FCC Memo, supra note 2, at 118-20. Furthermore, the U.S. government as late as 2002 defended the constitutionality of the TCPA fax provision by arguing that the law is best viewed “as an anti-conversion statute because its purpose is to prevent the shifting of advertising costs (paper, toner, human resources, business disruption), from the advertiser to the recipient of the advertising.” Sunbelt Commc’ns & Mktg., 282 F. Supp. 2d at 981.


When the TCPA was passed in 1991, the vast majority of faxes were sent and received by stand-alone thermal paper telephone fax machines. These analog devices had no scanning or receiving memory, operated at slow data transfer speeds, tied up telephone lines for significant periods of time, and consumed expensive thermal paper with every transmission. These considerations lay at the heart of both Congress’ decision to regulate fax advertising and its constitutional justification for doing so. Since the passage of the TCPA, however, data transfer speeds have increased and transmission times have decreased dramatically. Plain-paper fax technology has obviated the need for costly thermal paper. Most important, fax modem technology now enables the delivery of faxes to email inboxes where consumers can electronically retrieve, view or discard a fax image without ever reducing it to paper.  

\textsuperscript{167} How many pages a fax machine will store in its memory vary from twenty to two hundred pages, depending on the model and manufacturer. Scott Cullen, Fax Buying Tips, OFFICE DEALER AND OFFICE SOLUTIONS, Nov. 1, 2003, at 10 (“The number of pages a fax can store in memory is based on a standard test page with minimal amount of text. For text or graphics-intensive documents, 200 pages of memory may in reality only allow you to store 100 or fewer pages in memory.”). Courts have also noted that modern fax machines are not sufficient to fight the onslaught of junk fax transmissions. See, e.g., Mo. ex rel. Nixon v. Am. Blast Fax, Inc., 323 F.3d 649, 653 (8th Cir. 2003) (agreeing with plaintiff’s argument that technological changes have not eliminated burdens imposed on recipients of unwanted fax advertising).

\textsuperscript{168} Fax servers enable multiple computers to send and receive faxes from the same or shared number. 2003 FCC Memo, supra note 2, at 119.
machine is received instantly, which saves time and cost because it allows recipients to see the fax before deciding whether to print it. The FCC, however, in its 2003 memo overhauling the TCPA, clarified that its TCPA rules do not apply to fax advertisements sent as email attachments, so faxes sent as email attachments are irrelevant to a TCPA analysis.

According to the same 2003 FCC memo, the TCPA does govern faxes sent to “personal computers equipped with, or attached to, modems and to computerized fax servers.” Some businesses contend that fax server and desktop faxing technology do not raise the same cost-shifting issue as a conventional stand-alone fax machine because not every message from a fax server and personal computer is automatically printed. The FCC disagreed, however, finding the totality of harm—the cost of paper and toner if the message is printed, the possibility that faxes will tie up modem or fax server lines, and increased labor costs for monitoring which faxes were legitimate—justified subjecting personal computers and fax servers to TCPA regulations. Further, and more persuasively, the FCC argued that there is no way to indicate which type of faxing technology the recipient owns. There is no distinction in the numerical coding of fax numbers to indicate whether a fax sent to a recipient will go to a fax server or a traditional, cost-shifting machine.

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169 Id. at 119 n.736 (noting that this type of transmission does not fit the definition of 'telephone facsimile machine' at 47 U.S.C. § 227(a)(2)).
170 2003 FCC Memo, supra note 2, at 119.
171 Id. (“Nextel maintains that such faxes do not implicate the harms that Congress sought to redress in the TCPA, as they are not reduced to paper can be deleted from one’s inbox without being opened or examined.”).
172 See, e.g., Accounting Outsourcing, L.L.C. v. Verizon Wireless Pers. Commc’ns., 329 F. Supp. 2d 789, 815 (M.D. La. 2004) (noting faxes sent directly to email systems burden business’s computer networks); Covington & Burling v. Int’l Mktg. & Research, Inc., No. 01-0004360, 2003 LEXIS 29, at *9-10 (D.C. Super. Apr. 17, 2003) (rejecting defendant’s argument that plaintiff’s incurred no costs because plaintiff did not print out faxes) (“[T]he critical fact is that Covington’s fax server was unavailable to receive or transmit other faxes. Covington’s memorandum and affidavits in support of their summary judgment motion are persuasive that attorneys and staff at Covington reported delays in sending or receiving faxes on the dates in question.”). Sometimes more than the modem or sever is tied up. In one recent case, a man’s whole computer became inoperable due to the deluge of unwanted faxed advertisements sent to his computer modem. Minn. v. Sunbelt Commc’ns & Mktg., 282 F. Supp. 2d 976, 978 (D. Minn. 2002).
173 2003 FCC Memo, supra note 2, at 120.
174 Id.
175 Id. See Kaufman v. ACS Sys., 2 Cal. Rptr. 3d 296, 317-18 (Ct. App. 2003) (rejecting defendant’s argument that faxing technology outdates the TCPA cost-shifting
Thus, the cost-shifting arguments for a broad ban against unsolicited fax advertisements remain relevant and persuasive, even in light of modern fax technological developments and trends.

C. **Having Weak Federal Interstate Protection Will Undo Any Strong Intrastate Protection Of Faxes**

A main motivation behind the TCPA was to close up the jurisdictional gap state telemarketing laws could not reach.\(^{176}\) The TCPA explicitly does not preempt any state law that is more restrictive than the TCPA.\(^{177}\) In essence, the TCPA creates a minimum floor of protection for telemarketing legislation. Some states did not create intrastate junk fax laws after the TCPA was enacted.\(^{178}\) At least one state even repealed its junk fax law because it was unnecessary in light of the TCPA’s initial strict prohibition against all faxes.\(^{179}\) The Junk Fax Prevention Act did not amend the TCPA’s minimum floor preemption provision.\(^{180}\) Thus, for states with strong anti-junk fax laws,\(^{181}\) the Junk Fax Act Prevention Act severely undermines these efforts because marketers will simply move their faxing across state borders to trigger the weaker interstate protection.

D. **Congress Should Have Deferred or Given More Weight to the FCC’s Determination to Get Rid of the Fax EBR**

The junk fax debate is understandably framed in terms of consumer needs versus business needs. It can also be easily


\(^{177}\) 47 U.S.C. § 227(e) (2000). In contrast, the Can-Spam Act preempted all state laws involving email spam. Can-Spam Act, supra note 3, § 8 (“This Act supersedes any statute, regulation or rule of a State . . . that expressly regulates the use of electronic mail to send commercial messages[,]”).

\(^{178}\) For example, Iowa currently does not have a law regulating junk fax within the state of Iowa.

\(^{179}\) See infra discussion in Part VI.


\(^{181}\) For instance, Florida’s statute prohibits all intrastate junk faxes regardless of any EBR between sender and recipient. See Fla. Stat. § 365.1657(1) (1997) (“It is unlawful for any person to use a machine that electronically transmits facsimiles of documents through connection with a telephone network to transmit within this state unsolicited advertising material for the sale of any real property, goods or services.”). The broad ban is similar to the original text of the TCPA. See 47 U.S.C. § 227(a)(4).
viewed as a separation of powers struggle. Congress created the TCPA with strict prohibition against faxes, but granted the FCC the authority to implement its necessary rules. The FCC erroneously created a Fax EBR, which it later sought to overturn. Congress, unhappy with this decision to eliminate the Fax EBR, enacted the Junk Fax Prevention Act. This action serves as a reminder to the FCC that while the agency’s rulings have the force of law, Congress gave them the power to promulgate rules in the first place. Despite Congress’s position as authorizing law maker, Congress should have deferred more to the FCC’s decision to eliminate the Fax EBR.

First, the FCC had more time to study and consider the Fax EBR effect, both as part of the comment process and in its various TCPA fines and cases, since the Fax EBR’s establishment in 1992. In contrast, the Senate had two weeks of hearings in April 2005; the House had none. It is likely that Congress moved the bill faster than it should have due to the impending FCC deadline of July 1, 2005.

Second, it remains questionable whether codifying the Fax EBR was necessary to meet Congress’s true motivation in rushing the Junk Fax Prevention Act. The 2003 FCC memo announced two separate rule changes: (1) the elimination of the Fax EBR and (2) consent to fax would need to be written, signed and collected prior to a faxing campaign. Notwithstanding the codification of the Fax EBR, the legislative history primarily posits the Junk Fax Prevention Act as legislation to prohibit the costs of obtaining prior written consent for businesses. So it seems very possible that

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183 See supra discussion in Part III.
184 See supra discussion in Part IV.
185 Congress created the FCC as part of the 1934 Communications Act. See http://www.fcc.gov/aboutus.html.
188 See http://thomas.loc.gov (enter S. 714.ENR for bill number, and then click on Congressional Record References for a history of the bill as passed).
189 See supra notes 113-19 and accompanying text.
191 See S. REP. NO. 109-76, at 6 (1991) (“This legislation is designed to permit legitimate businesses to do business . . . without the burden of collecting prior written permission to send these recipients commercial faxes.”); id. (noting that that trade associations “would be saddled with a huge burden to collect signatures from each
Congress could have respected the FCC’s Fax EBR elimination but overturned the written consent requirement. Arguably, Congress could have limited its TCPA amendment to its adjustment of what consent meant in the definition of “unsolicited advertisement,” which after the Junk Fax Prevention Act reads “prior express invitation or permission, in writing or otherwise” instead of the previous “prior express invitation or permission.” In regards to the specific “writing or otherwise” change, the Senate Report states: “[t]he effect of this amendment would be to statutorily prohibit the FCC from promulgating a rule that would require prior express permission to be secured only in writing.” If Congress had deferred to the FCC by allowing the Fax EBR to expire but had changed consent to mean written or verbal, it would have created a better balance between consumer and business needs.

VI. FATE OF CONSUMER PROTECTION AND JUNK FAXES

With the passing of the Junk Fax Prevention Act, businesses have a clear authorization to send junk faxes based on an established business relationship. In response to the cost and privacy concerns of this new law, consumer advocates are likely to focus on other avenues of change, including mandated annual Congressional reports on junk faxes, the possibility of a national do-not-fax registry, and state legislatures reacting with stronger telemarketing statutes. However, this Note argues these options are ineffective solutions for prohibiting unfair cost-shifting from advertiser to consumer, which is arguably the most important policy reason for the ban against junk faxing.

Junk faxes essentially act as a “postage-due” tax on consumers. This is true whether a person receives 500 junk faxes or if a person receives one. Thus, merely reducing the number of junk faxes to a more manageable level by allowing only unsolicited fax advertisements sent based on an

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194 Junk Fax Prevention Act, supra note 5, § 2(a).
established business relationship is not a victory for consumers. To truly protect consumers from unwarranted costs, a ban on faxed advertisements sent without permission must be a complete ban, as it was when Congress passed the TCPA in 1991. Thus, Congress should eliminate the Junk Fax Prevention Act’s statutory Fax EBR exemption.

A. Future Congressional Review Under the Junk Fax Prevention Act

Perhaps as a silent nod to the Junk Fax Prevention Act’s inherent imbalance between business and consumer needs, Congress included an order in the legislation that there be future studies on the enforcement of junk faxing. This order required an annual FCC report and a study by the Comptroller General of the United States to be completed nine months after enactment. In the original TCPA, Congress did not include any annual review of faxing.

The Junk Fax Prevention Act’s future studies require several things. First, the annual FCC report requires the agency to report the number of complaints, citations and notices of apparent liability regarding the junk fax provision. Specifically, Congress is interested in considering how much time passes between a consumer’s complaint and notice of liability, as well as how effectively the FCC recovers monetary penalties. The Junk Fax Prevention Act also requires the General Comptroller of the United States to complete a study on how the FCC handles its junk fax enforcement. Specifically, the law requires the Comptroller to examine the impact and adequacy of existing statutory remedies on both senders and recipients of junk faxes. By

195 Id. § 3(g).
196 Id. § 4(a), (c).
198 Junk Fax Prevention Act, supra note 5, § 3(g)(4)(c). This “time between” issue is very relevant to consumer protection because the longer the FCC waits to address the complaint, the greater number unsolicited faxes the complaining consumer is likely to receive, and thus, the higher the costs consumer is likely to incur.
199 Id. § 3(g)(5)-(8).
200 Id. § 4(a). The GAO will study how the FCC receives and investigates complaints, the level of enforcement success the FCC achieves, and whether the FCC is adequately enforcing complaints, among other things. Id. § 4(a)(1)(3).
adding this additional level of supervision—the Comptroller will essentially be checking the FCC's checking—Congress indicates an unease that the bill it passed might not be the most effective solution. While it is established jurisprudential rhetoric that Congress does not have to hit the bulls-eye perfectly when enacting legislation, it seems Congress is passing off the tough work—finding a true balance between consumer and business needs in regards to junk fax regulation—to some future Congressional session down the line, all in exchange for helping lobbying businesses beat an FCC deadline.

These Congressional studies on junk faxes are an ineffective solution to prohibit cost to consumers for two reasons. First, in order to see a trend in cost to consumers, Congress will likely need at least two annual reports to compare, which means any legislative adjustment based on these annual reports will probably not be a possibility in the near future. In the meantime, businesses will continue to expose consumers to unwarranted costs by faxing unsolicited advertisements pursuant to an established business relationship. Second, by ordering an annual report, there is simply no guarantee that the results of these reports will lead to legislative adjustment. Thus, consumer advocates cannot effectively rely on future Congressional studies to prevent cost-shifting.

B. A National Do-Not-Fax Registry

For years, when challenging the constitutionality of TCPA's strict prohibition on unsolicited faxed advertisements, defendants often pointed to creating a do-not-fax registry as a solution. They argued that such a list would allow...
consumers to control the messages sent via fax and would give legitimate marketers the ability to send some unsolicited messages via fax to consumers who have not signed their fax numbers to the registry.\(^\text{205}\) As stated above, the Junk Fax Prevention Act’s company-specific do-not-fax list, which requires consumers to contact each company individually to opt out of future unsolicited messages, does not prohibit costs to the consumers and unfairly shifts the burden to consumers.\(^\text{206}\) In response, consumers are likely to push for a national do-not-fax registry.\(^\text{207}\)

When shaping any future rules for a national do-not-fax registry, Congress and the FCC would likely consider the recent rules authorizing the enactment of a do-not-call registry.\(^\text{208}\) The National Do-Not-Call Registry is a joint effort between the FCC and the Federal Trade Commission (FTC).\(^\text{209}\) The registry allows consumers to register their residential

\(^\text{205}\) See supra note 204 and accompanying text.

\(^\text{206}\) See supra discussion in Part IV.


\(^\text{208}\) For a comprehensive examination of the issue, see 2003 FCC Memo, supra note 2, at 14-51. The TCPA as originally enacted authorized the FCC to consider a nationwide do-not-call registry. 47 U.S.C. § 227(c)(3) (2000). As part of its initial rule-making, the FCC declined to adopt a nationwide list. 1992 FCC Memo, supra note 20, at 7-10.

telephone number, including wireless numbers.210 Once on the list, businesses may not make any interstate or intrastate telemarketing calls to that number for the next five years. There are some exceptions to the ban on calls, including an established business relationship exception.211 Once the five years have passed, a consumer may re-enter the number on the list.212 A consumer can remove his or her number from the do-not-call registry at any time.213

One year after enacting the registry, the FTC reported that the registry had been effective in greatly reducing the number of telemarketing calls. For instance, one survey conducted by a market research firm found that ninety-two percent of adults who had signed up had fewer phone calls and that twenty-five percent of adults who had signed up received absolutely no phone calls.214 Further, only less than one

210 2003 FCC Memo, supra note 2, at 24 (“We conclude that the national database should allow for the registration of wireless telephone numbers . . . .”).

211 Id. at 29-32. Other exemptions include commercial calls from charities and political support groups. Id. at 53. This distinction between commercial calls based on the subject matter of the call led to a Colorado district court ruling that the Do-Not-Call registry violated the First Amendment. Mainstream Mktg. Servs., Inc. v. FTC, 283 F. Supp. 2d 1151, 1168 (D. Colo. 2003) (holding the Do-Not-Call registry is a content-based regulation and violates the First Amendment), stay denied by 284 F. Supp. 2d 1266 (D. Colo. 2003), stay granted by 345 F.3d 850 (10th Cir. 2003), rev’d, 358 F.3d 1228 (10th Cir. 2004). A few months later, the Tenth Circuit held the registry constitutional. See 358 F.3d 1228, 1242 (holding the registry to be narrowly tailored without over-regulating protected speech).


213 See id. By creating an opt-out system, the government avoids First Amendment problems because the consumer becomes the censor, while the government is merely facilitating consumer choice. See Mainstream Mktg., 358 F.3d 1228 at 1233 (“The national do-not-call registry offers consumers a tool with which they can protect their homes against intrusions that Congress has determined to be particularly invasive.”). See also Rodney A. Smolla, The “Do-Not-Call List” Controversy: A Parable of Privacy and Speech, 38 CREIGHTON L. REV. 743, 756 (2005). Many view the do-not-call registry as a triumph of consumer choice. See, e.g., id. at 757 (“Do-Not-Call is not a paternalistic usurping of consumer choice; it is an empowerment of consumer choice, in aid of the tranquility of the home.”). One commentator, however, argues that the facilitation of consumer choice theory is only relevant when the government “present[s] the public with a vast array of options,” something the commenter feels ‘opt-out’ systems that discriminate based on subject matter, such as the registry, do not provide because the registry does not allow consumers to opt-out of political and charity telemarketers. See Zitter, Note, supra note 207, at 2814-16 (2004).

214 FTC, Annual Report to Congress for FY 2003 and 2004 Pursuant to the Do Not Call Implementation Act on Implementation of the National Do Not Call Registry 4 (2005), available at http://www.ftc.gov/reports/donotcall/051004dncfy0304.pdf. Another survey, conducted by Customer Care Alliance between February and April 2004, showed that sixty percent of respondents who had registered their primary home telephone number reported that they had experienced an eighty percent reduction in the number of telemarketing calls. Id.
percent of the numbers registered filed complaints about the registry’s effectiveness.\textsuperscript{215} By the end of the 2004 fiscal year, consumers registered sixty-four million numbers.\textsuperscript{216} While consumers celebrated, telemarketing associations decried the national registry for its negative financial impact on the industry and the potential for abuse and misuse of the registry contents.\textsuperscript{217}

Despite the positive consumer feedback for a federal do-not-call list, a similar national do-not-fax list is an inappropriate solution for faxed advertisements.\textsuperscript{218} First, the do-not-call registry exempts calls based on established business relationships.\textsuperscript{219} Faxing technology’s unique cost-shifting features make established business relationship exemptions unfairly burdensome and costly on fax machine owners.\textsuperscript{220} Second, the do-not-call registry allows only residential phone numbers to be listed.\textsuperscript{221} This would not address the problems of junk faxes interfering with business owners’ fax machines, which become unavailable for receiving and sending legitimate business faxes due to invading junk faxes. Finally, by creating a list of do-not-fax numbers, Congress would be sending the message that non-registered fax numbers are free targets for fax solicitations. Such a message would be contrary to the cost and privacy policies of the TCPA’s original blanket ban on unsolicited faxed advertisements.\textsuperscript{222} Thus, a national do-not-fax registry similar to the national do-not-call registry would not prevent cost-shifting.

\textbf{C. State Response to the Junk Fax Prevention Act}

The junk fax fight started in the states,\textsuperscript{223} so it is not surprising that is where the junk fax fight will continue. There

\begin{footnotesize}
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\item \textsuperscript{215} Id.
\item \textsuperscript{216} Id.
\item \textsuperscript{217} Gravelle, Note, supra note 209, at 1007-09. For example, the telephone numbers of several executives of the Direct Marketing Association were fraudulently added to the list without the executives’ knowledge. Id. at 1008.
\item \textsuperscript{218} Courts have rejected defendants’ arguments that a federal do-not-fax list is a better legislative solution than the TCPA junk fax ban. Accounting Outsourcing, L.L.C. v. Verizon Wireless Pers. Commc’ns, 329 F. Supp. 2d 789, 816-17 (M.D. La. 2004); Destination Ventures Ltd. v. FCC, 844 F. Supp. 632, 639 (D. Or. 1994).
\item \textsuperscript{219} See FTC, OFFICE OF CONSUMER & BUS. EDUC., \textit{supra} note 212, at 5-6.
\item \textsuperscript{220} See supra discussion in Part V.B.
\item \textsuperscript{221} See FTC, OFFICE OF CONSUMER & BUS. EDUC., \textit{supra} note 212, at 3.
\item \textsuperscript{222} See supra discussion in Part II.B.
\item \textsuperscript{223} See supra notes 33-35 about pre-TCPA state laws.
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is concern that the federal Junk Fax Prevention Act weakens state protection. California, for instance, recently enacted new legislation in response to the Junk Fax Prevention Act that would affect faxes coming into and out of the state.\footnote{224} State legislation, such as this, likely violates the Supremacy Clause,\footnote{225} and thus, is an ineffective solution for the junk fax problem.

In 1991, while the TCPA was being formed, the California legislature enacted a bill against intrastate junk faxes as a stop gap measure until a federal law emerged.\footnote{226} When the TCPA became law, it was more restrictive than the California bill,\footnote{227} so, per the TCPA, the federal law preempted the California law.\footnote{228} In 2002, realizing it had what was essentially a useless law on the books, the California legislature repealed its state junk fax law.\footnote{229} Thus, the state saw the TCPA’s broad prohibition against faxing as sufficient protection.\footnote{230}

That protection significantly changed after the passing of the Junk Fax Prevention Act. California responded by introducing new legislation in 2005 that would reinstate the original level of protection found in the TCPA’s strict ban on unsolicited faxed advertisements.\footnote{231} On October 7, 2005,
Governor Arnold Schwarzenegger signed into law SB 833, which prohibited all unsolicited faxed advertisements—with or without an established business relationship.\textsuperscript{232} The bill defined an unsolicited advertisement as an ad sent without a recipient’s “prior express invitation or permission.”\textsuperscript{233} What made this bill remarkable, though, is the fact that the strict prohibition applied if either the recipient or the sender is located in California.\textsuperscript{234} Thus, California essentially enacted a bill affecting both intrastate and interstate communication of faxes entering or leaving the state. The legislature sent a clear message to Congress that interstate protection under the Junk Fax Prevention Act is too weak to protect the state’s consumers.\textsuperscript{235} Ironically, the federal government’s key reason for establishing a federal telemarketing law in 1991 was to protect states.\textsuperscript{236}

Critics of the California law soon questioned whether the Junk Fax Prevention Act would preempt the law’s restrictions on interstate faxes.\textsuperscript{237} A week before the California law’s enactment date of January 1, 2006, the U.S. Chamber of Commerce, in conjunction with a blast-fax service company, filed a federal lawsuit to oppose the law.\textsuperscript{238} The U.S. Chamber of Commerce sought a declaratory judgment that the federal junk fax law preempted the unconstitutional California junk fax law. The Junk Fax Prevention Act did not affect the TCPA provision that stated the federal law had no preemptive effect on more restrictive state laws. See generally Junk Fax Prevention Act, supra note 5.

\textsuperscript{234} Id. (“It is unlawful for a person or entity, if either the person or entity or the recipient is located within California, to use any telephone facsimile machine, computer, or other device to send ... an unsolicited advertisement to a telephone facsimile machine.”) (emphasis added).
\textsuperscript{235} For California Senator Debra Bowen’s remarks to the American Chronicle, see President Bush to Junk Faxers: Start Your Engines, AM. CHRON., July 11, 2005, available at http://www.americanchronicle.com/articles/viewArticle.asp?articleID=1093 (“Thanks to Congress and the President, marketers can now legally hijack people’s fax machines and turn them into their own personal printing presses. ... The silver lining of the new law is it doesn’t prevent states from passing stronger laws and we need to take advantage of that opening. We need a strong state junk fax ban to prevent Californians from getting stuck paying for sales pitches they didn’t ask for and don’t want.”).
\textsuperscript{236} See supra notes 34-36 and accompanying text.
\textsuperscript{237} The Junk Fax Prevention Act did not affect the TCPA provision that stated the federal law had no preemptive effect on more restrictive state laws. See generally Junk Fax Prevention Act, supra note 5.
\textsuperscript{238} Lynda Gledhill, ‘Wasted Year’ Laws Take Effect; Measures on Faxes, Video Games Held Up by Court Decisions, S.F. CHRON., Jan. 1, 2006, at B1. The U.S. Chamber of Commerce won an injunction that stayed the state law until a judge could consider the Chamber of Commerce’s case. Id.
fax law. In February 2006, an Eastern District of California judge ruled that the California law’s interstate junk fax restriction violated the Supremacy Clause and was preempted by federal law. The law died before ever taking effect. Thus, protecting consumers through stronger state junk fax laws affecting interstate faxes is an ineffective solution due to their questionable constitutionality.

Therefore, future Congressional studies, a national-do-not-fax registry and stronger state laws affecting interstate faxes offer inadequate protection for consumers against cost-shifting. If Congress truly wants to prevent economic injury, then it should eliminate the Fax EBR and reinstate its complete ban on unsolicited fax advertisements sent without express permission, as set out in the TCPA as enacted.

VII. CONCLUSION

In conclusion, the Junk Fax Prevention Act undermines the strict prohibition against junk faxing set out in the TCPA. In rushing to meet the FCC’s expiration of the Fax EBR, Congress overlooked well-established consumer protection policies of privacy and cost-shifting. Additionally, Congress disregarded the FCC’s experience with studying TCPA fax issues and effectively weakened strong state protection against junk faxing already in place. In order to sufficiently protect consumers from unwarranted costs, Congress should reinstate a complete ban on unsolicited faxed advertisements sent without permission or consent.

It is an understatement to assert that there is a lot of consumer dissatisfaction with telemarketing methods. In an informative—but completely unscientific—online survey, Time Magazine asked its website readers to nominate “The 100 Worst Ideas” of the twentieth century. Telemarketing was ranked fourth on the list, behind only prohibition, the computer programming choice that led to the Y2K bug and Geraldo Rivera’s decision to open the vault of Al Capone. Despite these strong feelings against telemarketing, it is extremely

241 Id. Telemarketing held a clear victory over other suggested worst ideas of the century, including appetite-suppressant Fen-Phen, the crop chemical DDT, and Ishtar, the much maligned Warren Beatty-Dustin Hoffman comedy. Id.
important to remember that advertisers have First Amendment protection, limited though it may be. This Note does not challenge a legitimate marketer’s ability to share a commercial message with consumers. It simply questions the wisdom of doing so by a method that, due to its unique technological architecture, shifts costs to consumers and interrupts legitimate business with each unsolicited commercial message sent. By passing the Junk Fax Prevention Act and codifying the established business relationship for faxes, Congress has authorized marketers to do just that.

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